

(2022) 09 BOM CK 0095

In the Bombay High Court

Case No : Writ Petition No. 280 Of 2019, 10177 Of 2022

Arun Nagnath Sontakke

APPELLANT

Vs

State Of Maharashtra & Anr

RESPONDENT

Date of Decision : 20-09-2022

Acts Referred:

Constitution Of India, 1950 — Article 226, 311(2)
Maharashtra Civil Services (Discipline And Appeal) Rules, 1979 — Rule 5(1)(v), 5(1)(vi), 5(1)(vii), 5(1)(viii), 5(1)(ix), 9(2), 9(2A), 9(3), 9(4), 10
Maharashtra Municipal Corporations Act, 1949 — Section 54, 455(1)

Citation : (2022) 09 BOM CK 0095

Hon'ble Judges : Dipankar Datta, CJ; M. S. Karnik, J

Bench : Division Bench

Advocate : Vicky A. Nagrani, Vishwanath Patil, Lakshmikant Patil, R. A. Salunkhe

Final Decision : Disposed Of

Judgement

Dipankar Datta, CJ

1. These two writ petitions are at the instance of Arun Nagnath Sontakke (hereafter "Arun", for short). Solapur Municipal Corporation (hereafter "Corporation", for short) and the State of Maharashtra are the common respondents in both the writ petitions; however, in Writ Petition No. 10177 of 2022, there are six (6) other respondents who have been impleaded eo nomine.

2. Since both the writ petitions concern actions taken against Arun by the Commissioner of the Corporation, we have heard it together and propose to dispose of the same by this common judgment and order.

3. Writ Petition No.280 of 2019 was instituted by the petitioner on 8th January, 2019 for quashing of an order of the Commissioner of the Corporation dated 31st December, 2018 terminating Arun's service. At the material time, Arun was the Law Officer of the Corporation. He was appointed pursuant to a process of recruitment initiated in 2014. Without putting Arun on notice or even hearing

him, his service stood terminated on the ground that his appointment did not have the approval of the General Body of the Corporation. Upon Writ Petition No.280 of 2019 being moved before a coordinate Bench of this Court, by its order dated 10th January, 2019, the Bench issued rule and granted ad-interim order in terms of prayer clause (e) of the writ petition reading as follows:

"(e) Pending the hearing and final disposal of the above Writ Petition, the impugned termination order dated 31st December 2018 issued by the Respondent No. 2 thereby terminating the service of the Petitioner as a Law Officer of the Respondent Corporation may kindly be stayed forthwith;"

4. The effect of the aforesaid ad-interim order resulted in resumption of duty by Arun as Law Officer of the Corporation and continuance on such office till date.

5. On perusal of the order dated 10th January, 2019 we find the following reasons to have been assigned by the coordinate Bench for grant of interim relief:

"3. Undisputedly the Petitioner came to be appointed as a Law Officer in pursuance of the advertisement and by order dated 03/03/2014 after the Petitioner went through the regular selection process by the selection committee duly constituted under the provisions of Section 54 of the Maharashtra Municipal Corporation Act and also as per the Rules framed by the Government under Section 455(1) of the said Act notified on 13/02/1980. Not only this but the Petitioner's appointment also came to be approved by the State Government on 05/10/2018. The appointment of the Petitioner was initially on probation of one year from 05/03/2014. After completion of probation, the continuation of the Petitioner would be as that of confirmed employee. However, by the impugned order the subsequent incumbent in the office of the Commissioner of Municipal Corporation has terminated the services of the Petitioner only on the ground that the appointment of the Petitioner in the pay scale of Law Officer is equivalent to that of the Assistant Commissioner and as such the authority to make the appointment was not with the Commissioner but with the Corporation.

3. Merely because the incumbent in the office of the Commissioner of Municipal Corporation changes, he cannot take a contrary stand. ..."

6. We have not found an answer to the rule filed by the Commissioner of the Corporation. The allegations of Arun levelled in the writ petition that he was proceeded against without putting him on notice and/or granting him opportunity of hearing, thus, stands uncontroverted. It is on this ground alone that we are inclined to dispose of Writ Petition No.280 of 2019 by making the rule absolute.

7. The order of termination dated 31st December 2018 stands set aside. However, since we have not examined the claims of the rival parties on merits, we leave it open to the Corporation to decide afresh whether the appointment of Arun was made in accordance with the extant recruitment rules or not; however, no order adverse to the interest of Arun shall be passed by the Corporation without following due process of law. However, for reasons discussed hereafter,

the incumbent Administrator of the Corporation shall not be entitled to decide the fate of Arun in terms of the liberty granted by this order.

8. Before we part with W.P. No.280 Of 2019, we wish to advert to the aspect of permissibility of staying the effect of an order of termination from service by an ad-interim/interim order in exercise of jurisdiction under Article 226 of the Constitution.

9. We were a bit surprised looking at the order dated 10th January, 2019 passed by the coordinate Bench. Service of Arun having been terminated, the question of reinstating him in service by an interim order appeared to us to be in the teeth of the decision of the Supreme Court in *State of Haryana v. Suman Datta*, (2000) 10 SCC 311.

10. Mr. Nagrani, learned advocate for Arun, however, placed reliance on the decision of the Supreme Court in *Public Services Tribunal Bar Association v. State of U.P. & Anr.*, (2003) 4 SCC 104. Our attention was drawn to paragraphs 39 to 41 of the said decision in support of the proposition that in a very rare and exceptional case, a termination order could be challenged and interim relief of stay sought in respect thereof.

11. The decision in *Public Services Tribunal Bar Association* (supra) was rendered on a challenge to the vires of the U. P. Services (Tribunals) Act, 1976. While upholding the vires of the enactment under challenge, the Supreme Court held that in an extreme and rare case an employee may approach the High Court by filing a writ petition under Article 226 of the Constitution for interim relief, where the order of termination is mala fide or bad in law. This observation was made by the Supreme Court upon noticing that the Tribunal constituted by the 1976 Tribunals Act did not confer power on the Tribunal to grant any interim relief.

12. It must be remembered that a statement of law enunciated by the Supreme Court must be read in the light of the principle which it seeks to effectuate and it should not be construed as if it were a section of an enactment. The observations on which reliance have been placed by Mr. Nagrani do not in any manner dilute the law laid down in *Suman Datta* (supra). We have also not been able to locate any law laid down in *Public Services Tribunal Bar Association* (supra), in contradistinction to what has been laid down in *Suman Datta* (supra), that an order of termination can be stayed (emphasis ours) by the Court under Article 226 of the Constitution even in an extreme and rare case. As cautioned by the decision in *Suman Datta* (supra), a grant of stay of a termination order would result in an usurpation of public office, for, should the proceedings fail, the consequence would be irreversible.

13. Nevertheless, we are of the view that though no interim relief should have been granted to Arun, grant of the same by the order dated 10th January, 2019 has not worked to the disadvantage of either the State of Maharashtra or the Corporation inasmuch as we have upheld Arun's contention and set aside the order of termination dated 31st December, 2018. There has thus been no

occasion for Arun to usurp a public office. His right to retain the post on which he was appointed would thus continue, until his service is validly terminated.

14. In Writ Petition No.10177 of 2022, Arun has questioned the order of the Commissioner of the Corporation dated 19th August, 2022 and has prayed that such order be quashed and set aside.

15. The pleaded case in Writ Petition No.10177 of 2022 reveals that Arun was suspended from service on 28th January, 2020. Two charge-sheets of even date, i.e. 27th September, 2021 were drawn up by the Commissioner of the Corporation and served upon Arun. The charges forming part of the two charge-sheets, referred to above, pertain to alleged acceptance of illegal gratification by Arun as well as lack of diligence and devotion to duty, as evidenced from pendency of 174 cases where Arun had failed to offer his legal opinion which was sought for from him by the Corporation.

16. In the departmental inquiry that followed, Arun did not participate. The inquiry officer returned findings that the charges levelled against Arun were proved. Upon such inquiry report being placed before the Commissioner of the Corporation, he accepted such report and called upon Arun to show cause within four (4) days from receipt of the impugned notice dated 19th August, 2022, as to why his services shall not be terminated.

17. According to Mr. Nagrani, law has been well settled by the Constitution Bench of the Supreme Court in its decision in Managing Director, ECIL, Hyderabad & Ors vs. B. Karunakar & Ors., (1993) 4 SCC 727, that the report of inquiry has to be furnished to the delinquent even before the disciplinary authority considers whether the findings recorded therein by the inquiry officer deserve acceptance or not. Without furnishing to Arun the inquiry report and seeking his comments, the Commissioner proceeded to seek an explanation why Arun's service should not be terminated.

Such an act has been claimed by Nagrani to be illegal, arbitrary and high-handed and contrary to the provisions contained in the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 (hereafter "1979 Rules", for short).

18. Our attention was drawn to rule 9(2), (2A), 3 and 4 of the 1979 Rules, which read as follows:

"9. Action on the inquiry report. – (1) ...

(2) The disciplinary authority shall forward or cause to be forwarded a copy of the report of the inquiry, if any, held by the disciplinary authority or where the disciplinary authority is not the inquiring authority, a copy of the report of the inquiring authority together with its own tentative reasons for disagreement, if any, with the findings of inquiring authority on any article of charge to the Government servant who shall be required to submit, if he so desires, his written representation or submission to the disciplinary authority within fifteen days, irrespective of whether the report is favourable or not to the said Government

servant;

(2A) The disciplinary authority shall consider the representation, if any, submitted by the Government servant and record its findings before proceeding further in the matter as specified in sub-rules (3) and (4).

(3) If the disciplinary authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the minor penalties should be imposed on the Government servant, it shall, notwithstanding anything contained in rule 10 of these rules on the basis of the evidence adduced during the inquiry held under rule 8 determine what penalty, if any, should be imposed on the Government servant and make an order imposing such penalty:

Provided that, in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice, and such advice shall be taken into consideration before making any order imposing any penalty on the Government servant.

(4) If the disciplinary authority, having regard to its findings on all or any of the articles of charge and on the basis of the evidence adduced during the inquiry, is of the opinion that any of the penalties specified in clauses (v) to (ix) of sub-rule (1) of rule 5 should be imposed on the Government servant, it shall make an order imposing such penalty and it shall not be necessary to give the Government servant any opportunity of making representation on the penalty proposed to be imposed :

Provided that, in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice, and such advice shall be taken into consideration before making an order imposing any such penalty on the Government servant."

19. Resting on the aforesaid contentions, Mr. Nagrani has prayed that the impugned notice dated 19th August, 2022 may be set aside.

20. Mr. Patil, learned advocate appearing for the Corporation while not disputing the applicability of the 1979 Rules to Arun contended that Arun is required to demonstrate the prejudice that he has suffered owing to non-furnishing of the inquiry report. In any event, the Commissioner having granted opportunity to Arun to show cause against the proposed punishment, Arun cannot be said to have suffered a legal wrong for which the notice dated 19th August, 2022 should be interdicted. He has prayed for dismissal of the writ petition.

21. Having heard learned advocates for the parties, we find the action of the Commissioner to be indefensible. It has not been disputed before us that the provisions of the 1979 Rules apply to Arun in the matter of proceeding against him departmentally. The course of action adopted by the Commissioner appears to be in the teeth of sub-rules (2A) to (4) of rule 9 extracted above.

22. That apart, the law laid down in B. Karunakar (supra) is clear as crystal. We

propose to note what precisely the Supreme Court decided.

23. Paragraph 2 refers to the basic and the incidental questions arising for answers, reading as follows:

"2. The basic question of law which arises in these matters is whether the report of the enquiry officer/authority who/which is appointed by the disciplinary authority to hold an inquiry into the charges against the delinquent employee, is required to be furnished to the employee to enable him to make proper representation to the disciplinary authority before such authority arrives at its own finding with regard to the guilt or otherwise of the employee and the punishment, if any, to be awarded to him. This question in turn gives rise to the following incidental questions:

(i) Whether the report should be furnished to the employee even when the statutory rules laying down the procedure for holding the disciplinary inquiry are silent on the subject or are against it?

(ii) Whether the report of the enquiry officer is required to be furnished to the delinquent employee even when the punishment imposed is other than the major punishment of dismissal, removal or reduction in rank?

(iii) Whether the obligation to furnish the report is only when the employee asks for the same or whether it exists even otherwise?

(iv) Whether the law laid down in Mohd. Ramzan Khan case, (1991) 1 SCC 588, will apply to all establishments — Government and non-Government, public and private sector undertakings?

(v) What is the effect of the non-furnishing of the report on the order of punishment and what relief should be granted to the employee in such cases?

(vi) From what date the law requiring furnishing of the report, should come into operation?

(vii) Since the decision in Mohd. Ramzan Khan case has made the law laid down there prospective in operation, i.e., applicable to the orders of punishment passed after November 20, 1990 on which day the said decision was delivered, this question in turn also raises another question, viz., what was the law prevailing prior to November 20, 1990?

24. The answers to these questions are found in paragraphs 29 and 30 of the decision in the following terms:

"29. Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's

report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

30. Hence the incidental questions raised above may be answered as follows:

[i] Since the denial of the report of the enquiry officer is a denial of reasonable opportunity and a breach of the principles of natural justice, it follows that the statutory rules, if any, which deny the report to the employee are against the principles of natural justice and, therefore, invalid. The delinquent employee will, therefore, be entitled to a copy of the report even if the statutory rules do not permit the furnishing of the report or are silent on the subject.

[ii] The relevant portion of Article 311(2) of the Constitution is as follows:

‘(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.’

Thus the article makes it obligatory to hold an inquiry before the employee is dismissed or removed or reduced in rank. The article, however, cannot be construed to mean that it prevents or prohibits the inquiry when punishment other than that of dismissal, removal or reduction in rank is awarded. The procedure to be followed in awarding other punishments is laid down in the service rules governing the employee. What is further, Article 311(2) applies only to members of the civil services of the Union or an all-India service or a civil service of a State or to the holders of the civil posts under the Union or a State. In the matter of all punishments both Government servants and others are governed by their service rules. Whenever, therefore, the service rules contemplate an inquiry before a punishment is awarded and when the enquiry officer is not the disciplinary authority the delinquent employee will have the right to receive the enquiry officer’s report notwithstanding the nature of the punishment.

[iii] Since it is the right of the employee to have the report to defend himself effectively and he would not know in advance whether the report is in his favour or against him, it will not be proper to construe his failure to ask for the report, as the waiver of his right. Whether, therefore, the employee asks for the report or not, the report has to be furnished to him.

[iv] In the view that we have taken, viz., that the right to make representation to the disciplinary authority against the findings recorded in the enquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in Mohd. Ramzan case should apply to employees in all establishments whether Government or non-Government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or

not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the enquiry officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.

[v] The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an 'unnatural expansion of natural justice' which in itself is antithetical to justice.

25. These answers were followed by the following observation in the immediately next paragraph:

"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or

revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Where after following the above procedure, the Court/Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law."

26. Regrettably, more often than not, paragraph 31 is read to be the ratio of the decision in B. Karunakar (supra) without noticing what the basic question was, which the Constitution bench was called upon to answer, and how it was answered. The principle on which the basic question was answered forms the ratio of the decision, i.e., since the inquiry report finding the delinquent guilty of the charge(s) would form a material that the disciplinary authority is likely to consider while deciding on the question of punishment and opportunity to make representation thereagainst is an integral part of the opportunity of defense against the charges, it would amount to breach of principles of natural justice if such inquiry report were not furnished to the delinquent; and, without furnishing a copy of the inquiry report, the disciplinary authority is precluded from considering its contents and deciding upon the question of punishment to be imposed on the delinquent. However, the observations in paragraph 31 are to be read in continuation of the answer found in sub-paragraph (v) of paragraph 30 and in the scheme of things, has to be regarded as reasons in addition to the answer to the sixth incidental question, as to what ought to be the approach to deal with cases pending before the Courts prior to the law being laid down, which was to apply prospectively, in B. Karunakar (supra).

27. Despite the decision in B. Karunakar (supra) being clear, we find that law has not developed according to the well-defined lines laid down therein. This aspect of the matter was noticed by the Calcutta High Court in Smt. Aloka Bhattacharjee v. North Bengal State Corporation, (2017) Lab. I.C. 3602, where, the Court on an extensive examination of the decision in B. Karunakar (supra), held that

furnishing of the inquiry report before the disciplinary authority accepts the finding of guilt returned by the Inquiry Officer is a pre-condition for taking the disciplinary proceedings to its logical conclusion and that whether or not the delinquent has suffered any prejudice by reason of such non-furnishing of inquiry report is immaterial having regard to the answers given by the Supreme Court to the basic question that arose for decision as well as the incidental questions numbered 1, 2 and 3 (paragraph 2). The Court, inter alia, held that instead of calling upon the delinquent to show the prejudice suffered by him due to non-furnishing of inquiry report, the disciplinary authority should be first asked why it has not furnished the inquiry report and thereby disobeyed/disregarded the judicial mandate of the Constitution Bench. We share the concern and views expressed by the Calcutta High Court.

28. Thus, based on the above discussion, we hold that the Commissioner was required to maintain an open-mind till such time he received the representation of Arun against the inquiry report. Since the inquiry report is an important document that the Commissioner, as the disciplinary authority, seeks to rely on to nail Arun, such a document could not have been considered without furnishing a copy thereof to Arun. The Commissioner has proceeded in breach of the principles of natural justice and pre-judged the issue.

29. For the reasons aforesaid, we hold that the Commissioner was grossly in error in accepting the findings contained in the inquiry report and thereafter calling upon Arun to show cause why his service should not be terminated based thereon. As a sequitur, the notice dated 19th August, 2022 stands set aside.

30. We are of the view that remitting the matter to the Commissioner would not serve any fruitful purpose since the incumbent, i.e., Mr. P. Shiva Shankar, IAS has already perceived Arun to be guilty of the charges levelled against him without, however, extending to him the final opportunity to prove his innocence and has issued the notice to show cause seeking explanation on the question of punishment only.

31. We are informed that presently the Commissioner, Mr. P. Shiva Shankar, has been acting as an administrator of the Corporation, in the absence of elections to the General Body having been held. The matter relating to disciplinary action against Arun, if at all, therefore, has to wait till the General Body assumes charge or some other officer is appointed as the Administrator of the Corporation.

32. We have noted that the petitioner was placed under suspension since 28th January, 2020, but such order of suspension was revoked with effect from 28th July, 2020. Having regard to the gravity of the charges levelled against Arun, including the charge of illegal gratification, we are also of the considered opinion that the incumbent Administrator may consider the desirability of placing Arun under suspension once again. If such suspension is ordered, the same shall continue till conclusion of the disciplinary proceedings.

33. While proceeding to conclude the disciplinary proceedings, the provisions of

the 1979 Rules as extracted above shall be duly followed. A copy of the inquiry report must necessarily be furnished to Arun and opportunity of making a representation thereagainst given to him. After considering the representation that may be submitted by Arun, further action may be taken in accordance with law as is warranted on facts and in the circumstances.

34. Writ Petition No.10177 of 2022, thus, stands partly allowed.

35. Both the writ petitions are disposed of on the above terms. Parties shall, however, bear their own costs.