

(2013) 12 BOM CK 0108

In the Bombay High Court

Case No : Writ Petition No. 4590 of 2011

Dr. Hedgewar Seva Samiti and Public Information Appellate
Officer

APPELLANT

Vs

Purushottam and State of Maharashtra

RESPONDENT

Date of Decision : 19-12-2013

Acts Referred:

Citation : (2013) 12 BOM CK 0108

Hon'ble Judges : Ravindra V. Ghuge, J

Bench : Single Bench

Advocate : L.V. Sangit, for the Appellant; A.S. Sawant, Advocate for Respondent No. 1 and Mr. N.B. Patil, A.G.P., for the Respondent

Final Decision : Partly Allowed

Judgement

Ravindra V. Ghuge, J.—Heard. Rule. Rule made returnable forthwith and heard finally by consent of Shri L.V. Sangit, learned Advocate for the petitioners; Shri A.S. Sawant, learned Advocate for respondent no. 1 and Shri N.B. Patil, learned A.G.P. for respondent no. 2. The petitioners by this petition challenge the impugned order passed by the State Information Commission, Bench at Nashik, in Appeal No. 2010/RMA/CR/1937/2009, dated 21st December, 2010.

2. After hearing the learned Advocates for the parties the controversy boils down to only two issues for the present, which are as follows:-

(a) Whether the petitioners are covered u/s 2(h)(i) so as to be amenable to the jurisdiction under the Right to Information Act, 2005?

(b) Whether the first proviso to section 20 (1) of the said Act has been duly followed before penalty was imposed on the petitioners?

3. Shri Sangit draws my attention to section 2(h)(i) which reads thus:-

2. Definitions-In this Act, unless the context otherwise requires,-

(a) to (g)...

(h) "public authority" means any authority or body or institution of self-government established or constituted-

(a) to (c)...

(d) by notification issued or order made by the appropriate Government, and includes any-

(i) body owned, controlled or substantially financed.

4. The learned Advocate submits that though on the one hand the petitioners have appointed an Information Officer and have also created an appellate authority, they still would not be covered by the Right to Information Act since there is no State funding by which it could be covered under the definition u/s 2(h)(i). On the other hand, having supplied information to the best of its ability and having heard the appeal of the respondent through its appellate authority, it ought not to be taken as a presumption that the said Act is applicable to the petitioner trust, inasmuch as it ought not to be construed that the petitioners have acquiesced their right to raise a legal issue as regards applicability of the Right to Information Act. It is further contended that the impugned order is passed in one stroke while considering the claim of the respondent and penalty was straight away imposed without hearing the petitioners.

5. Mr. Sawant, learned Advocate has filed affidavit-in-reply on behalf of respondent no. 1. He contends in paragraph 3 as follows:-

I say and submit that for the first time in the present Writ Petition, it is contended by the petitioners that petitioner trust is registered under the provisions of BPT Act and not funded by the Government. Factually, the petitioner trust runs Agricultural Science Centre. The Ministry of Agricultural of Central Government had given funding to the said Agricultural Science Centre for the purpose of research and education. Undisputedly, the Central Government of India, Ministry of Agricultural had given finance to Agricultural Science Centre. Therefore, the contention raised by the petitioners that no fund was made available by the Government is fundamentally improper. I say and submit that for the first time said contention was raised by the petitioners and prior to that at no point of time said contention was raised by the petitioners.

I leave this contentious issue between the parties open for the lower authority to decide. The parties may agitate this issue before the State Information Commission.

6. Shri Sangit has then drawn my attention to the first proviso to section 20(1), which reads as under:-

Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him.

According to him, opportunity of being heard before any penalty was imposed, was not given to the petitioners.

7. Shri Sawant, the learned Advocate for respondent no. 1 submits that the petitioners have misconstrued the meaning and import of the proviso. According to him, when the petitioners were before the State Information Commission facing a challenge from the respondents, the petitioners were aware as to the effects of the said appeal if it was allowed. It is a creation of the Statute that penalty shall be at the rate of Rs. 250/- per day, in the event the authority comes to a conclusion that information was not supplied or was inappropriately or inaccurately supplied. He, therefore, strenuously submits that when the petitioners were aware of these effects if the appeal of the respondents was allowed, it ought to be presumed that they were aware of the imposition of the penalty and should, therefore, have addressed the authority on penalty as well while arguing against the appeal.

8. I am not in agreement with the submissions of Shri Sawant for the reason that if these submissions are accepted, it would mean that every respondent facing such an appeal will have to be under a constant shadow or fear of losing the appeal and suffering penalty, on the presumption that the appeal will be allowed and penalty would be imposed. This, therefore, would mean that before a verdict on the appeal is delivered, the concerned party will have to presume that it has lost the case and also make submissions on the penalty. This does not seem to be the intent and object of the said proviso.

9. The words/phraseology used in the said proviso, especially "shall be given a reasonable opportunity of being heard before any penalty is imposed on him" lead to a pre-supposition that the authority first has to come to a conclusion on the appeal and in the event the appeal is allowed, then thereafter the question of penalty would arise. In my view, the proviso gives the losing parties a right to a notice and hearing as regards imposition of penalty after the verdict of the appeal is handed down. It is only thereafter that a party similar to the petitioners would then become aware that the verdict has gone against it and would then be posed with the possibility of a penalty being imposed. It is in this situation that the hearing on the penalty is necessary.

10. From the impugned order it does not appear that the State Information Commission had put the petitioners to notice about the penalty and, therefore, obviously there was no hearing before imposing penalty. The opportunity of being heard is also not to be construed to be a mere formality or a farcical exercise. By the said proviso, a meaning can surely be imported that the authority is open to be convinced whether penalty should or should not be imposed. Had it been a pre-determined situation in law that the penalty shall be imposed as a matter of routine course, opportunity of hearing before penalty being imposed would not have been prescribed under the said proviso. Rather, the said proviso would not have been in place.

11. In the case of Guduthur Bros. Vs. The Income Tax Officer, Special Circle, Bangalore, , the three Judges" Bench of the Hon"ble Supreme Court of India, dealing with a case u/s 28(1)(a) of the Income Tax Act, 1922, held as under:-

4. There is no question here that the requirements of S. 28(1)(a) of the Income Tax Act were not completely fulfilled. If the appellants had not filed their return, as they were required by law to do, the omission would attract cl. (a) of sub-s. (1) of S. 28. We say nothing as to that. Sub-s. (3) of S. 28, however, requires that the penalty shall not be imposed without affording to the assessee a reasonable opportunity of being heard. This opportunity was denied to the appellants & therefore the order of the income tax Officer was vitiated by an illegality which supervened, not at the initial stage of the proceedings, but during the course of it. The order of the learned Appellate Assistant Commissioner pointed out the ground on which the illegality proceeded and his order directing the refund of the penalty, if recovered, cannot but be interpreted as correcting the error and leaving it open to the income tax Officer to continue his proceedings from the stage at which the illegality occurred. No express remand for this purpose, as is contended was necessary.

(5)... In our opinion, the notice issued to the appellants to show cause why penalty should not be imposed on them did not cease to be operative, because the Appellate Assistant Commissioner pointed out an illegality which vitiated the proceeding after it was lawfully initiated. That notice having remained still to be disposed of, the proceedings now started can be described as during the course of the assessment proceedings, because the action will relate back to the time when the first notice was issued.

12. As such, the analogy from the M/s. Guduthur Bros. (supra) ruling establishes that though issuance of notice before imposing penalty had not been expressly provided for under the Income Tax Act, 1922, opportunity of hearing before imposing penalty pre-supposes a proper hearing. Such a hearing can be made possible by issuing notice of hearing on penalty. Thus the concerned party is called upon to show cause as to why penalty should not be imposed. To achieve this object, which appears to be the intention of the Legislature in providing a proviso to section 20(1) of the Right to Information Act, it is incumbent upon the authority to issue a show cause notice under the proviso to section 20(1).

13. In the light of the above, the petition is, therefore, partly allowed with the following directions:-

(a) Impugned judgment and order dated 21st December, 2010, delivered by the State Information Commission, Bench at Nashik, in Appeal No. 2010/RMA/CR/1937/2009, is quashed and set aside;

(b) The said appeal is relegated back to the said authority for a fresh hearing;

(c) Both the parties are at liberty to bring on record material so as to enable the appellate authority to deal with the contention of the petitioners and the

respondent u/s 2(h)(i) and the applicability of the Right to Information Act, 2005.

(d) In the event the appeal of the respondent is allowed and if the State Information Commission desires to impose penalty, Section 20(1) and the first proviso thereunder shall be given effect to by issuing a show cause notice on penalty to the petitioners herein and after causing a hearing, would be at liberty to pass an order on its own merits.

(e) All contentions raised by the respective parties in this petition as well as in the appeal before the State Information Commission are kept open.

(f) Both the parties agree to appear before the State Information Commission Bench at Nashik on 13th January, 2014, at 11.00 a.m.

(g) Both the parties fairly state that they would make their best endeavour to co-operate with the learned authority in the proper adjudication of the appeal and would refrain from seeking unnecessary adjournments.

(h) The learned State Information Commission is expected to decide the said appeal as expeditiously as possible and preferably within a period of sixty days from 13th January, 2014.

14. Petition is partly allowed with the above directions. Rule is accordingly made absolute.