

(2018) 03 BOM CK 0156
In the Bombay High Court
Case No : WRIT PETITION NO.2302 OF 2018

JAYANT SARVOTTAMRAO KHARWADKAR APPELLANT
Vs
THE STATE OF MAHARASHTRA AND ANOTHER RESPONDENT

Date of Decision : 21-03-2018

Acts Referred:

Information Technology Act, 2000 — Section 66A
Constitution of India, — Article 19(1)(a), 19(2)

Citation : (2018) 03 BOM CK 0156

Hon'ble Judges : R.M.BORDE, J, K.K. SONAWANE, J

Bench : Division Bench

Advocate : V.J.Dixit, Sushant .V. Dixit, P.K.Lakhotiya,
S.S.Tope, A.V.Hon, S.S.Thombre,

Final Decision : Allowed

Judgement

R.M.Borde, J

1 Heard. Rule. Rule made returnable forthwith and hard finally by consent of learned Counsel for respective parties.

2 The petitioner is functioning as an Assistant Town Planner in the Town Planning department of the Municipal Corporation since last 19 years and

according to him, he is discharging his functions to the best of his abilities and to the satisfaction of the superior authorities. According to the

petitioner, his past service record is clean and there are no adverse remarks communicated to him.

3 The petitioner submits that on 11.02.2018, the petitioner has posted a comment on social media i.e. Facebook. The text of the comment/post reads

thus:

Ã?ukyk;d yksdkauk cksy.;klkBh lHkx`g feGkya dh rs rRoKkuh cuwu csNwV

vkjksi djrkr ;kykp yksd'kkgh Eg.krkr-Ã?

which means, when unworthy persons get opportunity to speak in the House, they become philosophers and make wild allegations and this is called

Democracy.

4 According to the petitioner, the post uploaded by him on social media is only for expression of his feelings and was limited for communication to his

Facebook friends. It is contended that the comment was not intended to be directed against any political party or any other group. The comment was

shared on social media, which was meant for a limited group. However, it appears that the comment was circulated by others on social media and as

such it was circulated beyond limited group. Some of the Corporators of Municipal Corporation carried a feeling that the said comment/post is

intended to insult the group of Corporators as a whole and as such, approached the Municipal Commissioner with a proposal to take action against

the petitioner.

5 A show cause notice came to be issued on 12.02.2018 calling upon the petitioner to explain as to why strict disciplinary action shall not be initiated

against him as per the provisions of Maharashtra Civil Services (Discipline and Appeal) Rules, 1979. According to the Commissioner, the act of the

petitioner is violative of provisions of Rule 3 of the Maharashtra Civil Services (Conduct) Rules, 1979. The petitioner has submitted his reply to the

show cause notice stating that the post of the Prime Minister of the Country is a Constitutional post and he holds a lot of respect for the person holding

such Constitutional post. As a result of chaos in the Parliament, the Speaker of the Rajya Sabha was required to reprimand some Members of the

House on account of their unruly behaviour, the petitioner felt distressed and in order to express his feelings, he published the post on social media and

the comment was intended to be circulated only amongst his Facebook friends. The comment was not directed against politicians as a class, much less

the Corporators. According to the petitioner, he holds a right of freedom of speech and expression and it is within his right to express his feelings.

The petitioner submits that he has fundamental right under Article 19(1)(a) to express his thoughts. The petitioner also explained that the said post was

neither against any individual or group or persons or any religion or caste, but since the petitioner was distressed, he gave way to his feelings.

According to the petitioner, he has not used any unparliamentary language against any individual or any politician or any party or Member representing local authority. The petitioner submits that Rules 5 to 9 of the Maharashtra Civil Services (Conduct) Rules, define "misconduct" and the act alleged against petitioner cannot be construed as misconduct. According to him, the act alleged is not a misconduct nor amounts to any act of indiscipline and as such, has prayed that no action of whatsoever nature be taken against him, as proposed.

6 Respondent No.2Â the Municipal Commissioner has issued an order on 21.02.2018 recording therein that the explanation tendered by the petitioner is unsatisfactory and the petitioner has committed misconduct, unbecoming an officer under Rule 3(1)(iii) of the Rules in causing insult to the representatives of the people. The Commissioner, as such, in exercise of powers under Rule 4(1) of the Maharashtra Civil Services (Discipline & Appeal) Rules, 1979, directed suspension of the petitioner and proposed a departmental enquiry against him.

7 It is the contention of the petitioner that the comment posted by him on social media does not relate to functions of the Corporation nor is referable to elected representatives of the Corporation. The said post uploaded on social media, which is claimed to be an act of indiscipline, does not relate to his functions as an employee of the Municipal Corporation. It is also contended that the provisions of Rule 3 of the Maharashtra Civil Services (Conduct) Rules, 1979, are not at all attracted in the instant matter. It is, thus, contended that the order passed by the Municipal Commissioner, impugned in this petition, deserves to be quashed and set aside.

8 On the contrary, learned Counsel for the Respondent Corporation objects the petition on the ground maintainability, contending that there is an alternate forum available to the petitioner for redressal of his grievance. It is contended that since the action has been taken by the Commissioner on the basis of Resolution adopted by the General Body, the view expressed by the General Body is binding on the Municipal Commissioner. It is further contended by the Respondent Corporation that the act of uploading a comment on social media amounts to indiscipline attracting Rule 3 of the Maharashtra Civil Services (Conduct) Rules, 1979. The order impugned in the petition, issued by the

Commissioner, records that the act of the petitioner is violative of Rule 3(1)(iii) and (viii) of the Rules of 1979, which read thus:

3 Duty of Government servant to maintain integrity, devotion to duty, etc.

(1) Every Government servant shall at all times—

(i) —

(ii) —

(iii) do nothing which is unbecoming of a Government servant.

(iv) —

(v) —

(vi) —

(vii) maintain political neutrality;

9 The act alleged surely does not relate to any political party or concerning political issue. Neither it can be said to be referable to the functions of

the Government servant liable to be performed in the official capacity. The uploading of the comment, which is meant for circulation amongst friends,

cannot be construed as an act unbecoming of a Government servant. In order to take action against a Government servant, the act alleged must have

some nexus with the functions of the employee in his official capacity or shall be of such a nature that it would lower down dignity of the office held

by the employee, in the eyes of the public. According to us, the post/comment, which is uploaded on the social media is of a general nature and the

same does not appear to have been directed against any individual, group, political party nor it was meant to be circulated amongst the general public,

much less, elected representatives of the Corporation.

10 Learned Counsel appearing for the petitioner places reliance on the judgment delivered by the Division Bench of Andhra Pradesh High Court in the

matter of M.V.S.Prasada Rao Vs. State of A.P., 1985 (2) APLJ (HC) 326. In identical circumstances, as in the instant matter, the petitioner before

the Andhra Pradesh High Court was placed under suspension on the allegation that he addressed a public meeting held under the aegis of the Action

Committee of the Employees and Workers of Hyderabad City, where he criticised adversely the State Government in respect of their actions

regarding suspension of some of the I.A.S. Officers and appointment of enquiry officers to conduct enquiries against I.A.S. Officers; and he

supported the struggle of the State Government employees. This conduct of the petitioner was branded as contravention of Rule 7(i) of the All India

Service (Conduct) Rules, 1968 and he was kept under suspension. It was contended before the High Court that the freedom of speech and expression

brings within its fold communication of ideas freely and fearlessly or to discuss freely. The freedom of speech and expression is essential for

effective exercise of power and to correct errors in the governmental actions. It is only through free debate and frank exchange of ideas that the

Government remains responsive to the will of the people and peaceful change is effected. Every idea is an incitement. It offers itself for belief and if

believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. Discussion in a conference

hall is a "workshop for ideas" from "robust exchange of thoughts" result in discovery of truth or fruitful result, "out of multitude of

tongues." It was contended before the Division Bench that the freedom of an individual to express himself cannot be restricted under the garb of

maintenance of discipline. It was also contended that the alleged act does not interfere with the functions of the employee. It would be appropriate to

refer to the observations of the Division Bench of A.P. High Court in paragraphs no.32 and 33 of the judgment, which read thus:

"32 In W.P.No.5552/1983, as seen, the respondents claim jurisdiction under Rule 3(1) of the Discipline Rules, on the basis of the information laid

by the Osmania University that the petitioner committed malpractice in writing the LL.B. Examination, claiming that the petitioner made an admission

of the same. The petitioner is denying his culpability. The University had already taken action and cancelled the examination. That is the subject

matter of W.P. 7577/83. Though it was also posted along with these writ petitions, we do not have time to hear the matter and it was separated. So

there is no need to express any opinion in this regard, but suffice it to state that the question raised in this writ is whether the respondent has

jurisdiction to take disciplinary action. The claim of the State is that even in his private disposition, the petitioner is expected of maintaining

unquestionable integrity and conduct and on the admission made by the petitioner in his letter dt. November 3, 1981, given to the Chief Superintendent,

Law Examinations, it gives jurisdiction to the respondent to take disciplinary action, in other words, the claim of the State Government is that the

allegation pertaining to the private life of a member of the All India Administrative Services is amenable to disciplinary action under Rule 3(1) of

Discipline Rules. The conduct would come within the meaning of the words "having regard to the circumstances in any case". Therefore, we

have to see what is the meaning to be ascribed to the clause "having regard to the circumstances in any case" occurring in Rule 3(1) of

Disciplinary Rules. It is to be read along with Rule 3(1) of Conduct Rules and the clause therein, i.e., "and shall do nothing which is unbecoming of

a member of the Service". As seen the Conduct Rules and Discipline Rules would operate in the realm of discharge of his duties in his capacity as a

member of the Cadre and his derogatory conduct is amenable to disciplinary action. In other words, Rule 3(1) of Conduct Rules entrench into the

entire length and breadth of the conduct a member is expected of to adhere in the performance of his duty as such officer so as to avoid the wrath of

unbecoming conduct. The question, therefore, is whether the private conduct also could be lugged in within this spectrum. There must be inter

connection of the offending conduct and the duty a member is to discharge or tend colour of reasonable relationship between the two. To such an

area obviously the operation of Rule 3(1) of Conduct Rules and Rule 3 of Discipline Rules could be projected. But when the link is snapped off, it is

purely his private conduct.

33 The very threat of disciplinary action even in respect of private conduct unconnected or unrelated with the duty or responsibility as a member of

the cadre would be a haunting ghost. It would hinder a member even to have social intercourse which he legitimately has, as a citizen and hampers

his pursuits to develop his personality and stifles his intellectual advancement. It impedes his adventitious thinking, intellectual speaking or writing.

Instead of a pipeline for happy pursuits, it becomes a deterrent dragon practically crippling his personality and destroys his dignity of person. The

threat of disciplinary action would also operate a parallel spying project and persons jealous of his or inimically disposed or disgruntled elements

become unsolicited plain clothes detectives. Ears are cocked to concocted palpably palatable tell tale stories of private life at once either to deter a

member of discharge even lawful duties or induce higher tip's to take recourse to disciplinary route. If we lend credence to the contention of the

State, the pernicious effects referred to above would ensue offending his freedom enshrined in Art. 19(1)(a) of the Constitution. The conduct of the petitioner complained of has no interconnection nor lend colour of reasonable relation to the duty of the petitioner as a member of the cadre and the link of unbecoming conduct is snapped off. Therefore, the conduct of the petitioner does not come within the sweep of Rule 3 of Discipline Rules. We are, therefore, of opinion that the respondents travelled beyond the bounds of their power. The enquiry into the private conduct of the petitioner is without authority or in excess of law. We have no hesitation to hold that the impugned action is beyond Rule 3(1) of the Discipline Rules.

Accordingly, we quash the G.O. Ms. No.2620/G.A.D., dated June 25, 1983 and allow W.P.No.5552/83 with costs. Advocate's fee Rs.500/-. We dismiss W.P.No.6568/83, but in the circumstances, without costs.

11 We are in respectful agreement with the afore stated view expressed by the Division Bench of the Andhra Pradesh High Court.

12 The private conduct of the petitioner in uploading the post on social media for limited circulation cannot be linked with his official functions of

officer of Corporation. There is absolutely no link between the alleged private act and his functions in the capacity of officer or Corporation servant.

Even otherwise also, act of expressing oneself cannot be branded as unbecoming of a public servant. The enquiry into private conduct of petitioner is

without authority and is in excess of law. The impugned action is surely beyond scope of Rule 3 of of Rules of 1973.

13 The petitioner contends that freedom of expression is a part of the fundamental rights and same cannot be taken away. It needs to be considered

that Article 19(1)(a) of the Constitution has to be interpreted in a manner by which the fundamental right to freedom of speech and expression is

nourished. The words, "freedom of speech and expression" find place in the association words "liberty of thought, expression, belief, faith and

worship", which form a part of the Preamble of the Constitution. The Preamble has its own sanctity and the said concepts have been enshrined in

the Preamble. Interpreting Article 19(1)(a) of the Constitution, the test is always to see Article 19(1)(a) in aid of the Preambular objectives which

form a part of the basic structure of the Constitution. Article 19(1)(a) is intrinsically linked with the Preambular objectives and it is the duty of the

Court to progressively realise the values of the Constitution.

14 It would be apt to refer to some of the observations made by the Hon'ble Supreme Court in the matter of Shreya Singhal Vs. Union of India, 2015

(5) SCC 1. A very important question of far-reaching consequences relating to fundamental right of "freedom of speech and expression"

guaranteed under Article 19(1)(a) of the Constitution of India, in reference to Section 66A of the Information Technology Act of 2000, was

considered by the Hon'ble Apex Court. Referring to the judgment in the matter of S. Khushboo V. Kanniamal & another, (2010) 5 SCC 600, it is

observed that the importance of freedom of speech and expression, though not absolute, was necessary as we need to tolerate unpopular views. This

right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition

for meaningful governance, the culture of open dialogue is generally of great societal importance. In paragraph no.13 of the judgment, the Hon'ble

Supreme Court has observed thus:

"13 This leads us to a discussion of what is the content of the expression "freedom of speech and expression". There are three concepts

which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is

incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such

discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or

expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the

security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the

arguments of both petitioners and respondents tended to veer around the expression "public order".

15 In the matter of Secretary, Ministry of Information & Broadcasting, Government of India and Others. Vs. Cricket Association of Bengal and

another, (1995) 2 SCC 161, the Hon'ble Supreme Court, after reciting Article 10 of the European Convention on Human Rights, went on to observe

(at page 213):

â?? The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is

necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on

social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can

circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly

endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or

electronic or audiovisual such as advertisement, movie, article, speech, etc.â??.

16 Surely, sub-article (2) of Article 19 provides for restriction on the right to freedom of speech and expression and the restriction makes an

exception in respect of operation of any existing law insofar as it relates to, or prevents the State from making any law relating to libel, slander,

defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow,

the State.â??

17 Learned Counsel for the Respondent Corporation has invited our attention to the judgment delivered by the Division Bench of Andhra Pradesh

High Court in the matter of Union of India and another Vs. Mahendra Kumar, 1985 II LLJ 108 AP. In paragraph 8 of the judgment, referring to the

Division Bench judgment of the Andhra Pradesh High Court in the matter of Khaja Khan Vs. Postmaster-General, 1975 I An. W.R. 64), it is

observed thus:

â??Regarding this impugned Rule 3(1)(iii) there is no direct authority of any Court. We may point out that the words â??do nothing which is

unbecoming of a Government servantâ? may be in relation to his duties of office as well as to his private life. This rule enjoins a Government servant

at all times whether in office or outside to do nothing which is improper or inappropriate or unsuited to his position as a Government servantâ?.

The Division Bench further observed:

â??If the Government servant is asked to do nothing which is unbecoming of a Government servant, he is merely asked to keep within the bounds of

administrative decency. Given common sense and a sense of decency, it will not

be difficult to judge whether what conduct amounts to unbecoming conduct. What is unbecoming can always be ascertained, having regard to the entirety of conduct. We do not think the rule suffers from the vice of vagueness. Thus, it could form the subjectmatter of the charge.â??

18 It must, therefore, be scrutinised as to whether the act alleged is improper or inappropriate or unsuited to his position as a Government servant; and as to whether it amounts to unbecoming conduct, has to be ascertained having regard to the entirety of the conduct of a person.

19 Respondents contend that the act complained of would fall within exception to Article 19(1)(a) of the Constitution of India. The argument deserves to be rejected for the reason that demonstrably uploading of alleged offending post is not either a defamatory or in the nature of libel or slander nor it offends against decency or morality.

20 Turning to the instant matter, as has been recorded above, the offending post uploaded on the social media by the petitioner is too general in nature and is not directed against any individual or group much less representatives of the people in the Municipal Corporation. By any stretch of imagination, it cannot be construed that the post is directed against the representatives of the people in the House of local body i.e. the Municipal Corporation.

21 Apart from this, the act alleged does not come within the purview of Rule 3(1) (iii) and (vii) of the Maharashtra Civil Services (Conduct) Rules, 1979. The order impugned in the petition is wholly arbitrary, unwarranted and illegal and, therefore, deserves to be quashed and set aside and same is accordingly quashed and set aside.

22 The petitioner has tendered an affidavit wherein it is stated that the post circulated on social media is not directed against any individual, any politician, any political party, group of persons or community or religion. Said post was never intended to bring disrepute to any person, caste, religion, political party or political leader. It was not intended to hurt feelings of any individual, caste, creed or religion. It is further recorded that the petitioner has lot of respect for the House and its office bearers and the Hon'ble Corporators. It is further stated that the petitioner has deleted the said post from his Facebook account and it is not available on the social media. It is further recorded that the petitioner has never intended to hurt anybody by way of this post and the petitioner has tendered his sincere and unconditional

apology to everybody who is hurt and aggrieved by such post uploaded on Facebook. The affidavit containing apology is accepted.

23 For the reasons recorded above, writ petition is allowed. The order impugned in this petition, passed by the Commissioner, Municipal Corporation on 21.02.2018, is quashed and set aside.

24 Rule is accordingly made absolute. There shall be no order as to costs.