
(1985) 11 BOM CK 0015

In the Bombay High Court

Case No : Writ Petition No. 1794 of 1985

Madhav Khandero Ambikar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 06-11-1985

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 311

Citation : (1987) 1 LLJ 31

Hon'ble Judges : H.N. Kantharia, J

Bench : Single Bench

Judgement

1. By this petition under Article 226 of the Constitution of India, the Petitioner challenges the order of relating to expunge the adverse remarks made against him and also the order reversion based on such adverse remarks.

2. The Petitioner joined the services in the Law and Judiciary Department of the Government of Maharashtra (hereinafter referred to as the "Respondent".) in December, 1960 and has been continuously working as a permanent employee of the State Government. He was promoted from time to time and in 1981 was promoted to the post of Under Secretary which post he held till the day he was reverted on September 2, 1985. Petitioner's case is that on June 24, 1985 he received a memo containing adverse remarks against him for the years 1981-82, 1982-83 and 1984-85. He made a representation by a letter dated August 29, 1985 and requested that the adverse remarks be expunged. It was his case that although rules require that the adverse remarks should be communicated to him within two months, the adverse remarks in question were not communicated to him till June 24, 1985. When his representation was thus, pending, he received the communication dated September 2, 1985 by which he was reverted to the post of Superintendent. It appears that challenging the order of his reversion he filed the present writ petition which was rejected at the admission stage by this Court on 24th September, 1985. The matter was carried in appeal successfully. In the meanwhile, it appears that the Respondent considered the representation

of the Petitioner into the adverse remarks and by an Order dated October 3, 1985 rejected his representation. Thereafter the petition was amended as per the order passed by the Appeal Court on October 5, 1985 to the effect that the order dated October 3, 1985 rejecting his representation refusing to expunge the adverse remarks should also be set aside.

3. The Respondent resisted this writ petition on the ground that the Petitioner was promoted purely on temporary basis as Under Secretary with effect from June 1, 1981. He, therefore, continued to hold the said post on temporary basis till he was reverted on the recommendation of the Maharashtra Public Service Commission. About the adverse remarks the contention of the Respondent is that the adverse remarks for the years 1981-82 and 82-83 were not communicated to the Petitioner in time. But after the representation was made which was pending consideration the present Writ Petition was filed and, therefore, the same could not be considered in time. The Respondent also contended that no opportunity for being heard was asked for by the Petitioner in the matter of considering the representation and this is how no personal hearing was granted to him when his representation for expunging the adverse remarks was rejected.

4. Mr. Kochar, learned Counsel appearing on behalf of the Petitioner, urged that the adverse remarks were not communicated to the Petitioner in time and that is how he was not given an opportunity to make representation and since the reversion order is based on such adverse remarks without giving an opportunity of being heard to the Petitioner, the reversion order cannot be sustained as it amounts to punishment without hearing the Petitioner. Mr. Kochar also urged that the adverse remarks of 1981-82 and 82-83 have to be ignored not only for the reasons that they were not communicated to the Petitioner but they are vague. Mr. Kochar then submitted that these adverse remarks were written by some one in the Department only on September 2, 1985 as an afterthought when the Petitioner was reverted. Mr. Kochar also attacked the order passed by the Respondent on October 3, 1985 refusing to expunge the adverse remarks made against the Petitioner on the ground that the concerned Secretary had not applied his mind.

5. Controverting the submissions of Mr. Kochar, Mr. Thakur, learned Counsel appearing on behalf of the Respondent, submitted that the promotional appointment of the Petitioner was purely on temporary basis and he had no vested right in such a promotion for being continued especially when there were adverse remarks against him. Mr. Thakur made eight propositions for my consideration in this regard as under :-

(i) Confidential Reports are intended to be general assessment of work performed by Government servant and serves as data of comparative merits when a question of promotion, confirmation etc. arises.

(ii) Making an adverse remark entry in confidential report is not equivalent to imposition of penalty and, therefore, there is no necessity of holding an enquiry.

(iii) The fact that confidential adverse remarks are not communicated to the Government servant does not vitiate his reversion. Fact that his representation is rejected is a relevant factor.

(iv) That when a person is appointed in an officiating capacity, it is implicit that there will be loss of that office if he is found unsuitable.

(v) When a Government servant is provisionally promoted and on proper scrutiny found unfit the order of reversion is passed in due course and not arbitrarily.

(vi) Reversion on the ground of unsuitability does not attract Article 311 of the Constitution because it does not amount to penalty.

(vii) Question of unsuitability for a particular post is a matter for appropriate authority to reach and High Court will not sit in appeal under Article 226 of the Constitution, and

(viii) The Court need not go into the question of correctness of confidential report and accept the decision based on this report as bona fide.

To substantiate his propositions Mr. Thakur relied upon four authorities in cases of R.L. Butah Vs. Union of India (UOI) and Others, R. L. Butail v. Union of India & Other 1977 M.L.J. 536, Shankar Ramaji Atram v. Chief Conservator of Forest, Government of Maharashtra, Poona and others 1984 (48) F.L.R. 694 Y.V. Thatte Vs. State and Maharashtra and another, and Y. B. Thatte v. State of Maharashtra.

6. Now, there is absolutely no dispute about the correctness of the eight propositions of law made by Mr. Thakur which are based on the authorities relied upon by him. The point here, in this matter, is whether regard being had to the facts and circumstances, injustice was done to the Petitioner. It is important to note that admittedly the Petitioner was promoted to the post of Under Secretary with effect from June 1, 1981. He was communicated with the adverse remarks for the years 1981-82, 82-83 and 84-85 only on June 24, 1985 as under :-

Government of Maharashtra Confidential No. S.F.R. 1095/II Law and Judiciary Deptt., Mantralaya, Bombay - 400 032 Dated 24th June, 1985 Subject : Confidential Adverse Remarks.MEMORANDUM Shri M. K. Ambikar, Under Secretary is hereby informed the following Confidential Adverse Remarks as directed by the Secretary.

1981-82 "He avoids to apply his attention specially to legal aspects of cases".

"Easy going lacks devotion to duty."

1982-83 "Lack of judgments, initiative and drive.

"His notes disclose lack of legal sense."

1984-85 "Does not care to apply his mind in any case", "shows complete lack of interest in the work" "Never takes initiative and as such question of drive does not arise." "He is still novice in law. He lacks logical and coherent thinking" "Puts

up slip shod and confusing notes. Shri Ambikar is of no use as Under Secretary (Litigation).

Sd/- (S. B. Unde) Deputy Secretary to Government To Shri M. K. Ambikar, Under Secretary, Law and Judiciary Deptt."

As a matter of fact, as submitted by Mr. Thakur and as can be seen from the order passed by the Secretary, Law and Judiciary on October 3, 1985 rejecting the representation of the Petitioner, the adverse remarks for the year 84-85 are irrelevant. Therefore, we are concerned with the adverse remarks for the years 1981-82 and 82-83 which were not communicated to the Petitioner within two months in violation of the Government Resolution No. GR/2571/19432 dated : 29th December 1968. There is no explanation offered by the Respondent for such non-communication. Therefore, the Petitioner could not make any representation with regard to those adverse remarks. And after the receipt of the adverse remarks when he made a representation on August 29, 1985, without considering his representation he was served with an office order dated September 2, 1985 reverting him to the post of Superintendent. This clearly shows that the Petitioner was condemned without being heard in the matter of the adverse remarks. Mr. Thakur submitted that the confidential remarks about the Petitioner for the year 83-84 were not adverse. In other words, only two years adverse remarks were taken into consideration for reverting the Petitioner. At the cost of repetition let it be noted here that since he was reverted without his representation being considered, the reversion order has to be set aside because the principle of natural justice is that no body should be condemned without being heard. It is also important to note that reversion is a major penalty or punishment and unless the Petitioner was given an opportunity as to what he had to say in the matter of the adverse remarks he could not have been visited with such a severe punishment. This makes the Government Order dated September 2, 1985 bad in law being arbitrary and thus violating the provisions of Article 14 of the Constitution of India.

7. That apart, there are certain surprising features of this matter. According to the Respondent, the Petitioner was, by a Government Resolution No. APT 1281/149 (a)-II dated 7th July 1981, promoted to the post of Under Secretary on purely temporary basis with effect from 1st June 1981 (F.N.) until further orders in the newly created post for a period of months with effect from 1st June, 1981 to deal with the work of consolidation of the Digest of Remembrancer of Legal Affairs and Advocate General" opinions for the period from 1970 to 1980. It is argued on behalf of the Respondent that since this was purely a temporary promotion, the Petitioner cannot say that he could not have been reverted especially when he was found unsuitable. About the unsuitability of the Petitioner, I shall say a little later. But so long as the promotion being purely temporary is concerned, it is not the case of the Respondent that the Petitioner was reverted to his original position because the period for which he was promoted expired or that the work for which he was promoted came to an end.

One can understand if the period for which he was appointed expired and he was reverted or that the work for which he was promoted got over and therefore he was reverted. But here right from June 1, 1981 till the day the Petitioner was reverted on September 2, 1985 he worked on this so-called purely temporary promotion and it is only soon after he was communicated the adverse remarks of two years 1981-82 and 82-83 that he was all of a sudden reverted. In this connection, there is another surprising feature of the matter. Thus after the Petitioner was promoted, a select committee of the department constituted for drawing up select list of Superintendents fit for promotion as Under secretary, decided on 12th August, 1981 to bring the Petitioner on the select list provisionally which was approved by the Government on 19th October, 1981. Thereafter a reference was made to the Maharashtra Public Service Commission on 15th November, 1981 for their views for bringing the Petitioner on the select list. The Maharashtra Public Service Commission agreed to bring the petitioner on select list on provisional basis. The said select committee reviewed the cases of the Petitioner and other Under Secretaries for bringing them on unconditional part of the select list on 7th May, 1984 and on the recommendation of the select committee, the Government had proposed to bring the Petitioner on unconditional part of the select list. Reference was made to the Maharashtra Public Service Commission for their views about the Petitioner being brought on unconditional part of the select list. However, by letter dated 29th January, 1985, the Maharashtra Public Service Commission informed the Government that as the Petitioner's confidential reports were not satisfactory, his name should be deleted from the select list. The Government again requested the Maharashtra Public Service Commission by a letter dated 14th February, 1985 to keep open the case of the Petitioner and to consider it after the confidential report for 1984-85 was available. However, the Maharashtra Public Service Commission did not accept the Government's proposal and, therefore, the Government accepted the recommendation of the Maharashtra Public Service Commission to remove the name of the Petitioner from the select list which resulted in his reversion. From these circumstances brought on the record in an affidavit filed on behalf of the Respondent by Prabhakar P. Prasad, Under Secretary to the Government, Law and Judiciary Department; Mantralaya, Bombay, it is clear that right from the time the Petitioner was promoted to the post of Under Secretary till 24th February, 1985 the Government was of the view that the Petitioner deserved to remain in his promoted post of Under Secretary. It is only because the Maharashtra Public Service Commission did not accept the Government proposal because of the adverse confidential reports that the Respondent reverted the petitioner. It is not brought on the record by the Respondent as to what are the business rules under which the recommendations made by the Government to the Maharashtra Public Service Commission have to deal with. It is therefore not clear as to under what circumstances the Government was obliged to succumb to the adamant attitude of the Maharashtra Public Service Commission not to accept the recommendation of the Government that the Petitioner should be continued in his promoted post at least upto the time his confidential reports for

the year 84-85 were available. It may also be noted here that there is nothing on the record to show that papers regarding representation made by the Petitioner were placed before the Maharashtra Public Service Commission and the same were considered by Maharashtra Public Service Commission. If the Maharashtra Public Service Commission did not know what was the representation of the Petitioner with regard to the adverse remarks made against him, it can be well said that the decision of the Maharashtra Public Service Commission was also arbitrary in not acceding to the recommendation made by the Government to allow the Petitioner to remain in the promoted post at least upto the period his confidential reports of the year 84-85 were available. Before switching over to the discussion on expunging the adverse remarks let it also be noted here that the Government had decided and had proposed on 23rd July, 1980 to grant two advance increments for outstanding work of the Petitioner which advance increments were course, not paid to the Petitioner because of the decision taken by the General Administration Department. I am not very particular about the payment of two advance increments to the Petitioner but the fact remains that the Law and Judiciary Department under whom the Petitioner was working was of the view that in the year 1980 the Petitioner deserved two advance increments for his outstanding work. This becomes relevant because of the fact that the Petitioner is reverted on account of the adverse remarks made against him for the years 1981-82 and 82-83.

8. Now, the Petitioner made his representation against the adverse remarks on August 29, 1985. As said earlier, when this representation was pending consideration he was reverted on September 2, 1985 which itself makes order of reversion bad in law being arbitrary. It is only when the matter was pending in this Court that the Respondent considered the representation of the Petitioner and rejected the same on October 3, 1985, thereby not expunging the adverse remarks. I am surprised at the reason given by the Respondent for not expunging the adverse remarks as under :

"The remarks in the confidential reports for these two years were entered by the then Secretary himself as a Reviewing Officer. It will, therefore not be proper to remove those remarks from the confidential reports merely on the ground that they were not communicated."

In my opinion this can never be a good ground for not expunging the adverse remarks. I am, therefore, of the view that the Order dated October 3, 1985 passed by the Respondent refusing the expunge the adverse remarks is also arbitrary and has to be set aside.

9. In this view of the matter, the Petition succeeds. The Order dated September 2, 1985 passed by the Respondent reverting the Petitioner to the post of Superintendent is quashed and set aside. Similarly, the order dated October 3, 1985 refusing to expunge the adverse remarks made against the petitioner for the relevant years is also quashed and set aside. Rule is accordingly made absolute with cost.