

(2018) 12 BOM CK 0119

In the Bombay High Court

Case No : Writ Petition No. 11956, 11957, 12092, 12206, 12207, 12224, 12080, 12439, 12166 Of 2015, 472, 1754 1771, 2090, Of 2016

Manik Sahadu Kedar

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 18-12-2018

Acts Referred:

Mahatma Gandhi National Rural Employment Guarantee Act, 2005 — Section 19

Citation : (2018) 12 BOM CK 0119

Hon'ble Judges : S V Gangapurwala, J; R G Avachat, J

Bench : Division Bench

Advocate : Dattatraya R Jayabhar, V D Sapkal, Amit A Yadkikar, N K Kakade, Amar D Soman, Santosh S Jadhavar, Yogesh B Bolkar, S K Tambe, Shivaji T Shelke, A A Nimbalkar

Final Decision : Dismissed

Judgement

R.G. Avachat, J

1. Rule, made returnable forthwith. With the consent of the learned counsel for the parties and the learned A.G.P., heard finally.

2. These petitions have been filed for quashment of the orders dated 24th February, 2015 and 24th November, 2015, passed by the Ombudsmen and the Appellate Authority, respectively, under the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (for short, "MNREGA") and the Rules framed thereunder.

3. Heard learned counsel for the petitioners, respondent No.3 - Zilla Parishad, respondent Nos.6 to 8 and the learned Assistant Government Pleader.

FACTS :

4. Most of the petitioners are public servants (petitioners in Writ Petition Nos. 12166/2015, 11956/2015, 11957/2015, 12092/2015, 12224/2015, 12080/2015,

472/2016 and 1754/2016). At the relevant time, they were serving with the Revenue Department and Zilla Parishad, at Pathardi in the district of Ahmednagar. Other petitioners claim to be unemployed agriculturists.

. Respondent Nos.6 to 8 herein had filed the Public Interest Litigation ("PIL", for short) No.68 of 2014 before this Court seeking directions to respondent Nos.1 to 3 to take appropriate action against erring officials, including the petitioners, who were found to have committed rampant illegalities in implementation of the Schemes under the MNREGA.

. A Division Bench of this Court, vide its order dated 2nd July, 2014, disposed of the aforesaid PIL with a direction to the Collector, Ahmednagar to cause an inquiry into the allegations made in the PIL and take remedial steps. Pursuant thereto, the Collector appointed the Ombudsmen under the MNREGA to go into the allegations. The Ombudsmen, in turn, conducted inquiry into the allegations and found the petitioners to have siphoned off public funds in implementing the Schemes under the MNREGA. The Ombudsmen submitted their report to the Collector. It is alleged that the Collector sat on the said report. Respondent Nos.6 to 8, therefore, filed Contempt Petition for non-compliance of the order passed by this Court in the PIL. Meanwhile, the petitioners preferred writ petitions, challenging the award/order passed by the Ombudsmen. Since, under the Scheme, an appeal has been provided against the award/order passed by the Ombudsman, the writ petitions came to be disposed of. The petitioners took recourse to the appeal. A three Member Appellate Authority, after hearing the petitioners and the concerned, slightly modified the impugned award. Hence, these writ petitions, challenging the order passed by the Appellate Authority.

SUBMISSIONS :

5. Learned counsel for the petitioners would submit in one voice that the Ombudsmen did not give the petitioners hearing. The principles of natural justice have not been followed. Respondent Nos.6 to 8 had filed the Public Interest Litigation with a political motive. It was submitted on behalf of the petitioners in writ petition No.11956 of 2015 that the work of desilting was carried out in the year 2011-2012, whereas the inquiry in that regard took place in the year 2015. The Government had issued directions in respect of such work. It had been directed that such work has to be undertaken before onset of rainy season. For, after the rainfall, it would not be possible to inspect the works at the bottom of percolation tanks. These petitioners mean to say that the inspection and measurement of the alleged work took place after the evidence thereof disappeared. On behalf of all the petitioners, the relevant guidelines to be followed by the Ombudsmen were pressed into service to suggest that those have not been adhered to. Some of the petitioners have also made a blame game. According to them, the officials, who were responsible for implementation of the schemes, have been let off. The Ombudsmen were biased against the petitioners. A complaint in that regard had already been preferred to the Collector. It was submitted by the learned counsel that the petitioners in writ

petition Nos. 12206/2015, 12207/2015, 12439/2015, 1771/2016 and 2090/2016 are neither public servants nor the beneficiaries. The Ombudsmen, therefore, did not have jurisdiction to make an inquiry against them. Learned counsel for the petitioners, therefore, urged for setting aside the impugned orders.

6. Mr. A.A. Nimbalkar, learned counsel for respondent Nos.6 to 8 would, on the other hand, submit that the Ombudsmen made the inquiry observing necessary directions/rules. Ombudsman shall not be bound by any legal rules of evidence and may follow such procedure that appears to him to be fair and proper in accordance with the principles of natural justice. The learned counsel took us through the material relied upon by the Ombudsmen and the Appellate Authority to arrive at the conclusion, holding the petitioners guilty. The learned counsel would submit that the respondents have to take pains to see that the matter is taken to its logical conclusion since the higher-ups responsible for implementation of the schemes were averse or not true to their job.

. The learned counsel on either side have relied on some authorities, in support of their respective submissions.

7. The learned A.G.P. would support the findings recorded by the Ombudsmen and the Appellate Authority.

SCHEME UNDER MNREGA :

8. With an object to enhance the livelihood security of the poor households in rural areas of the country by providing at least one hundred days of guaranteed wage employment to every poor household, whose adult members volunteer to do unskilled manual work, the MNREGA came to be passed. The rules have also been framed by the State Government for implementation of the scheme under MNREGA. Section 19 of MNREGA speaks of grievance redressal mechanism. The Section authorizes the State Government to frame rules, determine appropriate grievance redressal mechanisms at the Block level and the district level for dealing with any complaint by any person in respect of implementation of the Scheme and lay down the procedure for disposal of such complaints.

. The Government instructions on Ombudsman have been revised in January, 2014. The office of the Ombudsman is meant for making an inquiry into any grievance as regards implementation of the schemes.

9. It appears from the rules that Ombudsman is neither a judicial nor a quasi-judicial Authority. No complaint to the Ombudsman shall lie, if the complaint has already been disposed of by the office of Ombudsman in any previous proceeding. True, the Ombudsman had initially found the complaint to have been motivated by political considerations. Much water has, however, flown thereafter. If the earlier order of Ombudsman is without considering the material before it and is per se and ex-facie perverse, there would be no impediment to consider the complaint based on relevant material. Fresh and relevant material before it would not denude the Ombudsman to conduct enquiry afresh. Item

No.11 of the Instructions states that the proceedings before the Ombudsman shall be summary in nature. He shall not be bound by any legal rules of evidence. No doubt, the principles of natural justice are required to be followed. Spot inspection/investigation can be done with an advance notice thereof to all parties and to the local Gram Panchayat. Surprise inspection can also be undertaken, if so required.

10. Pathardi is a drought-prone Taluka. The scheme under MNREGA was, therefore, undertaken. The work of construction of seven roads, de-silting of percolation tanks and taking new wells were the subjects of the complaints made by respondent Nos.6 to 8. On inquiry, the Ombudsmen found the petitioners, in their respective/various capacities, to have indulged in rampant illegalities. This Court would not enter into a debate on factual matrix. The Ombudsmen, after having made a detailed inquiry, held the petitioners guilty. The Appellate Authority has put a stamp of approval on the findings of the Ombudsmen. To highlight the seriousness of the allegations, we have to refer to some of the findings of the Ombudsmen and the Appellate Authority.

. It is reiterated that under MNREGA, the Scheme was required to be implemented manually. The local work force was required to be engaged. The job seekers were provided with job cards. As a part of inquiry, the Ombudsmen have recorded the statements of the concerned. The statements of those persons, who were residing in the immediate neighbourhood of the works, have also been recorded. The statements of the petitioners have also been recorded, meaning thereby that they have been given an opportunity to put forth their case. We have not come across any request made by any of the petitioners to the Ombudsmen to allow them to lead/produce any other material in their defence. Cross-examination of the witnesses examined before the Ombudsman appears to have not been expected under the Rules. The Ombudsmen paid visit to the spots. The photographs/ video-shooting of the sites, while work was in progress, also found part of evidence. In short, there is voluminous material pointing out the illegalities. The Ombudsmen found that the construction of roads was entrusted to contractor, namely Shri Ramesh Bhausahab Gore (petitioner No.2 in writ petition No.2090/2016). The work was done, employing machines namely Poclain and JCB, instead of doing it manually. Entries in the muster roll of the work force were forged. Businessmen, money lenders and councillors were shown to have been engaged as work force. The Ombudsmen relied on the statements of the persons residing in the neighbourhood of the percolation tanks to find that the work of de-silting had not been undertaken. Expenditure thereon has been siphoned off. Even names of dead persons were shown in the muster roll. Names of some minors also figured therein. Smt. Surekha Ramesh Gore, who was the then councillor of Municipal Council was shown as a member of the work force on construction of the roads. Her statement was recorded. It has come on record that on a given date, she had attended General Body Meeting of the Council and at the same time, she was shown to have been present at/engaged in road construction work. She gave an explanation that she attended

the meeting and immediately rushed back to report for the work. There is one more glaring example. A well has been sanctioned to a money lender namely, Shri Gopalkrishna Murlidhar Mantri (petitioner in Writ Petition No.12439/2015). The Talathi, namely Buddhanand Shripati Thorat (petitioner in writ petition No. 12224/2015) issued a certificate to the effect that the agricultural holding of Shri Gopalkrishna Mantri was below five acres, while it, in fact, is more than that. The scheme was meant for those whose holding was less than five acres. No well could be taken within a radius of 500 mtrs. of another well. It was found that there was one well in the land of Shri Gopalkrishna Mantri. Still, the well under the scheme was taken in the very field. The distance between two wells was not more than 10 to 15 foot. The family members of this money lender were shown as members of the work force engaged in taking the well.

11. The Appellate Authority paid visits to the sites. It also recorded the statements of the petitioners. The enquiry reports give graphic details of illegalities/ irregularities committed by the petitioners. We need not further deal with the evidence and the findings recorded by both the authorities.

12. The question is "whether the principles of natural justice have not been followed" ? If yes, has there been any prejudice to all or any of the petitioners ?

13. In the case of Uma Nath Pandey and others V. State of U.P. and another, AIR 2009 SC 2375, it has been observed by the Hon'ble the Apex Court that it is but essential that a party should be put on notice of the case before any adverse order is passed against him. The principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

. The Apex Court was dealing with an order passed allowing the Revision Petition. The Revision Petition was allowed on hearing only learned counsel for respondent No.2 therein.

. In the case of State Bank of Patiala and others Vs. S.K. Sharma, AIR 1996 SC 1669, it was observed that in the case of violation of a procedural provision which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest.

. The aforesaid observations were made in the backdrop of the factual matrix before the Apex Court.

14. While in the case of Manohar Dhonde (Prof.) & ors. Vs. State of Maharashtra & ors. 2007(1) Bom.C.R.417, a Division Bench of this Court observed as under :-

"In case any authority, in discharge of its duties fastened upon it under the law, traverses into the realm of personal reputation, adversely affecting him, must provide a chance to him to have his say in the matter. In such circumstances,

right of an individual to have the safeguard of principles of natural justice before being adversely commented upon by a Commission of Inquiry is statutorily recognised and violation of the same will have to bear the scrutiny of judicial review. It would but be necessary to notice a person whose conduct the Commission considers it necessary to inquire into during the course of the inquiry or whose reputation is likely to be prejudicially affected by the inquiry. Such a person would have a reasonable opportunity of being heard and to adduce evidence in his defence. Thus, the principle of natural justice was got inducted in the shape of statutory provision. It is thus incumbent upon the Commission to give an opportunity to a person before any comment is made or opinion is expressed which is likely to prejudicially affect that person. Needless to emphasise that failure to comply with principles of natural justice renders the action non est as well as the consequences thereof."

. The Court was dealing with a case of alleged sexual harassment. The provisions of the Maharashtra State Commission for Women Act were being considered by the Court. The victims, who had made allegations of having been sexually harassed, were not believed.

Perusal of the judgment (supra) would indicate that the observations were made in the facts and circumstances of the case.

. Here, the Court is concerned with the provisions of MNREGA and Government instructions as regards the proceedings before an Ombudsman.

15. Adherence to the principles of natural justice will depend upon the facts and circumstances of each case. In some cases, there can be a post-decisional hearing. There may not be a right of cross examination. The petitioners were in the know of the allegations made against them first when respondent Nos.6 to 8 had preferred the complaint. Moreover, PIL filed against them contained the details of allegations. Although the Ombudsmen have not examined the witnesses in the presence of the petitioners, it cannot be said that prejudice has been caused to any of the petitioners. It is reiterated that the Ombudsmen and the Appellate Authority have recorded the statements of the petitioners. The sites were visited. The photographs and video-recording of the work is available in the material relied upon by the Ombudsmen. The report/award passed by the Ombudsmen has been modified by the Appellate Authority, withdrawing some of the suggestions, which were in the nature of penalty imposed on the petitioner Smt. Vandana Kharmale, such as recovery of the amount of expenditure.

16. Since the award of the Appellate Authority would prevail, we need not embark upon the award passed by the Ombudsmen. The Appellate Authority has recommended for initiation of the Departmental Enquiry against the petitioners, who are the public servants. The Authority has further recommended for placing them under suspension pending the enquiry. It has also been suggested for lodging First Information Report against them.

. The nature of recommendations made by the Appellate Authority would

undoubtedly indicate that no punishment in the nature of penalty has been imposed on any of the petitioners. The petitioners would have every opportunity to meet the allegations made against them and defend themselves in a prosecution, if launched against them.

17. The enquiry conducted by the Ombudsmen and the Appellate Authority is in the nature of a preliminary fact finding enquiry. As per service jurisprudence, no delinquent or a public servant against whom a complaint has been received, has an opportunity to put forth his case in the preliminary enquiry. In fact, the enquiry into the allegations has been made pursuant to the directions issued by this Court in the PIL. We are afraid as to how far the instructions/guidelines to be followed by the Ombudsman would come in the way when there is substantial compliance of the procedure. The State has admitted that illegalities and irregularities were committed in implementation of the subject schemes. It is reiterated that the guidelines do not provide for an opportunity to cross-examine witnesses examined by the Ombudsman. It is further reiterated that the petitioners have given their statements before the Ombudsmen and the Appellate Authority as well. None of them appears to have raised grievance about having been deprived of putting forth their grievance before those authorities. True, some of the petitioners appear to have made a written complaint alleging that the enquiry was being conducted behind their back. By making such complaint, some of the petitioners appear to have cried wolf. There is nothing to substantiate that prejudice has been caused to any of the petitioners during the enquiry. The record would indicate that one Ambetkar and one more officer have, in no uncertain terms, admitted the involvement of themselves and the petitioners.

18. It would be apposite to have a glance at the relevant provisions of Chapter-IV of the instructions on Ombudsman (as revised on 16th January, 2014). Chapter-IV speaks of procedure for redressal of grievances against MNREGA Authority or beneficiary. True, the term "beneficiary" has not been defined under the Act. The petitioners, who claim to be neither the public servants nor beneficiaries, were, prima facie, found to have been involved in siphoning off the public funds. Even otherwise, they could only be liable to face prosecution, if any launched pursuant to the recommendations made by the Ombudsmen. It needs no mention that the criminal law can be set in motion by any one. Independent of the award passed by the Ombudsmen and confirmed by the Appellate Authority, all the petitioners could be subjected to a criminal prosecution.

19. Item No.11 of Chapter-IV of the Instructions speaks that the proceedings before the Ombudsman shall be summary in nature. The Ombudsman shall not be bound by any legal rules of evidence and may follow such procedure that appears to him to be fair and proper in accordance with the principles of natural justice. There is record to indicate that advance notice was given to the MNREGA Authorities, including the petitioners (public servants) as to the proposed visit to the sites. Some of the petitioners were present during some site inspections.

Since the petitioners gave their statements before the Ombudsmen, they cannot be said to have not been afforded an opportunity to present their case.

. Item No.12.5 authorizes the Ombudsman to conduct a spot investigation. It further authorizes the Ombudsman to make surprise inspection. In the present case, panchanamas of the site inspections have been drawn.

. If a statutory provision, either specifically or by necessary implication excludes the application of any rule of natural justice, then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. (Union of India Vs. J.N. Sinha, AIR 1971 SC 40).

. As held in the case of Shailaja (Dr.) d/o Bhujangrao Wadikar Vs. Hon'ble Chancellor and another, 2014(1) Mh.L.J.868, it is no doubt a principle of natural justice that an authority cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him. The opportunity to meet out the averments, comments and the report submitted by the Vice Chancellor (here, "Ombudsmen") can be by written representation also. Whether the said opportunity should be by a written representation or by personal hearing depends upon the facts of each case.

. Cross-examination may not be allowed in the cases where there is no such provision either in the Act or in the Rules dealing with the matter on hand. It may not also be granted where the circumstances would not make cross-examination and essential ingredients of natural justice.

20. The Ombudsmen, by their Award, had recommended imposition of penalty of Rs.7000/- (Rs.1000/- per work of road construction) on the Tahsildar - Smt. Vandana Kharmale. It is also recommended for recovery of the expenditure incurred on construction of roads from the Deputy Engineers, Sectional Engineers. Smt. Vandana Kharmale, the Tahsildar and Shri B.D. Kakde, Deputy Engineer were recommended for being placed under suspension. Moreover, as per the Guidelines 2:3:1 IX, it was recommended for registration of an F.I.R. against all the petitioners. The Ombudsmen gave their recommendations workwise. Departmental Enquiry had also been recommended against the petitioners - Shri Shivaji Palhare, Shri Buddhanand Thorat and Shri S.V. Kedar. True, the Ombudsmen had not recommended for initiation of Departmental Enquiry against a few of the petitioners in respect of some of the subjects of the complaint.

21. The Appellate Authority has modified the Award passed by the Ombudsmen. It set aside the recommendations of imposition of penalty of Rs.7000/- on Smt. Vandana Kharmale - the Tahsildar. The Appellate Authority has, however, recommended for initiation of the Departmental Enquiry against the petitioners - public servants and filing of an F.I.R. against them. The Appellate Authority has further recommended for placing them under suspension pending Departmental Enquiry. Close reading of the order passed by the Appellate Authority would

indicate that the recommendation for initiation of Departmental Enquiry and placing the petitioners - public servants under suspension was not part of the Award passed by the Ombudsmen in respect of some of the subjects of the enquiry. It may, therefore, sound that the Appellate Authority stepped out of its jurisdictional periphery.

. It is, however, to be noted that the recommendations made by the Appellate Authority are recommendatory in nature. It is for the disciplinary authority to take a call in that regard. Considering magnanimity of illegalities committed by the petitioners, we do not propose to exercise our discretion to interfere with the order passed by the Appellate Authority. Needless to state that on some of the counts, Ombudsmen recommended for initiation of Departmental Enquiry against most of the petitioners. According to us, the concerned disciplinary authorities or the heads of the departments ought to have taken cognizance of the complaints made against the petitioners for initiation of preliminary enquiry without forcing them (complainant) to knock the doors of the Court.

22. As such, we reach such a pass that suggests the Ombudsmen to have made enquiry by observing the necessary rules and procedure. There is voluminous material on record to suggest prima facie involvement of the petitioners. Enquiry has been made pursuant to the directions issued by this Court in the PIL. The petitioners would have every opportunity to meet the charge, that may be levelled against them in Departmental Enquiry and/or criminal prosecution. It is a classic case of a conflict between an individual interest and public interest. In such a case, former shall give way to the latter (*Salus Populi Suprema Lex*).

23. In the case of *Niranjan Hemchandra Sashittal and another Vs. State of Maharashtra* 2013 AIR(SC)1682, the Apex Court observed thus :

"20. It can be stated without any fear of contradiction that corruption is not to be judged by degree, for corruption mothers disorder, destroys societal will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the institutions, paralyses the economic health of a country, corrodes the sense of civility and mars the marrows of governance. It is worth noting that immoral acquisition of wealth destroys the energy of the people believing in honesty, and history records with agony how they have suffered. The only redeeming fact is that collective sensibility respects such suffering as it is in consonance with the constitutional morality..."

24. The petitioners appear to have stultified the whole object of the Acts enacted to ensure enhancement in the livelihood security of the poor households in the rural areas of the country by providing at least one hundred days of guaranteed wage employment to every poor household whose adult members volunteer to do unskilled manual work. It is, therefore, in the interest of justice and larger public interest that the Award/report of the Ombudsmen modified by the Appellate Authority is taken to its logical conclusion by implementing the same.

25. In the result, the writ petitions are dismissed. No costs. Rule is discharged

accordingly.