
(2004) 01 BOM CK 0027

In the Bombay High Court

Case No : Writ Petition No. 4602 of 1999

Motilal Srivastava

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 13-01-2004

Acts Referred:

Bombay Police (Punishments and Appeals) Rules, 1956 — Rule 3, 4

Citation : (2004) 2 ALLMR 350 : (2004) 5 BomCR 386 : (2004) 2 MhLj 277

Hon'ble Judges : J.N. Patel, J;B.R. Gavai, J

Bench : Division Bench

Advocate : S.P. Dharmadhikari, for the Appellant; A.G. Mujumdar, A.G.P. For respondents 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

B.R. Gavai, J.—The petitioner has approached this Court, challenging the order passed by the learned Maharashtra Administrative Tribunal, dated 2-4-1999, thereby dismissing the Review Application No. 90/97 in Original Application No. 702/91 for setting aside the order dated 27-6-1986 passed by the Commissioner of Police, Nagpur, compulsorily retiring the petitioner from services.

2. The facts in brief, giving rise to the filing of the present petition are as under:--

The petitioner who was at the relevant time, working as Assistant Sub-Inspector, Buckle No. 556 with the Nagpur police was directed on 4-1-1984, to escort 90 passengers from Central Jail, Nagpur to Pune. These prisoners were to be carried under the supervision of superior A.S.I. Shri Ramchhabilsingh having Buckle No. 305 and A.S.I. Babuva Prasad Buckle No. 526, the petitioner and the constables in the escorting party. These prisoners were carried in two buses. The petitioner along with his senior A.S.I. Babuva Prasad Buckle No. 526, were travelling in Bus No. MTG-9695 along with 44 prisoners and rest of the prisoners were travelling in another bus under the senior A.S.I. Ramchhabilsingh.

3. That while travelling towards Pune, the driver of the bus, in which the

prisoners and the petitioner were travelling, stopped the vehicle near village Limbe in Jalgaon district for taking tea. That since the bus was stopped by the driver and the drivers and conductors of both the buses had gone for taking tea, some of the prisoners requested the escorting party, for permitting one prisoner, namely, Onkar Pande had requested the petitioner to go for nature's call. The petitioner acceded to the said request and took the said Shri Onkar Pande for answering the nature's call. However, said Onkar Pande, taking advantage of the situation made good his escape.

4. On the basis of this incident, the petitioner and A.S.I. Ramchhabilsingh were served with the charge-sheet dated 6-8-1984. The charge as against the petitioner was as under :--

"Name of the accused:--

1. A.S.I. 305, Ramchhabilsingh.

2. A.S.I. 556, Motilal (Both under suspension) Police Head Quarters, Nagpur

1. A.S.I. 305 Ramchhabilsingh (under suspension) Police Head Quarters, Nagpur.

There is unpardonable neglect, irresponsible conduct, disobedience of orders and dilatoriness in the discharge of Government work on your part.

You, A.S.I. 305, Ramchhabilsingh, while working in the Police Head Quarters at Nagpur, were entrusted with the work of taking (transferring) 90 prisoners from Central Jail at Nagpur to Pune on 4-1-1984. You were head of the Police team doing this job. You were also given duty pass, and it was clearly ordered there in to be fully equipped with "Hath kadi/hand cuffs, keys, Rifle and rounds. However you have neglected the instructions and have disobeyed the orders. This has resulted in fleeing of the prisoner No. C/2734 by name Onkarnath Chhabinath Pande, at village Walunj in Aurangabad district on 5-1-1984. 2. A.S.I. 556, Motilal (under suspension) Police Head Quarters, Nagpur.

There is unpardonable neglect, irresponsible conduct, disobedience of orders, and dilatoriness in the discharge of Government work on your part.

(a) You, A.S.I. , 556, Motilal, while working in the Police Head Quarters, Nagpur were entrusted with the work of guarding the transferring of 90 prisoners from Central Jail Nagpur to Pune on 4-1-1984. You were one of the members in the Protection Force team headed by A.S.I. 305, Ramchhabilsingh, The duty pass given to you on this account, clearly mentioned and ordered that "Hathkadi" Handcuffs, keys, Rifle and rounds should be taken with you. But you have disobeyed this order.

(b) On 4-1-1984, out of 90 prisoners, 44 of them were seated in S.T. Bus No. 9596 at the Central Jail, Nagpur, and you were the head of the Police Protection team for this bus. On 5-1-1984, when the bus stopped at village Walunj in Aurangabad District at about 04 00 Hours, some of the prisoners alighted from the bus for (easing) nature's call and urination. At that time you alone

accompanied the prisoner No. C/2734 named Onkarnath Pande, who wanted to attend to nature's call. Although you were aware, you did not take full precaution to take additional force with you, while going with the said prisoner. Taking full advantage of this situation, the prisoner C/2734 - Onkarnath Pande made good his escape."

The petitioner submitted his explanation, in reply to the aforesaid charge-sheet on 30-7-1985. The main contention of the petitioner was that the staff provided for the protection of the prisoners was only 21, whereas as per the manual it was necessary to have a staff of 48 officials. It is the contention of the petitioner that on the contrary, he took every precaution to prevent the escape of the prisoner Onkar Pande. Not only that, he followed the said prisoner and also fired two shots. The petitioner, therefore, prayed for his exoneration.

5. The Enquiry Officer in his report, came to the conclusion that, the only fault on the part of the petitioner, was that, he being seated near the door of the bus No. MTG 9695, did not ask adequate staff to accompany the prisoners getting down for urination and that he did not exercise proper control on the staff. The Enquiry Officer has observed that, taking into consideration, the facts of faulty distribution of duty and inadequate deployment of staff, it will not be judicious to propose severe action against the petitioner. The Enquiry Officer has, therefore, recommended to stop one increment in the case of the petitioner, because he did not control the staff and did not take proper precaution while permitting the prisoners to go down from the bus, which made it easy for the prisoner to run away.

6. The Disciplinary Authority, the Commissioner of Police, in his final order dated 27-6-1986, took into consideration the fact, that at an earlier point of time, prior to two years, one prisoner in similar circumstances had run away from the custody of the petitioner. In the said order, the disciplinary authority has observed that the charge against the petitioner was of a grave nature and he deserved to be dismissed from service. However, taking into consideration his long service of 31 years in the department, it was considered equitable to retire him compulsorily. Thus, by the said order, the Disciplinary Authority has compulsorily retired the petitioner, from service with effect from the date and time of receipt of the order.

7. Subsequent to the order of compulsory retirement, the petitioner submitted the papers for pensionary benefits. However, he received the communication dated 28-6-1990, whereby he was informed that, he was not entitled to retiral benefits. The petitioner, therefore, filed an application before the Maharashtra Administrative Tribunal bearing No. 702/91 on 4-9-1991, challenging therein, both the orders of compulsory retirement as well as refusal to grant retiral benefits. The learned Maharashtra Administrative Tribunal, after hearing the parties, dismissed the application of the petitioner vide order dated 10-6-1996. The petitioner, thereafter filed Review Application No. 9/97 along with application for condonation of delay on 18-8-1997. However, the learned Tribunal rejected

the application for condonation of delay, which compelled the petitioner, to approach this Court by way of Writ Petition No. 3545/98. This court, condoned the delay and directed the Maharashtra Administrative Tribunal to decide the Review Application on merits. The learned Maharashtra Administrative Tribunal, vide its order dated 2-4-1999 dismissed the Review Application. The petitioner, thus approached this Court, by way of present petition, under Article 226 of the Constitution of India.

8. Heard Shri S.P. Dharmadhikari, the learned Counsel on behalf of the petitioner and Shri A.G. Mujumdar, the learned Assistant Government Pleader on behalf of the respondents.

9. Shri Dharmadhikari, the learned Counsel for the petitioner, has raised three grounds, for assailing the order passed by the respondent No. 3, dated 27-6-1986, which are as under :--

(A) That, it has come on record, that the escorting party was specifically directed by jail authorities that the prisoners are all sportsmen and, therefore, it was not necessary to carry the handcuffs and rifles; since there was no possibility of their fleeing away and, therefore, the finding of the Disciplinary Authority, that the petitioner did not handcuff or fasten the rope to the prisoner and as such, it amounted to grave negligence, is perverse and cannot be sustained in law.

(B) That the Enquiry Officer, had come to a finding, that the negligence of the petitioner was pardonable negligence and as such imposition of minor penalty of withholding of one increment would be sufficient punishment. However, the disciplinary Authority had differed from the said finding and come to a conclusion, that the negligence was not pardonable and had imposed a severe punishment of compulsory retirement. That, since the Disciplinary Authority, has imposed higher punishment than the one proposed by the Enquiry Officer, it was necessary for the Disciplinary Authority to have issued a fresh show-cause notice to the petitioner and given an opportunity to reply the same, so as to comply with the principles of natural justice.

(C) That the Disciplinary Authority had taken into consideration the past record of the petitioner. Since the said fact had influenced the subjective satisfaction of the Disciplinary Authority, it was necessary for the Disciplinary Authority, to give a show-cause notice to the petitioner, putting him on notice about the said fact, which would have enabled the petitioner to give sufficient explanation. That non-compliance with this, has resulted in violation of principles of natural justice.

Shri Dharmadhikari in support of the second ground has relied upon the judgments of the Apex Court in the case of Punjab National Bank and Others Vs. Sh. Kunj Behari Misra, and Yoginath D. Bagde Vs. State of Maharashtra and Another, .

10. In reply, Shri A.G. Mujumdar, the learned Assistant Government Pleader, has vehemently supported the impugned order. The learned Assistant Government

Pleader, has submitted that the petitioner has been found guilty of grave misconduct, of permitting a prisoner to escape from his custody. He submitted that, not only this, but his past conduct, of permitting another prisoner to escape away, justifies the penalty of compulsory retirement, imposed by the Disciplinary Authority. It is further submitted that, the Disciplinary Authority has taken into consideration the entire evidence and after appreciating the same, has come to a judicious finding, which need not be interfered with by this Court.

11. Since, we are of the considered view, that the petition deserves to be allowed on the second ground, we need not refer to the rival submissions made by the learned counsel for the parties, in respect of other grounds.

12. It is clear from the charge-sheet issued by the Enquiry Officer, that the petitioner was asked to show-cause, as to why any of the punishments specified in Rule 3 of the Bombay Police (Punishments and Appeals) Rules, 1956 (hereinafter to be referred to as "the said Rules") be not imposed upon the petitioner. Rule 3(1)(a-2)(i-a) provides for the penalty of compulsory retirement. At this stage, it would be relevant to refer to Rule 4(1) of the said Rules :--

"4(1) No punishment specified in clause *[-] (a-2), (i), (i-a), (ii), and (iii) of Sub-rule (1) of rule 3 shall be imposed on any Police Officer unless a departmental inquiry into his conduct is held and a note of the inquiry with the reasons for passing an order imposing the said punishment is made in writing under his signature."

It is thus clear that, while imposing a punishment, of the nature which is imposed upon the petitioner, it is necessary to hold a departmental enquiry and to make a note of the enquiry with the reasons for passing an order imposing the said punishment in writing. By now, it is a settled position of law, that whenever the Disciplinary Authority disagrees with the Enquiry Officer, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings on punishment. Whenever the Disciplinary Authority, disagrees with the finding and recommendations of the Enquiry Officer and seeks to impose a higher punishment, the principles of natural justice would require that, the delinquent officer should be put on notice as to the proposed enhanced punishment and show cause as to why such a punishment should not be imposed. If this is not done, it would amount to violation of principles of natural justice. In this respect, we may refer to the observations of Their Lordships of the Apex Court in the case of Punjab National Bank v. Kunj Behari Misra (cited supra):--

"19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof whenever the disciplinary authority disagrees with the inquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the inquiry

officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the inquiry officer. The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file representation before the disciplinary authority records its findings on the charges framed against the officer.

In view of the aforesaid observations of the Apex Court, we are of the view that the principles of natural justice will have to be read in Rule 4 of the said Rules, when a Disciplinary Authority differs with the findings of an Enquiry Officer and proposes to impose a higher punishment. It is needless to state that the principles of natural justice are required to be observed, at every stage of an enquiry including the stage of passing final order, of inflicting penalty. This is necessary as the delinquent officer who has to show-cause, can point out the circumstances to the Disciplinary Authority, as to why such higher punishment should not be imposed on him. There may be various factors which may have a bearing on the subject matter and influence the subjective satisfaction of the Disciplinary Authority.

13. We may also refer to the decision of the Apex Court in the case of *Yoginath D. Bagde v. State of Maharashtra* (cited supra). In the aforesaid case also, the Disciplinary Authority had disagreed with the findings of the Enquiry Officer. The Enquiry Officer had come to a conclusion that the charges against the delinquent officer were not established. The Disciplinary Authority disagreed with the findings of the Enquiry Officer and held that the charges against the appellant were proved. Their Lordships of the Apex Court observed thus :--

"31. In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the enquiry officer into the charges levelled against him but also at the stage at which those findings are considered by the disciplinary authority and the latter, namely, the disciplinary authority forms a tentative opinion that it does not agree with the findings recorded by the enquiry officer. If the findings recorded by the enquiry officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the disciplinary authority has proposed to disagree with the findings of the enquiry officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the

disciplinary authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the disciplinary authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or service rule including rules made under Article 309 of the Constitution."

14. Applying the said principles, to the facts of the present case, it is undisputed that the Disciplinary Authority, before passing the impugned order dated 27-6-1986, by which it has disagreed with the recommendations of the Enquiry Officer, has not issued any show-cause notice to the petitioner. As discussed hereinabove, the principles of natural justice, will have to be read in Rule 4, even at the stage of passing of the final order imposing punishment by the Disciplinary Authority. Undisputedly, in the present case, while imposing a higher penalty, than the one proposed by the Enquiry Officer, the Disciplinary Authority has not issued a notice to the petitioner, as to why such a higher punishment should not be imposed upon the petitioner. Had the petitioner been served with such a notice, it would have enabled him to file his reply and point out his explanation regarding the proposed punishment. The Disciplinary Authority after considering such an explanation would have arrived at the subjective satisfaction as to the quantum of punishment. In that view of the matter, the order dated 27-6-1986, thereby imposing a penalty of compulsory retirement, being in violation of principles of natural justice is not sustainable in law.

15. At this stage, Shri Dharmadhikari, the learned Counsel for the petitioner, relying on the judgment in the case of Punjab National Bank, cited supra, submitted that taking into consideration the facts of the present case and that the petitioner is out of employment, for almost 15 years, this Court should mould the relief and award a lesser punishment. However, taking into consideration the facts of the present case, we are not inclined to do so. It would meet the ends of justice, if the impugned order is set aside and the Disciplinary Authority is directed to issue a show-cause notice to the petitioner thereby indicating the proposed punishment, so that the petitioner can show cause to the proposed action. The Disciplinary Authority after taking into consideration the explanation of the petitioner, if any, and other relevant factors would take appropriate decision in accordance with the law. This, in our view, will meet the requirement of principles of natural justice.

16. For the aforesaid reasons, the petition is allowed;

(i) The order dated 27-6-1986, passed by the Commissioner of Police, Nagpur thereby imposing the penalty of compulsory retirement, is hereby quashed and set aside.

(ii) The Commissioner of Police, Nagpur, is directed to issue a show-cause notice

to the petitioner, as to the proposed punishment, and

(iii) The Commissioner of Police, Nagpur is further directed to decide the question of penalty to be imposed on the petitioner, after taking into consideration the explanation of the petitioner and the other relevant factors, in accordance with law. We expect the Commissioner of Police to complete this process as expeditiously as possible and in any case within a period of six months.

The rule is, therefore, made absolute in the aforesaid terms. In the facts and circumstances of the case, there will be no order as to the costs.