(2016) 08 BOM CK 0005

In the Bombay High Court

Case No : Writ Petition No.9099 of 2014

Prabhakar s/o. Ambadasrao Dongre — APPELLANT

Vs

State of Maharashtra — RESPONDENT

Date of Decision : 01-08-2016

Acts Referred:

Constitution of India, 1950 — Article 311
Maharashtra Civil Services (Pension) Rules, 1982 — Rule 27(2)(a)

Citation : (2016) 5 AIRBomR 251 : (2016) 5 BCR 50

Hon'ble Judges : S.S. Shinde and Sangitrao S. Patil, JJ.

Bench : Division Bench

Advocate : Mr. Avinash Deshmukh, for Mr. Sumant L. Deshpande, Advocates, for the Petitioner; Mr. S.D. Kaldate, AGP, for the Respondent No. 1; Mr. B.B. Yenge with Mr. A.S. Savale, Advocates, for the Respondent nos. 2 and 3

Final Decision : Allowed

Judgement

S.S. Shinde, J.—Heard.

2. Rule. Rule made returnable forthwith, and heard finally with the consent of the parties.

3. This Petition takes exception to the departmental enquiry initiated against the petitioner as per the Memorandum bearing No. Admn/PAD/2013/8709 dated 20.11.2013 issued by respondent no.3 Deputy General Manager (Admn.), and also to the show cause notice dated 05.08.2015 issued by respondent no.3 pursuant to the enquiry report dated 31.12.2014.

4. The facts giving rise to the present Writ Petition as disclosed by the petitioner are as under:

It is the case of the petitioner that he has rendered more than 32 years of service with unblemished record. He got promotion in the year 2012 to the post of Incharge Regional Manager for Nanded Region. His performance has been appreciated by respondent nos. 2 and 3. When he was working as Regional

Manager at Nanded, he could achieve remarkable sale of Rs. 125.00 crores during the year 2012-2013 and respondent no.2 Managing Director issued appreciation letter on 08.04.2013 to him for achieving record sale of pesticides during the year 2012-13. It is further the case of the petitioner that his subordinates, without his prior permission, exceeded their powers and distributed excess fertilizers to Venkatesh Agency at Parbhani, for which he called their explanations and the said thing was informed to respondent no.2. He took written assurance from the Venkatesh Agency, Parbhani that the same would be cleared as early as possible.

5. It is further the case of the petitioner that he was shocked to receive show cause notice dated 27.08.2013 issued by respondent no.3, alleging that the petitioner supplied fertilizers in excess to Venkatesh Agency, Parbhani, who was defaulter instead of supplying the same to old and active distributor M/s. Ganesh Krushi Vikas Kendra, Parbhani. The petitioner was asked to give explanation within 10 days of receiving the notice to show cause as to why disciplinary action should not be taken against him for the alleged misconduct. The petitioner received notice on 06.09.2013. He was supposed to submit his explanation by 16.09.2013. However, without waiting explanation from the petitioner, respondent no.3 issued an order of suspension. The petitioner challenged the said order of suspension before the High Court, by filing Writ Petition No.8233/2013. However, in the said Writ Petition, no interim relief was granted.

6. It is further the case of the petitioner that by letter dated 26.11.2013, respondent no.3 informed that respondent no.2 has proposed to hold departmental enquiry against the petitioner, as per Memorandum dated 20.11.2013 along with statement of article of charges and the petitioner was directed to submit his written statement of defence within 10 days. On 22.02.2014, the documents sought by the petitioner were supplied. The petitioner filed written statement of defence on 22.02.2014, denying charges levelled against him. The Enquiry Officer was appointed by the respondents. The hearing was kept on 18.04.2014 and the same continued till 29.07.2014. During pendency of the departmental enquiry, a crime was registered against the petitioner and others with Shivaji Nagar Police Station on 02.06.2014. Since the petitioner was going to retire on attaining the age of superannuation on 31.07.2014, he requested respondent no.2 to fix his pay in the revised pay scale as per the Government order dated 21.05.2014, whereby the recommendations of 6th Pay Commission were directed to be implemented and the arrears to be paid w.e.f. 01.01.2006.

7. It is further submitted that the petitioner sent notice to respondent Corporation on 30.07.2014, stating therein that he is not in a position to attend the hearing on 29/30.07.2014 and no ex parte adverse order should be passed. On 31.07.2014, the petitioner retired on attaining the age of superannuation. The petitioner, by the letters dated 04.08.2014, 18.08.2014 and 05.09.2014 requested the respondents to grant him pensionary benefits including difference

of pay as per the revised pay scale, arrears, leave encashment, gratuity, provident fund, etc. However, the respondents did not pay any heed. Hence, this Petition is filed praying for quashing the proceedings of departmental enquiry initiated against the petitioner in view of his retirement on 31.07.2014, as there is no provision or rule for continuing the enquiry after retirement. The petitioner also prays for direction to the respondents to release all retiral benefits to him arising out of 6th Pay Commission recommendation with arrears from 01.01.2006 and all his legal dues such as gratuity, leave encashment, provident fund, etc.

8. The learned counsel for the petitioner submits that the continuation of departmental enquiry after retirement on attaining the age of superannuation, in the absence of specific provisions, is not just, legal and proper. The respondents are duty bound to pay all retiral benefits to the petitioner after his retirement including difference of revised pay, arrears, gratuity, dearness allowance, leave encashment, provident fund, etc. The learned counsel further submits that though the petitioner appeared on a number of occasions before the Enquiry Committee, the enquiry was not concluded by the respondents. The charges levelled against the petitioner are baseless and unfounded. The petitioner never put the Corporation under the financial loss. The petitioner has never violated the provisions of the Maharashtra Civil Services (Conduct) Rules, 1979 ("the Rules of 1979", for short) at any point of time. The respondents have not given reply as to on which rules the departmental enquiry could be continued/proceeded even after retirement on superannuation. There is no provision either in MAIDC?s Services Rules or in MCS (Discipline & Appeal) Rules, 1979, regarding continuation/conducting of departmental enquiry after retirement of Officers. The Bombay High Court at Principal Seat in the judgment dated 5th February, 2010 delivered in Writ Petition No.1930/2005 filed by one Mr.D.A.Jadhav, the then Manager (Fertilizer) against the Maharashtra Agro Industrial Development Corporation Ltd. has taken a view that in the absence of specific provisions to continue departmental enquiry in MCS (Discipline & Appeal) Rules or under MCS (Pension) Rules, the Corporation cannot continue/conduct departmental enquiry after retirement/superannuation/resignation. The Hon?ble Supreme Court in its judgment Bhagirathi Jena v. Board of Directors, O.S.F.C. and others, 1999 (2) SCR 354 held that in the absence of the provisions for continuing an enquiry after retirement, no authority is vested in the Corporation for continuing the departmental inquiry and the delinquent is entitled to full retiral benefits on retirement. In the above premises, the learned counsel for the petitioner prays that the Petition may be allowed.

9. The learned counsel appearing for respondent nos. 2 and 3 relying upon the averments in the affidavit-in-reply and additional affidavit-in-reply filed by the State made the following submissions:

There were outstanding of Rs. 29.40 lakhs to be recovered from M/s. Venkatesh Krushi Kendra, Parbhani on 06.04.2012 and as per the proposal of the party under survival scheme, the transaction started with M/s. Venkatesh Agency, Parbhani by depositing an amount of Rs. 15.00 lakhs against the outstanding dues of Rs. 29.40 lakhs. As per the approval from the office of respondent no.2, the transaction with M/s. Venkatesh Agency, Parbhani, was to be made only on "cash and carry basis". However, the petitioner sold 2369 Metric tones of Fertilizers worth approximately Rs. 5 crores from April, 2013 onwards to M/s. Venkatesh Agency, Parbhani on credit basis and violated the norms of respondent Corporation, thereby giving certain guidelines in respect of selling of fertilizers to the concerned dealers and it was obligatory on the part of the petitioner to follow the guidelines and the directions issued by the respondent Corporation and to recover the amount of sale of fertilizers from the concerned dealers within stipulated period. The petitioner favoured M/s. Venkatesh Agency, Parbhani and supplied huge fertilizers on credit and did not recover the amount due towards the said Agency. It is revealed that the petitioner has committed irregularity and misappropriated the huge amount of Corporation. The learned counsel also invites our attention to the specific instances quoted in the affidavit-in-reply about such misappropriation and irregularities committed by the petitioner and submits that respondent no.2 has issued show cause notice to the petitioner on 27.08.2013. The said notice was issued as the petitioner has favoured defaulter dealer M/s. Venkatesh Agency, Parbhani. It is submitted that the petitioner was placed under suspension on the basis of the report dated 05.09.2013 given by the Deputy General Manager (Fertilizer A/c.) and Assistant Manager (Fertilizer A/ v.). It was mentioned in the said report that it would be against the interests of respondent no.2 to keep the petitioner on such responsible post.

It was further observed that besides conducting the departmental enquiry against the petitioner, criminal action also should be initiated. The respondent Corporation issued memorandum under the signature of the Deputy General Manager (Admn.) on 20.11.2013 and the departmental enquiry is initiated against the petitioner and the detailed charge-sheet is given to him.

10. The petitioner has given reply to memorandum charge-sheet on 17.12.2013. The enquiry proceeded under the MCS (D & E) Rules, 1979 and the MCS (Pension) Rules, 1982. The respondent Corporation passed Resolution no.823 to make a provision in MAIDC Service Rules on par with Rule 27 of the MCS (Pension) Rules, 1982, applicable to Government Servants so as to enable the MAIDC to continue/conduct departmental enquiry even after resignation/ retirement/superannuation by the employee of the Corporation. It was also further resolved that whenever MAIDC?s Service Rules are silent in the particular matter or no specific provision is available, then the provisions in the MCS Rules, 1979, will automatically apply to the Officers/Employees of the Corporation.

11. It is further submitted that the petitioner was trying to avoid enquiry. The petitioner did not extend full cooperation. The petitioner filed Writ Petition, challenging the order of suspension, however, the said Writ Petition was subsequently withdrawn by the petitioner. The learned counsel invites our

attention to the averments in the short affidavit filed on behalf of respondent nos.2 and 3 and submits that the Service Rules of MAIDC have received sanction from the State Government on 22.07.1985. The State Government suggested certain changes to the Service Rules and by incorporating the said changes, the approval was granted. The State Government at that time clarified that it is not necessary for the Government to scrutinise the Rules framed by the Corporation every time since the employees of Corporation are not the employees of State Government. Therefore, the permission was given to the Corporation to effectuate or adopt the appropriate Rules as permissible in law. The State Government, considering all these aspects, has given final approval to the Service Rules of the Corporation, with liberty to incorporate appropriate changes. It is submitted that the MCS (Discipline and Appeal) Rules are applicable to the employees of the Corporation. The said Rules are adopted by Notification passed by the Corporation on 12.02.1986.

12. It is further submitted that the employees of the Corporation are paid gratuity as per the Payment of Gratuity Act, 1972 (for short "the Act of 1972"). Section 4 (6) (a) of the Act of 1972 provides that the gratuity amount payable to the employee can be forfeited if the conduct of the employee has caused loss to the Corporation. The said provision is enabling provision for recovery of amount of loss caused. The said aspect has been considered by the Supreme Court in the case of U.P. State Sugar Corpn. Ltd. and Ors. V. Kamal Swaroop Tondon, AIR 2008 SC 1235 and it is categorically held that the departmental proceedings are initiated for recovery of losses sustained by the Corporation due to the negligence of delinquent employee, the same can be continued after retirement and the loss could be recovered from his retiral benefit. It is submitted that though the said judgment has been considered in the case of Mr. Dhairyasheel A. Jadhav v. Maharashtra Agro Industrial Development Corporation Ltd. in Writ Petition No.1930/2005, decided on 05.02.2010, the facts of that case visavis the facts of the present case are distinguishable in terms that the employee therein was served with the memorandum on the day of its retirement. The said aspect of recovery of loss caused due to the negligence of delinquent employee has not been squarely considered in the case of Mr.Dhairyasheel A. Jadhav (supra).

13. The learned counsel also invites our attention to the averments in the surrejoinder to the rejoinder filed by the petitioner dated 05.04.2016 and submits that the facts of the present case are identical to the facts of the case in Writ Petition No. 3545/2014 (Nagesh Jagdishrao Deshpande v. The State of Maharashtra & Managing Director, Maharashtra State Other Backward Class Finance and Development Corporation Ltd. The ratio laid down in unreported judgment of the Division Bench of the Bombay High Court Bench at Aurangabad in Writ Petition No.3545/2014 17.12.2015 is squarely applicable to the facts of the present case. On these grounds, the learned counsel for respondent nos.2 and 3 submits that the Petition may be rejected.

14. We have given careful consideration to the submissions of the learned

counsel appearing for the petitioner, the learned AGP appearing for the respondent - State and the learned counsel appearing for respondent nos. 2 and 3. With their able assistance, perused the pleadings in the petition, annexures thereto, rejoinder filed by the petitioner, affidavit-in-reply, additional affidavit-in-reply and surrejoinder filed by the respondents.(i) Legal question which is raised by the petitioner in the present Petition is that whether the respondent Corporation is entitled to continue with the departmental enquiry/proceedings in the absence of any provision either in MAIDC Service Rules or in the MCS (D & A) Rules, 1979? (ii) Whether the ratio laid down in the unreported judgment of the Divisional Bench of the Bombay High Court Bench at Aurangabad in the case of Mr.Dhairyasheel A.Jadhav (supra) can be made applicable in the facts of the present case to accept the contention of the petitioner that there is no provision under the MAIDC Service Rules or in the MCS (D & A) Rules of 1979 regarding continuation/conducting of departmental enquiry after retirement of Officers working in respondent no.2 Corporation?

15. In Writ Petition No. 1930/2005 in the case of Mr. Dhairyasheel A. Jadhav v. Maharashtra Agro Industrial Development Corporation Ltd., it appears that the petitioner therein was working as Manager (Project) with the Maharashtra Agro Industrial Development Corporation Limited. The petitioner was relieved from the service by issuing letter dated 31.12.2003. According to the petitioner therein, after the petitioner was served with the relieving order, a memorandum came to be served upon him on the very same day i.e. 31.12.2003 alleging misconduct when the petitioner was working as Fertilizer Manager (Fertilization) in the Fertilizer Division of the Corporation in Head Office. According to the petitioner therein, he was entitled to gratuity and consequently he submitted an application under Rule 7 of the Payment of Gratuity Act on 18.07.2004. The respondents, however, did not pay the gratuity and hence he filed an application to the Controlling Authority. When the respondent therein came to know about it, an enquiry was initiated by issuing an order dated 04.02.2005 by appointing an Enquiry Officer to conduct the enquiry. It was the case of the petitioner in the said Petition that the respondents have no power to conduct enquiry against him after his superannuation/retirement from the service of the respondent. Further, there is no relationship of employer and employee. It appears that in the said Writ Petition, the respondent Corporation filed reply and stated that the charge-sheet was issued on 3.12.2003. It was specifically stated that the petitioner?s services were governed by the Maharashtra Civil Services (D & A) Rules, and the enquiry under the said Rules could be conducted even after retirement where such an enquiry had been initiated prior to retirement. It was further stated that Rule 27 provides for conducting an enquiry against the employee after superannuation and in view of the said provisions and underlying principle and principle analogous thereto an enquiry can be continued after superannuation.

16. It appears that the petitioner therein contended that the respondent Corporation had not adopted the Maharashtra Civil Services (Pension) Rules,1982, which permit an enquiry to be conducted even after superannuation

and in those circumstances the question of continuing the enquiry would not arise. The Maharashtra Civil Services (D & A) Rules do not provide for continuing enquiry which was initiated at the time when the employee was in service. It appears that the petitioner therein placed reliance on the judgment of the Supreme Court in the case of Bhagirathi Jena(supra) in support of his contention that in the absence of the provisions for continuing an enquiry, the enquiry cannot be continued. The respondent Corporation in the said Writ Petition fairly conceded that the Corporation has not adopted the Maharashtra Civil Services (Pension) Rules, 1982. However, the reliance was placed on the judgment of the Supreme Court in the case of U.P. State Sugar Corporation Ltd. (supra). It was submitted that the enquiry could be continued once it was initiated when the employee was in service.

17. The Division Bench proceeded to decide the controversy raised in the said Writ Petition considering the provisions of Rule 27 (2) (a) of the Maharashtra Civil Services (Pension) Rules, 1982 and also the judgment in the case of Bhagirathi Jena (supra) and concluded that the enquiry against the petitioner therein after his superannuation in the absence of the provision to continue enquiry, was without authority of law and allowed the Writ Petition, thereby holding that the respondent Corporation was not entitled to continue with the enquiry, and accordingly the Corporation should withdraw the said enquiry. Para 9 to 12 of the Judgment in the case of Mr.Dhairyasheela A. Jadhav (supra), are reproduced herein below:

9. We have heard the learned Counsel for the parties. We may gainfully refer to sub rule 27 (2) (a) of the Maharashtra Civil Services (Pension) Rules, 1982, which reads as under.

"27. Right of Government to withhold or withdraw pension.

(1) .....

(2)(a)The departmental proceedings referred to in Sub-Rule (1); if Instituted while the Government servant was in service whether before his retirement or during his reemployment, shall, after the final retirement of the Government Servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service." It is thus clear that in the event departmental proceedings were instituted it can be continued and concluded "as if the Government servant has continued in service".

Thus, by a deemed fiction though relationship of employer and employee has ceased, the rules continue the relationship pursuant to which the departmental proceedings can be proceeded with. There is no provision in the Maharashtra Civil Services (Discipline & Appeal) Rules, which provide for continuation of enquiry for major misconduct by issuing of charge-sheet. The penalties are set out under Section 5. If a Government servant is not in service then none of those penalties can be imposed. Thus, any enquiry initiated and in which there is no provision for continuing enquiry must cease on the employee being allowed to superannuate, in the absence of the provisions like rule 27 of the Maharashtra Civil Services (Pension) Rules, 1982.

10. Let us now examine the authorities cited at Bar to consider the contentions urged on behalf of the petitioner herein. In Bhagirathi Jena (supra), we may gainfully refer to paragraph Nos.6 & 7 which read as under:

"6. It will be noticed from the above said regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of the departmental enquiry after superannuation.

7. In view of the absence of such a provision in the above said regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

Thus, it is clear that only in the event that there is a provision for continuing the enquiry, the enquiry can be continued. The Supreme Court noted the judgment in the case of Takhatray Shivadattray Mankad v. State of Gujarat reported in 1989 Supp (2) SCC 110, but distinguished it on the ground that there was specific provision in the form of Rule 241A which enabled imposition of a reduction in the pension or gratuity of a person after retirement.

11. The question is whether the judgment in the case of Kamal Swaroop Tondon (supra) has taken a view which is different than the view taken in Bhagirathi Jena (supra). Both the judgments are of coordinate Benches. The judgment in Bhagirathi Jena (supra) has not been considered in Kamal Swaroop Tondon?s case (supra). On the facts there, it will be clear that the respondent had superannuated and show cause notice was issued after retirement i.e. after office hours at 6:45 p.m. on January 31, 2000. The contention urged on behalf the Corporation before the Supreme Court was firstly that if relationship of employer and employee continues and the proceedings can be continued and consequently under the U.P. State Sugar Corporation Ltd. General Service Rules, 1988 such proceedings could have been initiated even after an employee has retired since they related to the recovery of losses caused to the Corporation by the respondent - employee. The learned Supreme Court observed that retiral benefits are earned by an employee for long and meritorious services rendered by him/her. They are not paid to the employee gratuitously or merely as a matter

of bounty. It is paid to an employee for dedicated and devoted work. The Court then referred to the principles of gratuity.

On behalf of the respondent herein it is contended that the ratio of the judgment in Kamal Swaroop Tondon?s case (supra) is that there can be no rigid, inflexible or invariable test as to when the enquiry should be continued and when they should be allowed to be dropped. The Court then observed the effect of delay in conducting the enquiry and observed that there cannot be laid down a universal proposition that if there be delay in initiation of proceedings for a particular period they must necessarily be quashed. The Court went on to observe from the case law considered that it is clear that the proceedings could have been continued since they were initiated for recovery of loss sustained by the Corporation due to negligence on the part of the respondent employee.

It may be noted that it was not in dispute that the proceedings could have been initiated even after the employee had retired since relating to recovery of loss caused to the Corporation as there were rules for that purpose.

12. In our opinion, it is no doubt true, that the gratuity is a terminal benefit and is subject to the terms and conditions. Withholding of the gratuity can therefore be only if there be the provisions for withholding it in the Act or if there being any service condition which so provide. A person cannot be charged for a misconduct if it does not constitute a misconduct within the definition of misconduct either in terms of the standing order or the service regulations. Similarly no enquiry can be conducted for misconduct if there being no statutory provisions. In the absence of any statutory provisions for continuing the enquiry, in our opinion, the ratio of Bhagirathi Jena?s case (supra) which has directly dealt with the issue would be applicable. In the case of Bhagirathi Jena (supra) the Court itself noted the effect of absence of a provision. In our opinion, therefore, the ratio of Bhagirathi Jena?s case (supra) would squarely apply. The enquiry therefore against the petitioner after his superannuation in the absence of a provision to continue enquiry is without authority of law.

18. In the present case also, the petitioner stood retired from the service when the enquiry was pending. On comparison of the legal issues raised in the present case and in the case of Mr. Dhairyasheela A. Jadhav (supra) it is clear that the enquiry cannot be proceeded/continued after attaining the age of superannuation in the absence of any provision to that effect. It is evident from the facts of the case of Mr.Dhairyasheela A. Jadhav (supra), memorandum of charge-sheet was served upon the petitioner on the last day of retirement and the enquiry was continued after he stood retired. The facts of the present case are quite identical to that of the said case.

19. In that view of the matter, relying upon the exposition of law in the case of Mr.Dhairyasheela A. Jadhav (supra), we are of the considered view that the present Petition deserves to be allowed. Accordingly, the same is allowed in terms of prayer clauses (B) and (B1), which reads as under:

(B) By issue of Writ of Certiorari or any other Writ, Order or Direction in the nature of Writ of Certiorari the departmental enquiry initiated against the petitioner as per the Memorandum bearing No.Admn/PAD/2013/8709 dated 20.11.2013 issued by respondent No.3 Deputy General Manager (Admn.) (Exhibit "A") may kindly be quashed and set aside;

(B1) By issue of Writ of Certiorari or any other Writ, Order or direction in the nature of Writ of Certiorari the Show Cause Notice dated 5.8.2015 issued by respondent No.3 pursuant to the Inquiry Report dated 31.12.2014 (Exhibit "O2") may kindly be quashed and set aside;

20. The rule is made absolute partly. The Writ Petition stands disposed of accordingly.

21. Since the Petition is allowed in terms of prayer Clause (B) and (B1), the respondents shall calculate retiral benefits of the petitioner which are mentioned in prayer clause (C) of the Petition, however, subject to verification of the factual details as disclosed from the service record of the petitioner.

