

(2006) 10 BOM CK 0023
In the Bombay High Court
Case No : Writ Petition No. 415 of 2003

Prakash Balwantrao Dethe	Vs	APPELLANT
State of Maharashtra and others		RESPONDENT

Date of Decision : 20-10-2006

Acts Referred:

Bombay Home Guards Act, 1947 — Section 2, 9
Constitution of India, 1950 — Article 14, 311
Penal Code, 1860 (IPC) — Section 21

Citation : (2006) 10 BOM CK 0023

Hon'ble Judges : V.C. Daga, J; A.B. Chaudhari, J

Bench : Division Bench

Advocate : A.S. Mardikar, for the Appellant; A.S. Sonare, A.G.P. for respondents no. 1 to 5, for the Respondent

Final Decision : Dismissed

Judgement

A.B. Chaudhari, J.—By the present writ petition, the petitioner has challenged the order dated 10-12-2002 passed by the respondent No. 1 terminating his services as Commandant, Home Guards, Yavatmal.

Facts

2. The petitioner avers in his petition that he was appointed initially in the year 1986 as District Commandant, Home Guards, Yavatmal and subsequently by the order dated 5-1-1999 he was again appointed as District Commandant for a period of five years. The petitioner then states that the respondent No. 1 issued an order on 10-12-2002 terminating the services of the petitioner as District Commandant, Home Guards, Yavatmal, by giving him one month's notice. The precise challenge to the said order of termination raised by the petitioner was that the principles of natural justice were not followed before dispensing with the services of the petitioner, inasmuch as neither any show cause notice was issued to him nor any personal hearing was granted before taking the impugned action.

3. The respondent No. 1 has filed reply-affidavit and stated that during the inspection of the office of the District Commandant, Home Guards, Yavatmal, by the audit party on 12-7-2002, shortage of cash was found. The audit party found that the petitioner had misappropriated an amount of Rs. 1,42,238/- by misusing his official position as District Commandant. It is stated that out of the aforesaid amount the petitioner had deposited Rs. 37,348/- on 20-11-2002 and avoided to pay the balance amount. Therefore, an offence came to be registered against him and other concerned officers vide Crime No. 747 of 2002 and, as such, the Government decided to terminate his service by giving him one month notice.

A specific stand has been taken by respondent No. 1 that Sub-section 2A of section 2 of the Bombay Home Guards Act, 1947, as amended in 1978, (for short the Act) does not provide for issuance of either show cause notice or grant of personal hearing.

Submissions

The learned counsel for the petitioner urged before us that the petitioner was not given any show cause notice nor was offered any personal hearing before issuance of the impugned order of termination. The counsel for the petitioner assailed the provisions of sub-section (2) of the Act and contended that such a provision which does not provide for opportunity of hearing would violate Article 14 of the Constitution of India and, therefore, liable to be struck down. The learned counsel for the petitioner, therefore, urged that admittedly in the instant case neither any show cause notice was issued to the petitioner nor he was afforded an opportunity of hearing, and therefore the impugned order of termination is per se bad and illegal.

4. Per contra, learned A.G.P, argued that sub-section (1) of section 2A of the Act, and in particular its proviso, provides for appointment of a Commandant for such a period as the State Government may fix. He further urged that subsection (2) contains a non obstante clause and therefore the State Government has a right to terminate the services of a Commandant even before the expiry of the term fixed in the appointment order by giving one month's notice. He then contended that one month notice was given to the petitioner and there is no provision for affording an opportunity of hearing to the petitioner before terminating his services and what is provided is a notice of one month which was duly complied with, and as such, their action is in accordance with law.

Consideration

5. Having heard the learned counsel for the parties, at the outset, we find that the Commandant appointed under the provisions of Bombay Home Guards Act is not a Government servant for more than one reason.

Statutory Provisions

Before addressing the core issue, it is necessary to turn to the statutory provisions. In the first place, the Bombay Home Guards Act, 1947 was enacted

to provide for a voluntary organization, i.e. the organization of Home Guards. The Preamble of the Act reads as under:

"WHEREAS it is expedient to provide a volunteer organisation for use in emergencies and for other purposes in the [State of Bombay]....."

The Commandant is required to be appointed for each of the Home Guards constituted under sub-section (1) of section 2. Section 2A of the Act reads thus :

"2A. (1) The term of office and other conditions of service of the Commandant and the Commandant General shall be such as may be prescribed by the State Government by rules made under this Act: Provided that, while appointing any Commandant or the Commandant General, the State Government may direct that he shall hold office for such period as the State Government may fix in his case.

(2) Notwithstanding anything contained in sub-section (1), the State Government shall have the authority to terminate the services of any Commandant or of the Commandant General, at any time, after giving him one month's notice therefore."

Apart from the above, this Court had an occasion to consider above provision in the case of Ratanji A. Dubash vs. State of Maharashtra, 1970 Mh.L.J. 626 and the view was taken that a member of the Home Guard is not a Government servant.

Insofar as Commandant is concerned, except for the fact that he is appointed like a Head in the District for the Home Guards, the character of he being a member of the voluntary organization or body does not cease to exist. Similarly, the reasons recorded by this Court for holding that a Home Guard is not a Government servant, shall hold good even in the case of Commandant.

The learned Single Judge of this Court (Shri V. D. Tulzapurkar, J. as he then was) in the above case of Ratanji A. Dubash (supra) in paragraphs 8 and 9, has held as under:

"8. But, apart from the several aspects of the Home Guards Organisation which Sorabjee has placed before me and which emerge from a reading of the several provisions of the Act, in my view, section 9 of the Act gives a clear indication that a member of the Home Guards Organization under the Act is not a State Government servant. Section 9 of the Act runs as follows :

"Members of the Home Guards acting under this Act shall be deemed to be public servant within the meaning of section 21 of the Indian Penal Code."

Section 9, therefore, makes a deeming provision to the effect that members of the Home Guards Organization are to be deemed "public servants" u/s 21 of the Indian Penal Code. Now, if one turns to section 21 of the Indian Penal Code, it will appear clear from clause (9) thereof that all Government servants, however humble in their office, have been included in the definition of a "Public servant".

Clause (9) of section 21 runs as follows:

"Ninth - Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government,.... and every officer in the service or any of the Government or remunerated by fees or commission for the performance of any public duty."

The concluding portion of clause (9) clearly indicates that every officer, either in the service or pay of the Government, or remunerated by fees for the performance of any public duty, is defined to be a public servant within the meaning of section 21. It is well settled that the expression "officer" is used in the sense of functionary, and every functionary, however humble in his station (including even a peon), who is either in the service of the Government or pay of the Government, is a public servant within the meaning of section 21 of the Penal Code. That being the position, one fails to understand, if members of the Home Guards were State Government servants, where was the necessity of making a deeming provision in that behalf in section 9 of the Bombay Home Guards Act. The very fact that u/s 9 it has been provided that members of the Home Guards under the Act are to be deemed to be public servants within the meaning of section 21 of the Penal Code, indicates that they are not State Government servants, for while enacting section 9 of the Bombay Home Guards Act, it must be presumed that the Legislature had before it the definition of "public servant" as given in clause (9) of section 21 of the Penal Code.

9. In my view, therefore, on a consideration of the scheme of the Bombay Home Guards Act and on a fair reading of the several provisions thereof, it is clear that a member of the Home Guards Organization under the said Act is not a State Government servant."

6. We respectfully concur with the view taken by the learned Single Judge of this Court. We consequently hold that the commandant is not a Government servant and, as such, he is not entitled to protection under Article 311 of the Constitution of India.

7. Now coming to the challenge to the provisions of sub-section 2 of section 2A of the Act, we find that the validity of the said provision on the ground that it does not provide for a requirement of giving reasonable opportunity of being heard before an order is made, would be in jeopardy unless we read into the said provision a requirement of giving of reasonable opportunity of being heard before an order is made. In the instant case, admittedly, the impugned order has been passed without issuance of any show cause notice to the petitioner or without affording him any opportunity of hearing before passing of the impugned order. There is no doubt that passing of the impugned order has visited adverse civil consequences to the petitioner. What is civil consequence has been answered by the Apex Court in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, . Krishna Iyer, J. speaking for the Constitution Bench observed in para 66 thus :

"But what is a civil consequence, let us ask ourselves, bypassing verbal booby-traps? "Civil consequences" undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence."

Further, in *Union of India and others Vs. E.G. Nambudiri*, , the Hon"ble Apex Court in para 3 observed as under :

"The question is whether principles of natural justice require an administrative authority to record reasons. Generally, principles of natural justice require that opportunity of hearing should be given to the person against whom an administrative order is passed. The application of principles of natural justice, and its sweep depend upon the nature of the rights involved, having regard to the setting and context of the statutory provisions. Where a vested right is adversely affected by an administrative order, or where civil consequences ensue, principles of natural justice apply even if the statutory provisions do not make any express provision for the same, and the person concerned must be afforded opportunity of hearing before the order is passed."

8. It is further significant to note that in the reply affidavit on behalf of respondent No. 1, the respondent No. 1 has taken a specific stand that the petitioner having been found to have indulged in misappropriation by the audit party, his services were dispensed with. It is thus clear that a stigma is being sought to be attached to the petitioner without following the principles of natural justice by passing the impugned order without giving opportunity of being heard.

The Government, however, must deal with all persons reasonably and their action must stand to the scrutiny of rule of law and is expected to follow the principles of natural justice, if the action of the Government is likely to cause civil consequences. The Constitution Bench of Apex Court in the case of *C.B. Gautam Vs. Union of India and Others*, has held in paragraph 28 of the judgment as under:

"It must, however, be borne in mind that courts have generally read into the provisions of the relevant sections a requirement of giving a reasonable opportunity of being heard before an order is made which would have been adverse civil consequences for the parties affected. This would be particularly so in a case where the validity of the section would be open to a serious challenge for want of such an opportunity."

Following the aforesaid decision of the Apex Court, we read the requirement of giving a reasonable opportunity of being heard before an order is made into sub-section (2) of section 2A of the Act. Consequently, we hold that it was necessary to afford an opportunity of hearing to the petitioner before passing the impugned order.

9. In the result, the impugned order dated 10-12-2002 is quashed and set aside.

Rule is made absolute in terms of prayer clause (1) of the writ petition. However, in view of serious allegations of misappropriation of huge amount against the petitioner, we reserve liberty in favour of respondents to proceed against the petitioner according to law. Costs made easy.