

(1997) 06 BOM CK 0048

In the Bombay High Court

Case No : Criminal Writ Petition No. 5876 of 1987

Pramod Vishwasrao Ghatge

APPELLANT

Vs

State and others

RESPONDENT

Date of Decision : 27-06-1997

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 451, 56(4)
Constitution of India, 1950 — Article 226

Citation : (1997) 4 ALLMR 169 : (1998) 5 BomCR 420 : (1997) 3 MhLj 643

Hon'ble Judges : B.B. Vagyan, J;A.P. Shah, J

Bench : Division Bench

Advocate : S.K. Talsania and Jamshed Mistry, instructed by M/s. Haresh Mehta and Co, for the Appellant; C.R. Sonawane, A.G.P. and R.G. Ketkar, for the Respondent

Judgement

A.P. Shah, J.—This petition under Article 226 raises a short but interesting question of law relating to the interpretation of section 56(4) of the Bombay Provincial Municipal Corporation Act ("Act" for short). Briefly, the circumstances of the case are that the petitioner was working in the transport undertaking of the Pune Municipal Corporation, as Chief Engineer. He was supposed to look after the maintenance, repairs and preventive maintenance of buses of the Corporation. On 20th April, 1982 the petitioner was served with a memorandum alleging therein that buses are not properly sent on road as per required schedule and a number of buses are breaking down on the road as a result of which inconvenience is being caused to the commuters besides financial loss to the Corporation. It was alleged that the over-all functioning of the petitioner's department was not satisfactory. The petitioner was told to improve the functioning of the workshop. He was further told that improvement must be shown within 15 days. It appears that thereafter a report dated 28th May, 1982 was submitted by the Transport Manager to the Secretary, Transport Committee, wherein again it was alleged that the petitioner was negligent in his duties. It was alleged that as a result of the petitioner's negligence the buses were not

properly coming on road and were breaking down on the road and, therefore, the petitioner should be punished after inquiry. The Transport Committee acting upon the report of the Transport Manager passed resolution dated 31st May, 1982, whereby it was decided to hold inquiry against the petitioner and it was further decided to suspend the petitioner pending inquiry. It was further resolved that the Transport Manager should file charge-sheet against the petitioner and submit the findings within three months. Accordingly, a charge-sheet came to be issued to the petitioner alleging that the petitioner was extremely negligent in duty, committed breach of the rules and regulations of the department, deliberately disobeyed just orders passed by the higher officers and reported late on duty for more than four times during a month. The petitioner submitted his reply dated 2nd August, 1982, denying the charges framed against him.

2. The inquiry against the petitioner was first conducted by one Shri Banker, officer from the Corporation. After some time Shri Banker quit and Shri Mulik was appointed as the inquiry officer. However, ultimately the Transport Manager Shri M.B. Patil himself was appointed as the inquiry officer. The inquiry officer submitted his findings dated 27th July, 1984, holding the petitioner guilty of all the charges levelled against him. It is required to be stated that no reasons are given by the inquiry officer for holding the petitioner guilty of the charges. The inquiry officer in his report merely stated that all the six charges are proved beyond doubt. The inquiry officer observed that the petitioner cannot be considered as a faithful officer of the department and also suggested that if the petitioner is not dismissed then he would involve the department into a situation where other workers would be encouraged and there would be scope for insubordination. The entire matter was then placed before the transport authority being the disciplinary authority for taking necessary action in the matter along with the findings of the inquiry officer. The Transport Committee by its resolution dated 10th August, 1984, acquitted the petitioner of all the charges and directed that the petitioner should be reinstated in service with continuity of service and further directed that the period of suspension should be treated as period on duty.

3. It seems that the matter was again reopened on a report of the Transport Manager, Shri Patil. The Transport Manager, who also acted as the inquiry officer stated in his report that as per rules it was necessary for the Committee to have given a show cause notice to the petitioner and the act of the Transport Committee of not issuing a show cause notice to the petitioner was illegal and therefore the Transport Committee should reconsider its decision and should issue a show cause notice to the petitioner. Acting upon the said report, the Committee decided to cancel its resolution dated 10th August, 1984 and directed issuance of show cause notice to the petitioner as to why he should not be dismissed from service. Strangely, even the Transport Manager issued notice dated 6th September, 1984 whereby the petitioner was asked to show cause as to why the petitioner should not be dismissed from service for misconduct. The petitioner replied to the show cause notice by letter dated 26th September, 1984. The Transport Committee at its meeting held on 17th October, 1984 passed

resolution No. 354 dated 17th October, 1984 directing dismissal of the petitioner from service. Accordingly, the Transport Manager issued order of dismissal on 19th October, 1984.

4. It is required to be stated at this stage that an appeal lies to the Corporation against the punishment imposed by the Transport Committee by virtue of section 56(4) of the Act. Accordingly, the petitioner filed an appeal to the Corporation on 27th November, 1984. The appeal was placed before the general body of the Corporation on 21st February, 1985, whereby the appeal of the petitioner was considered and the dismissal order passed against the petitioner was cancelled and it was further directed that the petitioner be allowed to resume duty. It may be noted that the Transport Manager and two of the Transport Committee's members were present at the meeting. Minutes of the meeting produced by the Corporation's Counsel Shri Ketkar shows that the charges against the petitioner were discussed in the meeting before arriving at the unanimous decision of allowing the petitioner's appeal. Thereafter, the petitioner wrote several letters calling upon the Corporation to implement the resolution and to allow the petitioner to resume duty. However, the letters were not replied and the petitioner was not allowed to resume duty.

5. In the meanwhile, the Transport Manager Shri Patil made an application to the State Government against the said resolution of the Corporation dated 21st February, 1985 u/s 451 of the Act. It was alleged by Shri Patil in the said application that while passing resolution dated 21st February, 1985 there was breach of subsection (4) of section 56 in as much as before passing of the said resolution the remarks of the Transport Committee were not obtained and therefore resolution dated 21st February, 1985 was illegal. Apparently, the application was made on the assumption that the Corporation cannot exercise the appeal powers without first calling for the remarks from the authority which has imposed the punishment. Nearly two years thereafter the Deputy Secretary, Urban Development and Public Health Department, passed an order dated 27th February, 1987, u/s 451(1) of the Act suspending the resolution dated 21st February, 1985, passed by the Corporation. When the petitioner came to know of the stay granted by the State Government u/s 451(1), he made representation to the Deputy Secretary requesting to withdraw and/or cancel the order dated 27th February, 1987. It seems that the petitioner also made representations to various other authorities including the Governor of Maharashtra. Finally, the petitioner moved this Court by filing the present petition under Article 226 of the Constitution.

6. While the petition was pending for admission, of the representation made by the petitioner dated 17th September, 1987, which was also addressed to the Governor of Maharashtra, was treated as suo motu Writ Petition No. 772 of 1988 by this Court. The suo motu writ petition came up before the Division Bench. It seems that the petitioner had no knowledge of this petition and therefore he did not appear at the time of hearing of the petition. However, the learned

Government Pleader as well as the Advocate of the Corporation appeared before the Bench. The Bench then passed the following order :

"The State Government is directed to decide the representation made by Pune Corporation u/s 451 of the Municipal Corporation Act within three weeks from today. Save and except this direction, it is not necessary to entertain petition."

Pursuant to the order passed by the Division Bench, the State Government passed a final order on the application of the Transport Manager u/s 451(3) of the Act. In the said order it was mentioned that since the Government has not received any representation against the earlier order dated 27th February, 1987 and therefore under sub-section (3) of section 451 resolution No. 686 dated 21st February, 1985, would be deemed to be rescinded. It is an admitted position that the petitioner, who was the affected party, was not heard by the Government either at the stage of passing the initial order or at the stage of final order. It is also an admitted position that while passing the final order the State Government completely overlooked the representation made by the petitioner on 27th February, 1987. When this order was brought to the notice of the petitioner, he made necessary amendment to the petition with the leave of the Court incorporating a challenge to the final order dated 27th February, 1987.

7. Mr. Talsania, learned Counsel for the petitioner, raised before us a threefold submission viz., (i) that the provisions of section 56(4) empowering the appellate authority to call for remarks from the punishing authority are directory in nature and hence non-compliance of the said provisions would not render the resolution passed by the Corporation invalid; (ii) that having regard to the nature and scope of section 451, the State Government had no power under the said section to interfere with the resolution passed by the Corporation and therefore the impugned orders dated 27th February, 1987 and 22nd April, 1988, are illegal and without jurisdiction; and (iii) that the said orders passed u/s 451 are in violation of the principles of natural justice and disclose total non-application of mind.

8. In order to appreciate the submissions of Mr. Talsania, it would be necessary to refer to provisions of section 56 of the Act. Section 56 deals with imposition of penalties on Municipal officers and servants if such officer or servant is found guilty of a breach of departmental rules or discipline or of carelessness, neglect of duty or other misconduct or is found to be incompetent. The penalties are enumerated in sub-section (2). Sub-section (3) says that before removing, dismissing or reduction in rank, the concerned municipal servant or officer may be given a reasonable opportunity. Sub-section(4) then provides for an appeal to the Corporation where the punishment of dismissal/removal or reduction in rank is ordered by any authority other than the Corporation. Sub-section(4) which is material for our purpose reads as follows :

"(4) Subject to the provisions of Clause (d) of the proviso to sub-section (1), any Municipal officer or servant who is reduced, removed or dismissed by any authority other than the Corporation may, within one month of the

communication to him of the order of reduction, removal or dismissal, appeal to the authority immediately superior to the authority which imposed the penalty and the appellate authority may, after obtaining the remarks of the authority which imposed penalty, either confirm the order passed or substitute for it such order as it considers just, including an order for the imposition of some lesser penalty, and effect shall forthwith be given to any order passed by the appellate authority which shall be conclusive:

Provided that for the purposes of this sub-section the Standing Committee shall be deemed to be the authority immediately superior to the Commissioner and the Corporation shall be deemed to be the authority immediately superior to the Standing Committee."

9. On a plain reading of section 56(4) it is seen that it confers wide powers on the Corporation either to confirm the order passed or substitute such order as it considers just, including an order for the imposition of some lesser penalty. The order passed by the Corporation u/s 56(4) attains finality as sub-section (4) provides that such order shall be conclusive. Now the argument of Mr. Talsania is that the words "appellate authority may, after obtaining the remarks of the authority which imposed the penalty," merely indicate that it is open for the Corporation to call for the remarks of the authority which has imposed the punishment. In other words, according to Mr. Talsania, this is only an enabling provision and not a mandatory provision. Mr. Talsania argues that the provision is introduced only with a view to facilitate the Corporation in taking decision, that the Corporation may invite the remarks of the authority which has imposed the penalty. Mr. Talsania argues that the entire proceedings including charge-sheet, evidence, reply, written submissions, etc. are placed before the Corporation and therefore unless the Corporation deems it necessary to call for remarks, it is not obligatory to call for such remarks in each and every case. The Counsel argues that failure to call the remarks from the disciplinary authority would not vitiate the decision of the Corporation. On the other hand, Mr. Ketkar contends that it is clear from the language of the statute that it is obligatory on the part of the Corporation to call for the remarks of the punishing authority before taking any decision. Mr. Ketkar contends that the object of introducing this provision is to ensure that the appellate authority has both the view points before it, namely, that of the employee and the authority which has imposed punishment, Mr. Ketkar contends that calling for the remarks from the punishing authority is a condition precedent for exercising the appellate powers u/s 56(4).

10. Having regard to the rival contentions, it is necessary to ascertain whether the provision of calling for the remarks from the punishing authority is only enabling provision or is a condition precedent for exercise of the powers u/s 56(4). According to Mr. Talsania, the provision is merely directory and non-compliance thereof will not render the decision of the Corporation illegal. On the other hand, the argument of Shri Ketkar is that the provision is mandatory and any decision which is not in conformity with the provisions must be treated as a

nullity. Thus the short question is whether the provision relating to calling for the remarks from the disciplinary authority is mandatory or merely directory. It is now well settled that the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. In that connection, the following quotation from Crawford on "Statutory Construction"- Article 261 at p. 516 is pertinent :

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the content is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other...."

11. Section 56(4) provides an appeal before the Municipal Corporation where the punishment is imposed by an authority other than the Corporation. u/s 56(4) the appellate authority exercises wide powers. The appellate authority can confirm the decision of the disciplinary authority or substitute its own order including that of imposition of lesser penalty. If the interpretation suggested by Shri Ketkar is to be accepted, it would certainly put fetters on the exercise of the appellate powers of the Corporation. Ordinarily, when a superior authority is given appellate powers against the imposition of penalty by an inferior authority, there is no obligation to call for the record from the inferior authority which has imposed the penalty. If such an interpretation is given to the words contained in section 56(4), it will mean that the appellate authority will have to seek opinion of the disciplinary authority regardless of the fact whether the appellate authority considers necessary calling for such remarks or not. It will certainly affect the discretion conferred by the section. Shri Ketkar has argued that the appellate authority must get both versions before deciding the appeal and it is with that object the provision is made calling for the remarks of the disciplinary authority. It is an admitted position that when the appellate authority hears an appeal, all the papers along with the appeal memo are placed before the appellate authority. It is, therefore, not necessary to call for the remarks in each and every case unless the appellate authority feels that calling for such remarks is necessary. On the other hand, the use of the word "may", in our opinion, clearly is indicative of the fact that it is merely an enabling provision. There may be cases where the appellate authority might feel that such remarks are necessary e.g., when the appellate authority is contemplating reduction of sentence. In such cases remarks of the disciplinary authority can assume importance but it is difficult to accept the proposition of Shri, Ketkar that in every matter it is obligatory for the appellate authority to call for the remarks from the disciplinary

authority. On an over-all reading of sub-section (4) we are of the opinion that the provision is merely directory and non-compliance of such provision cannot render the decision of the appellate authority illegal. In these circumstances, we are of the opinion that the resolution passed by the Corporation directing reinstatement of the petitioner was perfectly legal and valid.

12. In view of the foregoing discussion, petition must succeed. Rule is made absolute in terms of prayer Clauses (a), (a-1) and (b). No order as to costs.

On the oral request made by Shri Ketkar, the operation of this order is stayed by a period of eight weeks.

Certified copy expedited.

13. Petition allowed.