

(2006) 11 BOM CK 0091
In the Bombay High Court
Case No : Writ Petition No. 3558 of 2006

Raju Khole (Lt. Professor)

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-11-2006

Acts Referred:

Bombay Home Guards Act, 1947 — Section 2
Penal Code, 1860 (IPC) — Section 409, 420

Citation : (2006) 11 BOM CK 0091

Hon'ble Judges : R.V. More, J;D.D. Sinha, J

Bench : Division Bench

Advocate : Anand Parchure, for the Appellant; A.G. Mujumdar, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Rule returnable forthwith. Heard by consent of Mr. Anand Parchure, learned Counsel for petitioner and Mr. Mujumdar, learned A.G.P, for respondent.

2. The writ petition is directed against the impugned communication dated 26-6-2006 issued by the Deputy Secretary, Government of Maharashtra, Home Department (Special), Mumbai in exercise of power under clause (2) of subsection 2(A) of section 2 of the Bombay Home Guards Act, 1947 whereby the service of the petitioner stands terminated after expiry of period of one month from the date on which the said notice was served on the petitioner.

3. Mr. Parchure has submitted that the petitioner was appointed as District Commandant (Home Guards) for the district of Nagpur vide order dated 2-8-2003 issued by the respondent No. 1 for a period of 5 years. Petitioner assumed charge of the post on 7-4-2003. It is contended that a frivolous complaint was filed against the petitioner for the offence punishable under sections 409 and 420 of the Indian Penal Code. The petitioner was granted interim bail by the Competent Criminal Court in the said crime. The learned

Counsel for the petitioner further contended that the respondents by impugned notice/order terminated the services of the petitioner without giving any reasons whatsoever as well as without following the principles of natural justice and, therefore, the impugned notice/order being violative of principles of natural justice cannot be sustained in law.

4. Mr. Parchure has vehemently argued that in the affidavits in reply filed by the respondent in the present writ petition, the respondent has given several reasons as to why the petitioner was unfit to continue in service as District Commandant. However, the petitioner was not issued any notice or any memo in respect of those alleged complaints by the respondent. It is contended that all the allegations made in the affidavits filed by the respondent pertaining to alleged complaints, if any, are denied by the petitioner by filing counter-affidavit dated 16-10-2006. It is submitted that if the impugned order dated 26-6-2006 is issued in view of the alleged complaints or alleged misconduct, if any, committed by the petitioner while discharging his duty as a District Commandant, in that event, it was all the more necessary for the respondents to grant reasonable opportunity of hearing to the petitioner before issuing the impugned order since the alleged allegations are completely denied by the petitioner. Mr. Parchure, therefore, contended that the impugned notice/order of termination being inconsistent with the rules of natural justice cannot be sustained in law. In order to substantiate the contention, reliance is placed on the decision of the Apex Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, .

5. Mr. A. G. Mujumdar, learned Assistant Government Pleader for respondent, has submitted that the respondent in exercise of powers conferred by clause (2) of sub-section 2 of section 2A of the Bombay Home Guards Act, 1947 issued the impugned notice/order whereby the petitioner was informed that his services stand terminated after expiry of period of one month from the date on which the said notice/order would be served on him. It is contended that clause (2) of section 2A of the Act does not contemplate grant of opportunity of hearing to the petitioner before terminating the services of the petitioner while exercising power under clause (2) of section 2A and empowers the State Government to terminate the services of any Commandant at any time after giving him one month's notice. It is submitted that it is the statutory power vested in the State Government which only requires the State Government to give one month's notice before terminating the service which has been given to the petitioner. Clause (2) does not require either issuance of show-cause notice nor grant of opportunity of hearing to such commandant before passing the order of termination and, therefore, the impugned order of termination/notice is just and proper and is sustainable in law. In order to substantiate this contention, reliance is placed on the decision of the Apex Court in the case of The State of Maharashtra and Another Vs. The Jalgaon Municipal Council and Others, .

6. We have considered the contentions canvassed by the respective Counsel.

Perused the impugned notice/order of termination as well as decisions cited and relied on by the respective Counsel. In the instant case, the respondent State in exercise of power conferred on it by Clause (2) of sub-section 2 of section 2A of the Bombay Home Guards Act terminated the services of the petitioner and, therefore, it will be appropriate to reproduce the provisions of the said sub-section 2 of section 2A of the Act which reads thus:-

"Section 2A(1) - The term of office and other conditions of service of 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 the Commandant General, at any time, after giving him one month's notice therefor."

7. In the instant case, the petitioner was appointed as District Commandant for the Nagpur district vide order dated 2-8-2003 for a period of 5 years. It is, therefore, evident that as per proviso to sub-clause (1) of section 2A, the appointment of the petitioner was made by the State Government for the period of 5 years with the result that the petitioner is legally entitled to hold the office of District Commandant, Nagpur district for a period of 5 years.

8. In the instant case, in the affidavit dated 9-10-2006 filed by the respondent it is stated that during the tenure of the petitioner, the petitioner has misused his power and discharged his duties contrary to the rules. The petitioner has made several appointments on temporary basis without following procedure laid down in relevant rules. Petitioner has issued several orders appointing persons in Nagpur Home Guard such as Advocate Mr. Anil Thakre as legal adviser for Nagpur district whereas there is no such post available in the department. Similarly, the petitioner has appointed one Manjusha Dave on the post of Staff Officer and Chief of Ladies Platoon at district level whereas such post is required to be filled in by promotion to be made by District Level Committee constituted by the Commandant General of Home Guards, State of Maharashtra. It is further stated in the affidavit filed on behalf of the State that there were complaints against the petitioner regarding misappropriation of Government money. The preliminary enquiry into the complaint was also made through Commissioner of Police, Nagpur and the said preliminary enquiry reveals that there was a substance in the complaints made against the petitioner. It is also mentioned in the complaint that the Crime No. 46/06 for the offence punishable under sections 420 and 409 of the Indian Penal Code is also registered against the petitioner on 23-2-2006 and after completion of investigation by the prosecution, the charge-sheet has been filed in the competent Criminal Court.

9. The petitioner in his counter-affidavit denied these facts and allegations made by the respondent in the affidavit and contended that if the petitioner would have been given reasonable opportunity of hearing, the petitioner would have submitted appropriate explanation to the respondent in respect of each and every allegation and would have satisfied the authorities concerned about the falsity of the allegations.

10. In the instant case, the respondent has taken a specific stand that in view of clause (2) of sub-section (2) of section 2A of the Act, the State has absolute power to terminate the services of the Commandant or of Commandant General at any time and the provision does not require the State Government to either issue show-cause notice or give reasonable opportunity of hearing before issuing the notice/order of termination. In order to substantiate this contention, reliance is placed on observations of the Apex Court in para 32 of the judgment in the case of State of Maharashtra and others vs. Jalgaon Municipal Council and others (supra) which reads thus:-

32. The caution of associating rules of natural justice with the flavour of flexibilities would not permit the Courts applying different standards of procedural justice in different cases depending on the whims or personal philosophy of the decision maker. The basic principles remain the same; they are to be moulded in their application to suit the peculiar situations of a given case, for the variety and complexity of situations defies narration. That is flexibility. Some of the relevant factors which enter the judicial process of thinking for determining the extent of moulding the nature and scope of fair hearing and may reach to the extent of right to hearing being excluded are : (i) the nature of the subject-matter, and (ii) exceptional situations. Such exceptionality may be spelled out by (i) the need to take urgent action for safeguarding public health or safety or public interest, (ii) the absence of legitimate expectation, (iii) by refusal of remedies in discretion, (iv) doctrine of pleasure such as the power to dismiss an employee at pleasure, and (v) express legislation. There is also a situation which Prof. Wade and Forsyth term as "dubious doctrine" that right to a fair hearing may stand excluded where the Court forms an opinion that a hearing would make no difference. Utter caution is needed before bringing the last exception into play."

The plain reading of the observations of the Apex Court would show that the Apex Court has given certain situations in which opportunity of hearing before passing the adverse order may not be necessary. However, this would depend upon nature of subject-matter, exceptional situations, need to take urgent action for safeguarding public health or safety or public interest, doctrine of pleasure and express legislation. Mr. Mujumdar, learned A.G.P, for respondent, has specifically argued that the action of termination taken by the respondent against the petitioner without giving him opportunity of hearing is in view of express legislation, i.e. clause (2) of sub-section (2) of section 2A of the Act.

11. It is well-settled that fundamental principles of fair hearing incorporated in

the doctrine of natural justice and as a rule of universal application, all administrative acts or decisions, affecting rights of the individuals must comply with the principles of natural justice and the individuals who are affected adversely by such decisions must be given reasonable, fair opportunity of hearing by the authorities before taking such decision. The action of the State must be reasonable, fair, just and transparent apart from being in the public interest. However, it is not possible to turn the Nelson's eye to the express legislation, scheme and object of the statutory provisions of the Act and Rules as well as public interest. The Apex Court, therefore, in case of State of Maharashtra and others (cited supra) has given certain situations wherein the authority exercising statutory powers while taking administrative decisions, it may not be necessary to grant hearing to the person likely to be affected by such decision. For the controversy in issue, the following are the relevant situations :-

- i. Exceptional situations requiring urgent action for safeguarding the public interest,
- ii. the express legislation.

12. While considering the law laid down by the Apex Court in the said judgment, as well as concept of the doctrine of natural justice, it will be appropriate to consider the functions and duties of the members of the Home Guards stipulated in the Bombay Home Guards Act, 1947 and Rules made thereunder. The members of the Home Guards are required to discharge such functions and duties in relation to the protection of persons, the security of property and the public safety as may be assigned to them in accordance with the provisions of the Act and Rules made thereunder. Rule 16 of Bombay Home Guards Rules, 1953 deals with the functions and duties of the members of the Home Guards and contemplates that the functions and duties of the members of Home Guards shall ordinarily consist of serving as auxiliary to the police and extending assistance in maintaining internal security subject to Guidelines 61-62 provided by Home Guards Evaluation Committee, assisting the community during emergencies such as air-raid, fire, flood, epidemic, earthquake, cyclone, etc., assisting in transport, communication, electricity, water supply and other essential services in the event of breakdown in such services, promoting communal harmony and assisting the administration in protecting weaker sections of the society, participation in socio-economic and welfare activities, such as adult education, health and hygiene, development schemes and such other functions as may be deemed useful, functioning as nucleus of civil defence services, such as fire, rescue, communication and ambulance, performing such other duties as may be assigned from time to time by the State Government or the Commandant General.

13. Looking to the object of the Act and the functions and duties required to be performed by the members of the Home Guards, it is evident that depending on the need and contingency, they are required to perform the functions and duties of police in maintaining the internal security as well as civil defence services

along with the other important functions referred to hereinabove. In our view, considering the nature of duties and the kind of obligations required to be performed by the members of the Home Guards, high moral character, total discipline and above boardness are the essential features and requirement of the job and, therefore, in order to keep the discipline intact in the organisation, the Legislature has given discretion to the authority to terminate the services of any Commandant or Commandant General at any time after giving him one month's notice in view of sub-section (2) of section 2A of the Home Guards Act. We want to make it clear that merely because section 2A(2) of the Act gives such discretion to terminate service by giving one month's notice, such discretion/power in the normal course cannot be exercised de hors of the rules of natural justice and it is only in the exceptional situation and that too when there is an urgent need to take action in order to safeguard the public interest, the authorities are entitled to exercise the said discretion and are entitled to terminate the service of the employee by giving one month's notice.

14. In the case in hand, petitioner was appointed as the District Commandant only for fixed tenure of 5 years. So it was not the permanent Government job in that sense of the term and, therefore, the concept of doctrine of natural justice needs to be considered in the context of this aspect coupled with requirements of job as well as intention of Legislature which has armed the authorities with such discretion to terminate the service by giving one month's notice. As we have already observed, such discretion/power must be exercised only if there is an urgent need to do so to safeguard the public interest.

15. It is not in dispute that Crime No. 46/06 has been registered against the petitioner for the offences punishable under sections 420 and 409 of the Indian Penal Code. Respondent in such undisputed situation thought it fit to exercise discretion vested in it u/s 2A(2) of the Act and terminated the service of the petitioner by giving one month's notice. The petitioner who was the District Commandant, if permitted to continue in the office in such peculiar situation would have undoubtedly affected the public interest. The situation, therefore, was exceptional and there was an urgent need to exercise power to safeguard the public interest and since there is an express provision, i.e. section 2A(2) of the Act which can be invoked in such situation, the authority has exercised discretion/power vested in it under the said section and terminated the service of the petitioner by giving one month's notice. In the facts and circumstances of the present case, the impugned order of termination was issued by the department in view of the express legislation as well as to safeguard the public interest which cannot be said to be either arbitrary nor bad in law for want of grant of opportunity of hearing.

16. There is no quarrel with the proposition laid down by the Apex Court in case of Mohinder Singh Gill and another (cited supra) that when a statutory functionary makes an order based on certain grounds mentioned therein, its validity must be judged by the reasons so mentioned in the order and cannot be

supplemented by fresh reasons in the shape of affidavit. In the instant case, the statutory power exercised by the authority while passing the impugned order needs to be understood in its right perspective and as per the scheme, object of the Home Guards Act in general and provisions of sub-section (2) of section 2-A of the Act in particular as well as in the light of the exceptions carved out by the Apex Court in case of State of Maharashtra and others (supra) wherein the grant of opportunity of hearing by the authorities before taking the administrative decision though affects the rights of the person concerned may not be necessary if such decision is urgently required to be taken to safeguard the public interest and in view of express legislation. It is difficult for us to appreciate as to how the law laid down by the Apex Court in Mohinder Singh Gill's case can help the contention canvassed by the petitioner.

17. For the reasons stated hereinabove, the petition is devoid of substance, misconceived and hence is dismissed. The interim order stands vacated. No order as to costs.

Shri Anand Parchure, learned Counsel for the petitioner, after pronouncement of the judgment, requested this Court to suspend effect and operation of this judgment for a period of four weeks in order to enable the petitioner to approach the Apex Court.

Shri A.G. Mujumdar, learned Assistant Government Pleader for the respondent, opposes the request.

Since findings recorded by this Court in the judgment are based on facts and law applicable, the request of the learned Counsel for the petitioner is disallowed.