

(1956) 01 BOM CK 0013

In the Bombay High Court

Case No : Special Civil Application No. 1484 of 1955

Sayed Kassam Ibrahim

APPELLANT

Vs

M.M. Chudasama

RESPONDENT

Date of Decision : 17-01-1956

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 311
Holding Departmental Enquiry Rules — Rule 16, 3
Police Act, 1861 — Section 7

Citation : AIR 1956 Bom 545

Hon'ble Judges : Chagla, C.J.;Dixit, J

Bench : Division Bench

Advocate : S.G. Samant, for the Appellant; Murzaban Mistry, instructed by Little and Co. Attorneys, for the Respondent

Judgement

Chagla, C. J.

1. The petitioner was a constable in the Bombay City Police Force and by this petition he challenges an order of dismissal passed against him by the Commissioner of Police on 23-6-1955.

2. This case has had rather a chequered career and various attempts have been made by the Police authorities to dismiss the petitioner from service and so far the petitioner seems to have succeeded on one technical ground or another. It appears that on 12-4-1950 Sub-Inspector Khanse obtained an order from a Presidency Magistrate to investigate a case of corruption. The investigation was completed by Sub-Inspector Khanse on 27-10-1950 and he made a report to Inspector Raje.

On 31-10-1950 Inspector Raje reported to Superintendent Subhan, and on 15-11-1950 Superintendent Subhan made a report to the Commissioner of Police. On 16-11-1950 Assistant Commissioner, Deshpande made a report to the Commissioner of Police recommending the suspension of the petitioner who was involved in the Investigation made by Sub-Inspector Khanse, and on 17-11-1950

the petitioner was suspended from service.

On the basis of inquiry made by Sub-Inspector Khanse, Superintendent Paranjpe framed charges against the petitioner and a charge-sheet was served upon the petitioner. The petitioner showed cause and Superintendent Paranjpe made a report holding the petitioner guilty, and on that report on 14-6-1951 Assistant Commissioner Pednekar dismissed the petitioner. An appeal was preferred to the Commissioner of Police which was dismissed. The petitioner then appealed to the State of Bombay and the State of Bombay set aside the order Of dismissal on 23-10-1952.

On 31-3-1953 another show-cause notice was served by Deputy Commissioner Pandya. After considering the reply submitted by the petitioner. Deputy Commissioner Pandya passed the order of dismissal on 14-5-1953. The petitioner appealed to the Commissioner of Police which appeal was rejected. He then served a notice upon Government u/s 80 Civil P. C. on 17-6-1954. The petitioner also appealed to the State against the order of the Commissioner and in appeal the State set aside the order of dismissal on 16-10-1954.

On 14-5-1955 the Commissioner of Police served a show-cause notice upon the petitioner upon which the ultimate order of dismissal was passed which is challenged in this petition, and as already stated the Commissioner of police, after considering the cause shown by the petitioner, passed an order of dismissal on 23-6-1955.

3. The only point urged by Mr. Samant is that the departmental inquiry has not been conducted in accordance with the Rules framed under the Police Act, and therefore to the extent that the show-cause notice issued by the Commissioner of Police is based upon the departmental inquiry, the order of dismissal cannot be justified, and the flaw that is pointed out in the holding of the departmental inquiry is that there was no proper preliminary inquiry as required by these Rules.

In order to understand the contention of Mr. Samant it is necessary to look at the Police Manual which contains the Rules framed for the purpose of holding the departmental inquiry. Rule 3(a) divides departmental inquiries into three categories: (i) Inquiries into misconduct by Inspectors, Deputy Inspectors, Sergeants and Sub-Inspectors; (ii) inquiries into offences by Jamadars, Head Constables and Constables, in which the charge, if proved, would render a major punishment probable; (iii) inquiries into minor offences by Jamadars, Head Constables and Constables.

Now, dismissal is a major punishment and the inquiry against the petitioner who is a constable, inasmuch as it was in respect of a serious offence which would render a major punishment probable, would fall in the category of Rule 3(a)(ii). Rule 3(b) deals with departmental Inquiries held in cases falling under Rule 3(a) (i), and Rule 3(c) deals with cases falling under item (ii), and what Mr. Mistree has urged on behalf of the State is that looking to the language of Rules 3(b) and 3(c) it is clear that the rules do not require a preliminary inquiry to be held

before a charge-sheet is framed and the person charged is called upon to enter upon his defence.

We have had occasion to say this before and we must say it again that the rules are extremely badly drafted and it is time that some responsible person sits down and looks to the language of these rules and puts them in order. Difficulties are constantly paused by the inartistic and sometimes even inaccurate drafting of these rules.

But we are satisfied, as we shall presently point out, that although we do not find any man-datory language used in these rules there is clear indication that a preliminary inquiry is mandatory and essential before a charge can be framed which charge the person alleged to be guilty of an offence has to meet.

4. In Rule 3(b) it is provided that the proceedings win ordinarily be held by the Superintendent of the Division in which the misconduct has taken place, but the Commissioner of Police may order them to be held by any other Superintendent. Then it is provided:

"After the Superintendent has gone through the preliminary inquiry papers, the grounds on which it is proposed to take action against the defaulter shall be reduced to the form of a definite charge or charges, which shall be communicated in writing to the defaulter & shall be accompanied by a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case".

Therefore, it is only after the Superintendent has gone through the papers of the preliminary inquiry that the charge has got to be framed. It is true that this rule does not lay down that the preliminary inquiry should be held by the same person who ultimately frames the charge.

The person holding the preliminary inquiry may be different from the person who ultimately frames the charge, but the rule assumes and presupposes that there must be a preliminary inquiry upon which ultimately the charges served upon the defaulter are based. Then lower down in Rule 3(b) it is provided:

"The Superintendent should recall the witnesses required for cross-examination and in the defaulter's presence read out any statement they have made in the preliminary inquiry and record, if necessary, any further statements they may have to make".

This provision again assumes that there has been a preliminary inquiry, that witnesses have been examined in the preliminary inquiry, and it casts an obligation upon the superintendent to read out the statements of those witnesses and if necessary call them for cross-examination by the defaulter. Then when we turn to Rule 3(c); it provides:

"In cases falling under Item (ii) the preliminary inquiries may be conducted by an Inspector or Deputy Inspector, but these inquiries shall, if a "prima facie" case

exists against the defaulter, be reported to the Superintendent concerned, who will then conduct the inquiry in the same manner as laid down above".

Therefore, in cases falling under item (ii) that is the case we are concerned with here -- an Inspector a Deputy Inspector is authorised to hold a preliminary inquiry, but that preliminary inquiry can only proceed upto a particular stage. As soon as the Inspector or the Deputy Inspector discovers that there is a prima facie case against the defaulter, then he must not proceed with the preliminary inquiry but must report the matter to the Superintendent who will continue the inquiry.

There is Rule 3(d) which deals with matters falling under item (iii) which can be dealt with summarily and therefore a distinction is drawn between departmental inquiries which are summary in their character which may not require the elaborate procedure laid down In Rules 3(b) and 3(c) and which, would be properly appropriate for minor offences falling under Rule 3(a) (iii).

Then Rule 3(e) provides for the report being made on which ultimately the final order is passed by the Commissioner of Police. Then there is a further indication in Rule 16 of the necessity of a preliminary inquiry. Rule 16 makes the earlier rules applicable "mutatis mutandis" to inquiries into the misconduct on the part of superintendents, and the second para of that rule provides that the Commissioner of Police may, however, depute a Deputy Commissioner of Police to make preliminary inquiries, with a view to seeing whether a prima facie case exists.

Therefore, although the final inquiry has to be held by the Commissioner of police, as far as the preliminary inquiry is concerned that can be conducted by a Deputy Commissioner as in the case of constables which can be conducted under Rule 3(c) by an Inspector or a Deputy Inspector. Therefore the departmental inquiry in its first stage, which stage comes to an end when the report is made under Rule 3(e), comprises of two parts in cases which fall under rules 3(b) and 3(c).

The two parts are, first, a preliminary inquiry which in the case of Rule 3(b) must be held by an officer of the rank not inferior to that of the Superintendent and in cases falling under Rule 3(c) it may be held by an officer of the rank not inferior to that of Inspector or Deputy Inspector, and it is after the result of the preliminary inquiry has been considered by the person who ultimately launches upon the second part Of the departmental inquiry that a charge can be framed against the alleged defaulter.

This particular provision affords a very important safeguard to a person against whom action is sought to be taken under the Police Act, and the safeguard is this that the statements of witnesses must be recorded by a Police officer holding a particular status. As the very foundation of the inquiry is the statements made by witnesses which disclose an offence committed by the alleged defaulter, the rules make provision for the proper holding of the preliminary inquiry.

5. In this case, whichever view one takes of the matter, the rules to which reference has been made have not been complied with. If we look upon the statements taken by Sub-Inspector Khan-se when he was investigating the offence, for which he had received the sanction of the Presidency Magistrate, as the preliminary inquiry contemplated by the rules, then the preliminary inquiry has been held by a Sub-Inspector who is of a status lower than that of either an Inspector or Deputy Inspector who alone can hold a preliminary inquiry as provided by Rule 3(c).

If, on the other hand, as contended by Mr. Mistree, in this case there was no preliminary inquiry at all and the departmental inquiry commenced when Superintendent Paranjpe served a charge-sheet upon the petitioner, then there is failure to comply with the rules by not having a preliminary inquiry at all. Therefore, the clear position that emerges on the facts before us is that either there was a preliminary inquiry by an officer who was not authorised to hold that inquiry, or there was no preliminary inquiry at all.

We fail to see the force of Mr. Mistree's contention that the Departmental inquiry started after the petitioner was suspended on 17-11-1950. Whenever the departmental inquiry commences, the rules require that it must be conducted in the manner laid down in the rules, and if we are right in the view that we take that the departmental inquiry at this stage must be in two parts and both parts are essential to the validity of the departmental inquiry, then clearly the fact that the departmental inquiry was commenced after the order of suspension was passed cannot make any difference to the position in law that the departmental inquiry must be conducted in the manner laid down in the rules.

6. Mr. Mistree relied on a judgment of this Court in "M.K. Rane v. M.M. Chudasama", Appeal No. 39 of 1955, D/- 19-8-1955 (Bom) (A). There we laid down construing Rule 3(b) that the rule did not require that the person who frames the charge must hold the preliminary inquiry himself. But there is a statement in the judgment which Mr. Samant points out is not borne out by the record and that is that we have referred to the person who held the inquiry as Inspector Bashiruddin.

The record shows that his status was not that of Inspector but Superintendent, and from this error in the judgment Mr. Mistree wants to argue that although the inquiry was held not by a Supdt. as required in cases falling under Rule 3(b) we still upheld the validity of the departmental inquiry.

But if Bashiruddin was a Superintendent and not an Inspector as appears to be the case, then the judgment is quite correct because all that we laid down was that Rule 3(b) permits an officer other than the officer who ultimately frames the charge to hold the preliminary inquiry. But we do not decide in that judgment that the officer who holds the preliminary inquiry need not be an officer who is authorised by the rules, and if Bashiruddin was the Superintendent then he was an officer authorised under Rule 3(b) to hold the preliminary inquiry.

7. There is also a judgment of Mr. Justice Desai on which Mr. Samant has relied which seems to have taken the same view of the rules which we are called upon to construe and that judgment is reported in *Shantaram D. Salvi Vs. M.M. Chudasama and Others*, . In that case the petitioner was a Deputy Inspector and the preliminary inquiry was held by another Inspector, and Desai J. held that the Inquiry was not proper and this is what the learned Judge says at page 363:

"Now a preliminary inquiry would be a part of the proceedings to be held by the Superintendent himself. If the preliminary inquiry is not a part of the proceedings to be held by the Superintendent then it is evident that no inquiry at all can be said to have been held in the matter".

So the view taken by Desai J. of Rule 3(b) was that the expression "proceeding" used in Rule 3(b) included the preliminary inquiry, and as the rule provides that the proceeding must be held by a superintendent the preliminary inquiry must also be conducted by a Superintendent. In that view of the matter the learned Judge upheld the contention of the petitioner and gave him the relief that he sought.

8. The question is, what is the proper order we should pass in this case. If we were to set aside the order of dismissal passed, in the view that we take of the law it would be incumbent upon the State to hold a preliminary inquiry by an authorised Police Officer to frame a charge and in brief to go over again the whole of the departmental inquiry. The incident in respect of which these charges have been framed took place as far back as 1949 and the Commissioner of Police in his affidavit has stated that it would be practically impossible to get the witnesses to depose to the said incident.

An order under Article 227 of the Constitution is a discretionary order and as we have had occasion to point out, a petitioner has no right to obtain relief under that Article. It is true that if a petitioner was deprived of his fundamental right it would be incumbent upon the Court to give him the necessary relief. It might also be said that if an order was passed by a Tribunal in violation of the rules of natural justice, the Court would not say that the granting of relief was discretionary

and therefore the Court may not in certain cases grant relief."

But the facts in this case are entirely different. It is not suggested that in the inquiry held against the petitioner" the rules of natural justice were not complied with. Although technically a Sub-Inspector recorded the evidence of witnesses, every formality laid down in Rule 3(b) was complied with, the copies of the statements were furnished to the petitioner, he was given the right to call the witnesses for cross-examination, he cross-examined them, and the report was made after all this evidence was taken into consideration.

In the various appeals that he preferred and in which he was fortunate enough to succeed, the grounds on which the appeals were allowed and the order of

dismissal set aside were purely technical. In the first case the order of dismissal was set aside because an Assistant Commissioner passed that order. In the second case the order of dismissal was set aside because a Deputy Commissioner passed the order, whereas the rules require that he should be the Commissioner of Police.

Undoubtedly, the State also is to be blamed for the manner in which the whole of this matter is conducted and dealt with. But we are neither concerned with the petitioner nor the State in that sense. What we are concerned with is whether it would be in the interests of Justice to set aside the order of dismissal. If this was a case which fell under Article 311 of the Constitution it could not possibly be urged by the petitioner that every reasonable opportunity was not afforded to him to defend himself.

The plea that he puts forward before us is not that there is a violation of Article 311 of the Constitution, but that on a purely technical ground the departmental inquiry has not been conducted as required by the rules. We feel that it will not be proper to interfere in a case like this, where the petitioner has been heard in full by all the authorities who are bound to hear his defence and his appeal under the rules and where every opportunity has been furnished to the petitioner to put forward all the arguments in support of his case, and when we are conscious of the fact that the setting aside of The order of dismissal may lead to a situation where it may be impossible to hold a preliminary inquiry by reason of the witnesses not being available and therefore we think that we should not exercise our discretion in favour of the petitioner.

9. There is another ground which is equally cogent which justifies us in making no order on this petition. The order of dismissal was passed by the Commissioner of Police on 23-6-1955. The petitioner has a statutory right of appeal to the State Government. He has not exercised that right and he has come to us before exercising that right.

It is well settled and settled beyond any doubt that if the law provides adequate legal remedy, which remedy is as efficacious as the remedy which this Court can give under the Constitution, then the petitioner must exhaust that remedy before he comes to this Court for the exercise of its special jurisdiction under Articles 226 and 227.

It cannot be suggested that the State Government in appeal was not in a position to set aside the order of dismissal. Therefore, instead of going to that appellate Tribunal which the Police Act sets up, the petitioner has come to us by way, as it were, of a short circuit. We cannot permit the petitioner to do that, and the only answer that Mr. Samant can give to this contention is that it is obvious that the State Government would have rejected his appeal on this ground of law which has found favour with us.

Mr. Samant says that this point was urged before the State Government in the earlier appeals and therefore it would be waste of time to urge the same ground

again in appeal before the State Government. But Mr. Samant forgets that in the earlier appeals he succeeded though it may be on another ground and we refuse to speculate that the State Government would not have appreciated the contention put forward by Mr. Samant as much as we have done and that his point of law would not have prevailed before the State Government to the same extent as it has prevailed before us. Therefore, on that ground also we think that the petitioner is not entitled to succeed.

10. The result is that there will be no order on the petition. Rule discharged. No order as to costs.

11. Rule discharged.