

(2008) 01 BOM CK 0120

In the Bombay High Court

Case No : Writ Petition No. 3195 of 1998

The State of Maharashtra and Others

APPELLANT

Vs

S.P. Kalamkar

RESPONDENT

Date of Decision : 31-01-2008

Acts Referred:

Bombay Police (Punishments and Appeals) Rules, 1956 — Rule 3

Bombay Police Act, 1951 — Section 12A, 2, 26

Constitution of India, 1950 — Article 226, 309, 311, 311(1), 311(2)

Citation : (2008) 2 ALLMR 649 : (2008) 2 BomCR 575 : (2008) 110 BOMLR 512 : (2008) 4 MhLj 553

Hon'ble Judges : Nishita Mhatre, J;J.N. Patel, J

Bench : Division Bench

Advocate : P. Deshpande, A.G.P, for the Appellant; G.K. Masand in Writ Petition Nos. 3195 of 1995 and 3196 of 1998 and N.Y. Gupte in Writ Petition No. 3385 of 1997, for the Respondent

Judgement

J.N. Patel, J.—Heard the learned Counsel for the parties.

2. We propose to dispose of the three petitions by a common judgment and order as it raises common issues, the facts are not much disputed and it raises identical questions for decision.

3. The State of Maharashtra has impugned the orders passed by the Maharashtra Administrative Tribunal in Original Application No. 512 of 1994 filed by Mr. Vinayak Raosaheb Patil, Ex. Inspector of Police and Original Application No. 590 of 1994 filed by Mr. Suhas P. Kalamkar, Ex. Inspector of Police which has been disposed of by a common judgment and order dated 3rd December 1997. The third one relates to an order passed by the Maharashtra Administrative Tribunal in Original Application No. 280 of 1996 filed by Ashok Hari Khedkar, Ex. Inspector of Police which came to be disposed of by a judgment and order dated 27th March 1997.

4. The then Commissioner of Police, Mumbai, in the case of all the three Police

Officers, who were at the relevant time working as Sr.Inspector of Police, exercising his powers under Clause (1) and Proviso (b) of Clause (2) of Article 311 of the Constitution of India removed all the three Police Officers from service.

5. Mr. Vinayak Raosaheb Patil and Mr. Suhas P.Kalamkar challenged the order before Maharashtra Administrative Tribunal which held that the State having failed to comply with the provisions of Section 26 of the Bombay Police Act, 1951, the impugned order of removal of Police Officers who were serving as Senior Police Inspectors came to be quashed and set aside. The State has challenged the order of the Maharashtra Administrative Tribunal in both the matters by passing a common judgment / order.

6. Another ground on which the Tribunal interfered with the order of removal of Ashok Hari Khedkar was that the impugned order removing the Officer concerned is passed by the Commissioner of Police whereas the order of promotion of the concerned Officer as Police Inspector was issued by the Director General of Police. The Tribunal has considered the issue by examining Rule 3 of the Bombay Police (Punishment and Appeals) Rules, 1956 which include the penalty of dismissal on all officers of the rank of Inspectors and below and these powers are subject to the provision that "Punishment of compulsory retirement, removal or dismissal shall not be inflicted by any authority lower in rank than by which the Police Officer was appointed" and the impugned order of removal was also held to be vitiated on that ground.

7. In the case of Ashok Hari Khedkar, the Tribunal did not feel it necessary to examine the issue as to whether the order under Article 311(2)(b) of the Constitution of India can be issued without giving the concerned Police Officer an opportunity of showing cause, although such an obligation has been cast on the State Government by Section 26 of the Bombay Police Act, as it was brought to their notice that the issue was pending in the Supreme Court in SLP preferred by the State relating to interpretation of Section 26 of the Bombay Police Act having visavis the respective provision of the Constitution and, therefore, the Tribunal held that they so not propose to probe into the aspect inasmuch as the matter is subjudice in the Supreme Court and inasmuch as the factual position was mentioned above.

8. The learned A.G.P. appearing on behalf of the State submitted that Section 12A of the Bombay Police Act, 1951 is very clear on the issue that the Inspectors appointed within the area under control of Commissioner of Police, the said Inspectors" appointing authority is the Commissioner of Police. Thus, the Commissioner of Police is empowered to award the penalty as provided under Rule 3 of the Bombay Police (Punishment and Appeals) Rules, 1956, in respect of the Inspectors working within the area of Commissioner of Police and, therefore, the Commissioner of Police for Greater Mumbai is empowered to dismiss or remove a person or to reduce in rank any Police Officer appointed in Greater Mumbai under the powers conferred upon him under Proviso (b) of Article 311(2) of the Constitution of India and the order is passed in accordance with law and

therefore, the impugned decision of the Tribunal deserves to be quashed and set aside.

9. It has been specifically canvassed that as per Section 2(a) of the Bombay Police Act in Bombay, the Commissioner is the appointing authority and not the Director General of Police who appointed the respondents and submitted that the Director General and Inspector General is the authority for appointing the Inspectors in respect of other areas and therefore, the Tribunal has not examined this aspect and erred in law in holding that the Commissioner of Police had no authority to pass an order under Rule 3 of the Bombay Police (Punishment and Appeals) Rules, 1956, in respect of officers holding the rank of Inspectors and below merely on the ground that the order of promotion in respect of respondents came to be passed by the Director General of Police. Therefore, the impugned order deserves to be quashed and set aside.

10. On the other hand, the learned Counsel appearing for the respondents submitted that the impugned order passed by Maharashtra Administrative Tribunal does not warrant any interference as the Tribunal has rightly arrived at a finding that the order stands vitiated for want of compliance of Section 26 of the Bombay Police Act, 1951 which carves out an exception to the mandate of Article 311 of the Constitution of India and the proviso to Section 26 of the said act and has placed reliance on the recent decision of this Court rendered in the case of Nitin Janardhan Raut Vs. State of Maharashtra and Another, which held that the proviso very clearly states that no order for reducing, removing or dismissing the Police Officer, shall be passed without giving him a reasonable opportunity of showing cause, against the action proposed to be taken against him and, therefore, the plain reading of the provisions of Section 26 therefore, shows that holding a departmental inquiry may be dispensed with in cases covered by Article 311(2). But even if such inquiry is dispensed with, an opportunity as contemplated by proviso to Section 26 of the Bombay Police Act will have to be given and admittedly, no such opportunity is given in the present case, and, therefore, the order impugned is liable to be set aside as no show cause notice asking the petitioner to show cause as to why he should not be discharged from service was issued. The statutory right of showing cause which vested in the petitioner by reason of Section 26 was therefore, imposed by the statute and, therefore, the Tribunal set aside the order of removal passed against the petitioner.

11. The learned Counsel for the respondent has also placed reliance on the decision of the Supreme Court rendered in the cases of Jaswant Singh Vs. State of Punjab and others, and Chief Security Officer and Others Vs. Singasan Rabi Das, on the issue that subjective satisfaction must be fortified by independent material and if the decision to dispense with the departmental inquiry rests solely on the ipse dixit of the concerned authority and if the satisfaction of the concerned authority is questioned in the court of law, the authority will have to show the court that the satisfaction is based on certain objective facts and is not

the outcome of the whim or caprice of the concerned officer.

12. It has been contended on behalf of the respondents that the reasons given in the order of removal for dispensing with the inquiry are not based on any material and, therefore, the authority cannot take advantage of the powers vested in it by proviso (b) of Article 311(2).

13. In reply, the learned A.G.P. placed heavy reliance on the decision of the five Judge Bench of the Supreme Court rendered in the case of *Union of India and Another Vs. Tulsiram Patel and Others*, to meet the contention of the respondents and submitted that in the said case, it has been held by majority that the court will not sit on the judgment over the relevancy of the reasons given by the disciplinary authority for invoking Clause (b) like a court of first appeal and that even in those cases where two views are possible, the court will decline to interfere and therefore, this argument is not available to the respondents.

14. Mr. Deshpande, the learned A.G.P. further submitted that in the facts and circumstances of the case, this Court should quash and set aside the order of the Tribunal as these three Police officers complicity in criminal activities is made out from the available records and do not deserve any consideration. The key issues which arise for our determination are:

(1) (i) Whether the respondents having been appointed as Inspector of Police by the Director General of Police and whether the order of their dismissal by the Commissioner of Police, Mumbai can be considered to be illegal being in contravention of Article 311(1) of the Constitution?

(ii) Whether the provisions of Clause (b) of the second provision to Article 311(2) of the Constitution were not attracted to the facts of the instant case and consequently, the order of dismissal was illegal having been passed without compliance with the requirement of Article 311(2)?

(2) Whether there is a conflict between the provisions of Article 311(2) and Section 26 of the Bombay Police Act and non compliance of the requirement of Section 26 of the Bombay Police Act would vitiate the order?

15. In order to appreciate the key issues let us examine the provisions of Article 311 of the Constitution of India and Section 26 of the Bombay Police Act.

16. Article 311 of the Constitution of India provides a special protection to civil servants of the Union and States against arbitrary exercise of powers by the officers of the State according to their whims and fancies and the objective of the Article is to afford protection to civil servants against such misuse and abuse of powers. Article 311 reads as under:

Article 311: Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.

(1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a

State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of these charges.

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply. Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

b. Where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reasons, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

c. Where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in Clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

17. Therefore, it is quite clear that provisions of Article 311 contemplate that no civil employee of a Union or State or person holding civil post under the Union or State shall be dismissed or removed by an authority subordinate to that by which he was appointed and that such a person can be dismissed or removed by authority which is superior to the appointing authority. It further provides that no such persons shall be dismissed or removed or reduced in rank without any inquiry for which it is not necessary that disciplinary proceedings are initiated by appointing authority. They can be initiated by Disciplinary / Controlling authority.

18. Article 311 incorporates principles of audi alteram partem i.e. in the said inquiry the person concerned should be informed of the charges against him and he should be given a reasonable opportunity of being heard in respect of such charges and penalty can be imposed on the basis of evidence adduced during the inquiry. It is not necessary to give an opportunity to the employee, to make representation on the proposed penalty but such inquiry is not necessary if a person is to be dismissed or removed or reduced in rank on the ground of conviction in a criminal charge. Article 311 also provides for dismissal, removal or reduction in rank of an employee without holding an inquiry, when the authorities are of the opinion that it is not reasonably practicable to hold inquiry and record the reasons in writing for dispensing the inquiry. Therefore, whenever

the question arises as to whether it is reasonably practicable to hold an inquiry, the decision of the authority is final. However, the Courts/ Tribunals had jurisdiction and powers to satisfy themselves as to whether the decision to dispense the inquiry is reasonable and not arbitrary and the next most important provision is that a person can be dismissed, removed or reduced in rank when a President or Governor is of the opinion that it is not expedient to hold an inquiry in the interest of the security of the State. However, the Courts / Tribunals have jurisdiction or powers to satisfy themselves as to whether the reason of interest of the security of the State given for dispensing the inquiry is reasonable and satisfactory.

19. In so far as the three respondents i.e. the Police officers are concerned, the orders passed by the Commissioner of Police, Mumbai in their cases clearly records the reasons on the basis of which the Commissioner was satisfied that it was not reasonably practicable to hold the departmental inquiry against the said Police Officer. Therefore, on this ground it cannot be said that the impugned order stands vitiated.

20. Clause (3) of Article 311 clearly lays down that "If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in Clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank is final."

21. With regard to Article 311(3) of the Constitution of India after pointing out that whether the Government Servant is dismissed, removed or reduced in rank by applying Clause (b) or an analogous provision of service Rules and he approaches either the High Court under Article 226 or the Supreme Court under Article 32, the court will interfere on grounds well established in law for the exercise of judicial review in matters where the administrative discretion is exercised. (Union of India and Anr. v. Tulsiram Patel (Supra)).

22. In so far as the contention of learned A.G.P. is concerned that the Commissioner of Police was the appointing authority, the Tribunal has clearly held in respect of the three respondents that they were promoted as Police Inspectors by an order of the Director General of Police and, therefore, there can be no quarrel over the fact that the impugned order of removal from service could not have been passed by an authority subordinate to Director General of Police / Inspector General of Police.

23. Mr.Deshpande has conceded that at the relevant time when the orders of removal came to be passed against these three officers, the Commissioner of Police, Mumbai was subordinate in rank to the Director General of Police / Inspector General of Police.

24. In the decision rendered by this Court in the case of Nitin J. Raut v. State of Maharashtra and Anr. (Supra) in para 8 and 9 of the reported judgment, this Court has already taken a view that the case of the personnel of police force stands protected by s.26 of the Bombay Police Act, 1951. Section 26 of the

Bombay Police Act, 1951 reads as under:

26. Procedure to be observed in awarding punishment When any officer passes an order for fining, suspending, reducing, removing or dismissing a Police officer, he shall record such order or cause the same to be recorded, together with the reasons therefore and a note of the inquiry made, in writing, under his signature:

Provided that no order for reducing, removing or dismissing a Police officer shall be passed without giving him a reasonable opportunity of showing cause against the action proposed to be taken against him except in cases referred to in the proviso (a) to Clause (2) of Article 311 of the Constitution.

(Now stands amended by the Bombay Police (Amendment) Act, 2005 (Mah. Act. No. 35 of 2005 w.e.f. 14.8.2005)

25. This Court held that an exception which is provided u/s 26 is two fold. Departmental inquiry need not be held in cases covered by Article 311(2). It is, however, provided that even if holding of inquiry may be dispensed with, if recourse is taken to Article 311(2), opportunity to show cause against the proposed punishment will have to be given according to provisions of Section 26 of the Bombay Police Act. The proviso very clearly states that no order for reducing, removing or dismissing a Police Officer, shall be passed without giving him a reasonable opportunity of showing cause, against the action proposed to be taken against him. A plain reading of the provisions of s.26 therefore, shows that holding of departmental inquiry may be dispensed with in cases covered by Article 311(2). But even if such inquiry is dispensed with, an opportunity as contemplated by proviso to Section 26 of the Bombay Police Act will have to be given. Admittedly, no such opportunity is given in the present case. Therefore, the order impugned is liable to be set aside as no show cause notice asking the petitioner to show cause as to why he should not be discharged from service was issued. The statutory right of showing such cause which vested in the petitioner by reason of Section 26 was therefore, imposed by the State. On this ground alone, the impugned order is liable to be set aside.?

26. The Tribunal in the case of Ashok H. Khedkar deferred to express any opinion in view of the fact that Ingle's case was pending before the Supreme Court. The decision of the Division Bench of this Court in case of Nitin Janardhan Raut (Supra) clearly concludes the issue. We may add that Section 26 of the Bombay Police Act provides statutory safeguard to a Police Officer which is in addition to the safeguards provided under Article 311 of the Constitution of India. This cannot be held to be in conflict with the letter and spirit to the Constitutional safeguards, rather it goes one step ahead and provides that even in case of a Police Officer being removed by the Competent Authority by exercising its powers under Clause (2) of Article 311 of the Constitution of India, a show cause notice is required to be given to the concerned officer before a final decision is taken in determining his services.

27. Nothing has been brought to our notice to show any judgment of the

Supreme Court declaring the exception carved out in the provisions of Section 26 of the Bombay Police Act that the person against whom such action is taken is required to be given an opportunity to show cause against the proposed punishment as it is within the competency of the State to provide for such exception while legislating under Article 309 of the Constitution of India which empowers the State to regulate the recruitment and conditions of service of persons appointed, to public services and posts in connection with its affairs.

28. Admittedly, in all the three cases there has been no compliance of Section 26 of the Bombay Police Act and therefore, the Tribunal was justified in holding that the impugned order of removal of the three officers stands vitiated.

29. In the course of hearing of three petitions, the learned Counsel for the respondents submitted that if this Court upholds the decision of the Maharashtra Administrative Tribunal in all three cases then the respondents should get by way of consequential relief reinstatement with back wages, this should follow in normal course if the order of removal is found to be illegal and is quashed and set aside.

30. The learned A.G.P. submitted that the Tribunal in none of the cases has granted such a relief and therefore, it will not be proper for this Court to grant back wages to the respondents as it would be heavy burden on the public exchequer and the three respondents only stands benefited for non compliance of certain technicalities particularly compliance of Section 26 of the Bombay Police Act, 1951.

31. It is further contended that even in their application before Maharashtra Administrative Tribunal they have only sought quashing and setting aside of the impugned order. The learned Counsel for the respondents submitted that such a view cannot be taken by the court, as it is contrary to well settled principles of service jurisprudence. Once the order of dismissal / removal is quashed and set aside, the person is entitled to all benefits which accrue to him as he will have to be treated in service and as all the three officers have reached the age of superannuation, it will be unjust to deny reinstatement with back wages and all consequential benefits.

32. The learned A.G.P. submitted that the respondents have not placed on record any material to show that during the period they were removed from service till they attain the age of superannuation, these officers were not employed gainfully elsewhere and therefore, now they cannot claim any back wages. To this, it is the contention of the learned Counsel for the respondents that the officers inspite of being removed have been directed and are following up the cases which were investigated by them and charge sheets were filed and there is no material on record to show that they were gainfully employed and for the aforesaid reason, they should not be deprived of back wages.

33. We find that in all the three matters, Maharashtra Administrative Tribunal on quashing and setting aside the impugned order granted liberty to the State to

proceed against the officers, if they so deem fit, in accordance with law and that these orders were passed 10 years back. Till these petitions were taken up by us for final hearing, the State never applied to the court to initiate the proceedings against these officers in accordance with the liberty given to them by the MAT. The learned A.G.P. submits that as the petition was admitted and the impugned order was stayed by this Court, it will not be proper on the part of the State to have opted for initiating any proceedings in the matter relating to the impugned order.

34. Taking into consideration that this Court has upheld the finding of the Tribunal, there can be no hesitation on our part to grant consequential relief to the respondents of reinstatement with back wages and continuity of service and other consequential reliefs which would arise as the respondents have already suffered a lot and even deprived of their promotional avenues if they would have continued in service which could not have been ruled out but for the serious allegations made against them. Therefore, in our view, ends of justice would meet if the respondents are paid 50% of the back wages till they attain the age of superannuation. As a consequence of impugned order passed by the Tribunal being upheld by this Court, which has quashed and set aside the order of removal passed by the Commissioner of Police, Mumbai against these three officers, therefore, these three petitions are dismissed. In view thereof, Civil Application No. 651 of 2005 does not survive. The same also stands dismissed as infructuous.

35. We direct the State to reinstate these officers with continuity of service and pay back wages @ 50% without disturbing their pay scale and usual increments which they would have received in rank of Inspector of Police and all consequential benefits like gratuity, pension etc. Rule dismissed with no order as to costs.