

(2014) 12 BOM CK 0033
In the Bombay High Court
Case No : Writ Petition No. 9660 of 2014

The State of Maharashtra

APPELLANT

Vs

Subhash Dhondiram Mane

RESPONDENT

Date of Decision : 01-12-2014

Acts Referred:

Administrative Tribunals Act, 1985 — Section 20(1)
Constitution of India, 1950 — Article 226

Citation : (2015) 4 BomCR 563 : (2015) 4 MhLj 791

Hon'ble Judges : N.M. Jamdar, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : A.Y. Sakhare, Senior Advocate and A.B. Vagyan, Government Pleader, Advocate for the Appellant; V.M. Thorat and Ashish S. Gaikwad, Advocate for the Respondent

Judgement

N.M. Jamdar, J.

Rule. Rule made returnable forthwith. By consent of both parties, petition taken up for final disposal.

1. By this petition, the State of Maharashtra has challenged the order passed by the Maharashtra Administrative Tribunal dated 13 December 2014, allowing the Original Application filed by the Respondent and setting aside the order dated 4 September 2014 suspending the Respondent from service.

2. The Respondent, Dr.Subhash Dhondiram Mane, is working as a Director of Marketing, which is a senior level post. He is due to retire on superannuation shortly, on 31 December 2014.

3. The Respondent, entered the services of State of Maharashtra on 19 January 1983 as a Deputy Registrar, Class-I. Thereafter he worked in various capacities and was promoted as an Additional Registrar, Class-I post in July, 2009. He was sent on deputation as Managing Director, Maharashtra State Power-loom Corporation. He was posted as an Administrator, Maharashtra State, Cooperation

and Agricultural Rural Development Bank in April, 2010. The Respondent made grievance that he was posted on a defunct bank and he was not permitted to work in a honest and diligent manner. After some other postings, the Petitioner was posted as an Additional Commissioner of Agricultural Produce Market Committee, Navi Mumbai, and was then transferred to the post of Administrator of Maharashtra State Agricultural and Rural Development Bank. Thereafter, the Respondent made representations for repatriation and posting on a vacant post.

4. The Respondent filed an original application in respect of continuation of his deputation for more than four years. The original application was allowed by the Maharashtra Administrative Tribunal by an order dated 29 November 2013. Since this order was not complied with, a contempt petition was filed by the Respondent. In this contempt petition, a notice was issued by the Tribunal. Thereafter, the Petitioner State issued an order of repatriation on 18 March 2014 and the Respondent was appointed as Director of Marketing and he took charge on 18 March 2014. On 20 March 2014, the powers delegated to Director of Marketing were stayed by the State Government. Thereafter, the Respondent filed another original application, upon which the Tribunal issued an interim order on 3 April 2014 staying the order of 20 March 2014. On 27 June 2014, the Respondent was served with a show cause notice in respect of certain news items pertaining to Agricultural Produce Market Committee, Mumbai. It was alleged that the Respondent was instrumental in publishing the news reports. Another show cause notice was served on 30 June 2014 alleging that the Respondent did not behave properly with representatives of people and used abusive language in respect of higher dignitaries. The Respondent gave his reply to both the notices. Thereafter the Petitioner-State issued an order for deputation-cum-transfer of the Respondent. The Respondent challenged the action of the State Government by filing Original Application, and the Tribunal by its speaking order dated 2 July 2014 stayed the order of transfer. Thereafter the Petitioner-State suspended the Respondent by order dated 4 September 2014, which is the subject matter of the present proceeding. The order of suspension stated that the Respondent gave false information to media and maligned the image of the Government, participated in a Television programme, criticized the Government and his behaviour with various higher functionaries and representatives of people was not proper.

5. The Respondent filed an Original Application No.834 of 2014 challenging the order of suspension dated 4 September 2014. The Respondent alleged that the order was malafide, issued with an intention to victimize the Respondent at the fag end of his career. He narrated the history of previous orders issued by the Petitioner State and the orders passed by the Tribunal to demonstrate that the order of suspension was a colourable exercise, only to victimize and punish the Respondent. A reply came to be filed by the Petitioner State, in which the Petitioner justified its action. It was contended that the Respondent had an alternate remedy available to challenge the order of suspension. On this basis it was contended that the challenge to the order was premature. Thereafter, an

additional affidavit in reply was filed by the Petitioner State dealing with the contentions raised by the Respondent, on merits. It was contended that since the charges are serious, the Respondent might interfere with the departmental enquiry and it was necessary to place him under suspension. The allegations regarding victimization were denied and various instances of misbehaviour on the part of the Respondent were detailed. The incidents specified in the order of suspension were justified by pointing out that there was a cogent material in support of the charges.

6. The Tribunal considered the preliminary objection regarding maintainability of the Original Application on the ground of availability of alternate remedy and held that the said remedy will not be efficacious and there was no legal bar to consider the original application. The Tribunal found that the history of litigation instituted by the Respondent including the orders passed by the Tribunal indicated that the action against the Respondent was by way of victimization. The Tribunal did not find any prima facie case of gross misconduct that warranted suspension of a senior officer that too at the fag end of his career. The Tribunal noted that the incidents which was formed basis of suspension order were also grounds for transfer of the Respondent, which order was stayed by the Tribunal. The Tribunal opined that the Respondent is not likely to influence the enquiry in any manner, looking at the nature of charges. The Tribunal allowed the Original Application by the impugned order dated 13 October 2014. The Tribunal set aside the order of suspension and directed the Petitioner-State to issue order of placing the Respondent back as Director of Marketing within a week, failing which the Respondent would stand reinstated on 20 October 2014. The Tribunal imposed costs of Rs. 2 lacs on the Petitioner-State and directed that the enquiry must be concluded within six months from the date of suspension order, failing which it will automatically abate.

7. The Petitioner-State moved the present petition on 20 October 2014. On 20 October 2014, the Respondent appeared in person and submitted that he has already taken charge in the morning on that day in view of self operative order of the Tribunal. The learned Vacation Judge granted ad-interim relief in favour of the Petitioner State and thereafter the matter was posted for consideration before us,

8. We have heard Mr.A.Y. Sakhare, learned senior advocate for the Petitioner-State and Mr.V.M. Thorat, learned Advocate for the Respondent.

9. The first contention raised on behalf of the Petitioner State is that the Tribunal ought not to have entertained the Original Application in view of the alternate remedy available to the Respondent. Reliance was placed by Mr.Sakhare, on Section 20(1) and (2) of the Administrative Tribunals Act, 1985. According to Mr.Sakhare, as per Rule 17 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979, a remedy of appeal against the order of suspension has been provided. Mr.Sakhare submitted that the reason given by the Respondent for not availing of this remedy that since the order is passed in concurrence of

the Chief Minister and therefore no appellate authority will give a decision against him, is an untenable reason. He submitted therefore that the discretion used by the Tribunal in entertaining the application was improper and therefore the order be set aside. We do not find any merit in this submission. Section 20(1) of the Administrative Tribunal Act does not place an absolute embargo on the Tribunal to entertain an application if alternate remedy is available. It only states that the Tribunal shall not ordinarily entertain application unless the Tribunal is satisfied that the applicant has availed the alternate remedy. This phraseology itself indicates that in a given case the Tribunal can entertain an application directly without relegating the applicant to the alternate remedy. In the present case, the Tribunal has found, on examination of various peculiar facts and circumstances, that, it will be futile to drive the Respondent to an alternate remedy. The Tribunal found that the order of suspension was based on the same grounds as the order of transfer, which was stayed and the order of suspension was an act of victimization. Having convinced that strong case for entertaining an application was made out, the Tribunal entertained the application. It was within the discretion of the Tribunal to do so. No absolute bar was shown, neither it exists. We are not inclined, at this stage, to accede to the submission of Mr.Sakhare, and set aside the impugned order on this ground alone.

10. It was then contended by Mr.Sakhare that the Tribunal could not have gone into the merits of the charges and interfere with the order of suspension and the exercise was premature. He placed reliance on the decision of the Apex Court in the case of District Forest Officer Vs. R. Rajamanickam and Another, and in the decision of the Division Bench of this Court in the case of Chandrakant Damodar Kale Vs. Nagpur Improvement Trust and Another, . He contended that the State Government, as an employer, has a power to place employee under suspension under Rule 4(1)(a) of the Maharashtra Civil Services (Discipline and Appeal) Rules, when an enquiry against an employee is pending or is in contemplation. He submitted that the order of suspension is purely an administrative act and the Court is not entitled to examine the merits of the charges, which will be considered at the time of the enquiry. It is not possible to accept such an absolute proposition. Though it is the power of the Petitioner State to place an employee under suspension, the order of suspension is not immune from judicial scrutiny. An employee can always challenge the order of suspension on the ground that it is actuated by malafides, arbitrariness or that it is issued with an ulterior purpose. The suspension order ordinarily should be passed when there is strong prima facie case against the delinquent and if the charges are proved it would warrant an imposition of major penalty. This position has been made clear in the decision rendered by the Apex Court in the case of Union of India (UOI) and Another Vs. Ashok Kumar Aggarwal, .

11. If the above grounds are available for an employee to challenge the order of suspension and he agitates the same in his application to the Tribunal, it is necessary for the Tribunal to examine, prima facie, the case against such applicant. For consideration of the contention that the order of suspension is

vitiated by malice, ulterior motive or that no strong prima facie case exists, it is necessary for the Tribunal to consider the factual matrix in that context. The decision in the case of District Forest Officer (supra) relied upon by Mr.Sakhare was in respect of challenge to a charge-sheet and in that context the Apex Court observed that the merits of the charges would be considered at the time of the enquiry. In the case of Chandrakant Kale (supra), the Division Bench of this Court was considering the case of an employee who was dismissed from service after holding an enquiry and the period of suspension was not to be treated as duty period. When the order of suspension was put into issue, the Division Bench found that no failure of justice had occasioned as the Petitioner had a fair and reasonable opportunity to reply to the chargesheet and contest and participate in the enquiry. The facts of this case are totally different from the case at hand. The Tribunal thus, to our mind, rightly considered the the factual aspect to ascertain whether the challenge raised by the Respondent fell under the available heads of challenge. The Tribunal was justified in looking at the material to find out whether the grounds of malafide and victimization made out by the Respondent were justified.

12. In respect of allegation of malafides, Mr.Sakhare contended that they are vague and no individual has been joined as a party Respondent to prove the allegation of malafides. If the case put up by the Respondent is carefully considered, the case is of victimization and of legal malice. In the case of Kalabharati Advertising Vs. Hemant Vimalnath Narichania and Others, , the Apex Court explained the concept as under :-

"25. The State is under obligation to act fairly without ill will or malice in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Whether malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts.

26. Passing an order for an unauthorized purpose constitutes malice in law."

The above mentioned passage indicates that an order for unauthorized purpose and that purpose other than for which it was intended, constitute legal malice.

13. The Tribunal has taken note of the previous litigation instituted by the Respondent, which is a matter of record, to draw a conclusion that there was a pattern of passing adverse orders against the Respondent and he was consistently shifted from department to department on deputation to prevent him from taking certain actions. Various orders were passed by the Tribunal

protecting the respondent from the orders of the Petitioner State. Considering this record, the Tribunal arrived at a finding that the series of events lead to an inference that there was malice in law against the Respondent. If the record pertaining to the Respondent and the earlier orders are perused, it cannot be said that no Tribunal would have arrived at such a finding. Merely because, upon construing the material afresh, we may come to another conclusion is not enough to interfere with the order of the Tribunal in writ jurisdiction. In fact, the material on record justifies the interference drawn by the Tribunal. If the previous litigation, which is part of the record, itself establishes malice in law and that is being taken as a basis, it cannot be said that the Tribunal has traveled beyond its jurisdiction.

14. Mr.Thorat, relied upon the decision in the case of Ashok Kumar Aggarwal (supra) which arose from a case of suspension of an employee. In this case, the Apex Court held that if the suspension order is based on the same material in respect of which there has been earlier judicial pronouncement, then the suspension will have to be treated as vitiated. In the present case, the allegation against the Respondent that he had misbehaved with representative of public and had uttered improper words against the higher dignitaries and that he was instrumental in issuing certain newspaper reports, were foundation for order of transfer, which was already stayed by the Tribunal by a speaking order. In view of the aforesaid decision of the Apex Court, the conclusion by the Tribunal that the same material could not have been used for order of suspension, cannot be termed as perverse. The only other ground is regarding a Television interview where the Respondent is stated to have criticized the Government. The compact disc in respect of the said programme is not furnished to the Respondent neither it was placed on record of the Tribunal. Least the Petitioner-State could have done is to indicate in the order of suspension as to why in spite of earlier order of the Tribunal, the order of suspension was warranted. The Respondent has categorically denied that he criticized the Government and has stated that he only referred to the fact of dissolution of the Agricultural Produce Market Committee. The Tribunal has found that even this charge prima facie does not have any merit and may not lead to imposition of major penalty. This is a possible view to be taken.

15. Mr.Sakhare then submitted that, if the approach adopted by the Tribunal in setting aside the order of suspension by considering the merits of charges is upheld, then it will have wide ramification and will create serious difficulties in the way of Administration. We do not see any warrant for such an apprehension. The principle that the action of suspension should not be used for malafide purpose and for ulterior motive, is well established. The question whether the power of suspension is used for extraneous and malafide reasons and by way of victimization, will depend on facts of each case. By deciding that in a particular case such a ground is made out no way lays down any wider proposition neither will have any administrative ramifications. We are only concerned with the facts of the case in hand.

16. We have to also keep in mind that, we are not testing the validity of the order of suspension at the first instance. This exercise has been undertaken by the Administrative Tribunal. The Petitioner-State has invoked our jurisdiction under Article 226 of the Constitution of India, which is limited to see if there is patent illegality or perversity in the order challenged and if there is any gross failure of justice. As regard equity and failure of justice is concerned, the question of suspension of the Respondent is only relevant for next 30 days or so, as the Respondent will retire on superannuation on 30 December 2014. The Petitioner State has made a statement that an enquiry will be initiated soon which, it appears, will continue beyond the date of superannuation. If the Respondent is found guilty, he will be dealt with accordingly. Therefore, the Respondent is not going scot-free. The question is whether we should set aside the order of the Tribunal at this stage and place the Respondent under suspension. The Tribunal has rightly noted that the charges are such that the Respondent is not likely to tamper with the evidence nor influence any witness. There is no charge of misappropriation against the Respondent. It is not that the orders passed by the Respondent in office are immune from correction. The actions of the State Government as an employer must be fair and reasonable in respect of its employees.

17. Mr.Sakhare submitted that the direction given by the Tribunal that enquiry must be completed within six months from the date of the order of suspension or it will abate, is uncalled for. We find merit in this submission. It is not necessary to place the Petitioner State under such embargo. The enquiry may not be completed in six months for various reasons. Further more, there is no discussion in the judgment of the Tribunal to arrive at this conclusion. The direction contained in paragraph 56 of the impugned judgment is set aside. It is however expected that the Petitioner State will conclude the enquiry, if initiated, within a reasonable period.

18. A grievance was made by Mr.Sakhare regarding the imposition of costs of Rs. 2 lacs upon the Petitioner-State. He submitted that the imposition of costs was unwarranted and the Petitioner-State was not put to notice that such a heavy cost will be imposed. While we do not wish to disturb the conclusion of the Tribunal that the Original Application should have been allowed with costs, we do not find any discussion preceding grant of costs which appear to be almost in the nature of punitive damages. Mr.Sakhare is justified in his grievance that the Tribunal ought to have put the Petitioner-State to notice as regard the quantum of costs and then appropriate submissions could have been then made. Since we are not disturbing the decision to impose the costs and that to remand the matter to the Tribunal only for determination of quantum of costs, will not be in interest of both the parties, we feel that the costs of Rs. 20,000/-on the Petitioner-State would be appropriate in the facts and circumstances of the case.

19. Mr.Sakhare then made an alternate submission that, if the order of the Tribunal is to be upheld, the Petitioner-State should be permitted to shift the

Respondent from his present post. This request was strongly opposed by Mr.Thorat. He pointed out that the order of transfer of the Respondent from the present post was stayed by the Tribunal and has not been challenged by the Petitioner-State and therefore this is an attempt to over reach the order of the Tribunal. The request of Mr.Sakhare cannot be accepted. If the order of transferring the Respondent from the present post, substantially on the same ground has been stayed, there is no question of granting liberty to the Petitioner-State to transfer the Respondent from the present post.

20. There was a controversy as to whether the Respondent took charge on 20 October 2014 and whether he continues to hold the same. Both sides have filed the affidavits on this aspect. But this issue has more or less become academic in view of the fact that we have heard the matter finally. In any case, the letters issued by the officers of the State Government annexed to additional affidavit of the Respondent indicate that the Respondent is holding the charge at present. Therefore the interim order granted on 20 October 2014 does not survive. Mr.Sakhare made a grievance that the action of the Respondent unilaterally taking charge that too before the office hours is high handed. No doubt, the act of the Respondent in proceeding in the morning of 20 October 2014 and taking charge is an act of over zealotness, but one has to consider the back ground of the case and the peculiar facts and circumstances and its effect on the state of mind of the Respondent and his attempt to retain his prestige at the end of his career. Therefore, we are not inclined to take a serious view of the matter.

21. In the circumstances, the writ petition is disposed of as under :

(a) The order passed by the Maharashtra Administrative Tribunal dated 13 October 2014 setting aside the order of suspension dated 4 September 2014, is upheld.

(b) The direction contained in paragraph 56 of the impugned order is set aside, however, it is clarified that the enquiry, if instituted, will be completed within a reasonable period.

(c) The order of imposition of costs of Rs. 2 lacs by the Tribunal is modified and the amount of Rs. 2 lacs is reduced to Rs. 20,000/-.

(d) Ad-interim order stands vacated.

(e) No order as to costs.

Rule disposed of accordingly.

At this stage, Mr. C.P. Yadav, the learned A.G.P. appearing for the Petitioner-State seeks to stay the operation of the judgment and order which we have pronounced today in the open Court and continuation of ad-interim relief. However, for the reasons so recorded above, no case is made out for continuation of interim order granted by this Court 20 October 2014. The oral application is accordingly rejected.