

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 257 OF 2005

The State of Maharashtra
Versus
Bhaskar Shankar Salvi

...Petitioner

...Respondent

Mr. O. M. Kulkarni – AAGP for Petitioner – State.
Mr. A. V. Pawaskar i/b. M/s. Khandeparkar & Associates for
Respondent.

**CORAM: SMT. V. K. TAHILRAMANI, Acting C. J. &
M. S. SONAK, J.**

DATE : 12 APRIL 2018

ORAL JUDGMENT :

1] Heard the learned counsel for the parties.

2] The challenge in this petition is to the judgment and order dated 17th June 2004 made by the Maharashtra Administrative Tribunal in Original Application No. 368 of 2003 instituted by the respondent questioning the order dated 27th February 2003, by which, his pension and gratuity were withheld permanently.

3] Mr. Kulkarni, the learned AAGP for the petitioner – State submits that the charge leveled and established against the respondent was of misappropriation of food grains and gunny bags valued at Rs.12,41,979.22 when he was posted as a Godown Keeper at Ratnagiri. Mr. Kulkarni submits that under Rule 27 of the MCS (Pension) Rules, 1982 the competent authority has been vested with powers to impose penalty of withholding of gratuity and pension. He submits that the MAT, by misreading and misconstruing the ruling of the Hon'ble Supreme Court in the case of **D. V. Kapoor vs. Union of India & Ors. (1990) 4 SCC 314** has interfered with the penalty imposed on the ground that the penalty order, did not use the term '*grave misconduct / negligence*'. Mr. Kulkarni submits that from the substance of the matter, it was quite clear that the respondent, was involved in a *grave misconduct / negligence*, and therefore, the mere absence of such terms in the penalty order, did not vitiate the penalty order. He relies on a decision of this Court in **State of Maharashtra vs. K. B. Nimbalkar & Anr. 2006(5) All MR 271.**

4] Mr. Pawaskar, the learned counsel for the respondent

submits that there was nothing '*grave*' in the misconduct or the negligence alleged against the respondent. He submits that powers under Rule 27 of the MCS (Pension) Rules, 1982 are hedged by the pre-condition that the allegation leveled must constitute *grave misconduct / negligence*. He relies upon *D. V. Kapoor* (supra) in support of this contention. He submits that the MAT, in the present case, has quite correctly relied upon the ruling of the Hon'ble Supreme Court in *D. V. Kapoor* (supra) which was binding upon the MAT and therefore, this Court, ought not to interfere with the impugned judgment and order made by the MAT. He submits that right to receive pension or pensionary benefits is a fundamental right and interference with such right must not be lightly countenanced. For all these reasons, Mr. Pawaskar submits that this petition may be dismissed.

5] The rival contentions now fall for our consideration.

6] There is no dispute that the charge of misappropriation to the extent of Rs.12,41,979.22 stands proved against the respondent. The respondent, was a godown keeper and had been placed in custody of gunny

bags and food grains. The gunny bags and food grains were disposed of without maintenance of proper records, resulting in misappropriation to the extent of Rs.12,41,979.22. In our opinion, this is clearly, a case where the respondent was involved in a *grave misconduct / negligence* so as to vest in the competent authority the right to exercise powers under Rule 27 of the MCS (Pension) Rules 1982. The MAT, by misreading and misconstruing the ruling of the Hon'ble Supreme Court in *D. V. Kapoor* (supra) has interfered with the penalty imposed upon the respondent on the sole ground that in the penalty order there is no mention of '*grave misconduct / negligence*'.

7] The reasoning of the MAT, in its entirety, is contained in paragraph 10 of the impugned judgment and order, which reads as follows :

"10. We shall then refer to the facts of the present case. Charge one inter alia provides that while the applicant was working as such Godown Keeper by disposing of the food grains and the gunny bags, he had committed misappropriation to the extent of Rs.12,41,979.22. There is no mention of grave misconduct / negligence. Admittedly, the other charges do not use the term 'negligence / misconduct'. Naturally, the report of the Enquiry Officer is conspicuous by its absence of the term of negligence / grave misconduct. These findings have been affirmed by the

disciplinary authority. In the impugned order dated 27.2.2003, again the term grave misconduct / negligence have not been mentioned. An omission to mention these terms goes to the very root of the matter. Having regard to the object of Rule 27 of M.C.S. (Pension) Rules, 1985 we are inclined to hold that in consonance with the various decisions rendered by this Tribunal and relying on the cases of Shri D. V. Kapoor (cited supra) and the case of B. Dev (cited supra) we have no other option, but to hold that the impugned order dated 27.2.2003 is liable to be quashed and set aside. In view of our findings on the question of law involved in the present petition, we feel it quite unnecessary to deal with the other points.”

8] In our opinion, the aforesaid reasoning is quite unsustainable and warrants interference in the exercise of our powers under Articles 226 and 227 of the Constitution of India.

9] Rule 27 of the MCS (Pension) Rules, 1982 reads as follows:

“27. Right of Government to withhold or withdraw pension

-(1) Government may, by order in writing, withhold or withdraw a pension or any part of it, whether permanently or for a specified period, and also order the recovery from such pension, the whole or part of any pecuniary loss caused to Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service including service rendered upon re-employment after retirement:

Provided that the Maharashtra Public Service Commission shall be consulted before any final orders are passed in respect of officers holding posts within their purview:

Provided further that where a part of pension is withheld or withdrawn, the amount of remaining pension shall not be reduced below the minimum fixed by Government.

-(2) (a) The departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service.

-(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment,-

-(i) shall not be instituted save with the sanction of the Government,

-(ii) shall not be in respect of any event which took place more than four years before such institution, and

-(iii) shall be conducted by such authority and at such place as the Government may direct and in accordance with the procedure applicable to the departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.

-(3) No judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action

which arose or in respect of an event which took place, more than four years before such institution.

-(4) In the case of a Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in rule 130 shall be sanctioned.

-(5) Where Government decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not, subject to the provision of sub-rule (1) of this rule, ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

-(6) For the purpose of this rule, -

-(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

-(b) judicial proceedings shall be deemed to be instituted

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-(i) in the case of criminal proceedings, on the date on which the complaint or report of a police officer of which the Magistrate takes cognizance is made, and

-(ii) in the case of civil proceedings, on the date of presenting the plaint in the Court."

10] From the aforesaid, it is quite clear that the powers to order withholding of pension can be exercised where, a

pensioner is found guilty of grave misconduct or negligence. There is a similar provision in the CCS Pension Rules which was considered by the Hon'ble Supreme Court in the case of *D. V. Kapoor* (supra). The MAT, without advertent to the facts in circumstances in *D. V. Kapoor* (supra) and by reading stray sentences out of the context has upset the penalty order only because the penalty order does not specifically mention that the charge proved against the respondent, constituted '*grave misconduct / negligence*'. This is not the proper manner of construing precedents.

11] *D. V. Kapoor* (supra) was a case where the Appellant was working as an Assistant in the Indian High Commission at London. Disciplinary proceedings were initiated against him on the ground that upon his transfer to New Delhi, he had not joined duties. The main defence was that the employee's wife was ailing and that he had applied for leave since she was not in a position to undertake travel. The Enquiry Officer while investigating the charge of wilful absence held that it was difficult to determine as to whether the absence from duty was entirely willful. Hence though

the Enquiry Officer eventually came to the conclusion that the charge was established, he submitted that a sympathetic consideration was warranted. In this background, Supreme Court held that *“myriad situations may arise depending on the ingenuity with which misconduct or irregularity was committed”* and then observed thus:

“It is not necessary to further probe into the scope and meaning of the words 'grave misconduct or negligence' and under what circumstances the findings in this regard are held proved. It is suffice that charges in the case are that the appellant was guilty of willful misconduct in not reporting to duty after his transfer from Indian High Commission at London to the - Office of External Affairs Ministry, Government of India, New Delhi. The Inquiry Officer found that though the appellant derelicted his duty to report to duty, it is not willful for the reasons that he could not move due to his wife's illness and he recommended to sympathetically consider the case of the appellant and the President accepted this finding, but decided to withhold gratuity and payment of pension in consultation with the Union Public Service Commission.”

The Supreme Court noted that the power to withdraw pension was subject to the condition that there should be a finding of grave misconduct or negligence in the discharge of duties and in the absence of such a finding, the imposition of a penalty withholding pension was without the authority of law.

12] The ruling in *D. V. Kapoor* (supra) was considered in ***Union of India vs. B. Dev AIR 1998 SC 2709***, which was

in fact, relied upon by the petitioner before the MAT. In that case an Assistant Director who was on deputation at the High Commission at London for three years failed to report back upon transfer. The Enquiry Officer held that the charge of misconduct was established and that the absence from duty between February 1979 and November 1981 involved grave misconduct. The Tribunal, however, held that "*grave misconduct*" as defined in Rule 8(5) of the CCS (Pension) Rules had not been committed. The Supreme Court distinguished D.V. Kapoor's case holding that there were vital differences since (i) no legitimate reason had been found for the Respondent to absent himself or to refuse to join his duties at Delhi; (ii) The Enquiry Officer had come to the conclusion that the employee had willfully disobeyed Government orders and that he had furnished untenable excuses relating to his own and his wife's illness in order not to join duties; (iii) The conduct of employee was pre-meditated since he had already purchased a house at London at the beginning of his tenure which showed that he had no intention of returning. The Supreme Court held that looking to the facts of the case, the charge of grave misconduct had been correctly held to be proved. The order

of the Tribunal was set aside.

13] In ***State of Punjab v. Sukhwinder Singh, 1999 SCC (L&S) 1234***, the Supreme Court considered Rule 16.2 of the Punjab Police Rules under which a dismissal was liable to be awarded “*for the gravest acts of misconduct*” or as the cumulative effect of continued misconduct proving incorrigibility. The Supreme Court allowed an appeal against the order of the High Court which had held that the misconduct had not been willful. The Court noted that Members of the Police force have to attend duties which have been allocated to them and ought not to absent themselves and this was a matter of paramount public interest which must outweigh private considerations. In that context, the Supreme Court held thus:

“That the order of dismissal did not use the “mantra” of “gravest act of misconduct” is not determinative. The substance of that conclusion is to be found in that order. When a policeman is repeatedly absent from duty, it cannot but be reasonably concluded that there is incorrigibility in his continued misconduct.”

14] All these decisions were considered by the Division Bench of this Court in case of *K. B. Nimbalkar* (supra), which was a case where powers under Rule 27 of the MCS

(Pension) Rules, 1982 were exercised to withhold pension of a jailer who was found to be negligent in permitting the under-trial prisoner to bring unauthorised articles including television set, video recorder and video cassettes in the prison cell. The Division Bench, speaking through Dr. D. Y. Chandrachud (as His Lordship then was) held thus :

“These decisions of the Supreme Court establish that in determining as to whether a case for withdrawal of pension under Rule 27 of the Maharashtra Civil Services (Pension) Rules, 1982 has been established, it is the substance of the matter and the not form that needs emphasis. In a given case, as a matter of form, the employer may well use the expression “grave misconduct” or “negligence”. However, a mere use of those words cannot on the one hand be dispositive of the question as to whether the misconduct is grave or, as the case may be, whether a charge of negligence has been found to be established in accordance with law. On the other hand, where the nature of the charge, the conduct of the employee and the finding of misconduct demonstrate that the misconduct is of a grave nature and the charge of negligence has been established, it would be most inappropriate for the Court to interfere merely because the order does not contain a dogmatic recital of the mantra laid down in the rules. Courts do and must have regard to the substance of the misconduct which has been established.”

15] In the present case, the charge established against the respondent no doubt, qualify to be regarded as a grave misconduct / negligence. Merely because, these terms were not stated in the penalty order, the MAT, upon

misconstruction of the ruling in *D. V. Kapoor* (supra) was not justified in interfering with the penalty. The view taken by the MAT is in excess of jurisdiction and in fact, directly contrary to the view taken by the Division Bench of this Court in the case of *K. B. Nimbalkar* (supra).

16] In the circumstances and for the reasons, which we have indicated, we set aside the impugned judgment and order dated 17th June 2004 made by the CAT in OA No. 368 of 2003. Rule is made absolute in terms of prayer clauses (a) and (b), except that there shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)

CHANDKA