

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

WRIT PETITION NO. 3732 OF 2003

Bhagwan D. Borade (Deceased)
through Smt. S.B. Borade ...Petitioner
Versus
The State of Maharashtra and ors. ...Respondents

Mr.A.S. Rao a/w. Mr. S.P. Saxena for the Petitioner.
Mr. N.C. Walimbe, AGP for Respondent Nos.1 to 6.

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

DATE : 24th APRIL 2018.

ORAL JUDGMENT:

1] Heard learned counsel for the parties.

2] The challenge in this petition is to the judgment and orders dated 5th October 2001 and 4th February 2002 made by the Maharashtra Administrative Tribunal (MAT), Mumbai in O.A. No. 581 of 1993 and Review Petition No. 100 of 2001 instituted by the husband of the petitioner Shri.Bhagwan D. Borade (Borade) to question the order dated 2nd January 1993 imposing upon him the penalty of compulsorily retirement him from the service for misconduct.

3] Mr. A.S. Rao, learned counsel for the petitioner, submits that the finding of enquiry officer that the petitioner (Borade) had indulged into any misconduct is vitiated by perversity. He points out that the petitioner (Borade), when he was appointed as Administrator at Satara Nagar Palika, upon noticing that a prime plot belonging to Nagar Palika was being encroached upon, had only passed a Resolution that such plot be allotted to the employees of the Nagar Palika on lease or sale basis so as to enable them to set up a housing project for their residence.

4] Mr. Rao submits that the Resolution very clearly states that this was subject to the approval from the Government. Mr. Rao submits that even assuming that there was any infirmity in such Resolution, the Chief Officer who was subsequently, appointed could have taken action as per Section 77 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (said Act) to rescind such Resolution. No such steps were taken by the Chief Officer. In these circumstances, Mr. Rao submits that the enquiry officer was not justified in holding

that the petitioner (Borade) had committed any misconduct or that such misconduct was duly established in the departmental enquiry.

5] Mr. Rao submits that ultimately, several other officers, illegally granted permissions for construction on the plot of Nagar Palika and though action was initiated against all such officers, it is not known as to whether action was in fact taken against such officials. Mr. Rao submits that in such circumstances, the petitioner (Borade) ought not to have been discriminated or singled out. Mr. Rao submits that the enquiry officer has not evaluated the evidence on record properly and despite there being no evidence whatsoever in relation to charges III and IV, the enquiry officer has held that such charges stand proved against the petitioner (Borade). He submits that there is perversity in the findings recorded by the enquiry officer.

6] Mr. Rao further submits that the Resolutions dated 1.09.1982 and 7.9. 1982, for which, the petitioner (Borade) has been charged were intended to save the Nagar Palika property which was reserved for parking purposes from

encroachment by strangers. He submits that the Resolutions were not made to profit either the petitioner (Borade) or any municipal employees, but were for the betterment of the conditions of service of the municipal employees.

7] Mr. Rao points out that the enquiry officer has ignored the voluminous documentary evidence in the form of notings in the handwriting of Assistant Chief Officer (Mr.Mhadik and Mr. Rajopadhaya) granting permission to various persons for construction on the said plot and the fact that no action was taken against these officers, but it is only the petitioner who was singled out for hostile discrimination. Mr. Rao submits that the Resolutions were only recommendatory in nature and therefore, there was no misconduct as such on the part of the petitioner (Borade), which aspect, has been ignored by the disciplinary authority. For all these reasons, Mr. Rao submits that the impugned judgments and orders are liable to be set aside.

8] Mr. Walimbe, learned counsel for the respondents, submits that full opportunity was afforded to the petitioner (Borade) in the course of disciplinary proceedings, which includes the enquiry before the enquiry officer. The findings recorded by the enquiry officer are based upon the evidence on record. He submits that there is absolutely no perversity. There is both documentary as well as other evidence to prove the charges against the petitioner (Borade).

9] Mr. Walimbe submits that this was a case of municipal property, which was reserved for parking and the petitioner, in his capacity as Administrator, instead of taking care of municipal property, chose to facilitate its allotment to the municipal officer/employees, contrary to the provisions of law and legal procedures. He submits that despite of this, penalty of only compulsory retirement came to be imposed upon the petitioner (Borade). He submits that the petitioner (Borade) was granted 2/3rd of the pension which he would have otherwise received and upon his demise his wife who is now pursuing this petition is also in receipt of family pension in accordance with rules.

For all these reasons, Mr. Walimbe submits that this petition may be dismissed.

10] The rival contentions now fall for our determination.

11] It is trite that as the Administrator, it was the duty and the responsibility of the petitioner (Borade) to ensure that the municipality functions in accordance with prescribed rules and regulations. In particular, it was the duty and the responsibility of the petitioner (Borade) to ensure that the municipal property is not frittered away for any unlawful purposes. Instead, the petitioner (Borade) on the specious plea that a prime municipal plot which was reserved for parking was being encroached upon, passed Resolutions proposing the allotment of such plot to employees of the municipality at throwaway prices.

12] On basis of such Resolutions, ultimately, the municipal property was frittered away. Now the defence is that the Resolution was in the nature of recommendation and the allotment was to be subject to the approvals from the Government. The defence is also that ultimately, the

municipality has recovered the plot from the employees and therefore, as of date, no much loss is caused to the municipality.

13] The disciplinary authorities have disbelieved such defences and there is really no perversity demonstrated by learned counsel for the petitioners in the findings recorded by the disciplinary authority, which findings have been upheld by the MAT in the impugned judgment and order.

14] The charge-sheet served upon the petitioner (Borade) enlisted four articles of charge:

- (i) That Mr. Borade, in breach of the provisions of Section 92 of the M.M. Act and without obtaining any prior approval from the Government sold municipal property at low rates and thereby, caused financial loss to the municipality;
- (ii) That Mr. Borade allotted municipal property to Shri. Mahadik, Rajopadhya, Shri. D.V. Vaidya, the employees of the municipality, even though, such employees, had their own ancestral properties and consequently, were ineligible for allotment ;

(iii) Mr. Borade abused his powers as Administrator of the municipality and allotted the municipal property to the employees, even though, this property was reserved for parking and even though, this reservation had never been changed in terms of Section 37 of the M.R.T.P. Act ;

(iv) Mr. Borade, in breach of rules, by non-application of mind and without consulting the public works department made allotments to almost 76 persons for trade purposes (Koka) .

15] The enquiry was held into the charges levelled against the petitioner (Borade). There is no complaint as regards any non-compliance with principles of natural justice or fair play. The enquiry officer submitted his report, which is a fairly detailed report made after taking into consideration not only the evidence on record, but also, all the contentions raised by and on behalf of the petitioner (Borade). Finally, the enquiry officer has held all the charges leveled against the petitioner (Borade) as proved.

16] A show cause notice was issued to the petitioner

(Boarde) as to why the enquiry report should not be accepted and penalty of dismissal imposed upon the petitioner (Borade). In response, the petitioner (Borade) filed a very detailed response and urged that the enquiry report be set aside and the petitioner (Borade) be granted promotion as an Additional Collector.

17] Upon detailed consideration of the petitioner's (Borade) response, the respondents by order dated 2nd January 1993 imposed upon the petitioner penalty of compulsory retirement, even though, earlier, the penalty of dismissal had been proposed.

18] The petitioner (Borade) then instituted O.A. No. 581 of 1993 before the MAT to question the order of compulsory retirement. By impugned judgment and order dated 5th October 2001, the MAT, after considering all the contentions raised by and on behalf of the petitioner (Borade) has dismissed the original application.

19] At paragraphs 7 and 8, the MAT has observed thus:

"7. The Enquiry Officer has considered the documentary as well as oral evidence on record and

on appreciation of the said oral evidence as well as documentary evidence has come to the conclusion, that the action of the Applicant in selling and leasing out property was contrary to the provisions of Section 92 of the Maharashtra Municipality Act. He has also come to the conclusion that the, amount of lease as well as amount of selling price affected by the present Applicant was very low and the same was clear indicated of his dishonest intention. The said findings recorded by the Enquiry Officer could not be said to be either perverse or with no evidence. No doubt, the Enquiry Officer has also observed that along with the present Applicant his successor Shri. D.N. VAIDYA and Shri. BHOKARE, Chief Officer of Satara Municipal Council, Deputy Chief Officer Shri. RAJOPADYE and Assistant Chief - Officer Shri. MAHADIK were also equally responsible for those under tabel delings. The material on record clearly shows that the findings recorded by the Enquiry Officer could not be said to be either perverse or with no evidence. When that is for the position, then it is not possible for this Tribunal to interfere with the said findings. I am therefore unable to hold that the findings recorded by Enquiry Officer deserves to be quashed and set aside.

8. It must be further mentioned that the punishment awarded to the present Applicant could notbe said to be disproportionate to the misconduct committed by the present Applicant. Though the Enquiry Officer had recommended the punishment of the dismissal from service, the government awarded him punishment of compulsory retirement by taking into consideration that he was at the fag end of his - service. Therefore, on the point of punishment Iam unable to hold that any interference is called for."

20] We have also considered the contentions of Mr. Rao and we find that such contentions lack merit particularly, taking into consideration the restricted scope of judicial

review of findings recorded by the disciplinary authority. This is certainly not a case where findings recorded by the disciplinary authority and confirmed by the MAT can be said to be perverse, in the sense that such findings are not based upon any evidence on record or contrary to the weight of evidence on record.

21] In fact, the charges against the petitioner (Borade) stand proved on the basis of evidence on record. To say that the Resolution passed by the petitioner (Borade) was only recommendatory or that there were other Chief Officers, who followed the petitioner (Borade) but did not take any action to rescind the Resolution, is hardly any defence that warrants acceptance in the exercise of extraordinary and equitable jurisdiction under Articles 226 and 227 of the Constitution of India.

22] The evidence on record bears out that it is on the basis of these Resolutions passed by the petitioner (Boarde) when he was the Administrator of the municipality that the allotments were ultimately made and even constructions came up. There is no clarity as to whether

the constructions have now been demolished and the property is now restored to the municipality. Even assuming that this has been done, it cannot be said that the petitioner (Borade) is required to be absolved of his charges, now that the municipal property is allegedly restored to the municipality. In any case, it is not for this court to interfere with the findings of fact in the absence of any perversity or non-application of mind. Similarly, this is also not a case where the penalty imposing is disproportionate or shocks conscience of the court.

23] In ***Union of India & Ors. vs. P. Gunasekaran - AIR 2015 SC 545***, the Hon'ble Supreme Court, in the context of exercise of powers under Articles 226 and 227 by the High Court in relation to disciplinary proceedings has held that the High Court is not and cannot act as a second court of first appeal. The Hon'ble Court has spelt out the restrictive parameters of jurisdiction to be exercised by a High Court in relation to disciplinary proceedings. It is held that the High Court cannot go into reliability and adequacy of evidence. Similarly, the High Court cannot re-appreciate the evidence before the enquiry officer in order to reach to

a different finding. Interference is permitted only where the findings of fact is perverse. The test laid down by the Hon'ble Supreme Court, which will apply also to Central Administrative Tribunal exercising the powers of judicial review are as follows :

- “(I) The High Court can only see whether:*
- a). the enquiry is held by a competent authority;*
 - b). the enquiry is held according to the procedure prescribed in that behalf;*
 - c). there is violation of the principles of natural justice in conducting the proceedings;*
 - d). the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;*
 - e). the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;*
 - f). the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;*
 - g). the disciplinary authority had erroneously failed to admit the admissible and material evidence;*
 - h). the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;*
 - i). the finding of fact is based on no evidence.*

- II) Under Article 226/227 of the Constitution of India, the High Court shall not:*
- (i). re-appreciate the evidence;*
 - (ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;*
 - (iii). go into the adequacy of the evidence;*
 - (iv). go into the reliability of the evidence;*

(v). interfere, if there be some legal evidence on which findings can be based.
(vi). correct the error of fact however grave it may appear to be;
(vii). go into the proportionality of punishment unless it shocks its conscience.”

24] The MAT, in the present case, has quite correctly resisted the invitation of the petitioner (Boarade) to go into the issue of adequacy of evidence. There is, accordingly, no jurisdictional error in the impugned judgment and order.

25] The petitioner's contention that no action was taken against the Chief Officers and other municipal employees, who were also responsible for the charges which were leveled against the petitioner (Borade) is quite misconceived. Equality is a positive concept and on the basis that allegedly no action was taken against the municipal employees, the petitioner (Borade) cannot invoke the provisions of Article 14 of the Constitution of India. In any case, all that Mr. Walimbe has submitted that the petitioner (Borade) was a State Government employee who had only been deputed as an Administrator to govern the municipal affairs, because an elected body was not available. He submits that action against the municipal

employees was required to be taken by the municipality concerned. In any case, we are satisfied that since the charges against the petitioner (Borade) have been proved and there is no perversity in the findings recorded by the enquiry officer and the disciplinary authority, there is no case made out to interfere with the impugned judgment and order made by the Tribunal.

26] We have been informed that the petitioner was awarded pensionary benefits to the extent of two-third of the pension and after his demise, his wife is drawing the family pension in terms of the rules. This is in fact not disputed by Mr. A.S. Rao, learned counsel for the petitioner.

27] Mr. A.S. Rao, learned counsel for the petitioner, however, submits that the petitioner (Borade) had requested for release of entire pension. This request, was declined by reference to Rule 101 of Maharashtra civil Services (Pension) Rules, 1982 (said Rules). Mr. Rao submits that Rule 101 of the said Rules was not applicable to the case of the petitioner, since, the petitioner was not seeking for any compassionate pension. Mr. Rao submits

that the Rule applicable to the case of the petitioner (Borade) was Rule 100 of the said Rules, which, confers a discretion upon the respondents to award pension or gratuity or both at the rate of not less than two-third and not more than full compensation pension or gratuity or both admissible to him on the date of his compulsory retirement.

28] Although, it is correct that Rule 101 of the said Rules, was not relevant to the case of the petitioner and what was relevant was Rule 100 of the said Rules, we find that the discretion has been appropriately exercised to award the petitioner (Borade) pension at two-third the normal rate. There is nothing unreasonable in the exercise of such discretion in the facts of the present case.

29] In the course of arguments, the contention was raised by Mr. A.S. Rao that the petitioner's (Borade) service career was "*blemish-less*". In order to consider the petitioner's contention as regards grant of some additional compensation, we had adjourned the matter in order to enable Mr. Walimbe, learned AGP to take instructions as to

whether the petitioner's (Borade) service career had indeed been "*blemish-less*" as contended by Mr. Rao in emphatic terms.

30] On the adjourned date, Mr. Walimbe, learned AGP, produced on record the material that yet another charge-sheet for misconduct had in fact been issued to the petitioner (Borade) on 14th January 1993. In this case also, the charge was enquired into and the enquiry officer held that such charge was proved. The enquiry officer had in fact recommended 50% cut in the pensionary benefits available to the petitioner (Borade). All this is considered by the MAT in its judgment and order dated 14th September 2005 in O.A. No. 794 of 2003. In this judgment and order, which is not the subject matter of the challenge in the present petition, even the contentions in relation to pensionary benefits have been considered by the MAT. In these circumstances, neither can the career of the petitioner (Borade) be said to be "*blemish-less*" nor can it be said that the discretion under Rule 100 of said Rules had not been validly exercised. In fact, there is absolutely, no unreasonability in the exercise of discretion in the matter

of grant of pensionary benefits. Therefore, the contention of Mr. Rao cannot be accepted.

31] For all the aforesaid reasons, we dismiss this petition. Rule is discharged. There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)