

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

WRIT PETITION NO. 1795 OF 2009

Sunil B. Malshikare	}	Petitioner
Versus		
The Superintendent of Police	}	
Thane (Rural), Thane and Anr.	}	Respondents

Mr. O. M. Kulkarni, advocate for the petitioner.
Mr. M. M. Pable, AGP for State.

**CORAM :- DIPANKAR DATTA, CJ &
M. S. KARNIK, J.**

DATE :- NOVEMBER 17, 2021

PC :-

1. Original Application No. 235 of 2008, on the file of the Maharashtra Administrative Tribunal, Mumbai Bench, Mumbai (hereafter "the Tribunal", for short) was dismissed by an order dated 22nd October 2008. Aggrieved thereby, the original applicant (hereafter "the petitioner", for short) has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India.

2. The petitioner was appointed as a Police Constable vide order dated 31st January 2003 on temporary/ad-hoc basis, subject to verification of documents viz. caste/tribe verification certificate, sports certificate, past character, etc. At the relevant time, the petitioner was attached as bodyguard of one Anil Gavad, Chairman of Agricultural Produce Marketing Committee (APMC), Palghar. During such

attachment, an unfortunate incident took place which, ultimately, triggered the petitioner's termination from service of the Police Force. On 17th January 2005, while the petitioner and one Ravindra Shinde, alleged acquaintance of the said Anil Gavad, were chitchatting and joking, a bullet from the service gun of the petitioner, which was in his possession, went off and struck the said Ravindra Shinde. Owing to the bullet injury, the said Ravindra Shinde passed away. A crime was registered against the petitioner for an offence punishable under section 304-A of the Indian Penal Code, 1860 (hereafter "the IPC", for short). In course of investigation of the crime, the petitioner was arrested and detained in judicial custody.

3. On 28th January 2005, a show-cause notice was issued by the respondent no.1 to the petitioner calling upon him to explain why his service should not be terminated after a month under Paragraph 78(vi) of the Bombay Police Manual, Vol.-I. The petitioner replied to the show-cause notice and explained the circumstances in which the bullet injury was caused to the said Ravindra Shinde. By an order dated 28th February 2005, the petitioner was terminated from service in terms of the said provision. English translation of the order in vernacular reads as follows: -

"Office of the Superintendent of Police,
Thane Rural,
Date: 28/2/2005

Subject: - Regarding termination of services.
Reference: - This office notice No. 5/E.B./D.E./
Delinquency/Malshikare/05,
dated 28/1/2005

ORDER: -

As the services of P.C./1775-Sunil Balasaheb Malshikare, attached to the Headquarters, Thane Rural are not required henceforth, as per Part-1, Rule 78(6) of the Police Manual, his services are terminated from the date of this order.

(R.E.Pawar)
Superintendent of Police
Thane Rural"

4. The said order of termination was the subject matter of challenge in the original application before the Tribunal which, as noticed above, has been dismissed.
5. On behalf of the petitioner, it was contended that the criminal court acquitted him of the charge under section 304-A, IPC and that the State unsuccessfully preferred an appeal there-against. It was further contended by the petitioner that the respondent no.1 did not consider the explanation offered by the petitioner in reply to the show-cause notice in the proper perspective. It was also contended before the Tribunal that since a show-cause notice had preceded the order of termination, a disciplinary proceeding ought to have followed. Although the order of termination is *ex facie* not stigmatic, but in effect it was punitive in nature; hence, termination of the petitioner's service is bad and illegal.
6. The Tribunal heard the parties and was of the opinion that the order of termination did not suffer from any infirmity and, accordingly, upheld the same.
7. Appearing in support of the writ petition, Mr. Kulkarni, learned advocate, has submitted that the Tribunal erred in the

exercise of its jurisdiction in not granting relief to the petitioner. According to him, the respondent no.1 had proceeded against the petitioner by issuing a show-cause notice and that the order of termination, which followed such notice, was entirely on the basis of a misconduct perceived to have been committed by the petitioner while on duty.

8. Reliance was placed by Mr. Kulkarni on the decisions reported in (2007) 10 SCC 71 (**Jaswantsingh Pratapsingh Jadeja vs. Rajkot Municipal Corporation and Anr.**); (2008) 2 SCC 479 (**Nehru Yuva Kendra Sangathan vs. Mehbub Alam Laskar**); (2010) 8 SCC 220 (**Union of India and Ors. vs. Mahaveer C. Singhvi**) and (2015) 15 SCC 151 (**Ratnesh Kumar Choudhary vs. Indira Gandhi Institute of Medical Sciences, Patna, Bihar and Ors.**) for the proposition that the impugned termination being based on a misconduct committed by the petitioner, principles of natural justice ought to have been complied with; and if any order of termination, although apparently non-stigmatic, is issued as a facade for not holding disciplinary proceeding, the same ought to be interdicted by applying the test of misconduct having been the “foundation” of such termination.

9. Upon hearing Mr. Kulkarni, we have not considered it necessary to call upon Mr. Pable, learned AGP for the respondents to address us.

10. At the outset, we record that it is unnecessary for us to decide the present writ petition on the basis of the law laid down in the decisions cited by Mr. Kulkarni. All such decisions turned on its own facts. In none of the cases did the Court

have the occasion to deal with a situation of the present nature where, in the discharge of official duty, a police constable was entrusted with a gun and from such gun a bullet went off taking the life of an individual. We shall, for the purposes of the present case, assume that it was indeed as a result of an accident that the said Rajendra Shinde lost his life. However, sight cannot be lost of the fact that the petitioner was a police constable and was assigned the duty of a bodyguard, armed with a gun, and he cannot feign that he was not accountable or responsible in any manner for any shot having been fired from it. We have perused the reply of the petitioner to the show-cause notice and found that the said Ravindra Shinde, being a close acquaintance of the said Anil Gavad, had the tendency of fiddling with the service gun of the petitioner and at times made unreasonable request to him to part with its possession. This was more reason why the petitioner should have taken more care to ensure that there is no misuse of the service gun. We shall assume that the petitioner did not actively contribute to the death of the said Ravindra Shinde, but his passive and indifferent indisposition in taking steps as were expected of a person of reasonable prudence, in the circumstances, cannot escape notice. The gun having been placed at his disposal, the petitioner ought to have taken utmost care to ensure that no shot is fired therefrom, except in cases of dire necessity to protect the said Anil Gavad. The respondent no.1 viewed the incident of death of the said Ravindra Shinde with seriousness and took a decision to terminate the petitioner's services invoking the provisions of Paragraph 78(vi) of the Bombay Police Manual,

Vol. I, which reads as follows: -

"78(vi): Whenever the services of any temporary Government servants are to be terminated because of any act of misconduct or on the ground of their unsuitability, the officers concerned, after satisfying themselves, should merely terminate the services of the persons by giving them a month's notice without charge-sheeting them or mentioning in the order any reason for the discharge, unless the misconduct is of a serious nature and it is considered that, in the interest of public service, the persons should be dismissed from service so as to mar their re-employment. In the latter case, steps should be taken to dismiss the person concerned after holding a regular Departmental Enquiry according to the prescribed procedure."

(emphasis supplied)

11. We have perused the order of termination dated 28th February 2005.

12. The petitioner having been appointed on temporary basis, had no right to post. The order of termination is couched in such language that it leaves none in doubt that it is a simplicitor termination order arising out of formation of opinion that the petitioner's service is no longer required. It could be so that unsatisfactory performance or unsuitability for the job was the main reason for the aforesaid order being issued but to equate it with an order which is stigmatic and issued as a punitive measure is clearly not called for.

13. To repel the contention of Mr. Kulkarni that show-cause notice was issued against the petitioner and that itself ought to be viewed as a circumstance of the termination being effected as a punitive measure, we may only refer to the decision of the Supreme Court reported in 2003 (3) SCC 263

(Mathew P. Thomas vs. Kerala State Civil Supply Corporation Ltd.), where the Supreme Court went to the extent of holding that even after issuance of a show-cause notice containing serious allegations of misconduct, the subsequent termination order based on unsatisfactory performance and without an enquiry cannot be seen to be stigmatic. In such decision it has also been laid down that the distinction between “motive” or “foundation” is thin and overlapping and that ultimately, the question as to whether a termination is simplicitor or punitive, ought to be decided having due regard to the facts and circumstances of each case.

14. In our view, deciding each case on its facts as to whether an order of termination is punitive or simplicitor in the light of the guidance provided by the decision in **Mathew P. Thomas** (supra) is a more satisfactory test than the confusing test of “motive” or “foundation”.

15. Bearing in mind the facts and circumstances leading to the impugned termination of service, discussed above, we have absolutely no hesitation in our mind that the petitioner as a police constable having failed to discharge his duty to the utmost satisfaction of his appointing authority and such authority having formed an opinion that the petitioner’s service is no longer required, any objection as to why in this case a disciplinary proceeding did not precede the impugned termination of service would be without substance. We hold that not only is the facade of the impugned order an order of simplicitor termination, the real face behind it is not to get rid

of the petitioner on the ground of misconduct.

16. The writ petition is devoid of any merit and is, accordingly, dismissed. The parties are left to bear their own costs.

SALUNKE
J V

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by SALUNKE J V
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(M. S. KARNIK, J.)

(CHIEF JUSTICE)