

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7488 OF 2021

Narayan s/o Madhavrao Gore ... **Petitioner**
Aged 59 years, Occu: Service,
R/o House No.1161, Gawalipura,
Chawani, Cantonment Board,
Aurangabad 431 002

VERSUS

1. The Lieutenant General,
General Officer,
Commanding-in-Chief,
Southern Command, Cantonment Cell,
OL Branch, HQ Southern Command
Pune.
2. The Cantonment Board,
Aurangabad 431 002
(Through its President)
3. The Cantonment Board,
Aurangabad 431 002
Through its Chief Executive Officer)

Mr. V. D. Sapkal Senior Advocate i/by Mr. S.T. Chalikwar, Advocate
for the petitioner
Mr. S.W. Munde, Standing Counsel/ASG for the Respondents.

CORAM : C. V. BHADANG AND
SANDIPKUMAR C. MORE, JJ.
DATE : 19 JULY 2022

JUDGMENT (PER C.V. BHADANG, J.)

By this petition under Article 226 of the Constitution of India, the petitioner is challenging the imposition of punishment on him of (i) reducing his pay to the minimum of scale for a period up to 30 June 2019 with no increments during this period and (ii) the period of service from the date of his suspension till reinstatement i.e. from 13 May 2015 to 1 August 2016 being treated as 'dies non'. On the expiry of period ending on 30 June 2019, the petitioner was held entitled to earn increments as per Rules on his present pay with 'no back effect of increments'.

2. Brief facts, necessary for the disposal of the petition, may be stated thus:

That the petitioner is in employment of the respondent-Cantonment Board. At the relevant time, the petitioner was working as a Tax clerk. A contract for collection of fees and brokerages from the weekly market of the Cantonment Board was awarded to one Mr. Sayed Baquar Ali Zaidi (the Contractor for short) for the period 2013-2014 and thereafter for the period 2014-2015. The present petition has arisen out of the default committed by the Contractor in the matter of payment of fees and brokerages, as agreed, to the Cantonment Board and the consequent dishonour of the cheques, submitted by the Contractor towards such fees/brokerages for the period 2014-2015. The first of such dishonour of the cheque was somewhere in April 2014 and May 2014. The facts disclose that at the relevant time, the cheques were placed in the custody of the

petitioner as a Tax Clerk, who was required to deposit the same in the Bank for realization.

3. The third respondent- Chief Executive Officer (CEO) who is the disciplinary authority, issued a show cause notice to the petitioner on 5 May 2015 alleging 'negligence' in performance of his duties and not informing 'in writing' about the dishonour of cheques to the Chief Executive Officer and some other consequential lapses in the matter of placement of the Bank guarantee on record. It may be mentioned that in terms of the conditions of the Tender and the Contract, the contractor was supposed to give solvency for the sum of Rs.5 lakhs and a Bank guarantee of Rs.2.50 lakhs. Be that as it may, the petitioner gave a detailed reply to the show cause notice refuting the allegations.

4. On 13 May 2015, the petitioner was placed under suspension in contemplation of the departmental enquiry, following which a charge-sheet dated 20 November 2015 was served on him. Although the charge-sheet mentions charges under 8 separate Heads/Articles, there was no Article V in the Charge sheet as noticed by the enquiry officer. The Chief Executive Officer appointed Dr. Vinod Dhamande, ARMO, Accounts Department, General Hospital as the enquiry officer, who conducted enquiry into 7 Articles of charge. The enquiry officer, vide his report dated 10 February 2016, found the charge under Articles I, II and IV to be proved. In so far as the remaining heads, the petitioner was exonerated.

5. Thereafter, the third respondent- CEO, by order dated 5 May 2016, imposed major penalty on the petitioner of dismissal from service under Rule 11 (2) (viii) of the Cantonment Fund Servants Rules, 1937.

6. The petitioner challenged the same before the respondent No.2- Cantonment Board being the first appellate Authority. The second respondent, vide Cantonment Board Resolution (CBR) No.11 dated 2 July 2016, modified the punishment to reduction of the pay of the petitioner to the minimum of the pay scale up to 30 June 2019 with no increment during this period and the period of suspension being treated as 'dies non'. The second respondent directed an undertaking in this respect to be obtained from the petitioner.

7. It appears that the petitioner filed undertaking on 1 August 2016 and eventually came to be reinstated in service with effect from the said date. However, the petitioner challenged the order of the second respondent before the first respondent- General Officer, Commanding-in-Chief, being the second appellate authority. The first respondent, by order dated 9 March 2021 has confirmed the order passed by the first appellate authority. Hence this petition.

8. We have heard Mr. V. D. Sapkal, the learned Senior Counsel for the petitioner and Mr. S.W. Munde, Standing Counsel/ASG for the Respondents. With the assistance of the learned counsel for the parties, we have gone through the record.

9. It is submitted by Mr. Sapkal, the learned senior Counsel for the petitioner, that the enquiry officer had come to the conclusion that it was the combined responsibility of the Cashier, Tax Clerk, Office Superintendent, Accountant and the Chief Executive Officer, to ensure timely realization of the cheques issued by the contractor. It is submitted that thus, the petitioner cannot be singled out and punished for any such lapses. It is submitted that the petitioner being an employee of the lowest rank, working as a tax clerk, has been made a scapegoat by letting off the other superior officers who were equally responsible. The learned senior counsel strenuously urged that the act for which the petitioner has been held guilty is that he had failed to inform the Chief Executive Officer 'in writing' about the dishonour of the cheques. He submitted that this assumes importance in view of the fact that the dishonour of the cheques was well within the knowledge of the Chief Executive Officer as well as the matter about such collection of the market fees was discussed in the Board meetings and the enquiry officer has also noted that a notice was issued to the Contractor as early as on 16 May 2014 and there was also advice from the Assistant Solicitor General (ASG) of India to the Board to initiate action under section 138 of the Negotiable Instruments Act. He, therefore, submitted that the charge is of hyper technical nature, of not informing the Chief Executive Officer 'in writing', which, in the submission of the learned senior counsel, was inconsequential as the matter was already known to the superiors. It is submitted that it is not on

account of any such alleged lapses on the part of the petitioner that the Board has suffered any financial loss.

10. It is next submitted that although the enquiry officer had found majority of the charges to be not proved, to be precise, four out of seven charges, the third respondent, without issuing any show cause notice, has found all the charges to be proved which is not permissible. It is submitted that if the disciplinary authority decides to differ with the opinion of the enquiry officer, the delinquent employee is required to be issued with show cause notice and heard. For this purpose, reliance is placed on the decision of the Supreme Court in **Punjab National Bank and Others Vs. Kunj Behari Mishra (1998) 7 Supreme Court Cases 84**, **Ranjit Singh Vs. Union of India and others (2006) 4 Supreme Court Cases 153**. Reliance is also placed on the decision of the Supreme Court in **Managing Director, ECIL Hyderabad Vs. B. Karunakar AIR 1994 Supreme Court 1074** and **Yoginath D. Bagde Vs. State of Maharashtra and another (1999) 7 Supreme Court Cases 739**. He, therefore, submitted that the disciplinary action taken against the petitioner is on the basis of charges which can be said to be concocted or groundless and without any evidence. He submitted that filing of the undertaking may not come in the way of the petitioner in challenging the order passed by the first appellate authority as the petitioner cannot be prevented from exercising his legal rights/remedies. The learned senior counsel submitted that under section 28 of the Indian Contract Act, 1872, agreements in restraint of legal proceedings are void.

11. The learned standing counsel for the respondents has supported the impugned order. It is submitted that the petitioner had committed dereliction of duty and negligence in the matter of his failure to report in writing, to the Chief Executive Officer about the dishonour of the cheques thereby shielding the contractor and causing monetary loss to the Board. It is submitted that the petitioner had also failed to handover the charge after he was placed under suspension which is an act of insubordination. It is submitted that the petitioner having furnished the undertaking and submitted to the orders passed by the first appellate authority, could not have challenged the same any further. He, therefore, submitted that the petition be dismissed.

12. We have given our anxious consideration to the rival circumstances and the submissions made.

13. As noticed earlier, the departmental enquiry was held against the petitioner under seven heads, although the charge-sheet mentions eight heads but without having any allegations under Article V. The petitioner was charged with negligence in the performance of his duties, in not informing the Chief Executive officer 'in writing' about the dishonour of the cheques from the contractor. The enquiry officer has held only Charge Nos. I, II and IV to be proved.

14. The charge levelled at Article I reads as under:

"I) That due to negligence of Shri Narayan Gore, Tax Clerk, Aurangabad, Cantonment Board suffered loss of funds by not reporting in writing to Accountant and

Chief Executive officer, Cant. Board with reference to dishonour of 11 Nos. of weekly market cheques."

(Emphasis supplied)

The enquiry officer has found that frequent notices were given to the weekly market contractor on 16 May 2014, 30 April 2015, 26 May 2015, 16 June 2015, 27 August 2015, February, 2015 and August 2014. The enquiry officer has also found that the Contractor had given letter regarding rebate in payment and settlement and asked for a rebate of Rs.20 lakhs. It has been further found that in all the Board meetings, arrears, settlement of tax and revenue were placed for consideration which were signed by the Accountant and the Chief Executive Officer and the same were approved. The enquiry officer has further found that although the ASG had asked to file a summary suit immediately on 26 May 2015, no action was taken. In the context of these findings, the enquiry officer has concluded as under:

"I find Mr. Narayan Gore guilty of not informing CEO in writing but it is combined responsibility of Cashier, Tax Clerk, OS, Accountant and CEO as it cannot be said that no one was aware of the facts".

15. Article No. II reads thus:

"That the said Shri Narayan Gore, Tax clerk kept the cheque in his custody against the provision of contract, did not deposit the last installment i.e. 12th No. of cheque dated 20th march 2015 amounting to

Rs.6,05,000/- of weekly market in cantonment fund showing negligence of duty.

The enquiry officer has concluded as under:

"Opinion- I found 15 cheques, 14 were submitted in bank, one cheque No. 984029 was honoured other cheques were resubmitted 3-4 times. In the month of March three cheques were submitted on Date 21/03/2015 Extra cheques were submitted after completion of contract with the hope of recovery. Hence this charge could not be proved How contractor has given 15 cheques for payment of 12 months is a surprise. Mr. Narayan Gore's irresponsibility and non-attentiveness to work is observed for which strict warning should be given to him.

16. Lastly under Article IV, the following charge was levelled.

"That the said Shri Narayan Gore, Tax Clerk, Cantonment Board, vide contract agreement for the collection of fees and brokerages in respect of cantonment weekly market w.e.f. 1st April 2014 to 31st March 2015, agreement condition No.1 the Bank guarantee of Rs.2,50,000/- not on record of the office as required showing negligence of duty.

17. The enquiry officer has found the petitioner guilty because there is no 'written document'. It is further found that the petitioner ought to have informed the Chief Executive Officer 'in writing' and ensured that bank guarantee was placed on record of the office. The final conclusion reached by the enquiry officer reads thus:

"1. During the course of enquiry and verification of records, it is observed that Mr. Sayed Baquar Ali Zaidi, the weekly market contractor was habitual

defaulter and failed to follow the terms and conditions of contract signed by him for the period ending 31st March 2014. It was informed by the then CEO to Mr. Sayed Baqar Ali Zaidi that the cheques submitted by him towards monthly installment of market bounce regularly and he was also directed to show cause as to why his name should not be blacklisted vide letter no. 9/MKTS/2014-15/138 dated 21.01.2014. Why this person is allowed to bid.

2. It is noticed that learned Asst. Solicitor General of India, High Court of Bombay bench at Aurangabad had advised the then CEO of cantonment board Aurangabad vide letter dated 30 April 2015 to initiate action against the contractor Mr. Sayed Baqar Ali Zaidi under provision of Negotiable Instrument Act under Section 138. It was further advised to file a summary suit in respect of remaining cheques. Delay to initiate action in this matter harasses the interest of the government for revenue recovery. Why action under Section 138 Negotiable Instrument Act has not been initiated.
3. There was no record or register of cheques given to cantonment board Aurangabad ideally there should be cheque register indicating date of cheque, bank, name of party, amount, purpose, posted in bank whether honored or dishonored.
4. Alterations in page numbers of file 9/MKTS/2014-15 was noticed. I have gone through charters of Duties of Accountant from Deolali, Kamptee, Kirki and Pune which indicates all Cheques has to be in custody of accountants. I was informed by the presenting officer that charter of duties for

Aurangabad Cantonment Board was published as office order in 1992 but it could not be traced.

5. I find that the Accountant, Office Superintendent and the CEO are equally responsible for the loss of the Cantonment Board. The details of inquiry proceedings duly completed are submitted in quadruplicate to the CEO for her perusal and further necessary action."

In the wake of such findings by the enquiry officer, it appears that without issuing any show cause notice to the petitioner (in the event the disciplinary authority was inclined to differ with the enquiry officer on certain articles of charge), the following order came to be issued by the Chief Executive Officer.

"On submission of inquiry report by Shri Vinod Dhamande dated 11th February, 2016, the facts were scrutinized by the Chief Executive Officer who is the competent disciplinary authority for reviewing the case. On review, Shri Narayan Gore is found guilty of the charges applied to him.

Under the authority conferred on me under rule 11 & 12 of the CFSR, 1937 and the inquiry report submitted by Shri. Vinod Dhamande, a major penalty is being imposed on him for good and sufficient causes under Rule 11(2) (viii) and he is hereby dismissed from service of the Cantonment Board."

It can thus be seen that the disciplinary authority has held the petitioner guilty of the 'charges applied to him'.

18. It is now well settled that in the event the disciplinary authority decides to concur with the finding of the enquiry officer, there is no requirement of issuance of the second show cause notice before imposition of the punishment. (This is subject to any provisions to be contrary in the relevant rules applicable to the employment). However, where the disciplinary authority is inclined to differ with the enquiry officer on one or more articles of the charge, the delinquent employee is required to be heard. It is not necessary to multiply authorities on the point. However, a reference in this regard may be made to the decision of the Supreme Court in **Punjab National Bank** (supra) wherein the Supreme Court, after referring to its earlier decision in **Managing Director ECIL Vs. B. Karunakar (1993) 4 SCC 727**, held that principles of natural justice requires such opportunity to be given. Thus, in our view, it was not open for the disciplinary authority to find the petitioner guilty of the 'charges applied to him' without affording an opportunity of being heard. The enquiry officer had found four out of seven charge as not proved.

19. This takes us to the order passed by the first appellate authority. CBR No.11 of the second respondent Board reads thus:

"11. Considered. The Board perused the appeal and the report of the enquiry proceedings. The Board noted that there was no embezzlement or misappropriation of funds by the delinquent, but instead dereliction in duties resulting in loss to the Cantonment Board. The Board resolved to allow the appeal and reinstate Shri.Narayan M.

Gore as a Junior Clerk with punishment by reducing his pay to the minimum of scale for a period upto 30.06.2019 with no increments during this period. On the expiry of this period he will earn increments as per rule on his present pay with no back effect of increments. An undertaking in this respect be taken from the individual. His performance be reviewed by the competent authority periodically. The periods of service from his date of suspension till his date of reinstatement be treated as dies non. The Board further resolved to recover the amount from the defaulter contractor by initiating court proceedings and that the matter be reviewed at every Board meeting till the outstanding amount is recovered. CEO to take action as per existing rules."

20. It can thus be seen that the Board has come to the conclusion that there was no embezzlement or misappropriation of the funds by the petitioner but only dereliction/negligence in the performance of duties which is in the wake of the finding that there was failure to inform the Chief Executive Officer 'in writing' about the dishonour of the cheques.

21. It is true that the petitioner has furnished an undertaking as required by the order of the first appellate authority and after which he was permitted to join with effect from 1 August 2016. The first respondent (Second Appellate Authority) has also noted that the lapse was only in respect of failure of the petitioner in informing in writing about dishonour of about 11 weekly market cheques issued by the Contractor and the non placing of the Bank guarantee of Rs.2.50 lakhs on record. In that view of the matter, he has refused to interfere with the order passed by the second respondent.

22. In our considered view, the fact that there was dishonour of cheques was already within the knowledge of the Chief Executive Officer and the Superiors which would be apparent from the fact there was notice issued as early as on 16 May 2014. The charge of the failure to inform the said fact in writing appears to be superfluous or technical in nature. We also note that the enquiry officer has consistently found that there were other officers also including Cashier, OS, Accountant and CEO who were responsible in the matter and thus, the petitioner - Tax clerk could not have been singled out. It is in this regard that the contention on behalf of the petitioner that being the employee of the lowest rank amongst others, who were concerned with the said contract, the petitioner has been made a scapegoat, has to be appreciated.

23. Coming to the submissions based on the undertaking, it is true that the petitioner has furnished the undertaking as required by the order of the first appellate authority after which he was reinstated. However, in the given facts, where the charge appears to be superfluous and technical nature and virtually groundless, we are not inclined to rely on the said undertaking to hold that the petitioner is precluded from challenging the same. While saying so, we are not accepting the contention on behalf of the petitioner based on Section 28 of the Contract Act as section 28 envisages a contract which is in restraint of legal proceedings. Here there is neither a contract nor the undertaking refers to any restraint nor the order requiring furnishing of the undertaking or the undertaking itself refers to any restraint of any legal proceedings. However, for

the reason that the charge, in our view, is superfluous and technical in nature, we are not inclined to rely on the said undertaking so as to non suit the petitioner.

24. We are conscious of the limitation in the exercise of the extra ordinary jurisdiction, particularly, in the context of the nature of the departmental proceedings and the powers exercised by the disciplinary authority and departmental appeals. However, we find that in this case, the disciplinary authority has, without issuing show cause notice, found the charges to be proved when the enquiry officer had exonerated the petitioner of four out of seven charges and consequently, the charge itself appears to be of a superfluous nature, are inclined to interfere.

25. In that view of the matter, the petition is allowed. The impugned orders are hereby set aside. The petitioner shall be entitled to all the monetary benefits flowing from this order including for the suspension period. The same shall be computed and paid to the petitioner within three months from today after deduction of the subsistence allowance, if any, paid to the petitioner.

Rule is made absolute in the aforesaid terms. No costs.

SANDIPKUMAR C. MORE, J.

C. V. BHADANG, J.

JPCChavan