

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5122 OF 2019

Ramesh Kashinath Pawar	]	
Age 61 years, Occ. Retired,	]	
R/At Tanvi, 17, Savarkar Nagar,	]	
Gangapur Road, Nashik – 422 013.	]	... Petitioner

Versus

Nashik Municipal Corporation	]	
Having address at Rajiv Gandhi Bhavan,	]	
Sharanpur Road, Nashik	]	
Notice to be served on Commissioner	]	
Nashik Municipal Corporation	]	... Respondent

Mr. Kiran S. Bapat i/by Mr. Vishal Tambat for the Petitioner
Mr. Sandip V. Marne for Respondent.

**CORAM : PRASANNA B. VARALE &
S. M. MODAK, JJ.**

RESERVED ON : 2nd DECEMBER 2021.

PRONOUNCED ON : 18th FEBRUARY 2022.

JUDGMENT (Per : S.M. Modak, J.) :-

1. The Petitioner who retires from service on 31st January 2016 from the service of Nashik Municipal Corporation as Superintendent Engineer was imposed with a penalty of permanent deduction of 10 % amount from the

pension has filed this writ petition. This order is passed by the Commissioner Nashik Municipal Corporation on 6th August 2018. The correctness of the said order is challenged on various grounds including the departmental inquiry being initiated after the expiry of statutory period of four months and also on the ground that the General Body of the Corporation is proper disciplinary authority and not Municipal Commissioner. There are also other grounds taken in this writ petition.

2. So the main issue involved in this petition is whether the Nashik Municipal Corporation has initiated the departmental inquiry within the mandatory period of four months as contemplated under the Maharashtra Civil Services (Pension) Rules, 1982. So also it is required to be seen whether the order is passed by the proper disciplinary authority.

3. Apart from the merits of the matter, the prayer is opposed on behalf of the Nashik Municipal Corporation on the ground of maintainability of this writ petition. So this Court within limited purview of the powers under Article 226 of the Constitution of India is expected to look into these issues. On this background we have heard learned Advocate Shri Kiran S. Bapat for the Petitioner and the learned Advocate Shri Sandip Marne, for the Nashik Municipal Corporation. With their assistance we have perused the record and

the judgments cited.

4. In the year 2006 Nashik Municipal Corporation has undertaken the project of Solid Waste Management under Jawaharlal Nehru National Urban Renewal Mission (J.N.N.U.R.M.) launched by Government of India. The Corporation has appointed Eco Save Systems (P) Limited, a consultant in December 2006 for preparing Detailed Project Report (D.P.R.).

5. Then the project was implemented and it was completed in January 2010. The Commissioner, Municipal Corporation has also issued Physical Completion Certificate (page 18). Even he has issued Utilization Certificate in the prescribed format (page 19), which certifies about spending of Rs.59.91 lakhs on that project.

6. Though the reason for review of the project is not informed to the Court, there is a report given by Shrikhande Consultants Private Limited dated 11th June 2010 (page 277 of the compilation filed by the Petitioner on 30th November 2021). He has certified that the project solid waste management is in order. Our attention is also invited to a photocopy from the compilation titled as Executive Summary prepared by Shrikhande Consultants Private Limited (page 266). They have certified quality of the work as satisfactory and overall performance is satisfactory.

7. Amongst 28 different charges faced by the Petitioner in the departmental inquiry one charge pertains to not making provision for electrification in the Detailed Project Report. Our attention is invited to a photocopy at page 22 of the Petition. It mentions about provision of Rs.152 lakhs for 'Electricals, Power connection, DG Set'. In that view, the Petitioner has denied the allegation of not making provision for electricals, power connection.

8. Nothing happened till 15th December 2015. Committee consisting of Deputy Municipal Commissioner (Administration), Chief Accountant and Medical Health Officer was constituted to inquire into the allegations of mismanagement and misappropriation made in respect of that project. The Petitioner was instructed not to deal with the work as Executive Engineer (Mechanical). After that Committee submitted the report on 28th January 2016 thereby putting a blame on the Petitioner and his explanation was called one day earlier to his retirement. He retired on 31st January 2016 and the explanation was called (page 20) by a letter dated 30th January 2016.

9. The Petitioner gave explanation as per his letter dated 8th April 2016 (page 21). It does not find favour with the Commissioner and accordingly departmental inquiry was ordered. One Shri Bajirao Ganpat Mali,

Deputy Engineer and one Shri Kishor Hirji Borde, Additional Commissioner-2, were appointed as Inquiry Officer and Presenting Officer respectively as per the Order dated 5th October 2016 (page 25). The Petitioner was supplied with Memo of Charges and supporting documents. Thereafter Dr.Madhukar Giri was appointed as Inquiry Officer and he finally conducted inquiry. He came to the conclusion that none of the charges were proved. Dr.Giri submitted his report on 23rd January 2018.

10. The Municipal Commissioner did not agree with the conclusion drawn by the Inquiry Officer and accordingly he placed the subject before the General Body of the Corporation. The proposal dated 13th April 2018 is at page 54. The General Body passed a Resolution on 19th July 2018 (page 56). The General Body has approved the action of freezing 10% amount from the pension belonging to the Petitioner. The Order is at page 59 and the calculation is at page 60.

11. There is a initial objection on behalf of the Respondent about maintainability of this Petition for the reason that the Petitioner has already filed earlier Writ Petition No. 14367 of 2016. According to the learned counsel for the Petitioner the said Petition was filed when the Departmental inquiry was pending. In the present Petition following are the reliefs claimed :-

- (a) Issuing direction to the Respondent to withdraw the Charge-sheet dated 15th June 2016 and Order dated 6th August 2018 (Order thereby freezing 10% pension amount).
- (b) A declaration that the Charge-sheet and the Order freezing pension is illegal.
- (c) Ancillary reliefs.

12. In view of the fact that, this Petition is filed after the Order freezing pension was passed, present Petition is certainly maintainable. Even though one of the reliefs in both the Petitions is common, it does not bar the Petitioner from prosecuting this Petition. Reason is earlier Petition is yet not decided. That objection is turned down.

Departmental Inquiry after Retirement

13. It is admitted fact that the Petitioner superannuated on 31st January 2016. Rule 27 (2) (a) of the Maharashtra Civil Services (Pension) Rules, 1982 (herein after referred to as 'Pension Rules') mentions about continuance of the departmental proceedings after retirement. It is to be continued in the same manner as if the Government servant had continued in service. However, such departmental inquiry ought to have been instituted before his retirement.

14. In this case, Petitioner's explanation was called on 30th January 2016. Charge-sheet was issued to him on 5th October 2016. While letter dated 30th January 2016, it was made clear that the Corporation wants to initiate departmental inquiry and that is why his explanation was called. There is a mention that it was called as per the provisions of Maharashtra Municipal Corporations Act and the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979. As per Rule 27(6) of Pension Rules, departmental proceeding is deemed to have been instituted when statement of charge is issued to him. In this case, charge is issued after retirement i.e. on 5th October 2016. So the proceeding was not initiated prior to his retirement.

15. Whereas Rule 27(2)(b)(i) permits institution of departmental inquiry after retirement only after sanction is obtained from the appointing authority. In this case, the General Body vide Resolution dated 1st June 2016 has sanctioned initiation of departmental inquiry against the Petitioner.

16. Rule 27(1) of the Pension Rules lays down the action to be taken if the employee is found guilty of grave misconduct or negligence. Maharashtra Civil Services (Conduct) Rules 1979 lays down what are the duties of Government servant, whereas Rule 5 of Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 lays down the Penalties.

17. “When the Government servant has retired, who is subjected to disciplinary inquiry, whether he can be penalized as per the provisions of Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 or whether he can be penalized as per the Pension Rules” has been decided by the Division Bench of this Court in case of *Manohar B. Patil Vs. State of Maharashtra*¹. It has been categorically held that, such an employee cannot be penalized in accordance with Discipline and Appeal Rules but only under Rule 27 of Pension Rules. The law of this point is settled.

18. The instances of misconduct and negligence are governed as per the provisions of the Conduct Rules and the procedure laid down as per Discipline and Appeal Rules will be applicable. That is why Rule 27(2)(b)(iii) lays down the procedure to be followed in such departmental inquiry. It further says “the procedure to be followed while imposing penalty of dismissal of service” is to be followed. Only difference is that a retired Government servant if found guilty cannot be subjected to the penalties laid down under Rule 5 of Discipline and Appeal Rules but only as per the Pension Rules.

Conducting Departmental inquiry within four months

19. The main thrust of the argument by learned Advocate Shri Bapat

¹ 2013 (6) Mh.L.J. 311

for the Petitioner is on not initiating the inquiry within time limit. According to him, the project was completed in the year 2010 and the Petitioner superannuated on 31st January 2016, whereas Charge-sheet was issued to him on 5th October 2016. According to him, this is belated Charge-sheet and it violates the provisions of Rule 27 (2) (b) (ii) of the Pension Rules. For ready reference that clause is reproduced below.

Rule 27 (2) (b) (ii) :-

Shall not be in respect of any event which took place more than four years before such institution.

20. In support of his contention, learned counsel Shri Bapat relied on following Judgments.

(a) **State of U.P & Another²**

(b) **Rajendra Singh Yambem Vs. Union of India & Another³**

21. By way of reply, learned counsel Shri Marne for Respondent vehemently opposed the said contention. He invited our attention to the averments of para No.2 of the Additional Affidavit-in-Reply sworn in by Assistant Municipal Commissioner (Administration). According to him, the Solid Waste Management Project was not commissioned even till 31st January 2016 with full capacity. He invited our attention to the averments pertaining to the Order dated 15th December 2015 thereby constituting a Committee to

² 1996 (9) SCC 395

³ (2016) 9 SCC 20

inquire into the allegations. He mean to say that the period cannot be computed from the month of January 2010 but it has to be computed from subsequent date as referred in para No.2 of the Additional Affidavit-in-Reply.

22. It will be material to consider the ratio laid down in above mentioned Judgments.

(i) State of U.P & Another Vs. Shri Krishna Pandey⁴

The provisions of Regulation No. 351 (A) of Civil Services Regulations were pointed out. There is also period of four years for initiation of the inquiry. It starts from happening of the event. In that case, the concerned Government employee retired on 31st March 1987 and the proceedings were initiated on 21st April 1991. The event of embezzlement took place four years earlier to date of retirement. Hon'ble Supreme Court set-aside the Order of freezing the pension. On reading Judgment, we may find that there are two dates available. One is the date of retirement on 31st March 1987 and second is 21st April 1991, when the proceedings were initiated. We do not find anywhere the date on which embezzlement was disclosed and F.I.R. was lodged.

(ii) Brajendra Singh Yambem Vs. Union of India⁵

In that case, the applicability of Rule 9(2)(b)(ii) of Central Civil

4 (1996) 9 SCC 395

5 (2016) 9 SCC 20

Services (Pension) Rules, 1972 was involved. There was allegation of missing of arms and ammunition in the year 1995. The Appellant was charged for that. He was working as regular Commandant in CRPF. He retired on 31st August 2006. Whereas the Memorandum of Charges was issued on 22nd August 2008. There was another Memorandum of Charges relating to contraband ganja. It was issued on 16th October 2009. Both these Memorandums were held to be beyond period of limitation of four years. In this case also partly there were two instances. One is of missing of arms and ammunition and second is the Petitioner found with contraband ganja.

23. On the basis of above said observations, it will be material to consider the important events. The period of four years goes back to happening of event. Question is when it can be said that event has happened. The following are the important dates -

Date	Events
22/12/2006	Sanction of project.
January 2010	Project completed.
11/06/2010	Performance report given by Shrikhande Consultants Pvt. Ltd.
15/12/2015	Three member Committee appointed to conduct inquiry.
28/01/2016	Report given by Committee.
30/01/2016	Explanation was called why disciplinary proceeding should not be initiated.
31/01/2016	Retirement of Petitioner.
08/04/2016	Explanation given by Petitioner.

01/06/2016	Proposal given by Deputy Municipal Commissioner through Commissioner thereby proposing departmental inquiry against the Petitioner.
16/06/2016	Approval given by General Body of the Corporation to initiate Department Inquiry (page 72).
05/10/2016	Inquiry Officer and Presenting Officer appointed and Charge-sheet given.
23/01/2018	Inquiry report submitted.
01/03/2018	Explanation of the Petitioner was called on inquiry report.
09/03/2018	Explanation given by the Petitioner.
13/04/2018	Proposal for conducting General Body Meeting to be held on 23 rd April 2018.
19/07/2018	Approval given by the General Body to take action under Rule 27 of Pension Rules.
06/08/2018	Order issued by the Commissioner thereby freezing 10% of the Pension amount.
15/10/2018	The Order of calculation.

24. No doubt it is true that even though the project was commissioned in January 2010, still it true that for the first time the Order of inquiry was passed on 15th December 2015. There is an Order dated 13th August 2012 thereby appointing three members Committee to inquire into the allegations. Even by the said Order, the charge of the Petitioner was withdrawn (page 68). From the papers it is not clear why there are two Orders dated 13th August 2012 and 15th December 2015. So in the set of facts, when it can be said that the event took place. That is to say when the project was commissioned in January 2010 or when the inquiry Committee was appointed on 13th August 2012 / 15th December 2015 or the date of 28th

January 2016 when the Committee gave a report (the copy of that report is not made available). But its reference do find place in the papers.

25. If we consider the facts of two cases referred above, we may find that the acts of misconduct (embezzlement, missing of arms and possession ganja) *prima-facie* amounts to contravention of penal law. Whereas in the case before us, the allegation pertains to the act of commission and omission and they falls within the purview of negligent attitude in performing duty. It falls under lack of supervision and taking proper case. There is a difference in between the acts of misconduct involved in above two judgments and the acts involved before us. Some time the act of misconduct and negligence is not noticed immediately. It takes time to know it and it take time to unearth it and fix the responsibility. Even though the project is completed in January 2010, a preliminary inquiry was ordered in the year 2012 (record not available) and subsequently on 15th December 2015. The report was given on 28th January 2016. It is for the first time, the *modus operandi* was concluded and *prima-facie* responsibility is fixed. So it cannot be said that the period of four years from the date of giving of chargesheet on 5th October 2016 if calculated, it goes back to the year 2012. So in this case, the date of giving of inquiry report on 28th January 2016 will have to be considered as an event as contemplated under Rule 27. Hence, we held that the inquiry is within time.

Competency of Disciplinary Authority

26. During arguments, learned Advocate Shri Bapat for the Petitioner made an attempt to raise a point about competency of the Disciplinary Authority i.e. to say whether it is the Municipal Commissioner or the General Body of Nashik Municipal Corporation. The documents to that effect are perused in order to ascertain whether there is breach of provisions of law. Those references are as follows.

Date	Events
13/08/2012	The Order issued by the Municipal Secretary on the basis of Resolution No. 207 of General Body, Inquiry Committee is appointed.
30/01/2016	The communication by the Commissioner thereby calling the explanation of the Petitioner.
05/10/2016	The Order appointing the Presiding Officer and Inquiry Officer and issuing Charge-sheet.
01/06/2016	Resolution passed by the General Body permitting to institute departmental inquiry against the Petitioner.
01/03/2018	Letter calling explanation of the Petitioner to take action under Pension Rules (also describing with the conclusion of the Inquiry Officer) by the Commissioner.
13/04/2018	The proposal by the Municipal Secretary.
19/07/2018	The Resolution by General Body.
06/08/2018 & 15/10/2018	Orders passed by the Commissioner on the basis of the Resolution of the General Body.

27. On reading the above papers, we may find that the proposal to initiate Departmental Inquiry was approved by the General Body as per the

Resolution passed on 1st June 2016 (page 72). There is a reference that the General Body of the Corporation is the appointing authority as contemplated under Section 53(1) of the Maharashtra Municipal Corporation Act. The Petitioner was working as Executive Engineer as a Class I Officer.

28. As said above, the provisions of Pension Rules are applicable. As per Rule 27(1) power to withhold or withdraw the pension is given to appointing authority. Earlier this power was with the Government, however the amendment is carried out on 18th January 2016. In the case of the Petitioner, the appointing authority is a Corporation. As said above, the General Body of the Corporation passed a Resolution on 19th July 2018, thereby approving 10% freezing of pension of the Petitioner. However, prior to placing the proposal before the General Body, it is the Municipal Commissioner, who has to scrutinize the papers.

29. The Municipal Commissioner was not satisfied with the findings recorded by the Inquiry Officer and that is why explanation of the Petitioner was called as per the letter dated 1st March 2018. The Commissioner was not satisfied about the explanation of the Petitioner. With his remarks he has placed the proposal before the General Body. Even in the Resolution, there is a reference of Section 53(1) of the Maharashtra Municipal Corporation Act that

the General Body being the appointing authority. So we are convinced that the Municipal Commissioner has adopted the proper procedure prior to taking the approval of the General Body. However, there is one issue which needs to be looked into.

Procedure while disagreeing with Inquiry Report

30. It is true that the powers of judicial review are very limited in departmental inquiry cases. It is also true that though the Petitioner has made representation dated 4th September 2018 before the standing committee, there is nothing on record to show that the standing committee has taken a decision. These references find place in the Affidavit-in-Reply filed by the Respondent. Standing Committee is superior authority to the Commissioner and Corporation is a superior authority to the Standing Committee. We may find the provision in Section 56(4) of MMC Act.

31. It is also true that, the Court should not substitute its opinion for the opinion expressed by disciplinary authority. It is permissible only in exceptional cases. However, in this case, we find that firstly the Municipal Commissioner and secondly the General Body while disagreeing with the findings of Inquiry Officer has failed to follow the accepted norms before disagreeing with the findings of Inquiry Officer.

32. It would be relevant to peruse the necessary correspondence.

They are as follows:-

- (a) The forwarding letter dated 23rd January 2018 sent by the Inquiry Officer Dr.Giri (page 47), however the Inquiry Report is not made available.
- (b) Show Cause Notice dated 1st March 2018 issued by the Municipal Commissioner to Petitioner thereby informing him, as to, why action should not be taken against him under Rule 27 of Pension Rules.
- (c) Explanation dated 9th March 2018 given by the Petitioner.
- (d) Proposal dated 13th April 2018 put up before the General Body.
- (e) Resolution dated 19th July 2018 passed by the General Body of the Corporation.

33. It is true that, the Inquiry Officer conducts the inquiry on behalf of the disciplinary authority. His report is only an opinion. Being the disciplinary authority there are various options available. They are as follows:-

- (a) To accept the report and to pass the necessary Order.
- (b) To disagree with the report and to pass further Order including further inquiry.
- (c) To disagree with the report and come to his own conclusion and pass an Order.

34. It is clear from the record that, according to Inquiry Officer charges could not be proved against the Petitioner. When we have read all above correspondence, we may find that in the resolution certain reasons for disagreeing with the report of Inquiry Officer are given. They are as follows:-

- (a) Grievance of Petitioner not giving the copy of preliminary inquiry report was not accepted.
- (b) Bar of 4 years for conducting inquiry is not accepted.
- (c) Explanation given by the administration to the objection taken by auditor was not accepted by the auditor.
- (d) Responsibility to prepare complete DPR is of the Petitioner and there is a delay in preparing DPR by the Petitioner and it has caused loss to the Corporation.
- (e) The Petitioner is responsible for preparing wrong DPR and for keeping the machinaries idle.

35. After reading them, we may find that the disciplinary authority has mainly relied upon the report of preliminary inquiry. It will be material to note the importance of preliminary inquiry report. The disciplinary authority got knowledge about alleged misconduct or negligence and accordingly he Ordered for preliminary inquiry, which is not required in every case. So the Officer conducting preliminary inquiry is supposed to verify the allegations and to give a report whether the disciplinary inquiry is required or not. That is one side inquiry. As against this, the report given by Inquiry Officer is after

full-fledged inquiry including perusing documents and recording of evidence. So the report of inquiry stands on higher pedestal than the report of preliminary inquiry. So what we find is that the final inquiry report stands on a higher footing than the preliminary inquiry. There is every reason to believe that the disciplinary authority while disagreeing with the inquiry report has overlooked this fact. They have overlooked that, the Inquiry Officer had given report after full-fledged inquiry. Unfortunately the inquiry report is not made available; otherwise we could have got an opportunity to ascertain the findings given by the disciplinary authority. So what we feel is that, there is reason for this Court to interfere.

36. Except that, the other reasons given by the disciplinary authority are not of a such nature which may change the entire scenario.

37. We have already concluded that, action taken by the disciplinary authority perfectly falls within the time limit. We have also concluded that the decision was taken by proper disciplinary authority, only above lacuna we have noticed. So entire Order cannot be set-aside, but it needs to be remanded back. We have not expressed any opinion on the point of proof of acts of misconduct and we have left it to be decided by the disciplinary authority. Hence, we proceed to pass the following Order.

ORDER

- (i) Writ Petition is partly allowed.
- (ii) Resolution dated 19th July 2018 passed by the General Body of the Corporation and the Orders dated 6th August 2018 and 15th October 2018 passed by the Municipal Commissioner are set-aside.
- (iii) Matter is remanded back to the Corporation for taking a fresh decision. Respondents-Corporation is directed to again issue notice to the Petitioner on the report of Inquiry Officer and give him 15 days to give reply.
- (iv) Respondent-Corporation further directed to take appropriate decision (after taking into account issues decided by us), as per law within two months from the expiry of the time limit for giving a reply.

[S. M. MODAK, J.]**[PRASANNA B. VARALE, J.]**

OMKAR
SHIVAHAR
KUMBHAKARN

Digitally signed
by OMKAR
SHIVAHAR
KUMBHAKARN
Date:
2022.02.18
15:44:09 +0530