IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NO.121 OF 2019
WITH
ORIGINAL APPLICATION NO.240 OF 2019

DISTRICT : MUMBAI / PALGHAR

****

ORIGINAL APPLICATION NO.121 OF 2019

Shri Shivaji Kisanrao Chormale.)
Age : 44 Yrs., Working as Police Constable)
[Buckle No.960080] attached to Oshiwara)
Police Station, Andheri (W), Mumbai and)
Residing at Virar (E), District : Palghar.)**...Applicant**

Versus

1. The Deputy Commissioner of Police,)
Zone No.9, Having Office at Bandra)
(West), Mumbai – 400 050.)

2. The Director General and Inspector)
General of Police, M.S, Mumbai and)
Having office at Old Council Hall,)
Shahid Bhagatsingh Marg,)
Mumbai – 400 039.)

3. The State of Maharashtra.)
Through Principal Secretary,)
Home Department, Mantralaya,)
Mumbai – 400 032.)**...Respondents**

WITH

ORIGINAL APPLICATION NO.240 OF 2019

Shri Shivaji Kisanrao Chormale.)
Age : 44 Yrs., Working as Police Constable)
[Buckle No.960080] attached to Oshiwara)
Police Station, Andheri (W), Mumbai and)
Residing at Virar (E), District : Palghar.)**...Applicant**

Versus

1. The State of Maharashtra & Anr.)**...Respondent**

Mr. Arvind V. Bandiwadekar, Advocate for Applicant.
Mrs. A.B. Kololgi, Presenting Officer for Respondents.

CORAM : SHRI A.P. KURHEKAR, MEMBER-J

DATE : 23.08.2021

JUDGMENT

1. These two Original Applications are filed by the same Applicant arising from common facts being decided by common Judgment.

2. In O.A.No.121/2019, the Applicant has challenged the order of punishment dated 22.11.2017 passed by Government in revisional jurisdiction thereby by setting aside the order of punishment of dismissal and imposing punishment of reduction to lower scale for three years and denial of pay and allowances for the period from dismissal to reinstatement in service.

3. Whereas, in O.A.No.240.2019, the Applicant has challenged the order dated 30.07.2018 passed by Respondent No.2 – Deputy Commissioner of Police whereby he was held not entitled to pay and allowances for the period on duty and said period was held to be considered only for pension purpose.

4. Admitted facts giving rise to these O.As are as under :-

(i) While Applicant was serving as Police Constable at Oshivara Police Station, he was served with charge-sheet dated 30.10.2010 for misconduct in terms of "Maharashtra Police (Punishment and Appeal) Rules, 1956 for the following charges (Page No.30 of Paper Book).

> "१) निलंबित पो.शि.क्र.९६००८०/शिवाजी किसनराव चोरमले यांनी मयत इसम प्रकाश ब्रह्मभट यांचेकडून जबरदस्तीने आयसीआयसीआय बँकेचे प्रत्येकी रु.२,००,०००/- (दोन लाख) रुपयाचे तीन चेक लिहून घेतले होते. सदर चेक गुन्ह्याच्या चौकशीसाठी हस्तगत करण्यात आलेले आहेत.
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> २) यातील मयत इसम याने आत्महत्या करण्याअगोदर लिहून ठेवलेल्या चिठ्ठीतील निलंबित पो.शि.क्र. ९६००८०/ शिवाजी किसनराव राऊत चोरमले याचे नाव आहे व सदर चिठ्ठीतील हस्ताक्षर व मयत प्रकाश ब्रह्मभट यांचे कोकण मर्कंन्टाईल बँक येथे अकाउंट उघडण्याच्यावेळी फार्म भरतेवेळी केलेली सही एकच असल्याचे स्पष्ट दिसून येते.
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> ३) मयत इसम प्रकाश ब्रह्मभट व त्यांची पत्नी अर्चना ब्रह्मभट यांनी अपचारी पो.शि.क्र. ९६००८०/शिवाजी किसनराव चोरमले नेमणूक ओशिवरा पोलीस ठाणे आणि त्यांचे साथीदार यांना शेवटच्या १४ दिवसापासून मानसिक त्रास होत देऊन घाबरविल्याने त्यांच्यात सहन करण्याची शक्ती उरली नाही. अक्षरश: मयत इसम वेडा झाला व नाईलाजाने आपल्या पत्नीसह आत्महत्या केली.
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> ४) अपचारी हे ओशिवरा पोलीस ठाणेमध्ये गुन्हे प्रकटीकरण विभागात कर्तव्याच्यावेळी त्यांच्यावर श्री. नामदेव ढसाळ हे पत्रकार, लेखक, कवी, दलित पँथर संघटनेचे अध्यक्ष असून त्यांचे कार्यकर्ते श्री. युनूस शेख यांचा मुलगा नझीम यास मारहाण केल्याबाबत तक्रार अर्ज दाखल केलेला होता. त्यानंतर अपचारी यांचेकडून नझीम यास कोणताही त्रास होणार नाही असे लिहून देण्यात आलेले आहे. म्हणजेच अपचारी यांची जनतेशी वागणूक आडमुठेपणाची आहे असे दिसून येते.
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> ५) लाचलुचपत प्रतिबंधक विभाग, मुंबई येथील १) गु.र.क्र. ४७/४९, कलम - ७, १२, १३(१)(ड)१३(२)लाचलुचपत प्रतिबंधक कायद्यासह कलम २१४, ३८६, ३४२ भादविस. अन्वये दाखल गुन्ह्यात अपचारी यांचा सहभाग आहे.
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> वर नमूद प्रमाणे आपल्या विरुद्ध दोषारोप असून त्या दोषारोपाचे सविस्तर अभीकथन केलेले आहे. सदरबाबत आपणास काही सांगावयाचे असल्यास किंवा बचावाच्या दृष्टीने काही पुरावे, साक्षीदार असल्यास ते आम्हास पुढील सुनावणीच्यावेळी सादर करावेत.''

(ii) The Enquiry Officer accordingly conducted enquiry and submitted his report dated 13.08.2011 holding the Applicant guilty for the charges levelled against him and proposed the punishment of dismissal from service (Page No.77 of P.B.)

(iii) The Respondent No.2 – Deputy Commissioner of Police issued Show Cause Notice dated 20.10.2011 to the Applicant calling an explanation as to why he should not be dismissed from service under Sections 25 and 26 of Maharashtra Police Act, 1951 (Page No.58 of P.B.)

(iv) The Respondent No.2 – Deputy Commissioner of Police by order dated 14.09.2012 dismissed the Applicant from service invoking Sections 25 and 26 of Maharashtra Police Act, 1951 read with Rule 3 of Maharashtra Police (Punishment and Appeal) Rules, 1956 (Page No.84 of P.B.).

(v) The appeal preferred by the Applicant against the order of dismissal was heard by Additional Director General of Police and came to be dismissed by order dated 26.05.2014 (Page No.88 of P.B.)

(vi) Being aggrieved by it, the Applicant has preferred revision before Government which came to be decided by order dated 22.11.2017 whereby punishment of dismissal was set aside and punishment of reduction to lower scale for three years was imposed in view of his acquittal in criminal case by Judgment dated 17.07.2014. The period out of duty i.e. from dismissal to reinstatement was to be treated only for pension purpose without pay and allowances for the said period.

5. The Applicant has thus challenged the order dated 22.11.2017 in O.A.No.121/2019 and has also challenged the order dated 30.07.2018 which was passed by Deputy Commissioner of Police in pursuance of the order passed by Government in revision and declined pay and allowances for out of duty period. In this O.A, in alternative, the Applicant has prayed that at least period from 22.11.2017 i.e. the date of order of revision passed by Government till 28.10.2018 i.e. the date of joining he be paid pay and allowances contending that he was not reinstated immediately on account of negligence on the part of Respondents.

6. Shri A.V. Bandiwadekar, learned Advocate for the Applicant has challenged the impugned orders on following grounds :-

(a) The charge-sheet has been issued under the name and signature of Enquiry Officer and not by disciplinary authority which vitiates the entire inquiry.

(b) In D.E, no Presenting Officer was appointed but Enquiry Officer himself acted as Presenting Officer and assumed a role of prosecutor which is against the settled principles of law.

(c) In D.E, the statement of some of witnesses which were recorded in preliminary enquiry itself were used as an evidence without examining them afresh, which is totally impermissible in law.

(d) The Applicant has been acquitted by Competent Court of Law from the charges under Section 384 and 306 of Indian Penal Code by Judgment dated 17.07.2014, and therefore, in view of this acquittal, he would have been exonerated from all the charges by revisional authority.

(e) There is no cogent and satisfactory evidence to sustain the charges levelled against the Applicant in D.E.

(f) The Respondent No.1 – Deputy Commissioner of Police was not competent to dismiss the Applicant since his appointing authority is Commissioner of Police, and therefore, the order of dismissal dated 14.09.2012 was totally bad in law.

7. Per contra, Mrs. A.B. Kololgi, learned Presenting Officer has pointed out that there is no such illegality in the procedure adopted for D.E. and evidence was enough to sustain the charges levelled against the Applicant. She taken me through the enquiry report to point out how the grounds raised by the learned Advocate for the Applicant are unfounded and misleading, which will be discussed during the course of discussion. She, therefore, prayed to dismiss the O.A.

8. Before going further, at this juncture itself, it would be useful to see the legal principles enunciated by Hon'ble Apex Court in ***(2015) 2 SCC 610 Union of India Vs. P. Gunasekaran***. The Hon'ble Supreme Court in the context of exercise of powers under Articles 226 and 227 by the Hon'ble High Court in relation to disciplinary proceeding has held that High Court or tribunal is not and cannot act as a second Court of Appeal and adequacy as well as reliability of evidence cannot be looked into in judicial review. It has been further held that, it is not permissible to re-appreciate the evidence laid before the E.O. in order to reach to a different finding and interference is permitted only when the finding of fact is perverse. Needless to mention that the parameters laid down by Hon'ble Supreme Court would also apply to the Tribunal established under Administrative Tribunals Act exercising the powers of judicial review. The Hon'ble Supreme Court laid down the parameters, which are as under :-

"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."

9. Further, the Hon'ble Supreme Court in Para No.13 of the Judgment held as follows :

> "**13.** Under Article 226/227 of the Constitution of India, the High Court shall not:
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> (i) re-appreciate the evidence;
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> (ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;
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> (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."

10. Reverting back to the facts of the present case, it is necessary to see the nature and details of incident giving rise to the departmental proceeding against the Applicant.

11. The Applicant was serving as Police Constable at Oshivara Police Station. Deceased Prakash son of Balubhai Bhahmabhat and his wife Archana were staying at Dahisar. On 23.04.2010, deceased Prakash Bhahmabhat and his wife Archana committed suicide on railway track at about 3.45 p.m. at Kandivali. Therefore, his brother Arun Bhahmabhat had lodged report in Amboli Police Station. On 22.04.2010, deceased Prakash had written suicide note and left it in home alleging that he and his wife Archana were highly indebted and lenders viz. Saiyad S. Ali, Imran Kadiwala, Salim Sayyad and Sayyad A. Sattar as well as Applicant were torturing him for last 15 days to repay the debt. In so far as present Applicant is concerned, in suicide note, he has categorically stated that on 22.04.2010 by night at about 8.30 p.m, Imran Kadiwala and Applicant had come to his home and got three cheques of Rs. 2 Lakh each drawn on ICICI Bank written from him forcibly. He had also mentioned Cheque numbers as 173380, 171381 and 171382. He further

stated in suicide note that because of this torture, he and his wife Archana are taking extreme step to end their life and requested his brother to look after his 2 sons. He further requested his brother to make necessary arrangement in respect of his share in the house property.

12. It is in pursuance of this suicide note, deceased Prakash and his wife Archana committed suicide on 23.04.2010 by jumping before running local train. His brother Arun after coming to know the incident, lodged report with Amboli Police Station. Amboli Police registered offence under Sections 306 and 384 read with 34 of Indian Penal Code against the Applicant and his associates viz. Sayyad S. Ali, Imram Kadiwala, Salim Sayyad and Sunny Chotumiya. Thus, in short, the Applicant with the help of others in furtherance of their commendation committed extortion by putting Prakash Bhahmabhat in favour of injury and dishonestly induced him to deliver 3 cheques of ICICI Bank and abated the act of suicide by putting deceased Prakash and his wife to mental torture for recovery of loan amount and thereby committed an offence under Sections 306, 384 read with 34 of IPC. It is on this background, the Applicant was chargesheeted in D.E. under the provisions of Maharashtra Police (Punishment and Appeal) Rules, 1956.

13. In D.E, the Enquiry Officer has recorded evidence of 7 witnesses and they were cross-examined by the next friend of the Applicant. Remaining 5 witnesses viz. Jainith Bhahmabhat, Sunny Bhahmabhat, Shaikh M.A. Rehman, Dilipkumar Rao and Manish Rao did not remain present in enquiry despite the issuance of notices by Enquiry Officer. The perusal of report of Enquiry Officer reveals that the statement of all these witnesses was recorded by Police during investigation of criminal case registered under Sections 384, 306 read with 34 of IPC and those statements were tendered before the Enquiry Officer. It is further revealed from the record that only in case of witness Arun Brahmabhat, his statement recorded by Police was read over to him which he accepted

to be correct and thereafter, additional statement was recorded by the Enquiry Officer. Whereas, in respect of other six witnesses, their statements recorded by Police during investigation were read over to him which they accepted to be correct and thereafter next friend of the Applicant cross-examined them. This procedure adopted by the Enquiry Officer has been severely criticized by the learned Advocate for the Applicant *inter-alia* contending that the statement recorded in criminal case could not have been used as it is in domestic enquiry and Enquiry Officer was obliged to record statement of witnesses afresh before him. This procedure adopted by the Enquiry Officer is undoubtedly contrary to the legal principles of law and he ought to have examined the witnesses afresh. This aspect and it's effect will be dealt with in greater detail during the course of discussion.

14. Now, let us see the grounds raised by the learned Advocate for the Applicant to challenge the impugned orders to find out whether impugned order of punishment inflicted in domestic enquiry is sustainable in law.

15. **As to ground no.(a)** :-

The learned Advocate for the Applicant pointed out that the charge-sheet ought to have been under the signature of disciplinary authority, but it has been issued under the signature of Shri Datta Dhavale, Assistant Police Commissioner and Divisional Enquiry Officer and it vitiates the entire enquiry. True, the perusal of charge-sheet (Page Nos.30 and 31 of P.B.) reveals that it has been issued under the signature of Shri Datta Dhavale, Assistant Police Commissioner and Divisional Enquiry Officer. However, material to note that there is reference of Office Order dated 14.10.2010 in the charge-sheet under which reference, charge-sheet was issued to the Applicant. In this behalf, the Respondents have placed on record the letter dated 14.10.2010 (Page No.145 of P.B.) which is referred in the charge-sheet to point out that in fact, charge-sheet has been issued under the signature

of Shri K.M.M. Prasanna, Deputy Police Commissioner being disciplinary authority. The perusal of record reveals that, in fact, charge-sheet was issued by disciplinary authority and by letter dated 14.10.2010, all that, directions were given to Assistant Commissioner of Police to serve the charge-sheet upon the Applicant. Accordingly, in pursuance of these directions, Shri Datta Dhavale, ACP who is also happens to be designated as Divisional Enquiry Officer had issued the charge-sheet. Suffice to say, the authority which issued the charge-sheet is disciplinary authority indeed and only copies of charge-sheet were served upon the Applicant under the signature of ACP who also happens to be Divisional Enquiry Officer. This being the factual position, as rightly pointed out by the learned Presenting Officer, it cannot be said that charge-sheet has been served under the signature of Enquiry Officer and it vitiates the enquiry proceeding. The submission in this behalf is totally erroneous rather misleading. As such, I see no such irregularity much less illegality in the issuance of charge-sheet.

16. **As to ground nos.(b), (c), (d) and (e)**:-

True, in inquiry, no Presenting Officer appointed on behalf of Department. Admittedly, there is no such a provision in Maharashtra Police (Punishment & Appeal) Rules for appointment of Presenting Officer alike Maharashtra Civil Services (Discipline and Appeal) Rules.

17. Shri Bandiwadekar, learned Advocate for the Applicant referred to ***(2018) 2 SCC (L & S) 356 [Union of India and AOrs. Ram Lakhan Sharma]*** to bolster-up his contention that where no Presenting Officer is appointed and Enquiry Officer himself conduct the examination of witnesses and adopted role of adjudicator indicative of his bias, there is breach of principles of natural justice and finding recorded in such enquiry is not sustainable in law. The issue posed before the Hon'ble Supreme Court was whether when the statutory rules governing the enquiry does not contemplate appointment of Presenting Officer whether

non-appointment of Presenting Officer ipso-facto vitiates the enquiry. The Hon'ble Supreme Court observed that "Enquiry Officer has to be independent and not representative of the disciplinary authority and if starts acting in any other capacity and proceed to act in a manner as if he is interested in eliciting evidence to punish an employee, the principle of bias comes into place. Following are the principles summarizes from the Judgment.

> *"(i) The Inquiry Officer, who is in the position of a Judge shall not act as a Presenting Officer, who is in the position of a prosecutor.*
>
> *(ii) It is not necessary for the Disciplinary Authority to appoint a Presenting Officer in each and every inquiry. Non- appointment of a Presenting Officer, by itself will not vitiate the inquiry.*
>
> *(iii) The Inquiry Officer, with a view to arrive at the truth or to obtain clarifications, can put questions to the prosecution witnesses as also the defence witnesses. In the absence of a Presenting Officer, if the Inquiry Officer puts any questions to the prosecution witnesses to elicit the facts, he should thereafter permit the delinquent employee to cross-examine such witnesses on those clarifications.*
>
> *(iv) If the Inquiry Officer conducts a regular examination-in-chief by leading the prosecution witnesses through the prosecution case, or puts leading questions to the departmental witnesses pregnant with answers, or cross-examines the defence witnesses or puts suggestive questions to establish the prosecution case employee, the Inquiry Officer acts as prosecutor thereby vitiating the inquiry.*
>
> *(v) As absence of a Presenting Officer by itself will not vitiate the inquiry and it is recognised that the Inquiry Officer can put questions to any or all witnesses to elicit the truth, the question whether an Inquiry Officer acted as a Presenting Officer, will have to be decided with reference to the manner in which the evidence is let in and recorded in the inquiry."*

18. As such, whether the Enquiry Officer has merely acted only as an Enquiry Officer or has also acted as a Presenting Officer and caused serious prejudice to the delinquent depends upon the facts and circumstances of each case. Non-appointment of Presenting Officer itself will not vitiate the enquiry. If Enquiry Officer with a view to arrive at a truth put certain question to the witnesses and thereafter permit the delinquent to cross-examine the witnesses, it cannot be said that Enquiry Officer has assumed the role of Presenting Officer.

19. Now turning to the facts of the present case. Admittedly, there is no requirement of appointment of Presenting Officer, and therefore, non-appointment of Presenting Officer itself will not vitiate the enquiry proceedings. It is only in case where it is shown that Enquiry Officer himself acted as a prosecutor by putting leading questions suggestive of answers, in that event only, there may be issue of bias. There is nothing on record to conclude that Enquiry Officer has put some suggestive questions or leading questions to the witnesses pregnant with answers and perform the role of prosecutor.

20. Now, let us see the nature of evidence led before the Enquiry Officer. As stated above, the deceased had left suicide note before committing suicide. It is written in Gujarati language and translation in Marathi is placed on record. The suicide note was written on 22.04.2010 giving details of torture meted out to him by the money lenders which compelled him to take extreme step to commit suicide with wife. In so far as Applicant is concerned, following portion of suicide note is relevant.

"दि. २२/०४/ २०१०

मी प्रकाश बाबुभाई ब्रह्मभट्ट, वय ४२ वर्षे आणि माझी पत्नी सौ. अर्चना प्रकाश ब्रह्मभट्ट, माझेवर बाजारावरुन कर्ज झालेले आहे. मी सर्वांना कर्ज असल्याने माझे पैसे परत देण्यास सांगितले आहे. मला सार्थक, रंजन, सलीम मेंढा, इम्रानभाई कडीवाला यांनी दिलेल्या त्रासामुळे मागील १४ दिवसापासून मला मानसिक त्रास झालेला आहे. त्यामुळे वेडा झालो आहे. त्यामुळे मी सदरचे पाऊल उचलत आहे. मी माझे राहते गावातील माझी मालमत्ता विकण्याकरिता ३ महिन्याची कालावधी नमूद इसमांकडे मागितला होता परंतु ते देण्यास तयार नाहीत. माझे भाऊ श्री. अरुण यांचेकडे देखील मी मदत मागितली होती परंतु त्याने मदत देण्यास असमर्थता दर्शवली. इम्रानभाई कडीवाला, सलीम मेंढा व सार्थकभाई यांच्यामुळे मला टोकाचे पाऊल उचलावे लागत आहे. मी विनंती करतो की, सदर प्रकरणात मला पोलिसांनी मदत करावी.

सही /-
प्रकाश बाबुभाई ब्रह्मभट्ट

दि. २२/०४/२०१०

सदरचे पत्र लिहिल्यानंतर रात्रौ ८.३० वा. इम्रानभाई यांनी त्यांचे मित्र **चोरमले जे ओशिवरा पोलीस ठाणे येथे पोलीस म्हणून काम करत आहेत**, त्यांनी माझ्याकडून आयसीआयसीआय बँकेचे रु. २,००,०००/- चे ३ चेक माझ्याकडून जबरदस्तीने भरुन घेऊन गेले. सदरचे चेक नं. १७१३८०, १७१३८१ व १७१३८२ असे आहेत. या त्रासामुळे मी आणि माझी पत्नी हे टोकाचे पाऊल उचलत आहे. तरी शासनास विनंती आहे की मला दोन मुले असून सध्या ते गुजरात येथे त्यांच्या मामाकडे रहावयास आहे तरी त्यांना कोणताही त्रास होणार नाही याची काळजी घ्यावी''

सही /-
प्रकाश बाबुभाई ब्रह्मभट्ट

21. Thus, the Applicant allegedly acted in furtherance of common intention with other co-accused and got 3 cheques forcibly written from deceased. Suicide Note was seized by Police during investigation.

22. True, the Applicant and co-accused were acquitted by Sessions' Court on 17.07.2014. The Judgment is on record (Page Nos.94 to 120 of P.B.). The perusal of Judgment reveals that learned Sessions' Judge was not satisfied with the evidence and extended the benefit of doubt to the accused. Needless to mention that the Judgment delivered in criminal case *ipso-facto* would not dislodge the findings recorded by the Enquiry Officer in domestic enquiry. It is well settled that the criminal proceedings and department enquiry may run simultaneously since standard of proof applied in criminal case is totally different from standard of proof required in domestic enquiry. In criminal case, guilt of the accused is required to be proved beyond reasonable doubt. Whereas, in domestic enquiry, the charge is required to be established on preponderance of probability. In so far as DE is concerned, the requirement of law is that the allegation must be established by such evidence acting upon which reasonable person acting reasonably and with objectivity may arrive at a finding of holding the gravamen of the charge.

23. In this behalf, reference may be made to the decision of Hon'ble Bombay High Court **2009(5) Maharashtra Law Journal 925 [Jayprakash B. Jadhav Vs. Indian Oil Corporation Ltd, Mumbai]**. In Para No.16 it has been held as under :-

> "**16.** Merely because the Petitioner was not found guilty by the CBI in the criminal investigation, *per se* would be no ground for this Court to interfere in the disciplinary proceedings. It is a settled principle of law that the proceedings in a criminal trial neither bind nor have an effect to completely wipe out the disciplinary proceedings. Reference in this regard may be made to *Govind Das vs. State of Bihar, (1997) 11 SCC 361*, wherein it is held that acquittal of the appellant in criminal case could not be made the basis for setting aside the order for termination of his service. Even acquittal was held to be no bar against domestic enquiry by the Supreme Court in *West Bokaro vs Ram, (2008) 3 SCC 729*. In addition to this, it may be observed that in the present case, the CBI was

> investigating on an allegation of fraud by the Marudhar Mahavidyalaya Institution and not by an individual applicant. No case was ever registered against the Petitioner and at no point of time there was a case filed by the CBI to hold him guilty."

24. Furthermore, it would be apposite to see one more decision of Hon'ble Bombay High Court **2010(5) Mah. L.J. 61 [A.S. Manjrekar Vs. Bombay Port Trust & Anr.]** wherein it has been held as under :-

> "Merely because there is acquittal order in a criminal case, that itself would not entitle the employee the order of re-instatement in each and every matter. It also depends upon the facts and circumstances of the case. The order passed in criminal proceeding may be taken note of in the departmental proceeding, but that itself is not sufficient to dismiss the departmental proceeding and/or not to take action based upon the charges so levelled if it falls within the ambit of respective service conditions. In the impugned order, the learned Judge has taken note of the order of acquittal so relied upon and dealt with the aspects in detail. Even otherwise, once the departmental inquiry is conducted in accordance with law and the reasoning supports the case of respondent/Trust that the petitioner is guilty of charges and that amounts to misconduct as contemplated under the Service Conditions and, therefore, the punishment so imposed as per the service conditions just cannot be set aside after so many years merely because there was acquittal order passed by the Magistrate specially in the present facts and circumstances of the case as the learned Judge has even considered those aspects in detail. The Court cannot compel the employer to continue such employees against whom, after holding due inquiry, they able to prove the charges independently and irrespective of the criminal proceedings. If both the proceeding can run together, it also means the different and respective principles of assessments of evidence and material apply and if, after due inquiry, the employer in view of the departmental inquiry report uses discretion and take action of dismissal of such employee within the frame work of service conditions, I see there is no reason that Court should interfere with the same as there is no case of perversity and/or any illegality. In such circumstances, the scope of judicial review is quite limited and restricted."

25. In view of the aforesaid Judgment, suffice to say, that acquittal of the Applicant in criminal case would not wipe out the disciplinary proceedings and the correctness of the finding recorded in disciplinary proceedings needs to be examined on the basis of evidence led before the Enquiry Officer without being influenced by the Judgment of acquittal in criminal case, particularly when the acquittal is on account of benefit of doubt.

26. In so far as procedure adopted by the Enquiry Officer by using the statement of witnesses recorded by Police during the investigation is concerned, it should not have been done despite guidelines to that effect in Bombay Police Manual, as pointed out by the learned Advocate for the Applicant. The Enquiry Officer committed gross error in using those statements. As stated above, the Enquiry Officer has been examined 7 witnesses. He has recorded additional statement of witness No.1 – Arun Brahmabhat only. In so far as other witnesses are concerned, he used the statement recorded before the Police, but opportunity of cross-examination was given to the next friend of the Applicant.

27. Now, let us see the nature of evidence. Witness No.1 – Arun Bhahmabhat admits before Enquiry Officer that Police have recorded his statement on 27.04.2010 and contents are correct. Thereafter, the Enquiry Officer recorded some additional statements afresh in which Arun Brahmabhat has categorically stated that on 22.04.2010, the Applicant along with co-accused forcibly got the cheques written from deceased Prakash Bhahmabhat. True, he was not present at the relevant time, as seen from his cross-examination. However, in cross-examination, he made it clear that deceased Prakash had informed him about the same on mobile. His cross-examination further makes it quite clear that those cheques were obtained against the repayment of loan borrowed by deceased Prakash Brahmabhat. Witness No.2 – Dilip Brahmabhat was also cross-examined on the basis of his statement recorded by the Police and in cross-examination, he also reiterates that deceased Prakash had informed to him that the Applicant and others assaulted him and got the cheques forcibly written from him. Witness No.3 – Chetna Brahmbhat also accepted that she has given statement before Police on 10.05.2010 and in cross-examination, it was brought on record that deceased Prakash Bhahmabhat was dealing in share market and has suffered loss. Witness No.4 – Shakil is Mobile Mechanic whose evidence is not much relevant. Witness No.4 – Smt. Saida Hasan is fond sister of deceased Prakash Bhahmabhat. She too accepts that Police

recorded her statement on 01.05.2010. Her cross-examination reveals that she used to deposit certain amount regularly with deceased Prakash and in lieu of it, the deceased Prakash was to give her flat. Witness No.6 – Parasmal Jain is scrap-dealer whose cross-examination reveals that on 24.04.2010, accused Imran had handed over 3 cheques of ICICI to him for keeping it in his custody and those were recovered from him by Police on 30.04.2010. Last witness Bharat Nathubhai is the employee of courier services who has been examined only on the point of identification of deceased Prakash since on 23.04.2010, deceased Prakash had dispatched some courier from his office. His evidence is of no much of assistance in so far as charge against the Applicant is concerned.

28. There is no denying that deceased Prakash and his wife committed suicide on 23.04.2010 and left suicide note. In suicide note, as discussed above, the deceased Prakash has categorically made a statement about the torture meted out to him and obtaining of 3 cheques forcibly by the Applicant and others. The perusal of suicide note clearly indicates that deceased was fed-up with life due to indebtness and alleged torture to him for refund of loan. On the next day i.e. on 23.04.2010, he and his wife committed suicide on railway track. As such, here Section 32(1) of Evidence Act is attracted since suicide note has to be treated as dying-declaration under the Evidence Act. Dying-declaration is a statement of relevant fact about the cause of his death or as to any of the circumstances of the transactions which resulted in his death. Dying-declaration is an exception to the general rule against hear-say evidence. There was sense of impeding death in suicide note. Such suicide note have sanction which is equal to obligation on an oath. No person would like to meet his maker with lie in his mouth and it is on this principle, dying-declaration is made admissible in law. Even in criminal case, for serious charge, there is no absolute rule of law or even rule of prudence which has ripen into rule of law that a dying-declaration

unless corroborated by other dependent evidence cannot be acted upon to sustain conviction.

29. Whereas, in the present case, we are dealing with domestic enquiry which finding has to be recorded on the preponderance of probabilities and proof beyond reasonable doubt is not the requirement of law. As such, in my considered opinion, suicide note led by deceased Prakash Brahmabhat itself would be sufficient to sustain the charge leveled against the Applicant in domestic enquiry. Therefore, even if the evidence of witness No.2 to 7 is discarded on account of non-examining their statement afresh, still there is evidence of witness No.1 – Arun Brahmabhat in the form of additional statement recorded by the Enquiry Officer coupled with suicide note. Suicide note was written on 22.04.2010 and deceased committed suicide immediately on 23.04.2010 complying the taste of proximity.

30. As stated above, there is nothing on record that the Enquiry Officer has acted as a prosecutor. All that, he has recorded the additional statement to elicit the truth since there was no appointment of Presenting Officer. Therefore, it cannot be said that Enquiry Officer had bias. As such, in my considered opinion, the decision of Hon'ble Supreme Court in ***Ram Lakhan Sharma*** (cited supra) relied by the learned Advocate for the Applicant is clearly distinguishable and is of no assistance to him in the facts and circumstances of the present case.

31. This is not a case of recording positive finding without any evidence or perverse finding. The suicide note and evidence of witness No.1 – Arun Brahmabhat sufficiently proves the complicity of the Applicant in the incident in so far as Charge Nos. 1 to 4 are concerned.

32. In so far as charge No.5 is concerned, it was framed simply on the basis of registration of some crime in respect of which there is absolutely no iota of evidence or material. Even charge-sheet for the said offence is not forthcoming. Only on the basis of registration of crime, it cannot be

said that Applicant was involved in offence under the provisions of Prevention of Corruption Act. No witness on this point has been cited in the charge-sheet nor examined. Therefore, the Applicant could not have been held guilty for Charge No.5.

33. As regard Charge Nos.1 to 4, the finding of Enquiry Officer holding the Applicant guilty cannot be faulted with.

34. **As to ground no.(f)** :-

The learned Advocate for the Applicant sought to contend that he was appointed by Commissioner of Police, and therefore, dismissal order by lower authority viz. Deputy Commissioner of Police is illegal. However, despite enough chances, no such appointment letter is produced to substantiate that the appointing authority of the Applicant is Commissioner of Police. In absence of any such document on record, it cannot be said that there is any illegality in the dismissal order because of competency of the authority. Apart, the order of dismissal of the Applicant is already quashed and set aside by the Government in revision and in place of dismissal, the punishment of deduction to lower time scale for three years has been imposed and consequently, Applicant has been reinstated in service. This being the position, the order of dismissal no more survives, and therefore, the question of challenging the said order on the point of competency of Deputy Commissioner of Police does not survive.

35. As such, the punishment imposed by Government in revision is based upon the evidence recorded during enquiry holding the Applicant guilty and no case is made out to interfere the same in view of parameters and limitations of judicial review, as laid down by Hon'ble Supreme Court in ***P. Gunasekaran's*** case (cited supra)

36. Now, coming to O.A.No.240/2019, it pertains to refusal of pay and allowances for out of duty period. The Applicant was dismissed from

service on 14.09.2012. In view of order of Government in revision, the order of dismissal was set aside and he was reinstated in service by order dated 22.11.2017. However, he joined on 29.10.2018. The Respondents declined to pay and allowances for the period 14.09.2012 to 28.10.2018. It is only after reinstatement, the Applicant made representation on 31.11.2018 that he was not allowed to join though made attempt to join on 09.03.2018.

37. Shri Bandiwadekar, learned Advocate for the Applicant sought to contend that after setting aside the order of dismissal, the punishment of reduction to lower time scale has been imposed, and therefore, the Applicant cannot be deprived of pay and allowances for the period from dismissal till reinstatement. However, it should not be forgotten that punishment of dismissal was modified only on account of acquittal of the Applicant in criminal case during the pendency of revision. Apart, this is not a case where a Government servant is exonerated from the charges in D.E. In D.E, he is held guilty for serious misconduct and the said finding is upheld in revision. All that, the punishment of dismissal is modified. As such, this is not a case of getting clean chit where a Government servant may ask for pay and allowances for out of duty period. Indeed, on the principle of 'no work no pay' coupled with penalty imposed in D.E. holding him guilty for the serious charges, the claim for pay and allowances is totally unacceptable. The submission for pay and allowances from the date of dismissal till reinstatement is thus *dehors* the law.

38. Shri Bandiwadekar, learned Advocate for the Applicant further sought to contend that there was delay on the part of Respondents to get the Applicant joined, and therefore, the Applicant is entitled for pay and allowances for the said period. I find no substance in his contention. Material to note that he was served with the order passed by Government in revision on 07.03.2018. The Applicant accepted the acknowledgement of the said order on 07.03.2018. However, thereafter, he did not make any representation immediately requesting the Respondents to get him

joined. As such, it is obvious that he himself did not join despite the service of order of reinstatement in service to him on 07.03.2018. His contention that on 09.03.2019, he went to the Office for joining, but was not allowed to join is nothing but after-thought version. Had he interested in joining, he would have issued notice or would have made representation exhibiting his willingness to join immediately. He was asked by order dated 30.07.2018 to join which he accepted on 22.10.2018 and thereafter only he joined on 29.10.2018. As such, the period in which the Applicant was not on duty, he is not entitled to pay and allowances on the principle of 'no work no pay'. This is not a case where Applicant was prevented from joining duty after the order of reinstatement in service. Suffice to say, the claim for pay and allowances for out of duty period is devoid of merit.

39. The totality of aforesaid discussion leads me to sum-up that the challenge to the impugned orders holds no water and both the O.As. deserves to be dismissed. Hence, the following order.

O R D E R

Both the Original Applications are dismissed with no order as to costs.

Sd/-
(A.P. KURHEKAR)
Member-J

Mumbai
Date : 23.08.2021
Dictation taken by :
S.K. Wamanse.
D:\SANJAY WAMANSE\JUDGMENTS\2021\August, 2021\O.A.121 & 240.19.w.8.2021.Minor Penalty and Denial of Pay and Allowances.doc

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