IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL MUMBAI

ORIGINAL APPLICATION NO.699 OF 2015 (D.B)

DISTRICT : THANE

Shri Bibhishan V. Tutare,)
C/o. Shri A.V. Bandiwadekar,)
O/at. 9, "Ram-Kripa", Lt. Dilip Gupte Marg,)
Mahim, Mumbai 400 016.)...**Applicant**

Versus

1. The Additional Director General of)
Police and Inspector General of Prisons,)
M.S. Pune O/at Old Administrative Build.)
Pune -1.)

2. The State of Maharashtra, through)
Principal Secretary, Home Department,)
O/at. Mantralaya, Mumbai 400 032.)..Respondents

Shri A.V. Bandiwadekar, Advocate for Applicant.

Ms N.G. Gohad, Presenting Officer for Respondents.

CORAM : RAJIV AGARWAL, (VICE-CHAIRMAN)
R.B. MALIK (MEMBER-JUDICIAL)

DATE : 17.2.2016

PER : R.B. MALIK (MEMBER-JUDICIAL)

ORDER

1. This Original Application is made by a former Jailor Grade-II calling into question the order of compulsory retirement from service after departmental enquiry (D.E.) on the allegations of having accepted illegal gratification so as to let the food articles etc. to be passed on to an inmate of Taloja jail of which the applicant was the Jailor on deputation. That order dated 20.10.2012 came to be confirmed in appeal and both the orders are the subject matter of the challenge herein.

2. The sum and substance of the case against the applicant was that as on 14.3.2009, one Shri Sanjay Jadhav was an inmate of the jail which the applicant had been deputed to as an under trial. His brother Shri Kishor Jadhav allegedly brought some eatables to be passed on to him. The applicant initially objected but later on in return for an illegal gratification of Rs.500/- he let those eatables be handed over to the said prisoner. The matter was reported to the higher ups and in due course of time a charge sheet came to be drawn up and an enquiry officer (E.O.) was appointed.

3. The substance of the charge sheet though three pronged was basically the same. The first charge was precisely what

has been summarized above with the only addition of the relevant rules of the Maharashtra State Civil Services (Conduct Rules), 1979 of which the breech was alleged and also the relevant provisions of the Maharashtra State manual of the prisons. The second charge was in effect that the applicant committed breech of the rules regarding the safety, precaution and safe-guards of the delicate nature related to the jail administration. There was some reference to the admission/confession allegedly made by the applicant to his superiors. The third charge was again more or less the same that the applicant in return of the illegal gratification allowed the eatable to be passed on to the said prisoner.

4. The third annexure which may have some relevance was the list of witnesses. They were all the authorities of the jail working in various capacities in the hierarchy. The names of the Jadhav brothers were not there in that list. But there is material on record of the enquiry to show that Jadhav brothers were sought to be served with the notices of enquiry. In this connection on behalf of the respondents reference came to be made, by Ms. Gohad, the learned P.O. to the provisions of the relevant rules to point out that though not cited initially the witnesses could still be called pending enquiry. It is, however a matter of record that the Jadhav brothers were not examined and from the original record one finds that according to the establishment they could not be

served because they were apparently not available at the address which was there in the record. At this stage, it may be noted, however, that Shri Sanjay Jadhav was apparently accused of dreadful murderous crime. Therefore, we do not think we can accept just for the asking that even he could not be served with the notices of the D.E. If, necessary this aspect of the matter may have to be discussed a little more in this determination.

5. The respondents by the affidavits filed on their behalf have supported the case against the applicant and according to them the enquiry was properly held under the relevant provisions of relevant rules which were applicable herein. They pointed out to the so called application i.e. representations of the applicant to the higher ups. Adverse allegations were denied. One aspect of the case of the applicant has been that the brother of the said inmate brought a vakalatnama in a rolled up condition, wherein Rs.500/- currency note was apparently stealthily kept. Therefore, the applicant could not be accused of the alleged infraction. The enquiry officer examined official witnesses and submitted his detailed report running into a 21 pages. The enquiry officer was Shri Y.D. Desai, Superintendent of Thane Central Jail. The alleged incident took place in Taloja prison. The enquiry officer has noted in details the statements which if need be will be mentioned presently.

But in the ultimate analysis the enquiry officer did find the charges against the applicant proved under all the heads.

6. The report came to be submitted to the deputy Inspector General of Prison, Smt Swati Sathe. By that order dated 20.10.2012, a copy of which is at Exb.'A', page 29 of the paper book, she accepted the report of the E.O. and made the order of compulsory retirement. There is no specific discussion of the evidence adduced by the E.O., in her order. But before we proceed further there is an extremely significant aspect of the matter which in our opinion goes to the root of the matter and that needs to be addressed here and now. The impugned order of compulsory retirement has been made by the Deputy Inspector of General, Police (Prison). The final order in Marathi may be reproduced for proper grasp and understanding.

"आदेश

श्री.व्ही.बी.तुतारे, तुरुंगाधिकारी श्रेणी-२ यांचेवर ठेवण्यात आलेले दोषारोप हे गंभीर स्वरुपाचे असून ते सर्व दोषारोप हे विभागीय चौकशी मध्ये सिध्द झाले आहेत. त्यामुळे त्यांना महाराष्ट्र नागरी सेवा (शिस्त व अपील) नियम १९७९ चे नियम ५ चे उपनियम (सात) अन्वये शासकीय सेवेतून सक्तीने सेवानिवृत्त करण्यात येत आहे.

(मा.अ.पो.म.व.का.म.नि.यांचे मान्यतेने)

(स्वाती साठे)
कारागृह उपमहानिरीक्षक (मु.)
महाराष्ट्र राज्य, पुणे-१."

7. The above order at the most indicates that it was made by the said authority with the approval of Additional Director General of Police and Inspector General (Prison) (मान्यतेने). Now, moment of the order hardly requires to be emphasized. It is worse only than out right dismissal but it is very close to it. We are very clearly of the view that such an order cannot be made by an authority who is not an appointing authority and a disciplinary authority so to say. No provision was cited before us in support of the validity of an order made by the said authority brining in its wake the momentous consequences. In that view of the matter, therefore, it is very clear that this is not just an instance of curable irregularity but it is a clear instance of incurable illegality enveloped within the circumstance, safeguarded inter-alia under article 311 of the Constitution which confers is a right not to be punished by an authority who is not competent to do so. In our opinion the defense of the respondents crumbles irredeemably on this single aspect of the matter without there being anymore and we would therefore hold that the impugned action of the respondents is unsustainable and impugned order needs to be quashed and set aside.

8. The above finding really decides the O.A. But even then we may deal with the facts in a precise manner. We make it clear that we adopt this course of action because in the present set of facts if we were to find that the case was

otherwise arguable against the applicant at least prima-facie then maybe we would have considered the option of remanding the matter from the stage of submission of the report of the E.O.. It is for that purpose and with that object in mind that we proceed further.

9. We have already mentioned above that much as the authorities below would try to put forth the case of impossibility to have primary evidence in the form of statements of Jadhav brothers, we are not convinced for the reasons already set out herein above. No doubt the erstwhile inmate facing the prosecution on the charge of murder was liberated on bail but the prosecution was pending nonetheless. We refuse to accept that it was impossible to have at least him to give a statement. The perusal of the original D.E. would show that the Jadhav brothers did make statements earlier which for all one knows came to be treated as what in common legal parlance is called examination in chief. Unless one had the benefits of those statements coming clear from the crucible of cross examination, it would not have been safe and prudent to act thereon. The absence of statements of Jadhav brothers in our opinion deals a significant blow to the case of the respondents.

10. Now, no doubt this being an instance of the D.E., the strict procedural provisions of the law of evidence do not

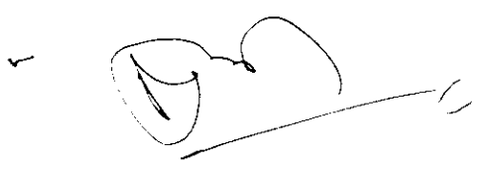
apply and the rule against hearsay can also be applied in considerably relaxed degree. The jurisdiction of this Tribunal in scrutinizing the impugned orders is of judicial review of administrative action and it is not an appellate jurisdiction where evidence can be scanned and appellate authority's own conclusion can be drawn even if they were to supersede the conclusions of the authorities below. Here the concern of the judicial forum is to make sure that the delinquent was the recipient of treatment which was fair, reasonable and just and all in keeping with the principles of natural justice. This would be true both at the stage of the conduct of D.E. as well as in the pronouncements like orders etc. However, equally true is the fact that with all jurisdictional limitations if it appears to the Tribunal that even within those limitations the interference is called for then the Tribunal would not stay its hand for that might tantamount to abdication of judicial duty. Law prescribes circumscription and not total refusal to act or to put seal of approval on the impugned action just for asking and mechanically. The Tribunal will examine if there is some incriminating evidence warranting the conclusions to be drawn and if such evidence is there then sufficiency thereof would be by and large and generally not be the concern of the judicial forum. As a corollary, evidence should be found to be incriminating on its evaluation by the Tribunal. This is the requirement and not just because the respondents say that it is incriminating.

11. In the above background, when we turn to the evidence it will not be necessary for us to read the same in extenso. It would appear that one Havaldar Shri D.Y. Chowkekar was what can be described as the complainant. On his report the authority concerned namely Shri A.S. Bangar took action. Now, what really happened was that from a wallet supposedly of the applicant a currency note of Rs.500/- denomination was taken out and was considered to be in the manner of speaking an incriminating piece of evidence. Now, we may repeat that strict rule of evidence do not apply to the D.E.s but then every case has its own peculiarity. Here Rs.500/- has proved to be nemesis of the applicant but at the same time it was quite significant also but it was such an amount which on its own force could not be considered to be unique or extra ordinary from the current socio-economic condition and therefore it was necessary to have at least some material on record to show as to what was so spectacularly wonderful about Rs.500/- note so as to hold it as an incriminating piece of evidence. If there was anything in that behalf, we find nothing on record. It is not there in the evidence of the complainant as well as in any of the orders herein impugned. In our opinion the whole thing can not be held in favour of the respondents because we have already explained the significance of this currency note. It is again no doubt true that the applicant does not entirely disown the incident. It is his case that the brother of the inmate brought a

vakalatnama which was rolled up containing with a currency note hidden therein. In a given set of facts this could have been a circumstance sufficient enough to raise the judicial eyebrows and may be sufficient enough at least to visit minor penalty. However, in our view the events that took place culminating into the so called seizer were such as to not make it possible to conclusively hold existence of what in the realm of criminal law is called mens-rea. Let us dilute it to the degree required in a D.E. but the fact remains that in no degree this aspect of the matter could be held against the applicant.

12. Shri Bangar was at the relevant time Superintendent of Taloja Jail. His statement has its own relevance regardless of whether it is examined in the light of the provisions of Section 9 of the Indian Evidence Act or even on the principle analogs thereto in so far as to conduct aspect is concerned going by the case of the respondents. Shri Bangar was amongst the first persons holding a responsible position that came to know about the alleged incident. In his cross examination a number of questions were put to him and he had just one standard answers to each one of them. We may reproduce in Marathi at least one set of question answer and all others are ditto.

"मित्रपक्ष :- झडती अंमलदार सामान सोडतो की, जेलर



श्री. बांगर :- श्री.तुतारे यांनी बंदयांच्या भावाकडून पैसे घेतल्याच्या घटनेबाबत मला जे काही सांगावयाचे होते ते मी नोंदवही क्र.१२ मध्ये नमुद केलेले आहे व तेच ग्राहय धरावे, याव्यतिरिक्त मला काही सांगावयाचे नाही."

13. It is very clear to us that a very conscious attempt was made by the said authority in his cross examination to indulge in blocking. In every proceeding judicial or quasi judicial there is something called quality of evidence and such a conduct brings to the fore the quality of evidence aspect of the matter which has to be held to be a black spot, a weak spot as it were in the case of the party concerned which in this case is the respondents.

14. In the background of the above discussion, when we examine the report of the E.O. and more particularly the order of compulsory retirement which as indicated above has been held to be incurably illegal, we find that even the basic infirmities therein are too glaring to be glossed over. We are undoubtedly conscious of our judicial limitations which aspect of the matter is already discussed in extenso. However, as already alluded to on the anvil of incriminating evidence there is nothing to write home about as far as the respondents are concerned. But even if they really wanted us to go along with them we should have had at least some basic material to suggest as to what was the opinion of the E.O. and then the authorities above him towards the various fact

components that are of formidable significance. There is nothing therein. And even if we keep aside the lack of competence in the authority making the impugned order still reading the order as it is, we do not have anything to grasp the process of reasoning that ultimately led her to accept the report of the E.O.

15. If that be the state of affairs in so far that "disciplinary authority" is concerned, the appellate order does no better. It does not deal with any basic aspect of the matter and puts a seal of approval on the first impugned order without the backing of the reasonings.

16. In view of the forgoing, therefore, this is a matter where for sound legal reasoning we must not only just intervene but effectively interfere by setting aside the order herein impugned. The net result is to order reinstatement of the applicant for which we shall be giving some reasonable time, taking into consideration the procedure at the official levels in the present set of circumstances. However, we are not so disposed as to grant to the applicant what can be described as back wages covering the period from the date of first impugned order till his reinstatement. However, he will be entitled to all other service benefits.

17. The orders herein impugned being at Exb. A and Exb. B hereto are quashed and set aside. The respondents are directed to reinstate the applicant to the post he was effectively removed from as a result of the impugned orders within six weeks from today with continuity of service and all service benefits except the back wages.

18. The Original Application is allowed in these terms with no order as to costs.

Sd/-

(R.B. Malik)
Member-J
17.02.2016

Sd/-

(Rajiv Agarwal)
Vice-Chairman
17.02.2016

Place : Mumbai
Date : 17.2.2016