IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2352 OF 2018

Abdul Rauf Mohammed Khaja,
Age : 54 years, Occu. : Service as a
Peon in Collector Office Nanded,
R/o Itwara Machi Market,
Nanded. .. Petitioner

Versus

1. The State of Maharashtra,
Through the Secretary,
Revenue Department,
Mantralaya, Mumbai 400 032.

2. The Divisional Commissioner
Office, Aurangabad.

3. The District Collector,
Nanded. .. Respondents

Shri Sunil V. Kurundkar, Advocate for the Petitioner.
Shri K. N. Lokhande, A.G.P. for the Respondent Nos. 1 to 3.

CORAM : MANGESH S. PATIL AND
SANDEEP V. MARNE, JJ.

CLOSED FOR JUDGMENT ON : 04.10.2022
JUDGMENT PRONOUNCED ON : 14.10.2022

JUDGMENT (Per Sandeep V. Marne, J.) :-

. Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing.

2. By the present petition, the petitioner assails judgment and order dated 16.08.2017 passed by the Maharashtra

Administrative Tribunal, Bench at Aurangabad (for short "Tribunal") in Original Application No. 482 of 2015. Before the Tribunal, the petitioner had challenged (i) order passed by the Disciplinary Authority dated 15.12.2008 imposing the penalty of reduction to the minimum pay scale (ii) order dated 23.09.2010 passed by the Appellate Authority modifying the penalty to that of reduction to the minimum of the pay scale permanently and (iii) order dated 03.03.2015 rejecting the revision petition. By the judgment and order impugned in the present petition, the Tribunal has proceeded to dismiss the original application.

3. We must note at the outset that the Tribunal has erroneously observed in para No. 2 of the judgment that the petitioner was challenging the order of dismissal from service. By order dated 15.12.2008, the disciplinary authority had imposed penalty of reduction to the minimum of the pay scale without specifying any period. The appellate authority while rejecting the appeal by order dated 23.09.2010 directed that the reduction to the minimum of the pay scale would be on permanent basis. This is the ultimate penalty which was the subject matter of challenge before the Tribunal.

4. While working as a Peon (Watchman), disciplinary proceedings were initiated against the petitioner vide memorandum of charge sheet dated 02.02.2005 on the charge that he had turned hostile during the trial in Sessions Case No. 10 of 2004 against another peon Shri Sayed Alim S/o Sayyed Mohiuddin, which led to his acquittal. Based on findings recorded by the Sessions Judge while acquitting the accused, the petitioner was charged with the misconduct of turning hostile

and aforesaid penalty came to be imposed on him after being found guilty in the disciplinary enquiry. The Tribunal has dismissed the original application of the petitioner holding him responsible for acquittal of the accused. It is held by the Tribunal that the petitioner had never claimed that his earlier statement before the Special Judicial Magistrate Nanded was given under coercion and that therefore, he was not justified in turning hostile.

5. Appearing for the petitioner Mr. Kurundkar, the learned counsel would submit that initiation of disciplinary proceedings against the petitioner was flawed as mere giving of testimony before the Sessions Judge cannot amount to misconduct. He would submit that the findings recorded by the Sessions Judge would indicate that the statement of the petitioner recorded by the Special Judicial Magistrate Nanded was not in accordance with the procedure prescribed by law. He would further submit that his testimony alone has not resulted in acquittal of the accused. He therefore prays for setting aside the order of the Tribunal.

6. Per contra, Mr. Lokhande, learned Assistant Government Pleader appearing for the State Government supports the order passed by the Tribunal. He would submit that the petitioner had witnessed the act of the accused pushing the victim from terrace. His statement was recorded by the Special Judicial Magistrate U/Sec. 164 of the Code of Criminal Procedure (for short "Cr. P. C.") and, therefore, his act in resiling from the statement and turning hostile clearly amounts to misconduct. He would submit that the testimony of the petitioner has resulted in acquittal of

the accused. He therefore prays for dismissal of the petition.

7. Having heard the learned counsel for the parties, we first examine Petitioner's contention that the act of turning hostile does not amount to misconduct. Perjury is an offfence punishable under Section 191 of the Indian Penal Code (for short "I. P. Code"). If the petitioner had committed offence of perjury, the Sessions Judge ought to have issued notice to him and tried him for that offence. Whether he had committed offence of perjury or not can be established by the Sessions Judge alone. The same cannot be established in a disciplinary enquiry. The law provides for a complete mechanism to punish a person committing office of perjury. Turning hostile, by itself, is not an offence. The only Court competent to record a finding of commission of perjury was the Sessions Judge. The appointing authority, not being an expert, would otherwise not be in a position to gauge the factors leading to hostility of the witness. After considering the testimony of the petitioner, the Sessions Judge has thought it appropriate not to issue notice to him for trial for the offence punishable U/Sec. 191 of the I. P. Code. Therefore, it is difficult to hold that the act of giving testimony before Sessions Judge as misconduct and to punish the petitioner for the same.

8. One may morally expect a witness to stand by his previous statement during trial. For a government servant, a higher degree of responsibility could be expected by assisting the prosecution to bring home guilt of the accused by sticking to the statement previously recorded. However, whether this 'expectation' could be extended to an extent that the act becomes

a misconduct capable of being punished is the issue. As observed earlier, turning hostile, by itself, is not an offence. Can it be a misconduct within the sphere of disciplinary proceedings? To find an answer, we may profitably refer to the judgment of the Apex Court in **Union of India v. J. Ahmed,** reported in **(1979) 2 SCC 286**, wherein it is held in para 11 as under:

> 11. Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that conduct which is blameworthy for the government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct (see Pierce v. Foster [17 QB 536, 542]). A disregard of an essential condition of the contract of service may constitute misconduct [see Laws v. London Chronicle (Indicator Newspapers [(1959) 1 WLR 698])]. This view was adopted in Shardaprasad Onkarprasad Tiwari v. Divisional Superintendent, Central Railway, Nagpur Division, Nagpur [61 Bom LR 1596] , and Satubha K. Vaghela v. Moosa Raza [10 Guj LR 23] . The High Court has noted the definition of misconduct in Stroud's Judicial Dictionary which runs as under:
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> > "Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct."
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> In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik [AIR 1966 SC 1051 : (1966) 2 SCR 434 : (1966) 1 LLJ 398 : 28 FJR 131] in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In S. Govinda Menon v. Union of India [(1967) 2 SCR 566 : AIR 1967 SC 1274 : (1967) 2 LLJ 249] the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P.H. Kalyani v. Air France, Calcutta [AIR 1963 SC 1756 : (1964) 2 SCR 104 : (1963) 1 LLJ 679 : 24 FJR 464] wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious

> consequences was treated as misconduct. **It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct** unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. ---------- **But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.**
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> (*emphasis supplied*)

9. Though the decision in ***J. Ahmed*** (supra) is not directly attracted in the present case, it does expound the law that every act of a government servant cannot be brought within the ambit of misconduct.

10. Moving closer to the subject in hand, we may also refer to the judgment of the Apex Court in **Inspector Prem Chand v. Govt. of NCT of Delhi,** reported in ***(2007) 4 SCC 566***. In that case, the Appellant therein was detailed as a raid officer to conduct raid against an official accused of demanding and accepting illegal gratification. Even though the tainted money was not accepted by the accused, the Appellant failed to seize the tainted money which was an important piece of evidence. He was therefore proceeded departmentally by issuance of charge memo alleging that his action resulted in acquittal of the accused. Examining the issue whether this act of the Appellant

constituted a misconduct, the Apex Court held as under:

> **"13.** The Tribunal opined that the acts of omission on the part of the appellant were not a mere error of judgment. On what premise the said opinion was arrived at is not clear. We have noticed hereinbefore that the Appellate Authority, namely, the Commissioner of Police, Delhi, while passing the order dated 29-8-2003 categorically held that the appellant being a raiding officer should have seized the tainted money as case property. In a given case, what should have been done, is a matter which would depend on the facts and circumstances of each case. No hard-and-fast rule can be laid down therefor.
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> **14. The criminal court admittedly did not pass any adverse remarks against the appellant**. Some adverse remarks were passed against the investigating officer, who examined himself as PW 4 as he had handed over the tainted money to the complainant PW 2.
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> **16. We, therefore, are of the opinion that in the peculiar facts and circumstances of this case, the appellant cannot be said to have committed any misconduct**."
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> (*emphasis supplied)*

11. Thus in **Inspector Prem Chand**, the Apex Court held that since the criminal court had not made any adverse observations against the appellant therein, there was no ground to proceed departmentally against him.

12. Not standing by the statement given under Section 164 of Cr.P.C. during his testimony during trial could possibly be construed as an unethical act not expected of an ideal government servant. By doing so he may not have shown the highest degree of probity. The same, however, would not amount to misconduct capable of being subjected to punishment for ensuring discipline amongst the organization. Also, every such act would not go unpunished even departmentally, for that upon being convicted for the offence of perjury, the appointing

authority has a right to punish him/her based on conviction without conducting any departmental inquiry. Therefore the act of turning hostile *ipso facto* would not amount to misconduct. We therefore find that initiation of disciplinary proceedings against the petitioner was completely unwarranted.

13. We have also gone through the judgment of the Sessions Court. In para No. 10 of the judgment, the Sessions Judge has held as under :

> "It is mandatory on the part of the Special Judicial Magistrate to make endorsement below the statement stating that statement is voluntary on his own accord, and it is also necessary the Magistrate must be satisfied prior to recording the statement that witness is giving statement voluntary without any pressure or threat. This fact is to be written by Special Magistrate prior to recording statement of witness. But on perusal of statement recorded by him or witness Abdul Rauf, there is no mention any where that he was fully satisfied that the witness is giving statement without any threat and undue influence and pressure, given by the police. He has issued certificate below statement of witness stating that he has recorded statement of witness u/ s. 164 of Cr.P.C. as per letter issued by the I.C. at 3.00 p.m. and finished at 4.15 p.m. The certificate given by him is silent about his satisfaction that witness has given the statement without any pressure, voluntary on his own accord. He has not uttered a single work in his statement stating that, the statement of witness is recorded in his own accord and he has fully satisfied that statement is true disclosure of the fact of the incident. Special Magistrate has not disclosed this fact in his certificate, therefore, the value of the statement of witness recorded by him is reduced. Any way evidence of P.W.5 is not supported by the evidence of P.W. 4 Abdul Rauf who disclosed the occurrence or the incident before him. Therefore, the evidence of P.W.-5 cannot be accepted for holding that witness Abdul Rauf has disclosed him true facts about the occurrence of the incident."

14. Thus a specific finding is recorded by the Sessions Judge

that, the petitioner's statement U/Sec. 164 of the Cr. P. C. was not recorded as per the procedure established by law. The Sessions Judge has further recorded findings about involvement of the accused in a false case by holding as under :

> "Possibility of involving the accused in a false case cannot be ruled out due to filing of report by the complainant at late stage, when witness Rauf was present on the spot at the time of spot panchanama and he did not disclose anything to the complainant or relatives or the complainant about the incident and disclosing the occurrence of the incident by witness Rauf after third day of the incident is sufficient or creating doubt about the genuineness of the report filed by the complainant against the accused. The arguments advanced by the Ld. Counsel for accused deserves for consideration, therefore, it can be safely inferred and held that the evidence on record is insufficient for establishing the charges leveled against accused, therefore, point No. 1 is to be answered in negative."

15. It is thus not a case that on account of hostility of the petitioner alone, the accused came to be acquitted. Furthermore it is trite that testimony of a hostile witness is not to be ignored in its entirety. Therefore the acquittal of the accused cannot be attributed to the Petitioner's testimony alone.

16. It is on both counts, impermissibility to initiate disciplinary proceedings in absence of petitioner's trial U/Sec. 191 of the I. P. Code as well as the findings recorded by the Sessions Judge in the judgment acquitting the accused, we are of the view that penalty imposed upon the petitioner is unwarranted.

17. Consequently, we allow the present petition by passing following order.

O R D E R

A. The judgment and order dated 16.08.2017 passed by the Maharashtra Administrative Tribunal, Bench at Aurangabad in Original Application No. 482 of 2015 is set aside.

B. Consequently, the order dated 15.12.2008 passed by the Disciplinary Authority, order dated 23.09.2010 passed by the Appellate Authority and order dated 03.03.2015 passed by the Revisional Authority are also set aside.

C. The petitioner be paid all consequential benefits arising out of setting aside orders of penalty within a period of four (04) months from today.

D. Rule is made absolute in above terms. There shall be no order as to costs.

[SANDEEP V. MARNE, J.] [MANGESH S. PATIL, J.]

bsb/Oct. 22