

IN THE HIGH COURT OF JUDICATURE OF BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO. 2438 OF 2012

Ashok S/o Shahaji Gulbhile,
Age 42 years, Occ: Nil,
R/o : Dipewadgaon, Post Borisavargaon,
Taluka Kej, District Beed.

... Petitioner

VERSUS

1] The Secretary,
Gramvikas Shikshan Prasarak Mandal,
Bansarola, Taluka Kej, Dist. Beed.

2] The President,
Gramvikas Shikshan Prasarak Mandal,
Bansarola, Taluka Kej, Dist. Beed.

3] The Headmistress,
Adarsh Kanya Vidyalaya,
Bansarola,
Taluka, Kej, Dist. Beed.

4] The Education Officer, (Primary)
Zilla Parishad, Beed.

5] The Education Officer (Secondary)
Zilla Parishad, Beed.

... Respondents

.....
Mrs. Rashmi S. Kulkarni , Advocate for petitioner
Mr. M.K. Deshpande, Advocate for respondent Nos. 1 to 3
Mr. K.M. Suryawanshi, AGP for respondent No. 5
.....

CORAM : RAVINDRA V. GHUGE, J.

Date of Reserving Judgment :- 13-02-2015

Date of pronouncing judgment :- 20-03-2015

JUDGMENT :

1. Rule. Rule made returnable forthwith by the consent of the parties and heard finally.

2. The petitioner/ employee is aggrieved by the judgment and order dated 22-12-2011 delivered by the School Tribunal whereby his Appeal No. 57 of 2002 has been dismissed.

3. The said Appeal was earlier dismissed by judgment and order dated 14-10-2010 which was quashed and set aside by this Court by its order dated 06-04-2011 passed in Writ Petition No. 11668 of 2010. The appeal was restored on 28-04-2011 and was reheard.

4. The contentions of the petitioner in the light of the memo of admitted facts dated 28-01-2015 and oral submissions are summarised as under :-

a] The petitioner has acquired the degree of Master of Arts and Bachelor of Education (M.A.B.Ed.)

b] He was appointed on 15-07-1991 as a secondary school teacher.

c] The petitioner and the respondent-management are covered by the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (here-in-after referred to as the “ MEPS Act”) and the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (here-in-after referred to as the “ M.E.P.S. Rules”).

d] On 20-12-2001, the petitioner was placed under suspension.

e] The suspension order does not indicate that the petitioner was under an obligation or was ordered to mark his attendance in the school premises on the attendance register as a precondition for earning his suspension allowance.

f] The resolution to suspend the petitioner was passed on 26-11-2001 which does not mention that the petitioner would not earn his suspension allowance if he did not mark his presence each day in the school attendance register.

g] A final show-cause notice was issued on 14-12-2001.

h] The petitioner received the said notice on 19-01-2002.

i] The petitioner replied to the show cause notice on 22-01-2002.

j] Before the petitioner received the notice and before he could submit his reply, the management arrived at a decision

to conduct an enquiry and issued the letter for initiating an enquiry on 06-01-2002.

k] A notice dated 06-01-2002 was issued to the petitioner to appoint his nominee on the enquiry committee.

l] By letter dated 07-02-2002, the petitioner appointed his nominee on the enquiry committee.

m] The charge sheet dated 25-02-2002 was issued to the petitioner setting out the charges as under :-

- i] Not residing within the head quarters.
- ii] Not following the time table.
- iii] Creating a dis-cord amongst the teachers.
- iv] defamed the school in a newspaper interview.
- v] Not accepting communication from the management.

n] The petitioner replied to the charge sheet on 05-03-2002 which was accompanied with several documents in support of his case.

o] On 23-03-2002 the petitioner informed the enquiry committee that his nominee had developed cold feet and thus withdrew himself as his nominee on the enquiry

committee. He prayed for eight days time to nominate a new nominee.

p] Despite the above, the management continued with the enquiry without permitting the petitioner to nominate his nominee on the committee and recorded his evidence on the same day 23-03-2002.

q] The enquiry was conducted by only two members.

r] The enquiry report was submitted on 15-04-2002.

s] The petitioner was terminated from employment on 19-04-2002.

t] The management had decided to conduct the enquiry without considering the reply of the petitioner in violation of Rule 33 of the Rules.

u] The enquiry was continued in the absence of the petitioner's representative, despite having intimated to the employer that the nominee earlier appointed had backed out.

v] The application dated 23-03-2002 seeking permission to appoint a nominee on the enquiry committee was not considered by the management as well as the enquiry committee.

w] Suspension allowance was not paid to the petitioner thereby weakening his defence.

x] Stale, Vague and ambiguous charges have been levelled only to victimise the petitioner.

y] Two additional charges at clause Nos. 6 and 7 were suo-moto introduced by the enquiry committee when the said charges were not levelled upon the petitioner in the charge sheet.

z] Despite the petitioner having filed voluminous documents and also supplied a list of witnesses, the School Tribunal has concluded that no evidence has been led by the petitioner in the enquiry.

aa] On 23-03-2002, the statement of the petitioner was recorded. He was thereafter cross-examined.

ab] No date of enquiry was posted after 23-03-2002.

ac] Management recorded its evidence on 30-03-2002, after the recording of the petitioner's evidence.

ad] On 04-04-2002 documents were supplied by the management (which the petitioner had been seeking for a long time) after the statement of the petitioner in defence was recorded on 23-03-2002.

ae] The procedure to conduct the enquiry laid down in Rule 37 has been disregarded and the enquiry was conducted in a slipshod manner.

af] The enquiry committee has not referred to any document produced by the petitioner and has delivered its findings by ignoring the documents and the evidence of the petitioner.

ag] Though the petitioner was suspended on 20-12-2001 and eventually dismissed on 19-04-2002, suspension allowance was not paid to the petitioner.

ah] The petitioner preferred representations dated 08-01-2002, 22-01-2002 and 04-03-2002 to the Education Officer raising a grievance that his suspension is continued and the enquiry is conducted against him without the payment of suspension allowance. The Education Officer by communication dated 03-05-2002 had directed the respondent to pay suspension allowance, as the management was under an obligation to pay the suspension allowance, but in vain.

ai] By communication dated 18-07-2002, the Education Officer directed the management to reinstate the petitioner.

aj] Rule 34 of the 1981 Rules prescribes the manner of payment of subsistence allowance and the components to be taken into account while calculating the said amount.

ak] Rule 33 (4) of the 1981 Rules mandates that an employee under suspension shall not leave the headquarter during the period of suspension without prior approval of the Chief Executive Officer.

al] The petitioner's contention is that he has not violated Rule 33 (4) and as such, the respondent- management was not justified in withholding the payment of subsistence allowance to the petitioner.

am] One Mr. Murlidhar Kakade, who is President of the enquiry committee, was convicted of theft. Every month, there is a deduction from his salary as recovery of the theft amount. Yet he was appointed as a President of the enquiry committee.

an] In the inquiry report, additional charges at clause Nos. 6 and 7, which were not mentioned in the charge sheet, have been held to be proved against the petitioner.

ao] The petitioner relies upon the following judgments in support of his case :-

I] 2007 (5) ALL MR 893

Shri Dnyaneshwar Samaj Prabodhan Sanstha Vs.
The Presiding Officer School Tribunal & Ors.

ii] 2010 (1) Mh.L.J. 359

Yavatmal Islamia Anglo Urdu Education Society
Yavatmal and another Vs. Mujib Ahmed Abbas
Ali & another

iii] 2013 (3) All MR, 952 (SC)

Shri Anant R. Kulkarni Vs. Y.P. Education
Society & others.

iv] 2014 (4) Mh.L.J. 556

Manohar Pandit Marathe Vs. President, Sharda
Vidya Prasarak Mandal

ap] It is, therefore, submitted that this petition deserves to be allowed and the petitioner deserves to be reinstated with continuity and full back wages.

5. Shri Deshpande, learned Advocate appearing on behalf of the management has submitted as under :-

a] The charge sheet was served upon the petitioner on 19-01-2002.

b] Decision to hold a Departmental Enquiry (DE) against the petitioner was taken by the management on 06-01-2002.

c] The petitioner has not questioned the suspension allowance and, therefore, even if this issue appears to be a legal issue the petitioner should not be permitted to raise the said issue for the first time.

(The petitioner pointed out Ground (d) from the appeal memo that a specific ground of non payment of subsistence allowance has been raised in the appeal)

d] The petitioner along with another employee namely Smt.Pujari Ratan Uttamrao and Mohanrao Kakade had held a press conference at Ambajogai on 03-05-1999 and had defamed the management by making serious allegations against the President and Secretary of the management.

e] The news appeared in 'Daily Lokmat' on 04-05-1999 thereby defaming the management.

f] The defamatory news report dated 04-05-1999 gave a serious blow to the reputation of the management.

g] On 31-05-1999 a show cause notice was issued to the petitioner, to which the petitioner replied by his reply on 05-06-1999.

h] On 26-11-2001, (after about 28 months) the management decided to seek permission from the Education Department to suspend the petitioner pending disciplinary action.

i] Since the nominee of the petitioner withdrew from the enquiry, the enquiry was conducted by only two members.

j] Since the petitioner requested for eight days time on 23-03-2002 as his nominee had declined to continue on the enquiry committee, the enquiry was proceeded with, without giving the petitioner an adjournment as the enquiry was getting delayed.

k] On the same day 23-03-2002, the evidence of the petitioner was recorded.

i] On 30-03-2002, the management submitted its evidence in the form of statement of employees for proving the mis-conduct of the petitioner.

m] The employees who gave the statement against the petitioner, were not subjected to any cross-examination by the petitioner.

n] On 04-04-2002, the summary final notice was issued to the petitioner.

o] The petitioner submitted his reply on 11-04-2002.

p] On 15-04-2002, the committee submitted its report concluding that the petitioner was guilty of the charges levelled upon him.

q] On 19-04-2002, the respondent terminated the service of the petitioner.

r] Suspension allowance was rightly not paid as the petitioner did not mark his presence in the school premises.

s] The above factors were duly considered by the School Tribunal and the appeal was rightly dismissed.

t] Impugned judgment of the Tribunal indicates proper application of mind.

u] Proper reasons are assigned in support of the impugned order.

v] The Tribunal has dealt with every aspect raised by the litigating sides and the judgment is sustainable.

w] Reliance is placed upon the following judgments :-

i] 2004 (4) BCR 488,

Sulochana Daulatrao Thakare Vs. sangam
Shikshan Sanstha and others

ii] 2012 (3) Mh.L.J. 291

Mohd. Irshad Ahmad Vs. Talha Education
Society Karjagaon and others

iii] 2006 (6) BCR 695

Datta Shikshan Prasarak Mandal & Anr. Vs.
Dinkar Krishna Gawade.

6. Considering the conspectus of this case, I have formulated the following issues :-

- A] Whether the management has followed the procedure while taking a decision to initiate an enquiry against the petitioner?
- B] Whether the enquiry committee rightly proceeded with the enquiry without the nominee of the petitioner?
- C] Whether the petitioner was rightly deprived of the suspension allowance?

- D] Whether the enquiry Committee followed the correct procedure while recording the evidence of the petitioner and the management?
- E] Was the enquiry committee justified in framing two additional charges suo-moto?
- F] Whether the charges held to be proved against the petitioner are grave and serious in nature and whether the punishment awarded to the petitioner is commensurate to the gravity and seriousness of the mis-conduct.

A] Whether the management has followed the procedure while taking a decision to initiate an enquiry against the petitioner?

7. Rule 29 of the 1981 Rules prescribes reduction in rank and termination of service as penalties. Under Rule 31, reduction in rank and termination of service are prescribed as major penalties.

8. Section 4(6) of the Act mandates that no employee of a private school shall be suspended, dismissed or removed or his services shall not be otherwise terminated or he shall not be reduced in rank by the management, except in accordance with

the provisions of this Act and the Rules made thereunder. Needless to state, the Rules framed under the Act need to followed in the light of Section 4(6) of the Act.

9. Rule 33 (1) of the 1981 Rules reads thus :-

33. Procedure for inflicting major penalties : (1) If an employee is alleged to be guilty of [any of the grounds specified in sub-rule (5) of rule 28] and if there is reason to believe that in the event of the guilt being proved against him, he is likely to be reduced in rank or removed from service, the Management shall first decide whether to hold an inquiry and also to place the employer under suspension and if it decides to suspend the employee, it shall authorise the Chief Executive Officer to do so after obtaining the permission of the Education Officer or, in the case of the Junior College Education and Technical High Schools, of the Deputy Director. Suspension shall not be ordered unless there is a prima facie case for his removal or there is reason to believe that his continuance in active service is likely to cause embarrassment or to hamper the investigation of the case. If the management decides to suspend the employee, such employee shall, subject to the provisions of sub-rule (5) stand suspended with effect from the date of such order.

10. Rule 36 (1) and (2) of the 1981 Rules read as under :-

36. Inquiry Committee : (1) If an employee is allegedly found to be guilty on [any of the grounds specified in sub-rule (5) of Rule 28] and the Management decides to hold an inquiry, it shall do so through a properly constituted Inquiry Committee. Such a committee shall conduct an inquiry only in such cases where major penalties are to be inflicted. The Chief Executive Officer authorised by the Management in this behalf (and in the case of an inquiry against the Head who is also the Chief Executive Officer, the President of the Management) shall communicate to the employee or the Head concerned by registered post acknowledgement due the allegations and demand from him a written explanation within seven days from the date of receipt of the statement of allegations.

[(2) If the Chief Executive Officer or the President, as the case may be, finds that the explanation submitted by the employee or the Head referred to in such rule (1) is not satisfactory, he shall place it before the Management within fifteen days from the date of receipt of the explanation. The management shall in turn

decide within fifteen days whether an inquiry be conducted against the employee and if it decides to conduct the inquiry, the inquiry shall be conducted by an Inquiry Committee constituted in the following manner, that is to say-

(a) In the case of an employee

(I) One member from amongst the members of the Management to be nominated by the Management, or by the President of the Management if so authorised by the Management, whose name shall be communicated to the Chief Executive Officer within 15 days from the date of decision of the Management.

(ii) one member to be nominated by the employee from amongst the employees of any private school;

(iii) One member chosen by the Chief Executive Officer from the panel of teachers on whom State/ National Award has been conferred;

(b) In the case of the Head referred to Sub-rule (1)-

(i) one member who shall be the President of the Management;

(ii) one member to be nominated by the Head from amongst the employees of any private school;

(iii) one member chosen by the President from the panel of Head Masters on whom State /National Award has been conferred.]

11. In the light of Rule 33(1), the management is first required to decide whether to hold an enquiry and also whether to place the employee under suspension after obtaining permission from the concerned Education Department.

12. The grievance of the petitioner is that he received the show-cause notice dated 14-12-2001 on 19-01-2002. This aspect has

been admitted by the respondent – Management as has been recorded here-in-above. It is also an admitted position that the petitioner submitted his reply dated 22-01-2002 to the show-cause notice. The communication dated 06-01-2002 issued to the petitioner by the management indicates that the management decided to initiate an enquiry on the presumption that the petitioner may have accepted the charges levelled upon him.

13. The fact that the respondent has admitted that the petitioner received, the show-cause notice on 19-01-2002, clearly indicates that it did not have any proof on 06-01-2002 to suggest that the petitioner was served with the show-cause notice dated 14-12-2001 so as to arrive at a conclusion that the petitioner appeared to have admitted the charges levelled upon him. As such, in my view, the respondent initiated the enquiry without considering the reply of the petitioner and has therefore violated Rule 33 & 36.

B] Whether the enquiry committee rightly proceeded with the enquiry without the nominee of the petitioner?

14. It is not in dispute that the petitioner had nominated his nominee. It is also not in dispute that the petitioner intimated to the enquiry committee in writing on 23-03-2002 that his nominee

Shri D.D. Gulbhile had declined to continue as a member of the enquiry committee and, therefore, prayed for eight days time so as to nominate another person as his nominee on the committee.

15. During the course of the submissions of the learned Advocate for the respondent, I had specifically drawn his attention to the said application dated 23-03-2002 and invited his explanation on the said aspect. His submissions are that the enquiry committee is not obliged to entertain such a request from the charge sheeted employee. He has to ensure that his nominee appointed on the committee performed his duties of being a part of the enquiry committee. It was, therefore, submitted that neither the committee can be blamed, nor was the committee obliged to adjourn the enquiry.

16. I am unable to accept the contentions of the respondent. The petitioner had only prayed for eight days time so as to nominate another person in place of his earlier nominee who had backed out from the enquiry proceedings. I am also unable to accept the contention of the respondent that by granting eight days time to the petitioner, it would have unduly delayed the enquiry. I cannot accept the contention of the respondent that the

petitioner will have to suffer the consequences of his nominee's refusal to participate in the enquiry.

17. Rule 36 (3) to 36(6) of the 1981 Rules read as under :-

36. Inquiry Committee :

[(3) The Chief Executive Officer or, as the case may be, the President shall communicate the names of members nominated under sub-rule (2) by registered post acknowledgement due to the employee or the Head referred to in sub-rule (1), as the case may be, directing him to nominate a person on his behalf on the proposed Inquiry Committee and to forward the name along with the written consent of the person so nominated to the Chief Executive Officer or to the President, as the case may be, within fifteen days of the receipt of the communication to that effect.]

(4) If the employee or the Head, as the case may be, communicates the name of the person nominated by him the Inquiry Committee of three members shall be deemed to have been constituted on the date of receipt of such communication by the Chief Executive Officer or the President, as the case may be. If the employee or such Head fails to communicate the name of his nominee within the stipulated period, the inquiry Committee shall be deemed to have been constituted on expiry of the stipulated period consisting of only two members as, provided in sub-rule (2).

[(5) The Convener of the respective Inquiry Committee shall be the nominee of the President, or as the case may be, the President who shall initiate action pertaining to the conduct of the Inquiry Committee and shall maintain all the relevant record of the inquiry.]

(6) The meetings of the Inquiry Committee shall be held in the school premises during the normal school hours or immediately there-after, if the employee agrees and even during vacation.

18. It is therefore, clear that the 1981 Rules have provided for a specific procedure for constituting the enquiry committee. The intent and object of providing representation to the charge sheeted employee on the committee would stand defeated if the said right to representation is taken away.

19. The Hon'ble Supreme Court, in the case of *the State Bank of Patiala and others Vs. S.K. Sharma*, reported at 1996 (3) SCC 364 has held in paragraph Nos. 10, 12, 29 and 31as under :-

10. Sub-clause (iii) aforesaid is indisputably part of a regulation made in exercise of statutory authority. The sub-clause incorporates a facet of the principle of natural justice. It is designed to provide an adequate opportunity to the delinquent office- to cross-examine the witnesses effectively and thereby defend himself properly. It is relevant to note in this behalf that neither the enquiry officers' report nor the judgment of the Trial Court, Appellate Court or High Court say that the respondent had protested at the relevant time that he was denied of an adequate opportunity to cross-examine the witnesses effectively or to defend himself properly on account of non-supply of the statements of witnesses. The Appellate Court, on the contrary, has recorded that when he was advised to peruse, examine and take note; from the documents including the statements of witnesses [Kaur Singh and Balwant Singh], the only objection raised by the respondent was that "the documents marked Exh.P-6, P-10 and P-11 were only photostat copies and not originals and should not be considered or marked exhibits". [Exhs. P-6, P-10 and P-11 are documents other than the statements of witnesses, i.e., of Kaur Singh and Balwant Singh.] Moreover, as pointed out above, the examination of witnesses began long after the expiry of three days from the day on which the respondent was advised to and he did peruse the documents and statements of witnesses. In the circumstances, it is possible to say that there has been a substantial compliance with the aforesaid sub-clause (iii) in

the facts and circumstances of this case though not a full compliance. This in turn question whether each and every violation of rules or regulations governing the enquiry automatically vitiates the enquiry and the punishment awarded or whether the test of substantial compliance can be invoked in cases of such violation and whether the issue has to be examined from the point of view of prejudice. So far as the position obtaining under the Code of Civil Procedure and Code of Criminal Procedure is concerned, there are specific provisions thereunder providing for such situation. There is Section 99 of the Code of Civil Procedure and Chapter 35. of the Code of Criminal Procedure. Section 99 C.P.C. says, "no decree shall be reversed or substantially varied nor shall any case be remanded in appeal on account of any misjoinder or nonjoinder of parties or causes of action or any error defect or irregularity in any proceeding in the suit, not affecting the merits of the case or the jurisdiction of Court." Section 465(1) of the Criminal Procedure Code, which occurs in Chapter 35 similarly provides that "subject to the provisions hereinbefore contained no finding sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this code or any error or irregularity in any sanction for the prosecution unless in the opinion of that court a failure of justice has in fact been occasioned thereby.

12.It would be appropriate to pause here and clarify a doubt which one may entertain with respect to the principles aforestated. The several procedural provisions governing the disciplinary enquiries whether provided by rules made under the proviso to Article 309 of the constitutions under regulations made by statutory bodies in exercise of the power conferred by a statute or for that matter, by way of a statute] are nothing but elaboration of the principles of natural justice and their several facets. It is a case of codification of the several facets of rule of audi alteram partem or the rule against bias. One may ask, if a decision arrived at in violation of principles of natural justice is voids how come a decision arrived at in violation of rules regulations/statutory provisions incorporating the said rules can be said to be not void in certain situations. It is this doubt which needs a clarification - which in turn calls for a discussion of the question whether a decision arrived at in violation of any and every facet of principles of natural Justice is void.

The matter can be looked at from the angle of justice or of natural justice also. The object of the principles of natural justice - which are now understood as synonymous with the obligation to provide a fair hearing is to ensure that justice is done, that there is no failure of justice and that every person whose rights are going to be affected by the proposed action gets a fair hearing. The said objective can be tested with reference to sub-clause (iii) concerned herein. It says that copies of statements of witnesses should be furnished to the delinquent officer "not later than three days before the commencement of the examination of the witnesses by the Inquiring Authority". Now take a case - not the one before us where the copies of statements are supplied only two days before the commencement of examination of witnesses instead of three days. The delinquent officer does not object; he does not say that two days are not sufficient for him to prepare himself for cross-examining the witnesses. The enquiry is concluded and he is punished. Is the entire enquiry and the punishment awarded to be set aside on the only ground that instead of three days before, the statements were supplied only two days before the commencement of the examination of witnesses? It is suggested by the Appellate Court that sub-clause (iii) is mandatory since it uses the expression "shall". Merely because, word "shall" is used, it is not possible to agree that it is mandatory. We shall, however, assume it to be so for the purpose of this discussion. But then even a mandatory requirement can be waived by the person concerned if such mandatory provision is his interest a & not in public interest, vide [Dhirendra Nath Gorai v. Sudhir Chandra Ghosh & Ors.](#) (1964 (6) S.C.R.1001). Subba Rao,J., speaking for the Court, held:

"Where the court acts without inherent jurisdiction, a party affected cannot by waiver confer jurisdiction on it, which it has not. Where such jurisdiction is not wanting, a directory provision can obviously be waived. But a mandatory provision can obviously be waived. But a mandatory provision can only be waived if it is not conceived in the public interests, but in the interests of the party that waives it. In the present case the executing court had inherent jurisdiction to sell the property. We have assumed that s.35 of the Act is a mandatory provision. If so, the question is whether the said provision is conceived in the interests of the public or in the interests of the person affected by the non- observance of the provision. It is true that many provisions of the Act were conceived in the interests of the public, but the same cannot be said of s.35 of the Act, which is really intended to protect the interests of a judgment-debtor and to see that a larger extent of his property than is

necessary to discharge the debt is not sold. Many situations may be visualized when the judgment-debtor does not seek to take advantage of the benefit conferred on him under s.35 of the Act."

31. Sub-clause (iii) is, without a doubt, conceived in the interest of the delinquent officer and hence, The could waive it. From his conduct, the respondent must be deemed to have waived it. This is an aspect which must be borne in mind while examining a complaint of non-observance of procedural rules governing such enquiries. It is trite to remember that, as a rule, all such procedure; rules are designed to afford a full and proper opportunity to the delinquent officer/employee to defend himself and are, therefore, conceived in his interest. Hence, whether mandatory or directory, they would normally be conceived in his interest only.

20. As observed here-in-above, by declining the petitioner an opportunity to nominate his nominee on the committee in the light of the earlier nominee having suddenly withdrawn from the enquiry committee, has led to a serious infringement of the right of the petitioner. The Constitution of the committee, therefore, is legally unsustainable.

C] Whether the petitioner was rightly deprived of the suspension allowance?

21. The petitioner has contended that the suspension order neither indicated that the petitioner was ordered to mark his attendance every day in the school premises, nor any provision of

law mandates a suspended employee to mark his attendance as a pre condition for earning his suspension allowance.

22. The petitioner relies on Rule 33 (3) and 33(4) which read as under :-

33.Procedure for imposing minor penalties :-

(3) An employee under suspension shall not accept any private employment.

(4) The employee under suspension shall not leave the head-quarters during the period of suspension without the prior approval of the Chief Executive Officer. If such employee is the Head and also the Chief Executive Officer, he shall obtain the necessary prior approval of the President.

23. The petitioner has, therefore, submitted that a suspended employee cannot accept any private employment and cannot leave the head-quarters without the prior approval of the head of the institution. It is, therefore, canvassed that neither has the petitioner accepted any employment after his suspension, nor has the petitioner left the head-quarters and started residing in another town or village without the prior approval of the management.

24. The respondent has canvassed that the petitioner did not mark his presence while being under suspension. It is further submitted that the management raised a bill for making payment

of suspension allowance to the petitioner for an amount of Rs. 3292/- as the entire quantum of suspension allowance payable to the petitioner from 20-12-2001 up to 19-04-2002. He, however, concedes that the basic pay of the petitioner as on 11-12-2001 was Rs. 6200/- per month. His statement is based on the certificate dated 11-12-2001 issued by the Head-mistress of the respondent school.

25. I called upon the learned Advocate for the respondent to point out from the record whether the order of suspension indicates that the petitioner was put to notice that he will have to mark his daily attendance in the school premises failing which he would not be paid his suspension allowance. Despite his efforts, the learned Advocate could not point out that the petitioner was ever put to notice in this regard by the management. So also, there is no evidence on record to indicate that petitioner had left the head quarters.

26. Rule 31 (1 & 2) of the 1981 rules read as under :-

Classification of Penalties : The penalties shall be classified into minor and major penalties as under :-

- (1) *Minor penalties :*
 - (I) *Reprimand,*
 - (ii) *Warning,*
 - (iii) *Censure,*

- (iv) *Withholding of an increment for a period not exceeding one year.*
- (v) *Recovery from pay or such other amount as may be due to him of the whole or part of any pecuniary loss caused to the institution by negligence or breach of orders.*

(2) *(Major Penalties)*

- (I) *Reduction in rank*
- (ii) *termination of service.*

27. The petitioner has been under suspension from 20-12-2001 till his dismissal on 19-04-2002. The respondent has raised a claim for payment of subsistence allowance to the Petitioner only on 07-05-2002 which was after his termination from service. In the absence of any specific instruction or intimation to the petitioner that he would not be entitled for subsistence allowance if he did not mark his daily attendance, the explanation put forth by the respondent for denying suspension allowance, is fallacious. It is, therefore, evident that the respondent management, unjustifiably, did not pay the subsistence allowance to the petitioner

28. The Hon'ble Supreme Court Court in the case of *U.P. State Textile Corpn. Ltd. V. P.C. Chaturvedi*, (2005) 8 SCC 211 has held in paragraph Nos. 15 & 16 :-

15. As per Uttar Pradesh State Textile Corporation Conduct, Control and Disciplinary Rules, 1992 (in short the 'Rules') Rule 41 provides as follows:

"41- Subsistence allowance during suspension: An employee under suspension shall be entitled to draw subsistence allowance equivalent to 50% of his basic pay plus 50% dearness allowance provided that the employee is not engaged in any other employment or business or profession or vocation. The subsistence allowance would be payable only when the employee, if required, presents himself every day at the place of work or such other place as mentioned in the relevant order. Further, the employee, under suspension would have to furnish a certificate that he is not engaged in other employment, business, profession or vocation for entitlement of subsistence allowance.

Variation in amount of subsistence allowance:

(2) Where the period of suspension exceeds six months, the authority which made or is deemed to have made the order of suspension, shall competent to vary the amount of subsistence allowance for any period subsequent to the period of the first six months as follows:

(a) the amount of subsistence allowance may be increased upto 75% of the basic pay and dearness allowance thereon if the period of suspension has been prolonged for reasons, to be recorded not directly attributable to the suspended employee;

(b) the amount of subsistence allowance may be reduced upto 25% of the basic pay and dearness allowance thereon if the period of suspension has been prolonged due to reasons, to be recorded directly attributable to the suspended employee."

16. Rule 41 provides that the subsistence allowance is payable only when the employee, if required, presents himself every day at the place of work. Obviously, for establishing that the employee had presented himself at the place of work, the authorities had clearly stipulated a condition that the attendance register was to be signed. No explanation was offered by the respondent No. 1-employee as to why he did not sign the register. It cannot be lightly brushed aside as technical and/or inconsequential. As admittedly, the respondent No. 1-employee had not signed the attendance register even though specifically required in the order of suspension the High Court was not justified in coming to a conclusion that the non signing was not consequential or a bona fide lapse. It is also to be noted that at various point of time the employer informed the respondent No. 1-employee about the consequences of his

not signing the attendance register as stipulated in the order of suspension

29. In the above case before the Apex Court, the rules provided for marking daily attendance so as to be entitled for subsistence allowance. Moreover, it was mentioned in the order of suspension with the employee was required to mark his daily attendance, lest he would not be entitled for suspension allowance. In the instant case, neither do the rules so provide, nor has the management ordered that the petitioner would not be entitled for suspension if he fail to mark his daily attendance.

30. The Apex Court, the in the case of *Indra Bhanu Gaur V. Committee, Management of M.M. Degree College, (2004) 1 SCC 281, State of M.P. v. Shankarlal, (2008) 2 SCC 55 and U.P. State Textile Corpn. Ltd. v. P.C. Chaturvedi, (2005) 8 SCC 211*, has laid down law that merely because suspension allowance is not paid, would not amount to denial of opportunity and would not vitiate the departmental proceedings, per-se. Unless prejudice was shown and establish, mere non payment of subsistence allowance cannot ipso-facto be a ground to vitiate the proceedings in every case. I am not required to deal with this issue since I am setting aside the enquiry on account of defective constitution of the committee and failure on the part of the management to follow

the prescription set out in Rule 34, 35, 36 and 37 of the MEPS Rules, 1981.

31. The contention of the respondent that the issue of suspension has never been raised by the petitioner any time before, is fallacious in the light of the fact that the petitioner has specifically raised the said issue in Ground (d) below paragraph No. 22 of the appeal No. 57 of 2002.

32. Rule 35 (5) provides that “ *the subsistence allowance shall not be withheld except in cases of breach of provisions of sub Rule (3) or (4) of Rule 33*”. As such, the management is not justified in depriving the petitioner of the suspension allowance since none of the ingredients of Rule 33 (3) or 33(4) have been established by the respondent management.

D] Whether the enquiry committee followed the correct procedure while recording evidence of the petitioner and the management?

33. The procedure of conducting an enquiry is set out under Rule 37 of the 1981 Rules. The petitioner has specifically contended in Ground (d) of the appeal memo that the enquiry was

conducted in violation of the rules. It is specifically contended by the petitioner that an application dated 23-03-2002 was filed in the enquiry informing the enquiry committee that his nominee had backed out and he desired to appoint his nominee within eight days. The said application was not dealt with by the enquiry committee and no order was passed thereon. Nevertheless, the opportunity to nominate a nominee was denied to the petitioner. On the same day, the statement of the petitioner was recorded and he was immediately cross-examined.

34. It is contended by the respondent as well that the deposition of the petitioner was recorded on 23-03-2002 and he was cross-examined on the same day. On 30-03-2002, the management led evidence by placing on record statement of employees. It appears that there was no cross-examination of these employees. Finally, on 11-04-2002, the petitioner submitted his written submission. On 15-04-2002 the committee submitted its report and on 19-04-2002 the petitioner was terminated from service.

35. Rule 37 (2) (d) clearly lays down the procedure for recording the evidence in the enquiry. Rule 37 (2) (d) (ii) requires the management to lead evidence. Rule 37(2) (d) (2) indicates that

the employee will have the right to cross-examine the witnesses examined by the management.

36. In the instant case, it appears that the enquiry committee first recorded the deposition of the employee and the said employee was cross-examined. Thereafter, the management adduced evidence on 30-03-2002. It is contended by the management that the statement of the petitioner recorded on 23-03-2002, was merely a statement made and that his reply to the notice dated 04-04-2002 issued by the enquiry committee was his deposition. This contention is wholly misconceived and incorrect.

37. The enquiry report indicates that the petitioner examined himself on 23-03-2002. The management recorded its evidence on 30-03-2002. This, therefore, establishes that the management who had levelled the charges upon the petitioner, did not lead evidence prior to the recording of the petitioner's statement. I find this procedure to be irregular and not in conformity with the Rules.

E] Was the enquiry committee justified in framing two additional charges suo-moto?

38. The charge sheet dated 25-02-2002 is placed on record. The first charge is that the petitioner did not reside in the head-quarters and was living elsewhere. The second charge was that he was not following the time table as prescribed by the Head-Mistress. He was creating mis-understanding amongst the students and was not conducting lectures as per the time-table. The third charge is as regards creating dis-cord amongst the teachers. The fourth charge was as regards defaming the management by giving an interview to the news paper and spreading rumours. The 5th charge was as regards not remaining present in the head-quarters during suspension period and refusing to receive communication from the management.

39. It is revealed from the enquiry report that two new charges were levelled upon the petitioner in the enquiry itself. It is beyond comprehension as regards who created these two charges. The charge sheet does not indicate charge No. 6 and 7. The enquiry report does not indicate that the respondent levelled these additional charges on the petitioner. It is also not revealed that the petitioner was given any opportunity to meet the additional charges.

40. It, therefore, appears that these two charges may have been brought on record through the statements of the management witnesses without allowing the petitioner to confront the said two charges. The witnesses whose statements were brought on record have not been cross-examined by the petitioner.

41. Record indicates that documents were filed along with the evidence of the management on 30-03-2002, after the petitioner's statement was recorded. Thereafter, a summary final notice was issued to the petitioner on 04-04-2002.

42. The petitioner has relied upon the judgment of this Court in the case of *Shri Dnyaneshwar Samaj Prabodhan Sanstha Vs. The presiding Officer School Tribunal and Ors*, reported at 2007 (5) ALL MR 893, in paragraph Nos. 7, 8, 9, & 11 read as under :-

7. Full Bench of this Court in the case of *Saindranath v. Pratibha Shikshan Sansthan* reported in 2007 (3) Mh.L.J. 753, affirming the view taken by a Single Judge of this Court in the case of *Pralhadrai Dalmia Lions College of Commerce and Economics, Bombay and Ors. v. A.M. Rangaparia and Ors.* 1988 Mh.L.J. 530, held that nomenclature would not be a decisive factor in determining the jurisdiction and powers of the Tribunal.

Now, the Preamble of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 reads thus:

WHEREAS it is expedient to regulate the recruitment and conditions of service of employees in certain private school in the State, with a view to providing such employees security and stability of service to enable them to discharge their duties towards the pupils and their guardians in particular, and the institution and the society in general, effectively and efficiently;

AND WHEREAS, it is further expedient in the public interest to lay down the duties and functions of such employees with a view to ensuring that they become accountable to the Management and contribute their mite for improving the standard of education; AND WHEREAS, it is also necessary to make certain supplemental, incidental and consequential provisions, it is hereby enacted in the Twenty-eighth year of the Republic of India as follows:.

In the following paragraphs, the Full Bench (cited supra), held thus:

28. It is also clear from the preamble of the Act that this Act has been enacted to regulate the recruitment and conditions of service of the employees, to provide such employees security and stability of service, to enable them to discharge their duties effectively and efficiently. The legislature has constituted School Tribunal which is presided over by a person who is judicial official not lower than the rank of the Civil Judge. The legislature has also conferred upon the School Tribunal the powers of the appellate authority under Civil Procedure Code, for the purposes of admission, hearing and disposal of the appeals before it, and even otherwise also being a quasi-judicial, if not a judicial authority, it would mean that it is inherent powers to pass appropriate orders in the list before it.

29. In the case of [Union of India v. Paras Laminates \(P\) Ltd.](#) AIR 1991 SC 696, after referring to the provisions contained in Section 129 (c) of the Customs Act, 1962, the Apex Court observed in para -8 of its judgment as under: There is no doubt that the Tribunal functions as a Court within the limits of its jurisdiction. It has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent in the Tribunal, not because its jurisdiction is plenary, but because it is legislative intent that the power which is expressly granted in the assigned field of

jurisdiction is efficaciously and meaningfully exercised.

30. Thus, it is clear that when the legislature expressly confers power, grant of that statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective.

8. From the above, it is clear that the Tribunal is the first Court / Tribunal which is required to examine correctness of otherwise of the termination order issued by the management on the original pleadings, facts, available on record, various documents, proceedings of Inquiry Committee, the evidence recorded during the enquiry as well as findings of the Inquiry Committee. It is also empowered to record oral evidence before it. It is, therefore, first fact finding Court / Tribunal which has to undertake investigation as to whether the action taken by the Management is in accordance with the Rules and the principles of natural justice. I do not think that such a fact-finding Tribunal for finding out the truth would not be able to look into the various points raised in the written note of arguments by a party to the appeal, more particularly in the instant case, because the written note of arguments was filed by Respondent No. 2 on 15.9.2000 and the petitioner had enough time of three years at its disposal to rebut the contentions raised in the written note of arguments even if the contentions were on facts or on law. Having carefully gone through the memo of appeal as well as the contentions raised in the written note of arguments, I do not think that the mere absence of precise, pertinent and detailed narration in the ground of appeal would denude the School Tribunal of its power to look into the entire record of the enquiry as well as written note of arguments. The contention raised by Mr. Lambat that in the absence of specific grounds in the memo of appeal, the Tribunal could not have seen the written note and recorded any finding is, therefore, rejected.

9. Now coming to the refusal to supply the documents to Respondent No. 2 under refusal letter dated 24.9.1996, it appears that the Respondent No. 2 demanded documents as per the list vide his letter dated 17.9.1996 for furnishing reply to show cause notice dated 6.9.1996. Rule 36 (1) of the Rules, 1981 reads thus:

36. Inquiry committee: (1) If an employee is allegedly found to be guilty on (any of the grounds specified in Sub-rule (5) of Rule 28) and the Management decides to hold an inquiry, it shall do so through a properly constituted Inquiry Committee. Such a committee shall conduct an inquiry only

in such cases where major penalties are to be inflicted. The Chief Executive Officer authorized by the management in this behalf (and in the case of an inquiry against the Head who is also the Chief Executive Officer, the President of the management) shall communicate to the employee or the Head concerned by registered post acknowledgment due the allegations and demand from him a written explanation within seven days from the date of receipt of the statement of allegations.'

Now perusal of the above provision shows that the procedure prescribed in rules pertaining to the inquiry into the major misconduct has been prescribed in minute details and step by step. Initially the show cause notice is required to be issued to the delinquent -employee and his explanation is required to be obtained for satisfaction of the Chief Executive Officer as to whether it is a fit case for holding departmental inquiry against such employee. If the explanation tendered by such employee is found to be satisfactory, the Chief Executive Officer himself has a authority to drop the show cause notice. If the Chief Executive Officer is not satisfied with the explanation tendered, he has to place the show cause notice as well as explanation of the employee with necessary documents before the Executive Committee of the Management which, in turn, would consider the show cause notice, explanation and documents and decide after applying its mind as to whether really a departmental inquiry is required to be held or not. It is, thereafter that further procedure is required to be followed. Now, this being the object, namely, to find out whether really inquiry is necessary or not by two authorities, in my opinion, this provision has been made with a view to have check as to whether frivolous, vexatious or biased inquiry is being proposed or a real and serious misconduct is not being allowed to be inquired. I have, therefore, no hesitation in holding that the requirement of Rule to obtain explanation to show cause notice by allowing the employee to have proper opportunity of submitting effective explanation is mandatory.

11. Having gone through the letter dated 10.10.1996 which was issued to Respondent No. 2 this Court finds that in the said letter there is a specific mention that on 7.10.1996 the Executive Committee had taken a decision to hold inquiry against Respondent No. 2 and he should furnish the name of his nominee within seven days and should also reply the charge-sheet enclosed with the said communication. In this communication, there is absolutely no mention about the names of the nominated representatives of the petitioner-Management on the Inquiry Committee. Had the names of

nominee or members of Inquiry Committee been communicated by this communication, the respondent No. 2 would have an opportunity to comment upon those names or object to the names or inclusion of any particular person. That was however, not done and, therefore, the Tribunal has correctly recorded a finding about violation of Rule 36 (3) of the Rules, 1981. Now looking to the communication dated 2.12.1996 Annexure 'D' with this petition, it is a fact that the receipt thereof has been denied by Respondent No. 1 as averred by him in the return and there is no rebuttal affidavit on record from the petitioner. Curiously enough, in this letter which is produced for the first time in this petition, there is a mention that on 1.12.1996 it was decided in the meeting of the Executive Committee to hold inquiry which is clearly contrary to what is stated in the letter dated 10.10.1996 that the said decision was taken on 7.10.1996. In this letter dated 1.12.1996, names of two nominees of management are mentioned. It appears to me that this letter dated 2.12.1996 was brought into existence and filed with this petition for the first time by the petitioner-management with a view to meet the finding of the School Tribunal that the names of the representatives of the management in the Inquiry Committee were not communicated under letter dated 10.10.1996. This attempt of the petitioner to introduce such a document in the Petition for the first time does not appear to be bona fide. The finding recorded by the Tribunal, therefore, is correct.

43. As such, the ratio laid down in the *Shri Dnyaneshwar* judgment (supra) would indicate that the failure to constitute the enquiry committee in accordance with law and non supply of documents so as to give the petitioner an effective opportunity of defending himself, would render the enquiry, bad in law.

44. The petitioner has relied upon the judgment of this Court in the case of *Yavatmal Islamia Anglo Urdu Education Society, Yavatmal and another Vs. Mujib Ahmed Abbas Ali and another*,

reported at 2010 (1) Mh.L.J. 359. Paragraph Nos. 6 & 7 of the said judgment are relevant to this case and read as under :-

6. It is seen that the delinquent was given charge sheet after he was suspended on 14.09.1998 and thereafter, for the first time, the first meeting was held on 29.9.1998 and it is on that date the convenor of the meeting or the petitioner-management were bound to supply the list of the witnesses to the delinquent before going ahead. But none bothered to do so. On 13.10.98 the delinquent issued a letter to furnish him the list of witnesses as he did not receive the same, but that was not done. Surprisingly enough, on 27.10.98 one Mohd. Haq 18 was examined and even on that day the list of witnesses was not furnished to the delinquent and even the petitioner states in its written note of argument that the said list was supplied to him on 28.10.98 i.e. after the evidence of Mr. Haq was recorded. The only explanation coming forward from the petitioner-management is that there was no requirement to supply the list to the delinquent. In the first place, having regard to the principles of natural justice, such a submission is misconceived and assuming it to be technically correct as per the rule 37(2)(i)(iii), the convenor was obliged to supply him the list of witnesses before proceeding to record any evidence. Supply of list of witnesses in advance is very important since the delinquent must know the names of witnesses or the nature of evidence that would be recorded against him and to plan his strategy to cross examine them and bring proper evidence on record. Failure to supply list of witnesses was certainly a serious breach on the part of the petitioner management as well as enquiry committee. Again on 28.10.98, on which date the list of witnesses was supplied, witnesses were examined by the Management. The Enquiry Committee had full knowledge that after repeated demands for supply of list of witnesses to it by the delinquent, the list was supplied on 28-10-1998. Despite this surprisingly enough it examined witnesses on 28-10-1998 and discharged the witnesses without their cross examination. Record nowhere shows that Committee had offered the delinquent some time to cross-examine the witnesses particularly because list was supplied on the same day. To say that nothing prevented the delinquent to cross examine the witnesses on 28-10-1998 in the above factual background is absurd. Enquiry Committee acts as a domestic tribunal for deciding the fate of an employee. It is an independent body constituted by rules, and it cannot be expected to indulge in breaching the principles of natural justice repeatedly. To my mind, all this was done deliberately. Though it is not possible to record each and

every thing from Page 165 to 217 to which my attention was invited by Mr. Johrapurkar, I must say that I have gone through the entire correspondence and I find that the state of affairs when the enquiry was going on clearly indicates that the attitude of the management as well as the Enquiry Committee was with clear hostility towards the delinquent-respondent no.1. The respondent no.1 was required to send the letters by registered post A/D having found that the Enquiry Committee was also hostile to him. He was not allowed to cross examine the witness Smt. Saba Nasreen on 14.11.98. He was not given the necessary order- sheet etc. when demanded. It is then pertinent to note that on 14.11.98 when the enquiry was fixed and was completed, the Committee did not fix the future date and allowed the parties to go without date and it appears that thereafter suddenly it fixed the next date as 17.11.98 and issued telegram and registered letter to the delinquent. He received the telegram at 1.35 hours on 17.11.98 and the letter on 18.11.98 and by that time on 17-11-1998 itself, four witnesses were examined and the management on that date closed its side without cross examination of all those witnesses. This is something unheard of and the only conclusion that can be drawn is that it was deliberate and view a view to victimize the employee. When on 18.11.98 he sought permission to cross examine them, his request was not even considered. As regards the hostility of the petitioner-management and the Enquiry Committee, there are further salient features which can be pointed out. On 30.11.98 when the enquiry was already fixed, Shri Pardakhe, nominee of the delinquent employee was required to attend meeting on 30.11.98 at Amravati as per permission granted by Headmaster. Permission was granted to attend the meeting on 2.12.98 at 11 o'clock at Nagpur. Thus in this background, since Shri Pardakhe was required to attend the meetings at Amravati and Nagpur, time was sought by the delinquent till 12.12.98 for examining himself and his witnesses, but his application for adjournment was rejected on 4.12.98 and immediately on the next date i.e. on 5.12.98 the summary of proceedings and copies of statement were sent by the Committee. It thus clearly appears that the petitioner and the Enquiry Committee hushed up the inquiry and deliberately prevented the respondent no.1/delinquent from examining himself and his witnesses. Nothing would have happened had he been given sufficient time to do so, since there is a provision in the rule for extension of time to complete the inquiry beyond 120 days with the permission of the Deputy Director of Education. But then it appears that the Enquiry Committee as well as the petitioner management were in a ugly haste to dismiss him from the service.

7. The counsel for both the parties have cited several decisions before me in respect of their respective contentions about permissibility of holding the inquiry before the tribunal. In the first place, I find that the petitioner management had never pleaded in the alternative and prayed for holding the inquiry before the tribunal in case the inquiry was ultimately found to be not fair and :: Downloaded on - 09/06/2013 15:14:19 :: 24 proper. That apart, in para 65, the Full Bench of this Court in 2007 (3) Mh.L.J. 753; Saindranath Jawanjal vs. Pratibha Shikshan Sanstha, has had to say thus;

“65. But this should not be understood as placing fetters on the powers of the Tribunal. It is always open to the Tribunal to exercise its powers on the peculiar facts and circumstances of each case as it deems just and necessary in the interest of justice. Take a case where the management is not in a position to hold enquiry because of the situation brought about by the employee himself making it impossible for the management to hold enquiry before taking punitive action against him, in such contingency, the School Tribunal is not powerless to permit the School management to lead evidence to prove the act of misconduct before it to support its action. This legal sanction in law is implicit in sub-rule (b) of Rule 27 of Order 41 of Civil Procedure Code which reads as, ".....for any other substantial cause". This clause gives wide discretion to the Tribunal, which, no doubt, is required to be exercised judiciously for the reasons to be recorded. But, exercise of such powers in every case; in a routine manner would take away the very object of the litigation meant to provide the employees security and stability of service to enable them to discharge their duties effectively and efficiently. Therefore,. such power is available for being exercised only in the extremely exceptional cases and in compelling circumstances and not in a routine manner in every case."

Having regard to the Full Bench Judgment of this Court in which Supreme Court judgments have been considered, I find that this being a case of victimization and the petitioner-management as well as Enquiry Committee having joined hands against the delinquent in the matter of conduct of departmental enquiry right from the beginning, no premium can be put over the action of the petitioner- management and Enquiry Committee who threw the principles of natural justice in the air. It would be a travesty of justice, in these

circumstances, to allow the petitioner Management to prove misconduct before the tribunal in such a extreme case. I, therefore, hold on the facts of the present case that this is not a fit case where the tribunal could be expected to have exercised its power to direct the petitioner-management to prove misconduct before it. Hence, I do not accept the alternate submission as well. As regards the question of award of back- wages, I find that the following proposition of law is laid down by the Supreme Court in the case of J.K.Synthetics Ltd. vs. K.P.Agrawal and another; (2007) 2 SCC 433, and in particular para 19 & 20 thereof read thus-

"19. But the cases referred to above, where back wages were awarded, related to termination/retrenchment which were held to be illegal and invalid for non-compliance with statutory requirements or related to cases where the Court found that the termination was motivated or amounted to victimisation. The decisions relating to back wages payable on illegal retrenchment or termination may have no application to the case like the present one, where the termination (dismissal or removal or compulsory retirement) is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding regarding misconduct, but only interferes with the punishment being of the view that it is excessive, and awards a lesser punishment, resulting in the reinstatement of employee. Where the power under Article 226 or Section 11-A of the Industrial Disputes Act (or any other similar provision) is exercised by any court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in a wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What requires to be noted in cases where finding of misconduct is affirmed and only the

punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a 8. The Scheme of Rules 36 and 37 read together mandates that the explanation submitted to the charge-sheet is considered by the management and if found to be unsatisfactory and the management decides to proceed against the delinquent teacher, an enquiry will have to be conducted by a committee as stated in the manner prescribed. The committee while Page 2921 conducting the enquiry will follow the procedure as set out so as to comply with the principles of natural justice and full opportunity will be given to the delinquent employee to defend his case including an opportunity to cross-examine the management's witnesses, produce his own witnesses and also place on record documentary evidence as well as demand certain documents to be placed on record if found relevant. The compliance of such rules and the failure partly thereof fell for consideration by the Apex Court in the case of [State Bank of Patiyala and Ors. v. S.K. Sharma and](#) it was stated, inter alia, as under:

... There may indeed be any number of varying situations which it is not possible for anyone to foresee. In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries: a distinction ought to be made between violation of the principle of natural justice, audi alteram partem, as such and violation of a facet of the said principle. In other words, distinction is between "no notice" / "no hearing" and "no adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity". To illustrate -take a case where the person is dismissed from service without hearing him altogether (as in Ridge v. Baldwin (Supra). It would be a case falling under the first category and the order of dismissal would be invalid -or void, if one chooses to use that expression (Calvin

v. Carr, (Supra). But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer's report ([Managing Director, ECIL v. B. Karunakar](#), (supra) or without affording him a due opportunity of cross-examining a witness (K.L. Tripathi, (supra) it would be a case falling in the latter category -violation of a facet of the said rule of natural justice -in which case, the validity of the order has to be tested on the touchstone of prejudice, i.e., whether, all in all, the person concerned did or did not have a fair hearing. It would not be correct in the light of the above decision to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In our opinion, the approach and test adopted in [B. Karunakar](#), (supra) should govern all cases where the complaint is not that there was no hearing (no notice, no opportunity and no hearing) but one of not affording a proper hearing (i.e., adequate or a full hearing) or of violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touchstone of prejudice as aforesaid. lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and not for other benefits like increments, promotions, etc.

20. But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimise him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back wages etc., will be the same as those applied in the cases of an illegal termination".

For these reasons, it is not possible to interfere with the award of back-wages. No material has been placed on record before me about the alleged bad financial position of the management. Similar is the case with the abolition of the post, since abolition of the post took place after termination of the

respondent/delinquent employee and it is of no relevance. As regards the order of the tribunal granting continuity of service, I find that in the light of the decisions of the Supreme Court in the cases of (2003) 2 SCC 212; A.P.SRTC and another vs. S.Narsagoud, and (2005) 6 SCC 36; A.P.State Road Transport Corporation & others vs. Abdul Kareem, the monetary benefits do not become automatically payable by grant of continuity of service, but there has to be specific order. It is necessary to apply the said law and accordingly I make modification in the order of the tribunal.

45. In the instant case, as well, the management had failed to supply the list of witnesses in advance which is held to be a serious flaw on the part of the management as well as the enquiry committee. The ratio laid down in the *Yavatmal Islamia Anglo Urdu Education* (supra), therefore applies to the instant case, wherein no such list of witnesses was supplied.

46. The petitioner has relied upon the judgment of the Hon'ble Supreme Court in the case of *Shri Anant R. Kulkarni Vs. Y.P. Education Society & Ors.*, reported at 2013 (3) ALL MR 952 (S.C.). Paragraph No. 10 of the said judgment reads as under :-

10. Where the chargesheet is accompanied by the statement of facts and the allegations are not specific in the chargesheet, but are crystal clear from the statement of facts, in such a situation, as both constitute the same document, it cannot be held that as the charges were not specific, definite and clear, the enquiry stood vitiated. Thus, nowhere should a delinquent be served a chargesheet, without providing to him, a clear, specific and definite description of the charge against him. When statement of allegations are not served with the chargesheet, the enquiry stands vitiated, as having been conducted in violation of the principles of natural justice. Evidence adduced should not be perfunctory, even if the delinquent does not take the defence of, or make a protest with against that the charges are vague, that does not save the enquiry from being vitiated,

for the reason that there must be fair-play in action, particularly in respect of an order involving adverse or penal consequences. What is required to be examined is whether the delinquent knew the nature of accusation. The charges should be specific, definite and giving details of the incident which formed the basis of charges and no enquiry can be sustained on vague charges. (Vide: State of Andhra Pradesh & Ors. v. S. Sree Rama Rao, AIR 1963 SC 1723; Sawai Singh v. State of Rajasthan, AIR 1986 SC 995; U.P.S.R.T.C. & Ors. v. Ram Chandra Yadav, AIR 2000 SC 3596; Union of India & Ors. v. Gyan Chand Chattar, [\(2009\) 12 SCC 78](#); and Anil Gilurker v. Bilaspur Raipur Kshetria Gramin Bank & Anr., [\(2011\) 14 SCC 379](#)).

47. The respondent has relied upon the judgment of the Division Bench of this Court in the matter of *Sulochana Daulatrao Thakare Vs. Sangam Shikshan Sanstha & others*, reported at 2004 (4) Bom.C.R. 488. Paragraph No. 8 of the said judgment reads as under :-

8. At the outset we wish to brush aside the whispering submissions made by the learned Counsel that all the points were not properly placed before the Tribunal and also before the learned Single Judge. We have perused the judgment of the School Tribunal and also the judgment of the Division Bench. We do not find any substance in the grievances made by the learned Counsel. According to us, whatever points were urged by Shri P.C. Madkholkar, the same were urged before the School Tribunal, before the Division Bench and also before the learned Single Judge in the case of the present appellants. It is also admitted that the contentions which are based on the facts were not pleaded before the Tribunal and, therefore, the Management had no opportunity to meet the same. It is only the question of language and form of submission that perhaps may make some difference but according to us the contents of the submissions are the same though the learned Counsel has skillfully elaborated his points stressing the time table part of the Rules 36 and 37. We, however, do not find any

substance in the strenuous submission of Shri P.C. Madkholkar that the time table prescribed in the Rules was missed by the school management. Merely because there is some variation in the Schedule prescribed in the Rules, it cannot be said that the entire disciplinary action would vitiate only on the ground. We have to see whether the principles of natural justice have been substantially complied with or not before a delinquent is punished. We have to see whether he had reasonable and adequate opportunity to meet the charges and to defend himself in the enquiry. It cannot be urged that as the management has constituted an Inquiry Committee soon after the issuance of the charge-sheet without waiting for receipt of the written explanation within the prescribed period, the whole disciplinary action would fall to the ground. The learned Counsel has stretched the point of interpretation of the Rules too far and it is not possible for us to go that far with the learned Counsel to strike down the inquiry on the ground that though the charge-sheets were issued to the appellants, the action of the management in constituting Inquiry Committee before receipt of the written explanation, had caused any prejudice to the appellants. We do not see any illegality or impropriety in the innocent act of the management to constitute an Inquiry Committee even simultaneously with the issuance of the charge-sheet. It is no doubt true that the Rule is prescribed that the Inquiry Committee should be constituted after receipt of the written explanation to the charge-sheet. Merely because Inquiry Committee is constituted in advance before the last date of receipt of the written explanation as prescribed under the Rules, the enquiry cannot be said to suffer from any illegality on that account. The appellants have not shown any prejudice caused to them in that respect. The facts remain that the appellants were charge-sheeted and were called upon to submit their written explanation which they submitted. The appellants were also called upon to nominate their representative in the Inquiry Committee which was done by the appellants. The appellants were intimated the date of the inquiry on the specified date. The appellants failed to appear before the Enquiry Committee. Even their nominee was not present on a spacious ground that he had no intimation. It was the duty of the appellants to remain

present before the Inquiry Committee with their nominee or to have prayed for adjournment to enable their nominee to attend the inquiry if he was not available. Even the appellants did not care to take part in the inquiry and, therefore, the Inquiry Committee consisting of the two members had proceeded ex parte. The findings and conclusion recorded by the Inquiry Committee were forwarded to the appellants for their reply as prescribed under the Rules. The appellants had submitted their replies on 22-5-1985. The School Management was not satisfied with the said replies and, therefore, had issued the orders to termination dated 31-5-1985. According to us, there is absolutely no illegality, impropriety or mala fides or colourable exercise on the part of the management in terminating the appellants from employment. The appellants had reasonable and adequate opportunity to defend themselves in the charges levelled against them. They knew what were the charges and they were called upon to submit their written explanation. They had accordingly submitted their written explanation. They were also required to nominate their nominee in the Inquiry Committee as required under the Rules. The nominee had accepted that nominations and had given his consent. The nominee, however, failed to attend on the specified date of the Enquiry i.e. 14-5-1985. On that date, the Enquiry proceeded ex parte in the absence of the appellants and their nominee. If the appellants have chosen to remain away from the inquiry, inspite of the due intimation, it cannot be said that the Management has violated the principles of natural justice or has violated the Rules. The Management had thereafter forwarded the summary and the enquiry proceedings and had called upon the appellants to submit their reply. The appellants had accordingly submitted their reply. The School Management thereafter had passed the orders of termination of the appellants from employment. In the entire process, we do not find any infraction of the principles of natural justice or any prejudice caused to the appellants. The only factor which was given emphasis by Shri P.C. Madkholkar, was that the management had constituted Inquiry Committee before the last date of submission of the written explanation. It appears that the charge-sheet dated 21-12-1984 was issued to the appellants and the last date for written

explanation was 7-1-1985 under the Rules. It appears that the management had constituted Inquiry Committee on 5-1-1985. According to Shri P.C. Madkholkar, the Inquiry Committee ought to have been constituted after 7-1-1985 and as that was not done, that was contrary to the mandatory Rules 36 and 37 to vitiate the whole inquiry. It is not at all possible for us to agree with the same far fetched submissions of the learned Counsel. The time frame, which is prescribed in the Rule, is to check and prevent the School Management from indulging in undue delay in the disciplinary proceedings to cause avoidable hardship to the teachers. The time frame cannot be taken as an iron structure. The time frame cannot be construed to be strict and mandatory nature to be observed and any deviation of a few days therein to be violative of the principles of natural justice unless a serious prejudice is caused to the delinquent is shown. In the present case the Management has followed the entire framework of the principles of natural justice and no prejudice of any nature is shown or established by the appellants who appeared to have deliberately abstained from the inquiry. Indeed they denied themselves the opportunity of hearing. We, therefore, do not find any fault with the judgment and order of the School Tribunal in upholding the termination orders passed by the School Management being legal and proper. Besides, all the points have been squarely discussed and decided by the Division Bench and we are in respectful agreement with the findings and conclusion recorded by the Division Bench.

48. The facts before the Division Bench as they appear from the said judgment are apparently different. The nominee in the said case accepted the nomination, gave his consent and yet did not turn up to participate in the enquiry. The employee also did not participate in the enquiry. The Division bench, therefore, concluded that the enquiry proceeded ex-parte in the absence of

the employee and his nominee since they chose to remain away from the enquiry. It is in these circumstances that the Division Bench concluded that the management cannot be said to have violated the principles of natural justice.

49. The respondent has relied upon the judgment of this Court in the case of *Mahalaxmi Shikshan Sanstha Vs. State of Maharashtra*, reported at 1998 (3) Bom.C.R. 796. Paragraph Nos. 7 and 10 read as under :-

7. A conjoint reading of the Rules 36 and 37 alongwith other provisions of Rules of 1981 would indicate that in elaborate and self contained procedure has been provided to enquire, into the allegations of misconduct, moral turpitude, wilful and persistent negligence of duty and incompetence of the employee covered under the Act and Rules. The procedure contained in Rules 36 and 37 dealing with the constitution of Enquiry Committee and procedure of enquiry is intended to ensure that every reasonable opportunity is extended to the employee for the defence of his case in the enquiry instituted against him. The procedure prescribed in Rules 36 and 37 is based on primary principles of natural justice and fair play to ensure that the employee of the private schools covered under the Acts and Rules is not condemned unheard. It provides enough opportunity to the employee to defend himself reasonably at all stages right from the time management decides to enquire into any misconduct, moral turpitude, wilful and persistent negligence of duty and incompetence of the employee and constitutes an Enquiry Committee proceeds with enquiry and submits its report. The Enquiry Committee is required to be constituted where major penalty is to be inflicted. Since in the present case the employee concerned is the Head of the school, I will confine myself to the procedure contemplated for holding enquiry against

such Head of the school under Rules 36 and 37 of the Rules of 1981. First of all, Chief Executive Officer authorised by the management is required to communicate to the Head of the school by registered Post with AD the statement of allegations against him and seek written explanation from him within 7 days from the date of receipt of the statement of allegations. In case the head of the school sends the explanation within time, the Chief Executive Officer or the President of the management has to look into the said explanation and if the explanation is not found satisfactory, the matter has to be placed before the management, within 15 days from the date of receipt of explanation. The management, then is required to decide within 15 days whether an enquiry needs to be instituted against such employee. If the decision is in the affirmative, Enquiry Committee is to be constituted which would comprise of (i) the President of the management. (ii) the member to be nominated by the delinquent head from amongst the employees of any private school and (iii) any member chosen by the President of the management from the panel of Headmaster or to whom State/National Award has been conferred. The Chief Executive Officer or the President of the management, as the case may be, is required, then to communicate the names of the members of the Enquiry Committee, nominated by the management and also by directing the delinquent head to nominate his name on the Enquiry Committee and to forward the name of such nominee alongwith written consent within 15 days of the receipt of communication to that effect. If the delinquent communicates the name of the person nominated by him alongwith his consent within the aforesaid time, the Enquiry Committee of all 3 members shall be deemed to be constituted on the date of the receipt of such communication by the Chief Executive Officer or the President of the management as the case may be. However, if the delinquent employee fails to communicate the name of his nominee within the stipulated period, the Enquiry Committee shall be deemed to have been constituted of only 2 members. The President of the management is to be the Convener of the Enquiry Committee and is required to maintain all the relevant record of the enquiry. Meetings of the Enquiry Committee have to be held in

the school premises during normal school hours or immediately thereafter and if the delinquent employee agrees during vacation. According to the procedure contemplated under Rule 37 the management has to prepare the charge-sheet containing specific charges and the said specific charge-sheet alongwith statement of allegation and the explanation of the delinquent employee, If any has to be handed over to the convener of the Enquiry Committee and copies thereof are required to be sent to the concerned delinquent employee by Registered post with AD within 7 days from the date of which the Enquiry Committee is deemed to have been constituted. If the delinquent employee desires to tender any written explanation to the charge-sheet he has to submit the same to the convener of the Enquiry Committee in person or sent by Registered post with AD within 10 days of the receipt of the copies of the charge -sheet and the statement of allegations. Within 3 days after the expiry of period of 10 days the Enquiry Committee is required to meet and notify the management and the delinquent by giving at least 10 days notice for producing documents and examining witnesses. The management if desires to examine any witnesses, it has to communicate in writing to the convener of the Enquiry Committee the names of witnesses whom it proposes to examine. Similarly, if the management desires to tender document/documents by way of evidence before the Enquiry Committee, it must supply true copies of such documents to the delinquent employee. The delinquent employee is also required to supply to the management the true copies of all documents to be produced by him in evidence. The emphasis is laid in Rule 37 that Enquiry Committee shall see that every reasonable opportunity is extended to the employee for the defence of his case. The management has right to lead evidence and the right to cross-examine the witnesses examined on behalf of the employee. Similarly the employee has right to be heard in person and lead evidence and he has also right to cross examine the witnesses examined on behalf of the management. The procedure of enquiry contemplated in Rule 37 also lays emphasis that sufficient opportunity shall be given to examine all witnesses intended by both the parties. The

proceedings of the Enquiry Committee shall be recorded and the same together with statement of witnesses shall be endorsed by both the parties in token or authenticated thereof. If any of the parties refuse to endorse the same, such refusal is to be recorded by the convener of the Enquiry Committee. Ordinarily the enquiry is expected to be completed within 120 days from its first meeting or from the date of suspension of delinquent employee whichever is earlier. The Enquiry Committee is also given power to adjourn the date of enquiry on valid grounds. The convener of the Enquiry Committee is required to forward to the delinquent employee summary of proceedings and copies of statement of witnesses, if any, by Regd. post with AD within 4 days of completion of above steps and allow time by 7 days of his further explanation, if any. The delinquent employee, if so desires, is required to submit his further explanation to the convener of the Enquiry Committee within period of 7 days from the date of receipt of summary or other proceedings by Regd. AD. On receipt of such further explanation or if no explanation is offered by delinquent within the time prescribed, the Enquiry Committee shall complete the enquiry and communicate its findings on the charges against the employee and its decision on the basis of these findings to the management for specific action to be taken against the delinquent employee. The answerable question in the present writ petition is whether the aforesaid procedure as contemplated under Rules 36 and 37 of the Rules of 1981 and particularly Rule 37 was followed by the Enquiry Committee or not.

10. By communication dated 20-2-84. The employee was sent statement of allegations, seeking his satisfactory explanation and to show cause why enquiry should not be instituted to enquire into the charges against him. No reply or explanation seems to have been received by the management to this notice and, accordingly the management decided to hold enquiry to enquire into allegations against the employee. The Enquiry Committee was constituted comprising of the President of the management as convener of the Enquiry Committee and Shri G.J. Raut is the nominee of the management and the

employee was asked by the communication dt. 3-4-84 to nominate his nominee on the Enquiry Committee on or before 23-4-84 failing which it was made clear that the two member Enquiry Committee shall proceed-with the enquiry against him. On 19-4-84 the employee sent a communication to the President of the management objecting to his (President of the management) being member of the Enquiry Committee and its convener. The employee did not nominate his nominee within the time given in the communication dated 3-4-84. On the face of this factual position I find that the observation made by the School Tribunal that the management ought to have included the nominee of the employee on the Enquiry Committee even at the later stage was not justified. If the employee did not avail of the opportunity given to him to nominate his nominee on the Enquiry Committee as required under Rule 36, within the time given to him, the employee did so at his risk. The Enquiry Committee of two members viz. the President of the management and the nominee of the management thus came to be properly constituted. However, that is not the end of the matter. The question is whether the Enquiry Committee so constituted acted in accordance with law by following the procedure contemplated under Rule 37 and gave reasonable opportunity to the employee to defend himself in the enquiry. As I have already observed, Rule 37 provides elaborate procedure of the enquiry to be followed by the Enquiry Committee.

50. In the *Mahalaxmi case* (supra), this Court concluded that the enquiry proceedings seriously suffered from violation of principles of natural justice and the procedure as is contemplated in Rule 37 as regards the conducting of the enquiry. This Court, therefore, upheld the conclusion drawn by the Tribunal and, dismissed the petition filed by the management.

51. This Court, in the *Mahalaxmi* case (supra) further held that it was the duty of the management to supply true copies of all such documents to the delinquent employee which it tendered by evidence before the enquiry officer. In the instant case, though the petitioner prayed for eight days time on 23-03-2002 to appoint his nominee in place of the earlier nominee, the enquiry committee did not pass any order on his application and in fact recorded his evidence on 23-03-2002. In a blatant violation of the procedure, the enquiry committee thereafter recorded the evidence of the management, accepted their documents on record and also accepted the statements of witnesses, on 30-03-2002.

52. In the instant case, the enquiry was concluded on 04-04-2002, the enquiry report was submitted on 15-04-2002 and the petitioner was terminated from employment on 19-04-2002. It appears the respondent was predetermined to hold against the petitioner. The Hon'ble Supreme Court in the case of *The Secretary to the Government Transport, Madras Vs. Munuswami Mudliar* AIR 1988 (SC) 2232 has held that the predisposition to decide for or against one party without proper regard to the true merits of the dispute, can be defined as 'BIAS'.

53. The respondent has relied upon the judgment of the Hon'ble Supreme Court in the case of *Canara Bank Vs. V.K. Awasthy*, reported at *All India Services Law Journal* 463. The Apex Court in the said case found that the full procedure was required to be followed in conducting an enquiry. It was held that the enquiry was properly conducted and the findings of the enquiry officer were sustainable. Upon considering the judgment of the Apex Court, it clearly appears that the facts of the case in hand are different and distinguishable from the facts appearing in the *Canara Bank* case (supra).

54. The respondent has relied upon the judgment of this Court in the case *Datta Shikshan Prasarak Mandal & Anr. Vs. Dinkar Krishna Gawde*, reported at 2006 (6) *Bom.C.R.* 695. Paragraph Nos. 8 of the said judgment reads as under :-

8. The Scheme of Rules 36 and 37 read together mandates that the explanation submitted to the charge-sheet is considered by the management and if found to be unsatisfactory and the management decides to proceed against the delinquent teacher, an enquiry will have to be conducted by a committee as stated in the manner prescribed. The committee while Page 2921 conducting the enquiry will follow the procedure as set out so as to comply with the principles of natural justice and full opportunity will be given to the delinquent employee to defend his case including an opportunity to cross-examine the management's witnesses, produce his own witnesses and also place on record documentary evidence as well as demand certain documents to be placed on record if found relevant. The compliance of such rules and the failure partly thereof fell for consideration by the Apex Court in the case of [State Bank](#)

of Patiyala and Ors. v. S.K. Sharma and it was stated, *inter alia*, as under:

... There may indeed be any number of varying situations which it is not possible for anyone to foresee. In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries: a distinction ought to be made between violation of the principle of natural justice, *audi alteram partem*, as such and violation of a facet of the said principle. In other words, distinction is between "no notice" / "no hearing" and "no adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity". To illustrate -take a case where the person is dismissed from service without hearing him altogether (as in *Ridge v. Baldwin* (Supra). It would be a case falling under the first category and the order of dismissal would be invalid -or void, if one chooses to use that expression (*Calvin v. Carr*, (Supra). But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer's report (*Managing Director, ECIL v. B. Karunakar*, (supra) or without affording him a due opportunity of cross-examining a witness (*K.L. Tripathi*, (supra) it would be a case falling in the latter category -violation of a facet of the said rule of natural justice -in which case, the validity of the order has to be tested on the touchstone of prejudice, i.e., whether, all in all, the person concerned did or did not have a fair hearing. It would not be correct in the light of the above decision to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In our opinion, the approach and test adopted in *B. Karunakar*, (supra) should govern all cases where the complaint is not that there was no hearing (no notice, no opportunity and no hearing) but one of not affording a proper hearing (i.e., adequate or a full hearing) or of violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touchstone of prejudice as aforesaid.

Apparently the facts in the case in hand are distinguishable as has been discussed here-in-above.

55. The respondent has relied upon judgment of this Court in the matter of *Mohd. Irshad Ahmad Vs. Talha Education and*

Welfare Society, Karajgaon and others, reported at 2012 (3)

Mh.L.J. 291. Paragraph Nos. 5, 6 and 9 read as under :-

5. Thus, there is a statutory duty cast upon the Convener of the Inquiry Committee under sub-rule (4) of Rule 37 to allow an employee or the Head, as the case may be, a time of seven days to offer his explanation, if any. Sub-rule (5) of Rule 37 confers the corresponding statutory right upon the employee or the Head, as the case may be, to furnish his explanation within a period of seven days from the date of receipt of summary of proceedings. The insistence under sub-rule (6) of Rule 37 is that the Inquiry Committee to wait for a period of seven days to receive explanation and it is only after expiry of seven days, further action can be taken. Further, a mandatory period of ten days under Rule 37(6) can be observed only if the requirement of waiting for a period of seven days to receive explanation under Rule 37(5) is observed. The period of seven days can be curtailed only if the explanation is received prior to seven days. However, it cannot be curtailed if the explanation is not received. It is the substantive right conferred upon the employee or the Head concerned under sub-rule (5) of Rule 37 to furnish an explanation within a period of seven days from the date of receipt of the summary of proceedings of the Inquiry Committee and the violation of it, by the Inquiry Committee would result in vitiating the ultimate action of :: Downloaded on - 09/06/2013 18:13:14 :: 8 wp1753.10.odt termination of the services also on the ground of breach of the principles of natural justice.

6. In the present case, it is not in dispute that the summary of proceedings, as contemplated by sub-rule (4) of Rule 37 of the MEPS Rules was dated 25-2-2010. Obviously, it must have been forwarded to the petitioner subsequent to that date. The petitioner claims to have received it on 2-3-2010. The Management simply denies the said fact. The School Tribunal has recorded the finding that the petitioner received it on 4-3-2010. Before this Court, it is urged that on 28-2-2010, the summary of proceedings was received by the petitioner and on that date, the Inquiry Committee has taken the decision to terminate the services. There is no evidence to show that the petitioner received it on 28-2-2010. If the decision was taken by the Management on 28-2-2010, the position is still worst for the Management. Obviously, there is no gap of seven days in between the date of issuance of summary of proceedings and the decision to terminate the services taken by the Management. Not only that, but the gap of seven days is also not in between the date of summary of proceedings and the date of termination of the services of the petitioner. Thus, there is a violation of the provisions of sub-rules (4), (5) and (6) of Rule 37 of the MEPS Rules, reproduced above.

9. In view of above, the School Tribunal has committed an error in holding that the order of termination cannot be invalidated for violation of Rule 37(4) of the MEPS Rules and it ought to have set aside the said order only on the ground of violation of the provisions of sub-rules (4), (5) and (6) of Rule 37 of the MEPS Rules. The order of the School Tribunal cannot, therefore, be sustained. Since the termination dated 3-3-2010 is held to be in violation of the statutory rights conferred upon the petitioner, the same is also required to be quashed and set aside. However, the Management cannot be denied its right to continue with and complete the proceedings of inquiry from the stage of issuance of summary of proceedings, as contemplated by sub-rule (4) of Rule 37 of the MEPS Rules. Since the petitioner was placed under suspension, during the pendency of the inquiry, he will be deemed to be placed under suspension till the completion of the inquiry and the question of payment of back wages shall depend upon the outcome of the inquiry and the Management shall be at liberty to pass an appropriate order in accordance with its final decision.

56. I find that vital aspects involved in this case have been totally ignored by the School Tribunal. Despite an order of this Court dated 06-04-2011 in Writ Petition No. 11668 of 2010 by which the earlier judgment of the School Tribunal dated 14-10-2010 was quashed and set aside and the Tribunal was directed to decide the appeal afresh, I find that the Tribunal has totally failed in considering the above aspects which are intricately related to the enquiry.

57. Having carefully considered the fact situation, the submissions of the rival sides and the conclusions drawn by the School Tribunal, I am convinced that the impugned order of the School Tribunal is unsustainable in law.

58. I find that the enquiry was conducted in a slipshod manner. The enquiry committee was not constituted as required by law. The evidence was recorded in a weird manner. The petitioner was not given an adequate opportunity of cross-examining the management witnesses. Two additional charges have been surreptitiously introduced / levelled against the petitioner. The suspension allowance was not paid to the petitioner thereby causing inconvenience to the petitioner. It is for all these reasons that the enquiry deserves to be quashed and set aside.

59. This Court in the case of *Rangdas Swami Shikshan Vikas Mandal and others Vs. Mutyal Vilas Rambau and others*, 2011 (6) *Mh.L.J.* 270 has concluded in paragraph Nos. 10, 11, 11 and 15 as follows :-

“10. In the present case, it must be borne in mind that the enquiry has been set aside since the procedure adopted by the Enquiry Committee was violative of the principles of natural justice as well as Rule 37 of the MEPS Act. Thus, from the very inception itself, the enquiry was vitiated. Admittedly the employee in the instant case was not under suspension when the enquiry was held against him. It must also be borne in mind that the Tribunal is a creature of the Statute.

11. It is now well settled that a Tribunal which is appointed under a Statute cannot traverse beyond the powers conferred upon it under the Statute. The only powers that the School Tribunal can exercise are contained in Section 11 of the MEPS Act. Any directions given by the Tribunal beyond the scope of the powers conferred under section 11 of the MEPS Act would mean that the Tribunal has acted in excess of the jurisdiction conferred upon it. Therefore, in my view, the School Tribunal, Pune, cannot be faulted for directing reinstatement of the employee. Had the respondent No.1 been under suspension while the enquiry had proceeded against him, it may have been possible to accept the submission of Mr.Mhaispurkar that while setting aside the

enquiry, the School Tribunal should have restored status-quo ante. The delinquent employee could then have been continued under suspension. However, in the present case since the respondent No.1 was not placed under suspension when the enquiry was in progress, he cannot be placed in a position worse than what he was in prior to the dismissal order being passed. The directions of the School Tribunal, therefore cannot be faulted.

14. In the case of Vidya Vikas Mandal and another (supra), the employee was not suspended during the progress of the earlier enquiry. However, on setting aside the enquiry the Supreme Court directed that the employee should be placed under suspension. The directions of the Supreme Court contained in this judgment have obviously been passed in exercise of its jurisdiction under Article 136 of the Constitution Of India. The Judgment does not in any manner state that the Tribunal could have directed suspension of the delinquent employee. Therefore, the submission of Mr.Mhaispurkar cannot be accepted. In my opinion, the order of the School Tribunal cannot be faulted.

15. However, while considering the submissions on behalf of the petitioners under Article 227 of the Constitution of India, it may not be beyond the purview of this Court to pass certain directions while disposing of the Writ Petition. In these circumstances, in my view, it would be appropriate to dispose of the Writ Petition as follows :-

- (i) The petitioners will reinstate the respondent No.1 notionally with continuity of service immediately.*
- (ii) The petitioners are at liberty to issue an order of suspension pending a fresh enquiry. If such an order is passed, the petitioners shall pay subsistence allowance in accordance with the MEPS Act and Rules framed thereunder.*
- (iii) The petitioners are at liberty to hold a fresh enquiry after constituting an Enquiry Committee in accordance with the MEPS Rules.*
- (iv) In case the respondent No.1 is exonerated of the charges in the fresh enquiry, the petitioners shall pay the back-wages as awarded by the School Tribunal in the impugned order within a month of the completion of the enquiry.*

- (v) *If respondent No.1 is found guilty of the misconduct allegedly committed by him, the petitioner-Management will decide whether the back wages should be paid to him as awarded by the School Tribunal, Pune.*

60. As I have come to a conclusion that the enquiry was defective for the reasons recorded here-in-above and deserves to be set aside, I am not going into the aspect as to whether the charges levelled upon the petitioner are vague or ambiguous. (Issue 'E' as framed in paragraph 4 above). Since I find that the enquiry committee needs to be re-constituted in accordance with law and a fresh enquiry can be ordered, I leave the issue as regards charges levelled upon the petitioner open so as to give the management an opportunity to prove the charges and to enable the petitioner to meet the charges by raising all such grounds as he may deem fit and proper.

61. As such, this petition is partly allowed. The impugned judgment and order of the School Tribunal dated 22-12-2011 in Appeal No. 57 of 2002 is quashed and set aside. Consequentially the said appeal is partly allowed. The impugned order of termination dated 19-04-2002 is set aside. The enquiry proceedings are quashed and set aside.

62. The respondent management is directed to re-constitute the enquiry committee in accordance with the Rules of 1981. The petitioner shall avail of the opportunity of nominating his nominee on the committee within fifteen days from the date of receiving the communication from the respondent management. It is, therefore, expected that the management shall conduct the enquiry strictly in accordance with Rule 35 to 37 of the MEPS Rules. The petitioner will be at liberty to raise all grounds and would be given an adequate opportunity to defend himself.

63. In the light of the above, since the case is being relegated back to the stage of constitution of the enquiry committee, the petitioner who was placed under suspension at the relevant time, shall therefore be construed to be under suspension with effect from 20-12-2001 and the said suspension may continue till the conclusion of the enquiry in the light of the *Mohd. Irshad* judgment (supra). Needless to state, the respondent management shall be duty bound to pay the suspension allowance to the petitioner from 20-12-2001 onwards till the date of this judgment in lump-sum within a period of four weeks from today.

64. Nevertheless, in the event the respondent management desires to revoke the suspension and reinstate the petitioner in

employment during the pendency of the enquiry, they are at liberty to do so subject to the payment of monthly salary as is required by law.

65. Rule is made partly absolute in the above terms.

(**RAVINDRA V. GHUGE, J.**)