

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6804 OF 2015

Yashwant Manikrao Bhamre,
Age-42 years, Occu-Nil,
R/o Vitthal Co-operative Housing Society,
Nanded Road, Latur

PETITIONER

VERSUS

1. The Secretary,
Shiv Chatrapati Shikshan Sanstha, Latur,
C/o Rajshree Shahu Mahavidyalaya,
Dist.Latur

2. Head Master,
Yashwant Vidyalaya,
Nanded Road, Latur,
Dist.Latur,

3. The Education Officer (Primary),
Zilla Parishad, Latur,
Dist.Latur

RESPONDENTS

Mr.A.N.Sabnis h/f Mr.D.J.Patil, Advocate for the petitioner.
Mr.V.D.Salunke with Mr.S.S.Manale, Advocate for respondent Nos. 1
and 2.
Mr.D.S.Mali, Advocate for respondent No.3.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 09/12/2015

ORAL JUDGMENT :

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

2. I had recorded the submissions of the petitioner in paragraph Nos. 1 to 3 of my order dated 14/07/2015 which read as follows :-

“1. The petitioner assails the judgment and order dated 10/04/2015 delivered by the School Tribunal in Appeal No.23/2012, which has resulted in the dismissal of the appeal preferred by the petitioner questioning his dismissal by way of punishment.

2. It is submitted that the petitioner employee could not nominate his nominee / representative on the Enquiry Committee within the stipulated period of 15 days. However, subsequently he suggested / nominated his representative beyond the period prescribed and which was not accepted.

3. He further submits that the composition of the Enquiry Committee thus comprised of only 2 members. The Management Representative obviously worked in the same Management. However, the State Awardee Teacher, who was a member on the Committee, also happens to be associated with the same Management in his capacity as being Deputy Head Master, Rajashree Shahu College. This has led to an element of bias and the petitioner, therefore, assails the verdict of the Enquiry Committee on the grounds of bias and non-adherence to the principles of natural justice.”

3. Contention of Mr.Salunke, learned Advocate for the

respondent / Management is that the petitioner did not reply to the charge sheet. He admitted that he was frequently absent on different dates from 2004. After the enquiry was decided to be conducted, he was given a notice by which 15 days time in the light of Rule 36 (2) of the M.E.P.S. Rules, 1981 was given to appoint his nominee on the enquiry committee. The last date for nominating his nominee was 28/10/2010. He nominated his nominee on 26/11/2010.

4. Mr.Salunke submits that Rule 36(4) indicates that if the employee does not communicate the name of his nominee within 15 days, the Enquiry Committee is deemed to have been constituted on the expiry of the stipulated period and shall thereafter consist of only 2 members.

5. Mr.Salunke further submits that the charge sheet on page No.17 will clearly indicate the unauthorized absence of the petitioner. The Management showed patience and tolerated the petitioner. However, when his absence became uncontrollable, the Management was left with no option but to initiate disciplinary proceedings against him.

6. He adds that no objection was raised by the petitioner against

the constitution of the Committee in the enquiry. No prejudice or grievance was voiced against the State Awardee Teacher. He fully participated in the enquiry. Only because the Enquiry Committee has concluded that the charges are proved, that the petitioner is now raising grievances about the constitution of the Committee.

7. From page 40 till page 50 of the petition paper book indicates the correspondence between the petitioner and the Management by which rejection of his leave was intimated to him.

8. In this backdrop, he points out paragraph No.3 of the appeal memo wherein the only grounds for remaining unauthorizedly absent from 2004 onwards are stated to be family stress, family crisis, mental stress and ill health. No details have been put forth either in the enquiry or in the appeal memo.

9. He further submits that the unauthorized absence of the petitioner has affected imparting of education to the students. Frequency of his absence was high and consequentially the students suffered. Hence, after due compliance of Rule 36 and 37 of the Rules of 1981, the petitioner has been dismissed from service by way of punishment.

10. In rebuttal, Mr.Sabnis, learned Advocate for the petitioner frankly states that that no objection was raised by the petitioner against the constitution of the Committee in the enquiry, though such objection was raised in the appeal. The State Awardee Teacher is an employee of the respondent/Institution. The said nominee Mr.Uddhav Kolape was the Vice Principal of Shri Shahu College, operated by the respondent/Management. Mr.Salunke informs that he has superannuated.

11. Mr.Sabnis further frankly states that his leave applications were rejected, but considering the reasons set out in the appeal, as noted above, he was constrained to remain absent. His family problems and family crisis cannot be narrated in writing.

12. He, however, submits that the Management has dug out stale charges and by a charge sheet dated 27/08/2010, alleged mis deeds in the nature of unauthorized absenteeism over a long period of 6 years. Mr.Sabnis submits on instructions that the petitioner has 13 years of service left as he is 45 years old. He cannot survive without employment. He is willing to file an affidavit giving up entire back wages and prays for reinstatement with notional continuity of service.

13. He states that his affidavit will also contain an undertaking that henceforth he would give top priority to his job of imparting education and will not remain absent unless his leave application is allowed and leave is sanctioned. Any misconduct in future may be viewed seriously by the Management and strict punishment may be awarded if the petitioner is found guilty.

14. I have considered the submissions of the learned Advocates for the respective sides as have been recorded hereinabove.

15. Rule 36 and 37 of the M.E.P.S. Rules read as under :-

“Rule 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 acknowledgment 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 sub-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 the 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 in 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.

(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 acknowledgment 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 alongwith 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 normal schools hours or immediately thereafter, if the employee agrees and even during vacation.

37. Procedure of inquiry :

1. *The Management shall prepare a charge-sheet containing specific charges and shall hand over the same together with the statement of allegations and the explanation of the employee or the Head as the case may be, to the Convener of the Inquiry Committee and also forward copies thereof to the employee or the Head concerned by registered post acknowledgment due,*

within 17 days from the date on which the Inquiry Committee is deemed to have been constituted.

2 (a) *Within 10 days of the receipt of the copies of charge-sheet and the statement of allegations by the employee or the Head, as the case may be, -*

(i) If the employee or the Head, as the case may be, desires to tender any written explanation to the charge-sheet, he shall submit the same to the Convener of the Inquiry Committee in person or send it to him by the registered post acknowledgment due.

(ii) If the Management and the employee or the Head, as the case may be, desire to examine any witnesses they shall communicate in writing to the Convener of the Inquiry committee the names of witnesses whom they propose to so examine, and

(iii) If the Management desires to tender any documents by way of evidence before the Inquiry Committee, it shall supply true copies of all such documents to the employee or the Head, as the case may be. If the document relied upon by the Management is a register or record of the school it shall permit the employee or the Head as the case may be, to take out relevant extracts from such register or record. The employee or the Head as the case may be, shall supply to the Management true copies of all the documents to be produced by him in evidence.

(b) Within 3 days after the expiry of the period of 10 days specified in clause (a), the Inquiry Committee shall meet to proceed with the inquiry and give 10 days notice by registered post acknowledgement due to the Management and the employee or the Head, as the case may be, to appear for producing evidence, examining witnesses etc., if any.

(c) The Inquiry Committee shall see that every reasonable opportunity is extended to the employee for defense of his case.

- (d)
 - (i) *The Management shall have the right to lead evidence and the right to cross-examine the witnesses examined on behalf of the employee.*
 - (ii) *The employee shall have the right to be heard in person and lead evidence. He shall also have the right to cross-examine the witnesses examined on behalf of the Management.*
 - (iii) *Sufficient opportunities shall be given to examine all witnesses notified by both the parties.*
 - (e) *All the proceedings of the Inquiry Committee shall be recorded and the same together with the statement of witnesses shall be endorsed by both the parties in token or authenticity thereof. The refusal to endorse the same by either of the parties shall be recorded by the Convener.*
 - (f) *The inquiry shall ordinarily be completed within a period 120 days from the date of first meeting of the Inquiry Committee or from the date of suspension of the employee, whichever is earlier, unless the Inquiry Committee has, in the special circumstances of the case under inquiry, extended the period of completion of the inquiry with the prior approval of the Deputy Director. In case the inquiry is to be completed within the period of 120 days or within the extended period, if any, the employee shall cease to be under suspension and shall be deemed to have rejoined duties, without prejudice to continuance of the inquiry.*
3. *The Management and the employee or the Head, as the case may be shall be responsible to see that their nominees and the witnesses, if any, are present during the inquiry. However, if the Inquiry Committee is convinced about the absence of either of the parties to the dispute or any of the members of the Inquiry Committee on any valid ground, the Inquiry Committee shall adjourn that particular meeting of the*

Committee. The meeting so adjourned shall be conducted even in the absence of person concerned if he fails to remain present for the said adjourned meeting.

4. *The Convener of the Inquiry Committee shall forward to the employee or the Head, as the case may be a summary of the proceedings and copies of statements of witnesses, if any, by registered post acknowledgement due within four days or completion of the above steps and allow him a time of seven days to offer his further explanation, if any,*
5. *The employee or the Head as the case may be shall submit his further explanation to the Convener of the Inquiry Committee within a period of seven days from the date of receipt of the summary of proceedings etc., either personally or by registered post acknowledgement due.*
6. *On receipt of such further explanation or if no explanation is offered within the aforesaid time the Inquiry Committee shall complete the inquiry 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 employee or the Head, as the case may be, within ten days after the date fixed for receipt of further explanation. It shall also forward a copy of the same by registered post acknowledgement due to the employee or the Head, as the case may be. A copy of the findings and decision shall also be endorsed to the Education Officer or the Deputy Director, as the case may be, by registered post acknowledgement due. Thereafter, the decision of the Inquiry Committee shall be implemented by the Management which shall issue necessary orders within seven days from the date of receipt of decision of the Inquiry Committee, by registered post acknowledgement due. The Management shall also endorse a copy of its order to the Education*

Officer or the Deputy Director as the case may be.”

16. It is trite law that unless non observance of procedural aspects causes prejudice to an employee, an enquiry is not to be set aside ipso-facto on account of non observance of procedural aspects. The judgment of the Apex Court in the case of State Bank of Patiala and others Vs. S.K.Sharma, reported at AIR 1996 SC 1669 is the law applicable on the aspect of procedural rights and substantive rights of an employee. Paragraph No.32 is as under :-

“32. We may summarise the principles emerging from the above discussion. [These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee] :

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character. (2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position

is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice, including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision g expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity inspite of the delinquent officer/employee asking for it. The prejudice is self- evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be

looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4)(a) In the case of a procedural provision which is not of a mandatory character the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirements either expressly or by his conduct. If he is found to have waived it then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions [include the setting aside of the order of punishment], keeping in mind the approach adopted by the Constitution Bench in B.Karunkar. The ultimate test is always the same viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is

to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action the Court or the Tribunal should make a distinction between a total violation of natural justice [rule of audi alteram] and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and "adequate opportunity, i.e., between "no notice"/"no hearing" "no fair hearing".

(a) In the case of former, the order passed would undoubtedly be invalid [one may call it "void" or a nullity if one chooses to]. In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule [audi alteram partem]. (b) But in the latter case, the effect of violation [of a facet of the rule of audi alteram] has to be examined from the standpoint of prejudice; in other word in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle [No.5] does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.] (6) While applying the rule of audi alteram partem [the primary principle of natural justice] the Court/ Tribunal/Authority must always bear in mind the ultimate and over-riding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is

this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of state or public interest may call for a curtailing of the rule of audi alteram partem. . In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision.”

17. In the light of the above, when the petitioner fully participated in the enquiry and raised no objection or grievance about the State Awardee Teacher, it would only indicate that he did not suffer any prejudice. As such, on the touchstone of prejudice, with no such case having been made out, I do not find that the inclusion of the State Awardee Teacher could be found fault with.

18. Rule 36(4) reproduced above clearly indicates that if the employee does not nominate his nominee or even if the Management does not nominate its nominee, within the stipulated period, the Committee shall be deemed to have been constituted comprising of only two members.

19. It is admitted by the petitioner that he was given 15 days time to appoint his nominee. He prayed for 2 months time, which prayer

was rejected. He admits that he appointed his nominee for the first time on 26/11/2010 when the enquiry had already commenced and when the last date for appointing his nominee was 28/10/2010. In this backdrop, I do not find that the enquiry could be faulted in the light of Rule 36(4) [School Tribunal having wrongly mentioned as Rule 37(2)].

20. This takes me to the aspect as to whether the respondent Management could have dug out stale charges. The charge sheet dated 27/08/2010 indicates the following charges of unauthorized absenteeism levelled upon the petitioner :-

14/06/2004 to 30/04/2005	10 months 17 days
20/06/2005 to 30/04/2006	10 months and 11 days
12/06/2015 to 10/11/2006	4 months and 30 days
04/08/2009 to 04/10/2009	2 months and 1 day
10/11/2009 to 21/01/2010	2 months and 12 days
21/01/2010 to 20/04/2010	3 months

21. It is trite law that a Management can level charges against an employee over a period of 3 years preceding the date of the charge sheet. Charges of misconduct for periods there beyond are held to be stale charges. In the instant case, there is no charge of unauthorized absenteeism in between 11/11/2006 and 03/08/2009. Presumption,

therefore, is that there has been no unauthorized absenteeism for about 2 years.

22. As such, the charges of unauthorized absenteeism for a period of 3 years prior to the date of the charge sheet indicates unauthorized absence of 8 months and 13 days going by the show cause notice dated 27/08/2010 and the same having been repeated in the final charge sheet presented before the Enquiry Officer dated 15/11/2010.

23. The petitioner has worked as an "Assistant Teacher" from 1992 till his date of dismissal 11/04/2012 which is a period of about 20 years. It is pointed out that this is the only enquiry initiated against him in these past 20 years. For his unauthorized absence, the petitioner has not been paid his salary on the basis of "no work no pay".

24. I am, therefore, to consider whether this one misconduct of absence of more than 8 months could be said to be so grave and serious in nature as to warrant the punishment of dismissal from service which amounts to civil death. The petitioner had 16 years of service left from the date of his dismissal and today is left with 13

years of service. No aggravating factors are pointed out.

25. I find that the proportionality of the punishment has not been properly looked into by the School Tribunal. Though the School Tribunal has taken efforts to deal with every aspect of the matter and has delivered a well reasoned judgment, but on the issue of proportionality of the punishment, I do not find that the School Tribunal has drawn any conclusion. It is in this backdrop that I have considered the submissions of the learned Advocates for the respective sides.

26. In my view, depriving the petitioner of his entire salary from 11/04/2012 till December 2015 would be sufficient punishment. Notional continuity of service could be granted so as to render him eligible for retiral / pensionary benefits. Having arrived at this conclusion, I am granting liberty to the petitioner to file an affidavit / undertaking as was volunteered on instructions recorded above.

27. In the light of the above, the statement of the petitioner is recorded that he would submit an affidavit/undertaking to the Management within 3 days from today and file a copy thereof in this matter. The impugned judgment of the School Tribunal dated

10/04/2015 is modified as under :-

- [a] The respondent/Management shall reinstate the petitioner in service w.e.f. 01/01/2016.
- [b] The petitioner shall tender an undertaking affidavit as per his statement, to the Management on or before 16/12/2015 stating therein that he waives his entire back wages and all increments as well as consequential benefits from 11/04/2012 till 31/12/2015, he shall not proceed on leave in future until his leave application is granted and shall not commit any misconduct in future, lest any such misconduct shall be strictly viewed and strict punishment would be awarded to the petitioner.
- [c] Notional continuity of service from 11/04/2012 till 31/12/2015 is granted and respondent No.3 / Education Officer shall make necessary entries in the records to that effect.
- [d] Violation of the undertaking affidavit shall entitle the Management to strictly deal with the petitioner in accordance with Law in future.
- [e] The punishment as modified by this Court shall mean that the misconduct at issue will constitute a part of the past service record of the petitioner.

28. This petition is, therefore, partly allowed and Rule is made partly absolute in the above terms.

29. No costs.

(RAVINDRA V. GHUGE, J.)