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

WRIT PETITION NO.10003 OF 2015

SARASWATI BHUWAN EDUCATION SOCIETY THROUGH ITS GENERAL
SECRETARY AND ANOTHERS

VERSUS

RAJESH MAHARUDRA PATIL AND ANOTHERS

...

Advocate for Petitioners : Shri Joshi Arvind Ramakant

Advocate for Respondent No.1 : Shri Dhage Vivek J..

AGP for Respondent No.2 : Shri S.G.Sangle.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 07th & 08th October, 2015

Per Court:

1 I have heard the learned Advocates for the Petitioners and the Respondents.

2 This case has a chequered history. Respondent No.1/ Employee was working as a full time teacher since 08.12.1993 in the junior college operated by the Petitioner/ Management. He was compulsorily retired by the order dated 06.07.2005 after conducting an enquiry in accordance with the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short "the MEPS Rules, 1981").

3 Respondent No.1 questioned his removal from service and the matter reached this Court from the School Tribunal in Writ Petition No.1551/2007. By the judgment and order dated 11.08.2010, this Court while partly allowing the petition has observed in paragraph 17 as under:-

“17. In the result, the Petition is partly allowed. The parties are relegated to the enquiry committee with direction that the enquiry committee shall issue fresh notice, alongwith the full enquiry report, calling upon the respondent no.1-delinquent employee to explain as to why the charges be not held as proved and why any major penalty be not awarded to him. After hearing the respondent no.1-delinquent employee, the committee may take appropriate decision within the four corners of the M.E.P.S. Rules. The respondent no.1 will be entitled to receive subsistence allowance on assumption that he is deemed to have been suspended, for the period from the date of this judgment till the procedure regarding awarding of the penalty or passing of further order, including the order of his exoneration, if any, is rendered by the petitioners. The respondent no.1 shall co-operate with the enquiry committee and shall not endeavour to delay the enquiry any more. The parties shall appear before the enquiry committee on 30.8.2010 and the further procedure shall be completed by the enquiry committee within a period of three months and de-novo order of penalty/final order may be rendered by the petitioners after consideration of the recommendations of the enquiry committee. The respondent no.1-delinquent employee shall be paid subsistence allowance w.e.f. date of this order till the final order is passed on basis of the enquiry report, as is available to a suspended employee. Rule is partly made absolute accordingly. Petition disposed of. No costs.”

4 It is, thus, apparent that since the Petitioner/ Management had failed to comply with the mandate of supplying a summary of the proceedings and copies of the statements of the witnesses, to the delinquent under Rule 37(4) of the MEPS Rules, 1981, this Court relegated the proceedings to the Enquiry Committee. It was specifically directed that the parties shall appear before the Enquiry Committee and further procedure shall be completed by the Enquiry Committee within a period of three months and a de-novo order of penalty/ final order may be passed by the Management after considering the recommendations of the Enquiry Committee. It was ordered that the delinquent shall be paid subsistence allowance from the date of the order of this Court till the final order is passed on the basis of the Enquiry Report.

5 It is an admitted position that pursuant to the directions of this Court, the Petitioner/ Management complied with Rule 37(4). For the sake of clarity, Rule 37 is reproduced as under:-

“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 acknowledgement 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 acknowledgement 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.”*

6 Respondent No.1/ Employee is said to have submitted his detailed explanation as expected under Rule 37(5). Then came the role of the Enquiry Committee under Rule 37(6) whereby, the Committee was obliged to submit a joint report, whether, concurring or dissenting.

7 The Convener of the Enquiry Committee did not intimate the

delinquent's nominee as to the programme for preparing a combined enquiry report. The reply of the delinquent was submitted on 06.11.2010 and within 10 days therefrom, a combined enquiry report was to be submitted on or before 16.11.2010 as per Rule 37(6).

8 It has come on record before the School Tribunal that the nominee of the delinquent realizing that the Convener of the Enquiry Committee is not responding, submitted his individual report on 06.12.2010 which is about 20 days beyond the 10 days limit under Rule 37(6). The two committee members, which include the Convener and the State Awardee Teacher, submitted their joint report on 24.12.2010, which is 38 days beyond the limit which was upto 16.11.2010.

9 The Management relied upon the report submitted by the Convener and the State Awardee Teacher which held the delinquent guilty. The Management disregarded the report submitted by the nominee of the delinquent as he was exonerated.

10 The facts recorded as above are practically identical to the facts that were before the Apex Court in the case of *Vidya Vikas Mandal v/s Education Officer*, **2007(3) Mh.L.J. 801**. The Apex Court had considered that Rule 37(6) was not complied with. The Enquiry

Committee, comprised of three members. In the said case, it was noticed that one report was submitted within time by the nominee of the delinquent and the Convener and the State Awardee Teacher submitted a combined report after expiry of the period prescribed under Rule 37(6).

11 The Apex Court has, after considering the situation, concluded in paragraphs 8 and 9 as under:-

“8. *As rightly pointed out by the learned counsel for the appellants, Rule 37(6), which is mandatory in nature, has not been strictly complied with. The Inquiry Committee comprising of three members, as already noticed, only one member nominated by the Management has submitted his Inquiry report within the time stipulated as per Rule 37 (6) and admittedly, the other two members nominated by the employee and an independent member have not submitted their report within the time prescribed under Rule 37 (6). However, the learned Judges of the Division Bench, though noticed that the two members out of three found the employee not guilty, failed to appreciate that the said findings by the two members of the committee were submitted after the expiry of the period prescribed under Rule 37(6). In our opinion, the report submitted by individual members is also not in accordance with the Rules. When the Committee of three members are appointed to inquire into a particular matter, all the three should submit their combined report whether consenting or otherwise. Since the report is not in accordance with the mandatory provisions, the Tribunal and the learned Single Judge and also the Division Bench of the High Court have committed a serious error in accepting the said report and acted on it and thereby ordering the reinstatement with back wages. Since the reinstatement and back*

wages now ordered are quite contrary to the mandatory provisions of Rule 37 (6), we have no hesitation in setting aside the order passed by the Tribunal, and learned Single Judge and also of the Division Bench of the High Court. In addition, we also set aside the order passed by the Management based on the report submitted by the single member of the Committee, which is also quite contrary to the Rules.

9. *In view of the order now passed by this Court, the Rule 36(2)(a) is now to be invoked and as per the said Rule, one member from amongst the members of the Management is to be nominated by the Management or by the President of the Management if so authorised by the Management, and one member is to be nominated from amongst the employees of any private school and the third member to be chosen by the Chief Executive Officer from the panel of teachers on whom State/National Award has been conferred. We direct the Management of the School to constitute the Committee in accordance with sub-Rules (i), (ii) & (iii) of Rule 36(2)(a) to go into the matter afresh. The respondent no.2, the employee, will be now treated under suspension and he will be entitled to the subsistence allowance as per rules with effect from the date of termination of his services. The inquiry shall be completed by the Committee within a period of six months from the date of their nomination/constitution.”*

12 It is, therefore, apparent and requires no further elucidation in the light of paragraphs 8 and 9 of the judgment of the Apex Court that the Apex Court directed the Management to reconstitute the Committee and conduct a de-novo enquiry. The Apex Court has specifically ordered the Management to constitute the Committee afresh in accordance with

sub-rules (i), (ii) and (iii) of Rule 36(2)(a) and to go into the matter afresh. The Employee in the said case was directed to be treated as being under suspension and was held entitled for the subsistence allowance from the date of his termination till the final decision of the Management after conducting a de-novo enquiry.

13 At this juncture, Shri Joshi, learned Advocate for the Petitioner/ Management, prays for a day's time in order to cite some judgments.

14 Considering the request and taking into account the consent of Shri Dhage, the matter is adjourned to 08.10.2015 (tomorrow) for further hearing and passing orders.

(Continued on 08th October, 2015)

15 Today, Shri Joshi, learned Advocate submits that the Management has lost trust in the Respondent/ Employee for the reason that charges of fraud, cheating, taking money for giving appointments etc. have been levelled upon the Respondent. On account of procedural lapses in the domestic enquiry, the disciplinary proceedings should not stand affected as the charges have been proved against the respondent. He relies upon the judgment of this Court in the case of *Sulochana Daulatrao*

Thakare Vs. Sangam Shikshan Sanstha, 2003 (3) CLR 560 : 2004(1) All MR 644. He also relies upon the judgment of the Apex Court in the case of *Union of India and others Vs. Alok Kumar*, AIR 2010 SC 2735.

16 He, therefore, submits that merely because two members have filed one enquiry report and the nominee of the delinquent has filed an independent report should not result in vitiating the enquiry. He further submits that both the reports submitted by the enquiry committee are beyond the time limit prescribed under Rule 37(6), which cannot be said to be fatal to the enquiry proceedings.

17 Shri Dhage, learned Advocate for the delinquent reiterates that the view taken by the Apex Court in the case of Vidya Vikas Mandal (supra) was not cited before the Apex Court, when it decided the matter of Union of India Vs. Alok Kumar (supra). He adds that in the event the judgment of the Apex Court in Vidya Vikas Mandal (supra) would have been cited, the Apex Court would have taken note of the conclusions drawn in paragraph Nos.8 and 9 of the said judgment.

18 In so far as the Union of India Vs. Alok Kumar case (supra) is concerned, the Apex Court dealt with Rule 9(2) of the Railway Servants (Discipline and Appeal) Rules, 1968. Rule 9 lays down the procedure for

imposing major penalties against a railway servant. Rule 9(1),(2) and (3) reproduced in the Alok Kumar's case (supra) read as under:-

“Rule 9. Procedure for imposing major penalties:-

- (1) No order imposing any of the penalties specified in Clauses (v) to (ix) of Rule 6 shall be made except after an inquiry held, as far as may be, in the manner provided in this rule and Rule 10, or in the manner provided by the Public Servants (Inquiries) Act, 1850 (37 of 1850) where such inquiry is held under that Act.*
- (2) Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a railway servant, it may itself inquire into, or appoint under this rule or under the provisions of the Public Servants (Inquiries) Act, 1850, as the case may be, [a Board of Inquiry or other authority] to inquire into the truth thereof.*
- (3) Where a Board of Inquiry is appointed under sub-rule (2) it shall consist of not less than two members, each of whom shall be higher in rank than the Railway servant against whom the inquiry is being held and none of whom shall be subordinate to the other member or members, as the case may be, of such Board.*

Explanation:-

Where the disciplinary authority itself holds the inquiry, any reference in sub-rule (12) and in sub-rule (14) to sub-rule (25), to the inquiring authority shall be construed as a reference to the disciplinary authority.”

19 It is, therefore, evident that the Apex Court was dealing with a case on different facts and under different provisions as compared to the case in hand, wherein, Rule 37(6) provides for the manner of submitting a

combined report by the enquiry committee and the period within which such report is to be submitted. This was not the issue before the Apex Court in the case of Alok Kumar (supra).

20 It is trite law that an enquiry should not ordinarily be set aside on account of procedural lapses unless the said lapses are tested on the touchstone of prejudice. However, the Apex Court in the Vidya Vikas Mandal case (supra) had an occasion to deal with an identical situation as found in this case. Observations of the Apex Court in paragraph No.8 and 9 of the Vidya Vikas Mandal judgment (supra) have been reproduced herein above. The Apex Court, in fact, has directed the management to appoint a fresh committee and conduct an enquiry afresh.

21 In the instant case, the School Tribunal has followed the ratio in the Vidya Vikas Mandal case (supra) and has directed the Petitioner / Management on similar lines, to constitute a new committee and for conducting an enquiry afresh. In the light of the ratio of the Apex Court in the Vidya Vikas Mandal case (supra), the Tribunal has directed the Petitioner/ Management to treat the delinquent / Respondent as being under suspension and being entitled for subsistence allowance as per Rules from the date of termination till passing of a fresh order after the enquiry is concluded.

22 I, therefore, do not find that the Tribunal has committed any error in delivering the impugned judgment and hence the same cannot be termed as being perverse.

23 This petition is, therefore, dismissed.

24 At this juncture, Shri Dhage, learned Advocate for the Respondent / delinquent submits, on instructions from his client, that despite the above result in this petition, the Respondent / Employee is willing to submit an application for voluntary retirement and seek payment of subsistence allowance for the period 02.07.2005 till 01.02.2009 and continuity of service from 02.07.2005 till the date on which his application for voluntary retirement is accepted. He shall make a proper representation so as to have a golden hand shake and part ways with the Petitioner.

25 Shri Joshi submits that if such representation is submitted expeditiously, the Petitioner / Management shall consider the same and shall take a decision thereon within a period of four weeks.

26 Shri Dhage makes it clear that if the Management does not

take a decision on his representation / voluntary retirement within the time set out above, it shall be presumed that the Petitioner / Management has no objection and in which case the directions of this Court and the School Tribunal shall be complied with. Shri Joshi is agreeable to the said position.

27 As such, in the event the Petitioner rejects the application of the Respondent/ Employee, it shall comply with the directions of the School Tribunal.

(RAVINDRA V. GHUGE, J.)