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

WRIT PETITION NO. 11317 OF 2015

Nanded Waghala City Municipal Corporation.
Through its Commissioner,
Laxman s/o Kashiram Chaure,
Age : 46 years,
Occ : Service as Assistant Commissioner,
R/o Nanded, Tal. & Dist.Nanded.

...PETITIONER

-VERSUS-

Keroji Sitaram Dasare,
Age : 49 years, Occ : Nil,
R/o Dayanand Nagar,
New Mondha, Nanded,
Tal. & Dist.Nanded.

...RESPONDENT

...

Advocate for Petitioner : Shri Ingole Patil R. K.

Advocate for Respondent : Shri Piratwad Anil P

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 05th December, 2015

Oral Judgment:

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

2 The Petitioner- Municipal Corporation is aggrieved by the

order dated 29.07.2015 delivered by the Labour Court below Exhibit U/2 in Complaint (ULP) No.12/2014 by which the second show cause notice dated 14.03.2014 issued by the Petitioner/ Management has been stayed.

3 The Petitioner is also aggrieved by the judgment and order dated 06.10.2015 delivered by the Industrial Court in Revision (ULP) No.42/2015 by which the revision petition of the Petitioner has been dismissed.

4 I have heard the learned Advocates for the respective sides at length.

5 The issue involved is that the Respondent/ Employee was served with the second show cause notice dated 14.03.2015 along with a copy of the Enquiry Officer's report dated 10.02.2014 and the same has been stayed by the Labour Court.

6 It is not disputed that the charge sheet -cum- show cause notice was issued to the Respondent/ Employee. He was charged with unauthorized absenteeism for 70 days. The Respondent was a “Leading Fireman” in the emergency cadre of the Petitioner and deployed in the Fire Brigade of the Petitioner. He has been placed under suspension

pending the disciplinary proceedings.

7 It is also not disputed that after considering the reply of the Respondent, the Petitioner initiated the domestic enquiry and the Respondent engaged an Advocate as his defence representative and participated in the enquiry. After conclusion of the enquiry, the Enquiry Officer submitted his report dated 10.02.2014 by which the charges of unauthorized absenteeism are held to be proved against the Respondent.

8 After receiving the second show cause notice dated 14.03.2014 and the findings of the Enquiry Officer annexed thereto, the Respondent preferred Complaint (ULP) No.12/2014 before the Labour Court at Nanded. By an ex-parte ad-interim order dated 25.04.2014, the Labour Court concluded that prima facie, the punishment proposed appears to be shockingly disproportionate.

9 The Petitioner submits that the Respondent obtained a copy of the inward register and after he noticed an entry at Sr.No.23 indicating that the order of termination by way of punishment was issued, he rushed to the Labour Court by filing the complaint and was granted an ex-parte ad-interim protection. By the impugned order dated 29.07.2015, the Labour Court has allowed the application for interim relief on the ground

that the Respondent is not absent for more than six months and therefore, the Petitioner was prevented from initiating any action against the Respondent.

10 The Petitioner preferred Revision (ULP) No.42/2015 before the Industrial Court at Jalna. By the impugned judgment dated 06.10.2015, the Industrial Court concluded that the interim order passed by the Labour Court was not perverse and no interference is called for.

11 The Petitioner submits that the Petitioner desires to follow the due procedure of law while dealing with the disciplinary proceedings. When there was substantial compliance of such procedure, the Labour Court ought not to have interfered with the endeavour of the Petitioner to take the disciplinary proceedings to a logical end. Earlier by an ex-parte ad-interim order dated 25.04.2014 and subsequently, by the interim order dated 29.07.2015, the Labour Court has prevented the Petitioner from initiating action in accordance with law.

12 The Petitioner submits that the impugned orders of the Labour Court and the Industrial Court deserve to be quashed and set aside and the Petitioner deserves to be permitted to follow the due procedure of law and conclude the disciplinary proceedings in accordance with law.

13 Shri Piratwad, learned Advocate for the sole Respondent, has vehemently supported the impugned orders. He submits that after receiving the second show cause notice, the Respondent has replied to the same on 29.03.2014. The reply has been submitted after considering the conclusions of the Enquiry Officer which are available through the report supplied to the Respondent. The Respondent has tried to convince the Petitioner that the charge is not proved against him. In the event, it is so held that the charge is proved, the same is of a minor and technical character. It does not warrant a major punishment. The past service record of the Respondent should be scrutinized before initiating any action against him.

14 He further submits that the Petitioner is under a legal obligation to consider the gravity and seriousness of the misconduct, the past service record and thereafter, arrive at a pragmatic decision as regards the quantum of punishment. He, therefore, submits that his apprehension that the Petitioner will intentionally terminate his services came to be true when he found through the inward register, copy of which he has obtained and placed before this Court, that the Petitioner has decided to terminate his services.

15 The said inward register is taken on record and marked as Exhibit X for identification.

16 Shri Piratwad further submits that the Labour Court has rightly protected him from 25.04.2014 and by the impugned order, has rightly directed the Petitioner not to initiate any action against the Respondent. He further points out that the Industrial Court has also come to the same conclusion. The complaint is held to be maintainable. Balance of convenience was held in favour of the Respondent by the Labour Court as well as the Industrial Court and hence, the Industrial Court also restrained the Petitioner from taking any action against the Respondent. He further adds that the impugned orders are legal and sustainable and no interference is called for. He prays for the dismissal of this petition with heavy costs.

17 I have considered the submissions of the learned Advocates as have been recorded herein above. I have no hesitation in concluding that neither the Labour Court nor the Industrial Court has considered the legal position.

18 The Apex Court in the case of *Hindustan Lever Limited vs. Ashok Vishnu Kate*, **1995(6) SCC 326**, has considered a similar issue after

the Division Bench of this Court has concluded that the complaint under Item 1 of Schedule IV of the MRTU & PULP Act, 1971 was maintainable before the Labour Court even at a penultimate stage.

19 The law is well settled. An employee may approach the Labour Court under Item 1 of Schedule IV of the MRTU & PULP Act, 1971 even at a penultimate stage. However, what is required to be scrutinized is that the stay to the disciplinary proceedings is not to be granted at the mere askance. A very strong prima facie case has to be made out so as to enable the Labour Court to conclude, prima facie, that the punishment likely to be awarded is “shockingly disproportionate” and the employee is prima facie guilty of unfair labour practices. Both the lower Courts have lost sight of the note of caution struck by the Apex Court in the Hindustan Lever case (supra).

20 It would be worth the exercise, for the benefit of the litigants, to reproduce paragraphs 53 and 54 of the Hindustan Lever case (supra) as under:-

“53. *Reference made in paragraph VI to the Bombay High Court's judgments also cannot be of any avail as they were based on the view which was accepted by the learned Single Judge of the High Court of Bombay at Nagpur which has rightly been overturned by the Division Bench of the Bombay High Court in the judgment under appeal on a correct interpretation*

of the relevant provisions of the Act. Therefore, the earlier view taken by the learned Single Judge of the Bombay High Court cannot be said to be well-sustained. For all these reasons, the appellant has made out no case for our interference in this appeal.

54. *Before parting with this case, however, we must strike a note of caution, as has been done by the Division Bench of the Bombay High Court. It could not be gainsaid that the employers have a right to take disciplinary actions and to hold domestic enquiries against their erring employees. But for doing so, the standing orders governing the field have to be followed by such employers. These standing orders give sufficient protection to the concerned employees against whom such departmental enquiries are proceeded with. If such departmental proceedings initiated by serving of chargesheets are brought in challenge at different stages of such proceedings by the concerned employees invoking the relevant clauses of Item 1 of Schedule IV before the final orders of discharge or dismissal are passed, the Labour Court dealing with such complaint should not lightly interfere with such pending domestic enquiries against the concerned complainants. The Labour Court concerned should meticulously scan the allegations in the complaint and if necessary, get the necessary investigation made in the light of such complaint and only when a very strong prime facie case is made out by the complainant appropriate interim orders intercepting such domestic enquiries in exercise of powers under Section 30(2) can be passed by the Labour Courts. Such orders should not be passed for mere askance by the Labour Courts. Otherwise, the very purpose of holding domestic enquiries as per the standing orders would get frustrated.”*

21 In the light of the above, the Labour Court was obliged to consider whether, the principles of natural justice have been substantially

followed by the Employer while conducting an enquiry and whether, a reasonable opportunity of defence was given to the charge-sheeted employee.

22 I find, in the instant case, that the charge sheet-cum- show cause notice was given, the Respondent submitted his reply dated 29.03.2014 and a domestic enquiry was conducted in accordance with the Rules. In fact the Respondent was defended by an Advocate in the enquiry. As such, after the second show cause notice was issued, the Respondent was expected to reply to the said notice in the light of the findings of the Enquiry Officer and thereafter, enable the Employer to arrive at a decision so as to conclude the disciplinary proceedings.

23 The Apex Court in the Hindustan Lever case (supra) has concluded that the disciplinary proceedings cannot be intercepted at various stages. Though the Employer may not strictly have a right to take disciplinary action, the Employer is obliged to follow the due procedure of law in conducting domestic enquiries against earning employees. These proceedings have to be taken to a logical end. I do not find that the Labour Court has embarked on an exercise as laid down by the Apex Court in the Hindustan Lever judgment (supra)..

24 I also do not find that the Labour Court or the Industrial Court have considered that the Respondent was “Leading Fireman” and was working in the emergency cadre of the Petitioner. He had remained unauthorizedly absent for 70 days for personal reasons which have not been divulged. I find it unacceptable that the Labour Court has concluded that he was not absent for more than six months and therefore, action initiated against him, deserves to be stayed.

25 The Apex Court in the case of *Managing Director, ECIL and others vs. B.Karunakar and others*, **(1993) 4 SCC 727**, has dealt with the distinction between the 15th amendment and the 42nd amendment to the Constitution. Under the 15th amendment to Article 311, an employee had two rights. Firstly, a right to show cause on the charge sheet and secondly, to show cause on the proposed quantum of punishment. By the 42nd amendment, the first right was maintained and the second right was altered. The right to show cause on the quantum of punishment was taken away and an employee was bestowed with a right to show cause on the findings of the Enquiry Officer and reason out to the Employer as to why the Employer should discard the findings and conclusions of the Enquiry Officer. A right to show cause on the quantum of punishment is now no longer available to the employee. This also does not seem to have been considered by the Courts below.

26 The observations of the Apex Court in paragraph Nos.25 to 30 in the Managing Director, ECIL judgment (supra) read as under:-

- “25. While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the 42nd Amendment.
26. The reason why the right to receive the report of the Inquiry Officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the Inquiry Officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is the negation of the tenets of justice and a denial of

fair opportunity to the employee to consider the findings recorded by a third party like the Inquiry Officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the Inquiry Officer along with the evidence on record. In the circumstances, the findings of the Inquiry Officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the Inquiry Officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the Inquiry Officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the Inquiry Officer's findings. The disciplinary authority is then required to consider the evidence, the report of the Inquiry Officer and the representation of the employee against it.

27. *It will thus be seen that where the Inquiry Officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, Inquiry Officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is*

not even reached. The employee's right to receive the report is thus, a part of the reasonable opportunity of defending himself in the first stage of the inquiry. If this right is denied to him, he is in effect denied the right to defend himself and to prove his innocence in the disciplinary proceedings.

28. The position in law can also be looked at from a slightly different angle. Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The findings on the charges given by a third person like the enquiry Officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. What is further, when the proviso to the said Article states that "where it is proposed after such inquiry to impose upon him any such penalty such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed", it in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the Inquiry Officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the Inquiry Officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry. The second stage follows the inquiry so carried out and it consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the Inquiry Officer. The latter right was always there. But before the 42nd Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the

conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the 42nd Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry Officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence of the charges.

29. Hence it has to be held that when the Inquiry Officer is not the disciplinary authority, the delinquent employee has right to receive a copy of the inquiry Officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

30. Hence, the incidental questions raised above may be answered as follows:

(i) Since the denial of the report of the Inquiry Officer is a denial of reasonable opportunity and a breach of the principles of natural justice, it follows that the statutory rules, if any, which deny the report to the employee are against the principles of natural justice and, therefore, invalid. The delinquent employee will, therefore, be entitled to a copy of the report even if the statutory rules do not permit the furnishing of the report or are silent on the subject.

(ii) The relevant portion of Article 311(2) of the Constitution is as follows:

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against

him and given a reasonable opportunity of being heard in respect of those charges."

Thus the Article makes it obligatory to hold an inquiry before the employee is dismissed or removed or reduced in rank. The Article, however, cannot be construed to mean that it prevents or prohibits the inquiry when punishment other than that of dismissal, removal or reduction in rank is awarded. The procedure to be followed in awarding other punishments is laid down in the service rules governing the employee. What is further, Article 311(2) applies only to members of the civil services of the Union or an all India service or a civil service of a State or to the holders of the civil posts under the Union or a State. In the matter of all punishments both Government servants and others are governed by their service rules. Whenever, therefore, the service rules contemplate an inquiry before a punishment is awarded, and when the Inquiry Officer is not the disciplinary authority the delinquent employee will have the right to receive the Inquiry Officer's report notwithstanding the nature of the punishment.

- (iii) Since it is the right of the employee to have the report to defend himself effectively, and he would not know in advance whether the report is in his favour or against him, it will not be proper to construe his failure to ask for the report, as the waiver of his right. Whether, therefore, the employee asks for the report or not, the report has to be furnished to him.
- (iv) In the view that we have taken, viz., that the right to make representation to the disciplinary authority against the findings recorded in the inquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in Mohd. Ramzan Khan's case (AIR 1991 SC 471) (supra) should apply to employees in all establishments whether Government or non-Government, public or private. This will be the

case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the Inquiry Officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.

- (v) *The next question to be answered is what is the effect on the order of punishment when the report of the Inquiry Officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an*

"unnatural expansion of natural justice" which in itself is antithetical to justice."

27 In my view, the Labour Court, by granting interim relief to the Respondent, has prevented the Employer from initiating disciplinary action against him which is apparently contrary to the note of caution struck by the Apex Court in paragraph 54 of the judgment in the Hindustan Lever case (supra), which has been reproduced herein above. The above aspects as discussed, do not seem to have been considered by the Labour Court as well as the Industrial Court.

28 In the light of the above, the Writ Petition is partly allowed.

29 The impugned order dated 29.07.2015 passed by the Labour Court below Exhibit U/2 and the impugned judgment of the Industrial Court dated 06.10.2015 delivered in Revision (ULP) No.42/2015 are quashed and set aside.

30 The Petitioner Corporation is, therefore, directed to issue a fresh order of punishment within a period of 05 (five) days from today after considering the following aspects:-

- (a) Length of service of the Respondent/ Employee.
- (b) The charges held to be proved against the Respondent.

- (c) His function in the Emergency Cadre and the fact of absence for 70 days for the undisclosed reasons calling them as personal reasons.
- (d) Impact of his absence on the day to day working of the Fire Brigade.
- (e) Whether, the Respondent has a clean and unblemished past service record.
- (f) If his past service record is clean, the same shall operate as a mitigating factor and in the event, the same is blemished, it shall operate as an aggravating factor.
- (g) The reply filed by the Respondent pursuant to the second show cause notice dated 14.03.2014.

31 Needless to state, the Petitioner Corporation shall apply it's mind to the above factors and shall issue a fresh order of punishment and shall award such punishment to the Respondent as the Disciplinary Authority deems it commensurate and proportionate.

32 The order dated 23.04.2014 which was issued by the Petitioner, but not served upon the Respondent, shall be discarded. A fresh order of punishment shall contain proper

reasons.

33 After service of the fresh order of punishment, in the event, the Respondent is aggrieved, he shall have the liberty of availing legal remedies in accordance with law. He may assail the said order before an appropriate Court either by filing a fresh proceeding or by amending the existing complaint.

34 The pending Criminal (ULP) Nos.24/2015 and 30/2014 under Section 48(1) of the MRTU & PULP Act, 1971 are rendered infructuous.

35 Rule is made partly absolute in above terms.

36 Since this judgment is dictated in open court in the presence of the learned Advocates, the parties shall act on an authenticated copy of the operative part of this order, which would be supplied to the parties.

(RAVINDRA V. GHUGE, J.)