IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2764 OF 2016

Dhananjay Veduji Jadhav.
Deceased through legal heirs:-

1 Smt.Indumati W/o Dhananjay Jadhav,
Age : 52 years, Occupation : Household
and Service.

2 Neelam Dhananjay Jadhav,
Age : 23 years, Occupation : Education.

3 Nikhil Dhananjay Jadhav,
Age : 19 years, Occupation : Education.

All R/o Sayyam Apartment,
Burudgaon Road, Ahmednagar.

...PETITIONERS

-versus-

Ahmednagar District Central Cooperative
Bank Limited, Station Road, Ahmednagar.
Through its Managing Director.

...RESPONDENT

...

Advocate for Petitioners : Shri Sonwane Mahesh R.
Advocate for Respondent : Shri Dhorde Vikram R.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 04th August, 2016

Oral Judgment :

1 Rule. Rule made returnable forthwith and heard finally by the

consent of the parties.

2 The Petitioner is aggrieved by the judgment dated 28.07.2015 delivered by the Industrial Court by which Revision (ULP) No.11/2015 filed by the Respondent-Management has been allowed and the part-1 judgment of the Labour Court dated 21.02.2014 on the preliminary points of fairness of the enquiry and the findings of the Enquiry Officer, has been set aside.

3 Shri Sonwane, learned Advocate for the Petitioner, has strenuously canvassed the following issues while criticizing the impugned judgment of the Industrial Court:-

(a) The Roznama of the enquiry has not been properly noted.

(b) The examination-in-chief of the Management witness Mr.S.D.Pandit is filed before the Enquiry Officer as a statement of the witness in writing in lieu of his examination.

(c) The said document which was placed before the Labour Court Exhibit-18 reveals that it was not verified before the Enquiry Officer.

(d) Any examination of the witness before the Enquiry Officer has to be verified in the form of evidence.

(e) Though an opportunity to cross-examine the said witness

Mr.S.D.Pandit has been given, the Roznama dated 04.11.2009 though discloses that the delinquent-employee declined to cross-examine this witness, the manner in which the Roznama is written cannot be accepted.

(f) The charges levelled upon the deceased employee are vague and ambiguous and because the first charge sheet dated 21.07.2008 was vague, the Management issued the additional charge sheet dated 25.06.2009 and conducted the enquiry thereafter from 16.07.2009.

(g) The Enquiry Officer was earlier Advocate of the Management for sometime.

(h) None of the charges are proved against the deceased employee.

(i) The findings of the Labour Court that the enquiry is vitiated, have wrongly been interfered into by the Industrial Court.

(j) The same Industrial Court which allowed the revision petition of the Respondent/ Employer, has dismissed the Revisions (ULP) Nos.62/2013 and 03/2014 of two other employees, namely, Fakkad Maruti Jadhav and Bharat Baburao Shinde.

(k) The widow of the deceased employee is willing to face a de-novo enquiry.

(l) The Management has reserved it's right to conduct a de-novo

enquiry before the Labour Court, therefore, there is no harm if such an enquiry is allowed.

(m) Though the deceased employee is no more, the Petitioner-widow is willing to face the enquiry and disprove the charges levelled upon the deceased employee.

4 Shri Dhorde, learned Advocate for the Respondent-Employer, submits as under:-

(a) If there are missing dates in the Roznama, the enquiry cannot be set aside merely because the Enquiry Officer has not properly written the Roznama.

(b) There is no law which mandates that the written examination by way of evidence of the witness should be verified or there should be any affidavit supporting it.

(c) The Roznama of the enquiry placed before the Labour Court was considered by the Court and it concluded that the Roznama dated 04.11.2009 discloses that the delinquent-employee declined to cross-examine the witness.

(d) Merely because an Advocate who earlier represented the Management for sometime, is an Enquiry Officer, would not mean that the enquiry is vitiated outright.

(e) Whether, the charges are sufficient to support the punishment

of dismissal, is an issue to be dealt with at the stage of deciding the proportionality of punishment.

5 I have considered the submissions of the learned Advocates.

6 The deceased employee, whose widow is before this Court as the Petitioner, was working with the Respondent Bank. The charge sheet was served upon him on 21.07.2008. The deceased employee replied to the charge sheet on 05.02.2009 claiming that the charges are vague and do not contain details. The Management, therefore, issued an additional charge sheet dated 25.06.2009 and both the charge-sheets were subject matter of the enquiry. Upon finding the deceased employee guilty of the misconduct levelled against him, the Management followed the procedure and dismissed the deceased employee from service w.e.f. 03.12.2009.

7 The deceased employee preferred Complaint (ULP) No.12/2010. By the part-1 judgment dated 21.02.2014, the Labour Court concluded that the enquiry was vitiated and the findings of the Enquiry Officer are perverse. Revision (ULP) No.11/2015 filed by the Respondent under Section 44 of the MRTU & PULP Act, 1971, was allowed by the Industrial Court and the part-1 judgment of the Labour Court was set aside thereby, concluding that the enquiry is fair and proper and the

findings of the Enquiry Officer are not perverse.

8 Shri Sonwane, learned Advocate for the Petitioner, has raised the following issues for consideration of this Court:-

(a) An erstwhile Advocate of the Respondent Bank was appointed as an Enquiry Officer and therefore, the enquiry deserves to be vitiated.

(b) The Roznama of the enquiry was not meticulously written by the Enquiry Officer and hence, the enquiry is vitiated.

(c) The evidence of the witness of the Bank Shri S.D.Pandit was not recorded verbatim before the Enquiry Officer. He prepared his deposition in writing and that was accepted by the Enquiry Officer without the said statement being supported by a verification.

(d) The Industrial Court has no jurisdiction to entertain any revision petition against the part-1 judgment of the Labour Court in relation to the fairness of the enquiry and the findings of the Enquiry Officer.

9 Insofar as the argument of the Petitioner that an Advocate of the Management, being the Enquiry Officer is concerned, though the part-1 judgment of the Labour Court is in favour of the Petitioner and has set

aside the enquiry, the issue of Enquiry Officer being Advocate of the Management (for sometime) was never canvassed. No where does it appear in the entire part-1 judgment of the Labour Court that the delinquent-employee raised the issue about the Advocate being the Enquiry Officer.

10 Nevertheless, it is trite law that merely because an Advocate who earlier represented the Management for sometime is an Enquiry Officer, would not ipso-facto render the enquiry vitiated. These contentions have to be tested on the touchstone of prejudice. This issue is totally absent in the case of the Petitioner. No prejudice has been voiced, much less proved. (*See Shri Farid Khan vs. Wipro Co.Ltd., 2012 LLR 732 = 2012 FLR (134) 174 and Beico Lawrie vs. State of West Bengal, 2010 (125) FLR 108 (SC)*).

11 Insofar as the contention of the Petitioner that evidence in written form must carry a verification is concerned, this issue is no longer res-integra. This Court in the matter of *M/s Siddheshwar Urban Cooperative Bank Limited vs. Ganesh Tejrao Bangale*, **2016 (2) Mh.L.J. 880,** has settled the issue that evidence of any witness in the enquiry is to be recorded either by way of a narration or in a concise form of what has

been stated. It is also held that evidence of any witness can be presented in writing before the Enquiry Officer and that would, in fact, be beneficial to both the sides because it would eliminate the possibility of missing any point and insofar as the cross-examination is concerned, the delinquent-employee would have a statement of the witness in his custody for preparation of his cross-examination and conduct the cross-examination accordingly.

12 The Standing Orders under the Industrial Employment Standing Orders Act, 1946 or the Model Standing Orders framed under the Bombay Industrial Relations Act, 1946, do not require the written evidence either to be verified or supported by an affidavit. The presentation of the said document before the Enquiry Officer is sufficient. There is no dispute that such a statement was filed and the delinquent-employee was given an opportunity to cross-examine. The statement of Mr.Pandit was presented on 22.09.2009 and the Enquiry Officer concluded that the delinquent-employee has declined to cross-examine this witness on 04.11.2009, which is practically after six weeks of the presentation of evidence. In the light of the above, the record reveals that the delinquent-employee has declined to cross-examine the said witness.

13 Insofar as the contention of the Petitioner that the

punishment awarded to the deceased employee is not commensurate to the charges levelled upon him is concerned, the said issue will have to be considered at the stage of deciding the proportionality of punishment. It is trite law that initially the enquiry has to be tested and if the enquiry is upheld and the findings are sustained, the issue of proportionality of punishment and loss of employment leading to continued unemployment, has to be considered at the last stage of the proceedings. This issue is, therefore, not required to be considered at this stage.

14 The next contention of the Petitioner is that the first charge sheet is vague and the Management realized its mistake and therefore, submitted the additional charge sheet only to ensure that details of the charges are mentioned. I do not find any fault on this count because the enquiry had commenced on 16.07.2009 and the charge sheet was issued on 21.07.2008. After noticing that the charges were somewhat vague, the Management filed the additional charge sheet on 25.06.2009 and both charge sheets were subject matter of the same enquiry. In this backdrop, the enquiry cannot be faulted.

15 The Industrial Court while dealing with the order of the Labour Court dated 21.02.2014 has concluded that the testimony of the witness Mr.Pandit cannot be discarded only because there was no

verification. Insofar as the sanctioned leave is concerned, the Industrial Court has concluded that though other charges are proved, the charge of absence from 01.12.2008 to 30.12.2008 has not been proved before the Enquiry Officer. This conclusion has not been challenged by the Management. This conclusion is in favour of the deceased employee.

16 As such, while deciding the proportionality of the punishment, the Labour Court would be better assisted by these observations of the Industrial Court found in the paragraph found on internal page 9 of it's judgment. This conclusion will, therefore, have to be taken into account by the Labour Court while considering as to whether, the punishment awarded to the delinquent-employee was proportionate or not.

17 The Honourable Supreme Court in the case of the *State Bank of Patiala v/s S.K.Sharma,* **AIR 1996 SC 1669,** has distinguished between the procedural rights and substantive rights of the delinquent who is subjected to disciplinary proceedings. The Apex Court has concluded that unless substantive rights flowing from the Service Law are not violated, an enquiry is not to be set aside only if there are procedural flaws. In the face of the contention that material rights of the delinquent are infringed, the Honourable Apex Court has laid down that these contentions have to be

tested on the touchstone of prejudice and the onus and burden lies on the delinquent to establish the prejudice.

18 Paragraph 32 of the State Bank of Patiala judgment (supra) reads as under:-

> *"32. We may summarize 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 characters the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it mays 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 provisional 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 its 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 no 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, (1994 AIR SCW 1050). 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 no 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 partem] 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."*

19 Considering the judgment of the Honourable Apex Court in the case of the *State Bank of Patiala (supra),* I do not find that the misconceived contention that the statement of evidence of a witness should be supported by verification or affidavit, would render the enquiry unfair. So also, there is no contention about an erstwhile advocate of the Management being the Enquiry Officer. Without having canvassed that point, this Court in it's supervisory jurisdiction cannot deal with the record and proceedings of the enquiry threadbare. An enquiry, therefore, cannot be vitiated on trivial grounds.

20 The strenuous contention of Shri Sonwane is that the same Industrial Court has concluded in two matters that the revision petitions filed by the employees against upholding of the enquiry, have been rejected and in the case of this Petitioner, the revision is allowed. I do not find that this Court can enter into such an enquiry and consider whether, the judgment of the Industrial Court in Revision (ULP) No.62/2013 and Revision (ULP) No.3/2014 was a fair judgment or not, when these matters are not before this Court. I do not find it appropriate, therefore, to entertain the submission of Shri Sonwane that because two revision petitions were dismissed by the same Court in other matters, it should have dismissed the revision petition of the Respondent herein as well.

21 Nevertheless, the learned Division Bench of this Court, in Ramchandra Joshi vs. Bank of Baroda, 2010 LLR 1255 and Suryabhan M. Avhad vs. Mahindra and Mahindra, 2011 (I) CLR 454, has concluded that the scope of scrutiny in a domestic enquiry is limited and if an interim order passed by the Labour or Industrial Court is perverse, same can be challenged.

22 In the light of the above, this Writ Petition being devoid of merit is, therefore, dismissed. Rule is discharged.

23 Shri Dhorde has submitted the statement dated 01.08.2016 issued by the Respondent Bank and addressed to him, contending that the Petitioner-widow has been paid the provident fund amount of Rs.4,61,226/- on 15.09.2010, gratuity amount of Rs.3,21,819/- on 18.09.2010 and leave encashment for an amount of Rs.1,23,960/- on 07.09.2010. However, it cannot be ignored that Petitioner No.1 is the widow of the deceased employee and is about 52 years old. Petitioner Nos.2 and 3 are daughter and son of the deceased employee. Considering this aspect, I deem it proper to direct the Labour Court to decide the remaining issues in the matter and especially with regard to the proportionality of punishment awarded to the deceased employee, as expeditiously as possible and preferably on or before 30.12.2016.

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