

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9284 OF 2017

1. Rajiv Shikshan Prasarak Mandal
Mantha Dist.Jalna,
Through its President,
Mr.Isamodyin Bashirodyin Shaikh,
Age-51 years, Occu-President
R/o Mantha, Tq.Mantha, Dist.Jalna,

2. Maulana Abdul Kalam Azad
Urdu High School, Mantha
Tq.Mantha, Dist.Jalna,
Through its Head Master,
Mr.Rafikkhan Rajakkhan Shaikh,
Age-32 years, Occu-Head Master,
R/o Mantha, Tq. Mantha,
Dist. Jalna

-- PETITIONERS

VERSUS

1. Shaikh Abdul Sattar Shaikh
Abdul Mannan,
Age-36 years, Occu-Nil,
R/o Old Post Office, Partur,
Tq.Partur, Dist.Jalna,

2. The Education Officer (Secondary),
Zilla Parishad, Jalna,

3. The State of Maharashtra,
Through its Secretary,
School Education Department,
Mantralaya, Mumbai

-- RESPONDENTS

Mr.P.M.Nagargoje, Advocate for the petitioners.
Mr.R.I.Wakade, Advocate for respondent No.1.
Mr.S.N.Kendre, AGP for respondent Nos. 2 and 3.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 10/08/2017

ORAL JUDGMENT :

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

2. The petitioner/Management is aggrieved by the judgment of the School Tribunal dated 30/09/2016 by which Appeal No.8/2013 filed by respondent No.1-employee/original appellant has been partly allowed. His termination dated 07/02/2013 is quashed and set aside and he has been granted 50% back wages from 07/02/2013 till 30/07/2016.

3. I have considered the strenuous submissions of the learned Advocates for the petitioner, original appellant and the learned AGP on behalf of the State.

4. The following factors need consideration :-

[a] The appellant was said to have been orally terminated on 07/02/2013.

[b] The Management contended that he was not orally terminated, but, by initiating a departmental enquiry under the MEPS Rules, 1981, he was dismissed from service for

proved misconducts w.e.f. 12/02/2015. The period of 07/02/2013 till 12/02/2015 is said to be a period of unauthorized absence of the appellant.

[c] By communication dated 28/07/2016, the petitioner/ Management voluntarily withdrew the dismissal order and placed the appellant under suspension from 30/07/2016.

[d] Both the parties, notwithstanding the allegations made against each other, submit that the departmental enquiry under Rule 36 and 37 has not been completed.

5. By the impugned order, the School Tribunal has granted 50% back wages from the date of oral termination till 30/07/2016. It is apparent that though the appellant has pointed out the judgment of the Hon'ble Apex Court in the matter of Vidya Vikas Mandal and another Vs. Education Officer and another [2007(3) Mh.L.J. 801], the Trial Court has failed to consider the effect of the law laid down by the Hon'ble Apex Court.

6. For the sake of clarity, I deem it appropriate to reproduce paragraph Nos.6 to 9 of the Vidya Vikas judgment (supra) hereunder :-

“6. We heard the learned counsel appearing for the respective parties. Mr. Manish Pitale, learned counsel for the appellants, submitted that the courts below were not justified in holding against the appellants ignoring the provision of Rule 37 (6) of the

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981. According to the learned counsel, the said Rule is mandatory in nature. It is further submitted that the findings given by two members of the Inquiry Committee exonerating the respondent no.2 were submitted after the mandatory period of ten days specified in Rule 37 (6) of the aforesaid Rules had expired. Therefore, he submitted that the findings given by the two members of the Inquiry Committee after expiry of the mandatory period cannot be binding on the appellant-Management while deciding the question of taking action against respondent no.2. In support of the above submission, our attention was drawn to sub-Rule (4) (5) & (6) of Rule 37 of the aforesaid Rules, which read thus:

"37(4) The Convenor 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 acknowledgment due within four days of 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 acknowledgment 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 acknowledgment 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 acknowledgment 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 acknowledgment due. The Management shall also endorse a copy of its order to the Education Officer or the Deputy Director as the case may be."

7. Our attention was also drawn to Rule 36 sub-clause 2(a), which applies to the case of an employee and reads thus:

"36 (2)(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 authorized 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.”

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.”

7. The law is therefore trite. If an enquiry conducted once by the Management is held to be vitiated, one more opportunity can be granted to the Management for conducting a *denovo* enquiry. In order to balance the equities, the Hon'ble Apex Court has concluded that the employee would be treated to be under suspension and he

would be entitled to the subsistence allowance as per the rules w.e.f. the date of his actual termination pursuant to the vitiated enquiry.

8. When the law is in place, the impugned judgment of the Tribunal cannot be sustained for the following factors.

[a] The issue of unauthorized absenteeism from 07/02/2013 till his actual dismissal on 12/02/2015 would be subject to the result of the enquiry since it is a charge of unauthorized absenteeism and the onus and burden lies on the Management to level that charge on the employee and prove it in the enquiry. Needless to state, if the charge is not proved, the delinquent would be entitled for the wages for that period.

[b] Since the admitted dismissal of the appellant is dated 12/02/2015 which has been subsequently withdrawn by the Management, the law laid down in Vidya Vikas case (supra) would be applicable and the appellant would be entitled to suspension allowance as is provided for under the Rules, from 12/02/2015 till the enquiry is completed and culminates into an order to be passed by the Management.

9. Considering the above, this petition is partly allowed. The impugned judgment of the Tribunal dated 30/09/2016 shall stand modified as under :-

[a] The period of 07/02/2013 till 12/02/2015 shall be subject to the result of the enquiry in so far as the charge of unauthorized absenteeism is concerned and if the said charge

is levelled and proved against the delinquent.

[b] The Management shall pay the subsistence allowance / suspension allowance as per rules to the appellant from 12/02/2015 till a final decision in the enquiry is announced.

[c] All arrears of suspension allowance shall be paid by the Management to the appellant within a period of 8 (eight) weeks from its own funds.

[d] The Management shall pay the monthly subsistence allowance on regular basis on or before the normal pay day of the employees working in the Management/Establishment

[e] The Management shall conduct its enquiry by strictly adhering to Rule 36 and 37 of MEPS Rules, 1981 keeping in mind that if the enquiry suffers from non-compliance of any of the provisions, there shall be no further opportunity to the Management to conduct one more *denovo* enquiry in the light of the judgment delivered by this Court in the matter of Head Master, Vivekvardhini Madhyamik Vidyalaya Vs. Alka Namdeo Khalekar [2017(4) All MR 621].

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

(Ravindra V.Ghuge, J.)