

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

WRIT PETITION NO. 3344 OF 2010

Ahmednagar Zilla Krishi Vibhag
Karmachari Sahakari Path Sanstha Ltd.
Ambar Plaza, A-Building Block no. 101/102
Station Road, Ahmednagar
Through its Administration
Laxman S/o Narsayya Bura
Age: 53 yrs. Occu: Service
R/o As above.

....Petitioner.

Versus

Ramdas S/o Devichand Magar
Age: 48 yrs. Occu: Service
R/o Sasewadi, Jeur,
Tq. and Dist. Ahmednagar.

...Respondent.

Mr. D. R. Markad, Advocate for petitioner.

Mr. P. V. Barde, Advocate for respondent (Sole)

**WITH
WRIT PETITION NO. 5035 OF 2010**

Ramdas Devichand Magar,
Age: 48 Years, Occu: Service,
R/o Sashewadi Jeur,
District Ahmednagar.

....Petitioner.

Versus

Ahmednagar Zilla Krishi Vibhag
Karmachari Sahakari Pat Sanstha Ltd.
Ambar Plaza, Building No.A,
Block No.101/102, Station Road,
Ahmednagar
Through its Administrator.

...Respondent.

Mr. P. V. Barde, Advocate for petitioner.

Mr. D. V. Changede, Advocate for respondent.

**CORAM :T.V. NALAWADE AND
SMT. VIBHA KANKANWADI, JJ.**
RESERVED ON : 24/09/2018
PRONOUNCED ON : 01/10/2018

JUDGMENT : [PER T.V. NALAWADE, J.]

1) Writ Petition No. 5033/2010 is filed for relief of quashing and setting aside the order dated 14.5.2010 passed below Exh. U-2 by learned Member of Industrial Court in complaint (ULP) No. 43/2010. The proceeding is filed by the complainant of the original proceeding. Writ Petition No. 3344/2010 is filed by the employer of the aforesaid complainant which is a Credit Cooperative Society by name Ahmednagar Zilla Krishi Vibhag Karmachari Sahakari Pat Sanstha Ltd. (hereinafter referred to as 'society' for short) and in this proceeding the decision of the Labour Court, Ahmednagar given in Complaint (ULP) No. 58/2006 dated 31.12.2007 and the decision of Revision (ULP) No. 79/2007 are challenged. In this proceeding, the society has prayed for further relief of allowing to conduct the departmental enquiry against the petitioner of Writ Petition No. 5035/2010. This proceeding was filed by Administrator of the Society. Both the proceedings were assigned to this Court and that is why, this Court is deciding the two proceedings. Two other proceedings like Criminal Application Nos. 1935/2007 and 2507/2007 filed under section 482 of Criminal Procedure Code for relief of quashing of one F.I.R. are also pending before this Court and today this Court is

deciding those two proceedings also. Both the sides are heard.

2) The private complaint was filed by a Member of the society against the Directors who were managing the affairs on the date of complaint, Ex-Director and also the auditors who had done the audit of the society for the years 2000-01, 2001-02, 2002-03, 2003-04. The complaint was filed on the basis of report given by auditor after conducting audit in the year 2004-05. There are allegations against the Directors and the Secretary, who is named as employee Shri. Ramdas Magar, petitioner of Writ Petition No. 5035/2010 that by joining hands with Directors, he misappropriated the amount of the society from the year 2000. There are allegations against the previous auditors that they did cover up in the audit done by them during relevant years.

3) In the present matters, it is the case of society that Ramdas Magar was appointed as Secretary in the year 1991, though prior to that he was appointed as a Clerk. It is the case of society that after conducting audit for the year 2004-05 the auditor reported that there was defalcation of amount of more than Rs.1.32 lakh and that amount was ascertained after comparing the account of society and the account opened in the District Bank. There were other allegations also in respect of other incidents including the record

created to show that dividend was distributed to all the members on the same day which was more than Rs. 10 lakh.

4) Show cause notice was issued to Magar as the Registrar of Cooperative Societies had asked the society about the action taken on the basis of audit report. In the reply, Magar admitted that the aforesaid amount was not deposited by him in the District Bank and he contended that it was mistake on his part. Inference was easy in view of the period for which the amount was not deposited and the modus operandi used like creation of false record by which the amount was misappropriated. It was clear that the amount was used by Magar for personal use. After receipt of the explanation, the Board of Directors passed resolution on 21.5.2006 and first suspended Magar. After the suspension, show cause notice was issued and after his say of aforesaid nature, Magar came to be dismissed from service. In the reply dated 6.9.2006, Magar had informed to the society that he was ready to deposit the amount, but he came to be dismissed on 25.11.2006. The departmental enquiry was not started and only on the basis of aforesaid admission of Magar, he was dismissed.

5) It is the case of society that in view of the admission given by Magar in respect of aforesaid amount and the period for

which the amount was used, he could have been dismissed straight away. Magar challenged this order by filing Complaint (ULP) No. 58/2006 in Labour Court, Ahmednagar. Then the Managing Committee represented by Chairman opposed the proceeding. By the decision dated 28.8.2007, the Labour Court directed the society to reinstate Magar on the original post, but without giving him backwages. The society challenged the decision of Labour Court by filing Revision (ULP) No. 79/2007 before the Industrial Court and Magar also filed Revision (ULP) No. 84/2007 as order to pay backwages was not made in his favour. Both the proceedings came to be dismissed by common order on 31.12.2007. On that day, also the elected Managing Committee was in existence.

6) Against the Board of Directors, criminal case was also filed and complaints were made to Registrar about the aforesaid incidents. Allegations were made that the Managing Committee had joined hands with Magar. After enquiry and on the basis of report of the auditor, this Managing Committee came to be dissolved and Administrator came to be appointed. The Managing Committee had not challenged the decision of the Industrial Court given in Revision (ULP) No. 79/2007 and so, the Administrator filed Writ Petition No. 3344/10 to challenge the said decision. It is the contention of the Administrator that the Managing Committee had joined hands with

the Secretary and due to that, the Secretary could get the decision before the Labour Court and in revision show was created that the proceeding was contested by the society.

7) The Administrator issued fresh show cause notice to Magar for starting of departmental enquiry as in the past no such enquiry was held and Labour Court had given decision in favour of Magar on this ground. Magar replied this notice and he took the support of decision given by Labour Court and Industrial Court mentioned above. Chargesheet was served on Magar on 1.4.2010.

8) Magar then filed Complaint (ULP) No. 43/2010 in Industrial Court to challenge the decision of the society to start departmental enquiry. He prayed for interim relief like stay to the departmental enquiry. The Industrial Court refused to grant such stay and so, he filed Writ Petition No. 5035/2010. In view of the decision of the Labour Court and Industrial Court, the Board of Directors had allowed Magar to resume the duty and so, till today Magar is on duty. It was submitted in the present proceedings that the Administrator is now removed and regular Managing Committee, probably the persons who were in control are now controlling the management of the society.

9) On merits, following contentions are made for Magar :-

"Magar could not have taken the decisions independently. Directors of the society used the money of the society. No action was taken against the Directors when they had used the money. After the complaints, he collected the money from Directors and he deposited money with society. In additional reply filed in Complaint (ULP) No. 43/2010 Magar then made another specific contention that due to pressure exercised by Board of Directors he had deposited the amount."

Thus, inconsistent contentions were made by Magar in the proceeding which was filed before the Labour Court, but he had admitted that he had deposited money with the society. There was already admission of Magar in reply given to show cause notice issued to Magar that he had committed the mistake. Considering the period, the inference of misappropriation atleast of that money by Magar was possible.

10) The Board of Directors had allowed Magar to resume the duty on 1.2.2008 and Administrator took over the Management on 31.7.2009. In view of the aforesaid circumstances, the Administrator has made specific allegations against the Directors that they had

joined hands with Magar. Board of Directors had not challenged the decision of Labour Court and Industrial Court by filing proceeding in this Court even when there were aforesaid circumstances. In view of the nature of defence taken, it can be said that there is force in the contention by Administrator against Magar and the Board of Directors. There is one more circumstance. Board of Directors had made Magar a Member of the society and then loan of more than Rs. two lakh was sanctioned to him and that amount was shown to be adjusted for recovery of the amount which was due from Magar at the relevant time.

11) The contentions made on law point by Magar are that when Writ Petition No. 3344/2010 was pending in this Court in respect of the previous decision of dismissal taken by the society, it was not open to the Administrator to issue fresh notice and start departmental enquiry. During arguments, some case law was cited on this point and the cases are as under :-

(i) AIR 1963 SUPREME COURT 295 [The Management of Ritz Theatre (Private Ltd., Delhi Vs. Its workmen]

(ii) AIR 1965 SUPREME COURT 1803 [Workmen of the Motipur Sugar Factory Private Ltd. Vs. The Motipur Sugar Factory Private Ltd.],

(iii) AIR 1972 SUPREME COURT 136 [The State Bank of India Vs. R.K. Jain and ors.],

(iv) AIR 1972 SUPREME COURT 1031 [Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh],

(v) AIR 1973 SUPREME COURT 1227 [The Workmen of M/s. Firestone Tyre and rubber Co. of India P. Ltd. Vs. The Management and others],

(vi) AIR 1975 SUPREME COURT 1900 [Cooper Engineering Limited Vs. P.P. Mundhe].

12) Before considering the observations made by the Apex Court in aforesaid reported cases, it is necessary to go through the provision of section 11 of Industrial Dispute Act, 1947 and the provision of section 11-A added in the Act in the year 1971. In some of the cases cited supra, the position of law prior to the amendment and after the amendment is discussed. The principles applicable for deciding the matters referred under section 10 Industrial Dispute Act or the applications filed under section 33 of the same Act are also discussed by the Apex Court while interpreting the aforesaid provisions. For the present purpose, interpretation of the provision of section 11 and also the change, if any, made by section 11-A with regard to the procedure to be followed by Tribunal and the rights of the employer and employee during such proceeding mentioned by the Apex Court need to be considered. So, only those portions from the reported cases are being quoted hereinafter.

13) In the case of **Delhi Cloth and General Mills Co. Vs. Ludh Budh Sing** cited supra, the Apex Court has summed up the law at para Nos. 60 and 61 and it is as follows :-

"60. From the above decisions the following principles broadly emerge:

(1) If no domestic enquiry had been held by the management, or if the management makes it clear that it does not rely upon any domestic enquiry that may have been held by it, it is entitled to straightaway adduce evidence before the Tribunal justifying its action. The Tribunal is bound to consider that evidence so adduced before it, on merits, and give a decision thereon. In such a case, it is not necessary for the Tribunal to consider the validity of the domestic enquiry as the employer himself does not rely on it.

(2) If a domestic enquiry had been held, it is open to the management to rely upon the domestic enquiry held by it, in the first instance, and alternatively and without prejudice to its plea that the enquiry is proper and binding, simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case no inference can be drawn, without anything more, that the management has given up the enquiry conducted by it.

(3) When the management relies on the enquiry conducted by it, and

also simultaneously adduces evidence before the Tribunal, without prejudice to its plea that the enquiry proceedings are proper, it is the duty of the Tribunal, in the first instance, to consider whether the enquiry proceedings conducted by the management, are valid and proper. If the Tribunal is satisfied that the enquiry proceedings have been held properly and are valid, the question of considering the evidence adduced before it on merits, no longer survives. It is only when the Tribunal holds that the enquiry proceedings have not been properly held, that it derives jurisdiction to deal with the merits of the dispute and in such a case it has to consider the evidence adduced before it by the management and decide the matter on the basis of such evidence.

(4) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be, under such circumstances, it is open to the Tribunal to deal, in the first

instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decided against the management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be that the management is deprived of the benefit of having the finding of the domestic Tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied, on evidence adduced before it, that he was or was not guilty of the alleged misconduct.

(5) The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are close. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper.

(6) If the employer relies only on the domestic enquiry and not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If the Tribunal decided that the domestic enquiry has not been held properly it is not its function to invite suo motu the employer to adduce evidence before it to justify the action taken by it.

(7) The above principles apply to the proceedings before the Tribunal, which have come before it

either on a reference under Section 10 or by way of an application under Section 33 of the Act.

61. Having due regard to the above principles, as could be gathered from the decisions, referred to above, in our opinion, the application filed by the management for permission to adduce evidence was highly belated. We have already emphasised that the enquiry proceedings before the Tribunal is

a composite one, though the jurisdiction of the Tribunal to consider the validity of the domestic enquiry and the evidence adduced by the management has got a right to adduce evidence before the Tribunal in case the domestic enquiry is held to be vitiated. The Tribunal derives jurisdiction to deal with the merits of the dispute only if it has held that the domestic enquiry has not been held properly. But the two stages in which the Tribunal has to conduct the enquiry are in the same proceeding which relates to the consideration of the dispute regarding the validity of the action taken by the management. Therefore, if the management wants to avail itself of the right, that it has in law of adducing additional evidence, it has either to adduce evidence simultaneously with its reliance on the domestic enquiry or should ask the Tribunal to consider the validity of the domestic enquiry as a preliminary issue is against the management. An enquiry into the preliminary issue is in the course

of the proceedings and the opportunity given to the management, after a decision on the preliminary issue, is really a continuation of the same proceedings before the Tribunal.”

14) The observations from aforesaid paras show that in a case like present one, where the validity of domestic enquiry is itself in question or where there was no domestic enquiry held at all, the Supreme Court says that the issue on this point needs to be framed and decided as preliminary issue. The Supreme Court has laid down that after answering the preliminary issue if the answer is against the employer, the employer can exercise the right to adduce evidence. In the present matter, admittedly, no such preliminary issue was framed in the first complaint filed by Magar.

15) In the case of **Workmen of M/s. Firestone Tyre and Rubber Co. of India Vs. The Management and others** cited supra, the Supreme Court has made it clear that the mere fact that no enquiry or defective enquiry has been held by employer does not by itself render the dismissal of workman illegal. The Supreme Court has laid down that it is the duty of the Tribunal to allow the employer to adduce the evidence on misconduct though it may be the first time before the Tribunal and only after that the Tribunal is expected to decide whether there was material for making the order of penalty

like dismissal.

16) It is already mentioned that in the present matter, there is admission of Magar on record. On such misconduct, chargesheet could have been served and domestic enquiry could have been held for imposition of penalty like dismissal. The Chairman of the society was examined to prove such admission given by Magar before the Labour Court. There was also record like application filed by Magar for supplying information to Labour Court that he had deposited the amount and he was entitled to get back the amount deposited with the society. This material is not at all considered by the Labour Court and when inference could have been drawn on such admission, vague reasoning is given by Labour Court on the merits of the matter. It can be said that the Labour Court took the decision only due to the circumstance that proper domestic enquiry was not held by the society. Surprising observation is made that in by-laws there was no power to the society to make the order of dismissal. On this point, there are the provisions in Maharashtra Cooperative Societies Act, 1960 which are quoted at proper place.

17) Before Labour Court the society had taken another defence that Magar was not 'workman' for the purpose of Industrial Dispute Act. In provision of section 2 (20) of Maharashtra

Cooperative Societies Act, the meaning of term 'officer' is given and it is as under :-

“(2) “officer” means a person elected or appointed by a society to any office of such society according to its by-laws; and includes a chairman, vice-chairman, president, vice-president, managing director, manager, secretary, treasurer, member of the committee, and any other person elected or appointed under this Act, the rules or the by-laws, to give directions in regard to the business of such society”

18) The provision of section 73-ID of Maharashtra Cooperative Societies Act shows that specific procedure is given like motion of no confidence for removal of the 'officer' of the society. Thus, if Magar was appointed as Secretary under aforesaid Special Enactment, he could have been removed by following the procedure given in Special Enactment. In section 74, qualifications for appointment of Secretary and the procedure for appointment of Secretary is given. The provision of section 88 of Cooperative Societies Act can be used against the Secretary as he is treated as 'officer'. Thus, after fixing liability on him in enquiry under section 88 of the Special Enactment also, he can be removed.

19) In the case reported as **1999 (1) Bom. C.R. 840**

[Pralhad Vithalrao Pawar Vs. Managing Director and Anr.], it is laid down by this Court that if employee of Cooperative Society can be treated as workman under Industrial Dispute Act, then only the dispute will go before Labour Court and it cannot be taken before the Cooperative Court. The jurisdiction will be also decided on the basis of claim made in the contract of employment.

20) Section 2 (j) (9) of Industrial Dispute Act shows that the Cooperative Society having number of employees less than 10 is not 'industry' for the purpose of Industrial Dispute Act. In section 2 (5) of Industrial Dispute Act meaning of 'workman' is given. Thus, for taking the dispute before Industrial Court, the employer needs to be 'industry' and the employee needs to be 'workman' under Industrial Dispute Act. From this angle, the objection to the proceeding taken by the society that Magar was not workman is not considered by the Labour Court.

21) The learned counsel for society placed reliance in the present matter on the observations made by the learned Single Judge of Madras High Court in **Writ Petition No. 21014/2007 [K. Pazhani Vs. The Presiding Officer of Labour Court and Others]** decided on 5.1.2012. The provisions of Cooperative Societies Act of that State and Industrial Dispute Act were considered by the Madras

High Court. That case was also involving the dispute between the Secretary and the society and High Court held that "Secretary of Cooperative Society in that case could not be treated as workman". In view of the meaning of 'industry' given in Industrial Dispute Act which is quoted above, the facts and circumstances of each and every case needs to be considered and then the decision needs to be given. In any case, the burden to prove that the complainant is workman is always on the complainant.

22) The case reported as **AIR 2017 SC 1647 [Maharashtra State Cooperative Housing Finance Corporation Ltd. Vs. Prabhakar Sitaram Bhadange]** is on the meaning of term 'officer'. In that case, the dispute of similar nature raised by Branch Manager of the society was considered and the Apex Court held that the dispute was not tenable under Maharashtra Cooperative Societies Act and the party was advised to go to Civil Court. It is already observed that in view of the meaning of 'industry' given in Industrial Dispute Act, each case needs to be decided on the basis of facts of that case.

23) In view of the discussion made above, this Court holds that the decision of Labour Court and Industrial Court in Complaint (ULP) No. 58/2006 and Revision (ULP) No. 79/2007 need to be set aside. The matter needs to be remanded back to the Labour Court as

the Labour Court is expected to frame specific issues on following points.

“(i) Whether any procedure was followed for imposing penalty of dismissal ? and

(ii) Whether Magar can be treated as workman for the purpose of Industrial Dispute Act ?”

Both the issues need to be treated as preliminary issues and need to be decided before adducing evidence on merits. Both the sides will be at liberty to make amendment in their contentions. If the issue of workman is decided against Magar, the matter will end there. If the issue is decided in favour of Magar, then the decision on the procedure of domestic enquiry will make difference. If that point is decided against the society then the society will be entitled to lead evidence to prove the misconduct before Labour Court.

24) In view of the aforesaid observations, both the proceedings need to be allowed and Complaint (ULP) No. 58/2006 needs to be remanded back to the Labour Court for fresh hearing. The aforesaid preliminary issues needs to be framed and parties need to be allowed to amend their contentions. In the result following order is made :-

ORDER

(I) Writ Petition No. 3344/2010 is allowed. The decision of Labour Court, Ahmednagar given in Complaint (ULP) No. 58/2006 and the decision of Industrial Court, Ahmednagar given in Revision (ULP) No. 79/2007 are hereby set aside. The Complaint (ULP) No. 58/2006 is remanded back to the Labour Court for fresh hearing. The preliminary issues as mentioned in the body of decision of these matters are to be framed by Labour Court and both the sides are to be allowed to amend their contentions and the procedure as laid down by the Apex Court and quoted by this Court is to be followed by the Labour Court. Rule is made absolute in aforesaid terms.

(II) Writ Petition No. 5035/2010 is also allowed. The order made by the Industrial Court below Exh. U-2 in Complaint (ULP) No. 43/2010 is set aside and new entire domestic enquiry which is started by the society is quashed and set aside. Rule is made absolute in aforesaid terms.

[SMT. VIBHA KANKANWADI, J.]**[T.V. NALAWADE, J.]**

SSC/

Salim
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ChoudhariDigitally signed
by Salim Shafi
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