

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

**LETTERS PATENT APPEAL NO. 99 OF 2005
IN
WRIT PETITION NO. 4211 OF 2005**

Prakash s/o Makdu Patil,
Age 49 years, Occ. Nil,
R/o. 7-A, Rajsarathi Colony,
Gondur Road, Deopur,
Dhule

... Appellant
(Ori. Respondent No.1)

VERSUS

1. The Chairman,
Abhay Yuva Kalyan Kendra,
Anmolnagar, Dhule.
2. The Principal,
Abhay Yuva Kalyan Kendra
Sanchelit Women's College,
Anmolnagar, Dhule.

...Respondents.
(Ori. Petitioners)

...
Advocate for Petitioner : Mr. Nitin Suryawanshi,
holding for Mr. D.J. Patil, Advocate.
Advocates for Respondents : Mr. S.P. Brahme.

**CORAM : T.V. NALAWADE &
K. L. WADANE, JJ.**

DATE : 10th April, 2018

JUDGMENT (PER K.L. WADANE, J)

1. The appellant employee preferred this Appeal
against the judgment and order passed by the learned

Single Judge of this Court in Writ Petition No. 4211/2005 dated 07.07.2005, by which the learned Single Judge has set aside the order passed by the Presiding Officer University and College Tribunal Aurangabad in Appeal No. NMU-12/2004 dated 05.04.2005.

2. Brief facts of the case may be stated as follows:

The appellant was appointed as a peon in the School run by the respondents/Management. Respondents/Management came across several acts of omissions and commission committed the appellant. It was noticed by the respondents/Management that the conduct of the appellant was not befitting to that of good employee. Therefore, the respondent No. 2 issued a memorandum on 18.03.2003. In spite of the memorandum the behaviour of the appellant was remained as it is. Therefore, on 05.12.2003 another memo was issued, informing him that he is not acting as per the oral directions given by the respondents and it is alleged that the appellant was not accepting the letters and other correspondence for being delivered to the concerned and not doing the work properly.

3. The appellant was called upon to tender an

explanation within seven days, failing which, disciplinary action was proposed. In spite of the warning, the appellant did not mend himself and continue to adopt adamant behaviour. Therefore, the respondents/management decided to initiate disciplinary action against appellant. A charge-sheet was issued by the respondents and enquiry was conducted by appointing Inquiry Officer. The appellant as well as respondents appeared before the Inquiry Officer. Both the parties have produced the evidence and after completion of the enquiry the Inquiry Officer concluded that the charges of the negligent in duty and theft are proved against the appellant. Thereafter submitted the report to respondents. The respondents/management accepting the report issued a show cause as to why the services of the appellant may not be terminated. After the service of notice the appellant tendered his explanation by which he disputed the correctness of the findings. The respondents did not accept the explanation and ultimately terminated the services of the appellant with effect from 07.09.2004.

4. Being aggrieved by the order of termination, the appellant preferred appeal under section 59 of the Maharashtra Universities Act 1994. The appeal was

heard and decided by the Presiding Officer and came to the conclusion that while conducting enquiry, the provisions of Rule 13(e) of Rule 46 of the Maharashtra Non-Agricultural Universities and Affiliated Colleges Standard Code Rules, 1984 (hereinafter referred as 'Standard Code') were not followed. The Tribunal has also held that the Inquiry Officer has not followed the various provisions as contemplated under Rule 46 while doing the enquiry and therefore set aside the termination order and allowed the appeal and the order passed by the respondents dated 07.09.2004 is quashed and set aside. The appellant is reinstated in the services of the College with effect from 07.09.2004 with back wages from 07.04.2004. The Management/ respondents challenged the order of the learned Tribunal by filing Writ Petition No. 4211/2005, by which the learned Single Judge has set aside the order of the learned Tribunal, therefore, present appeal.

5. We have heard the arguments of Mr. N.B. Suryawanshi, learned counsel for appellant and Mr. Brahme, learned counsel for the respondents.

6. During the course of argument Mr. Suryawanshi, learned counsel, has pointed out certain contradictions

in the evidence which was led before the Inquiry Officer. Mr. Suryawanshi, has further pointed out that the learned Inquiry Officer has not followed the proper procedure. The evidence was not properly recorded in question and answer form.

7. Mr. Suryawanshi further submitted that the Inquiry Officer has recorded the evidence of the witnesses in a summary manner and the gist of the statements were recorded, by which it was very difficult for the present appellant to cross-examine the witnesses. He further pointed out that no opportunity was given to the appellant to explain about the incriminating circumstances appearing against the appellant in the evidence. So the order passed by the Inquiry Officer was against the principle of natural justice.

8. Mr. Suryawanshi, learned counsel, further submitted that all these aspects have been rightly considered by the University Tribunal, however, learned Single Judge of this Court while exercising the supervisory powers has gone into re-appreciation of the evidence and has set aside the order passed by the learned University Tribunal.

9. As against this Mr. Brahme, learned counsel for respondents during the course of his argument pointed out that the copies of the charge was served upon the appellant and in response the appellant has submitted his reply/defence. Respondents have appointed an Inquiry Officer and the copies of the relevant papers were supplied to the appellant and after hearing both the parties, considering the evidence adduced by both the parties, the Inquiry Officer has submitted its report. The disciplinary authority i.e. the respondents therefore after going through the contents of the enquiry report as well as the explanation given by the present appellant have rightly terminated the appellant from the service.

10. We have perused the reasons recorded by the learned University Tribunal as well as the reasons recorded by the learned Single Judge of this Court in the Writ Petition. The allegations of the present appellant against the Management/respondents are that though the appellant was appointed as a peon in the College, he was constrained to work in the house of respondent No.1, who is the Chairman of the educational institution. When he refused to do such domestic work, the family members of the respondent No. 1 made false

complaint and on the basis of the false complaint offence came to be registered against the appellant. The appellant was arrested. However, he was enlarged on bail within a period of 48 hours. Therefore, the attempt of respondents to terminate/ suspend the appellant was futile. Therefore, the respondents have initiated departmental/domestic enquiry, in which a false evidence is led on behalf of the respondents.

11. We have also gone through the evidence on record and the original complaint filed by one Madhuri Bafna. From the record it appears that family member of respondent No. 1 namely Madhuri Bafna on 06.03.2004 filed two complaints. On perusal of the same it appears that there are material contradictions in reference to the alleged commission of theft by the appellant. In one complaint it has been mentioned that when this witness Madhuri entered into the bed-room at that the appellant took out an amount of Rs. 10,000/- from the drawer of the cupboard. So Mrs. Bafana called Mr. Vithal Bafna, Dr. Borse and Sau. Borse and took personal search of the appellant, in which amount of Rs. 10,000/- was found in the pocket of his trouser.

12. Looking to the another complaint which is filed

on the same date i.e. 06.03.2004, this witness (Madhuri Bafna) states that the appellant has took out an amount of Rs. 10,000/- from the drawer, at that moment Mrs. Bafna entered into the bed room. On seeing so the appellant put aside that amount. So in the second complaint it has been alleged that the appellant has attempted to commit the theft and the amount was put aside.

13. We also noticed that the Inquiry Officer recorded the statement of witnesses in the narrative form and not in the question and answer form, as required. And because of that we are of the opinion that the appellant was not in a position to cross-examine the witnesses effectively or make out his defence properly.

14. It is further reveals from the record that after registration of the crime the matter was pending before the Criminal Court for its adjudication in respect of allegations of theft against the appellant. The copy of the judgment delivered by the Criminal Court is placed on record. On perusal of the same it appears that the appellant has acquitted from the charge of theft. Further on perusal of the record it appears that

on behalf of respondents three witnesses were examined i.e. D.P. Mahajan, to prove that two memos were issued to the appellant at Sr. No. 77 and 78, Head Clerk Mr. Naval Patil to prove that the appellant was arrogant and negligent in his duty and third witness is Mrs. Madhuri, to prove the charge of theft. Another witness is examined i.e. principal Badane to prove the entries in the Tapal-book and to prove that the cheques were handed over to the appellant for obtaining the signature of the respondent No. 1/Chairman. As against this, on behalf of appellant two employees of the institution namely Usha Garad and Dilip Naik were examined. Both of them have stated that the behaviour and conduct of the appellant while serving in the institution was good.

15. While conducting the departmental enquiry, the Inquiry Officer has to conduct the enquiry in accordance with the rules and the procedures as contemplated under Rule 46 of the Standard Code. However, from the record it is seen that no preliminary enquiry was conducted and no statement of the witnesses were recorded during the preliminary enquiry. Without doing such enquiry, directly departmental enquiry was proposed and initiated and after appointment of the

Inquiry Officer, directly charge-sheet was given to the appellant along with the names of witnesses. However, only by putting the names of the witnesses, it was difficult for the appellant to know what the witnesses are going to depose against him. For that purpose a preliminary enquiry is necessary, recording the statement of the witnesses in the preliminary enquiry is also necessary and after supplying the copies of the statement of witnesses to the delinquent or appellant then and then only it is possible for the appellant to know what the witnesses are going to depose against him.

16. Herein the present case as the aforesaid exercise has not been done by the respondents, so also the Inquiry Officer has not followed the provision of Rule 46 of the Standard Code, in which various steps are contemplated for doing the enquiry.

17. As per sub-rule 3 of Rule 46 of the Standard Code it is an requirement to deliver form No. 10 of Appendix I appended to these rules, a copy of the articles of charge, the statement of imputation of misconduct and misbehaviour, a list of documents, and list of witnesses by which each article of the charge-

sheet is proposed to be sustained, and shall by a written notice require the employee to submit to it within such time as may be specified in the notice, a written statement of his defence, and to state whether he desires to be heard in person.

18. The Inquiry Officer in present case has not followed these provisions and directly has only issued the charge-sheet. Further as per sub-rule 5(c) Rule 46 of the Standard Code, it is a requirement to supply the copies of statement of the witnesses to the delinquent i.e. appellant. Herein the present case, admittedly, no preliminary enquiry was conducted, no statement of witnesses were recorded in the preliminary enquiry and therefore no copies of the statement of witnesses as contemplated in sub-rule 5(c) of Rule 46 of the Standard Code were supplied. Compliance of the above sub-rule is only possible when the preliminary enquiry is conducted. Hence in the present matter no such copies of the statement were supplied to the appellant.

19. Provision of Sub Rule 13(e) of Rule 46 of the Standard Code reads as follows :

"After the employee close his case and if the employee has not examined himself, the

Enquiring Authority may generally question him on the circumstances, appearing against him, for the purpose of enabling the employee to explain any circumstances appearing in the evidence against him"

20. On perusal of above provisions it appears that those provisions are akin to the provisions of section 313 of the Code of Criminal Procedure by which an opportunity must be given to the delinquent to explain the incriminating circumstances appearing against him in the evidence. Herein the present case no such opportunity was given to the appellant to explain the incriminating circumstances appearing against him. This is against the principle of natural justice.

21. Mr. Brahme, learned counsel for respondents in support of his argument has relied upon the observations in case of **2004 (4) Mh.L.J. (ADARSH Vidya Mandir Trust and another V/s. Awadesh Narayan Komal Singh and others)** wherein it is observed that :

"Having considered the rival submissions, I have no hesitation in affirming the opinion expressed by the Tribunal that the enquiry conducted by the Management is vitiated on account of breach of principles of natural justice. The Tribunal has recorded reasons to support the said opinion

which, to my mind, are unexceptional. However, there is substance in the argument canvassed on behalf of the petitioners that assuming that the enquiry was bad on that count, the Tribunal had two options either to decide the charges itself on merits or to relegate the parties for further enquiry from the stage where the Tribunal has found fault with the fairness of the disciplinary enquiry conducted against the respondent No. 1."

22. As against this Mr. Suryawanshi, learned counsel for appellant has relied upon the observations in cases reported in-

(1) **AIR 1974 Supreme Court 2335 (The State of Punjab V/s Bhagat Ram)** wherein it is observed that :

"7. The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the Government servant is afforded a reasonable opportunity to defend himself against charges on which inquiry is held. The Government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. We can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the Government servant will be able to refer to the previous statements of the witnesses

proposed to be examined against the Government servant. Unless the statements are given to the Government servant he will not be able to have a effective and useful cross-examination.

8. It is unjust and unfair to deny the Government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the Government servant. A synopsis does not satisfy the requirements of giving the Government."

(2) **A.I.R. 1984 Supreme Court 38 (Mohd.Yunus Vs. Mohd. Mustaqim and others)** wherein it is observed that :

"7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority," and not to correct an error apparent on the face of the record, much less an error of law. In this case there was, in our opinion, no error of law much less an error apparent on the face of the record. There was no failure on the part of the learned Subordinate Judge to exercise jurisdiction nor did he act in disregard of principles of natural justice. Nor was the procedure adopted by him not in consonance with the procedure established by law. In exercising the supervisory power under Art. 227, the High

Court does not act as an Appellate Court or Tribunal."

(3) **A.I.R. 1999 Supreme Court, 677 (Kuldeep Singh Vs. The Commissioner of Police and others)**, wherein it is observed that,

"6. It is no doubt true that the High Court under Article 226 or this Court under Art. 32 would not interfere with the findings recorded at the departmental enquiry by the disciplinary authority or the Enquiry Officer as a matter of course. The Court cannot sit in appeal over those findings and assume the role of the Appellate Authority. But this does not mean that in no circumstance can the Court interfere. The power of judicial review available to the High Court as also to this Court under the Constitution takes in its stride the domestic enquiry as well and it can interfere with the conclusions reached therein if there was no evidence to support the findings or the findings recorded were such as could not have been reached by an ordinary prudent man or the findings were perverse or made at the dictate of the superior authority."

23. Mr. Suryawanshi, learned counsel lastly relied upon the observations in case reported in **2011 (2) Mh.L.J. (Vijay s/o Shamrao Bhale Vs. Godavari Garments Ltd., Aurangabad)**, wherein it is observed that :

"7. The argument of Shri. Joshi that Rule 8(20) of the said Rules, 1979 are not followed requires consideration. The said Rule 8(20) of Rules 1979 reads as under :-

"(20) The inquiring authority may, after the Government servant closes his case and shall, if the Government servant has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the Government servant to explain any circumstances appearing in the evidence against him."

On perusal of the said Rule, it is manifest that the said Rule mandates the inquiring authority to question the delinquent on the circumstances appearing against him in the evidence, so that the delinquent may get opportunity to explain any circumstances appearing in the evidence against him. In the present case, the delinquent has not examined himself. If the delinquent has not examined himself, in that case the Inquiry Officer is not left with any discretion but has to question the delinquent about the circumstances appearing against him. The use of the word shall shows that the said provision is imperative and the same is mandatory. In the first part of the said Sub rule the legislature has used the word 'may', but when the delinquent has not examined himself has used

the word "shall", which itself clarifies that the word shall has to be considered as mandatory. The use of the word 'may' at one place and 'shall' at another place in the same rule would strengthen the inference that these words have been used in their primary sense, and that 'shall' should be considered as mandatory. The use of the word 'shall' therein as against 'may' shows that the same is mandatory. The use of the word 'shall' with respect to one matter and the used word 'may' with respect to another matter, in the same rule, would lead to the conclusion that the word 'shall' imposes an obligation. Whereas the word 'may' confers a discretionary powers. If, the delinquent has not examined himself, then it is obligatory on the inquiring authority to question the delinquent on the circumstances appearing against him in the evidence for the purposes of enabling him to explain any circumstances appearing in the evidence against him, and if the delinquent has examined himself, then the discretion vests with the Inquiry Officer to question the delinquent or not. In the present case, it is not disputed that the delinquent has not examined himself, in such circumstances it was mandatory for the Inquiry Officer to question the petitioner regarding the circumstances appearing against him. The said Rule has not been complied, and as such inquiry stands vitiated. The Division Bench of this Court in the case of "Masuood

Alam Khan-Pathan Vs. State of Maharashtra & others" referred supra has also observed that rule of Audi Alteram Partem is pregnant in the sub-rule(20) of Rule 8, departure there from would tantamount to violation of natural justice. On this count itself the inquiry vitiates, there cannot be any doubt that by non observance of the said rule the petitioner could not get the opportunity to explain regarding the circumstances which were prejudicial to him in the evidence."

24. We have gone through the facts and observations of the above case. The aforesaid observation of the Division Bench of this Court in **Vijay Bhale's case** is perfectly applicable to the facts of present case. In view of the above we are of the opinion that the impugned order passed by the learned Single Judge of this Court in Writ Petition No. 4211/2005 needs to be set aside. The reasons recorded by the learned University Tribunal are proper and therefore the judgment and order passed by the University Tribunal needs to be restored. Therefore, following order is passed.

ORDER

1 Letters Patent Appeal No 99/2005 is
allowed.

2. The judgment and order in Writ Petition No. 4211/2005 delivered by the learned Single Judge of this Court is hereby set aside.

3. The Judgment passed by the University Tribunal in Appeal No. NMU-12/2004 dated 05.04.2005 is restored.

25. Letters Patent Appeal is accordingly disposed of. No costs.

(K. L. WADANE, J.)

(T.V. NALAWADE, J.)

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