

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.553 OF 2016

Hiken Naresh Shah
Aged 31 years, Mumbai Indian
Inhabitant, Residing at 501 Lotus
Park TPS-3 Ram, Nr. R.K. Laundry
Bhabhai Naka, Mumbai – 400092 ...Petitioner.

Versus

The Board of Control for Cricket in India a Society registered under the Tamil Nadu Societies Registration Act, having its headquarters at Cricket Centre, Wankhede Stadium, D Road, Churchgate, Mumbai – 400020

...Respondent

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Mr. Karl Tamboly a/w Mr. Malcolm Siganporia, Mr. anuj Desai i/b. Som Sinha for the Petitioner.
Mr. Rafique Dada, Senior Counsel a/w Mr. Aditi Mehta, Ms. Aditi Thakur i/b. Cyril Amarchand Mangaldas for Respondent.

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***CORAM : R.M.BORDE &
R.G. KETKAR, JJ.***

DATE : 10th JANUARY, 2018

JUDGMENT : (PER R.M. BORDE, J.)

1. Heard.
2. Rule. With the consent of the parties, the petition is taken up for final disposal at admission stage.

3. The petitioner is objecting to the order passed by the Board of Control for Cricket in India (for short, "BCCI), dated 18.01.2016, thereby imposing a ban on him for a period of five years in respect of playing or representing cricket in any form, or in any way whatsoever, being associated with the activities of the respondent-Board and its affiliates. The petitioner is a professional cricketer and claims to have played 37 first class matches. The respondent is a Board governing sport of cricket in India and also represents the Country in respect of game of cricket and all other forms associated with game at international level. On 16.03.2015, the petitioner received a notice from Anti Corruption Unit (for short, "ACU") of the BCCI, calling upon him to remain present before the ACU authorities on 18.03.2015. According to the petitioner, he called upon the ACU authorities to confirm the reason as to why he has been summoned. The petitioner appeared before the ACU authorities for hearing led by Commissioner Mr. Ravi Sawani. On the same day, he received an e-mail from ACU authorities calling upon him to submit call record in respect of his mobile number 919869995097 for the period between 01.11.20014 to 18.03.2015. The petitioner contends that he

received yet another notice by e-mail from ACU calling upon him to remain present for hearing on 28.04.2015. The petitioner was put under suspension from playing all forms of cricket matches held by or under the aegis of the respondent-Board, by an order dated 12.07.2015. The petitioner challenge the said order dated 12.07.2015 by presenting Writ Petition No.2170 of 2015, which came to be dismissed by an order dated 12.08.2015. The Division Bench of this Court did not grant any interim relief revoking suspension. However, considering the affidavit presented on behalf of the respondent that the disciplinary proceedings initiated against the petitioner would be completed within the prescribed time limit provided under the Rules, this Court proceeded to dispose of the petition. According to the petitioner, he requested the President of BCCI to conduct urgent hearing in the matter and also requested to release his match fees for the period of 2013-2014 and 2014-2015. The petitioner was again directed to remain present for hearing before the Disciplinary Committee on 24.12.2015. He appeared before the Disciplinary committee and tendered his reply to the show cause notice, which was handed over to him on the earlier date. The petitioner tendered his reply on 05.01.2016. The respondent-Board passed the impugned order

on 18.01.2016 thereby imposing ban for a period of five years against the petitioner.

4. The petitioner vehemently contends that the order passed by the respondent-Board is vitiated on account of non-observance of principles of natural justice. The petitioner contends that he has not been offered proper opportunity of hearing. The petitioner was not extended leave to cross examine the witnesses examined by the Investigation Commissioner. It is further contention of the petitioner that the Investigation Commissioner, who tendered the report to the Board recommending action against the petitioner, did not examine the witnesses in presence of the petitioner and as such, the petitioner did not have any opportunity to cross examine the said witnesses. The petitioner thus contends that since there is non observance of principles of natural justice, the whole enquiry is vitiated and the resultant order needs to be set aside. So far as the statement of the petitioner recorded by the Inquiry Commissioner is concerned, it has been contended by the petitioner that he never intended to convey that he had made any offer to complainant Pravin Tambe for 'fixing' matches. According to the petitioner, he was put under tremendous pressure

in making statement. However, the reference made to Pravin was in relation to admitting students in D.Y. Patil Medical College and thereby making some money by reducing the overall donation required for such admissions since Pravin Tambe is in a position to facilitate such admissions due to his association with the management of the college. The petitioner contends that the reference to 'fixing' in the statement cannot be construed as a 'match fixing' and in fact, he never made such a statement before the Commissioner.

5. Mr. Praving Tambe, a player representing the Rajasthan Royals team in the Indian Premier League (IPL) since 2013 was contacted by the petitioner on 13.03.2015 through telephone and was requested for an urgent meeting. Mr. Pravin Tambe and the petitioner Hiken Shah knew each other for a reasonable length of time as they were playing cricket matches against each other for their respective clubs and had also played together for the Mumbai Cricket Association in Ranji Trophy matches. It further transpires that initially Pravin Tambe did not attend mobile calls of the petitioner, as such, request was made to him by sending WhatsApp message by the petitioner requesting to respond him urgently.

After Pravin Tambe contacted the petitioner, at the request of the petitioner, both decided to meet outside the Oberoi Mall, Goregaon. When Pravin Tambe enquired as to what is the purpose of meeting, the petitioner asked Pravin as to what is his age, and suggested it may be about 45-46 years. Pravin reported that he is 43 years of age. Thereupon, the petitioner is alleged to have asked him whether he is interested in making money and it has something to do with 'fixing'. Pravin Tambe rejected his corrupt approach and asked the petitioner to stop the conversation. It further transpires that Pravin Tambe reported the incident to Mr. Abey Kuruvilla, Sports Director at D.Y. Patil Sports Academy and Mr. Raghu Iyer CEO Rajasthan Royals on the same day and also sent e-mail to Raghu Iyer reporting the incidence. Mr. Raghu Iyer then informed Mr. Ravi Sawani, Commissioner of Inquiry, the head of BCCI Anti-Corruption Unit, of the incident over the telephone and also forwarded the e-mail received by him from Mr. Pravin Tambe narrating the incident. Acting upon the information received from the Commissioner, the BCCI ordered an inquiry on 14.03.2015 by the Commissioner directed submission of report to BCCI.

6. The petitioner appeared before the Commissioner on 18.03.2015 and his statement was recorded. The statement of Mr. Pravin Tambe was also recorded by the ACUC. The petitioner was called upon to submit the call details in respect of mobile used by him. It was noticed on perusal of the call details that the petitioner was in contact with one Sanny Jain who is also known for his involvement in betting and approaching players for 'fixing' matches. It also transpires that Sanny Jain had made contact with one Iqbal Abdullah, another cricketer representing Royal Challengers, Bangalore. Sanny Jain had offered handsome amount to Iqbal Abdullah in lieu of reporting about the pitch condition during the IPL matches. The statement of Iqbal Abdullah was also recorded by the ACU Commissioner. Sanny Jain is stated to have contacted Iqbal Abdullah through one Saurabh Walkar who was functioning as a video analyst for Mumbai Ranji Team. Mr. Saurabh Walkar, in his statement to the Commissioner, has reported that he came to know Sanny Jain through Mumbai player Hiken Shah. It is also observed by the Commissioner during the course of inquiry that the call details of the petitioner's mobile number indicate that Sanny Jain was frequently contacted by the petitioner and more particularly during the IPL season.

7. The petitioner strenuously contends that, in fact, the reference to 'fixing' in his statement has nothing to do with the IPL matches, however, he was referring to the admission of students in D.Y. Patil College. This defence appears to be after thought. It is the matter of common knowledge that the admissions to medical course commencing after declaration of results of the common entrance test conducted by the association of medical colleges, which in any case is not held in March. If at all there is any reference to admissions to the medical college, Pravin Tambe would not have retorted to the petitioner saying that he is doing everything for his love of cricket.

8 The petitioner was initially called upon to appear before the Commissioner on 18.03.2015, by transmitting a communication through e-mail on 16.03.2015. That communication refers to Anti Corruption Inquiry pursuant to article 4.2 of the Anti-Corruption Regulations of the BCCI. The petitioner was called upon to submit call details of the mobile number possessed by him, by anti corruption commission by sending e-mail on 18.03.2015. The e-mail also refers to Article 4 of the Code of Anti-Corruption

Regulations. The petitioner was again called upon to appear before the Anti-Corruption Official on 20.04.2015. The notice refers to article 4.2 of BCCI's Anti-Corruption Code. During the preliminary inquiry conducted by the Commissioner, the statement of the petitioner was recorded, which is a signed statement, wherein the petitioner has categorically admitted thus:

“In the car I told Pravin Tambe that he was approaching 43 years of age and whether he wanted to make some money. He asked me what is this about? “kya hai?”. I then said “fixing jaisa hai. Karega kya?”. Praving then stated that he did not need any money and “whatever I am doing, I am doing for the love of the game”. We then discussed our trip to England and also selections for Mumbai T20. Total meeting lasted for about 5 minutes. I did not tell Pravin anything relating to not informing about our talk to anyone”.

9. In the statement made by Pravin Tambe, it is reported by him to the Commissioner thus:

“I reached Oberoi Mall alone in my car at 1555hrs. Hiken came in 10-15 minutes in his car. He came out of his car and I told him to come sit in my car. I asked him what is the work. Then he asked how is everything. How is the camp going on. Kaun kaun aaya? Koi bada player aaya”. And then he asked me my age 46-47. I told him no, I am 43. Then he said “paisa banane ka hai kya”. I was shocked and he further said “fixing ka hai”. I immediately told him to stop the conversation. I said main IPL paise ke liye nahi khel raha tha. Mere se aisi baat bhi mat kar. Agar teri jagah koi aur hota to main ye baat bhi nahi karta”

Then I told him I want to go now. He said we can have some tea. I told him no I have to go back. He left saying not to tell anyone about this discussion. Hiken was with me for 15.20 munutes only in my car. I do not know how he had got my mobile number.

I immediately called Mr. Abey Kuruvilla, Sports Director, at D Y Patil Sports Academy and arranged to meet with him immediately. Then on my way to the Academy, I called Mr. Raghu Iyer, CEO Rajasthan Royals and asked to meet him. He told me to meet next day. Then I went to Academy around 1700hrs and told everything about the incident to Mr. Abey Kuruvilla. He told me to inform Mr.Raghu Iyer who will decide on next on course of action. I called Mr.Raghu Iyers' office in Andheri and met him and detailed him on the incident.I also mailed Mr.Raghu Iyer on his email raghu.iyer@rajasthanroyals.com at 1954 hrs about the incident. He told me that he will take necessary action and inform BCCI ACU of the same”

10. The petitioner was initially served with suspension order by BCCI on 12.07.2015, which notice was challenged in Writ Petition No.2170 of 2015 presented by the petitioner. The Writ Petition No.2170 of 2015 came to be dismissed in view of the assurance given by the respondent-BCCI to complete the proceedings within the period prescribed under the Regulations i.e. six months from the date of the order. After the decision of the High Court, the petitioner was served with a notice to attend the hearing on 05.01.2016 at BCCI office. The notice refers to relevant Regulations, notes, charges leveled against the petitioner and in

para 3 of the notice, it is recorded thus:

“On the night of 13th March 2015 it was reported by Mr.Pravin Tambe, a player for the Rajasthan Royal Team in the IPL since 2013, that you had contacted him on 13th March 2015 through telephone and requested to him to meet you. On meeting you the same day outside Oberoi Mall, Goregaon, you had inquired of Mr. Pravin Tambe if he was interested in making money and mentioned that it was to do with fixing”.

11. The findings on the report of the Commissioner are quoted in para 7 of the notice. The Articles 2.1.1, 2.1.2 and 2.1.4 of the BCCI Anti-Corruption Code for participants are also quoted in the said notice. The Articles relating to Corruption contained in BCCI Anti-Corruption Code are relevant for consideration. Those are as quoted below:

“ARTICLE 2.1 : Corruption

Article 2.1.1: *Fixing or contriving in any way or otherwise influencing improperly or being a party to any effort to fix or contrive in any way or otherwise influence improperly, the result, progress, conduct or any other aspect of any Match or Event.*

Article 2.1.2: *Seeking, accepting, offering or agreeing to accept any bribe or other Reward to fix or to contrive in any way or otherwise to influence improperly the result, progress, conduct or any other aspect of any Match or Event.*

Article 2.1.4: *Soliciting, inducting, enticing, instructing, persuading, encouraging or facilitating (a) any Participant*

to commit an offense under any of the forgoing provisions of this Article 2.1 and/or (b) any other person to do any act that would be an offense if that person were a Participant.”

12. The gist of the statement recorded by the petitioner was also quoted in para 10 of the notice. The petitioner was called upon specifically to provide his written statement (alongwith any evidence including the documents in support) in defence to the allegations contained in the inquiry report within seven days from the receipt of the notice and it was further warned that on failing to do so, it would be deemed that the petitioner had admitted all the contents of the inquiry report. The petitioner was specifically called upon under the notice dated 24.12.2014 to submit his written statement alongwith any evidence including the documents in support of his defence to the Committee. The petitioner, however, failed to submit any evidence though he tendered his written statement. Neither in the written statement, nor by presenting any application, the petitioner has made a specific request permitting him to examine or cross examine the witnesses. The petitioner cannot be permitted to contend that he was not extended a fair opportunity to place his contentions during the course of inquiry. The petitioner, has been issued

notices time and again. The petitioner during the course of inquiry, never made any request for examination or cross examination of the witnesses. It is for the first time in the instant petition, a grievance is made as regards infraction of principles of natural justice. There is ample material on record to establish the charge. The final decision is arrived keeping in view the report of the Commissioner. The Disciplinary Committee has considered the report of the Commissioner as well as the written reply tendered by the petitioner and has directed imposition of penalty. The contention raised by the petitioner that, he has not been extended proper opportunity of hearing or that there is non-observance of principles of natural justice is devoid of substance.

13. The petitioner, in order to substantiate his contentions, places reliance on the judgment in the matter of ***Khem Chand Vs. Union of India and others, AIR 1958 SC 300***. The petitioner before the Supreme Court relates to departmental proceedings initiated against an officer of the Delhi Audit Fund. The issue before the Supreme Court was referable to interpretation of Article 311(2) of the Constitution of India since the petitioner before the Supreme Court was a civil servant. The Hon'ble Supreme Court,

while interpreting the provisions of Section 214(3) of the Government of India Act, 1935, now embodied in Article 311(2) of the Constitution of India, has recorded in para 19 of the judgment, as quoted below:

“To summarise: the reasonable opportunity envisaged by the provision under consideration includes-

(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant.

14. The petitioner also places reliance on the judgment in the matter of ***Jagmohan Dalmiya Vs. The board of Control for Cricket in India & Ors.***, AIR 2008 Cal 227 as well as ***Lalit Kumar Modi Vs. The Board of Control for Cricket in India & Ors.***, 2010 (6) AIR Bom 685. The judgments quoted above are of little assistance to the petitioner.

15. So far as the instant matter is concerned, a distinction has to be made in respect of an inquiry of a servant holding a civil post, in which case the protection provided under Article 311 of the Constitution of India is available. In order to claim protection under article 311, the employee must be a member of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union or who is a member of a civil service of a State or holds any civil post under the State. The Petitioner who is a player participating in IPL tournaments conducted by BCCI cannot be equated with a civil servant having protection of Article 311 of the Constitution of India. There is no relationship of master and servant between the petitioner and the respondent. The petitioner is not entitled to receive regular salary from the respondent, nor it can be said that he is entitled to draw monetary benefits from BCCI out of the State fund and whatever the remuneration paid by the respondent-BCCI to the petitioner as fees for playing cricket matches cannot be equated with the salary out of the State fund. In any case, the petitioner cannot be considered to be an employee, much less holding a civil posts. It would be apt to refer the judgment of the Supreme Court in the matter of *Chairman, Board of Mining*

Examination and Chief Inspector of Mines and another Vs.

Ramjee reported in ***AIR 1977 SC 965***. The Hon'ble Supreme Court has observed in the judgment, while dealing with issue of observance of natural justice that :

“natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt i.e. conscience of the matter”. It is further observed that, “ the Court cannot look at law in the abstract or natural justice as a mere artifact. Nor can we fit into a rigid mould the concept of reasonable opportunity. Every minuscule violation does not spell illegality. If the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justices were sacred scriptures”.

16. It would be worthwhile to refer to an judgment of the Supreme Court in the matter of ***Union of India and others Vs. P. Gunasekaran*** reported in ***(2015) 2 SCC 610***. In para 12 of the judgment, the Supreme Court has serialised the circumstances or the parameters which are permissible to be looked into by the

High Court. Para 12 of the judgment reads thus:

“12. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge no. I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into re- appreciation of the evidence. The High Court can only see whether:

- (a) *the enquiry is held by a competent authority;*
- (b) *the enquiry is held according to the procedure prescribed in that behalf;*
- (c) *there is violation of the principles of natural justice in conducting the proceedings;*
- (d) *the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;*
- (e) *the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;*
- (f) *the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;*
- (g) *the disciplinary authority had erroneously failed to admit the admissible and material evidence;*
- (h) *the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;*

(i) the finding of fact is based on no evidence.”

17. In para 13 of the judgment, the Supreme Court has in reference to Article 226 and 227 of the Constitution of India, mandated that the High Court shall not:

- (i) re-appreciate the evidence;
- (ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;
- (iii) go into the adequacy of the evidence;
- (iv) go into the reliability of the evidence;
- (v) interfere, if there be some legal evidence on which findings can be based.
- (vi) correct the error of fact however grave it may appear to be;
- (vii) go into the proportionality of punishment unless it shocks its conscience.

18. While considering the scope of interference by the High Court under exercise of Article 226 of the Constitution of India in the departmental inquiry proceedings, the Supreme Court, in the matter of *State of Andhra Pradesh and others Vs. Chitra Venkata Rao, (1975) 2 SCC 557* has observed that the High Court does not exercise appellate powers which exercising jurisdiction

under Article 226 of Constitution of India in respect to decisions under review recorded by authorities holding the departmental inquiries against public servants. The Court is concerned with determining whether the inquiry conducted by an authority is competent to hold such inquiry and the procedure prescribed has been followed, and as to whether the rules of natural justice are not violated. Secondly, where there is any evidence which the authorities entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court to take review of the whole evidence and to arrive at an independent. The High Court may interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion arrived at on the very face of it, is so wholly arbitrary and capricious that no reasonable

person could ever have arrived at such conclusion. The adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding under Article 226. It is further observed in para 23 of the judgment that, the jurisdiction to issue a writ of certiorari under Article 226 is a supervisory jurisdiction. The Court exercising jurisdiction is does not act as an appellate Court. The findings of fact reached by an inferior court or tribunal on appreciation of evidence are not liable to be reopened or questioned in these proceedings. An error of law which is apparent on the face of record can be corrected but not an error of fact, however grave it may be. A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal. Even applying the principles of the instant matter though it cannot be said that the inquiry is in the nature of departmental proceedings, still there does not appear any error in the decision making process for the conclusions drawn in the inquiry proceedings can be said to be erroneous.

19. In an another matter before the Supreme Court i.e. ***State Bank of India Vs. Ram Lal Bhaskar and another*** reported in ***(2011) 10 SCC 249***, same view has been reiterated. In the instant matter, it cannot be said that the petitioner has not been extended an adequate opportunity of hearing. Though the petitioner is making a grievance in respect of the failure of the respondents to permit him to examine or cross examine the witnesses, it is apparent that in spite of several opportunities given and in spite of specific notice calling upon him to lead evidence, petitioner did not tender a single application requesting the respondent to permit him to examine or cross examine the witnesses who were examined by Anti-Corruption Commissioner. In fact, the petitioner in his recorded statement has admitted his guilt. There is an abundant evidence that the petitioner is guilty of the heinous act which lowers reputation of the institution patronising game of cricket.

20. Lastly, the petitioner has urged to consider request for reduction of the period imposing ban. The petitioner has been prohibited from playing cricket under the aegis of the respondent

for a period of five years. This Court also called upon the respondent to consider whether the penalty imposed against the petitioner can be reduced. The matter was considered by the committee of the BCCI appointed by the Supreme Court and it was decided that since the petitioner has been awarded minimum penalty provided under Article 5 of the BCCI's Anti-Corruption Code, there is no further warrant to reduce the same. Article 5 of the BCCI's Anti-Corruption Code mandates imposition of ban and prescribing ineligibility ranging from minimum five years up to maximum life ban, against an errant player. Since the Disciplinary Committee has imposed a minimum penalty provided under Regulations, the Committee appointed by the Supreme Court thought it not proper to interfere in the decision prescribing quantum of punishment. It is recorded by the Committee that in order to maintain the higher standards of ethics and fair play in cricket and in line with the of BCCI's zero tolerance policy in matters pertaining to any form of corruption in the sport, the Committee of Administrators while expressing highest respect and deference to the orders of the High Court, was not persuaded to reduce the penalty. Even otherwise, in view of the judgment of the Supreme Court in the matter of *P. Gunasekaran* (supra),

it is not open for the High Court in exercise of the writ jurisdiction under Articles 226 and 227 of the Constitution of India to consider issue of the proportionality of punishment so long as the punishment does not shock the conscience of the Court.

21. In view of the reasons set out above, we do not deem it appropriate to cause interference in the petition. The Writ Petition is devoid of substance and stands dismissed. Rule discharged. There shall be no order as to costs.

(R.G. KETKAR)
JUDGE

(R.M. BORDE)
JUDGE