

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

914. WRIT PETITION NO. 7313 OF 2019

Loknete Aamdar Kai. M.N. Rajput
@ Thansing Jibhau Shikshan Prasarak Mandal,
Shindkheda and another ...Petitioners

VERSUS

Gorakh Pandit Malche and another ...Respondents

*Mr. B.R. Waramaa, Advocate for petitioners.
Mr. N.T. Bhagat , Asstt. Govt. Pleaders for Respt. No. 2*

CORAM : RAVINDRA V. GHUGE, J.

DATE : 19th June, 2019

PER COURT:

1. The petitioner-management in this petition has raised a peculiar issue as regards it's failure to constitute an Enquiry Committee for conducting a departmental enquiry, as is prescribed under Rules 36 and 37 of the Maharashtra Employees of the Private Schools (Conditions of service) Rules, 1981. This stand is taken for the first time before the School Tribunal.

2. I have heard the strenuous submissions of the learned Advocate for the petitioner-management of the school.

With his assistance, I have gone through the petition paper book threadbare. He has also relied upon the judgment delivered by the learned Division Bench of this Court in the matter of *Saindranath Jagannath Jawanjil Vs. Pratibha Shikshan Sanstha & Anr.*, 2007(3) Mh.L.J. 753.

3. The petitioner has canvassed all the grounds that are summarised in this order and has prayed for a decision from this Court. It is in the light of the same that I have dealt with all the contentions of the petitioner.

4. The contentions of the petitioner can be summarised as under:

(A) An order dated 31st August, 2013 has been passed by the President of the petitioner-educational society, vide which, the services of respondent No.1 employee have been brought to an end in the following words:

“ या सर्व कारणांमुळे आपणास नौकरीची गरज नाही असे दिसते, म्हणून संस्था आपली दि. १/९/२०१३ पासून सेवा समाप्ती करत आहे. बडतर्फ करण्यात येत आहे. सेवेतून कमी करण्यात येत आहे. ”

(B) It is undisputed that the above reproduced order of termination is based on several allegations of misconduct levelled upon the employee and the educational society reached a

conclusion that respondent No.1 does not require service, therefore, the petitioner management has brought to an end his services and he stands dismissed with effect from 1st September, 2013.

(C) The petitioner society made an effort to constitute an Enquiry Committee as is prescribed by Rule 36 and despite its best efforts, it failed to secure a State Awardee Teacher to be included as a member of the three members Enquiry Committee.

(D) The petitioner has levelled the following allegations in the reference title of the order of dismissal dated 31st August, 2013;

- (a) To claim information against the petitioner - management & the school under the provisions of the Right to Information Act,
- (b) Making false complaints of injustice done to him as he belonged to a backward class,
- (c) Remaining absent from duty without leave and by filing applications through others
- (d) Not residing in the accommodation at the headquarter, as endorsed in Annual Inspection Report of the year 2012-2013.
- (e) Playing a lead role in committing theft of the registers of the School Nourishment Food Scheme and also involved in wrong deeds in maintaining the records of the said scheme.

(E) The petitioner has taken a stand in its additional

written statement dated 24th October, 2016 that it made an effort to constitute the Enquiry Committee and the names of several State Awardee Teachers are mentioned, who did not extend their consent to be a member of the Enquiry Committee.

(F) The petitioner requested the Education Department to allocate a State Awardee Teacher in order to constitute the Enquiry Committee. Yet, no assistance was rendered by the Education Officer.

(G) Finally, one Mr. Bharat Asaram Kale, a State Awardee Teacher, agreed to be a member of the Enquiry Committee, vide his communication dated 16th June, 2016, which was received during the pendency of the appeal preferred by the respondent-employee.

(H) The petitioner has substantially discharged its burden of attempting to constitute the Enquiry Committee and it was on account of reasons beyond its control that the Enquiry Committee could not be constituted.

5. The learned Full Bench has laid down in the case of *Saindranath Jagannath Jawanjal, (supra)*, the law in paragraphs 56, 57, 58, 63, 64 and 65 and 66, vide which, a management can conduct an inquiry before the School Tribunal though no such

enquiry was earlier conducted.

6. Upon considering the submissions of the petitioner, recorded as above, Rules 36 and 37 of the M.E.P.S. Rules need to be perused in order to test the bonafides of this management.

Rules 36 and 37 read as under:

“ 36. Inquiry Committee.

(1) If an employee is allegedly found to be guilty on (any of the grounds specified in sub-rule (5) of rule 28) and the Management decides to hold an inquiry, it shall do so through a properly constituted Inquiry committee. Such a committee shall conduct an inquiry only in such case where major penalties are to be inflicted. The Chief Executive Officer authorised by the Management in this behalf (an in the case of an inquiry against the head who is also the Chief Executive Officer, the President of the Management) shall communicate to the employee or the Head Concerned by registered post acknowledgment due the allegations and deemed from him a written explanation within seven days from the date of receipt of the statement of allegations.

(2) If the Chief Executive Officer or the President, as the case may be, finds that the explanation submitted by the employee or the Head referred to in sub-rule (1) is not satisfactory, he shall place it before the Management within fifteen days from the date of receipt of the explanation. The Management shall in turn decide within fifteen days whether an inquiry be conducted against the employee and if it decides to conduct the inquiry, the inquiry shall be conducted by an Inquiry Committee constituted in the following manner, that is to say -

(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 authorised 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;*
- (b) *in the case of the Head referred to in sub-rule (1) -*
- (i) *one member who shall be the President of the Management;*
- (ii) *one member to be nominated by the Head from amongst the employees of any private school;*
- (iii) *one member chosen by the President from the panel of Head Masters on whom State/National Award has been conferred.)*
- (3) *The Chief Executive Officer or, as the case may be, the President shall communicate the names of members nominated under sub-rule (2) by registered post acknowledgment due to the employee or the Head referred to in sub-rule (1), as the case may be, directing him to nominate a person on his behalf on the proposed Inquiry Committee and to forward the name alongwith the written consent of the person so nominated to the Chief Executive Officer or to the President, as the case may be, within fifteen days of the receipt of the communication to that effect.*
- (4) *If the employee or the Head, as the case may be, communicates the name of the person nominated by him the Inquiry Committee of three members shall be deemed to have been constituted on the date of receipt of such communication by the Chief Executive Officer or the President, as the case may be. If the employee or such Head fails to communicate the name of his nominee within the stipulated period, the Inquiry Committee shall be deemed to have been constituted on expiry of the stipulated period consisting of only two members as, provided in sub-rule (2).*
- (5) *The Convener of the respective Inquiry Committee shall be the nominee of the President, or as the case may be, the President who shall initiate action pertaining to the conduct of the Inquiry Committee and shall maintain all the relevant record of the Inquiry.*
- (6) *The meetings of the Inquiry Committee shall be held in the school premises during normal school hours or immediately thereafter, if the employee agrees and even*

during vacation.

37. Procedure of inquiry.

(1) The Management shall prepare a charge sheet containing specific charges and shall hand over the same together with the statement of allegations and the explanation of the employee or the Head as the case may be, to the Convener of the Inquiry Committee and also forward copies thereof to the employee or the Head concerned by registered post acknowledgment due, within 7 days from the date on which the Inquiry Committee is deemed to have been constituted.

(2)(a) Within 10 days of the receipt of the copies of charge-sheet and the statement of allegations by the employee or the Head, as the case may be. -

- (i) If the employee or the Head, as the case may be, desires to tender any written explanation to the charge-sheet, he shall submit the same to the Convener of the Inquiry Committee in person or send it to him by the registered post acknowledgment due.
- (ii) If the Management and the employee or the Head, as the case may be, desire to examine any witnesses they shall communicate in writing to the Convener of the Inquiry Committee the names of witnesses whom they propose to so examine, and
- (iii) If the Management desires to tender any documents by way of evidence before the Inquiry Committee, it shall supply true copies of all such documents to the employee or the Head, as the case may be. If the document relied upon by the Management is a register or record of the school it shall permit the employee or the Head, as the case may be, to take out relevant extracts from such register or record. The employee or the Head as the case may be, shall supply to the Management true copies of all the documents to be produced by him in evidence.

(b) Within 3 days after the expiry of the period of 10 days specified in clause (a), the Inquiry Committee shall meet to proceed with the inquiry and give 10 days notice by registered post acknowledgment due to the Management and the employee or the Head, as the case may be, to appear for producing evidence, examining witnesses etc., if any.

(c) The Inquiry Committee shall see that every reasonable opportunity is extended to the employee for defending his case.

- (d)(i) *The Management shall have the right to lead evidence and the right to cross-examine the witnesses examined on behalf of the employee.*
 - (ii) *The employee shall have the right to be heard in person and lead evidence. He shall also have the right to cross-examine the witnesses examined on behalf of the Management.*
 - (iii) *Sufficient opportunities shall be given to examine all witnesses notified by both the parties.*
 - (e) *All the proceedings of the Inquiry Committee shall be recorded and the same together with the statement of witnesses shall be endorsed by both the parties in token or authenticity thereof. The refusal to endorse the same by either of the parties shall be recorded by the Convener.*
 - (f) *The inquiry shall ordinarily be completed within a period 120 days from the date of first meeting of the Inquiry Committee or from the date of suspension of the employee, whichever is earlier, unless the Inquiry Committee has, in the special circumstances of the case under inquiry, extended the period of completion of the inquiry with the prior approval of the Deputy Director. In case the inquiry is not completed within the period of 120 days or within the extended period, if any, the employee shall cease to be under suspension and shall be deemed to have rejoined duties, without prejudice to continuance of the inquiry.*
- (3) *The Management and the employee or the Head, as the case may be shall be responsible to see that their nominees and the witnesses, if any, are present during the inquiry. However, if the Inquiry Committee is convinced about the absence of either of the parties to the disputes or any of the members of the Inquiry Committee on any valid ground, the Inquiry Committee shall adjourn that particular meeting of the Committee. The meeting so adjourned shall be conducted even in the absence of person concerned if he fails to remain present for the said adjourned meeting.*
- (4) *The Convener 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. It is thus, obvious from Rule 36(1) that if the management feels that an employee is guilty of any grounds mentioned in Rule 28(5) and the management decides to hold an enquiry, it shall do so through a properly constituted Enquiry Committee. Such a committee is to be constituted only when major penalties are to be inflicted. Thus, Rule 36(1) initially mandates that the management would communicate to an employee the entire allegations against him and demand from him a written explanation, within seven days from the date of receipt of the statement of such allegations. It is further clear

from Rule 36(2) that if the management finds that the explanation is unsatisfactory, such explanation will be placed before the management within 15 days from the date of receipt and the management would decide whether an enquiry is required to be conducted and if it decides to conduct the inquiry, only then the Enquiry Committee will have to be constituted.

8. Considering the language of the Rule discussed above, the first step required to be taken by the management is to generate a statement of allegations. I find from the order of dismissal dated 31st August, 2013 that no such statement of allegations was issued to the employee pointedly indicating to him a specific charge of misconduct levelled upon him.

9. The issue, therefore, emerges from the order of dismissal, that there was no statement of allegations issued by the management under Rule 36(1) and those allegations were vague.

10. The Hon'ble Apex Court has laid down that when an employer is unable to conduct an enquiry in accordance with the procedure as is laid down by law, it has to list out reasons as to why it could not conduct a departmental enquiry. No such reasons are found in the impugned order of dismissal. It is also

not referred to in the order of dismissal that a State Awardee Teacher was not available and hence an enquiry could not be conducted. If the Education Department was not suggesting a State Awardee Teacher for constituting the Enquiry Committee, the petitioner-management could have approached this Court through a writ petition seeking a direction to the Education Department to allot a State Awardee Teacher. No such effort has been taken by the management.

11. It also needs to be seen as to whether the conduct of the employee was such that he had committed misconducts which were of a grave and serious character and it became extremely necessary for the management to forthwith dispense with his services in the interest of the organization. No such material is available on record. Documents prepared by the management and filed before the School Tribunal would not be a substitute for certain steps that were required to be taken by the management at the relevant time before concluding that firstly, an enquiry could not be conducted and secondly, that the misconduct is of such a grave and serious nature that the employee didn't deserve to be kept in employment in the interest of the Organization, Teachers and Students.

12. The management has come forward with a solitary

ground for having not been able to conduct an enquiry, that a State Awardee Teacher was not available. The requirement of a State Awardee Teacher, as laid down under Rule 36(2), would arise after the management had complied with Rule 36(1), i.e. only after the statement of allegations was served on the employee, a reply was received by the management and these documents were placed before the governing council of the management to take a decision that an enquiry should be initiated and then the second stage of constituting an Enquiry Committee would occur. When the management has not complied with Rule 36(1), there was no scope to jump to the second stage under Rule 36(2) to project it as a ground for not being able to conduct an enquiry.

13. The learned Full Bench of this Court in *Saindranath's* case, (supra), has observed in paragraphs 56 to 58 and 63 to 66 as under :

“56. Now the question comes: how and at which stage the School Management is expected to seek leave from the Tribunal to lead additional evidence in exercise of its right. In our considered view, such right should be exercised, as soon as there is challenge to the action of the management, in appeal before the Tribunal, contending that there was no sufficient evidence to prove the charges leveled against the appellant/employee. In the event of exercise of such right by the school management, the Tribunal is expected to consider the question of grant of leave to lead additional evidence subject to compliance of provision of Order 41 Rule 27 of C.P.C. In the event of grant of leave opposite party-employee would also get an opportunity of placing

his side before the School Tribunal i.e. when the School Management is allowed to lead additional evidence on the question of misconduct before the Tribunal.

57. *At the same time, if the employee comes before the Tribunal challenging the punitive order on merits in appeal contending that the evidence is not sufficient to prove alleged misconduct or that he has some additional evidence in his possession to establish his innocence, which he could not produce for want of knowledge in spite of due diligence at the time when the enquiry was conducted; in such circumstances, there is no fetter on the power of the School Tribunal to admit such evidence at the instance of the employee. It is, thus, always open for the School Tribunal to take such additional evidence on record for the reasons to be recorded, after giving rival parties fair opportunity following principles of natural justice. This power, however, has to be exercised by the Tribunal before expressing its opinion about validity or invalidity of the punitive action of the management challenged in appeal. In every case, the management cannot be allowed to lead de novo evidence before the Tribunal because that right is circumscribed with certain conditions laid down under Order 41 Rule 27 as indicated hereinabove.*

58. *The Tribunal, therefore, has power to take additional evidence on record only in the contingency, where the management or employee wants to supplement the evidence already on record by leading additional evidence to prove their contentions, however, subject to the provisions of Section 107 read with Order 41 Rule 27 of C.P.C. After leading the evidence by both the parties in support of their contentions, it is always open to the Tribunal, in exercise of its power of judicial review, to reappraise the said evidence so as to find out whether or not action of the school management can be sustained.*

.....

63. *The policy of law emerging from the Industrial Disputes Act and its sister enactments is to provide an alternative dispute-resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of the courts and tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute. As against this, the M.E.P.S. Act and*

Rules constitute statutory provisions themselves. As such, free-hand given to the employer under Industrial and Labour Legislations to lead evidence to prove misconduct in case of no enquiry or defective enquiry cannot be recognised in toto while considering such cases arising under the provisions of the M.E.P.S. Act and Rules.

64. *In the aforesaid backdrop, we hold that the Tribunal has a power to take additional evidence on record mainly in the contingency, when the management wants to supplement its evidence already on record, at the same time, the employee has also a corresponding right to lead additional evidence either in rebuttal or to supplement his attempt to dislodge the action of the management, again but subject to the provision of Order 41 Rule 27 of C.P.C. This is independent of power of the Tribunal given under Sub-rule (1)(b) of Rule 27 of order 41 of C.P.C. The parties, thereafter, are expected to leave the matter in appeal for being decided by the Tribunal on its own merits.*

65. *But this should not be understood as placing fetters on the powers of the Tribunal. It is always open to the Tribunal to exercise its powers on the peculiar facts and circumstances of each case as it deems just and necessary in the interest of justice. Take a case where the management is not in a position to hold enquiry because of the situation brought about by the employee himself making it impossible for the management to hold enquiry before taking punitive action against him, in such contingency, the School Tribunal is not powerless to permit the School management to lead evidence to prove the act of misconduct before it to support its action. This legal sanction in law is implicit in Sub-rule (b) of Rule 27 of Order 41 of C.P.C. which reads as '...for any other substantial cause' This clause gives wide discretion to the Tribunal, which, no doubt, is required to be exercised judiciously for the reasons to be recorded. But, exercise of such powers in every case; in a routine manner would take away the very object of the legislation meant to provide the employees security and stability of service to enable them to discharge their duties effectively and efficiently. Therefore, such power is available for being exercised only in the extremely exceptional cases and in compelling circumstances and not in a routine manner in every case.*

66. *We may make it clear and clarify that although we have observed that in certain extremely exceptional and compelling contingencies the school management may, in a case of grave nature of misconduct, dismiss the employee without holding an enquiry but, ordinarily, such an enquiry*

should not be dispensed with unless it is impossible to hold. In the event, it is found ultimately by the Tribunal that the School Management has taken recourse to dispense with the enquiry without any exceptional and compelling circumstance or the order of termination has been passed mala fide or by way of victimization, then it would be open to the Tribunal to award suitable compensation to the employee and adopt the route followed by the Division Bench of this Court in the case of Kashiram Kathane (supra) for the reason that the mandate of the Act and Rules has not been followed and principles of natural justice have not been complied with.

14. The conclusion drawn in paragraph 60 is with regard to a management conducting a *de-novo* inquiry by leading additional evidence in addition to the evidence already on record through a departmental enquiry. The conclusion in Rule 66 is that the management may dismiss an employee in a case of grave misconduct without holding an enquiry, but ordinarily, such an enquiry should not be dispensed with unless it was impossible to hold an enquiry. The School Tribunal then has to be convinced that the management had no option but to dispense with the enquiry in exceptional and compelling circumstances. Then it may permit the management to conduct an enquiry in the Tribunal in order to conclude that the order of termination has not been passed malafide or by victimization.

15. The petitioner had filed an application (Exh.30) before the School Tribunal on 17th August, 2018 when the appeal was already five years old. When the matter was to be conducted

finally, it was set out in Exh. 30 that the management desires to lead evidence before the Appellate Court. The Appellate Court has rejected the said application on the ground that the management would have no right to lead oral evidence before the Tribunal under the M.E.P.S. Act. Though the learned Advocate for the management has criticised the impugned order, I find that there were no pleadings in application Exh. 30 and the judgment delivered by the learned Full Bench in *Saindranath's* case, (supra), was also not cited.

16. The Hon'ble Apex Court while dealing with the case in *Bharat Forge Company Ltd. Vs. A.B. Zodge and another, AIR 1996 Supreme Court 1556*, has concluded that if an enquiry is vitiated for any reason whatsoever, the case would stand on a footing of there being no enquiry. In Labour and Industrial Jurisprudence, the concept of conducting a *denovo* inquiry has crystallized. However, under the M.E.P.S. Act, issue of an enquiry being set aside for being vitiated was dealt with by the Hon'ble Apex Court in the matter of *Vidya Vikas Mandal and another Vs. the Education Officer and another, (2007) 11 SCC 352*. The observations in paragraphs No. 8 and 9 have, thus, laid down the law as under :-

"8. Our attention was also drawn to Rule 36 sub-rule (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 authorised 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.

9. *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 is appointed to inquire into a particular matter, all the three members 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 acting on it and thereby ordering the reinstatement with back wages. Since the reinstatement and back wages now orders 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 members of the Committee, which is also quite contrary to the Rules."*

17. As such, in the facts and circumstances of this case, the petitioner-management cannot be permitted to conduct an inquiry for the first time before the School Tribunal for having

put-forth a false excuse without complying with Rule 36(1). The only option available is that the management may withdraw the dismissal order and may initiate an enquiry in obedience to Rules 36 and 37. For the said purpose, it would have to either reinstate the employee or treat him to have been placed under suspension from 31st August, 2013 and pay him the entire suspension allowance, in view of *Vidya Vikas Mandal* (supra). Needless to state, the contention of the employee as regards the vague charges being levelled upon him, will have to be left open.

18. Hence, I do not find that the impugned order could be termed as being perverse or erroneous. This petition being devoid of merit, is therefore, dismissed.

**(RAVINDRA V. GHUGE)
JUDGE**

Madkar