

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

WRIT PETITION NO. 2977 OF 2017

- 1) Gandhi Shikshan Sanstha,
through its Secretary, Dhapewada,
Tq. Kalmeshwar, District – Nagpur.
- 2) Gajanan High School,
through its Head Master, Adasa,
Tq. Kalmeshwar, District – Nagpur.
- 3) Administrator, Gajanan High School,
Office of Deputy Director of Education,
Sitabuldi, Nagpur (since there is no
Administrator now, the Petitioner No.3
is represented through the petitioner
No.2)

.... **PETITIONERS**

VERSUS

- 1) Prakash s/o Shalikram Kadu,
Aged about 45 years, Occ. - Nil,
R/o Dhurkheda (Borgaon), Post -
Dhapewada, Tq. Kalmeshwar,
District – Nagpur.
- 2) The Education Officer (Sec.),
Zilla Parishad, Nagpur.

.... **RESPONDENTS**

Mr. A.Z. Jibhkate, Counsel for the petitioners,
Mr. S.S. Dhengale, Counsel for respondent 1,
Mr. N.S. Rao, A.G.P for respondent 2.

CORAM : ROHIT B. DEO, J.

DATE OF RESERVING THE JUDGMENT : 22-10-2019

DATE OF PRONOUNCING THE JUDGMENT : 21-10-2020

JUDGMENT :

Heard Mr. A.Z. Jibhkate, learned Counsel for the petitioners, Mr. S.S. Dhengale, learned Counsel for respondent 1 and Mr. N.S. Rao, learned Assistant Government Pleader for respondent 2.

2. At the very outset, it may be recorded that due the several reasons and circumstances, including pertaining to the record, the judgment was delayed. I, therefore, deemed it appropriate to convey to the learned Counsel that if they so desire, the petition can be reheard. Mr. A.Z. Jibhkate and Mr. S.S. Dhengale, learned Counsel, who appear for the contesting parties, however, categorically stated that the judgment may be delivered and that rehearing would not be necessary.

3. The challenge is to the judgment dated 12-4-2017 rendered by the Presiding Officer, School Tribunal, Nagpur (Tribunal) in Appeal STN 15/2002 whereby the termination order dated 14-2-2002 issued by the petitioners (management) is held illegal, and respondent 1-teacher (employee) is held entitled to reinstatement with continuity in

service and back-wages.

4. The Tribunal held in favour of the employee on two counts. The Tribunal held that the enquiry conducted against the employee was in contravention of the Maharashtra Employees of Private Schools (Conditions of Service), Rules, 1981 (Rules) and, therefore, illegal. The Tribunal further held that the misconduct is not proved.

5. Before advertng to the rival contentions, it may be noted that the litigation has a chequered history. The Tribunal initially dismissed the appeal vide judgment dated 23-6-2006. Relying on the decision in *Anna Manikrao Pethe v. Presiding Officer, School Tribunal, Amravati and others, 1997 (3) MhLJ 697*, the Tribunal framed three preliminary issues. The first issue was whether the school was recognised, which was answered affirmatively. The second issue was whether the appointment of the appellant was made as per Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 and the Rules framed thereunder, which was answered in the negative, and the third issue was whether the appointment was approved by the Education Officer, which was also answered in the negative. The employee challenged the said judgment

in Writ Petition 4784/2006. A learned Single Judge held that the Tribunal had no occasion to examine the question as to whether the petitioner was appointed in a clear and permanent vacancy or whether the petitioner was qualified to hold the post and the appointment was in accordance with Section 5 of the Act. This view is premised on the termination order being punitive. It was observed, that even if it is assumed that the appointment of the petitioner was on temporary basis, it was open for the management to terminate the service by an innocuous order of termination simplicitor or on the ground that the appointment of the petitioner was not made in accordance with Section 5 of the Act or for the reasons that the petitioner was not qualified to hold the post. The appeal was remitted to the Tribunal for fresh decision. It is the fresh decision which is impugned herein.

6. The case of the employee as is discernible from the memo of appeal :

i) The employee was initially appointed at petitioner 2 with effect from 26-6-1986 as an Assistant Teacher. The employee is a permanent and confirmed employee with clean service record. No adverse remarks were communicated to the employee.

ii) It was only when the employee became entitled to

promotion to the post of the Head, that the management started levelling false allegations. The employee was duly qualified to hold the post of the Head and was the seniormost. However, superseding the claim of the employee, one Mr. R.W. Ganar was promoted as the Head.

iii) The employee challenged the supersession in Appeal 16/1999 before the Tribunal. In retaliation, the management vindictively issued Statement of Allegation dated 20-6-2001 which was served on 26-6-2001. Stale charges were levelled pertaining to the period 1988-89.

iv) The employee objected to the Statement of Allegations, questioning the authority of the Officiating Secretary to issue the same. The employee further denied the allegations vide reply dated 02-7-2001 which was received by the Officiating Secretary on 09-7-2001.

v) Vide letter dated 31-7-2001 received on 08-8-2001, the management communicated to the employee its decision to conduct an enquiry and conveyed the names of two members of the Enquiry Committee. The employee was called upon to furnish the names of his nominee within fifteen days.

vi) The employee contended in the memo of appeal that while his reply was served on the Officiating Secretary on 09-7-2001, the

communication dated 31-7-2001 purported to state that the reply is considered by the management in the meeting dated 22-6-2001. The employee contended that the falsity of the statement in the communication dated 31-7-2001 indicates *mala fides*.

vii) The employee issued a letter to the Officiating Secretary requesting two weeks time for nominating his representative, which letter was received by the management and Officiating Secretary on 25-8-2001. On 31-8-2001, while the employee objected to the constitution of the Enquiry Committee, he nominated Mr. Rangrao Mankar as his nominee to the Enquiry Committee. The said letter was received back from the Postal Department with the remark "continuously not found". In the interregnum, vide letter dated 29-8-2001 received on 03-9-2001 the management informed that since the employee did not nominate his representative, two member committee is constituted.

viii) Alongwith the said letter, the employee was served with the charge-sheet and photocopy of the statement of allegations. However, no document was forwarded to the employee.

ix) The employee wrote to the management pointing out that no documents are forwarded and demanded that the documents be supplied to enable the employee to effectively reply to the allegations

in the charge-sheet. The employee further objected to the constitution of the two member committee. The employee submitted reply to the charge-sheet on 11-9-2001 and enclosed therewith copy of the letter dated 31-8-2001. This communication was refused by the Secretary and was returned by the Postal Department with the endorsement "refused".

x) While noting the case of the employee as is discernible from the memo of appeal, it may be recorded that the management appears to have relented and the representative of the employee Mr. Rangrao Mankar is treated as the third member of the Enquiry Committee.

xi) The convener of the Enquiry Committee Mr. Vinayakrao Wakade, vide letter dated 13-9-2001, which was received by the employee on 20-9-2001, informed that the first meeting of the Enquiry Committee is scheduled on 15-9-2001. Since the said letter was received on 20-9-2001, there was no occasion for the employee to attend the enquiry on 15-9-2001. However, the employee was marked absent in the record of the Enquiry Committee.

xii) The second meeting of the Enquiry Committee was scheduled at 4-00 p.m. on 29-9-2001 and the employee was directed to produce the oral and documentary evidence. It was also informed that

the representative of the employee is included in the Enquiry Committee. While no proceedings were held on 29-9-2001 and the enquiry was adjourned to 10-10-2001, the employee, vide application dated 29-9-2001, requested the convener to supply copy of Schedule-I, the resolution pursuant to which the Enquiry Committee was constituted, the relevant documents and the list of witnesses.

xiii) Vide letter dated 04-10-2001 the convener of the Enquiry Committee again called upon the employee to produce the evidence. The employee, vide reply dated 08-10-2001, pointed out that since he has not been supplied with the copies of the documents on which the management would rely, he cannot be asked to produce the oral and documentary evidence.

xiv) On 10-10-2001 the employee pointed out to the convener of the Enquiry Committee that since a criminal complaint is pending on the same set of allegations, the enquiry may not be proceeded with. The request was rejected and it was recorded that the employee did not produce documents and the list of witnesses. The enquiry was adjourned to 14-10-2001, on which date copies of 87 documents were produced by the management.

xv) Vide letter dated 23-10-2001 the employee was informed by the convener that the enquiry is scheduled on 24-10-2001. The letter

dated 23-10-2001 was received by the employee on 24-10-2001.

xvi) It was the convener who produced the list of witnesses on behalf of the management, on 24-10-2001. The next meeting of the Enquiry Committee was scheduled on 06-11-2001, after recording the evidence of the management witness Mr. Ramesh Mankar in part. In the meeting of the Enquiry Committee held on 08-12-2001 Mr. Ramesh Mankar adduced further evidence although he was to be cross-examined. Instead of oral examination-in-chief, the written statement prepared by Mr. Ramesh Mankar was recorded as evidence adduced. The objection to the manner in which the evidence was recorded, which was submitted by the employee, was not taken on record.

xvii) The enquiry could not be held on 18-12-2001 in view of the absence of the National Awardee Teacher-the employee's representative and the enquiry was adjourned to 12-00 p.m. on 22-12-2001 which notice was received on 1-00 p.m. on 22-12-2001. However, no enquiry was held on 22-12-2001 and when the employee insisted that the enquiry be conducted, he was threatened that he would be forced to commit suicide, which threats the employee documented in letter dated 24-12-2001 addressed to the convener of the Enquiry Committee.

xviii) Mr. Ramesh Mankar was partially cross-examined on 26-12-2001 and the cross-examination concluded on 31-12-2001. The next sitting was scheduled on 07-1-2002.

xix) On 07-1-2002 the management examined Mr. Ganpat Ingle, Mr. Krushna Wankhede, Mr. Narayan Dhawad and Ms. V.B. Bhagat. On 15-1-2002 the management examined Mr. Baban Bhange, Mr. R.W. Ganar, Mr. M.S. Motikar and the enquiry was adjourned to 22-1-2002. Mr. Ingle was cross-examined on 22-1-2002 and the enquiry was adjourned to 23-1-2002. The employee's representative on the Enquiry Committee had personal difficulty in attending the enquiry. The religious rituals as regards the demise of the mother of the employee's representative were to be performed on 23-1-2002. However, the Enquiry Committee commenced the recording of the evidence of Ms. Jaya Nemad and called upon the employee to cross-examine her in the absence of his representative. The employee refused, and the convener adjourned the enquiry to 25-1-2002 for employee's evidence. The employee was not permitted to cross-examine the witnesses of the management namely Mr. Krushna Wankhede, Narayan Dhawad, Ms. Bhagat, Mr. Baban Bhange, Mr. R.W. Ganar, Mr. M.S. Motikar and Ms. Jaya Nemad.

xx) Vide letter dated 25-1-2002 the employee placed on record

that he was denied the opportunity to cross-examine the management witnesses, the convener made an endorsement that it was the employee who did not avail the opportunity of cross-examination.

xxi) The employee submitted list of witnesses on 25-1-2002 and requested the convener to fix the date of the Enquiry Committee and communicate the same. The letter was received by the convener on 30-1-2002. No response was received and the Enquiry Committee closed the proceedings on 25-1-2002.

xxii) On 29-1-2002 the employee received letter dated 27-1-2002 alongwith which was enclosed the summary of proceedings. The employee responded by letter dated 04-2-2002 pointing out that he is being condemned unheard.

xxiii) Vide order dated 04-2-2002 served on the employee on 20-2-2002, the employee was terminated.

7. The gist of the written statement of the management :

i) Dealing with the allegation that the employee was not permitted to cross-examine the witnesses, the management contended that the employee did not avail the opportunity of cross-examination. According to the management, the employee refused to cross-examine the witnesses and, therefore, he cannot be heard alleging breach of

principles of natural justice.

ii) Responding to the allegation of the employee that vide letter dated 25-1-2002 he placed on record that he was refused the opportunity of cross-examining the witnesses, the management contended that the said letter was received after the closure of the enquiry.

iii) While generally denying the allegations levelled by the employee, the management specifically contended thus :

“E) That, in compliance of the resolution referred above, inquiry committee came to be constituted and charge-sheet alongwith all necessary documents was duly served upon the appellant, asking him to submit the explanation to the convener, if he desires. The list of witnesses was also supplied to the appellant. Each and every document connected with the charges levelled against the appellant was timely supplied so as to extend full opportunity to set up his defence before the inquiry committee.

F) That, the management examined the witnesses before the inquiry committee on the charges levelled against the appellant, the appellant realized that nothing would come out in his favour in the cross-examination of the witnesses since they had stated

the correct facts regarding the charge. Therefore, the appellant indulged in a lengthy cross-examination of witness of Shri Ramesh Mankar, so as to prolong the proceeding of the inquiry committee. On perusal of cross-examination and inquiry proceeding, it would reveal that the appellant was not interested in cooperating with the inquiry committee to complete the proceeding and all sorts of tactics were employed to prolong the same.

G) That, the appellant, so as to create false ground of denial of opportunity, deliberately avoided and refused to cross-examination of the witness examined by the management. On perusal of the proceeding of inquiry committee meeting dated 23-1-2002, so also 25-1-2002, it is clear that the appellant refused to enter into the witness box and also to examine witnesses in support of his defence. Therefore, considering the deliberate and intentional act of non-cooperation, the members of the inquiry committee, in its meeting dated 25-1-2002, resolved to close the proceeding of the inquiry committee.

H) Thereafter, meeting of inquiry committee for recording findings and arriving at a decision on charges was convened on 11-2-2002 and the appellant and his representative preferred not

to attend the meeting. The two members of the inquiry committee considered the documents, evidence on record and upon deliberation on the same, recorded finding and decision on the charges, thereby recommending the punishment of termination of services of the appellant after recording the finding that charges have been proved.

I) That, the copy of finding and decision of inquiry committee was served upon the appellant, copy was also forwarded to the Education Officer (Sec.), Z.P. Nagpur, Dy. Director, as also to the Secretary/Chief Executive Officer, Gandhi Shikshan Sanstha, Dhapewada.

J) That, the managing committee of the respondent decided to implement the decision of the inquiry committee and resolved to dismiss the appellant from service w.e.f. 14-2-2002.

K) That, the averments made in memo of appeal are totally baseless and substanceless and are not substantiated by record. The stand taken in the amendment to memo of appeal is misconceived.

L) That, the proceeding of the inquiry committee cannot be at the whim and caprice of the appellant. The appellant must participate in inquiry committee with clean hands and disprove

the charges levelled against him and refrain to from indulging in raising false objections. The objection raised regarding non-receipt of documents by the appellant are only with a view to create ground of denial of opportunity. Upon consideration of the proceeding of inquiry committee, it is clear that the appellant was not interested in defending himself, but he was interested to raise false objections on technical grounds. The members of the inquiry committee always attempted to extend each and every opportunity to the appellant, and since he denied the opportunity, the ground raised in the present appeal regarding violation of principle of natural justice and denial of opportunity are of no assistance to substantiate the challenge raised in the appeal.”

8. The findings recorded by the Tribunal in the judgment impugned:

i) The Tribunal held that the school is recognised and the appointment of the employee was made in accordance with Section 5 of the Act and the Rules framed thereunder.

ii) The Tribunal noted that as many as 19 charges are levelled against the employee, to wit :

- 1) Misappropriation of Rs.1,06,310/-.
- 2) Falsely accusing the Headmaster of assault.
- 3) Lodging false complaint to defame the Headmaster.
- 4) Levelling allegations against the management in press conference.
- 5) Misbehaviour with parents.
- 6) Approaching the High Court with incorrect allegations without obtaining the prior permission of the Head of the management.
- 7) Misbehaviour with the Headmaster.
- 8) Supplying the school document to outsider.
- 9) Making entries of serious nature in the admission register and T.C. while alleging the charge of Head.
- 10) Accusing the Education Officer of incompetence.
- 11) Accusing the Headmaster of incompetence.
- 12) Lodging complaints against the Headmaster, school and the institution, with political party.
- 13) Exhibiting incompetence as regards the physical education course.
- 14) Failure to not explaining the question paper to students.
- 15) Failure to take extra class of 10th Standard students.
- 16) Failure to curtail the absence of students.

- 17) Failure to record attendance.
- 18) Failure to check the handwriting of the students.
- 19) Failure to pay attention to the students while teaching.

9. i) The Enquiry Committee held that Charges 4, 5, 6, 8, 11 and 12 are not proved and the remaining thirteen charges are duly proved. The Tribunal, therefore, proceeded to analyze the material on record in order to ascertain whether the thirteen charges are duly proved.

ii) Dealing with charge 1, which is the most serious of the charges, the Tribunal noted that the Superintendent of Police, Crime Branch, Nagpur enquired into the allegation of misappropriation and found no evidence against the employee.

iii) *De hors* the said opinion of the Crime Branch, the Tribunal found that the management did not adduce cogent and reliable evidence to bring home the charge of misappropriation.

iv) The Tribunal noted that the misappropriation alleged pertains to the academic sessions 1988-89 and 1989-90. It would have been more appropriate had the Tribunal considered the documentary evidence in some detail while recording a finding that there is no cogent evidence on record to prove the misappropriation. The

implication and effect of the failure of the Tribunal to consider the evidence in detail shall be considered at a later stage in the judgment.

v) The Tribunal's finding that charges 2, 3 and 4 do not survive for consideration since the employee was already punished withholding of one increment, is consistent with record. The Tribunal's finding that charge 5 is not proved, is equally unexceptionable. As regard the rest of the charges, the Tribunal noted that other than the bald statements of witnesses documentary evidence in the form of note books of students, the work load chart, the attendance roll, etc., is not produced on record. This finding cannot be faulted.

vi) The Tribunal has held that the enquiry is conducted contrary to rules and principles of natural justice. The Secretary Ms. Jaya Nemad, who issued the charge-sheet, participated in the enquiry proceedings and questioned the witnesses and further entered the witness box, is a finding recorded by the Tribunal. The Tribunal further found that the employee was denied the opportunity to cross-examine the witnesses and that the documents were supplied belatedly on 10-10-2001.

vii) While the management contended that the representative of the Enquiry Committee did not attend the meeting convened to consider the material on record and to come to an conclusion, the

Tribunal notes that the employee and his representative filed separate affidavits Exhibits 79 and 84/1 to the effect that the notice of the meeting was neither served on the representative nor on the employee. The Tribunal then notes the counter affidavit of the management and proceeds to consider the signature on the acknowledgment placed on record by the management purporting to be of the employee. The Tribunal notes that while the final meeting of the Enquiry Committee was held on 11-2-2002, the acknowledgment bears the postal seal dated 12-2-2002 and the signature of the employee is in English, whereas the employee claims that he has never signed in the said language. The Tribunal, therefore, records a finding that the enquiry report violated the mandatory provisions of Rule 37(6) of the Rules since the third member of the Enquiry Committee was excluded from the deliberations and that as a fact he is not a privy to the report.

viii) The Tribunal found that the employee was not permitted to cross-examine the witnesses and to adduce the evidence in defence, that the Secretary acted as the complainant and the adjudicator, that there was no deliberation amongst the three member of the Enquiry Committee before recording the finding of guilt, and the enquiry is, therefore, conducted in breach of the rules and the principles of natural justice.

ix) In so far as the relief is concerned, the Tribunal observed that since the employee specifically pleaded that he is not in gainful employment with any other institution since the date of his termination, the management ought to have refuted the said plea. On this premise, the Tribunal held the employee entitled to reinstatement, continuity in service and back-wages.

10. Mr. A.Z. Jibhkate, learned Counsel for the petitioners has a twin submission to canvass. The first submission is that the findings of the Tribunal, particularly qua the most serious charge, which is misappropriation, is perverse. Other submission is, that after coming to the conclusion that the enquiry is vitiated, the Tribunal ought to have permitted the management to conduct fresh enquiry. Mr. A.Z. Jibhkate contends that directly ordering reinstatement, and that too with continuity and back-wages, is a serious error. The submission that the management was entitled to conduct fresh enquiry is buttressed by relying on the following decisions :

i) (1996) 9 SC 322, State of Punjab & others v. Dr. Harbhajan Singh Greasy.

ii) 1997(3) MhLJ 235, Kashiram Rajaram Kathane v. Bhartiya R.B. Damle Gram Sudhar Tatha Shikshan Prasara Society and others.

iii) (2005) 8 SCC 264 U.P. State Spinning Co.Ltd. v. R.S. Pandey and another.

iv) 2007(3) MhLJ 753, Saindranath s/o Jagannath Jawanjal v. Pratibha Shikshan Sanstha and another.

v) 2017(4) All MR 821, The Head-Master, Vivek Wardhini Prathamik Vidyalaya vs. Alka Namdeo Khalatkar and others.

vi) 2018(5) MhLJ 149, Dnyaneshwar Govindrao Daigavhane v. Shubham Bahu-Uddeshiya Sanstha, Warddhamna and others.

vii) (1973) 1 SCC 813, The Workmen of M/s. Firestone Tyre and Rubber Co. of India (Pvt) Ltd. v. The Management and others.

viii) Unreported ruling in the matter of LPA 92/2009 in WP 3505/2008, The Shah Bahu Education Society, Patur + 1 v. Anis Khan Yunus Khan and others.

11. Mr. A.Z. Jibhkate, learned Counsel would further rely on the decisions (i) 2012 I CLR 391 (SC) Burdwa Central Co-operative Bank Ltd. and another v. Asim Chaterjee and others and (ii) 2012 III CLR 1025 (SC), Sanjay Nagar v. Delhi Tourism and Transportation Development Corporation Limited and another, in support of the submission that the standard of proof in departmental enquiry and in criminal proceedings is essentially different and there is no

impediment in conducting a departmental enquiry even after the conclusion of the criminal proceedings.

12. Mr. A.Z. Jibhkate, learned Counsel has placed on record a short note summarizing the material on record which substantiates the charge of misappropriation. In all fairness to Mr. A.Z. Jibhkate, I must record that he candidly submitted that he would join issues with the findings recorded by the Tribunal only on charge 1, since it is charge 1 which is extremely serious and can be the sole basis of the dismissal.

13. Mr. A.Z. Jibhkate submits, without prejudice to the contention, that the judgment of the School Tribunal must be set aside in entirety, that the employee is not entitled to back-wages. Mr. A.Z. Jibhkate would submit that the employee suppressed from the Tribunal that he was in gainful employment. Mr. A.Z. Jibhkate submits that the employee worked at the Radhika Bang D.Ed. College, Hingna from 27.7.2007 to 28.6.2009 and at the Sant Tajuddin Baba D.Ed. College, Waki from 10.11.2009 to 30.4.2011, and the said employment is suppressed from the Tribunal. Mr. A.Z. Jibhkate would emphasize that the Appeal was decided, after remand by this Court, 15 years after the termination order. The submission is, that although the Management

did not request the Tribunal to frame preliminary issues, in view of the claim of the employee that he was an Assistant Teacher, preliminary issues were framed and answered. This Court set aside the order of the Tribunal dated 23.6.2006 whereby the Appeal was dismissed. The extension of the submission is, that the Management is not responsible for the 12 years period which lapsed from the date of the termination till this Court directing that the Appeal be decided afresh, which is a circumstance relevant for deciding the entitlement to back wages.

14. Mr. S.S. Dhengale, the learned counsel for the employee would rebut the submissions emphatically. In so far as the charge of misappropriation is concerned, Mr. S.S. Dhengale submits that the charge was stale and the fact that the Management chose to wreck up the issue pertaining to the year 1988-89, in the year 2002 *ipso facto* is suggestive of falsity and malafides. Mr. S.S. Dhengale would draw my attention to the documents on record and certain portions of the cross-examination of witness Ramesh Mankar, to buttress the submission that the then Secretary Ramesh Mankar was working as the Head Master during the period 1988-89 while holding the office of the Secretary of the institution, contrary to the allegation that the employee was in charge of the post of Head Master during the said period. Mr. S.S.

Dhengale would support the finding recorded by the Tribunal that the enquiry was conducted in breach of the principles of natural justice. Mr. S.S. Dhengale submits that the Secretary Ms. Jaya Nemad acted as the Chief Executive Officer and participated in the enquiry despite being the author of the statement and allegations. It is further submitted that the documents were supplied belatedly and no opportunity was given to cross-examine the witnesses of the Management. Mr. S.S. Dhengale would further submit that the Enquiry Report is not a combined report of the three member committee, that the employee's nominee was excluded from the meeting in which the Enquiry Committee arrived at the decision and that the Enquiry Report, is therefore, contrary to the provisions of Rule 37(6) of the Rules. In response to the submission canvassed by Mr. A.Z. Jibhkate that the employee is not entitled to back wages, Mr. S.S. Dhengale would submit that the employee having discharged the initial burden, it was the responsibility of the Management to plead and prove that the employee was in gainful employment, which burden is not discharged.

15. Countering the submission that the Tribunal could not have directed reinstatement with back wages, and the only course available was to direct that the inquiry be conducted afresh, Mr. S.S. Dhengale

submits that a fresh inquiry is not the requirement of law, in every case. The record reveals that the disciplinary action is tainted with malafides, and considering the fact that the termination order is issued on 14.2.2002, it would not be appropriate to permit the Management to conduct a fresh enquiry. Mr. S.S. Dhengale further submits that such a course is not permissible in view of the superannuation of the employee w.e.f. 30.11.2019.

16. I have given anxious consideration to the rival submissions and with the assistance of the learned counsel, the record is scrutinized.

17. The Tribunal has held that the inquiry conducted is contrary to statutory provisions and the principles of natural justice. I am inclined to concur. The record reveals that the enquiry was an empty and ritualistic formality. The Tribunal has recorded a finding that the Chief Executive Officer Ms. Jaya Nemad, issued the statement of allegations, acted as the accuser, adjudicator and witness. While Ms. Jaya Nemad was not a privy to the decision making process, she has issued the statement of allegations, participated in the enquiry and has questioned the witnesses and has also deposed. Be that as it may, even *de hors* the said finding of the Tribunal, it is more apparent that the

employee was denied the opportunity of cross-examining Ms. Jaya Nemad and six other witnesses. The employee was more than justified in not cross-examining the witnesses in the absence of his representative, and there was no propriety in closing the enquiry in ugly haste. Moreover, the Enquiry Committee did not consider the request of the employee for permission to cross-examine the witnesses and to adduce evidence in defence, on the specious ground that the enquiry was closed on 25.1.2002. The Enquiry Committee was not justified in denying the opportunity of cross-examining the Management witnesses and to adduce evidence in rebuttal, particularly, since the next meeting of the Enquiry Committee, ostensibly to prepare the report, was held only on 11.2.2002.

18. The finding of the Tribunal that the Enquiry Report contravenes the mandatory provisions of Rule 37(6), is consistent with record. It is well settled that the said provision contemplates a combined report. While a combined report may not necessarily mean a single report, it is necessary that there must be deliberation amongst all the members of the Enquiry Committee before arriving at the finding. The finding of the Tribunal that the nominee of the employee was not a privy to the meeting dated 11.2.2002 in the absence adequate notice, is not

perverse and a reasonable view is taken on the basis of the evidence on record. In view of the decision of the Apex Court in ***Vidya Vikas Mandal & anr. vs. The Education Officer & Anr, 2007(2) All M.R. 461 (SC)***, which is consistently followed by this Court, I am of the considered view that the Enquiry Report is not in conformity with the mandatory provisions of Rule 37(6).

19. Adverting to the findings of the Tribunal that Charge-1, which is the most serious charge, to which charge alone Mr. A.Z. Jibhkate has restricted his submission, Mr. A.Z. Jibhkate is justified in submitting that the Tribunal fell in error in heavily relying on the clean chit given in the enquiry conducted by the police. The Management was well within its rights to adduce evidence and prove the misconduct and the Tribunal ought to have considered the evidence on record uninfluenced by the findings of the police enquiry. However, notwithstanding the said error, I am not inclined to interfere with the finding of the Tribunal since the charge was irrefutably stale when levelled. It was in 2002 that an issue of alleged misappropriation was wrecked up. The alleged misappropriation pertains to the period 1988-89. Mr. A.Z. Jibhkate did make a strenuous attempt to convince me that the delay is sufficiently explained and that the employee did accept the liability and promised

to make good the loss. Notably, the alleged admission, which according to the Management is reflected in the proceedings of the School Committee, pertains to the year 1995. Mr. A.Z. Jibhkate has invited my attention to several proceedings, all pertaining to the year 1995-96 and there is no conceivable explanation as to why the Management did not initiate any action against the employee till 2002.

20. In my considered view, an employee is bound to face difficulties in disproving an allegation of misappropriation which pertains to the period 1988-89, in the enquiry held in the year 2002.

21. Mr. A.Z. Jibhkate has invited my attention to several decisions to buttress the submission that having found the enquiry illegal, the Tribunal erred in not extending an opportunity to the Management to conduct a de-novo enquiry. Mr. A.Z. Jibhkate invites my attention to the observations of the Division Bench of this Court in ***Kashiram Rajaram Kathane vs. Bhartiya R.B. Damle Gram Sudhar Tatha Shikshan Prasari Society & Ors***, [1997(3) Mh.L.J. 235 in paragraph 18. Reliance is placed on the directions issued by the Division Bench of this Court in ***LPA 92 of 2009 (The Shah Babu Education Society & Anr vs. Anis Khan Yunus Khan)***. Mr. A.Z. Jibhkate then invites my attention to the

decision of the Apex Court in ***State of Punjab & Ors. vs. Dr. Harbhajan Singh Greasy, (1996)9 SCC 322***. The decision of the Apex Court in ***U.P State Spinning Co. Ltd. vs. R.S. Pandey & anr, (2005)8 SCC 264*** and in particular, the observations in paragraph 25 therein, is brought to my notice, in support of the submission that the proper relief that should be granted is to direct reinstatement with liberty to the Management to conduct a de-novo enquiry, by placing the employee under suspension. The decision of the Full Bench of this Court in ***Saindranath s/o. Jagannath Jawanjal..vs.. Pratibha Shikshan Sanstha and anr, 2007(3) Mh.L.J. 753*** and in particular paragraphs 44 to 47 thereof are pressed in service. Several other decisions rendered by learned Single Judges of this Court are brought to my notice.

22. Notably, in ***State of Punjab and Others***, the Apex Court articulated that in view of the superannuation of the employee, no useful purpose will be served in directing a de-novo enquiry. In present case, as noted supra, after the employee was reinstated in view of this Court's order dated 5.9.2018, he has superannuated on 30.9.2019. In this view of the matter, I am not inclined to extend an opportunity to the Management to conduct a de-novo enquiry, particularly, since the manner in which the enquiry was conducted

smacks of malafides and the only charge qua which the findings are seriously contested appears to be a stale charge pertaining to the period 1988-89.

23. In my considered view, the finding of the Tribunal that the order of termination is illegal and that the employee is entitled to reinstatement with continuity of service, is just and no interference is warranted in writ jurisdiction.

24. The next question which arises for consideration is whether employee is automatically entitled to back wages, and if entitled to back wages, is he entitled to full back wages.

25. Mr. S.S.Dhengale heavily relies on the decision of the Apex Court in *Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & ors, (2013) 10 SCC 324*, to buttress the submission that if the termination is found wrongful, reinstatement with continuity of service and back wages is normal rule. However, observations to the said effect are qualified by the observation that the employee is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not

gainfully employed or was employed on lesser wages and then if the employer wants to avoid payment of full back wages, the employer has to plead and prove that the employee was gainfully employed. It would be useful to reproduce paragraphs 38.1, 38.2 and 38.3 of the said decision, which read thus:

“38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus

lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments”.

26. Scrutinizing the pleadings on the anvil of the decision on which the employee heavily relies, I find that the Memo of Appeal does not incorporate a specific averment that the employee was not gainfully employed. All that is pleaded, is that the employee has no other source of income and he is the only bread earner in the family. This pleading is not sufficient to discharge the initial burden, and the Tribunal erred in observing that it was the burden of the employer to plead and prove that the employee was in gainful employment.

27. Certain pleadings are made, and documents and affidavits filed, for the first time in this Court, by the employee and the Management touching the issue of back wages and gainful employment. The rival contentions gave rise to disputed questions of fact, and it would be more appropriate if the Tribunal, rather than this Court, considers the entitlement of the employee to back wages.

28. In the light of the discussion supra, while the finding of the Tribunal that the order of termination is illegal and that the employee

is entitled to reinstatement with continuity is confirmed, the Appeal is remitted to the Tribunal for the limited purpose of ascertaining the entitlement, if any, and the extent or quantum to /of back wages. The Tribunal shall permit the parties to adduce evidence, if the parties so desire.

29. The submission of the Management that since the litigation is protracted for reasons not attributable to the Management, the employee is not entitled to full back wages, is left open for the consideration of the Tribunal in the light of the observations in paragraph 38.6 in *Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & ors.* The Tribunal shall further consider every relevant circumstance which has a bearing on the employee's entitlement, if any, to back wages and the quantum thereof.

30. The Tribunal is requested to decide the Appeal as expeditiously as possible, and in any event, within four months from the date of the communication of this order.

31. Without prejudice to the respective contentions, the Management shall provisionally deposit 20% of the back wages

ordered by the Tribunal, which deposit shall be subject to the findings recorded and directions issued by the Tribunal.

32. The Petition is partially allowed in the aforestated terms.

Judge

Adgokar/Belkhede