

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

WRIT PETITION NO.3164 OF 2008

Abdul Shakil Shakil Ahamad
 S/o. Abdul Rasheed
 Aged about : 45 years,
 Occupation : Nil,
 R/o. C/o. Modern Sports,
 Laskaribagh, Near Masjid, Nagpur. **PETITIONER**

...V E R S U S...

1. Husanmiyan Education Society,
 Nagpur, through its Secretary,
 Sheikh Shabbir Fidvi,
 Near Bohara Masjid,
 Itwari, Nagpur.
2. Shri Sheikh Ali Hussain Bhai,
 Convener, Enquiry Committee,
 Jamali English School,
 Shanti Nagar, Itwari, Nagpur.
3. The Education Officer (Secondary),
 Zilla Parishad, Nagpur. **RESPONDENTS**

 Mr. A. D. Mohgaonkar, Advocate for Petitioner.
 Mr. M. M. Agnihotri, Advocate for Respondent 1.
 Mr. N. R. Rode, AGP for Respondent 3/State.

CORAM: ROHIT B. DEO, J.

DATE OF RESERVING THE JUDGMENT : 06.04.2022
DATE OF PRONOUNCING THE JUDGMENT : 26.08.2022

JUDGMENT:

The petitioner is assailing the judgment dated 15.04.2008 rendered by the School Tribunal, Nagpur in Appeal STN 41/2006 whereby the appeal preferred by the petitioner challenging the termination order dated 09.11.2006, is dismissed.

2. The petitioner shall be referred to as the employee and the respondent 1 as the employer.

3. The facts, to the extent relevant, are thus:

(i) The employee was initially appointed as Peon vide appointment order dated 24.06.1989 on probation for period of two years, pursuant to permission obtained from the Education Department and after following the due procedure. The employee was promoted as Laboratory Attendant in the year 1993 and in June, 1999 was promoted as Junior Clerk.

(ii) According to the employee he was paid a meager consolidated salary in gross violation of the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (MEPS Act) and the Rules framed thereunder which constrained him to address letters cum

representations dated 29.08.2005 and 30.09.2005. The just demand of the employee that he be paid salary in accordance with law was not perceived in the right spirit and the Head Mistress of the school issued letter dated 19.09.2005 alleging for the first time that the employee did not maintain the service record and that he committed certain lapses.

(iii) The refusal of the employer to pay salary in accordance with law constrained the employee to approach the High Court in Writ Petition 778/2006 which was disposed of vide order dated 25.04.2006, in view of the statement of the employer that the employee shall be given pay scale as per Schedule-C of the MEPS Rules from June, 2006 onwards.

(iv) According to the employee after the High Court disposed of Writ Petition 778/2006 on the basis of the statement made by the employer, within a short period of 15 to 20 days, he was served with statement of allegations on 12.05.2006. The employee contends that since 1989 to 2006 the employer did not communicate any adverse remark nor was he issued any memo alleging improper discharge of duty and that it was only in view of the employee approaching the High Court, that the

victimization started.

(v) The employee addressed communication dated 19.05.2006 to the employer stating that he was on medical leave and while the allegations levelled in the charge-sheet are not acceptable, he would submit reply after joining duty.

(vi) The employer decided to hold an inquiry and addressed communication dated 23.06.2006 calling upon the petitioner to nominate his representative in the inquiry. The employee was further informed that Mr. Shaikh Ali Hussain Bhai and Mr. Pandurang Shrawanji Umredkar are appointed as Convenor and President Awardee Teacher – Member of the Inquiry Committee, respectively.

(vii) The employee appointed Mr. S. J. Sorte as his representative and the Inquiry Committee was constituted on 11.07.2006. Petitioner contends that he was served with charge-sheet dated 21.07.2007 along with which were enclosed few documents. However, certain relevant documents *inter alia* copies of letter dated 10.03.2005, 11.03.2005, 16.05.2005 and 23.05.2005 were not served despite the specific demand of the

employee.

(viii) According to the employee the inquiry which was conducted was farcical and the Member of the Inquiry Committee Mr. Pandurang Umredkar assumed the role of prosecutor. The employee further contends that the procedure adopted while conducting the inquiry clearly reveals that the fate of the employee was sealed and the inquiry was an empty formality.

(ix) The employee submits that the inquiry was closed on 17.10.2006 and summary of the proceeding was served and even that stage, the documents which were relied upon by the Inquiry Committee were not supplied to the employee.

(x) The employee submitted his reply/comments as regards the summary of the inquiry.

(xi) The nominee of the employee recorded a finding that the charges are not proved whereas the Awardee Teacher and the Convenor of the Inquiry Committee held the petitioner guilty and vide order dated 09.11.2006 the petitioner was terminated.

(xii) Petitioner preferred appeal under Section 9 of the MEPS Act (Appeal STN 41/2006).

(xiii) The learned Tribunal answered the preliminary issues in favour of the employee and held that the school is recognized and the employee was appointed in accordance with the provisions of the MEPS Act and the rules.

(xiv) The learned Tribunal dismissed the appeal on merits vide judgment dated 25.04.2008, which is impugned herein.

4. **Pleadings in Memo of Appeal:-**

(i) The employee emphasized that the disciplinary action was motivated and vindictive and that the employee was victimized for approaching the High Court.

(ii) The employee contended that he and his nominee preferred an application for supply of the documents on the basis of which the statement of allegations and the charge-sheet was issued. However, the relevant documents were not supplied which adversely affected the right of the employee to effectively defend

himself against the allegations.

(iii) The employee contended that he was not permitted to cross-examine the witnesses of the employer.

(iv) The summary/proceedings of the inquiry were not supplied at the end of the hearing.

(v) The constitution of the inquiry is in violation of Rule 36 (2) since no decision was taken by the Management to conduct an inquiry after the employee submitted the explanation to the charge-sheet.

(vi) The application preferred by the employee seeking permission to cross-examine the witnesses was rejected.

(vii) Rule 37 (4) mandates that the Convenor shall forward summary of the proceedings of the Inquiry Committee to the delinquent employee and grant time for further explanation. The employee was however, not granted such opportunity despite a specific request.

(viii) The mandate of Rule 37 (6) is that before imposing punishment, the summary of proceedings and the decision of the Inquiry Committee shall be forwarded to the employee and time shall be granted for furnishing explanation, which opportunity the employee was not given.

(ix) The inquiry conducted is farcical and the allegations are motivated, and are even otherwise not proved.

5. **Reply of the Employer in Appeal STN 41/2006:-**

(i) The employer denied that the discharge of duty by the employee was blemishless. The employer specifically contended that the employee's work and behaviour was not satisfactory and several complaints were received from the Head Mistress and the Management and others.

(ii) The disciplinary action against the employee has no nexus with the order passed by the High Court on the basis of the statement made by the employer that the employee shall be paid salary in accordance with law.

(iii) The employee was issued statement of allegations on 12.05.2006 and the employee did not furnish explanation within time.

(iv) The Management of the employer did pass a resolution to hold inquiry against the employee.

(v) All relevant documents were supplied to the employee. Certain relevant documents were kept available in the inquiry for the employee and his representative to inspect.

(vi) The employee denied that the employee was not permitted to cross-examine the witnesses of the Management.

(vii) The copies of the proceedings of the inquiry were supplied on meeting to meeting basis.

(viii) The employee used to disobey the orders of the Head Mistress and interfere in the interaction between the Head Mistress and the parents of the students.

(ix) The employee misbehaved with the Secretary of the

Management.

(x) The employee took photographs certain vital record without securing permission from the Head Mistress.

(xi) The employee used to leave the school without obtaining permission of the Head Mistress.

(xii) The employee did not maintain the record of the school properly.

(xiii) The Head Mistress issued the employee letters dated 15.04.2003 and 20.03.2005 which the employee refused to accept.

(xiv) The employee continued to work in the night school despite the withdrawal of permission by the Management.

(xv) The employee did not personally prepare important record of the school like cash-book, transfer certificates book and used to get the job done through other employees.

(xvi) The employee did not learn computer and typing.

(xvii) The employee used to misbehave with the members of the staff.

(xviii) The statement of allegations containing 12 charges were served on the employee to which he replied and after considering the reply in the Executive Body meeting dated 22.06.2006 the decision to hold an inquiry was taken.

(xix) In accordance with Rule 37, the charge-sheet along with the documents, the statement of allegations and the list of witnesses was sent to the employee by registered post which was duly received.

(xx) Every possible opportunity was given to the employee to defend himself. The contention of the employee that relevant documents were not supplied, that the employee was not permitted to cross-examine the witnesses etc. are falsified from the record of the inquiry.

6. I have not extracted the contentions of the employer

in response to the memo of appeal which attempt to demonstrate that the appointment of the employee was not in accordance with law in as much the employer is not challenging the findings rendered by the learned Tribunal on the preliminary issues, and in particular the findings that the employee was appointed in accordance with the provisions of the MEPS Act and the rules framed thereunder.

7. **Consideration by the Tribunal:-**

(i) I need not dilate on the consideration of the learned Tribunal of the preliminary issues and the finding recorded that the appointment of the employee was in accordance with Section 5 of the MEPS Act, since the said finding is not assailed.

(ii) The learned Tribunal noted that 12 charges framed against the employee broadly allege incompetency, negligence in discharge of duty and misconduct as contemplated under Rule 28 (5) of the rules. The learned Tribunal noted that the transfer certificates at serial 1001 to 1700, the inward and outward register, salary bills, cash and ledger books are held by the Inquiry Committee not to be written by the employee. The learned

Tribunal held that from the evidence on record it can be inferred that either the employee was incompetent or that he neglected to perform his duty.

(iii) The learned Tribunal held that the witnesses of the Management admitted to have written the transfer certificates at the behest of the Head Mistress. The learned Tribunal concluded that the Head Mistress was required to get the job done from some other person since the employee either refused or avoided to write or prepare the transfer certificate.

(iv) The charge that the employee did not write the account of the school from July 2004 till December 2004 is held proved on the basis of the admission of the employee.

(v) The charge that the employee misbehaved with the Secretary of the School on 11.03.2005 is held proved on the basis of part admission. Notably, the words attributed to the employee were “*Tumse Jo Banta Wo Karlo Maine Accounts Nahi Likhe Aur Nahi Likhunga*” (broadly translated *I have not written the account and will not write the account and you are free to do whatever you can*). What is held to be past admission is the statement of the

employee that he was asked by the Secretary of the school why he did not write the account from July, 2004.

(vi) The learned Tribunal held that the employee admitted that he took photographs and photocopies of the record. The learned Tribunal held that the employee has no right to continue in the employment since he has lost the confidence of the Management.

(vii) The learned Tribunal held that while some charges are indeed vague, charge 1, 5, 6 and 9 are specific and are duly proved.

(viii) The learned Tribunal held that since some of the charges are proved, the order of the dismissal does not suffer from any infirmity.

(ix) The learned Tribunal then considered the submission of the employee on the basis of the decision in ***Kashiram Rajaram Kathane v. Bhartiya R. B. Damle Gram Sudhar Tatha Shikshan Prasari Society and others*** 1997(3) *Mh.L.J.* 235, that since the Secretary of the Society who served the statement of allegations

also deposed as witness, the inquiry is vitiated due to personal bias. The learned Tribunal observed that since the Secretary of the Society was not Member of the Inquiry Committee, the decision in *Kashiram Rajaram Kathane supra* has no applicability.

(x) The learned Tribunal then noted the submission that the employee was not given the opportunity of cross-examining the witnesses. The learned Tribunal held that in view of the endorsement in the proceedings of the Inquiry Committee that the nominee of the employee has completed the cross-examination, there is no substance in the said submission.

(xi) The learned Tribunal held that since the employer has filed copy of the resolution at Exhibit-49, there is no merit in the submission that the Management did not resolve to hold an inquiry against the employee.

(xii) The learned Tribunal then considers the submission that the copies of the documents relied upon by the employer were not supplied to the employee. The learned Tribunal held that since the employee did not raise any objection that the documents which are referred to in the charge-sheet are not as a fact received

by him, the submission is unmerited.

8. **Submissions:-**

(i) Mr. A. D. Mohgaonkar would reiterate the submissions which did not find favour with the learned Tribunal.

(ii) Mr. A. D. Mohgaonkar would submit that the copies of the communications dated 10.03.2005, 11.03.2005, 16.03.2005, 22.03.2005 and 16.03.2003 were not supplied to the employee despite specific demand.

(iii) Mr. A. D. Mohgaonkar would submit that the Awardee Teacher acted as the prosecutor which *ipso facto* vitiates the inquiry.

(iv) Mr. A. D. Mohgaonkar would submit that the findings recorded by the Inquiry Committee including the finding qua the charges 1, 5, 6 and 9 held proved by the learned Tribunal, are perverse in as much as there is no supporting evidence.

(v) Mr. Makrand Agnihotri would submit that there is no

infirmity whatsoever, either substantive or procedure, in the conduct of the inquiry.

(vi) Mr. Makrand Agnihotri would submit that as many as 12 charges were framed which are broadly thus:

- a) Not performing the duties of the clerk*
- b) Misconduct and misbehaviour with the Headmistress*
- c) Refused to perform the official duty for which he was solely responsible*
- d) Refused the notices issued by Headmistress for his inaction*
- e) The Petitioner failed to prepare the accounts of school from July 2004 to December 2004*
- f) Abused the Secretary by using filthy language*
- g) Negligence in performing the clerical duties*
- h) Failed to prepare the Service books of employees*
- i) Clandestinely took photographs and photocopies of the official record.*
- j) Violation of management rules*
- k) Failed to prepare the Transfer Certificate of the School*
- l) Did not complete the courses of Computer and Typing.*

(vii) Mr. Makrand Agnihotri would submit that while the

charge-sheet was served on 12.05.2006, the employee did not submit reply to the charge-sheet.

(viii) Mr. Makrand Agnihotri would submit that while the employee examined four witnesses to wit, the Secretary, the Head Mistress, the Laboratory Attendant and the Peon, the employee examined himself on 09.10.2006 and then informed the Committee that he did not wish to examine any other witness.

(ix) The summary was duly forwarded to the employee on 18.10.2006 in accordance with Rule 37 (4) of the rules to which the employee submitted reply dated 01.11.2006.

(x) The inquiry concluded and the report was reserved for 03.11.2006.

(xi) The Convenor and the Awardee Teacher Member Mr. Pandurang Umredkar pronounced their joint finding on 03.11.2006 while the nominee of the employee Mr. S. J. Sorte recorded finding of innocence.

(xii) Mr. Makrand Agnihotri would submit that the learned

Tribunal has held charges 1, 5, 6 and 9 proved which are sufficient to warrant the punishment of dismissal.

(xiii) Mr. Makrand Agnihotri referred to the record of the inquiry to buttress the submission that the finding recorded by the learned Tribunal that the charges 1, 5, 6 and 9 are held proved, is unexceptionable and is supported by the evidence on record. Illustratively to prove charge (1) which alleges incompetency and negligence, the transfer certificates at serial 1001 to 1700, the inward and outward registers, salary bills, cash and ledger books which are shown not to be in the hand-writing of the employee, is sufficient material.

(xiv) Mr. Makarand Agnihotri then submitted that charge (5) which is that the employee did not write the account of the school from July 2004 to December 2004 is proved on the basis of admission in the cross-examination and the finding of the learned Tribunal does not suffer from any infirmity.

(xv) Mr. Makrand Agnihotri then submitted that charge (6) which is that the employee misbehaved with the Secretary of the Management is proved, on the basis of admission of the

employee. It is further submitted that the misbehavior with the Secretary is further proved by the evidence of the Laboratory Attendant Mr. Shabbir Saifee, who categorically stated that the employee abused the Secretary in filthy language. It is further submitted that in the absence of effective cross-examination, the evidence of Mr. Shabbir Saifee has gone unchallenged.

(xvi) Mr. Makrand Agnihotri would submit that the employee has admitted to have taken the photographs and photocopies of the official record which proves charge (9).

(xvii) Mr. Makarand Agnihotri then argues that Rule 36 does not mandate the documents shall be supplied along with the statement of allegations and that the employee replied to the statement of allegations without making a grievance that the documents were not supplied.

(xviii) Mr. Makarand Agnihotri would argue that the contention that the employee was prejudiced due to non-supply of relevant documents was not raised either before the Inquiry Committee or the learned Tribunal, and such contention may not be considered by the Court in exercising of writ jurisdiction.

9. **Consideration** -

(i) In the context of the submissions canvassed, it would be apposite to consider the seminal issue touching the fairness and the validity of the enquiry proceedings. The issue arises for consideration in view of the submission canvassed by Mr. A.D. Mohgaonkar that Mr. Umredkar, who was a Member of the enquiry committee, assumed the role of prosecutor and the axiomatic bias vitiates the findings recorded against the employee by the enquiry committee in the majority opinion. Mr. M.M. Agnihotri has relied on the decision of a learned Single Judge of this Court in ***Sukhadeo Vishwanath Garaje v. M/s. Food Corporation of India and others, 1989 Mh.L.J. 236*** in support of the submission that the fact that the enquiry officer has examined and questioned the witnesses or has cross-examined the witnesses does not *ipso facto* vitiate the enquiry as long as the delinquent employee is given opportunity to cross-examine the witnesses. Mr. M.M. Agnihotri would further draw support from the decision of the Hon'ble Apex Court in ***Workmen Employed in B and C Mills, Madras v. Management of B and C Mills, Madras, 1970 LLJ SC 126.***

(ii) In the present case, the employer did not appoint a

Presenting Officer. However, since neither the MEPS Act nor the Rules framed thereunder mandate the appointment of a Presenting Officer, the enquiry is not *ipso facto* vitiated. The question which nonetheless falls for consideration is whether Mr. Umredkar has assumed the role of prosecutor as would introduce an element of bias in the decision making process.

(iii) In ***Bharath Electronics Ltd. v. K. Kasi*, 1986 7 SCC OnLine Kar 30**, the Karnataka High Court extensively considered the contours of the role of the enquiry officer. The said decision of the Karnataka High Court having received the imprimatur of the Hon'ble Apex Court in ***Union of India and Others v. Ram Lakhan Sharma*, (2018) 7 SCC 670**, the relevant observations in the said decision may be extracted.

The Karnataka High Court articulates thus in ***Bharath Electronics Ltd.*** (supra) :

“8. One other ground on which the domestic inquiry was held invalid was that Presenting Officer was not appointed. This view of the Tribunal is also patently untenable. There is no legal compulsion that Presenting Officer should be appointed. Therefore, the mere fact that the Presenting Officer was not appointed is no ground to set aside the inquiry (see : *Gopalakrishna Reddy v. State of Karnataka*). It is true that in the absence of Presenting Officer if the inquiring authority plays the role of the Presenting Officer, the inquiry would be invalid and this aspect arises out of the next point raised for the petitioner, which I shall consider

immediately hereafter.

9. *The third ground on which the Industrial Tribunal held that the domestic inquiry was invalid was that the Enquiry Officer had played the role of the Presenting Officer. The relevant part of the findings read:*

"The learned Counsel for the workman further contended that the questions put by the enquiry officer to the Management's witnesses themselves suggest that he was biased and prejudiced against the workman. There has been no explanation as to why no Presenting Officer was appointed and as to why the enquiry officer took upon himself the burden of putting questions to the management's witnesses. The enquiry proceedings at Ext. A-6 disclose that after the cross-examination of the management's witnesses by the defence, the enquiry officer has further put certain questions by way of explanation, but from their nature an inference arises that they are directed to fill in the lacuna. The learned counsel for the management contended that the enquiry officer has followed the principles of natural justice and that the domestic enquiry is quite valid. I am of the view that the fact that the enquiry officer has himself taken up the role of the Presenting Officer for the management goes to the root of the matter and vitiates the enquiry,"

As far as position in law is concerned, it is common ground that if the inquiring authority plays the role of a Prosecutor and cross-examines defence witnesses or puts leading questions to the prosecution witnesses clearly exposing a biased state of mind, the inquiry would be opposed to principles of natural justice. But the question for consideration in this case is: Whether the Enquiry Officer did so? It is also settled law that an inquiring authority is entitled to put questions to the witnesses for clarification wherever it becomes necessary and so long the delinquent employee is permitted to cross-examine the witnesses after the inquiring authority questions the witnesses, the inquiry proceedings cannot be impeached as unfair. (See Munchandani Electric and Radio Industries Ltd. v. Their Workman.)"

(iv) In **Ram Lakhan Sharma** (*supra*), the Hon'ble Apex Court was further pleased to endorse the principles enumerated by the Division Bench of the Madhya Pradesh in **Union of India v. Mohd. Naseem Siddiqui**, *ILR 2004 MP 821*. The Madhya Pradesh High Court held that where the enquiry officer acts as the Presenting Officer, bias can be presumed. The relevant observations read thus :

“9. A domestic inquiry must be held by an unbiased person who is unconnected with the incident so that he can be impartial and objective in deciding the subject matters of inquiry. He should have an open mind till the inquiry is completed and should neither act with bias nor give an impression of bias. Where the Enquiry Officer acts as the Presenting Officer, bias can be presumed. At all events, it clearly gives an impression of bias. An Enquiry Officer is in position of a judge or adjudicator. The Presenting Officer is in the position of a prosecutor. If the Enquiry Officer acts as a Presenting Officer, then it would amount to Judge acting as the prosecutor. When the Enquiry Officer conducts the examination-in-chief of the prosecution witnesses and leads them through the facts so as to present the case of the disciplinary authority against the employee or cross-examines the delinquent employee or his witnesses to establish the case of the employer/disciplinary authority evidently, the Enquiry Officer cannot be said to have an open mind. The very fact that he presents the case of the employer and supports the case of the employer is sufficient to hold that the Enquiry Officer does not have an open mind.”

v) The Madhya Pradesh High Court summarised the principles which are fully endorsed by the Hon'ble Apex Court in

the following passage :

“16. We may summarise the principles thus:

(i) The Enquiry Officer, who is in the position of a Judge shall not act as a Presenting Officer, who is in the position of a prosecutor.

(ii) It is not necessary for the disciplinary authority to appoint a Presenting Officer in each and every inquiry. Non- appointment of a Presenting Officer, by itself will not vitiate the inquiry.

(iii) The Enquiry Officer, with a view to arrive at the truth or to obtain clarifications, can put questions to the prosecution witnesses as also the defence witnesses. In the absence of a Presenting Officer, if the Enquiry Officer puts any questions to the prosecution witnesses to elicit the facts, he should thereafter permit the delinquent employee to cross-examine such witnesses on those clarifications.

(iv) If the Enquiry Officer conducts a regular examination-in-chief by leading the prosecution witnesses through the prosecution case, or puts leading questions to the departmental witnesses pregnant with answers, or cross-examines the defence witnesses or puts suggestive questions to establish the prosecution case employee, the Enquiry Officer acts as prosecutor thereby vitiating the inquiry.

(v) As absence of a Presenting Officer by itself will not vitiate the inquiry and it is recognised that the Enquiry Officer can put questions to any or all witnesses to elicit the truth, the question whether an Enquiry Officer acted as a Presenting Officer, will have to be decided with reference to the manner in which the evidence is let in and recorded in the inquiry.

Whether an Enquiry Officer has merely acted only as an Enquiry Officer or has also acted as a Presenting Officer depends on the facts of each case. To avoid any allegations of bias and running the risk of inquiry being declared as illegal and vitiated, the present trend appears to be to invariably appoint Presenting Officers,

except in simple cases. Be that as it may.”

vi) In **Ram Lakhan Sharma** (*supra*), the Hon’ble Apex Court further referred to the following observations in **Workmen v. Lambabari Tea Estate (1966) 12 FLR 361** :

“The inquiry which was held by the management on the first charge was presided over by the Manager himself. It was conducted in the presence of the Assistant Manager and two others. The enquiry was not correct in its procedure. The Manager recorded the statements, cross-examined the labourers who were the offenders and made and recorded his own statements on facts and questioned the offending labourers about the truth of his own statements recorded by himself. The Manager did not keep his function as the enquiring officer distinct but became witness, prosecutor and Manager in turns. The record of the enquiry as a result is staccato and unsatisfactory.”

vii) In **Ram Lakhan Sharma** (*supra*), the Hon’ble Apex Court did emphasize that the question as to whether the enquiry officer, who is supposed to act independently, has acted as prosecutor or not, is a question of fact which has to be decided on the facts and proceedings of a particular case. The Hon’ble Apex Court held that since the High Court came to the conclusion that the enquiry officer himself led the examination-in-chief of the prosecution witnesses by putting questions, and acted as the prosecutor, and the capacity of independent adjudicator was lost,

the principle of bias shall come into play and the High Court was right in setting aside the dismissal orders.

viii) Certain observations of the learned Single Judge in *Sukhdeo Vishwanath Garaje (supra)* do suggest that the learned Single Judge took a view that it is competent for the enquiry officer to examine and question the witnesses and to cross-examine the delinquent employee, and the enquiry is not vitiated on that count. With due respect to the learned Single Judge, the proposition is formulated too broadly and must be restricted to the factual matrix. Even otherwise, in view of the authoritative enunciation of the Hon'ble Apex Court noted *supra*, I am not persuaded to fall in line with the articulation of the learned Single Judge in *Sukhdeo Vishwanath Garaje (supra)*.

ix) Mr. M.M. Agnihotri would heavily rely on the decision of the Hon'ble Apex Court in ***Workmen Employed in B and C Mills, Madras v. Management of B and C Mills, Madras*** to buttress the submission that the fact Mr. Umredkar examined the witnesses and cross-examined the employee leads to no inference of bias. It is discernible from the said decision, that the Senior Labour Officer who examined the witnesses, had no authority to record any finding on the basis of the evidence recorded by him and it

was the Mill Manager who was the authority competent to impose the punishment. The other aspect which weighed with the Hon'ble Apex Court was that what the Labour Officer had done was to take the statement of the worker and **to ask for clarification from him wherever necessary** (emphasis supplied). The observations in the said decision do not take the case of the employer any further. As I have noted supra, the 109 questions which were put to the employee by Mr. Umredkar were not intended to seek clarification. More importantly, in the context of the scheme of the MEPS Act and the Rules the decision making authority is the enquiry committee and the employer has no option but to implement the decision of the enquiry committee, as is apparent from the unambiguous language of sub-rule 6 of Rule 37, which reads thus :

“(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.” (emphasis supplied)

x) The manner in which Mr. Umredkar examined the witnesses of the management and cross-examined the delinquent employee may now be considered on the touchstone of the articulation of the Hon'ble Apex Court noted supra.

xi) The employer examined four witnesses, Mr. Sheikh Shabbirbhai Fidvi-the Secretary of the institution, Mrs. Munira Hussain-the Headmistress, Mr. Shabbir Saiffee-the Laboratory Attendant and Mrs. Geetabai-the Peon, and the employee examined himself. While the examination-in-chief of the employee was conducted by the defence representative Mr. Sorte, the member of the enquiry committee Mr. Umredkar cross-examined the employee. Mr. Umredkar conducted lengthy and searching cross-examination during the course of which he put 109 questions to the employee. Perusal of the cross-examination of the delinquent employee which is conducted by Mr. Umredkar leads to the irresistible conclusion that he abdicated the role of

independent adjudicator and donned the mantle of prosecutor. There is no gainsaying that the enquiry officer or member of the enquiry committee would be justified in putting certain questions to the witnesses in the quest for truth. However, the examination-in-chief of the witnesses of the employer which Mr. Umredkar conducted, was not to elicit clarifications or truth. The witnesses of the employer were put leading questions, from which the bias is clearly discernible.

xii) It would suffice if certain questions put by Mr. Umredkar to the witnesses of the employer are culled out as illustrations. Question 14 put to witness 1 Mr. Shaikh Fidvi was “was the delinquent employee giving due respect to the Headmistress?”. Question 40 was “whether the delinquent employee did not defraud the Government by working in Shivaji Night School and Jamali English School and drawing salary from both the institutions?”. Question 41 was “the delinquent employee was told to discontinue working at Night School, what had you to say?”

xiii) Witness 2 Mrs. Munira Hussain was put the following questions by the member of the enquiry committee Mr. Umredkar :

(a) Do you feel that the delinquent employee respected the instructions given by the Headmistress from time to time ?. By not acting on the instructions issued by the Headmistress, do you feel that the delinquent employee insulted Headmistress ?

(b) Since the delinquent employee was incompetent to perform his duty, did you take the help of other employee ?

(c) Do you not feel that by not responding to the oral and written instructions issued by the Headmistress, the delinquent employee has insulted the Headmistress, and such is the view of the superior madam (reference appears to be a lady member of the management) ?

(d) The delinquent employee was conversing loudly with the Secretary, were abuses heaped on the Secretary ?

(e) Did the delinquent employee take photographs of important record with his camera ?

xiv) Question 18 put by Mr. Umredkar to witness 3 Mr. Shabbir Saifee was “during the conversation between the delinquent employee and the secretary, could you hear the verbal altercation, the arrogant behaviour and the abuses ?” Pertinently, the said witness had answered question 17 which Mr. Umredkar put to elicit what transpired between the delinquent employee

and the Secretary, and in response to question 17 the witness did not state that abusive language was used. The witness was led and suggested the answer which Mr. Umredkar wished to bring on record. Mr. Umredkar then asked the witness whether he was helping the employee in the office work and the answer extracted was in the affirmative. This question was put in the context of the charge that since the employee was incompetent, his work was required to be done by the witness.

10. I have no hesitation in holding that the findings recorded by the majority of the enquiry committee, with the nominee of the employee dissenting, stand vitiated since Mr. Umredkar who along with the nominee of the management rendered the majority verdict of guilt, transgressed the “Laxman Rekha” and acted as the representative of the management and not as an independent adjudicator.

11. While the majority verdict held that all the twelve charges levelled against the employee stood proved, the Tribunal held charges 1,5,6 and 9 proved. Mr. A.D. Mohgaonkar and Mr. M.M. Agnihotri have taken me through the record and certain decisions are cited in the context of the rival submissions touching the

correctness or otherwise of the findings recorded by the Tribunal qua the charges which are held proved. Inasmuch as, I have held that the enquiry is vitiated due to manifest bias, I have refrained from delving deeper in the said submissions.

12. The next question which needs an answer is whether the employer is entitled to an opportunity of conducting fresh enquiry. In normal course, such opportunity could have been granted. However, in the factual matrix, I am not persuaded to grant an opportunity to the employer to conduct *de novo* enquiry, considering that the employee has superannuated. In ***State of Punjab & Ors. v. Dr. Harbhanjan Singh Greasy (1996) 9 SCC 322***, the Hon'ble Apex Court held that in view of the superannuation of the employee, no useful purpose will be served by directing a *de novo* enquiry.

13. For reasons spelt out supra, the order of termination dated 09-11-2006 is liable to be quashed, and I order accordingly. Since the petitioner has superannuated, the next question which needs consideration is the relief to which the employee is entitled.

(i) I note from the memo of appeal that the employee

has not specifically stated that he was not in gainful employment. While the failure to so assert in the memo of appeal can perhaps be explained by the short duration between the termination and the filing of appeal, the employee did not, even at a later stage in the proceedings, plead that he was not in gainful employment. The employee could have amended the memo of appeal or filed an affidavit asserting that he was not in gainful employment. Having observed thus, the management on its part made no effort to invite the Tribunal to consider the burden of proof by placing on record its stand that the employee was, as a fact, in gainful employment. In ***Shambhu Nath Goyal v. Bank of Baroda and others, (1983) 4 SCC 491***, the Hon'ble Apex Court observes thus :

“17.
 The management is thus seen to have been taking steps periodically to see that the dispute is not disposed of at an early date one way or the other. The blame for not framing an issue on the question whether or not the workman was gainfully employed in the intervening period cannot be laid on the Tribunal alone. It was equally the duty of the management to have got that issue framed by the Tribunal and adduce the necessary evidence unless the object was to make up that question at some later stage to the disadvantage of the workman as in fact it has been done. The management appears to have come forward with the grievance for the first time only in the High Court. There is no material on record to show that the workman was gainfully employed anywhere. The management has not furnished any particulars in this regard even before this Court after such a long lapse of time. The workman could have been

asked to furnish the necessary information at the earliest stage. The management has not resorted to that course. The workman was not expected to prove the negative. In these circumstances, we do not think that it would be in the interest of justice to prolong any further the agony of the workman whose power to endure the suffering of being out of employment for such a long time and to oppose the management Bank, a nationalised undertaking with all the money power at its disposal in this prolonged litigation is very limited by allowing the Bank to have the advantage belatedly sought in the application dated February 8, 1979 in an industrial dispute which arose to early as in 1965.”

(ii) In relatively recent decision of the Hon’ble Apex Court in *Allahabad Bank and others v. Avtar Bhushan Bhartiya, 2022 SCC OnLine SC 499* the principles elucidated in *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and others, (2013) 10 SCC 324* are extracted. Having considered the enunciation in *Deepali Gundu Surwase (supra)*, the Hon’ble Apex Court observes thus :

“32. Even if we apply the propositions enunciated by this Court in Deepali Gundu Surwase (supra), the Officer-employee may not be entitled to full back wages. This is for the reason that there is nothing on record to show whether he was gainfully employed after his dismissal from service. A careful look at the pleadings in the writ petition W.P No. 1403 of 2013 would show that he has not pleaded about his non-employment. Though in paragraphs 36 to 38 of his writ petition, the employee has pleaded about the sudden set back to his health in the year 2011 and the financial hardships he was facing,

there was no assertion about his non-employment. The employee had his pleadings amended after the dismissal of his appeal during the pendency of the writ petition. Even in the amended pleadings, there was no averment relating to his non-employment. Therefore, even if we apply the ratio in Deepali Gundu Surwase (supra), the employee may not satisfy the third proposition found in para 38.3 thereof.”

(iii) In ***Avtar Bhushan Bhartiya***, while the Hon’ble Apex Court did not accept the contention of the employee that he was entitled to full back-wages, the decision of the High Court awarding 50% back-wages to the employee was upheld on the premise that the High Court had struck balance which need not be upset.

(iv) The principles set out in ***Deepali Gundu Surwase*** (*Supra*) in paragraph 38 read thus :

“38. The propositions which can be culled out from the aforementioned judgments are:

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 averment 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.

38.4 The cases in which the Labour Court/Industrial Tribunal exercises power under [Section 11-A](#) of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5 The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under [Article 226](#) or [136](#) of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a

different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6 In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in [Hindustan Tin Works \(P\)Ltd. v. Employees.](#)

38.7 The observation made in [J.K. Synthetics Ltd. v. K.P. Agrawal](#) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three-Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman."

(v) Perusal of paragraph 38.3 would reveal that the Hon'ble Apex Court has categorically stated that ordinarily an employee whose services are terminated, and who is desirous of getting back-wages, is required to plead or at least make a statement before the adjudicating authority or the Court of first instance that he or she was not gainfully employed or was under employed. It is observed that once employee shows that he was not employed onus lies on the employer to specifically prove that the employee was gainfully employed and was getting the same or substantial similar emoluments.

(vi) I have noted supra that neither the employee nor the employer took pains to invite the learned Tribunal to frame an appropriate issue and to have the same adjudicated. However, since I have found that the termination is liable to be set aside in view of the egregious violation of the principles of natural justice, I am not inclined to remand the matter to the learned Tribunal to decide the quantum of back-wages, particularly since the litigation has dragged for fourteen years and the employee has superannuated. While the employee is not entitled to 100% back-wages, equitable balance can be struck by directing the management to pay the employee 50% of the back-wages for the

period from 09-11-2006 till the date of superannuation.

14. The petition is partly allowed in the afore-stated terms.

JUDGE

nikhare 1-20/adgokar