

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.7192 OF 2023

Bhagwan Sahebrao Sonawane

.... **Petitioner**

Versus

The General Manager BEST

.... **Respondent**

...

Mr. J. P. Kharge, for Petitioner.

Mr. Sagar Shetty, a/w. Ms. Shraddha Nagaonkar & Adv. Rouble Chhabra for Respondent.

...

CORAM	: SANDEEP V. MARNE, J.
RESERVED ON	: 16 JANUARY 2024.
PRONOUNCED ON	: 31 JANUARY 2024.

JUDGMENT:

By this Petition, Petitioner challenges Judgment and Order dated 24 August 2022 passed by the Industrial Court, Mumbai in Appeal (IC) No.55 of 2018, which was filed by him challenging the Part-I Award dated 07 April 2015 as well as the final Award dated 16 July 2017 passed by the 3rd Labour Court, Mumbai in Application No.3 of 2024.

2. Briefly stated, facts of the case are that Petitioner was appointed as bus driver in Respondent-Undertaking. On 18 May 2013, he was deputed to

drive bus having Route No. 138. While driving bus, an accident occurred where the bus dashed against the pedestrian lady at zebra crossing who injuries, which lead to her death. An FIR was registered against Petitioner on 18 May 2013 for offences punishable under Sections 279 and 304 of the Indian Penal Code, 1860 and Section 184 of the Motor Vehicles Act, 1988.

3. Petitioner was subjected to disciplinary enquiry by issuance of charge sheet dated 30 May 2013. In the charge sheet, Petitioner was accused of misconduct under clause 20(j) and 20(k) of the Regulations. The Inquiry Officer, after considering the evidence on record, submitted report holding that the pedestrian was responsible for the accident and therefore it was held that the charges under clause 20(j) and 20(k) were proved against him. After considering the evidence on record, the Inquiry Officer proceeded to pass order dated 12 July 2013 imposing penalty of dismissal from service on the Petitioner. He preferred First Appeal which came to be rejected by Deputy Depot Manager. Petitioner thereafter preferred Second Appeal which came to be rejected by committee of Deputy Chief Manager (Traffic) City and Deputy Chief Engineer (Depots).

4. The Petitioner approached Labour Court, Mumbai by filing Application under provisions of Sections 78 and 79 of the Bombay Industrial Regulations Act 1946 (**BIR Act**) challenging penalty of dismissal. The Application was numbered as Application (DIR-M) No.3 of 2014. The Labour Court framed preliminary issue of fairness in the enquiry and perversity in the findings recorded by enquiry officer and delivered Part-I Award dated 07 April 2015 holding that the enquiry is fair and proper and that the findings are not

perverse. The Labour Court thereafter delivered final Judgment and Order dated 16 June 2017 deciding the further issue of proportionality of the penalty and proceeded to dismiss the Petitioner's Application.

5. Aggrieved by the Order dated 07 April 2015 on preliminary issue and 16 June 2017 dismissing the complaint, Petitioner filed Appeal under Sections 84 and 85 of the BIR Act before Industrial Court. By Judgment and Order dated 24 August 2022, the Industrial Court has proceeded to dismiss the Appeal. Petitioner has accordingly filed the present petition challenging the decision of Labour Court and Industrial Court.

6. I have heard Mr. Kharge, the learned counsel appearing for Petitioner and Mr. Shetty, the learning counsel appearing for Respondent. Both the learned counsel have taken me through various findings recorded by the Labour Court and Industrial Court as well as the evidence produced on record. However, after perusal of the proceedings of enquiry, certain gross illegalities are noticed in the manner in which the disciplinary enquiry proceedings have been conducted. In the present case, the charge sheet dated 30 May 2023 was issued by the Mr. A. S. Bhor, the Deputy Depot Manager. The enquiry has been conducted by Shri. M. S. Decruz, Senior Traffic Officer. There is no dispute to the position that the Senior Traffic Officer has acted as Inquiry Officer, who is lower in rank than Deputy Depot Manager. This is clear from the fact that Deputy Depot Manager has acted as First Appellate Authority over the Order passed by the Senior Traffic Officer. The Inquiry Officer (Senior Traffic Officer) not only conducted enquiry but also passed the final penalty order of dismissal on the Respondent. The Inquiry Officer is

supposed to conduct enquiry and prepare report with his findings on each article of charge and submit the same for consideration to the Disciplinary Authority which, in the present case, was Deputy Depot Manager. However, the Inquiry Officer exceeded his role and proceeded to penalize the Petitioner by Order dated 12 July 2013. The Inquiry Officer did not prepare a separate report and passed a consolidated Order containing his findings on articles of charge as well as final penalty on 12 July 2013. Thus, the report of Inquiry Officer is incorporated in the final penalty order, as the Inquiry Officer himself acted as if he is the disciplinary authority.

7. The irregularity in the procedure does not stop here. The Deputy Depot Manager, who was the disciplinary authority and who had issued charge sheet to the Petitioner proceeded to act as First Appellate Authority and decided the First Appeal preferred by the Petitioner by Order dated 31 July 2013.

8. I had an occasion to deal with almost identical case in ***Balu Namdevrao Mule Vs. The General Manager, The BEST Undertaking***, Writ Petition No.2096 of 2010 decided on 12th September 2023. The case involved identical circumstances especially with regard to manner of conduct of enquiry. It would therefore be apposite to reproduce the relevant paragraphs of the Judgment as under:

12. As observed above, Respondent-Undertaking has adopted a strange method of authorising the Enquiry officer not just to conduct the enquiry but also to impose the punishment. Ordinarily, the Disciplinary Authority is the appointing authority of an employee. The Disciplinary Authority nominates an Enquiry Officer to conduct an enquiry and submit findings before the Disciplinary Authority, who invites representation of the delinquent employee to the findings recorded by the Enquiry Officer. If

Enquiry Officer holds the charge to be disproved, such finding is not binding on the Disciplinary Authority, who is empowered to disagree with the findings after following the prescribed procedure. If on the other hand, the charge is held to be proved by the Enquiry Officer, after considering the representation made by the delinquent employee, the Disciplinary Authority proceeds to pass final decision in the disciplinary proceedings. In the present case, however the Memorandum of Chargesheet was issued to Petitioner by Mr. S.G. Shetye-Assistant Traffic Superintendent, (Colaba). Enquiry is conducted by Shri. R.V. Shetty-Senior Traffic Officer (Colaba). The said Enquiry Officer did not prepare any report after conclusion of the enquiry. The last proceedings of the enquiry was conducted on 21 March 2003 when statement of Petitioner's defence representative was recorded. Within five days thereafter, the said Enquiry Officer proceeded to pass order dated 26 March 2003 imposing the penalty of dismissal from service. It must be observed that this procedure followed by Respondent-Undertaking is rather strange.

13 Apart from Enquiry officer punishing Petitioner, there is another glaring error in the manner of conduct of enquiry. The chargesheet was issued by Shri. S.G. Shetye-Assistant Traffic Superintendent, (Colaba). The enquiry is however conducted by the lower officer, Shri. R.V. Shetty-Senior Traffic Officer, Colaba. The penalty is also imposed by the said Enquiry Officer, Shri. R.V. Shetty-Senior Traffic Officer, Colaba. Thus, though the disciplinary proceedings are initiated by a higher officer viz. Assistant Traffic Superintendent, Colaba, the penalty order is imposed by lower officer i.e. Senior Traffic Officer, Colaba.

14 Mr. Pakale, has attempted to persuade this Court to ignore any objections to the manner of conduct of enquiry on twin grounds. Firstly, he has submitted that Petitioner never raised any objection about the procedure either during conduct of enquiry or during prosecuting the First Appeal and Second Appeal, as well as before the Labour Court. According to him, the Labour Court has recorded a specific finding in para-6 of its order that fairness of enquiry is admitted by the Petitioner. The second ground raised by Mr. Pakale is that the Sr. Traffic officer has been delegated power of punishing a driver by the General Manager. He has placed reliance on the relevant provisions of the Standing Order and Circular dated 1 January 2001 by which powers have been delegated. According to him, even though the General Manager is empowered to impose punishment on employees, he can also authorise other officers to exercise such power. As per the Circular dated 1 January 2001, Senior Traffic Officer has been delegated the power to take disciplinary action against the employees of Traffic Department. It is by relying on the said Circular dated 1 January 2001, that Mr. Pakale has urged before me that Senior Traffic Officer was empowered to impose punishment of dismissal from service.

15 While Mr. Pakale may not be entirely wrong in submitting that the

Senior Traffic Officer was empowered under the Circular dated 1 January 2001 to take disciplinary action and punish scheduled and non-scheduled employees of Traffic Department, his reliance on the said Circular does not solve the problem of initiation of disciplinary proceedings by higher officer and imposition of punishment by lower officer. As observed above, the disciplinary proceedings are initiated by Assistant Traffic Superintendent, Colaba who is higher in rank than Senior Traffic Officer. True it is that under Circular dated 1 January 2001, even the Sr. Traffic Officer is also delegated with the power to initiate disciplinary action and punish employees in the Traffic Department. However, once the Assistant Traffic Superintendent decides to exercise the power to initiate disciplinary action, he cannot thereafter let the lower officer, being Senior Traffic Officer to impose the punishment. In the present matter, the Assistant Traffic Superintendent has acted as a Disciplinary Authority and the Senior Traffic Officer has merely acted as the Enquiry Officer. Once the Assistant Traffic Superintendent decides to exercise the delegated power of conducting disciplinary proceedings, it is that very officer who ought to have taken final decision of punishing Petitioner. Delegation of powers in favour of multiple hierarchical officers would not mean that the powers in a case can be simultaneously exercised by all such officers. The Enquiry Officer has clearly exceeded his role in proceeding to impose penalty on the Petitioner. In my view, merely because the Enquiry Officer is also empowered under Circular dated 1 January 2001 to initiate disciplinary action and to punish employee of Traffic Department, he cannot exercise such delegated powers once the power is exercised by his higher officer being Assistant Traffic Superintendent.

16 The strange procedure of the Enquiry Officer acting as a Disciplinary Authority has led to one more problem in the present case. After the Petitioner was punished by the Senior Traffic Officer in acting in twin capacities of Disciplinary Authority and Enquiry Officer, the Appeal was heard by Assistant Traffic Superintendent, Colaba. As observed above, Assistant Traffic Superintendent, Colaba had initiated disciplinary proceedings against Petitioner by issuing chargesheet dated 24 February 2003. The very same authority later exercised the power of the Appellate Authority and decided Petitioner's First Appeal. Ironically on both the dates of issuance of chargesheet on 24 February 2003 and the date of decision of the First Appeal on 21 April 2003, the very same person, Shri. Sadanand Shetye was occupying the post of Assistant Traffic Superintendent, Colaba. Thus, in the present case, the authority who initiated the disciplinary proceedings by issuing chargesheet has acted as the Appellate Authority. This has essentially resulted in denial of right of Appeal to Petitioner. In service jurisprudence, it is axiomatic that the Appeal is heard and decided by an authority higher than the Disciplinary Authority. However, since the Respondent-Undertaking committed the first folly of allowing the Enquiry

Officer to pass the order of penalty, the second blunder of the earlier Disciplinary Authority deciding Petitioner's First Appeal has crept in.

17 The Apex Court in ***Suman Bala v. Union of India***, (2005) 12 SCC 388 has dealt with somewhat similar situation. It held:

4. Counsel for the appellant points out that disciplinary proceedings were initiated at the instance of the then Commissioner of Income Tax, Mrs S.K. Aulakh and the appeal preferred by the appellant was heard by the very same officer and therefore the whole proceedings are vitiated. We find some force in the contention. In view of the facts and circumstances, we set aside the orders passed by the Appellate Tribunal as well as the High Court and direct that the appeal preferred by the appellant be heard by the present Commissioner of Income Tax, Jalandhar and dispose of the appeal on merits in accordance with law.

20 The nature of illegality in conduct of enquiry in the present case, would go to the root of the matter. Initiation of disciplinary enquiry by higher officer, imposition of penalty by a lower officer and decision of First Appeal by the Officer who initiated disciplinary enquiry would completely vitiate the proceedings. The extent of illegality is so gross that absence of cause of prejudice to Petitioner cannot be cited for saving the proceedings. The decision of Appeal by the very same Officer who issued chargesheet would definitely cause prejudice to the employee, as his very right of Appeal is being denied. It therefore cannot be said that no prejudice is caused to Petitioner on account of the irregularities in the disciplinary proceedings. Therefore even if Petitioner was not to point out these illegalities in the manner of conduct of inquiry before Labour or Industrial Courts, this Court would not turn a blind eye to the same as the same go to the root of the matter.

9. Thus in ***Balu Namdevrao Mule***, this Court has held that Senior Traffic Officer, who acted as Inquiry Officer, ought to have restricted his role only to preparation of his report and reporting his findings on proof on charge or otherwise to the disciplinary authority. This Court also held that the Senior Traffic Officer exceeded his jurisdiction in punishing the Petitioner therein. This Court also held that officer, who issued charge sheet, could not have acted as First Appellate Authority.

10. There is yet another factor considered in the case of *Balu Namdevrao Mule* which appears to be similar in the present case. In *Balu Namdevrao Mule*, the Petitioner therein was punished by taking into consideration six past penalties. This Court held that, past penalties could not be taken into consideration without framing a specific charge to that effect. This court held in paragraph 23 and 24 as under :

23 There is yet another irregularity committed by the Respondent-Undertaking while punishing Petitioner. Perusal of the punishment order would indicate that the concerned Authority has taken into consideration six past penalties for the purpose of choosing the penalty of dismissal from service. It is well settled law by a Constitution Bench decision in *State of Mysore V/s. K. Manche Gowda*, AIR 1964 SC 506 that if past penalties are to be taken into consideration, a separate charge to that effect must be framed. The Apex Court held in para-8 and 9 as under :

8. Before we close, it would be necessary to make one point clear. It is suggested that the past record of a government servant, if it is intended to be relied upon for imposing a punishment, should be made specific charge in the first stage of the enquiry itself and, if it is not so done, it cannot be relied upon after the enquiry is closed and the report is submitted to the authority entitled to impose the punishment. An enquiry against a government servant is one continuous process, though for convenience it is done in two stages. The report submitted by the Enquiry Officer is only recommendatory in nature and the final authority which scrutinizes it and imposes punishment is the authority empowered to impose the same. Whether a particular person has a reasonable opportunity or not depends, to some extent, upon the nature of the subject-matter of the enquiry. But it is not necessary in this case to decide whether such previous record can be made the subject matter of charge at the first stage of the enquiry. But, nothing in law prevents the punishing authority from taking that fact into consideration during the second stage of the enquiry, for essentially it relates more to the domain of punishment rather than to that of guilt. But what is essential is that the government servant shall be given a reasonable opportunity to know that fact and meet the same.

9. In the present case the second show-cause notice does not mention that the Government intended to take his previous punishments into consideration in proposing to dismiss him from service. On the contrary,

the said notice put him on the wrong scent, for it told him that it was proposed to dismiss him from service as the charges proved against him were grave. But, a comparison of paras 3 and 4 of the order of dismissal shows that but for the previous record of the government servant, the Government might not have imposed the penalty of dismissal on him and might have accepted the recommendation of the Enquiry Officer and the Public Service Commission. This order, therefore, indicates that the show-cause notice did not give the only reason which influenced the Government to dismiss the respondent from service. This notice clearly contravened the provisions of Article 311(2) of the Constitution as interpreted by Court.

24 In the present case, neither a specific charge was framed nor any show cause notice was issued to him before imposing penalty indicating that the past penalties would be taken into account. Petitioner therefore did not have any opportunity before the punishing authority to represent in respect of the allegation of being punished repeatedly in the past. Mr. Pakale, has contended that Petitioner was charged with the misconduct under the Standing Order 20(j) which is “habitual or gross neglect of work or habitual or gross negligence”. He would contend that the Petitioner was thus specifically made aware in the chargesheet itself that, he was habitual in committing misconduct. In my view, mere use of the word “habitual” in Standing Order 20(j) would not fulfill the requirement of framing of a separate charge as per the judgment of the Constitution Bench in **K. Manche Gowda** (supra). This is more so because six instances highlighted in the penalty order, *prima-facie*, do not indicate that Petitioner was penalized in all six incidents. It appears that he has been suspended for one/two days on four occasions and was given warning on two occasions. Suspension is not a punishment. Whether warning was issued as a measure of penalty after conducting disciplinary proceedings is unknown. However, the punishing authority has erroneously described all six instances as “punishments”. If specific charge was to be framed against the Petitioner alleging punishment on six occasions in the past, he would have taken a defence that either or most of the incidents did not amount of punishments. Thus, non-framing of specific charge of past punishments has clearly caused prejudice to the Petitioner. Mr. Pakale, has placed reliance on judgment of this Court in **Rajaram Balu More** (supra) in support of his contention that the Respondent-Undertaking is entitled to take into consideration even past penalties. Firstly, the judgment of the Apex Court in **K. Manche Gowda** (supra) was apparently not brought to the notice of this Court. Secondly, the charge leveled against the Petitioner was relating to unauthorized absence from duty. It is in that context that this Court took into consideration his past conduct of absenteeism on five occasions. Therefore the past punishments imposed for unauthorized absence are taken into consideration to justify the penalty for habitual unauthorized absence. In the present case,

it is not the case of the Respondent-Undertaking that all these suspensions / warnings were for causing accidents. Therefore, reliance of Mr. Pakale on the judgment of this Court in ***Rajaram Balu More***, would not assist his case.

11. The facts in *Balu Namdevrao Mule* about manner of conduct of enquiry are exactly identical to the present case. In *Balu Namdevrao Mule* this Court set aside the Orders passed by the Labour Court and Industrial Court as well as dismissal order of Petitioner therein and remanded proceedings to the Inquiry Officer for preparation of report. The operative portion of the order in *Balu Namdevrao Mule* reads thus :-

- (i) The judgment and order dated 27 August 2007 passed by the Industrial Court, Mumbai in Appeal (IC) No. 100/2006 as well as judgment and order dated 12 January 2006 passed by the Labour Court Mumbai in Application BIR/MIC No.58/2002 are set aside.
- (ii) The order of dismissal dated 26 March 2003 as well as the orders of the First and Second Appellate Authority are also set aside.
- (iii) The proceedings of the enquiry are remanded to the Enquiry Officer for preparing a report based on evidence on record and for recording his finding on proof of charge. The Report of Enquiry Officer, if adverse to Petitioner, shall be supplied to him and his representation be called thereon. After considering the report of the enquiry officer and Petitioner's representation, the Assistant Traffic Superintendent-Colaba shall pass final Order in the proceedings. While doing so the Disciplinary Authority shall not take into consideration any past penalties in absence of a specific charge to that effect.
- (iv) Petitioner shall be reinstated in service and shall be treated as in deemed suspension from the date of dismissal till reinstatement. He shall be paid subsistence allowance as per Rules.

12. In the present case, no doubt the irregularities committed by Inquiry Officer in penalizing the Petitioner or disciplinary authority acting as First Appellate Authority are not specifically raised. However, it appears that the Petitioner had questioned fairness of the enquiry before the Labour Court.

The findings of the Labour Court on fairness of the enquiry were challenged before the Industrial Court. Therefore, it cannot be stated that Petitioner has not raised the issue of fairness of enquiry. Furthermore, since this Court has taken a view in the case of *Balu Namdevrao Mule* that Inquiry Officer cannot penalize the delinquent employee and that disciplinary authority cannot act as Appellate Authority, same view needs to be followed in the present case as well. In my view, therefore, in the present case also proceedings of the Inquiry are required to be remanded before the Inquiry Officer for preparation of report and for placement of such report before disciplinary authority for taking appropriate decision.

13. Both the learned counsel have pressed submissions on merits of charges, proportionality of penalty, etc. However, since the proceedings are being remanded before the Inquiry Officer, it is not necessary for this Court to record any finding on those contentions.

14. I accordingly proceed to pass following order :

- i) Order dated 07 May 2015 and 16 July 2017 passed by Labour Court in Application (BIR-M) No.3 of 2014 as well as Judgment and Order dated 24 August 2022 passed by the Industrial Court in Appeal (IC) No.55 of 2018 are set aside.
- ii) The Order of punishment of dismissal from service dated 12 July 2013 as well as Order of the First Appellate Authority dated 31 July 2013 and of Second Appellate Authority dated 10 September 2013 are also set aside.

iii) The proceedings of the enquiry are remanded to the Inquiry Officer for preparing a report based on evidence on record and for recording his findings on proof of charge. The Report of Inquiry Officer, if adverse to Petitioner, shall be supplied to him and his representation be called thereon. After considering the report of the Inquiry Officer and Petitioner's representation, the Deputy Depot Manager shall pass final Order in the proceedings. While doing so the Disciplinary Authority shall not take into consideration any past penalties in absence of a specific charge to that effect.

iv) Petitioner shall be reinstated in service and shall be treated as under deemed suspension from the date of dismissal till reinstatement. He shall be paid subsistence allowance as per Rules.

15. Writ Petition is accordingly disposed of.

SANDEEP V. MARNE, J.

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