

(2023) 09 BOM CK 0020
In the Bombay High Court
Case No : Writ Petition No. 2096 Of 2010

Balu Namdevrao Mule

APPELLANT

Vs

General Manager, The Best Undertaking

RESPONDENT

Date of Decision : 12-09-2023

Acts Referred:

Constitution Of India, 1950 — Article 311(2)
Bombay Industrial Relations Act, 1946 — Section 78, 79
Indian Penal Code, 1860 — Section 279, 304A

Citation : (2023) 09 BOM CK 0020

Hon'ble Judges : Sandeep V. Marne, J

Bench : Single Bench

Advocate : K.N. Shermale, Saurabh Pakale, Bhavesh Wadhwani, M.V. Kini

Final Decision : Allowed

Judgement

Sandeep V. Marne, J

1. By this petition, Petitioner challenges judgment and order dated 27 August 2007 passed by the Industrial Court, Mumbai dismissing Appeal (IC) No. 100/2006 filed by Petitioner challenging the judgment and Order dated 12 January 2006 passed by the Labour Court, Mumbai rejecting his Application (BIR/MISC.) No.58/2003. That Application was filed by Petitioner under the provisions of Sections 78 and 79 of the Bombay Industrial Relations Act, 1946 (BIR Act) seeking setting aside of order of dismissal from service.

2. Facts of the case are that Petitioner was appointed as a Bus Driver in Respondent-Undertaking in the year 1993 and was posted at Colaba Bus Depot. While driving bus No. 6733 on route 132/6 on 9 February 2003, an accident occurred at 19.50 hrs at Kalaghoda, Mumbai where a pedestrian was knocked down by front portion of the bus. Upon being admitted in the hospital, the pedestrian was declared dead.

3. An offence was registered against the Petitioner at Colaba Police Station vide

C.R. No.35/2003 under Sections 279 and 304A of the Indian Penal Code. Additionally, the Respondent-Undertaking initiated disciplinary proceedings against him by issuing Memorandum of Chargesheet dated 24 February 2003 alleging misconduct under Standing Order 20(j) of "habitual or gross neglect of work or habitual or gross negligence". The Chargesheet was issued by Assistant Traffic Superintendent (Colaba). Petitioner was placed under suspension by order dated 25 February 2003.

4. The disciplinary enquiry was conducted by Senior Traffic Officer (Colaba) in his capacity as Enquiry Officer. In the enquiry, various witnesses were examined. It appears that the enquiry was conducted upto 21 March 2003. It is not known whether the Enquiry Officer prepared any report or recorded his finding on the charge alleged against the Petitioner. It is also not known whether Petitioner's representation was called on any such report. It appears that, instead of Assistant Traffic Superintendent (Colaba) passing punishment order, the Enquiry Officer passed order dated 28 March 2003 and imposed the penalty of dismissal from service on the Petitioner.

5. Petitioner preferred Appeal against the penalty order which came to be rejected by Assistant Traffic Superintendent (Colaba) on 21 April 2003. Petitioner thereafter preferred Second Appeal before the Traffic Manager (South) on 21 April 2003. However, Petitioner has placed on record merely the proceedings of the Second Appeal of 23 May 2003 and the final decision taken by the Traffic Manager (South) is not placed on record. The General Secretary, Best Workers Union filed Application (BIR/MISC) No. 58/2003 before the Labour Court, Mumbai under Sections 78 and 79 of the BIR Act challenging the order of dismissal. In the meantime, Petitioner came to be acquitted in criminal prosecution by the Metropolitan Magistrate by judgment and order dated 19 August 2005.

6. The Labour Court rejected Petitioner's application by its judgment and order dated 12 January 2006. Petitioner challenged decision of the Labour Court before the Industrial Court by filing Appeal No. 100/2006, which came to be rejected on 27 August 2007. Aggrieved by the decision of the industrial Court, Petitioner has filed the present petition. The petition was admitted by this Court by its order dated 3 August 2010.

7. Mr. Shermale, the learned counsel for Petitioner would submit that the Labour Court has erred in rejecting the complaint despite absence of any cogent evidence on record in support of the charge. He would submit that no evidence was led in the enquiry by the Respondent-Undertaking to indicate any rash driving on the part of Petitioner. That Petitioner has been acquitted in respect of the same charge in the criminal prosecution and therefore the penalty of dismissal from service cannot be sustained. That the entire enquiry is held in gross violation of principles of natural justice. The Enquiry officer himself conducted the enquiry and also imposed punishment on Petitioner. That Enquiry officer should not have acted as a disciplinary authority. That therefore the entire proceedings of the enquiry are vitiated. Lastly, Mr. Shermale would contend that

the penalty imposed on the Petitioner is grossly disproportionate to the misconduct alleged. He would pray for setting aside of the order of the Labour Court. Mr. Shermale relies upon judgments of this Court in (i) Brihan Mumbai Electric Supply and Transport Undertaking Vs. Shri. Shivaji K. Shinde (WP-283/2020 decided on 16 January 2023 and (ii) Division Controller, M.S.R.T.C vs. Gulab Tanbaji Bhandarkar (1998) 3 ALL MR 1.

8. Per-contra, Mr. Pakale, the learned Counsel appearing for the Respondent-Undertaking would oppose the petition and support the order passed by the Labour Court. So far as the conduct of enquiry is concerned, he would invite my attention to the findings recorded by the Labour Court in para-6 of the order that fairness of enquiry was admitted by Petitioner before the Labour Court. That therefore Petitioner is now estopped from questioning the manner of conduct of enquiry. Nevertheless, he would submit that under the Standing Orders of the Respondent-Undertaking, though the General Manager is empowered to impose penalty on Petitioner, other Officers duly authorised by the General Manager are also empowered to punish the employee. He would rely on departmental Circular dated 1 January 2001, under which the General Manager has delegated the power of imposing punishment on Sr. Traffic Officer. He would therefore submit that there is no error in the Senior Traffic officer (Colaba) acting in twin capacities of Enquiry officer and Disciplinary Authority.

9. Mr. Pakale would further contend that mere acquittal in the criminal case does not have any bearing in the finding recorded in the domestic enquiry. He would take me through the various findings recorded by the Labour and industrial Courts to buttress his point that the Petitioner failed to prove that he was careful in driving the bus at the time when the accident occurred. That once occurrence of accident is proved by the Respondent-Undertaking, the burden of proving careful driving shifts on the driver. That Petitioner failed to discharge the said burden.

10. Mr. Pakale, would further contend that the scope of power of judicial review by this Court is extremely limited. There is sufficient evidence on record to prove charge against the Petitioner. This Court therefore would be loathe in interfering with the findings recorded in domestic enquiry. Mr. Pakale would further submit that the Respondent-Undertaking has rightly taken into consideration the past penalties imposed on Petitioner which shows that he has habitually indulged in misconduct. He would place reliance on the judgment of this Court in Rajaram Balu More V/s. General Manager, BEST Undertaking (Writ Petition No.962/2022 decided on 26 July 2023) in support of his contention that past penalties can be taken into consideration. Lastly, Mr. Pakale would submit that penalty imposed on Petitioner is commensurate with the gravity of misconduct, as Petitioner's act has resulted in the death of a pedestrian.

11. Rival contentions of the parties now fall for my consideration.

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.

18. The Respondent-Undertaking has thus committed series of errors in the matter of conduct of enquiry. The objections to these illegalities were admittedly not raised by the Petitioner either during conduct of enquiry or during prosecution of First and Second Appeals. Petitioner has not placed on record copy of the complaint filed before the Labour Court. However, from the order of the Labour Court it appears that Petitioner questioned the fairness of enquiry in his complaint filed before the Labour Court. The Labour Court has framed Issue No.1 about fairness of enquiry and answered the same in affirmative by recording following findings in para-6 of its judgment :

"6. In this case fairness of enquiry is admitted by the applicant. Hence, dispute only as to perversity of findings and punishment remained for my determination."

19. There is no discussion by the Labour Court as to how the conduct of enquiry was fair. In para-2 of the order, the Labour Court has recorded specific contention of Petitioner that "it is its contention that the enquiry conducted by him is not fair and proper". Therefore, the question as to how admission on the part of the Petitioner is inferred by the Labour Court begs an answer. Once the point of absence of fairness in the enquiry was specifically raised by the Petitioner, the Labour Court ought to have discussed the said issue and then recorded its finding. In my view, the Labour Court has skirted the said issue by erroneously assuming an admission on Petitioner's part about fairness of enquiry. The issue of improper holding of enquiry was also raise before the Industrial Court, but the objection is rejected holding that Petitioner was given full opportunity in the enquiry. However the Industrial Court has also missed the errors discussed herein.

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.

21. So far as the finding of guilt recorded in the domestic enquiry is concerned, the Labour Court has held that once the accident is established, then the burden of proving that the accident was not on account of rash and negligent driving was on Petitioner.

In my view, occurrence of an accident was an admitted position of account of which the chargesheet was issued. Occurrence of accident was not required to be proved by the Respondent-Undertaking. It was never denied by anyone. The allegation against the Petitioner in the chargesheet was rash and negligent driving. Therefore, the burden of proving that the Petitioner was driving in a rash or negligent manner was on the Respondent-Undertaking. It has come on record that the pedestrian was crossing the road on zebra crossing. That the traffic lights were not functioning at the spot. Thus, it is not a case where the Petitioner has jumped the signal which has resulted in the accident. The Labour Court has however shifted the entire burden of proving innocence on Petitioner by holding that he failed to prove exactly how the accident happened and he was not negligent. The scope of judicial review over findings recorded in domestic enquiry is in extremely narrow compass. The Courts and Tribunals are justified in interfering with such findings only where a case of perversity or total absence of evidence is made out. However, since the proceedings will have to be remanded to the Disciplinary Authority, it is not necessary to delve deeper into the issue of availability of evidence to punish Petitioner.

22. Petitioner is also acquitted in the criminal case involving similar/identical charge. It is well established principle that acquittal recorded in criminal trial, has no significance to the findings recorded in the domestic enquiry. That the purpose of conducting two proceedings being entirely different, acquittal in criminal trial would have no consequence on the punishment imposed in the domestic enquiry. The burden of proof in the two sets of proceedings is also entirely different. While the charge in the criminal case is to be proved beyond reasonable doubt, an employee can be held guilty in a domestic enquiry on touchstone of preponderance of probabilities. Therefore mere Petitioner's acquittal in the criminal cases would not entail his exoneration in the domestic inquiry.

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.

25. Coming to the last aspect of proportionality of punishment, I am not at this juncture going into that issue since the proceedings will have to be remanded for passing of penalty order afresh.

26. After considering the entire conspectus of the case, I am of the view that the penalty of dismissal cannot be sustained. There is gross violation of principles of natural justice in the matter of conduct of the disciplinary proceedings on the part of the Respondent-Undertaking. Since the disciplinary proceedings were initiated by the Assistant Traffic Superintendent, the enquiry officer (Sr. Traffic Officer) ought to have restricted his role only in preparing his report and recording his findings on proof of charge or otherwise. He has exceeded his jurisdiction in punishing Petitioner. The Assistant Traffic Superintendent proceeded to hear Petitioner's first appeal ignoring the fact that he was the Disciplinary Authority who has issued the chargesheet. In these circumstances, the proceedings are required to be 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, is required to be supplied to him and his representation needed to be invited. After considering

the report of the enquiry officer and Petitioner's representation, the Assistant Traffic Superintendent-Colaba will have to pass the final Order in the proceedings. For observing this procedure, Petitioner will have to be reinstated in service by setting aside the penalty order. However since penalty of dismissal is being set aside for non-observance of principles of natural justice, Petitioner cannot get backwages and he will have to be treated as being in deemed suspension. He will however be entitled to be paid of the subsistence allowance.

27. I accordingly proceed to pass the following order :

ORDER

(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.

28. Writ Petition is accordingly allowed. Rule is made partly absolute in above terms. There shall be no orders as to costs.