

(2014) 04 BOM CK 0170

In the Bombay High Court

Case No : Writ Petition No. 9310 of 2013 and Civil Application No. 2010 of 2014

Manohar Pandit Marathe

APPELLANT

Vs

President, Sharda Vidya Prasarak Mandal and Others

RESPONDENT

Date of Decision : 01-04-2014

Acts Referred:

Constitution of India, 1950 — Article 136, 227
Industrial Disputes Act, 1947 — Section 11A, 15
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 11

Citation : (2014) 4 ABR 469 : (2014) 5 ALLMR 116 : (2014) 6 BomCR 62 :
(2014) 4 MhLj 556

Hon'ble Judges : R.V. Ghuge, J

Bench : Single Bench

Advocate : S.P. Brahme, Advocate for the Appellant; A.N. Kakade, Advocate for
Respondent Nos. 1 and 2, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Ravindra V. Ghuge, J.—Heard the learned Advocates for the respective sides at length. Rule. Rule made returnable forthwith and heard finally by the consent of the parties. Grievance of the petitioner is that he was terminated on 20/01/2009, which was challenged by preferring an appeal before the School Tribunal bearing No. JAL/11/2009. The School Tribunal, by its judgment and order dated 20/09/2013, concluded that Rule 36 and 37 of the M.E.P.S. Rules, have not been followed in conducting the enquiry against the petitioner. The enquiry was, therefore, quashed and set aside.

2. In the operative part of the impugned order, the employer has been granted the liberty to either give up the de novo enquiry and grant all reliefs to the petitioner or to conduct a de novo enquiry. Option was also given to the employer to suspend the petitioner pending the de novo enquiry, if so opted for. However, the employer was directed to first reinstate the petitioner in employment and then to place him under suspension, if so preferred and in the

event of conducting a de novo enquiry.

3. Grievance of the petitioner, therefore, is that from the date of termination i.e. 20/01/2009, till the date of re-instatement and suspension, back wages need to be paid since the respondent employer cannot be granted an opportunity to take advantage of its own wrong. As an alternative submission, the petitioner contends that the suspension be relegated back to the date of first dismissal and the suspension allowance be therefore paid till 18/11/2012. It is not in dispute that the petitioner has been reinstated on 18/11/2012 and has been immediately suspended on the same date.

4. The petitioner has placed reliance upon the judgment of the Hon"ble Supreme Court in the case of Vidya Vikas Mandal and Another Vs. The Education Officer and Another, . Attention of this Court is drawn to paragraph Nos. 8 and 9 of the said judgment, which read thus:-

8. As rightly pointed out by the learned Counsel for the appellants, Rule 37(6), which is mandatory in nature, has not been strictly complied with. The Inquiry Committee comprising of three members, as already noticed, only one member nominated by the Management has submitted his Enquiry report within the time stipulated as per Rule 37(6) and admittedly, the other two members nominated by the employee and an independent member have not submitted their report within the time prescribed under Rule 37(6). However, the learned Judges of the Division Bench, though noticed that the two members out of three found the employee not guilty, failed to appreciate that the said findings by the two members of the Committee were submitted after the expiry of the period prescribed under Rule 37(6). In our opinion, the report submitted by individual members is also not in accordance with the Rules. When the Committee of three members are appointed to enquire into a particular matter, all the three should submit their combined report whether consenting or otherwise. Since the report is not in accordance with the mandatory provisions, the Tribunal and the learned Single Judge and also the Division Bench of the High Court have committed a serious error in accepting the said report and acted on it and thereby ordering the reinstatement with back wages. Since the reinstatement and back wages now ordered are quite contrary to the mandatory provisions of Rule 37(6), we have no hesitation in setting aside the order passed by the Tribunal, and learned Single Judge and also of the Division Bench of the High Court. In addition, we also set aside the order passed by the Management based on the report submitted by the single member of the Committee, which is also quite contrary to the Rules.

9. In view of the order now passed by this Court, the Rule 36(2) is now to be invoked and as per the said Rule, one member from amongst the members of the Management is to be nominated by the Management or by the President of the Management if so authorised by the Management and one member is to be nominated from amongst the employees of any private school and the third member to be chosen by the Chief Executive Officer from the panel of teachers

on whom State/National Award has been conferred. We direct the Management of the School to constitute the Committee in accordance with sub-rules (i), (ii) and (iii) of Rule 36(2)(a) to go into the matter afresh. The respondent No. 2, the employee, will be now treated under suspension and he will be entitled to the subsistence allowance as per rules with effect from the date of termination of his services. The inquiry shall be completed by the Committee within a period of six months from the date of their nomination/Constitution.

5. The petitioner, therefore, submits that in the light of the view taken by the Apex Court in Vidya Vikas Case (supra), the respondent employer be directed to treat the petitioner employee as being under suspension and pay him subsistence allowance as per rules w.e.f. the date of his termination. It is further contended that this would take care of the forceful unemployment caused to the petitioner by the illegal acts of the respondent employer.

6. It is also submitted that since the enquiry has been set aside and the dismissal order has also been set aside the respondent employer either has to treat the petitioner in employment from 20/01/2009 till 18/11/2012 or to treat him under suspension for the said period. Mr. Brahme, therefore, strenuously contends that in any given situation, the petitioner cannot be deprived of any relief for the said period as it would mean that the petitioner is made to starve in that period. He contends that if such liberty is granted to the respondent of not compensating the petitioner for the above said period, it would mean granting liberty to the respondent to resort to an act of unjust enrichment.

7. Mr. Kakade, the learned Advocate on behalf of the respondent employer contends that the Apex Court in the case of Vidya Vikas Mandal (supra) has considered that the Tribunal had granted back wages to the employee. The learned Judges of the Single Bench as well as of the Division Bench of the High Court, which dealt with the said case, had also granted back wages from the date of dismissal till placing of the said employee under suspension for conducting a de novo enquiry. He, therefore, canvasses that the Apex Court had finally concluded that the Tribunal, the learned Single Judge and so also the learned Division Bench of the High Court had committed a serious error in ordering reinstatement with back wages to the employee. He submits that the said judgment indicates that back wages were not to be granted in such situation.

8. Mr. Kakade has further submitted that in the instant case, the petitioner was not placed under suspension when the first enquiry was conducted. He was dismissed from employment by way of punishment on 20/01/2009. The Tribunal, in the impugned judgment, neither granted back wages to the petitioner, nor directed the respondent to treat the period of first dismissal till re-instatement as a period of suspension. Mr. Kakade, therefore, submits that the facts of the instant case are totally distinct and distinguishable from the facts emerging from the Vidya Vikas Mandal's Case (supra).

9. Mr. Kakade has further submitted that a de novo enquiry has already been

commenced as per the order of the Tribunal. The employer has preferred to place the petitioner under suspension initially by reinstating him as per the directions of the Tribunal on 18/11/2012 and thereafter immediately suspended him on the same date so as to conduct the de novo enquiry. He places reliance upon the judgment of this Court in the case of Shri Shriprakash Chandmal Bora and President of Shree Rangadas Swami Shikshan Vikas Mandal and Mr. Anil Mhatarba Viswhwasrao Head Master, Kamaljadevi Secondary and Higher Secondary Vidyalaya Vs. Shri Mutyal Vilas Rambau, .

10. He further states that the facts in the Rangdas case (supra) are identical to the facts of this Case. He, therefore, has drawn my attention to paragraph Nos. 10, 11, 14 and 15 of the said judgment, which read thus:-

10. In the present case, it must be borne in mind that the enquiry has been set aside since the procedure adopted by the Enquiry Committee was violative of the principles of natural justice as well as Rule 37 of the MEPS Act. Thus, from the very inception itself, the enquiry was vitiated. Admittedly the employee in the instant case was not under suspension when the enquiry was held against him. It must also be borne in mind that the Tribunal is a creature of the Statute.

11. It is now well settled that a Tribunal which is appointed under a Statute cannot traverse beyond the powers conferred upon it under the Statute. The only powers that the School Tribunal can exercise are contained in Section 11 of the MEPS Act. Any directions given by the Tribunal beyond the scope of the powers conferred u/s 11 of the MEPS Act would mean that the Tribunal has acted in excess of the jurisdiction conferred upon it. Therefore, in my view, the School Tribunal, Pune, cannot be faulted for directing reinstatement of the employee. Had the respondent No. 1 been under suspension while the enquiry had proceeded against him, it may have been possible to accept the submission of Mr. Mhaispurkar that while setting aside the enquiry, the School Tribunal should have restored status-quo ante. The delinquent employee could then have been continued under suspension. However, in the present case since the respondent No. 1 was not placed under suspension when the enquiry was in progress, he cannot be placed in a position worse than what he was in prior to the dismissal order being passed. The directions of the School Tribunal, therefore cannot be faulted.

14. In the case of Vidya Vikas Mandal and another (supra), the employee was not suspended during the progress of the earlier enquiry. However, on setting aside the enquiry the Supreme Court directed that the employee should be placed under suspension. The directions of the Supreme Court contained in this judgment have obviously been passed in exercise of its jurisdiction under Article 136 of the Constitution Of India. The Judgment does not in any manner state that the Tribunal could have directed suspension of the delinquent employee. Therefore, the submission of Mr. Mhaispurkar cannot be accepted. In my opinion, the order of the School Tribunal cannot be faulted.

15. However, while considering the submissions on behalf of the petitioners under Article 227 of the Constitution of India, it may not be beyond the purview of this Court to pass certain directions while disposing of the Writ Petition. In these circumstances, in my view, it would be appropriate to dispose of the Writ Petition as follows:-

(i) The petitioners will reinstate the respondent No. 1 notionally with continuity of service immediately.

(ii) The petitioners are at liberty to issue an order of suspension pending a fresh enquiry. If such an order is passed, the petitioners shall pay subsistence allowance in accordance with the MEPS Act and Rules framed thereunder.

(iii) The petitioners are at liberty to hold a fresh enquiry after constituting an Enquiry Committee in accordance with the MEPS Rules.

(iv) In case the respondent No. 1 is exonerated of the charges in the fresh enquiry, the petitioners shall pay the back-wages as awarded by the School Tribunal in the impugned order within a month of the completion of the enquiry.

(v) If respondent No. 1 is found guilty of the misconduct allegedly committed by him, the petitioner-Management will decide whether the back wages should be paid to him as awarded by the School Tribunal, Pune.

11. I have given an anxious thought to the submissions of the petitioner as well as the respondent employer. The anxiety of the petitioner is quite evident from the fact that he has been made to suffer rigours of litigation from the date of termination till the date of his subsequent suspension pending de novo enquiry. Mr. Brahme has, therefore, vehemently canvassed that a human being ought not to be treated in such a way so as to cause starvation on account of the illegal acts of the employer. He contends that the Tribunal has arrived at a conclusion that the employer had acted in an illegal manner and therefore the petitioner deserves to be compensated in some way.

12. This Court has taken a consistent view so far as "Doctrine of relation back" is concerned in matters of service jurisprudence. Right from the judgment in the case of Managing Director, A.P.S.R.T.C. Vs. S.P. Satyanarayana, , Desh Raj Gupta Vs. Industrial Tribunal IV, U.P., Lucknow and another, , Rambhau Vs. Maharashtra State Road Transport Corporation, and lastly in the case of Mumbai Cricket Association Vs. Pramod G. Shinde, . The entire case law on the point of "Doctrine of relation back" has been considered in the case of Mumbai Cricket Association (supra).

13. In the case of Rambhau Vs. Maharashtra State Road Transport Corporation, , it is held in paragraph Nos. 11,20,21 as under:-

11. The law as enunciated in the case of D.C. Roy and discussed above was accepted as correct in the subsequent decision of the Supreme Court in Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and

Others, . It is a Judgment delivered by three Judges, and Krishna Iyer, J. speaking for the Bench stated as follows:-

..... Jurisprudentially, approval is not creative but confirmatory and therefore relates back. A void dismissal of just void and does not exist. If the Tribunal, for the first time, passes an order recording a finding of misconduct and thus breathes life into the dead shell of the Management's order, predating of the nativity does not arise. The reference to Sasa Musa Sugar Works (P) Ltd. Vs. Shobrati Khan and Others, in Kalyani enlightens this position. The latter case of D.C. Roy V. Presiding Officer, Madhya Pradesh Industrial Court, Indore (supra) specifically refers to Kalyani's case and Sasa Musa's case and holds that where the Management discharges a workman by an order which is void for want of an enquiry or for blatant violation of rules of natural justice, the relation-back doctrine cannot be invoked. The jurisprudential difference between a void order, which by a subsequent judicial resuscitation comes into being de novo, and an order, which may suffer from some defects but is not still-born or void and all that is needed in the law to make it good is a subsequent approval by a tribunal which is granted, cannot be obfuscated.

Though the learned Judges agree with the law laid down in D.C. Roy's case the decision does not proceed further because the orders of termination in that case were set aside. Actually the point of "relation back, doctrine does not fall for consideration in the case of Gujarat Steel Tubes. Suffice it to say that the Judge, who delivered the judgment in the said case, was also one of two Judges who decided D.C. Roy's case.

20. An ingenious contention was also raised on behalf of the petitioner. The contention was that when the Court find the domestic enquiry to be defective, it is an unfair labour practice covered by any of the clause of Item 5 of the Fifth Schedule of the Industrial Disputes Act. The workman immediately becomes entitled to the relief of reinstatement with back wages. Instead the employer takes up the second chance to prove the misconduct and if he succeeds, the workman loses all the rights to get any relief. It is in these circumstances, it is urged that right to claim back wages arises at least from the date of dismissal to the date of the award. I will shortly point out that the submissions are devoid of any merit and must be rejected for more than one reasons.

21. Simply because the enquiry is held to be defective, it is not necessary that holding of such an enquiry would be an unfair labour practice. It is difficult to fathom which clauses of item 5 would be attracted. Again it would be premature to hold that the management indulged in unfair labour practice because it is always open for the employer to seek an opportunity to establish the misconduct before the Court or Tribunal by adducing evidence before it and justifying the order of dismissal or discharge. If the employer succeeds in establishing the misconduct it can never be said that they have indulged in any type of unfair labour practice. Hence, the question of reinstatement of the workman does not arise at the time the enquiry is held to be defective. In case the reinstatement

were to follow immediately upon the Court or Tribunal coming to the conclusion that the enquiry is defective, the right of the employer to prove the misconduct before it by adducing evidence would come to an end and that is not what is contemplated by the various decisions of the Supreme Court. The intention behind permitting the employer to establish the misconduct before the Court or Tribunal either for the first time or as a supplementary measure is well illustrated in the Supreme Court case of *The Cooper Engineering Limited Vs. Shri P.P. Mundhe*, . The relevant portion is extracted below to illustrate the point.

..... The reference involves determination of the larger issue of discharge or dismissal and not merely whether a correct procedure had been followed by the management before passing the order of dismissal. Besides, even if the order of dismissal is set aside on the ground of defect of enquiry, a second enquiry after reinstatement is not ruled out nor in all probability a second reference. Where will this lead to ? This is neither going to achieve the paramount object of the Act, namely, industrial peace, since the award in that case will not lead to a settlement of the dispute. The dispute, being eclipsed, pro tempore, as a result of such an award, will be revived and industrial peace will again be ruptured. Again another object of expeditious disposal of an industrial dispute (see S. 15) will be clearly defeated resulting in duplication of proceedings. This position has to be avoided in the interest of labour as well as of the employer and in furtherance of the ultimate aim of the Act to foster industrial peace.

It is in the aforesaid background the consistent view of the Supreme Court is that when a case of dismissal or discharge of an employee is referred for industrial adjudication, the Labour Court should first decide as a preliminary issue whether domestic enquiry has violated the principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer, there could be not difficulty. But when the matter is controversial, it must be decided as a preliminary issue. On that decision being pronounced, it will be for the management to decide whether it will adduce any evidence before the Labour Court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue. In case the employer adduces the evidence and proves the misconduct, the order of dismissal though passed earlier is to be upheld. The "relation back" doctrine must come to fore.

14. In the case of *Mumbai Cricket Association Vs. Pramod G. Shinde*, 2011 (I) CLR 745, it is held in paragraph Nos. 16, 17 and 19 that:-

16. In my view, the Labour Court has seriously erred in allowing the application. In a recent decision reported in *Engineering Laghu Udyog Employees" Union Vs. The Judge, Labour Court and Industrial Tribunal and Another*, a three Judges" Bench of the Hon"ble Supreme Court was dealing with the controversy about effective date of termination and doctrine of relation back. It was held that by virtue of section 11A of the Industrial Disputes Act, 1947 a wide power is conferred on the Labour Court to give appropriate relief in case of discharge or dismissal of workman. While adjudicating on a reference made to it, the Labour

Court if satisfied that the order of discharge and dismissal was not justified, it may, while setting aside the same, direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.

17. Thus, only in case a satisfaction is reached by the Tribunal that the order of the discharge or dismissal was not justified, same can be set aside. So long as the same is not set aside, it remains valid. But once where on the basis of the evidence brought on record in the domestic enquiry or by reason of additional evidence, the employer makes out a case justifying the order of dismissal, such an order of dismissal cannot be given effect to only from the date of the award but from the date of the order of punishment. Once the charges are proved before the Labour Court, the order of termination would relate back to the date of original order.

19. Once this legal position is taken into consideration, then, there is no scope for the arguments canvassed by Mr. Pathak. The order of dismissal remains and is not set aside. If upheld by the Court, it will be after the order of the Court in that behalf. However, it relates back to the date of punishment. If what is postponed is its coming into effect or operation, then, the argument of Mr. Pathak that it is held in abeyance must be straightway rejected. His argument would render doctrine of relation back completely nugatory. The Supreme Court has construed the provisions of the Industrial Disputes Act, 1947. The provisions give a right to the employer to adduce evidence before the Tribunal to justify its action in either cases, namely, where no domestic enquiry whatsoever has been held or where domestic enquiry has been held and the charges are proved thereat but the Court finds it to be defective. In the Hon'ble Supreme Court held that such a right is conferred by the provisions of Industrial Disputes Act and particularly section 11A thereof and that is how the Industrial and Labour Courts have been giving opportunity to the employer to adduce evidence after a conclusion is drawn that the domestic enquiry held by them is vitiated and the findings of Enquiry Officer are perverse, then, the dismissal order stands and is not set aside but what is postponed is the date of its coming into effect. That is the doctrine of relation back as explained in the foregoing paragraphs by the Hon'ble Supreme Court. To hold that the dismissal order is kept in abeyance because of such an exercise, would be contrary to law. Equally, such a situation cannot be held to be akin to a suspension pending domestic enquiry.

15. Doctrine of relation back has been considered to be an important part of service jurisprudence. The essence of the "doctrine of relation back" is that though an employee necessarily has to undergo rigours of litigation, he eventually stands compensated if the order of punishment is set aside. Entire back wages and benefits incidental and consequential to reinstatement are then available to an employee if the subsequent order of punishment in the form of dismissal or termination is held to be bad in law since it relates back to the initial

date of dismissal. It is, in this situation, that the "doctrine of relation back" has its operation.

16. In the Rangdas's case (supra), this Court has considered the ambit of service jurisprudence in situations where enquiries are quashed and set aside for being defective in law and the employer is ordered to conduct de novo enquiry. In tune with the law as laid down, this Court in the case of Rangdas (supra), therefore directed the employer to pay suspension allowance to the employee from the date of his suspension with liberty to hold a fresh enquiry. It is noteworthy that he was actually placed under suspension before his initial termination. The option of challenging the subsequent order of punishment in the event the charges are held to be proved and for claiming back wages from the date of first dismissal till the last order of punishment was also kept open for the employee to agitate upon before the School Tribunal.

17. Mr. Kakade, learned advocate for the respondent employer has made a statement that in the event, the charges are proved against the petitioner, the order of the Disciplinary Authority will be made effective from the first date of the termination of the petitioner i.e. 20/01/2009. He further states that in the event, the petitioner is exonerated of the charges levelled upon him by the Enquiry Committee comprising of 3 members, the petitioner, subject to the further proceedings, would be entitled for back wages from 20/01/2009 till the date of suspension 18/11/2012. Needless to state the decision would be by a combined report of all 3 members as has been held in Vidya Vikas Mandal's judgment (supra).

18. In the light of the above, this petition is partly allowed with the following directions:-

(a) In the event, the charges are proved against the petitioner and the employer decides to award punishment of dismissal, the petitioner shall be at liberty to challenge the said decision and can also raise a comprehensive challenge as regards back wages for the period 20/01/2009 till 18/11/2012. In that situation, the Tribunal would be legally bound to consider the challenge posed by the petitioner.

(b) In the event of such order of punishment, awarded to the petitioner, he shall also be at liberty to challenge the same on all grounds including disproportionate punishment in view of the contentions of the petitioner that the charges levelled upon him are trifle and minor in nature.

(c) The statement of the respondent recorded in paragraph No. 16 is a statement made to the Court.

19. The writ petition is, therefore, partly allowed and disposed of with the above directions. So far as the civil application is concerned, the grievance of the petitioner is that though the respondent employer has placed him under suspension, he is prevented from signing the muster roll probably with an

intention that the respondent later on plans to raise a plea that suspension allowance for the days of absence of the petitioner shall not be granted to him. Mr. Kakade, learned Advocate for the respondent employer makes a statement that notwithstanding whether the petitioner signs the muster roll or not, having placed him under suspension from 18/11/2013, the respondent employer shall pay subsistence allowance/suspension allowance to the petitioner under any circumstances. In light of the said statement, the apprehension of the petitioner is laid to rest and the civil application is therefore disposed off.