

(2018) 02 CAL CK 0040
In the Calcutta High Court
Case No : MAT 997, 1049 of 2017

MARIAN COEDUCATIONAL SCHOOL AND OTHERS	APPELLANT
Vs	
STEPHANIE FERNANDES MONDAL AND OTHERS.	RESPONDENT

Date of Decision : 28-02-2018

Acts Referred:

Constitution of India, 1950 — Article 12, 13, 14, 21, 141, 144, 311, 311(2)

Citation : (2018) 02 CAL CK 0040

Hon'ble Judges : DIPANKAR DATTA, J;PROTIK PRAKASH BANERJEE, J

Bench : Division Bench

Advocate : Rahul Karmakar, Gargi Goswami, Subhro Prokash Lahiri, Sanjay Kr. Baid

Final Decision : Disposed Of

Judgement

Protik Prakash Banerjee, J

1. Two appeals have been preferred from an order dated May 12, 2017 passed by the learned Single Judge in W.P. No.25600 (W) of 2016 [Stephanie

Fernandes Mondalâ?"vâ?"State of West Bengal and Others]. An order removing the writ petitioner from service, following disciplinary proceedings

initiated against her by the management of Marian Coeducational School (hereinafter referred to as â??the said schoolâ?), was under challenge in the

writ petition. After considering the submissions made by the parties, the learned Single Judge by the impugned order had been pleased to decline

jurisdiction on the ground of what was submitted to be an alternative remedy under the Code of Regulations of AngloIndian and Other Listed Schools,

1993 (hereinafter referred to as â??the Codeâ?), as amended, and relegated the parties to an arbitration by an arbitrator to be appointed by the

â??State Boardâ??, which was not a party respondent before His Lordship though

the State was impleaded as the respondent no. 1 in the writ petition.

2. MAT 1049 of 2013, has been preferred by the authorities of the said school, primarily on the ground that there is no existence of any provision for

arbitration under the Code at the relevant point of time when the dispute arose and further that there is an effective appellate remedy under the Code.

3. MAT 997 of 2017, on the other hand, was preferred by the writ petitioner, on several grounds, which may be difficult to appreciate without

considering the facts of the case, at least briefly. One common ground to both the sides was in respect of the lack of any provision for arbitration in

the Code.

4. It is not disputed that the said school is affiliated to the Council for Indian School Certificate Examinations, Delhi (ICSE) (hereinafter referred to as

the said Council). The Code referred to above applies to all listed schools. A listed school under Regulation 5(10) of the Code, as rightly held by

the learned Single Judge, is one which is not an Anglo Indian School, but which is recognized by the said Council for presenting candidates for the

examinations conducted by it. Therefore, the Code applies to the said school.

5. Under the provisions of Regulation 18, the Managing Committee of such schools can frame rules not inconsistent with the provisions of the Code.

The Code by way of Regulation 24 provides for the procedure for disciplinary action against confirmed staff. Staff as defined in the explanation

to Regulation 5 at clause (14) includes both teaching and non-teaching Staff. Regulation 24 is set out hereinbelow: -

24. Procedure for disciplinary action against confirmed staff :

(a) The Head will frame charges after giving sufficient warning on the basis of the allegation against a staff and will bring it immediately to the notice

of Managing Committee. No warning will, however, be necessary for gross misconduct.

(b) The Chairperson of the Managing Committee will appoint a person to conduct an enquiry.

(c) The employee shall be supplied with a copy of the charges together with a statement of allegations on which the charges are based.

(d) He/she will be required to submit within 10 days of the receipt of the charges and the statement of allegations a written statement to the Enquiring

Officer in his/her defence and also to state whether he/she desires to be heard in

person and adduce witnesses in his/her favour. He/ she will have the right to have another person to defend him/her, if so desired, to adduce defence evidence.

(e) The Enquiring Officer will prepare a report of the enquiry with his findings on each of the charges together with reasons thereof.

(f) The enquiry report will then be sent to the Chairperson of the Managing Committee who will issue a show-cause notice with proposed penalties, if

any, and the employee will be called upon to reply to the show-cause notice within a fortnight of the receipt of such notice. Thereafter, the Managing

Committee will take a final decision about the penalty, if any, that should be imposed.

Provided that any employee who is dismissed, removed or reduced in rank may, within a period of 90 days from the date of communication to him/her

of the order of such dismissal, removal or reduction in rank, appeal against such order to the Tribunal constituted under Section 24A.â??

6. Mr. Lahiri, the learned advocate appearing on behalf of the writ petitioner, took us through the facts of the case in some detail. The writ

petitioner's case is that she applied for leave from May 3, 2016 to May 13, 2016 to pursue her law studies. The said school refused such leave on

the ground of paucity of teachers and the heavy duty the writ petitioner was performing, which could not be easily distributed among the existing

teachers. The writ petitioner, admittedly, did not attend duty during the period for which she had sought leave to pursue studies in law, but instead

produced a medical certificate. It is not known what happened to such pursuit. The said school did not accept her medical certificate but proceeded to

hold a disciplinary proceeding against her by issuance of a chargesheet dated May 13, 2016, of which two charges pertained to the alleged

unauthorized absence and the medical certificate, while the third was in respect of an unconnected issue. It is the case of the writ petitioner that an

inquiry was conducted by an inquiry officer who was not appointed by the Chairperson of the Managing Committee in terms of Regulation 24(b) of

the Code but by the Secretary of the Managing Committee and that though she participated in the inquiry, she was not allowed to cross-examine the

witnesses produced by the school authorities in support of the charges. It is trite, therefore, that the disciplinary authority was not the inquiring

authority.

7. One of the questions and answers recorded in the inquiry proceedings, whose minutes bear her signature, was Question No.12: "Did you change

your plan of giving the LLB Exam? Answer: No, was supposed to only go for registration but fell sick". It ought to be remembered that she applied

for a leave of 13 days to pursue studies in law, but she herself answered that she was supposed to only go for registration.

8. Her further contention is no copy of the inquiry report containing the findings on the charges framed against her was served on her. Despite the

aforesaid, she was served with a notice dated September 7, 2016 issued by the Secretary of the Managing Committee of the said school to show

cause, why the penalty of removal from service should not be imposed on her. Very significantly, it was mentioned in the said notice issued by the

Secretary, inter alia, as follows: -

"The Enquiry Officer appointed to enquire into the charges made against you vide Secretary's letter dated 13th May, 2016, has submitted his

Report and Proceedings.

On a careful consideration of the Enquiry Report the Managing Committee of the School at its Meeting on 1.09.2016 comes to the conclusion that you

are not a fit person to be retained in the service of the School and so the school Managing Committee proposes to impose on you the penalty of your

removal from service. In accordance with the provisions of Rule 23 (vii) of the Rules relating to the Terms of Employment and Conditions of

Service of Teaching and Non Teaching Staff in the Diocesan Schools of the Archdiocese of Calcutta, you are being directed to show cause within a

fortnight of receipt of this Notice as to why the proposed penalty of your removal from service should not be imposed on you."

9. Therefore, it is clear that the school authorities relied upon the findings contained in an inquiry report "naturally against the writ petitioner" to

arrive at a conclusion which sought to take away her livelihood and asked her to make a representation against the proposed penalty based on such an

inquiry report, copy whereof was never served on her. In other words, she was being asked to defend herself against a report on the basis of which

her employers came to a conclusion against her. Her employers are "State" within the meaning of Article 12 of the Constitution of India, since

they perform public and statutory duties under statutory regulations. They are supposed to be model employers. Yet, they were asking her to defend herself against something whose contents she did not know. This would not have been permissible even if the employers had no whiff of the State about them. She could not, therefore, make any meaningful representation against it and the opportunity to make a representation or show cause against the proposed penalty was wholly illusory without supplying a copy of the said inquiry report on which the school authorities had relied upon to come to the said conclusion. According to the writ petitioner, there was thus a gross violation of the basic principles of natural justice and the principle of audi alteram partem. These, she perceived, vitiated the entire exercise and were in violation of Articles 14 and 21 of the Constitution of India. She replied to the notice to show cause where all possible defences were raised, as appears from her reply showing cause dated September 21, 2016 including at paragraph 9 thereof, that no copy of the inquiry report was served on her. Such pleading, incidentally is also present at paragraph 26 of the writ petition. However, the cause shown by her was not accepted. As a consequence, she was removed from service without an adequate opportunity of being heard.

10. On facts, Mr. Karmakar, the learned advocate appearing for the said school admitted before this Court that no copy of the inquiry report was ever served on the writ petitioner though she was asked to respond to the notice to show cause why the penalty of removal from service should not be imposed upon her on the basis of the conclusion reached by the school authorities relying upon the findings in the inquiry report as aforesaid. He, however, drew inspiration from Regulation 24(f) of the Code which clearly specifies that "The enquiry report will then be sent to the Chairperson of the Managing Committee who will issue a show-cause notice with proposed penalties, if any, and the employee will be called upon to reply to the show-cause notice within a fortnight of the receipt of such notice. Thereafter, the Managing Committee will take a final decision about the penalty, if any, that would be imposed."

11. Mr. Karmakar submitted that Regulation 24(f) as it stands simply requires that the inquiry report is to be sent only to the Chairperson of the Managing Committee and not that a copy be sent to the staff facing the

disciplinary proceeding. It is his further case, that there can be no question of violation of the Code when the authorities act strictly according to the Code and the literal meaning of its regulations which permit no ambiguity. He pointed to the resounding silence of the Code not merely from the date when it was given effect to but till today, after several amendments, in respect of any requirement of supplying a copy of the inquiry report to the delinquent staff before asking him or her to show cause against the penalty. He submits, in effect, that while enforcing the Code this Court cannot add words that the framers of the Rule did not, in their wisdom, themselves enjoin. He has further submitted that his clients were under the impression that they were guided by the rules of the Archdiocese within whose jurisdiction their school, they thought, was situated in the episcopal sense. He also submitted that after a query from the Court that factually the said school is not at all a Diocesan School under the Archdiocese of Calcutta. In the context of this admission, it ought to be remembered that the school authorities purported to remove the writ petitioner from service under Clause 23(vii) of Terms of Employment and Conditions of Service of Teaching and NonTeaching Staff in the Archdiocese of Calcutta.

12. On behalf of the said school, Mr. Karmakar also disputed the contention of the writ petitioner that no opportunity was given to her to cross examine the witnesses produced on behalf of the management of the said school or that the appointment of the enquiry officer by the Secretary rather than the Chairperson of the Managing Committee is a fatal defect particularly when the writ petitioner, according to him, participated in the inquiry proceedings.

13. Now that the factual matrix has been summarized, let me deal with the law on the subject of the failure to supply an inquiry report to a delinquent employee by an authority which is a State within the meaning of Article 12 of the Constitution of India, in a case where such report has been relied upon by the employer to come to a conclusion that the employee is guilty as charged and a penalty is proposed to be imposed upon him, and he is asked to show cause why such penalty shall not be imposed.

14. The majority decision in the case of Managing Director, ECIL v. B. Karunakar reported in (1993) 4 SCC 727 and some subsequent decisions on the point, have been succinctly considered by a learned Single Judge of this

Court, which I quote with approbation. The judgment in the case of

Smt. Aloka Bhattacharjeeâ?"vâ?"North Bengal State Transport Corporation and Others, reported in (2017) 2 CAL LT 499 (HC), passed by one of us

(Dipankar Datta, J), concisely sets forth the correct position of law, in the following terms: -

A. â??17. Owing to a perceived conflict of opinion in the decisions reported in (1988) 3 SCC 600 (Kailash Chander Asthana v. State of U.P.) [where

it was held that non- service of a copy of the report of enquiry, the enquiry having been held in that case by an Administrative Tribunal under the

relevant disciplinary rules, was immaterial] and (1991) 1 SCC 588 (Union of India v. Mohd. Ramzan Khan) [where it was held that the delinquent

employee is entitled to a copy of the enquiry report before the disciplinary authority takes its decision on the charges levelled against him], both

rendered by Benches of three learned judges, several matters were referred by another Bench of co-equal strength to the Constitution Bench for

decision by an order dated August 5, 1991 reported in (1992) 1 SCC 709 (Managing Director, ECIL v. B. Karunakar). It is worth mentioning that

Mohd. Ramzan Khan (supra) ushered in a new phase in the law relating to disciplinary action by acknowledging that consideration of the report of

enquiry by the disciplinary authority without furnishing copy thereof to the delinquent employee constitutes violation of natural justice.

B. 18. The majority decision of the Constitution Bench in B. Karunakar (supra) was authored by Hon'ble P.B. Sawant, J. (as His Lordship then was).

Paragraph 2 of the decision contains recital of the basic question that arose for decision, which in turn gave rise to certain incidental questions. The

basic question and the incidental questions, from paragraph 2 of the decision, are quoted below:

2. The basic question of law which arises in these matters is whether the report of the enquiry officer/authority who/which is appointed by the

disciplinary authority to hold an inquiry into the charges against the delinquent employee, is required to be furnished to the employee to enable him to

make proper representation to the disciplinary authority before such authority arrives at its own finding with regard to the guilt or otherwise of the

employee and the punishment, if any, to be awarded to him. This question in turn gives rise to the following incidental questions:

(i) Whether the report should be furnished to the employee even when the statutory rules laying down the procedure for holding the disciplinary inquiry are silent on the subject or are against it?

(ii) Whether the report of the enquiry officer is required to be furnished to the delinquent employee even when the punishment imposed is other than the major punishment of dismissal, removal or reduction in rank?

(iii) Whether the obligation to furnish the report is only when the employee asks for the same or whether it exists even otherwise?

(iv) Whether the law laid down in Mohd. Ramzan Khan case will apply to all establishments -- Government and non-Government, public and private sector undertakings?

(v) What is the effect of the non-furnishing of the report on the order of punishment and what relief should be granted to the employee in such cases?

(vi) From what date the law requiring furnishing of the report, should come into operation?

(vii) Since the decision in Mohd. Ramzan Khan case has made the law laid down there prospective in operation, i.e., applicable to the orders of

punishment passed after November 20, 1990 on which day the said decision was delivered, this question in turn also raises another question, viz., what

was the law prevailing prior to November 20, 1990?

C. 20. This statement is sufficient to clear the doubt of there being any conflict of opinion expressed in the decisions in Kailash Chander Asthana

(supra) and Mohd. Ramzan Khan (supra). The Court, in normal circumstances, may not have proceeded further but found reason to do so in view of

what was recorded in paragraph 19. Such paragraph reads:

19. In Mohd. Ramzan Khan case the question squarely fell for consideration before a Bench of three learned Judges of this Court, viz., that although

on account of the Forty-second Amendment of the Constitution, it was no longer necessary to issue a notice to the delinquent employee to show cause

against the punishment proposed and, therefore, to furnish a copy of the enquiry officer's report along with the notice to make representation against

the penalty, whether it was still necessary to furnish a copy of the report to him to enable him to make representation against the findings recorded

against him in the report before the disciplinary authority took its own decision with regard to the guilt or otherwise of the employee by taking into

consideration the said report. The Court held that whenever the enquiry officer is other than the disciplinary authority and the report of the enquiry

officer holds the employee guilty of all or any of the charges with proposal for any punishment or not, the delinquent employee is entitled to a copy of

the report to enable him to make a representation to the disciplinary authority against it and the non- furnishing of the report amounts to a violation of

the rules of natural justice. However, after taking this view, the Court directed that the law laid down there shall have prospective application and the

punishment which is already imposed shall not be open to challenge on that ground. Unfortunately, the Court by mistake allowed all the appeals which

were before it and thus set aside the disciplinary action in every case, by failing to notice that the actions in those cases were prior to the said decision.

This anomaly was noticed at a later stage but before the final order could be reviewed and rectified, the present reference was already made, as

stated above, by a Bench of three learned Judges. The anomaly has thus lent another dimension to the question to be resolved in the present case.

D. 23. Turning to the conclusions recorded, it appears that the answer to the basic question is in paragraph 29 of the decision (the majority view)

reading as follows:

29. Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the

enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to

the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the

enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to

prove his innocence and is a breach of the principles of natural justice.

E. 24. Hon'ble Ramaswamy, J. observed, in relation to the basic question, as under:

61. It is now settled law that the proceedings must be just, fair and reasonable and negation thereof offends Articles 14 and 21. It is well- settled law

that the principles of natural justice are integral part of Article 14. No decision prejudicial to a party should be taken without affording an opportunity

or supplying the material which is the basis for the decision. The enquiry report

constitutes fresh material which has great persuasive force or effect on the mind of the disciplinary authority. The supply of the report along with the final order is like a post-mortem certificate with putrefying odour. The failure to supply copy thereof to the delinquent would be unfair procedure offending not only Articles 14, 21 and 311(2) of the Constitution, but also, the principles of natural justice. The contention on behalf of the Government/management that the report is not evidence adduced during such inquiry envisaged under proviso to Article 311(2) is also devoid of substance. It is settled law that the Evidence Act has no application to the inquiry conducted during the disciplinary proceedings. The evidence adduced is not in strict conformity with the Indian Evidence Act, though the essential principles of fair play envisaged in the Evidence Act are applicable. What was meant by 'evidence' in the proviso to Article 311(2) is the totality of the material collected during the inquiry including the report of the enquiry officer forming part of that material. Therefore, when reliance is sought to be placed by the disciplinary authority, on the report of the enquiry officer for proof of the charge or for imposition of the penalty, then it is incumbent that the copy thereof should be supplied before reaching any conclusion either on proof of the charge or the nature of the penalty to be imposed on the proved charge or on both.

F.Â 25. The incidental questions were answered in paragraph 30. The Court held, while answering question (i), that even if the statutory rules laying down the procedure for holding disciplinary inquiry do not permit the furnishing of the report or are silent on the subject, the delinquent employee would still be entitled to a copy of the report since the denial of the report of enquiry is a denial of reasonable opportunity and a breach of the principles of natural justice; and statutory rules, if any, which deny the report to the delinquent employee are against the principles of natural justice and, therefore, invalid. The answer to question (ii) was that, whenever the service rules contemplate an inquiry before a punishment is awarded and when the officer assigned with the duty of conducting enquiry is not the disciplinary authority, the delinquent employee will have the right to receive the report of enquiry notwithstanding the nature of the punishment. Question (iii) was answered by holding that whether or not the delinquent employee asks for the report, it has to be furnished to him since it is his right to

have the report to defend himself effectively and it would not be proper to construe his failure to ask for the report, as a waiver of his right. In respect of question (iv), it was held that the law laid down in Mohd.

Ramzan Khan (supra) should apply to employees in all establishments whether Government or non- Government, public or private.

G. 28. A threadbare analysis of the said decision would reveal the Court's anxiety to ensure that the delinquent employee's right to defend himself

effectively at an enquiry conducted by an officer appointed by the disciplinary authority, and not conducted by such authority himself, is not defeated.

Upon detailed survey of the law on the point as well as due consideration of the provisions of Article 311 of the Constitution, as it originally stood, and

after the Constitution (42nd Amendment) Act, 1976 became operative from January 1, 1977, the Court succinctly stated the reason for its answer to

question (i) i.e. the basic question, in paragraph 26 of the decision reading as under:

26. The reason why the right to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage

and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority

which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said

findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The

findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a

finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should

have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity

to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it.

Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also

equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In

the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it.

H. 29. Right to receive copy of the report of enquiry by the delinquent employee, where charge(s) is/are held to be proved, thus was recognised by the Constitution Bench to be a valuable right of such employee, irrespective of who his employer is (public or private), and regardless of the position of the rules governing enquiry. Not only that, the requirement to furnish the report of enquiry by the employer, notwithstanding the employee not having asked for it, was also recognised since it was considered to be the right of the employee to receive it as part of reasonable opportunity.

I. 45. It is quite unheard of that the law laid down by a Constitution Bench of the Supreme Court may be allowed to be breached with impunity by employers, even bordering on contempt, yet permitting them to raise the point of "no prejudice" having been suffered by the delinquent employee at the time the matter reaches a court/tribunal. If indeed the answer given by the Constitution Bench to question (v) is the law on the effect of non-service of the enquiry report, this Bench is inclined to the view that there would have been no necessity for the Constitution Bench to discuss the law elaborately and to stress on the need for the enquiry report to be furnished to the delinquent employee. The Constitution Bench may have simply stated that if an employer, post-November 20, 1990, is found not to furnish copy of the report of enquiry to the delinquent employee and disciplinary

action is taken without adhering to the law requiring furnishing of the enquiry report, and the issue reaches the competent court of law for its

determination at a subsequent stage, the employer may not be required to say why the report was not furnished and its action could be interdicted only

if the delinquent employee succeeds, on the touchstone of prejudice, to prove that reasonable opportunity to defend was denied to him. Dilution of the

law laid down by the Constitution Bench (regarding the necessity to furnish enquiry report to a delinquent employee before disciplinary action is taken,

which is part of natural justice) by interpretative exercises subsequently undertaken without bearing in mind other Constitution Bench decisions

[holding that violation of a principle of natural justice is violation of Article 14 of the Constitution (AIR 1985 SC 1416 : Union of India v. Tulsiram

Patel), non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is

unnecessary (AIR 1981 SC 136 : S.L. Kapoor v. Jagmohan, approved by the Constitution Bench in AIR 1986 SC 180 : Olga Tellis v. Bombay

Municipal Corporation) and no prejudice need be proved for enforcing the fundamental rights (AIR 1988 SC 1531 : A.R. Antulay v. R.S. Nayak)] is

an unfortunate development likely to invite the frown of encroachment upon the rule of law.

J. 46. What then should be the proper course for the court/tribunal once the matter reaches it? The proper course would thus seem to this Bench to be

to enquire from the employer ~ public or private ~ the reason for not furnishing copy of the enquiry report to the employee. This course, experience

has shown, is seldom followed. If no justification is forthcoming and the court/tribunal has reasons to believe that copy of the enquiry report was not

furnished with a view to advance an unholy cause or prompted by an extraneous reason or simply because of utter carelessness, the order of

punishment ought not to be allowed to stand for a moment on the premise that the employer cannot be allowed to derive any advantage out of its own

wrong and the matter remitted to the disciplinary authority to resume proceedings from the stage of consideration of the employee's representation

against such report. Should the court/tribunal be satisfied that there was genuine endeavour to furnish the enquiry report to the employee but for some

reason or the other, beyond the control of the employer, the report could not reach the employee, or some other justification is provided that is

acceptable to the court/tribunal, the "prejudice" principle may be applied. However, application of the "prejudice" principle without embarking on an enquiry of the nature indicated above, in the humble understanding of this Bench, would tantamount to subverting the law laid down by the Constitution Bench in B. Karunakar (supra).â??

15. Therefore, the judgment in the case of Karunakar (supra) was divided into a basic question and incidental questions. The basic question which permits of no dilution is that a delinquent employee is entitled to have a copy of the inquiry report on which the disciplinary authority bases his conclusion of guilt and asks the employee to show cause why a certain penalty shall not be imposed, since it is a new material available on which the decision-making process is finally based. In the case of Karunakar (supra) the incidental questions arose and were answered. In case of reopening the disciplinary proceedings or setting aside the order of dismissal, only on the basis of non-supply of the inquiry report, the test of prejudice was used and intended to be used only in respect of proceedings which had become final before the judgment in Karunakar (supra) was rendered, in case of grave offences, where even the supply of inquiry report may ultimately prove to be a mere technical mistake, as appears from paragraph 44 of the judgment in the case of Karunakar (supra) itself.Â That is why Karunakar (supra) itself held at paragraph 44, that the law laid down in Mohd. Ramzanâ??s case as referred to in Karunakar (supra), needed to be made prospective. However, the learned Single Judge has gone on to also record how this aspect was widely misunderstood by applying the test of prejudice regardless of whether the disciplinary proceeding commenced or was yet to reach a terminus before the Disciplinary Authority, after the judgment in the case of Karunakar (supra). What was the nature of the exercise that the Writ Court was to undertake once a penalty was imposed on the basis of a notice to show cause where no copy of the inquiry report was given to the employee, was laid down in paragraph 46 with sufficient clarity.

16. I agree with the view of the learned Single Judge as expressed in the case of Smt. Aloka Bhattacharjee (supra) as good law and even independently of such judgment, construe the judgment in the case of Karunakar (supra) to mean that in any case where the inquiry report contains adverse findings against the delinquent employee, and a punishment is proposed

to be imposed on him by the disciplinary authority (who is not the inquiry authority) on the basis of such findings, after having come to a conclusion that the charges against the delinquent employee stand proved, based among other things on such inquiry report, in the event such report had not been furnished to the employee before he was asked to show cause why such penalty shall not be imposed, then the punishment cannot stand and the disciplinary proceedings stand vitiated and the decision-making process is incurably and fatally in violation of the basic principles of natural justice and the right to defend oneself, and is thus doubly a nullity since it also violates Article 14 of the Constitution of India. The doctrine of fairness applies with equal force even to private employers where there are statutory rules which govern the field.

17. I have embarked upon such exercise and have found that had the writ petitioner been given a copy of the inquiry report, she would have been able to deal with the findings reached against her by the inquiring authority "and whether the inquiring authority had dealt with the question impeaching his jurisdiction having been appointed by someone other than the appropriate authority under the Code, and whether he had dealt with her allegations of not being afforded adequate opportunity of being heard including in the matter of cross-examination of the witnesses through whom evidence was adduced by the said school. Without the inquiry report being supplied, she was reduced only to making general objections on the point of jurisdiction without knowing what findings had been reached even in respect of those objections by the inquiring authority. Therefore, in any view of the matter, non-supply of the inquiry report prejudiced her right of defence.

18. Once the legal position has been considered and decided as above, it is clear that non-supply of the inquiry report in the facts and circumstances of the present case, where the school authorities concerned relied upon it to arrive at a conclusion that the writ petitioner was guilty as charged and asked her to show cause why the penalty of removal from service should not be imposed upon her, it is also clear that the gravest of prejudices was being caused to her by relying upon materials not supplied to her, while at the same time asking her to defend herself against such material without knowing its contents. The case of Karunakar (supra) also makes it clear at

paragraph 30 that even if the rules laying down the procedure for holding disciplinary inquiry were silent on the subject or do not permit the furnishing of the inquiry report, still it was to be furnished to the employee since the denial of the inquiry report is a denial of reasonable opportunity and a breach of the principles of natural justice.

19. Hence, I do not find merits in the submission of Mr. Karmakar, appearing on behalf of the said school, that non-supply of the inquiry report by the school authorities to the writ petitioner before issuing the notice to show cause against the penalty of removal from service proposed to be imposed upon her, on the basis of the said inquiry report and the eventual removal of the petitioner from service on that basis, does not vitiate the proceedings or the decision-making process. The fact that the Code is silent about supply of the inquiry report to the staff proceeded against does not render the Constitution Bench decision in the case of Karunakar (supra), which explicitly envisaged such a situation, nugatory nor allows me to ignore binding law laid down by the Honâ??ble Supreme Court and give an interpretation to the Code which is in violation of the law laid down by the Constitution Bench of the Honâ??ble Supreme Court.

20. As such, I find a clear and gross violation of the basic principles of natural justice in the most egregious manner.Â The order of removal from service impugned in the writ petition shocks the conscience of the Court and cannot, therefore, stand.

21. The Archdiocese is the appellant no.4 in MAT 1049 of 2017 and is therefore one of the appellants, supporting the disciplinary proceedings and the punishment imposed. In view of the above discussions, I most emphatically lay down that the provisions of the Terms of Employment and Conditions of Service of Teaching and Non-Teaching Staff in the Archdiocese of Calcutta have no manner of application to the instant case and cannot and do not override the Code and to the extent that any rule has been made by the Archdiocese or the managing committee of the said school, which is inconsistent with either the statutory regulations in the Code as interpreted by me as above, or the law laid down by the Apex Court in the case of Karunakar (supra), it cannot be applied to the present case and the case is governed by the Code as interpreted by us relying upon the judgment of the Honâ??ble Supreme Court in the case of Karunakar (supra).

22. In view of the point which I have decided, as above, the other contentions of the writ petitioner as contained in the writ petition or the representation/causes shown in the letter dated September 21, 2016 including the factual allegations made by the parties about the merits of the case, are not required to be decided since the appeals can be decided on the above question alone, on the basis of non-supply of the inquiry report in the facts and circumstances of this case and the discussion of the law laid down on the subject. Naturally, the other contentions shall be free to be agitated in terms of the order which follows.

23. So far as the order impugned in both the appeals are concerned, the parties say in unison that the statutory tribunal to be constituted under

Regulation 24A of the Code, to which an appeal lies under the proviso to Regulation 24(f), has not been constituted. However, with the greatest

possible respect to the learned Single Judge, I cannot agree that even if such a tribunal had been constituted, merely on the ground of alternative

remedy, exercise of jurisdiction by way of judicial review against the decision making process behind such a blatant violation of the basic principles of

natural justice and the law laid down by a Constitution Bench of the Honâ??ble Supreme Court, on the face of the record, could have been declined

by the learned Single Judge. The decisionmaking process has been rendered a nullity because of the gross violation of the basic principle of natural

justice leading to deprivation of the livelihood of the writ petitioner without following due process or procedure established by law, which is

furthermore a violation of her fundamental rights under Article 21 read with Article 14 of the Constitution of India. The consequence of a nullity, being

the penalty of removal from service, can only be a nullity. So alternative remedy, according to the well settled principles of law, would not be a bar. If

authority is needed for this proposition, I may refer to the case of Registrar of Trademarksâ?? vâ??Whirlpool Corporation reported in (1998) 8 SCC

1.Â The question is, however, academic since in the instant case there is no statutory appellate tribunal constituted till date and so there can be no

question of relegating the writ petitioner to a statutory appeal under the Code.

24. Again, where the statutory regulations do not permit reference of a matter for arbitration, but envisages recourse to an appeal, even if no appellate

forum is constituted, the question of referring the matter to arbitration appears

to be judicial legislation of which I am understandably very wary. I am conscious that there is nothing in the Code, which is law within the meaning of Article 13 of the Constitution of India, by which a disciplinary dispute may not be referred to arbitration, but that does not mean a new provision has to be engrafted by judicial decision. The duty is to move from molar to molecular and the Court dwells in the interstices of statutory silence. It is no part of the Court's duty to create primal sound where already there is ambient cacophony.

25. I am, therefore, constrained to set aside the said order dated May 12, 2017 and to that extent both the appeals succeed.Â However, the writ petition is not remanded to the learned Single Judge but instead the following order is passed which, it is felt, ought to have been passed on the writ petition in the facts and circumstances of the case and in the light of the discussions as above.

26. I hold that the decision-making process based on the inquiry report, the notice to show cause dated September 7, 2016 and the ultimate decision based thereon removing the writ petitioner from service dated October 4, 2016 are all bad in law and are nullities, and I declare them to be so and strike them down as void ab initio.

27. As a consequence, the writ petitioner is entitled to be reinstated inservice. However, the materials on record, including the answers of the writ petitioner to question No.12, as also the reason for the disciplinary proceedings mentioned in the charge-sheet, are not such which permit me to exonerate her without going into the merits of the matter which I have not done. I agree completely with the learned Single Judge in the order under appeal, that these are questions of fact which the writ court ought not to go into. Hence, while I have held the writ petitioner to be entitled to reinstatement, such reinstatement would for the present be for the purpose of completing the disciplinary proceedings only. Accordingly, I further direct that she be deemed to be under suspension from this date till the completion of the disciplinary proceedings, if resumed in terms of this order. If the school authorities decide to resume the disciplinary proceedings, it shall commence from the stage of issuance of a notice on her to show cause along with a copy of the inquiry report and shall be taken to its logical conclusion strictly in accordance with law. For the period during which she

would be under suspension starting from this day till final order is passed on the disciplinary proceedings, the writ petitioner would be entitled to

subsistence allowance according to the rules applicable to any employee under suspension which are consistent with the Code. Should the writ

petitioner be found not guilty of the charges levelled against her, she shall be entitled to full back wages from the date she was removed from service.

Also, if it is decided against resuming the disciplinary proceedings, then the suspension will lapse and the writ petitioner shall be deemed to be in

service with effect from October 4, 2016 and entitled to full back wages from the date of her removal from service, as if she was never removed. The

appeal of the writ petitioner being MAT 997 of 2017 succeeds to that extent.

28. So far as MAT 1049 of 2017 is concerned, I make it clear that I allow it only in part so far as the direction of reference to arbitration is concerned.

However, the disposal of the said appeal being MAT 1049 of 2017 or my present order shall not preclude the Chairman of the Managing Committee

of the said school to serve a copy of the inquiry report on the writ petitioner and proceed afresh from the stage of issuing a notice to her to show

cause and make a representation against the proposed penalty and then complete the exercise in accordance with law, if they are so advised, as

directed above.

29. I have decided none of the other contentions raised by the parties in view of the position of law as discussed above, and the writ petitioner will be

free to agitate all the said contentions before the disciplinary authority in the event of resumption of the disciplinary proceedings from the stage

indicated above. The disciplinary authority, in such case, shall decide the matter afresh, being uninfluenced by its earlier decision and shall give a

reasoned decision on every point which may be raised by the writ petitioner. The school authorities will also be at liberty to urge all other points which

have not been decided by me hereinabove.

30. The appeals are disposed of on the above terms.Â The parties shall bear their own costs.

DIPANKAR DATTA, J.:

31. I have read the draft judgment proposed by my learned brother.

32. The occasion for writing a separate opinion would not have arisen but for reliance placed by Mr. Lahiri, learned advocate for the writ petitioner on

the decision reported in (2017) 2 CAL LT 499 (HC) : Smt. Aloka Bhattacharjee v. North Bengal State Transport Corporation and Others

[incidentally, a judgment authored by me] and my learned brother proposing to hold that such decision lays down good law. It would be contrary to all

canons of judicial propriety to agree with such opinion of my learned brother and thereby, effectively, give the ratio propounded in the decision in

Aloka Bhattacharjee (supra) the imprimatur of a Division Bench being a member thereof. I, therefore, intend to decide the issue involved in the

appeals without reference to what has been laid down in Aloka Bhattacharjee (supra).

33. The report of enquiry, admittedly, was not furnished to the writ petitioner. Indubitably, such report was a relevant material that the management

considered while first proposing to remove the writ petitioner from service and ultimately in so removing her. The writ petitioner was entitled in law to

claim that the report be furnished to her. She did, in fact, point out in her reply to the second show cause notice that she was disabled in putting up

effective defence without having access to such report. Even then, the report was not furnished. Mr. Karmakar, learned advocate for the school,

attempting to take shelter of the rules governing the disciplinary proceedings, contended that since the same did not require furnishing of the report the

request of the writ petitioner was not accepted.

34. More than two decades back, the Constitution Bench of the Supreme Court in its decision reported in (1993) 4 SCC 727 : Managing Director,

ECIL v. B. Karunakar made it very clear that the requirement to furnish the report of enquiry has to be read into the rules, if the rules governing

disciplinary proceedings of the employer ~ be it public or private ~ were silent on such aspect. It is indeed unfortunate that the law laid down by the

Supreme Court has been observed in the breach. The explanation proffered by Mr. Karmakar does more harm than good for the cause of the

management of the school inasmuch as the action is in the teeth of the answer to the basic question that arose for decision before the Supreme Court

in B. Karunakar (supra). While law laid down by the

Hon'ble Supreme Court is binding on all courts under Article 141 of the Constitution, all civil and judicial authorities in terms of Article 144 thereof

are obliged to act in aid of such Court. At this distance of time, it is considered

inappropriate and improper for the management of the school to either feign ignorance of the law laid down in B. Karunakar (supra) or to contend that it chooses to stand by its own rules rather than the law laid down

therein. I have, therefore, no hesitation in agreeing with my learned brother that the disciplinary proceedings stood grossly vitiated.

35. I further hold that the learned Judge of the writ court fell in error in making the ultimate direction for resolution of the inter se dispute by way of

arbitration noticing that the appellate tribunal had not been set up. If indeed the writ petitioner had no remedy by way of appeal, the remedy of judicial

review could be pursued by her; and within the parameters of judicial review, her grievance could have been scrutinised. If any of the vices of

illegality, irrationality or procedural irregularity were found to be present in the decision making process leading to her removal from service, the writ

petitioner could have been granted such relief as the circumstances warranted. I, thus, agree with my learned brother that the impugned order is

indefensible and thus deserves to be quashed together with the order of removal passed against the writ petitioner.

36. I am also in agreement with my learned brother that the disciplinary proceedings must resume from the stage of furnishing of the report of enquiry

to the writ petitioner, and the directions regarding conditional reinstatement of the writ petitioner, her placement on suspension and entitlement to back

wages only if she is exonerated or the said school elects not to resume the proceedings against her.

37. The appeals shall stand disposed of on the terms as proposed, leaving the parties to bear their own costs.