
(2006) 12 BOM CK 0108
In the Bombay High Court
Case No : W. P. No. 2616 of 1996

Punjaram Wogdarkar

APPELLANT

Vs

Presiding Officer, School Tribunal, Amravati and another

RESPONDENT

Date of Decision : 21-12-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 99
Criminal Procedure Code, 1973 (CrPC) — Section 465

Citation : (2006) 12 BOM CK 0108

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : R.S. Parsodkar, for the Appellant; Uday Dastane for respondent No. 2 and Asstt. Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J.—Challenge in this writ Petition is to the judgment delivered by respondent No. 1 School Tribunal Amravati in Appeal No. 97/93A on 24-7-1996 dismissing the appeal filed by present petitioner and upholding his termination by order dated 31-5-1993 after departmental inquiry.

2. The petitioner is basically pointing out conduct of departmental inquiry in violation of Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 framed under The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977. (This Act is hereafter referred to as MEPS Act while Rules mentioned above are referred to as MEPS Rules) Petitioner states that he was appointed as Headmaster of respondent No. 2 school on 9-7-1983 and he was also confirmed in 1987. He further states that in academic session 1992-93 dispute between himself and respondent No. 2 management arose on account of misbehaviour by one teacher Shri Dasarwar with a girl student of 9th standard whose father complained of it. Petitioner has also named said girl student in his appeal memo filed before School Tribunal. He further states that teacher Shri Dasarwar was afraid of consequences and he joined

hands with one Shri Minekar an earlier hostel superintendent styling himself as chief executive officer of respondent No. 2 Trust. It is alleged that there was some old dispute and enmity between petitioner and said Minekar and ultimately Dasarwar together with him succeeded in victimising petitioner by using their influence with management of respondent No. 2. A false and fabricated story was thereafter prepared against petitioner and on the basis of said story two charge-sheets were issued. Farce of inquiry was then staged and ultimately petitioner was dismissed from service. Petitioner has highlighted various lacunae in the conduct of departmental inquiry to which reference will be made little later. His appeal before School Tribunal was opposed by management who contended that petitioner was found guilty of grave and serious misconduct after departmental inquiry conducted in accordance with provisions of MEPS Act and MEPS Rules. It justified its departmental action and prayed for dismissal of appeal. School Tribunal has considered the controversy and found that inquiry has been conducted as mandated by Rules 36 and 37 of MEPS Rules and petitioner was given reasonable opportunity to defend himself in the matter. It therefore dismissed his appeal.

3. After hearing arguments advanced, I find that detailed reference to misconduct is not that relevant in present controversy. However the charges levelled against petitioner on 29-1-1993 are being briefly stated here for records. By charge No. 1 part A it is alleged that petitioner in meeting of School Committee held on 22-8-1992 proposed confirmation of Shri Dasarwar and resolution was passed accordingly. However contrary to this resolution he met Education Officer personally on 7-12-1992 and proposed that Shri Dasarwar should not be confirmed. Part B is about not forwarding the above resolution of confirmation to Education Officer and submitting incorrect information about matters of two employees as being subjudice. By part C it is alleged that petitioner misused his powers to obtain signature of one person on complainant made against Shri Dasarwar by three other persons. By part D it is stated that on 9-12-1992, 3 named male students along with other students came to petitioner and complained against abovementioned girl student of 9th standard but petitioner did not take any cognizance thereof. It is alleged that due to behaviour of said girl student atmosphere in the school was being spoiled and petitioner threatened these students with rustication. By part E it is stated that petitioner tried to provoke male students to complain against Shri Dasarwar and by part F, management alleged that petitioner contacted father of one male student to procure false complaint against Shri Dasarwar. Part G accuses him of not handing over the charge though he was suspended and part H states that he did not return keys in spite of demand in writing and behaved arrogantly. Charge No. 2 charges him with negligence for not forwarding proposal of Shri Dasarwar properly (part A), of not inquiring into complaint against girl student named above lodged by male and girl students with him (part B). It is alleged in part C that on 10-12-1992 the girl student mentioned above misbehaved with other girl student and slapped her in his presence but petitioner instead of taking action

laughed away the incidence. Part D states that he did not submit information sought for by chief executive officer in spite of two written letters. By charge 3 - part A it is alleged that he tampered with inward numbers for recording complaint against Shri Dasarwar, part B is similar allegation in relation to complaint filed by abovementioned girl student with allegation that entry was taken by him in earlier date. Part D is about bringing pressure upon Clerk to score off entry and then making entries in earlier date. Charge No. 4 is in relation to non-compliance with orders of superiors and it is in relation to proposal of Shri Dasarwar and about not handing over charge after suspension. On 9-3-1993 he was given a supplementary charge-sheet about trying to obstruct school working in spite of suspension by trying to stop working of bank accounts by writing letter to branch manager of Co-operative Bank and by trying to occupy the chair and by trying to work as Headmaster by placing signature on teacher's copies of certain communications. It is further alleged that in spite of registered letter dated 20-1-1993 he did not handover important documents to his successor. Thus, it is apparent that everything revolves around teacher Shri Dasarwar and the girl student of 9th standard with whom petitioner claims that he (Dasarwar) misbehaved and suspension of petitioner. In their complaint against this girl student, other students charge her of making obscene and indecent remarks against male students.

4. I have heard Advocate R. S. Parsodkar for petitioner employee, Advocate Uday Dastane for respondent No. 2 management/employer and learned AGP for respondent No. 1 School Tribunal.

5. Learned counsel for petitioner has contended that School Tribunal has not properly appreciated the scheme of Rule 36 and Rule 37 of MEPS Rules 1981 and this has resulted in refusal on its part to exercise jurisdiction available to it. He has contended that there was no statement of allegations issued to petitioner as required by Rule 36(1) and hence petitioner lost important opportunity to file reply to it to show his innocence. He argues that such reply is to be considered by President of respondent No. 2 and only when he is not satisfied, such reply along with statement of allegations is to be placed before management for deciding whether to hold departmental inquiry or not. According to him, here the respondent No. 2 has directly issued charge-sheet and the inquiry therefore stands vitiated. It is further argued that the management has to first appoint its representative on Inquiry Committee and then nominate any award winning teacher from panel of award winning teachers maintained by education department. Petitioner is to be called upon to nominate his representative at the end and as this sequence has not been followed, according to learned counsel the inquiry is illegal. It is stated that award winning teacher Shri Ballal nominated by management is not from the panel maintained by education department and hence there was no valid Inquiry Committee. To show that such defect in constitution of Inquiry Committee is fatal, he has relied upon Ganpati Sant Vs. Shri Sant Gulab Baba Shikshan Sanstha and others, , Kankubai Trust vs. Kamal D. Khajurkar, reported at 1992 Mh.LJ. 216. It is further argued that

petitioner has not been given permission to engage lawyer to defend himself in departmental inquiry though convener of Inquiry Committee himself was practicing advocate and though presenting Officer nominated by respondent No. 2 was having law degree. J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd. and others, and Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others, are relied upon for this purpose. It is further contended by Advocate R. S. Parsodkar that the summary of proceedings as contemplated by Rule 37(4) was not served upon petitioner and what was made available to petitioner, was only finding of convener and findings recorded by remaining two members of Inquiry Committee were not made available to him. According to him, as findings recorded by Shri Ballal and representative of petitioner were not made available, punishment is based only upon findings recorded by convener of inquiry Committee who happens to be President of respondent No. 2 institution. Hence, entire action on such report or finding is void. Reliance has been placed upon the judgment of Hon'ble Apex Court in case of Union of India and others Vs. Mohd. Ramzan Khan, to point out such entitlement. Lastly, it is argued that petitioner was not given requisite time to file reply after service of summary upon him and therefore also inquiry is liable to be set aside. It is further contended that same procedure ought to have been followed even before issuing supplementary charge sheet and as that has not been done, entire inquiry has to fall to ground. The School Tribunal lost sight of all these defects and hence, there is failure to exercise jurisdiction.

6. Learned advocate for respondent No. 2 has stressed the scheme of Rule 36 and Rule 37 to point out how there is no breach of the scheme by management/ employer in the facts of present case. He states that initially statement of allegations has been furnished to petitioner and after having his say upon it, president of respondent No. 2 placed the same for consideration before management which resolved to hold departmental inquiry and thereafter, a fresh memo about very same charge-sheet and statement of allegations came to be issued. It is argued that there is no prohibition for issuing draft charge-sheet along with statement of allegations again under Rule 37(1) or 36(1). It is further stated that same procedure was followed even in relation to supplementary charge-sheet and it was not necessary to appoint new Inquiry Committee for inquiring into it. He has invited the attention to relevant facts available on record to urge and point out how petitioner is trying to create unnecessary confusion. It is argued that findings recorded by all three members constituting Inquiry Committee were made available petitioner as directed in Rule 37(6) of MEPS Rules. It is pointed out that petitioner got opportunity to submit reply on all occasions and petitioner did not choose to file reply to charge-sheet at Rule 37(1) stage. It is further argued that burden was upon petitioner to show that name of Shri Ballal did not figure in panel maintained by education department. Lastly it is argued that in any case petitioner has to point out that alleged non-compliance has caused him some prejudice and that having not been done, the arguments of petitioner before this Court are without merit. When majority

report/findings of Inquiry Committee are against petitioner, mere inclusion of Shri Ballal in Inquiry Committee is not fatal without proof of prejudice. Advocate Uday Dastane has relied upon judgment of Hon''ble Apex Court in case of State Bank of Patiala and others Vs. S.K. Sharma, . It is further argued that in reported cases pointed out by petitioner presenting Officers appointed by employers were lawyers and hence, Hon''ble Apex Court has held that delinquent ought to have been permitted to engage advocate. It is stated that presenting Officer Shri Minekar obtained the law degree in 1967 but never practiced law and fact of convener of Inquiry Committee being practicing lawyer does not make any difference and is not relevant. It is further argued that in any case School Tribunal could not have granted back wages to petitioner.

7. Before considering the facts of case at hand, it will be proper to understand the law on the points raised. Rules 36 and 37 which are relevant for the purposes of present writ petition deal with the constitution of enquiry committee and the procedure to be followed in departmental enquiry instituted against an employee or head and the said rules read thus:-

"36. Inquiry Committee.- (1) If an employee is allegedly found to be guilty of any of the grounds specified in sub-rule (5) of Rule 28 and the Management decides to hold an inquiry, it shall do so through a properly constituted Inquiry Committee. Such a committee shall, conduct an inquiry only in such case where major penalties are to be inflicted. The Chief Executive Officer authorised by the Management in this behalf (and in the case of an inquiry against the Head who is also the Chief Executive Officer, the President of the Management) shall communicate to the employee or the Head concerned by registered post acknowledgment due the allegations and demand from him a written explanation within seven days from the date of receipt of the statement of allegations.

(2) If the Chief Executive Officer or the President, as the case may be, finds that the explanation submitted by the employee or the Head referred to in sub-rule (1) is not satisfactory, he shall place it before the Management within fifteen days from the date of receipt of the explanation. The Management shall in turn decide within fifteen days whether an inquiry be conducted against the employee and if it decides to conduct the inquiry, the inquiry shall be conducted by an Inquiry Committee constituted in the following manner, that is to say,

(a) in the case of an employee

(i) one member from amongst the members of the Management to be nominated by the Management, or by the President of the Management if so authorised by the Management, whose name shall be communicated to the Chief Executive Officer within 15 days from the date of the decision of the Management;

(ii) one member to be nominated by the employee from amongst the employees of any private school;

(iii) one member chosen by the Chief Executive Officer from the panel of

teachers on whom State/National Award has been conferred

(b) in the case of the Head referred to in sub-rule (1)

(i) one member who shall be the President of the Management;

(ii) one member to be nominated by the Head from amongst the employees of any private school;

(iii) one member chosen by the President from the panel of Head Masters on whom State/National Award has been conferred.

(3) The Chief Executive Officer or, as the case may be, the President shall communicate the names of members nominated under sub-rule (2) by registered post acknowledgment due to the employer or the Head referred to in sub-rule (1), as the case may be, directing him to nominate a person on his behalf on the proposed Inquiry Committee and to forward the name along with the written consent of the person so nominated to the Chief Executive Officer or to the President, as the case may be, within fifteen days of the receipt of the communication to that effect.

(4) If the employee or the Head, as the case may be, communicated the name of the person nominated by him the Inquiry Committee of three members shall be deemed to have been constituted on the date of receipt of such communication by the Chief Executive Officer or the President, as the case may be. If the employee or such Head fails to communicate the name of his nominee within stipulated period, the Inquiry Committee shall be deemed to have been constituted on expiry of the stipulated period consisting of only two members as provided in sub-rule (2).

(5) The Convener of the respective Inquiry Committee shall be the nominee of the President, or as the case may be, the President who shall initiate action pertaining to the conduct of the Inquiry Committee and shall maintain all the relevant record of the Inquiry.

(6) The meetings of the Inquiry Committee shall be held in the School premises during normal school hours or immediately thereafter, if the employee agrees and even during vacation.

37. Procedure of inquiry. - (1) The Management shall prepare a charge sheet containing specific charges and shall hand over the same together with the statement of allegations and the explanation of the employee or the Head, as the case may be, to the Convener of the Inquiry Committee and also forward copies thereof to the employee or the Head concerned by registered post acknowledgment due, within 7 days from the date on which the Inquiry Committee is deemed to have been constituted. (2)(a) Within 10 days of the receipt of the copies of the charge-sheet and the statement of allegations by the employee or the Head, as the case may be

(i) If the employee or the Head, as the case may be, desires to tender any

written explanation to the charge-sheet, he shall submit the same to the Convener of the Inquiry Committee in person or send it to him by the registered post acknowledgment due. (ii) If the Management and the employee or the Head, as the case may be, desire to examine any witnesses they shall communicate in writing to the Convener of the Inquiry Committee the names of witnesses whom they propose to so examine, and (iii) If the Management desires to tender any documents by way of evidence before the Inquiry Committee, it shall supply true copies of all such documents to the employee or the Head, as the case may be. If the document relied upon by the Management is a register or record of the school it shall permit the employee or the Head as the case may be, to take out relevant extracts from such register or record. The employee or the Head as the case may be, shall supply to the management true copies of all the documents to be produced by him in evidence.

(b) Within 3 days after the expiry of the period of 10 days specified in clause (a), the Inquiry Committee shall meet to proceed with the inquiry and give 10 days notice by registered post acknowledgment due to the Management and the employee or the Head, as the case may be, to appear for producing evidence, examining witnesses etc. if any.

(c) The Inquiry Committee shall see that every reasonable opportunity is extended to the employee for defence of his case.

(d)(i) The Management shall have the right to lead evidence and the right to cross-examine the witnesses examined on behalf of the employee, (ii) The employee shall have the right to be heard in person and lead evidence. He shall also have the right to cross-examine the witnesses on behalf of the employee, (iii) Sufficient opportunities shall be given to examine all witnesses notified by both the parties.

(e) All the proceedings of the Inquiry Committee shall be recorded and the same together with the statement of witnesses shall be endorsed by both the parties in token on authenticity thereof. The refusal to endorse the same by either of the parties shall be recorded by the Convener.

(f) The inquiry shall ordinarily be completed within a period 120 days from the date of first meeting of the Inquiry Committee or from the date of suspension of the employee, whichever is earlier, unless the Inquiry Committee has, in the special circumstances of the case under inquiry, extended the period of completion of the inquiry with the prior approval of the Deputy Director. In case the inquiry is to be completed within the period of 120 days or within the extended period, if any, the employee shall cease to be under suspension and shall be deemed to have rejoined duties, without prejudice to continuance of the inquiry.

(3) The Management and the employee or the Head, as the case may be shall be responsible to see that their nominees and the witnesses, if any, are present during the inquiry. However, if the Inquiry Committee is convinced about the

absence of either of the parties to the dispute or any of the members of the Inquiry Committee on any valid ground, the Inquiry Committee shall adjourn that particular meeting of the Committee. The meeting so adjourned shall be conducted even in the absence of person concerned if he fails to remain present for the said adjourned meeting.

(4) The Convener of the Inquiry Committee shall forward to the employee or the Head, as the case may be a summary of the proceedings and copies of statement of witnesses, if any by registered post acknowledgment due within four days of completion of the above steps and allow him a time of seven days to offer his further explanation, if any.

(5) The employee or the Head as the case may be shall submit his further explanation to the Convener of the Inquiry Committee within a period of seven days from the date of receipt of the summary proceedings etc., either personally or by registered post acknowledgment due.

(6) On receipt of such further explanation or if no explanation is offered within the aforesaid time the Inquiry Committee shall complete the inquiry and communicate its findings on the charges against the employee and decision on the basis of these findings to the Management for specific action to be taken against the employee or the Head, as the case may be, within ten days after the date fixed for receipt of further explanation. It shall also forward a copy of the same by registered post acknowledgment due to the employee or the Head, as the case may be. A copy of the findings and decision shall also be endorsed to the Education Officer or the Deputy Director, as the case may be, by registered post acknowledgment due. Thereafter, the decision of the Inquiry Committee shall be implemented by the Management which shall issue necessary orders within seven days from the date of receipt of decision of the Inquiry Committee, by registered post acknowledgment due. The Management shall also endorse a copy of its order to the Education Officer or the Deputy Director as the case may be."

8. Opening sentence of Rule 36(1) "If an employee is allegedly found to be guilty of any of the grounds specified in sub-rule (5) of Rule 28 and the Management decides to hold an ?inquiry" is only a general statement and procedure therefor follows in latter part of Rule 36 and Rule 37. Perusal of first two sentences of this Rule 36(1) clearly show that this opening sentence or first sentence does not contemplate any additional application of mind i.e. resolution by management apart from one contemplated under Rule 36(2) of MEPS rules.

The stage of decision of management to hold inquiry referred to in this opening sentence is reached in sub-rule (2) when the chief executive officer or president places the statement of allegation served upon employee along with his explanation thereto before it after he himself finding it to be not satisfactory. The chief executive officer or president therefore need not place such explanation for consideration of management if after its perusal he is satisfied that no case to

proceed further is made out. It is also apparent that management has only to authorise chief executive officer or president to call for such explanation and, said authorisation has to be general and not specific in relation to each employee or each misconduct. An occasion for holding departmental inquiry will arise only after incident amounting to misconduct is noticed. If such incident is required to be placed before management so as to enable it to authorise chief executive officer or president to serve statement of allegation and call for explanation of such employee, management will be prima facie forming an opinion about "misconduct". Thereafter, the president or chief executive officer cannot be expected to exonerate such employee after receipt of his explanation. It will be in derogation of authority of management and such an interpretation will introduce a discordant note in the scheme of Rule 36(1). The chief executive officer or president required to reach satisfaction or otherwise after considering the explanation received will not be left a free or unbiased agent. It is also not expected and may not be possible to immediately hold meeting of management on receipt of each and every complaint so as to secure authorisation in favour of chief executive officer or president. After receipt of such knowledge of incident constituting misconduct, authorised chief executive officer or president has to communicate those allegations to concerned teacher/head and after receipt of his explanation, if he is satisfied that there is no substance in the allegations he can drop the action. Otherwise he has to place papers before management to decide further course of action. This also finds support from the fact that what is to be immediately communicated is only statement of allegations and formulation of exact charges constituting misconduct is postponed till stage of Rule 37(1) is reached. Thus, the scheme enables chief executive officer or president to act immediately after learning about the incident which may or may not constitute misconduct.

9. After the management takes a decision as required by Rule 36(2) to conduct departmental inquiry against employee, it has to constitute Inquiry Committee. It first appoints one member from amongst itself or its president and one representative from panel of teachers or from panel of headmasters on whom State/National Award has been conferred. Thus after these two members of Inquiry Committee are appointed, under sub-rule (3) chief executive officer or president has to communicate these two names by R. P. A. D. to employee or head and then such employee or Head has to select his representative as third member of Inquiry Committee. Thus employee or Head is given opportunity at end and after learning about the composition of Inquiry Committee. If within 15 days of receipt of such intimation, employee or head communicates name and consent of his representative, Inquiry Committee of three members stands constituted. In default of such communication by employee or Head, Inquiry Committee of only two members comes into being. It is therefore clear that upon every Inquiry Committee normally one will get three members. One will be representing management while one will be representing delinquent. The Rules provide for an independent and impartial representative also in the shape of

award-winning teacher or head. Rules have also taken precaution of specifying that such representative has to be from panel of teachers or of headmasters on whom State/National Award has been conferred. State Government is releasing grants to Schools and it is paying salary of delinquent. If such delinquent is under suspension pending inquiry and suspension is approved by education department, State Government is releasing his subsistence allowance. It therefore appears that deliberately Inquiry Committee consisting of three members to represent interest of all three i.e. management, teacher and revenue, involved in function has been formed. Such third member therefore must be as prescribed by State Government in the Rules and not otherwise. It appears to be a measure prescribed in public interest and hence mandatory. The obligation on Inquiry Committee to furnish copy of its findings and decision to education department and also duty of management to furnish copy of order passed by them to education department along with time limit of 7 days imposed on it to pass punishment orders as directed by Inquiry Committee under Rule 37(6) also countenance this position.

10. As already stated above, management has to submit definite charges in terms of MEPS Rules to the Inquiry Committee under Rule 37(1). The framing of specific charges or charge-sheet is the culmination of process of application of mind by management to the facts disclosed in statement of allegations served upon employee under Rule 36(1) in the light of his explanation thereto and requirements of MEPS Rules. Thus, in the scheme of disciplinary proceedings as contemplated, statement of allegations constitute an important anchor. The employee has been given the right to be exonerated/discharged if his reply to statement of allegations is found satisfactory by chief executive officer/president.

This opportunity or right prescribed statutorily therefore needs to be protected from any invasion. Only when the employee fails to get himself discharged at this stage, the matter proceeds further and management steps in to find out whether departmental inquiry needs to be held or not. It reaches this decision after pondering over statement of allegations served by chief executive officer/president upon employee, reply or explanation of said employee to it and ingredients of Rule 28(5). If it finds some substance in the allegations levelled, it can be said that "employee is allegedly found to be guilty on any of the grounds specified in sub-rule (5) of Rule 28". If it decides to hold Inquiry, then it has to constitute Inquiry Committee in the mode and manner prescribed in Rule 36. It has then to submit said statement of allegations with its explanation by employee to the convener of Inquiry Committee along with charge-sheet. As statement of allegations is already received by employee and he has already filed his explanation thereto. Rule 37(2)(i) leaves it at discretion of such employee whether to file any written explanation to the charge-sheet or not. Even if he prefers not to file any written explanation to the charge-sheet, no adverse inference can be drawn against him. No arguments requiring examination of Rule 37(2) and (3) are advanced in this matter and suffice it to say that the provisions there relating to procedure to be followed by Inquiry Committee during its

sittings do not contain any provision either expressly or impliedly permitting or prohibiting appointment of lawyer as defence assistant or next friend by delinquent. Being welfare measure, it will have to be construed in favour of delinquent and hence in appropriate cases, management may permit delinquent such legal assistance. From the arguments of management quoted above it is apparent that respondent No 2 has also not canvassed that in no case lawyer can be permitted under MEPS Rules.

11. Rule 37(4) is the only provision which requires the convener of Inquiry Committee to supply copies of statement of witnesses to the delinquent. It also obliges him to serve upon delinquent "summary of proceedings". Sub-rule (2)(e) speaks of "proceedings" of Inquiry Committee and also of statement of witnesses. Completion of Inquiry is contemplated in sub-rule (6) and thereafter Inquiry Committee has to communicate its "findings" to the management. It has also to communicate its "decision" on the basis of these findings to management for specific action to be taken against delinquent. Thus there is difference between "summary of proceedings" and "findings" of Inquiry Committee. Findings are not at all available at stage of Rule 37(4) and perusal of sub-rule (5) shows that delinquent has been given the right to submit his further explanation to convener of Inquiry Committee after receipt of summary of proceedings. Sub-rule (6) shows that no opportunity is given to delinquent against the findings of Inquiry Committee. It is to be noted that management has been placed under obligation to implement the decision of Inquiry Committee. Thus though technically management is disciplinary authority, it has not been given right to differ with findings of Inquiry Committee or to differ with decision thereof. Further explanation contemplated under sub-rule (5) is clearly not against the findings but against the summary of proceedings and statement of witnesses. Perusal of judgment of Hon'ble Apex Court in case of Union of India vs. Mohd. Ramzan Khan (supra) leaves no manner of doubt that opportunity to submit explanation against findings is made available to delinquent only when such findings are to be considered by disciplinary authority which was not party to departmental inquiry. In paragraph 13 of judgment Hon'ble Apex Court states that in case conclusions of inquiry officer are kept away from the delinquent officer and the Inquiry Officer submits his conclusions with or without recommendation as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him by the disciplinary authority. The report is an adverse material if the Inquiry Officer records a finding of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of natural justice are breached. Such is not the position or scheme in MEPS Rules. From paragraph 16 of report of judgment (supra) it is apparent that when departmental inquiry is conducted by disciplinary authority itself, there is no requirement of furnishing copy of "findings" to delinquent. Here, though disciplinary authority is technically

different requirements of sub-rule (6) clearly show that it has no power to differ with findings recorded by Inquiry Committee and it only acts as an agent of Inquiry Committee. The obligation on Inquiry Committee to furnish copy of its findings and decision to education department and also duty of management to furnish copy of order passed by them to education department along with time limit of seven days imposed on it to pass such orders clearly negate the requirement of serving copy of findings i.e. enquiry report upon delinquent.

12. First communication about commission of misconduct by him addressed to petitioner by management is dated 29-1-1993. Petitioner contends that this is charge-sheet under Rule 37(1) while employer management states that it is only statement of allegation as contemplated by Rule 36(1) with which draft charges were also enclosed. Paragraph 5 of writ petition filed before this Court shows that petitioner accepts that notice dated 29-1-1993 was accompanied by statement of allegations made. Advocate Uday Dastane has relied upon this assertion to state that petitioner himself accepts that he received statement of allegation. However then in his appeal filed before School Tribunal, petitioner has stated that he was not served with any statement of allegation and hence no further steps under Rule 36(2) could have been taken. Even in his reply to communication No. 16/1993 dated 29 January, 1993 sent to management on 6-3-1993, in paragraph 7 petitioner has made grievance that his exhalation was not sought to any statement of allegation and Employer Society has directly resolved to suspend him and to conduct inquiry against him. Even in paragraph 5 of this representation he has stated that President did not serve any statement of allegation on him and no explanation was called for from him. In said paragraph, Petitioner has stated if any resolution was passed by management to conduct inquiry against him, it would be contrary to Rule 36(2). This grievance is more specifically made in paragraph 4 and breach of Rule 36(1) and corresponding right available to him has been mentioned in it. Perusal of above communication with outward No. 16/1993 dated 29-1-1993 shows that the same is addressed by president to present petitioner. It shows that certain complaints were received against petitioner and preliminary Inquiry was conducted on 13, 15 and 17 Dec. 1992. On 18-12-1992 meeting of trust was called and in that meeting report given by chief executive officer was considered and report revealed prima facie that petitioner committed misconduct punishable with severe punishment and hence the decision to conduct inquiry was taken. It was also resolved to suspend petitioner and accordingly he was suspended from 3-1-1993. Along with this communication dated 29-1-1993, draft of charges for indiscipline and misconduct in respect of which Inquiry was decided to be conducted, was enclosed and each charge was supported by statement of allegation. Not only this, list of documents to be relied upon and list of witnesses through whom the charges were to be proved was also enclosed with this communication. Petitioner was given time of seven days to file his reply in defence and it was specified that Inquiry would be restricted only to charges not accepted by him. It was further stated that if no reply in writing was received, ex parte inquiry would begin. It is therefore

apparent that in the face of this communication there was nothing to be decided by management after receipt of reply in defence, except constitution of Inquiry Committee. Contention of respondent employer is also that after receipt of reply same was considered by management in its meeting held on 18-2-1993 and Inquiry Committee was constituted. Employer also contends that petitioner himself is accepting receipt of charge-sheet under Rule 37(1) and hence, there is absolutely no prejudice caused to him in the matter. It is argued that what was initially only a draft of charges has been latter on finalised as charge-sheet to be used in departmental Inquiry and there is no violation either of Rule 36(1) or any other rule in this respect. Perusal of proceeding dated 18-2-1993 reveals that in that meeting vide resolution No. 3 it is recorded that management has considered explanation submitted by petitioner suitably and decided to appoint Inquiry Committee as per Rule 36. It further mentions that member suggested by President for said Inquiry Shri Suresh Shankarrao Ballal, Headmaster, Samartha High school, Ghatanji was approved by management. Similarly it is also recorded that charges levelled in charge-sheet forwarded to petitioner on 29-1-1993 are approved by management. This proceeding dated 18-2-1993 nowhere mentions that President had earlier found reply submitted by petitioner to communication dated 29-1-1993 to be "not satisfactory" and therefore he placed it before management. The management has nowhere resolved that an Inquiry be conducted against petitioner after perusal of said opinion. Next communication by President to petitioner is dated 20-2-1993 by which petitioner was informed of resolution dated 18-2-1993 to appoint Inquiry Committee to hold inquiry into charges against him as per Rule 36 and he was called upon to nominate his representative within 15 days. Petitioner nominated 1 Pandurang Krushnarao Tonge as his representative accordingly. This communication does not state that charges mentioned in communication dated 29-1-1993 are approved as final charges or Inquiry is to be conducted on those charges. However, no grievance has been made by petitioner about not having formal knowledge of charges during departmental inquiry. His grievance is only about not serving upon him "statement of allegation" and denial of right of consideration of his reply by President as contemplated by 36(2). The records show that President of society has nowhere applied his mind to reply dated 9-2-1993 submitted by petitioner to the communication dated 29-1-1993 and he has not therefore found it to be "not satisfactory". He has not placed the communication dated 29-1-1993 before management on 18-2-1993 in mode as contemplated by Rule 36(2) MEPS Rules. It needs to be mentioned here that proceeding of meeting of management dated 18-12-1992 is not produced on record and from its mention in communication dated 29-1-1993, decision to hold departmental inquiry against petitioner was already taken on 18-12-1992 itself even before calling for reply of petitioner to alleged statement of allegation.

Additional Charge-sheet dated 9-3-1993 has been served upon petitioner as a result of meeting of management dated 8-3-1993 and petitioner has replied to it on 15-3-1993. This reply was received by President on 20-3-1993 and it was

considered by managing Committee on 21-3-1993. The management found said reply to be not satisfactory and wrong and hence decided to forward the same to Inquiry Committee already constituted requesting that Inquiry Committee to also inquire into supplementary charge-sheet. Again it is apparent that no statement of allegation as contemplated by Rule 36(1) in relation to misconduct mentioned in this supplementary charge-sheet was served upon petitioner and President has not applied his mind to reply submitted by petitioner to supplementary charge-sheet and has not recorded his dissatisfaction with such reply. Thus Petitioner has been deprived of right of consideration of his explanation by President under Rule 36(1).

13. Law on departmental enquiries in such matters can be best understood through State Bank of Patiala and others Vs. S.K. Sharma, where in para 11 the Hon"ble Apex Court states:-

"11. It is not brought to our notice that the State Bank of Patiala (Officer's) Service Regulation contains provision corresponding to section 99 CPC or section 465 Criminal Procedure Code. Does it mean that any and every violation of the regulations renders the enquiry and the punishment void or whether the principle underlying section 99 CPC and section 465 Criminal Procedure Code is applicable in the case of disciplinary proceedings as well. In our opinion, the test in such cases should be one of prejudice, as would be later explained in this judgment. But this statement is subject to a rider. The regulations may contain substantive provisions, e.g., who is the authority competent to impose a particular punishment on a particular employee/officer. Such provisions must be strictly complied with. But there may be any number of procedural provisions which stand on a different footing. We must hasten to add that even among procedural provisions, there may be some provisions which are of a fundamental nature in the case of which the theory of substantial compliance may not be applicable. For example, take a case where a rule expressly provides that the delinquent officer/employee shall be given an opportunity to produce evidence/material in support of his case after the close of evidence of the other side. If no such opportunity is given at all in spite of a request therefor, it will be difficult to say that the enquiry is not vitiated. But in respect of many procedural provisions, it would be possible to apply the theory of substantial compliance or the test of prejudice, as the case may be. The position can be stated in the following words :

(1) Regulations which are of a substantive nature have to be complied with and in case of such provisions, the theory of substantial compliance would not be available. (2) Even among procedural provisions, there may be some provisions of a fundamental nature which have to be complied with and in whose case, the theory of substantial compliance may not be available. (3) In respect of procedural provisions other than of a fundamental nature, the theory of substantial compliance would be available. In such cases, complaint/objection on this score have to be judged on the touchstone of prejudice, as explained later in this judgment. In other words, the test is : all things taken together whether the

delinquent officer/employee had or did not have a fair hearing. We may clarify that which provision falls in which of the aforesaid categories is a matter to be decided in each case having regard to the nature and character of the relevant provision."

In para 32, Hon^{ble} Apex Court has given its conclusions which are also important.

"32. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this : procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and

mandatory provisions, if one is so inclined. The principle stated under (4) herein below is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in *B. Karunakar*, AIR 1994 SCW 1050. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action - the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of *audi alteram partem*) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and not adequate opportunity, i.e., between "no notice" "V" "no hearing" and "no fair hearing." (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (*audi alteram partem*). (b) But in the latter case, the effect of violation (of a facet of the rule of *audi alteram partem*) has to be examined from the stand-point of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.)

(6) While applying the rule of *audi alteram partem* (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair

hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of state or public interest may call for a curtailing or the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

Shri Datta Shikshan Prasarak Mandal and Another Vs. Shri Dinkar Krishna Gawde, is the ruling of this Court in which it has been held that compliance of Rule 36 (2) is an internal procedure of management and time schedule mentioned in it has been held to be not mandatory. It does not consider the case in which opportunity under Rule 36(1) is totally denied to employee. In the facts of present case, it is apparent that President did not discharge obligation of applying mind to the explanation furnished by petitioner and in any case, management had already resolved on 18-12-1992 itself to hold departmental inquiry against petitioner and President being part of management was party to that decision and therefore, had disqualified himself to perform said duty under Rule 36(1). It is apparent that a filter provided in scheme to safeguard petitioner was rendered meaningless and petitioner got "no opportunity" as per the said provision. Thus very commencement or initiation of departmental inquiry by management suffers from a fatal defect.

14. Petitioner and his representative have also raised grievance about Constitution of Inquiry Committee. They have contended that Shri Ballal appointed by President as award-winning teacher is not from the panel. This objection was raised by petitioner also on 28-3-1993 and order about it is passed on 30-3-1993. Said order is in English and in it, president has only dealt with aspect of permission to engage lawyer and has not dealt with objection against Shri Ballal and Shri Minekar. Though in the order sheet it is mentioned that such application was tendered on 30-3-1993 and order rejecting it has been recorded on its back, there is no such application or order on record. It appears that Shri Ballal is in award-winning teacher but not from the panel maintained by State Government. The purpose of prescribing inclusion of name of such award winning teacher from panel as member of Inquiry Committee is already discussed above and it is apparent that said purpose is not achieved but is being defeated in the facts of present matter. Such representative from panel is not supposed to take any sides but has to act as an independent impartial officer to see that representative of management or representative of employee does not succeed in influencing the proceedings. Discussion in paragraphs above shows that such an independent and impartial award-winning teacher could have been useful to find out truth by impartial and fair conduct of departmental proceedings. The judgments on which the learned counsel for petitioner has placed reliance i.e. Ganpati Sant Vs. Shri Sant Gulab Baba Shikshan Sanstha and others, and Kankubai Trust vs. Kamal D. Khajurkar, reported at 1992 Mh.LJ. 276, para 10,11

clearly show that if Constitution of Inquiry Committee is bad, proceedings conducted by such defective Inquiry Committee are void and no punishment imposed on the basis of such proceedings can be sustained. Judgment of Hon''ble Apex Court in State Bank of Patiala vs. S. K. Sharma (supra) also supports this view because departmental inquiry at the hands of an Inquiry Committee constituted in terms of Rule 36(2) is fundamental in the scheme of MEPS Rules.

15. Admittedly, President of employer society is practicing advocate. Petitioner made request for lawyer on 28-3-1993 while replying to communication dated 19-3-1993 of management. His request has been rejected by President on 30-3-1993 on the ground that presenting officer Shri Minekar was only having Law degree which he secured in 1967 but he never practiced as advocate. Perusal of Inquiry proceedings shows that first witness examined by management is presenting officer Shri Minekar. His evidence was objected to by petitioner, but it was recorded. It appears that petitioner and his representative Shri Tonge boycotted the Inquiry on 10-4-1993 when after recording of oral evidence of student witness Ku. Baby Burbure, President confronted her with document Exhibit m-5 bearing her signature and it was objected to by representative of petitioner. After petitioner and his representative left, further statement of this student witness came to be recorded and said statement is in direct conflict with her earlier oral statement. She stated that said written statement was recorded by presenting officer Shri Minekar. It appears that said presenting officer had recorded statements of all witnesses in writing on 13-12-1992. Only evidence of two more witnesses has been recorded after they left on 10-4-1993. Evidence of about 11 such witnesses has been recorded on 12-4-1993 in absence of petitioner and his representative. In this matter we are not concerned with details but even cross-examination of petitioner has been conducted in departmental inquiry by Shri Minekar. Petitioner has examined some parents and students. Students i.e. witnesses of petitioner, have deposed that they were threatened by Shri Minekar for obtaining statement against petitioner. They have not been cross-examined. Hon''ble Apex Court in J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd. and others, also considers the earlier ruling in case of Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others, and in paragraph 4 observes:-

"4. In the present case, the matter is guided by the Provisions of Rule 7(5) of the Civil Services (Punishment and Appeal) Rules, 1952 which says : (not reproduced)

It would appear that in the inquiry, the respondent-Corporation was represented by its Personnel and Administrative Manager who is stated to be a man of law. The rule itself recognises that where the charges are so serious as to entail a dismissal from service the inquiry-authority may permit the services of a lawyer. This rule vests a discretion. In the matter of exercise of this discretion one of the relevant factors is whether there is likelihood of the combat being unequal entailing a miscarriage or failure of justice and a denial of a real and reasonable

opportunity for defence by reason of the appellant being pitted against a presenting officer who is trained in law. Legal Adviser and a lawyer are for this purpose somewhat liberally construed and must include "whoever assists or advises on facts and in law must be deemed to be in the position of a legal adviser." In the last analysis, a decision has to be reached on a case to case basis on the situational particularities and the special requirements of justice of the case. It is unnecessary, therefore, to go into the larger question "whether as a sequel to an adverse verdict in a domestic enquiry serious civil and pecuniary consequences are likely to ensue, in order to enable the person so likely to suffer such consequences with a view to giving him a reasonable opportunity to defend himself, on his request, should be permitted to appear through a legal practitioner" which was kept open in Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni and Others, . However, it was held in. that case :

".....In our view we have reached a stage in our onward march to fair play in action that where in an enquiry before a domestic tribunal the delinquent officer is pitted against a legally trained mind, if he seeks permission to appear through a legal practitioner the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated....." (Para 837)

5. On a consideration of the matter, we are persuaded to the view that the refusal to sanction the service of a lawyer in the inquiry was not a proper exercise of the discretion under the rule resulting in a failure of natural justice; particularly, in view of the fact that the Presenting Officer was a person with legal attainments and experience. It was said that the appellant was no less adept having been in the position of a Senior Executive and could have defended, and did defend, himself competently; but as was observed by the learned Master of Rolls in Pett's case that in defending himself one may tend to become "nervous" or "tongue tied". Moreover, appellant, it is claimed, has had no legal background. The refusal of the service of a lawyer, in the facts of this case, results in denial of natural justice."

Taking overall view of the matter, in view of non-constitution of proper Inquiry Committee, management going out of way and choosing to appoint an award-winning teacher whose name did not appear on panel, circumstances in which petitioner and his representative were required to boycott departmental inquiry, fact that President of institution did not discharge his obligation under Rule 36(1), he, a practicing lawyer was member of Inquiry Committee and also its convener and also presenting officer appointed by management was its chief executive officer who recorded all statements in preliminary inquiry and also has a law degree; it is apparent that petitioner could have defended himself in better way had he been allowed a lawyer. The nature of charges against him and manner in which evidence has been collected against him all show that an assistance through lawyer would have made difference even in conduct of

departmental inquiry. I therefore, find that request of petitioner to have services of lawyer ought to have been allowed by management.

16. Contention of petitioner that findings of all members of Inquiry Committee were not made available to him is without any substance in view of discussion already undertaken above. Here management has got no discretion in the matter of accepting said findings and it has to only implement recommendations of Inquiry Committee in the matter of punishment. Thus technically it is Inquiry Committee which also acts as disciplinary authority and it is also party to entire inquiry. Hence, question of supplying copy of these findings of all three members of Inquiry Committee (Enquiry reports) does not arise in view of law as laid down in Union of India vs. Mohmd. Ramzan Khan (supra) by Hon''ble Apex Court. Similarly, summary of proceedings of Inquiry Committee is also required to be furnished only by president and it is because he acts as convener thereof. There is no question of other members of Inquiry Committee maintaining any proceedings and hence supplying summary to petitioner. Argument that Petitioner was not given required time to submit his reply to summary is therefore again misconceived. Grievance made by petitioner about non-payment of subsistence allowance also appears to be without any substance because no prejudice on that account has been pointed out and as held by Hon''ble Apex Court in Indra Bhanu Gaur Vs. Committee, Management of M.M. Degree College and Others, , it is settled law that mere non-payment of subsistence allowance by itself is not fatal to the validity of any departmental inquiry.

17. Learned counsel for management has contended in the alternative and by way of abundant precaution that back wages cannot be awarded to the employee as he has not demanded the same in writ petition. However, perusal of appeal memo reveals that such prayer has been made in appeal filed by petitioner before School Tribunal. The petitioner is out of employment for last about 13 years. In his lengthy appeal before School Tribunal he has not stated that he is without any source of income or livelihood. There is no such assertion even in writ petition though in ground XII he has stated that he should be permitted to join duties to save him and his family from financial crisis and disaster. In view of the judgments of Hon''ble Apex Court in case of L.J. P. State Brassware Corporation vs. Uday Narayan Pande, reported at 2006 (I) CLR 39 (SC) and Haryana State Electronic Corporation vs. Mamni, reported at 2006 (II) CLR 1047 (SC), it is apparent that burden in this respect is upon employee and he has to raise proper pleadings in this respect and also support his stand by proper documents or affidavits. Here though it cannot be said that petitioner remained out of employment for any fault on his part, because of these vital omissions on his part, I find that he cannot be given full backwages. Considering the fact that he is out of service since last more than 13 years and is getting a lump sum now, I am inclined to grant him 25 percent of the backwages for the period from his termination till the date of this decision.

18. Writ petition is thus allowed. Impugned judgment of School Tribunal dated

24th July 1996 in Appeal No. 97/1993-A, is set aside. Termination of petitioner by respondent-management is hereby quashed and set aside. His appeal before School Tribunal stands allowed. He is reinstated back in service with continuity and 25% backwages from the date of his termination. Rule made absolute accordingly with no order as to costs.