

BEFORE THE JUDGE, LABOUR COURT, SANGLI
(Presiding Officer Mr. S. D. Bauchkar)

Complaint (ULP) No. 9/2011

Shri. Vishwas Ananda Koli, **... Complainant**
Galli No. 17, Near Dr. Shaikh, Jayshingpur,
Tal. Shirol, Dist. Kolhapur.

Vs.

Vasantdada Shetakari Sahakari Sakhar **... Respondent**
Karkhana Ltd, Sangli,
Madhavnagar Road, Sangli 416 416,
Through the Managing Director.

Appearances :-

Shri. S. R. Rane, Advocate for the Complainant.

Shri. S. S. Mutalik, Advocate for the Respondent.

PART – I – J U D G M E N T

(Delivered on 22nd day of March, 2017)

Pronounced and dictated in open court.

1) The Complainant has filed the present complaint under Section 28(1) read with item 1(a), (b), (d), (f), and (g) of Schedule-IV of the Maharashtra Recognition of Trade Unions And Preventions of Unfair Labour Practices Act, 1971 (hereinafter referred to as 'the Act' for short) challenging his dismissal from the services.

2) ***It is pleaded by the Complainant that :-***

He was working with the Respondent Co-operative Society as a 'Cleaner' on permanent basis since 1983-84

continuously till the date of termination. He was issued suspension order dated 15/17.07.2003, suspending him with effect from 19.07.2003. He was issued with a charge-sheet dated 16.10.2003. He was not paid subsistence allowance. He vide his application dated 26.04.2006 and 07.09.2006 demanded the subsistence allowance. However, the Respondents have not paid him subsistence allowance. He personally met the Chairman and the Managing Director of the Respondent-Karkhana on numerous occasions and requested to pay the subsistence allowance at the rates prescribed in the model standing orders applicable to his employment. The Respondent has also not paid him bonus since 2003.

3) The Respondent conducted the enquiry into the charges levelled against him by appointing an Advocate as an Enquiry Officer. The Respondent management was represented by an Advocate. He had submitted application before the Enquiry Officer and requested to stay the enquiry proceeding till the subsistence allowance is paid to him. The Enquiry Officer passed an order that directing the management to pay subsistence allowance was not within his jurisdiction. He filed complaint of unfair labour practices bearing Complaint (ULP) No. 1/2011 before the Hon'ble Industrial Court, Sangli on 04.01.2011. The Respondent not liking his act of filing aforesaid complaint has dismissed him by a back dated order dated 22/27.12.2010.

4) Since, the Respondents failed to pay subsistence

allowance to him, he could not incur the expenses for keeping his representative present before the Enquiry Officer. He could not make proper representation before the Enquiry Officer. However, he somehow managed to arrange for his own transportation for remaining present before the Enquiry Officer. He could not arrange for the expenses to remain present before the Enquiry Officer. Due to non payment of subsistence allowance he suffered prejudice by losing an opportunity of defending himself by a legally trained person. The enquiry held against him was a farce, illegal and against the principles of natural justice. The Enquiry Officer with undue haste rejected his application. Hence, the findings are perverse. They are without reasoning. The Enquiry Officer has reproduced the examination in chief of the witnesses of the Respondent in his report and has drawn the conclusion that the charges are proved. The Enquiry Officer has acted more as management representative throughout the enquiry as well as while drawing the report of enquiry.

5) The Respondent has appeared in the matter and has contested the claim of the Complainant by filing its Written Statement and say at Exhibit C-1. The Respondent has denied the material, averments and statements made in the complaint. According to the Respondent, the Complainant was in the employment with the Respondent-Karkhana as a cleaner in its vehicle department. He was found to have 118 Ltrs. of diesel instead of 200 Ltrs. as per the bill, which act amounted to dishonesty with the employer's business. It was misconduct of very

serious nature and hence a charge-sheet dated 16.10.2003 was issued to him. Based upon the charge-sheet, the disciplinary enquiry was conducted in the matter. The Complainant participated in the enquiry and put-up his defence. The Enquiry Officer submitted its report holding the Complainant guilty of the charges and based on said enquiry report, as the charges were of serious nature and also considering his past service record, was dismissed from the services vide an order dated 27.12.2010. The enquiry conducted into the charge-sheet is legal and proper and as per principles of natural justice. The findings of the Enquiry Officer are based upon the evidence before him.

6) On the basis of pleadings of both the parties, my Learned Predecessor in chair framed issued at Exhibit O-4 on 12.03.2013. The issues framed are as under :-

ISSUES

- 1) Does the Complainant prove that the enquiry conducted against him is not legal, proper and fair ?
 - 2) Does he further prove that the findings recorded by the Enquiry Officer are perverse and not based upon the evidence and materials before him ?
 - 3) Does the Complainant prove that the Respondent is indulged in unfair labour practice, as alleged ?
 - 4) Whether he is entitled for reinstatement with continuity of service ?
 - 5) Whether he is entitled for back wages? If yes, to what extent ?
- 7) The Complainant has himself examined at Exhibit U-16. He has been cross examined by the then Learned Advocate for

the Respondent. The Complainant vide pursis Exhibit U-22 informed that he does not wish to lead further oral evidence on the issues of conduct of enquiry and perversity of findings. The Respondent vide pursis Exhibit C-3 has informed that he does not wish to lead any oral evidence on it's behalf. The Respondent vide list of documents at Exhibit C-2 has produced on record original papers of enquiry conducted into the charge-sheet dated 13.10.2003. The Complainant with list Exhibit U-24 has placed on record certified true copy of Judgment and Order passed in Complaint (ULP) No. 1/2011, by the Hon'ble Industrial Court, Sangli.

8) I have heard Learned Advocate Mr. S. R. Rane appearing on behalf of the Complainant and the Learned Advocate Mr. S. S. Mutalik appearing on behalf of the Respondent.

9) Out of aforesaid noted issues, issue No. 1 and 2 are treated as preliminary issues as per the note on said Exhibit O-4. The said preliminary issues are reproduced below. I am recording my findings against them with reasons to follow.

ISSUES

- 1) Does the Complainant prove that the enquiry conducted against him is not legal, proper and fair ?
- 2) Does he further prove that the findings recorded by the Enquiry Officer are perverse and not based upon the evidence and materials before him ?

FINDINGS

In the negative.

***The findings are
perverse***

3) What order ?

As per final order.

REASONS

10) **In respect of issue No. 1 :-**

The Advocate for the Complainant argued that, the Complainant was not paid subsistence allowance during the course of enquiry and the enquiry stands vitiated for non payment of subsistence allowance.

11) The Complainant in terms of his pleading has examined himself at Exhibit U-16 and has submitted on oath that due to non-payment of subsistence allowance, he could not keep his Representative present in the enquiry. He himself made arrangement for his travelling expenses and had attended the enquiry. He has further submitted that due to non-payment of subsistence allowance by the Respondent-Karkhana, he could not incur for attendance expenses of himself and his representative and due to that he could not remain present in the enquiry and put his defence effectively. During course of cross-examination, the Complainant admitted that for the first time on 26.04.2006, he had requested for payment of subsistence allowance.

12) The enquiry papers as stated above are record. The following facts are emerging from the perusal of proceedings of enquiry.

That the charge-sheet dated 13/16.10.2003 was issued the

Complainant. Advocate Shri. N. M. Jagdale acted as an Enquiry Officer. Enquiry into the said charge-sheet commenced on 14.11.2003. On the said date of enquiry, the Complainant pleaded not guilty and admitted receipt of charge-sheet and further admitted that he had understood the contents of charge-sheet. Thereafter, the enquiry was held on 26.12.2003. On said date of enquiry the Complainant had requested for adjournment on the ground of non-availability of his representative Shri. P. N. Mulik and accordingly enquiry was adjourned to 02.01.2004, which directly took place on 04.06.2004. On the said date of enquiry, statement of management witness Shri M. M. Devgonnavar was recorded in the presence of the Complainant and after recording of statement, enquiry was adjourned to 11.06.2004 at the request of the Complainant. Thereafter, the enquiry took place on 23.3.2007 in presence of the Complainant and the Management Representative submitted that the witness Shri. Degonnavar due to resignation of his services was unable to present and the said witness was given up with permission to examine another witness. Thereafter enquiry took place on 22.06.2007 and the Complainant filed authority letter in favour of Shri. P. N. Mulik as his Representative who was present.. Thereafter the enquiry took place on 24.08.2007 and on said date, the Complainant cancelled authority letter in favour of Shri. P. N. Mulik and appointed Advocate Shri. K. D. Shinde and Shri. B. R. Mulani as his Representatives. Thereafter enquiry took place on 07.09.2007 and the Complainant along with his defence representative Shri. B. R. Mulani was present and statement of Shri. D. R. Chavan, witness on behalf of the management was

recorded. On the said date of enquiry, after recording of statement of said witness was over, the Complainant's representative submitted for adjournment with permission to conduct cross-examination on the adjourned date i.e. 14.09.2007. On 14.09.2007, the Complainant submitted an application for adjournment with a reason that his Representatives were unable to remain present and conduct cross-examination of the witness. The Enquiry Officer granted the said application and adjourned the enquiry to 21.09.2007. Thereafter the enquiry took place on 18.01.2008 and as the Complainant declined to cross examine the management witness, no cross-examination order came to be passed and enquiry was adjourned to 25.01.2008. On 25.01.2008, the Complainant submitted application for quashing of said no cross order, and prayed for permission to cross examine the said witness. However, the management witness was not present on same date. The defence Representative Shri. B. R. Mulani submitted certain documents with list, which were taken on record and the enquiry was adjourned to 01.02.2008. On 01.02.2008, said defence Representative of the Complainant conducted cross-examination of Management witness Shri. D. R. Chavan and enquiry was adjourned to 08.02.2008. On 08.02.2008, statement of management witness Shri. Pandurang Tukaram Ghadage was recorded and the defence Representative requested for permission to conduct cross-examination on next date and accordingly enquiry was adjourned to 22.02.2008. It seems from the proceeding of enquiry dated 21.03.2008 that on 22.02.2008 the Complainant and his Representative were absent and thereafter enquiry was kept on

07.03.2008 and 14.03.2008 and on these dates also the Complainant and his Representative were absent. That notice dated 14.03.2008 was issued to the Complainant by registered A.D. Post, and the enquiry was kept on 21.03.2008 and no cross order was passed by the Enquiry Officer and enquiry was adjourned to 03.04.2008. On 03.04.2008 the Complainant was present and submitted application for adjournment and same was granted as a last chance and enquiry was adjourned to 17.04.2008. On 17.04.2008, the Complainant was absent and the Enquiry Officer despite request of the management Representative to proceed ex-parte, adjourned the enquiry on 13.06.2008. On 13.06.2008 enquiry was conducted in absence of the Complainant and the statement of management witness No. 3 Shri. Gururaj Shrinivas Gote and no cross order was passed against the Complainant as he was absent in spite of call to him by the Enquiry Officer. Further statements of management witnesses nos.4 and 5 namely Shri. Sampat Rajaram Mane and Shri. Bhagwan Hindurao Patil were recorded and no cross orders in respect of said witnesses were passed. Pursis informing that the management had no further evidence was filed. The Complainant was called by the Enquiry Officer. However, in spite of call by the Enquiry Officer, he was absent and order that the Complainant had no evidence in defence was passed and arguments advanced by the management Representative were heard and enquiry was declared as completed. The Enquiry Officer submitted his report of enquiry on 08.05.2009.

13) The Complainant on 25.01.2008 vide list Exhibit 14

submitted to the Enquiry Officer xerox copies of his applications dated 26.04.2006 and 07.09.2007 requesting for payment of subsistence allowance from the Respondent, submitted by him to the Respondent-Karkhana. The Complainant on 08.02.2008 vide his application at Exhibit 15 submitted before the Enquiry Officer that he has not received subsistence allowance for last four years and it is difficult for him to attend the enquiry and prayed that the enquiry be stayed till he is paid subsistence allowance. The Enquiry Officer after obtaining say of the Respondent-Karkhana, passed an order as noted in the proceeding dated 08.02.2008 that considering the say of the Respondent, directions to pay subsistence allowance is not within his jurisdiction and on that count he disposed of the application of the Complainant. It seems from the proceeding of enquiry that the Complainant thereafter stopped to attend the enquiry. It is pertinent to note that for the first time the Complainant vide his application dated 26.04.2006 had requested the Respondent to pay the subsistence allowance to him.

14) The Advocate for the Respondent relied upon the Judgment of Hon'ble Allahabad High Court reported in 2001 LLR 1004 and 2010 LLR 348 in the matter of Sarv U.P. Gramin Bank Vs. Manojkumar Shinha and submitted that mere non payment of subsistence allowance during the period of suspension will not ipso-facto render the order of termination and / or enquiry invalid. He further submitted that material has to be produced to prove prejudice due to non-payment of subsistence allowance.

15) The Hon'ble Supreme Court in the matter of Indra Bhanu Gaur Vs. Committee of Management of M. M. Degree College reported in 2004 AIR (SC) 248 has ruled that Unless prejudice is shown and established, mere non-payment of subsistence allowance cannot ipso facto be a ground to vitiate the proceedings in every case. It has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non-receipt of subsistence allowance. Unless that is done, it cannot be held as absolute proposal in law that non-payment of subsistence allowance amounts to denial of opportunity and vitiates departmental proceedings.

16) The Hon'ble Bombay High Court in the matter of Vastala Prem Chand Sarmal Vs. Raghunath Damodhar Krachale reported in 2007 (I) Mh.L.J. 705 after referring to various Supreme Court rulings has observed that “the subsequent decision emphasized that in order to enable the court to hold that the non-payment of subsistence allowance vitiated disciplinary proceedings, it is first time and foremost necessary for the workman to set-up the plea that as a result he was either not in a position to participate in a proceeding or to effectively defend them. Prejudice either in the form of not being able to participate in the disciplinary proceeding or of some other nature has to be specifically pleaded and established.”

17) It is on record that prior to his application requesting for payment of subsistence allowance submitted to Enquiry Officer,

he had attended the enquiry and had appointed initially Shri. Mulik as his Representative and thereafter he appointed Shri. B. R. Mulani and Advocate Shri. K. D. Shinde as his Representatives.

18) From the above record, it is clear that the Complainant was attending the enquiry and at no place he had raised any grievance at to his inability to attend the enquiry on account of non-payment of subsistence allowance. From the record of enquiry, it is seen that no prejudice was shown by the Complainant on account of non-payment of subsistence allowance, except claiming subsistence allowance. It is pertinent to note that, the Complainant was suspended w.e.f. 19.07.2003 and for first time on 26.04.2006 he made request for payment of subsistence allowance and till that date was attending the enquiry. He for first time on 08.02.2008 applied to the Enquiry Officer for issuance of directions for payment of subsistence allowance to the Opponent Karkhana, which request was turned down by the Enquiry Officer. He made no protest to said order and attended the enquiry on 03.04.2008 and submitted application (Exhibit 18 in the enquiry) for adjournment on the ground of non-availability of his Defence Representative which was granted and enquiry was kept on 17.04.2008. It is pertinent to note that, the Complainant had appointed Shri. K. D. Shinde as his Representative. No alternative defence challenging the enquiry is appearing in the pleading of the Complainant. Under these circumstances and facts obtained from record, the contention that the subject enquiry stands vitiated owing to non-payment of subsistence allowance, holds no water. Accordingly, it is held that

enquiry conducted against the Complainant is in accordance with the principles of natural justice and accordingly issue No. 1 is answered in 'negative'.

19) **Reasons as to issue No. 2 :-**

The charge-sheet issued to the Complainant is on record. It was alleged against him that report was received that he is working as a 'Cleaner' in the Transport Department of the Respondent. On 15.06.2003, he was present in the shift of 12.00 a.m. to 8.00 p.m. On that day, at about 2.30 O'clock to 3.00 O'clock he had gone in Jeep No. MH-10-C-3773 with empty barrel of green colour having writing 'Castrol' of capacity of 220 Ltrs. to take diesel for bulldozer No. 6362 which was on work at baggage yard. At that time Shri. Sampat R. Mane, Mazdoor cum Pump Attendant working at petrol pump for release of petrol and diesel was in office and therefore the Complainant himself started the diesel pump and took diesel in the said empty barrel and had been to the main gate of the Karkhana with slip No. 957 dated 14.06.2003 and himself changed the said date to 15.06.2003 and handed over the said slip to Shri. Mane and took from him bill No. 42756 dated 15.06.2003 for 200 Ltrs. of diesel and thereafter took the said bill to the main gate for the purpose of entry in the inward / outward register. At that time, the employee at main gate made entry of the bill and put inward No. 453 dated 15.06.2003 and returned the same to the Complainant. Thereafter, the Watchman on duty of the Security Department verified whether the barrel contains diesel as per bill or not whereupon he found that there was less diesel and he

practically measured the same and found that there was 118 Ltrs. diesel instead of 200 Ltrs. and there was shortage of 82 Ltrs. of diesel.

20) According to the Respondent-Karkhana, the said act of the Complainant amounted to gross negligence of duties and dishonesty. The Respondent-karkhana levelled against the Complainant following misconducts:-

Committing act of dishonesty in relation to the business of the employer 23(D);

Violating Rules and discipline of the Karkhana and disobedience of Superior's order (23-A).

21) The Respondent-management examined Shri. D. R. Chavan, Supervisor of Security Department. He deposed in terms of charge-sheet. He identified the reports on record. He submitted that Security Officer Shri. M. M. Devgonnavar had conducted preliminary enquiry and submitted his confidential report to the Managing Director of the Karkhana on 16.06.2003. He identified the said confidential report. He identified the statement dated 15.06.2003 of the Complainant and submitted that the Complainant had signed in his presence and he had signed the said statement in token of its execution before him. He identified requisition slip dated 15.06.2003 and credit memo of Indian Oil. The Complainant cross examined the said witness. Nothing contrary to the evidence of said witness was revealed in the cross examination. The statement of the Complainant identified by the said witness is on

record. In the said statement, the Complainant had specifically admitted that he had taken slip dated 14.06.2003 at about 5.30 p.m. on 14.06.2003 from Shri. Pandurang Ghadage and since the vehicle was not available, instead of bringing diesel on that day he on 15.06.2003 had gone the petrol pump in Jeep bearing No. MH-10-C-3773 with empty barrel of 220 Ltrs. of capacity. He has further submitted in the said statement that the Pump Attendant was not present and he himself took diesel in the said empty barrel in hasty manner without looking at the meter and had took credit bill No. 42756 dated 15.06.2003 from Shri. Mane and while he had been to the main gate of the Karkhana for the purpose of entry, got the said bill entered by inward No. 453 and at that time Shri. Khade, Watchman checked diesel in barrel and it was found that there was 118 Ltrs. diesel and there was shortage of 82 Ltrs. of as per slip. He had further submitted that he took the diesel from pump when it was not his responsibility, and there was no intention behind this shortage and further it was due to hastiness on his part. The Respondent-management had examined Shri. Gururaj Shrinivas Gote, Clerk at Petrol Pump, Shri. Sampat Rajaram Mane, Majdoor at Petrol Pump and Shri. Bhagwan Hindurao Patil, Baggage Contractor. No doubt, the statements of evidence of aforesaid witnesses are in absence of the Complainant but he was having the knowledge of dates of enquiry. The statement of the Complainant recorded at the relevant time of checking of diesel in barrel is on record and was proved by the Respondent-Karkhana through witness Shri. D. R. Chavan. As observed above, nothing adverse was revealed in his cross examination.

22) The Enquiry Officer held the Complainant guilty of the misconducts levelled against him (Complainant). It is pertinent to note that the only fact revealed before the Enquiry Officer was that the Complainant instead of taking 200 Ltrs. of diesel as per the requisition slip took 118 Ltrs. diesel and got credit memo in respect of 200 Ltrs. of diesel instead of 118 Ltrs. No material to show that the said act of the Complainant amounted to dishonesty in relation to business of the employer, violation of Rules and discipline and disobedience of Superior's order was before the Enquiry Officer. The Complainant had himself admitted that he acted negligently. From the facts on record, it could safely be concluded that the aforesaid act of the Complainant of taking less liters of diesel than the requisition slip amounts to negligence on his part while performing duties. It is pertinent to note that the requisition slip which the Complainant had taken on 14.06.2003 was not cancelled by the Karkhana and / or it was not contention of the Karkhana that it was invalid and without authority the Complainant took the diesel from the Petrol and Diesel Pump of the Karkhana. In the report of the preliminary enquiry only suspicion was raised by Shri. Devgonnavar that there is possibility of collusion in between employees and he had suggested certain precautions. The act of 'negligence' is quite distinct from the acts of misconducts alleged and there is no overlapping. Hence, in my considered opinion, the Enquiry Officer has lost sight of this difference. Hence, findings recorded by the Enquiry Officer are declared as and perverse. Accordingly, issue No. 2 is answered. In order to answer resultant

issue No. 3, I pass following order :-

ORDER

- a) The enquiry conducted against the Complainant is legal, proper and fair.
- b) The findings recorded by the Enquiry Officer are perverse.
- c) The matter to proceed further.

Sangli
Date :- 22.03.2017

SYK/-

Sd/-
(S. D. Bauchkar)
Judge,
Labour Court, Sangli.