

(1957) 06 CAL CK 0001
In the Calcutta High Court
Case No : Civil Rule No. 1917 of 1954

Abdul Hamid

APPELLANT

Vs

The District School Board, 24 Parganas and Others

RESPONDENT

Date of Decision : 20-06-1957

Acts Referred:

Constitution of India, 1950 — Article 220, 226

Citation : 61 CWN 880

Hon'ble Judges : Bose, J

Bench : Single Bench

Advocate : Anil Kumar Das Gupta and Nikhil Chandra Talukdar, for the Appellant; Sudhir Kumar Bose for Opposite Parties Nos. 1 and 2, J. Majumdar, (Additional Government Pleader) and Pradyut Kumar Banerjee for Opposite Parties Nos. 3 to 5, for the Respondent

Judgement

Bose, J.—This is an application under Article 226 of the Constitution. for a writ in the nature of Certiorari for quashing an order of discharge from service passed against the petitioner and also for a writ in the nature of Mandamus directing the Respondents to forbear from giving effect to that order. The case of the petitioner is that in October, 1939 the petitioner was permanently appointed as a Second Teacher of the Dadpur Free Primary School by the District School Board, Respondent No. 1. In 1941 he was promoted to the rank of Head Teacher. In September, 1949 the petitioner was appointed permanently as Assistant Teacher of Korapara Basic School in the district of 24-Parganas by the Respondent No. 1. In November, 1950, the petitioner was transferred to Saibana Basic School as Assistant Teacher. While the petitioner was working at Saibana as such Assistant Teacher he was arrested by the police of the Barasat Police Station on suspicion on the 15th" July. 1951 in connection with a criminal case which was pending in the court of the Sub-Divisional Officer at Barasat being Case No. G. R. No. 471 of 1951 under sections 395J397 of the Indian Penal Code in respect of an alleged dacoity on the night of the 3 4th July, 1951 at Manikpore. On the 36th July, 1951 the said Saibana Basic School was closed for the Rainy Season Vacation. On the

27th July, 1951 the petitioner was released on bail. After the School re-opened on the 3rd August, 1951 the petitioner resumed his duties as Assistant Teacher. It is alleged that the petitioner was thereafter allowed to perform his duties upto the 22nd of August, 1951, after which he was debarred from putting his signature to the attendance register maintained by the School On the 22nd of September, 1951. the Head Master of the Saibana Basic School directed the petitioner to submit a report in respect of the charges for which the petitioner had been arrested by the Police. On 15th October, 1951. the petitioner submitted his explanation and it appears that on the 13th November, 1951 the petitioner was discharged from the said criminal case and immediately thereafter on the 15th November, 1951 the petitioner forwarded a copy of the said order of discharge made by the Sub-Divisional Officer, Barasat, to the Sub-Inspector of Schools, Barasat Circle the then District Inspector of Schools, and the Secretary (Respondent No 3), and the Director of Public Instruction (Respondent No. 5). Thereafter there was some further correspondence between the petitioner and the School authorities and ultimately on the 18th of April, 1952. an order of discharge was passed to the following effect :

"Md. Abdul Hamid, 2nd Teacher of Saibana Basic School is hereby discharged from Board's service with effect from 15.7. 51. the date on which he was arrested by the police.

Sd. S. Pramanik.

Secretary, District School Board, 24 Bargains."

2. After some representations to the Director of Public Instruction and the Secretary, District School Board, the petitioner preferred an appeal against the order of discharge to the Director of Public Instruction Respondent No. 5. on the 8th -January, 1954, but as the petitioner did not get any relief in the appeal or on the representations that he made to the Secretary and to the Director of Public Instruction he moved this Court under Article 226 of the Constitution and obtained the present Rule on the 1st June, 1954.

3. An affidavit-in-opposition affirmed by the District Inspector of School has been filed on behalf of Respondents 2 to 5. Although this affidavit was affirmed on the 12th July, 1954, a copy of this affidavit was served on the petitioner only on the 6th June, 1957, with the result that no affidavit-in-reply has been filed on behalf of the petitioner.

4. Mr. Anil Kumar Das Gupta, the learned Advocate for the petitioner has contended that as the order of discharge dated the 18th April, 1952 was passed in contravention of Rule 12 of the Rules framed under the Bengal (Rural) Primary Education Act 1930, the same is illegal and without jurisdiction. Rule 12 may be set out hereunder :

"No teacher shall be punished, dismissed, discharged, rewarded or promoted by the Board without a previous report on his or her work from the District

Inspector of Schools or the Female Inspecting Officer-in-charge of the area within which the primary school is situated as the case may be."

5. It is submitted by Mr. Das Gupta that as no previous report as to the work of the petitioner by the District Inspector of Schools, was obtained, or procured before the order of discharge was passed, the order cannot be sustained. On behalf of the respondents the attention of the Court is drawn to paragraphs 12 and 13 of the affidavit-in-opposition in which it is stated inter alia that a report was called for from the Sub-Divisional Officer, Barasat, requesting him to intimate whether the order of discharge in the criminal case would be treated as honorable acquittal. The Sub-Divisional Officer, Barasat, forwarded a copy of the report of the Officer-in-charge, Barasat Police Station, and a copy of this report dated the 5th December, 1951 is annexed to the petition and marked A. Thereafter the respondent No. 3, i.e. the District Inspector of Schools caused a local enquiry to be made through the Sub-Inspector of Schools, Barasat, and a copy of the report which was submitted by the Inspector of Schools and which is dated the 19th March, 1952 is also annexed to this petition and is marked B and it is on the basis of these reports that the order of discharge was passed on the 18th April, 1952. Now, a perusal of the copies of these reports shows that the entire reports are concerned with the criminal case in which the petitioner was implicated but which ultimately terminated in his favour. These reports have no relation whatsoever to the nature of the work done in the past by the petitioner as a teacher. It is quite clear from Rule 12 that the report that is contemplated in that Rule must be one which has relation to the work which is done by a particular teacher who is sought to be punished or dismissed from service. The obtaining or procuring of such report is condition precedent to the exercise of the power of the Board to punish, dismiss, discharge, reward or promote a particular teacher. It is curious that there is no express rule which empowers the Board to dismiss or punish or discharge a teacher who is guilty of any misconduct or moral turpitude. Of course it may be pointed out that no case of misconduct or moral turpitude appears to have been satisfactorily established against the petitioner in the present case and I have already pointed out that the petitioner was discharged from the criminal case by the Magistrate as there was no sufficient evidence against him to support the charges which were levelled against him. It is clear from Rule 12 that the Board has no absolute power of dismissing or discharging a teacher but its powers are circumscribed by the conditions or restrictions mentioned in the Rule. In the absence of the requisite report the Board has no power of discharging a teacher from service. Reference may be made in this connection to the decision of the English Court reported in (1912) 1 Ch. 81G [Smith v. Manually (1)]. In this case Section 7(1) (c) of the Education Act provided that the consent of the local education authority would be required for the dismissal of a teacher unless the dismissal be on grounds connected with the giving of religious instruction in the school. As the plaintiff in that case was appointed as a supplementary teacher in a school at Hartwell in the county of Northampton and was given a notice of discharge without obtaining the consent

of the local education authority, and the reason for which this notice was given, was, that in the opinion of the management of the School the plaintiff had ceased to be a member of the Church of England, it was held that as the ground of dismissal was not connected with giving religious instruction by the plaintiff, the consent of local authority was necessary and in the absence of such consent, the notice of discharge was bad. It was held by Warrington, J. that u/s 7 of the Education Act the position of the plaintiff was not merely that of a servant who had entered into a contract of employment with a master, a term of which was that she should not be dismissed except upon her compliance with certain conditions, but that she had a statutory right to the position which she had acquired under the Act unless and until the requirements of the Act with regard to her dismissal had been complied with. This case has been followed with approval by Harries, J. and Rachpal Singh, J. in the case of *Prabhu Lal Upadhaya v District Board, Agro and another* (2) [ILR (1918) All. 252]. In this Allahabad case the Secretary of District Board was dismissed upon a resolution of the Board which did not comply with the requirements of section 71 of the District Board Act which provided that, "A Board may by special resolution punish or dismiss its Secretary, provided (a) that such resolution is passed by a vote of not less than two-thirds of the total number of members of the Board for the time being, or (b) that it is passed by a vote of not less than one-half of the total number of such members and is sanctioned by the Local Government." As there was violation of section 71 it was held that the dismissal of the Secretary was bad.

6. It appears to me that the same rule of interpretation as was put by the English Court in the case of *Smith v. Macanally* (1) (*supra*) should be applied to the interpretation of Rule 12 framed under the Bengal (Rural) Primary Education Act. and as the requisite report was not obtained before making the order of discharge the order of discharge must be declared to be illegal and without jurisdiction.

7. The other point that has been argued by Mr. Das Gupta on behalf of the petitioner is that the order of discharge is *ex facie* bad inasmuch as it purports to dismiss the petitioner with retrospective effect from the 15th July, 1951. that is, the date on which the petitioner was arrested by the Police. Reliance is placed by Mr. Das Gupta on the decision of this Court in the case of *Hemanta Kumar Bhattacharjee v. S.A. Mukherje* (3) (58 CAV.N. 1) in which an order of suspension was made with retrospective effect and it was pointed out by Chakravartti, C. J., that suspension with retrospective effect is a contradiction in terms. Towards the latter portion of the judgment (page 10 of the report) the learned Chief Justice made the following observation:

""Suspension in the past is, as I have shown, an impossible notion and Rule 2, as I have also shown, does not in fact contemplate such suspension. The result is that the order of suspension made on the 29th April, 1952 is valid and effective as on and from that date which was in fact not questioned before us but as

purporting to cover the period from the 16th January, 1951, up to the 28th April, 1952. it is unwarranted by law and wholly invalid. During that period, the appellant was on duty and entitled to the usual salary and allowances and his such status and right? could not be affected by the order passed on 29th April, 1952 with retrospective effect".

8. In the present case it appears that the petitioner was duly performing his duties upto 22nd of August, 1951 but since then he was deprived of the opportunity of attending to his duties by the Head Master of the school. Mr. Bose the learned Advocate for Respondents 3 and 2 has therefore argued that the order of discharge will lie effective from the 23rd of August, 1951 since when the petitioner was not allowed to attend to his duties. But to give effect to such a contention will he to substitute an order of discharge in place of the order of discharge which was actually made by the Board and which was not contemplated by the Board. This, in my view, the court has no power to do because such modification of the original order will be not carrying out the original intention of the Board. Mr. Bose has further argued in the alternative, that "even if this order of discharge cannot have any retrospective operation it must be held to be a valid order, effective from the date on which the order was passed having regard to the observation of the learned Chief Justice at page 10 of 58 C.W.N. In answer to this argument Mr. Das Gupta has however submitted that this Court in exercise of its jurisdiction under Article 220 of the Constitution does not function as a Court of Appeal and if an order or an act is found to be in excess of jurisdiction then it must be quashed or cancelled in toto. This Court has no jurisdiction to pass a modified order or to substitute its own order in place of the order made by the authority whose jurisdiction is challenged before the Court, in an application under Article 226 of the Constitution. It may be pointed out that in the case reported in 58 C.W.N, it was not questioned by the opposite parties that the order was not effects e and valid from the date on which the order was. purported to have been made, although it was challenged that it was bad so far as it had a retrospective operation. It was for this reason that the learned Chief Justice had disposed of the Rule with the observation that he made at page 10 of the report. It appears to me that when the real intention of the Board was to discharge the petitioner with effect from the date when he was put under arrest, it is not within the jurisdiction of the Court to substitute a different intention and maintain the order of discharge in a modified form. The order must stand or fall in toto. In this view of the matter it appears to me that the order of discharge as passed by the Board cannot stand.

9. The last point that has been argued by Mr. Das Gupta is that in view of Rule 12 to which reference has already been made, an order of discharge must be passed by the Board itself. Since in the present case it was the Secretary who had purported to make the order of discharge. the said order is bad. In the counter-affidavit that has been filed on behalf of the Respondents 2 to 5 it is alleged that the said order of discharge had received the approval of the Board and the Secretary merely communicated the order of the Board. I asked the

learned Advocate appearing for these Respondents to produce evidence of this approval. The learned Advocate for the Respondents had produced a resolution of the Education Committee dated the 5th July, 1952 which shows that the Education Committee has approved of the action of the President in discharging the petitioner from service with retrospective effect from the 15th July, 1952. He has also produced the resolution of the District School Board which is dated the 2nd August, 1952. Both these resolutions are thus subsequent to the order of discharge which was passed on the 18th April, 1952 and copies of these resolutions which have been filed in Court are marked as H. C. Exts. M and N. It is therefore clear that at the time the order was communicated to the petitioner the order was not a valid and effective order as contemplated by Rule 12, Since however the Board has subsequently confirmed and adopted the act of the President it is possible to maintain that the order of discharge as passed by the President, is the order of the Board. It may be also pointed out that in some of the annexure to the petition, viz., in annexure B which is dated 26th May, 1952, annexure C which bears date 19th October, 1952, annexures E and F which bear date 10th September, 1953 and 8th, January, 1954, the petitioner has admitted that it was the School Board which has discharged him on the 18th April, 1952. It may however be that these admissions have been made under the mistaken impression that the order which was passed on the 18th April, 1952 was in fact passed by the Board but inasmuch as in point of fact the Board had subsequently granted its approval I am inclined to hold that the order made on the 18th of April, 1952, though originally defective at the time it was passed, became valid when the approval of the Board was granted.

10. Mr. Das Gupta also argued that the Secretary had no power to append his signature to an order of this nature and it is only the President who has the power to sign such orders. The learned Advocate placed reliance on section 18 of the Bengal (Rural) Primary Education Act, 1970 but what section 18 contemplates is that all orders of the Board shall be implemented and given effect to by the President and there is nothing in that section to prevent a Secretary from communicating an order made by a Board. It appears from the Rules framed under the Bengal Primary Education Act, page 3, that the District Inspector of Schools is also the Secretary to the Board, and from section 6 of the Act it is clear, that this District Inspector is a member of the District School Board, So, if an order is actually passed by the District School Board, I fail to see why the Secretary of the Board cannot communicate such an order to the person concerned. This disposes of all the points raised in this case. In the result, this petition succeeds and the order of discharge dated the 18th April, 1952 is cancelled. The Rule is made absolute and let a Writ in the nature of Mandamus issue directing the opposite parties to forbear from giving effect to such an order. There will be no order as to costs.