

(1982) 10 BOM CK 0002
In the Bombay High Court
Case No : Appeal No. 214 of 1981

Kamla Prasad Shukla

APPELLANT

Vs

S.N. Ingole and others

RESPONDENT

Date of Decision : 25-10-1982

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1983) MhLj 348

Hon'ble Judges : M.N. Chandurkar, J;B. Lentin, J

Bench : Division Bench

Advocate : N.H. Gursahani with R.A. Dada, B.N. Vaishnawa and N.N. Vaishnawa, for the Appellant; S.M. Shah with B.A. Desai for respondents No. 1 and 2 and D.R. Dhanuka with V.S. Khemka, for the Respondent

Final Decision : Allowed

Judgement

B. Lentin, J.—On June 14, 1968 the appellant was appointed as a teacher in Shri Sanatan Dharma High School, run at Kolwada, Bombay, by a society known as Kolwada Sanatan Dharma Sabha's Education Society whereof the third respondent is the President. In 1970 the appellant was confirmed as assistant teacher. On December 20, 1975 he was suspended from service. A charge-sheet dated December 23, 1975 was furnished to the appellant wherein 16 charges were levelled against him, one of them being character assassination of the Principal. An enquiry committee as provided by the Secondary Schools Code was constituted; one of the 3 members was the principal, the other two were the respective nominees of the appellant and the management. The enquiry resulted in the appellant being found guilty of all the charges by the Principal and the management's nominee; the appellant's nominee found the appellant not guilty of any of the charges levelled against him and recommended that the appellant be allowed to resume duty forthwith. On the majority finding of the principal and the management's nominee, the appellant was removed from service. On May 31, 1977 the appellant's appeal to the Deputy Director of Education was allowed

on 4 grounds, one of them being that the Principal of the school who held a bias against the appellant, could not have been a member of the enquiry committee. The management's appeal to the Joint Director of Education was allowed by the latter's order dated February 14, 1979 to the extent that out of 16 charges, 4 charges including the charge of the principal's character assassination, were held proved. The appellant's writ petition in this Court challenging the Joint Director's order dated February 14, 1979 was dismissed by the learned single Judge, who while endorsing the appellant's contention that the principal was a judge in his own cause and hence should not have been a member of the enquiry committee, upheld the Joint Director's order on the ground that the Joint Director had himself gone through the record, heard both the sides and applied his mind afresh to the evidence. Hence the present appeal.

2. This appeal can conveniently be disposed of on one point which goes to the root of the matter, namely whether in the enquiry held against the appellant, the Principal, who indisputably had an animus against the appellant, could have been a member of the enquiry committee. The answer is to be found from the following facts which are not in dispute:

(a) On January 28, 1974 the appellant and a lady teacher sent a letter to the Principal, who then was the assistant head master, making certain nasty allegations against him of a personal nature involving moral turpitude.

(b) The charge-sheet against the appellant was dated December 23, 1975 and the very first charge levelled against the appellant was of character assassination of the Principal and was specifically based on that letter dated January 28, 1974. The eighth charge was of conspiracy between the appellant and that lady teacher in writing that letter.

(c) Two years after the receipt of this letter dated January 28, 1974 by the Principal, and with reference thereto and after the charge-sheet was furnished to the appellant, the Principal jointly addressed his advocate's notice dated March 2, 1976 to the appellant and the lady teacher, complaining of character assassination and calling upon the appellant and the teacher to pay damages in the sum of Rs. 5,000 for "loss, ridicule and suffering" sustained by the Principal, and threatening civil and criminal proceedings against them.

(d) Thereafter the 3-member enquiry committee comprising of the Principal himself, the appellant's nominee and the management's nominee commenced its proceedings on May 30, 1976.

(e) The principal took an active part in the enquiry. While the appellant's nominee found that none of the 16 charges were established and recommended the appellant's reinstatement, the principal and the management's nominee found the appellant guilty of all the charges including the first and eighth charges of character assassination and conspiracy respectively and which were the subject-matter of the appellant's letter dated January 28, 1974 and the principal's belated grievance manifested in his advocate's reply and notice dated

March 2, 1976.

(f) Thereafter the dismissal order was passed on August 30, 1976.

3. From these bare facts which are not in controversy and without the necessity of comment, the inescapable conclusion is that bias on the part of the Principal is writ large, as inter alia is demonstrated by the fact of the Principal even demanding damages from the appellant in the sum of Rs. 5,000 for character assassination and threatening him with civil and criminal proceedings. Whether the bias was well or ill-founded is a matter of no consequence. Bias thus being plainly and positively manifest, it was not proper for the principal to have sat in the enquiry committee, much less have taken an active part in the proceedings against the appellant against whom he had demonstrated a positive hostility in his (i. e. the Principal's) own interest. There was a positive conflict of interest and duty insofar as the principal was concerned. This was not just a case of "legal bias", where for instance an authority may have to adjudicate in an enquiry concerning his own department or even concerning his own property. Here is a case of active and positive bias resulting from the letter dated January 28, 1974 to which the Principal sent his advocate's reply dated March 2, 1976 demanding damages from the appellant and even threatening civil and criminal proceedings against him for character assassination, which was the subject-matter of the very first charge and was the subject-matter of the eighth charge of conspiracy. It is of no mean significance that the principal chose to send his advocate's reply two years later, and shortly after the charge-sheet was furnished to the appellant and shortly prior to the commencement of the enquiry proceedings. The positive hostility shown by the Principal (rightly or wrongly is of no consequence) towards the appellant is sufficient to spell bias on the part of the Principal in a matter vitally and personally touching the Principal. Such bias made the principal unfit to take part in the enquiry proceedings against the appellant. That by itself goes to the root of the matter and is sufficient to vitiate not only the findings against the appellant but also the proceedings themselves which must be treated as non-est. It was therefore not open to the Joint Director to substitute his own judgment and to arrive at his own conclusions. In so doing the Joint Director exercised jurisdiction not vested in him, and by not upholding the order of the Deputy Director allowing the appellant's appeal inter alia on the ground that the Principal could not have been a member of the enquiry committee as he was biased against the appellant, the joint Director failed to exercise jurisdiction vested in him.

4. It was however urged by Mr. Dhanuka, the learned counsel appearing on behalf of the 3rd respondent (who incidentally did not choose to appear before the learned single Judge), that the inclusion of the Principal in the enquiry committee could not be said to be in breach of the Secondary Schools Code as rule 77-3 (1) (i) made it obligatory on the Principal to be on the enquiry committee, with the result that the Principal had no choice but to take part in the enquiry proceedings against the appellant even though one of the charges

against the appellant was the Principal's own character assassination by the appellant. Mr. Dhanuka relied on a passage from De Smith's Judicial Review of Administrative Action, 4th Edition, at page 277 as under:

What would be the position in English administrative law if a Minister were to be called upon to decide whether or not to confirm an order made by a local authority affecting his own property. He could not lawfully transfer to another Minister his duty to decide. He might depute one of his own officials to make the decision; the decision would nevertheless be made in the Minister's name. It is submitted that the validity of the decision could not be challenged merely on the ground that the Minister was in a sense judge in his own cause; for the legal duty to decide the class of matter to which this belonged had been cast upon him, and upon him alone. If it were possible to show that the Minister had in fact failed to consider the merits of the order for reasons of personal interest, his decision could be successfully challenged.

To start with, De Smith does not, under the guise of an obligatory duty, advocate to an authority unbridled and ubiquitous power to be a judge in his own cause and thereby place him beyond the pale of the law. The sequence of events set out in (B), (C) and (D) in para 2 earlier, do not appear prima facie to be mere coincidental but appear prima facie to be a part of a preconceived plan by the principal to attain a preconceived end in the solemn guise of discharging his bounden duty. To add, the answer to Mr. Dhanuka's contention is to be found no further than in a decision of a Division Bench of this Court in *Vinayakrao Deshmukh High School v. Deputy Director of Education* 1981 Mh. L J 441. In that case the subject-matter of the enquiry was the conduct of an assistant teacher on a complaint made by the Head Master. The Head Master was not included in the enquiry committee as he himself was a likely witness. The question that arose was whether the inclusion of the Head Master as a member of the enquiry committee was compulsory by reason of rule 77.3 despite the fact that he was a likely witness in the enquiry against the teacher. Answering this question in the negative, it was held by the Division Bench that when it is not possible for the head of the school to be a member of the enquiry committee, the provisions of sub-rule (ii) could be extended whereby the third member could be either from the members of the executive or governing Council of any other aided secondary school. It was observed that this rule of procedure like any other rule, had behind it an object of a fair and impartial enquiry and procedure being only a means and not an end in itself, all procedural provisions are designed to serve and not frustrate the ends of justice by introducing endless technicalities, with the result that the spirit if not the letter of the rule could be extended to a situation where the Head Master was a witness highly interested in establishing the charges. It was held that the provisions of sub-rule (ii) of rule 73.3 (1) could be extended to all situations where for any valid reason the Head Master could not act as a member of the committee.

5. It is true that sub-rule (ii) pertains to an enquiry against the head master of

the school. It is therefore but salutary that he himself cannot be a member of the committee for in that event he would be a judge in his own cause. It is the extension of this sub-rule that was rightly advocated by the earlier Division Bench where the head master was a likely witness and hence would have to sit in judgment over his own evidence. The present case stands even on a higher footing, inasmuch as the principal was more than just a witness against the appellant. He was personally and actively aggrieved by what he considered to be his own unwarranted character assassination by the appellant, in retaliation and for the redress whereof he had gone to the length of addressing his advocate's notice dated March 2, 1976 demanding damages in the sum of Rs. 5,000 and threatening civil and criminal proceedings against the appellant. In these circumstances the learned single Judge was correct in his view:

.....It is now well-settled that the complainant should not be a judge of his own complaint. It would have been better if the Principal Sudani had not participated in the Inquiry Committee.

Surely if the ends of justice, which must not only be done but must be seen to be done, were to be met, the principal with his manifest bias against the appellant, had pre-empted himself from being on the enquiry committee. We do not agree with Mr. Dhanuka when he says that because sub-rule (i) provides that in the case of an enquiry against the employee other than the head master, the enquiry committee shall consist of the head master and one nominee of the employee and one nominee of the management, the word "shall" is so totally mandatory as to leave no scope for exclusion of the principal even though he has a positive bias or animus against the person charge-sheeted. The word "shall" need not without exception be given the mandatory meaning it otherwise has. If in enactments or rules, "'may" can be construed as "shall", there is no reason why in a lit case the reverse should be beyond contemplation, and why in a fit case such as the present, the provisions of sub-rule (ii) cannot be extended to cover a situation otherwise within the scope of sub-rule (i).

6. Mr. Dhanuka however sought to distinguish the earlier Division Bench judgment on the ground that unlike in that case, the present matter was not one where the principal was not a member of the enquiry committee. In our opinion, that can make no difference to the principle involved. Mr. Dhanuka also urged that in the earlier decision of the Division Bench, the non-inclusion of the principal was held to be an irregularity and invited us to do likewise in the present case where the Principal was included in the enquiry committee. We must decline to do so. In the present case, the inclusion of the Principal in the enquiry committee cannot just be brushed aside merely as an irregularity. It is a factor which goes to the root of the matter and is against the basic concept of the rules of natural justice.

7. It was next urged by Mr. Dhanuka that in case the relevant provisions of the Code requiring the inclusion of the Principal in the enquiry committee are violative of constitutional law or the principles of natural justice, such a provision

would be void but no challenge to such provision has been levelled in the present petition. If we agree with the ratio laid down by the earlier Division Bench, which we do, and if we hold, as we do, that the presence of and participation by the Principal in the enquiry against the appellant goes to the root of the matter rendering the proceedings non est, the want of challenge to any provision of the Code must become academic and unnecessary.

8. It was next urged by Mr. Dhanuka that the appellant had no enforceable right to seek a writ basing his claim on the Code which consists of executive instructions conferring no right or cause of action on the appellant. Mr. Dhanuka elaborated that a contract of master and servant cannot be specifically enforced except in case of exceptions incorporated in law, the present case not being covered by any statutory exception to the general rule. Mr. Dhanuka further contended that the appellant is not entitled to reinstatement or backwages by way of present petition and that his only remedy is to file a suit, if at all. Reliance was placed by Mr. Dhanuka on *Sohanlal Fulchand v. Deputy Director of Education* 1975 Mah L J Note 20, where it was held that breach of the rules in the Secondary Schools Code, which are only executive instructions issued by the State Government to management of schools receiving grant-in-aid, does not confer any enforceable right on third parties like a teacher in a private school, with the result that even if a breach of the rules is committed, the same would not confer on the teacher any right to get relief by way of a writ petition.

9. In *Secretary, Bishop Cotton School v. S. M. Yakub* 1976 Mah. L J 18, the management had filed a writ petition challenging the order of the Deputy Director of Education. On behalf of the teacher it was urged that the writ petition was not maintainable as the provisions of the Code were merely administrative instructions and any right or obligation flowing there from was not enforceable under Articles 226 and 227 of the Constitution. It was held that the ratio laid down in *Sohanlal's* case (*supra*) was not applicable, as from the bare reading of the Code it was clear that in so far as the management was concerned, it stood on a different footing than a third party like a teacher. At page 30 of the Report it was observed as under:

.....In our opinion, therefore, so far as the School Management is concerned, it stands on an altogether different footing, and, therefore, the law laid down by this Court in *Sohanlal Fulchand's* case (*cit. supra*) is not applicable to the case of Management. In what circumstances and subject to what conditions a writ petition could be entertained by this Court under Article 226 or 227 of the Constitution of India will depend on the facts and circumstances of each case. It is neither possible nor advisable to lay down any general rule in that behalf. However, so far as the present case is concerned, while deciding the appeal filed by the respondent No. 2 teacher, the Deputy Director was acting as a Non-statutory tribunal discharging the functions of a public nature and was expected to decide the appeal in conformity with the provisions of the Secondary Schools Code. In the present case, the Deputy Director of Education has wholly

misconstrued the provisions of the Code and has, therefore, passed an arbitrary order. It is by now fairly settled that even an administrative act of authority which directly affects the rights or interests of a person can be challenged in a proceeding under Article 226 or 227 of the Constitution of India. If this is so, in our opinion, such an order can be corrected by this Court in exercise of its power under Article 226 or 227 of the Constitution of India.....

(The emphasis is ours.) Mr. Dhanuka also relied on the Full Bench decision of this Court in *Sheela Damle v. Deputy Director of Education* 1982 Mah. L J 116, (to which my learned Brother was a party). In that case the question as reformulated was whether writ petitions under Articles 226 and 227 are maintainable at the behest of teachers for the enforcement of their entitlements under clause 77.4 and other connected clauses of the Code. This question was answered in the negative by the Full Bench. More on this later.

10. While we agree with the ratio of the above decisions, we do not read in them a total and absolute ban on a teacher from approaching the Court by way of a writ as suggested by Mr. Dhanuka. This is brought to the forefront by the observations of the Division Bench delineated by us in *Bishov Cotton's* case (supra). The appellant before us does not base his claim on the Code nor does he seek to enforce any contract between master and servant, and though he seeks reinstatement and backwages, it is not by way of specific performance of a contract between master and servant. All that the appellant seeks is to have set aside the order of the Joint Director of Education, who is a functionary under the Code and who acting as a non-statutory tribunal discharging functions of a public nature was expected to decide the appeal in conformity with the provisions of the Code. Thus what in effect the appellant says is: The Joint Director decided the appeal before him on a total misconception by substituting his judgment in proceedings which are non est; therefore the Joint Director's order is arbitrary and capricious, directly affects my rights and interests and is liable to be set aside. Such a stand, though not directly adjudicated upon, was commented on by the Full Bench in *Sheela Damle's* case (supra), without the same being brushed aside, as appears from the observations at page 124 of the Report as under:

Shri Sohoni then contended that even if the teacher is not in a position to seek enforcement of any terms of the Grant-in-aid Code the Teacher would still be entitled to challenge the order of the functionary under the Code such as the Deputy Director of Education whenever such order can be demonstrated to be arbitrary, capricious or in violation of the principles of natural justice. We are informed by Shri Madkholkar that such a contention is accepted by a Division Bench of this Court in its judgment dated 26-11-1980 in Writ Petition No. 875 of 1974 and Writ Petition No. 1058 of 1974. A claim of teacher to enforce any contractual right against the employer school or claim as a beneficiary under the Code may stand on a different footing from his claim to compel the authorities of the Education Department to perform their duties under the Code in regard to

their appeals or representations permitted under the Code. Suffice it to say that no such question arises in the present petition nor can the question be said to be covered by the reference made to us. We do not propose to express any opinion on this point in this reference.

Pausing here for a moment, it is therefore manifest that all that the appellant wants is that once the impugned order of the Joint Director is set aside the consequences flowing from the order of the Deputy Director which has become effective, must be implemented which it is the duty of the management to implement and which if it does not, can be compelled to do. In this we are fortified by the view taken by a Division Bench of this Court in its judgment in V. D. Pathak v. Director of Education Special Civil Application No. 407 of 1978 dated 3rd August 1981. In that case the order of the Deputy Director of Education holding that the enquiry against the teacher was not properly conducted and directing his reinstatement, was set aside by the Director of Education on certain grounds not germane to the present appeal. The teacher's writ petition challenging the Director's order succeeded before the Division Bench which set aside that order and directed the teacher's reinstatement with the Observation:

It hardly requires to be stated that the petitioner would be entitled to all backwages and in case the institution declines to comply with the order of the Deputy Director, the Government will take the necessary steps to implement the same.....

In the matter before us, it is obvious that once the impugned order passed by the Joint Director is struck down, the order of the Deputy Director is automatically revived with its concomitant consequences which must make themselves manifest without even the necessity of our detailing them in as many words.

11. The view we have taken also caters to the contention urged by Mr. Desai on behalf of the State that there can be no review from an order under the grant-in-aid Code, hence the order of the Joint Director cannot be judicially reviewed at the instance of the teacher who is not a party to the contract between the school and the Government under the grant-in-aid Code. In exercise of writ jurisdiction, it is competent for us to strike down the order of the Joint Director for the reasons stated in this judgment.

12. Mr. Dhanuka finally tendered a compilation of documents which he asserted were before the enquiry committee, and invited us to treat the same as part of the record. Mr. Dhanuka urged that this is a fit case where we should ourselves go into the charges and the record of the enquiry and the compilation tendered by him, and consider whether discretion ought to be exercised against the appellant or not. He urged that discretion should be exercised against the appellant. On the other hand, Mr. Dada, the learned counsel appearing on behalf of the appellant, brought to our notice that the documents compiled by Mr. Dhanuka were disputed documents and to that end Mr. Dada referred us to the

comment of the appellant's nominee in the enquiry committee as under:

The serial numbers given to the exhibits were not given in the meetings. The total number is not confirmed. Inspection at the time of recording findings was refused. (The resolution of Managing Committee was demanded for inspection.)

13. To start with, what Mr. Dhanuka invites us to do is to take as part of the record and scrutinise documents which are not admitted documents. Furthermore, to plough through the record would entail on our part the very error which we found on the part of the Joint Director in coming to his own finding in a proceeding that was non est. In any event, in exercise of writ jurisdiction, it is not competent for us to re-appraise the record and substitute our judgment as in a first appeal. For these reasons we do not accede to the contentions of Mr. Dhanuka nor do we treat the documents compiled by him as part of the record. We have however taken them on file at his request but not as part of the record.

14. In the result, the appeal is allowed. The judgment and order of the learned single Judge and the impugned order dated 14th February 1979 passed by the Joint Director of Education are set aside, resulting in the revalidation of the Deputy Director's order and the consequences flowing therefrom which it is the duty of the management to implement. Each party shall bear his costs of the appeal.

Leave to appeal to Supreme Court rejected.