

(2015) 10 KAR CK 0093

In the Karnataka High Court

Case No : Writ Petition No. 65490/2009 (S-DIS)

Karnataka Lingayat Education Society and Others

APPELLANT

Vs

Basavaraj

RESPONDENT

Date of Decision : 09-10-2015

Acts Referred:

Karnataka Education Act, 1983 — Section 94(1)

Citation : (2015) 10 KAR CK 0093

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : Shriyuths P.C. Prabhakar, C.K. Subramanya and Mallikarjun B. Hiremath, Advocates, for the Appellant; A.G. Mulawadmth, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—Heard the learned counsel for the petitioners and the learned counsel for the respondent.

2. The facts of the case are as follows -

"The petitioner is a Society registered under the Karnataka Societies Registration Act, 1960 and the Bombay Public Trust Act, 1950 and the Rules thereunder. It is said to be a Charitable Trust running various educational institutions. It is running an unaided institution, under the name and style of "Jawaharlal Nehru Medical College, Belgaum" (hereinafter referred to as "J.N. College", for brevity). It is part of the K.L.E. Society's Hospital and Medical Research Centre. The respondent was said to be working as an Assistant Professor of Anesthesiology in the J.N. College."

3. One of the terms of appointment was that he should not take up private practice, while in the service of the petitioners. He had given an Undertaking in this regard dated 30.06.1997 and in lieu of such an Undertaking, the respondent was being paid a Non-practicing allowance of Rs. 13,000/- per month.

4. It was the petitioners' case that the respondent violated the Undertaking and he had acted contrary to the terms and conditions, thereof. In that, he had indulged in private practice at Ashoka Hospital, Belgaum, in which regard a show-cause notice was given and a domestic enquiry was held, which found him guilty of the charge. The same was forwarded to the respondent giving him an opportunity to submit his representation. He did reply stating that he was visiting Ashoka Hospital in the mistaken impression that it was affiliated to K.L.E. Hospital and that thereafter he had stopped visiting that hospital and he was apologetic for his misunderstanding. Therefore, the petitioners took a lenient view of the said explanation and had warned him to correct his ways and the respondent is said to have undertaken and assured the petitioners that he would work with devotion and dedication and would not step out of line.

5. When matters stood thus, it was found that the respondent was again indulging in such malpractices in carrying on private practice at the very same Ashoka Hospital and also in B.M. Patil's Hospital, Belgaum, as an Anesthetist. He was further found to have tampered with the Attendance Register while proceeding to attend a Conference at Mangalore. In this background, a show-cause notice was issued for the following acts of misconduct -

i) That on 04.10.2000 between 1.00 p.m. to 4.00 p.m. he had been found practising as an Anesthetist at B.M. Patil's Hospital, K.C. Circle, Belgaum, for conducting laparotomy for perforation.

ii) That on 04.11.2000 between 7.45 a.m. to 8.30 a.m. he had worked as Anesthetist in conducting a D and C operation in Ashoka Hospital, Belgaum.

iii) That he was sanctioned Casual Leave only on 21.10.2000 and 22.10.2000 and he was permitted to leave the Head Quarters only after day's work on 20.10.2000 but inspite of which he had remained absent unauthorisedly on 20.10.2000 and was found at Mangalore on the very same day.

iv) He had joined duty on 23.10.2000 and had signed the Muster Roll for 20.10.2000, though he was not present at all on that day, and thereby fabricated and manipulated the Muster Roll.

v) Further that he was not punctual in attending to work and was not showing any interest in academic work of the J.N. College."

6. The respondent was called upon to submit his submission as to why appropriate disciplinary action should not be taken against him. He had submitted his reply, which was not found to be satisfactory by the Disciplinary Authority, and therefore, Articles of Charge was issued and an enquiry ensued. The respondent was given every opportunity to contest the proceedings. The Enquiry Committee consisted of three members. There was a full-fledged enquiry complying with the principles of natural justice. Two witnesses were examined in support of the charges and 25 documents as Ex. M-1 to M-25 were marked. The respondent had examined one independent witness, apart from himself and he

had produced 14 documents. A report was submitted holding that the charges against the respondent were proved. However, the charge relating to private practice at Ashoka Hospital was established, but the allegation pertaining to working in B.M. Patil's Hospital was not proved. The charge of fabrication of the Muster Roll was held to be proved. A copy of the report was furnished to the respondent, proposing a tentative punishment of dismissal from service. His explanation was called for, which was submitted. The Disciplinary Authority, after considering his explanation, which was found to be not satisfactory, took a decision to dismiss the petitioner from service and he was accordingly dismissed by an order dated 06.12.2001.

7. The respondent, thereafter, had filed an appeal challenging the order of dismissal before the Educational Appellate Tribunal, Belgaum, under Section 94(1) of the Karnataka Education Act, 1983, seeking to set aside the order of dismissal of reinstatement and other reliefs. The petitioners had contested the appeal. The Tribunal had framed the following issues for consideration:

"i. Whether the domestic enquiry conducted against the appellant is fair, proper and in conformity with the principles of natural justice?

ii. Whether the respondents prove that the appeal memo is defective and liable to be rejected on the ground that it is not verified and signed by the appellant as pleaded in paragraph 2 of their objection statement?

iii. Whether the respondents prove that they are justified in dismissing the appellant from service?"

8. The first issue was tried as a preliminary issue. The Tribunal held the preliminary issue in favour of the respondent and allowed the appeal and set aside the order of dismissal.

That was challenged by way of writ petitions before this Court in W.Ps. No. 45337-45338 of 2003. The petitions were partly allowed as on 10.11.2003. The order of reinstatement was set aside and the Tribunal was directed to dispose of the matter on merits, after permitting the parties to tender evidence in support of their contentions. Being aggrieved by a portion of the order of the learned Single Judge, the petitioners had filed Writ Appeals in W.As. No. 8016-8017 of 2003, which came to be rejected. However, the Division Bench observed as follows -

"The question that now arises is if the enquiry was not fair and proper could the Tribunal direct the management to reinstate the respondent. We do not think so. When the enquiry was not fair, the Tribunal should have permitted the parties to lead their evidence in regard to the merits of the misconduct. Not having done so, the learned Single Judge is right in remitting the case back with a direction to permit the parties to lead their evidence in support of their case and thereafter pass appropriate orders in accordance with law."

9. After dismissal of the appeal, evidence was tendered before the Tribunal and

the respondent had examined five witnesses. After completion of the evidence, the Tribunal passed an order allowing the appeal and the order of dismissal was set aside. The matter was remitted back to the Management with a direction to constitute a new Enquiry Committee consisting of members, who would not have any bias against the respondent and with other directions as to the manner in which the enquiry ought to be conducted.

10. The petitioners, therefore, aggrieved by the said order had filed a writ petition before this Court. The respondent had also filed a writ petition in W.P. No. 9615/2006 challenging the very same judgment, both the petitions were clubbed together and were allowed. The impugned judgment of the Tribunal was set aside and matter was remitted to the Tribunal with the following directions:

(a) To read the pleadings in the case and to frame an issue to the effect whether the respondents prove the alleged misconduct against the petitioner and then decide the said issue in the light of evidence, adduced by both the parties, recorded after remand by looking into the oral and documentary evidence and decide the question whether the alleged misconduct is proved or not from the aforesaid material;

(b) If the finding is, alleged misconduct is not proved then the order of dismissal is liable to be set aside and reinstate him and decide what are the consequential benefits to which he is entitled to;

(c) If the finding of misconduct is proved then the Tribunal has to go into the question whether the punishment of dismissal imposed on the petitioner is proportionate to the gravity of misconduct held to be proved and if it is of the opinion that it is not proportionate, it is at liberty to impose such lesser punishment; and decide what are the benefits to which the petitioner is entitled to."

11. Pursuant to the above order, the Tribunal had again framed the following points for consideration:

"1. Whether the respondents prove the alleged misconduct against the appellant?

2. If point No. 1 is held as proved, whether the punishment of dismissal imposed by the respondents on the appellant is in proportionate with the gravity of the misconduct held as provided?

3. What order?"

12. The Tribunal had passed an order dated 03.08.2009 allowing the appeal and had directed the reinstatement of respondent with full salary and interest thereon at the rate of 6% per annum on the salary as and when it became due for payment, and a direction was also issued to comply with the order within two months.

13. It is that which is under challenge in the present writ petition.

14. The learned counsel for the petitioner would point out that the Tribunal had failed to take into consideration the admitted fact that the respondent had willfully violated the Undertaking given by him that he would not engage in private practice in lieu of receipt of Non-Practicing allowance and there was also an admission to the effect that he worked in Ashoka Hospital, Belgaum, contrary to the Undertaking given by him. Despite a lenient view having been taken by the Management, he continued to indulge in private practice, which was certainly a serious misconduct and there was a corroborative evidence of all the witnesses, who were examined in support of the charges to prove that the respondent had engaged in private practice, contrary to his Undertaking. In this regard, the Tribunal has utterly failed to appreciate that portion of the evidence on record.

15. Further the Tribunal has not considered certain admitted portions of misconduct. The respondent had admitted the above instance, where he was found indulging in private practice in Ashoka Hospital, Belgaum, which is again overlooked by the Tribunal. The evidence of the eye-witness, who has stated of having seen the respondent engaged in private practice in Ashoka Hospital, Belgaum, namely, on 04.11.2000 when the witness went to Ashoka Hospital that the respondent had performed a D and C operation in the morning at about 7.15 a.m. and in the said operation the respondent was the Anesthetist. In this, he had submitted a report, which was marked as M.W. 21. This evidence was un rebutted and unchallenged, inspite of the witness having been subjected to lengthy cross-examination, this has been completely overlooked by the Tribunal.

16. It is further pointed out that R.W. 2 to R.W. 5 have corroborated the evidence to the effect that the respondent was negligent in his work and he did not respond to attend the operation theatre for emergency cases. R.W. 2 had spoken at length regarding the types of leave available in the College and the procedure for applying for leave. He had stated that on 14.10.2000 the respondent had sought for leave on certain days. The casual leave was sanctioned on two days, namely, 21.10.2000 and 22.10.2000. The reason given by the respondent for applying leave, was to attend a Conference at Mangalore, which was held to be held on 21.10.2000 and 22.10.2000. The witness had reported for duty on 23.10.2000 and he had verified the Attendance Register on 23.10.2000 and found the attendance for 20.10.2000 of certain doctors were not found to have been entered, and therefore, he rounded off the attendance register against their names, on 20.10.2000. On 24.10.2000 he found that the doctors had however signed for 20.10.2000 as well, and that the respondent, particularly, had signed the Register on the previous day and thus fabricated the document. Further, he had met the respondent at Mangalore at about 10.00 p.m., and therefore, it was evident that he had left the hospital on 20.10.2000 itself, if he could be present in Mangalore on the same day. This evidence had not been properly appreciated by the Tribunal.

17. Further R.W. 3 working in the Department of Anesthesia had stated that he had attended hospital duty as per the duty chart prepared by the Head of

Anesthesia. He had also attended emergency calls from hospital on 14.10.2000, the operation of the patient had to be postponed since the respondent did not respond to the emergency call.

18. R.W. 5 had also spoken about the indifferent manner of the working of the respondent. This portion of the evidence was unrebutted and has been overlooked by the Tribunal. The gist of the evidence of the said witnesses, supported by documentary evidence is overlooked by the Tribunal and the witnesses were all colleagues of the respondent, and their evidence could not be characterised as false and got up evidence. It is also not the respondent's case that they had any ill will or personal animosity against him. In the absence of any such allegation there was no reason for the Tribunal to have ignored the evidence of the said witnesses.

19. It is pointed out that the petitioners were required to establish the case against the respondent only on a preponderance of probabilities and the burden of proof was not of a nature as would be warranted in a criminal case and the above evidence and material documents adequately meeting the requirement of having established the case on a preponderance of probabilities, the Tribunal was not justified in overlooking the said evidence.

20. It is further pointed out that the respondent was not a workman in the organisation of the petitioners, he was holding a responsible position of an Associate Professor in Anesthesia and his work was of such a nature where lives of patients were at stake, depending on his devotion to duty and the manner in which he was discharging his duties as spoken to by the witnesses. This would indicate that the attitude of the respondent was highly unbecoming of his stature and the responsibility of his work and his conduct of having tampered with the Muster Roll impinges on his integrity and honesty, and therefore, the respondent having been visited with the extreme punishment of dismissal could not have been set at naught by the tribunal on extraneous considerations of having addressed material other than what was relevant in addressing the charges against the respondent.

21. The learned counsel would take this Court through the reasoning of the Tribunal to pointedly demonstrate that the crucial documents such as M.7 and M.8, which were extracts of the Muster Roll, wherein it is even admitted by the respondent that he has affixed his initials as if he had attended work on 20.10.2000. Though it is sought to be canvassed that the entry was made on 20.10.2000 itself and not on 23.10.2000 as is sought to be alleged. The fact of having affixed his initials, though he never worked in the hospital on the said day, is clearly admitted by the respondent. Therefore, the learned counsel for the petitioners would submit that this would be sufficient to over turn the judgment of the Tribunal and to affirm the order of dismissal from service.

22. The learned counsel for the respondent, on the other hand, would vehemently oppose the present petition and in support of the statement of

objections that are filed would contend that the respondent is a highly respected person in his field and he holds a good professional and academic record. He had conducted the Karnataka State Level Anesthesiology Conference in 1983. He was the organising Secretary of the State Level Anesthesiology Conference of the year 1995. He was also a recognised Post Graduate Teacher of Karnataka University, Dharwad, and the Rajiv Gandhi University of Health Sciences, Bangalore. He had worked as a Post Graduate Examiner in M.D. and D.A., and also a question paper setter at Karnataka University Dharwad. In this manner it is highlighted to show that he is a man who has much to his credit and the proceedings initiated against the respondent were clearly engineered by persons inimically disposed towards him at the hospital of the petitioners and is a false propaganda that was engineered against the respondent.

23. Insofar as the show-cause notice dated 03.01.2001 as regards the allegations of respondent having worked in private hospital though he had offered a valid explanation for the same, he was placed under suspension. Thereafter the Enquiry Committee was appointed.

24. It is pointed out that the charge Nos. 2 and 3 were a repetition of charge No. 1. Insofar as charge No. 4 is concerned, as being in violation of Service Rules of the Society and the subsequent proceedings as narrated by the petitioners is a matter of record.

25. However, the learned counsel would submit that this is the fourth round of litigation by the petitioner Management, which itself would indicate that there was a concerted effort to ensure the dismissal of the respondent from service by all and every means, notwithstanding that the allegations were of a frivolous nature. The ground urged in the petition that the appellant had willfully violated the Undertaking given by him and that he had admitted that he had worked in private hospitals and that a lenient view had been taken, etc. is denied as false.

26. Insofar as the alleged previous misconduct is concerned, this was not part of the charges, and therefore, was wholly irrelevant as no evidence was tendered in this regard and the Tribunal could not have taken it into consideration as it had rightly ignored the same. The petitioners seeking to throw out the said earlier instance even though there is no charge framed or evidence tendered is not a valid ground on which the petition could be filed. The petitioners are not in a position to highlight facts prior to 1999 and mix up the same with the present Articles of charge. Therefore, the contention that the Tribunal had ignored the past misconduct of the respondent is a misleading and an unfair statement.

27. Further, insofar as the reference to R.W. 3 as being an important eye witness, who has spoken about the fact of the respondent practicing at a private hospital is wholly false. It is contended that it may be seen that R.W. 3 had not stated in his evidence as claimed by the petitioners. He had not stated that he had seen the respondent herein to perform in or take part in an operation conducted at the said private hospital. The so called report submitted by R.W. 3

is denied as false. The respondent had anaesthetised a patient at Ashoka Hospital, was therefore, not at all proved and the appellant has gone on record to vehemently deny this before the Court.

28. It is also not acceptable that R.W. 2 to R.W. 5 have tendered corroborative evidence of the respondent being negligent in carrying out his work and did not respond to attend the operation theatre on emergency calls, etc.

29. The learned counsel would submit that insofar as the Muster Roll having been marked for 20.10.2000 though he had taken permission from the Head of the Department to leave the hospital for Mangalore, along with other colleagues and having affixed his initials for 20.10.2000 was done in a hurry and in the anxiety to leave for Mangalore, where he was the Executive Member, who had organised the Conference at Mangalore and he had to reach Mangalore on the same day and since all his colleagues had affixed their initials to the Muster Roll on 20.10.2000 though they were leaving the hospital was an act committed by inadvertence with no ill-intentions of making any unlawful gain and is a frivolous matter, which does not warrant serious punishment of dismissal from service. This is especially so when all his other colleagues had also put their initials just as the respondent and it is a matter of curiosity that no action has been taken against any of his other colleagues except singling out the respondent for the extreme punishment of dismissal, which clearly indicates that the Management was using it as an excuse to dismiss the petitioner from service. Therefore, when the Enquiry Committee had opined that the Management had failed to prove that the respondent was indulging in private practice in violation of his Undertaking at B.M. Patil's Hospital and the evidence not clearly establishing of the respondent having indulged in private practice at Ashoka Hospital, Belgaum, and the charge pertaining to tampering to the Muster Roll being a frivolous charge, the extreme punishment of dismissal was certainly not warranted, as rightly held by the Tribunal and now that the respondent had attained the age of superannuation, the only solace that the respondent can expect is the salary that was unlawfully denied to him by virtue of the illegal termination, which requires to be paid to him, amounting to Rs. 3.50 crore and he would submit that the same be paid in terms of the judgment of the Tribunal with interest thereon, as the petitioners have made the respondent run from pillar to post for the past 15 years and the untold misery that the respondent had undergone being at the mercy of his relatives for his very livelihood, requires to be adequately compensated. It is further submitted that the respondent had also filed an affidavit before this Court of not having been gainfully employed during the pendency of these proceedings, and therefore, the dismissal from service being wholly illegal, it is only just that the respondent be given his due by way of the nominal compensation that he is entitled to.

30. The learned counsel for the petitioners, however, would insist that the admitted tampering of the Muster Roll cannot be brushed aside as being a frivolous matter. The very admission would require this Court to set aside the

judgment of the Tribunal. The admitted act of the respondent of not having worked on 20.10.2000, but having put his initials as if he was on duty, is nothing short of fraud and would speak for the lack of integrity and honesty on the part of the respondent. In service jurisprudence the extreme punishment of dismissal is warranted where the confidence of the employer is lost on account of such acts. In that, as for instance, in the case of a bus conductor, who if found indulging in pilfering small amounts of money is yet visited with the extreme punishment of dismissal as this is the consistent view taken by the Courts including the Apex Court as a betrayal of the confidence imposed on the employee by the employer, is what would weigh in addressing the quantum of punishment that is warranted and not the quantum of money that is involved.

31. Similarly, in the case on hand, though by affixing such initial on the Muster Roll without having discharged duty on the said day, the respondent though would gain only the day's salary. It is not the amount involved that is material but the dishonesty and lack of integrity that is displayed by the respondent, which is material. Therefore, he would submit that this would require the Court to take a strict view of the admitted conduct of the respondent, which the Tribunal had completely ignored in Ex. M-7 and M-8 not even being referred to and addressed by the Tribunal, and therefore, the learned counsel would submit even if it could be said that the evidence of the Management has not established the petitioner having indulged in private practice, the admitted position that the respondent had affixed his initials to the Muster Roll without having attended duty for the day, is more than sufficient to visit the respondent with the extreme punishment of dismissal.

32. Given the above circumstances, it is to be stated at the outset that this Court is not sitting in appeal over this matter. It is only to test as to whether the Tribunal had taken into consideration material that was available on record in arriving at its findings or whether it has proceeded to arrive at its findings without the necessary material being on record. On this simple test, it is to be noticed as rightly pointed out by the learned counsel for the petitioners, that one of the charges pertained to the tampering of the Muster Roll though the charge was brought on the footing that it was noticed by one of the witnesses that the Muster Roll was not signed for 20.10.2000 by the respondent and others and as was noticed on 23.10.2000, but one day later on 24.10.2000, it was noticed that initials had been filled in for 20.10.2000, which was clearly indicative that it had been tampered with, later on 23.10.2000. Though this is sought to be vehemently denied by the respondent even assuming that the initials were affixed on 20.10.2000, it would make the respondent guilty of tampering the Muster Roll. The explanation offered that there were other employees, who had also affixed their initials on 20.10.2000, though they were leaving the hospital without discharging any duty on that day, it would not absolve the respondent of the misconduct. The several decisions relied upon by the learned counsel for the respondent to claim that the alleged acts cannot be construed as misconduct and it could at best be characterised as mere negligence or inadvertence and could

not be termed as misconduct is not tenable. The several cases cited are authorities for the cases in which the decisions are rendered, depending on the facts and circumstances of those cases and there is no precedent that can be cited as applicable to this case. There is no case similar to that of the present one amongst the several decisions cited by the learned counsel for the respondent.

33. On the other hand, there are a catena of decisions where it is held that if the confidence of the employer is lost on account of acts which impinge on the integrity and honesty of the employee, the extreme punishment of dismissal being warranted, is well settled.

34. In that view of the matter, the respondent having been absolved by the Tribunal and the petitioners having to reinstate him with full backwages and interest thereon, was not justified. The Tribunal had certainly overlooked the material evidence that was available and the admitted circumstance itself is sufficient for this Court to hold that the judgment of the Tribunal is vitiated.

35. Consequently the petition is allowed. The judgment of the Tribunal is quashed. The order of dismissal of the respondent is confirmed.

36. Incidentally there was an interim order of this Court directing that the respondent be permitted to report for work pending disposal of this writ petition and subject to the result of the same, it is brought on record that the petitioners had called upon the respondent to report for work as per letters dated 04.06.2010 and 03.07.2010. The respondent, however, had imposed a condition that he should be taken into service only as a Professor, as by that time many of his juniors had been promoted and if he had joined as an Associate Professor, he would have to work under his own juniors. Therefore, such a condition having been imposed, the petitioners had not obliged and did not agree to any such condition. It is in that background that the affidavit is filed by the respondent to state that he had remained without employment throughout the pendency of these proceedings.

37. Incidentally, at the outset, without going into the merits of the case, and since the respondent had attained the age of superannuation, a proposal was made by this Court and the petitioners were compelled to agree to pay a just compensation in a sum of Rs. 10,00,000/- without any questions being asked. The petitioners had agreed with the reluctance, but the respondent was firm in his opinion that he was entitled to nothing less than Rs. 3.50 crore, to which the petitioners were not agreeable. Therefore, the settlement proposed having failed, the matter has been decided on merits.