
(1997) 08 RAJ CK 0029
In the Rajasthan High Court
Case No : C.W.P. No. 2483 of 1995

Kewal Kishan Talwar

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 13-08-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1999) 3 LLJ 523 : (1997) 3 RLW 1590 : (1998) 1 WLC 383 : (1997) 2 WLN 343

Hon'ble Judges : J.C. Verma, J

Bench : Single Bench

Advocate : M. Mridula and Rajesh Joshi, for the Appellant; S.L. Jain, for the Respondent

Final Decision : Allowed

Judgement

J.C. Verma, J.—The petitioner, a Lecturer/Professor, is challenging the order of compulsory retirement Annex. 1 dated May 5, 1995 passed by the respondents, on various grounds.

2. The petitioner was initially appointed as Lecturer/Professor on August 1, 1969 with the respondent No. 2 Seth G.L. Bihani S.D. College, Sri Ganganagar, which is an aided institution and was confirmed in the year 1971. It is stated that the respondent No. 2 is an educational society registered under the Societies Registration Act and is getting 80% aid from the State Government and is, therefore, "State" within the meaning of Article 12 of the Constitution of India and amenable to the jurisdiction of this Court under Article 226 of the Constitution of India. It is stated by the petitioner that throughout his service of about 26 years, there was nothing adverse against him or in any case, no adverse remarks had ever been communicated to the petitioner. It is alleged that he had been victimised and chosen for compulsory retirement for the reason that he had pointed out the fact that the President of the Society had not utilised the amount of Rs. 91,000/-, which was given by the State Government for the

development. He had objected and pointed out and raised this point with the Union of India. He had also sent reminders to the President of the Society for depositing this amount. For this action of the petitioner, the President became annoyed and had threatened that he would terminate the services of the petitioner and ultimately on May 5, 1995 vide Annex. 1 the petitioner was removed from service by way of compulsory retirement without even consulting the Principal of the College and even the College Principal had resigned in protest later on. It is stated that the Principal had also written a letter to the President for depositing the amount of Rs. 91,000/- vide letter dated June 18, 1993 Annex. 3. The letter has been placed on record written by Shri P.L. Modi, Principal to the Secretary of the society to the fact that because of the reason that the petitioner had been compulsorily retired illegally, the Principal also did not want to remain in service and he, too, had resigned. It is stated by the petitioner that when the students came to know of such an action of the management, they raised great hue and cry and even whole of the public of the city was agitating and the citizens of the city had even constituted a "Sangharsh Samiti" and also filed representations. Even some of the daily newspapers had also highlighted this fact about the mis-management on the part of the management. The public had raised their voice against the victimisation of the petitioner as well as of the Principal Shri Modi.

3. It is stated that the impugned order could not be passed as no procedure has been prescribed as required u/s 16 of the Rajasthan Non-Government Educational Institutions Act, 1989 (referred to hereinafter as "the Act"). It is further submitted that Rule 244(2) of the Rajasthan Service Rules, 1951 is not applicable in the case of the petitioner nor any public interest was involved. It is further submitted that appointment, termination and promotion of the employees are controlled and governed by the statutory rules, bye-laws and the competent authority for taking such action should only be the Executive Committee but in the instant case, the Executive Committee had not passed any order for taking a decision of compulsory retirement in the case of the petitioner. The petitioner is also challenging the impugned action being arbitrary, mala fide, and against the rules. It is also stated that the Secretary had no power to issue the impugned order in the absence of any resolution of the Executive Committee and, thus, the impugned order is violative of Article 14 of the Constitution of India and, therefore, it is prayed by the petitioner that the impugned order be quashed.

4. A reply has been filed by the respondents. A preliminary objection has been taken that the petitioner has an alternative efficacious remedy by way of filing civil suit for redressal of his grievance or to approach the Tribunal constituted under the Act. It is further stated that because of the disputed questions of fact involved in the present case, the writ petition is not maintainable. It is stated that the record of the petitioner was not above board. He was given warnings on various occasions to improve his efficiency and on various occasions explanations were also called for to improve his conduct but all the times, instead of improving his conduct and efficiency the petitioner started indulging in extra

curricular activities. It is stated that because of these activities the petitioner was called upon to not to show any indecent behaviour. It is stated that the petitioner was indulging in the activities which warranted the Managing Committee to initiate preliminary enquiry and the preliminary enquiry was conducted and in that preliminary enquiry it was found that it shall be appropriate to take action against the petitioner by retiring him compulsorily. It is denied that any amount of Rs. 91,000/- had been retained by the President. It was stated that the petitioner had been discontinued on the ground that it was not in the interest of the college to retain the petitioner in service. However, it is admitted in para 9 of the written-statement that on the letter having been received from the Principal for returning back the unutilised amount of Rs. 91,000/-, the unutilised amount was sent back to the Government. It is stated that the petitioner had been creating nuisance with the help of uncalled for elements. It is stated that the students had boycotted the University examination because of the petitioner. It is further stated that by virtue of proviso to Section 16 of the Act the petitioner could be compulsorily retired after completion of 25 years of service or on attaining the age of 50 years and the managing committee after looking into the matter from each and every angle had decided to retire the petitioner compulsorily. The grounds of challenge as narrated by the petitioner have been denied.

5. The petitioner has filed the rejoinder stating that no appeal is provided u/s 19 of the Act for the reason that the appeal lies to the Tribunal in case any order is passed u/s 18 of the Act. It is further submitted that the provisions of Section 21 of the Act are not applicable in the present case. It is denied that the petitioner was ever issued any warning except one or two letters and that, too, related to very long past which were duly replied by the petitioner. It is further stated that there was resentment not only in the institution but throughout the city of Sri Ganganagar. Petitioner's result was always above 95% and the petitioner was always made the convenor and member of many committees and also warden of the hostel. Out of 30 teachers employed by the respondent management, the petitioner was the only sole person who was appointed as member of various committees i.e. disciplinary committee, convenor of cultural committee etc. It is denied that the relations with the staff were not cordial. It is stated that very vague allegations have been levelled by the respondents in the written-statement. It is stated that it was at the instance of the petitioner that the President of the society was compelled to return the unutilised amount of Rs. 91,000/- back to the Government. It is reiterated in the rejoinder that no meeting of the managing committee was called and no decision was taken by the managing committee in regard to the services of the petitioner. The petitioner has also attached as Annex. 6 an affidavit of the then Principal Shri P.L. Modi to the fact that he was the member of the executive committee and there was no agenda in regard to the compulsory retirement of the petitioner in any of the committee meetings.

6. Counsel for the respondent No. 2 has placed on record a report of the

preliminary enquiry held by 3 members i.e. Shri Satish Chandra Jain. Shri S.M. Choudhary and Shri Banshidhar Jindal, who had given certain findings of fact against Shri P.L. Modi, the then Principal to the fact that Shri Modi was non-cooperating in the administration of the college. It was also stated in the preliminary enquiry that Shri P.L. Modi and Kewal Kishan Talwar, the petitioner, are helping each other and Shri Talwar the petitioner was favouring the students in the agitation conducted by the students. In the preliminary fact finding report it was mentioned by the Committee that very secret papers of non-utilisation of the amount had been passed over to Shri Kewal Kishan Talwar which papers had been used by Shri Talwar against the management of the college for return of the unutilised amount to the Government. After going through the preliminary enquiry report, I find that the report was primarily based against the then Principal Shri Modi and one Shri S.S. Verma. However, the Committee had also observed that Shri Talwar was favouring the demands of the students who were agitating since December, 1994. The preliminary enquiry report of the Committee is dated April 3, 1995.

7. According to the counsel for the respondents, this preliminary report was put up before the managing committee with the agenda to consider the report of the committee and for necessary action and it was decided vide resolution No. 2 in the meeting held on April 20, 1995 that the action on the report be taken according to the rules by the President and the Secretary of the society. It is stated on behalf of the respondents that on the basis of this fact finding preliminary enquiry report and having been authorised by the managing committee vide its meeting dated April 20, 1995 the Secretary had passed the order of compulsory retirement of the petitioner.

8. On the facts narrated above, the petitioner was compulsorily retired vide Annex. 1 which was signed and issued by the Secretary on May 5, 1995. The order Annex. 1 states that while exercising the powers u/s 16(1) of the Act read with Rule 244(2) of the Rajasthan Service Rules, 1951 Shri Kewal Kishan Talwar, Professor in Botany is hereby compulsorily retired after attaining the age of 53 years with effect from May 5, 1995 and he is relieved from May 5, 1995 itself. The letter was issued and signed by the Secretary of the respondent institution. The copies were sent to the petitioner, Principal, Director, College Education, Rajasthan, Jaipur and the Vice Chancellor of Maharishi Dayanand Saraswati University, Ajmer.

9. As narrated above, the petitioner has challenged this order being based on mala fides, without jurisdiction, punitive in nature and having been passed not by the competent authority, without holding any enquiry or giving any opportunity and being against the principles of natural justice.

10. Before dealing with the merits of the case, it is necessary to deal with the preliminary objections taken by the respondents to the fact that the alternative remedy being available u/s 19 of the Act, the petitioner should have availed the alternative remedy.

The petitioner relies on the judgment Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, wherein the Hon"ble Supreme Court had observed that Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill suited to meet the demands of extraordinary situations, as for instance where the very vires of the Statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it, that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by Statute. Surely matters involving the revenue where statutory remedies are available are not such matters. The Supreme Court was seized of the matter where the practice of granting an interim order giving principal relief sought in the petition for the mere reason that prima facie the case has been made out was deprecated.

11. On the other hand, the counsel for the petitioner relies on a Supreme Court authority in V. Vellaswamy Vs. Inspector General of Police, Tamil Nadu, Madras and Another, in a case of compulsory retirement of a police officer, wherein it was held that the petition under Article 226 cannot be dismissed on the only ground of existence of alternative remedy. The Hon"ble Supreme Court had set aside the order of the High Court whereby the High Court had dismissed the writ petition on the only ground that there was an alternative remedy, namely, a review petition under Rule 15-A of Tamil Nadu Police Subordinate Service (Discipline and Appeal) Rules, 1955.

12. In S.S. Jain Subodh Shiksha Samiti v. Uttam Singh Karnawat (S.B. Civil Writ Petition No. 3838/1994, decided on September 29, 1994) in similar case of termination of a teacher, on the objection that an appeal was maintainable before the Tribunal constituted under the Act, this Court i held as under -

"ALTERNATIVE REMEDY

On the point of alternative remedy, the long drawn arguments have been raised on behalf of the rival parties.

Mr. Gaur, in support of his submission for dismissal of the writ petition, on the ground of alternative remedy, has relied upon decisions of the Supreme Court, reported in S. Jagadeesan Vs. Ayya Nadar Janaki Ammal College and Another, Assistant Collector of Central Excise, Chandan Nagar v. Dunlop India Ltd. (supra) and Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, The view taken in these decisions is that writ jurisdiction should not be exercised for bypassing the alternative remedy. If there is an alternative remedy available, it must be availed of. Following the same, I accept the contention of Mr. Gaur that there is an alternative remedy available to the petitioner and, in normal course, it should have been asked to avail the same. But what purpose it would serve, in the instant case, if ask him to do so.

The Supreme Court, in the case of Dr (Smt.) Kuntesh Gupta Vs. Management of

Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others, has held that alternative remedy is not an absolute bar in maintainability of the writ petition. In another case, reported in Ram and Shyam Company Vs. State of Haryana and Others, it was observed "the rule which requires exhaustion of the alternative remedy is a rule of convenience and discretion and a self-imposed restraint on the Court, It does not oust the jurisdiction of the Court where the order complained against is alleged to be illegal or invalid as being contrary to law." This judgment has followed the ratio of the earlier decision reported in State of U.P. v. Mohd. Nooh AIR 1958 SC 86, wherein it has been observed that there is no rule with regard to certiorari as there is with mandamus that it will lie only where there is no equally efficacious remedy.

In spite of statutory provision of alternative remedy, keeping in view the facts of the instant case, I hold that the writ petition cannot be dismissed on the ground of alternative remedy."

13. In the present case, admittedly the appeal can be filed to the Tribunal from an order of the managing committee passed u/s 18 of the Act and Section 18 provides that no employee of a recognised institution shall be removed, dismissed or reduced in rank unless he has been given by the management a reasonable opportunity of being heard against the action proposed to be taken. Provided further that no final order in this regard shall be passed unless prior approval of the Director of Education or an officer authorised by him in this behalf has been obtained and further it has been mentioned that the provisions of Section 18 shall not be applicable to the case where the managing committee is of unanimous opinion that the services of an employee cannot be continued without prejudice to the interest of the institution, the services of such employee are terminated after giving him six months notice or salary in lieu thereof and the consent of the Director of Education is obtained in writing. The provisions of Sections 18 and 19 are reproduced as under--

"18. Removal, dismissal or reduction in rank of employee. Subject to any rules that may be made in this behalf, no employee of a recognised institution shall be removed, dismissed or reduced in rank unless he has been given by the management a reasonable opportunity of being heard against the action proposed to be taken:

Provided that no final order in this regard shall be passed unless prior approval of the Director of Education or an officer authorised by him in this behalf has been obtained.

Provided further that this Section shall not apply,--

(i) to a person who is dismissed or removed on the ground of conduct which led to his conviction on a criminal charge, or

(ii) where it is not practicable or expedient to give that employee an opportunity of showing cause, the consent of Director of Education has been obtained in

writing before the action is taken, or

(iii) where the managing committee is of unanimous opinion that the services of an employee cannot be continued without prejudice to the interest of the institution the services of such employee are terminated after giving him six months notice or salary in lieu thereof and the consent of the Director of Education is obtained in writing."

" 19. Appeal to the Tribunal.--(1) If a managing committee is aggrieved from the order of refusal made by the Director of Education u/s 18, it may prefer an appeal to the Tribunal constituted u/s 22 within ninety days of the date of receipt of such order."

(2) An employee aggrieved from an order of the managing committee made u/s 18 may prefer an appeal to the said Tribunal within ninety days of the date of receipt of such order."

14. Counsel for the respondents himself submits that according to the respondents, no action has been taken u/s 18 of the Act against the petitioner i.e. he has not been removed, dismissed or reduced in rank and according to the learned counsel for the respondents himself resorting to Section 16 of the Act would not attract any of the clauses or conditions of Section 18 of the Act. As per the submission of the respondents the compulsory retirement has not been passed as a measure of punishment.

15. From the arguments of the learned counsel for the respondents, if the action has not been taken u/s 18, no appeal would lie u/s 19 of the Act to the Tribunal for the reason that the appeal lies to the Tribunal only if action is taken u/s 18. In my view, not only there is no absolute bar in filing the writ petition even if an alternative remedy is available in certain given circumstances, but even as per the submission of the counsel for the respondents, no appeal could be maintainable against the action taken by the respondents in the case of the petitioner. Thus, the objection of the counsel for the respondents in this regard is not maintainable.

16. Even otherwise, the writ petition was admitted after hearing both the counsel for the parties, despite objection being taken by the respondents, therefore, it shall not be appropriate to accept the contention of the respondents on the ground of resorting to alternative remedy at this stage. The contention of the respondents in this regard is rejected for the reasons mentioned above.

17. The other objection taken by the respondents is that the writ petition is not maintainable because of the disputed questions of facts involved. This objection has no merit. No disputed questions of facts have been brought to the notice of the Court. The appointment and compulsory retirement stand admitted. It is also admitted that the order Annex. 1 has been passed by the Secretary of the Committee. This Court is only to adjudicate upon the validity of such an order. It is also admitted that the Secretary had passed the impugned order on being so

authorised by the Committee to take suitable action in accordance with law in the meeting dated April 20, 1995 when the preliminary fact finding enquiry report was put up before the managing committee. The respondents themselves state that the petitioner had been compulsorily retired because of the preliminary enquiry report, which was put up before the committee. The Court is only to adjudicate about the rights of the parties. In such situation, no disputed questions of facts are involved in the present case and the matter is to be decided only on the admitted facts. Thus, this objection of the respondents is also not maintainable.

18. From the established facts, it is clear that the petitioner after putting in 26 years of service had been compulsorily retired even when nothing has been said in the written-statement, filed by the respondents, in regard to his inefficiency as a Professor and even it is also not denied that the result of the examinations of the classes, the petitioner had been teaching, was from 95% to 100%. It is also not shown in the written-statement as to why the petitioner had been chosen to be compulsorily retired. It is not the case of the respondents that the petitioner had ever become a dead wood to be weeded out. Only because of the reason that there is a provision u/s 16 of the Act to retire an official compulsorily on fulfilling the terms mentioned in the Section as per the procedure prescribed, can it be said that the powers are to be exercised without any reason or as a measure of punishment without giving any opportunity to the official to defend himself. The respondents submit that because of the reason that there is an enabling provision in Section 16, it is an absolute power to retire any person after completion of 25 years of service or on attainment of the age of 50 years, whichever is earlier in accordance with the procedure as may be prescribed. Section 16 empowers the State Government to regulate, the recruitment and conditions of service, including conditions relating to qualifications, pay, gratuity, insurance, age of retirement etc. etc. with the proviso that irrespective of the age of retirement prescribed, action may be taken for compulsory retirement of such an employee who completes 25 years of service etc. etc. Section 16 of the Act reads as under -

"Power of the State Government to regulate the terms and conditions of employment.--(1) The State Government may regulate the recruitment and conditions of service, including conditions relating to qualifications, pay, gratuity, insurance, age of retirement, entitlement of leave, conduct and discipline, of persons appointed as employees of aided institution in the State :

Provided that the rights and benefits accruing to an employee of an existing institution under the grant-in-aid rules in force at the commencement of this Act shall not be varied to the disadvantage of such employee:

Provided further that every such employee shall be entitled to opt for such terms and conditions of service as were applicable to him immediately before the commencement of this Act:

Provided also that, irrespective of the age of retirement prescribed, action may be taken for compulsory retirement of such an employee after completion of 25 years of service or on attainment of the age of 50 years whichever is earlier, in accordance with the procedure as may be prescribed.

(2) Every recognised institution shall constitute a provident fund for the benefit of its employees in such manner and subject to such conditions as may be prescribed and contribute to such fund and pay interest on the deposited amount at such rate as may be prescribed from time to time."

19. From the bare reading of Section 16 it is clear that the words "action may be taken for compulsory retirement" and "in accordance with the procedure as may be prescribed" are material for the application of the provisions of this Section. No procedure has been prescribed under the Act or the Rules nor it has been brought out to the notice of the Court by either of the parties that the powers u/s 16 can only be resorted to without there being any prescribed manner meaning thereby that order of compulsory retirement is to follow by adopting certain procedure to be prescribed by the Government. Admittedly no procedure has been prescribed or adopted or followed in the present case. The words "action may be taken" also postulate that it is not at the sweet will of the employer to retire an official at any time. If the employer wants to retire him, then this action can be resorted to, if the management is convinced that there are certain grounds for taking action against the employee as to warrant an order of compulsory retirement and that too, after following the procedure prescribed. It is not the intention of the Statute to confer absolute naked power on the management for retiring an employee.

20. In the present case, the attack has been made on the impugned order of retirement on various grounds, namely:

1. That the order has been passed as a punitive measure;
2. That none of the rules or the provisions of the Act have been complied with before passing such an order;
3. That the order has not been passed by the competent authority;
4. That there was no agenda ever put up in regard to retirement of the petitioner before the managing committee;
5. That the Secretary had no power, whatsoever, to pass the impugned order;
6. That even otherwise the impugned order of compulsory retirement violates the principles of natural justice.

21. It is admitted by the respondents that a committee was constituted to enquire into the conduct of certain teachers including the Principal, one Shri Verma and the petitioner. The Committee is said to have submitted its preliminary enquiry report on April 3, 1995. The report of the committee in regard to some agitation of the students had put the blame on the Principal Shri

Modi and it was observed by the committee that the students were favouring the petitioner and, therefore, the report of the committee was put up before the management committee on April 20, 1995 and vide resolution No. 2 of the meeting held on April 2, 1995, the committee had authorized the President and the Secretary to take action as per rules. Basing on such authorisation, the Secretary vide Annex. 1 dated May 5, 1995 had retired the petitioner compulsorily from this very date itself. The order is signed by the Secretary. The managing committee had not passed any order of retirement. However, the Secretary seems to have later on May 8, 1995 much after the retirement, had circulated the decision taken by the Secretary to the members of the committee with the Heading "Resolution by Circulation" and seems to have obtained the signatures from the members of the committee on the so-called decision taken by the Secretary. By no stretch of imagination it can be said that the managing committee had taken any decision or the agenda for retiring the petitioner compulsorily, had ever been put up before the managing committee. It is not disputed by the counsel for the respondents that the managing committee is the appointing as well as disciplinary authority of the petitioner and in that situation the Secretary could not have passed the order of compulsory retirement on May 5, 1995 and circulated the order for signatures and obtained the same by way of approval on May 8, 1995.

22. It is submitted by the counsel for the petitioner that any such approval by circulation is not authorised by law nor an illegal action can be ratified by way of approval. It was the managing committee which should have taken the decision. The petitioner relies on *Marathwada University Vs. Seshrao Balwant Rao Chavan*, for the proposition that the illegal action taken by the Secretary has no sanctity even if it was approved by way of circulation. The counsel further submits that it was not a case where the action taken by the Secretary could be approved by way of circulation on the decision of the Secretary. The contention of the counsel for the petitioner is correct in this regard. It was incumbent upon the managing committee to have decided the matter in case any action was to be taken against the petitioner by calling a meeting in accordance with the rules and by putting an agenda and also discussing the same. It is a known fact that the discussion in the meeting has its own importance, where by way of persuasive power, a member in the meeting can even persuade other members to come to a certain conclusion for and against a decision. Approval by way of circulation cannot be said to be decision in the meeting. If in any urgent or routine work some decision is required to be taken or some information is to be passed, only that part may be permissible for a decision by way of circulation but not where the rights of third party are concerned or some disciplinary action or action of removal or compulsory retirement is to be taken against an employee, that should be taken in a duly called meeting in accordance with the Rules.

23. Rule 29 of the Rajasthan Non-Government Educational Institutions Rules, 1993 (referred to hereinafter as "the Rules") prescribes that it is the managing committee which shall be the appointing authority. Rule 39 of the Rules provides

for removal or dismissal from service. Rule 39(2) of the Rules empowers the management to remove or dismiss from service an employee on the grounds of insubordination, inefficiency neglect of duty, misconduct or any other grounds which make the employee unsuitable for further retention in service by following the procedure i.e. (1) by holding preliminary enquiry on the allegations and bringing such preliminary enquiry to the notice of the management (2) on the basis of the preliminary enquiry by issuing a charge-sheet alongwith the statement of allegations (3) by going through the report of the preliminary inquiry, the charge-sheet and the reply submitted to the charge-sheet, the managing committee is to form an opinion that a detailed enquiry is required and then a 3 member committee is to be constituted by the managing committee which must include a nominee of the Director of Education (4) by giving proper opportunity to the employee to defend himself (5) the enquiry report is to be submitted to the managing committee (6) the managing committee having regard to the findings of the enquiry committee to the charges is to take action against the employee (7) the employee is entitled to the copy of the report and a show-cause notice (8) all these proceeding are to be sent to the Director of Education for seeking approval.

24. The above said are the contingencies and the procedure prescribed under Rule 39(2) of the Rules for holding such an enquiry on grounds of insubordination, inefficiency, neglect of duty, misconduct or any other grounds which render the employee unsuitable for further retention in service are required to be enquired into.

25. In the case in hand if the employee has been now compulsorily retired for any of the reasons i.e. insubordination, inefficiency, neglect of duty or misconduct or any other grounds, it was incumbent upon the respondents to have held the enquiry and give proper opportunity. Rule 39(2) reads as under:

"39. Removal or Dismissal from Service--

(1)

(2) An employee, other than the employee referred to in Sub-rule (1), may be removed or dismissed from service on the grounds of insubordination, inefficiency, neglect of duty, misconduct or any other grounds which makes the employee unsuitable for further retention in service. But the following procedure shall be adopted for the removal or dismissal of an employee--

(a) A preliminary enquiry shall be held on the allegations coming into or brought to the notice of the management against the employee.

(b) On the basis of the findings of the preliminary enquiry report, a charge sheet alongwith statement of allegations shall be issued to the employee and he shall be asked to submit his reply within a reasonable time.

(c) After having perused the preliminary enquiry report and the reply submitted by the employee, if any, if the managing committee is of the opinion that a

detailed enquiry is required to be conducted, a three member committee shall be constituted by it in which nominee of the Director of Education shall also be included.

(d) During the enquiry by such enquiry committee the employee shall be given a reasonable opportunity of being heard and to defend himself by means of written statement as well as by leading evidence, if any.

(e) The enquiry committee, after completion of the detailed enquiry, shall submit its report to the management committee.

(f) If the managing committee, having regard to the findings of the enquiry committee on the charges, is of the opinion that the employee should be removed or dismissed from service, it shall:

(i) Furnish to the employee a copy of the report of the enquiry committee.

(ii) Give him a notice stating the penalty of removal or dismissal and call upon him to submit within a specified time such representation as he may wish to make on the proposed penalty.

(g) In every case, the records of the enquiry together with a copy of notice given under Sub-clause (f)(ii) above and the representation made in response to such notice if any, shall be forwarded by the managing committee to the Director of Education or an officer authorised by him in this behalf, for approval.

(h) On receipt of the approval as mentioned in Sub-clause (g) above, the managing committee may issue appropriate order of removal or dismissal as the case may be and forward a copy of such order to the employee concerned and also to the Director of Education or the officer authorised by him in this behalf"

26. The management itself admits that the petitioner had been removed because of the finding of the preliminary enquiry conducted against the Principal and the petitioner. If that be so, it was essential and mandatory for the respondents to have complied with the provisions of Rule 39(2) of the Rules.

27. If the management is of the opinion that the petitioner was to be removed or compulsorily retired because of insubordination, inefficiency, neglect of duty, misconduct or any other grounds still it was mandatory for the management to have complied with the mandatory provisions of the Rules which admittedly have not been done. It is admitted fact that no charge-sheet had been issued, no reply had been sought from the petitioner, no enquiry committee had been constituted and no approval of the Director had been sought. The respondent management had resorted to the action indirectly which it could not have done directly except by complying with the provisions of law.

28. It is also provided under Rule 39 that the employee can be removed or dismissed from service by the management as has been discussed above. In the present case, the Secretary has removed the petitioner from service. The functions and powers of the Secretary have been enumerated in Rule 25 i.e. to

carry on correspondence on behalf of the institution, to call meetings of the managing committee and prepare agenda in consultation with the Chairman, to conduct and record the proceedings of the meeting of the managing committee, to carry out the orders and resolutions of the managing committee, to maintain accounts of the invested funds, title deeds and other documents and papers belonging to the institution, to open and operate bank accounts of the institution, to check, sign and supervise the accounts of the institution, to prepare budget in consultation with the Chairman and Heads of the institution and to furnish statements u/s 12 of the Act and to submit return, statements, reports and accounts of the institution to the concerned authorities to issue orders of suspension of any employee with the prior approval of the managing committee, to sanction the expenditure of the institution according to the sanctioned budget provision, to grant leave other than casual leave to the staff including the head of the institution and casual leave to the head of the institution and to perform such other duties as may from time to time be entrusted to him by the managing committee.

29. In the resolution No. 2 dated April 20, 1995 the managing committee had only directed the President and the Secretary to take necessary action in accordance with law. The managing committee had nowhere taken any decision to retire the petitioner compulsorily. If the finding of the preliminary enquiry dated April 3, 1995 was put up before the managing committee and the managing committee had directed the Secretary to proceed in accordance with law, that was a direction to the Secretary to prepare the papers in accordance with Rule 39(2) of the Rules and not to take the final action himself without complying with the provisions of law. The managing committee had only authorised the Secretary to act in accordance with law and not to by-pass the law. The managing committee had not authorised or delegated any of its powers to the Secretary to take final action against the petitioner as the final action could only be taken by the managing committee in the meeting held for that purpose in accordance with the provisions of the Act and the rules. The Secretary had acted illegally without any authority, without power by passing an order of compulsory retirement of the petitioner on May 5, 1995 and getting his order approved by way of circulation on May 8, 1995. It is dismaying that the managing committee of an educational institution had actually succumbed to the decision taken by the Secretary by putting the signatures on the circulation made by the Secretary of the action taken by him against an employee which action of the Secretary was totally unauthorised under the law.

30. The argument of the counsel for the respondents cannot be accepted that the petitioner could be compulsorily retired on the ground of misconduct without holding the enquiry only by putting the report of the preliminary enquiry before the managing committee and by abrogating its function to the Secretary even though no disciplinary functions have been abrogated in the resolution but assuming it be so, no statutory functions of the managing committee could be delegated or abrogated to the Secretary. The powers vesting in managing

committee could not have been usurped by the Secretary of the Society.

31. In Union of India (UOI) and Others Vs. Shaik Ali, wherein in similar circumstances when an employee of the railways was removed under Rule 2046(h)(ii), the Apex Court had held that if the order of compulsory retirement is punitive, it cannot be sustained in the eyes of law. On the facts in that case, the Hon"ble Supreme Court had held that they were satisfied that the impugned order of premature retirement is punitive and was in flagrant violation of the principles of natural justice and could not be allowed to stand.

32. It was held in Ram Ekbal Sharma Vs. State of Bihar and another, that in normal circumstances it was upto the employer to decide on the material on the record but the exercise of that power should be bona fide. In the present case I am convinced, even as per the submissions made on behalf of the respondents, that the petitioner has not been retired bona fide or on the basis of the material on record. Counsel for the respondents also relies on Union of India (UOI) and Others Vs. Dulal Dutt, Union of India Vs. V.P. Seth and another, and AIR 1992 SC 1268 for the proposition that no interference is called for in the order of compulsory retirement made by the employer and it is the inherent power of the employer to retire an employee under the Rules. There is no dispute so far as the abovesaid proposition is concerned but in the present case the respondent management had resorted to an action which could have only been taken by complying with the provisions of Rule 39(2) of the Rules. Apart from the above, it is clear that the order has not been passed by the managing committee at all nor there is any mention in the impugned order that it has been passed on its behalf. The Secretary has no power to remove a person in any manner whatsoever. It is the managing committee which is the ultimate authority to take a decision even for compulsory retirement, in the properly held meeting and, thus, it can be safely said that in the present case, there is no order of the managing committee nor there is any application of mind by the managing committee over the action proposed to be taken against the petitioner and thus the action of removing the petitioner was actually an action purporting to have been taken under Rule 39(2) of the Rules. The petitioner has been, as a matter of fact, removed by resorting to the action of compulsory retirement which is not permissible under the law. Even otherwise nothing has been brought in the written statement except that the action was taken because of the preliminary enquiry held against the petitioner and the managing committee had authorised the Secretary to proceed in accordance with law. As already discussed above to proceed in accordance with law cannot mean to resort to any indirect method of removing a person when the law requires to initiate action as per the rules.

33. To sum up (i) there was no order passed by the managing committee in the present case at all u/s 18 of the Act, and therefore, no appeal was maintainable u/s 19 of the Act; (ii) there are no disputed questions of facts involved in the present case; (iii) the order of compulsory retirement has not been passed by the competent authority and the Secretary was not authorised, nor he could be

authorised, nor there are any powers with the managing committee to delegate any of its statutory powers to the Secretary; (iv) the order of compulsory retirement has not been passed bona fide and is a punitive action taken against the petitioner without complying with the statutory provisions of the Act and the Rules, (v) no charge-sheet had been issued, no enquiry was conducted, no approval of the Director was taken by the respondents, (vi) the power u/s 16 can only be used for taking certain action against the employee as per the procedure prescribed.

34. Therefore, for the above discussion and reasons, the writ petition is allowed, the impugned order Annex. 1 dated May 5, 1995 cannot be upheld in the eyes of law and is, therefore, quashed. The petitioner shall be entitled to all consequential benefits and also the costs of this writ petition which is assessed at Rs. 2000/- (Two Thousand). As a consequence of allowing the writ petition, the petitioner is deemed to continue in service and shall be entitled to all arrears of salary etc. which shall be paid by the respondents within one month from the date of receipt of a certified copy of this order and if the order is not complied with in stipulated period then it shall also carry an interest @ 12% per annum till final payment.