
(2005) 05 KL CK 0006
In the High Court Of Kerala
Case No : W.A. No. 1678 of 2003

Manager, St. Michael's College

APPELLANT

Vs

V.S. Andrews and Others

RESPONDENT

Date of Decision : 16-05-2005

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2005) 05 KL CK 0006

Hon'ble Judges : K.T. Sankaran, J;J.B. Koshy, J

Bench : Division Bench

Advocate : P.F. Thomas, A.K. Rani, Raynold Fernandez, Shiju Varghese and Dileep Varghese, for the Appellant; K.R.B. Kaimal and Jobi Cyriac for Respondent No. 1, P.S. George and Vahitha Babu, for the Respondent

Final Decision : Allowed

Judgement

J.B. Koshy, J.—First Respondent/Petitioner, a Senior Superintendent of St. Michael's College, Cherthala, an aided college, was removed from service by Ext. P-12 order. When he challenged the above order, the learned Single Judge set aside the order on the ground that the Manager, the disciplinary authority, who issued the order of removal was a witness in the enquiry and there was bias on his part. Since the Petitioner attained the age of superannuation before the case was disposed of, the Management was directed to pay the consequential benefits to the Petitioner. Aggrieved by the above judgment, this appeal was filed.

2. The short facts of the case are as follows: On 11-7-2000, the Petitioner was served with Ext P-1 memo of charges by the first Respondent--Manager. The main charges levelled against him were the following:

1. Misconduct during working hours by engaging in matters alien to duty and distracting and obstructing staff members in their duty at their place on 5-7-2000 a.n.

2. Gravely disrespectful behaviour and unwarranted remarks about colleagues

and Superiors of the College.

3. Conduct and behaviour unbecoming to a Senior Superintendent of the college and disedifying to students and staff.

He was placed under suspension by Ext.P-3 order. Ext.P-3 suspension order was challenged by him by filing O.P. No. 22663 of 2000. He contended that charges were vague and enquiry officer was biased. The learned Single Judge declined to interfere with the suspension order by Ext.P-8 judgment But the Management was directed to consider his request for changing the enquiry officer. An additional memo of charges was given to the Petitioner on 5-9-2000. The additional charges were as follows:

1. In the Statement of Allegations No. 3 the following further clarification shall be added. You have engaged in illegal activities out of inordinate attachment to a last grade lady staff of the College, of which at least two incidents have been "reliably reported: (1) of being together in the College store room with closed doors in odd circumstances; (2) of an intimate act on another occasion near the same place. There have been also frequent inordinate activities after college hours within the premises of the college campus suspected to be illegal.

2. Grave disrespect towards the Superiors: it is manifest in your reply, its tone and its contents, including even intimidation and threat.

3. You have brought in false and unwarranted allegations against Manager, Asst. Manager, Principal, etc. See your reply para 1,2,10, etc.

Ext.P-7 reply was filed by the Petitioner. Considering the request of the Petitioner an independent advocate was appointed as the enquiry officer. No objection was raised by the Petitioner against the new enquiry officer. The Petitioner was allowed to be represented by an advocate of his own choice and he was actually represented by an advocate. 14 witnesses were examined. The first witness was the Manager. He produced various documents received by him while acting as the Manager and also submitted that since there was prima facie case, charge sheet was issued. He was not a witness to the facts alleged in the charge sheet. The charge sheet, replies, complaints received by him etc. were also produced by him. Thirteen other witnesses were examined to prove the charges. The enquiry officer found that all the charges levelled against the Petitioner were proved. ExtP-9 is the report submitted by the enquiry officer.

3. Petitioner was served with a copy of the enquiry report along with a notice to show cause why he should not be dismissed from service. Petitioner filed Ext. P-11 reply. His case in paragraph 2 of the reply is as follows:

2. In the version given by P.W. 1 (Manager) regarding charge No. 1, Rev. Fr. has stated that P-6 to P-8 does not contain statement showing mat the delinquent has obstructed the staff. The Manager does not have any direct knowledge about the contents of Ext.P-6 to P-8. P.W. 4 V.J. Joseph (Typist) says that he has not stated that Sri. V.S. Andrews has caused obstruction of work seen from Ext.P-7.

None of the witnesses given any cogent statement pointing to the complicity of the delinquent as regards charge No. 1.

With regard to the other charges, the main contention raised by the Petitioner is that P.W.1 Manager did not state anything against him. Thereafter, in paragraphs 5 and 6 it was contended as follows:

5. In the enquiry report the tone and tenor of my reply dated 20-7-2000 to the first show cause notice has been rejected as casting alum on my conduct to the superiors. I have to admit that certain statement is made which may appear to be not in good taste while addressing superior. However, this was not meant to cause any disrespect the Management. I seek pardon for such a conduct. However when allegations are made which cast a stigma on the person or his integrity moral conduct etc. that would have to be taken seriously especially when the employee is a senior employee in a college. It is only in that context that the reply was sent.

6. In conclusion may I state that the enquiry report as a whole does not give a dispassionate and independent appraisal of the evidence adduced in the matter. I have put in more than 30 years of service in the St. Michael's College, Cherthala in various capacities as a member of the ministerial staff before being appointed as the Senior Superintendent. I have all along discharged my duties to the best of my abilities without fear or favour, affection or ill-will and following the lawful instructions and directions of the Management. I have only less than two years more for superannuating. I pray that taking the aforesaid facts into consideration the punishment proposed in the letter be dropped.

4. There was no contention for the Petitioner that since P.W.1 disciplinary authority was a witness in the enquiry, any prejudice has been caused or the disciplinary authority was biased against him. Considering the reply, instead of ordering dismissal, the punishment of removal from service with effect from 17-1-2001 was imposed. Petitioner was due to retire on 30-11-2002. In ground A of the original Petition it was contended as follows:

It is one of the basic tenets of the principles of Natural Justice viz. Nemo Judex in Cause sua i.e. to say no man shall be a Judge in his own cause. The Manager of the college served memo of charges calling for the explanation of the Petitioner delinquent. Thereafter an enquiry officer was appointed to conduct domestic enquiry. The Manager of the College was the principal management witness (P.W. 1). The report of enquiry was placed before the Manager who himself in his capacity as the disciplinary authority agreed with the findings on the enquiry report and ordered removal of the Petitioner from service of the college. There is nothing wrong in the Manager initiating disciplinary action against the Petitioner if circumstances warrant, however when the Manager himself gives evidence as P.W. 1 there is every likelihood of reasonableness of bias which is sufficient to vitiate the enquiry. To give a few decisions of the Apex Court wherein the questions of bias was considered. See Rattan Lal Sharma Vs. Managing

Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, . The decision reported in Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, was followed by a decision of the Division Bench of this Hon"ble Court reported in 1994 (2) KLT 235. The Supreme Court as well as this Hon"ble Court held that the trial and the consequential punishment is vitiated.

It was answered by the Management as follows:

I deny all the allegations and averments contained in the statement of facts which are contrary to the objections above stated. I deny the ground taken as (A) and the same is regarding the examination of the manager as P.W.I. I was not the principal witness as alleged and was not a witness of facts. I was examined for the purpose of proving the correspondence of issuing the charges along with the memorandum of allegations and the various replies given by the delinquent and complaints received or came to my possession. I produced those documents along with the other documents relied on by the management. I was not a witness to prove the charges. It is contended on the basis of my examination for the purposes stated above on erroneous conclusion of bias is drawn and a few decision of Apex Court are quoted as supporting the proposition. The decision cited are irrelevant and inapplicable to the facts of the case. The domestic enquiry was conducted by the enquiry officer and my examination was not objected and the conclusion that I was biased or likelihood of reasonable bias by such examination, is bereft of any truth.

5. On going through the evidence of P.W. 1 it can be seen that P.W. 1 has only produced the letters as well as complaints, explanation etc. received by him and the charge sheet. He was not a witness to the incident. Any event, he was not the enquiry officer. Charge-sheets can be issued only when the disciplinary authority is satisfied that there are prima facie cases and therefore, enquiry should be conducted But on that account disciplinary authority is not disallowed from issuing final order of punishment when an employee is found guilty in a properly conducted enquiry. After considering the findings of the enquiry officer, it is for the disciplinary authority to take disciplinary action. The disciplinary authority may himself conduct the enquiry or may entrust any other person to conduct enquiry. Here an independent advocate was asked to conduct enquiry so that an impartial decision can be taken and the Petitioner was found guilty of all the charges levelled against him. There is no allegation in the original Petition that the Petitioner was disallowed from adducing evidence or from cross-examining the witnesses examined. However, the learned Single Judge found that since the disciplinary authority was examined as P.W. 1, there is bias on the part of the disciplinary authority and, therefore, punishment order is vitiated. To support the above decision, the learned Judge mainly relied on the decision of the Supreme Court in State of U.P. v. Mohammad Nooh AIR 1958 S.C. 86. In that case, the enquiry officer himself became a witness to contradict the testimony of one of the witnesses. The Supreme Court held that an enquiry officer himself

cannot become a witness as he cannot disbelieve himself and therefore, there is clear bias. Even otherwise, it is settled law that nobody can be a Judge for his own cause. *Nemo iudex in re sua* (No man a Judge in his own cause). It is an important part of principle of fair hearing and rule of *audi alteram partem* (hear the other side) means no man shall be condemned unheard. It is an important ingredient of the principles of natural justice. As held by Per Bowen LJ in *Lesson v. General Council of Medical Education* (1890) 43 Ch. D. 366 Justice must be rooted in confidence, and confidence is destroyed when the Judge is biased. Judges like Ceaser's wife should be above suspicion. But here, P.W. 1, the disciplinary authority, the Manager, was not the enquiry officer. To find out the truth of the allegations in the charge-sheet an independent enquiry officer was appointed and there is no case that the enquiry officer was biased. Even in the writ Petition there is no allegation that the enquiry officer is biased. An independent enquiry officer found that all the misconducts alleged against the Petitioner were proved. Then it is the turn of the disciplinary authority to impose the punishment, considering the gravity of the misconduct etc.

6. The next decision relied on is a Division Bench decision of this Court in *Saji v. District Court* 2000 (1) KLT 767. There, the Division Bench held that if the disciplinary authority, who initiated proceedings, acted as enquiry officer also and imposed punishment, there is bias. Enquiry must be held by a person who is not biased. He cannot be a witness himself as held by the Apex Court in *Workmen of Lambabari Tea Estate v. Lambabari Tea Estate* 1996 (11) L.L.J. 315. In this case, the enquiry officer was an independent person. We also note that there may be cases where doctrine of necessity is applicable as highlighted by the Supreme Court in *Election Commission of India and another Vs. Dr. Subramanian Swamy and another*, and Privy Council in *The Judge v. A.G. for Saskatchewan* (1937) 53 T.L.R. 464. It is for the disciplinary authority to impose punishment. The question is whether he was biased only because he was examined in the enquiry to prove the documents like charge-sheet explanation etc. and he deposed that he issued the charge-sheet on his prima facie satisfaction. But for that there was no allegation of personal bias. In every case, disciplinary authority issues charge-sheet only if he is satisfied that prima facie there is some substance in the allegation and if not satisfied by the explanation, enquiry should be conducted to find out truth. Petitioner had no case before the authorities that the disciplinary authority was biased. Plea of bias should be taken at the earliest opportunity. For the first time that contention was taken up in the writ petition, after the punishment order was issued. A point not raised before the administrative authorities is normally not allowed to be raised for the first time in the writ proceedings as held by the Supreme Court in *A.M. Allison Vs. B.L. Sen*, . But, if there is clear violation of the principles of natural justice, this Court can quash the proceedings. Though compliance with the principles of natural justice is necessary, same cannot be put in a strait-jacket formula as held by the Apex Court in *Divisional Manager, Plantation Division, Andaman and Nicobar Islands v. Munnu Barrick and Ors.* (2005) S.C.C. 200. Apex Court in *Canara Bank v. V.K.*

Awasthy (2005) 3 SC 492 held that Court shall not interfere on mere allegation of failure of natural justice unless prejudice has been caused resulting in failure of justice. Even if there is infringement of natural justice the court can insist upon proof of prejudice as held in Bar Council of India v. High Court of Kerala (2004) 6 S.C.C. 3. Considering the nature and gravity of the misconduct found proved in a duly conducted impartial enquiry, it cannot be stated that punishment was imposed by the disciplinary authority because he was biased. In this case at no stage before the authorities the Appellant pleaded prejudice. Even when punishment was proposed, there was no plea that disciplinary authority was biased. As held by the Apex Court in Canara Bank and Others Vs. Shri Debasis Das and Others, . In the absence of prejudice Court cannot mechanically set aside an order of punishment. In Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, the disciplinary action was taken by the Principal of the college. The enquiry was conducted by a Committee, but one of the Committee members gave evidence against the delinquent despite specific objection raised by him. In fact, the Supreme Court observed that at all stages of the proceedings he was interfering. In such circumstances, there is clear bias. *Nemo debet esse iudex in propria sua causa* is a maxim that was accepted in India also. But in this case, enquiry was conducted by an independent advocate and he found the Petitioner guilty and it cannot be stated that the findings of the enquiry officer were illegal because enquiry was conducted by an officer with bias. In fact, since it was conducted by an outside enquiry officer who is not subordinate to the Manager, the contention that the disciplinary authority was biased cannot be accepted. The findings of the enquiry officer cannot be assailed on that ground.

7. Then the only question is regarding the correctness of the findings of the enquiry officer. It is well-settled law that under Article 226 this Court is not sitting in appeal over the findings of the enquiry officer. See Government of Tamil Nadu Vs. K.N. Ramamurthy, . The punishment imposed by the disciplinary authority also cannot be interfered lightly by exercising power of judicial review, unless it is shockingly disproportionate. The Supreme Court in B.C. Chaturvedi v. Union of India and Ors. (1995) 6 S.C.C. 101 observed as follows:

A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

The disciplinary authority considering the long service of the Petitioner imposed punishment of removal from service instead of punishment of dismissal as proposed. In the counter-affidavit it is made clear that such an order was passed on the understanding that the Petitioner will get all the retrial benefits. It is submitted by the counsel for the Petitioner that since the removal from service is imposed by way of punishment, there is chance of denial of retrial benefits. The learned Counsel for the Management has no objection in converting the order of removal to an order of compulsory retirement. The order of removal from service with effect from 17-1-2001 is therefore, converted as an order of compulsory retirement from service with effect from 17-1-2001. For the period he was under suspension, he is entitled to get subsistence allowance only. He is entitled to service benefits as he was compulsorily retired from service on 17-1-2001.

The judgment of the learned Single Judge is set aside and the writ appeal is allowed with the above observations.