
(2019) 04 CAL CK 0090

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 3326 (W) Of 2019

Naresh Chandra Howly

APPELLANT

Vs

W.B.B.S.E. & Ors

RESPONDENT

Date of Decision : 26-04-2019

Acts Referred:

West Bengal Board Of Secondary Education (Appointment, Confirmation, Conduct And Discipline Of Teachers And Non-Teaching Staff) Rules, 2018 — Rule 3, 3(2), 3(d), 5, 5(1), 5(2), 5(3) 5(12)

Citation : (2019) 04 CAL CK 0090

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Biswaroop Bhattacharya, Reshmi Ghosh, Supriyo Chattopadhyay, Sabyasachi Mandal, Subir Sanyal, Ratul Biswas, Pratik Majumder, Himadri Kr.Bandyopadhyay, Anirban Sarkar, Monalisa Das, Dipmita Samanta

Final Decision : Dismissed

Judgement

Moushumi Bhattacharya, J

1. The facts of this case calls for a construction of Rule 5 of the West Bengal Board of Secondary Education (Appointment, Confirmation, Conduct and Discipline of Teachers and Non-Teaching Staff) Rules, 2018, as notified (No. 214) on 8th March, 2018. Rule 5 relates to the manner of initiation of disciplinary proceedings against a teacher or a non-teaching staff of an institution by the West Bengal Board of Secondary Education (the Board).

2. The petitioner is the Headmaster of Gustia Khetranath High School, which is governed by the Management of Sponsored (Secondary) Rules, 1972, and is aggrieved by a Show-cause notice dated 4th February, 2019 issued by the Board by which the petitioner was directed to respond to the allegations contained in the Notices within a specific period of time.

3. The bombardment of charges, so to speak, against the petitioner commenced

after a detailed order passed by the Commissioner of School Education on 27th September 2018 pursuant to a direction of this court where allegations made against the petitioner were comprehensively dealt with and the District Inspector (DI) was directed to cause a 'spot enquiry' to verify some of the allegations. The aforesaid order of the Commissioner set into motion the subsequent actions taken against the petitioner from three different directions and which were proximate to each other in point of time. The first was from the District Magistrate to the District Inspector and the District Project Officer dated 28 November 2018, referring to a complaint received from the teachers of the school and seeking a report in relation to the specific heads of complaint. The second was a letter from the DI to the President dated 13th December 2018 with reference to an Report following an enquiry done on 4th December 2018 by three Assistant Inspectors, recording inter alia that the Commissioner of School Education has issued a reasoned order on 27th September 2018 following which the DI was directed to transmit the matter to the Board for taking appropriate disciplinary action under the 2018 Rules against the petitioner as the Headmaster of the school. The third was a Notice from the District Project Officer, Paschim Banga Samagra Shiksha Abhiyan, recording the fact of service book records not being updated and calling for a hearing in this regard as per instruction of the District Magistrate. The fourth was from the DI dated 7th January 2019 seeking clarification with regard to 'gross irregularities in official record maintenance and dereliction of duties as Headmaster'.

All the above actions formed the prelude to the impugned Show Cause notice dated 4th February, 2019.

It should be mentioned that the petitioners responded to the charges made by the letters on several occasions which form part of records.

4. The immediate cause of grievance of the petitioner is the show-cause notice dated 4th February, 2019 issued by the Board to the petitioner referring to information received by the Board from the District Inspector of Schools (DI) by an Office Memo dated 13th December, 2018. The show-cause lists alleged irregularities committed in the concerned school at the instance of the petitioner (as the Headmaster) and the petitioner was directed to reply to such show-cause notice within seven days from the date of receipt of such notice. The petitioner claims that the show-cause notice was received on 7th February, 2019. The writ petition was filed on 8th February, 2019.

5. The primary contention of learned counsel appearing for the petitioner is that the Board could not have issued the show-cause in the absence of a complaint relating to the misconduct of the petitioner from the Managing Committee of the School. Counsel submits that the starting point of the assumption of the jurisdiction of the Board before any proceeding is initiated against the petitioner is a complaint received by the Board from the Committee of the concerned School against the petitioner. Counsel relies on Rule 5(1) of the 2018 Rules to submit that the said sub-rule contemplates authorisation by the Board to conduct

a preliminary investigation to any Officer not below the rank of a Sub-Inspector against any teacher or non-teaching Staff (the petitioner as the Headmaster of the School in this case) only upon receiving of a complaint against the teacher and relating to the misconduct of such teacher from the Committee or the administrator or the head of the concerned institution.

6. Relying upon the show-cause notice as it reads, counsel submits that there was no complaint made by the Managing Committee or the administrator against the petitioner and that the only complaint which is part of records is from a group of teachers led by the respondent no. 9 who is an Assistant Teacher in the said School and the private respondent in the writ petition. Counsel submits that the impugned show-cause notice would show that the disciplinary authority of the Board proceeded on the basis of information received from the DI by a memo dated 13th December, 2018. Counsel further submits that the District Magistrate, North 24 Parganas also assumed jurisdiction in the matter by taking cognizance of the complaints made by the group of teachers led by the private respondent and refers to other steps initiated almost simultaneously against the petitioner by various authorities but which remained open-ended. Counsel points out that the action of the District Magistrate in directing an inquiry or seeking a report from the DI and forwarding the same to the Board leading to the impugned show-cause implies a concerted effort to un-seat and cause undue harassment to the petitioner despite the petitioner making repeated attempts to explain the charges levelled against him. Counsel submits that as on the date of the impugned show-cause notice, the Managing Committee of the concerned School had not made any complaints against the petitioner to the Board, in the absence of which, the Board was not empowered to issue the show-cause notice. Counsel points out that the stage of issuing a show-cause notice can only arise if the preliminary investigation report (resulting from the action taken by an officer not below the rank of a sub-inspector and upon being duly authorised by the Board) reveals a prima facie case of misconduct against the teacher as provided under Rule 5(2). Counsel submits that the Rules in this case have therefore not been complied with and the respondents should be restrained from giving any further effect to the impugned show-cause notice.

7. Learned counsel appearing for the Board places emphasis on the complaint made by the teachers of the concerned School against the petitioner (Headmaster of the said School) to the District Magistrate persuading the latter to request the District Inspector to submit a report on the points raised in the Memo dated 28th November, 2018. The District Inspector thereafter formed a committee consisting of three Assistant Inspectors of Schools for making inquiry on the points raised by the District Magistrate. Counsel submits that due opportunity of hearing was given to all concerned on 4th December, 2018 after which a report was submitted to the DI. The DI by a memo dated 13th December, 2018 thereafter forwarded the report to the Board for taking necessary action. The impugned show-cause was issued by the Board to the petitioner as a natural conclusion to the aforesaid. Counsel relies on Rule 3(d) of

the 2018 Rules which authorises the Board to take disciplinary action against misconduct of teachers or non-teaching staff and Rule 3(2) which provides that the Board shall obey any order of the Commissioner of School in the interest of education. Counsel submits that the Commissioner of School Education took recourse to Rule 3 in directing the DI to cause an inquiry and transmit the matter to the Board for taking necessary action. It is further submitted that the District Magistrate who is the District Project Director of Sarva Siksha Abhiyan is the appropriate authority to implement and monitor the work in connection with Sarva Siksha Abhiyan and places document issued by the State Project Director to the DI on 18th March, 2002 clause 4 of which provides inter alia in connection with the work of Sarva Siksha Abhiyan, the State has approved setting up of a separate District Project Office in each District with the District Magistrate being authorised to function as District Project Director of Sarva Siksha Abhiyan vide notification dated 11th March, 2002 of the School Education Department, Government of West Bengal.

8. Learned counsel appearing for the Managing Committee (respondent no. 8) supports the cause of the petitioner in assailing the impugned show-cause notice as being in violation of the procedure laid down under Rules 5(1) and (2). Counsel points to the ulterior motive and vested interest of the private respondent and the handful of teachers in trying to disrupt the activities of the School by not allowing the petitioner or the Managing Committee to perform their duties. Counsel relies on *State of Jharkhand vs. Ambay Cements* reported in (2005) 1 SCC 368 and *Union of India Vs. Deoki Nandan* reported in AIR 1992 SC 96, on the proposition that when the statute prescribes a particular act to be done in a particular manner, non-compliance of which would lead to severe consequences, the requirement to comply with the procedure would be mandatory. For the second decision, counsel emphasises that a court cannot enlarge the scope of a legislation when the language of the provision is clear and unambiguous.

9. Learned counsel on behalf of the private respondent submits that asking for a strict compliance of Rule 5(1) would not take into account situations where the Managing Committee of the concerned School, for reasons peculiar to the school, refuses to or would be reluctant to make a complaint against any teacher of the said School. This would particularly be true where the teacher concerned and the Managing Committee act in tandem thus preventing any other teacher to bring the misconduct of the concerned teacher to the notice of the Board. According to counsel since the Rules lay down the procedure, they are diverting in nature, and hence substantial compliance of such would be enough to uphold any action taken by the Board. Counsel stresses on the clear instances of misconduct on the part of the petitioner (Headmaster of the School) and the extent of the wrongful acts which have led to the unjust enrichment of the petitioner at the cost of the school.

10. Counsel relies on several decisions on two propositions, namely, that a

procedural provision may be construed as directory if no prejudice is caused and that substantial compliance of such provisions is adequate for sustaining the act which is the subject-matter of challenge. Counsel has also relied on decisions on the point that a show-cause notice cannot be challenged unless a court is satisfied that the notice suffers from an absolute want of jurisdiction.

11. The entire dispute centres around the construction of Rule 5(1) of the 2018 Rules.

12. The shortcoming of Rule 5(1) as framed is that the Rule takes into account only a set of circumstances where complaints may be made against an errant teacher or non-teaching staff by the existing head of the school or the committee of an institution. In other words, the rule presupposes that a complaint relating to actions which may call for a disciplinary proceeding will always be in relation to a teacher or non-teaching staff who is not the head of the institution or from a person who is synonymous to or identifiable with the committee of a school. The phraseology used in Rule 5(1) shows that the framers excluded all other instances where the wrongdoing emanates from the head of the institution or a teacher who is in cahoots with the Managing Committee or enjoys the support of the committee (as in the present case) which may warrant initiation of an enquiry by the Board. The Rule does not even take into account situations where there may be an unholy nexus between any of the entities mentioned in Rule 5(1), namely, the Board, the Sub-Inspector of Schools, the errant teacher, the Committee, the Administrator and lastly the head of the institution. It is possible that a situation may develop in a school, for reasons uncharted, leading to alliances between any of the entities mentioned under Rule 5(1) which may obstruct compliance with the sequence as contemplated under the sub-rule. Sub-Rule 1 of Rule 5 peculiarly segregates the teachers/non-teaching staff of a school from the head of an institution and presupposes that the latter will either be outside the community of teachers of a school or be excluded from all charges of misconduct which may call for disciplinary proceedings.

13. The next issue: Is the fairness of the procedure contemplated under Rule 5 in keeping with the principles of natural justice with an effective opportunity of hearing to a teacher against whom an enquiry has been initiated? Under Rule 5(2), the Board has been empowered to issue a Show-cause notice to the concerned teacher only upon coming to a conclusion that a prima facie case of misconduct is evident from the enquiry report and to give an opportunity to the concerned teacher to explain the alleged misconduct. Initiation of disciplinary proceedings will follow only if the Board finds such explanation to be unsatisfactory under Rule 5(3). The fairness of the procedure contemplated under Rule 5 is relevant for the issue whether the Rule 5(1) should be read as mandatory, requiring complete compliance of the steps therein. The consistent principle which emerges from the cases cited by learned counsel appearing for the private respondent is that writ petitions challenging a Show-cause notice should not be entertained for the mere asking or as a matter of routine unless

the court is satisfied that the Show-cause notice is legally invalid for an absolute want of jurisdiction; refer State of Uttar Pradesh Vs. Brahm Datt Sharma reported in (1987) 2 SCC 179. In this case, where it was held that interference by a court is uncalled for before a final decision is taken in the matter of the show cause notice by the authority concerned. In AIR 2004 Supreme Court 1467, (2006) 12 Supreme Court cases 28, the Supreme Court used the word "ordinarily" before expressing its reservation in the matter of courts invoking its discretionary jurisdiction for quashing a Show-cause notice and lastly an extract from the well-known decision of State Bank of Patiala Vs. S.K. Sharma reported in (1996) 3 SCC 364, set out below;

"33. We may summarize the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and order of punishment imposed by an employer upon the employee):

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate an enquiry held or order passed. Except cases falling under ---"no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of delinquent officer/employee in defending himself properly and effectively. It is found that he has been so prejudiced, appropriate setting aside the enquiry and/or the order of punishment. If no prejudice called for. In this connection, It may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidences, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under

(4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee."

14. As held in P.T. Rajan Vs.T.P.M Sahir reported in (2003) 8 SCC 498, the decision whether a law laying down procedure should be construed as mandatory or directory will depend on the purport and object of the act itself. In that case, the issue was whether publication of electoral rolls was directory in nature and the Court was of the opinion that where a statutory functionary is asked to perform a statutory duty within a prescribed time, the same would be directory and not mandatory. The court further held that a provision in a statute which is procedural in nature, notwithstanding the use of the word "shall", may not be held to be mandatory if no prejudice is caused to any party. The decisions cited on both these points are relevant for the argument whether the procedure under Rule 5(1) is mandatory and on the broader issue whether the present writ petition challenging the impugned show cause notice issued by the Board should be entertained at all.

15. The facts leading to the issuing of the Show-cause notice will have to be considered for assessing whether full compliance of Rule 5(1) was at all possible at the material point of time. On 4th February, 2019, there were five documents including an enquiry report alleging misconduct on the part of the petitioner. Contrast this with there being no complaint from the Committee, the Administrator or the Head of the Institution corroborating such misconduct. The reason for an absence of a complaint from any of the three entities named in 5(1) is obvious; the petitioner was the Headmaster in charge of the affairs and enjoyed the support of the Committee in running the school. In fact, this is the very situation which Rule 5(1) overlooks, which brings us to the question;

What is the alternative route of drawing the attention of the Board in case of misconduct of the Headmaster/Headmistress of a school where all complaints would necessarily have to be routed through the headmaster and vetted by him before reaching the Board?

16. In such a scenario, where following the procedure becomes practically impossible, the question of full or substantial compliance becomes irrelevant. If the extract from P.T. Rajan Vs.T.P.M. Sahir reported in (2003) 8 SCC 498 is considered, then the object of Rule 5 would necessarily point to first, adequate safeguards being in place before disciplinary proceedings are initiated against a teacher and second, sufficient opportunity being given to such teacher for defending his cause. Taking the other limb of the argument in Rajan, would any prejudice be caused to the errant teacher if the complaint comes from a source other than the one prescribed? This court thinks not. Unless of course, there is no complaint at all to begin with, or the Board proceeds to embark upon an enquiry based on no materials or on a mere allegation without corroborative evidence. In this case, the route of the complaint deviated as to its source and the starting point of the enquiry report. None of the aforesaid would call for annulling the actions taken by the Board solely on the point of Rule 5(1) not being complied with.

17. The next issue is whether the challenge thrown to the impugned Show-cause

notice by the petitioner should be entertained by this court. The authorities cited by counsel for the private respondent have held that courts should desist from exercising discretion save in exceptional circumstances where the notice suffers from absolute want of jurisdiction. This court is of the view that the deviation in the starting point of the procedure provided in Rule 5(1) does not constitute such a rare or exceptional circumstance as to warrant interference as sought for by the petitioner. This is more so since Rule 5(1) itself fails to provide effective alternatives in case of misconduct falling outside the scenario contemplated under the said Rule. The decisions shown also touch upon the effect of a show-cause notice where the immediate purpose is for the recipient of such a notice to place his case before the concerned authority and a hearing being afforded to such person before a final decision is taken in the matter. Interference at this stage of investigation into the facts will therefore be premature (ref; Brahm Datt Sharma; Mohd Ghulam Ghouse; Kunisetty). The impugned Show-cause notice has called upon the petitioner to reply to the notice with all relevant documents before the disciplinary authority of the Board. No penal or disciplinary action has been threatened by the concerned authority. Therefore, no immediate (or foreseeable) prejudice has been caused to the petitioner by the show cause notice.

18. On the question whether the Board could have taken cognizance of the enquiry report of the DM and proceeded to issue the impugned Show-cause notice, one cannot turn a blind eye on the nature of the complaints made against the petitioner (the Headmaster of the school) and the reiterations of the charges levelled against the petitioner in the complaints. The charges may have come from different persons at different points of time, but the context remained substantially similar. The substance needs to be touched upon for an assessment whether the procedure prescribed under Rule 5(1) could have been adhered to at the material point of time. In this case, the complaints came from three sources; the teachers led by the respondent no.9, the District Magistrate and the District Inspector of Schools. Even if the teachers may be imputed with some sort of personal motive against the Headmaster (as alleged by the petitioner), the commonality (and reiterations) of the allegations in the communications of order of the Commission of School Education, the District Magistrate, the DI assumes significance purely for the question whether the spot-enquiry directed by the of Commissioner of School Education was justified on facts.

19. Although the primary issue for adjudication revolves around Rule 5(1), this court cannot disregard the nature of the allegations made in the impugned Show-cause notice or in the four other communications preceding the said Show-cause notice. The complaints are grave in nature and point to a complete breakdown of the proper administration of the school. The charges include misuse of funds meant for construction of classrooms, service-books of the teachers not being updated, delayed submission of pension files, serious irregularities in the manner of conducting summative evaluations, illegal collection of fees from students and unlawful constitution of the Managing Committee of the school. Without going

into the veracity of the charges, it is evident that these allegations are reiterated in all the communications exchanged between the authorities and/or sent to the petitioner and hence cannot not be seen as trumped-up charges of a group of disgruntled teachers. Whatever may be the worth of the petitioner's response to the allegations, there is no doubt that the letters from the District Magistrate (to the DI and the District Project Officer) dated 28th November, 2018, the Memo of 13th December, 2018 from the DI to the President of the Board enclosing the enquiry report of 11th December, 2018, the notice of 19th December from the District Project Officer and the letter dated 7th January, 2019 from the DI to the petitioner, crystallized into a substantive complaint, as envisaged under Rule 5(1) in relation to the alleged misconduct of the petitioner calling for a preliminary investigation (Rule 5(1) of the 2018 Rules. It may be argued that in this case the authorising of a preliminary investigation against the errant teacher has been made at the instance of the Commissioner of the School Education by the order dated 27th September, 2018 which directed the DI to cause a spot enquiry in light of the issues considered in the said order. The result of such direction is the enquiry report of the three Assistant Inspectors (AIs) of December, 2018, which was communicated by the DI to the President of the school by a Memo dated 13th December, 2018. Hence, the procedure adopted by the Board in terms of acting pursuant to a) a complaint and b) an enquiry report pursuant to a preliminary investigation, cannot be faulted. The impugned Show-cause notice was issued by the Board to the petitioner only upon receiving the enquiry report under Rule 5(2). It is also pertinent to mention that under Rule 3 of the 2018 Rules; "Powers and Duty of the Board" Sub-Rule (d) empowers the Board to take disciplinary action against misconduct of teachers or non-teaching staff. Further, Rule 5(12) provides the following;

"(12) The Board may suo moto initiate disciplinary proceedings against a teaching or non-teaching staff if there is reason to believe that any misconduct has been committed by a teaching or non-teaching staff. In all cases of suo moto proceedings, a preliminary investigation has to be conducted, and follow up action is to be taken as mentioned hereinbefore."

20. For the above reasons, the action of the Board in issuing the impugned Show-cause notice cannot be held to be invalid on the ground of the Board not following the procedure laid down under Rule 5(1). After issuing the Show-cause notice, the Board has not proceeded any further and has stopped at the stage of Rule 5(2). The petitioner cannot complain of any punitive action without replying to the said Show-cause notice which may be taken by the Board at a future point of time since such stage is yet to come. It is only upon receiving the petitioner's reply to the explanation to the Show-cause and upon finding such explanation to be unsatisfactory that disciplinary proceedings can be initiated against the petitioner by the disciplinary authority. Hence, at the point of time when the writ petition was filed, the petitioner did not have any compelling ground to persuade the court to exercise its discretion for setting aside the Show-cause notice or restraining the Board from giving any effect to the Show-cause notice.

21. In view of the above, this court finds no grounds made out in the writ petition for setting aside the impugned Show-cause notice dated 4th February, 2019, as prayed for.

22. W.P. 3326(W) of 2016 is accordingly dismissed without any order as to costs.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.