

(2022) 06 KL CK 0248

In the High Court Of Kerala

Case No : Writ Appeal No. 431 Of 2022

Prasannakumari.P.R.Vs State Of Kerala

Date of Decision : 22-06-2022

Acts Referred:

Kerala Education Rules, 1959 — Rule 67(8), 75, 75(1)(b), 75(2), 75(3), 75(4), 75(5), 75(6), 75(7), 75(8), 75(9), 80, 81

Citation : (2022) 06 KL CK 0248

Hon'ble Judges : P.B.Suresh Kumar, J;C.S.Sudha, J

Bench : Division Bench

Advocate : Elvin Peter P.J., K.R.Ganesh, Gouri Balagopal, Abhijith.K.Anirudhan, Sreelekshmi A.S., M.R.Jayalath, Karthika Sukumaran, A.J.Varghese

Final Decision : Allowed

Judgement

P.B.Suresh Kumar, J

1. This appeal is directed against the judgment dated 25.03.2022 in W.P.(C) No.8218 of 2015. The appellant was the petitioner in the writ petition.
2. The appellant was the headmistress of an aided upper primary school run by the fourth respondent as its Manager. On 15.11.2011, the appellant was placed under suspension by the Manager in contemplation of disciplinary proceedings. On receipt of report from the Manager, having found that there was no valid ground for the suspension in the investigation conducted in terms of Rule 67(8) of Chapter XIVA of the Kerala Education Rules (KER), the concerned Educational Officer directed the Manager to reinstate the appellant. Though the order passed by the Educational Officer was challenged by the Manager in revision before the Government, the challenge was repelled. The appellant was consequently reinstated.
3. On 21.06.2013, the appellant was placed under suspension again in contemplation of disciplinary proceedings. On this occasion also, the Educational Officer directed the Manager to reinstate the appellant. As done on the previous occasion, the order passed by the Educational Officer was challenged by the

Manager in revision before the Government and though the said challenge was repelled, in terms of the order passed by the Government in this regard, the Educational Officer was directed to conduct formal enquiry against the appellant in terms of Rule 75 of Chapter XIVA of the KER.

4. The Educational Officer, however, requested the Government to recuse him from the enquiry on the ground that the Manager has threatened and insulted him when he attended a function in the school. On the said request, the Government appointed the then Additional Director of Public Instruction to conduct the formal enquiry. Ext.P35 is the order issued by the Government in this regard. Pursuant to Ext.P35, the Additional Director of Public Instruction conducted the formal enquiry and submitted Ext.P36 report to the Government. On Ext.P36 report, the Government issued Ext.37 order directing the Manager to finalize the disciplinary proceedings against the appellant.

5. The writ petition was filed in the said background challenging Exts.P35 and P37 orders of the Government and Ext.P36 report of the Additional Director of Public Instruction. The appellant also sought a declaration in the writ petition that the action of the Government in appointing the Additional Director of Public Instruction as enquiry officer in the disciplinary proceedings initiated against the appellant is illegal and arbitrary. A direction was also sought in the writ petition to the Government to conduct the enquiry afresh in terms of the provisions of the KER. The case set out by the petitioner in the writ petition was that Rule 75(1)(b) of Chapter XIVA does not contemplate appointment of the Additional Director of Public Instruction as the enquiry officer; that the enquiry conducted by the Additional Director of Public Instruction was not one conforming to Rule 75 of Chapter XIV A and that the Government, in the circumstances, ought not have issued Ext.P37 order directing the Manager to finalise the disciplinary proceedings based on Ext.P36 report.

6. A counter affidavit has been filed by the Manager contending, inter alia, that the appellant who has participated in the enquiry conducted by the Additional Director of Public Instruction without challenging Ext.P35 order, is estopped from challenging the said order after suffering an adverse report. It was also contended by the Manager that the challenge against Ext.P36 report is premature insofar as no decision adverse to the interest of the appellant has been taken on the same.

7. Pending disposal of the writ petition, the Manager issued Ext.P40 show cause notice to the appellant on the basis of Ext.P36 report and Ext.P37 order proposing to impose a penalty of dismissal from service. At the time of admission of the writ petition, this Court had in fact passed an interim order against imposition of any penalty against the appellant, and in the light of said interim order, this Court stayed further proceedings pursuant to Ext.P40 by way of an interim order in Contempt Case (C) No.827 of 2020 filed by the appellant against the Manager.

8. The learned Single Judge repelled the contention of the appellant that Rule 75(1)(b) of Chapter XIVA does not contemplate appointment of the Additional Director of Public Instruction as an enquiry officer and that no prejudice was caused to the petitioner by such appointment, and dismissed the writ petition accepting the contention of the Manager that the challenge against Ext.P36 report is premature.

9. Heard Adv.Elvin Peter P.J. for the appellant, Adv.Karthika Sukumaran for the Manager and the Senior Government Pleader Sri.A.J.Varghese for the official respondents.

10. The learned counsel for the appellant submitted that the first limb of Rule 75(1)(b) of Chapter XIVA is that the enquiry against teachers other than Headmasters of High Schools and Training Schools shall be conducted either by the Educational Officer or by any other officer not below the rank of an Assistant Educational Officer authorised by the Educational Officer. It was pointed out that the second limb of the said rule, however, empowers the Director General of Public Instruction (presently the Director of General Education) or the Government to appoint an officer of the department for the said purpose. According to the learned counsel, merely for the reason that the Government is empowered to appoint an officer of the department to conduct an enquiry, the Government cannot appoint the Additional Director of Public Instruction, who himself is empowered to exercise the power of appointing an officer of the department to conduct the enquiry, for if such a course is adopted, there will not be any impartial and unbiased decision in the appeals provided to the teacher against the grant of sanction to impose major penalty as also against the order imposing penalty under Rules 80 and 81 of Chapter XIVA inasmuch as such appeals are to be decided by officers subordinate to the Director of Public Instruction. The submission of the learned counsel, therefore, was that Ext.P35 order is illegal. According to the learned counsel, since Ext.P35 order is illegal, Ext.P36 report of enquiry and Ext.P37 order passed by the Government on Ext.P36 report are also illegal and unsustainable. Alternatively, it was argued by the learned counsel that even assuming that the Additional Director of Public Instruction would be a competent officer who could be appointed to conduct a formal enquiry against a teacher, Ext.P36 report cannot be treated as an enquiry report in terms of Rule 75 of Chapter XIVA as it does not render any finding on any of the charges levelled against the appellant. It was also argued by the learned counsel that at any rate, Ext.P36 only expresses an opinion that disciplinary proceedings can be initiated against the appellant and therefore, the Government was not justified in issuing a direction on the said report permitting the Manager to finalise the pending proceedings against the appellant on the basis of Ext.P36 report.

11. Per contra, the learned counsel for the Manager contended that going by the plain meaning of the words used in Rule 75(1)(b) of Chapter XIVA, it cannot be said that the Government is not empowered in terms of the said provision to

appoint the Additional Director of Public Instruction, who is an officer of the department as enquiry officer. According to the learned counsel, merely for the reason that the appeals against orders granting sanction for imposing penalty on teachers and against orders imposing penalty on teachers are to be dealt with by officers subordinate to the Additional Director of Public Instruction, it cannot be said that the Government cannot appoint the Director of Public Instruction or Additional Director of Public Instruction as enquiry officers. It was, therefore, argued by the learned counsel that the enquiry conducted by the Additional Director of Public Instruction is in order. Alternatively, it was argued by the learned counsel that at any rate, since the appellant has participated in the enquiry pursuant to Ext.P35 order without challenging the same, she cannot be heard to contend that Ext.P35 is bad in law. It was also argued by the learned counsel that the appellant is not entitled to challenge the report of enquiry which has not been acted upon by the disciplinary authority before this Court. It was further argued that Ext.P36 cannot be said to be a report of enquiry not conforming to the requirements of Rule 75 of Chapter XIVA.

12. We have considered the submissions made by the learned counsel for the parties on either side.

13. The first and foremost question to be considered is as to whether the appellant is entitled to challenge Ext.P35 order of the Government appointing the Additional Director of Public Instruction to conduct a formal enquiry against the appellant, after having participated in the enquiry and after having suffered an adverse report.

14. As noted, the contention of the Manager in this regard is that the appointment of an incompetent enquiry officer will not vitiate the entire proceedings and that such a right can be waived. The stand taken by the appellant in this regard is that insofar as the Government is not empowered to appoint the Additional Director of Public Instruction as enquiry officer, the appointment made by the Government is non-est in law and that there is no question of the appellant waiving the said right. As noted, Ext.P35 order, in terms of which the Government appointed the Additional Director of Public Instruction as enquiry officer is one passed on 31.03.2014. The appellant has not challenged Ext.P35 order at that point of time on the ground urged in the writ petition. Instead, she participated in the enquiry conducted without raising any objection as to the competence of the enquiry officer to conduct an enquiry in terms of Rule 75(1) of Chapter XIVA. Ext.P36 report has been submitted by the enquiry officer to the Government on 30.05.2014. It is much later that the Government issued Ext.P37 order directing the Manager to finalise the pending proceedings on the basis of Ext.P36 report. Ext.P37 is an order passed on 10.11.2014. The writ petition is one filed about two months after Ext.P37 order. The appellant has no case that any prejudice has been caused to her on account of the fact that the enquiry has been conducted by the Additional Director of Public Instruction. We are, therefore, of the view that the appellant, having participated in the enquiry

conducted by the Additional Director of Public Instruction without challenging Ext.P35 order and without raising any objection as to the competency of the enquiry officer to conduct the enquiry, shall be deemed to have waived her right to challenge the competency of the Additional Director of Public Instruction against her. We are fortified in this view by the decision of the Apex Court in *H.V.Nirmala v. Karnataka State Financial Corporation*, (2008) 7 SCC 639. The question considered by the Apex Court in the said case also was as to whether the competence of the enquiry officer in a disciplinary proceedings could be waived. The dispute was one concerning the disciplinary action against an officer of the Karnataka State Financial Corporation. The prescription in the relevant rules was that the enquiry shall be conducted by an officer of a rank above that of the employee against whom the charges have been framed. The enquiry in that case was not conducted by an officer appointed in terms of the relevant rule. As in the case on hand, the objection as to the competency of the enquiry officer to conduct the enquiry was not raised at the stage of enquiry and it was raised for the first time before the Apex Court. The argument was that since the incompetency of the enquiry officer is one that goes to the root of the jurisdiction, the same can be urged at any stage of the proceedings. Having regard to the aforesaid facts and circumstances, the Apex Court has held that the appointment of an enquiry officer being a procedural matter, infraction of the rules does not vitiate the enquiry especially when the aggrieved party is unable to show prejudice in the enquiry. In the light of the decision of the Apex Court, we are inclined to hold that the appellant who has not objected to the appointment of the Additional Director of Public Instruction as enquiry officer is not entitled to challenge the appointment after having participated in the enquiry and after having suffered an adverse report.

15. Insofar as it is found that the appellant is precluded from challenging Ext.P35 order, it is unnecessary to consider the question as to whether the Government is empowered to appoint the Additional Director of Public Instruction as the enquiry officer to conduct a formal enquiry against the teacher of an aided school in exercise of its powers under Rule 75(1)(b) of Chapter XIVA.

16. The next question is as to the sustainability of Ext.P37 order passed by the Government. As noted, Ext.P37 is an order passed by the Government on receipt of Ext.P36 report of the Additional Director of Public Instruction. The argument advanced by the learned counsel for the appellant as regards the challenge of the appellant against Ext.P37 order is that insofar as the recommendation of the enquiry officer in Ext.P36 is only to initiate departmental action against the appellant, the Government ought not have directed the Manager to finalise the disciplinary proceedings on the basis of the said report. We have perused Ext.P36 report of enquiry. The concluding portion of Ext.P36 report reads thus:

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The charge contained in the additional memo served on the appellant reads thus:

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request such witnesses to appear before him to give evidence. Where the witness to be examined is any other teacher the Inquiring Authority will normally try to secure the presence of witnesses unless he is of the view that the witness's evidence is irrelevant or not material to the case under inquiry. Where the witness proposed to be examined by the teacher is any other person the Inquiring Authority will be under no obligation to summon and examine him unless the teacher himself produces him for examination.

(8) At the conclusion of the inquiry, the Inquiry Authority shall prepare a report of the inquiry, recording its findings on each of the charges together with the reasons therefor. If in the opinion of such authority the proceedings of inquiry establish charges different from those originally framed, it may record its findings on such charges provided that findings on such charges shall not be recorded unless the teacher has admitted the facts constituting them or has had opportunity of defending himself against them.

(9) The records of inquiry shall include:-

(i) the charges framed against the teacher and the statement of the allegation furnished to him;

(ii) his written statement if any;

(iii) the oral evidence taken in the course of inquiry;

(iv) the documentary evidence considered in the course of the inquiry;

(v) the orders; if any; made in regard to the inquiry;

(vi) a report setting out the findings on each charges and the reasons therefor."

Ext.P36 report does not reveal that an enquiry has been conducted in terms of Rule 75. The report does not refer to the charges levelled against the teacher. The report does not refer to the stand taken by the appellant in the written statement filed against the memo of charges. The report does not indicate as to whether any evidence has been adduced by the parties. The report does not indicate the orders, if any, passed during the course of enquiry. The report does not indicate the findings on each of the charges and the reasons thereof. In other words, it is evident that there was no enquiry against the appellant by the Additional Director of Public Instruction in terms of Rule 75.

18. Ext.P37 is not an order passed by the Government solely on Ext.P36 report. It deals with some other matters connected to the administration of the school as well. The relevant portion of Ext.P37 order dealing with Ext.P36 report reads thus:

"5) The inquiry report read as 8th paper above revealed that Smt.P.R.Prasannakumari has committed irregularities, unbecoming of Headmistress. She was suspended, then reinstated and still working as Headmistress with all service benefits while Smt.C.N Jalaja, the teacher-in-

charge also faced suspension by the Assistant Educational Officer, despite the fact that the Manager is the disciplinary authority. But Smt.C.N.Jalaja has not challenged the said action. Her only request is to grant her the withheld eligible increment. The Inquiry Officer has stated that direction is given to the Assistant Educational Officer, Adimali to enlist the school registers. More over, the Managership of Sri.K.D Bijimon expired on 18/06/2014.

6) Government have examined the case in detail. The recommendation of the Inquiry Officer is to initiate departmental action against Smt.P.R. Prasannakumari. Being the Headmistress of an aided school, the Manager is empowered to initiate disciplinary action against her. But she was suspended and later reinstated, but no details are available whether disciplinary action against her is finalised. No disciplinary action against an officer can be taken twice for the same offence. The offence of the Headmistress pointed out by the Inquiry Officer is that her action in having locked the cupboards/tables in which school register are kept and the hesitation in handing over them to the teacher-in-charge, as instructed by the Manager. But the said action is pursuant to her suspension by the Manager.

7) On the basis of the findings of the Inquiry Officer Government hereby order the following:

i) the Manager will finalise disciplinary action against Smt.P.R. Prasannakumari, Headmistress, initiated if any, pursuant to her suspension.

ii) xxx

iii) xxx

iv) xxx "

The extracted order would indicate that Ext.P37 is one passed without taking note of the purpose for which the Additional Director of Public Instruction was appointed in terms of Ext.P35 order and without taking note of the provisions contained in Rule 75, as the Government is expected to direct the Manager to finalise the disciplinary proceedings against the teacher only when there is an enquiry in terms of Rule 75 and findings in that enquiry that all or any of the charges framed against the teacher in the said enquiry have been established.

19. In a case of this nature, insofar as there was no enquiry at all against the appellant in terms of Rule 75, the Government could have, while acting on Ext.P36 report, remitted the matter for a fresh enquiry. Insofar as the said course has not been adopted, under normal circumstances, this Court should have set aside Ext.P37 and directed the Government to order enquiry afresh in terms of Rule 75 through an officer competent to do so in terms of the said provision. Unfortunately, we are unable to adopt the said course in this matter since the appellant who was placed under suspension earlier in contemplation of disciplinary proceedings has been reinstated in service and she was permitted to retire, for there is no provision in the Act and Rules enabling the Manager to

continue the disciplinary proceedings against a teacher after her retirement. In this context, it is profitable to refer to a few passages from the judgment of the Apex Court in Civil Appeal No.5848-49 of 2014, the relevant portion of which read thus:

"3. The appellant challenged the continuance of disciplinary proceeding after his retirement by filing Writ Petition No. 1919(SB) of 2009 on the file of the High Court of Judicature of Allahabad, Lucknow Bench. The High Court relying on the decision of this Court in U.P. Coop. Federation Ltd. v. L.P. Rai held that there is no ground to interfere with the disciplinary proceeding and directed to complete it within four months by the impugned order dated 18-12-2009. The appellant filed Review Petition No. 139 of 2010 and the High Court dismissed the same by order dated 29-3-2010. Challenging both the orders the appellant has preferred the present appeals.

4. The learned counsel for the appellant contended that the disciplinary proceeding was not completed for more than three years and in the absence of any provision in the Regulations providing for continuation of disciplinary proceedings after retirement of the employee, the respondents could not continue the disciplinary proceeding against the appellant after his superannuation. It is his further contention that the High Court has failed to appreciate the law laid down by this Court in similar circumstances in the decision Bhagirathi Jena v. Orissa State Financial Corpn. and for the said reason the impugned order is liable to be set aside.

5. Per contra, the learned counsel appearing for the respondents contended that pursuant to the liberty given by the High Court in its order dated 10-1-2006 fresh disciplinary proceeding was initiated and as held by this Court in its decision rendered in U.P. Coop. Federation Ltd. case the right of the employer to hold a fresh inquiry cannot be denied on the ground that the employee has since retired from service and the impugned order is sustainable.

6. We have carefully considered the rival submissions. The facts are not in dispute. The High Court while quashing the earlier disciplinary proceedings on the ground of violation of principles of natural justice in its order dated 10-1-2006 granted liberty to initiate the fresh inquiry in accordance with the Regulations. The appellant who was reinstated in service on 26-4-2006 and fresh disciplinary proceeding was initiated on 7-7-2006 and while that was pending, the appellant attained the age of superannuation and retired on 31-3-2009. There is no provision in the Uttar Pradesh Cooperative Societies Employees' Service Regulations, 1975, for initiation or continuation of disciplinary proceeding after retirement of the appellant nor is there any provision stating that in case misconduct is established a deduction could be made from his retiral benefits. An occasion came before this Court to consider the continuance of disciplinary inquiry in similar circumstance in Bhagirathi Jena case and it was laid down as follows : (SCC pp. 668-69, paras 5-7)

"5. Learned Senior Counsel for the respondents also relied upon clause (3)(c) of Regulation 44 of the Orissa State Financial Corporation Staff Regulations, 1975. It reads thus:

'44. (3)(c) When the employee who has been dismissed, removed or suspended is reinstated, the Board shall consider and make a specific order:

(i) Regarding the pay and allowances to be paid to the employee for the period of his absence from duty, and

(ii) Whether or not the said period shall be treated as a period on duty.'

6. It will be noticed from the abovesaid Regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of the departmental enquiry after superannuation.

7. In view of the absence of such a provision in the abovesaid Regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

7. In a subsequent decision of this Court in U.P. Coop. Federation case on facts, the disciplinary proceeding against employee was quashed by the High Court since no opportunity of hearing was given to him in the inquiry and the management in its appeal before this Court sought for grant of liberty to hold a fresh inquiry and this Court held that charges levelled against the employee were not minor in nature, and therefore, it would not be proper to foreclose the right of the employer to hold a fresh inquiry only on the ground that the employee has since retired from the service and accordingly granted the liberty sought for by the management.

8. While dealing with the above case, the earlier decision in Bhagirathi Jena case was not brought to the notice of this Court and no contention was raised pertaining to the provisions under which the disciplinary proceeding was initiated and as such no ratio came to be laid down. In our view the said decision cannot help the respondents herein.

9. Once the appellant had retired from service on 31-3-2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the

enquiry had lapsed and the appellant was entitled to get full retiral benefits.”

In the circumstances, we are constrained to set aside Ext.P37 order and leave the matter to rest.

In the result, the appeal is allowed, the impugned judgment is set aside and the writ petition is allowed in part quashing Ext.P37 order of the Government, insofar as it permits the fourth respondent to finalise the disciplinary proceedings against the appellant pursuant to her suspension.