

(2002) 03 KAR CK 0043

In the Karnataka High Court

Case No : Writ Petition No's. 5761 and 5763 of 2001

S.K. Joshi and Another

APPELLANT

Vs

Vidyavardhaka Sangh, Bijapur and Others

RESPONDENT

Date of Decision : 13-03-2002

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Karnataka Education Act, 1983 — Section 131, 93, 94

Citation : (2003) ILR (Kar) 1896 : (2002) 4 KarLJ 59 : (2002) 2 KCCR 167 SN

Hon'ble Judges : H.L. Dattu, J

Bench : Single Bench

Advocate : Prabhuling K. Navadgi, for the Appellant; T.N. Raghupathy, for Common Respondents-1 and 2 and Sreenivasa Murthy, Government Advocate for Common Respondents-3 and 4, for the Respondent

Final Decision : Allowed

Judgement

H.L. Dattu, J.—Facts in these two writ petitions and the questions of law raised are more or less identical. Therefore, they are heard together and disposed off by this common order.

2. For narration of facts, I would be relying upon statements made by the petitioner in W.P. No. 5761 of 2001.

3. Petitioner is an Assistant Teacher working in a school managed and controlled by the first respondent-Vidyavardhaka Sangha, a society registered under the provisions of the Societies Registration Act. The society is running several educational institutions in and around Bijapur District.

4. The second respondent is the school run by the first respondent-society. At the time of appointment of the petitioner, the second respondent-school was known as V.V. Sangha Primary School (English and Kannada Medium). After introduction of the Pre-University Classes, it has been redesignated as V.B. Darbar Pre-University College.

5. Petitioner in this writ petition filed under Article 226 of the Constitution, calls in question the correctness or otherwise of the orders made by the first respondent-society dated 31-1-2001, terminating his services with immediate effect, on the ground that the services of the petitioner is no more required by the society.

6. The first respondent-society had issued a paper publication dated 9-2-1992, inviting applications from eligible and suitable candidates for the post of Assistant Teachers (English medium). Pursuant to the advertisement so issued, petitioner herein had shown his willingness by filing his application along with necessary documents and particulars of his qualification. The first respondent-society, after being satisfied about the educational qualification of the petitioner, had appointed him as Assistant Teacher in the second respondent-composite college by issuing him a letter of appointment dated 13-8-1991. In the said letter of appointment, it was made known to the petitioner that the appointment is for the academic year 1993, and further the appointment is subject to the approval of the Department of Education. The first respondent-society had also reserved its rights to terminate the services of the appointees/petitioners at any time without any notice.

7. After such appointment, the first respondent-society had made a request to the Department of Education for approval of the appointment of the petitioner as Assistant Teacher in their school. Though the request made by school was some time in the year 1992, the Department of Education in the year 1996 has rejected the request made by the first respondent society to approve the appointment of the petitioner as Assistant Teacher in the second respondent-composite college. However, the first respondent-society has continued the services of the petitioner as Assistant Teacher in the second respondent-composite college till the date of the impugned order by paying him consolidated salary.

8. The first respondent-society has also maintained the service register of the petitioner. Petitioner has produced a Xerox copy of the same along with the writ petition papers.

9. It is also stated in the writ petition that the services of Assistant Teachers, who are appointed along with petitioner namely, Sri B.R. Patil, V.Y. Kasmis, S.K. Desai and S.C. Nadakatha, were confirmed as permanent employees of the first respondent society.

10. Though the petitioner is working in the first respondent-society from last one decade, it is paying him a meager salary. Therefore, petitioner had approached the first respondent-society for regularisation of his services as an Assistant Teacher and also for payment of salary on par with regularly employed persons. Since the representation filed by the petitioner did not yield any response/result from the first respondent-society, he was constrained to issue a legal notice to the first respondent-society to regularise his services and also for payment of

salary on par with regularly appointed persons, since he has completed unblemished service for a decade and more.

11. The first respondent-society, may be irked by the legal notice issued by the petitioner through his learned Counsel, has now issued the impugned order dated 31-1-2001 terminating the services of the petitioner with immediate effect. The order made is in Kannada language. In the order, they use the expression which would mean dismissal, removal or termination. Aggrieved by the same, petitioner is before this Court.

12. Apart from raising various other contentions, learned Counsel appearing for the petitioners states, that the first respondent-society could not have terminated the services of the petitioners without issuing an appropriate show-cause notice and without holding at least a summary enquiry and therefore it is stated that the action of a private educational institution, which is aided by the State Government, is arbitrary, illegal, invalid, unfair, unjust and opposed to the rules of natural justice. Therefore, a request is made to quash the impugned order dated 31-1-2001.

13. Respondents have filed their detailed statement of objections. In that, they would contend that the impugned order made by the first respondent society is a "termination simpliciter" and if for any reason, petitioners are aggrieved by the said order, they have to necessarily approach the appropriate authorities as provided under the provisions of Karnataka Education Act, 1983 for redressal of their grievances. They further state that the relationship of the petitioners and the first respondent-society and the school is that of a master and servant and in terms of the contract of employment, the first respondent-society has brought to an end the relationship by terminating the services of the petitioners herein, and therefore, this Court in exercise of its jurisdiction under Article 226 of the Constitution, should not interfere with the impugned order. Sri Raghupathy, learned Counsel appearing for the respondents has brought to my notice the orders made by me as well as by a Division Bench of this Court to suggest that writ remedy is not available to the petitioners at this stage and necessarily they have to choose a forum as provided under the provisions of Karnataka Education Act, 1983.

14. Both the learned Counsels have relied upon the observations made by this Court as well as the Apex Court in support of their submissions. I will be making a reference to those decisions in the course of my order a little later.

15. This Court while entertaining the writ petitions had granted an interim order in the following terms:

"Issue notice to respondents re-rule. Stay of Annexure-A, dated 31-1-2001 bearing Reference No. 108/VVS/2000-2001 for a period of four weeks if the petitioner is not already relieved".

16. Since petitioners had been relieved from service by then, the interim order of

this Court was not given effect to by the respondents.

17. The settled legal position is that a temporary employee has no right to the post and his services may be terminated in terms of appointment. Where however, the temporary employee succeeds in establishing that the termination was arbitrary having nexus with unsuitability or unsatisfactory conduct or the like or by way of punishment, then the Courts will definitely interfere and set aside the termination if the same was done without complying with the principles of natural justice. This will be so, even if the termination order on the face of it appears to be innocuous since in an appropriate case, the Courts will lift the veil and examine whether the device of termination adopted by an employer as a cloak for punishment or purports to be in terms of the conditions of employment. Termination of service without holding an appropriate enquiry is contrary to the principles of natural justice and this Court can definitely come to the aid of the aggrieved persons.

18. Keeping in view this well-settled legal position, let me notice the arguments advanced by the learned Counsels for the parties to the lis.

Learned Counsel Sri Raghupathy appearing for the respondents vehemently contends before this Court that the impugned communication of the first respondent-society is in the nature of "termination simpliciter", and if for any reason, petitioners are aggrieved by the said order, they have to file an appropriate appeal/revision before the Appellate Authority/State Government as provided under Sections 130 and 131 of the Karnataka Education Act.

Per contra, learned Counsel Sri Prabhuling Navadgi appearing for the petitioners submits that the remedy provided u/s 130 of the Karnataka Education Act is not available to the petitioners herein and secondly, the right of revision as provided u/s 131 of the Act may be an alternate remedy but it is not an effective and efficacious remedy. In support of his contentions, learned Counsel has brought to my notice the observations made by the Apex Court in the case of Parshotam Lal Dhingra Vs. Union of India (UOI), and the observations made by the Apex Court in the case of The Principal and Others Vs. The Presiding Officer and Others, and the observations made by a Division Bench of this Court in the case of Mageshwari Vs. Assistant Commissioner of Income Tax, .

19. The parties to the Us are governed by the provisions of the Karnataka Education Act, 1983 ("Act" for short). Petitioners are Assistant Teachers. Their selection and appointment is against a regular vacancy by the respondent's management after following the procedure prescribed under the Act. The second respondent is a Composite Junior College managed and controlled by the first respondent-society. The State Government is providing salary grant to the teaching and nonteaching staff of the respondent-Composite Junior College.

20. Section 93 of the Act provides for communication of orders made by the managing committee imposing any penalties or otherwise affecting the conditions of service of an employee to his prejudice.

Section 94 of the Act provides for appeals against the orders communicated u/s 93 of the Act. The provision would clearly indicate that appeals can be filed by any teacher or every employee working in a private educational institution, if he is dismissed, removed or reduced in rank, within three months from the date of communication of the order to the Tribunal.

21. Sri Raghupathy, learned Counsel for the respondent's management informs me that the impugned order is not an order of dismissal or removal of the petitioners from the services of the respondent-college. According to the learned Counsel, the impugned order is only an order of "termination simpliciter", since respondents no more require the services of the petitioners as Assistant Teachers in their college. It is difficult to accept this submission of the learned Counsel.

22. The meaning of the expressions "dismissed", "removed" and "reduced in rank" came up for consideration before the Apex Court in the case of Parshotam Lal Dhingra, *supra*. The Court was pleased to observe:

"The words, "dismissed", "removed" and "reduced in rank", as used in the service rules, were well-understood as signifying or denoting the three major punishments which could be inflicted on Government servants. The protection given by the rules to the Government servants against dismissal, removal or reduction in rank, which could not be enforced by action, was incorporated in Sub-Sections (1) and (2) of Section 240 to give them a statutory protection by indicating a procedure which had to be followed before the punishments of dismissal, removal or reduction in rank could be imposed on them and which could be enforced in law. These protections have now been incorporated in Article 311 of our Constitution".

The Court was further pleased to observe:

"Thus under Article 311(1) the punishments of dismissal or removal cannot be inflicted by an authority subordinate to that by which the servant was appointed and under Article 311(2) the punishments of dismissal, removal and reduction in rank cannot be meted out to the Government servant without giving him a reasonable opportunity to defend himself."

23. In view of the law declared by Apex Court, the settled position of law is that only in those cases where the Government intends to inflict those three forms of punishments namely, "dismissal", "removal" or "reduction in rank" the Government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, if the termination of service is made otherwise than by way of punishment, then the Government servant whose service is so terminated cannot claim the protection of Article 311(2) of the Constitution.

24. The Apex Court in the very decision while explaining the concept of the term "termination" in Service Law Jurisprudence was pleased to observe:

"Where, however, the termination of service is founded on the right flowing from

contract or the service rules then, prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with.

A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. If the Government servant has a right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. The use of the expression "terminate" or "discharge" is not conclusive.

Thus in each case the Court has to apply the two tests namely, (1) whether the servant had a right to the post or the rank? or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Article 311, which give protection to Government servant have not been complied with, the termination of service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant".

25. Keeping in view these settled principles, let me notice the submission of the learned Counsel for respondents. Learned Counsel Sri Raghupathy contends before this Court that the impugned order passed by the first respondent-society is only an order of termination simpliciter, and therefore, respondents are not obliged either to issue a show cause notice or to hold an enquiry before terminating the relationship of master and servant. If that submission of the learned Counsel is accepted, in that event petitioners may not be in a position to file an appeal as provided u/s 94 of the Act. The reason being, if the termination of service of an employee if it is not by way of punishment i.e., either by way of dismissal, removal from service or by way of reduction in rank, then the aggrieved teacher or other employee working in a private educational institution may not be in a position to file an appeal as provided under the provisions of Section 94 of the Act, but in the present case, petitioners were appointed as Assistant Teachers against a regular vacancy after following the procedure

prescribed under the Act. Their appointment was subject to the approval of the Education Department. In fact, the request made by the management for approval of the appointment of petitioners had been turned down by the Education Department in the year 1996 itself. But the management continued the services of the petitioners since there was a need and necessity for teachers in the school. All these aspects would clearly demonstrate that petitioners have a right to hold the post. Now the respondents have issued the impugned order terminating their services. Naturally it results in evil consequences. Therefore, the order of termination passed by the respondents is in the nature of punishment of dismissal from service and before inflicting the punishment, the respondents should have complied with the requirement of principles of natural justice. However, respondents strongly contend before this Court that the impugned order is a pure and simple order of termination and by no stretch of imagination, it could be construed as an order of dismissal and therefore, at this stage, it may not be proper to direct the petitioners to file an appeal as provided u/s 94 of the Act.

26. Now the next question is whether the petitioners can file appeals or revisions as provided under Sections 130 and 131 of the Act?

27. Section 130 of the Act envisages that any person of Governing Council aggrieved by an order passed by an officer or authority under the Act may prefer an appeal before the prescribed authority within the prescribed period. These provisions can be made use of by any person or a Governing Council, if they are aggrieved by an order made by an officer or other authority under the Act and it cannot be a teacher or other employee of a private educational institution. Therefore, the appeal, remedy provided u/s 130 of the Act cannot also be pressed into service by the petitioners for redressal of their grievances.

28. Now what remains is whether petitioners can file a revision before the State Government as provided u/s 131 of the Act?

Under Section 131 of the Act, the State Government may entertain a revision petition either suo motu or on an application from any person interested and thereafter call for and examine the records of an educational institution or of any authority, officer or person in respect of any administrative or quasi-judicial decision or order, not being a proceeding in respect of which a reference to an Arbitrator or an appeal to the High Court is provided to satisfy themselves as to the regularity, correctness, legality or propriety of any decision or order passed therein and thereafter may modify, annul, reverse or remit for reconsideration.

Proviso appended to Section 131 of the Act says that the order u/s 131(1) of the Act requires to be made only after affording an opportunity of hearing to a party, who may be affected by such an order.

29. Petitioners, who are working as Assistant Teachers temporarily in the services of the second respondent-Composite Junior College, can be said to be aggrieved by an order made by the private educational institution. They may

question the said order before the State Government by filing an appropriate revision petition. The question is whether that remedy provided u/s 131 of the Act is effective and an efficacious remedy? A Division Bench of this Court in the case of Smt. S. Mageshwari, supra, has observed that revision is not a right and it cannot at all be equated to the right of appeal and therefore, failure to invoke revisional jurisdiction or avail the remedy of revision by itself would not disentitle a party aggrieved to invoke the jurisdiction of this Court under Articles 226 and 227 of the Constitution nor such failure is a bar for exercise of jurisdiction under Articles 226 and 227 of the Constitution. Here again, it is left to the discretion of the Court either to entertain or reject a petition at the threshold and the same depends upon the facts and circumstances of each case. Secondly, whether this alternative remedy is a bar to an aggrieved party under all circumstances to approach this Court for necessary reliefs. The Apex Court in The Bengal Immunity Company Limited Vs. The State of Bihar and Others, has observed that the doctrine of exhaustion of statutory remedies is available under two exceptional circumstances namely, if the proceedings are taken under a provision of law which is ultra vires and where the impugned order is made in total violation of principles of natural justice and further it was pointed out that these exceptions cannot be regarded as exhaustive of the exceptions and discretion always vests in the High Courts to entertain a petition notwithstanding the existence of alternative remedy. Therefore, it can safely be said that an alternative remedy is not an absolute bar to the maintainability of a writ petition, where an authority has acted wholly without jurisdiction and in blatant violation of principles of natural justice. In the present case, respondent's management has taken the extreme step of dispensing with the services of these petitioners only because they had taken a bold step to request the private educational institution to regularise their services and also for payment of salary on par with regularly employed Assistant Teachers. In such circumstances if this Court does not assist the aggrieved persons, then it would be failing in its duty and responsibility. Therefore, the petitions filed by the petitioners is maintainable before this Court, though they have an alternate remedy of revision as provided under the Act, since the action of the respondents is in blatant violation of principles of natural justice.

30. Having answered the preliminary objection canvassed by the learned Counsel for respondents, let me now consider whether the first respondent-society could have passed the impugned order without issuing an appropriate notice to the petitioners and without holding a semblance of an enquiry?

31. The learned Counsel for respondents very strenuously urges that the impugned order is in the nature of termination simpliciter and therefore, there is no necessity for the respondent's management to hold any enquiry before severing the relationship of master and servant. The argument advanced at the time of hearing of these petitions looks attractive but on a deeper consideration, in my view, it has no merit whatsoever. Petitioners are appointed substantively to a permanent post and against a regular vacancy by the respondent's

management after going through the process of selection and appointment as provided under the Act. However, that appointment was subject to approval by the Department of Education. Though a request had been made by the respondent management in the year 1992, the Department of Education has rejected the request of the respondent management in the year 1996. Even after receiving the communication of rejection of their request, the respondent's management has continued the services of the petitioners in their Organisation till the date of passing the impugned order i.e., nearly for six years. In my opinion, since the petitioners were appointed substantively to a permanent post in an Organisation, which is receiving the salary grants from the State Government, petitioners have acquired a right to hold the post until they attain the age of superannuation or compulsorily retired from the service or unless they are guilty of misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken as provided under the Act and termination of service of a teacher so appointed would be nothing but punishment, since it affects their service condition, and secondly, the premature termination of the service of the petitioners would come within the meaning of the expression "dismissal" or "removal from service" by way of punishment and the same could not have been done by the respondents without a notice and without holding an enquiry as required under the Act and in compliance with principles of natural justice.

32. Lastly, in my opinion, the totality of the circumstances of the case pleaded by the petitioners would definitely demonstrate that the impugned order though reads like an order of termination simpliciter, the same is done by way of punishment since the petitioners were pressurising the first respondent-society to regularise their services and also for payment of salary on par with regularly employed persons since they have completed 10 years of continuous service. This could not have been done by the respondent's management without issuing a show-cause notice and without holding an enquiry as provided under the Act and in compliance with principles of natural justice. Therefore, it is difficult to sustain the impugned order dated 31-1-2001.

33. In the result, the following:

ORDER

I. Writ petitions are allowed. Rule made absolute.

II. The impugned order made by the first respondent-society dated 31-1-2001 is quashed.

III. Respondents are directed to reinstate the petitioners into service forthwith. Petitioners are entitled for monetary benefits from the date of their termination till the date of their reinstatement into service.

IV. Liberty is reserved to the first respondent-society, if it so desires, to terminate the services of the petitioners only in accordance with law.

V. All the other contentions of both the parties are left open.