

(2009) 01 KL CK 0049
In the High Court Of Kerala
Case No : CRP No. 1181 of 2005

Sudhakaran C.B. (Dr.)

APPELLANT

Vs

The Cochin Educational Society and Another

RESPONDENT

Date of Decision : 20-01-2009

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Mahatma Gandhi University Act, 1985 — Section 63(1), 63(12), 63(4), 63(9)

Citation : (2009) 1 KLJ 349

Hon'ble Judges : P.R. Raman, J;C.T. Ravikumar, J

Bench : Division Bench

Advocate : V. Chitambaresh, K. Amminikutty and N. Raghuraj, for the Appellant;
A. Jayasankar and Manu Govind, for the Respondent

Final Decision : Allowed

Judgement

P.R. Raman, J.—The revision petitioner was working as a Selection Grade Lecturer as also the Head of the Department in English in the Cochin College run by the Cochin Educational Society, which is a private college affiliated to Mahatma Gandhi University. He possess a Doctorate in English. While working so, he was elected as a staff representative of the Parent Teacher Association (hereinafter referred to as "PTA" for short) during 2002-03 and 2003-04. The constitution of the Executive Committee consists of 25 members of which 16 shall represent the parents/guardians of the students studying in the college and 9 members are to be selected as representatives of the staff of the college the President of the PTA is considered to be the guardian of students as per the bye-laws and its Secretary, a member of the staff. While holding the position as the Secretary of the PTA, the petitioner along with the President happened to sent a complaint to the Vigilance and Anti Corruption Bureau, alleging certain mismanagement against the office of the college, On receipt of the said complaint, a surprise check was made by the vigilance in the office of the Cochin College and had taken certain documents for the purpose of investigation. The intervention of the vigilance, as a result of the complaint made by the petitioner,

was considered to be a conduct unbecoming of a Lecturer in the College and the management thought that the petitioner was instrumental for bringing disrepute to the institution, kept him under suspension from service by order dated 28-5-2004, invoking Section 63(1) of the Mahatma Gandhi University Act, 1985 (hereinafter referred to as "the Act"). As per the above provision, the Educational Agency is competent to place a teacher of a private college under suspension, when any disciplinary proceedings is proposed to be taken against him or when such disciplinary proceedings are pending. However, as per Section 63(4) of the Act, such disciplinary action has to be completed within a period of three months or within such further period as may be allowed by the Vice-Chancellor.

2. Challenging the order of suspension, the petitioner has approached this Court by filing W.P(C) No. 17784 of 2004. Though the challenge in the writ petition was only against the suspension order, by the time the matter came up for hearing, the normal charge sheet was issued and the petitioner has also submitted his reply. This Court, in such circumstances, by order dated 3-8-2004, directed that if the enquiry against the petitioner is not completed before 28-8-2004, the maximum time fixed for completing the enquiry as per Section 63(4) of the Act, the petitioner shall be reinstated in service. Of course, we notice that u/s 63(4) of the Act, it is not merely the enquiry, but the entire disciplinary proceedings should be completed within, a period of three months. In the interim order passed by this Court in W.P(C) No. 17784 of 2004, there was an observation that the action of the petitioner will amount to setting the law in motion, by moving the competent authority to enquire into certain allegations concerned with the collection and utilisation of the funds of PTA etc. Prima facie, on the facts disclosed in the suspension order, it was unnecessary to keep the teacher under suspension. This Court went on to say that the case of something similar to the classical example of unreasonable administrative action, i.e., dismissing a teacher for being red haired. Though Sri. Chitambaresh, the learned senior counsel appearing for the revision petitioner placed heavy reliance on the said order, we may notice that such an observation was made at a pre-mature stage of the enquiry, at a time when the ultimate punishment of dismissal could not have been contemplated. However, the management could not complete the disciplinary proceedings within the aforesaid period of three months as contemplated by the Statute and as directed by this Court. Hence, he was reinstated in service and proceeded with the disciplinary action. An enquiry officer was appointed to hold a domestic enquiry into the allegations levelled against the petitioner. Enquiry was conducted after giving an opportunity of being heard in the matter, including an opportunity to cross examine the witness examined on the side of the management, and to adduce his own evidence in the matter both oral and documentary. As per the final report submitted by the enquiry officer, we find that some of the charges are proved in the enquiry. Incidentally, it may be mentioned that there were altogether five charges levelled against the delinquent employee, the petitioner herein, and the allegation that he

has filed a complaint without being backed by a resolution of the PTA which resulted in the vigilance action, is only one among such charges. The management agreed with the above finding and issued a second show cause notice to the petitioner, giving him an opportunity to show cause on the punishment aspect. Thereafter, the management passed an order of compulsory retirement as a punishment, as contemplated by the Statute. This was challenged by the petitioner before the Statutory Tribunal by filing an appeal. The Tribunal eventually, after hearing the parties, dismissed the appeal. Hence, this revision is filed invoking the provisions u/s 63(9) of the Act, as per which a revision lies to this Court on the ground that the Appellate Tribunal has either decided erroneously or failed to decide any question of law.

3. We have heard the arguments of Sri. Chitambaresh, the learned senior counsel appearing on behalf of the petitioner and Sri. N. Ranghuraj, the learned Counsel appearing along with him and also Sri. Jayasankar, the learned Counsel appearing on behalf of the respondents.

4. According to the revision petition, the order passed by the Tribunal is erroneous in that it did not consider the legality of the order passed by the management, in the light of the provisions contained under Article 311(2) of the Constitution of India, in so far as the copy of the enquiry report was not served on the petitioner before proceeding to decide and accept the finding of the enquiry officer and hence vitiated. Further, the Tribunal has exceeded its jurisdiction and has taken into consideration certain extraneous matters, which are beyond the findings in the enquiry. It was also contended that none of the charges are factually proved and at any rate, the charges are so flimsy and not serious enough to warrant a punishment of compulsory retirement. According to him, the unblemished record of service of the petitioner as a Head of the Department for over 25 years along with other materials on record, including the lesser gravity of the charges, ought to have persuaded the Tribunal, at least in the matter of punishment and to hold that it is excessive and should have moulded the relief accordingly.

5. The learned Counsel appearing for the respondents however sustained the action of the management and contended that the Tribunal even after re-appreciating the entire evidence on record, came to the irresistible conclusion that the conduct on the part of the petitioner is unbecoming of an office occupied by him and do not deserve any sympathy or a lesser punishment. The finding as entered into by the enquiry officer, after appreciating the materials on record and which was re-appreciated by the Tribunal, would clearly show that the findings arrived at by the enquiry officer is not perverse and hence there is no scope for interference by this Court in this revision.

6. Before we proceed to consider the contentions as aforesaid, we may now reiterate the charges levelled against the petitioner which are contained in the enquiry report marked as Ext. B1 before the Tribunal. The substance of the charges levelled against the petitioner which were the issues adjudicated by the

enquiry officer in its final report are as follows:

(1) Whether the delinquent employee, in his capacity as the secretary of the PTA, lodged a complaint before the Superintendent of Police, Vigilance and Anti Corruption Bureau, (VACB), Ernakulam, over the alleged misappropriation and exploitation in the collection of Matriculation fee and price of application form in the PTA fund etc. If so, whether it was backed by any resolution of the PTA and whether this act of filling a complaint before the VACB, amounts to a misconduct on the part of the delinquent employee.

(ii) Whether the act of filling the complaint before the VACB, Ernakulam, by the delinquent employee was to divulge official matters to outsiders with definite intention to defame the institution and to create unrest among the members of the staff and whether it was to wreck vengeance on some of the members of the staff.

(iii) Whether the PTA account on be operated only with concurrence of both secretary and Treasurer of the PTA and whether the delinquent employee operated the PTA accounts single handely without the concurrence of the Treasurer of the PTA. In doing so, whether a total amount of Rs. 2,11,092 were drawn by the delinquent employee during 2002-2004.

(iv) Whether the delinquent employee handed over the register and other records of PTA to the Principal on the dissolution of the Executive Committee of the PTA and whether his act if not in doing so amounts to gross misconduct.

(v) Whether the delinquent employee issued a lawyer notice against the Principal of the college, threatening criminal proceedings against her for non-disbursal of the salary for the period May 2004. Whether any cogent steps were taken by the Principal for disbursing the salary and whether the act of issuing a lawyer notice threatening action under criminal proceedings in it amounts to gross indiscipline on the part of the delinquent employee.

7. On the above charges, the findings of each on the charges shorn off details are as follows. The enquiry officer found that the delinquent employee has filed a complaint before the Vigilance and Anti Corruption Bureau, without backing any resolution of the PTA and the above complaint contained a set of allegations which were not even considered by the Annual General Meeting held on 15-8-2003. The delinquent employee did not even make any attempt to find out whether the allegations in Ext.D 11 were true or correct, (Ext D11 is the complaint sent to the Vigilance and Anti Corruption Bureau, signed by the petitioner and the President of the PTA) and, therefore, it was filed with a malafide intention to tarnish the image of the college. The delinquent employee also did not seek to raise any complaint before the Director of Collegiate Education or to the University inviting them for any investigation either by themselves or though the VACB, as the case may be, as contemplated under the provisions of Statute 84 of the M.G. University statute. As per the Statute 84 of the M.G. University Statute, investigation into the allegations rained by the

Vigilance and Anti Corruption Bureau could be done only if it is referred to by the Educational Agency, University or by the Director of Collegiate Education. The delinquent employee was holding the post of Secretary of PTA in his capacity as the teacher of the college, and hence, he ought to have routed the complaint, if any, only through the Principal, in terms of Statute 20 of the M.G. University Statute, which in clear terms provide that except in exceptional circumstances as declared by the Vice-Chancellor of the University, the complaints are normally to be routed through the Principal. In the absence of any such exceptional circumstances, the routing of such complaint directly, except through the Principal was in violation of the provisions contained in Statute 20 of the M.G. University Statute. It was also found that audit accounts for the year 2002-03 of PTA, Ext. D7, were approved by the Annual General Meeting. But the accounts for the year 2003-04 of PTA were not approved by the Annual General Body Meeting. The Executive Committee was dissolved on 8-6-2004, and the President has admitted that he was in possession of the records of the PTA after its dissolution, but he did not ask the Secretary to return the documents after the dissolution. The Secretary, being the custodian of the documents of PTA, is bound to return the documents and he failed do so. Therefore, he was found guilty of this misconduct. The non signing of the vouchers by the President is found to be an irregularity supporting Charge No. 3. The fifth charge, viz., Ext. M6 lawyer notice to the Principal alleging criminal offences and threatening criminal proceedings against her because of the delay in disbursement of the salary due to him for the month of May, 2004, is a conduct unbecoming of a teacher and such allegation ought to have been avoided.

8. From the above, it could be seen that all the charges levelled against the petitioner as such were not proved, except to the extent as indicated in the finding referred to above. The management after receipt of the above finding proceeded to issue a notice dated 9-11 -2004, which though forms part of the records of the Tribunal, has been separately produced as Document No. 3 in this revision petition. The said notice is addressed to the petitioner and it is stated that a copy of the report of the enquiry officer is furnished to him.; that the Managing Committee considered the report in the meeting held on 8-11-2004 and accepted the report. It is also stated that the charges proved against the petitioner are serious and warrant major penalty and it proposes the punishment of compulsory retirement, considering the gravity of misconducts proved. He was also called upon to show cause why the punishment of compulsory retirement should not be imposed on him. Admittedly, the enquiry report containing the finding of the enquiry officer was furnished along with this notice. Though the petitioner submitted his reply, that was not accepted and he was compulsory retired from service by order dated 9-12-2004 produced as Document No. IV in this revision petition, which states that the Executive Committee being the disciplinary authority in its meeting held on 8-11-2004 unanimously accepted the enquiry report and suggested punishment of compulsory retirement on the petitioner with effect from 11-12-2004.

9. Evidently, the management had no occasion to consider the explanation dated 24-11-2004 before issuing Document No. III, viz., the second show cause notice dated 9-11-2004, as per which the management has already decided to accept the report and finding of the enquiry officer and even proposed the maximum punishment of dismissal from service and he was asked to submit his explanation only with regard to the punishment proposed. It was thereafter that the punishment proposed. It was thereafter that the punishment was considered and decided to compulsorily retire him, as evident from Document No. IV.

10. The first contention now raised by the counsel appearing for the petitioner is that in so far as the enquiry report was not furnished to the delinquent employee prior to the issuance of the show cause notice and before accepting the finding, is vitiated for the non-compliance of the principles of natural justice as embodied in Article 311(2) of the Constitution of India, which has been extended to the private and other Public Corporations. He placed reliance on the decision of the Constitution Bench of the Apex Court in *Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.*, . The Apex Court has considered the first proviso to Article 311(2) of the Constitution of India (after 42nd Amendment) and held that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him ", The findings on the charges given by a third person like the enquiry officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. What is further, when the proviso to the said Article states that "where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed it in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effects is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee's, reply to the enquiry officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry. The second stage follows the inquiry so carried out and it consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the enquiry officer. The latter right was always there. But before the Forty Second Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage, viz, the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. II that has happened after the Forty-second Amendment of the Constitution is to advance

the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence of the charges.

11. The Apex Court also held that the right to receive the report of the enquiry officer is considered as an essential part of the reasonable opportunity at the first stage and that the finding recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by third party like the enquiry officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it.

12. In the concluding paragraph of the Constitution Bench decision, in paragraph 30, the questions were answered and for our purpose, the answer contained in (iv) alone is relevant, as per which it was answered that the right to make representation to the disciplinary authority against the findings recorded in the enquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is

only appropriate that the law laid down in *Union of India and others Vs. Mohd. Ramzan Khan*, should apply to employees in all establishments whether Government or non-Government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of the punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the enquiry officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly. (emphasis supplied)

13. In *N.T.C. (WBAB and O) Ltd. and Another Vs. Anjan K. Saha*, , the Apex Court had occasion to consider again as to the effect of non supply of the enquiry report to the delinquent employee, after conclusion of the enquiry and before passing an order of punishment. Following the Constitution Bench in *ECIL's* case, there was a case where the clause in the standing orders governing the service condition of the employee provided that if the workman is found guilty on the conclusion of the enquiry, or as the case may be, of the charges levelled against him, after giving the workman concerned a reasonable opportunity of making representation on the penalty proposed, that an order of dismissal or suspension or fine, or stoppage of annual increment or reduction in rank would meet the ends of justice, the employer shall pass an order accordingly. The High Court, while considering the legality of the order of dismissal passed against the employee, directed full relief of reinstatement with back wages, though preserving the liberty to hold a *de novo* enquiry, after following all due procedural formalities. It was further held that the enquiry was so necessary, because it was found that there is not merely a serious lapse in not supplying the enquiry report to the employee, but there is also non-compliance of the Model Standing Orders. Referring to the provisions contained in the standing order, it was held that non-compliance of relevant provision of the standing order cannot be held to be a more vitiating factor than non-supply of enquiry report. When the Constitution Bench of the Apex Court directs the procedure to be adopted in cases of non-supply of enquiry reports, by allowing the employer to restart the enquiry from the stage of supply of enquiry report without reinstating the employee, it posed that such a course should not be directed to be adopted where the grievance of the employee is denial of opportunity to show cause against proposed penalty. Following the dictum in *Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.*, , wherein it was held that if the employee is cleared of the charges and is reinstated, the disciplinary authority would be at liberty to decide according to law how it will treat the period from the date of dismissal till the period of reinstatement and the consequential benefits, issued a similar direction.

14. By virtue of the Constitution Bench of the Apex Court, the position of law is settled that furnishing a copy of the enquiry report, before accepting the same by the employer and proposing a punishment, is a mandatory requirement of the

principles of natural justice. As such, a report also forms part of the proceedings in a disciplinary action, based on which the management decides as to whether a punishment should be imposed or not. Therefore, it is not only the materials before the enquiry, but the enquiry report also forms the basis of further action, and hence as held by the Apex Court, in case, the, report is not furnished to the delinquent employee before arriving at a conclusion as to accept or reject the finding thereof, will certainly vitiate the disciplinary action taken against him. Even though, the learned Counsel appearing for the respondents placed reliance on the decision of the Apex Court in *State of U.P. v. Harendra Arora and Anr.* 2001 SCC (L&S) 959 and canvassed for the position that unless any prejudice is shown, such non-furnishing of the report will not be fatal to the disciplinary proceedings. But in the light of the Constitution Bench of the Apex Court, wherein unambiguous terms, it was held that furnishing of the enquiry report is a mandatory requirement embodied under Article 311(2) of the Constitution of India. An opportunity to show cause why the finding of the enquiry officer shall not be accepted is mandatory, so that before accepting the finding, the disciplinary authority can consider as to whether all or any of the finding should be accepted or not, in the light of the objection filed by the delinquent employee. If an opportunity is not given in the manner as laid down by the Appex Court, by furnishing a report, virtually it denies to the delinquent a fair opportunity of being heard in the matter, because the enquiry report is not known to the delinquent employee, which also is a material relied on by the management, based on which action is proposed. Therefore, when that material is kept away from the employee, that itself works to his prejudice, in the result, we find that the failure to supply a copy of the enquiry report to the delinquent employee before accepting the finding thereon has vitiated the disciplinary proceedings.

15. The next question that arise is as to how the relief should be moulded. Going by the Constitution Bench decision, the proper course would be to direct reinstatement of the employee formally, for the limited purpose of enabling the employer to continue the disciplinary proceedings from the stage of considering the finding in the light of the objection filed by the employee and to leave the matter, regarding the fact as to whether he will be entitled for the monetary benefits during the period prior to the order, to be decided in accordance with the final wording, such a course, if adopted in this case, may become a futile exercise from the point of view of both the employer as well as the employee. It is agreed by both sides that the petitioner herein is due to attain the age of superannuation, had he continued in service, with effect from 31-3-2009. Therefore, there will be hardly two months left for the management to complete the further disciplinary proceedings, if any, notionally reinstating him in service, and ultimately by the time an order is to be passed, he would have attained the age of superannuation, and then no question of punishment of compulsory retirement would become possible.

16. Considering the fact that the petitioner had unblemished record of service except the present disciplinary action and further considering the fact that his

academic brilliance is beyond any dispute and also that he is due to retire from service on 31-3-2009, we think, it will be in the interest of justice, to accept his request to convert compulsory retirement to that of voluntary retirement from today, and we do so.

17. Even though both sides elaborately argued on the merits of the charges, in view of Our finding on the main issue as above, there arises no occasion to go into the merits of such contentions, as ultimately when the first contention is accepted, normally it will be for the management to consider the matter from that stage onwards in the matter of disciplinary action, as held by the Appex Court, Therefore, we refrain from entering into the merits of the contentions raised by the parties.

18. In the result, the order of the Tribunal impugned in this revision petition is set aside and the punishment of compulsory retirement imposed on the petitioner shall stand converted to one of voluntary retirement from today.

C.R.P is thus allowed to the extent as indicated above.

19. A copy of the judgment shall be forwarded to the University Tribunal for passing consequential orders, as contemplated u/s 63(12) of the Mahatma Gandhi -University Act, 1985.