

(2010) 08 MAD CK 0172
In the Madras High Court
Case No : W.A. No. 1316 of 2009

The Secretary, School Committee, National Higher Secondary School and Sivakumar APPELLANT

Vs

V. Mogalingam and State of Tamil Nadu RESPONDENT

Date of Decision : 03-08-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 — Section 22, 23

Citation : (2010) 08 MAD CK 0172

Hon'ble Judges : R. Banumathi, J;G.M. Akbar Ali, J

Bench : Division Bench

Advocate : Yashod Varadhan for A.S. Balaji, for the Appellant; G. Rajagopal for V. Babu, for R.1 and M. Dhandapani, Spl. G.P for R.2 to R.4, for the Respondent

Judgement

G.M. Akbar Ali, J.—The order of the learned Single Judge made in WP No. 23916 of 2009 dated 27.8.2009 is challenged in this writ

petition by the respondents 4 and 5.

2. The 1st respondent was working as Head Master in Government Aided Private School viz., National Higher Secondary School, Gudiyattam,

Vellore District, from the year 1991. The 1st appellant is the Secretary of the School Committee and the 2nd appellant is a committee member.

Since the 2nd appellant insisted the 1st respondent to give voluntary retirement application, on 14.12.2007, the 1st respondent gave such

application. Subsequently, the 1st respondent was permitted to withdraw the voluntary retirement application on 5.3.2008. However, an order of

suspension was served on the 1st respondent on 29.3.2008 and a charge memo dated 9.5.2008 was issued containing 19 charges including

alleged sexual harassment of girl students and financial irregularities. On 20.5.2008, the 1st appellant informed the appointment of an Enquiry

Officer even prior to the explanation of the 1st respondent. On 24.5.2008, the 1st respondent submitted a detailed explanation to the charge

memo. Not satisfying with the explanation, an enquiry was conducted by the Enquiry Officer and he submitted a report on 16.7.2008. He found

charge Nos. 1 to 8, 10 to 12, 14 and 17 were proved and charge Nos. 9, 13, 18 and 19 were not proved and charge Nos. 15 and 16 were

dropped by the Management. A copy of the report was furnished to the 1st respondent on 18.7.2008 with a direction to submit his representation

before 23.7.2008. On 22.7.2008, the 1st respondent sent a letter requesting extension of time for submitting his representation. However, on

23.7.2008, the request of the 1st respondent was rejected and based on the enquiry report, the School Committee resolved to dismiss the 1st

appellant. Resolution was forwarded to the Chief Educational Officer, who is the competent authority and meanwhile, the 1st respondent

forwarded a representation dated 28.7.2008 to the School Committee. The competent authority approved the dismissal by its order dated

13.9.2008. On 16.9.2008 the School Committee considered the representation and rejected the same and the order of dismissal was intimated to

the 1st respondent. On 24.9.2008, the 1st respondent filed a Writ Petition stating that principles of Natural justice was violated by not affording an

opportunity to him to submit a representation against the Enquiry Report.

3. The Writ Petition was filed against the official respondents 1 to 3 and respondents 4 and 5 who are the Secretary and the Member of the

School Committee. The School Committee filed a counter interalia, stating that serious allegations were levelled against the 1st respondent

including the alleged sexual harassment to the girl students and also for committing financial irregularities on which enquiry was initiated; sufficient

opportunities were given in each and every stage of the enquiry; and the official respondents 1 to 3 have intimated to the School Committee that

the enquiry has to be completed within a period of four months, which expired on July 2008 and therefore, time extension was not granted to the

1st respondent. It was also submitted that sufficient opportunities were given to the 1st respondent for submitting explanation for the charge memo,

to take part in the independent enquiry, to be represented through a counsel and to examine and cross examine the witnesses. According to the

appellants a copy of the enquiry report was forwarded with a direction to submit his representation giving sufficient time.

4. The learned single Judge held that even though, show cause notice was received by the 1st Respondent-Writ Petitioner on 19.07.2008 and the

following two days happened to be the weekly holidays, 1st Respondent-Writ Petitioner has sent letter dated 20.07.2008 seeking for extension of

time and the same was received well in advance on 23.7.2008 by the School Committee and the School Committee did not have the defence of

the 1st Respondent and therefore, there was violation of principles of natural justice. Setting aside the order of dismissal, the learned single Judge

observed that it is open to the School Committee to take a fresh decision in the School Committee meeting on the basis of the explanation already

submitted by the 1st Respondent-Writ Petitioner and the learned single judge directed the School Committee to afford sufficient opportunity to the

1st Respondent-Writ Petitioner.

5. Aggrieved against which, the School Committee has preferred the present appeal on various grounds, more particularly, on the ground that the

learned judge's reasoning that there is violation of natural justice, is not supported by law and such situation or any obligation is not contemplated

u/s 22 of the Tamil Nadu Recognised Private Schools (Regulation) Act, and hence the said findings are liable to be set aside and also on the

ground that when an alternative remedy is available by way of an appeal, the writ petition ought to have been dismissed directing the 1st

respondent to exhaust the appeal remedy.

6. Mr. Yashod Varadhan, the learned senior counsel appearing for the School Committee took us through the various events transpired between

29.3.2008 and 16.9.2008, the date of intimation of the order of dismissal. The learned senior counsel pointed out that out of 19 charges, 10

charges relate to sexual harassment of girl students and the rest relate to monetary irregularities. The learned senior counsel also pointed out that

the parents of the girl students and an affected girl student was examined to prove the charges and sufficient opportunity was given to the 1st

respondent to cross examine the witnesses and ultimately the Enquiry Officer

found the alleged charge of sexual harassment stands proved.

7. The learned senior counsel further pointed out that the 1st respondent was given sufficient time to explain to the charge memo and he was given

extension of time to inspect the documents and he was also permitted to engage a legal counsel and the enquiry report was also served on him with

a direction to submit his representation within a stipulated time as the time granted by the official respondents came to an end by July 2008.

8. The learned senior counsel also pointed out that the Committee Meeting was convened on 23.7.2008 and the letter of extension was discussed

in the meeting and the members were unanimously viewed that the request of the 1st respondent cannot be maintained.

9. The learned senior counsel further pointed out that u/s 22 of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 (hereinafter

called as ""Act""), there is no statutory obligation to provide opportunity for written representation and the learned senior counsel further submitted

that the proceedings are not vitiated by any lapse and the principles of natural justice was not violated. The learned senior counsel further submitted

that after the approval of the dismissal by the competent authority u/s 22 of the Act, the remedy was available to the 1st respondent for an appeal

u/s 23 of the Act and the petitioner has not chosen to exhaust his remedy and therefore, the learned single Judge ought not to have entertained the

writ petition under Article 226 of the Constitution.

10. The learned senior counsel relied on a decision reported in 1996 STPL (LE) 21940 SC : 1996 SCC 3 364 (State Bank of Patiala and Ors. v.

S.K. Sharma), wherein the Apex Court has held as follows:

28. The matter can be looked at from the angle of justice or of natural justice also. The object of the principles of natural justice - which are now

understood as synonymous with the obligation to provide a fair hearing is to ensure that justice is done, that there is no failure of justice and that

every person whose rights are going to be affected by the proposed action gets a fair hearing. The said objective can be tested with reference to

Sub-clause (iii) concerned herein. It says that copies of statements of witnesses should be furnished to the delinquent officer "not later than three

days before the commencement of the examination of the witnesses by the Inquiring Authority. Now take a case not the one before us - where the

copies of statements are supplied only two days before the commencement of examination of witnesses instead of three days. The delinquent

officer does not object he does not say that two days are not sufficient from him to prepare himself for cross-examining the witnesses. The inquiry

is concluded and he is punished. Is the entire enquiry and he punishment awarded to be set aside on the only ground that instead of three days

before the statements were supplied only two days before the commencement of the examination of witnesses? It is suggested by the appellate

Court that Sub-clause (iii) is mandatory since it uses the expression ""shall"". Merely because, word ""shall"" is used, it is not possible to agree that it is

mandatory. We shall, however, assume it to be so for the purpose of this discussion.

11. The learned senior counsel also relied on an unreported order in WP No. 38815 of 2006 dated 13.6.2008, wherein, in a similar case of sexual

harassment, the Division Bench of this Court observed as follows:

29. Therefore, now the employers can have only one stage action. After the Sexual Harassment Committee's report, they must proceed to impose

punishment on an employee found guilty of sexual harassment. This order came to be passed by the Supreme Court, as the Court had received

complaints that the earlier procedure led the woman being further harassed by attending before two separate enquiries one by the Special

Committee and the other before the Enquiry Officer appointed in terms of Service Rules. In the light of the above, the question of examining the

victim girl in the presence of the first respondent does not arise.

12. The learned senior counsel also relied on a decision reported in (2008) 9 SC 31 (Haryana Financial Corporation and Anr. v. Kailash Chandra

Ahuja), wherein the Apex Court has held as follows:

21. From the ratio laid down in B. Karunakar it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry

officer's report to the delinquent if such enquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry

officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would

not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent

employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside.

13. The learned senior counsel further relied on a decision reported in (1997) 2 SC 534 (Avinash Nagra v. Navodaya Vidyalaya Samiti and Ors.), which is also a case of allegation of sexual harassment and misconduct of a teacher, wherein, Rules framed by Navodaya Vidyalaya Samiti do not have a provision for enquiry and had a power to punish the perpetrator and the Apex Court has held as follows:

Under those circumstances, the conduct of the appellant is unbecoming of a teacher much less a loco parentis and, therefore, dispensing with regular enquiry under the rules and denial of cross-examination are legal and not vitiated by violation of the principles of natural justice.

14. The learned senior counsel also relied on a decision reported in 2005 (4) MLJ 104 (Union of India v. Central Administrative Tribunal), wherein, the Division Bench of this Court has held as follows:

In a Departmental enquiry, the guilt can be arrived at on the preponderance of probability. The appreciation of evidence is the exclusive domain of the disciplinary authority, to consider the evidence on record and to render findings, whether charges have been proved or not.

15. On the contrary, Mr.G. Rajagopal, learned senior counsel appearing for the 1st respondent submitted that the 2nd appellant was bent upon to terminate the services of the 1st respondent with ulterior motives. The learned senior counsel pointed out that as early as on 29.2.2008, the 1st respondent was forced to give a letter of voluntary retirement and only on 5.3.2008, he was permitted to withdraw the letter of resignation and immediately thereafter, he was placed under suspension by letter dated 29.3.2008. The learned senior counsel also pointed out that on 9.5.2008 a charge memo was given for the alleged incidents of the year 2007-2008 and a retired a Judicial Officer was appointed as Enquiry Officer. The complaints of the students who left the school was dig out and only one student and the parents of two other students were examined to prove the charge of sexual harassment.

16. The learned senior counsel further pointed out that the enquiry report dated

18.7.2008 was received by the 1st respondent only on 19.7.2008

and as the report contained 26 pages, the 1st respondent sought extension of time to submit his representation by letter dated 22.7.2008 and

inspite of such request, the School Committee meeting was convened on 23.7.2008 and without affording an opportunity to the 1st respondent to

submit his representation, it was decided to dismiss the 1st respondent and the act of the appellants was very much prejudiced and therefore, the

1st respondent was forced to approach this Court invoking Article 226.

17. The learned senior counsel further pointed out that though there is an alternative remedy available, the 1st respondent was not barred from

seeking writ of certiorari when there is apparent and gross violation of principal of natural justice. He relied on a decision reported in AIR 1958

SC 86 (U.P. State v. Mohd. Nooh), wherein the Apex Court has held as follows:

10. ...But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion

rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other

adequate legal remedies.

18. The learned senior counsel also relied on a decision reported in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, ,

wherein, the Apex Court has held as follows:

20. Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold

the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, inspite of

the alternative statutory remedies is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no

jurisdiction or had purported to usurp jurisdiction without any legal foundation.

19. The learned senior counsel also brought to our attention to Form-VIIA of the Tamil Nadu Recognised Private Schools (Regulation) Rules,

1974 and also took our attention to Clause 7(c) which reads as follows:

7.(c) After the conduct of the personal hearing or enquiry by the School Committee, the report of such personal hearing or enquiry shall be

furnished to the Teacher and a notice shall be issued to him/her setting out the

proposed punishment and he/she shall be given a reasonable time to defend himself/herself against the proposed punishment.

20. The learned senior counsel further submitted that there are catena of judgments which lay down that sufficient opportunity must be given to the party against whom a major punishment is likely to be inflicted to submit his representation before such punishment is imposed.

21. We gave our anxious considerations to the rival contentions. First of all we are not persuaded by the contention of the appellants that the affected party ought to have exhausted his appeal remedy before invoking the jurisdiction of the High Court under Article 226. When there is gross violation of principles of Natural Justice and when an imminent hardship to the affected party is established, the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution is not affected, especially, when the prejudice is writ large. In the present case, suffice to say that the sequence of events would show that the first respondent invoking the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, inspite of the alternative statutory remedies is not affected.

22. In Rajasthan State Electricity Board Vs. Union of India (UOI) and Others, , in which the Apex Court has held as follows:

3. By now it is a well-settled principle of law that availability of alternative remedy is not an absolute bar for granting relief in exercise of power under Article 226 of the Constitution.

23. In 2009 2 SCC 630 (Mumtaz Post Graduate Degree College v. Vice Chancellor), in which the Apex Court has held as follows:

Apart from the fact that a statutory authority cannot consider the validity of a statute, as has been urged before us by Mr. Chaudhari, it is beyond any doubt or dispute that availability of an alternative remedy by itself may not be a ground for the High Court to refuse to exercise its jurisdiction.

It may exercise its writ jurisdiction despite the fact that an alternative remedy is available, inter alia, in a case where the same would not be an efficacious one.

24. In 2009 1 MLJ 1071 (V.R. Palanisamy v. Director of Collegiate Education), where one of us a party (R. Banumathi, J), in which this Court has held as follows:

31. Alternative remedy of departmental Appeal is not a bar for maintainability of a writ petition, where the order is in utter violation of rules of natural justice. The rule of exclusion of Writ Jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, inspite of the availability of an alternative remedy, the writ Court may still exercise discretionary jurisdiction of judicial review.

25. As per Section 22 of the Act, no teacher or other person employed in a private school shall be dismissed or removed or reduced in rank nor shall his appointment be otherwise terminated except with the prior approval of the competent authority. As per Section 22 of the Act, the teacher and others employed in a private schools enjoy two rights viz., (i) prior approval of the competent authority is necessary; (ii) competent authority should satisfy that there are adequate and reasonable grounds for taking the proposed action. The above rights are extremely valuable in the sense that the awarding of major punishments is completely taken out of the mercy of the private management. Prior approval of the competent authority is not automatic.

26. Form VII-A deals with Form of Agreement to be executed by a School Committee of a private school in respect of permanent teachers.

Clause (7) deals with the procedure for conducting disciplinary proceeding against the teacher employed in a private school. As per Clause 7(b) after considering his/her explanation, the School Committee shall communicate to him/her findings and if so desired by the said teacher conduct a personal hearing or enquiry, wherein he/she shall be given the opportunity to examine or cross-examine any or all the witnesses and also produce witnesses. As per Clause 7(c) after the conduct of the personal hearing or enquiry by the School Committee, the report of such personal hearing or enquiry shall be furnished to the Teacher and a notice shall be issued to him/her setting out the proposed punishment and he/she shall be given a reasonable time to defend himself/herself against the proposed punishment. As per Clause 7(d) after the receipt of the statement of defence from him/her and taking into consideration, the School Committee shall inform him/her in writing about its final decision. Principles of natural justice is embedded in Form VII-A. Enquiry has to be conducted fairly in accordance with

the Rules found in the Agreement in Form VII-A appended to the Rules.

27. The competent authority must satisfy that there are adequate grounds for imposing the proposed punishment and the said satisfaction should

rest on adequate and relevant materials. Before according his approval, the competent authority should consider the following aspects:- (i)

Whether guilt of the delinquent employee has been brought in the enquiry clearly; (ii) Whether enquiry has been conducted fairly in accordance

with the Rules found in the Agreement in Form VII-A appended to the Rules; (iii) Whether the charge proved warrants the punishment proposed;

and (iv) Whether there are any extenuating circumstances in the case which warrant lesser punishment.

28. Before exercising the power of approval, competent authority has to look in to the materials including the defence of the delinquent teacher. By

not affording sufficient opportunity to put forth to his further defence, the 1st Respondent-Writ Petitioner is deprived of the opportunity of his

further defence being considered by the School Committee as well as by the competent authority. This assumes significance in view of the fact that

1st Respondent-Writ Petitioner had given VRS letter on 29.02.2008 and which was withdrawn on 05.03.2008. Immediately, thereafter the 1st

Respondent-Writ Petitioner was suspended on the charges. In the facts and circumstances of the case, we are of the view that by not affording

further opportunity to submit his explanation after the report of Enquiry Officer, a serious prejudice has been caused to the 1st Respondent-Writ

Petitioner as he has been deprived of the further defence being considered by the School Committee and by the competent authority.

29. Incidentally, the other limb of the arguments by the appellants also relates to violation of principles of natural justice. The arguments submitted

is that, non extension of time for the 1st respondent's request dated 22.7.2008 is not violative of natural justice for the reasons, the charged officer

was already shown all the indulgence, the time prescribed by the department was coming to an end and lastly, in cases of serious allegation of

misconduct with girl students, the charged officer need not be shown any indulgence.

30. Indisputably, the allegations levelled against the first respondent are very

serious, especially, sexual harassment of girl students were alleged and found proved by the enquiry officer. When such allegations were levelled and proved, mere denial of extension of time to submit effective post enquiry representation may look insignificant. But the sequence of events would show that there is force in the argument advanced by the learned Senior counsel for the first respondent who submitted that the prejudice is writ at large.

31. The ratio laid down in (1997) 2 SC 534 (Avinash Nagra v. Navodaya Vidyalaya Samiti and Ors.), is not applicable to the facts of the case before us. The rules dispensing with enquiry in sexual harassment was questioned in Navodaya Vidyalaya's case. In the present case provisions of the Private school regulation Act are applicable and the charged officer is entitled for an effective post enquiry representation. The minutes of the School committee reads as follows.

The delinquent HM has sent a letter dated 22.7.2008 by Speed Post received on 23.7.2008 at 10.40 am before the commencement of the

meeting, in which the delinquent HM has asked some more time to make his representation. This letter has also been placed before the members

during the time of meeting. In this connection the Secretary informed the members that if order of suspension and the subsequent extension of time

granted by the Competent Authority along with the recent communication dated R.C. No. 1708/A2/2008 dated 17.7.2008 received on

19.7.2008 from the DEO, Thirupathur are taken note of, this last minute request of the Delinquent made without any basis cannot be entertained.

The Secretary informed that as per the provision of School Act and Rules and as per the letter of DEO, Thirupathur, the process has to be

completed and the decision of the Committee has to be sent to the Competent Authority within the prescribed time limit viz., on or before

29.7.2008. Therefore, the members are of unanimous view that the request of the Delinquent cannot be entertained.

32. The learned Single judge has set aside the order of dismissal, however has held that the fourth respondent may take a fresh decision in the

school committee meeting on the basis of the explanation already submitted by the petitioner and afford sufficient opportunity to the petitioner and

then pass an appropriate order in this regard. He has made it clear that in the

event of the School Committee again taking a decision to dismiss the petitioner, all the relevant records including the explanation of the petitioner shall be forwarded to the competent authority seeking prior approval.

By this order, the proceedings of the post enquiry report is restored and the appellants were directed to consider the representation before taking a

decision based on the enquiry report and forward the entire material to the competent authority. We find no reason to interfere with order of the

learned single judge. We make it clear that we have not expressed any opinion on the merits of the matter. The School Committee shall comply

with the direction of learned single Judge within a period of two months from the date of receipt of copy of this judgment.