

(2008) 09 BOM CK 0074

In the Bombay High Court

Case No : Writ Petition No. 7622 of 2007

Waheed Akhtar Ansari

APPELLANT

Vs

The President, Khairul Islam Higher Education Society's
Maharashtra College of Arts and Commerce and Others

RESPONDENT

Date of Decision : 16-09-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 1 BomCR 84

Hon'ble Judges : Ranjana Desai, J; D.Y. Chandrachud, J

Bench : Division Bench

Advocate : A.N. Maniyar, for the Appellant; Nusrat Shah, V.A. Almeida, Pravin D. Contractor, A.K. Gupta and Ema Almeida, instructed by Naazish N. Shah, for Respondents 1 and 2 and P.S. Cardozo, AGP for Respondents 3 and 5, for the Respondent

Judgement

D.Y. Chandrachud, J.—Rule, made returnable forthwith. Counsel appearing for the Respondents waive service. By consent of the learned Counsel, taken up for hearing and final disposal.

2. On 22nd August, 2002 the Petitioner was appointed as a Shikshan Sevak in a junior college conducted by the First and Second Respondents for a term of three years. A complaint was addressed on 16th January, 2003 to the management by a lady lecturer complaining of sexual harassment by the Petitioner. An explanation was called for by the management from the Petitioner on 18th January, 2003 and his services were terminated on 31st January, 2003. According to the Petitioner, between the receipt of the complaint and the letter of termination certain events transpired. The allegation of the Petitioner is that on 22nd January, 2003 he was called to the police station at Nagpada; he was assaulted there and he was compelled to sign an inculpatory statement. Thereafter, the Petitioner alleges that on 25th January, 2003 he was summoned to the office of the Principal where a statement accepting of guilt was dictated by the Principal and corrected by a trustee. The Petitioner claims that on 28th

January, 2003 he submitted a fair copy of the explanation to the Principal. A letter of termination followed on 31st January, 2003.

3. The Petitioner challenged the order of termination before the Grievance committee set up in pursuance of a Government Resolution dated 13th October, 2000 issued by the State Government to regulate the terms of appointment and conditions of service of Shikshan Sevak. The appeal was dismissed by the Grievance committee on 8th April, 2004. The order of the Grievance committee was challenged by the Petitioner in a writ petition under Article 226 of the Constitution (Writ Petition No. 1680 of 2004). The Writ Petition was disposed of by a Single Judge of this Court on 2nd July, 2004. This Court inter alia noted that the case of the Petitioner was that the apology which he had been called upon to tender by the Principal was not voluntary. The Court observed that the Grievance committee had not considered as to whether the allegation of misconduct was established. Consequently the Petition was disposed of with a direction that the management would be at liberty to convene a disciplinary proceeding for the purpose of enquiring into the charge of misconduct against the Petitioner pending which the Petitioner could be placed under suspension. The order of the Grievance committee and the order of termination were both set aside in order to facilitate a fresh determination.

4. Pursuant to the order passed by this Court the management conducted a disciplinary enquiry and on 1st September, 2005 the enquiry officer submitted his report. The Petitioner had instituted a writ petition before this Court (Writ Petition 6203 of 2005), during the pendency of the disciplinary proceedings for setting aside a Roznama dated 8th August, 2005 under which evidence was recorded in the disciplinary proceedings and for a direction to the management to forward the complaint made by the lady lecturer on 16th January, 2003 to the Grievance committee as required by the Government Resolution dated 13th October, 2000. The Petitioner also made a prayer in regard to the payment of subsistence allowance. The Petition came up for hearing before a Division Bench and on 28th September, 2005 the Division Bench made rule absolute in terms of prayer Clause (a) by setting aside the Roznama of the enquiry dated 8th August, 2005. The Division Bench observed that it was only the Grievance committee which could go into the issue of misconduct. The management was directed to refer the complaint in respect of which the charge-sheet was issued to the committee for its consideration. The operative directions of the Division Bench were as follows:

In so far as the enquiry is concerned, the petition will have to be allowed in as much as it is only the Committee as set out earlier which is the Committee which can also go into the issue of misconduct. In the light of that Petition made absolute in so far as prayer Clause (a) is concerned. We further direct the management to refer the complaint in respect of which charge sheet was issued to the Committee for their consideration. It will be open to the petitioner to contend before the Committee that what can be considered is only the complaint based upon which his services were terminated. All these issues are left open to

be considered by the Committee.

5. Thereupon the Grievance committee heard the parties and delivered its impugned order dated 16th June, 2007 holding that the services of the Petitioner were correctly terminated. The Grievance committee came to the conclusion that it was entitled to rely upon the enquiry report submitted by the management. The order of the committee shows that the report of the enquiry forms the basis and foundation of the order.

6. Counsel appearing for the Petitioner has urged that (i) By the judgment of the Division Bench dated 28th September, 2005 the management was required to refer the complaint in respect of which the charge-sheet was issued to the Grievance committee. The grievance is that the committee has not decided upon the complaint dated 16th January, 2003. Since the Grievance committee has failed to do so, the complaint must be treated as having come to an end and the committee would have no right or jurisdiction to entertain any proceeding hereafter; (ii) The charge of sexual harassment has been made malafide and it is only a ruse to throw the Petitioner out of employment. Though the Petitioner had applied for the job of a Shikshan Sevak pursuant to an advertisement, he was initially not given an interview call and it was only on his intervention that a letter was issued to him on 22nd August, 2002. The management was actuated with a desire to oust the Petitioner. The management, it was urged, ought to have reported the allegation of misconduct to the Grievance committee which it failed to do: As a result the order of the Grievance committee should be quashed and set aside and the Petitioner should be granted reinstatement with consequential benefits.

7. By the judgment and order that was passed by the Division Bench of this Court on 28th September, 2005 this Court formed the view that it was only the Grievance committee which was set up in pursuance of the Government Resolution (noted above) which could go into the issue of misconduct. The management was directed to refer the complaint in respect of which the charge sheet was issued to the committee. This Court made the rule absolute in terms of prayer Clause (a), consequent upon which the entire proceedings at Exhibit M to the earlier writ petition were quashed and set aside. The Grievance committee, upon the judgment of the Division Bench, was required to consider as to whether there was any substance in the charge of misconduct which was founded on the complaint of sexual harassment made on 16th January, 2003 against the Petitioner.

The Grievance committee has founded its entire judgment only on the basis of the report of the enquiry conducted by the management. There is merit in the submission which has been urged on behalf of the Petitioner that under the Government Resolution dated 13th October, 2000 as construed by the judgment of the Division Bench of this Court dated 28th September, 2005, the Grievance committee was required to consider the complaint of misconduct and to determine whether the misconduct stood established. That exercise has not been

carried out by the Grievance committee. To that extent, there is merit in the grievance of Counsel appearing for the Petitioner.

8. It would be necessary to observe at this stage that during the course of the hearing of these proceedings, counsel appearing on behalf of the management (the First and Second Respondents) has fairly accepted this position and has submitted before the Court that an order of remand may be passed, with a view to enabling the management to establish the misconduct by leading evidence before the Grievance committee.

9. Counsel appearing for the Petitioner has urged that no purpose would be served in an order of remand, the grievance committee having already held against the Petitioner and it was submitted that the Petitioner is entitled to reinstatement with consequential benefits. On behalf of the Petitioner it was also sought to be urged that the Petitioner has been absolved of the charge of misconduct. This submission is without any basis and cannot be accepted. On 2nd July, 2004, when this Court disposed of Writ Petition 1680 of 2004 it was made clear that the Court was not rendering any determination on the allegation of misconduct. The issue of misconduct was thus kept open. In the subsequent judgment of the Division Bench dated 28th September, 2005 similarly it has been clarified that all issues are left open to be considered by the Grievance committee. There was no adjudication by this Court at any stage on whether or not the charge of misconduct stood established. By the judgment dated 28th September, 2005 the Division Bench allowed the petition filed by the Petitioner herein only on the ground that the allegation of misconduct could have been enquired into by the Grievance committee alone. An order of remand was necessitated on that count. The infirmity which has been found in the order of the Grievance committee in the present proceedings is that the committee has not independently considered whether there was any substance in the complaint of sexual harassment made against the Petitioner. The committee was not entitled to rely upon the report of the enquiry conducted by the management once the Division Bench had held that the issue of misconduct was one which could only be considered by the committee. That being the position, it would be impermissible to accept the plea of the Petitioner for the grant of reinstatement at this stage. There is a serious charge of misconduct against the Petitioner. The infirmity which has been found in the disciplinary proceedings can be cured by directing the Grievance committee to adjudicate upon the correctness of the charge of sexual harassment made against the Petitioner on the basis of the complaint lodged on 16th January, 2007. Pending this determination, there is no question of the Petitioner being reinstated either with or without consequential benefits. It is now a settled principle of law that where a defect is found in a disciplinary proceeding convened by an employer into an allegation of misconduct, it would not be permissible to grant reinstatement straightaway and the appropriate order to pass would be to permit the management to have an opportunity to establish the charge of misconduct from the stage at which the defect had occurred. The question of mala fides again is a question of fact. The

Petitioner has accepted the earlier order of the Division Bench which has attained finality. Hence, all questions will have to be left open for adjudication by the Grievance Committee on remand.

10. In the circumstances, the Petition shall stand disposed of with the following directions:

i) The order of the Grievance committee dated 16th June, 2007 (Exhibit D) is quashed and set aside and the proceedings shall stand remitted back to the Grievance committee for a decision afresh in accordance with the judgment of the Division Bench dated 28th September, 2005 in Writ Petition 6203 of 2005;

ii) The First and Second Respondents would be at liberty to lead evidence in support of the charge of misconduct before the Grievance committee. The Petitioner would be at liberty to cross examine the witnesses produced by the management. The Petitioner would also be at liberty to lead such evidence as he desires in defence to the charge of misconduct;

iii) Both the parties shall appear before the Grievance committee for receiving directions on 23rd September, 2008. The committee is requested to expedite the disposal of the proceedings and to endeavour to do so by 31st December, 2008;

iv) The Petitioner shall continue to remain suspended pending the disposal of the proceedings before the Grievance committee. The grievance committee shall inter alia determine as to whether the charge of misconduct, based on the complaint of sexual harassment made on 16th January, 2003 has been duly established. The Grievance committee shall also determine as to whether the Petitioner is entitled to arrears on account of honorarium and/or subsistence allowance during the period of suspension.

11. Rule is made absolute in the aforesaid terms. There shall, in the circumstances, be no order as to costs.