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(2009) 3 CALLT 474 : (2009) 2 ILR (Cal) 501

Calcutta High Court

Case No: F.M.A. 466 of 1995

Bangabani Institution for Girls and Others	APPELLANT
Vs	
Smt. Suchitra Sen Alias Roy and Others	RESPONDENT

Date of Decision: May 18, 2009

Acts Referred:

- Constitution of India, 1950 - Article 12, 226
- Management of Sponsored Institutions (Secondary) Rules, 1972 - Rule 23, 5

Citation: (2009) 3 CALLT 474 : (2009) 2 ILR (Cal) 501

Hon'ble Judges: Debi Prasad Sengupta, J; Debasish Kar Gupta, J

Bench: Division Bench

Advocate: Asok Kumar Chakrabarti, Pinaki Ranjan Chakrabarti and Sakya Maity, for the Appellant;Kashi Kanta Moitra, Alok Ghosh and Srikanta Moitra, for the Respondent

Final Decision: Dismissed

Judgement

Debasish Kar Gupta, J.
This appeal is directed against the judgment and order dated April 2, 1991 passed in CO. No. 6150(W) of 1991.

2. By the aforesaid judgment the order dated September 14, 1990 passed by the Managing Committee of the Appellant No. 1 was set aside and the Appellants were directed to reinstate the Respondent No. 1 paying her all arrear salaries and other service benefits.

3. Bangabani institution for Girls, the Appellant No. 1, was a government sponsored Girls High School (hereinafter referred to as the said school) and the said school was affiliated to the West Bengal Board of Secondary Education having a special constitution. The said school was getting financial aid from the State Government to the extent of 95%.

4. The Respondent No. 1/writ Petitioner was appointed in the said school on the basis of the letter of appointment dated February 1, 1980 as an Assistant Teacher in science group against a permanent vacancy in the scale of pay and usual allowances as admissible under the Rules of DPI, West Bengal. Her service was confirmed in the said post on completion of two years continuous satisfactory service.

5. The Respondent No. 1 was on maternity leave with pay from the month of June 1986 to September 1986. Thereafter the Respondent No. 1 took medical leave.

6. After joining her duty, the Respondent No. 1 was requested by the Headmistress of the said school to stay at Nabadwip instead of Krishnagar. Subsequently, the Respondent No. 1 received a show cause notice dated November 9, 1987 from the authority of the said school for attending the said school from Krishnagar instead of staying at Nabadwip. By a notice dated March 4, 1988, the Respondent No. 1 was further asked to explain in writing as to why she had not submitted the undertaking within February 20, 1988. In reply the Respondent No. 1 requested the Headmistress of the said school on March 5, 1988 to inform her the subject matter of the undertaking.

7. By a communication dated March 7, 1998 the Headmistress of the said school informed the Respondent No. 1 that she would not be allowed to join her duties in the said school until and unless the cause of non furnishing of reply would be shown. The Respondent No. 1 submitted a representation dated March 16, 1988 to the Headmistress of the said school with request to allow her to resume duties. The above representation was followed by a further representation dated March 28, 1988. Since the Respondent No. 1 was not allowed to resume her duties, she submitted a representation dated March 30, 1988 to the president of Managing Committee of the said school to intervene in the matter. But Respondent No. 1 was restrained from resuming duties. She filed a suit bearing T.S. No. 46 of 1988 for a declaration that she was still continuing as Assistant Teacher of the said school. Initially the Court granted an interim order. But subsequently that was vacated by an order dated August 21, 1988.

8. Against the order of vacating injunction an appeal being Misc. Appeal No. 35 of 1988 was filed before the learned District Judge, Nadia. The order of vacating the interim injunction was stayed by the First Appellate Court by order dated August 31, 1989.

9. Against the above order the Appellants filed a revisional application before this Court and this Court passed an order remanding the case back to the Appellate Court.

10. On November 3, 1989 the above appeal Was disposed of in terms of the undertaking to the effect that (i) she would follow the leave rules of the said school, (ii) she would follow and obey the resolution of the Managing Committee as per rules, (iii) in the event of violating any rules, the Managing Committee of the said school would take action against the Respondent No. 1.

11. Subsequently, by a communication dated May 19, 1990 the authority of the said school informed the Respondent No. 1 that until and unless the document relating to withdrawal of case No. 46, 1988 as also documents in support of her staying at Nabadwip were submitted to the school authority the pay fixation as per government order would not be finalised. The Respondent No. 1 submitted her reply dated May 24, 1990 to the above communication. Ultimately the above title suit was withdrawn on June 27, 1990.

12. Again by communication dated August 28, 1990, the headmistress of the said school directed the Respondent No. 1 to appear before the enquiry committee on September 4, 1990 for enquiring into the matter concerning her affairs in the institution since November 4, 1989.

13. A hearing before the enquiry committee took place on September 4, 1990. Thereafter, by an order dated September 14, 1990 the Secretary/Headmistress of the said school informed the Respondent No. 1 that her services as an Assistant Teacher in the said school was terminated by the Managing Committee of the said school with effect from September 22, 1990.

14. The aforesaid order of termination was the subject matter of challenge in the writ application bearing CO. No. 6510(W) 1991 and the above writ application was allowed by the judgment and order dated April 2, 1991.

15. It is submitted by the learned senior counsel of the Appellants that the school under reference was a Government sponsored institution run by its managing committee and the same was not an instrumentality of the State. So, the writ application was not maintainable.

16. According to the learned senior counsel, the only remedy for the Respondent No. 1 was to prefer an appeal against the order of termination of services before the appellate authority in accordance with the provisions of Regulation 3 of the West Bengal Board of Secondary Education (Manner of Hearing and Deciding Appeals by Appeal Committee) Regulations, 1964 (hereinafter referred to as the said Regulations)

17. According to the learned Senior Counsel for the Appellants, the writ application was liable to be dismissed on the ground of nonjoinder of parties, namely the members of the enquiry committee which had conducted the enquiry against the Respondent No. 1.

18. It is further submitted by the learned Senior Counsel for the Appellants that the Respondent No. 1 was served with a show cause notice. It was followed by an opportunity of hearing. Therefore, according to the Appellants, the provisions of Clause (iii) of Rule 23 of the Management of Sponsored Institutions (Secondary) Rules, 1972, (hereinafter referred to as the said Rules) were complied with.

19. It is also submitted on behalf of the Appellants that there was suppression of material facts that the Respondent No. 1 had promised to abide by the rules of the school

authority in her various letters as also by way of accepting the ideals of the society which run the school. Therefore, the writ application was hit by the doctrine of promissory estoppel.

20. Reliance is placed on the decisions of Ajit Kumar Mahanli v. Managing Committee Jhilimili High School, 1973 CLJ 1 and Shri Vidya Ram Misra Vs. Managing Committee, Shri Jai Narain College, to submit that a writ application is not maintainable against a private sponsored school which is run by a non-statutory managing committee.

21. Relying upon the decision of C.C.T. Orissa and Others Vs. Indian Explosives Ltd., it is submitted on behalf of the Appellants that a writ application is not maintainable in case of availability of alternative remedy. Relying upon the decisions of The Regional Manager and Another Vs. Pawan Kumar Dubey, and Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd., it is submitted that the learned Single Judge relied upon the decisions which were not applicable. Relying upon the decision of Makhan Lal Bangal Vs. Manas Bhunia and Others, it is submitted that the impugned judgment is liable to be set aside on the ground that the learned single judge did not arrive at conclusions on the some issues framed by him. Reliance is placed on the decisions of The State of Haryana and Others Vs. Karnal Distillery Co. Ltd. and Another, and Welcom Hotel and Others Vs. State of Andhra Pradesh and Others, to submit that suppression of material fact is sufficient to reject the writ application and as such the impugned judgment suffers from illegality.

22. It is submitted on behalf of the Respondent No. 1/writ Petitioner that the Managing Committee of the Appellant school was formed in accordance with the provisions of Rule 5 of the said Rules. The Managing Committee consisted of two Government officials, two representatives nominated by the State Government and three representatives nominated by the Director of School Education, West Bengal out of 11 members of the Managing Committee. The Respondent school was getting financial aid from the State Government to the extent of 95%. That apart the Managing Committee of the Respondent school had the power to remove or dismiss the Respondent No. 1 subject to the approval of the Director of School Education, West Bengal and subject to further such direction as the State Government might from time to time issue as prescribed in Rule 23 of the said rules. Therefore, the Respondent school was an instrumentality of the state under Article 12 of the Constitution of India having deep and pervasive control of the State Government over the affairs of the Respondent school.

23. It is submitted on behalf of the Respondent No. 1 that in the event of violation of any fundamental right like principles of natural justice of a teacher of a Government sponsored institution the above provision of the said regulation could not stand as a complete bar to initiate a proceeding under Article 226 of the Constitution of India.

24. It is further submitted on behalf of the Respondent No. 1 that the writ application under reference did not suffer from non-joinder of parties because the Respondent school

as also all the members of the managing committee were made parties to the writ proceeding. It is pointed out by the learned Senior Counsel that the order of termination of the Respondent No. 1 from the service of the Respondent school was passed by the Managing Committee of the Respondent school.

25. It is submitted on behalf of the Respondent No. 1 that the provisions of Clause(iii) of Rule 23 of the said rules were violated. The service of the Respondent No. 1 was not terminated after offering reasonable opportunity of representing her case. According to the learned Counsel the requirements of fair hearing, namely (i) knowledge of the case that the Respondent No. 1 was to meet; and (ii) an adequate opportunity of meeting that case were not offered to the Respondent No. 1. As a result the rules of natural justice were violated. It is submitted that the rules of natural justice included procedural fairness by issuing charge-sheet, considering the reply thereto, holding of enquiry proceeding, serving report of the enquiry officer/committee upon the delinquent staff for the purpose of submitting representation thereto before passing the order of major punishment. According to the learned Senior Counsel none of the above facets of principles of natural justice was adhered to in the instant case. Therefore, the order of punishment passed against the Respondent No. 1 suffered from procedural impropriety and was liable to be set aside.

26. It is further submitted on behalf of the Respondent No. 1 that the Mise. Appeal No. 35 of 1998 was disposed of on March 14, 1990 in terms of undertaking and the above order contended, inter alia, that the Managing Committee of the Respondent school would take no action for the past conduct of the Respondent No. 1. But the Appellants imposed the impugned punishment against the Respondent No. 1 taking into consideration the conduct of the Respondent No. 1 from the period from November 4, 1989 as evident from the notice dated August 28, 1990. According the Respondent No. 1, there was no violation on her part of the promise of adhering to the alleged rules of the Respondent school at any point of time and particularly after the disposal of the above appeal. Therefore, the question of suppression of material fact or applicability of the doctrine of promissory estoppel as alleged by the Appellants were baseless. According to the Respondent No. 1 the impugned judgment does not require to be interfered with.

27. Relying upon the decisions of Vidya Dhar Pande Vs. Vidyut Grih Siksha Samiti and Others, and Manmohan Singh Jaitla Vs. Commissioner, Union Territory of Chandigarh and Others, it is submitted on behalf of the Respondent No. 1 that the writ application under reference was maintainable. Relying upon the decisions of Mazharul Islam Hashmi Vs. State of U.P. and Another, and Sujit Das v. W.B. Board of Secondary Education, 1997(2) CLJ 497 it is submitted on behalf of the Respondent No. 1 that conclusion of a formal disciplinary proceeding was a condition precedent to pass the order of punishment against the Respondent No. 1. Reliance is also placed on the decision of Union of India and others Vs. Mohd. Ramzan Khan, to submit that the Respondent No. 1 was entitled to know the findings of the enquiry committee as also the proposed punishment for the purpose of submitting representation thereto for consideration of the disciplinary authority

at the time of passing order of punishment against her.

28. We have heard the learned Counsels appearing for the respective parties and we have also given our anxious considerations to the facts and circumstances of this case.

29. The first and foremost issue in this appeal which may matter in the longer term is: whether the learned Single judge was right in holding that the Respondent institution was an instrumentality of "the State"? In examining this question we take into consideration the following admitted facts of this appeal:

(i) The Appellant institution was getting financial aid from the State Government to the extent of 95%.

(ii) The Appellant institution was affiliated to the West Bengal Board of Secondary Education having a special constitution.

(iii) Consequent upon obtaining affiliation to the West Bengal Board of Secondary Education, the Appellant Institution was under obligation to prepare the students following the syllabi and the course of the study of the above Board for appearing in examinations conducted by the above Board. Unless and until they were in accordance with the prescription of the above Board, degree would not be conferred.

(iv) The managing committee of the Appellant institution was constituted in accordance with the provisions of Rule 5 of the said. Rules. It consisted of two Government officials, two representatives nominated by the State Government and three representatives nominated by the Director of School Education, West Bengal, out of eleven members of that managing committee.

(v) The managing committee of the Appellant Institution was to exercise the powers to appoint teachers and other employees on permanent or temporary basis and to remove or dismiss teacher and other employees subject to approval of the Director of Education, West Bengal and subject to further such direction as the State Government might from time to time issue in accordance with the provisions of sub-rules (i) and (iii) of Rule 23 of the said Rules respectively.

30. Therefore, there were extensive and unusual degree of control of the State Government over the finance, function and administration of the Appellant school. Applying the tests for determining whether the Appellant Institution could be said to be an instrumentality of the State on the basis of the principles of law as settled in the matter of Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, which was followed in the matter of All India Sainik Schools Employees" Association v. Sainik Schools Society, 1989 Supp (1) SCC 205 we hold that the Appellant Institution was an instrumentality of the State.

31. The next argument of the Appellants is that the Respondent No. 1 should have exhausted the statutory remedy under Regulation 3 of the said Regulation. We find that the propriety of the order of termination of service of the Respondent No. 1 was under challenge in the writ application on the ground of violation of principles of natural justice. We further find that the above issue could only be decided by interpreting the provisions of Clause (iii) of Rule 23 of the said Rules.

32. In the case of Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, the Hon"ble Supreme Court observed as follows:

There are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well-settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writs for quashing them, on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course. (See the decisions of this Court in Carl Still G.M.B.H. and Another Vs. The State of Bihar and Others, and The Bengal Immunity Company Limited Vs. The State of Bihar and Others,). In the second place, the doctrine has no application in a case where the impugned order has been made in violation of the principles of natural justice. (See The State of Uttar Pradesh Vs. Mohammad Nooh,)

(Emphasis supplied)

33. Therefore, we do not find any substance on the above argument of the Appellants.

34. We also do not find any substance in the arguments made on behalf of the Appellants that the writ application was not maintainable on the ground of non-joinder of the members of enquiry committee as parties to the above proceeding. The order of punishment was passed by the managing committee of the Appellant Institution who had appointed the enquiry committee. All the members of the above managing committee were made parties to the writ application.

35. We may now turn to the merits of controversy between parties. The bone of contention of argument of the learned Counsel appearing on behalf of the Appellants on merit is that the rules of natural justice were complied with. The reasonable opportunity was given to the Respondent No. 1 by issuing show-cause notice dated November 9, 1987, communication dated May 19, 1990 as also by giving opportunity of hearing before the enquiry committee prior to the termination of service of the Respondent No. 1. As discussed hereinabove Sub-rule (iii) of Rule 23 of the said rules provided for affording reasonable opportunity to the delinquent teacher before passing the order of removal or dismissal from service.

36. The impugned order of termination of the service of the Petitioner involved civil consequences. It must be made in accordance with the provisions of Sub-rule (iii) of Rule

23 of the said rules, meaning thereby affording reasonable opportunity before passing such an order. So the same must be made consistently with the rules of natural justice after informing the Respondent No. 1 of the case of the Appellant authority, the evidence in support thereof and after giving an opportunity to her of being heard for meeting or explaining the evidence. No such steps were admittedly taken in this case. In this regard the relevant portions of the decision of the State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, are quoted below:

12. It is true that some preliminary enquiry was made by Dr. S. Mitra. But the report of that Enquiry Officer was never disclosed to the first Respondent. thereafter the first Respondent was required to show cause why April 16, 1907, should not be accepted as the date of birth and without recording any evidence the order was passed. We think, that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value. It is true that even order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural Justice after informing the first Respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first Respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken, the High Court was, in our judgment, right in setting aside the order of the State.

(Emphasis supplied)

37. Further, copy of the enquiry report was not served upon the Respondent No. 1. The disciplinary authority depended upon the report of the enquiry committee which was an adverse material. It prevented the Respondent No. 1 to know why the defence taken by her had been rejected by the enquiry committee. The report of the enquiry committee was not furnished before the learned Single Judge or before us for enabling to ascertain whether the Respondent No. 1 was prejudiced due to non-furnishing of the copy of enquiry report. Therefore, the settled principles of law as laid down in the decision of ECIL v. B. Karunakar (1993) 4 SC 727 was violated.

38. We do not find that there was any suppression of material fact on the part of the Respondent No. 1 because her communications assuring compliance of the rules of the Respondent Institution (at pages 113D to 113H) were not at all relevant for deciding the issues under reference.

39. The irresistible conclusion is that the learned Single Judge was not in error in setting aside the order of punishment dated September 14, 1990.

40. The decisions of Ajit Kumar Mahanli (supra), Vidya Ram Misra (supra) and CCT, Orissa (Supra) axe not applicable in this case in view of distinguishable facts and circumstances. Since we have already examined the propriety of the impugned judgment considering all the grounds on merits applying the settled principles of law, the decision of

Pawan Kumar Dubey (supra), Commissioner, Income Tax, (supra), and Makhanlal Bengal (supra) have no manner of application in this case. It has already been held hereinabove that the allegation of suppression of material fact was not correct and as such the decisions of the Karnal Distillery Co. Ltd., (supra) and Welcome Hotel(supra) are not applicable in this case.

41. This appeal is, thus, dismissed.

42. The Appellants are directed to allow the Respondent No. 1 to join her duties upon payment of arrear salaries and allowances in accordance with law within the period of one month. There will be, however, no order as to costs.

43. Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

Debi Prasad Sengupta, J.: I agree

Later:

Mr. A.K. Chakraborti - For the Appellants.

44. After delivering the judgment, the learned Advocate of the Appellants makes a prayer for stay of operation of this judgment and order. Such prayer is refused.