Gomanbhai G. Patel Vs. Valavada Vibhai Sarvajanik Kelavani Mandal and ors.

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Court : Gujarat

Decided On : Aug-08-1978

Reported in : (1979)1GLR477

Judge : M.P. Thakkar, J.

Appellant : Gomanbhai G. Patel

Respondent : Valavada Vibhai Sarvajanik Kelavani Mandal and ors.

Judgement :

M.P. Thakkar, J.

1. An amazing proposition canvassed by the Management of a secondary school has found favour with the Tribunal constituted under the Gujarat Secondary Education Act, 1972, namely, that notwithstanding the protective armour of Section 36 of the Act a teacher can yet be dismissed without holding any enquiry upon the mere levelling of some accusations against him. The teacher concerned who has been dismissed by respondent No. 1 institution upon his application being rejected and upon the order of dismissal passed against him being confirmed by the Tribunal, has approached this Court by way of the present petition under Article 227 of the Constitution of India.

2. The following facts are not in. dispute:

1. The petitioner was appointed as an Assistant Teacher by respondent No. 1 institution with effect from June 10, 1969 and he became permanent by virtue of the lapse of two years after his appointment.

2. A show cause notice as per Annexure 'A' was issued by the President of the institution against the petitioner on September 7, 1973 but no follow up action was taken thereafter.

3. On the same charges and some others a further show cause notice was issued against the. petitioner on April 22, 1974 as per Annexure 'C' and he was given only two days' time to file a reply. But without waiting for the reply of the petitioner on the very day of the issuance of the notice an application was made to the District Education Officer (D.E.O.) for seeking approval to the proposed action of dismissing the petitioner from service.

4. On May 1, 1974 as per Annexure 'D' the petitioner was informed that no reply had been received from him to the show cause notice and that it was proposed to make an enquiry against him and the petitioner was called upon to nominate a person of his

choice within a week in connection with the enquiry.

5. The petitioner by his reply dated May 7,1974 as per Annexure 'E' informed the president of the institution that he had already replied to the charges on an earlier occasion on September 14, 1973 and that he was adopting the same reply in connection with the current proceedings and that he was enclosing a copy of the said reply. He further nominated one Shri Jayantibhai C. Desai, President of the Secondary Teachers Association to assist him at the enquiry.

6. Not with standing the aforesaid reply the institution did not hold an enquiry, did not examine any witness, did not afford any opportunity to the petitioner to lead evidence, and straightaway proceeded to pas an order of dismissal as per Annexure 'F' dated May 9, 1974 of the ground that the confidential reports about him were not satisfactory and that his conduct was objectionable and permission dismiss him had already been granted by the D.E.O. as per his order dated May 4, 1974.

3. The petitioner approached the Tribunal constituted under the Act and challenged the order passed by the D.E.O. granting approval to the Management to dismiss him and he also raised a dispute to the effect that the impugned order of dismissal was passed in violation of the principles of natural justice, was not supportable on merits, and was unjust. The appeal-cum-application under Section 38 was disposed of by the Tribunal by order as per Annexure 'H' dated November 4, 1974. The Tribunal came to the conclusion that under Section 36(1) it was not necessary for the Management to hold an enquiry and to record a finding of guilt in respect of the charges of misconduct levelled against a school teacher had that it was sufficient if a show cause notice was served on him before dismissing him. In this view of the matter the Tribunal negatived the contention urged on behalf of the petitioner that the impugned order of dismissal was void having been passed in violation of the statutory provision contained in Section 36(1) of the Act inasmuch as it had been passed without holding any enquiry and without giving him a reasonable opportunity of showing cause against the proposed action of dismissal from service. The Tribunal recorded evidence in order to find out whether the charges or accusations levelled against the petitioner were established. In other words, the Tribunal converted itself virtually into a disciplinary forum, recorded evidence, and came to the conclusion that the charges against the petitioner were established. In this view of the matter by the impugned order at Annexure 'H' the appeal-cum-application of the petitioner was dismissed.

4. The learned Counsel for the petitioner has contended that on a true interpretation of Section 36(1) it was incumbent on the Management to hold an enquiry in order to satisfy itself that the accusations made against the petitioner were established and that it was not competent to the Management to dismiss a teacher by way of a disciplinary action merely on the basis of the accusations without holding any enquiry and without satisfying itself about the truth or otherwise of the allegations. It is argued that this would amount to denial of reasonable opportunity of showing cause against the proposed action and an order of dismissal passed without following the aforesaid procedure would be void. The Management could not therefore lawfully dismiss the petitioner and any order passed without holding an enquiry and without recording a finding of guilt would be violative of the statutory provision contained in Section 36(1) of the Act. It was also argued that in the proceeding before the Tribunal the Tribunal had simply to 'confirm' or 'modify' or 'reverse' an order passed by the Management at the conclusion of a domestic enquiry and the purpose of recording

evidence was to examine the validity or otherwise of the findings recorded at the domestic enquiry on merits. It was not the function of the Tribunal to hold a departmental enquiry itself in order to find out whether the Management was in a position to establish the charges before the Tribunal or not.

5. Section 36(1) of the Act in so far as material must be quoted in order to test the validity or otherwise of the interpretation canvassed on behalf of the petitioner:

36. (1) No person who is appointed as a head-master, a teacher or a member of non-teaching staff of registered private secondary school shall be dismissed or reduced in rank nor shall his service be otherwise terminated by the manager until-

(a) he has been given by the manager a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, and

(b) The action proposed to be taken in regard to him, has been approved in writing by an officer authorised in this behalf by the Board:

Provided that nothing in this sub-section shall apply to any person who is appointed for a temporary period only.

It has been inter alia provided by the Legislature that a teacher who is entitled to claim the protection of Section 36 cannot be dismissed from service until he has been given by the Manager a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. What exactly is the content of the requirement embodied in Section 36? Does it entitle the Management to dismiss a teacher by way of a penal measure on the ground of misconduct merely on the levelling of some charges or accusations? On a plain reading of the provision what is enjoined by Section 36 is that before the Management reaches a conclusion that the teacher concerned is guilty of misconduct, it must afford him reasonable opportunity to show that the charges are devoid of merit and that he is not guilty. This can be done only at a domestic enquiry at which the Management on the basis of evidence produced before it may record a finding of guilt. But before this finding is recorded sufficient opportunity must be afforded to the petitioner. The argument of the learned Counsel for the Management which strangely enough found acceptance with the Tribunal is that it is sufficient for the Management to issue a show cause notice and that it is not necessary for the Management to hold any enquiry even to convince itself that the charges are established. To uphold this contention would be to uphold the proposition that in order to dismiss a teacher, it is not necessary that he must be found guilty of misconduct but it will be sufficient for the Management merely to level a charge that he is guilty of misconduct. It would be a travesty of the principles of natural justice to construe the expression 'reasonable opportunity' as requiring no more than a notice to the teacher concerned that some accusations are levelled against him. Reasonable opportunity to show cause within the meaning of Section 36(1)(a) is this reasonable opportunity to satisfy the Management that the accusations against him are untrue. Besides, even if the teacher does not participate at the enquiry, it does not mean that the Management can proceed on the assumption that once the charges arc levelled, they must be presumed to have been established without anything more. The Management will have to, convince itself that the charges are 'true' for the very good reason that a disciplinary action by way of a penal measure postulates a finding of misconduct and follows on the heels of a conclusion that the teacher concerned is guilty of misconduct, Reliance has been placed by the learned Counsel for the

petitioner on Khem Chand v. The Union of India and Ors. (1958) S.C.R. 1080, wherein the Supreme Court was faced with a similar question in the context of Article 311 of the Constitution of India as it was then worded. At the material time Article 311 in so far as material was framed as under:

311 (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him;

Provided....

The language and content of Article 311 may be compared with the language and content of Section 26 from the perspective of the requirement of reasonable opportunity of showing cause. Article 311(2) also provides that no civil servant who is covered by Article 311(1) can be dismissed etc. until he has been given a reasonable opportunity of showing cause against the action proposed to be taken against him. With regard to the phraseology used in Article 311(1)(a) no express provision has been made which enjoins the disciplinary authority in terms to hold an enquiry, for it is obvious that giving of an opportunity in the context of the proposed penal action postulates holding of an enquiry in order to establish the guilt of theft employee concerned. The Supreme Court has dealt with this question at page 1096 of the report and the conclusions have been summarised as under:

To summarise : the reasonable opportunity envisaged by the provision under consideration includes-

(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finallyXX XX XX XX XX

In view of the aforesaid decision of the Supreme Court in regard to the interpretation of the requirement of affording a reasonable opportunity of showing cause in the context of a disciplinary proceeding it is spacious to argue and futile to contend that it is not necessary to hold even a domestic enquiry before dismissing a teacher and that he can be dismissed merely on the making of the allegations contained in a charge-sheet without the Management even satisfying itself that the charges are established. Counsel for the petitioner is right in his submission that there are observations which support the view canvassed by him in Satsangi Shishuvihar Kelavani Trust and Ors. v. P.N. Patel and Ors. 18 G.L.R. 615, decided by a Division Bench of this High Court. In para 14 at page 631 the Division Bench has observed that a Tribunal constituted under the Act has been conferred a wide jurisdiction when a dispute is raised after the termination of the service of the school teacher in order to ascertain whether the order of termination is wrong, unlawful and unjustified. It

has been furthermore observed that the Tribunal can embark upon a full enquiry even by 'reappreciating' evidence and can modify the punishment. The expression 're-appreciate evidence' clearly postulates that an enquiry must have been held by the Management and evidence must have been recorded at such an enquiry which could be 'reappreciated' by the Tribunal. Further, onwards on page 632 the Division Bench has observed that if the Management is guilty of blame-worthy conduct or acts in contravention of the principles of natural justice or without holding a fair enquiry as required by law or by flouting the fetter of previous approval, such action would justify the Tribunal apportioning the blame by suitably modifying the direction about the back wages so that the Management would have to bear the burden of back wages itself. By necessary implication it would mean that the Management is expected to hold a fair enquiry. Under the circumstances, it must be held that the Tribunal has committed an error apparent on the face of the record in taking the view that the Management can dismiss a teacher merely by levelling charges without even satisfying itself that the charges are established by holding an enquiry. In my opinion, Section 36 clearly enjoins by necessary implication that an enquiry must be held before a teacher is dismissed. Admittedly in the present case no enquiry whatsoever was held. Section 36 makes the exercise of the power of taking penal action conditional upon the Management affording a reasonable opportunity to the teacher concerned to show cause against the proposed action which by necessary implication and as held by the Supreme Court in Khem Chanel's case includes an opportunity to cross-examine the witnesses produced by the Management and of producing witnesses in order to establish its defence. The power being a conditional power it cannot be exercised until the opportunity is afforded and the condition precedent is satisfied. Since the opportunity has not been afforded, the Management had no jurisdiction to pass the impugned order dismissing the petitioner from service. The order of dismissal, therefore, was void ab initio. It was a still-born order. It was no order in the eye of law. There was, therefore, no question of the Tribunal recording evidence in order to ascertain whether or not the order passed by the Management was right or wrong, whether it was lawful or unlawful, and whether it was justified on the basis of the material produced at the enquiry. The function of the Tribunal is only to re-appreciate evidence and examine the finding recorded at the domestic enquiry on merits taking into consideration the evidence produced at the enquiry as also recording such fresh evidence as the Tribunal considers necessary. But the function is a limited function. The task is undertaken with a view to find out whether the finding recorded at the conclusion of the domestic enquiry requires to be confirmed, modified or reversed or whether the punishment imposed at the conclusion of the domestic enquiry requires to be reduced or set aside as the case may be. The Tribunal does not itself undertake the managerial function of holding a disciplinary proceeding and of finding out whether or not the Management is able to establish the accusations levelled against a teacher. The order of dismissal has to be passed by the Management at the conclusion of the enquiry after satisfying itself that the misconduct is established. It is not required to be passed by the Tribunal as if acting on behalf of the Management. There must first be in existence an adverse finding against the teacher recorded by the Management at the conclusion of the domestic enquiry. If there is no such enquiry and no such adverse finding on the basis of the material produced at the enquiry, the order itself would be void and the Tribunal is required to do no more than to declare it to be void. It is only when material has been produced at the enquiry and a conclusion adverse to a teacher has been recorded in the domestic forum that the Tribunal confirms, modifies or reverses it on the basis of such material and the additional material if any produced before the Tribunal itself. The Tribunal does not convert itself into a domestic forum and undertake for the first

time the function of holding of enquiry on behalf of the Management. Under the circumstances, the order passed by the Tribunal confirming the order of dismissal passed by the Management deserves to be quashed and set aside. It was, however, argued by the learned Counsel for the Management that in view of the fact that the Tribunal on appreciating evidence which was produced for the first time before it was persuaded to take the view that the Management had established its charges, this Court should not interfere with the order passed by the Management in exercise of its jurisdiction under Article 227 of the Constitution of India. In the first place since there is non-compliance with the requirement of Section 36(1) and the impugned order of dismissal is passed without holding any enquiry, the order of dismissal is a nullity. There is, therefore, no question of the Tribunal confirming it on merits. In the second place, as discussed earlier, the Tribunal had no jurisdiction to hold an enquiry on its own for the first time with the end in view to find out whether or not the petitioner was guilty by converting itself into a disciplinary forum. The role of the Tribunal was at a higher allotted of finding out whether the finding of guilt, if any, recorded at the conclusion of the enquiry was warranted or unwarranted, just or unjust and one which required to be confirmed, modified or reversed, in a way it partakes of the role of an appellate forum. No doubt the Tribunal has the jurisdiction to record evidence. That, however, does not mean that for the first time it can undertake an enquiry not with a view to find out whether the finding and the conclusion at the enquiry deserves to be confirmed or not but with a view to record such a finding for the first time on its own. Under the circumstances, it is not possible to accede to the argument of the learned Counsel for the Management. At the request of parties who want to negotiate a settlement, operative order is not being passed today.

6. Parties have agreed that instead of reinstatement, order for compensation in the following terms may be passed. Hence the following order is passed:

In the result, the petition succeeds. Rule is made absolute to the following extent:

1. The imputed order passed by the Tribunal as per Annexure 'H' dated November 4, 1974 is quashed and set aside.

2. It is declared that impugned order of termination at Annexure 'G', dated May 9, 1974 is null and void.

3. Instead of reinstatement with salary for the anterior period, by consent payment of compensation as under shall be made to the petitioner by respondent No. 1 and respondent No. 2 in view of the fact that the classes have been subsequently reduced and the petitioner being junior most his service in any case was liable to be terminated:Rs. 3000/- to be paid on or before 23-10-78Rs. 5000/- to be paid on or before 31-5-79Rs. 2000/- to be paid on or before 15-12-79Rs. 2000/- to be paid on or before 31-3-80.

It may be stated that the petitioner has consented to compensation being paid as per Clause (3) instead of being reinstated in view of the undertaking given by respondent No. 1 and respondent No. 2 to make payment as per the aforesaid time-schedule which undertaking is accepted and acted upon by the Court and the parties.

There will be no order regarding costs.