

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1481 OF 2012

Vishwanath Dnyanoba Kirade,
Age 27 years, Occ. Clerk (T),
R/o Yeota, Tq. Risod,
District Washim.

..Petitioner

Versus

1. Nav Akanksha Mahila Mandal,
Lokmanya Nagar, Parbhani,
Tq. and Dist. Parbhani
Through its Secretary.

2. Vasant Anusuchit Jati
Madyamik Ashram School,
Karegaon, Dist. Parbhani
Through its Head Master.

3. Social Welfare Officer (S),
Sec. "A" Zilla Parishad, Parbhani
Taluka and Dist. Parbhani.

..Respondents

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Advocate for Petitioner : Shri Godbole R.J.
Advocate for Respondents 1 & 2 : Shri Gunale V.D.
Advocate for Respondent 3 : Shri Panpatte V.S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: February 05, 2015

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ORAL JUDGMENT:-

1. Heard the learned Advocates for the respective parties at length.
2. Rule. By consent, Rule is made returnable forthwith and heard finally.

3. The issue that has been raised for the consideration of this Court is as regards whether a temporary employee or a deemed confirmed employee could be terminated by issuance of a stigmatic order without an opportunity of hearing and/or enquiry.

4. A host of contentions have been set out by the learned Advocates for the respective sides. Issue before me is as to whether the impugned order of termination is stigmatic and if so, whether it is sustainable without giving the petitioner an opportunity of hearing. It is in this backdrop that I would be adverting to those submissions of the respective sides, which I find are germane to the cause of action.

5. It is an admitted position that the petitioner was appointed as a Clerk on 24.7.2006 by the first respondent - Educational Institution in the second respondent School. It is not in dispute that the petitioner had been terminated by an order dated 9.10.2009.

6. The petitioner, on the basis of the record, appears to have worked as a Clerk from 24.7.2006 and was in employment till his termination dated 9.10.2009. For a continuous period of 3 years and 2 months, he was in employment with the respondent.

7. The petitioner preferred an appeal before the School Tribunal, bearing Appeal No.50 of 2009. The third respondent - Department of Social Welfare (Secondary), was arrayed in the said Appeal. No Written Statement

was filed by the third respondent before the School Tribunal.

8. The petitioner has contended that an advertisement was published in a News Paper Daily Gavkari on 15.7.2006, whereby the post of a Clerk was advertised and the same was reserved for the Scheduled Caste category.

9. The petitioner has placed on record certificates issued by the Maharashtra State Board of Technical Education, indicating that he has passed the Maharashtra State Certificate in Information Technology (MS-CIT) with 88% marks in April, 2008. Another certificate, dated 27.2.2007, issued by the Maharashtra State Council of Examinations, Pune is placed on record to indicate that the petitioner has passed English Typewriting with 40 words per minute speed after appearing for the Government Commercial Certificate Examination held at Mangarulpeer in the month of November, 2006. A similar certificate of the same date as regards the Marathi Typewriting Examination is also on record.

10. The petitioner has placed on record the proposal sent by the respondent, in which the petitioner is shown at Sr. No. 6. He belongs to the Scheduled Caste Category which is mentioned. His date of appointment is indicated as 24.7.2006 and the approval sought by the employer was for continuous service. The stamp of respondent No.3 - Social Welfare Department is said to be indicative that the said approval has been granted.

11. The petitioner has placed on record certain complaints, dated

17.7.2009, 20.8.2009 and 8.9.2009. The first two complaints are as regards the insistence of the respondent employer that the petitioner should remain present in the Ashram School on twenty four hour basis, failing which, he would not be allowed to work. Pursuant to such complaint, the third respondent had issued a show cause notice to the respondent - Institution to explain as to why were they insisting on twenty four hours duty for the petitioner.

12. Notwithstanding the above, the respondent issued the order of termination dated 9.10.2009 to the petitioner listing out ten charges against him. I find the order of termination to be self explanatory. Allegations ranging from not undergoing a medical examination, chewing tobacco and spitting on the premises, not working properly, negligence in duties, lodging a false complaint against the management with the Social Welfare Department, willful disobedience, arguing in arrogant manner with the Head Master, making sexual advances towards the girl students, not having the requisite qualifications for the post on which he is selected, committing a fraud on the Maharashtra State Board of Technical Education, remaining unauthorizedly absent etc. have been levelled upon the petitioner. Shri Godbole, learned Advocate, therefore, contends that it is a stigmatic order of termination, without issuance of show cause notice, much less conducting an enquiry as per Rules or proving the charges.

13. Shri Godbole, learned Advocate has placed reliance upon the judgment of the Apex court in the case of Dipti Prakash Banerjee

Vs.Satyendra Nath Bose National Centre for Basic Sciences [(1993) 3 SCC 60], the judgment in the case of Jarnail Singh and others Vs.State of Punjab and others [AIR 1986 SC 1626] and the judgment of this Court in the matter of Usha Ramchandra Mule Vs. Presiding Officer, Additional School Tribunal and others [2003 (1) M.L.J.90].

14. Submission is that a stigmatic order of termination, be it against a probationer or a temporary employee, is unsustainable in law in the absence of any opportunity of hearing. It is, therefore, submitted that the impugned judgment of the School Tribunal, dated 16.12.2011 is unsustainable in law since the School Tribunal has concluded that the petitioner required no opportunity of hearing as he was a temporary and no fault can be found with the impugned order of termination. It is specifically observed by the Tribunal that despite the approval granted by the competent department to the continuous employment of the petitioner, no enquiry is required for terminating his services since he was not on probation.

15. Shri Gunale, learned Advocate appearing on behalf of respondent Nos.1 and 2 / employer has vehemently contended that the Social Welfare Department has conducted an enquiry as against the petitioner in relation to his MS-CIT certificate. He contends that the department has noticed that the petitioner was present on duty from 24.7.2006 onwards in the School and as such could not have undergone the prescribed course of studies for which he has been awarded the MS-CIT. Shri Gunale, learned

Advocate, therefore, submits that the conclusion drawn by the Social Welfare Department leads to the conclusion that the certificate produced by the petitioner is an act of forgery.

16. Shri Godbole has clarified that the certificates as regards English Typewriting and Marathi Typewriting pertain to the examination undergone by him in November, 2006 as the employer had orally stated that he should acquire the said qualification while in employment. He has further stated that the employer had not given him any opportunity to refute the conclusions drawn by it, purportedly on the basis of the stand taken by the Social Welfare Department.

17. Shri Gunale, learned Advocate has pointed out from his affidavit-in-reply and the documents annexed thereto that the Social Welfare Department had directed the Principal of the Maharana Pratap Typing Institute, by its letter dated 15.6.2009 to submit an explanation as to whether any action has been initiated against the petitioner. It was also stated that the department proposes an action against the said institute. It is, however, unknown as regards what has transpired thereafter.

18. Shri Gunale, learned Advocate further points out that the Social Welfare Department by its letter dated 24.8.2009 had called upon the respondents to follow the due procedure of law for concluding the services of the petitioner. It is, therefore, canvassed that since the Social Welfare Department instructed the respondent to terminate the services of the

petitioner, they have promptly issued the termination order dated 9.10.2009.

19. To a specific query put to the learned Advocate for the respondent as to what was the procedure in law adopted by the employer for ending the services of the petitioner, Shri Gunale, learned Advocate has no answer. He, however, insisted that the order of termination dated 9.10.2009 was the action initiated by the respondent and one apology tendered by the petitioner in 2008 was the basis of the termination order.

20. While making his submissions, the learned Advocate for the respondent stated that a show cause notice was issued to the petitioner. When called upon to point out such a notice, the respondent / employer was unable to indicate such a show cause notice. Shri Gunale, however, stated that the termination order was issued for all the specific reasons, set out in the said order and these are the reasons which are the basis and foundation for terminating the services of the petitioner.

21. Shri Gunale, learned Advocate has contended that another employee has been recruited in place of the petitioner, approval has been granted by the department and the said employee has not been impleaded in this petition. It is, therefore, stated that even if this Court comes to a conclusion that the termination was stigmatic and is unsustainable, order of reinstatement may not be granted since it would amount to foisting an employee on the employer.

22. Shri Gunale, learned Advocate has relied upon the judgment of this Court in the case of Syed Nasiruddin Vs. M.B.Shaikh [2002 All MR 1-193] to support his contention that a temporary employee can be terminated by issuing a stigmatic order and no opportunity of hearing is required to be afforded to him. According to him, the principles of natural justice cannot be made applicable to the case of the petitioner. He submits that the impugned order of the School Tribunal is perfectly justified and is neither erroneous nor perverse.

23. Shri Panpatte, learned Advocate appearing on behalf of respondent No.3 submits that the third respondent had not issued the order of termination. It could not have issued such an order. Based on the material before it, it only brought the said material to the notice of the respondent / employer and called upon the employer to follow the procedure laid down in law for ending the services of the petitioner. It is further stated that there was no guidance from the third respondent to the respondent / employer as regards setting out various charges in the order of termination. The department only expected the employer to follow the due procedure of law.

24. Having considered the submissions of the learned Advocates for the respective sides, in the light of the record and proceedings before me, I am of the considered view that the impugned order of termination is a stigmatic order. Several allegations have been set out in the said order. No

show cause notice was issued by the employer to the petitioner. Principles of natural justice have not been adhered to. The order of termination indicates that the charges leveled upon the petitioner are the basis of terminating his services. I am, therefore, unable to accept the submission of the respondent that the order of termination is a non-stigmatic order.

25. In the case of D.P.Bannerjee (supra), it has been observed in paragraph Nos.18 to 22, 25 and 27 as under:-

" 18. On the basis of the above contentions, the following points arise for consideration:

(1) In what circumstances, the termination of a probationer's services can be said to be founded on misconduct and in what circumstances could it be said that the allegations were only the motive?

(2) When can an order of termination of a probationer be said to contain an express stigma?

(3) Can the stigma be gathered by referring back to proceedings referred to in the order of termination?

(4) To what relief?

Point 1:

19. As to in what circumstances an order termination of a probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation. In this area, as pointed out by Shah, J. (as he

then was) in Madan Gopal v. State of Punjab (1964) ILLJ 68 SC there is no difference between cases where services of a temporary employee are terminated and where a probationer is discharged. This very question was gone into recently in R.S. Gupta v. U.P. State Agro Industries Corporation Ltd. and Anr., (1999)ILLJ432SC and reference was made to the development of the law from time to time starting from Purshottam Lal Dhingra v. Union of India (1958) ILLJ 544 SC, to the concept of 'purpose of inquiry' introduced by Shah, J. (as he then was) in State of Orissa v. Ram Narayan Das : (1961)ILLJ552SC and to the seven Bench decision in Samsher Singh v. State of Punjab : (1974)ILLJ465SC and to post Samsher Singh case-law. This Court had occasion to make a detailed examination of what is the 'motive' and what is the 'foundation' on which innocuous order is based.

20. This Court in that connection referred to the principles laid down by Krishna Iyer, J. in Gujarat Steel Tube v. Gujarat Steel Tubes Mazdoor Sangh : (1980)ILLJ137SC . As to 'foundation', it was said by Krishna Iyer, J. as follows:

...a termination effected because the master is satisfied of the misconduct and of the desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in different proceedings from the formal order, does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service, the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious

terminology is used.

and as to motive:

On the contrary, even if there is suspicion of misconduct, the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge.

As to motive one other example is the case of State of Punjab v. Sukh Raj Bahadur (1970) ILLJ 373 SC where a charge memo for a regular inquiry was served, reply given and at that stage itself the proceedings were dropped and a simple termination order was issued. It was held, the order of simple termination was not founded on any findings as to misconduct. In that case, this Court referred to A.S. Benjamin v. Union of India, Civil Appeal No. 1341 of (1966) dt. 13.12.1966 (SC) where a charge memo was issued, explanation was received, an inquiry officer was also appointed but before the inquiry could be completed, the proceedings were dropped and a simple order of termination was passed, the reason for dropping the proceedings was that "departmental proceedings will take a much longer time and we are not sure whether after going through all the foundation, we will be able to deal with the accused in the way he deserves'.

21. *The termination was upheld.*

22. *If findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the*

allegations and will be bad. But if the inquiry was not held, no findings were arrived at and the employer was not inclined to conduct an inquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to inquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.

25. *The contention for the appellant is that if the appellant is to seek employment elsewhere, any new employer will ask the appellant to provide the copies of the letters dated 30.4.96, 17.10.96 and 31.10.96 referred to in the impugned order and that if the said letters contain findings which were arrived at without a full fledged departmental inquiry, those findings will amount to stigma and will come in the way of his career.*

27. *There is, however, considerable difficulty in finding out whether in a given case where the order of termination is not a simple order of termination, the words used in the order can be said to contain a 'stigma'. The other issue in the case before us is whether - even if the words used in the order of termination are innocuous, -the court can go into the words used or language employed in other orders or proceedings referred to by the employer in the order of termination?"*

26. In the case of Indra Pal Gupta Vs. Managing Committee, Model Inter College [(1984) 3 SCC 384], the three Judges' Bench of the Apex Court has held that the foundation behind the termination of the employee was a

report of the Manager which was made a part of the order of termination as an annexure. The Manager's report contains words amounting to a stigma. It was, therefore, held that it was a clear case where order of termination issued is merely a camouflage for an order imposing a penalty of termination of service on the ground of mis-conduct. The findings in the Manager's report amounted to a mark of disgrace or infamy and that the employee was visited with evil consequences. The said employee was, therefore, reinstated with all the benefits of back wages and continuity of service.

27. The Apex Court in the case of D.P.Bannerjee (supra), while considering the grant of relief to the appellant (Dipti Prakash Bannerjee) has observed in paragraph Nos.46 and 47 as under:-

" 46. Learned senior counsel for the respondent submitted on the basis of State of Haryana v. Jagdish Chander (1996) ILLJ 737 SC, that merely because an order of termination was set aside on grounds of lack of opportunity, it was not necessary to direct reinstatement and back wages. Reliance in Jagdish Chandra's case was placed upon Managing Director, ECIL v. B. Karunakar (1994) ILLJ 162 SC . It is true that such an order not granting reinstatement or back wages was passed in Jagdish Chander's case following Karunakar's case. But it has to be noticed that in Kanmakar's case, there was a regular departmental inquiry but the inquiry report was not given to the officer. This Court directed the report to be given and set aside the proceedings from that stage and stated that no order for reinstatement or backwages need be passed at that stage. But in cases like the present where no departmental inquiry whatsoever was held, Kanmakar's case, in our view, cannot be an

authority. As to backwages, on facts, the position in the present case is that there is no material to say that the appellant has been gainfully employed. The appellant is, therefore, entitled to reinstatement and backwages till the date of reinstatement from the date of termination and to continuity of service. Point 4 is decided accordingly.

47. For the aforesaid reasons, the appeal is allowed, the Judgments of the Division Bench & learned Single Judge of the High Court are set aside, the impugned order of termination is quashed, and the appellant is hereby directed to be reinstated with backwages till the date of reinstatement and continuity of service. It will be open to the respondents to take such action as they may deem fit in accordance with law against the appellant. The appeal is allowed as stated above. There will be no order as to costs. "

28. The petitioner has been working with the respondent from 24.7.2006 till the date of termination 9.10.2009. Approval granted by the Social Welfare Department to the continuous service of the petitioner is also on record. It is not in dispute that the Maharashtra Employees of Private Schools (Conditions of Service) Act, 1977 ("the MEPS Act" for short) is applicable to the respondent institution.

29. Section 5(1) and (2) of the said Act read as under:-

"5. Certain obligations of Management of private schools:- (1) The Management shall, as soon as possible, fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy:

Provided that, unless such vacancy is to be filled in by promotion, the Management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, the Education Officer, Zilla Parishad or, as the case may be, the Director or the Officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools and in the event of such person being available, the Management shall appoint that person in such vacancy.

(2) Every person appointed to fill a permanent vacancy except Assistant Teacher (Probationary) shall be on probation for a period of two years. Subject to the provisions of sub sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed.

Provided that, every person appointed as on probation for a period of three years.

(2A) Subject to the provisions of sub-sections (3) and (4), Assistant Teacher (Probationary) shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher."

30. In the light of the provisions of the MEPS Act, reproduced as above, and in the light of the record before this Court which indicates that the petitioner was selected pursuant to the advertisement, it appears that the petitioner has acquired the deemed status of a confirmed employee. Notwithstanding the same, the order of termination in my view, being stigmatic, could not have been passed as against the petitioner.

31. The judgment of this Court (Coram: R.M.S. Khandeparkar, J.) in the case of Syed Nasiruddin Karimuddin Vs. N.B.Shaikh [2002-All MR-1-193], notes that the management had issued two notices calling upon the employer to explain away the charges leveled on him. The employee chose to avoid submitting any reply and it was in the said backdrop that this Court had observed that the employee had lost the opportunity of submitting his explanation. It is observed in paragraph No.7 of the judgment that the concerned employee remained silent and was totally non-cooperative in the matter. In the present case, no notice was ever issued to the petitioner.

32. Though the learned Advocate for the petitioner Shri Godbole has stressed on the aspect of being qualified and having the requisite qualification as is prescribed under the Maharashtra Employees of Private Schools Rules, 1981, I am not inclined to go into the said aspect since it is apparent that the issue of a stigmatic termination without adherence to the principles of natural justice has been raised for my consideration.

33. The Apex Court in the case of D.P. Bannerjee (supra) has concluded that a stigmatic termination is in fact, punitive in nature. The ratio laid down by the Apex Court in the case of Radhey Sham Gupta Vs. U.P. State Agro Industries Corporation Ltd. and Anr., [(1999) 2 SCC 21] and in the case of Samsher Singh Vs. State of Punjab [(1997) 2 SCC 831] (Seven Judges' Bench), has concluded that a stigmatic termination, if is founded on charges of mis-deeds / mis-conducts, the employer is under an obligation to

go into the charges and issue the order of punishment. The foundation or the motive of the termination is to be considered. The distinction made by the Apex Court as regards motive and foundation is that allegations leveled against an employee would be the foundation. If termination on account of the allegations is the cause of issuance of the termination order, the motive of the employer is established.

34. In the Usha Ramchandra Muley's judgment (supra), this Court has concluded in paragraph No.7 that merely because the explanation given by an employee viz-a-viz an allegation leveled against him is found to be unsatisfactory by the employer, would not mean that the charges are proved against the said employee. It was, therefore, held that the employer needs to establish the charges leveled upon the employee before issuing a stigmatic termination which is punitive in nature.

35. In so far as the contention of Shri Gunale is concerned that an employee appointed in place of the petitioner is a confirmed employee and has not been impleaded as a respondent in this petition, I do not find any plausible reason to entertain the said submission. The petitioner has challenged his termination. The moment the termination is set aside, consequential reliefs need to follow. It is for the respondent employer to deal with the situation strictly in accordance with law. The concept of non-joinder of parties would, therefore, not be attracted in this case.

36. In the impugned judgment of the School Tribunal, none of the

contentions of the petitioner seem to have been properly appreciated. The case law discussed in this judgment have not been considered at all. It is surprising to note that the School Tribunal came to a conclusion that a temporary employee has no right of hearing and no enquiry is required for terminating his services despite the order of termination being stigmatic.

37. In my view, the impugned judgment of the School Tribunal is perverse, erroneous and unsustainable. Taking into account the facts of this case and the ratio laid down by the Apex Court in the judgments referred to hereinabove, I, therefore, have no hesitation in concluding that even if an employee is a temporary, in the event the employer desires to terminate his services on grounds of mis-conducts, such a stigmatic order of termination, which is punitive in nature, cannot be sustained unless the charges levelled upon the said employee are proved in accordance with the procedure laid down in law.

38. In the light of the above, this petition succeeds. The impugned order of termination dated 9.10.2009 is quashed and set aside. Similarly, the impugned judgment of the School Tribunal is also quashed and set aside. The respondent / employer shall, therefore, reinstate the petitioner in service with continuity and full backwages. In so far as the contention of Shri Gunale that the employer would then resort to a proper procedure so as to prove the charges against the petitioner is concerned, this Court cannot restrict the respondent from initiating such process. The respondents are, therefore, at liberty to follow the due procedure of law in

the event they are desirous of proving the charges which were levelled against the petitioner in the impugned order of termination.

39. Rule is, therefore, made absolute in the above terms.

40. At this stage, Shri Gunale, the learned Advocate for the respondents prays for staying of this judgment since respondents 1 and 2 are desirous of approaching the Apex Court. Shri Godbole, learned Advocate has opposed the said prayer contending that when the respondents have admitted that the termination order was issued only for the reasons set out in the said order and no show cause notice was issued to the petitioner, the said request be rejected.

41. In the light of the above, the request of Shri Gunale is rejected.

(RAVINDRA V. GHUGE, J.)

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