

kps

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.10268 OF 2014
WITH
WRIT PETITION NO. 11933 OF 2014

- 1 LOKNETE AAMDAR KAILASWASI MANGALSING
NIMJI RAJPUT @ THANSING JIBHAU SHIKSHAN
PRASARAK MANDAL.
Registered Public Trust.
Sakuba Niwas, Thansing Jibhau
Chowk, At.Post.Sindkheda,
District Dhule.
Through it's President
Vijaysing Nathesing Rajput,
Age : 62 years, Occ : Agriculture,
R/o Sindkheda, Tq.Sindkheda,
District Dhule.

- 2 The Headmaster,
Aai Saheb Sakuba Devi Madhyamik
Vidyalaya, At Post Divi,
Tq.Sindkheda, District Dhule.

...PETITIONERS in both petitions

-VERSUS-

- 1 THE EDUCATION OFFICER (SECONDARY),
Zilla Parishad, Dhule,
District Dhule. ...R/1 in both petitions.
- 2 The Deputy Director of Education,
Nashik Division, Nashik. ...R/2 in both petitions.
- 3 Yadav Pandharinath Sawant,
Age : 40 years, Occ : Service,
R/o B.K.Desale Nagar,
At Post Sindkheda,
District Dhule. ...R/3 in WP/10268/2014
- 3 Hilal Krishna Rajput,

Age : 54 years, Occ : Service,
R/o Ekvira Colony, Plot No.18,
At Post Sindkheda,
District Dhule.

...R/3 in WP/11933/2014

....

Advocate for Petitioner : Shri Patil Pradip R.
AGP for Respondent Nos.1 and 2: Shri D.R.Korde.
Advocate for Respondent No.3 : Shri Shrikant S Patil

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 02nd September, 2015

Oral Judgment:

1 Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2 The Petitioners in both these petitions is the same Educational Institution/ Management. Respondent No.3 in both these petition are two employees, who have been dismissed from service on the charges of misappropriation without conducting an enquiry. The Petitioners are challenging the identical judgments of the School Tribunal both dated 05.12.2013 delivered in Appeal Nos.12/2012 and 04/2012, respectively.

3 Since both the Employees stand on an identical set of facts and since the issue for determination is identical, I have taken up both these petitions together for hearing and disposal.

4 Shri Pradip R. Patil, learned Advocate for the Petitioners/ Management and Shri Shrikant S. Patil, learned Advocate for Respondent No.3/ Employees have canvassed a host of factors. The learned AGP appearing on behalf of Respondent Nos.1 and 2 in these petitions, submits that the said Departments are not the contesting Respondents. In the light of the order that I intend to pass, I would not be adverting to the submissions of the learned Advocates in their entirety.

5 It is undisputed that both the Employees are charged with having committed misappropriation of money/ food grains in the Midday Meal Scheme meant for the students. It is also undisputed that barring a show cause notice by which the charges were levelled, no specific charge sheet cum show cause notice was issued and the procedure laid down in Rules 36 and 37 of the MEPS Rules, 1981 has not been followed by the Petitioner/ Management. It is also not in dispute that both the Employees are accused in Crime No.142/2011 in relation to the misappropriation as alleged. The criminal proceedings are still pending before the competent authority/ court.

6 The Petitioner/ Management has vehemently submitted that considering the charge levelled upon the Employees and the pressure that

was mounted on the Management at the behest of several complainants/ parents of students, the Management was compelled to initiate urgent steps as against the Employees. It was in this context that the show cause notice dated 26.09.2011 was issued to the said Employees.

7 Simultaneously, the First Information Report was registered. Both the Employees submitted their replies on 13.10.2011 and denied their involvement in the said acts. They claimed innocence and prayed that the proceedings be dropped against them. Nevertheless, the Petitioner/ Management has issued the orders of termination dated 08.02.2012 and 02.01.2012, respectively against these Employees.

8 Both the Employees, therefore, preferred their appeals before the School Tribunal. By the impugned judgment, both the Appeals were allowed. The Petitioner/ Management was directed to reinstate the Employees with continuity of service and full back-wages. However, the reinstatement on their earlier position of Headmaster was denied and they were directed to be posted as Assistant Teachers.

9 The Petitioner/ Management has relied upon the judgment of the Apex Court in the case of *Union of India v/s Y.S. Sadhu, Ex-Inspector*, **2008 (12) SCC 30** and the judgment of this Court in the case of *Bhartiya*

Seva Acharya Education Society v/s School Tribunal, Nagpur, **2014 (6) BCR**

26. Based on these reports, the Petitioner submits that in the event the back-wages are reduced and breathing time of six weeks is granted, the said amount would be paid to the Respondents/ Employees and thereafter, the Petitioner/ Management would initiate the disciplinary proceedings against these two Employees strictly in accordance with Rules 36 and 37 of the MEPS Rules, 1981.

10 It is further contended that since the Petitioner did not conduct an enquiry on account of mounting pressure of the society in the light of the misappropriation in the Midday Meal Scheme, the Petitioner/ Management cannot be precluded from following the due procedure of law in conducting an enquiry.

11 The learned Advocate for the Respondent No.3/ Employees has placed reliance upon the judgment of the Apex Court in the case of *Deepali Gundu Surwase v/s Kranti Junior Adhyapak Mahavidyalaya (D.Ed.)*, **AIR 2013 SCW 5330 : 2013 (10) SCC 324.**

12 It is trite law that if an enquiry is set aside on the ground of being vitiated, a de-novo enquiry can be ordered. In Industrial Legislation, the doctrine of “Relation Back” is to be made applicable and the effect of

the enquiry would then be related back to the date of termination/dismissal. The same is applicable in the case of not conducting an enquiry at all whereby, the Employer is at liberty to justify his action of terminating the services of the Employee by proving the charges before the Labour Court or the Tribunal.

13 It is an arguable issue that the above legal position may not be strictly applicable in the case before the School Tribunal. The matter, therefore, has to be remitted back to the Employer for conducting an enquiry. In the instant case, no enquiry was conducted at all. The MEPS Act, 1977 and the Rules, 1981 framed thereunder prescribe the manner in which the Enquiry Committee is to be formed as well as the procedure to be followed in conducting an enquiry.

14 The Employer apparently has committed a grave error in not conducting an enquiry as was mandated by law. Nevertheless, looking at the charge of misappropriation against the Employees and on account of defect in the action of the Petitioner/ Management, in my view and in the light of the judgments in the case of Union of India v/s Y.S.Sadhu and Bhartiya Seva Acharya Education Society v/s School Tribunal (supra), the School Tribunal has fallen in error by not permitting the Petitioner/ Management to initiate a departmental enquiry against the Employees.

15 In Deepali Gundu Surwase's case (supra), the Apex Court has observed in paragraph 33 as under:-

- “33. The propositions which can be culled out from the aforementioned judgments are:
- i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.
 - ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.
 - iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.
 - iv) The cases in which the Labour Court/ Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even

though the enquiry held against the employee/ workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/ Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v) *The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/ workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/ workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.*

vi) *In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman*

if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).

- vii) *The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) that on reinstatement the employee/ workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.”*

16 In the instant case, the School Tribunal has granted full back-wages to both the Employees. It was necessary for the School Tribunal to adduce reasons for granting full back-wages to both the Employees. I do not find any such conclusion arrived at by the School Tribunal for justifying it's direction that full back-wages deserve to be granted to Respondent No.3/ Employees.

17 With due circumspection and upon considering the aforesaid fact situation, I deem it proper to direct the Petitioner/ Management to

pay 50% back-wages from the dates of termination dated 10.02.2012 in the first petition and 05.01.2012 in the second petition, respectively, on or before 15.10.2015. Payment of this amount and reinstatement shall be a pre-condition for initiating an enquiry against Respondent No.3/ Employees.

18 The learned Advocate for the Petitioner/ Management submits that considering the public outcry that had occurred when the misdeeds of the Employees were exposed, it would prefer to place the Employees under suspension and pay subsistence allowance as per the Rules till the decision of the Enquiry Committee and the decision of the Petitioner/ Management pursuant thereto.

19 I need not pass any orders on these submissions since the said issue falls within the domain of the Petitioner/ Management and the Petitioner/ Management is at liberty to do so by following the due procedure laid down in law.

20 In the light of the above, both these Writ Petitions are partly allowed. The impugned judgments dated 05.12.2013 delivered by the School Tribunal are modified with the following directions:-

(a) The Petitioner/ Management shall pay 50% of the back-wages

from 10.02.2012 and 05.01.2012, respectively to both Respondent No.3/ Employees individually, as expeditiously as possible and on or before 15.10.2015.

- (b) The remaining amount of 50% back-wages shall be subject to the result of the disciplinary proceedings against both Respondent No.3/Employees.
- (c) The Petitioner/ Management shall reinstate both the Respondent No.3/ Employees w.e.f. 16.10.2015.
- (d) Insofar as the suspension is concerned, no orders are being passed by this Court as it is left to the Petitioner/ Management to opt for the said decision subject to the mandate of law.
- (e) In the event, the Petitioner/ Management does not pay the back-wages as directed above and does not reinstate both Respondent No.3/ Employees from 16.10.2015, the said Employees shall be entitled for full back-wages from the dates of termination dated 10.02.2012 and 05.01.2012, respectively and then, the Employees would be at liberty to seek recovery of the said amount in accordance with law.
- (f) The Petitioner/ Management and Respondent No.3/ Employees shall cooperate with the Enquiry Committee which shall be constituted within six weeks from 16.10.2015.

- (g) The Enquiry Committee shall endeavour to conclude the enquiry, within the period prescribed after its constitution.

21 Rule is made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)