

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9279 OF 2013

1. The Secretary,
Niti Niketan Shikshan Sanstha,
Jamb (Bk.) Tq. Mukhed,
District Nanded.

2. The Headmaster,
Niti Niketan Vidyalaya,
Jamb (Bk.), Tq. Mukhed,
District Nanded.

..Petitioners

Versus

1. Smt. Vaishali Ramdas Thote,
Age 31 years, Occ. Nil,
R/o Jamb (Bk.) Tq. Mukhed,
District Nanded.

2. The Education Officer (S),
Zilla Parishad, Nanded.

..Respondents

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Advocate for Petitioners : Shri Gunale V.D.
Advocate for Respondent 1 : Shri Dhage Vivek
AGP for Respondent 2 : Smt. Kshirsagar Y.M.

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CORAM : RAVINDRA V. GHUGE, J.

Dated: August 10, 2015

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ORAL JUDGMENT :-

1. Heard.

2. Rule.

3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.

4. Shri Gunale, learned Advocate for the petitioner criticizes the judgment of the School Tribunal dated 10.10.2013. He has raised the following three grounds, which render the impugned judgment perverse:-

- (a) the first respondent / employee had abandoned her service,
- (b) she was habituated to unauthorized absenteeism, and
- (c) her performance was not satisfactory.

5. He submits that the School Tribunal has allowed Appeal No.26 of 2012 filed by the first respondent for challenging her order of termination dated 1.8.2011 on the ground that she was appointed for three years as a probationer w.e.f. 1.8.2008. He further submits that because she was unauthorizedly absent, she was required to be terminated as she had abandoned her service. When her performance was not satisfactory, the employer cannot be compelled to keep such an employee in service.

6. Shri Gunale further submits that, even if the order of reinstatement is to be taken as it is, by the communication dated 24.4.2014, addressed to the Deputy Director of Education, Latur Division, by the Education Officer (Secondary), Zilla Parishad, Nanded, it is clear that the first respondent has become surplus, her name has been entered in the list of surplus employees by the Education Department and it is just a matter of time, that she would be absorbed in any other school.

7. He further submits that as respondent No.1 had not worked from her date of termination till the date she became surplus, backwages are not

required to be paid to her.

8. He relies upon the following judgments to support his contention that the very appointment of the first respondent was illegal and therefore, she had no right to reinstatement, much less, continuity of service and backwages.:-

- (1) Rayat Shikshan Sanstha Vs. Yeshwant Dattatraya Shinde - 2009 (6) Mh.L. J. 476,
- (2) Ku. Jaimala Bhaurao Ramteke Vs. Presiding Officer, School Tribunal - 2009 (2) Mah. L.J. 772,
- (3) Mohd. Asif and others Vs. State of Bihar and others - (2010) 5 SCC 475,
- (4) Shivdutta Education Trust Vs. Harishchandra Rajabali Yadav - 2012 (4) Mh.L.J. 900,
- (5) University of Rajasthan Vs. Prem Lata Agarwal - AIR 2013 SC 1265,
- (6) Uniworth Textiles Ltd. Vs. Commissioner of Central Excise - 2013 (1) CCC 152 (SC),
- (7) Ram Awadh Mahel Pal Vs. Shivdutta Educational Trust - 2007 (6) Bom. C.R. 23 and
- (8) Ramkrishna Chauhan Vs. Seth D.M. High School - 2013 (3) ABR 106.

9. The learned AGP appearing on behalf of the second respondent confirms that the said respondent has intimated the Deputy Director of Education, Latur Division by his letter dated 24.12.2014 that the first respondent has been entered in the list of surplus employees.

10. Shri Dhage, learned Advocate has strenuously opposed the petition on the ground that the impugned order is stigmatic and cannot be sustained since no domestic enquiry was conducted by the petitioner. He submits that unless the first respondent is reinstated, the name of the said employee could not be entered in the list of surplus employees. He, therefore, submits that, by virtue of the communication dated 24.12.2014 by the second respondent and the application of the petitioner to the Education Department, which has invited the response of the second respondent to the said communication, it has to be presumed that the first respondent is deemed to be reinstated.

11. I have considered the submissions of the learned Advocates, have gone through the petition paper book with their assistance and have also considered the reports relied upon by the petitioners. The termination order dated 1.8.2011 is on record. It is undisputed that there was no domestic enquiry conducted by the petitioner on the ground that the first respondent is a temporary employee and no departmental enquiry is required to be conducted, even if there are any charges against the first respondent.

12. The termination order dated 1.8.2011 is a communication to the first respondent that her service has been brought to an end w.e.f. 30.7.2011. It is apparent that the termination order gives a retrospective effect to the termination of the first respondent. The learned Division Bench of this Court in the matter of Assaram Raibhah Dhage Vs. Executive Engineer and

others [1989 II CLR 331] lays down the law that the services of an employee, be he permanent or temporary, cannot be terminated with retrospective effect. The observations of the learned Division Bench in paragraph Nos.1 to 3 read as under:-

“1. The services of an employee, be he permanent or temporary, cannot be terminated with retrospective effect. Such is the ratio of this judgment.

2. On June 7, 1980. The petitioner, a project displaced person was appointed as a Mustering Assistant in the Work Charge Establishment at a monthly salary of Rs. 200. Thereafter he worked continuously without break in service till March 1986, when by a letter of termination dated March 11, 1986 his services were retrospectively terminated with effect from March 1, 1986. Hence this writ petition.

3. The petitioner's learned Counsel Miss Purohit is perfectly justified in making a grievance that it is unthinkable that an employee's services can be terminated with retrospective effect, as done in the present case. We join learned Counsel in her astonishment. For that matter, one of the conditions in the letter of appointment is that if the petitioner desired to resign he was liable to pay one month's salary or give one month's notice. It is therefore ironical that on the other hand, the petitioner's services were terminated with retrospective effect. ”

13. The learned Division Bench in the Assaram Raibhah's case (supra), therefore, set aside the termination order and granted full salary, treating the employee to be continued in service.

14. Even otherwise, the petitioner has come up with a clear case of habitual absenteeism, abandonment of service and performance not being satisfactory. The Apex Court in the case of Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences [(1993) 3 SCC 60], has concluded that if the foundation of the termination is a charge and if the termination order is not innocuously worded but contains specific charges, it needs to be branded as a stigmatic termination. The relevant observations of the Apex Court in the case of D.P. Bannerji's case read 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?"*

15. Similarly in the case of Novartis India Ltd. Vs. state of West Bengal

and others [AIR 2008 SC (Suppl) 836], the Apex Court has held that the charge of abandonment is stigmatic in nature and as such, unless there is a domestic enquiry conducted in the charges levelled upon the employee, the termination order shall amount to a stigmatic termination.

16. This Court has considered the law as is laid down, in the case of Dy. Chief Executive Officer (Child Welfare), Zilla Parishad Ahmednagar and another Vs. Smt. Ratan Eknath Gund - Writ Petition No.129 of 2014 dated 25.9.2014, while considering a similar situation. The termination has been set aside on account of it being stigmatic in nature and there being no enquiry conducted against the said employee.

17. The petitioner has now taken a stand that the termination is on account of the appointment of the first respondent not being in tune with the procedure laid down in law while recruiting the first respondent. The case law relied upon by the petitioner in the above referred cases relates to a case of an irregular or illegal appointment.

18. I, however, do not find any trace in the termination order that the termination of the employee is on account of her appointment being illegal. The said defence is, therefore, taken with an oblique motive, probably, to misdirect the Tribunal as well as this Court. I am, therefore, not detained by the said contentions of the petitioner as the petitioner cannot supplant reasons for termination for self serving purposes before the Tribunal and before this Court when the said reason for termination has not been spelt

out in the termination order itself. Therefore, the reliance placed upon the above reports by the petitioners is mis-placed.

19. In so far as the absorption of the first respondent is concerned, the procedure laid down in law may eventually lead to such absorption. The subsequent events would not render the impugned judgment erroneous.

20. In the light of the above, I do not find that the impugned judgment could be termed as perverse or erroneous. The petitioner, who is a widow, has been kept out of employment despite having completed the period of probation. It is not the case of the petitioner that her bad or unsatisfactory performance was periodically brought to her notice, with the intention of intimating her of her shortcomings and therefore, afford her an opportunity of improving her work.

21. As such, this petition being devoid of merits, is dismissed. Rule is discharged. No order as to costs.

(RAVINDRA V. GHUGE, J.)

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