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

WRIT PETITION NO. 11285 OF 2015

SHAIKH FARHEEN SULTANA ABDUL SAMAD

VERSUS

THE PRESIDENT DAYANAND SHIKSHAN SANSTHA LATUR AND OTHERS

...

Advocate for Petitioner : Shri Gunale V.D.

AGP for Respondent No.4/ State: Shri D.R.Korde.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 02nd December, 2015

Oral Order:

1 The Petitioner is aggrieved by the judgment and order dated 08.10.2015 delivered by the University and College Tribunal (herein after referred to as “the Tribunal”) by which, Appeal No.1/2009 preferred by the Petitioner for challenging the order of termination dated 26.04.2009 w.e.f. 01.06.2009, has been dismissed.

2 Shri Gunale, learned Advocate for the Petitioner, has strenuously criticized the impugned judgment. His submissions can be summarized in brief as follows:-

- (a) Though the advertisement was published for selection of a Lecturer in Hindi subject and the Petitioner was at Sr.No.1 in

the order of merit, she was not appointed till she raised the issue before the concerned University under the Right to Information Act, 2005.

- (b) By the appointment order dated 17.12.2007, the Petitioner was appointed on probation w.e.f. 18.12.2007.
- (c) The University approved the appointment of the Petitioner for the probation period from 18.12.2007 to 17.12.2009.
- (d) The Management issued a notice dated 09.01.2009 pointing out the shortcomings in her performance.
- (e) The Petitioner replied to the said notice on 12.01.2009.
- (f) By the order of termination dated 26.04.2009, the Petitioner was intimated that her performance was not satisfactory and hence, her probation period would be brought to an end w.e.f. 01.06.2009.
- (g) Accordingly, the Petitioner was discontinued as a probationer w.e.f. 01.06.2009.
- (h) By the judgment and order dated 04.05.2010, Appeal No.01/2009 preferred by the Petitioner before the Tribunal was allowed and the Petitioner was directed to be reinstated in service and was awarded compensation of Rs.20,000/-. The back-wages were denied.
- (i) The Management preferred Writ Petition No.5984/2010

before this Court.

- (j) By the judgment dated 27.07.2011, the petition filed by the Management was allowed and the judgment of the Tribunal dated 04.05.2010 was quashed and set aside on the ground that the documents pertaining to lack of performance of the Petitioner and opportunity of improvement given to her, were not considered by the Tribunal.
- (k) Appeal No.1/2009 was, therefore, remitted back to the Tribunal for a fresh decision by considering the said documents.
- (l) By the impugned judgment and order dated 08.10.2015, Appeal No.1/2009 has been dismissed by the Tribunal.

3 The Petitioner submits that she produced the chart pertaining to 08 students to the Management to indicate marginal improvement in their performance in between Semester-I and Semester-II. The contention is that this improvement indicates that the Petitioner is a good teacher.

4 It is further submitted that after receiving the notice dated 09.01.2009, the Petitioner submitted a detailed reply dated 12.01.2009 so as to convince the Management that she was a good teacher and she was competent to be confirmed in employment after completion of the

probation period. The order of termination dated 26.04.2009 is a stigmatic order and the said order cannot be sustained since the Management has attached a stigma to the performance of the Petitioner.

5 The Petitioner relies upon the judgment delivered by this Court in the matter of *Vishwanath Dnyanoba Kirade vs. Nav Akanksha Mahila Mandal*, **2015 (4) ALL MR 702**, in support of the contention that if a stigmatic order of termination is issued, it amounts to being punitive in nature and such order is unsustainable if a proper enquiry is not conducted in accordance with the procedure laid down in law. The judgments of the Apex Court relied upon by this Court in Vishwanath Kirade case (supra) are also cited in support of the Petitioner's case.

6 Shri Gunale further submits that the Management had developed animosity towards the Petitioner since she had involved the University in the process of her appointment. Because of her persuasion, the Management had appointed her. As such, the Management was bent upon terminating the services of the Petitioner and hence, a concocted story of lack of performance and not being suitable for the Institution, has been put forth by the Management. It is, therefore, submitted that the impugned judgment of the Tribunal deserves to be quashed and set aside.

7 I have considered the lengthy submissions of Shri Gunale on behalf of the Petitioner as have been recorded herein above.

8 It is trite law that a probationer does not have a right to be regularized in employment. It is also trite law that a candidate who is selected for being appointed on probation, cannot have a right to appointment.

9 The Petitioner had approached the concerned University for seeking appointment. It is apparent that the University could not and has not exerted pressure on the Management to issue an order of appointment to the Petitioner. The appointment order clearly indicates that the Petitioner was put under probation from 18.12.2007 to 17.12.2009.

10 It is not in dispute that the Management has specifically stated in the order dated 26.04.2009 that despite opportunities, since the Petitioner has not improved her performance, she is found to be unsuitable for the organization. After a period of five weeks from the date of notice of termination, the Petitioner has been disengaged during her probation period w.e.f. 01.06.2009, which is the beginning of a new academic year 2009-2010. It is, therefore, apparent that the Management has not shown any undue haste in terminating the services of the

Petitioner. The contention of the Petitioner that the Management was bent upon terminating her services is, therefore, put to rest.

11 Reliance placed upon the judgment of this Court in the matter of Vishwanath Kirade (supra) by the Petitioner is misplaced. The charges levelled upon the concerned employee in the Vishwanath Kirade case (supra) by the Management are reproduced in paragraph 12 which read as under:-

“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.”

12 It is, therefore, apparent that the Management in Vishwanath Kirade case (supra) had levelled serious and grave charges against the

employee including the charge of making sexual advances towards girl students besides committing a fraud on the statutory authorities. No charge sheet was issued much less a departmental enquiry. Naturally, this Court, by placing reliance upon the judgments delivered by the Apex Court as well as this Court (reproduced below), concluded that the order of termination was not an innocuous order, was not a simplicitor termination of the probation period as specific charges were levelled upon the Petitioner and no enquiry was conducted.

- (a) Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences, [(1993) 3 SCC 60].
- (b) Jarnail Singh and others Vs. State of Punjab and others, [AIR 1986 SC 1626].
- (c) Usha Ramchandra Mule Vs. Presiding Officer, Additional School Tribunal and others, [2003 (1) M.L.J.90 : 2003 (1) ALL MR 618].
- (d) Syed Nasiruddin Karimuddin Vs. N.B.Shaikh, [2002 (1) All MR 193].
- (e) Indra Pal Gupta Vs. Managing Committee, Model Inter College, [(1984) 3 SCC 384].
- (f) Radhey Sham Gupta Vs. U.P. State Agro Industries Corporation Ltd. and Anr., [(1999) 2 SCC 21].
- (g) Samsher Singh Vs. State of Punjab, [(1997) 2 SCC 831].

13 In the case of Dipti Banerjee (supra), the Apex Court has observed in paragraphs 18 to 22 and 25 to 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?"

14 In the case of Syed Nasiruddin (supra), this Court has noted 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.

15 The observations of this Court in the case of Vishwanath Kirade (supra) in paragraphs 33 and 34 read as under:-

“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."*

16 In the instant case, the order of termination is an innocuous order which brings to the notice of the Petitioner that her performance was not satisfactory and there was no improvement despite oral and written notices. The record reveals that self appraisal reports were considered by the Head of Department and the opinion expressed by the Head of Department was that the Petitioner is not suitable for the organization. It is based on this internal record of appraisal and assessment that the Management concluded that the Petitioner was not suitable for the post on which she was appointed.

17 It cannot be disputed that an employee is placed under probation so as to test his/ her suitability for the post on which the appointment is made. The subjective assessment of the Management as to

whether such employee is suitable for the organization, needs to be given weightage.

18 Considering the principles laid down by a Three Judges Bench (Lord Greene, M.R., Somervell, L.J., and Singleton, J.) in the *Associated Provincial Picture Houses Ltd. v/s Wednesbury Corporation* reported in **(1947) 2 ALL ER 680 : (1948) 1 KB 223**, the scope of judicial scrutiny with regard to such subjective assessment of the Management is limited. It would be difficult for this Court to question the bonafides of the Management with regard to its conclusion that the candidate is not suitable for the organization. Unless the order of terminating the probation period is stigmatic and punitive in nature, scope of interference is limited.

19 In the light of the above, I do not find that the Tribunal has wrongly considered the fact situation and the law applicable to the case. The impugned judgment, therefore, cannot be termed to be perverse or erroneous.

20 As such, this petition being devoid of merit is, therefore, dismissed.

(RAVINDRA V. GHUGE, J.)