

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1600 OF 1997

Anjuman-E-Taleem and Another ..Petitioners
versus
The State of Maharashtra
and Another ..Respondents

Mr. G.R. Rege a/w. Mr. S.M. Railkar, for the
Petitioners.

Ms. Aparna Vhatkar, AGP for Respondent No.1.

Mr. N.V. Bandiwadekar i/b. Mr. Sagar Mane, for
Respondent No.2.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 23/02/2015

Date of Pronouncing the Judgment : 05/03/2015

JUDGMENT :-

. This petition is directed against the judgment and order dated 8th January, 1997 made by the School Tribunal, Kolhapur Region, Kolhapur allowing the appeal instituted by respondent No. 2 setting aside termination notice dated 16th August, 1994 and directed the reinstatement of the Respondent No. 2 with backwages and other allowances from the date of termination.

2. The respondent No. 2 came to be appointed as Assistant Teacher w.e.f 21st June, 1993 by the petitioner – management at the Haji Mukadam High School, Khed ("said school") on probation for a period of two years. On 8th March, 1994, a memo was issued to respondent No. 2 with regard to her unauthorized absence. It is the case of the respondent No. 2 that said memo was never received by her. Therefore, on 6th June, 1994 a second memo was issued to respondent No. 2 with regard to several deficiencies in her functioning and the respondent No. 2 was offered an opportunity to submit her responses to the same. By communication dated 7th June, 1994, the respondent No. 2 accepted the charges levelled against her but assured rectification in the future. By notice dated 16th August, 1994. The services of the respondent No. 2 were terminated w.e.f. 16th September, 1994 after school hours. On 17th August, 1994, the respondent No. 2 addressed detailed representation protesting against said termination. Therein the respondent No. 2 also retracted her previous response dated

7th June, 1994. On 29th August, 1994 the petitioner No. 2 communicated to the respondent No. 2 adverse remarks in the confidential report for the year 1993-94. The remark is to the effect that the performance of respondent No. 2 is not satisfactory and that she is not ready to accept her faults though brought to her notice.

3. Respondent No. 2 instituted an appeal under Section 9 of The Maharashtra Employees of Private Schools (Conditions of Service Regulation Act, 1977 ("said Act")) and the School Tribunal by the impugned order dated 8th January, 1997 has allowed the same. Hence the present petition.

4. Mr. Rege, the learned counsel for the petitioners submitted that respondent No. 2 was a probationer and her services came to be terminated as her work was found to be unsatisfactory. The termination order is not stigmatic but simpliciter. The School Tribunal has incorrectly held that there was any breach of Rule 15 of the Maharashtra

Employees of Private Schools(Conditions of Service) Rules, 1981 ("said rules"). In particular, Mr. Rege pointed out that the petitioners in compliance with the provisions of Rule 15(3) had communicated adverse remarks in the confidential report of the respondent No. 2, before the end of August, 1994 and on the date of said communication, the respondent No. 2 was very much in service, since the termination was to take effect on 16th September, 1994. The respondent No. 2 chose to address no representation against the adverse remarks so communicated on on 29th August, 1994. Accordingly, there was no obligation to revisit the adverse remarks in the confidential report. The performance of the respondent No. 2 was objectively assessed and the record of her assessment was duly maintained. For all these reasons Mr. Rege submitted that the impugned order made by the School Tribunal warrants interference.

5. On the other hand, Mr. N.V. Bandiwadekar, the learned counsel for respondent No. 2 defended

the impugned order by submitting that the termination was in gross breach of the provisions contained in Rule 15 of the said rules. The learned counsel submitted that in present case the termination notice issued on 16th August, 1994 and so called adverse remarks were communicated later i.e. on 29th August, 1994. Besides, the adverse remarks were not written or communicated in prescribed Form under 'Schedule G'. Relying upon the decision of this Court in the case of "*Vinayak Vidhyadayini Trust & Anr. vs. Aruna T. Prabhu & Ors.*"¹, learned counsel submitted that Rule 15 of the said rules is mandatory and in non compliance would vitiate the termination order. Learned counsel also placed reliance upon the decision of Hon'ble Apex Court in case of "*Progressive Education Society and Another vs. Rajendra and Another*"² and contended that "power to terminate during probation is conditioned by Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981". For all these reasons, the

1. 2011(1) Mh.L.J. 550.

2. (2008) 3 Supreme Court Cases 310.

learned counsel submitted present petition be dismissed.

6. Rival contentions now called for my determination.

7. Rule 15 of the said rules reads thus :-

Rule 15 – Writing of confidential reports etc. :

(1) “The confidential reports shall be written annually in the respective Form in Schedule “G”. the reporting authorities in respect of the employees and the Head shall be the Head and the Chief Executive Officer respectively. Confidential reports shall be written in respect of the employee or the Head who had worked for six months or more during an academic year commencing from June. If the Head or a teacher is the Secretary of the Management the confidential report in this respect shall be written by the President of the Management.

(2) The confidential reports so written in respect of the employees and the Head shall be reviewed by the Chief Executive Officer and the President of the Management, respectively. The confidential report of the employee written by President shall be reviewed by the Managing Committee.

(3) The respective reporting authority shall arrange to communicate confidentially in writing adverse remarks, if any, to the concerned employee or the Head, as the case may be, before the end of August every year.

(4) Representation, if any, from any employee against the

adverse remark communicated to him in accordance with sub-rule (3) above shall be decided by the School Committee. Similar representation, if any, from the Head shall be decided by the Managing Committee.

(5) Failure to write and maintain confidential reports and to communicate adverse remarks to the employees within the period prescribed in sub-rule (3) shall have the effect that the work of the employee concerned was satisfactory during the period under report.

(6) Performance of an employee appointed on probation shall be objectively assessed by the Head during the period of his probation and a record of such assessment shall be maintained.

8. In the present case, no material was produced by the petitioners to establish that confidential reports in respect of respondent No. 2 were written and maintained in the respective form in "schedule G". Although, Mr. Rege is right in his submission that strict adherence to the writing of confidential report in the prescribed form, may not be the mandate, nevertheless in the present case, there is no material produced on record to establish even substantial compliance. That apart, in the present case, the petitioners vide notice

dated 16th August, 1994 terminated the services of respondent No. 2, effective from 16th September, 1994. However, the adverse remarks in the confidential report were communicated to her only on 29th August, 1994 i.e. after issuing of the termination notice, though technically respondent No. 2 was in service on the said date. In such circumstances, the decision of the School Tribunal that there was no compliance with the provisions contained in Rule 15 of the said rules cannot be faulted.

9. The scheme of Rule 15 of the said rules is that confidential reports shall be written in respect of the employee or the Head who had worked for six months or more during an academic year commencing from June and had to be written annually by the head of the school and reviewed by the Chief Executive Officer.

10. The sub rule 3 of rule 15 provides that the respective reporting authority shall arrange to

communicate confidentially in writing adverse remarks, if any, to the concerned employee or the Head, as the case may be, before the end of August every year. The sub rule 4 provides that representation, if any, from any employee against the adverse remark communicated to him in accordance with sub-rule (3) above shall be decided by the School Committee. Sub rule 5 of rule 15 provides that failure to write and maintain confidential reports and to communicate adverse remarks to the employees within the period prescribed in sub-rule (3) shall have the effect that the work of the employee concerned was satisfactory during the period under report. Sub rule 6 of rule 15 finally provides that the performance of an employee appointed on probation shall be objectively assessed by the Head during the period of his probation and a record of such assessment shall be maintained.

11. The entire object of providing such detailed procedure as aforesaid, is to ensure that

there is no arbitrary power vested in the appointing authority to do away with the services of the probationer. Normally, the question as to whether or not services of probationer are satisfactory, largely depend upon the subjective satisfaction of appointing authority. Such subjective satisfaction however, is by no means unfettered or unbridled lest, the same would lead to arbitrariness. The provisions in the rules, therefore provide for an objective assessment of service records coupled with maintenance of records of such assessment. Besides, with a view to introduce the element of fairness as well as natural justice, the rules provides that adverse remarks in the confidential report have to be communicated to employee concerned and the employee concerned has to be offered an opportunity to make representation against the same before such adverse remarks are taken into consideration for the purpose of arriving at satisfaction that the services of the employee during probation, were unsatisfactory.

12. It is well settled position in law that the purpose for communication of adverse remarks is two fold. Firstly, such communication is to enable the employee concerned to improve his/her performance. Secondly, to enable the employee concerned to represent against the adverse remarks and consequently satisfy the reviewing authority that such adverse remarks ought not to have been made or were not justified.

13. In the case of Progressive Education Society (supra), the Hon'ble Apex Court has held that *"appointing authority is at liberty to terminate the services of the petitioner if it finds the performance of petitioner to be unsatisfactory. However, in case of employees governed by the said act or the said rules, the satisfaction as to unsatisfactory performance is hedged by the provisions of rule 15 of the said rules. Therefore if the provisions contained in section 5(3) of the said act and rule 15 of the said rules are read together, it would mean that*

before taking recourse, the powers vested under Section 5(3) of the said act, the performance of the employee appointed on probation shall have to be taken into consideration by the appointing authority in the manner prescribed by rule 15 before terminating services on the ground of unsatisfactory performance". Similarly, Division Bench of this Court in the case of Vinayak Vidhyadayini Trust(supra) has held that the provisions contained in rule 15 of the said rules are mandatory and breach thereof would vitiate termination order.

14. The submission of Mr. Rege that there was compliance with rule 15 (3) in as much as adverse remarks were communicated to the respondent No. 2 on 29th August, 1994 can not be accepted. Though the communication of adverse remarks was before the end of August, 1994, the same was after the petitioner had come to the conclusion that the services of respondent No. 2 were unsatisfactory and that she was to be terminated w.e.f. 16th

September, 1994. The entire object of the scheme contained in rule 15 of the said rule is to ensure that proper assessment records are maintained and further the service of an employee appointed on probation is objectively assessed. Rule 15 also promotes compliance with the principles of natural justice and fair play by requiring the communication of adverse remarks to the concerned employee, so that the employee concerned is offered an opportunity to improve or make representation against the adverse remarks. Implicit in the scheme is the requirement that uncommunicated adverse remarks are not made the basis or foundation for the subjective satisfaction with regard to unsatisfactory services of the probationer. In present case, petitioners founded their satisfaction on the basis of uncommunicated adverse remarks. Communication of adverse remarks, after record of satisfaction that services of respondent No. 2 were unsatisfactory, can hardly be said to be in compliance with provisions contained in rule 15 of said rules, either in letter or in spirit.

15. There is no merit in the contention of Mr. Rege that memo dated 8th March, 1994 and 6th June, 1994 are to be construed as communication of adverse remarks. In the first place, such was not the case made out before the School Tribunal. Secondly, there is serious dispute as to whether or not memo dated 8th March, 1994 was ever served upon the respondent No. 2. There is no reference to the memo dated 8th March, 1994 in the reply filed by the petitioner before the School Tribunal. The memo dated 6th June, 1994 at the highest brings to the notice of respondent No. 2 certain deficiencies. However, respondent No. 2 by her response dated 7th June, 1994 accepted the deficiencies and promised improvement in future. Such position appears to have been accepted by the petitioners on 7th June, 1994. Therefore, it was incumbent upon the petitioners to produce at least some material on record that post 7th June, 1994 there was no improvement in the services of respondent No. 2. Further, such material should have been reflected in the confidential report and communicated to the

respondent No. 2 before 16th August, 1994, on which date at least the petitioners came to the conclusion that services of respondent No. 2 were not satisfactory and deserved to be terminated from 16th September, 1994. Therefore no fault can be found in the decision of School Tribunal on the aspect of breach of rule 15 of the said rules and the illegality in the issuance of termination notice.

16. However, on the aspect of award of backwages for the entire period i.e. from 16th September, 1994 onwards, there is really no discussion or reasoning on the said aspect. In the memo of appeal instituted by the respondent No. 2, there is no statement that respondent No. 2 was not gainfully employed. This is quite understandable because the appeal to the School Tribunal was instituted within 30 days from the date of termination. However, during the pendency of proceeding before the School Tribunal also, there was no statement or affidavit made by respondent

No. 2 on the aspect of her gainful employment. In this Court, however, respondent No. 2 has filed affidavit in reply by January, 2015 stating that from the date of her termination 16th September, 1994 she has been unemployed.

17. In the case of "*Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya*"³ upon which reliance was placed by respondent No. 2, it has been held as follows :-

"In cases of wrongful termination of service, reinstatement with continuity of service and backwages is the normal rule. However, such rule is subject to the rider that while deciding the issue of backwages, 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. However, and ordinarily an employee or workman whose services are terminated and who is desirous of getting backwages is required to either 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. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically

3. 2014(2) Mh.L.J. 480.

plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments”.

18. In determining whether respondent No.2 ought to be awarded the entire backwages for the period between 17 September 1994 and the year 2015, i.e., backwages for a period of almost 21 years, the circumstances referred to by the Hon'ble Apex Court shall have to be taken into consideration. Respondent No.2, prior to her termination with effect from 16 September 1994 had served in the school for hardly 15 months. As noted earlier, respondent No.2 had not filed any affidavit or made any statement with regard to her not being in gainful employment before the School Tribunal, which is the Court of first instance. The appeal was instituted by the petitioners in the year 1994 and the same was disposed of in the year 1997. During this period of three years, there was no statement made to the effect that the respondent NO.2 was not gainfully employed. Rule was issued and interim relief was granted on 2

April 1997. However, respondent No.2 has chosen to file an affidavit only in January 2015, i.e., after period of almost 18 years. Accordingly, no case is made out by the respondent No.2 for grant of entire backwages for a period of almost 21 years.

19. At the same time, it is necessary that some backwages are awarded in favour of respondent No.2. This is because the petitioners have not been diligent in the prosecution the present petition. This petition was dismissed for default on 17 November 2005, but restored on 13 March 2009. This petition was again dismissed for default on 13 June 2014 and thereafter restored on 14 January 2015. The petition was dismissed for default for the third time on 6 February 2015, but was restored on 12 February 2015. All this lack diligence on the part of the petitioners has contributed significantly to the protraction of the proceedings against the respondent No.2. Respondent No. 2 had in fact succeeded before the

School Tribunal, but it is on account of interim relief that was granted in this petition, that the respondent No.2 was not reinstated.

20. Therefore, upon cumulative consideration of the aforesaid circumstances, it would be appropriate if the respondent NO.2 is awarded 50% of the backwages.

21. Accordingly, the impugned order to the extent of setting aside termination notice dated 16th August, 1994 and directing reinstatement of the respondent No. 2, is not interfered with. However, the direction to pay entire backwages and allowances is set aside and substituted with the direction to pay 50% of the backwages and allowances. The same shall be paid by the petitioner to respondent No. 2 within period of four months from today. If the amount is not paid within a period of four months, then same shall carry interest at the rate of 7% per annum.

22. Rule, is made partly absolute to the aforesaid extent. There shall be no order as to costs.

23. Parties to act on the basis of authenticated copy of the order.

(M. S. SONAK, J.)