

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6196 OF 2015

Smt. Prajwala Bhatu Khalane
Age 37 years, Occ. Service
Assistant Teacher in Smt. T.T.
Khalane Mahajan High School and
Late Bapusaheb G.D.Mali Guruji
Junior College, Deopur, Dhule
R/o House No.62, Shrihari Colony,
Sakri Road, Taluka and
District Dhule.

..Petitioner

Versus

1. Mahatma Phule Vidya Prasarak
Sanstha, Deopur, Taluka and
District Dhule, through its
President.

2. Shri Tulsiram Tanaji Khalane
Maharaj High School and Kai.
Bapusaheb G.D.Mali Guruji
Junior College, Deopur, Dhule
through its Head Master.

3. The Education Officer (S),
Zilla Parishad, Dhule.

..Respondents

WITH
WRIT PETITION NO. 6200 OF 2015

Nitin Dilip Choudhary,
Age 31 years, Occ. Service
Assistant Teacher in Smt. T.T.
Khalane Mahajan High School and
Late Bapusaheb G.D.Mali Guruji
Junior College, Deopur, Dhule
R/o House No.13/14, Telephone Colony,
Air Port Road, Gondur Deopur,
Taluka and District Dhule.

..Petitioner

Versus

1. Mahatma Phule Vidya Prasarak

Sanstha, Deopur, Taluka and
District Dhule, through its President.

2. Shri Tulsiram Tanaji Khalane
Maharaj High School and Kai.
Bapusaheb G.D.Mali Guruji
Junior College, Deopur, Dhule
through its Head Master.

3. The Education Officer (S),
Zilla Parishad, Dhule.

..Respondents

WITH
WRIT PETITION NO. 7049 OF 2015

Smt. Bhagyashri Devidas Mali,
Age 30 years, Occ. Service
Assistant Teacher in Smt. T.T.
Khalane Mahajan High School and
Late Bapusaheb G.D.Mali Guruji
Junior College, Deopur, Dhule
R/o House No.5/B, Telephone Colony,
Air Port Road, Gondur Deopur,
Taluka and District Dhule.

..Petitioner

Versus

1. Mahatma Phule Vidya Prasarak
Sanstha, Deopur, Taluka and
District Dhule, through its
President.

2. Shri Tulsiram Tanaji Khalane
Maharaj High School and Kai.
Bapusaheb G.D.Mali Guruji
Junior College, Deopur, Dhule
through its Head Master.

3. The Education Officer (S),
Zilla Parishad, Dhule.

..Respondents

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Advocates appearing for :
Petitioners : Shri S.R.Barlinge and Shri S.R.Kolhare
Respondents 1 & 2 : Shri V.D.Sapkal
Respondent 3 : Shri P.G.Borade, AGP

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CORAM : RAVINDRA V. GHUGE, J.
Reserved on : August 12, 2016
Pronounced on : August 31, 2016

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JUDGMENT :-

1. Heard.

2. Rule.

3. By consent, Rule is made returnable forthwith and heard finally.

4. In the first petition, the petitioner has challenged the judgment and order dated 31.12.2014, delivered by the School Tribunal, by which, her Appeal No.77 of 2012 has been dismissed.

5. In the second petition, the petitioner is aggrieved by the judgment and order dated 31.12.2014, by which his Appeal No.79 of 2012 has been dismissed by the School Tribunal.

6. In the third petition, the petitioner is aggrieved by the judgment and order dated 31.12.2014, by which her Appeal No.78 of 2012 has been dismissed by the School Tribunal.

7. In all these Appeals, the petitioners were working as 'Shikshan Sevaks' and on the stroke of the completion of their probation period, all of them have been terminated.

8. The respondent / management is the same educational institution and the same college. Hence, by the consent of the parties, all these matters have been heard together.

9. For the sake of brevity, all the petitioners in these petitions are being referred to as the 'Teachers' and the respondent / institution is being referred to as the 'employer'.

10. I have heard the learned Advocates for the respective sides and have gone through the petition paper book with their assistance.

11. All the Teachers have applied pursuant to the advertisement dated 17.11.2009, by which, applications were sought for appointment of four 'Shikshan Sevaks'. By separate appointment orders, all the Teachers were appointed as 'Shikshan Sevaks' in the Secondary School, on probation. The first teacher was appointed from 3.12.2009 to 2.2.2012, second teacher was appointed from 2.12.2009 till 1.12.2012 and the third teacher was appointed from 1.12.2009 to 30.11.2012.

12. The contention of the Teachers is that at the stroke of completion of their probation period, merely because there was a change in management, they were terminated. Their services were approved by the order of approval placed on record. The only reason cited was that their appointments were illegally made and hence, their probation period has been brought to an end, when, each of them completed the said period.

13. Shri Barlinge, learned Advocate for the Teachers strenuously submitted that the advertisement clearly prescribes the educational qualification, which a candidate was required to possess. All the three candidates possessed the qualification and hence were appointed as 'Shikshan Sevaks'. Since the dispute in the management was pending before the appropriate authorities, the Head-master had officiated as the School Committee. Since the management was engrossed in the dispute, the Head-master had proceeded to initiate the process of selection and upon making the necessary appointments, the proposals of these Teachers were forwarded for grant of approval. They were approved. All the three Teachers performed their duties on the basis of the approval. Their salaries were paid as per the Rules.

14. It has been further submitted by the Teachers that their performance as probationers was without any blemishes. The

management has not issued any memo or warning or an intimation indicating to the Teachers that their performance was not satisfactory and that they ought to improve their conduct.

15. On 5.11.2012, the change report of one group of the management was accepted. The said body took charge of the functioning of the institution on 6.11.2012. Two years prior thereto, the same group had preferred Regular Civil Suit No. 92 of 2010 before the Court of the learned Civil Judge S.D., seeking quashing of the appointments of these Teachers, on 26.4.2010. On 26.11.2012, after 19 months of the pendency of the suit, the said body withdrew the suit unconditionally from the Civil Court, thereby, giving up its challenge to the appointments of the Teachers. On 29.11.2012, which is three days after the unconditional withdrawal of the suit, the termination orders were issued to the Teachers. Rule 15 of the the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 ("MEPS Rules" for short), has not been followed.

16. The Education Officer has filed an affidavit-in-reply. It is stated in paragraph No.5 that since there was a dispute in the management, the Head-master in his capacity as the Secretary of the School Committee, had published an advertisement for filling up the posts of teachers, which were vacant due to retirement of some teachers. Considering the interest of the students and to ensure that their

teaching curriculum is not affected, the Education Department granted approval to the appointments of these Teachers as 'Shikshan Sevaks' for a period of three years. The affidavit further submits that only because the other group has taken charge, that the services of these Teachers have been abruptly terminated.

17. It also emerges from the record that after these Teachers were appointed by the Head-master, pursuant to his retirement, the succeeding Head-master has appointed seven teachers in a similar fashion on 6.1.2012. The employer in it's Written Statement has not denied that seven other teachers were appointed in an identical manner and the employer led by the group, whose change report was accepted, has not touched their services.

18. The petitioners have placed reliance upon the following judgments:-

(1) Ram Avadh Mahel Pal Vs. Shivdutta Educational Trust [2007 (6) Mh.L.J.659],

(2) Progressive Education Society Vs. Rajendra and another [2008 (2) Mh.L.J. 715],

(3) Vinayak Vidhyadayini Trust Vs. Aruna T. Prabhu [2011 (1) Mh.L.J. 550],

(4) Bhartiya Buddha Dhamma Dnyan Vidyalaya Vs. Presiding Officer, school Tribunal, Nagpur [2010 (3) Mh.L.J. 177],

(5) D.G.Ruparel College Vs. State of Maharashtra [1998 (2) CLR 402], and

(6) Gajanan Uddhaorao Garole Vs. State of Maharashtra [2009 (5) Mh.L.J. 300].

19. The learned Advocate for the employer Shri Sapkal submits that the Resolution, which was passed by the management for appointing these Teachers does not bear the signature of the Chairman. The approval granted by the Education Officer does indicate that the appointments of these Teachers had been approved for a period of three years, which was pursuant to the proposal sent by the employer seeking approval to their appointments. Similarly, the appointment of the six other teachers by the succeeding Head-master has also been approved by the Education Officer. Yet, the employer has terminated the services of these three Teachers, because it felt that their appointments were illegal and their work was not satisfactory.

20. Shri Sapkal, learned Advocate has contended that whenever there is a dispute in the management and the office bearers are not discharging their duties, yet the Head-master will not get the authority to make appointments. He has placed reliance upon the affidavit in reply to contend that though the said body was elected on

2.11.2008, its change report was accepted on 5.11.2012. The Resolution passed by the management was suspicious and the same, therefore, deserves to be ignored.

21. He, however, is unable to dispute that after the appointments of these Teachers were made, their services were approved, they discharged their duties by imparting education and their salaries were paid on month to month basis. The management elected on 2.11.2008, was available in the institution premises but it did not take any objection to the appointments of these Teachers and did not protest or lodge any complaints to any authority with regard to their appointments.

22. Shri Sapkal further submitted that the employer realized that the work of these teachers was not satisfactory. There were no vacancies for the OBC and all these teachers belong to OBC. Their original documents as regards selection and appointment orders are not traceable.

23. Having considered the submissions of the learned Advocates, I have gone through the petition paper books, the impugned judgments and the reports cited.

24. There is no dispute that the advertisement was published and

it was pursuant to the advertisement that these teachers had applied for appointments. The Education Officer has stated in his affidavit that the Head Master was permitted to proceed with the appointment of Shikshan Sevak considering that several teachers have retired and the ongoing dispute between the two groups of the employer would have an adverse effect on the educational curriculum and the students. It was in this backdrop that these teachers were appointed.

25. The same employer has appointed 6 other teachers by following the same procedure. Their services have not been disturbed by this employer. It is, therefore, apparent that the employer has picked and chosen these 3 teachers for termination. It is not the case of the employer that these teachers are not holding the requisite qualifications. Nevertheless, their qualifications were before the Tribunal and despite the copies of their marks memo indicating their educational qualifications being available to the Tribunal, it has concluded, very strangely, that the qualifications of the teachers are suspicious.

26. The Tribunal has sustained the termination of the teachers on the ground that the advertisement was published in 'Saptahik Bawankashi'. It lost sight of the fact that 'Saptahik Bawankashi' is included in the list of publications available with and approved by the

Education Department in which the advertisements can be published. The employer, upon going through the list, cannot dispute that 'Saptahik Bawankashi' was in the list of publications and the subsequent 6 teachers were also appointed by publishing advertisement in the same newspaper.

27. The School Tribunal has completely lost sight of the fact that the employer had indulged in legal victimization by picking these 3 teachers for termination after the conclusion of their probation periods and the identically placed 6 other teachers were not disturbed. The School Tribunal could not have ignored this act of victimization of the employer.

28. Rule 15 of the 1981 Rules pertains to the writing of confidential reports. Rule 15 reads as under :-

“(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 of 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 his 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 Head or a teacher written by the 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 an employee against the adverse remarks 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.”*

29. Rule 15(6), therefore, mandates that the performance of a probationer shall be objectively assessed during the period of

probation and record of such assessment needs to be maintained. For these reasons, the Hon'ble Apex Court in the matter of Progressive Education Society and another Vs. Rajendra and another [(2008)3 SCC 310], has concluded that the termination of a probationer would stand vitiated for violation of Rule 15(6). Paragraph Nos. 13, 14 and 16 of the Progressive Education Society (supra) reads as under :-

“13. On a consideration of the submissions made on behalf of the respective parties, the main issue which, in our view, requires determination in this appeal is whether the provisions of Rules 14 and and, in particular Sub-rule (6) of Rule 15 of the MEPS Rules, 1981, would control the powers vested in the Management of the School under Sub-section (3) of Section of the MEPS Act. The law with regard to termination of the services of a Probationer is well established and it has been repeatedly held that such a power lies with the Appointing Authority which is at liberty to terminate the services of a Probationer if it finds the performance of the Probationer to be unsatisfactory during the period of probation. The assessment has to be made by the Appointing Authority itself and the satisfaction is that of the Appointing Authority as well. Unless a stigma is attached to the termination or the Probationer is called upon to show cause for any shortcoming which may subsequently be the cause for termination of the Probationer's service, the Management or the Appointing Authority is not required to give any explanation or reason for terminating the services except informing him that his services have been found to be unsatisfactory.

14. *The facts of this case are a little different from the normal cases relating to probation and the termination of the services of a Probationer in that the satisfaction required to be arrived at under Sub-section (3) of Section of the MEPS Act has to be read along with Rule 15 of the MEPS Rules, 1981 with particular reference to Sub-rule (6) which provides that the performance of an employee appointed on probation is to be objectively assessed by the Head during the period of his probation and a record of such assessment is to be maintained. If the two provisions are read together, it would mean that before taking recourse to the powers vested under Sub-section (3) of Section of the MEPS Act, the performance of an employee appointed on probation would have to be taken into consideration by the School Management before terminating his services.*

15.

16. *This brings us to the next question regarding the sufficiency of the materials before the School Management while purporting to pass the order of termination on 1st August, 1994. As has been discussed, both by the School Tribunal and the High Court, the Confidential Report which has been produced on behalf of the School Management does not inspire confidence on account of the different dates which appear both on Part-I and Part-II of the said Report. Part-I of the Self-Assessment Form gives the particulars of the concerned teacher and the remarks of the Reporting Authority, namely, the Head Mistress of the School. The date in the said Part is shown as 4th July, 1994, whereas the date at the end of*

Part-II, which is the form of the Confidential Report giving details of the teacher's performance, is dated 24th June, 1994, which appears to be in line with the date given of the forwarding letter written by the Head Mistress to the Secretary of the Society. To add to the confusion created by the different dates on the form, there is a third date which appears on Part-I of the Self-Assessment Form which shows that the documents were presumably forwarded to the Management of the School on 6th August, 1994, which is a date which is prior to the date of termination of the services of the Respondent No. 1, namely, 1st August, 1994."

30. It also cannot be ignored that the same employer, which was elected on 02/11/2008 were watching the affairs of the Institution till their change report was accepted on 5.11.2012, had preferred RCS No.92/2010 praying for quashing of the appointment orders of the petitioners. The said suit was unconditionally withdrawn on 26.11.2012 thereby giving up the challenge to the appointment of the teachers. However, within 3 days thereafter, the 3 teachers were disengaged by a cryptic Resolution that their performance is not satisfactory, in the total absence of any assessment in any form whatsoever of their 3 years of probation period.

31. Shri Sapkal has placed reliance upon the judgment in the Rayat Shikshan Sanstha case (supra). The same would not be applicable since the approval granted in the said case was with regard to the

temporary appointment of the appellant.

32. He has further relied upon the judgment of this Court in the matter of Ashok Asramji Gavhane (supra). In the said case, the Court concluded that the petitioner undoubtedly was not a qualified person. In the said case, the appointment order was signed by a person who claimed to be the President of the Trust. This Court, therefore, dismissed the petition and sustained the judgment of the Tribunal. However, in the instant case, this management/employer has chosen only these 3 teachers for termination and in identical circumstances continued 6 other teachers.

33. He has further relied upon the judgment of this Court in the case of Vidya Bharti (supra) wherein the appointments of the employees were only for a limited period and there was no advertisement published. Therefore, this Court interfered with the matter and allowed the petition of the employer. The facts of these three cases in hand clearly indicate that the teachers were duly qualified and were appointed pursuant to the advertisement, coupled with the fact that similar other six teachers, who were selected after almost two years in an identical manner, were retained by the management and they have been confirmed.

34. The learned Division Bench of this Court, by placing reliance

upon the judgment of the Honourable Apex Court in Progressive Education Society (supra), in the case of Vinayak Vidhyadayini Trust Vs. Aruna T. Prabhu [2011 (1) Mh.L.J. 550], concluded that the termination of employment of a probationer on the ground of unsatisfactory performance, cannot be sustained unless the said decision is based on a proper assessment of the probationer's performance. Paragraph Nos.13 and 15 of the said judgment read as under:-

“13. It is true that as a general principle in service jurisprudence an employee is appointed on probation to test his/her performance and suitability for the post appointed and if during this period of probation, the performance is found to be unsatisfactory, the employer has the right to discontinue the employee on completion of the probationary period and without assigning any reasons. It is also equally well settled that such an order of termination is not a stigmatic order and as per the contract of service or the terms of appointment, the employer has such a right so that the exercise of such right would not amount to an illegal action on the part of the employer. Such an order will not by itself be a penal order and the period of probation furnishes a valuable opportunity to the master to closely observe the work of the probationer. However, the MEPS Act is a special piece of legislation and Section 5(2) of the said Act states that every person appointed to fill a permanent vacancy shall be on probation for a period of two years and subject to the provisions of Sub-sections 3 and 4, he shall, on completion of his probation period of two years, be deemed to have been

confirmed. As per Sub-section 3 of Section 5 of the MEPS Act, if in the opinion of the management, the work or behaviour of any probationer during the period of his probation is not satisfactory, the management may terminate his services at any time during the said period after giving him one month's notice or salary of one month in lieu of notice. Thus, the appointment on probation and the termination of the service of the probationer are governed by the provisions of Sub-sections 2 and 3 of Section 5 of the MEPS Act. In addition, Rules 14 and 15 of the MEPS Rules, 1981, have elaborately set out the procedure for the assessment of the probationer's performance and writing of his confidential reports. When a special statute like the MEPS Act has provided for a specific procedure to be followed while terminating the employment of a probationer on the ground of unsatisfactory performance, the said procedure is mandatory and non compliance thereof would vitiate the order of termination and the School Tribunal will be fully justified to interfere with the same and set it aside by directing reinstatement of the appointee/appellant.

14.

15. *Under Schedule 'G' to the MEPS Rules, various forms have been set out and are required to be filled in for the teaching staff and they are, (1) Self-Assessment Form, (2) Confidential Report Form and (3) Reviewing Authority Remarks Form. Under Sub-rule 1 of Rule 15, confidential reports shall be written in respect of the teacher who had worked for six months or more during an academic year commencing from June and the confidential reports so written shall be reviewed by the Chief Executive Officer/President of the management. Whereas the confidential reports of the Head or a teacher*

written by the President shall be reviewed by the Managing Committee as per Sub-rule 2. The respective reporting authority shall arrange to communicate confidentially in writing adverse remarks, if any, to the concerned employee before the end of August every year and representation, if any, from any employee against the adverse remarks communicated to him, shall be decided by the School Committee or the Managing Committee, as the case may be, as per the combine reading of Sub-rules 3 and 4. As per Sub-rule 5 failure to write and maintain confidential reports and to communicate adverse remarks to the employee 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. Further, as per Sub-rule 6 of Rule 15, 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.

The Supreme Court in the case of Progressive Education Society and Anr. v. Rajendra and Anr. : AIR 2008 SC 1442 had an occasion to consider the scheme of Section 5(3) of the MEPS Act and Rule 15 of the MEPS Rules. It held that while Rules 14 and 15 of the MEPS Rules cannot override the provisions of Section 5(3) of the MEPS Act, it has to be said that the requirements of Sub-rule 6 of Rule 15 would be a factor which the school management has to take into consideration while exercising the powers which it undoubtedly has and is recognized under the said section. It further held that there ought to be sufficient material to be brought by the school management before the Tribunal so as to support the order of termination passed at the end of the probationary period and such record must also inspire confidence being bona fide. Such

material cannot be cooked up material and it must be genuine confidential records maintained from time to time and communicated to the teacher. It is also clear from Sub-rule 5 of Rule 15 of the MEPS Rules, that failure to write and maintain confidential reports and to communicate adverse remarks to the employee 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. In the instant case, there was nothing brought on record to show that in the prescribed form, the confidential reports in respect of respondent No. 1 were written and adverse remarks were communicated to her so as to provide her an opportunity to submit her representation against the adverse remarks. In any case, the show cause notice dated 23/6/1995 would not amount to compliance of Sub-rules 1 to 5 of Rule 15 of the MEPS Rules.

Even otherwise, the action of the management in issuing show cause management withdrew the termination order dated 29/4/1995 by its letter dated 15/6/1995 so as to make Appeal No. 73 of 1995 as infructuous and within about a week's time it issued the second show cause notice. The reply to the said show cause notice submitted by the teacher was not taken into consideration. The management did not apply its mind to the allegations levelled against the teacher and the veracity of these allegations was not examined on the basis of the reply submitted by her. In short, it was a stage managed action and it demonstrated the malice with which the management proceeded to issue second termination order dated 1/7/1995. In our considered opinion, the School Tribunal was fully justified in setting aside the order of termination dated 1/7/1995 for non compliance of the requirements of Rule 15 of the MEPS Rules and the learned Single Judge rightly

confirmed the said decision. In the case of Mohammed Haji Saboo Siddik Institution and Ors. v. The State of Maharashtra and Ors. (Supra), the Division Bench did not consider the implications of failure to maintain the confidential reports under Rule 15 of the MEPS Rules and in any case in view of the decision of the Supreme Court in the case of Progressive Education Society (Supra), the said view of this Court in the said case is no more a good law and, therefore, there is no reason to interfere in the concurrent findings recorded by the School Tribunal and the learned Single Judge in the instant case.”

35. In the light of the facts noted as above and the law laid down, the impugned judgments of the School Tribunal are rendered perverse and erroneous. The impugned judgments are, therefore, quashed and set aside. The termination orders of these teachers are quashed and the respective appeals filed by the petitioners are allowed by granting reinstatement in service with continuity from the date of their termination. Hence, these teachers shall be treated as confirmed employees from the date of their terminations.

36. In so far as the claim for backwages is concerned, the Honourable Supreme Court in the matter of Nicholas Piramal India Ltd. Vs. Harising [2015 II CLR 468], has concluded that grant of 50% backwages would be appropriate and reasonable for reducing the hardships and rigors suffered by the employees on account of their

illegal termination. I am, therefore, granting 50% backwages to the petitioners, at the rate of last drawn wages of a regular teacher, which shall be paid by the respondent No.1 management, since the effects of the unlawful acts of the employer shall be suffered by the employer. The State exchequer shall not be burdened for making such a payment towards backwages.

37. These petitions are, therefore, partly allowed and Rule is made partly absolute in the above terms.

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38. At this juncture, the learned Advocate for the Employer/ Management prays for staying this judgment for a period of four weeks.

39. The learned Advocate for the Teachers opposes the said request on the ground that the Teachers are suffering rigours of unemployment.

40. The impugned judgments of the School Tribunal have been quashed and set aside and it has been concluded that the Management has indulged in victimization by picking and choosing only these three Teachers for termination and confirming the services

of six other identically selected and appointed Teachers. For these reasons, the request for staying this judgment is rejected.

(RAVINDRA V. GHUGE, J.)

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