

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

WRIT PETITION NO. 6043 OF 2014

- 1 Smt.Mohinibai Badriprasad Agrawal Shikshan
Prasarak Mandal, Nandurbar,
Office : Shivaji Road, Kasar Galli,
Nandurbar, District Nandurbar.
Through its President.
- 2 The Incharge Head Master,
Mahatma Jyotiba Fule Secondary School,
Lahan Kadwan, Tq.Nawapur,
District Nandurbar.

...PETITIONERS

-VERSU-

- 1 Shri Gokul s/o Pitambar Patil,
Age : 46 years, Occupation : Service,
R/o Near Santoshi Mata Mandir,
Visarwadi, Tq.Navapur,
District Nandurbar.
- 2 The Education Officer (Secondary),
Zilla Parishad, Nandurbar,
District Nandurbar.

...RESPONDENTS

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Advocate for Petitioners : Shri Bagul D.S. and Shri G.D.Jain.

Advocate for Respondent 1 : Shri S P Brahme.

AGP for Respondent 2 : Shri P.N.Kutti.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 18th August, 2016

Oral Judgment :

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

2 On 16.08.2016, after extensively hearing the learned Advocates for the respective sides and considering the request of the learned Advocates, I have passed the following order:-

- “1. I have heard the learned Advocates for the respective sides at length on 27/07/2016, 11/08/2016 and again today.
2. After the conclusion of their submissions and before I could begin the dictation of the judgment, I intimated to the litigating sides that the right of the Management to conduct an enquiry would be sustained subject to placing the respondent/ employee under suspension from the date of alleged oral termination 21/06/2010 and on payment of subsistence allowance as per rules, keeping in view the observations of the Hon'ble Supreme Court in paragraph Nos.8 and 9 of Vidya Vikas Mandal & Anr vs The Education Officer & Another, 2007(3) Mh.L.J. 801 = 2007(11) SCC 352.
3. Mr.Brahme submitted on instructions that even now the respondent is willing to waive all back wages on the condition that he would be given continuity of service and there shall be no disciplinary proceedings by digging up the old charges.
4. Mr.Bagul submits that he would take instructions from the petitioners President and Secretary and make a statement on 18/08/2016.
5. Considering the above, stand over to 18/08/2016. It is made clear that there shall be no further

submissions addressed to the Court.”

3 It is informed by Shri Bagul that the Petitioners are not in a position to make any statement and as such, this petition be considered on it's own merits.

4 The submissions of Shri Bagul can be summarized as follows:-

- (a) The Respondent No.1 / Employee was appointed as an Assistant Teacher with Petitioner No.2/ Institution on 01.06.1999.
- (b) The said Institution was without any grants from the State Government.
- (c) On 31.08.2002, the Education Officer granted approval to the services of the Respondent/ Employee.
- (d) The Employee was absent from 26.03.2010.
- (e) The first notice regarding unauthorized absenteeism was issued on 17.04.2010.
- (f) The Employee appeared before the Management on 21.04.2010 and stated that he was suffering from fever and could not report for duties.
- (g) The second notice was issued on 23.04.2010 which was replied to by the Employee on 27.04.2010.

- (h) The Employee submitted a detailed reply on 29.04.2010.
- (i) The third, fourth and fifth notices dated 01.05.2010, 06.05.2010 and 15.05.2010 issued to the Employee were not replied to.
- (j) The Employee preferred Appeal No.15/2012 before the School Tribunal alleging oral termination on 21.06.2010.
- (k) The Petitioners filed their Written Statement in the appeal and specifically contended that there was no oral termination at the hands of the Management, the Employee is not punished with dismissal from service, he is remaining unauthorizedly absent, he has committed several misconducts of grave and serious nature and therefore, is not reporting for duties for the fear of suffering disciplinary proceedings and the appeal is misconceived.
- (l) By judgment and order dated 16.08.2013, the School Tribunal has erroneously come to the conclusion that the Petitioners have orally terminated the services of the Employee on 21.06.2010.
- (m) The School Tribunal has erroneously granted reinstatement with continuity and full back-wages to the Employee.
- (n) When there was no termination at all in the eyes of law, there is no question of allowing the appeal and granting any relief

pursuant to the setting aside of the purported termination.

5 Shri Brahme, learned Advocate appearing on behalf of the Respondent/ Employee, submits as under:-

- (a) The Employee, after having been appointed as an Assistant Teacher on 01.06.1999, was promoted as Headmaster on 01.06.2004.
- (b) He has not committed any misconduct and merely because he was absent for some period due to illness, the Petitioners felt antagonized and therefore, have restrained him from reporting for duties.
- (c) The Employee desperately tried to report for duties, but in vain.
- (d) Finally, upon being convinced that the Management is intentionally restraining the Employee from reporting for duties on 21.06.2010, he preferred his appeal alleging oral termination.
- (e) The appeal was filed on 25.08.2011 since the Employee was pursuing the Management to withdraw from their acts of restraining him from reporting for duties and upon failing to convince the Management, he finally approached the School Tribunal.

6 Having considered the submissions of the learned Advocates for the respective sides, it is apparent in this case that the contention of the Management that the Employee is himself not remaining present on duties, is pitted against the statement of the Employee that the Management is restraining him from reporting for duties. It is word against word.

7 In the Written Statement filed before the School Tribunal, though the Management contends that the Employee himself is not reporting for duties and is unauthorizedly absent, the Management, besides merely issuing notices to the Employee, did not exercise its right as an Employer to initiate disciplinary proceedings regarding the charge of unauthorized absenteeism against the Employee. On the one hand, the Management contends that the Employee was unauthorizedly absent and on the other hand, the Management, for reasons best known to it, has not initiated any disciplinary proceedings. It also appears from the Written Statement that the Management has taken a stand that the Employee has committed grave and serious misconducts and in order to avoid the disciplinary proceedings, he is not remaining present.

8 During the course of his submissions, Shri Bagul submits, on

instructions from the Petitioners, that they could not initiate the disciplinary proceedings against the Employee because he was not available and was not reporting for duties. I find such contention to be a lame excuse. It cannot be accepted that the Management is not aware of the law especially the MEPS Act, 1977 and the MEPS Rules, 1981. Rule 16(3) of the MEPS Rules, 1981 clearly provides that if a permanent employee is remaining unauthorizedly absent, the Management will have to initiate proceedings against him. The other option available under the MEPS Rules, 1981 is that the Management will have to wait for a period of three years, during which the permanent employee is unauthorizedly absent continuously, so as to draw a conclusion that the permanent employee has abandoned employment. It is beyond comprehension that the Management issued five notices in a period of four weeks from 17.04.2010 till 15.05.2010 alleging that the Employee is unauthorizedly absent, but refrained from initiating the disciplinary proceedings.

9 I also do not find any statement in the Written Statement filed by the Management before the School Tribunal that since the Respondent/ Employee is not terminated, he may report for duties subject to the Management exercising it's right to initiate disciplinary proceeding against him.

10 In contra distinction, the Respondent/ Employee alleged oral termination from 21.06.2010. After having received the Written Statement from the Management in the appeal before the School Tribunal, it was open for the Employee to immediately make a claim before the School Tribunal through an application seeking leave to report for duties. I do not find any such application having been filed. As such, it appears that both the sides have merely taken the stands contradictory to each other and yet, neither the Management made an offer to allow the Employee to report for duties, nor has the Employee put forth a request for joining duties during the pendency of the proceedings before the School Tribunal.

11 It emerges from the record and especially from the contentions of the Management that the Employee has been remaining unauthorizedly absent and has committed several misconducts which are of grave and serious nature. All these misconducts apparently are preceding the purported date of oral termination which is 21.06.2010.

12 In the peculiar facts of this case, I am of the view that though on the one hand, the right of the Management to initiate the disciplinary proceedings cannot be curbed or curtailed and on the other hand, in the light of the contentious issue regarding unauthorized absenteeism, it would not be fair to direct reinstatement of the Employee, lest it would

amount to prejudging the matter and concluding that there was no unauthorized absenteeism on the part of the Employee.

13 I am arriving at this conclusion in the peculiar facts of this case and particularly in the light of paragraphs 8 and 9 of the judgment of the Honourable Supreme Court in *Vidya Vikas Mandal (supra)*, which read thus:-

“8. As rightly pointed out by the learned counsel for the appellants, Rule 37(6), which is mandatory in nature, has not been strictly complied with. The Inquiry Committee comprising of three members, as already noticed, only one member nominated by the Management has submitted his Inquiry report within the time stipulated as per Rule 37 (6) and admittedly, the other two members nominated by the employee and an independent member have not submitted their report within the time prescribed under Rule 37 (6). However, the learned Judges of the Division Bench, though noticed that the two members out of three found the employee not guilty, failed to appreciate that the said findings by the two members of the committee were submitted after the expiry of the period prescribed under Rule 37(6). In our opinion, the report submitted by individual members is also not in accordance with the Rules. When the Committee of three members are appointed to inquire into a particular matter, all the three should submit their combined report whether consenting or otherwise. Since the report is not in accordance with the mandatory provisions, the Tribunal and the learned Single Judge and also the Division Bench of the High Court have committed a serious error in accepting the said report and acted on it and thereby ordering the reinstatement with back wages. Since the reinstatement and back

wages now ordered are quite contrary to the mandatory provisions of Rule 37 (6), we have no hesitation in setting aside the order passed by the Tribunal, and learned Single Judge and also of the Division Bench of the High Court. In addition, we also set aside the order passed by the Management based on the report submitted by the single member of the Committee, which is also quite contrary to the Rules.

9. *In view of the order now passed by this Court, the Rule 36(2)(a) is now to be invoked and as per the said Rule, one member from amongst the members of the Management is to be nominated by the Management or by the President of the Management if so authorised by the Management, and one member is to be nominated from amongst the employees of any private school and the third member to be chosen by the Chief Executive Officer from the panel of teachers on whom State/National Award has been conferred. We direct the Management of the School to constitute the Committee in accordance with sub-Rules (i), (ii) & (iii) of Rule 36(2)(a) to go into the matter afresh. The respondent no.2, the employee, will be now treated under suspension and he will be entitled to the subsistence allowance as per rules with effect from the date of termination of his services. The inquiry shall be completed by the Committee within a period of six months from the date of their nomination/constitution.”*

14 Shri Bagul strenuously submits that as the Employee was never terminated, there can be no presumption that he should be placed under suspension from the date of termination which is 21.06.2010. He submits that since there was no termination at all, the issue of unauthorized absenteeism will have to be kept open to be considered in

the disciplinary proceedings. The Management is willing to place the Respondent/ Employee under suspension forthwith by seeking permission under Rule 35 of the MEPS Rules, 1981 from the Education Officer and is willing to initiate the disciplinary proceedings under Rules 36 and 37.

15 Shri Brahme has relied upon the judgment of this Court in the matter of *Madhukar Namdeo Patil vs. The Chairman, Sudhagad Education Society*, **2000(4) Mh.L.J. 206**, contending that no Rule under the MEPS Rules, 1981 contemplates automatic suspension. He further submits that Section 4(6) of the MEPS Act, 1977 has been dealt with by this Court in *Madhukar Namdeo Patil judgment* (supra) by which no employee can be suspended, dismissed, removed or his services cannot be otherwise terminated except in accordance with the provisions of the MEPS Act, 1977 and the Rules made thereunder. Considering the facts in the said case, I do not find that said judgment is applicable to this case.

16 If I am to accept the submissions of Shri Brahme, the Respondent/ Employee will have to be granted reinstatement prospectively since the issues as to whether, he was unauthorizedly absent or he was attempting to report for duties and the Management purportedly restrained him, are to be gone into. Such contentious issues cannot be considered by this Court in its writ jurisdiction. Unless this

allegation of unauthorized absenteeism is not properly gone into by the Enquiry Committee under Rules 36 and 37 of the MEPS Rules, 1981, there cannot be any conclusion as to which of the sides is narrating the truth.

17 The submissions of Shri Brahme cannot be accepted even for the reason that granting reinstatement from the purported date of termination which is 21.06.2010 in the face of the Management contending that the Employee was never terminated, would amount to presuming falsehood on the part of the Management/ Employer. If the Employee was sure of having been restrained from joining duties, he would have filed an application before the School Tribunal upon receipt of the Written Statement so as to seek permission to report for duties forthwith. Failure to do so and failure to seek any order from the School Tribunal for joining duties in the face of the contentions of the Management in the Written Statement that the Employee had never been terminated, cannot be countenanced and at the same time, the Employee cannot be rewarded with back-wages.

18 In my view, upon considering the ratio laid down by the Honourable Supreme Court in paragraphs 8 and 9 of *Vidya Vikas Mandal (supra)* reproduced above, it appears to be equitable to keep the Respondent/ Employee under suspension so as to ensure that the

Management/ Employer follows the due procedure of law in conducting a proper enquiry.

19 The School Tribunal has arrived at a conclusion that there was oral termination from 21.06.2010. Considering the said date as being the date from which the rival contentions of the parties originate, I deem it proper to direct the reinstatement of the Respondent/ Employee from 21.06.2010 and to be treated as being under suspension subject to payment of suspension allowance strictly in accordance with Rule 35 of the MEPS Rules, 1981. In doing so, ends of justice would be met meaning thereby, on the one hand, the right of the Management to initiate the disciplinary proceedings would not be taken away and on the other hand, the contention of the Employee that he was not unauthorizedly absent, but was orally terminated from 21.06.2010, would be gone into by the Enquiry Committee under Rules 36 and 37.

20 In the light of the above, this Writ Petition is partly allowed and the impugned judgment of the School Tribunal to the extent of directing grant of back-wages is set aside. The Petitioner/ Management shall treat the Respondent/ Employee to be under suspension w.e.f. 21.06.2010 and shall initiate the disciplinary proceedings under Rules 35 and 36 of the MEPS Rules, 1981 under the following conditions:-

- (a) The Petitioner/ Management shall pay the subsistence allowance to the Respondent/ Employee as per the MEPS Rules, 1981 from 21.06.2010, within a period of SIX WEEKS from today and shall continue to pay his subsistence allowance until the enquiry proceedings culminate into a final order as per law.
- (b) The Petitioner/ Management shall follow Rules 36 and 37 of the MEPS Rules, 1981 and shall initiate the disciplinary proceedings within a period of SIX WEEKS from today, if it so desires, failing which it shall be presumed that the Petitioner/ Management does not desire to initiate the disciplinary proceedings and after passage of six weeks as directed above, the Respondent/ Employee will then be treated as being entitled to full wages w.e.f. 21.06.2010.
- (c) Since this Court is relying upon paragraph 9 of *the Vidya Vikas Mandal judgment (supra)*, the concerned Education Officer shall pass necessary orders according permission for suspension of the Respondent/ Employee w.e.f. 21.06.2010.
- (d) In the event, considering that the Petitioner / Management is receiving 20% grant-in-aid from the Government and the suspension allowance is to be paid from the said grants, the Education Officer shall, accordingly, take a decision strictly in

accordance with the law applicable.

- (e) The issue of unauthorized absenteeism and any other misconduct as is alleged by the Petitioner/ Management in the Written Statement filed before the School Tribunal, shall be subject to the result of the disciplinary proceedings.
- (f) The disciplinary proceedings/ departmental enquiry, if any initiated, shall be completed in accordance with the time frame as is prescribed under the MEPS Rules, 1981.

21 Rule is made partly absolute in the above terms.

kps

(RAVINDRA V. GHUGE, J.)