

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.11707 OF 2015

- 1 The President,
 Lewa Educational Union,
 Zilla Peth, Jalgaon,
 District Jalgaon.
- 2 The Principal,
 Dr. Annasaheb G. D. Bendale
 Mahavidyalaya,
 Zilla Peth, Jalgaon.
 District Jalgaon.
 ...Petitioners...

Versus

- 1 Ajay S/o Gopalrao Firke,
 Age 29 years, Occu : Service,
 R/o 54, Vidyanagar,
 Zilla Peth, Jalgaon.
 Tq. & District Jalgaon.
- 2 The Registrar,
 North Maharashtra University,
 Jalgaon.
- 3 The Joint Director,
 Higher Education, Jalgaon
 Region, Ramdas Colony,
 Jalgaon, Dist. Jalgaon.
- 4 The State of Maharashtra,
 Education Department,
 Mantralaya, Mumbai-32.
 ...Respondents...

WITH

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WRIT PETITION NO.11708 OF 2015

- 1 The President,
Lewa Educational Union,
Zilla Peth, Jalgaon,
District Jalgaon.
- 2 The Principal,
Dr. Annasaheb G. D. Bendale
Mahavidyalaya,
Zilla Peth, Jalgaon.
District Jalgaon.
...Petitioners...

Versus

- 1 Shivdas S/o Bhanudas Barela,
Age Major, Occu: Service,
R/o Larkame,
Post Melane, Tq. Chopra,
District Jalgaon.
- 2 The Registrar,
North Maharashtra University,
Jalgaon.
- 3 The Joint Director,
Higher Education, Jalgaon
Region, Ramdas Colony,
Jalgaon, Dist. Jalgaon.
- 4 The State of Maharashtra,
Education Department,
Mantralaya, Mumbai-32.
...Respondents...

WITH

WRIT PETITION NO.11711 OF 2015

- 1 The President,
Lewa Educational Union,
Zilla Peth, Jalgaon,
District Jalgaon.

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- 2 The Principal,
 Dr. Annasaheb G. D. Bendale
 Mahavidyalaya,
 Zilla Peth, Jalgaon.
 District Jalgaon.
 ...Petitioners...

Versus

- 1 Deepak S/o Pandit Surwade,
 Age Major, Occu: Service,
 R/o "Suyog" Near Mamaji
 Talkites, Bhusawal,
 Tq. Bhusawal. Dist. Jalgaon.
- 2 The Registrar,
 North Maharashtra University,
 Jalgaon.
- 3 The Joint Director,
 Higher Education, Jalgaon
 Region, Ramdas Colony,
 Jalgaon, Dist. Jalgaon.
- 4 The State of Maharashtra,
 Education Department,
 Mantralaya, Mumbai-32.

...Respondents...

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Shri V. T. Choudhary , Advocate for petitioner.
Shri P. R. Katneshwarkar, Advocate for respondent No.1.
Shri V. G. Shelke, AGP for respondent Nos.3 & 4.
Respondent No.2 served.

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CORAM: RAVINDRA V. GHUGE, J.

DATE: 08.02.2016

ORAL JUDGMENT :

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

2] The petitioners in all these three petitions is the same educational institution. All the first respondents in these petitions are identically situated employees. The respondent nos.2 & 3 are the same University and Joint Director of Higher Education. The respondent no.4 in all these petitions is the State of Maharashtra. Identical judgments are delivered by the University and College Tribunal impugned in these petitions by the petitioner – management.

3] In the light of the above, I have taken up all these petitions together for hearing. For the sake of clarity, the petitioner will be referred to as the employer – management and the first respondents would be referred to as the employees in this judgment.

4] Shri V.T. Choudhary, learned Advocate appearing on behalf of the management has canvassed at length. His submissions can be summarized as follows:-

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a] The respondent – employees were appointed by specific appointment orders.

b] The appointment orders clearly indicate that the services of these employees were only for one year on temporary basis as Junior Clerk-cum-Typist.

c] Their services could be terminated without assigning any reasons and with one month's notice.

d] By order of termination dated 23.2.2010, one month notice was given to the employees and their services were terminated with effect from 27.3.2010.

e] Rule 7(1) and 7(6) of the Maharashtra Non-Agricultural Universities and Affiliated Colleges Standard Code Rules, 1984, are applicable to the employees.

f] After the completion of the temporary engagement of one year, their services were discontinued by giving them more than one month's notice.

g] The employees filed appeals before the

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University and College Tribunal challenging their termination.

h] The College Tribunal referred to Rule 7(1) to 7(5), but has totally ignored Rule 7(6) while delivering the impugned judgments by which the appeals were allowed, the petitioner was directed to reinstate the employees and pay them 50% back wages alongwith Rs.1,000/- as costs.

i] This is the second round of litigation between the parties.

j] By an earlier judgment, the appeals were dismissed. The employees approached this Court and by order dated 1.3.2011, the three petitions filed by the employees were allowed and the appeals were restored back to the file of the University Tribunal by setting aside the impugned judgments.

k] Even if it is presumed that the employees are under probation, the petitioner – employer has a right to disengage them on the ground of unsatisfactory performance.

l] The judgments of the Apex Court in the

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cases of *Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre* (AIR 1999 SC 983) and *V.P. Ahuja v. State of Punjab* (2000 (3) SCC 239) were wrongly relied upon by the College Tribunal.

m] The Full Bench of this Court in the matter of *Ramkrishna Chauhan v. Seth D.M. High School & others* (2013(2) Mh.L.J. 713 has laid down the law that once the terms and conditions of employment set out in the appointment order are accepted, they are not open to be challenged subsequently, which has been lost sight of by the Tribunal.

n] Presently, the management on account of reduction in the strength of workers finds the strength of non-teaching employees reduced and hence the employees cannot be reinstated in employment.

o] The impugned judgment of the Tribunal is perverse and erroneous and deserves to be quashed and set aside.

p] The order of termination of the employees is not stigmatic but is an innocuous order vide which their services have been terminated

simplicitor.

5] Shri Katneshwarkar, learned Advocate appearing on behalf of the respondent – employees in all these matters supports the impugned judgment. He submits that the contention of the petitioner that once the terms and conditions of employment are accepted, they cannot be challenged subsequently, would also apply equally to the petitioner – management.

6] All these employees were appointed on probation as is explicit from their appointment orders. All of them have been terminated after the completion of one year probation. While terminating their services, the management has, on the one hand stated that their services are unsatisfactory and on the other hand, it is stated that their behaviour is whimsical, eccentric and hence they cannot be continued in employment (in relation to the first employee in the first petition). With regard to the other two employees, the termination order mentions that they have not been working properly. They have been committing many mistakes in their employment

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and despite having been orally warned frequently, they are not working properly, they are inefficient and incompetent.

7] Shri Katneshwarkar, therefore, submits that firstly, the management cannot turn a volte-face to contend that the employees were appointed on a temporary basis when their appointment orders indicate that they were appointed on probation for one year.

8] Secondly, though it is contended that an innocuous termination order has been issued, the termination orders would speak for itself. Specific charges have been leveled upon the employees as a ground for terminating their services. As such, the reliance placed by the Tribunal upon the judgments of the Apex Court in the cases of *Dipti Prakash Banerjee* and *V.P. Ahuja* (supra) cannot be said to be mis-placed.

9] He further submits that he would also place reliance upon the judgment of the Full Bench of this Court in the case of *Ramkrishna Chauhan* (supra) to

contend that as like the employees, even the petitioner cannot question its own orders of appointment by selectively taking up a favourable clause and attempting to ignore a vital clause.

10] He further submits that the plea that the strength of non-teaching employees has reduced cannot be a ground for nullifying the impugned order of the College Tribunal.

11] The learned AGP appearing on behalf of the State authorities and the learned Advocate for the University submit that the dispute is between the educational institution and the employees and as such, they have no reason to assail the impugned judgment.

12] I have considered the submissions of the learned Advocates as have been recorded hereinabove.

13] The whole issue turns upon the appointment orders issued by the management to the employees. No doubt, in Clause (2) of their appointment orders, the

management has stated that the appointment is temporary for one year and that they were likely to be discontinued by giving one month's notice. However, Clauses (3) and (4) cannot be ignored. Clauses (1) to (4) read as under:-

"1] With reference to your application, dated 29/12/2009 the Registrar/Principal pleased to inform you that you are hereby appointed to the post of Junior Clerk cum Typist in the College on a starting pay of Rs. 3050/- p.m. in the time scale of pay of Rs. 3050-75-3950-80-4590.

2] Your appointment is temporary for one year i.e. up to 24/02/2010. During this period your services are likely to be discontinued by giving one month notice on either side.

3] After the completion of the probation period of one year normally you will be entitled to annual increment subject to your satisfactory performance and conduct and a report thereof from concerned head of the Section/Unit.

4] Your appointment on probation shall not be deemed as confirmed unless you are issue with an order of confirmation at the end of your probation."

14] It is apparent from Clauses (3) and (4) reproduced above that the employees were intimated by the

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employer that after completion of the probation period of one year satisfactorily, they would be entitled for an annual increment subject to a good report from the concerned head of the section. Clause (4) as well intimates the employees that they would not stand automatically confirmed in employment after completion of probation until an order of confirmation is issued at the end of the probation.

15] The Full Bench of this Court in *Ramkrishna Chauhan* case (supra) has observed in paragraph nos.24, 26 and 28 as under:-

"24] The other legal principle, which is indisputable, is that, if the parties accept the terms and conditions stipulated in the appointment order, later on, it is not open to the employee to challenge that appointment, being contrary to the Rules or on the ground that the terms and conditions stipulated therein were not legally valid. This legal position is restated in para 8 of *Kalpataru Vidya Samasthe* (supra). In the facts of the present case, it is noticed that the initial appointment of the Writ Petitioner, in the leading Writ Petition, was on temporary basis for a limited period. After his service was terminated, once again he was appointed in the

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following academic year, on the same post but, on temporary basis. When the said Petitioner was appointed in the succeeding academic years, he had become fully aware about the terms and conditions of his initial appointment, yet he continued to be in the employment, without any demurer. Suffice it to observe that if the appointment order mentions that the appointment is on temporary basis or for a limited period, it is not open to the employee to assume that he was appointed on probation against permanent vacancy, nor it is open to the School Tribunal or the Court of law to assume that fact. That is a question of fact to be pleaded and proved in appropriate proceedings, on case to case basis. We hold that there is no legal fiction or deeming provision that every appointment made against the permanent vacancy, is deemed to be on probation, though the Management makes that appointment on temporary basis, having found that the candidates appeared in the selection process were unsuitable.

26] However, we are bound by the exposition of the Apex Court in the case of Hindustan Education Society (supra), which had occasion to consider Section 5 of the Act. In that case, the appointment of Respondent No. 1 therein was against a clear vacancy but on purely temporary basis, for a limited period of eleven months. The Court, after considering Section 5(1) and (2) of the Act, opined that the said respondent cannot be

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treated to be appointed as a permanent employee or that he was appointed on probation. Even in the case of *Bhartiya Gramin P. Sanstha* (supra), the Apex Court was dealing with person appointed for a period of two years. No doubt, in that case, the appointment was on purely temporary basis, because of non availability of reserved candidate to fill in permanent vacancy. But, the principle restated in this decision, is that, when the appointment letter expressly states the terms and conditions, it is not open to assume that the appointment was on probation, merely because of availability of permanent vacancy. Even in the unreported decision of the Apex Court in the case of *Chatrapati Shivaji Shikshan Prasarak Mandal* (supra), the same view has been reiterated. In the case of *Priyadarshini Education Trust* (supra), the Division Bench of this Court has culled out the gist of the decisions on the point, in paragraph 9 thereof. Notably, the issue was directly considered by the learned Single Judge, after the decision in *Hindustan Education Society* (supra), in the case of *Pandurang Maruti Dhumal* (supra). As a matter of fact, the Learned Single Judge expressed his inability to take a different view because of the said decision of the Apex Court. His Lordship granted leave to appeal under Article 133 read with 134(A) of the Constitution of India, as prayed by the Petitioner, as the issue was recurring one and involved in large number of

matters. However, due to dismissal of the SLP (Civil) No. 14795 of 1999 against the decision in Writ Petition No.3488 of 1999 in the case of *Pandurang Dhumal*, vide order dated 7th July, 1999, it is clear that the Apex Court did not find it necessary to examine the question any further, having been answered in the decision in *Hindustan Education Society* (supra).

28] Accordingly, we are inclined to answer the issue in the negative. We hold that it is not open to the School Tribunal to assume as of fact that the appointment made against a clear and permanent vacancy is deemed to be on probation, within the meaning of Section 5(2) of the Act. The School Tribunal cannot disregard the terms and conditions of the letter of appointment, if it expressly provides that the appointment is on temporary basis, for a limited term."

16] In the light of the above, neither the employees nor the management can be permitted to go against the terms and conditions of the appointment order, much less, pick and choose a single clause, which may appear to be favourable to the case of the management.

17] Rule 7 under Chapter II of the Standard Code Rules, 1984, referred to above, reads as under:-

"7. Probation –

1] The employee appointed to a permanent post by selection shall be on probation for a period of two years. The Competent Authority may, in exceptional circumstances, reduce the period of probation upto one year, after reviewing his confidential reports : Provided that the employee appointed to officiate in higher post for a temporary period shall not be considered to be on probation.

2] During the period of probation, the employee shall comply with conditions of successful completion of probation, prescribed by the Competent Authority from time to time.

3] The Head of the Department/Section (Assessing Authority) under whom the employee on probation is working shall send to the Registrar or the Principal his report in Form 3 appended to these rules about his work and conduct, after every six months from the date of his joining. The deficiencies, if any, mentioned in the report shall be conveyed to the employee on probation for the guidance.

4] The Assessing Authority under whom the employee or probation is working, shall send to the Registrar or the Principal at least three months before the expiry of probationary period, a report about the work and conduct of the employee with specific recommendations for his confirmation in service or otherwise. If

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the Assessing Authority recommends that the employee should be confirmed in the service within less than two years of probationary period, he should substantiate his recommendation. When he recommends action other than confirmation, he should furnish sufficient particulars about the probationer's performance and conduct in support of his recommendation.

5] On receipt of each report, the Registrar or the Principal, shall place the report and the recommendations of the Assessing Authority before Competent Authority for consideration.

The Competent Authority may--

- (a) confirm the probationer in service, from a specific date, or
- (b) extend his probationary period, maximum by one year, six months at a time, on expiry of which he shall either be confirmed or his service shall be dispensed with, or
- (c) terminate his service, or
- (d) revert him to the post held by him, if any, under the University or the same Management, prior to his appointment on probation :

Provided if the person on probation enjoys leave, his probationary period shall deemed to have been extended to the extent of leave taken by him.

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6] If on the opinion of the Appointing Authority, the work or behaviour of any probationer or during the period of the probation is not satisfactory the appointing authority may without assigning any person terminate the services of the probationer at any time during the period of his probation, after giving him one month's notice."

18] Assuming for the sake of assumption that the contention of the petitioner that the probation could not be for one year and should be read as being for two years is accepted, the management was required to follow a particular procedure as set out in Clauses (3), (4) and (5) of Rule 7 before concluding that the services of the employees were not satisfactory. Only after the compliance of Clauses (3), (4) and (5), could the management fall back upon Rule 7(6) for terminating the services of the employees on the ground of unsatisfactory performance.

19] It is trite law that an employee is placed under probation so as to test his suitability for the organization. The unsuitable employee cannot be foisted

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upon an employer. However, at the same time, the employer is cast with the duty of intimating the shortcomings to the employee and afford him an opportunity of improving his conduct while considering his suitability. If finally the employer finds that the candidate is not suitable for the organization, his probation period can be brought to an end or he can be disengaged by efflux of time on the ground of unsatisfactory work and having been found unsuitable for the organization.

20] The termination order issued to each of these employees cannot be said to be an innocuous order. Firstly, Rule 7(3), (4) and (5) have not been complied with by the management while testing the suitability of the employees. Without such compliance, the management has ruled that their work is unsatisfactory. However, the termination order further makes a reference to the conduct of the employees, which cannot be said to be non-stigmatic. In the first case, it is stated that the behaviour of the employee is whimsical / eccentric and he is incompetent. In the second and third cases, it is

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stated that they continuously commit mistakes in their working and despite having been orally warned on several occasions, they have not improved and are, therefore, incompetent.

21] In the light of the above contents of the order of termination, I find that the said orders can be termed as being stigmatic. The College Tribunal has, therefore, rightly placed reliance upon the judgment of the Hon'ble Supreme Court in the cases of *Dipti Prakash Banerjee and V.P. Ahuja* (supra). It has been held in the said two cases that the order of termination of a temporary or a probationer, if indicates a stigmatic cause, the said order cannot be sustained unless the charges have been proved against the employee.

22] Insofar as the contention of the management that the strength of non-teaching staff has been reduced is concerned, that would not absolve the management from reinstating the respondent — employees. After reinstatement, if the management finds that these employees are in excess, the management can take recourse

to the appropriate procedure laid down in law and by considering the principle of 'last come first go', could initiate legal steps.

23] The petitioner has also contended that none of the employees are entitled for back wages. The principle of 'no work no wages' should be made applicable. I find that the College Tribunal has granted 50% back wages to these employees after concluding that their termination is stigmatic and deserves to be set aside. The Apex Court in the case of *Nicholas Piramal India Ltd. v. Harisingh* (2015 (2) CLR 468) considered the case of grant of 50% back wages and concluded that the said order of granting 50% back wages cannot be faulted considering the hardships suffered by the employees.

24] As such, I do not find any reason to interfere with the conclusion of the Tribunal of granting 50% back wages to the employees.

25] In the light of the above, these petitions, being devoid of merit, are, therefore, dismissed. Rule

is discharged. There shall be no order as to costs.

26] At this juncture, the learned Advocate for the petitioner prays that this order be stayed and since the back wages have been deposited in this Court, the stay be granted for a period of four weeks.

27] The learned Advocate for the employees submits that the employees are out of employment from 27.3.2010 and despite having succeeded in litigation, are kept out of employment. This is their second round of litigation upto the High Court. As such, they be permitted to withdraw the amounts deposited if the request for stay to this order for four weeks is to be accepted.

28] In the light of the above, this order shall stand stayed for a period of four weeks on the condition that the respondent – employees are permitted to withdraw the amount deposited by the petitioner – management in this Court by giving an undertaking on affidavit that they would repay the amount to the management within three months in the event they are unsuccessful in this

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litigation in the Hon'ble Apex Court.

29] The respondent – employees shall file copies of their election identity cards and PAN cards or Aadhar Cards alongwith the undertaking on affidavit while withdrawing the amounts.

(RAVINDRA V. GHUGE, J.)