

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.4578 OF 2003

Bhairavanath Shikshan Sanstha & Anr. ... Petitioners

vs.

Ujwala Ramdas Ahire & Ors. ... Respondents

Mr. Sanjiv A. Sawant a/w Ms. Ruchita Kadam for the Petitioners.

Mr. Yatin Malvankar i/b Mr. S.S. Pakale for the Respondent No.1.

Mr. J.A. Madane, AGP for the Respondent Nos.2 and 3/State.

Coram : A.A.Sayed, J.

Date : 27 April 2017

JUDGMENT:

1 The challenge in this Petition under Articles 226 and 227 of the Constitution, is to the judgment and order dated 29 April 2003 passed by the School Tribunal, Kolhapur Region, Kolhapur in an Appeal filed by the Respondent No.1/original Appellant-Assistant Teacher under section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ('MEPS Act' for short). By the impugned order, the Appeal came to be allowed and the Petitioner Management was directed to reinstate the Respondent No.1/original

Appellant on the original post with the back-wages and incidental benefits including continuity of service, difference in salary, etc. from the date of termination till reinstatement.

2 The case of the Respondent No.1/original Appellant in her Appeal before the School Tribunal in a nutshell was as follows:

She belongs to the Scheduled Caste and acquired the qualification of M.A., B.Ed. An advertisement was published by the Petitioner-Management for filling up the post of Assistant Teacher belonging to Scheduled Caste. She accordingly applied and was recommended by the District Social Welfare Officer and State Selection Board. After interview by the Petitioner Management, she was selected for the post of Assistant Teacher on a permanent vacant post and issued an appointment order on 17 June 1994. She joined service from 17 June 1994 and had become a permanent employee of the Petitioner Management. However, on 25 March 1996, the Petitioner Management had issued a letter to her informing her that her services will be terminated from 30 April 1996. No charge sheet was served on her and no enquiry was conducted by the Petitioner-Management and she was terminated without granting an opportunity to explain the charge. The reasons given in the termination order were vague and not sufficient for her termination.

3 The Petitioner-Management/original Respondent Nos. 1 and 2 had filed Written Statement opposing the Appeal of the Respondent No.1. Their case was as follows:

The Respondent No.1 was appointed as an Assistant Teacher on on probation by appointment letter dated 17 June 1994. After the appointment it was noticed that the work of Respondent No.1 was not satisfactory. The Respondent No.1 was not staying in the village where the school was situate and she used to come late to the school and used to go early before the closing time of the school. She was in the habit of going on leave without an application for leave and without getting the leave sanctioned. The leave availed by the Respondent No.1 was in excess of the permissible leave according to the rules. The Respondent No.1 used to make applications to the Education Officer directly and not to the school authority. The Petitioner Management have communicated the Respondent No.1 about her misconduct and improper working in the school and she was given number of opportunities to improve herself. The Petitioner-Management had no alternate but to terminate the services of the Respondent No.1 because of unsatisfactory work and behaviour in the school. No enquiry was necessary as the Respondent No.1 was on probation.

4 After hearing the parties, the School Tribunal passed the impugned order as indicated in para 1 hereinabove.

5 I have heard learned Counsel for the Petitioners-Management and the learned Counsel for the Respondent No.1. It is noticed that after passing of the impugned order dated 29 April 2003 by the School Tribunal, the Petitioner Management had filed the present Petition and on 12 December 2003 this Court had stayed the direction of the School Tribunal in respect of payment of back-wages. However, this Court did not grant stay to the direction of the School Tribunal granting reinstatement and granted two weeks to the Respondent No.1 to report for duty. Thus, by virtue of the interim order, the Respondent No.1 came to be reinstated from the academic year 2003-04 and is continuing service in the school till date.

6. It is an admitted position that the Respondent No. 1-Assistant Teacher was on probation when she was terminated. The provisions governing a probationer are found in section 5 of the MEPS Act and Rules 14 and 15 of MEPS Rules. Section 5 of the MEPS Act and as it then stood and Rules 14 and 15 of the MEPS Rules, read as under:

“5 Certain obligations of Management of private schools:

(1)

(2) Every person appointed to fill a permanent vacancy shall be on probation for a period of two years. Subject to the provisions of sub-section (4) and (5), he shall on completion of this probation period of two years, be deemed to have been confirmed.

(3) 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.

(4)

(4A)

(5)

14. Assessment of employees work.

(1) At the beginning of each term, the teacher shall prepare the plan of his academic programme and at the end of the academic year, prepare a report of the work done by him and submit it to the Head.

(2) Each employee on the teaching and non-teaching staff of a school shall submit the report of self-assessment in the respective Form in Schedule "G" within one month after the end of a year.

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 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 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.”

7. In **Vinayak Vidhyadayini Trust through its Secretary/Trustee & Anr. vs. Aruna T. Prabhu & Ors., 2010(4) Bom.C.R. 543**, the Division Bench of this Court considered the aforesaid provisions of the MEPS Act and Rules. Following the judgment of the Supreme Court in the case of *Progressive Education Society v. Rajendra*, (2008) 3 SCC 310, the Division Bench in paragraphs 13 and 15 held as follows:

“13 ... 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.

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 v. Rajendra*, 2008(2) Mh.L.J. (SC) 715 : (2008) 3 SCC 310 : 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.”

8. A learned Single Judge of this Court in the case of **Anjuman-E-Taleem and anr vs. State of Maharashtra and anr, 2015 (3) MhLJ 98**, following the aforesaid judgment of the Division Bench, held in paragraphs 9 to 12 as follows:

“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”.

9. In the present case, no confidential reports of the Respondent No. 1 were produced before the School Tribunal. As a matter of fact no such confidential reports of the Respondent No. 1 were written or

maintained. No adverse remarks, if any, were communicated to her so as to provide her an opportunity to make a representation against the adverse remarks. In these circumstances, having regard to the exposition of law in the aforementioned judgments, the work of the Respondent No. 1 would have to be treated as satisfactory and the order of termination was therefore rightly set aside by the School Tribunal. Even otherwise, it is noticed that there was nothing adverse against the Respondent No. 1 so far as her performance is concerned and the grievance of the Petitioner Management was essentially about the Respondent taking leave and coming late to School and leaving early. The School Tribunal in the impugned order has observed that during the tenure of the Respondent No. 1, the result of her subject was satisfactory. The School Tribunal found that the material produced before it is not sufficient to hold that the work of the Respondent No.1 is unsatisfactory during her probation period and rightly observed that it was the duty of the Petitioner Management to give her reasonable opportunity to improve in case of minor mistakes. In **Kunwar Arun Kumar vs. U.P. Hill Electronics Corporation Ltd. & Ors., (1997) 2 SCC 191**, relied upon by the learned Counsel for the Petitioner Management, the provisions of MEPS Act and Rules did not fall for consideration and the said judgment would therefore be of no assistance.

10. So far as the issue of backwages is concerned, the learned Counsel for the Petitioner Management contended that the School Tribunal has wrongly granted backwages to the Respondent No. 1 for the period from termination i.e. from 30 April 1996 till the date of reinstatement pursuant to the interim order of this Court dated 3 December 2003. He placed reliance upon the judgment of the Supreme Court in the case of **Deepali Kundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya**, (2013) 10 SCC 324. In the said case, the Supreme Court after reviewing all the judgments on the issue of backwages held in paragraph 38 as under:

“38. The propositions which can be culled out from the aforementioned judgments are:

38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or 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.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to 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. This is so because it is

settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of

infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in *Hindustan Tin Works (P) Ltd. v. Employees*, (1979) 2 SCC 80 : 1979 SCC (L&S) 53

38.7. The observation made in *J.K. Synthetics Ltd. v. K.P. Agrawal*, (2007) 2 SCC 433: (2007) 1 SCC (L&S) 651 that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three-Judge Benches (1979) 2 SCC 80 : 1979 SCC (L&S) 53, *Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court*, (1980) 4 SCC 443 : 1981 SCC (L&S) 16, referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.”

11. Thus, the employee who is seeking to claim backwages is in the first instance required to plead or make statement before the Adjudicating Authority/Tribunal/Court that he was not gainfully employed. It is thereafter that the burden shifts on the employer. This is because if the employee is infact gainfully employed elsewhere and drawing the same or more salary, the said employee may not be entitled to backwages. In the case in hand, it is noticed that there was no Affidavit filed before the School Tribunal by the Respondent No.1

that she was not gainfully employed elsewhere. The School Tribunal by the impugned order has granted full backwages mechanically without any such Affidavit having been filed before it by the Respondent No.1. There is no discussion in the impugned order by the School Tribunal whether or not the Respondent No. 1 was not gainfully employed elsewhere or the reasons why 100% backwages need to be awarded to the Respondent No.1 even in absence of any such statement/Affidavit. No such Affidavit has been filed even in the present proceedings by the Respondent No.1. In these circumstances, the learned Counsel for the Petitioner Management would be justified in his grievance that the initial burden has not been discharged by the Respondent No.1. Moreover, the conduct of the Respondent is also required to be considered for the grant of backwages. It is an admitted position that the Respondent No.1 during the period of probation had on several occasions come late to school and had even left early. She also did not attend school on several occasions even though her leave was not sanctioned. It is an admitted position that several memos were served upon her and the Respondent No.1 even apologized to the Petitioners Management in respect of her late-coming and leaving early and remaining absent. The Respondent No.1 was on probation and such conduct is least expected of a probationer who is looking to be confirmed after the period of probation. A teacher is a role model for the students and is required to maintain discipline for the students to

emulate. In my view, the School Tribunal was not justified in granting backwages to the Respondent No.1 for the period for which she has not rendered services. However, in the facts and circumstances of the case, I am inclined to grant the benefit of continuity of services and consequential benefits to the Respondent No.1 for the said period. Even otherwise, the learned Counsel on instructions from the Respondent No.1 fairly states that the Respondent No.1 is not pressing for backwages, if she is granted continuity of service and consequential benefits. Hence the following order:

ORDER

- i) The impugned order to the extent it grants reinstatement is upheld;
- ii) The impugned order to the extent it grants back-wages is set aside. The Respondent No.1 shall however be entitled to continuity of service and consequential benefits for the period she was not continued in service.
- iii) The impugned order is modified to the aforesaid extent.

12. The Writ Petition is partly allowed in the aforesaid terms. Rule made partly absolute accordingly. There shall be no order as to costs.

(A.A.Sayed, J.)