

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2219 OF 2014

Dr. Suswir Jaidao Dahiware

...Petitioner

Versus

The Secretary, Vidya Prasarak Mandal's Arts,
Science And Commerce College, Kinhavali
And Ors

...Respondents

....

Mr.Mihir Desai, Senior Advocate for the Petitioner.

Mr. R.S. Apte, Senior Advocate a/w. Girish J. Paryani, for
respondent No.1.

Mr.A.R. Metkari, AGP for respondents No.3 and 4.

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CORAM : R. G. KETKAR, J.

DATE : 11th JULY, 2017

P.C.

1. Heard Mr.Mihir Desai, learned Senior Counsel for the petitioner, Mr.R.S. Apte, learned Senior Counsel and Mr.A.R. Mitkari, learned A.G.P. for respondents No.3 and 4, at length.

2. By this Petition under Article 226 of the Constitution of India, the petitioner has challenged the judgment and order dated 7.10.2013 passed by the learned Presiding Officer, Mumbai University and College Tribunal, Mumbai (for short, 'Tribunal') in Appeal No.8/2013. By that order, the Tribunal dismissed the appeal preferred by the petitioner against termination notice

dated 29.1.2013.

3. The petitioner holds the qualification of M.A. M.Phil and Ph.D. On 28.6.1984 he was appointed for the first time as a Lecturer in Degree College. On 1.3.2005, the petitioner was appointed as a Principal in the College known as Kala Mahavidyalaya, Abhone, Taluka-Kalavan, District – Nashik run by Dang Seva Mandal, Nashik (for short, 'Mandal'). He was working in that post from 1.3.2005 to 28.2.2011. On 25.10.2010, he was suspended by that Mandal. Respondent No.1 herein issued advertisement on 12.12.2010 for filling up the post of Principal. The petitioner applied for that post and was interviewed by the duly Constituted Selection Committee on 20.1.2011 and the petitioner was selected to the post of Principal. By appointment order dated 24.1.2011, the petitioner was appointed as a Principal in the College run by the first respondent. The letter of appointment does not specify whether the appointment of the petitioner is made on temporary basis or on probation basis or permanent basis. There was settlement between the petitioner and the College run by Mandal. On 17.2.2011, the petitioner resigned from that College and the charges leveled against him were dropped and suspension was

withdrawn. On 28.2.2011 the petitioner resigned from the college run by Mandal. On 1.3.2011 the petitioner joined as Principal with the first respondent College.

4. It appears that the notice was issued by Mandal through Advocate on 31.1.2012 to the first respondent, respondent No.3 University for cancelling the appointment of the petitioner on the ground that he was suspended by the Mandal. On 9.2.2012, respondent No.1 issued letter informing the petitioner that his appointment was for one academic year 2011-12. The period of one year expires on 29.2.2012. The meeting of Managing Council is convened on 18.2.2012 to consider the issue of confirming the petitioner in the services.

5. The petitioner gave reply on 13.2.2012 to the notice dated 31.1.2012 issued by the Mandal denying the allegations. Even the first respondent gave reply to Mandal justifying the appointment of the petitioner on the post of Principal. It is the case of the petitioner that respondent No.1 issued alleged communication on 25.2.2012 extending his probation period by one year. It is the case of the petitioner that he did not receive said communication. On 2.5.2012, one Pradip Deshpande,

acting Principal of Dang Seval Mandal made complaint to the Vice Chancellor of the third respondent University as regards appointment of the petitioner as Principal. Two committees were formed in pursuance of the complaint made by Mr.Deshpande. The first committee was appointed by the University and the second committee was appointed by respondent No.4 Joint Director. On 29.1.2013, respondent No.1 terminated the services of the petitioner on the ground that the petitioner did not disclose his suspension as also his work was found unsatisfactory.

6. On 8.2.2013, the petitioner preferred appeal before the Tribunal. During pendency of the appeal, the Committee appointed by respondent No.4 submitted report on 18.3.2013 exonerating the petitioner completely. Respondent No.1 filed reply on 20.3.2013 *inter alia* contending that the petitioner was appointed through duly constituted Selection Committee of University; the petitioner was appointed on probation and his probation period was extended by communication dated 25.2.2012 and that his performance was not satisfactory. Additional reply was filed by the Management (respondent No.1) on 15.4.2013. The petitioner filed additional affidavit dated 30.4.2013

before the Tribunal *inter alia* contending that the letter dated 25.2.2012 extending the probation period was never given to the petitioner and that the termination was punitive. By order 7.10.2013, the Tribunal dismissed the appeal preferred by the petitioner. It is against this order, the petitioner has instituted present Petition under Article 226 of the Constitution of India.

7. In support of this petition, Mr. Desai strenuously contended that the Tribunal was not justified in holding that the petitioner was not appointed on permanent basis and that he was appointed on probation. He further submitted that the communication dated 25.2.2012 extending probation period by one year was not received by the petitioner. He submitted that under the Statute of third respondent University the probation period is one year. As the probation period was not extended after one year, the petitioner is deemed to have been made permanent on the post of Principal. Respondent No.1, therefore, could not have terminated the services of the petitioner on the ground that he was on probation.

8. Mr. Desai has taken me through the grounds raised in the appeal filed before the Tribunal and in particular ground (b)

and (d). He also invited my attention to the termination order dated 29.1.2013 and in particular paragraphs-2 to 5 to contend that the order of termination is stigmatic. He further submitted that the Statute prescribes assessment of probationer during the probation period. In the present case no such assessment was made. He submitted that the provisions of the assessment of probationer during his probation period is mandatory. He submitted that though these points were not specifically agitated before the Tribunal, in paragraph-10 of the Petition, the petitioner has specifically asserted in the alternative that assuming that the petitioner was on probation, the termination was not justified. As per the Statutes of the third respondent University, a probationer's service is required to be assessed in a manner provided in detail thereunder. No such assessment was ever made and no adverse remarks were ever communicated. He, therefore, submitted that the order of termination deserves to be set aside as it is stigmatic as also contrary to the mandatory provisions of the Statute of third respondent University. In support of his submissions, Mr. Desai relied upon the decision in *Madha Taluka Shikshan Prasarak Mandal, Kurduwadi and another v. Prashant Kamlakar Narkhade and*

others, of this Court (Coram:R.D. Dhanuka,J.) in W.P. No.11074/2015 a/w. W.P. No.10207/2015 decided on 3.8.2016.

9. On the other hand, learned Counsel for the respondents supported the impugned order and submitted that admittedly the petitioner was suspended by the college run by Mandal on 25.10.2010. In pursuance of the advertisement dated 12.12.2010, the petitioner applied and appeared for interview before the Selection Committee on 20.1.2011. The petitioner was appointed on 24.1.2011. The appointment letter does not show that he was appointed on permanent basis. The petitioner did not disclose the fact of his suspension at the time of interview as also at the time when the appointment letter was issued.

10. The Tribunal has considered this aspect while passing the impugned order and also dealt with the contention of the petitioner that the termination order is stigmatic and is passed without holding enquiry. The respondents therefore contended that no case is made out for invocation of powers under Article 226 of the Constitution of India.

11. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused

the material on record. It is not in dispute that the petitioner was suspended on 25.10.2010 by Mandal. On 12.12.2010, the petitioner applied for the post of Principal in the first respondent College. The petitioner was interviewed by the Selection Committee on 20.1.2011 and the petitioner was issued appointment letter on 24.1.2011. It is also material to note that Mandal had accepted the resignation of the petitioner on 28.2.2011 and it is only thereafter the petitioner joined as Principal in the first respondent college on 1.3.2011. The Tribunal has considered this aspect in paragraphs-9 and 10 of the impugned order.

12. In paragraph-9, the Tribunal observed that the petitioner joined on 1.3.2011 only after Mandal accepted his resignation by communication dated 28.2.2011. The resignation was tendered while the petitioner was under suspension and not during his regular service as Principal in Mandal.

13. In paragraph-10, the Tribunal observed that from the record it is established that when the petitioner was facing interview on 20.1.2011, he was not regularly discharging his duty as Principal in Mandal and was under suspension. There is

no satisfactory proof of disclosure of suspension made by the petitioner before the Selection Committee or to the Management of the first respondent. Though the appointment letter was issued on 24.1.2011 appointing the petitioner from 1.2.2011, he did not join duties immediately because he was under suspension pending dispute/charges leveled against him. In ordinary course, had these facts made known to the Management of the first respondent, he would not have been considered for selection. It is only after his resignation, he reported his joining from 1.3.2011. The Tribunal accordingly had drawn an adverse inference against the petitioner.

14. In paragraphs-11 and 12, the Tribunal dealt with the contention raised by the petitioner that he was appointed as a confirmed Principal. After considering Statute 413(4)(a), the Tribunal concluded that the petitioner was appointed on 24.1.2011 on probation basis and not on permanent basis.

15. In paragraph-14, the Tribunal dealt with communication dated 25.2.2012 by which the petitioner's probation was extended for one year more. The communication also referred to the representation dated 4.2.2012 made by the

petitioner for confirmation. Earlier also by letter dated 9.2.2012, the petitioner was informed regarding his appointment on probation and that the issue of confirming in service will be considered in the meeting of Board of Directors scheduled on 18.2.2012. The petitioner did not protest or took such stand of statutory protection and for the first time raised this claim after he was served with the notice of termination. It was also admitted that during extension of time the petitioner has given no objection certificate for taking employment elsewhere.

16. In paragraph-15, the Tribunal dealt with the contention of the petitioner that the termination order being stigmatic, bad in law and without holding any enquiry. The Tribunal relied upon the decision of *Dipti Prakash Banerjee v. Satyendra Bose National Centre for Basic Sciences, Calcutta & Ors., (1999) 3 SCC 60*. In paragraph-16, the Tribunal noted that the petitioner did not raise contention in the alternative that he was appointed as a probationer and the termination order is stigmatic.

17. Mr. Desai invited my attention to the termination notice dated 29.1.2013 and submitted that it is stigmatic. With

the assistance of learned Counsel appearing for the parties, I have perused the termination notice dated 29.1.2013. In that notice, reasons are given for terminating the services of the petitioner w.e.f. 28.2.2013. It is set out therein that the petitioner was working as a Principal in the College run by the Mandal. The Management had to deal with the correspondence with the Chancellor, Vice-Chancellor of respondent No.3, Joint Director, Panvel as also the Mandal for last two years which has caused tremendous harassment. It also affected the progress of the College. Mr. Pradip Deshpande was addressing letters for last two years seeking information about the petitioner's appointment under Right to Information Act, 2005 and was also raising objections. Mr. Deshpande alleged that while the petitioner was under suspension by the Mandal, he attended the interview conducted by the Management. The petitioner did not disclose the fact of his suspension. The notice thereafter referred to certain lapses on the part of the petitioner.

18. In the case of *Dipti Banerjee* (supra), the Apex Court referred to the letters dated 11.12.1995, 15.4.1996, 30.4.1996 and 17.10.1996 addressed by the Director of the respondent organization to the appellant. The Apex Court also referred to

the report dated 15.7.1996 made by High Level Enquiry Committee as also the report dated 30.7.1996 made by the Administrative Officer in favour of the appellant. In paragraph-19, the Apex Court observed that as to in what circumstances an order of termination of a probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation and thereafter referred to several decisions.

19. In paragraph-20, the Apex Court referred to the decision in *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha, (1980) 2 SCC 593* and reproduced paragraphs-53 and 54 which are to the following effect:

“...a termination effected because the master is satisfied of the misconduct and of the desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in different proceedings from the formal order, does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service, the conclusion is dismissal, even if full benefits as on simple termination, are

given and non-injurious terminology is used.”

and as to motive:

“54. On the contrary, even if there is suspicion of misconduct, the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge.”

20. The Apex Court also referred to the decision of *State of Punjab v Sukh Raj Bahadur, AIR 1968 SC 1089* wherein it was held that the order of simple termination was not founded on any findings as to misconduct. In paragraph-21, the Apex Court held that if findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as “founded” on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive

and the order would not be bad.

21. Applying the tests laid down in the aforesaid decision in *Dipti Banerjee* (supra) to the facts of the present case and after perusing the termination notice dated 29.1.2013, I am of the opinion that it does not indicate that any allegations are leveled against the petitioner herein or that they are foundation for his termination. Even assuming the lapses referred therein are allegations against the petitioner, they are not foundation for his termination. In other words the notice of termination is not stigmatic and it is a case of termination simplicitor.

22. Mr. Desai relied upon the decision of this Court in *Madha Taluka Shikshan Prasarak Mandal* (supra). In that judgment this Court considered the regulations of University Grants Commission which prescribes probation of one year. In paragraph-45, this Court noted that the probation period was not extended and that the services of the petitioner therein were not terminated before the expiry of probation period. In paragraph-46, this Court therefore held that as the petitioner therein had completed the period of one year on probation from the date of appointment, he had attained the status of a

permanent Assistant Professor. As noted earlier in the present case the petitioners probation was extended by communication dated 25.2.2012 and during his probation period his services were terminated on 29.1.2013 that is to say before expiry of his probation period.

23. Mr.Desai submitted that the communication dated 25.2.2012 extending probation period by one year was not received by the petitioner. It is not possible to accept this submission. In the appeal memo, no such case was made out. Respondent No.1 filed affidavit in reply of Ramchandra Dinkar dated 20.3.2013. In paragraph-4, respondent No.1 specifically referred to communication dated 25.2.2012. Petitioner filed additional affidavit dated 30.4.2013. In paragraph-5, the petitioner reiterated that he was not appointed on probation and that the Management is trying to make a stand that his probation was extended by one year. That the letter was not served on him. A perusal of paragraph-14 of the impugned order shows that the Tribunal referred to the letter dated 25.2.2012. The petitioner, however, did not agitate that it was not served on the petitioner. Even in the petition, the petitioner has not pleaded that he was not served letter dated 25.2.2012 or

that though he agitated the said point before the Tribunal, it was not dealt with.

24. In the light of above discussion, I do not find that the Tribunal committed any error in dismissing the appeal. Hence, the Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Deshmane (PS)