

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL WRIT PETITION NO. 3668 OF 2017**

- 1 Senapati Prataprao Gujar Education Society, Kanadewadi
Taluka Gadhinglaj, Dist. Kolhapur,
Through its President/Secretary.
- 2 Raja Shivchhatrapati Arts and Commerce College, Mahagaon,
Tal. Gadhinglaj, Dist. Kolhapur,
Through its Hon'ble Principal. ..Petitioners.

V/s.

- 1 Shri Keshav Pandharinath Deshmukh
Age: 34 yrs., Occ. Not known,
R/o. At Kharbi, Post: Bhoshi,
Tal. Bhokar, District: Nanded.
- 2 Shivaji University, Kolhapur
through its Hon'ble Registrar.
- 3 The Joint Director of Higher Education (Kolhapur Division)
Rajaram College Campus,
Vidya Nagar, Kolhapur 416 002. ..Respondents.

Mr. Prashant Bhavake, advocate for petitioners.

Mr. Sarnath Sariputta Pramod, advocate for respondent No. 1.

Ms. Mansi Bane, AGP for State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATE : SEPTEMBER 5, 2018.

JUDGMENT :

1 Heard the learned Counsel for the Petitioners and the learned Counsel for the respondents.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The Petitioner herein questions the correctness and the validity of the Order dated 30/6/2016 passed by Presiding Officer of the College Tribunal. Needless to say at this stage that the order of the

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Tribunal dated 30/6/2016 has not been complied with. The Petition was filed on 29/8/2016 and the learned Counsel for the petitioner had been taking adjournments right from 1st day and hence, on 9/1/2018, the respondent No. 1 had filed Civil Application seeking compliance of the order of Tribunal. It is in view of this, that the matter is being finally heard at the stage of admission.

4 Respondent No. 1 was appointed as Assistant Professor in Economics in the Institution of the Petitioner vide an appointment order dated 31/1/2013. The Respondent No. 1 was working in Senior College. He had joined service on 1st February, 2013. The appointment of the respondent No. 1 was approved by Shivaji University, Kolhapur vide order dated 28/4/2013.

5 By an administrative order dated 15/12/2013, services of the respondent No. 1 was terminated on the ground that he used to remain absent from duty frequently and his performance as an Assistant Professor was not satisfactory. The respondent No. 1 was therefore, constrained to approach the University and College Tribunal, Pune by filing an appeal under section 59 of the Maharashtra University Acts, 1994. The said appeal was registered as Appeal No. 1 of 2014.

6 The appellant had specifically submitted in his appeal memo that when he had been to sign the muster roll, he was informed by the concerned peon that biometric machine is not in working condition. He had approached the principal of the college, who had refused to allow him to sign muster roll and instead, asked the respondent No. 1 to give his attendance in writing to the inward section and if it is not accepted by the inward section, he was asked to send it by registered A/D. It was submitted that from 25/11/2013 he was reporting his attendance in writing. Some of the letters were reverted to him as there was denial to accept the same. It was further submitted that pursuant to the directions of Shivaji University, Kolhapur, he had worked as External Senior Supervisor for the Examination Centre in Shivaji College of Arts and Commerce D.S. Kadam Science College, Gadhinglaj Dist. Kolhapur college from 3rd December, 2013 to 13th December, 2013. Thereafter, he was not allowed to sign the muster and from 1st December, 2013 biometric machine was maintained only for the staff. Thereafter, he had learnt from the Principal that his name was scored off from the biometric machine. It was specifically alleged in the appeal memo that the clerk Bharna Arjun Patil and the Principal had demanded Rs. 12,00,000/- in order to confirm his service. Thereafter, his services were terminated. In short, according to the respondent, his order of termination was motivated.

7 When the respondent No. 1 had demanded letter of termination in order to enable him to approach the Court of Law, he was coerced to sign blank papers. On refusal to sign, he was assaulted in the office of the Principal and thereafter, he had managed to escape and had reported about the incident to the police station on 2/1/2014.

8 It was urged before the Tribunal that no notice was issued to the appellant and therefore, he had been deprived of his right to be heard before passing of the coercive order. It is stated that he has been a victim of the abusive powers of the Principal. The Petitioner had contended before the Tribunal the dates, on which the appellant therein has chosen to remain absent. In fact, no such notice was given to the present respondent calling for an explanation of absenteeism from duty without authority. The respondent No. 1 had demonstrated before the Tribunal that the Order dated 15/12/2013 was sent at the permanent address of the respondent at Nanded and the letter dated 20/1/2014 was sent on his residential address at Gadhinglaj.

9 The respondent had placed sufficient material before the tribunal to substantiate his contention that the order of termination was motivated.

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10 Learned Tribunal vide Judgment and Order dated 30/6/2016 was pleased to allow the appeal thereby setting aside the order of termination dated 2/1/2014. The Petitioner Society was directed to reinstate the appellant on the post of Assistant Professor on probation within two months from 30/6/2016. The Presiding Officer had further directed that in the eventuality, the management decides to hold enquiry, his entitlement in respect of backwages would be decided by the authorities depending upon the result of the enquiry.

11 The services of the respondent No. 1 would be governed by the statutory provisions of the Shivaji University Statute. Clause 198(3) of the Shivaji University Statute reads as follows :

“198(3) The Principal shall maintain assessment reports of teachers on probation, in the proforma prescribed for the purpose by the University, for every six months. The Principal shall forward the recommendations to the Chairman, Governing Body at least two months before the date of expiry of the period of probation, for confirmation in service or otherwise. If a person is not to be confirmed at the end of the probationary period a confidential report justifying the decision should be attached and such cases be referred to the Chairman for further instruction. The Governing Body shall be the deciding authority in these cases.”

12 The case of the petitioner before the Tribunal was that probationer is not entitled to an opportunity of hearing as per the UGC notification of 2010. Learned Judge had partly allowed the appeal directing the respondent Nos. 1 and 2 i.e. present petitioner to reinstate the appellant on the post of Assistant Professor on probation within 2 months from 30/6/2016. The Petitioner was protected in the sense that the entitlement of the respondent herein in respect of the back-wages were to be decided by the authorities, subject to the result of the enquiry if the management decides to hold an enquiry.

13 It is pertinent to note that the order of the presiding officer, University and College Tribunal was not complied with. Therefore, there was no question of even holding an enquiry. It is now pertinent to note the steps taken by the petitioner. The Petitioner has kept the present petition pending since 29/8/2016 and on that ground had not complied with the order of the Tribunal.

14 Today in the course of argument, learned Counsel for the petitioners has submitted that the statutory regulations issued by the UGC would prevail over the University Statute. That the termination is a

simplicitor termination and not stigmatic. That there was unauthorised absenteeism by probationer and therefore, no show cause notice or enquiry is contemplated before terminating services. It is not necessary to mention the dates of unauthorised absenteeism in the termination order. It is also submitted that since the respondent was terminated before completion of probation, verification as far as unsatisfactory performance is concerned, is not required and it is the right of the management to terminate the services of the respondent without issuing any notice. The learned Counsel for the petitioners further submits that since the respondent was a probationer, it was not necessary to hold inquiry. It is also submitted that prior to completion of probation, the respondent cannot acquire any legal right to the post on which he was appointed.

15 The learned Counsel for the petitioners has drawn attention of this Court to Rule-11.1, 11.2. and 11.3 of the UGC Regulations. Rule 11.1 reads as follows :

“R.11.1 The minimum period of probation shall be one year extendable by a maximum period of one more year in case of unsatisfactory performance.

R.11.2 The confirmation at the end of one year shall be automatic, unless extended for another year by a specific order before expiry of the first year.

R.11.3 Subject to this clause 11, it is obligatory on the part

of the University/the concern institution to issue an order of confirmation to the incumbents within 45 days of completion of probation period after due process of verification of satisfactory performance.”

It is therefore, submitted that there is no specific clause as far as verification of satisfactory performance is concerned, for the purpose of termination and that it is only for the purpose of confirmation. Needless to say that in the present case, there are no assessment report. The respondent was never apprised of his unsatisfactory performance or the complaints received against him. No opportunity was given to him and hence, it is clear that the statutory provisions have not been followed by the petitioners.

16 Learned Counsel for the respondent submits that the petitioner had not followed due procedure of law before passing the termination order and that it was motivated. Therefore, no interference is warranted in the judgment of the Tribunal. The meaning of the term “due process” as per Law Lexicon is as follows :

“The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a Tribunal with the power to decide the case.”

The material to determine whether motive has culminated into

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foundation may not be sufficient even otherwise the cause/reason for termination also must lay a foundation, especially when it is stigmatic. The petitioner has not even laid a foundation for termination as the order prima facie appears to be stigmatic. The respondent was not given any opportunity of hearing.

17 A stigma is something that detracts from the character or reputation of a person. It is a blemish, disgrace, an imputation a mark a label indicating a deviation from a norm.

18 Learned Counsel for the petitioners submits that the order is not stigmatic, but an opinion formed by the petitioner after observing his performance. In the case of **C.C. Shah v/s. Union reported in AIR 1964 SC 1854**, the Apex Court observed :

“When the order referred to the fact that the servant was found undesirable to be retained in Govt. Service, it expressly casts a stigma on the servant and must be held to be an order of dismissal and not discharge. To say that it is undesirable to continue a temporary servant is very much different from saying that it is unnecessary to continue him.”

Hence, the contention of the learned Counsel for the petitioners that the order of termination is simplicitor and not stigmatic does not hold any good ground.

19 In the case of **Kamal Kishore v/s. Management P.A.W. Airways, reported in AIR 1987 SC 229**, the Hon'ble Apex Court has observed as follows :

“Loss of confidence by the employer in the employee is a feat, which certainly affects the character or reputation of the employee and so allegation of loss of confidence amounted to stigma.”

20 Learned Counsel for the respondent has placed reliance upon the judgment of the Hon'ble Apex Court in the case of **V.P. Ahuja v/s. State of Punjab & ors. reported in page 239**, wherein the Hon'ble Apex Court has held as follows :

“A probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principles of natural justice.”

It is further observed that -

“The entire case-law with respect to a “probationer” was reviewed by this Court in recent decision in **Dipti Prakash Banerjee v/s. Satyendra Nath Bose National Centre for Basic Sciences, [reported in (1999) 3 SCC page 60]**. This decision fully covers the instant case as well, particularly as in this case, the order impugned is stigmatic on the face of it.”

21 At this stage, learned Counsel for the respondent No. 1 vehemently submits that the condition precedent of due process of verification of satisfactory performance for the purpose of confirmation within 45 days on completion of probationary period shall be a condition precedent for the purpose of termination. It is submitted that condition precedent for verification would also be necessary for termination. It is true that in the present case, there is no material placed on record to show that there was some verification for recording subjective satisfaction of the unsatisfactory performance.

22 Learned Counsel for the petitioners has placed reliance upon the order of Single Bench of this Court in the case of **Jaya Ramkrishna Maturkar v/s. Wainganga Bahuuddeshiya Vikas Sanstha & ors. reported in 2010 2 BCR page 130**. However, the facts of the said case are not relevant in the present case.

23 Persistent absenteeism would be stigmatic in view of the fact that upon reading the appeal memo, in the eventuality that an enquiry was held, the respondent would have been in a position to rebut the allegation that there was any absenteeism. In fact, the termination order is innocuous in the sense that the absenteeism by itself without giving

any details of the period for which he had absented himself could have laid a foundation for passing a punitive order. The respondent had in fact, stated and had demonstrated before the Tribunal that he was not permitted to sign the muster roll. He had also sent his attendance by post, which were returned for want of acceptance and the said period on which he had not signed the muster was treated as absenteeism.

24 Section 211(3)(ii) of the Shivaji University Statute reads as follows:

“A teacher is liable for disciplinary action on one or more of the following grounds :

- 1) Misconduct,
- 2) Moral Turpitude,
- 3) Wilful and persistent negligence of duty,
- 4) Physical or Mental unfitness,
- 5) Incompetence,
- 6) Participation in Private coaching classes, directly or indirectly accepting tuitions, accepting any outside employment or office of profit.

Explanation :

- a) Misconduct shall among other things include the following:
 - a)...
 - b)...
- c) Breach of the terms and conditions of service, prescribed by the Statutes and agreement.
- d) Violation of Code of Conduct.”

It is deemed that to remain absent without leave or without informing the authorities would amount to breach of terms and conditions of service as prescribed by Statute and agreement. Therefore, in the present case, it can be safely inferred that absenteeism as well as incompetence would amount to breach of terms and conditions of

service. It would be liable for disciplinary action on the ground of misconduct as well as incompetence and hence, an inquiry ought to have been held before passing the order of termination irrespective of the fact that the respondent was probationer.

25 The learned Counsel for the petitioners has then placed reliance upon the Judgment of the Single Bench of this Court in the case of **Subhash Ramchandra Dumbre v/s. Maharashtra State Co-operative Agricultural and Rural Development Bank Ltd., reported in (2009) 5 BCR page 88**, wherein the Court had observed as follows :

“The Industrial Court rightly, in my view, noticed that the question of holding inquiry in the present case did not arise. In the present case, the complainant admittedly was on leave for long period on the ground of illness and as such, the Industrial Court correctly held that the bank was justified in issuing notice of termination by paying compensation of discharge simplicitor and for such a discharge, no inquiry was necessary.”

The case law is not relevant as the services of the respondent herein are governed by Shivaji University Statute.

26 The petitioner has then placed reliance upon the Judgment of the Single Bench of this Court in the case of **Madha Taluka Shikshan Prasarak Mandal & anr. V/s. Prashant Kamlakar Narkhade & ors.**

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Reported in 2016 (5) BCR 252, wherein this Court had observed that :

“It is held that upon referring to various Supreme Court Judgments, it is concluded that all the Universities or the Colleges affiliated to such Universities are bound by UGC Regulations issued by the UGC and non-compliance , if any, can be excused by relaxation only by the UGC, if a case is made out and not as of right.”

The facts of the said case are at variance and the said judgment would not be relevant in the present case.

27 The learned Counsel for the respondent has also placed reliance on the judgment passed by Single Bench of this Court in the case of **Rohidas Ganpat Godse v/s. Principal, G.B. Khare College & ors.**, wherein the learned Single Bench has relied upon judgment in the case of **V.P. Ahuja(supra) and Dipti Banerjee(supra)**. It was held that termination of the services of the petitioner was illegal as the respondents were unable to establish that the petitioner's behaviour and work were not up to the mark. It was also held that “the appointment on probation and the termination of services of the probationer are governed by the provisions of sub-section 2 and 3 of section 5 of MEPS and in addition, Rule 14 and 15 of MEPS Rules have elaborately set out the procedure for 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."

28 In the case of **The Management of Utkal Machinery Ltd. V/s. Workman, Santi Patnaik reported in AIR 1966 SC 1051**, the Hon'ble Apex Court has observed as follows :

"In the absence of any Standing Order the unsatisfactory work of an employee may be treated as misconduct. When the management discharged the respondent for alleged unsatisfactory work it should be taken that the discharge was tantamount to punishment for alleged misconduct. If this was so, the management was not justified in discharging the respondent without holding Proper enquiry. Even before the Labour court no evidence was adduced by the management to show that the work of the respondent was unsatisfactory."

In the present case, the termination order therefore, is not only stigmatic, but has been passed without following due procedure of law.

29 In the case of **Abhijit Gupta v/s. S.N.B.National Centre, Talwalkar**

Basic Sciences & ors. Reported in (2006) 4 SCC 469, the Hon'ble Apex Court has considered the Judgment of **Sumati P. Shere (Dr.) v/s. Union of India reported in (1989) 3 SCC 311** and upheld the observations in the said case as follows :

“This Court pointed out that an employee on probation should be made subjected to assessment of work and should be made aware of the defects in his work and deficiencies in his performance.”

“It is the duty of the employer to inform the employee about his deficiencies from time to time so that the employee may improve himself.”

30 In the case of **Chandra Prakash Shahi v/s. State of U.P. & ors. reported in (2000) 5 SCC 152**, the Hon'ble Apex Court has observed as follows :

“Defects or deficiency, indifference or indiscretion may be with the employee by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, it was observed, it would be arbitrary to give a movement order to the employee on the ground of unsuitability.”

31 In the present case, the Management had never informed the respondent about any lacunas in his performance nor the management had apprised him of any complaint received against him.

The management had failed to apprise the respondent of any defect on his part of the work allotted to him or that he had been careless or has show cause an insufficient performance of his duty. There is no record to indicate that the respondent was questioned in writing about habitual impunctuality and irregular attendance or the absence without permission or conduct detrimental to the interests of the management. In fact, all these acts would amount to misconduct and breach of discipline and therefore, they ought to have been an enquiry into the same. The learned Tribunal had erred in holding that unsatisfactory performance is not a misconduct. In view of this, it cannot be said that the respondent was terminated by following the principles of natural justice or has followed due procedure of law.

32 In the case of **State of Haryana and anr. v/s. Jagdish Chander reported in AIR 1995 SC 984**, the Hon'ble Apex Court has held as follows :

The findings of habitual absence and indiscipline necessarily cast stigma on his career and they would be an impediment for any of future employment elsewhere. Under those circumstances, the principles of natural justice do require that he should be given an opportunity to explain the grounds on which the S.P. proposes to pass an order of discharge and then to consider the explanation submitted by the Police Officer.

In view of the statutory provisions of the Shivaji University Statute, it can be said that the order would be punitive in nature and therefore, it cannot be treated as a simplicitor termination as contended by the learned Counsel for the petitioner. It was incumbent upon the management to hold an inquiry in the given circumstances. The learned Tribunal had erred in holding that unsatisfactory performance is not a misconduct. Incompetence can also be read as unsatisfactory performance.

33 The purpose for holding an enquiry as condition precedent before passing an order on termination would be simply that there would be specific reasons to not accept the explanation given by the delinquent and the order would be supported by the reasons. The Hon'ble Apex Court in the case of **Union of India and others v/s. Jai Prakash Singh and anr. reported in (2007) 10 SCC 712** has followed the Judgment of **Lord Denning, M.R., in Breen v/s. Amalgamated Engg. Union** and has observed as follows :

“The giving of reasons is one of the fundamentals of good administration”.

"Failure to give reasons amounts to denial of justice". Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived

at". Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, speaking out. the "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance.

The order is passed without following due procedure of law and in violation of principles of natural justice.

34 Persistent absenteeism would be stigmatic in view of the fact that an enquiry was held, the respondent would have been in a position to rebut the allegation that there was any absenteeism. In fact, the termination order is innocuous in the sense that the absenteeism by itself without giving any details of the period for which he had absented himself could have laid a foundation for passing a punitive order. The respondent had in fact, stated and had demonstrated before the

Tribunal that he was not permitted to sign the muster roll. He had also sent his attendance by post, which were returned for want of acceptance and the said period on which he had not signed the muster was treated as absenteeism.

35 It is deemed that to remain absent without leave or without informing the authorities would amount to breach of terms and conditions of service as prescribed by Statute 211(3)(ii)(3) and agreement. Therefore, in the present case, it can be safely inferred that absenteeism as well as incompetence would amount to breach of terms and conditions of service. It would be liable for disciplinary action on the ground of misconduct as well as incompetence and hence, an inquiry ought to have been held before passing the order of termination irrespective of the fact that the respondent was probationer.

36 Hence, it is clear that habitual absence or habitual irregularity in attending work would be stigmatic and impediment for any future employment elsewhere. In view of the above observations, this Court is of the opinion that the respondent had been terminated arbitrarily, without following due procedure of law as well as principle of natural justice. It can also be inferred that the order of termination is stigmatic. The background of the case and the allegations made by the respondent also need to be taken into consideration. The judgment of

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the Tribunal calls for no interference. The petition being sans merits stands dismissed. Rule is discharged accordingly.

37 It is further directed that the management is hereby directed to reinstate the respondent and abide by the order passed by the Tribunal on or before 31st October, 2018. In the eventuality that this order is not complied with, the petitioner would be liable for contempt of Court.

[SMT. SADHANA S. JADHAV, J.]