

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 713 OF 2010**

WITH

CIVIL APPLICATION NO. 820 OF 2019

IN

WRIT PETITION NO. 713 OF 2010

DESALE SHARAD RAMBHAU,
Aged 26 years, residing at Post Kasare,
Taluka Sakri, District Dhule

...Petitioner

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~ VERSUS ~

- 1. THE PRESIDENT, KAVIVARYA
KUSUMAGRAJ ADIVASI SUDHAR
SAMITI, NASHIK,**
having address at & post Nirgude,
Taluka Peth, District Nashik.
- 2. LOKNETE KAILASVASI SITARAM
BHOYE,**
Primary Aashram School, Pimpal Vati
Post Nachlondi, Taluka Peth,
District Nashik.
- 3. THE PROJECT OFFICER,**
Integrated Tribal Department
Project, Nashik.

4. **THE COMMISSIONER,**
Tribal Development Department,
Adivasi Vikas Bhavan, Nashik.
5. **THE SECRETARY,**
Writ to be served upon the
Government of Maharashtra,
Social Welfare & Tribal Development
Department, Mantralaya,
Mumbai 400 032.

...Respondents

APPEARANCES

FOR THE PETITIONER	Ms Kumud A Bhatia.
FOR RESPONDENTS NOS. 1 & 2	Mr Sanjeev B Deore, i/b Suchita J Pawar.
FOR RESPONDENTS NOS. 3 TO 5-STATE	Ms PN Diwan, AGP.

**CORAM : G.S.Patel &
Neela Gokhale, JJ.**

DATED : 31st March 2023

ORAL JUDGMENT (Per GS Patel J):-

1. Rule was issued on 4th February 2010. On 24th March 2023, we were constrained to make the following order:

“1. The Petition was admitted on 10th February 2010. It has been pending for the last 13 years. The Petitioner challenges an order of termination of the Petitioner’s services as a teacher from the 2nd Respondent school, which is run by the 1st Respondent Samiti. A copy of the

impugned termination order of 2nd October 2007 is at page 40. It accuses the Petitioner of being repeatedly absent without permission. The entire termination order is based on a report of a surprise visit of 29th September 2007 by the Section Officer, Mantralaya and the Desk Officer and Project Officer, Nashik. The dates themselves are curious. The surprise visit was of 29th September 2007. Apparently, the report was “verified” by the Society the very next day, 30th September 2007, and a mere two days later, on 2nd October 2007, came the termination order. We confess to be more than somewhat surprised at this astonishing display of alacrity.

2. This is all the more surprising because although Rule has been issued and served in 2010, this very same institute has not, in the last 13 years, found time to file an Affidavit in Reply. The termination order is issued in three days, but an Affidavit in Reply cannot be filed for 13 years.

3. This was what we have been told. We are also being told that now Respondents Nos. 1 and 2 have changed Advocates and they need even more time.

4. At least on the record as it now stands, it is clear that there was no show-cause notice issued to the Petitioner, no hearing, but instead a termination order was directly issued.

5. We will give Respondents Nos. 1 and 2 an opportunity but only until next Wednesday, 29th March 2023 to file an Affidavit in Reply. This Reply must disclose a show-cause notice if one was issued and if it was not, the reasons for not issuing a show-cause notice and for not minimally following a fair procedure of granting a hearing.

6. The matter is to be listed high on board on 30th March 2023.”

2. The only document to be considered is the termination notice that is impugned in the Petition of 2nd October 2007. The original is at Exhibit “E” at pages 40 and 41 and a translation is provided from pages 41A to 41C.

3. The very short background is that a Section Officer of Mantralaya, one Chaudhari made a surprise visit on 29th September 2007 to the 2nd Respondent school. He was accompanied by a Desk Officer, Jadhav. Exactly one day later, the report of that surprise visit was allegedly “verified” by officers of the 1st Respondent society which runs the 2nd Respondent school.

4. We say that this despatch is surprising because the impugned order itself shows that neither the school nor its management showed any such great anxiety in the past. Paragraph 1 of the impugned order refers to the surprise visit. But then in paragraph 2 alleges that the Petitioner was “repeatedly absent”. It then notes these details: 29th September 2007 for one day, 26th June 2006 to 27th June 2006, 11th June 2006, 29th September 2006, 28th November 2006, 29th January 2006, 1st May 2006, 28th August 2007 to 20th August 2007 “to” 21st August 2007. This is exceedingly peculiar (and there is clearly a typographical error in the last set of dates). The impugned order is of 2nd October 2007 but it seems clear that for none of the previous alleged absences from 2006 onwards did the 1st Respondent take any action at all.

5. There is now, finally, an Affidavit in Reply and even this does not indicate that any such action was taken against the Petitioner.

6. We note this because Mr Deore invites our attention to Section 5(3) of the Maharashtra Employees of Private Schools (Conditions of Services) Regulation Act 1977. The sub-section says:

“5. Certain obligations Management of private Schools.

.....

(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 or honorarium of one month in lieu of notice.”

7. The submission by Mr Deore is that no show cause notice is necessary. Once the management finds that a probationer's work is unsatisfactory, the management may terminate services at any time during the period after one month's notice or salary or honorarium of one month in lieu of notice. It is his submission that the Petitioner's termination was to take effect one month later.

8. We are unable to see how this Section has any application. It does not set out a procedure. It is merely an empowering Section. The submission of an implicit exclusion of a fundamental rule of natural justice is only to be stated to be rejected.

9. What is also relevant is that the Section speaks of a probationer. Now paragraph 5 of the Petition reads thus:

“5. The Petitioner states that pursuant to the advertisement dated 14.11.2005 in the local news-paper viz.,

“Dainik DeshDoot Sakal” inviting applications for the post of Shikshan Sevak in Respondent No. 2’s Primary School, the Petitioner applied for the said post and was selected and appointed as a Shikshan Sevak vide appointment order dated 22.11.2005 in Respondent No. 2 school in a clear and permanent vacancy. He is H.S.C.D. Ed. His appointment is made on probation for a period of 3 years. The said appointment of the Petitioner is made in accordance with the terms and conditions declared by the Government of Maharashtra for appointment of Shikshan Sevak. Hereto annexed and marked as “EXHIBIT-A” is a copy of the Advertisement dated 14.11.2005 and “EXHIBIT-B” is a copy of the Petitioner’s Appointment Letter dated 22.11.2005. The Petitioner was appointed in the Primary Section of Respondent No. 2 School. The said Shikshan Sevak Scheme is made applicable for private primary aided schools vide G.R. dated 27.2.2003. Hereto annexed and marked as “EXHIBIT-C” is a copy of the G.R. dated 27.2.2003.”

10. In the Affidavit in Reply that is filed 13 years late, there is no traverse of paragraph 5 at all. Curiously, paragraph 3 of the much-delayed Affidavit in Reply accepts that the Petitioner was appointed on a *permanent* basis by the management. The allegation that the Government had not approved the appointment and therefore the Petitioner was temporary does not make the Petitioner a probationer for the purposes of the Act.

11. Second, Section 5(3) speaks about the formation of an opinion. That opinion has to be formed following a certain procedure. It cannot be whimsical. Rules 32 and 33 set out a procedure including for removal from service.

12. Leaving aside these considerations, we believe that the millennia-old principle that requires a person charged with a wrongdoing to be heard and given an opportunity, every principle of natural justice and the principle of *audi alteram partem* demand that at the minimum the Petitioner ought to have been given an opportunity to explain these absences. The Affidavit in Reply contends that the absences are not the only reason for the dismissal. An exclusion of the rules of natural justice is never implied; their inclusion always is. See: *State Bank of India v Rajesh Agarwal and Ors.*¹

13. There are other reasons, the Affidavit says, given in the impugned order such as not filling attendance registers, carelessly remaining absent and other reasons. But the only other reason cited in paragraph 3 is an accusation of not filling up an attendance register only for the month of September 2007.

14. The entire conduct of the 1st and 2nd Respondents is a mockery and travesty of justice. A minimal notice would have enabled the Petitioner to give an explanation. Then had that explanation been decided, conceivably we would have not had reason to interfere. The 2nd Respondent, Loknete Kailasvasi Sitaram Bhoje, is a primary ashram school. The Government of Maharashtra launched a scheme for free education for tribal students. Initially, ashram schools were controlled by the State Education Department in 1976 and then they were being controlled

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by the Tribal Development Department. This is how, in our view, a Writ Petition is maintainable against the 2nd Respondent.

15. Mr Deore's final argument is that the Petitioner has an alternate remedy. The plea of an alternate remedy is not one that can be entertained at the final hearing of the Writ Petition. It is a threshold argument to be considered before issuing Rule. Once Rule has been issued, there is no question of examining the existence of an alternate remedy.

16. Accordingly, Rule is made absolute in terms of prayer clauses (a) and (b) which read thus:

“(a) That a writ of certiorari, writ of mandamus or any other appropriate writ, order or direction be issued calling for the records of Petitioner's case and after examining the propriety and legality of the impugned termination order dated 2.10.2007 passed by the Respondent No. 1 be quashed and set aside the same and the Respondents No. 1 and 2 be ordered and directed to reinstate the Petitioner on his original post of Asst. Teacher in the Respondent No. 2 School along with all consequential benefits of back wages from the date of termination till reinstatement with continuity of service.

(b) That by a writ of mandamus or any other appropriate writ, the Respondents Nos. 1 and 2 be ordered and directed to pay Petitioner's unpaid salary from 22.11.2005 to 28.10.2007 and/or Respondents No. 3 to 5 be ordered and directed to deduct the amount of Petitioner's said unpaid salary from the grants due and payable to the Respondent No. 1 Trust and pay the said unpaid salary from 22.11.2005 till 28.10.2007 to the Petitioner.”

17. We clarify that all wages up to date have to be paid and not just for the period of 22nd November 2005 till 28th October 2007.

18. We specifically do not fasten liability on the State Government for the payment of wages. It is for the management to pay these wages because the State Government is not at fault, and it is not the State Government that terminated the Petitioner. It is true that the State Government did not approve the appointment of the Petitioner prior to his termination. It is open to the 1st and 2nd Respondents to make a representation to the State Government that for the period for which the approval was pending, the 1st and 2nd Respondents should receive financial aid or support from the State Government. If any such representation is made, it will be decided on its merits.

19. The pending Civil Application does not survive and disposed of as infructuous.

(Neela Gokhale, J)

(G. S. Patel, J)