

Sayali Upasani

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.- 1858 OF 2022

Trustees of Swati Education Trusts Smt. ...Petitioner
J.B. Khot High School No. 2

Vs.

Orith Ezekiel Solomon and Ors ...Respondents

Mr.Pankaj M. Patel, for Petitioner.

Ms. Kausar Banatwala i/b Tushar Goradia, for Respondent
No. 1 in WPL/1858/2022.

Mr. S.B. Gore, AGP for Respondent No. 2.

CORAM:- N. J. JAMADAR, J.

RESERVED ON:- 6th MARCH, 2023

PRONOUNCED ON:- 14th MARCH, 2023

JUDGMENT:-

- 1) Rule. Rule made returnable forthwith and heard finally.
- 2) By this Petition under Article 226 of the Constitution of India, the Petitioner takes exception to the judgment and order dated 29th June, 2020, passed by the learned Presiding Officer, School Tribunal, Mumbai, in Appeal No. 26 of 2019, whereby and whereunder the Appeal preferred by the respondent No. 1 came

to be allowed by setting aside the order of dismissal from service dated 14th September, 2019 with direction to reinstate the respondent No. 1 and pay backwages to the extent of 60%.

3) Shorn of superfluities, background facts necessary for the determination of this Petition can be stated as under:-

(a) Swati Education Trust, the petitioner, is a trust duly registered under the Maharashtra Public Trust Act, 1950. The petitioner - Trust runs, *inter alia*, Smt. J. B. Khot High School, a recognized school. The respondent No. 1 was appointed as an Assistant Teacher in the said school.

(b) Alleging that the respondent No. 1 was indulging in delinquent activities, during the period of 2016 and 2017, two separate memos were served on the respondent No. 1. By an order dated 7th February, 2017, respondent No. 1 was placed under suspension and chargesheet was served on the respondent No. 1. During the pendency of the inquiry, the suspension was revoked on 17th April, 2017.

(c) Post conclusion of inquiry, the Inquiry Committee submitted a report on 4 June, 2019 and found respondent No. 1 guilty of insubordination and misconduct. Based on the findings recorded by the Inquiry Committee, by an order dated 14th

September, 2019, a major penalty of dismissal from service was imposed upon the respondent No. 1.

(d) Being aggrieved, the respondent No. 1 preferred an Appeal under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("the MEPS Act").

(e) The learned Presiding Officer, School Tribunal, after appraisal of the material on record and the submissions canvassed before him, was persuaded to hold that the inquiry was not fair, legal and proper. The findings recorded by the Inquiry Committee were perverse and the penalty inflicted upon the respondent No. 1 was also shockingly disproportionate. Thus by the impugned judgment and order, the School Tribunal quashed and set aside the order of dismissal and directed the reinstatement of the respondent No. 1 in service with 60% backwages.

4) Being aggrieved by and dissatisfied with the impugned judgment and order, the petitioner - Trust has invoked the Writ jurisdiction of this Court.

5) I have heard Mr. Pankaj M. Patel, the learned Counsel for the petitioner and Ms. Banatwala, the learned Counsel for respondent No. 1. With the assistance of the learned Counsel for

the parties, I have perused the material on record and the relevant documents.

6) Mr. Patel mounted a two-fold challenge to the impugned judgment. Firstly, when the School Tribunal came to a finding that the inquiry was vitiated on account of failure to comply with the prescription contained in Rule 33 to 37 of the Maharashtra Employees of Private Schools (Conditions of Service) Rule, 1981 ("the MEPS Rules"), it was incumbent upon the School Tribunal to either provide an opportunity to the petitioner to hold a fresh inquiry or itself hold an inquiry by providing an opportunity to the petitioner to adduce evidence before the School Tribunal.

7) Secondly, the School Tribunal, according Mr. Patel, committed a grave error in law in awarding 60% backwages in the absence of pleading and proof on the part of respondent No.1 - employee that, in the intervening period, the respondent No. 1 was not gainfully employed. Mr. Patel would urge that what accentuates the situation in the instant case is that the School Tribunal was fully alive to the proposition of law that it was for the employee to plead that she was not gainfully employed and no affidavit that the respondent No. 1 had not been gainfully employed was placed on record. Therefore, the impugned order

deserves to be interfered with in exercise of writ jurisdiction, urged Mr. Patel.

8) In contrast to this, the learned Counsel for the Respondent No. 1 stoutly submitted that the challenge to the impugned order on both the counts is misconceived. Inviting the attention of the Court to the alleged perfunctory and slipshod manner in which the Departmental Inquiry was conducted by the Inquiry Committee, as adverted to by the learned Presiding Officer, School Tribunal, it was urged that in the circumstances of the case, the setting aside of the dismissal order and reinstatement of the services of the respondent No. 1 was the only viable option. It is not a case of a *bona fide* mistake or breach of principles of natural justice of insignificant nature. The learned Presiding Officer, School Tribunal has specifically observed that the inquiry was vitiated from its inception to conclusion. In the face of such finding, the learned Presiding Officer committed no error in setting aside the order of dismissal whilst declining to provide another opportunity to the petitioner to conduct a fresh inquiry.

9) On the second count of challenge, the learned Counsel for the respondent No. 1 countered the submissions that there was no assertion on the part of the respondent No. 1 that she was not gainfully employed during the currency of the termination.

Attention of the Court was invited to an affidavit filed on behalf of the respondent No. 1 seeking an amendment in the Appeal Memo so as to incorporate the prayer of reinstatement in service. In the said affidavit, a categorical statement was made that, after passing of the impugned order, the respondent No. 1 had not been serving elsewhere and earning therefrom. In the affidavit-in-reply to the said application, it was denied by the petitioner that the respondent No. 1 was not serving elsewhere. Therefore, the petitioner can not be permitted to take advantage of a stray observation in the impugned judgment that there was no affidavit of respondent No. 1 not being gainfully employed, which is not factually correct.

10) In view of the aforesaid submissions, whether a case to interfere with the impugned judgment and order in exercise of extraordinary writ jurisdiction is made out is required to be considered in two parts. First, the grievance of the petitioner that having found the inquiry to be vitiated the School Tribunal ought to have either provided an opportunity to the petitioner to hold a fresh inquiry or itself conducted the inquiry.

11) In order to appreciate the aforesaid contention in a proper perspective, it may be apposite to extract the observations of the

learned Presiding Officer, which bear upon the nature of the inquiry and the infirmities therein.

“The inquiry proceeded defectively right from the stage of issuing of the statement of allegations till the conclusion of the inquiry by recording its findings but without decision as to penalty. The constitution of the inquiry committee was equally defective. The proceeding of inquiry conducted appeared to be not fair and proper offending every provision and procedure under the Rules 33 to 37 of the MEPS Rules for inquiry in to the charges ensuring the major penalty. Two memos were issued to the appellant and on her reply the vague charge sheet was issued to her. Two witnesses were examined by the Management to prove the charges against the appellant. One of these witnesses could not be produced by the Management for his cross examination. The appellant filed her statement of defence and she was cross examined on such statement of defence in a way foreign to the MEPS Rules. The appellant was cross examined at length and number of admissions were secured from her by the Ld. Practicing advocate as Representative of the Management. The reliance was placed on such admissions of the appellant to prove her guilt. The findings were recorded by the CEO of the inquiry committee and the consensus was recorded by other two members of the inquiry committee. The nominee of the appellant appears to have not been given any opportunity to record his findings on inquiry. The findings of the inquiry committee appear to be perverse. The penalty of dismissal inflicted on the appellant appears to be shockingly disproportionate. Therefore, the appellant is entitled to the reliefs sought for. Section 10 of the MEPS Rules empowers the tribunal with all powers of the appellate Court under the CPC for the purpose of admission, hearing and disposal for the appeal before this tribunal. Section 107 of the CPC empowers the appellate court to decide the case finally. It is the matter of record that the inquiry could not be concluded within 120 days and it took a length of time between 2017 to 2019 to have its march. The charges against the appellant were not specific but vague. The charges

included even what was not there in the memos issued to the appellant. The inquiry was conducted at the cost of objectivity. The charges did not appear to be so serious to warrant the dismissal or other major penalty that is reduction in rank. Therefore, there is no good cause to remand the inquiry to the management to follow the second inning of inquiry to go with the appropriate procedure. There appears a substantial cause to interfere with the impugned order of dismissal of the appellant by the Management. There appears an occasion to set aside the impugned order of dismissal and direct the reinstatement of the appellant... ”

12) In fairness to Mr. Patel, it must be observed that Mr. Patel did not make a serious endeavor to assail the aforesaid findings of the learned Presiding Officer. The infirmities and infractions which the learned Presiding Officer has highlighted in the observations, extracted above, speak for themselves. It would be difficult to urge that the learned Presiding Officer was not justified in recording a scathing observation that the inquiry was vitiated at every stage since inception till conclusion. Having recorded such a finding, the learned Presiding Officer came to the conclusion that there was no good cause to remand the inquiry to the management and give a second chance.

13) Whether the aforesaid approach of the learned Presiding Officer is justifiable? Mr. Patel urged that it is well neigh settled that where the inquiry is vitiated on account of the breach of governing rules or principles of natural justice, a direction to hold

de novo inquiry ought to be given. The learned Presiding Officer, in the case at hand, did not adhere to the said discipline.

14) It is trite that ordinarily when a Court or Tribunal records a finding that inquiry was vitiated on account of breach of the procedure prescribed for holding the inquiry or principles of natural justice were infringed, an opportunity is given to the employer to hold a fresh inquiry from the stage at which there was breach of the rules or principles of natural justice. This, however, does not seem to be an immutable rule of law to be applied in every case, even where the Court or Tribunal finds that the employee has been treated unfairly and the entire proceeding betrays an intent to get rid of the employee at any cost.

15) A useful reference in this context can be made to a judgment of this Court in the case of **Bhagwanrao s/o Vishwanath Vyawhare and Another Vs. Sau. Sunita w/o Gopinath Palve and Another**¹. In the said case, in the context of allegations that there was violation of Rules 36, 37 and 38, while upholding the order of the School Tribunal, this Court observed that after subjecting the respondent No. 1 (employee) to the rigmarole of a full fledged inquiry for a period of 10 months, it would not be just and proper to relegate the matter to

1 2008 (1) Mh. L.J. 417

management for holding a fresh inquiry. The manner in which the petitioners had proceeded against the respondent No. 1 did not inspire confidence and, therefore, the contention on behalf of the respondent No. 1 that the petitioners were bent upon to remove the respondent No. 1 by hook or crook appeared to be well founded. In paragraph No. 10 of the said judgment, the Court concluded as under:-

“It is pertinent that the School Tribunal also considered the findings recorded by the Inquiry Committee and has made observations in the impugned order as regards the said findings. Since the Tribunal has not followed either of the courses contemplated in the judgment reported in 2004 (4) Mh. L.J. p. 173, it would have to be held that the Tribunal did not deem it fit to follow the said course in the facts and circumstances of the instant case. For the reasons stated earlier in this judgment the order of the Tribunal cannot be faulted with. In that view of the matter, no case for interference in the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution is made out....”

16) The aforesaid pronouncement was followed by another Single Judge of this Court in the case of **Rajashri Shahu Chhatrapati Shikshan Sanstha, Nagpur and Another Vs. Mangala w/o Rajesh Mankar and Others²**. Observations in Paragraph Nos. 21 and 22 are material and thus extracted below:-

“...21. In order to examine the said submission made on behalf of the petitioners, it would be necessary to analyze whether in every case where

violation of principles of natural justice and fundamental defects in the enquiry are found, the Management/ employer is to be permitted to hold a fresh enquiry. In this regard, the learned counsel appearing for the respondent No.1 has correctly relied upon the judgment of this Court in the case of Bhagwanrao s/o Vishwanath Vyawhare and another v. Sau. Sunita w/o Gopinath Palve and another (supra). In the said case also a similar question had arisen, because the Management was insisting on its right to hold a de novo enquiry while the employee contended that the Management was hell bent upon removing her by hook or crook and that the Court ought not to come to the assistance of such a Management. In the said judgment, this Court took into consideration the law pertaining to the requirement of holding a de novo enquiry and found that in every case the Management could not be permitted to hold a de novo enquiry and that on an appreciation of the facts and circumstances of an individual case, if it was found that the Management had acted in a malicious manner, there was no need to permit a de novo enquiry, particularly when the employee was sought to be removed by hook or by crook.

22. The facts of the present case, as noted above, clearly indicate that the petitioner No.1-Management acted in a most malicious and biased manner from the very beginning against the respondent No.1 and that it was hellbent upon removing the respondent No.1 from the post of headmistress by hook or by crook. Once such a conclusion is reached, it would not be justified to permit the petitioner No.1-Management to hold a de novo enquiry, thereby not only prolonging the harassment of the respondent No.1, but giving a premium to such malicious and biased actions of the petitioner No.1-Management. Therefore, it cannot lie in the mouth of the petitioner No.1-Management that permission for holding de novo enquiry was required to be given in the present case....”

(emphasis supplied)

17) It the facts of the case at hand are appraised on the touchstone of the aforesaid principles, especially in the context of the findings of the learned Presiding Officer, School Tribunal, that there was infringement of the MEPS Rules and principles of natural justice at every stage of the inquiry, an inference becomes inescapable that the inquiry stood vitiated in all facets, right from the service of the chargesheet to composition of Inquiry Committee, to the cross examination of the respondent No. 1 merely on the strength of defence statement without the respondent No. 1 having entered into the witness box and placing reliance on the admissions allegedly elicited in such cross-examination, to the denial of the opportunity to the nominee of the appellant to record his findings.

18) In the aforesaid view of the matter, I am persuaded to hold that the School Tribunal was justified in foreclosing the option to conduct a fresh inquiry in conformity with the Rules. Element of objectivity was completely lost in the disciplinary proceedings and an animus to get rid of the respondent No. 1 was borne out by the manner in which the said proceedings was conducted, especially in the context of the gravamen of indictment which is essentially the perceived insubordination.

19) On the issue of grant of 60% backwages, Mr. Patel would urge that the School Tribunal after having noted the party on whom onus lay and absence of evidence to show that the respondent No. 1 was not gainfully employed, could not have awarded backwages. A very strong reliance was placed by Mr. Patel on the pronouncement of Supreme Court in the case of **Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) And Others³**.

20) In the case of **Deepali** (supra) a two Judge Bench of the Supreme Court had, after reviewing the earlier precedents including the judgments of the Supreme Court in the cases of **Hindustan Tin Works (P) Ltd. Vs. Employees⁴**, and **Surendra Kumar Verma Vs. Central Govt. Industrial Tribunal-cum-Labour Court⁵**, the three Judge Bench judgments, had laid down the following principles:-

“...22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the

3 (2013) 10 SCC 324

4 (1979) 2 SCC 80

5 (1980) 4 SCC 443

latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

.....

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 averments 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 victimizing the employee or workman, then the concerned Court or Tribunal 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 be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give 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 finalization 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. Vs. Employees of Hindustan Tin Works Private Limited (supra).

38.7 The observation made in J.K. Synthetics Ltd V. K.P. Agrawal(supra) 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 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....”

(emphasis supplied)

21) The aforesaid principles have been followed as laying down the correct criteria for determination of the issue of grant of backwages where termination has been held to be illegal. It would be superfluous to note the judgments which have followed the line in the case of **Deepali** (supra). It would suffice to make a profitable reference to a recent pronouncement of the Supreme Court in the case of **Pradeep s/o Rajkumar Jain Vs. Mangnese Ore (India) Limited and Others**⁶, wherein the Supreme Court considered two lines of the decisions. The first, which follows the Three Judge Bench judgment in the case of **Hindustan Tin Works** (supra) and, the second, represented by the view adopted by the Supreme Court in the case of **Talwara Coop. Credit and Service Society Ltd Vs. Sushil Kumar**⁷, wherein reference was made to the provisions contained in Section 106 of the Evidence Act to cast burden on the workman to show that she was neither gainfully employed nor generated income. After analyzing the aforesaid two lines of decisions, the Supreme Court in the case of **Pradeep** (supra) expounded the legal position as under:-

“....12. It is, undoubtedly, true when the question arises as to whether the backwages is to be given and as to what is to be the extent of backwages, these are matters which will depend on the facts of the case as noted in **Deepali Gundu Surwase**

6 (2022) 3 SCC 683

7 (2008) 9 SCC 486

(supra). In a case where it is found that the employee was not at all at fault and yet, he was visited with illegal termination or termination which is actually activated by malice, it may be unfair to deny him the fruits of the employment which he would have enjoyed but for the illegal / malafide termination. The effort of the Court must be to then to restore the status quo in the manner which is appropriate in the facts of each case. The nature of the charges, the exact reason for the termination as evaluated and, of course, the question as to whether the employee was gainfully employed would be matters which will enter into the consideration by the Court.....”

(emphasis supplied)

22) The aforesaid pronouncement indicates that the nature of the action which visited the employee with the consequence of termination must enter the arena of determination as to entitlement of backwages. If the Court comes to a conclusion that the action of termination, which was found to be illegal, was actuated by malice or ill-will, as distinguished from a *bona fide* pursuit of disciplining an employee, it would be unfair to deny the employee fruits of employment which he would have enjoyed but for the illegal/malafide termination. In such a case, the nature of the charge, the reason for the termination as well as the aspect as to whether the employee was gainfully employed would be the factors influencing the decision.

23) Applying the aforesaid principles to the facts of the case at hand, first and foremost, it is pertinent to note that the premise

of the petitioner that there was no assertion by employee that post termination order she was not serving elsewhere and did not generate any income is not factually correct. Not only the application to amend the Appeal Memo clearly record the said fact but the petitioner, in its reply, had also controverted the same.

24) Secondly, in the light of the propositions enunciated in the case of **Deepali** (supra), the onus on the employee, which is in a sense negative one, would stand discharged once a positive assertion is made by the employee that she was not gainfully employed or was employed on a lesser wages. Then if the employer wants to avoid the backwages, it is incumbent on the employer to plead and also lead cogent evidence to the contrary. In the case at hand, the petitioner does not profess to have led such evidence to the contrary.

25) Thirdly, the nature of the employment also assumes significance. An Assistant Teacher after having rendered more than 15 years of service, would not be in a position to get an alternate employment easily. Mr. Patel, attempted to salvage the position by canvassing a submission that the respondent No. 1 could have rendered tutions. This submission does not fully comprehend the practicability and realities of life.

26) In any event, the learned Presiding Officer, School Tribunal has taken into account the then prevailing circumstances, including the situation brought about by COVID-19 Pandemic, and scaled down the backwages to 60%. I do not find any reason to interfere with the exercise of judicious discretion by the School Tribunal.

27) Resultantly, the Petition fails on both the counts.

28) Hence, the following order.

:-ORDER:-

- (i)** The Petition stands dismissed.
- (ii)** The Interim Application, if any, also stands disposed.

[N. J. JAMADAR, J.]