



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5651 OF 2008

1. The Secretary,
National Charitable Trust,
Khorl Galll, Latur.
2. The Head Master,
Mahatma Gandhi Vidyalaya,
Tungi, (Bk.), Tq. Ausa, District Latur. ... **Petitioners.**

Versus

1. The State of Maharashtra,
Through, Secretary Education Department,
Mantralaya, Mumbai.
2. The Education Officer (Secondary),
Zilla Parishad, Latur.
3. Dayanand s/o Chandrahas Kale,
Age 30 years, Occu. Service,
R/o Wanvada, District Latur, ... **Respondents.**

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Advocate for Petitioners : Mr. R. K. Ashtekar.
AGP for Respondent/s-State : Mr. A. S. Shinde.
Advocate for Respondent No.3 : Mr. R. J. Godbole.

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CORAM : S. G. MEHARE, J.

RESERVED ON : 13.03.2024

PRONOUNCED ON : 30.04.2024

JUDGMENT :-

1. Heard the learned counsel for the petitioners, learned
AGP for respondents/State Authorities and learned counsel for
respondent No.3.

2. The management/respondent has impugned the judgment and order of the School Tribunal dated 07.08.2008, passed in Appeal No.213 of 2006, District Latur.

3. The petitioners will be referred to as "respondents" and respondent No.3 will be referred to as the "appellant" as per their status before the learned Tribunal.

4. Brief facts of the case were that the appellant was appointed as Assistant Teacher by following due procedure of law on 23.06.2003. However, on two grounds, the respondent terminated his services by a written communication dated 16.04.2005. Firstly, he repeatedly sought leave and did not attend school. His acts were illegal and against the interest of the society. Secondly, the Education Officer did not approve the appointment as there was no requisite workload.

5. The appellant impugned the said order before the Presiding Officer. He contended that his termination of services was illegal and against the provisions of the law. His performance was never assessed as required under Rule 15(4) and (6) of the Maharashtra Employees Of Private Schools (Conditions Of Service) Regulations Act, 1977 (for short "Act

of 1977). He also has the case that the respondent cannot terminate his service only for non-approval by the Education Officer. He was on probation. He has a further case that he was otherwise terminated on 29.01.2005 as he was not allowed to sign the muster roll. He admitted that he sought leave on 27.01.2005 and half day on 28.01.2005.

6. The respondent opposed the appeal of the appellant, contending that his performance was unsatisfactory. Therefore, his services were correctly terminated before the probation period was over.

7. The learned Tribunal observed that the performance of the probationary is to be taken into consideration before terminating his services. Rule 15(6) and 14 thus are not complied with, and the termination of the probationary service in exercise of power under Section 5(3) of the Act of 1977 is liable to be set aside. He further observed that Rules 14 and 15 of the M.E.P.S. Rules do not overwrite the provisions of Section 5(3) of M.E.P.S. Act. The Management did not place on record any material about the adverse remarks or any adverse performance of the appellant during the preceding year. In view of the ratio laid down in the case of *Progressive*

Education Society and another Vs. Rajendra and another; AIR 2008 SC 1442, refusal of the individual approval is not a ground to terminate the services. It has also been observed that every school is bound to appoint one physical education teacher, and such a teacher is required to be up to the strength of 250 pupils. If there are more than 250 pupils, then the school may appoint another physical education teacher and give him the workload of other subjects. He also directed the Education Officer to consider the proposal of approval of the appellant afresh as per his findings.

8. Learned counsel Mr. Ashtekar for the appellant has vehemently argued that the strength of the student in the school at the relevant time was below 250, and the post of physical education teacher was not sanctioned. The respondent knew it well. Hence, he remained absent in the school. He argued that the learned Tribunal had incorrectly observed that as per the Government Resolution dated 14.05.1987, the schools were bound to appoint one physical education teacher. The findings of the Tribunal on the workload are also baseless. He would submit that under Section 5(3) of the Act of 1977, the Management can terminate the services at any time before the probation period is complete. Therefore, his termination

was correct. Rules 14 and 15(1)(3)(4)(5)(6) do not apply in the case at hand. It is not necessary to communicate adverse reports of performance to employees.

9. To bolster his argument, he relied on the case of the Full Bench judgment of Bombay High Court in ***Gramin Yuvak Vikas Shikshan Mandal + 1 Vs. Shivnarayan Datta Raut+1, in Writ Petition No.5998 of 2019, dated 30.05.2023***. He would submit that the termination of the petitioner was not stigmatic. Therefore, he, being a probationary teacher, was correctly terminated from services without inquiry. He also argued that the learned Tribunal did not consider the legal aspects and passed the erroneous order. He prayed to allow the writ petition.

10. Per contra, learned counsel Mr. Godbole, for contesting respondent No.3, has vehemently argued that if the order terminating the probationer's service is stigmatic, the inquiry is essential. The post of physical education teacher was in existence. There was sufficient strength in the school. However, a false record was created with mala fide intent to terminate his services. He referred to Rule 28 (5) and (c)/2 of the M.E.PS. Rules, 1981 and argued that there was no persistent

absence of the respondent without permission. The respondents have cancelled the appointment of the applicant. The approval to his appointment was incorrectly rejected. He also submits that the petitioner was entitled to back wages automatically upon succeeding in the appeal.

11. To bolster his argument, he relied on the case of ***Arti Vitthalrao Warkhede Vs. Education Officer (Secondary) Zilla Parishad, Wardha and others; 2011 (1) Mh.L.J. 638*** on the point that the School Tribunal has the jurisdiction to decide the correctness of the order of the Education Officer as an incidental question. He relied on the case of ***Jayashri Jyotiram Phale Vs. People's Education Society, Kolhapur and others*** ; Maharashtra Education Cases, 67 and vehemently argued that the stigmatic termination order of the probationary also requires the inquiry contemplated under the Act of 1977. He also relied on the case of ***V. P. Ahuja Vs. State of Punjab ; AIR 2000 SC 1080***. In this case, it has been held that the stigmatic order affecting the performance and future of the teacher could not have been passed without holding a regular inquiry and giving an opportunity of hearing to the appellant. He further relied on the case of ***Vishwanath Dnyanoba Kirade Vs. Nav Akanksha Mahila Mandal, Parbhani and others ; MEC 551***

equal 2015 (3) Mh.L.J. 725. In this case, it has been observed that the stigmatic order could not have been passed against the probationer.

12. The first question that goes to the root of the case is whether the termination order is stigmatic and affects the future of the petitioner. A copy of the termination order is placed on record. In the termination order, it has been contended that from 24.01.2005 to 26.01.2005, he was sent to the Adolescence Life Skill Camp. Then, on 27.01.2005, he took leave. On 28.01.2005, in the morning, he was present, did his teaching and in the second half, he obtained the leave. Thereafter, he did not attend the school for discharging his duties. His acts were illegal and against the interest of the society. Further, it has been mentioned therein that the Education Officer refused the approval for his appointment as there was no required workload.

13. Learned counsel for the appellant has vehemently argued that the contents of the notice proved that the termination of the petitioner of the appellant was stigmatic. Therefore, he could not have been terminated unless the inquiry was conducted against him. The Hon'ble Supreme

Court, in the case of *V. P. Ahuja* (*supra*) has held that a probationary, 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. This Court, in the case of *Vishwanath* (*supra*) considered the landmark judgment of *Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences ; (1993) 3 SCC 60*, on the point of the termination of the probationer. In that case, a specific issue was framed: when can an order of termination of a probationer be said to express stigma?

14. The law is well settled that any order terminating the services of the probationary is stigmatic or punitive in nature; the employee cannot be terminated without following the principle of natural justice, i.e. without giving him an opportunity of hearing and holding an inquiry. The termination of the services under Section 5(3) of the Act 1977 of the probationer should not reflect the contents that are stigmatic or punitive because such orders affects the future of the employee.

15. Reading the contents of the termination order, in no manner of doubt, it is stigmatic and punitive. Therefore, the services of the appellant could not have been terminated without holding an inquiry contemplated under the Act of 1971.

16. The next question has been raised that Rules 15 and 14 of the M.E.P.S. Rules are not applicable in the case of the probationer. Learned counsel for the respondent relied on the case of ***Gramin Yuvak*** (supra). It was a case referred to the Larger Bench since there were conflicting judgments on the applicability of entire Rule 15 of M.E.P.S. Rules. The Full Bench has answered the questions referred to it and held that only Sub Rule 6 of Rule 15 of M.E.P.S. Rules applies where an employee is appointed on probation when the Management takes action under Section 5(3) of M.E.P.S. Act and not the entire Rule from Sub Rule 1 to 6 of the M.E.P.S. Rules. It has been further answered that failure to adhere to the requirement of sub Rule (3) and (5) of Rule 15 of M.E.P.S. Rules will not ipso facto vitiate action taken by the Management under Section 5 (3) of M.E.P.S. Act. If the Management satisfied the requirement of Sub Rule 6 of Rule 15 of M.E.P.S. Rules by ensuring that the performance of an

employee appointed on probation has been objectively assessed by the Head or the record of such assessment has been maintained. It has been further held in the said case that non-compliance of Sub Rule 5 of Rule 15 of M.E.P.S. Rules did not vitiate an order of termination of service simplicitor issued by the Management under Section 5(3) of the M.E.P.S. Act as it covers termination of an employee appointed on probation on both counts it is unsatisfactory work and also for unsatisfactory behaviour. Lastly, it has been observed that it can be summed up by holding that the plain reading of Rule 15 of M.E.P.S. Rules does not indicate that Rules 15(1) to 15 (5) apply to probationers along with Rule 15 (6) of the M.E.P.S. Rules.

17. The Bombay High Court, in the case of *High School Education Society and another Vs. Presiding Officer, School Tribunal and another; 2004 SCC OnLine Bombay 915*, in paragraph No.18 observed that if Sub Section (3) of Section 5 of the Act and sub Rule 6 of Rule 15 of the Rules are read conjointly, it can very well be inferred that adverse remarks need not be communicated to a probationer in order to grant him an opportunity to improve upon the same or agitate the same. Communication of adverse remarks, holding of enquiry, grant of further chance for improvement etc., in my view, is not

contemplated either under Section 5(3) of the Act or Rule 15(6) of the Rules. Therefore, if the Management is of the opinion that during the period of probation, the services of a probationer were not satisfactory, it can very well terminate the services of such employee before the probation period comes to an end.

18. The law is clarified in ***Gramin Yuvak*** (supra) that failure to adhere to requirements of sub-rules (3) and (5) of Rule 15 of the MEPS Rules would ipso facto vitiate an action taken by the Management under Section 5(3) of the MEPS Act. If the Management satisfies the requirement of sub-rule (6) of Rule 15 of the MEPS Rules by ensuring that the performance of an employee appointed on probation has been objectively assessed by the Head and a record of such an assessment has been maintained. However, the Management did not produce any such record. The respondent failed to produce such a record before the Court.

19. This Court has already observed above that the termination order is ipso facto stigmatic and punitive. Therefore, the view of the Hon'ble Supreme Court in ***V.P. Ahuja*** is squarely applicable to the case at hand.

20. So far, the termination of the employee for non-approval of the appointment is concerned, it is well settled that it is not a ground for termination of service. Bombay High Court, in the case of *Arti* (supra) has held that the School Tribunal has jurisdiction to decide the correctness of the impugned order of the Education Officer as an incidental question.

21. The Education Officer did not approve the appointment as there was no workload and there were excess teachers. The learned Tribunal on facts recorded the findings that the petitioner was appointed prior to the appointment of another employee Mr. Sonkamble from S.C. Category. The approval of the teaching staff was 1+4. The appellant was at serial No.4 in the teaching staff. He was appointed on 23.06.2003, and Sonkamble was appointed after him on 10.06.2004. The appellant was appointed against the vacant, clear and permanent post. He was appointed as a physical education teacher. The Government has a resolution dated 14.05.1987 mandating the school to appoint one physical education teacher in a school. The criteria for appointing such a teacher was that there shall be a strength of up to 200 to 250, and the appointment shall be made from the sanctioned post. It has also been provided therein that such a teacher should be given

at least 50% of the workload of physical education, and if the physical education teacher has a workload of 9 Clock hours or more than that, one more teacher may be appointed as physical education teacher. The Tribunal examined the teaching timetable and believed that he was also teaching Marathi and geography subjects. In 2004-2005, the strength of the pupil was 234. Interpreting the said Government Resolution, the Tribunal has correctly discarded the argument of the respondent that there must be one physical teacher there should a strength of 250 pupils. He correctly interpreted the resolution that there should be one physical education teacher for the strength of pupils up to 250. He has correctly exercised the powers to examine the legality of not approving the appointment as an incidental question.

22. Learned counsel for the respondent has vehemently argued that there was no pleading at all about the back wages. Therefore, the impugned order is bad in law awarding the back wages.

23. Normally, the back wages are denied. If the employee was gainfully employed during the period from the date of termination of his services and the date of the order by the

Tribunal awarding him compensation/back wages. The respondent has no case that from the date of his termination till the conclusion of the appeal, the appellant was in gainful employment. Therefore, the learned Tribunal is correct in granting him back wages as provided under Section 11(2)(c) of the Act of 1977.

24. For the above reasons, the writ petition stands dismissed.

25. Rule made discharged.

26. No order as to costs.

(S. G. MEHARE, J.)

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27. Learned counsel for the petitioners submits that the petitioners wanted to impugn the order before the Apex Court. Hence, the order may be stayed for further three (3) weeks as the summer vacation of the Hon'ble Supreme Court is ensuing.

28. Learned counsel for the respondent strongly opposed the prayer of the petitioners on the ground that the petitioners

have been terminated in the year 2005. Thereafter, the learned Tribunal passed the order in his favour. Instead of reinstating him, the management has secured the stay since 2008. The employee is out of job. Hence, it would be unjustifiable to stay the matter. The petitioners have no good case on merit.

29. Considering the issue involved in this case and the age of litigation, this Court find substance in the submissions of the learned counsel for the employee. It would be unjustifiable to keep the matter stayed for further period. Hence, the request of the petitioners to stay the petition could not be accepted.

(S. G. MEHARE, J.)

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