



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO.6055 OF 2022

1. Bhavan's Bhagvandas Purohit
Vidya Mandir, Nanda, Khaparkheda
Road, Koradi, Tah. Dist. Nagpur
through its Principal.
2. Bharatiya Vidya Bhavan, through
its Executive Secretary, Munshi
Sadan, Bhartiya Vidya Bhavan
Chowk, Kulpati K.M.Munishi
Marg, Mumbai – 400 007.
3. Bhartiya Vidya Bhavan, Nagpur
Kendra, Near Meetha Neem
Dargah, Civil Lines, Nagpur,
through its Associate Secretary.

.... **PETITIONERS.**

// VERSUS //

1. Swanand S/o. Ashok Khedkar,
Aged about 33 years, Occu. Nil,
R/o. Plot No.9, Shivani Apartment,
Central Exercise Colony, Telcom
Square, Nagpur.
2. The Education Officer (Secondary),
Civil Lines, Zilla Parishad, Nagpur.

.... **RESPONDENTS.**

Shri M.G.Bhangde, Sr.Adv. a/b Shri Shantanu Ghate, Advocate for Petitioners.
Shri H.S.Chitale, Advocate for Respondent No.1.
Shri D.P.Thakre, A.G.P. for Respondent No.2.

CORAM : ANIL S. KILOR, J.
DATE OF RESERVING THE JUDGMENT : 19/10/2023
DATE OF PRONOUNCING THE JUDGMENT : 19/01/2024

JUDGMENT :

1. Heard learned counsel for the respective parties.
2. **RULE.** Rule made returnable forthwith. Heard finally by consent of the parties.
3. This petition takes exception to the judgment and order dated 12/08/2022 passed by the School Tribunal, Nagpur in School Tribunal Appeal No.08 of 2021, thereby allowing the appeal and setting aside the order of termination dated 23/02/2021 and further directing the petitioners to reinstate the respondent No.1 in service with continuity and full back wages.

The brief facts of the case are as under under:

4. The petitioner No.2 is a registered society running various schools all over India and in Nagpur it is running around 5 schools. The petitioner No.1 is a school run by Petitioner No.2 and it is a recognized school.

5. The respondent No.1 was appointed in the petitioner No.1 school in the academic year 2017-18 on a probation for a period of one year, vide order dated 14/07/2017. The said period of probation was extended for one year vide order dated 23/04/2018.

6. Thereafter, vide order dated 04/05/2019 the respondent No.1 was confirmed in service w.e.f. 01/07/2019.

7. Then, the services of the petitioner came to be terminated vide order dated 23/02/2021 which was the subject matter of challenge before the School Tribunal. The Tribunal allowed the appeal vide impugned judgment and order dated 23/02/2021. Hence, this petition.

8. I have heard the learned counsel for the respective parties.

9. Shri Bhangde. Learned Senior Advocate submits that while terminating the services of the respondent No.1 as per rules a cheque of three months' salary in lieu of three months' notice was issued in the name of the respondent No.1. The said cheque was encashed by the respondent No.1 on 15/05/2021 which amounts to acceptance of the order of termination. It is submitted that the respondent No.1 is

therefore, estopped from pursuing the appeal against the termination order. It is submitted that the respondent cannot be permitted to approbate and reprobate by adopting one part of the order and refusing another part, when the order intends to take effect in its entirety. In support of his submission he has placed reliance on the judgments of the Hon'ble Supreme Court of India in the case of *Punjab Sind Bank ..vs.. S. Ranveer Singh Bawa*, reported in **(2004) 4 SCC 484**, *State of Punjab ..vs. Dhanjit Singh Sandhu*, reported in **(2014) 15 SCC 144** and a judgment of the Division Bench of this Court in a case of *Dev Sha Corpn. V. Shree Ram Mills Ltd.*, reported in **2009 (4) Mh.L.J. 357**.

10. Shri Bhangde, learned Senior Advocate has argued that reinstatement can only be granted in case the termination is against breach of any statutory provision or rule. It is submitted that in the present matter there is no allegation that the termination is in breach of any statutory rule or provision. Hence, it is argued that, the reinstatement granted by the Tribunal is illegal. To buttress this contention, the learned counsel for the petitioners has placed reliance upon the judgments of the Hon'ble Supreme Court of India in the case of *Kumari Regina ..vs.. St. Aloysius School*, reported in **(1972) 4 SCC 188** and *State Bank of India .. vs. S.N.Goyal*, reported in **(2008) 8 SCC 92**.

11. It is further submitted that the termination was on the ground that the services of the respondent were not found suitable. It is contended that, as far as the paragraph in the termination order, which says that, it is found that the respondent had no other work due to the pandemic Covid-19 and inasmuch as the respondent has always declined to perform alternative work. It is found that the respondent was not willing to work which was assigned to him time to time, this has been deleted and it was informed to the respondent vide communication dated 09/06/2021. It is submitted that the said communication was not challenged by the respondent by carrying out necessary amendment to the appeal memo. It is therefore, submitted that the amended termination order, not put to the challenge, which governs the position and earlier order loses its efficacy. In the circumstances, it is submitted that the Tribunal ought not to have entertained the appeal.

12. It is submitted that as the respondent was not found suitable, there is no need to hold the enquiry against the respondent. It is further submitted that as no disciplinary action was taken against the respondent there is no need to grant hearing to the respondent.

13. It is further argued that the learned Tribunal has committed error in granting back wages, ignoring the fact that the respondent No.1 is a practicing lawyer and as such he is gainfully employed.

14. Shri Chitale learned counsel for respondent No.1 argues that the order passed by the School Tribunal is just and proper and needs no interference. It is submitted that the respondent is a confirmed employee and he was confirmed after evaluation of his performance and on finding it satisfactory. It is submitted that therefore, termination on the ground that he was not suitable is not tenable.

15. It is submitted that the petitioner No.2 school is affiliated to the Central Board of Secondary Education (CBSE) and the school is permitted to define the Service Rules for Teaching and Non-Teaching Employees on the lines of Services Rules for employee of the appropriate Government as mentioned in the Chapter 5 of the Affiliation Bye-laws. It is submitted that accordingly the petitioner No.1 School had framed the Service Rules i.e. the Bharatiya Vidya Bhavan (Nagpur Kendra) Service Rules, 2006 (hereinafter referred to as "Service Rules 2006"). It is submitted that, the Right of Children to Free and Compulsory Education, 2009 (hereinafter referred to as "the Act of 2009") came into

effect and the provisions of the said Act of 2009 are applicable to the petitioner No.1 School. It is submitted that the petitioner No.1 school did not follow and comply either Rules of 2006 or Section 24(2) of the Act of 2009. It is therefore, submitted that the learned Tribunal has rightly held that the termination is illegal.

16. Shri Chitale learned counsel for the respondent No.1 submits that the respondent has recently joined Bar to practice as an Advocate. It is submitted that practicing as an Advocate cannot be said that the respondent is gainfully employed.

17. It is submitted that after the termination immediately the appeal was filed raising a challenge to the termination and before expiry of the period of validity of the cheque, the cheque was encashed for survival as the respondent was jobless. It is therefore, submitted that it would not take away the right of the respondent to claim his right. It is therefore, prayed for dismissal of the present writ petition. He has placed reliance on the judgments of the Hon'ble Supreme Court of India in the case of *Nar Singh Pal ..vs.. Union of India*, reported in **AIR 2000 SC 1401** and *Workman of S.T.Estate ..vs.. S.T. Estate*, reported in **AIR 1967 SC 420**.

18. In light of rival submissions, I have perused the record and the impugned order.

19. From the record following facts emerge as admitted facts:

- a) The respondent was appointed as Physical Education Teacher in petitioner No.1 school vide order dated 14/07/2017 on probation for a period of one year.
- b) The period of probation of the respondent was extended for one more year w.e.f. 09/05/2018 to 08/05/2019 vide order dated 23/04/2018.
- c) The period of probation of the respondent was further extended from 10/05/2019 to 30/06/2019 vide order dated 30/04/2019.
- d) The services of the respondent came to be confirmed as Physical Education Teacher w.e.f. 01/07/2019 vide order dated 04/05/2019.
- e) The respondent was terminated vide order dated 23/02/2021 on the ground that he had no work due to pandemic and always declined to perform alternate work and not willing to work which is assigned to him. Accordingly, it was observed in the termination order that, services of the respondent No.1 were no longer found to be required by the petitioners.

- f) The respondent No.1 was paid three months' salary in lieu of three months' notice vide cheque dated 22/02/2021 drawn on Bank of Baroda, which was encashed by him on 15/05/2021.
- g) The appeal challenging the termination was filed on 22/03/2021.
- h) The School Management Committee in its meeting dated 30/04/2021 amended the termination order and thereby removed the following portion "However, it is found that you had no other work due to the pandemic Covid 19 and inasmuch as you have always declined to perform alternate work. It is found that you are not willing to work which is assigned to you time to time."
- i) The above referred amendment was informed to the respondent No. vide order dated 09/06/2021.
- j) In the written statement in paragraph 25 it was stated by the petitioners that the respondent No.1 was terminated because he was not suitable for the job.

20. From the above referred admitted facts, it is evident that after the first appointment of the petitioner on probation, twice the probation period was extended and finally he was confirmed w.e.f. 01/07/2019.

21. The order of termination gave two reasons for termination which read thus :

“However, it is found that you had no other work due to the pandemic Covid 19 and inasmuch as you have always declined to perform alternate work. It is found that you are not willing to work which is assigned to you time to time.

Accordingly, in the meeting of SMC overall assessment was made and it is found that your services are no longer required and, therefore, it has been resolved to terminate your services.”

22. The above referred first para was subsequently removed from the order of termination by making amendment to the termination order, in pursuance to the resolution passed in School Management Committee, dated 30/04/2021.

23. Whereas, in the written statement it is the case of the petitioners that the services of the respondent No.1 were not found suitable. Thus, it is evident that before the School Tribunal the whole case of the petitioners was that the services of the respondent was not found suitable.

24. In the circumstances, at this juncture, it is necessary to examine whether after the confirmation, that too after extending the

probation period twice after the first probation period was over, the respondent No.1 can be terminated on the ground of non-suitability?

25. To answer the above referred question it would be beneficial to reiterate the law as regards the purpose of probation.

26. The Hon'ble Supreme Court of India in the case of *Rajasthan High Court v. Ved Priya*, reported in **2020 SCC OnLine SC 337** has held thus :

“14. The present case is one where the first respondent was a probationer and not a substantive appointee, hence not strictly covered within the umbrella of Article 311. The purpose of such probation has been noted in Kazia Mohammed Muzzammil v. State of Karnataka :

“25. The purpose of any probation is to ensure that before the employee attains the status of confirmed regular employee, he should satisfactorily perform his duties and functions to enable the authorities to pass appropriate orders. In other words, the scheme of probation is to judge the ability, suitability and performance of an officer under probation. ...”

15. Similarly, in Rajesh Kumar Srivastava v. State of Jharkhand it was opined: (SCC p.449, para 9)

“9... A person is placed on probation so as to enable the employer to adjudge his suitability for continuation in the service and also for confirmation in service. There are various criteria for adjudging suitability of a person to hold the post on permanent basis and by way of confirmation. At that stage and during the period of probation the action and activities of the probationer (appellant) are generally

under scrutiny and on the basis of his overall performance a decision is generally taken as to whether his services should be continued and that he should be confirmed, or he should be released from service. ...”

16. It is thus clear that the entire objective of probation is to provide the employer an opportunity to evaluate the probationer’s performance and test his suitability for a particular post. Such an exercise is a necessary part of the process of recruitment, and must not be treated lightly. Written tests and interviews are only attempts to predict a candidate’s possibility of success at a particular job. The true test of suitability is actual performance of duties which can only be applied after the candidate joins and starts working.”

27. From the above referred observation it is evident that a person is placed on probation so as to enable the employer to adjudge his suitability for continuation in the service and also for confirmation in service. During the probation the action and activities of the probationer are generally under scrutiny and on the basis of his overall performance a decision is generally taken as to whether his services should be continued and that should be confirmed or he should be relieved from service.

28. In the matter at hand, admittedly, the respondent No.1’s initial appointment dated 14/07/2017 was on probation for one year which was extended for one more year up to 08/05/2019 and again it was extended up to 30/06/2019. Thus, after scrutinizing the suitability of the

respondent No.1 during his probation period the petitioners confirmed him on finding that he is suitable. In the circumstances, after confirming the employee in service on completion of the probation period, a right is created in favour of such an employee to hold the post until he attains the age of superannuation and in the absence of a contract express or implied or a Service Rule, he cannot be turned out his post unless the post itself is abolished or unless he is guilty of misconduct, negligence, insufficiency or other disqualification and appropriate proceedings are taken under the Service Rules.

29. Moving further, admittedly, the services of the petitioner were governed by the Service Rules of the petitioner No.2 society. Rule 17 of the Service Rules deals with normal procedure for dealing with acts/ omissions resulting in the violation of Service Rules or misconduct, disobedience etc. The relevant portion of the same reads thus :

“17. The normal procedure for dealing with the acts / omissions resulting in the violation of these rules, or misconduct, disobedience etc., is laid down hereunder. On the commission of any offence by an employee, the management or, a person authorised by them, will call for the explanation from the offending person, hold an enquiry in regard thereto and pass orders awarding such punishment as deemed necessary in the circumstances of the case. Full opportunity will be given to the employees to defend himself/ herself before the final orders are passed. The delinquent employees may be placed immediately under suspension, if necessary,

pending such disciplinary proceedings as mentioned above.

An employee under suspension may be entitled to a subsistence allowance amounting to half of his/ her average monthly emoluments. If the enquiry is not completed within three months, the employee under suspension, beginning from the fourth month will be entitled to $\frac{3}{4}$ of the average monthly emoluments till the completion of six months. After that, the employee will be entitled to full emoluments if a decision is not given within the period of six months from the date of suspension; provided that during the suspension period, the employee makes himself/ herself available for the enquiry as per administrative requirements of the Management of the Institution, and does not leave the station where he/she works causing delay to the enquiry or arriving at a decision in the said case.

The punishment mentioned includes:

Warning

Censure

Fine

With-holding of increments of pay

Reducing in pay or rank

Compulsory retirement

Removal from Service

Dismissal from service.

x x x

Before imposing any penalty, the Director, Principal or the Chairman/ Secretary/ Management as the case may be, shall give reasonable opportunity to the concerned employee to show cause against the allegations made against him/ her.

The Punishing Authority as the case may be, intending to impose any penalty on an employee, shall nominate an enquiry officer who will make his/ her recommendations, after taking into consideration the material placed before him/ her and, if necessary, conduct a further enquiry himself/ herself to clear obscure points, if any. The punishing authority shall allow him/her a personal hearing. If the employee requests for it in writing. ...”

30. Admittedly, no such procedure was followed by the petitioners before terminating the services of the respondent. On the date of termination the reasons given in the order of termination would attract Rule 17 as it also covers disobedience.

31. The learned Tribunal has rightly held in the judgment that the stigmatic part of the order of termination was deleted to avoid to hold enquiry and the ground of non-suitability put forward. Thus, considering the background in which the stigmatic part of termination order was deleted after filing of the appeal does not absolve the petitioners from complying Rule 17 of the Service Rules as on the date of termination the said stigmatic reasons were there in the order.

32. In the circumstances, the reasons stated in the initial order of termination before amendment would be relevant in this matter as the reasons in the termination order would determine whether the proper procedure was adopted while terminating the services as per the Service Rules 2006.

33. Hence, the subsequent amendment to the termination order though not challenged, would not vitiate the appeal.

34. The Right to Education Act came into force in 2009, which received assent of the President of India on 26/08/2009. The provisions of the Act of 2009 are applicable to the present case. Section 24, which deals with duties of the teachers and redressal of the grievances, which reads thus:

“24. Duties of teachers and redressal of grievances. - (1)

A teacher appointed under sub-section (1) of section 23 shall perform the following duties, namely:-

(a) maintain regularity and punctuality in attending school;

(b) conduct and complete the curriculum in accordance with the provisions of sub-section (2) of section 29;

(c) complete entire curriculum within the specified time;

(d) assess the learning ability of each child and accordingly supplement additional instructions, if any, as required;

(e) hold regular meetings with parents and guardians and apprise them about the regularity in attendance, ability to learn, progress made in learning and any other relevant information about the child; and

(f) perform such other duties as may be prescribed.

(2) A teacher committing default in performance of duties specified in sub-section (1), shall be liable to disciplinary action under the service rules applicable to him or her:

Provided that before taking such disciplinary action, reasonable opportunity of being heard shall be afforded to such teacher.

(3) The grievances, if any, of the teacher shall be redressed in such manner as may be prescribed.”

35. From the above referred provisions, it is evident that sub-Section (2) of Section 24 says that a teacher committing default in performance of duties specified in sub-section (1), shall be liable to disciplinary action under the service rules applicable to him or her. Proviso to sub-section (2) says that before taking such disciplinary action, reasonable opportunity of being heard shall be afforded to such teacher.

36. In the circumstances, there is violation of statutory provision while terminating the services of the respondent No.1 as argued by the learned counsel for the petitioners.

37. In the circumstances, even clause (2) of the appointment order dated 04/05/2019 is not sufficient to say that the termination simpliciter is permissible, for the reason that clause (4) of the order of appointment says that the respondent No.1 will continue to be governed by the provisions of the Rules and Regulations, Service Conditions and Code of Conduct for Teachers of the School and Rules of Bhartiya Vidya Bhavan prevailing, present and as may be laid down from time to time.

38. In the circumstances, the contention of the learned counsel for the petitioners that there is no violation of the statutory provisions

and the appointment order permits to terminate the services by issuing three months' notice or payment of an amount equal to three months' salary in lieu thereof cannot be accepted and accordingly it is rejected.

39. Interestingly, even before resolution of the Management to terminate the services of the respondent, the cheque for the amount of three months salary was ready and it was signed. The date of the cheque issued to the respondent towards three months salary in lieu of three months notice is dated 22/02/2021 whereas, the order of termination is dated 23/02/2021.

40. The above referred fact shows that the termination was predetermined.

41. As far as the encashment of cheque is concerned, the judgments cited by the learned counsel for the petitioner in the case of *Punjab and Sind Bank* (supra), *State of Punjab* (supra) and *Dev Sha* (supra) are of no help to the petitioners for the reasons that in those cases certain benefits were given to the employee or a person while issuing certain orders.

42. In the case of *Punjab and Sind Bank* (supra) the amount paid to the employee on his voluntary retirement was accepted and subsequent to the same the voluntary retirement was sought to be withdrawn.

43. In another matter i.e. *State of Punjab* (supra) it is held that once an order has been passed and accepted by other party and derived the benefits out of it he cannot challenge it on any ground. In the present matter, the amount towards three months salary cannot be considered as benefit of termination and it also cannot be said that by encashing the cheque the respondent received some advantage.

44. Lastly, in the case of *Dev Sha* (supra) the petitioner received the benefits of the order setting aside decree by accepting costs imposed on the respondent and therefore, the Court has observed that adopting one part of the order and refusing another part when the order is intended to take effect in its entirety, is not permissible.

45. In the present matter, the cheque was encashed for survival by the respondent on his termination and such course is permitted by the Hon'ble Supreme Court of India in the case of *Nar Singh Pal* (supra) wherein the Supreme Court of India held thus :

“13. The Tribunal as also the High Court, both appear to have been moved by the fact that, the appellant had encashed the cheque through which retrenchment compensation was paid to him. They intended to say that once retrenchment compensation was accepted by the appellant, the chapter stands closed and it is no longer open to the appellant to challenge his retrenchment. Thus, we are constrained to observe, was wholly erroneous and was not the correct approach. The appellant was a casual labour who had attained the 'temporary' status after having put in ten years' of service. Like any other employee, he had to sustain himself, or may be, his family members on the wages he got. On the termination of his services, there was no hope left for payment of salary in future. The retrenchment compensation paid to him, which was only a meagre amount of Rs.6,350/- was utilised by him to sustain himself. This does not mean that he had surrendered all his constitutional rights in favour of the respondents. Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution. As pointed out earlier, the termination of the appellant from service was punitive in nature and was in violation of the principles of natural justice and his constitutional rights. Such an order cannot be sustained.”

46. Similarly, in the case of *Workman of S.T.Estate* (supra) the Hon'ble Supreme Court has held thus :

“26. It is true that the notices for effecting the retrenchment were issued by Mr. Hammond and it was Mr.Hammond who paid the retrenchment compensation to the employees. Mr. Sastri sought to make a point against the appellants by suggesting that the employees had accepted retrenchment compensation and should not now be permitted to

question the validity of the retrenchment. Apart from the fact that such technical pleas are not generally entertained in industrial adjudication, we cannot overlook the fact that after retrenchment compensation was paid to the employees on August 31, 1959, the next day they complained that they had been forced to accept the said compensation, because they were virtually told that if they did not accept the compensation, they would not receive their wages for the month of August. The notices issued by Mr Hammond and the payment of compensation made by him; and the fact that the payment of wages for the month of August was made by the Vendee's Manager, can all be explained on the basis that once the Vendor and the Vendee agreed to retrench the 8 workmen, they decided to adopt the course which would apparently comply with the provisions of S. 25FF. That being so, we are not impressed by the argument that the acceptance of retrenchment compensation by the 8 workmen should be held to create a bar against them in the present proceedings.”

47. Nothing has been pointed out on behalf of the respondent No.1 that the respondent No.1 was gainfully employed and receiving regular salary. The ground that the respondent No.1 is practicing as an Advocate to deny the back wages cannot be accepted.

48. In the case of *Deepali Gundu Surwase ..vs.. Kranti Junior Adhyapak Mahavidyalaya*, reported in (2013) 10 SCC 324, the Hon'ble Supreme Court of India has held thus :

“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.”

49. In the present matter, though it is the case of the petitioners that the respondent No.1 is a practicing lawyer, the petitioners failed to establish that the respondent No.1 was / is getting amount equal to the salary, the respondent No.1 was drawing prior to termination of his services. The burden of proof of the existence of a particular fact lies on a person who makes a positive averment about its existence. Therefore, the onus lies on the petitioners. As the petitioners failed to prove the said fact, I do not want to interfere with the order of grant of back wages.

50. The termination in this case is contrary to Section 24 of the Act of 2009 and therefore, there is a breach of statutory provision and therefore, it cannot be said that the termination was not in breach of any statutory provision. In the circumstances, the judgment cited by the petitioner in the case of *Kumari Regina* (supra) and *State Bank of India* (Supra) are of no help to the petitioner.

51. In the circumstances, I do not find any error committed by the learned School Tribunal in allowing the appeal and directing the petitioners to reinstate the respondent.

52. Hence, as there is no merit in the writ petition, the Writ Petition is **dismissed**. No order as to costs.

(ANIL S. KILOR, J)

At this stage, the learned counsel for the petitioners submits that the statement made by the respondent-employee 'not to take coercive action', may be continued for further eight weeks.

This request cannot be accepted for the reason that the respondent-employee is not ready to continue with that statement and this Court cannot compel the respondent to continue such concession which was given by the respondent during pendency of the writ petition.

Accordingly, the request is **rejected**.

(ANIL S. KILOR, J)

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