

(2009) 02 BOM CK 0092

In the Bombay High Court

Case No : Writ Petition No. 4837 of 2003

Anand Education Society and Another

APPELLANT

Vs

Bharti Bhaskarrao Parsodkar and Others

RESPONDENT

Date of Decision : 16-02-2009

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 5, 5(1), 5(3)
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 28, 33, 34, 35, 36

Citation : (2009) 5 BomCR 421 : (2009) 122 FLR 293

Hon'ble Judges : Bhatia J.H., J

Bench : Single Bench

Advocate : R.L. Khapre, for the Appellant; D.T. Shinde and V.A. Thakare, A.G.P. for respondents 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

Bhatia J.H., J.—Respondent No. 1 was first appointed as Assistant Teacher on temporary basis for the period from 1.7.1996 to 30.4.1997 by Order dated 1.7.1996. After that academic session, by Order dated 1.5.1997 she was appointed on probation of two years with effect from 2.5.1997. The appointment of respondent No. 1 on probation was also approved by the Education Officer. However, even before one year's service was completed, during the probation period on 29.4.1998 the petitioner issued an order terminating services of respondent No. 1 on the ground that her work was found to be unsatisfactory. She was given one month's salary in lieu of this notice along with that termination order and thus her services came to be terminated with effect from 30.4.1998. That order was challenged by respondent in Appeal No. STC/50/1998 before the School Tribunal. According to her, the termination order was contrary to law, arbitrary and out of vindication and violating the principles of natural justice. She contended that her entire service record was satisfactory and unblemished and no adverse remarks were communicated to her. However, at

the fag end of the academic session 1997-1998, the Head Mistress of the School had issued a letter to respondent No. 1 calling explanation about a letter received about her character. However, copy of that letter was not supplied. It is contended that letter dated 30.4.1998 was issued to her for improving her behaviour and that letter was received along with the order terminating her services. It was contended that the management had tried to create adverse record against her in respect of termination order. It is contended that termination order amounts to termination on the basis of misconduct, misbehaviour and is thus stigmatic. It is contended that without holding Departmental Enquiry under Rules 36 and 37 under the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981, (For Short the "Rules") such termination order could not have been issued.

2. The petitioner contested the said appeal denying all the adverse allegations. It is contended that teaching performance of the respondent was poor and her overall performance as Assistant Teacher was unsatisfactory. She was warned and notices were issued to her in that respect. It is contended that because she was probationer it was not necessary to hold enquiry under the relevant rules. Services of the probationer could be terminated u/s 5(3) of the MEPS Act, if the work and behaviour of the probationer was not satisfactory. It is contended that several complaints were received about character and behaviour of respondent No. 1. Taking into consideration overall performance, the Management decided to terminate her services and her services were rightly terminated.

3. After hearing the parties, the School Tribunal held that the termination order is not just, proper and illegal because the termination is based on certain allegations about her character and misconduct amounting to moral turpitude and this could not be done without holding departmental enquiry. In the result, termination order was quashed and set aside and the Management was directed to reinstate her on her original post with continuity of service within a period of 30 days with arrears of emoluments. That order is challenged in the present case.

4. Heard learned Counsel for the parties. Learned Counsel for the petitioner vehemently contended that in view of settled position of law, in case of probationer the only thing required to be seen is whether under the relevant rules, the performance and behaviour of the probationer was satisfactory or not. If the employer is of opinion that the performance is not satisfactory, it is not necessary to hold any departmental enquiry. He also contended that if complaints of misconduct and misbehaviour are the foundation for termination of service, the Management is required to hold an enquiry and the employee would be entitled to minimum protection that the enquiry should be fair and proper and as per the principles of natural justice. On the other hand, learned Counsel for respondent No. 1- teacher vehemently contended that temporary employee cannot be removed from services unless an enquiry is held against him and relying on certain authorities he contended that the probationer is also entitled to that much protection. According to him, in the present case, there were certain

allegations of misbehaviour and misconduct and the Management has served the termination order on the basis of those complaints and, therefore, it was necessary to hold an enquiry. Learned Counsel for respondent No. 1 further contends that as no such enquiry was held and respondent No. 1 was not given an opportunity to defend herself, the termination order is bad in law and is liable to be set aside. Thus, he defends the impugned order passed by the School Tribunal.

5. Section (5) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (For short the "Act") deals with appointment as well as termination of services of probationer. As per Section (5)(1) the Management is required to fill in the permanent post in the private School by appointment of a person duly qualified and such appointment shall be on probation for the period of two years and on completion of probation period of two years, subject to provisions of Sub-sections (3) and (4), the employee shall be deemed to have been confirmed. Sub-section (3) of Section 5 is relevant for the purpose of the present matter, which reads as follows:

5 :-(1)...

(2) ...

(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.

On perusal of Sub-section (3) it will be clear that if in the opinion of the Management the work and behaviour of the probationer is not satisfactory, the Management may terminate the services during the period of probation by following procedure laid down in Sub-section (3). There is no provision in Sub-section (3), which requires the Management to hold an Enquiry to come to the conclusion that the work and behaviour is not satisfactory. Rule 28 of the Rules under the Act deals with the removal and termination of services of temporary employees as well as permanent employee but that is also not applicable to the probationer. For the purpose of inflicting major penalties, procedure is laid down in Rules 33 to 37 of the Rules.

6. In Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, , the question was whether the order of termination was founded on the allegations of misconduct. In that case on similar charges, enquiry had been held after service of charge-sheet. An enquiry report was also submitted by the Enquiry Officer but immediately thereafter termination order was issued. According to the employer, the enquiry was merely conducted to assess fitness of the employee for being continued on probation. According to the employee, the termination was bad in law because it was based on certain allegations of misconduct for which he was not given an opportunity to defend himself. The

Supreme Court held that, "one of the judicially evolved tests to determine whether there is substance in order of termination is punitive is to see whether prior to termination, there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct (c) which culminated in a finding of guilt. If all the three factors are present, the termination has to be held to be punitive, irrespective of the form of termination order. Conversely, if any of the three factors is missing, the termination has been upheld".

In *Mathew P. Thomas Vs. Kerala State Civil Supply Corpn. Ltd. and Others*, ; the Supreme Court had an opportunity to consider the position of law in respect of termination simpliciter and the termination, which is punitive in nature in respect of the probationer. Their Lordships observed as follows:

11. An order of termination simpliciter passed during the period of probation has been generating undying debate. The recent two decisions of this Court in *Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others*, and *Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr*, , after survey of most of the earlier decision touching the question observed as to when an order of termination can be treated as simpliciter and when it can be treated as punitive and when a stigma is said to be attached to an employee discharged during period of probation. The learned Counsel on either side referred to and relied on these decisions either in support of their respective contentions or to distinguish them for the purpose of application of the principles stated therein to the facts of the present case. In the case of *Depti Prakash Banerjee (supra)*, after referring to various decisions indicated as to when a simple order of termination is to be treated as "founded" on the allegations of misconduct and when complaints could be only as motive for passing such a simple order of termination. In para 21 of the said judgment a distinction is explained, thus:

21. If findings were arrived at in an enquiry as to misconduct, behind the back of the Officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not a foundation and the simple order of termination would be valid.

From long line of decisions it appears to us whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of

termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of un-suitability to continue in service. If the form and language of the so called order of termination simpliciter of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simpliciter or punitive. In cases where the services of a probationer are terminated by an order of termination simpliciter and the language and form of it do not show that either it is punitive or stigmatic on the fact of it but in some cases there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other words, the facade of the termination order may be simpliciter but the real face behind it is to get rid of services of a probationer on the basis of misconduct. In such cases, it becomes necessary to travel beyond the order of termination simpliciter to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In the process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from service on the foundation of his misconduct.

Again in *Abhujit Gupta Vs. S.N.B. National center, Basic Sciences and Others*, ; their Lordships held that, "The real test to be applied in a situation where an employee is removed by an innocuous order of termination is : Is he discharged as unsuitable or is he punished for his misconduct?.

7. From all these findings, it would be clear that if the misconduct is foundation of termination order, it becomes punitive in nature and, therefore, the principles of natural justice require that the Departmental Enquiry be held so that the same could be given an opportunity to defend himself and to clear his record because the termination of services on the basis of serious allegations about character of the probationer would amount to a stigma on that person. However, if the Management has material before it on the basis of which it forms an opinion that the person is not suitable for the job and having formed such opinion, the Management terminates the services of a probationer, it will not be necessary to hold enquiry provided the termination order itself is not stigmatic. Same view has been followed by this Court in *Secretary/Rector, Hyderabad Sindh National College Board and Others Vs. Deepak Indar Ahuja and Others*, and *Usha Vs. Presiding Officer, Additional School Tribunal and Others*, . In each of these matters, the termination order only revealed that the services had been terminated because performance of the probationer was not found satisfactory. It was held that this does not amount to punitive action and, therefore, departmental enquiry was not required.

8. Learned Counsel for respondent No. 1 placed reliance on (*Choudhari Mohammad Samiuddin v. Zilla Parishad, Aurangabad and Ors.*) 2001(Supp. 2)

Bom.C.R. 169 (A.B.) : 2001(4) Mh.L.J. 25 , Prakash Khushalrao Dabhade Vs. Zilla Parishad, Aurangabad and Others, ; (Malti Dadaji Mahajan v. Chief Executive Officer, Zilla Parishad, Wardhah, 1976 B.C.I. (soft) 13 (N.B.) : 1976 Mh.L.J. 109 and V.P. Ahuja Vs. State of Punjab and Others, . In the case of V.P. Ahuja v. State of Punjab and Ors. (supra), the Supreme Court held that services of a probationer cannot be terminated arbitrarily or punitively without complying with the principles of natural justice and a probationer like a temporary service is also entitled to certain protection. In the case of Choudhari Mohammad Samiuddin (supra) the petitioner was a teacher working in Zilla Parishad. A notice was served upon him and explanation was obtained in respect of allegations regarding his misconduct and thereafter his services were terminated. In view of the facts of the case, the Division Bench of this Court came to the conclusion that there was a live connection between the order of termination of service and the previous complaints, enquiry etc. and, therefore, even if the termination order communicated that it was simpliciter termination, still it was based on misconduct of the petitioner and as no proper enquiry was held, it was illegal and was required to be set aside. Almost similar were the facts in the case of Prakash Khushalrao Dabhade v. Zilla Parishad, Aurangabad and Ors. (supra). In case of Malti Dadaji Mahajan v. Chief Executive Officer, Zilla Parishad, Wardha (Supra), services of Midwife, who was appointed on purely temporary basis were terminated. The order was challenged on the ground that it was really a penalty and was in violation of the rules. In defence, it was contended that the services, being temporary, could be terminated by an order of termination simpliciter under the contract. However, it was disclosed that an Officer was deputed for local enquiry and he reported that the petitioner was guilty of disobedience, of negligence "in maintaining register, of maintaining false record, of being absent without leave and colossal want of responsibility. In the circumstance, the Division Bench of this Court held that the termination was in the nature of penalty and it was illegal in the absence of an opportunity being given to the petitioner to meet the charges.

9. In view of the law laid down by the Supreme Court in Pavanendra Narayan Verma v. Sanjay Gandhi P.G.I. of Medical Sciences and Anr. (supra), it becomes clear that unless a full scale formal enquiry into allegations involving moral turpitude or misconduct which culminated in finding of guilt is held, the act cannot be treated as punitive irrespective of form of termination order. In fact, in view of the authorities of Supreme Court, referred to above, it appears that even if same enquiry is conducted to find out suitability of a person to continue and if after such enquiry the employer comes to the conclusion that probationer is not suitable, the services may be terminated. Of course, if the termination order itself shows that it is punitive or it is stigmatic, the enquiry will be necessary. This legal position will have to be borne in mind while dealing with the facts of the present case.

10. As stated earlier, even before completion of one year, after appointment of respondent No. 1 as probationary teacher, her services came to be terminated by

impugned Order dated 29.4.1998 with effect from 30.4.1998. The relevant part of termination order reads thus;

Since your working during the probation period is found to be unsatisfactory, your services are hereby terminated from 30.04.1998 afternoon.

From this, it is clear that it is a termination order simpliciter without putting any blame or stigma on the respondent. It is true that the order shows that her performance was not satisfactory. However, in view of language of Section 5(3) of the Act, the Management can terminate services of probationer only if it is of opinion that the work or behaviour of the probationer is not satisfactory and, therefore, in the termination order the Management will be required to state that the work was not found satisfactory. In view of this, it is difficult to accept the contention of learned Counsel for respondent No. 1 that it is a stigmatic order.

11. Learned Counsel for respondent No. 1 vehemently contended that the termination Order dated 29.4.1998, was served to the respondent along with a letter dated 30.4.1998 by which she was required to improve her behaviour. According to him, she was not given an opportunity to improve and before she could show improvement, her services were terminated and this is against the principles of natural justice. However, on perusal of bunch of notices issued by the Management from time to time to respondent No. 1, it appears that she was warned, cautioned and advised to improve herself in respect of her remaining absent from duty without any pre-intimation, keeping her School work incomplete, keeping attendance register incomplete, in-complete and wrong preparation of monthly compliance copy about teaching, non preparation of question papers of unit test creating hurdle to the Management in holding examinations, poor teaching qualities, mistakes in preparation of her notes, her own dirty hand-writing and several other aspects. Most of these letters and notices required her to improve and to perform properly. These letters may be seen from 19.9.1997 till the end of March-1998. Thus, record reveals that the Management was not satisfied with her performance as Assistant Teacher. Besides this, it appears that one outsider along with his family had come to the School and had made certain allegations about the character of respondent No. 1. One letter from unnamed person was received about her character. The Head Master of the School had forwarded that letter to respondent No. 1 along with covering letter for her remarks on that letter and also to see that such allegations are not made in future. If the Management receives any complaint against an employer and if the Management simply forwards that complaint to the employee for his remarks, there is nothing wrong and, in fact, it is necessary in the interest of justice.

12. The Management has to look into all the circumstances including her performance as teacher as well as her behaviour before coming to a conclusion as to whether performance of such person is satisfactory and is suitable for continuation on probation. Section 5(3) of the Act clearly reveals that the services of a probationer may be terminated if work or behaviour of probationer

is not satisfactory. In the present case, there is overwhelming material in the form of letters and notices given to respondent No. 1 that her performance as a teacher was not satisfactory and she was advised to improve from time to time. In the circumstances, if some complaints were received about her behaviour also that could also be taken into consideration by the Management while terminating the services on the ground that the performance was not satisfactory. No fault can be found with the Management, taking into consideration the record, which indicates that the decision to terminate services was not founded on the allegations about her character or behaviour, though they might have been taken into consideration and they might have motivated the Management to take a decision to terminate the services.

13. In view of the facts and circumstance and legal position discussed above, I find that the School Tribunal was not justified in coming to the conclusion that the Management had passed the termination order which is punitive in nature. Therefore, the impugned order, setting aside the termination and directing the Management to reinstate respondent No. 1 is liable to be quashed and set aside.

14. For the aforesaid reasons, the petition is hereby allowed. The impugned order passed by the School Tribunal, Nagpur setting aside termination order and directing reinstatement of respondent No. 1 and payment of back wages is hereby set aside.

Rule is made absolute. No order as to costs.