

(2016) 05 GUJ CK 0004
In the Gujarat High Court

Case No : Special Civil Application No. 11245 of 2003 with Special Civil Application No. 11229 of 2003

Prakashkumar G. Pandya

APPELLANT

Vs

Administrator and D.D.O.

RESPONDENT

Date of Decision : 02-05-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Gujarat Secondary and Higher Secondary Education Act, 1972 — Section 36

Citation : (2016) 3 GLR 2388

Hon'ble Judges : Mr. A.G. Uraizee, J.

Bench : Single Bench

Advocate : Mr. M.B. Gohil, Advocate, for the Appellant; Ms. Amita Shah, A.G.P, for the Respondent

Final Decision : Dismissed

Judgement

Mr. A.G. Uraizee, J. (Oral) - Both these petitions involved common issue and question of law in the background of common facts. Therefore, there being disposed of by this common judgement.

2. In this petitions, under Article 226 of the Constitution of India has prayed for following substantive reliefs:

"13(b) be pleased to issue a writ of mandamus or any other appropriate writ, order or direction by quashing and setting aside the order dated 23.7.2003 passed by the District Education Officer, Bhavnagar at Annexure A to the petition and further be pleased to direct the District Education Officer, Bhavnagar to take the petitioner back in service forthwith with all consequential and incidental benefits;

(c) pending admission, hearing and final disposal of this Special Civil Application, be pleased to stay further operation, implementation, execution and enforcement of the order dated 23.7.2003 at Annexure A passed by the District Education

Officer, Bhavnagar and further be pleased to direct the respondent District Education Officer to take the petitioner back in service forthwith and to pay his regular salary every month regularly;

(d) be pleased to award the costs of this petition;"

3. The facts in nutshell giving rise to the petitions are that the petitioners applied for the post of Assistant Teacher in response to an advertisement issued by respondent no. 2 and he was selected and placed at Sr. No. 1 by an interview committee validly constituted and the petitioners herein were appointed as an Assistant Teacher/Shikshan Sahayak by order dated 7.9.2002 and since then the petitioners were working as such with the respondent no. 1 school. By order dated 23.7.2003 the District Education Officer, Bhavnagar terminated the services of the petitioners on the ground that the approval of the Shree K.T. Kiran Vidyalaya High School, Bhavnagar ? respondent No. 1 wherein the petitioners were working has been cancelled and as per the Government Resolution dated 6.7.1998 for petitioners being a Shikshan Sahayak they cannot get protection of surplus teacher and, therefore, with effect from 23.7.2003 service of the petitioners has been terminated. In fact the school has not been closed down and no such procedure for closing down the school has been followed. An administrator has been appointed by the Government and all the students and staff except the petitioners and one another Assistant Teacher have been transferred to another nearby school which is also administered by the Government. Hence the action of the respondents of terminating the services of the petitioners being unjust and illegal, the petitioners are approaching this Honourble Court by way of this petitions.

4. I have heard Mr. M.B. Gohil, learned advocate for the petitioners and Ms. Amita Shah, AGP for respondent nos. 1, 3 and 4.

5. Mr. Gohil, learned advocate for the petitioners submits that upon closer of respondent no. 2 School, the petitioners being surplus teacher ought to have been accommodated and absorbed in other school but the respondents without giving any notice or opportunity of hearing to the petitioners terminated service by office order dated 23/7/2003. He further submits that the respondents have not followed the provision of section 36 of the Secondary and Higher Secondary Education Act, 1972 before terminating the services of the petitioners. He, therefore, urges that the petitions may be allowed and the respondents be directed to reinstate the petitioners with all consequential benefits.

6. In support of his contention, he has relied upon the decisions of the Supreme Court:

Union of India & Ors v. Mahaveer C. Singhvi, (2010) 8 SCC 220;

Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) & Ors, (2013) 10 SCC 324;

National Textile Workers" Union & Ors v. P.R. Ramakrishnan and Ors, (1983) 1

SCC 228;

7. Per contra, Ms. Amita Shah, learned AGP has opposed this petitions and submits that the petitioners were appointed as Vidhyasahayak on probation of five years. Since the services of the petitioners are terminated before completion of probation owing to closer of school, the petitioners are not entitled to any reliefs. She further contended that the protection of surplus teachers are available to those teachers, who are appointed before 1998 in view of Education Department's Government Resolution dated 6/7/1998.

8. She further submits that the Government resolution is dated 6/7/1998, which is modified by another Government resolution dated 16/8/2002, whereby those teachers, who are appointed after 30/6/1998 and have completed services of 360 days before 30/6/1998 are also covered for the protection of surplus teachers. Since the petitioners were appointed in the year 2002, they are not entitled to protection of surplus teacher. According to her submission, the provisions of section 36 of the Secondary and Higher Secondary Education Act are not applicable to the facts of the present case and the decisions of the Supreme Court relied upon by the learned advocate for the petitioners are also not applicable to the facts of the petitions.

9. The undisputed facts are very clear. The petitioners were appointed as Vidhyasahayak vide appointment letter dated 7/9/2002 (Annexure D) in respondent no. 2 School. It is further undisputed that the approval of respondent no. 2 school is cancelled vide Government resolution dated 6/7/1998. The terms of appointment letter of the petitioners are very clear. She was appointed as Vidhyasahayak on probation of five years. It is settled proposition of law that the services on probation can be terminated without assigning any reasons during probation period.

10. Learned advocate for the petitioners has placed strong reliance on section 36 of the Education Act to contend that the services of the petitioners were terminated without following due procedure. In my view, the provisions of section 36 are reads as under:

"sub-section (1) & (5)

(1) No person who is appointed as a headmaster, a teacher or a member of non-teaching staff of a registered private secondary school shall be dismissed or removed or reduced in rank nor shall his service be otherwise terminated by the manager until

(a) he has been given by the manager a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, and

(b) the action proposed to be taken in regard to him has been approved in writing by an officer authorised in this behalf by the Board; Provided that, nothing in this subsection shall apply to any person who is appointed for a temporary period only.

(2)....

(3)....

(4)....

(5) Any person aggrieved by an order of the authorised officer under Clause (b) of subsection (1) may make an appeal to the Tribunal within a period of thirty days from the date of the decision of the authorised officer."

11. The bare reading of the provisions of 36 makes it abundantly clear that the person, who is appointed as headmaster or teacher or member of non-teaching staff of registered private school cannot be dismissed or removed or reduced in rank nor his services cannot be terminated unless an opportunity of hearing offered to such a person and that such an action is approved in writing by the Board. The proviso to subsection (1) clearly provides that nothing in this subsection shall apply to any person, who appointed for temporary period only. Moreover, subsection 5 provides that any person, who is aggrieved by an order passed under sub clause (b) of subsection 1 may make an appeal to the Education Tribunal within 30 days. Here, in the present cases, the petitioners were appointed as Vidhyasahayak on probation period of five years and therefore, in my view, the protection of section 36 is not available to the petitioners. Moreover, the petitioners have approached this Court directly without resorting to alternative remedy of approaching the Tribunal. Since the petitions are admitted in the year 2003, the petitioners, in my opinion, cannot be non-suited on the ground of availability of alternative remedy but in any case since they were appointed as Vidhyasahayak for probation of five years, they are not entitled to seek the protection of section 36.

12. The claim of the petitioners to treat as surplus cannot be accepted in view of Education Department Government Resolution dated 6/7/1998 as the petitioners are appointed in the year 2002 and such a protection as surplus teacher is available to those teachers, who are appointed before 3/6/1998 and thereafter, those teachers, who have completed services of 365 days before 30/6/1999.

13. Learned advocate for the petitioners has relied upon the decision of the Supreme Court in case of National Textile Union and Ors. (supra), on facts, this judgement is not applicable to the case of the petitioner. The Supreme Court was dealing with the issue as to whether the workers union can seek right to appear and to be heard and permitted to contest winding up petition filed by the Company. The Supreme Court while dealing with this issue has recorded a finding that it is difficult to imagine how any system of law which is designed to promote justice through fair play in action can permit the court to make a winding up order which has the effect of bringing about termination of the services of the workers without giving them an opportunity of being heard against the making of such order. It would be violative of the basic principle of fair procedure and unless there is express provision in the Companies Act, 1956 which forbids the workers from appearing at the hearing of the winding up

petition and participating in it, the workers must be held entitled to appear and be heard in the winding up petition. That is the minimum requirement of the principle of audi alteram partem which cannot be ignored save on paid of invalidation of the order of winding up.

14. In case of Union of India and Ors v. Mahaveer C. Singhvi (supra) the Supreme Court has stated relevant factors as regards discharge during probation and to find out whether the discharge order is punitive. Accordingly, if findings against probationer is arrived at behind his back on the basis of inquiry conducted into allegations made against him and if such findings formed foundation of discharge order, same would be bad and liable to be set aside. If, on the other hand, no inquiry was held or contemplated and allegations were merely a motive for passing of order of discharge without giving a hearing same would be valid.

15. The services of the petitioners came to be terminated solely on the ground that the approval of respondent no. 2 school was cancelled by the authorities on account of certain irregularities and therefore, the termination is simpliciter and is not based upon any allegations or findings of an inquiry and therefore, the contention of the learned advocate Mr. Gohil for the petitioners that without notice and without affording an opportunity of hearing the services of the petitioners could not have been terminated, is devoid of merits. The termination order is simpliciter and is not stigmatic and therefore, I am of the view that termination was not required to be proceeded by a notice and personal hearing.

16. In view of the foregoing reasons, I am of the view that since the petitioners were appointed on 7/9/2002 and their services came to be terminated on 23/7/2003 before their probation period was over, provisions of section 36 were not required to be followed and the petitioners cannot be treated as surplus teachers to be accommodated in other school in view of Education Department Government resolution no. G-T-5-10395-99. The termination of the petitioners being simpliciter can not be labelled as stigmatic, the petitioners were not required to be served with a notice or be heard before terminating their services. Since the petitioners are not entitled to be reinstated in service the judgment of the Supreme Court in case of Deepali Gundu Surwase (supra) relied on by learned advocate is not required to be delved upon.

17. For the foregoing reasons the petitions fail and are hereby dismissed. Rule discharged.