
(1994) 10 BOM CK 0068
In the Bombay High Court
Case No : Writ Petition No. 639 of 1991

Shikshan Prasarak Mandal, Wani

APPELLANT

Vs

Presiding Officer and Others

RESPONDENT

Date of Decision : 26-10-1994

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (1995) 70 FLR 925 : (1995) 2 LLJ 176

Hon'ble Judges : G.D. Patil, J; Dhabe, J

Bench : Division Bench

Judgement

H.W. Dhabe, J.—The Petitioner Society which runs the Lokmanya Mahavidyalaya, Wani (for short the "College"), has challenged in this writ petition the order of the College Tribunal dated 16-11-1990 setting aside the order of the termination of service of the respondent No. 2 as a Principal of the College and granting him a declaration that he continues to be in service as Principal of the College and is entitled to back wages of the said post from the date of the order of termination of his service till the date he is taken back in service in the said post.

2. The facts relevant to this Petition are that pursuant to the selection made by the Selection Committee constituted as per the rule in the Amravati University for appointment of the Principal in the College run by the Petitioner Society, the respondent No. 2 who was at serial No. 1 in the panel of the Selection Committee in order of preference was appointed as the Principal of the College by an order dated 3-9-1988 issued by the President of the Society who was ex-officio Chairman of the Local Managing Committee of the college. The said order dated 3-9-1968 was signed by him as the President of the College. The report of the Selection Committee was sent by him to the Amravati University to seek the approval of the Vice-Chancellor for appointment of the respondent No. 2 as the Principal of the college of the Petitioner Society which approval was communicated to him by the Deputy Registrar of the University by his letter dated 7-10-1988.

3. Perusal of the order of appointment of the respondent No. 2 dated 3-9-1988 as the Principal of the College shows that his appointment was on probation for a period of 2 years. During the period of his probation, it appears that there was a Meeting of the Managing Committee of the Petitioner Society on 24-8-1989 at the residence of Shri N. S. Nagarwala, in which the subject discussed was about the dissatisfactory working of the respondent No. 2 as the Principal of the College in the light of the letter of the Vice-President of the Petitioner Society dated 21-3-1989 addressed to its President. The President of the Petitioner Society had made clear in the said meeting his own point of view in the matter. After some discussion, it was decided in the said meeting dated 24-8-1989 to call the Meeting of the Managing Committee on 13-9-1989 for detailed discussion and for hearing the explanation of the respondent No. 2.

4. Perusal of the letter of the Vice-President dated 21-3-1989 addressed to the President of the Petitioner Society, shows that the Vice-President of the Petitioner Society had brought to the notice of the President the complaints and the charges against the respondent No. 2 regarding some bottles of spirit being taken away by him for personal use, although it was shown that they were needed for eye camp. The said letter dated 21-3-1989 also contained certain charges about the activities and accounts of the N. S. S. for which according to the said letter dated 21-3-1989 the College was black-listed by the University resulting in loss of reputation to the college. The said letter then shows that the NSS activities of the college were required to be stopped because of which the students lost 10 marks on account of weightage given by the University to the said N. S. S. activity. It was also pointed out in the said letter dated 21-3-1989 to the President of the petitioner Society that due to negligence of the respondent No. 2 in not taking proper steps for release of the salary- grants of some of the teachers the college had to bear the financial burden of the salaries of such teachers. The Vice-President had by its aforesaid letter dated 21-3-1989 requested the President to take appropriate decision in the matter.

5. However, when the Meeting of the Managing Committee of the Petitioner Society was not called for the said purpose and instead the meeting of the Local Managing Committee of the College was called on 3-10-1989, a requisition was given by some of the Members of the Managing Committee to the President of the Petitioner Society on 2-10-1989 for convening the Meeting of the Managing Committee, but not later than 15-10-1989 to consider the following Agenda.

Proposed Agenda :

"To discuss the dissatisfactory working of Shri A. W. Hood, Principal on probation and to decide about his termination of service and requisite order to that effect."

Accordingly, it appears that the Meeting of the Managing Committee as called by the Secretary of the Petitioner Society on 11-10-1989 as per his Notice dated 3-10-1989 to discuss the above Agenda.

6. The Meeting of the Managing Committee was thus held on 11-10-1989. After

taking into consideration overall review of the performance of the respondent No. 2 as the Principal of the College during his probationary period of about 13 months, the Managing Committee was of the view that his performance during the said period was not satisfactory. Hence it resolved to terminate the services of the petitioner as the Principal of the College with effect from 30-11-1989 and to revert him back to his original post of Lecturer in English. The Secretary of the Petitioner Society was authorised to give notice to termination of service to the respondent No. 2 with effect from 30-11-1989. It appears from the minutes of the said Meeting dated 11-10-1989 that one of the Members Shri M. G. Jain, Advocate had challenged the validity and authority of the Managing Committee to terminate the services of the respondent No. 2. If further appears that the Secretary of the Petitioner Society had remained neutral. As regards the President of the Society and the Honorary Secretary Shri N. R. Bhagwant they did not support the Resolution. The Managing Committee also resolved in the said Meeting dated 11-10-1989 that its decision to terminate the services of the respondent No. 2 as Principal should be communicated to the requisitionists and the other concerned authorities.

7. It is material to see that by his letter dated 11-10-1989, addressed to the Honorary Secretary of the Petitioner Society, the President had confirmed the views which he had expressed in the meeting of the Managing Committee held on 11-10-1989. According to him, the Principal should have freedom in the day to day Management of the affairs of the College, and that, if there are any minor mistakes, he can be told about the same orally by the Managing Committee. What is important from the point of view of the instant writ petition is that according to him, the action should be taken against the Principal according to the rules and after giving him full opportunity to defend against the complaints and charges levelled against him.

8. It is then material to see that before the decision was taken to terminate the services of the respondent No. 2 on 11-10-1989, the Vice President had given Show Cause Notice to him on 17-8-1989 regarding disobedience of the orders about election to the Local Managing Committee to which he had replied by his letter dated 19-8-1989 intimating him that he had staled the election process as per the direction of the President of the Petitioner Society. He was thereafter also given a Show Cause Notice on 6-9-1989 by the vice President of the Petitioner Society about approaching the President directly ignoring him, which act according to him was an act of disobedience and disrespect, insubordination to him and also a deliberate attempt on his part to create a rift and disharmony among the members of the Managing Committee. He had also castigated him by the aforesaid letter for acting for acting on his own in the matter of issuing an Advertisement for admission to the vocational college without waiting for the financial sanction from Bombay and without for the sanction of the Managing Committee to the same. The respondent No. 2 replied to the said letter dated 6-9-1989 by his letter dated nil in which again he had pointed out that he had consulted the President about the work of the College and that he had taken

action as per his directions. As regards the vocational courses, he had pointed out that he had complied with the Resolution No. 2 passed in the meeting of the Managing Committee of the Petitioner Society held on 1-2-89.

9. Feeling aggrieved by the order of termination of his service as Principal of the College and his reversion to his original post of Lecture, in English, the respondent No. 2 filed an appeal before the College Tribunal u/s 45(1) of the Amravati University Act, 1983. The respondent No. 2 had before the College Tribunal challenged the order of his termination of his service as Principal and reversion to his original post as Lecture in English as illegal inter-alia on the ground that it was not passed by the competent authority. The respondent No. 2 had also urged before the College Tribunal that without compliance with the principles of natural justice, his service could not have been terminated before the completion of his period of probation on the ground that his work was not satisfactory. He has further urged before the College Tribunal that the impugned order of termination of his services as Principal and reversion to the nature as it was issued for the acts of misconduct, indiscipline and insubordination alleged to be committed by him, and, therefore, before passing the said order, it was necessary for the Management to hold a departmental enquiry against him according to law to give him due opportunity to defend the charges levelled against him.

10. The petitioner society filed the reply in writing to the Memo of Appeal submitted by the respondent No. 2 before the College Tribunal u/s 45(1) of the Amravati University Act, 1983 denying the allegations made by the respondent No. 2 and contending that the impugned order of termination was issued by the competent authority and that the services of the petitioner could be terminated even before the completion of his probation, if his work was not satisfactory, thus denying that the impugned order of termination of his services was punitive in nature for the alleged acts of misconduct, indiscipline and insubordination as urged on behalf of the respondent No. 2.

11. The learned College Tribunal, on the basis of the material before it, held that the President of the Petitioner Society, who was the Ex-Officio Chairman of the Local Managing Committee had alone power to maintain annual confidential records of the Principal of the College and to place them before the Managing Committee for taking decision in respect of his performance. It has then held in the facts and circumstances of the instant case that the confidential reports of the respondent No. 2 about the assessment of his performance were not placed before the Managing Committee by the President of the Society, but the said assessment about his work was made in the meeting of the Managing Committee held on 11-10-1989 at the instance of the Vice President who was not empowered to assess his work or performance. It further observed that the President of the Society and the Ex-officio Chairman of the Local Managing Committee happened to be an Educationist and the Ex-Principal of the College, who was competent to assess the work or performance of the respondent No. 2

whereas the vice-president who was not from the Educational filed, could not assess the performance of the respondent No. 2 as Principal, nor was he empowered to do so by any Statute or Rule of the University applicable to the affiliated Colleges. It also pertinently pointed out that the President of the society had voted against the resolution passed in the aforesaid Meeting of the Managing Committee held on 11-10-1989 by which it was decided to terminate the services of the respondent No. 2 as the Principal of the College on the ground of unsatisfactory work. It thus held that the Resolution passed by the Managing Committee in its Meeting held on 11-10-1989 taking the view that the performance of the respondent No. 2 was unsatisfactory was not valid in the eye of law.

12. The learned College Tribunal further held that there were specific allegations of misconduct made against the respondent No. 2 by the Vice-President of the Petitioner Society and therefore, the impugned order of termination of service of the respondent No. 2 was not discharge simpliciter, but punitive in nature, which could not have been passed without holding a regular enquiry against the respondent No. 2 giving him an opportunity to properly defend himself against the charges levelled against him. In the light of the above findings rendered by the College Tribunal, by its order dated 16-11-1990, set aside the order of termination of the respondent No. 2 as the Principal of the College granting him a declaration that he continued to be in service in the said post and further granting him back service till he was taken back in the post of the Principal of the College.

13. Feeling aggrieved by the above order of the College Tribunal passed on 16-11-1990, the Petitioner Society has preferred the instant writ petition in this Court. No interim stay was granted by this Court in the instant Writ Petition, because of which, the respondent No. 2 was required to be reinstated in service in the post of the Principal of the College by the Petitioner Society. It however, appears that after his reinstatement, the Petitioner Society has started the departmental enquiry against the respondent No. 2 for the alleged acts of misconduct, misbehaviour, indiscipline, misappropriation etc. for which he is suspended pending the said departmental enquiry as is clear from the order of the Petitioner Society dated 21-9-91 incorporated as Annexure R. 1 to the Return filed on behalf of the respondent 2. We are however, not directly concerned with the said departmental enquiry in the instant writ petition.

14. The learned counsel for the petitioner has urged before us that the Appointing Authority of the Principal was the Foundation Society and the Managing Committee of the Petitioner Society was the Foundation Society within the meaning of Clause 5 of Chapter II of Ordinance No. 24 of the Nagpur University i.e. the College Code Ordinance which continued and continues to apply to the Colleges affiliated to the Amravati University after its establishment. The submission thus is that the Managing Committee was competent to termination of service of the respondent No. 2 as the Principal of the college. It is

alternatively urged that if the order of termination of service of the respondent No. 2 as Principal of the college was illegal because it was not issued by the Foundation Society of the Petitioner, his appointment Order would also be illegal, because it was not issued by the said Foundation Society, with the result that the respondent No. 2 would not be entitled to reinstatement.

15. The Petitioner has then assailed the finding of the College Tribunal that the President of the Petitioner Society as Ex-officio Chairman of the Local Managing Committee of the College has alone power to assess the work or the performance of the Principal during the period of probation on the ground that there is no provision in the University Act or its Ordinances or Regulations which empowers the President of the Society or Ex-officio Chairman of the Local Managing Committee to assess the performance of the Principal during the period of probation. It is urged that the assessment of the performance of the Principal is required to be made by the Managing Committee after perusing the confidential records, complaints etc. if any against him and it is irrelevant as to who places on record before the managing Committee such complaints or confidential records for the assessment of work or performance of the Principal.

16. Lastly, it is urged on behalf of the petitioner that even if certain complaints, show cause notices etc. are taken into consideration for assessing the work and performance of the respondent No. 2 during the period of his probation, it would not mean that the order of termination is not discharge simpliciter and is punitive in nature. In Support of his above contention, the learned Counsel for the Petitioner has relied upon the following decisions of the Supreme Court.

1. Ravindra Kumar Misra Vs. U.P. State Handloom Corpn. Ltd. and Another,
2. 1991 1 C. L. R. 732 State of U. P. v. Kaushal Kishore.
3. 1992 1 C. L. R. 323 Governing Council v. Dr. Pandurang.
4. State of Uttar Pradesh Vs. Bhoop Singh Verma, .
5. Oil and Natural Gas Commission and Others Vs. Dr. Md. S. Iskender Ali, .
6. State of U.P. and another State of U.P. and another Vs. Km. Prem Lata Misra and others, .

17. The learned Counsel for the respondent No. 2, on the other hand has contended before us that the instant writ petition is infructuous, because after reinstatement, the departmental enquiry is started against the respondent No. 2 on 4-1-1992 as per the decision taken by the managing Committee of the Petitioner society in its Meeting held on 21-9-1991. He has then urged that according to clause 3 of Appendix A to the Statute No. 8 of 1979 framed under the Amravati University Act, 1983, all appointments of Principals of Colleges are to be made by a Selection Committee, composed of the Members mentioned therein and the recommendations of the Selection Committee are subject to the approval of the Vice-Chancellor who can reject its recommendations after

recording the reasons therefor. According to hi, the above provision in clause 3 of Appendix A in Statute 8 of 1979 has superseded the provision in that regard in Clause 2 of the College Code Ordinance No. 24 which provides that the Principal of the College shall be appointed by the Foundation Society. He has further submitted that the Managing Committee had actually no role to play in the appointment of the respondent No. 2 as the Principal of the college and after his selection by the Selection Committee, his appointment was communicated to him by the President of the Local Managing Committee. In fact, according to him, the Petitioner had failed to produce any Resolution by which the Managing Committee had made his appointment as the Principal of the College. Further, according to hi, the validity of his appointment was not challenged by the Petitioner Society according to which both the appointment and the termination of the respondent No. 2 was validly made.

18. As regards the question of termination of service of any teacher, it is urged on behalf of the respondent No. 2 that it is governed according to the relevant provisions of the College Code Ordinance No. 24 which is made applicable by Statute No. 53 of the Amravati University. It is his case that it is the Governing Body, which according to him, means the Local Managing Committee, which has power to pass the orders of termination of the services of the teacher after complying with the provisions of the said College Code Ordinance No. 24. Since, the Local Managing Committee has not considered the question of termination of service of the respondent No. 2, it is urged that his order of termination of service is illegal and invalid. Even otherwise, it is urged that it clause 29 of the College Code Ordinance No. 24 does not stand superseded by clause 3 of Appendix A to Statute No. 8 of 1979, as hereinbefore shown since the Foundation Society, which is the governing Body of the petitioner society and is larger than its Managing Committee and which is the Appointing Authority of the Principal under the aforesaid clause 29 of the College Code Ordinance No. 24 has not considered the question of termination of service of the respondent No. 2, the said termination of his service is illegal and invalid.

19. The learned counsel for the respondent No. 2 has then urged that the employer i.e. the Petitioner Society has no right to curtail the period of probation i.e. terminate the services of the probationer before the expiry of his period of probation except on the ground of misconduct, particularly, when there is no right reserved in the management under the relevant rules regulating contract of service of the employees of under the order of appointment allowing termination of service of a probationer before the expiry of or during the period of his probation. In support of his above submissions, the learned counsel for the respondent No. 2 has relied upon the Judgment of the Supreme Court in the following cases.

The Management of the Express Newspapers (Private) Ltd. Madurai Vs. The Presiding Officer, Labour Court, Madurai and Another, .

AIR 1966 1051 The Management of Utkal Machinery Ltd. v. Workman Santi

Patnaik.

Agra Electric Supply Co. Ltd. Vs. Sri Alladdin and Others,

The Management of Brooke Bond India (Private) Ltd. Vs. Y.K. Gautam,

20. The last but the most important contention urged on behalf of the respondent No. 2 before us is that the order of termination of service of the respondent No. 2 is punitive in the facts and circumstances of the instant case narrated hereinbefore and therefore, it was necessary for the petitioner society to hold a proper departmental enquiry against him giving him proper opportunity to defend the charges levelled against him. A large number of cases are relied upon by the learned counsel for the respondent No. 2 in support of his above contention. Some of them are as follows :

1. Anoop Jaiswal Vs. Government of India and Another, .
2. Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, .
3. The High Court of Punjab and Haryana and Others Vs. The State of Haryana and Others, .
4. Indrapal Gupta v. Managing Committee, Model Inter College, Thora 1984 SLR 1189.
5. Nepal Singh v. State of U. P. AIR 1965 S. C. 84
6. Manik Manmath Karande v. State of Maharashtra, 1980 (1) SLR 144.
7. Dr. Bool Chand Vs. The Chancellor, Kurukshetra University, .
8. Malti Damaji v. C. E. O. Z. P. Nagpur 1976 ML J 109.
9. K. P. Kamble v. C. E. O. Zilla Parishad, Nagpur, 1976 MLJ 2.
10. Miss Ratna v. Indian Institute of Technology. 1973 (2) SLR 673.
11. Ajit Singh v. State of Punjab 1983 (46) FLR 407

21. In appreciating the rival contentions we may first deal with the question whether clause 3 of Appendix A to the Statute No. 8 of 1979 has superseded clause 29 of the College Code Ordinance No. 24 regarding the appointing authority of the Principal of an affiliated college being its foundation society. It is not in dispute that the College Code Ordinance No. 24 framed by the Nagpur University continued and continues to apply to the colleges affiliated to the Amravati University after it was established under the Amravati University Act, 1983. It is true that in the absence of any provision to the contrary, the foundation society which is the appointing authority for the Principal of a college will have authority to terminate his services also.

22. The question however is whether the foundation society is still or to be

precise at the time of appointment of the respondent No. 2 as Principal of the College, the competent authority to make the appointment of the Principal in an affiliated college. In this regard, it is necessary to see that Statute No. 8 of 1979 which was originally framed by the Nagpur University to implement the recommendations of the University Grants Commission regarding revision of pay-scales of the University and College teachers accepted by the State Government was deemed to be applicable to the Amravati University after it was established under the Amravati university Act, 1983 as provided by Section 108(2) thereof. Clause (iii) of Appendix I to the said Statute No. 8 of 1979 shows that the power to make appointment of the Principal of the College vests in the Selection Committee as envisaged therein. The said clause (iii) of Appendix-I of the Statute No. 8 of 1979 is as follows :-

(iii) "All appointments of the Principals of colleges shall be made by a selection committee composed of the following :- (a) Chairman, Local Managing Committee of the College.

(b) One Member of Local Managing Committee;

(c) Two nominees of the Vice-Chancellor;

(d) One nominee of the Director of Education (Higher Education).

The recommendations of the Selection Committee shall be subject to the approval of the Vice-Chancellor, who may reject the recommendations after recording reasons therefor.

23. The language used in the above clause (iii) of the Appendix A to the Statute No. 8 of 1979 viz. an appointment of the Principal of the College shall be made by the Selection Committee is clearly mandatory and therefore, the appointment of the Principal in the College has to be in accordance with the recommendations of the Selection Committee constituted thereunder for the said purpose as approved by the Vice-Chancellor. As shown hereinbefore the appointment of the respondent No. 2 as Principal of the college was made by the President of the college by his order dated 3-9-1988 as per the recommendations of the Selection Committee duly constituted as per the aforesaid clause (iii) of Appendix I of Statute 8 of 1979 made on 2-9-1988 which appointment was approved by the Vice-Chancellor of the Amravati University as per its communication dated 7-10-1988. Although, the learned counsel for the petitioner society has urged before us that the appointment of the respondent No. 2 as Principal of the College was made by the Managing Committee of the petitioner Society, the learned counsel for the respondent No. 2 has brought to our notice that no resolution of the Managing Committee is produced in this regard and what is produced is a resolution by which the managing Committee has appointed its nominee upon the Selection Committee. In this regard, he has referred us to the letter of the Petitioner Society addressed to him on 18-11-1989, along with which the proceedings of the meeting of the Managing Committee held on 14-8-1988 were enclosed, to show that Resolution No. 8 of the Managing

Committee therein related to the appointment of the said respondent No. 2 as Principal, although the said Resolution, in fact shows the appointment of the member of the Society upon the Selection Committee to be constituted for the appointment of the Principal. The above resolution No. 8 of the Managing Committee passed in its Meeting held on 14-8-1988 bears out the above submission made on behalf of the respondent No. 2. It is, therefore, clear that the respondent No. 2 was appointed by the President of the College as per his order dated 3-9-1988 pursuant to the recommendations of the Selection Committee made on 2-9-1988.

24. It is then necessary to see that as regards the question of termination of service of the respondent No. 2, the relevant clause No. 5 of Statute No. 53, which has come into force from 2-1-1978, on which date it received the assent of the Chancellor shows the termination of services of any teacher has to take place only in accordance with the provisions of the College Code Ordinance No. 24 and the contract appended thereto. It has to be seen that the expression teacher used in clause 5 of the aforesaid Statute No. 53 includes the Principal as per the definition of the said word given in clause 3(ii) of the said statute No. 53. It is however, not clear either from clause 5 of Statute 53 or the provisions of the Contract appended to the College Code Ordinance No. 24 as to who the competent authority is to terminate the services of the teacher. The competent authority, therefore, would be the Appointing Authority. However, as regards the said question, it is not necessary for us to decide the said question finally or to express any views finally, upon the rival contentions made on behalf of the parties, viz, whether the Foundation Society, the Selection Committee, the Managing Committee or whether the Local Managing Committee being the Appointing Authority is the authority to terminate the services of the petitioner, since in our view, the impugned order of termination is punitive in nature, and could not have been passed without holding a departmental enquiry and without giving opportunity to the respondent No. 2 to defend the charges levelled against him.

25. To appreciate the rival submissions on the question whether the termination of service of the respondent No. 2 is punitive or simple termination, it is necessary to see that pursuant to his selection by the selection committee, the respondent No. 2 was appointed as a Principal on probation for a period of 2 years as per the order dated 3-9-1988 issued by the President of the respondent college. Statute No. 53 of the Nagpur University which is applicable to the teachers in the Amravati University deals with the question of confirmation of the teachers working in affiliated colleges. In particular, clause 4 of the said Statute No. 53 provides that a teacher which expression includes a Principal as per its definition in clause 3(ii) of the said Statute No. 53, should be appointed in a clear vacancy in the first instance on probation for two years from the date of his appointment at the end of which he should either be confirmed or his services should be dispensed with. However, the said clause 4 of the Statute No. 53 makes it obligatory that notice of such confirmation or termination of services

should be given at least one month before the due date, in the absence of which it would be construed that the teacher appointed on probation has completed the period of probation satisfactorily and that he is deemed to be confirmed in service.

26. The service of the respondent No. 2 as Principal of the college were however terminated before the expiry of his probationary period by an order dated 11-10-1989 w.e.f. 30-11-1989. The submission therefore made on behalf of the respondent No. 2 is that the services of the respondent No. 2 could not have been terminated except by way of misconduct before completion of his probationary period. It is the case of the respondent No. 2 could not have been terminated except by way of misconduct before completion of his probationary period. It is the case of the respondent No. 2 that his services could be terminated on the ground of unsatisfactory work only at the end of the probation period since neither clause 4 of Statutes 53 permitted the Management to do so nor was there any specific clause to that effect in the order appointing the respondent No. 2 as the Principal of the college. Since the termination of service of the respondent No. 2 as Principal of the College is effected before the expiry of the probationary period by the notice of termination dated 11-10-1989 on completion of a period of about 13 months only, the said termination, according to him is not a simple termination effected in accordance with the provisions of clause 4 of the Statute No. 53 but it is termination of service which is punitive in nature.

27. In support of the above submission, the learned counsel for the respondent No. 2 has relied upon the following cases :

- (i) The Management of the Express Newspapers (Private) Ltd. Madurai Vs. The Presiding Officer, Labour Court, Madurai and Another,
- (ii) Management Utkal Machinery Ltd. Vs. Workmen, Miss Shanti Patnaik, .
- (iii) Agra Electric Supply Co. Ltd. Vs. Sri Alladdin and Others, ; and
- (iv) The Management of Brooke Bond India (Private) Ltd. Vs. Y.K. Gautam, .

28. Perusal of the Judgment of the Supreme Court in the case of The Management of the Express Newspapers (Private) Ltd. Madurai Vs. The Presiding Officer, Labour Court, Madurai and Another, shows that ordinarily according to the said judgment of the Supreme Court an employee is entitled to continue in service till end of his probationary period. Further, according to it, at the end of the probationary period, he may be confirmed in service or his services may be terminated, if his work is unsatisfactory. However, if no action is taken by him at the end of the probationary period either by way of confirmation or by way of termination, his services do not automatically cease but he continues to be in service on probation. What is material to be seen from the said judgment from our point of view is that according to the Supreme Court, without anything more, the appointment of an employee on probation gives the employer no right to

terminate the services of the employee before this period of probation had expired except on the ground of misconduct or to the sufficient reasons in which case, even the services of the permanent employee can be terminated. To the same effect are the observations of the Supreme Court in the case of *Agra Electric Supply Co. Ltd. Vs. Sri Alladdin and Others*, . Similar is the view taken by this Court in the case of *College of Engineering v. Mrs. Asmita* (1987) ML. J. 676.

29. It is however material to see that the facts in the instant case are stronger as compared to the facts in the judgment of this Court in the aforesaid case because in the said case the facts showed that the services of a probationer could be terminated as per the order of appointment before the completion of probationary period whereas in the instant case as shown above, neither clause 4 of the Statute 53 nor the terms of the order of appointment of the respondent No. 2 as Principal of the college permitted the management to terminate his services before completion of his probationary period on the ground of unsatisfactory work. Be that as it may, even otherwise, in view of the ratio of the judgments of the Supreme Court in the cases cited supra, unless there is something more, the services of a probationer cannot be terminated before the expiry of the period of probation except on the ground of misconduct or other sufficient reasons.

30. Keeping in mind the above rule explained by the Supreme Court in regard to the case of probationer, we have to consider the principal question in the instant case whether the service of the respondent No. 2 whose services are terminated before the completion of his probationary period are terminated by way of punishment or whether they are terminated by way of discharge simpliciter on the ground of unsatisfactory work. As regards the law in this regard, it is well settled and it is not therefore, necessary to refer to all the judgments relied upon by both the parties.

30A. The Judgments of the Supreme Court show that it is not the form of the order but its substance which is decisive of the question whether the impugned order amounts to termination of service simpliciter of a probationer for his unsuitability or whether it is by way of punishment for his misconduct, inefficiency or other similar reason. For the said purpose, it is open to the Court to go behind the order of termination even though it is innocuously worded, lift the veil and find its true character by taking into consideration the circumstances preceding the order of termination and/or the circumstances attendant upon it. As regards termination of service for reasons which may show misconduct, inefficiency or other similar lapse on the part of the delinquent employee, the judgments have sought to make a subtle distinction between motive and foundation. If the said reasons were to operate only as a motive or the inducing or influencing factors to pass the order of termination simpliciter, it was held that such termination was not by way of punishment but if the said reasons were the foundation of the order the termination of services of a probationer or a temporary employee even though couched in innocuous language would be by

way of punishment.

30B. The Supreme Court has however observed in para 8 of its judgment in the case of Ravindrakumar v. U. P. State Handloom Corporation Limited 1988 1 CLR 525 that when the reasons are given, they are bound to disclose adverse features of the employee and disclosure of such features become the ground of challenge of the order on the plea that termination is not innocuous. According to the said judgment it is to met this position that the distinction between "motive" and "foundation" has been adopted by the Courts. Further, according to it, as long as the adverse feature of the employee remains the motive and does not become transformed as the foundation of the order of termination it is unexceptionable. It is however, observed that no strait jacket test can be laid down to distinguish the two and whether "motive" has become the foundation has to be decided by the Court with reference to the facts of a given case. The two, according to it, are certainly two points of one line ordinarily apart but when they come together "motive" does get transformed and merges into foundation.

31. We may now refer to a few decisions of the Supreme Court on the question of termination of service of a probationer or a temporary employee. The question whether simpliciter of a service of a probationer or temporary employee is termination simpliciter or is by way of punishment is considered by the Bench of Seven Judges of the Supreme Court in the case of Samsher Singh Vs. State of Punjab and Another, . In para 63 of his judgment Ray C. J. has observed as follows :

"Para 63 : "No abstract proposition can be laid down that where the services of a probationer are terminated with saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution."

It is clear from the above para that if the probationer is discharged on the ground of misconduct or inefficiency or for similar reason without giving him a reasonable opportunity of showing cause against such discharge, it would in a given case amount to discharge by way of punishment.

32. Krishna Iyer J. in paras 159 and 160 of his separate judgment in the above case has brought out in his inimitable style the thin distinction between the "motive" and the "foundation" and the need to lay down the plain test which the Administrator and the Civil servant can understand without subtlety and apply without difficulty. He has then referred to with approval the rule laid down in the said case by the learned Chief Justice in his judgment to govern the question as to when the termination of service of a probationer is termination simpliciter and when it is by way of punishment.

33. We may then refer to the judgment of the Supreme Court in the case of Anoop Jaiswal Vs. Government of India and Another, . After referring to its leading previous judgments, the Supreme Court has held in para 12 of its judgments as follows :

Para 12 "It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

34. However, what is material for us from the aforesaid judgment is the facts referred to in para 13 of the said Judgment. As in the instant case, the period of probation was not over in the said case and the impugned order of discharge was passed in the middle of the probationary period. The facts then showed that an explanation was called from the delinquent employee in that case for an act of indiscipline and the recommendations of the Director was the basis or the foundation of the order of his termination which recommendation the Supreme Court held should be had along with the order to determine his true character. It ultimately held that but for the above act of misconduct the services of the delinquent employee would not have been terminated.

35. The Supreme Court has however distinguished the above judgment on facts in its subsequent judgment in the case of Governing Council v. Pandurang AIR 1993 SC 393 in which it held that termination simpliciter of the services of a probationer after preliminary enquiry taking into consideration his overall performance and some action or inaction does not amount to removal by way of punishment. In para 7 of its judgment, it observed that the principle of tearing of veil for finding out real nature of the order shall be applicable only in a case where the Court is satisfied that there is a direct nexus between the charge so levelled and action taken.

36. It is in the light of the law thus laid down by the Supreme Court on the question as to when the termination simpliciter of a probationer is termination simpliciter and when it is by way of punishment that the question has to be considered in the facts and circumstances of the instant case, whether the order of termination of services of the respondent No. 2 is passed to terminate his service for unsatisfactory work during his probationary period or whether it is passed for misconduct, inefficiency, insubordination or corruption or any other similar reasons. As already pointed out, it must be seen in this regard that the termination of service of the respondent No. 2 is before the expiry of the period of his probation although there is no term in his appointment order that his service can be terminated during the period of his probation even before its expiry. On the other hand, clause 4 of the Statute 53 clearly emphasises that the

decision to confirm or to dispense with the services of a teacher which expression includes the principal should be taken at the end of his probationary period of two years from the date of his appointment. In its judgment in *The Management of the Express Newspapers (Private) Ltd. Madurai Vs. The Presiding Officer, Labour Court, Madurai and Another*, and in *Agra Electric Supply Co. Ltd. Vs. Sri Alladdin and Others*, , the Supreme Court has held that ordinarily without anything more the appointment of an employee on probation gives the employer no right to terminate the services of the employee before his period of probation has expired, except on the ground of misconduct or to sufficient reasons.

36A. Perusal of the facts in the instant case, hereinbefore referred to, show that what is considered by the Managing Committee of the petitioner Society is not the work of the respondent No. 2 during the period of his probation, as such, but certain charges against him. In fact, the respondent No. 2 is allowed to work as Principal for a period of 13 months and during the said period his increment in the scale of pay of the principal was released, which would mean that his work was considered as satisfactory during the said period. What is more important to be seen is that in the Meeting of the Managing Committee held at the residence of Shri N. S. Nagarwala on 24-8-1989, the dissatisfactory working of the respondent No. 2 as Principal was discussed on the basis of the letter of the Vice-President of the petitioner society dated 24-3-89 addressed to the President of the Society which clearly discloses certain charges of misconduct against the respondent No. 2 and in particular as serious charge of misappropriation of the college and the N. S. S. Funds. The detailed discussion took place in the said meeting of the Managing committee held on 24-8-89 and it was decided that the Meeting of the Managing Committees should be convened on 13-9-1989 for the further detailed discussion and explanation of the principal i.e. the respondent No. 2.

37. There were Show Cause notices given to the respondent No. 2 on 17-8-89 and 6-9-1989 by the Vice-President of the Society. As per the Show Cause Notice dated 17-8-89, the respondent No. 2 was charged with disobedience of the order of the Vice-President about the election to Local Managing Committee. As regards the Show Cause Notice dated 6-9-1989, the charge was that respondent No. 2 was approaching the President of the Society ignoring the Vice-President, which act would amount to act of disobedience and disrespect and insubordination to him and also a deliberate attempt on his part to create rift and disharmony amongst the members of the Managing Committee. By the above Show Cause Notice dated 6-9-1989 he had also castigated him for acting on his own in the matter of issuing an Advertisement for admission to the vocational college without waiting for the financial sanction from Bombay and without waiting for the sanction of the Local Managing Committee to the same. The respondent No. 2 had as hereinbefore shown, sent his replies to both the Show Cause Notices, in which he had taken the stand that he had taken action as per the directions of the President and further as regards the vocational course his stand was that he had complied with the Resolution No. 2 passed by the

Managing Committee itself on 1-2-1989.

38. It is on the basis of the above facts and circumstances that the learned College Tribunal has come to the conclusion that the order of termination of services of the respondent No. 2 was not by way of termination simpliciter of the services of probationer but was by way of punishment and it could not have been passed without holding proper departmental enquiry against him in which it was necessary to give him an opportunity to defend against the said charges. The above conclusion drawn by the College Tribunal in the facts and circumstances of the instant case cannot be said to be pervious. It is well-settled that in its writ jurisdiction, the High Court should not interfere with the view on facts taken by the subordinate Court or Tribunal only because some other view is possible in the facts and circumstances of the case. See para 12 of the Judgment in Express Newspapers case cited (supra). The view taken by the College Tribunal cannot, therefore, be interfered with.

39. In the above view which we have taken it is not necessary for to decide the question whether the decision taken by the Managing Committee to terminate the services of the respondent No. 2 is illegal because the Vice-President of the Society who had placed before the Managing Committee the dissatisfactory working of the principal had no authority to do so and it is President alone who had power to writ the confidential reports of the Principle and place the same before the Managing Committee. The fact remains that the action of termination of his service is taken against the respondent No. 2 by the Managing Committee on the basis of the report of his dissatisfactory working submitted by the Vice-president. The said action of termination of service of the respondent No. 2 is rightly held by the College Tribunal a punitive in nature in the facts and circumstances of the instant case narrated hereinbefore. It is pertinent to see that after the judgment of the College Tribunal, the respondent No. 2 is reinstated and the departmental enquiry is initiated against him for the above charges of misconduct alleged to be committed by him. For all these reasons, no interference is called for in the impugned order of the College Tribunal.

40. In the result, the instant Writ Petition fails and is dismissed. However, in the circumstances of the case there shall be no order as to costs.