

(2002) 09 BOM CK 0129

In the Bombay High Court

Case No : Writ Petition No. 2256 of 2002

Vinayak Vidyadayini Trust and Another

APPELLANT

Vs

Aruna T. Prabhu and Others

RESPONDENT

Date of Decision : 04-09-2002

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 5(2), 5(3)

Citation : (2002) 4 ALLMR 462 : (2002) 6 BomCR 9 : (2002) 95 FLR 1131

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : Suresh Mukar, J. Panicker and Payal Mishra, for the Appellant; Sunil Dighe and P.M. Palshikar, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

R.J. Kochar, J.—Rule. Rule heard forthwith, by consent.

The petitioner No. 1 is a registered Public Trust and Society and is running a recognised and aided private school. The school is a secondary private school. The petitioner No. 1 the trust and the petitioner No. 2, the Head Mistress of the school are aggrieved by the judgment and order dated 20th July, 2002 passed by the Presiding Officer of the School Tribunal, Mumbai in Appeal Nos. 73 of 1995 and 119 of 1995 filed by the respondent No. 1, the concerned teacher to challenge the two orders of her termination dated 29th April, 1995 and 1st July, 1995.

2. It appears that when the respondent teacher was issued the first order of termination dated 29th April, 1995, she approached the School Tribunal to challenge the said order being illegal and improper. It appears that the School Tribunal granted an ad interim ex parte stay on 8th May, 1995. It further appears that the petitioner after coming to know the order of the School Tribunal withdrew the termination order dated 29th April, 1995 on 15th June, 1995 and reinstated the respondent teacher. Thereafter, it appears that the petitioner again

issued an order of termination dated 1st July, 1995 to once again dispense with the services of the respondent No. 1. Since the earlier order of termination dated 29th April, 1995 was withdrawn by the petitioner school, the appeal filed by the respondent No. 1 viz., 73 of 1995 did not survive and the same was withdrawn by the respondent No. 1 teacher. The School Tribunal has heard the subsequent Appeal No. 119 of 1995 on merits and decided the same in favour of the respondent No. 1 by granting her reinstatement with full backwages and all service benefits. The petitioners are before this Court to give challenge to the said judgment and order of the School Tribunal under Article 226 of the Constitution of India.

3. There is no dispute that the petitioners had appointed the respondent No. 1 as Assistant Teacher on probation for a period of 2 years from 6th July, 1993 to 5th July, 1995. There is also no dispute that the petitioners had issued the first order of termination on 29th April, 1995 which was subsequently withdrawn and the respondent teacher was reinstated on 15th June, 1995. Thereafter, by an order dated 1st July, 1995, the petitioners terminated the service of the respondent No. 1 stating that the management was not satisfied with her service and, therefore, she was terminated with immediate effect. The petitioners justified the order of termination before the School Tribunal as also before this Court on the ground that the respondent No. 1 was appointed on probation and that her work was not satisfactory and, therefore, she was terminated from employment. Shri Panikar, the learned Counsel, appearing for the petitioners submits that as the respondent teacher was only on probation, no grounds were required to be stated in the order of termination. He further submitted that since her work and attendance was not satisfactory she was terminated from employment during the probation period. He also submitted that it was not that the petitioners were required to issue any memos to her during the period of probation to convey to her that her work was not satisfactory. Shri Panikar has also relied upon a show cause notice dated 23rd June, 1995 (after reinstating her). He pointed out that during the probation period, she had taken a number of casual leaves and that she was also often coming late in the school. In the show cause notice, there are other incidents which are mentioned such as the teacher, though had given residential address of Andheri was actually residing at Bhayander that the teacher did not involve the participation of the students; that the daily attendance register of pupils was not maintained neatly and properly and that there were mistakes and erasers which appear to have been rectified subsequently.

4. By her written statement/explanation dated 28th June, 1995, the respondent teacher submitted a detailed reply. She submitted that since the school was situated in a remote slum area where transport was not easily available some times she used to be late in attending the school. She also explained that since the pupils coming to the school were from communities like fishermen, OBC Adivasis etc. she had to take strenuous efforts to bring them to the academic standards. She also submitted that there was cultural gap which was to be filled

up systematically and delicately. She pointed out the basic difficulties in bringing up the pupils to the expected standards. She also explained the so called mistakes and erasers which were done under the oral instructions of the Head Mistress as she had changed her decision regarding the past students as there were many students who failed in English and Maths and, therefore, she had decided to change the decision so that the results could be improved in view of the social background of the students who belong to the backward class and that not to discourage that community and not to keep away the students from taking education. It further appears that the Head Mistress had decided to hold special examination during May 1995 and, therefore, there was no question of preparing cards by the respondent teacher. She also submitted that since she was terminated from service on and from 29th April, 1995 she could not be blamed for the incomplete work during the period 28th April, 1995 to 20th June, 1995. She also denied the fact that she did not disclose that her appeal against another school was pending to challenge the earlier illegal order passed by that school. She has denied all the allegations made by the petitioners in the aforesaid show cause notice.

5. It appears from the record that the respondent teacher had submitted a detailed reply to the show cause notice. She has explained every minute allegations made against her. She has also explained her late attendance which was due to, mainly for two reasons viz., the school being situated in a remote slum area, there was no transport easily available and, therefore the respondent teacher used to be late some times. The second reason which appears to have been given by her was that during that period her husband had undergone a Kidney operation and, therefore, she had to some times take casual leave and some times she used to be late in the school. For a lady these two reasons have to be accepted as bona fide and genuine. The transport hardships in the city like Mumbai have to be realised better than theorized .The ideal situation no doubt is that no one comes late and that everyone attends punctually. Had she been staying very close to the school at a walking distance and still she used to be habitually late the school management perhaps would have been justified to take a serious view of the late attendance. It appears that she had applied for casual leave and the same was sanctioned. It further appears that the reason of late attendance might be common for every one who commuted upto the school and, therefore, during the period of two years the management appears to have always taken a lenient view. There was no denial of the facts which she stated in her written explanation. It appears that the school management was satisfied with the explanation submitted by her and, therefore, there was no rejoinder or no denial of the factual aspects which the teacher had explained. It may be because the management had already determined to put an end to her employment with effect from 1st July, 1995. It is significant to note that the aforesaid show cause notice was given to her on 23rd June, 1995 after reinstating her by withdrawing the earlier termination order. In my opinion, this fact itself is enough to draw an inference of malice or mala fide against the order

of termination. We have to consider the proximity of the events which took place to infer mala fides, which are obvious in the present case. The second factor which also indicates malice against the respondent teacher is that during the pendency of the appeal, the petitioners appointed respondent No. 2, another teacher, permanently without warning him that his appointment was subject to the result or outcome of the pending appeal filed by the respondent teacher, if he was appointed in her place i.e. in the place of respondent No. 1. No reasonable and prudent employer would ever take a risk of appointing permanently a teacher or an employee in the place of the one whose litigation is pending before the Court or any authority. It appears that the petitioners took for granted that they would finally succeed in the appeal and, therefore, they were free to appoint the respondent No. 2 permanently, not even temporarily as a stop gap arrangement. It is clarified that I am not at all disturbing the position of the respondent No. 2, in the present petition.

6. u/s 5(2) of the M.E.P.S. Act, a probationer is appointed in a permanent vacant post for a period of 2 years and can be terminated u/s 5(3) if his/her work or behaviour is not satisfactory. On completion of the probationary period of two years, to the satisfaction of the management in respect of the work and behaviour, the probationer shall be deemed to have been confirmed. Every probationer being on the threshold of his career tries to exert himself to put the best of his qualities in his work and behaviour. None would ordinarily shirk his work or would behave improperly. To earn permanency and confirmation in the service, a probationer put his best. He/she, however, certainly expects to get guided or advised in the work by the superiors so that the probationer acquires the bench mark required. He has to learn by experience while working and he expects to be properly taught or told to correct his mistakes, flaws and lapses. That is the purpose of probation period. He needs a parent like treatment to be put on right track. And after closely observing and assessing his work and behaviour the employer takes a bona fide decision either to confirm or not to confirm him in service. If in spite of the best efforts by the employer the probationer does not come upto the expected mark of suitability of that post, he can be terminated from employment without giving him any memo for his unsatisfactory work. There is no law that a probationer need not be advised or guided orally or even in writing. Such things would establish the bona fides of the employer and his good faith. If the order of termination is challenged in the Court of law, such tangible or objective material produced by the employer would substantiate his case that his subjective satisfaction about the suitability of the probationer was based on proper assessment and that inspite of opportunity and advice, there was no improvement in the work and behaviour of the probationer. It would rule out any allegations of malice. Mala fides or ulterior motives on the part of the employer.

7. As far as the performance of the respondent teacher is concerned during the period of probation, she ought to have been atleast sounded about her performance. There is hardly any credible material on record to indicate that the

performance of the teacher was correctly and properly assessed to come to a bona fide conclusion that the probation period of the teacher could not be extended or she deserved to be discontinued from employment on the ground of unsatisfactory work. The services of every probationer must be seriously and properly assessed as the probationer is a new entrant in the career and at the very threshold he or she cannot be scuttled from rise of the career. That is a very delicate period in every entrant in the service. The purpose of the probation period is well known. Every probationer must be sounded, told, warned that he was committing certain mistakes and where he or she should improve. If the probationer in spite of the efforts and warning of the Management fails to improve the performance then perhaps the management would be justified in terminating the employment of the probationer. Merely because an employee is appointed on probation period and as soon as the probation period is completed he or she cannot be thrown out of employment arbitrarily. The work and performance has to be genuinely and properly assessed during the course of the probation period as was done in the case before the Supreme Court relied upon by Krishnadevaraya Education Trust and Another Vs. L.A. Balakrishna, . In that case the performance of the probationary teacher was assessed by a committee which was constituted to opine about the job proficiency of the probationer. The Committee on the basis of material came to a conclusion that the job proficiency of the probationer was not upto the mark. This was held to be a valid reason for terminating the services of the probationer in the case before the Supreme Court. This is a genuine and bona fide effort on the part of the employer to assess the services or the work performance of the probationer. The aforesaid ratio of the judgment of the Supreme Court is not helpful to Shri Panikar. He has also relied upon a judgment of the Supreme Court in the case of Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, . Even in this case the facts are totally different. In that case, the performance of the probationer was totally unsatisfactory as his probation period was extended twice and that there were several allegations made against him and he challenged that order of termination as punitive. The Supreme Court in the aforesaid circumstances, held that the order of termination of a probationer in the circumstances in that case was not punitive. Shri Panikar has also relied upon a judgment of the division of this Court in Writ Petition No. 1094 of 1985 in the case of Mohammed Haji Saboo Siddik and Ors. v. The State of Maharashtra and Ors., in support of his contention that it was not necessary for the management to issue any memo to the probationer for his unsatisfactory performance. The learned Judges have held that unless there is material to show that the order of termination was actuated by malice or with ulterior motives, it was not for the Court to interfere with the assessment of the work of the probationer. They have referred to the memo of unsatisfactory work of the probationer but they have not said that the probationer need not be guided, advised or corrected at appropriate times. Timely caution or warning would keep the probationer away from any pitfalls. In the present case the School Tribunal has positively come to a conclusion that there was enough material to show that the order of termination

was issued with ulterior motives and the same speaks of malice. The Division Bench has not laid down any ratio that in each and every case a probationer need not be issued any memo or need not be told where and how he should improve his performance. If that is so, the entire purpose of appointment of a new entrant on probation would be defeated and destroyed. In the present case, there is nothing on record to show that her performance was bad and that her teaching was not upto the mark. Her work was not assessed by any committee or independent persons. Whatever points were raised by the school management in the show cause memo have been satisfactorily explained by the teacher. We can take judicial note of a fact that it is very difficult to bring up the level and standard of the pupils who are living in slum area. The present school is situated in a slum area where the pupils from Adivasi and backward communities come for education. It takes tremendous pains to teach such pupils who and whose parents have no doubt suffer from inherent disabilities which require to be removed by the teachers. The involvement of the students which the Head Mistress talked of is not that easy and it cannot be achieved in a short span of period. It would take perhaps a generation to create a sense of involvement in that class and to bring them upto the present mark of civilisation. I, therefore, do not find any draw backs in the efforts which the respondent teacher might have taken which appears from her explanation.

8. I do not find any illegality and infirmity in the impugned judgment and order of the School Tribunal. The School Tribunal has considered all the facts and circumstances in the matter and has come to a conclusion that the order of termination of the respondent No. 1 was bad in law as the same was actuated by malice and with ulterior motive. The circumstances, which I have narrated and which the Tribunal has considered are enough to draw an inference of malice and ulterior motives. The decision of the management is certainly no bona fide one.

9. There is absolutely no warrant to interfere with the order passed by the School Tribunal under the extra ordinary jurisdiction of Article 226 of the Constitution of India. There is no miscarriage of justice. The writ petition is, therefore, rejected with no orders as to costs. Rule is made absolute. Request for stay is refused, C.C. expedited