

IN THE HIGH COURT OF BOMBAY AT GOA

LD-VC-CW-68-2020

Mrs. Nekheta N. Fernandes,
Trained Primary Teacher,
Santa Cruz primary School,
Santa Cruz, In service,
24 years of age, Indian National,
Presently residing at
H. No.1029, Mangueral Wado,
St. Estevam, Ilhas, Goa.

.... Petitioner

V e r s u s

1. State of Goa.
Through its Chief Secretary,
Having his Office at Secretariat,
Porvorim, Bardez, Goa.
2. The Director,
Office of Directorate of Education,
Having office at
Alro-Porvorim Bardez Goa.
3. Secretary of Diocesan
Diocesan Society of Education
Represented by Fr. Jesus N. Rodrigues
Having Register office at
Institute Nossa Senhora de Piedade
D. B. Marg, Panaji,
Ilhas, Goa, 403 001.
4. Fr. Ricardo Pinheiro,
Manager of St. Cruz Primary School,
St. Cruz Goa.
5. Mr. J. J. Russel Coutinho,
Headmaster,
St. Cruz High School,
St. Cruz, Goa.

.... Respondents.

Adv. Shri G. Teles for the Petitioner.

Ms. Maria Correia, Additional Government Advocate for the Respondent nos.1 and 2.

Mr. J. Coelho Pereira, Senior Advocate with Adv. V. Korgaonkar for Respondent nos.3 to 5.

CORAM: DAMA SESHADRI NAIDU, J.

DATE: 9th September 2020.

ORDER:

Facts:

Petitioner Nekheta Fernandes was a 'primary teacher' in a school run by the third respondent--Society. She was appointed on 2nd July 2018. That was "provisional appointment on probation". Later, on 26th December 2018, with the Directorate of Education's approval, the Society appointed Nekheta as a "trained primary teacher, on probation, on a regular basis". Eventually, the Society terminated her services on 25th May 2020. It was on the premise that Nekheta's services were unsatisfactory.

2. Aggrieved, Nekheta has filed this Writ petition, as she has no other efficacious alternative remedy under the statute that governs the teacher's appointment in aided schools.

Arguments:

Petitioner:

3. Shri Galileo Teles, the learned counsel for the petitioner, has submitted that the third respondent/management has not followed the procedure prescribed under Rule 83 of the Goa, Daman and Diu School Education Rules 1986, framed under the Goa Education Act 1984. In this context, I may summarise the submissions advanced by Shri Teles.

(i) As per the Explanation to Rule 83, Nekheta should have been allowed to rectify her conduct, but that opportunity was not given.

(ii) Any misconduct should have been entered into Nekheta's service register, but that has not happened. This amounts to another violation.

(iii) The Memo issued to Nekheta referred to various notices the Managing was said to have issued to Nekheta on different counts of misbehaviour or unsatisfactory performance. But Nekheta actually received only two memos. Therefore, without providing copies of the other unserved memos and without calling for an explanation on them, the Management ought not to have concluded that Nekheta's services were unsatisfactory. The Management's action, thus, cannot be sustained.

(iv) The alleged incident that has led to the registration of a crime by the Ponda Police Station against Nekheta has nothing to do with her discharging duties as a teacher. In fact, the incident allegedly happened outside the school premises. Besides, it is only an allegation that is yet to be proved before a competent court. Therefore, such an incident should not have been the basis for Nekheta's removal.

Respondents:

4. In response, Shri J. Coelho Pereira, the learned Senior Counsel for the respondent nos.3 to 5, submits that admittedly the petitioner was a probationer. On earlier two occasions, she was served with memos of misconduct. Those memos concerned her inflicting corporal punishment on the pupils, though it is prohibited. According to him, it amounted to misconduct under the Right of Children to Free and Compulsory Education Act 2009 (RTE Act). Despite the leniency shown by the Management, Nekheta has not mended her ways. Later in January 2020, in a drunken state, she drove her motorcycle with a pillion rider. Then, on her way, Nekheta skidded and fell. This led to a brawl with the passers-by. In fact, based on the demand from the people around, the police intervened and sent Nekheta for a medical check-up. In that medical check-up, she was found to have been drunk. But as the alcohol in blood was less than the prescribed limit, that did not amount to a crime.

5. At any rate, when Nekheta was taken to the police station, according to the learned Senior Counsel, she and her companion picked up a

fight with the police and that led to their arrest in Crime No.13/2020 for the alleged offence under sections 427, 504, 353, r/w 34 IPC.

6. The alleged incident happened on 23rd January 2020; the crime was registered on 24th January 2020; and Nekheta was enlarged on bail the next day. In this context, the Management also issued a memo to Nekheta. That Memo notified that she indulged in a crime, which is unbecoming of a teacher. It also treated Nekheta's absence from duty on 24th and 25th January as unauthorised.

7. In this context, Shri Pereira submits that the Management never desired to hold an inquiry; instead, it dispensed with Nekheta's service through a termination simpliciter—no stigma attached. In this context, the learned Senior Counsel, too, refers to Rule 83 of the Rules. To support his contentions that the Management has followed the procedure and terminated the petitioner's services entirely in accordance with the law, Shri Pereira relied on these decisions: (i) *Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd.*¹, (ii) *Muir Mills Unit of NTC (UP) Ltd. v. Swayam Prakash Srivastava*², and (iii) *Rajesh Kohli v. High Court of J&K*³.

Reply:

8. In reply, Shri Teles has submitted that as to the alleged crime and unauthorised absence, the Management issued the Memo on 28th January 2020. Nekheta replied to it the very next day. According to him, Nekheta clarified and narrated the whole incident. She concealed nothing. Nekheta has also explained why she could not attend her duties on 24th and 25th January 2020. So Shri Teles stresses that the punishment is disproportionate and deserves to be set aside.

9. Heard Shri Galileo Teles, the learned counsel for the Petitioner; Ms Maria Correia, Additional Government Advocate for the Respondent nos.1

1(2003) 3 SCC 263

2(2007) 1 SCC 491

3(2010) 12 SCC 783

and 2; and Shri J. Coelho Pereira, the learned Senior Advocate for Respondent nos.3 to 5.

Discussion:

10. Indeed, the facts are not in dispute. Nekheta was a teacher in the school run by the respondent Society. She was on probation. On two occasions—once on 18th January and again on 26th September 2019—the parents complained to the Society about Nekheta beating the pupils. It was in the face of the Rules under Section 17 of the Right to Education Act 2008, prohibiting corporal punishment. Nekheta, in her explanation, profusely apologised and assured the Society of proper conduct. So on 9th December 2019, the Society let off Nekheta with a warning.

11. On 23rd January this year, as the allegations reveal, Nekheta was riding her scooter with a pillion rider. Trying to negotiate a sharp curve, Nekheta lost her balance; as a result, she and the pillion rider fell on the road. That led to an altercation with the passers-by. Nekheta allegedly abused the people gathered around in filthy language. That seems to have prompted them to complain to the police, who soon arrived on the scene. Nekheta's conduct, it is further alleged, "forced the general public" to demand "alcoholic test" because Nekheta had been smelling of liquor.

12. When Nekheta was referred to Subdistrict Hospital, Ponda, the medical officer on duty certified that Nekheta "was under the influence of alcohol and was not in the position to take care of herself". Then the police brought Nekheta and her lady companion to the police station. There, Nekheta allegedly picked up a fight with the police on duty. That constrained them to register Crime No. 13/2020 on 24th January 2020. It was for the offences punishable under sections 504, 353, 427 read with section 34 IPC. Nekheta was arrested. She nevertheless got bail the next day.

13. In the light of the above incidents, on 20th March 2020, the school Management issued a memo to Nekheta. In that memo, it set out all

the above allegations. It has also reminded Nekheta of her earlier misconduct and its condonation by the Management. Eventually, the school Management treated Nekheta's behaviour as misconduct under Rule 3 (1) (iii) of the CCS (Conduct) Rules. Nekheta had also been found absent on 24th and 25 January 2020 from duty without leave. This was also treated as another instance of misconduct. Nekheta's explanation did not satisfy Management.

14. Finally, on 21st May 2020, the Management terminated Nekheta's services. The order of termination records that Nekheta's work and conduct during her probation have not been satisfactory. It also brought to her notice about the earlier memos the Management issued. Then it terminated her services from 1st July 2020 "with the requisite statutory period of one month, in terms of the provisions of the Goa, Daman and Diu School Education Rules 1986". The order has also clarified that it "shall not in any way be interpreted that it casts a stigma/or be a disqualification for future employment."

15. Let us examine Rule 83 of Goa School Education Rules, 1986. The Rule reads:

83. Probation.- (1) Every employee shall on initial appointment be *on probation for a period of 2 years* which may be extended by the appointing authority by another year, and *the services of an employee may be terminated with one month's notice without holding any enquiry during the period of probation if the work and the conduct of the employee, during the said period is not, in the opinion of the appointing authority, satisfactory:*

Provided that no termination from the service of an employee on probation shall be made by a recognised non-minority school except with the previous approval of the Director of Education.

Explanation: *The work is said to be unsatisfactory only when written Memos are served on the employee pointing out the defects or acts of misbehaviour and reasonable opportunities are given to the employees to explain and improve; and provided further that those deficiencies/ shortcomings are reflected in the confidential report/reports of the respective year/years.*

(2) ...

(3) Nothing in this rule shall apply to an employee who has been appointed to fill a temporary vacancy or any vacancy for a limited period.

(Italics supplied)

16. For our purpose, only sub-rule (1) and the explanation appended to it matter. An employee's probation must be two years, extendable by one more year. The appointing authority can terminate the employee's services with one month's notice and without holding any enquiry when the employee is under the probation. This termination can be on the grounds that the employee's conduct is unsatisfactory.

17. But the employee's work is regarded as unsatisfactory subject to these conditions: The appointing authority must have served written memos on the employee, pointing out the defects or acts of misbehaviour. And reasonable opportunities must have been given to the employee to explain and improve. Of course, these deficiencies or shortcomings must have reflected in the employee's confidential reports of the years concerned.

18. In *Mathew P. Thomas*, the Supreme Court has acknowledged that order of termination simpliciter passed when an employee under probation has been generating endless debate. It has also held that whether an order of termination is simpliciter or punitive has ultimately to be decided based on the facts and circumstances of each case. In that context, it has referred to two of its earlier judgments: *Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta*⁴, and *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences*⁵. Then, it has quoted with approval the case holding of *Dipti Prakash Banerjee*.

19. According to *Dipti Prakash Banerjee*, if findings were arrived at in an enquiry as to misconduct, behind the officer's back or without a regular departmental inquiry, the simple order of termination is to be treated as

⁴(1999) 3 SCC 60

⁵(2002) 1 SCC 520

'founded' on the allegations and will be bad. But the employer may not inquire, nor may it intend to inquire into the misconduct of an employee. Yet, at the same time, it may not want to continue the employee whose conduct or performance is unsatisfactory. Then, it is a case of motive, and the order of discharge or termination is not wrong. Similar is the position, according to *Dipti Prakash Banerjee*, 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 the foundation and the simple order of termination would be valid.

20. In *Muir Mills Unit of NTC*, the Supreme Court has referred to its earlier decision in *State of MP v. Virendera Kumar Chourasiya*⁶. Then, it has held that in the event of a non-stigmatic termination of the services of a probationer, principles of *audi alteram partem* are not applicable. In *Rajesh Kohli*, the matter involved the termination of a judicial officer. To confirm an employee or to extend his probation period, the employer, according to the Supreme Court, must consider the employee's service record. While doing so, the employer may note from the service records that the employee's performance is not satisfactory. Mentioning of this in the order "would not amount to casting any aspersion on the [employee], nor could it be said that stating in the order that his service is unsatisfactory amounts to a stigma".

21. In this case, we see no procedural violation. Of course, Nekheta contends that after the memo, dated 20th March 2020, she was not allowed to improve her performance or remedy her conduct. I am afraid that contention cannot be countenanced; it is, in fact, a circular argument. Rule 83 has not contemplated an opportunity for redemption after every instance of misconduct. Instead, it means that an employee under probation may be given a chance or two in the face of any misconduct so that he or she could

redeem her behaviour and improve her performance. If we insist on a literal—and an absurd—interpretation of the Rule, every instance of misconduct will be followed by an opportunity of redemption, and that goes on endlessly.

22. The Management earlier twice condoned Nekheta's conduct when she faced the charges of imposing corporal punishment on the pupils. Later, she was arrested in a crime under sections 504, 353, 427 read with section 34 IPC. She was arrested and enlarged on bail. Even a government doctor is said to have certified about her drunken-driving. True, Nekheta asserts that the alcohol percentage in the blood was not high enough to attract a charge. But the fact remains that a teacher taking care of elementary school pupils was found driving under the influence of alcohol, involved in a brawl, got arrested in a crime. That is a tall order for a teacher, a supposed role model for her wards—the young, impressionable minds. For justifiable reasons, every Society reveres teachers. Nothing more needs to be said. All that Nekheta faced thus far may be mere allegations, but they are sufficient for the employer to decide whether it should carry on with Nekheta. The standards of criminal adjudication, not even those of civil adjudication, bind the employer.

23. As the rules permit, the Management did not want to conduct an enquiry; instead, it wanted to relieve the teacher of her responsibilities without any stigma. That is the privilege the employer enjoys, especially during an employee's probation. With that privilege the courts seldom interfere.

24. I, therefore, find no merit in the writ petition; I see no valid grounds to exercise this Court's extraordinary jurisdiction under Article 226 or the supervisory powers under Article 227 of the Constitution to be used to upset the power and the discretion of an employer over a probationer.

25. Shri Pereira has told me when Nekheta filed the writ petition, this Court granted her interim protection. On the strength of it, she signed in

the attendance register but did not discharge duties. Indeed, all interim orders merge in the final disposition. Once the writ petition gets dismissed on the merits, the interim order gives no independent right or benefit to the petitioner.

The writ petition is dismissed. No order on costs.

DAMA SESHADRI NAIDU, J.

AP/-