

AGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8021 OF 2016

Dipti Madhukar Sheth

... Petitioner

Vs.

1. Borivali Education Society
2. Seth G.H. High School
3. The Education Inspector,
(West Zone), Greater Mumbai
4. The Dy. Director of Education
(Higher Education), Gr. Mumbai.
5. Bhavana Shah
6. Zankhana Desai
7. State of Maharashtra

... Respondents

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Mr. Mihir Desai, Senior Advocate with Ms. Sanskruti
Yagnik i/by Ms. Rishika Agarwal for the petitioner.

Mr. Himanshu Kode for respondent Nos.1 and 2.

Mrs. A.A. Purav, AGP for respondent Nos.3, 4, and 7-
State.

CORAM : AMIT BORKAR, J.

RESERVED ON : JULY 27, 2026.

PRONOUNCED ON : JULY 31, 2026

JUDGMENT:

1. By the present writ petition under Articles 226 and 227 of the Constitution of India, the petitioner is challenging otherwise termination with effect from 1 September 2012 orally preventing

her from resuming duty in respondent No.2 School and the impugned Judgment and Order dated 12 January 2016 passed by the Presiding Officer, School Tribunal, Mumbai passed in Appeal No.16 of 2014.

2. Facts giving rise to the filing of the present writ petition, as narrated by the petitioner are that the record shows that from 18 January 2005 the petitioner was working in respondent No. 2 School. According to the petitioner, though she was continuously working, the School deliberately gave her artificial breaks in service. It is her case that she continued to work because the School authorities orally assured her that as soon as a regular post became available, she would be appointed and confirmed as a Shikshan Sevak. Thereafter, on 22 December 2010, respondent No. 2 School published an advertisement in the daily newspaper Times of India inviting applications for the post of Shikshan Sevak. The petitioner submitted her application pursuant to the said advertisement and participated in the selection process.

3. On 10 January 2011, after completion of the selection process, the petitioner came to be selected and was appointed as a Shikshan Sevak in respondent No. 2 School. According to the petitioner, the appointment was made against a sanctioned post which had become vacant on 3 June 2010 on account of the retirement of one Kusumaben Vasa. However, despite the availability of the sanctioned vacancy, respondent Nos. 1 and 2 did not discharge their obligation of forwarding a proposal for approval of her appointment. As a result, on 21 January 2012, respondent No. 3 declined to grant approval to the petitioner's

appointment.

4. Thereafter, on 31 August 2012, the Headmistress of respondent No. 2 School called the petitioner to her office and orally informed her not to report for duty from 1 September 2012 onwards. According to the petitioner, no written order was issued and no reason whatsoever was communicated to her for preventing her from resuming her duties.

5. Being aggrieved, on 14 September 2012, the petitioner addressed a written representation to respondent No. 2 requesting that she should be permitted to resume her duties as a full-time Shikshan Sevak. However, according to the petitioner, despite the said request, she was not allowed to join her duties.

6. On 22 February 2013, respondent No. 3 called upon respondent No. 1 Management to explain the reasons for preventing the petitioner from signing the muster roll. Thereafter, on 17 April 2013, the petitioner formally recorded her objection against what she described as her oral termination. After considering the matter, the Education Inspector addressed a communication to the School stating that although the reason shown for discontinuing the petitioner's services was non-availability of vacancy, the official record disclosed that one vacant post was available in the School. Thereafter, on 11 July 2013, respondent No. 4 directed respondent No. 3 to initiate an inquiry into the circumstances in which the petitioner's services had been brought to an end. Since no effective relief was granted, during the year 2013 the petitioner approached the School Tribunal by filing

an appeal challenging the termination of her services.

7. In the proceedings before the School Tribunal, the respondents filed their reply on 24 January 2014. Thereafter, on 21 July 2014, they also filed their written statement. On the very same day, namely, 21 July 2014, the petitioner filed her affidavit in rejoinder placing on record her response to the stand taken by the respondents.

8. After hearing the parties, the School Tribunal delivered its judgment on 12 January 2015. The appeal filed by the petitioner was partly allowed. However, the Tribunal did not grant the relief of reinstatement. Being dissatisfied with the denial of reinstatement, the petitioner challenged the said judgment before this Court. By order dated 11 September 2015, this Court set aside the relevant part of the Tribunal's decision and remanded the matter to the School Tribunal for fresh consideration in accordance with law.

9. After the remand, the School Tribunal again considered the matter and, by its judgment dated 12 January 2016, re-examined the entire dispute on merits. According to the petitioner, instead of confining to the scope of the remand, the Tribunal reconsidered the whole case afresh and concluded that the petitioner was not entitled to the relief of reinstatement.

10. Mr. Desai, the learned Senior Advocate appearing for the petitioner, submitted that the learned School Tribunal failed to properly consider the petitioner's right to the relief of reinstatement. According to him, the Tribunal ignored the material

fact that one vacant post was available even at the time when other surplus teachers were absorbed. He submitted that the petitioner herself was working against that very post. However, instead of allowing her to continue in service, the respondent Management took advantage of the orders relating to absorption of surplus teachers and terminated her services. According to him, such action was beyond the powers of the respondent Management. He submitted that at the time of termination, the petitioner was on the verge of completing three years of service as a Shikshan Sevak and, therefore, the Management ought to have continued her either on the post on which she was working or on the vacant sanctioned post. He pointed out that the existence of the vacant post was evident from the information furnished by the respondent Management and was also recorded in the earlier judgment and order dated 12 January 2015. On these grounds, he contended that the impugned judgment and order dated 12 January 2016 cannot be sustained in law and deserves to be quashed and set aside.

11. Mr. Desai submitted that under the relevant provisions, the services of a probationer can be terminated during the period of probation only if, in the opinion of the Management, the probationer's work or conduct is found to be unsatisfactory. Even in such a case, the Management is required to give one month's notice or pay one month's salary or honorarium in lieu of such notice before terminating the services. According to him, no such procedure was followed in the present case and, therefore, the action of the respondent Management was contrary to law.

12. Per contra, Mr. Kode, the learned Advocate appearing for the respondent Management, submitted that before the School Tribunal the only issue which was argued was with regard to the minority status of the Management. He submitted that the provisions of Section 5(3) are not applicable to the facts of the present case because the said provision applies only to an Assistant Teacher appointed on probation. According to him, the petitioner had not attained the status of an Assistant Teacher on probation, as she was still serving as a Shikshan Sevak. He submitted that such status could be acquired only after successful completion of three years of service as a Shikshan Sevak and, since the petitioner had not completed that period, she could not claim the protection available under Section 5(3).

REASONS AND ANALYSIS:

13. I have read the pleadings, papers placed on record, judgments passed by the School Tribunal dated 12 January 2015 and 12 January 2016, submissions made by learned advocates for both sides and also the judgments relied upon by them. After seeing all these materials together, it appears that dispute is not only whether termination of the petitioner was or illegal. Main dispute is also about what protection a Shikshan Sevak gets under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, what is the position during probation period and in what manner the Management can stop service before probation period is completed.

14. Mr. Desai learned Senior Advocate submitted that the learned Tribunal did not consider the real controversy in correct manner. According to him, the Tribunal discussed adjustment of surplus teachers but failed to properly consider that one sanctioned vacant post was available in the School. He submitted that the petitioner was working on that post, and she was about to complete three years as a Shikshan Sevak. Therefore, according to him, merely because surplus teachers were adjusted, that could not become reason for terminating the petitioner's service. He submitted that in the earlier judgment dated 12 January 2015 there was discussion regarding existence of the vacant post. Therefore, after remand, the Tribunal was not expected to ignore that finding without recording reasons. This submission cannot be ignored because if one sanctioned vacancy was available, then that fact affects legality of discontinuance.

15. From the record, it appears that the petitioner was not appointed against any leave vacancy or temporary vacancy. Her case throughout has remained that vacancy became available on 3 June 2010 because one Kusumaben Vasa retired. Thereafter, advertisement was issued and she was selected through regular recruitment process. The respondents have also not disputed that advertisement was published and that the petitioner participated in the selection process. Therefore, at least from the available material, it does not appear that the appointment was made through any backdoor method or by ignoring the recruitment procedure.

16. Mr. Desai also submitted that respondent Nos.1 and 2 failed to forward proposal for approval to the Education Department and because of that omission respondent No.3 refused approval. If the Management failed to perform its duty, then the employee should not suffer because of such lapse. Mere refusal of approval cannot by itself mean that the appointment was illegal. It is necessary to see for what reason approval was refused and whether that reason was because of the employee or because of the Management.

17. The petitioner also relied upon another circumstance. According to her, from 1 September 2012 she was orally prevented from resuming her duties. No written order was ever served upon her. She submitted a representation requesting permission to resume duties. The record shows that respondent No.3 called upon the Management to explain why the petitioner was not permitted to sign the muster roll. Thereafter, the Education Inspector recorded that although the School stated there was no vacancy, according to official record one vacant post was available. This communication becomes important because it came from the Education Department. If official record was showing one vacant post, then the Management was expected to explain properly why only the petitioner's service came to be discontinued.

18. One more circumstance also deserves consideration. Respondent No.4 directed that inquiry should be initiated regarding termination of the petitioner. Such direction indicates that even the educational authorities were not satisfied that action taken by the Management was legal. If there was no vacancy or if the Management had acted according to law, then there would

have been no occasion for directing such inquiry.

19. However, submissions made on behalf of the respondent Management also require consideration. Mr. Kode submitted that before the School Tribunal the only issue argued was regarding minority status of the institution and not reinstatement under Section 5(3). He submitted that Section 5(3) has no application because the petitioner had not yet acquired status of Assistant Teacher on probation. According to him, till completion of three years as a Shikshan Sevak, she continued only as a Shikshan Sevak and therefore could not claim protection available to an Assistant Teacher appointed on probation.

20. This submission is required to be examined in light of amendments discussed by the Coordinate Bench in *Principal, Our Lady of Salvation High School v. Rashmi Upadhyay*, (2009) 3 Bom CR 401. The said judgment holds that the Shikshan Sevak Scheme was introduced by Government Resolution dated 13 October 2000. Under that Scheme appointment was initially on honorarium for three years and "Upon satisfactory completion of service over a period of three years, the services of a Shikshan Sevak were to be absorbed as a regularly appointed teacher." The Coordinate Bench noticed that Maharashtra Act 14 of 2007 amended the MEPS Act and inserted the definition of Shikshan Sevak. The Court quoted Section 2(24A), which defines a Shikshan Sevak as:

"a member of base teaching cadre appointed on honorarium ... for eventual appointment as a teacher."

21. The Coordinate Bench thereafter observed that after amendment, the Legislature intentionally changed the nature of employment. The Court observed:

"The Legislature intended to bring Shikshan Sevaks within the purview of the protection..."

22. It stated:

"What was earlier a matter of contract is converted statutorily into status."

23. Again, the Court held:

"The appointment and conditions of service of Shikshan Sevaks cease to be merely a matter of contract..."

24. These observations are of considerable importance. They show that after amendment, service of a Shikshan Sevak cannot remain only contractual employment which Management can end only according to its own choice. After amendment, service conditions became governed by provisions. The Coordinate Bench also held that the Legislature amended the definition of "employee" and included Shikshan Sevak within it. Therefore, remedy under Section 9 also became available. The Court specifically observed:

"The remedy of an appeal before the School Tribunal... is available to Shikshan Sevaks inter alia against a termination of service."

25. Therefore, submission made on behalf of the respondent that a Shikshan Sevak has no protection cannot be accepted. It is true that confirmation comes only after successful completion of three years, but remedies become available because the Act includes a

Shikshan Sevak within the definition of employee.

26. Still, this does not mean that every Shikshan Sevak gets absolute right to continue in service till confirmation. Statutory protection and right of confirmation are two separate matters.

27. The Full Bench in *Gramin Yuvak Vikas Shikshan Mandal Kinhi Naik (2023) 4 Mah LJ 323* has explained the position regarding probationers. The Full Bench held:

"the probationer has no right to his post and the termination of service of probationer does not amount to dismissal or removal by way of punishment."

28. The Court observed:

"The purpose of any probation is to ensure that before the employee attains the status of confirmed employee, he should satisfactorily perform his duties and functions."

29. Again, the Court held:

"The probationers have no indefeasible right to continue in employment until confirmed..."

30. Therefore, merely because the petitioner was close to completing three years cannot create right to continue in service. Completion of probation period and successful completion according to law are not the same thing. The Full Bench has also held that when the Management forms opinion that work or behaviour of probationer is unsatisfactory, disciplinary inquiry is not required. The Court observed:

"there is no requirement to initiate disciplinary proceedings or departmental enquiry..." provided objective assessment under Rule 15(6) exists.

31. The Full Bench held:

"Only sub Rule (6) of Rule 15... applies to an employee appointed on probation..." and observed that notice or warning is not compulsory unless termination order is stigmatic.

32. Therefore, submission of Mr. Desai that every probationer must receive notice or departmental inquiry before termination cannot be accepted as complete proposition of law. At the same time, the Full Bench has nowhere held that the Management can terminate a probationer without complying with Rule 15(6). Rather, throughout the judgment, emphasis has been placed on objective assessment. The Court specifically observed:

"the objective assessment of performance... by maintaining the record of such assessment under Rule 15(6)... is sufficient."

33. Therefore, although departmental inquiry may not be necessary, objective assessment of work still remains mandatory.

34. In the present matter, the Management has never defended the termination by saying that objective assessment of the petitioner's work or behaviour was made, and she was found unsuitable. Throughout, the stand taken by the Management has been that there was no vacancy. On the other hand, the Education Inspector recorded that according to official records one vacancy was available. Therefore, reason put forward by the Management was not unsatisfactory work under Section 5(3), but alleged non-availability of vacancy.

35. This distinction assumes importance. If termination had been based upon unsatisfactory performance, then principles laid down by the Full Bench would apply. But where the Management says that there was no vacancy, then this Court has first to examine whether such vacancy was not available. Unless this fact is established, reliance upon principles governing probation cannot sustain the termination.

36. Further, no material has been produced before this Court to show that the Head of the institution made any objective assessment of the petitioner's performance as contemplated by Rule 15(6). No assessment record has been placed on record. No finding has been recorded by the Tribunal that Rule 15(6) stood complied with. Even before this Court, the Management has not defended its action on that basis. Therefore, protection recognised by the Full Bench regarding simple termination of probationer on ground of unsatisfactory performance cannot validate the impugned action.

37. After considering the material, this Court is unable to accept the submission of the petitioner that merely because she had almost completed three years she acquired indefeasible right of confirmation. The Full Bench has taken a different view. At the same time, this Court is also unable to accept submission of the respondent Management that the petitioner, being only a Shikshan Sevak, had no protection whatsoever. *Rashmi Upadhyay* holds that a Shikshan Sevak is an employee under the MEPS Act and is entitled to remedies available under the Act.

38. Therefore, real issue is not whether the petitioner was probationer or whether she had become confirmed. Real issue is whether the Management has shown that discontinuance of the petitioner's service was made according to provisions governing a Shikshan Sevak and whether reasons assigned by the Management are supported by the record. On the material available, stand of the Management regarding non-availability of vacancy is contradicted by the communication issued by the Education Inspector. At the same time, there is no material showing objective assessment of the petitioner's work as required by Rule 15(6). The Tribunal also failed to examine these material aspects.

39. For all these reasons, findings recorded in the impugned judgment dated 12 January 2016 cannot be sustained. The Tribunal failed to appreciate protection available to a Shikshan Sevak under the amended provisions of the MEPS Act. It also overlooked the material regarding sanctioned vacancy and failed to examine whether mandatory requirement of objective assessment under Rule 15(6), as explained by the Full Bench, was complied with. Therefore, the impugned judgment suffers from error and cannot be allowed to stand.

40. The petitioner has prayed for grant of back wages. However, it is well settled that grant of back wages does not follow because termination is held to be illegal. A person claiming back wages is expected to state on oath that after termination of service he or she was not gainfully employed elsewhere during the intervening period. In the present case, the petitioner has not made any such statement on oath that after her services came to be terminated,

she remained unemployed or was not earning any income from any other employment till disposal of the proceedings. In absence of such pleading and statement on oath, this Court is not in a position to presume that the petitioner had no earnings during that period. Therefore, though the petitioner is entitled to continuity of service and other consequential benefits, she is not entitled to claim back wages.

41. In view of the foregoing discussion, and upon overall assessment of the material record, the following order is passed:

- (i) The Writ Petition is allowed;
- (ii) The judgment and order dated 12 January 2016 passed by the School Tribunal is quashed and set aside;
- (iii) The termination of the petitioner's services with effect from 1 September 2012 is declared to be illegal and is hereby set aside;
- (iv) The respondent Nos.1 and 2 are directed to reinstate the petitioner in service on the post of Shikshan Sevak/Assistant Teacher, as may be permissible in law, within a period of eight weeks from the date of receipt of this order;
- (v) The petitioner shall be entitled to continuity of service for all purposes, including seniority and pensionary benefits, together with all other consequential service benefits flowing from such continuity;
- (vi) The petitioner shall not be entitled to back wages, as she has failed to plead and state on oath that she was not

gainfully employed after termination of her services and during the intervening period till disposal of the proceedings;

(vii) Respondent Nos.1 and 2 shall submit an appropriate proposal to the competent Education Authority for approval of the petitioner's appointment/reinstatement, if required under the applicable Rules, within a period of four weeks from the date of her reinstatement;

(viii) Upon receipt of such proposal, the competent Education Authority shall consider and decide the same on its own merits and in accordance with law, expeditiously and preferably within a period of eight weeks thereafter;

(ix) Rule is made absolute in the aforesaid terms.

(x) There shall be no order as to costs.

(AMIT BORKAR, J.)