

5 December 2023

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6983 OF 2018

1. Dyanganga Bal Vikas Mandal,
Khandali and Ors.

...Petitioners

V/s.

1. Anita Vithalrao Shinde & anr.

...Respondents

Mr. Deendayal Dhanure a/w. Ms. Jyoti Dhanure, for the Petitioners.

Mr. Surel Shah, for Respondent No.1.

Mr. P.P. Pujari, AGP for State-Respondent No.2.

CORAM : SANDEEP V. MARNE, J.

Resd. On : 30 November 2023.

Pron. On : 5 December 2023

JUDGMENT :

1. Petitioner-Management has filed this petition challenging Judgment and Order dated 12 February 2018 passed by the Presiding Officer, School Tribunal, Solapur partly allowing the Appeal filed by Respondent No.1. The School Tribunal has set aside the termination order dated 10 November 2012 and has directed the Petitioner-Management to reinstate her in original post with continuity of service and full backwages. The Tribunal has further directed the Petitioner-Management to follow the provisions of Rule 26 of the Maharashtra

5 December 2023

Employees of Private Schools (Conditions of Service) Rules, 1981 **(the Rules of 1981)** and report the compliance in respect of initiation of process under Rule 26 to the Tribunal.

2. Briefly stated, facts of the case are that Petitioner No.1 is a Public Charitable Trust registered under the provisions of Maharashtra Public Trusts Act, 1950 as well as a Society registered under the provisions of the Societies Registration Act, 1860. The Trust runs a School by name, Parvatibai Nanaware High School at Khandali, Taluka-Malshiras, District-Solapur. By letter dated 28 September 2004, the Education Officer (Secondary) Zilla Parishad, Solapur sanctioned one additional division for Class-9 for the Academic Year 2001-02 on non-grant basis considering increase in the number of students in the School for Class-9. Respondent No.1 came to be appointed as Part Time Assistant Teacher on temporary basis vide Order dated 10 June 2005 in view of sanction of one additional division for Class-9 vide Order dated 28 September 2004. Petitioner-Management sent a proposal for grant of personal approval to the appointment of Respondent No.1 to the Education Officer on 16 February 2006. The proposal was however rejected by the Education Officer vide reply dated 25 July 2008 for various reasons including non-submission of staffing pattern and roster. Petitioner-Management therefore issued advertisement dated 22 June 2008 in the newspapers including applications from eligible candidates for appointment as Part Time Assistant Teachers on non-grant basis for Geography subject. Respondent No.1 requested the

5 December 2023

Management to appoint her against the advertisement so issued. The Petitioner-Management appointed Respondent No.1 as Part Time Assistant Teacher in additional division of Class-9 and submitted proposals to the Education Officer for grant of approval to the appointment of Respondent No.1. By order dated 8 June 2011, the Education Officer granted approval to the appointment of Respondent No.1 as Part Time Assistant Teacher w.e.f. 13 June 2005.

3. It is the case of the Petitioner-Management that there was reduction in the number of students in the School in the Academic Year 2012-13. That upto the year 2011-12, the sanctioned posts of Teachers was 17.5 and Respondent No.1 was working against 0.5 sanctioned post on part time basis. That in the Academic Year 2012-13, the sanctioned strength was reduced by the Education Officer to 17, on account of which one part time post got reduced. The Petitioner-Management therefore terminated the services of Respondent No.1 by letter dated 10 October 2012. The Management informed the Education Officer about termination of services of Respondent No.1 vide letter dated 5 November 2012.

4. Respondent No.1 initially challenged the termination order dated 10 February 2012 by instituting Regular Civil Suit No. 1444 of 2012 in the Court of Civil Judge Junior Division, Malshiras. The Complaint was however returned on account of objection raised by the Petitioner-Management about jurisdiction vide Order dated 3 May 2013.

5 December 2023

Respondent No.1 thereafter approached the School Tribunal, Solapur by filing Appeal under the provisions of Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (**the Act of 1977**). The Appeal was resisted by the Petitioners by filing its Written Statement. After hearing both the sides, the School Tribunal has partly allowed the Appeal and has set aside the termination order dated 10 October 2012 with further directions to the Petitioner-Management to reinstate Respondent No.1 in service with continuity of service and full backwages. Aggrieved by the decision of the School Tribunal, the Petitioner-Management has filed the present petition.

5. Mr. Dhanure, the learned counsel appearing for the Petitioner-Management would submit that the services of Respondent No.1 have rightly been terminated on account of reduction of sanctioned strength from 17.5 to 17 during the Academic Year 2012-13. He would submit that the provisions of Rule 26 of the Rules of 1981 are not applicable in the present case as the appointment of Respondent No.1 was purely on temporary basis. He would invite my attention to Clause-5 of the Approval Order dated 8 June 2011, under which Teachers were to be appointed by taking into consideration the subject wise workload at Secondary level. That as per Clause-5, the approval was to remain in force only till maintenance of the sanctioned strength and the moment the sanctioned strength got reduced, the approval for appointment of Respondent No.1 automatically got cancelled. That the

5 December 2023

Petitioner-Management had given due intimation to the Education Officer about reduction in sanctioned strength and continuation of services of Respondent No.1.

6. Mr. Dhanure would further submit that the sanctioned strength of Petitioner-School is now reduced to 13 for Academic Year 2022-23 and that therefore there is no question of continuation of services of Respondent No.1. Alternatively, he would submit that one of the Teachers has opted for voluntary retirement and in the event of the Education Officer sanctioning the proposal for voluntary retirement of that Teacher, the Petitioner-Management is willing to consider the case of Respondent No.1 for appointment against the post vacated by that Teacher.

7. *Per-contra*, Mr. Shah the learned counsel appearing for Respondent No.1 would oppose the petition. He would submit that the Appointment Order nowhere states that the same is temporary. Respondent No.1 is unceremoniously thrown out of service without any notice and without effecting any retrenchment as contemplated under Rule 26 of the Rules of 1981. That even if retrenchment was necessitated on account of alleged reduction in sanctioned strength, the procedure prescribed under Rule 26 of the Rules of 1981 must be mandatorily followed. That Petitioner-Management could not have unilaterally terminated the services of Respondent No.1 without

5 December 2023

seeking prior approval of the Education Officer. That the provision of obtaining prior approval of Education Officer is consciously included in Rule 26 of the Rules of 1981 to ensure that the retrenched Teacher is absorbed in other Schools. That on account of failure to seek prior approval of the Education Officer, Respondent No.1 lost the opportunity of absorption in other Schools. In support of his contention, Mr. Shah would rely on judgment of this Court in ***Bharat Education Society's Junior College of Commerce and Economics and Others V/s. Balaram Vembulu***, 2001 (1) L.L.N. 188.

8. Mr. Shah would further submit that even if the theory of alleged reduction of sanctioned strength is to be accepted, Respondent No.1 was not the junior most teacher who could be terminated from service. He would place reliance on the appointment orders of Rani Bhimsha Koli made on 5 June 2008 and Navnath Narayan Shelke made on 26 June 2006 in support of the contention that the said teachers were junior to Respondent No.1 at the time of termination of her services. Mr. Shah would invite my attention of the Court to Order dated 25 April 2022 when this Court had noticed retirement of one of the Teachers on 3 March 2022 and directed the Management to explore the possibility of appointment of Respondent No.1 against that post. Mr. Shah would submit that despite order of this Court, Petitioners failed to appoint Respondent No.1 against the post vacated by the said Teacher. He would pray for dismissal of the petition.

5 December 2023

9. Rival contentions of the parties now fall for my consideration.

10. Respondent No.1's initial appointment was effected by the Management vide letter dated 10 June 2005 on account of sanction of one additional division for Standard-9 for Academic Year 2001-02 vide Order dated 28 September 2004. The Division however was sanctioned on non-grant basis. The initial appointment effected on 10 June 2005 was on part time basis and the order clearly stated that the same was on temporary basis. It appears that the proposal submitted by the Management for grant of personal approval to the appointment of Respondent No.1 was rejected by the Education Officer on 25 January 2008. The Petitioner-Management thereafter issued an advertisement for filling up part time post on non-grant basis. Petitioner applied in pursuance of the Advertisement vide application dated 30 June 2008. She submitted one more application for appointing her against the advertised post. It appears that the subsequent appointment/continuation in service of Respondent No.1 was against advertised post. The Management once again sent proposal for grant of approval to the appointment of Respondent No.1. By order dated 8 June 2011, the Education Officer granted approval to the appointment of Respondent No.1 as Part Time Teacher w.e.f. 13 June 2005. Clause-5 of the Approval Order clearly directed the Management to make appointments by taking into consideration the subject wise workload. The Petitioner-Management has resorted to terminate the services of Respondent No.1

5 December 2023

on account of reduction of posts consequent to reduction in number of students. Petitioner-Management has placed on record details of numberwise students for Academic Year 2005-2006 to Academic Year 2012-13 which is as under :

Academic Year	Total Students	Additions/Reductions compared to Previous Year
2005-06	665	
2006-07	662	Reduction by 3
2007-08	671	Increase by 9
2008-09	673	Increase by 2
2009-10	645	Reduction by 28
2010-11	639	Reduction by 6
2011-12	629	Reduction by 18
2012-13	570	Reduction by 51

11. The Petitioner-Management has placed on record sanctioned strength approved by the Education Officer from the Year 2005-06 onwards which shows that total 17.5 posts of teachers were sanctioned during the years 2005-06 to 2011-12. In the year 2012-13, there was slight reduction in the total number of sanctioned teachers from 17.5 to 17. It is on account of reduction of sanctioned strength by 0.5 that the Petitioner-Management was required to terminate the services of one Part Time Teacher.

5 December 2023

12. Mr. Shah has produced Approval Orders of Rani Bhimsha Koli w.e.f. 5 July 2008 and Navnath Narayan Shelke w.e.f. 22 June 2006. On the basis of those Orders, it is sought to be contended that since Rani Bhimsha Koli and Navnath Narayan Shelke were appointed after Respondent No.1, she could not be terminated by following the principle of Seniority. However, approval order issued in the case of Respondent No.1 shows that the approval was on part time basis, whereas the approval orders of Rani Bhimsha Koli and Navnath Narayan Shelke are on full time basis. For reduction of 0.5 posts, the Petitioner-Management was not expected to terminate the services of a full-time teacher. Therefore, the Petitioners have clearly made out a case for termination of one part time teacher on account of reduction of total number of sanctioned posts from 17.5 to 17. Mr. Shah has not been able to demonstrate that any parttime teacher junior to Respondent No. 1 was retained in service after her termination. Therefore, it is sufficiently demonstrated by the Petitioner-Management that Respondent No. 1 had become surplus on account of reduction of number of posts.

13. The next issue is whether, the procedure required under Rule 26 of the Rules of 1981 for retrenchment on account of abolition of posts is followed or not. Rule 26 of the Rules of 1981 reads thus :

5 December 2023

26. Retrenchment on account of abolition of posts

(1) A permanent employee may be retrenched from service by the Management after giving him 3 months' notice, on any of the following grounds, namely:

- (i) reduction of establishment owing to reduction in the number of classes or divisions;
- (ii) fall in the number of pupils resulting in reduction of establishments;
- (iii) change in the curriculum affecting the number of certain category of employees;
- (iv) closure of a course of studies;
- (v) any other bona fide reason of similar nature.

(2) The retrenchment from service under sub-rule (1) shall be subject to the following conditions, namely:-

- (i) The principle of seniority shall ordinarily be observed;
- (ii) Prior approval of the Education Officer in the case of Primary and Secondary Schools or, of the Deputy Director in the case of Higher Secondary Schools and Junior Colleges of Education shall be obtained by the Management in each case of retrenchment including such cases in which the principle of seniority as proposed to be departed from and a senior member of the staff is proposed to be retrenched when a junior member should have been retrenched, stating the special reasons therefor;
- (iii) The employees from aided schools, whose services are proposed to be retrenched shall be absorbed by the Education Officer in the case of Primary and Secondary Schools or by the Deputy Director in the case of Higher Secondary Schools and Junior Colleges of Education. The order of absorption of such employees shall be issued by registered post acknowledgement due letter, and till they are absorbed, the Management shall not be permitted to

5 December 2023

effect retrenchment on account of any reasons mentioned in sub-rule (1).

(3) In case any employee refuses to accept the alternative employment offered to him under clause (iii) of sub-rule (2), he shall lose his claim for absorption, and the Management of the school shall be allowed to retrench, such employee from the services after completion of 3 months' notice period.

(4) If the posts retrenched are revived or additional posts for the same subject are created, the Management shall, by a registered post acknowledgement due letter addressed to the employee who is retrenched and absorbed in other school, give him the first opportunity of rejoining services in the school. For this purpose, the employees shall communicate to the Management, his address and availability for the job every year before April by a letter sent by registered post acknowledgement due.

(5) The retrenched person who may have been absorbed in other school shall have an option either to get repatriated to his original school or to continue in school in which he has been absorbed.

(6) If the employee opts to continue in the school in which he has been absorbed, or if no written reply is received from the employee within a fortnight from the date of receipt of the letter addressed to him by the Management regarding the offer for re-appointment or repatriation to the school or on refusal by him to receive the letter containing such offer, the Management shall be free to fill the post or posts by appointing some other qualified person or persons.

(7) In the event of the employee opting to get repatriated to the original school, he shall be restored to his original position in pay, seniority etc.

(8) In the event of the employee opting to continue in the school in which he has been absorbed, and even during the intervening period when he has not been given an opportunity to rejoin his previous school, his services shall not be terminated by the Management under sub-rule (1) of rule 28 by treating him as

5 December 2023

temporary. If the services of such an absorbed employee are required to be terminated under rule 25A or he is to be retrenched under this rule, the procedure prescribed under rule 25A or, as the case may be in this rule shall apply. However, his seniority for the purpose of promotion in the school in which he is absorbed shall be fixed in the respective category from the date of his absorption.

(9) In case, the fall in the number of pupils, classes or divisions affects the scale of the employee or his status, the facility of absorption admissible as per provisions of clause (iii) of sub-rule (2) shall not be admissible to him and he shall have to work on the lower scale or lower post or part-time post, as the case may be. In the event of such an employee showing unwillingness to work on such a post, the authorities mentioned in clause (iii) of sub-rule (2) shall permit the Management to retrench him after him three months' notice or, as the case may be, after completion of the notice period if already given.

14. Thus, under Rule 26, a permanent employee can be retrenched from service by Management after giving him three months' notice, *inter-alia*, on account of reduction of establishment owing to reduction in the number of classes or divisions. However, such retrenchment is made subject to the conditions of following the principle of seniority and obtaining prior approval of the Education Officer in case of Primary and Secondary Schools. Clause-(iii) of sub-Rule 2 of Rule 26 provides that employees from aided schools whose services are proposed to be retrenched shall be absorbed by the Education Officer and till such absorption, the Management is not permitted to effect retrenchment.

5 December 2023

15. In the present case, it is sought to be contended by Mr. Dhanure that Respondent No.1's appointment was on temporary basis and therefore Rule 26 has no application. I am unable to agree. Though the initial Appointment Order dated 10 June 2005 stated that appointment of Respondent No.1 was on temporary basis, after rejection of proposal for approval, the Management issued advertisement dated 22 June 2008 for filling up post of Part Time Teacher on non-grant basis. The advertisement nowhere indicated that the appointment was to be effected on temporary basis. Also of relevance is the fact that the Education Officer has granted approval to the appointment of the Respondent No.1 since 13 June 2005 and therefore it cannot be stated that the appointment remained temporary even after grant of approval by the Education Officer. In my view, therefore the rigors of Rule 26 of the Rules of 1981 would fully apply to the present case.

16. Mr. Shah has placed reliance on the Judgment of this Court in ***Bharat Education Society's Junior College of Commerce and Economics*** (supra) in which this Court has held in paras-4 and 5 as under :

4. A consideration of Rule 26 thus, shows that even if there is a reduction in the establishment due to a fall in the number of pupils, classes or divisions, the decision to retrench an employee cannot rest in the unilateral discretion of the management of a school. In the case of all schools, the principles on the basis of

5 December 2023

which the retrenchment is to be effected, are specified. The prior approval of the competent authorities of the Education Department is a mandatory condition. In the case of aided schools, the employee whose services are sought to be dispensed with is to be absorbed in an alternative establishment. In the exceptional case specified in sub-rule (9) where the facility of absorption is not admissible, the employee has to be given an opportunity of working on a lower scale or post or on a part-time post.

5. In the present case, it is abundantly clear that the procedure which is postulated by Rule 26 was evidently not followed. The Director of Education had drawn the attention of the management to this position and had consequently advised it against the unilateral decision to close down divisions or classes. The respondent was a permanent full-time employee. The decision of the petitioners to alter his status from that of a full-time employee into an employee engaged on a clock-hour basis without following the procedure prescribed by Rule 26 was therefore, illegal and no fault can be found with the order of the school Tribunal in that regard.

17. Thus, prior approval of the Education Officer is a mandatory requirement for effecting retrenchment of a Teacher on account of absorption of posts. In the present case, there is no dispute to the position that Petitioner's appointment was against aided post and therefore she was entitled to be absorbed in another School upon absorption of posts in Petitioner's School.

5 December 2023

18. I therefore do not find any error in the Order passed by the Tribunal in holding termination of Respondent No.1 to be bad in law.

19. The next issue is about nature of relief that can now be granted to the Petitioner. The Tribunal while setting aside the termination and directing reinstatement, has permitted the Management to follow the provisions of Rule 26 of the Rules of 1981 in respect of Respondent No.1. This essentially means that notwithstanding setting aside termination, the Management was free to follow procedure under Rule 26 for her retrenchment. The School Tribunal has proceeded to grant full backwages to Respondent No.1 from the date of termination alongwith continuity of service. It appears that Respondent No.1 was erroneously advised to file Civil Suit challenging termination order and, in the process, she unnecessarily wasted time upto 19 August 2014. Respondent No.1 ultimately filed Appeal before the School Tribunal. For mistake on her part in approaching the Civil Court Petitioner-Management cannot be saddled with the liability of payment of backwages. As observed above, the Petitioner-Management was granted opportunity to follow procedure under Rule 26 even after setting aside the termination order. Mr. Dhanure has placed on record, the sanctioned strength for the Academic Year 2022-23 which shows that the total number of sanctioned posts has further reduced to 13. It is on account of this reason that the Management has apparently not effected appointment

5 December 2023

of Respondent No.1 despite retirement of Smt. Ashwini Hanmant Mandal on 3 March 2022. Therefore, it appears that even if Respondent No.1 was to be reinstated in service towards compliance of the order of the School Tribunal, the retrenchment was otherwise inevitable. Be that as it may, one post of Teacher is likely to become vacant on account of voluntary retirement application of another Teacher which is under consideration with the Education Officer. Petitioner-Management has shown willingness to accommodate Respondent No.1 against the vacancy created on account of voluntary retirement of a Teacher. In my view, this is a reasonable offer which would ensure employment to Respondent No.1 rather than leaving her fate to be decided by Education Officer for grant of absorption in other Schools. In my view, therefore the relief granted by the School Tribunal is required to be molded.

20. Though the order of the School Tribunal setting aside termination and directing reinstatement is required to be upheld, the direction for payment of full backwages needs to be modified. Petitioner-Management was left with no alternative but to terminate the services of Respondent No.1 on account of reduction of posts. The reinstatement is directed on account of technical violation of failure to obtain prior approval of the Education Officer. Now the Petitioner-Management is willing to offer appointment of Respondent No.1 against full time post vacated by another teacher. Thus, the Petitioner would get a full time appointment instead of reinstatement on non-

5 December 2023

existent part time post. In that view of the matter, the direction for payment of full backwages to Respondent No.1 deserves to be set aside.

21. I accordingly proceed to pass the following Order :

- (i) The Judgment and Order dated 12 February 2018 passed by the School Tribunal is upheld only to the extent of setting aside termination order dated 10 October 2012 and direction to reinstate Respondent No.1 in service with continuity. The direction for payment of full backwages is set aside.
- (ii) The Petitioner-Management shall appoint Respondent No.1 as full time teacher against vacancy created on account of voluntary retirement of existing Teacher.
- (iii) Respondent No.1 shall not be entitled to any backwages from the date of termination of her services till grant of appointment as Full Time Teacher. She shall however be entitled to the benefit of continuity of service. The intervening period from 11 November 2012 till grant of appointment as Full Time Teacher shall be treated as 'duty' only for the limited purpose of computing the period as qualifying service for Pension, if any and the same shall not be treated as duty for any other purposes.

5 December 2023

22. With the above directions, the Writ Petition is **disposed of**. All interim applications pending therein also stand disposed of.

SANDEEP V. MARNE, J.

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