

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3451 OF 2013

Syed Shahin d/o Sharafat Ali (Borikar),
Age-37 years, Occu-Assistant Teacher,
Ujam Urdu Primary School At Latur,
At present NIL,
R/o Anjalinagar, Latur

- PETITIONER

Versus

1. Vaishalitali Deshmukh Shikshan Sanstha,
Dhanegaon, Tq. And Dist. Latur,
Through its President.
2. Vaishalitali Deshmukh Shikshan Sanstha,
Dhanegaon, Tq. And Dist. Latur,
Through its Secretary,
3. Head Master,
Ujma Urdu Primary School,
Mahada Colony, Babalgaon Road,
Latur, Tq. And Dist. Latur,
4. Education Officer (Primary),
Zilla Parishad Latur,
Tq. And Dist. Latur

- RESPONDENTS

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Mr.Syed Masood Chand, learned Advocate for the petitioner.
Mrs.A.N.Ansari, learned Advocate for respondent Nos. 1 to 3.

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CORAM : RAVINDRA V. GHUGE, J.

Reserved on : 26/08/2015

Pronounced on : 02/09/2015

JUDGMENT :-

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is aggrieved by the judgment and order dated 01/02/2013 in Appeal No.35/2009 delivered by the School Tribunal, Latur.

3. The contention of the petitioner is as follows :-

- (a) The petitioner was S.S.C. and Teachers' Certificate Higher Course (TCH) qualified at the time of her appointment as a "Shikshan Sevak" on 05/07/2003 on probation for a period of 3 years, on the basis of the G.R. dated 13/10/2010.
- (b) The petitioner worked till 20/09/2006, completed her probation period satisfactorily and therefore was deemed permanent u/s 5(2) of the Maharashtra Employees of Private Schools Act, 1977. (For short, the MEPS Act).
- (c) From 21/09/2006, the respondent/Management prevented the petitioner from signing the muster roll and thereby restrained the petitioner from discharging her duties.
- (d) The petitioner filed Appeal No.35/2009 u/s 9 of The MEPS Act before the School Tribunal for challenging her oral termination.
- (e) The respondent/Management filed its written statement in the said proceedings and specifically took a stand that the petitioner had abandoned her service and had approached the School Tribunal under a false plea of oral termination.
- (f) The respondent/Management also took the stand that the petitioner was never appointed by a competent person, was over age, was not D.Ed. qualified, TCH is not equivalent to D.Ed. and hence was terminated.
- (g) Contradictory stands have been taken by the respondent.
- (h) TCH has been granted the equivalence of D.Ed. by the State of Maharashtra by the G.R. dated 24/10/1989.

- (i) The respondent/Management had levelled charges against the husband of the petitioner and in the Regular Criminal Case No.833/2009, the witnesses of the Management stated on oath that the petitioner was appointed from the N.T.Category as a “Shikshan Sevak”.
- (j) Three witnesses of the Management have stated that an advertisement was published pursuant to which the petitioner applied for appointment and was appointed as “Shikshan Sevak” from the N.T. category.
- (k) The learned Court of Criminal Jurisdiction by judgment dated 11/11/2013, acquitted the husband of the petitioner from all charges.
- (l) The proviso to Rule 9(4)(a) relaxes the age of appointment with the permission of the Deputy Director.
- (m) The petitioner's appointment order dated 05/07/2003 was signed by the two competent persons as is required in Law.
- (n) The appointment order is self explanatory.
- (o) Oral termination in itself is an illegal act committed by the respondent.

4. The learned Advocate for the petitioner relied on the following judgments :-

- 1 *Ram Avadh Mahel Pal Vs. Shivdutta Educational Trust and others, (Full Bench-Bombay High Court), 2007(6) BCR 23.*
- 2 *Rekha Damodar Joshi Vs. State of Maharashtra and others, 2011(5) BCR 895.*
- 3 *Union of India, through the Superintendent of Post Offices, Wardha Vs. M.Z. Quazi, 1990(2) BCR 162.*
- 4 *Jagdamba Education Society, Nagpur Vs. Rajendra s/o Baburao Golhar and others, [2009(2) Mh.L.J.522;*
- 5 *Bhushan Arvind Sonawane Vs. State of Maharashtra and others, [2005(6) BCR 408*

5. Learned Advocate for respondent Nos.1, 2 and 3 Management has drawn my attention to its written statement and specifically set out the reasons for the termination of the petitioner as under :-

- (a) The petitioner herself abandoned service and her husband also chose to remain absent from duty (paragraph 11 of W.S.)
- (b) False plea of oral termination has been put forth by the petitioner (paragraph 11 of W.S.).
- (c) The petitioner was never appointed by a competent person.
- (d) Petitioner was over-age at the time of her appointment.
- (e) The petitioner did not possess D.Ed. qualification.
- (f) TCH is not equivalent to D.Ed. despite the G.R. dated 24/10/1989.
- (g) The petitioner's husband marked the presence of the petitioner on duty by signing her muster roll despite the petitioner being on maternity leave.
- (h) The petitioner had filed an application for maternity leave on 31/01/2006 and was on maternity leave for 90 days.
- (i) The respondent collected the birth certificate indicating the birth of the child of the petitioner on 29/01/2006.
- (j) The respondent Institution is on "Non Grant Basis" and hence approval of the appointment of the petitioner is not required.
- (k) The School Tribunal has rightly dismissed the appeal of the petitioner by its judgment dated 01/02/2013.

6. I have considered the submissions of the learned Advocates who have taken me through the petition paper book and the record available.

7. The Full Bench of this Court in the Ram Awadh case (supra), considered the controversy with regard to whether a "Shikshan Sevak", who has completed three years in service, would be entitled to be absorbed as a Regular Teacher, as was held by the Division Bench in WP No.2627/2003

vide its judgment dated 11/12/2003 or whether they will have to be treated as appointed on Probation for a further period of 2 years before being treated as regularly appointed as was held by another Division Bench in the case of Swati Vasant Patil Vs. Kandiwali Education Society, 2002(3) BCR 51.

8. The Full Bench considered the said reference made by the Division Bench and answered the same in paragraph Nos. 4, 5 and 6 as under :-

*"4. At the outset, it is material to note that the Junior College run by the 1st respondent-**society** is a college fully aided and recognised by respondent Nos. 3 and 4. The 1st respondent-**education society** is an Institution run by a linguistic minority. It is also an accepted position that as far as the service conditions of the employees of private schools (which include junior colleges) are concerned, they are all governed under a State Act known as "Maharashtra Employees of Private Schools (Conditions of Service) Regulations Act, 1977 (for short, "MEPS Act"). The MEPS Act contains various provisions for the purposes of regulating the recruitment and conditions of service of the members of the teaching and non-teaching staff of recognised schools. As far as minority schools are concerned, it is provided in section 3(2) of said Act that the provisions of this Act shall not apply to the recruitment of the head of a minority school and any other persons (not exceeding three) who are employed in such schools and whose names are notified by the Management to the Director or the Deputy Director for this purpose.*

*5. It so happened that some-times in the year 2000 respondent No. 4 State of Maharashtra took an over view of the expenditure required to be incurred on the Secondary and Higher Secondary **Education**. It was noted that the expenditure was rising and that it was becoming increasingly difficult to make appropriate financial provisions for the same. The State of Maharashtra, therefore, examined the schemes introduced in the other States such as Rajasthan, Madhya Pradesh and Gujarat and came out with a scheme known as "Shikshan Sevak Scheme" (a scheme to engage para teachers). The scheme was introduced through the Government Resolution*

(G.R.) dated 27th April, 2000. The teachers and their organisations were of the view that the said scheme reduced the pay, rights and facilities of the teachers. In fact, their pay and other service conditions were considerably affected. Some such teachers organisations, therefore, filed a few writ petitions in this Court. All of them came to be heard by a Division Bench (Coram : A.P. Shah & V.C. Daga, JJ.). The Division Bench was of the view that the matter requires consideration and hence the group of petitions being Writ Petition No. 2940 of 2000 and others, Bombay Suburban Secondary School Teachers Association & others v. Secretary, Shri Samartha **Education Society** & others, were admitted. The Division Bench gave certain interim directions by its order dated 16th August, 2000. The State Government had indicated to the Division Bench its willingness to accept the suggestions which emerged during the course of the discussion before the Division Bench. The Government, therefore, issued another G.R. in modification of the earlier G.R. The subsequent G.R. dated 13th October, 2000 along with its annexures is the one now prevalent in the State as the G.R. laying down the Shikshan Sevak Scheme. The issues raised in the present petition are concerning and arising out of some of the provisions of this G.R. These provisions will be referred to later on.

6. The two petitioners herein are well qualified young ladies. The 1st petitioner has done her Master of Science (M.Sc.) in Physics with First Class and has thereafter taken the Degree of Bachelor of **Education** (B.Ed.). Similarly the 2nd petitioner has done her M.Sc. with Chemistry. She has also obtained First Class in M.Sc. and taken her Degree in Bachelor of **Education** (B.Ed.). Thus they are fully qualified to become teachers in a junior College. They were recruited after following the prescribed procedure for selection”

9. It is, therefore, settled that an employee who works as a “Shikshan Sevak” for 3 years on probation will be deemed to be permanent unless under any exigency, his services are lawfully terminated.

10. I am quite astonished by the fluctuating stands taken by the

respondent/Management, which is beyond comprehension. It is contended by the Management that there was no termination and hence the petitioner is deemed to have abandoned service.

11. On the one hand the respondent has taken a stand that the petitioner has not been terminated. On the other hand, it is contended that the petitioner has abandoned service. It, therefore, amounts to charging the petitioner with unauthorized absenteeism, which therefore amounts to stigmatic termination.

12. In the matter of Dipti Prakash Banerjee Vs. Satvendra Nath Bose National Centre, AIR 1999 SC 983, the Apex Court has held that if the foundation of termination is a charge, the said termination is a stigmatic termination and necessarily needs to be preceded by a proper enquiry. Observations in paragraph nos.20, 22 and 24 read as under :-

“20. As to in what circumstances an order termination of a probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation. In this area, as pointed out by Shah, J. (as he then was) in Madan Gopal v. State of Punjab, AIR 1963 SC 531, there is no difference between cases where services of a temporary employee are terminated and where a probationer is discharged. This very question was gone into recently in R.S. Gupta v. U.P.State Agro Industries Corporation Ltd., (1998)8 JT (SC) 585 : (1999 AIR SCW 207) and reference was made to the development of the law from time to time starting from Purshottam Lal Dhingra v. Union of India (1958) SCR 828 : (AIR 1958 SC 36), to the concept of 'purpose of inquiry' introduced by Shah, J. (as he then was) in State of Orissa v. Ram Narayan Das (1961) 1 SCR 606 : (AIR 1961 SC 177) and to the seven Bench decision in Samsher Singh v. State of Punjab (1974) 2 SCC 831 : (AIR 1974 SC 2192) and to post Samsher Singh case-law. This Court had occasion to make a

detailed examination of what is the 'motive' and what is the 'foundation' on which innocuous order is based.

22. If findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad. But if the inquiry was not held, no findings were arrived at and the employer was not inclined to conduct an inquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to inquire 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.

24. In the present case before us, the order of termination dated 30.4.97 is not a simple order of termination but is a lengthy order which we have extracted above. It not only says that performance during probation is not satisfactory but also refers to a letter dated 30.4.19% by which the period of probation was extended by six months from 2.5.1996, and to letters dated 17.10.96 and 31.10.96. It concludes by saying that the appellant's 'conduct, performance, ability and capacity during the whole period of probation was not satisfactory and that he was considered 'unsuitable' for the post for which he was appointed."

13. Considering the ratio laid down by the Full Bench in the Ram Awadh case, the petitioner who worked from 05/07/2003 till 20/09/2006 by virtue of her appointment order dated 05/07/2003 is deemed to have become permanent in service.

14. In the Rekha Damodar Joshi case (supra), this Court has concluded in paragraph Nos. 6, 7 and 8 as under :-

“6. In the present case, the Deputy Director has refused to relax the age limit only because the petitioner was over age by eight years. This order has been accepted by the Tribunal and it has therefore held that the termination of service was legal and proper.

7. The learned AGP, while supporting the order of the Deputy Director, submits that had the petitioner been overage by one or two years, the age limit could have been relaxed. According to him, eight years is too long a period to be relaxed.

8. In my opinion, this submission is without merit. There is no upper age limit provided in respect of women, ex-servicemen and for persons having previous experience. Appointments of such persons can always be made subject to the previous permission of the Deputy Director. The Deputy Director cannot refuse permission arbitrarily. The reason given by the Deputy Director for refusing permission is unsustainable. There is no basis in the Act or the Rules for the Deputy Director to conclude that the upper age limit, while appointing persons from these categories can be relaxed only by one or two years.”

15. As such, the age at the time of appointment can be relaxed under Rule 9 (4) of the MEPS (Conditions of Service) Rules, 1981. The respondents themselves did not choose to forward the proposal of the petitioner for age relaxation to the Education Department. Nevertheless, having chosen to appoint the petitioner pre-supposes a proper scrutiny at the time of appointment.

16. The respondent/Management has taken a plea that the petitioner

was not properly appointed by a competent person. The appointment order of the petitioner indicates that the Head Master and the Secretary has issued the appointment order dated 05/07/2003. Prior thereto, the Resolution passed by the Managing Committee dated 23/06/2003 for appointing the petitioner on a permanent vacant post w.e.f. 05/07/2003 bears the signature of the President and the Secretary of the Institution. So also, it is the case of the respondents that the petitioner was on maternity leave vide her application dated 31/01/2006.

17. The effect of all these documents makes it evident that the petitioner was appointed as a “Shikshan Sevak” by the Management and which chose to drive out the petitioner orally under a spacious plea that she has abandoned her service.

18. In the matter of Novartis India Ltd., Vs. State of West Bengal and others, AIR 2008 SC (supra) 836, the Apex Court has observed that the concerned employee was transferred and had declined to join the place of transfer. The employer presumed abandonment of service. It was held that the presumption of abandonment of service rests upon the charge of unauthorized absenteeism and unless such a charge was proved in a proper domestic inquiry, the contention of the employer would be rendered unsustainable. Full back wages were granted to the said employee in such circumstances.

19. As regards relaxation of age, this Court in the case of Union of India

(supra) has held in paragraph No.7 as under :-

“7. The first contention that the respondent is not qualified to be appointed since he has crossed the age of 30 years is totally devoid of any substance. On this point the learned Presiding Officer of the Tribunal was emphatic that the qualification prescribed for recruitment was capable of being relaxed, but instead of relaxing the qualification the petitioner chose to appoint another driver Shri Yete and it is not difficult to imagine why such a course was adopted. The petitioner could not digest the claim put forth by the respondent seeking benefits that are available to a regular employee after putting in three years service and therefore he was victimised. The best course to do away with the respondent was not to relax the age so that on such a pretext the services of the respondent could be discontinued. Suffice it to say that the respondent was engaged and also continued in service despite the knowledge that he was age barred and it would be certainly unjust to hold that he cannot be continued in service, particularly when the Government is endowed with a power to relax the rules to avoid unjust results. The bar of age, therefore, cannot come in the way of the petitioner to reinstate the respondent.”

20. In the light of the above, I find that the respondent / Management was apparently in a confused state of mind while opposing the appeal of the petitioner before the School Tribunal. Conflicting stands which could never co-exist were taken by the Management before the School Tribunal. I find it surprising that the School Tribunal, despite the fact that there was no termination order on record, agreed with the contentions of the respondent that the petitioner was not qualified, was age bar, was not appointed by a competent authority, appeared to have abandoned her work and hence the oral termination deserves to be sustained.

21. Considering the law referred to hereinabove and the facts of the case, as well as the testimony of the three witnesses of the respondent / Management, which comprise of the Secretary of the respondent and two other witnesses, would indicate that the petitioner was appointed as against a permanent vacant post which was advertised. She has completed her probation period and was deemed permanent. There is no order of termination on record. Charge of abandonment of service is levelled, but not proved. In these set of facts, the impugned judgment is rendered perverse and erroneous.

22. In the result, this petition is allowed. The impugned judgment and order dated 01/02/2013 delivered by the School Tribunal in Appeal No.35/2009 is quashed and set aside. Appeal No.35/2009 stands allowed.

23. The petitioner shall be reinstated in service by the respondent within 2 (two) months from the date of this order.

24. Having considering the fact that the petitioner as well as her husband were in employment and considering the ratio laid down by the Apex Court in Gauri Shanker Vs. State of Rajasthan, 2015(2) CLR 497 and Nicholas Piramal India Ltd., Vs. Hari Singh 2015(2) CLR 468, I am awarding 50% back wages to the petitioner from the date of her termination 21/09/2006 till the payment of back wages within 60 days from the date of this order, failing which, the said amount shall attract interest @ 6% per annum from the date of termination till actual payment.

25. Rule is made absolute in the above terms.

(RAVINDRA V. GHUGE, J.)

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