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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 6563 OF 2015

Manmath Laxmanappa Nagapure,
Age : 25 years, Occ : Nil,
R/o Samatanagar, Parli (V),
Tq.Parli (V), District Beed.

...PETITIONER

-VERSUS-

- 1 The Secretary,
Sau.Sardabai Gurulingappa Menkudale
Madhyamik Vidyalaya, Sangam,
Taluka Parli (V), District Beed.
- 2 The Headmaster,
Sau.Sardabai Gurulingappa Menkudale
Madhyamik Vidyalaya, Sangam,
Taluka Parli (V), District Beed.
- 3 The Education Officer (Secondary),
Zilla Parishad, Beed.

...RESPONDENTS

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Advocate for Petitioner : Shri Deshmukh Sachin S.

Advocate for Respondent Nos.1 and 2 : Shri Sanjay Kolhare.

AGP for Respondent No.3 : Shri S.G.Sangle.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 21st September, 2015

Oral Judgment:

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

2 The Petitioner is aggrieved by the impugned judgment and order dated 20.04.2015 delivered by the School Tribunal, Aurangabad in Appeal No.67/2004 by which the Appeal preferred by the Petitioner has been dismissed.

3 Shri Deshmukh, learned Advocate appearing for the Petitioner, has specifically pointed out the first appointment order dated 15.06.2000 which is signed by the Headmaster of the School purportedly on behalf of the School Committee in his capacity as Secretary of the said Committee. By the said appointment order, the Headmaster has appointed the Petitioner as a Peon on temporary basis for the academic year 2000-2001.

4 Shri Deshmukh then points out another appointment order (undated) signed by the Headmaster which indicates that the Petitioner has been appointed on probation as a Peon with effect from 15.06.2001 for the academic year 2001-2002 only.

5 He then points out the communication dated 28.03.2003

issued by the Education Officer (Secondary), Zilla Parishad, Beed, indicating that the Petitioner's appointment was approved on temporary basis from 10.06.2002. It is, therefore, contended that as the Petitioner worked as a probationer from 2001-2002 and subsequently, he has been granted approval on temporary basis for the academic year 2002-2003, it needs to be presumed that he was continued on probation by the Management even for the academic year 2002-2003.

6 It is further submitted that the Petitioner was never appointed against any reserved category post. There are four posts of Peon. Only two are reserved for backward class. The School Tribunal has erroneously concluded that the Petitioner was not validly appointed by following the due procedure of selection and appointment as is laid down in law.

7 Shri Deshmukh submits that the School Tribunal could not have overlooked that the Petitioner worked for the year 2000-2001, for 2001-2002 as a probationer and then again for 2002-2003 as a temporary and therefore, was deemed to be permanent in the light of Section 5(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short "MEPS Act").

8 Shri Deshmukh submits that the Respondent/ Management

has itself appointed the Petitioner and who has worked continuously for three years. One post of peon is still vacant. The Petitioner having attained the deemed status of a permanent employee, deserves to be continued in employment as such. The impugned judgment of the School Tribunal is an outcome of non application of mind and a pedantic approach. It is, therefore, prayed that the petition be allowed.

9 The Petitioner has relied upon the judgment of the Division Bench of this Court in the case of *Anil Dattatraya Ade v/s Presiding Officer, School Tribunal and others*, **2003 (4) Mh.L.J. 866**.

10 Shri Kolhare, learned Advocate appearing for Respondent Nos.1 and 2/ Management and Headmaster, submits that there was no oral termination as is alleged by the Petitioner. The Petitioner was engaged temporarily for the academic year 2002-2003 and by efflux of time owing to the end of the academic year, he was disengaged from 30.04.2003.

11 He further submits that the Headmaster is the competent authority to appoint an Employee in the non teaching staff category, temporarily for a period not exceeding one academic year. The Headmaster had appointed the Petitioner by the order dated 15.06.2000 for an academic year. By the second appointment order, he was again

appointed for one year on temporary basis, though it is erroneously mentioned as “on probation”.

12 He submits that the Petitioner cannot be said to have been appointed as a probationer since there was no permanent vacant post available and no advertisement calling for applications for filling in a permanent vacant post was ever published by the Petitioner. An employee can be appointed on probation only for the purpose of testing him for his suitability and for confirmation on the permanent vacant post.

13 Shri Kolhare further submits that the Education Officer, by the order dated 28.03.2003 has granted approval for the temporary appointment of the Petitioner for the academic year 2002-2003 which ended on 30.04.2003.

14 Shri Kolhare refers to the documents available pertaining to the reservation of posts in the non teaching staff category. He points out that the first post has been converted into reserved category post for the Scheduled Caste (SC). The second post is converted for the Scheduled Tribe (ST). The third post is reserved for Vimukta Jati & Nomadic Tribe (VJNT). The last post is reserved for the disabled/ physically handicapped from Other Backward Category (OBC).

15 Shri Kolhare further submits that presently there is one post available which is reserved for Scheduled Tribe (ST) category. The Petitioner is not in employment from 01.05.2003 for the last more than 12 and ½ years.

16 The learned AGP indicates from the order dated 28.03.2003 that Respondent No.3/ Education Officer had granted approval to the temporary engagement of the Petitioner for the academic year 2002-2003 w.e.f. 10.06.2002. He submits that the said approval was not with regard to any appointment of the Petitioner as a probationer. Unless there is permanent vacant post available and the selection procedure as laid down in law is complied with, Respondent No.3/ Education Officer would not accord approval for the probation period of any employee.

17 I have considered the submissions of the learned Advocates as have been recorded herein above.

18 The Petitioner has relied upon paragraphs 7 and 8 of the judgment delivered by the Division Bench of this Court in the case of Anil Dattatraya Ade (supra), which read as under:-

“7. We are, therefore, not able to agree with the

submissions of the learned counsel for the respondents that relationship between the petitioner and the respondents as on 9-5-1981 was governed by either the common law or by the law of Contract or even by the M.C.S. Rules. In fact, we are not concerned with the law that might have existed on that date as we are concerned with the crucial date of termination, which took place on 30th June, 1984. The first date of appointment is not relevant or material to test the legality and validity of the order of termination which took place after the enforcement of the Act. The learned Presiding Officer of the School Tribunal was also not right in holding that the relationship was governed by the M.C.S. Rules 1981, and therefore, the probation period of the petitioner could be extended and therefore, till the specific order of confirmation was passed, the petitioner continued to be on probation. As soon as the Act was brought in force on 15-7-1981 the relationship between the parties was governed by the Act and not by any other law or rules including the M.C.S. Rules as erroneously held by the learned Presiding Officer of the School Tribunal. After the judgment of the Full Bench, this position has become beyond any pale of doubt. The entire basis of the learned Tribunal was, therefore, erroneous which has led him to an erroneous finding and conclusion in respect of the right of the petitioner on the question of his probation and confirmation in service. The conclusion of the learned Presiding Officer that there was no automatic confirmation by mere passage of time and that confirmation does not depend on passage of time but it depends on positive order of confirmation and that mere expiry of probation period does not lead to an inference of fitness of the employee for confirmation and that the specific order of confirmation is essential and that till that time he continues to be a probationer is erroneous. Applying this line of arguments, the learned Tribunal has come to a wrong decision which is directly in contravention of the mandatory Section 5(2) of the Act, which specifically lays down that after expiry of two years probation period, the employee automatically

acquires the status of permanency. On this crucial issue the Tribunal has committed grave error of law and therefore, the finding deserves to be quashed and set aside. The Tribunal has, however, rightly held that it had proper jurisdiction to entertain and try the appeal of the petitioner under Section 9 of the Act. The Tribunal has also rightly held that the petitioner was holding the required qualifications as per prevalent Rules on the date of the appointment. The Tribunal has, however, gone wrong in holding that the issue of probation and confirmation was governed by M.C.S. Rules and not by the provisions of the Act.

We therefore, have to examine the facts of the present case on the touchstone of Section 5 of the M.E.P.S. Act. The Section 5 reads as under :-

"Section 5 (1) The Management shall, as soon as possible, fill in the manner prescribed every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy; [Provided that unless such vacancy is to be filled in by promotion, the Management shall, before proceeding to fill such vacancy, ascertain from the Education Inspector, Greater Bombay, [the Education Officer, Zilla Parishad or, as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools; and in the event of such person being available, the Management shall appoint that person in such vacancy.] (2) Every person appointed to fill a permanent vacancy shall be on probation for a period of two years. Subject to the provisions of subsections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed. (3) If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may notice [or salary of one month in lieu of notice.] (4) If the services of any probationer are terminated under sub-section (3) and he is

reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purpose of subsection (2). (4-A) Nothing in subsection (2), (3) or (4) shall apply to a person appointed to fill a permanent vacancy by promotion or by absorption as provided under the proviso to subsection (1).] (5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the period of appointment of such person."

8. *From a bare look at this provision, it becomes crystal clear that the employee gets automatic confirmation after expiry of two years probation period. Under this provision, if an employee, who is appointed in a permanent vacancy on probation and he completes two years he acquires the status of permanency automatically without any specific confirmation order passed by the employer. We cannot forget that this provision is in the enactment and not an administrative rule framed by the Executive in a form of delegated legislation. The mandate is issued by the Legislature that on completion of two years' probation period, the employee gets automatically confirmed in the post. There is no escape from the clutches of Section 5(2) of the Act.*

The first order of appointment is dated 9-5-1981, which clearly reads that the petitioner was appointed on probation for two years though the appointment order in its first Clause mentions that the appointment was temporary for academic year 1981-82. The second Clause, however, stipulates a compulsory condition that the petitioner will have to serve the institution at least for two years and that period will be the probation period. Clause 3 also contemplates the probation period. In Clause 4 also

the probation period is contemplated. The reading of the entire appointment letter, and construing the same, it is crystal clear that the petitioner was appointed to serve institution for two years on probation period. He was also put in regular pay-scale with increments and usual other allowances. By a subsequent order dated 30-4-1982, the aforesaid order is continued further for the next year of 1982-83. Clause I of this letter also contemplates the probation period of two years from the date of joining. It was a continuation sheet of the first order and not the fresh or first order of appointment. Since the petitioner was already in employment and he was put on a condition of minimum service for two years, the management has continued the said letter in the present renewal or continuing letter of appointment. The probation period was directed to be computed from the date of joining which was as per the earlier letter of appointment dated 9-5-1981 i.e. with effect from 1-7-1981. It is, therefore, clear that the petitioner had joined the service on 1-7-1981 and he had completed one year of service when the present office order dated 30-4-1982 was issued to him. Applying the provisions of Section 5(2) of the Act, the petitioner had completed two years of probation period on 30th June, 1983. There is no doubt that the management had issued one letter dated 7-3-1983 purporting the extension of the probation period of one year. In the eyes of law, this letter has no meaning and has to be ignored and the same is to be construed as under misconception of legal provision. Since the petitioner had completed the two years probation period on 30th June 1983, he was deemed to have been regularized and he was deemed to have acquired permanent, status of an employee of the institution. The order of termination dated 29-6-1984 purporting to terminate the services of the petitioner on 30-6-1984 is ex facie illegal and contrary to the provisions of the Act, which prescribes mandatory provisions to be followed before terminating the permanent employee from the employment. The impugned order of termination dated 29-6-1984, therefore, was

passed wholly under the misconceived legal position that the petitioner did not acquire the status of permanent employee and that he still continued to be on probation merely because the respondents fancifully thought so regardless of the legal provision under the Act, which was binding on them. The Impugned order of termination is simpliciter termination order and not on the ground that during the probation period the work of the petitioner was unsatisfactory. There is not even a whisper of unsatisfactory work of the petitioner. On the contrary the petitioner has relied on good service certificates, issued by the management.

From the judgment of the School Tribunal, it appears that the management has tried to give several instances which would partake the character of misconducts committed by the petitioner while in employment. Since we have held that he completed the probation period of two years and thereafter he was in employment for two years till 30th June, 1984, he could not have been terminated on the ground of alleged unsatisfactory work for the instances which are enumerated by the management on which the learned Presiding Officer of Tribunal has relied on. If the petitioner was to be terminated during the employment for any acts of misdemeanor, the Act prescribes mandatory procedure of forming an Inquiry Committee to decide the allegations or charges of misconducts levelled against the delinquent employee. If the petitioner had committed any acts of misconduct, he ought to have been served with a charge-sheet and he ought to have been called upon to furnish his written explanation and thereafter it was for the management to have proved the allegations levelled against the petitioner. The petitioner would have got an opportunity of cross-examination of the witnesses and to submit his own defence in the matter. There is minute and elaborate procedure under the Act to be followed before a Permanent employee is to be terminated for any act of misconduct. The order, therefore, is ex facie illegal and cannot be sustained. We, therefore, hold and declare the impugned order of

termination dated 29-6-1984 terminating the petitioner from employment with effect from 30-6-1984 to be illegal and invalid and it deserves to be quashed and set aside. We therefore, hold that the petitioner is entitled to get reinstatement with continuity of service with effect from 30-6-1984 but not with full back-wages.”

19 It is apparent from the facts emerging from Anil Ade's case (supra) that the selection process was followed in appointing the concerned Employee. He was appointed on probation. He was continued as such and the requirement of Section 5(2) of the MEPS Act was fulfilled. It is in this backdrop that this Court had allowed the petition and reinstated the Employee therein.

20 However, in the instant case, the engagement of the Petitioner for the academic year 2000-2001 to 2002-2003 was on temporary basis. One solicitory order for the period 2001-2002 indicates that the Petitioner was appointed on probation. However, it cannot be overlooked that neither was any advertisement published, nor applications were sought for filling in a permanent vacant post.

21 The Petitioner has relied upon the judgment of this Court dated 29.07.2015 in the matter of *Balasaheb Ramchandra Burke v/s President, Bahujan Samaj Probodhan Shikshan Sanstha, Kotul* in Writ

Petition No.485/2015 along with a group of petitions in support of his contention that this Court has taken a view that the Management is estopped from claiming that the Employee was irregularly appointed, thereby warranting his continuation in employment.

22 I do not find that the ratio laid down in the said judgment would support the case of the Petitioner for the reason that in the said case the Petitioners were working with the Respondent/ Institution for periods ranging from 12 years to 18 years. Two of them were working for 17 years and two of them had worked for 18 years. Considering these facts, this Court concluded that after a long tenure in employment, the Employer/ Management deserves to be precluded from alleging that all the appointments were irregular/ illegal and that too in the light of the fact that grants were sanctioned by the State Government to the said Institution. The moment the grants were sanctioned, the Institution suddenly alleged that all the employees were irregularly/ illegally appointed.

23 The contention of the Petitioner that Section 5(2) of the MEPS Act would apply to the case of the Petitioner, appears to be an unsustainable submission. The phraseology of Section 5(2) reads as under:-

“5(2) Every person appointed to fill a permanent vacancy (except shikshan sevak) shall be on probation for a period of two years. Subject to the provisions of sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed.

Provided that, every person appointed as shikshan sevak shall be on probation for a period of three years.”

24 It is, therefore, apparent that the Petitioner ought to have been appointed for filling a permanent vacant post and should have been appointed on probation for the period of two years after the procedure for filling in a permanent vacant post as required under Section 5(1) of the MEPS Act was complied with. In the instant case, these vital aspects are not available since the Headmaster has exercised his powers of appointing the Petitioner in the non teaching staff category for a period of one year only.

25 Considering the fact situation and the law applicable, I do not find that the impugned judgment delivered by the School Tribunal could be termed as perverse or erroneous.

26 The Petitioner, however, submits that certain unpaid monthly wages are required to be paid by the Respondent/ Management.

27 Shri Kolhare fairly submits that Respondent Nos.1 and 2/ Management would verify their records and in the event it is noticed that monthly wages of the Petitioner are not paid for any duration, the same shall be promptly paid within a period of four weeks from today.

28 The statement made is recorded. It is expected that Respondent Nos.1 and 2/ Management shall verify from it's records and shall pay unpaid monthly wages to the Petitioner, if any, within a period of FOUR WEEKS from today.

29 This Writ Petition is dismissed. Rule is discharged.

(RAVINDRA V. GHUGE, J.)