

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6199 OF 2003

Smt. Darshana Dashrath More	..	Petitioner
VS.		
The Head Mistress, Shri Dadasaheb Thakur Vidyalaya & Ors.	..	Respondents

Mr. Neel Helekar for Petitioner.
Mr. Avinash Belge i/b. R. V. Paranjape for Respondent No. 4.
Ms Aparna Vhatkar – AGP for Respondent No. 5.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 24 February 2015

Date of Pronouncing the Judgment : 04 March 2015

JUDGMENT :-

1] This petition is directed against the judgment and order dated 7 April 2003 made by the School Tribunal, Mumbai, dismissing the petitioner's appeal against the termination of her services w.e.f. 13 June 1994.

2] It is the case of the petitioner that she belongs to the category of Scheduled Caste and in pursuance of advertisement dated 22 May 1993, she applied for, and was selected and appointed as an Assistant Teacher at the Thakur Nagar Vidya Mandir ("School") vide order of appointment dated 2 July 1993. The order of appointment did make a mention that the appellant was appointed

from 17 June 1993 to 30 April 1994, but none of the columns with regard to the appointment being temporary, permanent, leave / deputation vacancy were scored off. In fact the appointment letter, in the alternate, state that the appointment was on probation for a period of two years. In such circumstances, it was the case of the petitioner that her appointment was in a clear and permanent vacancy and therefore she ought to be deemed to have been appointed on probation for a period of two years as provided by Section 5 (2) of the Maharashtra Employees of Private School (Conditions of Service) Regulation Act, 1977 ("MEPS Act, 1977").

3] It is further the case of the petitioner that when she reported for duties on 13 June 1994 i.e. after the conclusion of summer vacations for the academic year 1993-94, she was not permitted to resume duties. It is also the case of the petitioner that for the period between 17 June 1993 and 30 April 1994, there was absolutely no complaint about the petitioner's services. The petitioner was never served with any memo of adverse remarks or warning during the said period. Accordingly, it is the case of the petitioner that her termination of services w.e.f. 13 June 1994 was in gross breach of the provisions of the MEPS Act, 1977 as also the Rules made thereunder. In particular, it is the case of the petitioner that the termination of her services is in breach of Rule 15 of the MEPS

Rules 1981, the compliance of which Rule is mandatory in matters of termination of services of probationers.

4] Mr. Neel Helekar, the learned counsel for the petitioner submitted that the School Tribunal failed to appreciate the circumstance that the appointment order was vague and it was nowhere specified that the petitioner's appointment was only for a temporary period from 17 June 1993 to 30 April 1994. In any case, the perusal of the appointment order would indicate that alternatively, the petitioner had been appointed on probation for a period of two years. Mr. Helekar also submitted that the School Tribunal has committed an error apparent on record in observing that there was no evidence produced to show that the petitioner was appointed against a vacancy reserved for the Scheduled Caste category, when in fact, the relevant advertisement indicating the same, was very much on record. Adverting to the provisions contained in Section 5(2) of the MEPS Act, 1977, Mr. Helekar submitted that since the appointment was in a clear and reserved vacancy, the same had to be regarded as one under probation for two years. Further, adverting to Rule 15 of the MEPS Rules 1981, Mr. Helekar has submitted that the provisions contained therein are mandatory and since the same were not complied with, the termination effected from 13 June 1994, was required to be set

aside.

5] Mr. Avinash Belge, the learned counsel appearing for the respondent no. 4 submitted that there has been a misjoinder in impleading the respondent no. 4, and consequently the respondent no. 4 be deleted from the array of the respondents or in any case the petition be dismissed as against the respondent no. 4.

6] Mr. Helekar's contention, based upon the terms of the appointment order, unfortunately cannot be accepted. Although, in the appointment order dated 2 July 1993, several options with regard to the status of appointment have not been scored off, nevertheless the appointment order, in clear terms states that the appointment was for a period between 17 June 1993 and 30 April 1994. In fact, this is not the case where some of the status options have been scored of and some not. This is a case where none of the options have been scored of. However, the appointment order, very specifically makes reference to a term from 17/6/93 to 30/4/94. This portion, has been typed in bold, upon the copy of the order of appointment at Exhibit 'C' to the petition. In these circumstances, it is quite clear that the petitioner was appointed for a fixed term from 17 June 1993 to 30 April 1994.

7] The School Tribunal is not correct about absence of material that the petitioner was appointed on a post reserved for the Scheduled Caste category. This is because the petitioner had produced before the Tribunal advertisement dated 22 May 1993 issued by the School advertising two vacancies for Scheduled caste category and one vacancy for Scheduled Tribe category. However, that by itself does not take the case of the petitioner any further. The crucial issue is whether the appointment can be regarded as one under probation in terms of Section 5(2) MEPS Act, 1977?

8] In the case of *Ramkrishna Chauhan & Ors. etc. etc. vs. Seth D. M. High School, Deputy Director of Education, The Bharat Jatiya Sangh and State of Maharashtra & Ors. etc. etc.*¹, the Full Bench of this Court was constituted to answer the following question:

Would it be open to the School Tribunal to hold that an employee would be deemed to be on probation within the meaning of Section 5(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 on the ground that the appointment was made in a clear and permanent vacancy, notwithstanding the fact that the letter of appointment specifically stipulated that the appointment has been made in a temporary capacity?

9] In the aforesaid case, the contention on behalf of the employees was that the purport of Section 5 of the MEPS Act, 1977 leaves no choice to the management of a private school but to fill in the permanent vacancy, by appointing a person duly qualified to fill

1 2013 (3) ALL MR 1

the same upon probation for a period of two years. Further, irrespective of the tenor or the contents of the appointment order, it will have to be assumed that the appointment was on probation for a period of two years, if made against a permanent vacancy. Accordingly, a Tribunal or a Court as the case may be, would be justified to hold that the employee concerned, in such circumstances, was deemed to be appointed on probation within the meaning of Section 5 (2) of the MEPS Act, 1977. In support of such proposition, reliance was placed upon several decisions referred to in paragraph 4 of the said decision.

10] On the other hand, the school management relying *inter alia* upon the decision of the Apex Court in the case of *Hindustan Education Society & Anr. vs. Sk. Kaleem Sk. Gulam Nabi & Ors.*², contended that the school management would be well within their rights in appointing teachers on purely temporary basis for a limited period, making it clear that services will be terminated on the expiry of that period, without any notice. It was contended that Section 5 of the said Act does not whittle down this power or authority of the management, but rather supports the same. Reliance was also placed upon the decision of the Apex Court in the case of *Gridco Limited & Anr. vs. Sadananda Doloi & Ors.*³, for the

2 (1997) 5 SCC 152

3 2012 AIR SC 729

proposition that the power to make contractual appointment is implicit in the power to make regular appointment. Unless the statute under which the authority exercises its powers and discharges its functions or the rules and regulations governing recruitment, specifically forbid making of any such appointment.

11] The Full Bench of this Court, upon consideration of the rival contentions, observed thus :

“22) The Form of order of appointment is found in Schedule ‘D’ to the Rules. Clause 2 of the Form indicates the category of appointment, purely temporary or on probation. As regards appointment on temporary basis, it refers to the appointment against leave/deputation vacancy. Moreover, the prescribed Form provides that the inapplicable conditions be struck off. Understood thus, we have no manner of doubt that the scheme of the Act and the Rules in no way forbid the Management to appoint a duly qualified person on temporary basis for a limited duration, until the selection of a duly qualified and “suitable” person for being appointed on probation, to fill in the permanent vacancy.

23) The other legal principle, which is indisputable, is that, if the parties accept the terms and conditions stipulated in the appointment order, later on, it is not open to the employee to challenge that appointment, being contrary to the Rules or on the ground that the terms and conditions stipulated therein were not legally valid. This legal position is restated in para 8 of Kalpataru Vidya Samasthe (supra). In the facts of the present case, it is noticed that the initial appointment of the Writ Petitioner, in the leading Writ Petition, was on temporary basis for a limited period. After his service was terminated, once again he was appointed in the following academic year, on the same post but, on temporary basis. When the said Petitioner was appointed in the succeeding academic years, he had become fully aware about the terms and

conditions of his initial appointment, yet he continued to be in the employment, without any demurer. Suffice it to observe that if the appointment order mentions that the appointment is on temporary basis or for a limited period, it is not open to the employee to assume that he was appointed on probation against permanent vacancy, nor it is open to the School Tribunal or the Court of law to assume that fact. That is a question of fact to be pleaded and proved in appropriate proceedings, on case to case basis. We hold that there is no legal fiction or deeming provision that every appointment made against the permanent vacancy, is deemed to be on probation, though the Management makes that appointment on temporary basis, having found that the candidates appeared in the selection process were unsuitable.

24) We shall now turn to the relevant decisions. In the case of National Education Society's High School (supra), the Learned Single Judge of this Court, after adverting to the appointment order, which clearly mentioned that it was for the relevant academic year and for a limited term, held that since the Petitioner therein was appointed in the vacancy caused due to the outgoing employee, who was a permanent employee, the appointment should be deemed to be on probation. It is not possible to countenance this exposition. The next decision is an unreported decision of the Division Bench of this Court in the case of Anil Vasant Chaudhari (supra), which has followed the view taken by the Learned Single Judge in the case of National Education Society (supra) and Enteshan Baig (supra).

25) However, we are bound by the exposition of the Apex Court in the case of Hindustan Education Society (supra), which had occasion to consider Section 5 of the Act. In that case, the appointment of Respondent No. 1 therein was against a clear vacancy but on purely temporary basis, for a limited period of eleven months. The Court, after considering Section 5(1) and (2) of the Act, opined that the said respondent cannot be treated to be appointed as a permanent employee or that he was appointed on probation. Even in the case of Bhartiya Gramin P. Sanstha (supra), the Apex Court was dealing with person appointed for a period of two years. No doubt, in that case, the appointment was on purely temporary basis, because of non availability of reserved candidate to fill in permanent vacancy. But, the principle restated in this decision, is that.

when the appointment letter expressly states the terms and conditions, it is not open to assume that the appointment was on probation, merely because of availability of permanent vacancy. Even in the unreported decision of the Apex Court in the case of Chatrapati Shivaji Shikshan Prasarak Mandal (supra), the same view has been reiterated. In the case of Priyadarshini Education Trust (supra), the Division Bench of this Court has culled out the gist of the decisions on the point, in paragraph 9 thereof. Notably, the issue was directly considered by the learned Single Judge, after the decision in Hindustan Education Society (supra), in the case of Pandurang Maruti Dhumal (supra). As a matter of fact, the Learned Single Judge expressed his inability to take a different view because of the said decision of the Apex Court. His Lordship granted leave to appeal under Article 133 read with 134(A) of the Constitution of India, as prayed by the Petitioner, as the issue was recurring one and involved in large number of matters. However, due to dismissal of the SLP (Civil) No. 14795 of 1999 against the decision in Writ Petition No. 3488 of 1999 in the case of Pandurang Dhumal, vide order dated 7th July, 1999, it is clear that the Apex Court did not find it necessary to examine the question any further, having been answered in the decision in Hindustan Education Society (supra).

26) The Counsel for the Writ Petitioner, however, relied on the decisions of the Learned Single Judge of this Court in the case of Enteshan Baig (supra), Shri. Sairam Education Trust (supra), Shikshan Prasarak Mandal (supra) and Jagdamba Education Society (supra). For the view that we have taken, we do not agree with the exposition of the learned Single Judge of this Court in the above said decisions. No doubt, attempt has been made in the case of Shikshan Prasarak Mandal (supra) to distinguish the Judgment of the Apex Court in the case of Hindustan Education Society (supra). Further, the reason to distinguish the decision of the Apex Court decision in the case of Hindustan Education Society (supra), will be of no avail. That reason cannot be the basis to discard the exposition, in particular, in Paragraph 5 and 6 of Hindustan Education Society (supra). Because, it clearly proceeds on the admitted position that the appointment order of Respondent No. 1 indicated that the appointment was on purely temporary basis, against a clear vacancy. Counsel for the Writ Petitioner, however, was at pains to persuade us to

take a view that the expression "clear vacancy" may have different connotation than the expression "permanent vacancy". In case of permanent vacancy, the manner of appointment can be only on probation. However, we are not impressed with this logic.

27) Accordingly, we are inclined to answer the issue in the negative. We hold that it is not open to the School Tribunal to assume as of fact that the appointment made against a clear and permanent vacancy is deemed to be on probation, within the meaning of Section 5(2) of the Act. The School Tribunal cannot disregard the terms and conditions of the letter of appointment, if it expressly provides that the appointment is on temporary basis, for a limited term. Having answered the issue under consideration, we deem it appropriate to direct the office to place the matters, before the Appropriate Bench, for taking up the same for hearing on merits."

[Emphasis supplied]

12. In view of the aforesaid legal position, it is not possible to accept the contentions of Mr. Helekar and to upset the impugned order made by the School Tribunal.

13] The School Tribunal, in the impugned order had noted that the petitioner was in gainful employment with the respondent no. 4 School and that this fact was suppressed from the memo of appeal. The petitioner, in her rejoinder before the School Tribunal, admitted that she was employed with the respondent no. 4 School, but stated that she would submit the details of such appointment at a later date. The School Tribunal has noted that such details were however, never submitted. Mr. Helekar submitted that the

petitioner had been appointed in the respondent no. 4 school, only for a temporary period in a leave / deputation vacancy. Even if such contention is accepted, no relief can be granted to the petitioner, in view of the legal position propounded by the Full Bench of this Court in the case of *Ramkrishna Chauhan* (supra).

14] Accordingly, Rule is discharged. There shall be no order as to costs.

(M. S. SONAK, J.)

Chandka