

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1158 OF 2016

Manisha d/o Gangadhar Gadewad,
Age-36 years, Occu-Nil,
R/o Plot No.9, Parimal Housing Society,
Garkheda Parisar, Aurangabad,
Dist. Aurangabad

PETITIONER

VERSUS

1. Vasantrao Naik Shikshan Prasarak Mandal
Jalna Road, Aurangabad,
Through its President,
Jalna Road, Aurangabad,
Dist.Aurangabad,

2. Vasantrao Naik Shikshan Prasarak Mandal
Jalna Road, Aurangabad,
Through its Secretary,
Jalna Road, Aurangabad,
Dist.Aurangabad,

3. Vasantrao Naik Mahavidhyalaya (Jr.College),
Jalna Road, Aurangabad,
Through its Principal
Jalna Road, Aurangabad,
Dist.Aurangabad,

4. The Deputy Director of Education,
Aurangabad Division, Aurangabad,
Dist.Aurangabad

RESPONDENTS

Mr.S.M.Vibhute, Advocate for the petitioner.

Mr.S.S.Jadhavar, Advocate for respondent Nos. 1 to 3.

Mr.P.G.Borade, AGP for respondent No.4.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 21/07/2016

ORAL 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 17/10/2015 by which Appeal No.42/2012 filed by the petitioner has been dismissed.

3. This petitioner was before this Court earlier in WP No.10664/2014 for challenging the judgment of the Tribunal dated 24/09/2014, by which the same appeal was earlier dismissed. After hearing the parties and after considering the peculiar facts of the case, this Court had recorded the submissions of the learned Advocates in paragraph No.2(a) to 2(d), which read as under :-

“(a) Whether, the termination of services by way of retrenchment under Rule-27 of the MEPS Rules, 1981 on the basis of surplusage/ seniority, would affect the members of the Backward Classes or not. As such, the applicability of Rule 27(e) of the MEPS Rules, 1981 has not been properly considered by the School Tribunal in deciding the appeal of the Petitioner.

(b) It is conceded that the Petitioner was on unpaid maternity leave from 01.04.2010 to 30.09.2010 for a period of 180 days. Rule 16(14) r/w Rule 16(15) & 16(16) would, therefore, result in the Petitioner being entitled only for 90 days maternity leave and as such, remaining portion of 90 days are

to be debited from the period of 3 years for which she was appointed initially.

(c) Whether, by applicability of Rule 16(15) and 16(16) of the MEPS Rules, 1981, after debiting 90 days from the period of three years of the Petitioner, would mean that the Petitioner has not completed the three years period.

(d) Whether, in the light of the correspondence between the Respondent/ Institution by its letter dated 26.08.2011 addressed to the Respondent No.4/ Deputy Director of Education and the response of Respondent No.4 by communication dated 12.12.2011, would indicate that there is no workload available for the Petitioner for the subject of Biology and whether, it would amount to abolition of the post.”

4. In view of the above, the appeal was remitted back to the School Tribunal for considering the above issues. Now, by the impugned judgment, the School Tribunal has dismissed the appeal.

5. I have heard the learned Advocates for the petitioner and the respondent/Management at length. In my view, two issues arise which are germane to the cause of action. Firstly, as to whether the Management was constrained to abolish one post in the biology subject prior to the petitioner becoming permanent in employment. Secondly, whether the petitioner can be said to be deemed permanent by virtue of which the Management would be compelled to dispense

with the services of a permanent employee from the open category so as to accommodate the petitioner who belongs to the Scheduled Tribe, pursuant to the abolition of one post.

6. It is undisputed that the petitioner was on maternity leave from 01/04/2010 to 30/09/2010, which is a period of 180 days. The petitioner was appointed in the academic year 2008-2009. She would have normally completed her probation period of 3 years on 26/08/2011 in the academic year 2011-2012.

7. Rule 16 (14, 15 and 16) of the M.E.P.S. Rules 1981 are relevant and the same are reproduced as below :-

“(14)(a) Subject to the provisions of sub-rule(16) maternity leave shall be granted to a female employee who has put in more than one year’s service. It may be granted for a period not exceeding ninety days from the date of its commencement.

Explanation : In the case of a female employee entitled to vacation, if the date of confinement falls during the vacation, the maternity leave shall commence from the date of confinement and it shall run concurrent with the vacation.

(b) The application for maternity leave from an employee shall invariably be supported by medical opinion as to the probable date of confinement, and her undertaking to the effect that she shall communicate the date of confinement supported by a

medical certificate. In case of lower grade staff in which insistence on a regular medical certificate is likely to cause hardship, the authority competent to grant leave may accept such certificate as it may deem sufficient.

+ Earlier sub-rule (14) is relettered as clause (a) of that sub-rule and thereafter “Explanation” and clause (b) is added by Not. No. PST/1083/194/SE-3-Cell, dated 20-12-1984.

(15) Maternity leave under sub-rule (14) shall be granted on half pay to an employee, who has put in more than one year's but less than two years service before the date of commencement of such leave. In the case of employee who has put in two year's service or more on the date of commencement of such leave, she shall be granted maternity leave with full pay. In case of a female employee with less than one year's service she shall be granted extraordinary leave for a similar period.

(16) Maternity leave shall not be debited to the leave account. Leave of any other kind may be granted in continuation of maternity leave, if the request for granting it is supported by a medical certificate.”

8. By virtue of the said rules, the sanctioned maternity leave for 90 days is not to be debited from the tenure of the petitioner. As such, had she restricted her maternity leave in accordance with the Rules, she would have completed her 3 years of probation on 26/08/2011 in the academic year 2011-2012. Since she availed of

unpaid leave of 90 days beyond the 90 days maternity leave provided by Law, she would have completed her probation on 26/11/2011.

9. The respondent points out the letter dated 26/08/2011 that was addressed to the Deputy Director of Education for seeking sanction to the staffing pattern for the academic year 2011-2012 to the extent of the Jr.College. Since there was a reduction in the strength of the students from 672 (standard 11 and 12) in the academic year 2009-2010 to 606 (Standard 11 and 12) in the academic year 2011-2012, the weekly teaching hours required were reduced to 104.15. The fall of students by 66 therefore resulted in the reduction of one post in the biology subject.

10. The above fact situation was conveyed to the Deputy director, Education seeking guidance as regards the future of the petitioner and the staffing pattern. It appears quite evidently that the respondent/Management avoided acting in haste and showed sympathy towards the petitioner by not terminating her services straight away, but by seeking guidance from the Deputy Director of Education. It appears that the fact that she had taken maternity leave from 01/04/2010 till 30/09/2010 was also kept in mind.

11. There is no dispute that the Deputy Director of Education sanctioned the staffing pattern for the academic year 2011-2012 vide its communication dated 12/12/2011. The reduction of one post in the biology subject was also approved. The name of the petitioner as a teacher in the biology subject was therefore not mentioned in the list sanctioned by the Deputy Director. There is also no dispute that 5 positions as teachers in biology for the Jr.College are occupied by 5 permanent teachers.

12. The petitioner strenuously contends that since she was terminated on 24/12/2011, it needs to be presumed that she is deemed permanent on the post of a “Shikshan Sevak” and as such is at par with the other 5 permanent teachers. Based on this assumption, the petitioner contends that as on the date of termination, she would be deemed to be a permanent teacher having successfully completed the probation period of 3 years as a “Shikshan Sevak”. Therefore, one of the permanent teachers from the open category will have to make way to accommodate the petitioner who is deemed permanent u/s 5 of the M.E.P.S.Act.

13. I am unable to accept the submissions of the learned Advocate for the petitioner. The Management had realized that one post of

teacher for biology was reduced and accordingly the staffing pattern for the academic year 2011-12, which commences in June 2011, was prepared and forwarded to the Deputy Director of Education. At the stroke of commencement of the academic year 2011-2012, one post was already abolished. The petitioner in fact could not have been considered for conducting lectures in the biology subject as the post itself was abolished in June 2011. The respondent / Management would have been justified in terminating the services of the petitioner in June 2011 itself.

14. Needless to state, as on 26/11/2011, the petitioner could not be said to have attained the deemed status of a permanent teacher in the light of the ratio laid down in the matter of Head Master, Amar High school Aurangabad and another Vs. Lata d/o Gajanan Suryawanshi, 2005(1) Mh.L.J.1150. Paragraph Nos.9 and 11 of the said judgment read as under :-

“9. The above reasoning is manifestly erroneous and contrary to the scheme of the Act as well as the Rules framed thereunder. It is evident that the Tribunal failed to appreciate the ambit and scope of sub-section (2) and (3) of Section 5 of the Act.

(2) Every person appointed to fill in a permanent vacancy 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 shall 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 terminate his services at any time during the said period after giving him one month's notice or salary of one month in lieu of notice.

The teacher appointed on probation to fill in the permanent vacancy would thus attain the status of being a deemed confirmed teacher only on completion of the probationary period of two years and as on 3-12-1997 when the notice of one month was issued to the respondent No.1 she had not attained the status of a deemed confirmed teacher by any stretch of imagination. It is no doubt true that sub-section (3) of section (5) provides for termination of service of a teacher on probation on account of work or behaviour of the probationary being unsatisfactory. This right could be exercised any time during the said period of probation but after giving one month's notice or salary of one month in lieu of notice. It is nobody's case that the petitioner's work or behaviour was found to be unsatisfactory by the management. The management received the communication from the respondent No.2 stating that on account of reduction of student's strength one division in the secondary section (9th standard) was found to be reduced and consequently, one teacher would be surplus. As the respondent No.1 was the junior most teacher in the secondary section and on probation the Education Officer rightly advised the management to discontinue the services of the respondent No.1 from 4-1-1998.

11. *If there is no vacancy available for confirmation of the probationer on account of reduction in the strength of students, the question of confirming the probationary service against a non existing post cannot be conceived. It would be permissible in given cases that such teachers would be required to be discontinued even though their services during the probationary period was found to be satisfactory so long as this discontinuation is at the end or towards the end of the probationary period. Section 5(3) of the Act has perhaps not envisaged such a contingency but that does not mean that there is a legal bar for discontinuation on completion of the probationary period on account of non-availability of the posts. If it is accepted that such a discontinuation is not permissible the teachers on completion of the probationary period will have to be made permanent against non-existing posts when it is well established that availability of a permanent post is sine qua non for regularization/confirmation of the service. The management is admittedly running on aided school and the teacher's salary goes from the exchequer which cannot be allowed to be burdened for unjustifiable grounds. The factum of reduction of divisions as well as the students during the academic year 1997-98 has not been disputed and even for the subsequent academic years there has been no increase in the divisions of any standard in the secondary school. It is required to be held that on account of non-availability of a regular post as per the staffing pattern approved by the Education Officer the management is not required to confirm the probationer's service even though the probationary period was satisfactory. The order*

dated 3-12-1997 was neither punitive nor stigmatic.”

15. In the light of the peculiar facts as above, though the petitioner was continued by the Management as a benevolent gesture despite one position of teacher in biology having been abolished and remaining five having been occupied by the permanent teachers, it would amount to stretching the concept of “deemed confirmation” u/s 5, too far.

16. The School Tribunal, by the impugned judgment, has extensively dealt with all the issues in the light of the points framed by this Court vide its order dated 11/03/2015. I do not find that the impugned judgment could be termed as being perverse or erroneous.

17. This petition, being devoid of merit, is therefore dismissed.

(RAVINDRA V. GHUGE, J.)