

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5038 OF 2000

1.Matsyodari Shikshan Sanstha,
Jalna, Through it's Secretary.

2. The Principal,
Arts and Commerce College,
Jalna.

..Petitioners

Versus

Ankush Nivrutti Kajale
Aged 29 years, Occ. Nil,
R/o Gharegaon, Taluka
and Dist. Aurangabad.

..Respondent

...
Advocate for Petitioners : Shri S.S.Tope h/f Shri N.B.Khandare
Advocate for Respondent 1 : Shri R.L.Kute
AGP for Respondent 2 : Shri S.D.Kaldate

...
CORAM : RAVINDRA V. GHUGE, J.
Dated: September 08, 2016
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ORAL JUDGMENT:-

1. The petitioners / management is aggrieved by the impugned judgment and order dated 2.9.2000, by which, Appeal No.144 of 1998, filed by the respondent No.1 / employee challenging his termination order dated 15.4.1998, has been allowed.

2. The contentions of the petitioners can be summarized as follows:-

(a) The respondent No.1 / employee was appointed as a

Teacher in the Arts and Commerce College on purely temporary basis vide order dated 1.9.1995.

- (b) No advertisement was published.
- (c) No Selection Committee was formed.
- (d) No process of selection was followed.
- (e) It was only on his application dated 15.6.1995, that he was temporarily appointed for one academic year.
- (f) Approval was granted by respondent No.2 authority, vide its order dated 5.10.1996, indicating that the approval was by way of an exception and unless the management satisfies the reservation roster, no such approvals will be granted in future.
- (g) It was specifically mentioned that the appointment would come to an end by efflux of time on 31.3.1996.
- (h) Due to the insistence of the petitioner / management, a similar approval was granted on 2.3.1998 for the academic year 1998-99 with the same warning as above.
- (i) By approval order dated 7.8.1997, the petitioner was permitted to continue respondent No.1 only for the first semester. Yet he was permitted to be continued till the end of the academic year 1997-98.
- (j) As a consequence of the above, the employee worked from the academic year 1995-96 till the academic year 1997-

98.

(k) The management passed a Resolution, thereby, agreeing to continue the employee on permanent basis, which proposal was rejected by respondent No.2 / authority.

(l) By the appointment order for the academic year 1997-98, it was made clear to the petitioner that the appointment would end after the academic year concludes.

(m) By order dated 15.4.1998, the respondent / employee was terminated.

(n) He preferred Appeal No.144 of 1998 before the School Tribunal under Section 9 of the the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("the MEPS Act" for short).

(o) By the impugned judgment, the appeal was allowed on two grounds, firstly, that the principle of 'carry forward' could be invoked by continuing the appellant / employee and Secondly, since the management has violated Rule 28(1) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 ("MEPS Rules" for short) by not giving one month's notice or one month's salary in lieu of notice, the termination is bad in law.

3. This Court, by its order dated 13.4.2001, stayed the impugned judgment by granting interim relief in terms of prayer clause (c) and admitted the matter.

4. The respondent / employee is out of service for the last 18 years.

5. Reliance is placed upon the following judgments:-

- (i) Asha Shamkumar Patil Vs. Sadhana Rajan Kamble
[2007 (6) Bom. C.R. 402 = 2007 (7) Supreme 196],
- (ii) Akbar Peerbhoy College Vs. Mrs. Pramila N. Kuty
[1997 (3) Mh.L.J. 195] and
- (iii) Anna Manikrao Pethe Vs. The Presiding Officer,
School Tribunal [1998 (4) Bom. C.R. 565].

6. Shri Kute, learned Advocate for respondent No.1 has strenuously supported the impugned judgment. He submits that the petitioner never stated in the appointment order that he was appointed against any reserved category. The approvals granted by respondent No.2 authority were on the basis of the proposal put forth by the petitioners. Having worked for three academic years, as a temporary, would render his services permanent. A new candidate, who has been appointed from the S.T. category in the year 2000, has been promoted from the Junior College to the Senior College and as such, the vacancy still exists as on date.

7. He further submits, on instructions from the employee, present in the Court that the employee is willing to waive backwages

or any compensation and the petitioner may consider reinstating him with notional continuity on the post which is vacant and available. He further submits that the conclusions arrived at by the Tribunal, ought to be interfered with since they are findings on facts.

8. Shri Kute relies upon the judgment of this Court in the matters of Lalitha Thutpi Vs. C.B.Karkhanis, Presiding Officer, School Tribunal [1998 (1) Mah. L.R. 235] and Shri Bhagwan Mahavir Primary School and another Vs. Learned Presiding Officer, School Tribunal, Amaravati [2014 (4) All MR 29].

9. I have considered the submissions of the learned Advocates.

10. There is no dispute that the appointment orders placed on record have been served upon the employee. He has accepted the said orders and has worked with the petitioners. The three orders indicate that he was appointed in the “Marketing and Salesmanship” subject on purely temporary basis for one academic year, on three occasions.

11. It is also undisputed that the approval orders indicate that the employee is engaged on temporary basis and the management will have to fill in the backlog of the reservation roster by appointing employees from the respective reserved categories. These approval

orders further indicate that the services of the employee should not be continued in future. Despite these orders, the petitioner continued the employee on temporary basis.

12. It is also not disputed that no advertisement was published, no selection committee was formed and the petitioner did not follow the regular selection process vide appointing the respondent / employee.

13. The School Tribunal has concluded that even if the backlog is to be cleared by following the reservation roster, the respondent should not have been terminated, considering the view taken by this Court in the Lalitha case (supra). In the said judgment, this Court has concluded that after a candidate has been subjected to a selection process and has been appointed against a reserved category post, as the candidate from the said category was not available, the said Teacher could be continued on the said post and the principle of 'carry forward' could be invoked.

14. I do not find that the view taken by this Court in the Lalitha case (supra) may be of any assistance to the respondent for the reason that the facts are distinguishable. In the instant case, there was no advertisement, there was no selection committee appointed and the respondent was not subjected to any selection process.

Secondly, the Government Resolution dated 25.1.1999 was not cited before this Court in the Lalitha case (supra). Vide the said Government Resolution, the manner of advertising the post for reserved category for five years was prescribed and in the sixth year, if the reserved candidate was not available, it was made interchangeable. The employee in this case, has worked for three academic years and in 2000, a candidate from the Scheduled Tribe category was selected from amongst 23 applicants and has been appointed.

15. The view taken by this Court in Shri Bhagwan Mahavir's judgment (supra), was in connection with the resignation submitted by a Teacher. His removal from service was based on the resignation tendered by him. It was in these facts that the School Tribunal had concluded that the resignation was not legal and valid and as such, the acceptance of the resignation was held to be illegal. Facts of the case in the cited judgment being different than those in the case in hand, would render the said view inapplicable in this case.

16. The Honourable Supreme Court in the Asha Shamkumar case (supra), has observed in paragraph Nos.6 and 7 as under:-

“6. Having heard the learned Counsel for the parties and after going through the relevant rules and resolutions, we are of the view that no interference is called for in the present

case. Admittedly, the appellant is from the general category. From the advertisement in the daily newspaper, it would be clear that the posts for which teachers were wanted were reserved for candidates belonging to ST/DT/NT and other backward classes. However, it was also clarified that if candidates from the aforesaid reserved category were not available, then, candidates belonging to scheduled caste would be considered. In this connection, we may also refer to Rule 9(a) of the Maharashtra Employees of Private Schools, 1981, which reads as follows:

Rule 9(a) - In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in Sub-rule (7) and if no person from any of the categories is available, the post may be filled in temporarily on an year to year basis by a candidate not belonging to the Backward Classes.

A plain reading of Rule 9(a), which deals with appointment of staff of a school, would show that in case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of candidates, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in Sub-rule (7) and if no person from any of the categories is available, the post may be filled in temporarily on an year to year basis by a candidate not belonging to the Backward classes.

7. From the above, it is, therefore, clear that the post may be filled in by a candidate belonging to the other remaining categories if no person is available from ST/DT or NT categories. If no person is available from any of the categories, then, the said post can be filled in temporarily on a year to year basis by a candidate not belonging to the classes of candidates mentioned in Rule 9(a). Here, in the present case, the appellant was appointed on a permanent status as a teacher in the said school, which under Rule 9(a) is not permissible.”

17. In the above said case, an advertisement was published indicating that the Teachers were to be appointed from the reserved categories. The Apex Court concluded that if the candidate from the reserved category was not available, the appellant / employee could not be appointed on permanent basis.

18. Shri Kute submits, on the basis of the documents, received under the Right to Information Act from respondent No.2, that the post occupied by him was not reserved and was available for the open category. The employee belongs to the open category. I have considered the said document, which mentions the name of the respondent / employee against the open category. But, I do not find the said document to be convincing for the reason that the series of approval orders passed by the competent authority at the relevant time indicates that the management was placed under a compulsion

to fill in the backlog of reserved posts before opting for appointing a candidate from the open category. Though this does not indicate that the respondent / employee was subjected to a selection process for filling in the posts reserved for backward classes, yet it appears that he could not have been appointed by not filling in the backlog. In these peculiar facts, the principle of carry forward would not be available to the respondent / employee, who was not subjected to any selection process.

19. The petitioner relies upon the judgment in the case of Akbar (supra), to support its contention that when an appointment order is for a particular tenure and states the period of engagement, Rule 28(1) need not be scrupulously made applicable. Paragraph No.13 of the said judgment reads as under:-

“13. A look at the said Rule would show that it provides that services of temporary employee who is not on probation may be terminated by the management at any time without assigning any reason provided one calendar month's notice or one month's salary (pay and allowances if any) in view of such notice has been given. In the said Rule it cannot be read that where the service of a temporary employee comes to an end automatically by efflux of time as stated in the appointment order yet the management is obliged to give one calendar month's notice or to pay one month's salary to such temporary employee in lieu of notice. Rule 28(1) is attracted in a situation where either there is no period stated in the

appointment order of such temporary employee and his services are sought to be brought to an end or where the period is stated in the appointment order of such temporary employee and the management intends to terminate the services of such temporary employee earlier than the period stated in the appointment order. Rule 28(1) does not contemplate nor does it envisage a situation of its compliance where the services of the temporary employee other than on probation comes to an end on the date stated in the appointment order. In other words, in a case where appointment of temporary employee is for a fixed period and the services of such a temporary employee comes to an end on the expiry of that fixed period, giving of the notice as contemplated under Rule 28(1) is not required nor any specific termination order is required to be passed because in the appointment order itself the period of appointment is fixed and on expiry of that period the appointment comes to an end automatically. It would be relevant to mention here that Schedule 'D' appended to the Rules of 1981 provides for format of order of appointment of a temporary employee and in terms of such format the management is required to mention in the order of appointment that appointment of such employee was purely temporary for a particular period and after expiry of the said period the services of such employee shall stand terminated without any notice.....”

20. In the light of the above, I do not find that the impugned judgment delivered by the School Tribunal could be sustained. Nevertheless, the fact remains that the petitioner tried to facilitate a back door entry to the respondent / employee by appointing him on

temporary basis, without advertising the post and without following the process of selection. The respondent / employee is in litigation from 1998. In these peculiar facts, in lieu of reinstatement, I deem it proper to grant compensation to the respondent / employee under Section 11(2)(e) of the said Act, which permits payment of six months' salary, inclusive of pay and allowances, to an employee, who has worked for less than ten years. It is stated that the approximate salary of a Teacher from the Junior College is approximately Rs.25,000/- per month.

21. As such, this petition is partly allowed. The impugned judgment of the School Tribunal, dated 2.9.2000 stands modified and the petitioner is directed to pay compensation in terms of six months' salary with allowances payable (as on date as per VI Pay Commission) to a Teacher as like the respondent, within a period of twelve weeks from today. On the payment of such compensation, there shall be no reinstatement in service.

22. Shri Kute submits on instructions from the respondent / employee present in the Court that he may make a representation to the petitioner / management praying for reinstatement and by waiving the compensation as is granted by this Court. I need not record any observation on the said request, since it is for the respondent / employee to make such representation and it would be

a matter between the petitioner and respondent No.1 to settle the said issue.

23. Rule is made partly absolute in above terms.

(RAVINDRA V. GHUGE, J.)

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akl/d