

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3861 OF 2016

Secretary and another

PETITIONERS

VERSUS

Dnyaneshwar Tukaram More and another

RESPONDENTS

Mr.S.S.Manale, Advocate for the petitioners.

Mr.A.N.Sabnis h/f Mr.D.J.Patil, Advocate for the respondents.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 05/04/2016

PER COURT :

1. The petitioner is aggrieved by the impugned judgment and order dated 30/01/2016 by which Appeal No.3/2012 filed by respondent No.1 / employee has been partly allowed.

2. The strenuous submissions of Mr.Manale, learned Advocate for the petitioners/Management are summarized as under :-

- [a] Respondent No.1 who was 12th Standard and had acquired the qualification of English Typewriting, was appointed as a "Clerk" on 10/10/1997 for a period of only one year and on consolidated wages.
- [b] He was issued with similar appointment orders till his termination on 15/12/2011.
- [c] One appointment order dated 11/06/2004 would indicate that

he was appointed for 3 years continuously.

- [d] No post of Clerk was sanctioned.
- [e] In response to the appeal filed by respondent No.1 employee, the management has categorically taken a stand in paragraph No.11 that there was no post sanctioned and respondent No.1 could not be regularized / confirmed.
- [f] The appointment order at Page No.83 of the petition paper book is undated, does not have an outward number and is a false document.
- [g] There is no dispute about the appointment order dated 11/06/2004 whereby the employee was continued for a period of 3 years from 11/06/2004 till 11/06/2007.
- [h] After the appointment order dated 11/06/2004, respondent No.1 was continued in service without issuing any fresh appointment order till his termination on 15/12/2011.
- [i] Respondent No.1 had approached the learned Division Bench of this Court in WP No.800/2007 which was disposed of with a direction that the representation of the Management for creation of a post of Clerk shall be decided.
- [j] 100% Grants were accorded to the petitioner/school in 2007.
- [k] By communication dated 10/02/2012, the Education Officer informed respondent No.1 / employee that he would be absorbed only after the earlier / senior members of the non teaching staff are absorbed.
- [l] The conclusions drawn by the School Tribunal in the impugned judgment are unsustainable.
- [m] When there is no vacant post, respondent No.1 employee cannot be absorbed in service.
- [n] The deeming fiction under section 5(2) of the M.E.P.S.Act,

1977 would be of no assistance to the employee in the light of the judgment of the learned Full Bench of this Court in the matter of Ramkrishna Chauhan Vs. Seth D.M. High School and others, 2013 (2) Mh.L.J. 713.

- [o] Reliance is also placed on the judgment of the Hon'ble Supreme court in the matter of Bharatiya Gramin Punarrachana Sanstha Vs. Vijay Kumar and others, 2003(3) Bom.C.R. 191.

3. Mr.Sabnis, learned Advocate for respondent No.1 / Employee submits as under :-

- [a] There is no dispute that respondent No.1 had worked with the petitioners for a period of 14 years.
- [b] The Deputy Director of Education, Latur Division, by communication dated 02/07/2011 informed the Director of Education (Primary) that 193 posts of Clerks and 193 posts of peons have been sanctioned by the State Government.
- [c] The name of respondent No.1 / employee is shown at Sr.No.2 in the petitioner School as being an employee working as a "Clerk".
- [d] The post of clerk was sanctioned w.e.f. 2004-05 as mentioned in the said communication.
- [e] Despite the above, the employee has not been confirmed.
- [f] The petitioner/Management itself, vide its communication dated 06/03/2003, had demanded to the post of Clerk.
- [g] By communication dated 06/03/2003 the petitioner/Managment had addressed the Secretary of School Education in Maharashtra thereby seeking sanction to the post of Clerk

and non teaching staff in the petitioner/school.

- [h] After respondent No.1 employee was terminated on 15/12/2011, the petitioner/Management published an advertisement on 23/11/2012 by way of a public notice that the Management intended to fill in 3 positions of Jr.Clerks and 2 positions of Teachers in Computer Science.
- [i] By a corrigendum published on 25/11/2012, it was clarified that the posts of Jr.Clerks and Teachers in Computer Science, were on “No Grant Basis” and therefore the candidates selected would be appointed on consolidated wages.
- [j] After going through the advertisement, the Education Officer directed the petitioner/Society vide its communication dated 27/11/2012 that no sanction would be granted to any appointment of a clerk until the proposal of respondent No.1 employee is not submitted for approval.
- [k] It was, therefore, apparent that the petitioners terminated the services of the respondent/employee and kept the Education Department in dark.
- [l] Since the post of Clerk was sanctioned w.e.f. 2004, respondent No.1 could be absorbed from the academic year 2004 and in the event the said post is abolished anytime thereafter, respondent No.1 could be placed in the list of surplus employees to be absorbed in any other school under the directions of the Education Department.

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

5. The thrust of the petitioners' argument is that the post of a

Clerk has never been sanctioned at any time ever since respondent No.1 employee was appointed. There is no dispute that respondent No.1 has worked continuously from 10/10/1997 till his termination 15/12/2011 after 14 years. Reliance is placed upon the full bench judgment of this Court in the case of Ramkrishna Chauhan (supra) and especially the observations of this Court in paragraph Nos. 13, 15, 16, 18, 20 and 24 to support the argument that the employer has an unfettered right to engage an employee as a Temporary or contractual basis and until the Management appoints him on probation, such an employee can never be deemed to be permanent even if he has put in 14 years of service.

6. The fallacy in the stand taken by the petitioners is two fold. Firstly, that in the Ramkrishna Chauhan judgment (supra), the employee was an Assistant Teacher, who was appointed on year to year basis for 3 years and was terminated by issuance of letter of termination, after each temporary engagement. Secondly, there was no sanctioned post and the learned Full Bench therefore concluded that there could not be automatic absorption.

7. In the instant case, there was no termination order issued to the employee in 14 years, except the impugned termination order

dated 15/12/2011. Secondly, he was appointed for a continuous period of 3 years by appointment order dated 11/06/2004 under Rule 9(5) in Form D. After the employee worked as per the said appointment order, he was continued thereafter in the uninterrupted service of the petitioners till his termination on 15/12/2003.

8. By communication dated 02/07/2011 prior to the termination of the employee, the Deputy Director (Education) Latur Division has informed the Director of Primary Education (State of Maharashtra) that 193 posts of Clerks were sanctioned and one such post was sanctioned in favour of the petitioner's school and respondent No.1 employee was in employment on the said post. The date of sanction is shown to be academic year 2004-2005 acknowledging the employment of the respondent No.1.

9. The above facts, therefore, would not entitle the petitioners to seek the benefit of the view taken by the learned Full Bench in the Ramkrishna Chauhan case (supra) as the said view is primarily based on there being no sanctioned post. Eventually, though it has not come on record either before the School Tribunal or before this Court, whether the post of clerk is abolished in relation to the petitioner/school, the respondent No.1 employee would be entitled for

being enlisted as a surplus employee and for absorption in any other school under Rule 26(2) of the MEPS Rules 1981, if the post is abolished.

10. Notwithstanding the above, the conduct of the petitioners cannot be ignored. When the post was declared sanctioned by the communication dated 02/07/2011 and that too w.e.f. academic year 2004-05 in the petitioner/school, merely because the school was 100% grant-in-aid, the petitioners appear to have terminated respondent No.1/employee so as to fill in the vacant post subsequently. It has not come on record as to why have the petitioners issued a corrigendum pursuant to its advertisement dated 23/11/2012 that the said 3 posts of junior clerks would be filled in on consolidated wages.

11. Nevertheless, even if it is presumed that the advertisement is restricted to appointment on contractual basis and on consolidated wages, the petitioners cannot attempt to fill in the vacancy purportedly through contractual/ad-hoc appointments after respondent No.1 had put in 14 years in service. It is trite law that an ad-hoc / temporary employee cannot be terminated to fill up the said post through another ad-hoc/temporary employee. In the event, the

post was abolished, the Management ideally should have entered into correspondence with the Education Department and should have got respondent No.1 enlisted as a surplus employee. I am, therefore, convinced that the petitioners do not have bonafide intentions.

12. Learned Advocate Mr.Manale has strenuously submitted that the posts have not been filled in pursuant to the advertisement. I cannot accept the said statement as being an innocent statement since learned Advocate Mr.Sabnis has pointed out the communication dated 27/11/2012 which is a direction issued by the Education Officer within 3 days from the date of publication of the advertisement, that the Education Department would not permit the petitioners to engage a contractual employee untill the earlier employee respondent No.1 is not accorded approval and for which reason, the petitioners were directed to forward the proposal of respondent No.1 for seeking approval to his appointment.

13. Mr.Manale has strenuously criticized the impugned judgment. As noted above, the thrust of his argument is that there was no sanctioned post. The said contention has been rendered fallacious in the light of the observations as above. Naturally, the termination of the employee dated 15/12/2011 is a colourable act by an employer

and has resulted in the victimization of respondent No.1.

14. The observations of the School Tribunal in clause 2, 3 and 4 of the impugned order read as under :-

“2. The impugned written termination order dated 15/12/2011, issued by respondent No.1 Secretary, terminating the services of the appellant w.e.f. 23/01/2012, from the post of junior clerk in respondent No.2 school, is quashed and set aside.

3. The respondent No.1 Secretary and respondent No.2 Head Master are directed to reinstate the appellant on the original post with continuity of service and full back wages and if the post is abolished from academic year 2013-14, then take necessary steps for absorption etc. as per rules including Rule-26 (1) (III) and Rule-26(2) of M.E.P.S. Rules and respondent No.3 Education Officer (Primary) to consider the same according to Rules.

4. The respondent No.3 Education Officer (Primary) is directed to withhold the non salary grants of respondent No.2 School, in case the respondent management failed to obey the aforesaid order.”

15. Much grievance has been voiced by the learned Advocate Mr. Manale even with regard to the grant of full back wages to respondent No.1 / employee. I have considered his submissions and have assessed the same in the light of the malafide intention of the

Management to fill in 3 posts of clerks by publishing an advertisement after the termination of respondent No.1 employee. It is on account of the tainted act of the petitioner/Management that I do not find any reason to show any sympathy towards the Management and reduce the back wages granted to respondent No.1. The direction in clause 2 and 3 is sustained to the said extent.

16. Clause No.3 reproduced above is in two parts. The second part is with regard to the post of Jr.Clerk being/if abolished, would oblige the Education Officer to initiate steps for enlisting respondent No.1 / employee in the list of surplus employees considering his date of termination and initiate further steps for his absorption elsewhere under Rule 26. I do not find that the said direction could be termed as being perverse or erroneous. It is the scheme of Law that if the post is abolished, the employee would not be foisted upon an employer, of course if an employer desires to continue such an employee, and thereafter provide for an absorption of such surplus employee.

17. I am inclined to modify the direction in clause No.4 by giving some breathing time to the petitioners. Clause 4 reproduced above shall, therefore, take effect if the petitioner/Management fails to

comply with the direction in clause 2 and 3 reproduced above within a period of 4 (four) weeks from today.

18. In the light of the above, this petition is partly allowed only to the extent of modifying clause 4 of the impugned order as above. Needless to state, the challenge to the impugned judgment and the directions in clause 1, 2, 3 of the impugned order stands rejected.

(RAVINDRA V. GHUGE, J.)