

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9322 OF 2015

Devidas Rajaram Patil,
Age-39 years, Occu-Service/Asst.Teacher,
C/o Dr.P.C.Patil,
Near Z.P.School, Sillod,
Dist.Aurangabad

-- PETITIONER

VERSUS

1. The State of Maharashtra,
Through, its Secretary,
Higher Education Department,
Mantralaya, Mumbai - 32,
2. The Secretary,
Bhartiya Shikshan Sanstha,
N-12, HUDCO, Roza Bagh,
Abhijot Vidyalaya,
Aurangabad,
3. The Principal,
Gajanan Secondary and Higher Secondary School,
Golegaon, Tal.Sillod,
Dist. Aurangabad,
4. The Director of Education,
Directorate of Secondary and Higher Secondary
Education, State of Maharashtra,
Pune - 1,
5. The Dy.Director of Education,
Aurangabad Division,
Aurangabad,
6. The Education Officer,
Zilla Parishad, Aurangabad

-- RESPONDENTS

WITH
WRIT PETITION NO.11048 OF 2015

1. Bhartiya Shikshan Sanstha
N-12, HUDCO, Rojabag,
Aurangabad,
C/o Abhijyot Vidyalaya
Aurangabad, Dist.Aurangabad,
Through its Secretary,
Abhinandan Ashok Patil,
Age-24 years, Occu : Agriculture
R/o. B-102, Tulsi Arcade, Cannaught Place,
N-5, CIDCO, Aurangabad,
2. Gajanan Secondary and Higher Secondary
School, at Golegaon,
Tq.Sillod, Dist.Aurangabad,
Through its Principal

-- PETITIONERS

VERSUS

1. Babulal Chapa Patil,
Age-37 years, Occu-Service,
R/o C/o Principal P.C.Patil,
Near Zilla Parishad School,
Sillod, Tq.Sillod,
Dist.Aurangabad,
2. The Director of Education,
Directorate of Secondary and
Higher Secondary Education,
Maharashtra State, Pune,
3. The Deputy Director of Education,
Aurangabad Region, Aurangabad,
4. The Education Officer (Secondary),
Zilla Parishad, Aurangabad
District Aurangabad

-- RESPONDENTS

Mr.Anandsing Bayas, Advocate for the petitioner in WP
No.9322/2015.

Mr.S.P.Sonpawale, AGP for respondents/State in both matters.

Mr.R.I.Wakade, Advocate for respondent Nos. 2 and 3 in WP
No.9322/2015.

Mr.Ajinkya Deshmukh h/f Mr.A.V.Hon, Advocate for the petitioners in WP No.11048/2015.

Mr.A.S.Bayas, Advocate for respondent No.1 in WP No.11048/2015.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 21/11/2016

ORAL JUDGMENT :

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

2. WP No.9322/2015 is yet another case before this Court where the employee contends that he was orally terminated from 11.7.2013 and the Management contends that he was never terminated. The fact remains that in this case, the petitioner employee has worked for 10 years in continuous employment with respondent No.2/ Management.

3. I have heard the submissions of the learned Advocates for the respective sides at length. The undisputed factors are as under :-

- [a] The petitioner employee was issued with an appointment order dated 14/07/2003 u/s 5 r/w Schedule D of the MEPS Act and the MEPS Rules.
- [b] He was appointed as an “Assistant Teacher” considering his qualification of M.A., B.Ed.

- [c] He was appointed temporarily for 2 years.
- [d] Clause 2 of the appointment order indicates the above and also mentions that the two years appointment is on probation.
- [e] The appointment order does not state that the petitioner was appointed on part time basis.
- [f] A resolution was passed by the Management on 13/07/2003 and the petitioner was sought to be appointed alongwith 3 other teachers.
- [g] By communication dated 17/01/2011, the Deputy Director of Education did not grant approval to the appointment of the petitioner and observed that there is no availability of work even for a part timer and hence the approval is not granted for the year 2009-2010.
- [h] The Management does not contend that the petitioner has been terminated pursuant to the communication dated 17/01/2011.
- [i] The petitioner approached the School Tribunal by filing Appeal No.14/2013 for challenging his oral termination dated 11/07/2013.
- [j] The Management has filed its written statement running into 14 pages.
- [k] It is nowhere contended that the appointment order issued to the petitioner was for a part time assignment.
- [l] In paragraph No.3 of the written statement, it is admitted that *"The appellant was appointed on 01/07/2003 as an Assistant Teacher"*.
- [m] In paragraph No.9 of the written statement, it is contended that the Deputy Director of Education has granted approvals to the appointment of the petitioner till the academic year 2008-2009.

- (n) It is alleged in paragraph No.9 that the petitioner did not work continuously from 01/07/2003 to 11/07/2013, though it is not stated in the written statement as to whether he was remaining absent or as to whether there was no workload, in as much as there is no contention that any disciplinary action was initiated against the petitioner.
- [o] In paragraph No.14, it is categorically stated that the appellant himself has remained absent from 30/04/2013, that the Management did not restrain him from signing the muster roll from 17/06/2013 and that there is no question to prohibit him from signing the muster roll as he himself was absent from 17/06/2013 which was the opening day of the school after the vacations of the Month of May.
- [p] Though it is stated in paragraph No.16 of the written statement that the petitioner was appointed on temporary basis, the fact remains that he has worked for 10 years.
- [q] A stigma is sought to be attached in paragraph No.16 of the written statement that the petitioner's service is not satisfactory and hence there is no question to confirm him in employment, notwithstanding the fact that the petitioner worked for 10 years and has not been communicated his shortcomings and has not been apprised of his alleged unsatisfactory performance.
- [r] In paragraph No.16, it is stated that the Management has never terminated the service of the petitioner.

4. From the undisputed factors as recorded above, it is apparent that the Management has taken a stand that the petitioner has not

been terminated. It is also admitted that there were vacations in May 2013 and 17/06/2013 was the first day after vacations when the petitioner claims to have been prevented from signing the muster roll. If this be the situation, the issue of termination is put to rest by the Management itself.

5. The Management contends that there is no workload available. If the Deputy Director has passed an order on 17/01/2011 observing that the workload has raised, the Management should have brought this aspect to the notice of the petitioner in writing and if he was the junior most employee, his proposal for being declared surplus and further absorption in any other school where vacancy was available, should have been forwarded by the Management to the Department of Education.

6. It is apparent that after the School Tribunal concluded that the appointment of the petitioner is legal and valid and therefore sustainable, it should have dealt with the issue as to whether the short fall in the workload would lead to the petitioner's being declared as surplus. Rather than dealing with the said issue, the Tribunal has dismissed the appeal accepting the statement of the Management as gospel truth, without noting that the petitioner will

have to be dealt with strictly in accordance with the Act of 1977 and 1989 Rules, for being declared as Surplus. The petitioner is not expected by Law to approach the Education Officer for being declared surplus. The onus and burden lies on the Management to refer his case to the Education Department and get an order of the petitioner being declared as surplus. Consequentially, the proviso below section 5(1) of the MEPS Act, would then entitle the petitioner to be absorbed as per his seniority emerging from the seniority list of the surplus teachers.

7. From the written statement of the Management, this appears to be a classic case of a confused Management not being able to settle on a particular reason for purportedly dispensing with the service of the petitioner. In one breath, it is stated in the written statement that he was appointed as a part time teacher, when the appointment order indicates that he was appointed for 2 years and also mentions that he was on probation. Then the Management takes a stand in the written statement that he has remained absent after 30/04/2013 when the academic year had in fact come to an end. He cannot therefore be held to be unauthorizedly remaining absent or absconding in vacation. It is admitted by the Management that 17/06/2013 was the opening date and since then the signature of the

petitioner does not appear on the muster roll. It is then stated in the written statement that the Management neither prevented him from signing the muster roll nor did it terminate him.

8. In the light of the above, I am of the view that as the Management has not terminated the service of the petitioner and since the Management has not taken steps for declaring the petitioner surplus by following the due procedure of law, these aspects having been lost sight of by the School Tribunal which renders the impugned judgment of the School Tribunal perverse and erroneous.

9. This petition, is therefore, partly allowed. The impugned judgment of the School Tribunal dated 22/06/2015 is quashed and set aside and Appeal No.14/2013 filed by the petitioner stands partly allowed. The petitioner shall be reinstated in service with continuity from the Academic year 2013 onwards.

10. In so far as the back wages are concerned, the petitioner is at liberty to move a representation to the Education Department for claiming wages for the reason that the Education Department has taken a stand that there is no workload. Such representation shall

be considered strictly in accordance with Law and the Education Department i.e. respondent Nos.4, 5 and 6 shall take an appropriate decision.

11. Needless to state, if the workload is still not available, the Management is at liberty to forward the proposal of the petitioner to respondent Nos. 4, 5 and 6 / Education Department for being declared as surplus strictly on the basis of his seniority. In the event, work is available, the Management shall proceed to allot work to the petitioner.

12. Rule is made partly absolute in the above terms.

ORAL JUDGMENT IN WP NO.11048 OF 2015

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

14. In this matter, the same Management as in the first case, has challenged the judgment of the School Tribunal dated 22/06/2015 by which Appeal No.15/2003 filed by respondent No.1/ appellant has been allowed.

15. The date of appointment of this appellant and the facts of this case are said to be identical to the first petition decided as above. In this case as well, the appellant is appointed on 01/07/2003 and he alleged oral termination on 11/07/2013. The petitioner/Management has taken the same stand that he was never terminated, that he was absent after 30/04/2013 and that he has abandoned service.

16. The Management has similarly taken a stand that he was never restrained from signing the muster roll and he was never orally terminated from service. The only difference between this case and the earlier case is that the School Tribunal concluded that one Assistant Teacher Mr.S.G.Jadhav was appointed on 01/12/2003 in the Marathi subject and being junior to the appellant, who was appointed on 01/07/2003 for Marathi subject, the said Mr.Jadhav will have to be treated as surplus. It needs mention that the petitioner in the first petition was a teacher of Hindi subject.

17. It is informed by the learned Advocates that Mr.Jadhav was appointed against the OBC category and the appellant herein was appointed from the open category. Mr.Jadhav is also said to be a physically challenged person. These aspects were lost sight of by the School Tribunal and being oblivious to these two aspects, the

impugned order of reinstatement has been passed.

18. It is trite law that a surplus teacher is one who is the junior most person. In between employees so as to calculate juniority, it is settled that persons belonging to the reserved categories are not to be equated with a teacher from the Open Category. In a given case, if the teacher belonging to the reserved category is junior most and the immediate senior teacher belongs to the Open Category, the said senior teacher is to be considered as being junior most for deciding as to who is the surplus teacher.

19. In the light of the above, this petition is partly allowed. Though the oral termination is rightly set aside by the Tribunal and reinstatement has been rightly granted, I am modifying the directions of the Tribunal to the extent of the back wages, for which the appellant shall move a representation to the concerned Education Department / respondent Nos. 2, 3 and 4 herein for seeking the wages for the period of termination till reinstatement and shall be considered by the said respondents strictly in accordance with the Rules.

20. So also, the petitioner/Management shall follow the rules

strictly for referring the case of a surplus teacher in between the petitioner and Mr.Jadhav in the light of the observations set out hereinabove and the Education Department shall consider the said proposal strictly as per rules. Needless to state, the teacher who is declared surplus shall be enlisted in the list of surplus candidates and would be eligible for absorption strictly in accordance with his seniority in the said list. In both these cases, in the event issue of surplus of teachers still exists, the Management shall deal with the said issue as expeditiously as possible and preferably within a period of 8 (eight) weeks from today.

21. Rule is made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)