

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10769 OF 2015

1. Sant Kabir Shikshan Prasarak Mandal,
Aurangabad,
Through its President,
Madhav Haribhau Borde,
Age-68 years, Occu-Agriculturist,
R/o Office at Plot No.54,
Banai Nandanvan Colony,
Aurangabad,
Tq. and Dist. Aurangabad,
2. Savitribai Phule Girls High School,
Bhim Nagar, Bhavsinghpura,
Aurangabad, Tq. And Dist. Aurangabad,
Through its Headmistress,
Nirmala W/o Narayan Jadhav,
Age-55 years, Occu-Service,

..Petitioners

Versus

1. Azhar Khan S/o Azizurraheman Khan,
Age-42 years, Occu-At Present Nil,
R/o House No.1-11-3, Jaisinghpura,
Aurangabad,
Tq. And Dist. Aurangabad,
2. The Education Officer (Secondary),
Zilla Parishad, Aurangabad,
3. Rajani Bhimrao Wagh,
Age-35 years, Occu-Service,
R/o Plot No.54, Nandanwan Colony,
Cantonment, Aurangabad,
Tq. And Dist.Aurangabad

..Respondents

WITH
WRIT PETITION NO.10797 OF 2015

Rajani Bhimrao Wagh,
Age-35 years, Occu-Service,
R/o Plot No.54, Nandanwan Colony,

Cantonment, Aurangabad,
Tq. and Dist. Aurangabad

..Petitioner

Versus

1. Shri Sant Kabir Shikshan Prasarak Mandal,
Aurangabad, Through its President
Office at Plot No.54, Banai Nandanvan Colony,
Aurangabad, Tq. And Dist.Aurangabad,
2. The Headmaster,
Savitribai Phule Girls High School,
Bhim Nagar, Bhavsinghpura,
aurangabad, Tq. Dist.Aurangabad,
3. The Education Officer (Secondary),
Zilla Parishad, Aurangabad,
4. Azhar Khan S/o Azizurraheman Khan
Age-42 years, Occu-At Present Nil,
R/o House No.1-11-3, Jaisinghpura,
Aurangabad, Tq. And Dist.Aurangabad

..Respondents

WITH
WRIT PETITION NO.12038 OF 2015

Azhar Khan S/o Azizurraheman Khan,
Age-43 years, Occu-Nil,
R/o House No.1-11-3, Jaisingpur,
Aurangabad, Tq. And Dist.Aurangabad

.. Petitioner

Versus

1. The State of Maharashtra,
The Secretary, Education Department,
Mantralaya, Mumbai,
2. The Education Officer (Secondary),
Zilla Parishad, Aurangabad,
3. Shri Sant Kabir Shikshan Prasarak
Mandal, Aurangabad,
Through its President,
Office at Plot No.54,
Banai, Nandanwan Colony,
Aurangabad,

4. The Head Master,
Savitribai Phule Girls High School,
Bhim Nagar,
Bhawsingpura, Aurangabad,

5. Rajani Bhimrao Wagh,
Age-Major, Occu-Service,
R/o Savitribai Phule Girls High School,
Bhim Nagar, Bhavsingpura,
Aurangabad

.. Respondents

Mr.R.N.Dhorde h/f Mr.V.S.Kadam, Advocate for the petitioners.
Mr.P.M.Shinde, Advocate for respondent No.1.
Mr.P.S.Dighe, Advocate for respondent No.3.
Mrs.S.S.Raut, AGP for respondent No.2.

CORAM : RAVINDRA V. GHUGE, J.
Dated : April 16/18, 2016

ORAL JUDGMENT :-

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

2. The first petition is filed by the Educational Institution (hereinafter referred to as the 'employer/Management'). The second petition is filed by Mrs.Rajani Bhimrao Wagh, who is respondent No.3 in the first petition (Hereinafter referred to as the 'new employee'). The third petition has been filed by Mr.Azhar Khan, who is respondent No.1 in the first petition (hereinafter referred to as the 'Appellant Employee').

3. These 3 petitions have been filed by the respective litigating sides challenging the same judgment and order dated 05/08/2015 delivered by the School Tribunal in Appeal No.31/2012. The said appeal was filed by the Appellant Employee and by the impugned judgment, his appeal has been allowed and the Management has been directed to reinstate him in service.

3. Mr.R.N.Dhorde, the learned Senior Advocate appearing on behalf of the Management submits as under :-

- [a] On 05/05/2000, the Management published an advertisement in "Dainik Vishwamitra" Aurangabad Edition thereby calling for applications for appointment of teachers and Shikshan Sevak (2 posts) which were reserved for the ST and NT category. The required qualification was B.A.B.Ed.
- [b] It is stated that the Appellant Employee was appointed on 10/07/2000 as an "Assistant Teacher" against the ST category.
- [c] The tribe certificate became necessary since the post was reserved for the ST category.
- [d] The Appellant Employee claimed to be belonging to the "Tadvi" tribe which fell in the Scheduled Tribes Category.
- [e] The Management was consistently pursuing the Appellant Employee to submit his tribe certificate so that his proposal would be forwarded to the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes, (Vimukta Jatis), Nomadic Tribes, Other Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000 for obtaining the Tribe Validity certificate.

- [f] Grievance is that the Appellant Employee continued to dodge the Management and in effect declined to submit the said certificate.
- [g] Mr.Dhorde, placed his reliance upon the GR dated 18/12/2003 by which any employee appointed against a reserved post for the tribe mentioned is under a mandate to produce the validity certificate.
- [h] On 05/05/2004, the Head Master informed the concerned Appellant Employee to submit his tribe certificate so as to enable the Management to forward the same to the Validation Committee. He was given a deadline upto 30/05/2004. He has received the said letter.
- [i] Despite the same, he has failed to submit his tribe validity certificate.
- [j] Mr.Dhorde hastens to add that all other employees, who were similarly directed, have promptly submitted their certificates which were forwarded to the appropriate committees and their claims have been validated. It was only the said Appellant Employee who continue to dodge the Management.
- [k] Mr.Dhorde submits that a letter dated 11/05/2004 bearing O/W No.431/2004 was addressed to the Research Officer of the Divisional Caste Claim Validation Committee and the same letter was handed over to the Appellant Employee to be submitted to the competent authority. He received the said letter, but did not forward it to the Tribe Validation Committee for validation and kept the said letter with himself.
- [l] He further submits that from 2005, the Appellant Employee started remaining unauthorisedly absent and did not report for duties.
- [m] Since he did not turn out for reporting for duties, the Management presumed that he has abandoned his service.

- [n] He approached the School Tribunal in August 2009. After the delay was condoned by this Court, his appeal was registered on 27/09/2012. Same has been allowed by the impugned order.
- [o] He further submits that the documents at Page Nos. 51 to 57 of the first petition paper book would indicate that the Management brought to his notice that he was remaining unauthorizedly absent.
- [p] He, therefore, submits that despite the reminders of the Management about the unauthorized absence, he did not turn up for duties.
- [q] He submits that the Management published another advertisement dated 06/12/2005 in "Dainik Sakal" Aurangabad Edition calling for applications for the vacant position, in the light of the vacancy created by the said employee owing to his abandonment of service.
- [r] Respondent No.3 in the first petition, the new employee, was then appointed in place of the Appellant Employee on 14/12/2005. Her services were approved by the Education Officer on 07/08/2008.
- [s] Mr.Dhorde, therefore, submits that the new employee has now been working for almost 10 years. The Appellant Employee could not have been reinstated in place of the new employee since she has acquired a permanent approval to her appointment.

4. Mr.Dhorde, strenuously submits that the Appellant Employee does not have the right to claim reinstatement since he is the Architect of his termination. Because of his refusal to submit his tribe certificate, he could not have continued in service and has himself abandoned service.

5. Mr.Dhorde has criticized the impugned judgment severely. He submits that the Tribunal should have consider the fact that the Appellant Employee was avoiding submission of his tribe certificate and approaching Tribe Validity Committee since he did not have a genuine Tribe certificate. In these circumstances, if the Management has presumed abandonment, no fault can be found with the Management and respondent No.3 / new employee cannot be dislodged from her position. He, therefore, prays that this petition be allowed and the impugned judgment be quashed and set aside.

6. Mr.Dhorde placed his reliance upon the judgment of this Court in the matter of Shriram Mahadeorao Tandale Vs.Saraswatimata Vidya Prasarak and others, 2006(2) All MR 93.

7. Mr.Dighe, learned Advocate appearing on behalf of the new employee supports the contentions of the Management. His contention is that after the Appellant Employee stopped reporting for duties from May 2005, the new employee was appointed on 14/12/2005 pursuant to the advertisement dated 06/12/2005. The new employee has worked diligently and has been granted permanent approval on 07/08/2008. He submits that the Appellant Employee cannot be reinstated by dislodging the new employee. Even if the Appellant Employee succeeds, he would not have any right to dislodge the newly

appointed employee. He, therefore, submits that the petition filed by the Management be allowed alongwith the petition of the new employee and the petition of the Appellant Employee be dismissed.

8. He relies upon the judgment of this Court in the matter of Mr.Tatyaba Nivrutti More Vs.Miss Rajashri Bapusaheb Chougule and others, 2008(2) All MR 145, to support his contention that the newly appointed employee cannot be terminated from service consequent to the order of the School Tribunal directing reinstatement of the terminated employee.

9. Mr.Shinde, learned Advocate appearing on behalf of the Appellant Employee has strenuously defended the impugned judgment. He submits that the Management had directed him to submit his tribe certificate. He had submitted a copy of the said certificate at the time of joining. The Management issued reminders to him for submission of tribe validity certificate. He further submits that the Head Master supplied a copy of the communication dated 11/05/2004 bearing O/W No.431/2004 vide which the Head Master had addressed the Research Officer of the Divisional Caste/Tribe Committee by indicating to him that the Management has already forwarded his tribe claim for validation before the appropriate committee. He denies that the said document was supplied to him in

original form so as to forward the said communication to the tribe validation committee as like a messenger on behalf of the Management.

10. Mr.Shinde further submits that even in the written statement filed by the Management before the School Tribunal, it is not the case of the Management that the covering letter dated 05/05/2004 alongwith the documents was handed over to him with the instructions that he should forward it to the Tribe Validation Committee. His signature appearing on the OC is only by way of an acknowledgment that he received a copy of the said letter. The Management has made the Appellant Employee believe that his validation claim was already forwarded to the competent authority. In the absence of the said stand, the Management now cannot contend that the Appellant Employee himself did not submit the papers to the Tribe Validation Committee and hence he is not entitled to be kept in employment.

11. Mr.Shinde submits that documents at page Nos. 51 to 57 in the first petition are forged documents. The Management has created the said documents only to misdirect this Court. None of these documents bear the signature of the terminated employee so as to indicate that he has received the copies of the said reminders.

12. Mr.Shinde vehemently submits that all these documents from page No.51 to 57 are forged documents and are created by the Management in a single day only to create a story that the terminated employee has been unauthorizedly absent. He specifically draws my attention to two letters so as to expose the Management. He points out to the letter dated 14/02/2006 especially the outward No.526/A. By letter dated 07/03/2006, the outward No. is 536 and by letter dated 30/04/2006, the outward No. of the letter is 542/A. He then turns to a letter dated 26/06/2006 with outward No.541/A and contends that if the letter dated 26/06/2006 has been issued after 03/04/2006, the outward number could not have been 541/A and 542/A respectively. If this position is accepted, it would indicate that these documents have been created by the Management for self serving purposes.

.....

Date : 18/04/2016

13. He submits that no sooner he was stopped from signing the muster roll in May 2005, the new employee was appointed on 14/12/2005 purportedly in place of the terminated employee and the Education Officer has granted approval to the said post. He, therefore, submits that if the Management alleges abandonment of service, they were under a mandate to conduct a departmental enquiry in the light of the judgment of this Court in the matter of Sudhakar Chindhu

Bhadane Vs. Niphad Taluka Education Society and others, 2008(1) Mh.L.J. 448.

14. Mr.Shinde also places reliance upon the judgment of the learned Division Bench of this Court in the matter of Sadique Hussain Sheikh Azim Qureshi Vs. Divisional Caste Certificate Scrutiny Committee, Nagpur and others, 2011(2) Mh.L.J. 87 to contend that the appointing authority cannot avoid its duty of referring such a caste certificate for verification to the Scrutiny Committee.

15. Mr.Shinde relies upon the judgment of the Hon'ble Supreme Court in the matter of Dipali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others, 2013 AIR SCW 5330 to support his contention that back wages deserve to be granted if the termination is held to be invalid.

16. Mr.Shinde strenuously submits that the reason why the Management has acted arbitrarily against him is because the Management was committed in appointing the new employee Mrs.Rajani, who is the 'daughter in law' of the Chairman of the Educational Society. The Management, therefore, started chasing the Appellant Employee to ensure his ouster so as to accommodate the Chairman's daughter in law. He submits that the Management has

succeeded in appointing Mrs.Rajani in place of the Appellant Employee within 6 (six) months of his oral termination. He, therefore, prays that the terminated employee deserves reinstatement, with continuity and full back wages.

17. I have considered the submissions of the learned Advocates as recorded above.

18. There is no dispute that the Appellant Employee was a permanent employee with the management. It is also undisputed that there is no written order of termination. The defense taken by the Management before the School Tribunal was that the Appellant Employee was dodging the Management and was not supplying a copy of the Caste Certificate so as to be forwarded to the competent committee for validation. It is also the defense of the management that the Appellant Employee has abandoned his service and hence the Management was not required to initiate any steps against him.

19. In the above backdrop, Rule 16(3) of the MEPS Rules, 1981 assumes importance and the same reads as under:-

“16(3) In the case of a permanent employee who, without sufficient cause, fails to apply for leave within 7 days from the date of absence, it shall be treated as breach of discipline and he shall be liable for suitable disciplinary action after due inquiry.

A permanent employee who is absent from duty +[without leave continuously for a period exceeding three years], shall be deemed to have voluntarily abandoned his services.

+ The words “with or without leave continuously for a period of three years or more” are substituted by Not.No.PST/1083/194/SE-3-Cell, dated 20-12-1984.”

20. It is thus provided in the Rules that when a permanent employee fails to apply for leave or is absent from duties without leave continuously for a period exceeding three years, it shall be deemed that he has voluntarily abandoned his service. Abandonment is based on a charge of unauthorized absenteeism, which amounts to a breach of discipline. An employer is empowered to initiate disciplinary action against a permanent employee, who has been unauthorizedly absent.

21. The Honourable Supreme Court in the matter of Novartis India Ltd. Vs. State of West Bengal and others [AIR 2008 SC (Suppl) 836] = (2009)3 SCC 124, while dealing with a case of permanent employee, having not reported at the place of transfer, concluded that the same would amount to an unauthorized absenteeism. The Management had taken a stand that the employee has abandoned employment. The Honourable Apex Court concluded that abandonment amounts to a charge of unauthorized absenteeism and hence a disciplinary enquiry is required in such matters.

22. In the instant case, the Management, on the one hand, claims that the Appellant Employee was remaining absent from May 2005 and on the other hand, it has taken a stand that he had abandoned his employment. There is no dispute that a disciplinary proceeding has not been conducted against the said employee. As per Rule 16(3) of the MEPS Rules, the Management may not be required to conduct disciplinary proceedings if the employee is continuously absent without leave for three years.

23. As such, if the Management had taken a stand that the Appellant Employee had abandoned service, it was mandatorily required to wait for a period of three years from May 2005 to May 2008. However, the Management proceeded to appoint the daughter in law of the Institution's Chairman in place of the Appellant Employee on 14.12.2005, which is in the 7th month from the date from which the said employee is said to have abstained from duties. In this backdrop, the defense taken by the Management is that the Chairman's daughter-in-law was granted permanent approval on 07/08/2008. Considering the effect of Rule 16(3), the Management could not have made the said appointment of the new employee (Chairman's daughter-in-law) within three years from the date of the unauthorized absence of the Appellant Employee.

24. This Court in the matter of Sudhakar Chindu Bhadane (supra) has concluded that Rule 16(3) mandates the Management to issue a show cause notice of hearing to the permanent employee, to consider whether he does not desire to report for duties. If the said employee declares that he does not desire to report for duties, the management would then be in a position to take a decision. It was, therefore, held by this Court that a notice of hearing ought to have been given to the concerned employee and was under an obligation to prove that he was continuously absent for 3 years.

25. There is yet another fallacy in the submissions / stand of the Management. As the Management has taken a stand that the Appellant Employee has abandoned service, it has purportedly issued letters dated 28.6.2005, 4.9.2005, 14.2.2006, 7.3.2006, 30.4.2006, 26.6.2006 and 27.1.2006, by which the said employee is purportedly directed to explain his unauthorized absence and report for duties.

26. This stand can be tested in the face of two facts. Firstly, that the Chairman's daughter-in-law was appointed on 14/12/2005. The Management categorically states that she was appointed in place of the Appellant Employee. Secondly, none of these documents have been proved to have been served upon the Appellant Employee. The Tribunal has, therefore, concluded that these documents have been

manufactured by the Management.

27. The purported notice dated 30/04/2006 carries the outward No.542/2008. A subsequent notice purportedly issued on 26/06/2006 carries the outward No.541/2008. This indicates that the Management must have hurriedly prepared these documents only to create documentary evidence to support its stand that the said employee had abandoned employment.

28. Notwithstanding the falsity in these documents and the engagement of the Chairman's daughter in law on 14/12/2005, the Management could not have filled in the post occupied by the Appellant Employee until the charge of unauthorized absenteeism was not proved against him resulting in his dismissal or for a period of three years so as to presume deemed abandonment under Rule 16(3) of the Rules as is held by this Court in the case of Sudhakar (supra).

29. In spite of the above, it also cannot be ignored that the Appellant Employee had preferred his Appeal before the School Tribunal as late as in 2009. Though the delay of 4 years in the matter has been condoned by this Court after the Tribunal declined to condone it, it does create a complication in this matter since the new employee has been appointed and has obtained permanent approval. She is now in

employment for more than ten years from 14/12/2005 and despite the fact situation as above, it would be harsh to dislodge her after having settled in employment for more than ten years. This situation has occurred only because the Appellant Employee kept silent for four years and then approached the School Tribunal in 2009 alleging oral termination / refusal to offer work from May 2005.

30. The Appellant Employee has taken a stand that he was forcibly restrained by the Management from signing the muster roll and performing his duties. This purported act of the Management assumes significance since it is well settled by now that such manner of refusal to offer work or restraining an employee from working amounts to “otherwise termination” and the same is questionable under Section 9 of the MEPS Act, 1977. Had the Appellant Employee immediately approached, either the Education Officer or the School Tribunal after the oral refusal by the Management, the said Management could have been prevented from filling in the post until the decision of the Tribunal. The failure on the part of the Appellant Employee in approaching the School Tribunal for four years has, therefore, practically crystallized the rights of the newly appointed employee.

31. It is, in the above backdrop, that the three claims put forth by

these petitioners i.e. the Management in the first petition, the newly appointed employee in the second petition and the Appellant Employee in the third petition, have to be considered by this Court and in the light of the directions of the School Tribunal.

32. The School Tribunal, below paragraph No.15 of the impugned judgment has ordered as under:-

“The appeal is allowed as under with costs.

The termination order dated 01/05/2005 is hereby quashed and set aside.

Respondent Nos. 1 to 3 are hereby directed to reinstate the appellant within 40 days from the date of this order.

It is hereby declare that the appellant is entitled for 30% salary and back wages from the date of decision of Writ Petition No.5588/2012 till the date of reinstatement from the respondent No.1 and 2.”

33. The claim of the terminated employee in the third petition is with regard to full back wages as against the 30% back wages granted by the Tribunal from the order of this Court dated 02/08/2012 in Writ Petition No.5588/2012, condoning the delay.

34. The Honourable Apex Court in the matter of Gauri Shankar Vs.

State of Rajasthan [2015 II CLR 497], has concluded that when the termination of an employee is held to be illegal and unsustainable, the hardships suffered by the employee can be reduced by granting 25% back wages. In the instant case, the Tribunal has granted 30% back wages from 02/08/2012.

35. In my view, on the one hand the Tribunal has rightly deprived the terminated employee of the back wages from May 2005 till 02/08/2012, since he could alone be blamed for the delay caused in voicing his grievance against the Management. On the other hand, the Tribunal has granted 30% back wages to reduce his hardships. As such, I do not find any reason to interfere with the said direction of the Tribunal. Consequentially, Writ Petition No.12038/2015 filed by the Appellant Employee is dismissed and Rule is discharged.

36. The claim of the newly appointed employee is that she has been appointed on 14/12/2005 in place of the Appellant Employee. She has settled in employment, has a family to support and has put in more than 10 years in employment. Mr.Dighe, learned Advocate for the newly appointed employee contends that there is no reason to disturb her since she is not at fault and the Appellant Employee was sleeping over his alleged cause of action.

37. Mr.Shinde, learned Advocate on behalf of the Appellant Employee contends that the newly appointed employee could not have been engaged at least for a period of three years, even if it is presumed that the Appellant Employee has abandoned his employment.

38. In the light of the observations set out herein above, it is apparent that by the action of the Management, the Appellant Employee has been virtually terminated since neither did the Management conduct disciplinary proceedings for his unauthorized absence, nor did the Management wait for three years to presume that the said employee has abandoned the employment. His disengagement amounts to an illegal termination which has been rightly set aside by the Tribunal.

39. At the same time, the contention of Mr.Dighe is that the newly appointed employee is innocent. I am of the view that as her father in law has orchestrated her appointment, she cannot be punished by dislodging her after more than ten years of employment in order to create a place for the Appellant Employee. Moreover, the delay caused by the Appellant Employee has its own effects and impact on this proceeding.

40. I am, therefore, of the view that the petition filed by the newly

appointed employee is on an apprehension that she would have to be terminated to make space for the appellant / employee. The second petition No.10797 of 2015 is, therefore, partly allowed to the extent of issuing a direction to the management not to terminate the services of the newly appointed employee.

41. In so far as the termination of the appellant / employee from 01/05/2005 is concerned, the same has been rightly quashed and set aside. He, therefore, deserves to be reinstated in employment notionally with the 30% back wages granted by the Tribunal to be paid by the Management from its own coffers considering that the Chairman has orchestrated the appointment of his daughter-in-law in his place.

42. Upon reinstatement, the management shall proceed to submit the proposal of the appellant / employee to the competent Education Officer for including his name in the list of surplus employees, provided there is no vacancy with the Management as on date. Needless to state, if there is any vacancy available with the Management, it shall accommodate the appellant / employee on the said post. If the said post is for the reserved tribe, the Management shall forward the proposal of the Appellant Employee for validation of his tribe claim and he shall forthwith submit his tribe certificate for

the said purpose.

43. If due to the absence of vacancy, the Management shall forward the proposal to the Education Officer and he shall consider the same favourably in view of the fact that the termination of the employee dated 02/08/2012 has been quashed and set aside and he has been granted notional continuity in service. The appellant / employee shall, therefore, be entitled for absorption in any school after being entered in the list of surplus employees, which the Education Officer may so direct.

44. In order to avoid delay, the Management is directed to reinstate the appellant / employee forthwith and submit his proposal within three weeks to the Education Officer for declaring him surplus. The Education Officer shall then decide the said proposal and enlist the appellant / employee in the list of Surplus Employees in the Teaching Category, within a period of (6) six weeks thereafter. The second part of the directions of the School Tribunal, therefore, stands modified in the light of the above directions.

45. The first petition filed by the management is, therefore, partly allowed and Rule is made partly absolute accordingly.

(RAVINDRA V. GHUGE, J.)