

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO. 1321 OF 2009

1. Shaikh Mushtaque Ahmed Janmohammed
Age 58 years, occupation - retired teacher
residing at - 7143, Hatam Pura,
Ahmednagar - 414 001 .. Petitioner

versus

1. The State of Maharashtra,
through its Secretary to the Government
Education and Employment Department,
Secondary Education Section,
Mantralaya, Mumbai - 32
2. The Zilla Parishad, Ahmednagar,
through its Education Officer,
Secondary Education, having its office
located opp. Old Bus Stand,
Ahmednagar
3. ATU Chand Sultana Anglo Urdu
High-School and Junior College,
Juna Bazar, Church Road,
Ahmednagar-414 001
Through its Head Master .. Respondents

Mr. G. R. Syed, Advocate for petitioner
Mr. P. K. Lakhotia, Asstt. Govt. Pleader for respondent no. 1
Smt. A. N. Ansari, Advocate for respondent no. 3

CORAM : SUNIL P. DESHMUKH AND
SANGITRAO S. PATIL, JJ.

DATE : 06-12-2017

ORAL JUDGMENT (PER: SUNIL P. DESHMUKH, J.)

1. Heard learned counsel for appearing parties.
2. Petitioner is before the court, challenging validity of circular dated 10-05-1989 of the Department of Education and Employment, Government of Maharashtra issued further to earlier Government Resolutions, clarifying in the same, authorities vested with powers to condone break in service for a period of 1/5th of the admissible qualifying service of member of teaching and non-teaching staff in non aided secondary schools, and further purports to challenge competence of the officer viz; Superintendent, (Secondary) Salary and Provident Fund Inspection Unit, Ahmednagar, to make adverse endorsement dated 05-04-2008 on proposal forwarded by management for condonation of break in petitioner's service.
3. Learned counsel appearing on behalf of petitioner Mr. G. R. Syed submits that had interruption in service from

1982 to 1994 been condoned, perhaps petitioner would have been able to secure more pensionary benefits than the ones those have been granted to him. He submits that even otherwise, communication/endorsement dated 05-04-2008 on proposal by management for condonation of break in service is untenable, for, that would be in colourable exercise of power looking at the purport underlying the government circular dated 10-05-1989 since the power vests with the officer of the rank of Deputy Director of Education whereas, communication / endorsement dated 05-04-2008 had been made by the officer of lower rank i.e. Superintendent and, as such, the same is not in accordance with provisions of the relevant rules and said circular. He further purports to challenge validity of the circular.

4. He submits, the conditions which are purportedly imposed under circular dated 10-05-1989 are overbearing and overreaching the purport of the very circular and adversely affect the cases like that of the petitioner and, therefore it be declared *ultra vires*, against logic, unconstitutional, illegal and unreasonable.

5. Learned counsel submits that the petitioner had been appointed as Assistant Teacher in 1973. He had been bed-ridden for quite a long time, from 1983 to 1994 and, as such, there was break in his service. He resumed services in 1994 and continued to work till superannuation in 2008.

6. He submits, having regard to that Maharashtra Civil Services (Pension) Rules being made applicable to employees of private schools under the provisions of Maharashtra Employees of Private Schools (Conditions of service) Regulation Act, 1977 and as can be gathered from the decision of this court in the case of *Gajraj Mohanlal Mohabey vs. State of Maharashtra and others*, 2003 (1) LJSOFT 96 : 2003 Bom.C.R. 56, petitioner shall receive benefit of condonation of break in service. The purported communication / endorsement dated 05-04-2008 issued by Superintendent (Secondary) pursuant to circular dated 10-05-1989, stating that break period is for a period more than 1/5th of total admissible service is untenable for want of authority with him. Deputy Director of Education being vested with power to condone break in service under the circular and as such, the purported communication being

by authority lower in rank than him, refusal to accept proposal for condonation of break is untenable.

7. Learned counsel submits that the petitioner had not been well for quite a long period and, as such, it should be considered that interruption caused in his service had been for the reasons which were beyond his control.

8. Learned counsel appearing for respondent no. 3 Smt. A. N. Ansari, however, fairly points out the position, that as a matter of fact, the petitioner had been terminated from service in 1982 and in 1994 he had again been appointed as a fresh candidate. As such, it would not be a case wherein it can be said that there had been interruption in service as contemplated under the Pension rules.

9. Besides aforesaid, various conditions as appearing under the 1989 circular show that the petitioner is seldom in a position to overcome impediments appearing under the circular. Even assuming for the sake of argument that there is interruption, certainly the same is for a period more than 1/5th of the total admissible / qualifying service. Smt. Ansari points out that under clause 3 of circular dated

10-05-1989, various eventualities have been referred to and petitioner's case is not covered by any of them.

10. Learned Assistant Government Pleader appearing for respondent no. 1 Mr. P. K. Lakhotia supports the respondent no. 3 and submits that clearly it is not a case which can be said to be of interruption in service. He submits, it is not a case of resumption of service in 1994. There is no question of condonation of break. As such, the contention of the petitioner in that respect is not tenable. He further submits that since the petitioner's case does not fall for consideration pursuant to relevant rules for condonation of break, challenge to the validity of the circular dated 10-05-1989 would not be proprietarily correct and is rendered only academic.

11. Looking at undeniable position that petitioner had been terminated from service in 1982 and was in 1994 appointed as a fresh candidate, basic requirement for consideration of this span of 12 years as break in service would not be available to petitioner. Termination for such a long period may not be an interruption in service for the

purpose of Pension rules. Even otherwise, condonation of such interruption, in accordance with rules, especially sub rule (2) of rule 48 of the Maharashtra Civil Services (Pension) Rules, 1982 would not be possible. Said rule would show, benefit of this condonation would hardly be available since it would not be treated as part of admissible qualifying period of service.

12. Rule 48 of Maharashtra Civil Service (Pension) Rules 1982 reads as under:

" 48. Condition of interruption in service.

(1) The appointing authority may, by order, condone interruptions in the service of a Government servant :

Provided that-

(a) the interruptions have been caused by reasons beyond the control of the Government servant;

(b) the total service pensionary benefit in respect of which will be lost, is not less than five years duration, excluding one or two interruptions, if any; and

(c) the interruption including two or more interruptions if any, does not exceed one year.

Provided further that, such service of the Government Servant shall be count as qualified service for the purpose of rule 33. "

2. The period of interruption condoned under sub-rule (1) shall not count as qualifying service.

(3) In the absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the per-interruption service treated as qualifying service.

(4) Nothing in sub-rule (3) shall apply to interruption caused by resignation, dismissal or removal from service or for participation in a strike.

(5) The period of interruption referred to in sub-rule (3) shall not count as qualifying service. "

13. In the face of the eventual position that it cannot be said that there had ever been any interruption in service of the petitioner since he had been terminated from service and thereafter had been appointed as a fresh candidate, no case can be said to have been made out to sustain challenge to the validity of the circular dated 10-05-1989 and the communication/endorsement dated 05-04-2008 by Superintendent (Secondary), Salary and Provident Fund Inspection Unit, refusing to accept the proposal for condonation of break in petitioner's service, in view of rule 48 of Maharashtra Civil Service (Pension) Rules.

14. Writ petition, as such, fails and is dismissed.

15. Rule is discharged.

SANGITRAO S. PATIL,
JUDGE

SUNIL P. DESHMUKH,
JUDGE

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