

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3714 OF 2005

Kum. Kamal Ramchadra Desai
R/at : Inam Dhamani Tal. Miraj District-
Sangli. ...Petitioner

Versus

President, Rajarshi Shahu Shikshan
Sanstha & Ors. ...Respondents

**WITH
WRIT PETITION NO.3660 OF 2005**

Shri Sudhakar Bhupal Kamu
R/o. Samdoli Taluka Miraj,
District-Sangli ...Petitioner

Versus

President, Rajarshi Shahu Shikshan
Sanstha & Ors. ...Respondents

...

Mr. Umesh Mankapure for the Petitioners.
Ms Sukhman Rait i/b. Mr. S.S. Patwardhan for the Respondent
No.1.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

JUDGMENT RESERVED ON : 25th SEPTEMBER, 2017.

JUDGMENT PRONOUNCED ON: 13th OCTOBER, 2017.

JUDGMENT :-

The Petitioners herein have challenged the judgments and orders dated 31st January, 2005 whereby the Presiding Officer, School Tribunal, Kolhapur Region, Kolhapur, dismissed the Appeals filed under

Section 9 of the Maharashtra Employees of Private Schools (Conditions of Services) Regulation Act, 1977 (for short 'the MEPS Act').

2. The brief facts necessary to decide these Petitions are as under:

The Respondent No.1 is the President of an Educational Institution which runs a school under name Late B.K. Patil Madhymik Vidyalaya Inam Dhamani, Taluka-Miraj, District-Sangli. The Respondent No.2 is the Headmaster of the said School.

3. The Petitioner- Kamal Desai claims that she was appointed in the said School in August-1994, whereas the Petitioner-Sudhakar Kamu claims that he was appointed in June-1996. Both these Petitioners claim that they held requisite qualifications and that their appointments were on clear and permanent vacancies. The Petitioners have claimed that initially the school was being run on non grant basis and that they were not paid any salary. The Petitioners claimed that they were assured that they would be paid full salary after getting full grant-in-aid. The Petitioners have stated that the school started receiving 25% grant in aid in the academic year 1997-1998 and 50% grant in the academic year 1998-1999. Thereafter the School started

getting 100% grant-in-aid.

4. The Petitioners were appointed in the said School as Assistant Teachers and their services were orally terminated on 24th November, 1999.

5. The Petitioners claim that they worked continuously till 23rd November, 1999. The grievance of the Petitioners is that their services were orally terminated despite the fact that they had completed three years service on a clear permanent vacant post. The Petitioners have stated that after completing two years' probationary period their services had become permanent and having rendered uninterrupted service of three years their services could not have been terminated. The Petitioners have stated that their services were terminated with an intention of accommodating the relatives of the Managing Committee or for getting exorbitant donations. The Petitioners claimed that their oral termination was malafide and is in contradiction of the legal provisions as well as the principles of natural justice. The Petitioners therefore, challenged their termination by filing Appeals under Section 9 of the MEPS Act.

6. The Respondent Nos.1 and 2 denied that the Petitioners had served continuously for a period of two years. These Respondents claimed that the Petitioners were appointed purely on temporary basis on a fixed period. Their appointments for the academic year 1998-1999 were not approved by the Education Officer. The Respondents claim that since the Petitioners were appointed on a temporary basis, their services were terminated on expiry of the fixed period.

7. The Respondent No.3, the Education Officer, claimed that the management had not submitted the proposal of staff approval in respect of the Petitioners before getting 100% grant in aid. The Education Officer further stated that the Respondent Nos. 1 and 2 were instructed to allow the Petitioners to join the duties but despite such instructions, the Respondent Nos.1 and 2 did not permit the Petitioners to join their duties.

8. The learned Presiding Officer of School Tribunal after considering the case put forth by the respective parties and after going through the material on record, held that the Petitioners had failed to substantiate their claim that they were appointed on a clear permanent vacancies and that they had served continuously for more than two

years. It was held that appointment letters, joining reports as well as the undertakings show that the Petitioners were appointed on temporary basis for a fixed period. The learned Presiding Officer further held that the Education Officer had not approved the appointment of the Petitioners herein in the academic year 1998-1999.

9. The learned Presiding Officer further held that copy of the roster, which was relied by the Education Officer also reveals that there is backlog of one Scheduled Caste and one VJ/NT till 30.12.2004 and that the Petitioners had not brought on record any evidence to show that the Management had appointed any other teacher in general category post. In the light of the said findings, the learned Presiding Officer dismissed the appeals filed by the aforesaid Petitioners. Being aggrieved by the dismissal of their Appeals, the Petitioners have filed the present Petitions.

10. Mr. Umesh Mankapure, the learned counsel for the Petitioners has submitted that both the Petitioners were appointed on clear and permanent posts. He contends that having completed two years' continuous service, the Petitioners had attained the status of permanent teachers and their services could not have been orally

terminated. He further submitted that the Respondents had issued a certificate stating that the Petitioner-Kamla had worked continuously for three years. In view of the said certificate, the Petitioner was allowed to serve as an Examiner for SCC Board and was paid honorarium. This fact clearly indicates that the Petitioner Kamla was appointed on a permanent post. The learned counsel for the Petitioners further submitted that the Presiding Officer, School Tribunal has erred in holding that the appointment was on a temporary basis for a fixed period.

11. The learned counsel for the Petitioners has further submitted that the Respondents had failed to produce the muster roll, which would have otherwise proved that the Petitioner-Kamla was working as teacher since the year 1994. He further submits that failure to produce the muster roll, pay book, etc, despite the order of the School Tribunal warranted drawing of adverse inference. He has further submitted that the Petitioners were appointed on permanent vacancies and that the burden was on the Respondent Nos.1 and 2 to prove that the posts on which the Petitioners were appointed were reserved category posts. He has submitted that the Respondents having failed to discharge the said burden, the Tribunal could not have

held that appointments of the Petitioners were not on open and general category posts. The learned counsel for the Petitioners has relied upon the decisions of *Adarsh Education Society and Anr. Vs. The State of Maharashtra & Ors.* 2000 (2) Bom.C.R. 799; *Jagdamba Education Society Vs. Rajendra Baburao Golhar & Ors.* and *Abdul Rafique Abdul Hamid Vs. Yavatmal Islamia Anglo Urdu Education Society and Ors.*

12. Ms Sukhman Rait, the learned counsel for the Respondent Nos.1 and 2 has urged that the appointment letters amply prove that the Petitioners were appointed on temporary basis for a fixed period. She therefore, claims that the Petitioners cannot claim any right of permanency on the said posts. She has further submitted that the Petitioners were appointed on the said post only because non availability of candidates from reserved category. This was the reason the Education Officer had not approved the posts. The learned counsel for the Respondents has submitted that the appointments of the Petitioners were purely temporary and stood terminated by efflux of time. The learned counsel for the Respondents relied on the decision of *Hindustan Education Society and Anr. Vs. Sk. Kaleem Gulam Nabi and Ors.*

13. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

14. It may be mentioned that the appointments in private schools are regulated and controlled by provisions of the MEPS Act. In order to appreciate the rival submissions it would be advantageous to refer to the relevant provisions of the MEPS Act and the Rules framed thereunder.

15. Section 5 of the MEPS Act, which casts certain obligations on management as regards appointment of teachers of private schools reads thus :-

5. Certain obligations of Management of private schools:

(1) The Management shall, as soon as possible, fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy :

Provided that, unless such vacancy is to be filled in by promotion, the Management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, the Education Officer, Zilla Parishad or, as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in

other schools and in the event of such person being available, the Management shall appoint that person in such vacancy.

(2) Every person appointed to fill a permanent vacancy except Assistant Teacher (Probationary) shall be on probation for a period of two years. Subject to the provisions of sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed :

Provided that, every person appointed as Assistant Teacher (Probationary) shall be on probation for a period of three years.

(2A) Subject to the provisions of sub-sections (3) and (4), Assistant Teacher (Probationary) shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.

(3) If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice 9 or salary 10 or honorarium of one month in lieu of notice.

(4) If the services of any probationer are terminated under sub-section (3) and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purposes of sub-section (2).

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(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the

period of appointment of such person.”

16. Rule 9 which prescribes the procedure for appointment of staff reads thus :-

9. Appointment of staff-

(1) The teaching staff of the school shall be adequate having regard to the number of classes in the school and the curriculum including alternative courses provided and the optional subjects taught therein.

(2) Appointments of teaching staff (other than the Head and Assistant Head) and those of non-teaching staff in a school shall be made by the School Committee:

Provided that, appointments in leave vacancies of a short duration not exceeding three months, may be made by the Head, if so authorised by the School Committee.

(3) Unless otherwise provided in these rules for every appointment to be made in a school, for a teaching or a non-teaching post, the candidates eligible for appointment and desirous of applying for such post shall make an application in writing giving full details regarding name, address, date of birth, educational and professional qualifications, experience, etc., attaching true copies of the original certificates. It shall not be necessary for candidates other than those belonging to the various sections of backward communities for whom posts are reserved under sub-rule (7) to state their castes in their applications.

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7. The Management shall reserve 52 per cent of the total number of posts of the teaching and non-teaching staff for the persons belonging to the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes as follows, namely:-

.....

(8) For the purpose of filling up the vacancies reserved under sub-rule (7) the Management shall advertise the

vacancies in at least one newspaper having wide circulation in the region and also notify the vacancies to the Employment Exchange of the District and to the District Social Welfare Officer and to the associations or organisations of persons belonging to Backward Classes, by whatever names such associations or organisations are called and which are recognised by Government for the purposes of this sub-rule requisitioning the names of qualified personnel, if any, registered with them. If it is not possible to fill in the reserved post from amongst candidates, if any, who have applied in response to the advertisement or whose names are recommended by the Employment Exchange or the District Social Welfare Officer or such association or organisations as aforesaid or if no such names are recommended by the Employment Exchange or the District Social Welfare Officer or such associations or organisations as aforesaid within a period of one month the Management may proceed to fill up the reserved post in accordance with the provisions of sub-rule (9).

(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.

(b) In the case of a non-teaching post, if a person from the particular category of Backward Classes is not available, the Management shall make efforts with regular intervals to fill up the post within the period of five years and the post shall not be filled up during that period by appointing any other person who does not belong to the respective category of Backward Class.”

17. A plain reading of the above provisions indicates that the management is under obligation to fill in every permanent vacancy in

the private school by appointing a duly qualified person by following the procedure prescribed under Rule 9. Sub Section 2 of Section 5 provides that every person (except *Shikshan Sevak*) so appointed to fill in the permanent vacancy, shall be on probation for two years and subject to provisions of Sub Sections 3 and 4, he shall on completion of probation period of two years, be deemed to have been confirmed. Sub Section 3 empowers the management to terminate services of their Probationer during the probationary period if the work or behaviour of the Probationer during such period is not satisfactory. Sub Section 4 stipulates that if a Probationer whose services were terminated under Sub Section 3 is reappointed within a period of one year, then the period of probation undergone prior to termination shall be considered for terminating the required period of probation for the purpose of Sub Section 2. Sub Section 5 enables the management to fill in every temporary vacancy by appointing a duly qualified person by drawing the appointment order in the prescribed form and stating the period of appointment.

18. While considering the scope of Sub Section 2 of Section 5 of the MEPS Act the Apex Court in *Bhartiya Gramin Punarrachna Sanstha Vs. Vijay Kumar & Ors. (2002) 6 SCC 707* has observed

thus:

"A plain reading of the said provision which is subject to the provisions of sub-sections (4) and (5), would show that it applies to a person who is put on probation consequent upon his appointment in a permanent vacancy. In such a case the period of probation will be for a period of two years. Sub-section (4) refers to computation of the period of probation of a probationer who is terminated by the management during the period of probation but who has been reappointed within a period of one year. Sub-section (5) empowers the management to fill up temporary vacancy by appointing a qualified person in such a vacancy. It is thus clear that only when an employee has completed successfully the probation period of two years, sub-section (2) directs that he shall be deemed to have been confirmed."

19. ***In Abdul Rafiq Abdul Hamid Vs. Yavatmal Islamia Anglo Urdu Education Society & Ors. 2014 (3) Mah.L.J. 99*** Single Judge of this Court upon considering the decision of the Full Bench in ***Ramkrishna Chauhan [2013 (2) Mah.L.J.713*** has held thus -

17. Sub-section (1) of Section 5 does not speak to the nature of appointment to be made - whether temporary or for a fixed period or on probation or on permanent basis. It does not create an obligation to appoint a person on probation if he is appointed to fill in the permanent vacancy.

Sub-section (2) therein creates an obligation to appoint a person on probation for a period of two years in a permanent vacancy. This provision is held by the Full Bench to be enabling and it does not take away the implicit power of the Management to make appointment on temporary basis or for a fixed period even in a permanent vacancy. The Management may have several good reasons for making an

appointment on temporary basis in a permanent vacancy, including that the post is reserved for a candidate belonging to a backward class category and no suitable candidate from such category is available, or that the Management wants to have a wider choice of the candidate, which is not available. Hence, the power under sub-section (2) of Section 5 is held to be discretionary.

18. The exercise of discretion under sub-section (2) of Section 5 has to be by keeping in view the object of enactment and the exigencies of the administration. If the exercise of discretion is found to be arbitrary, unreasonable, capricious or is a colourable exercise of power to defeat the protection in service granted by the statutory provisions, then the Court is empowered even to invoke the principles of "lifting of veil" to find out the real reason of making an appointment on temporary basis, and if the action is not found to be bona fide, an appropriate direction can be issued to provide protection in service by treating the appointment on probation, even if it is shown to be on temporary basis or for a fixed period. This is the view propounded by the Full Bench, which is in conformity with the object and the provisions of the MEPS Act. The ratio of the decision of the Full Bench cannot be construed as creating absolute bar to the jurisdiction of the School Tribunal under Section 9 of the MEPS Act, to consider and decide the question as to whether in the given facts and circumstances of the case, an order of appointment on temporary basis or for a fixed period in a permanent vacancy cannot be treated as one on probation and the employee is entitled to protection in service, in a challenge to the order of termination. The question of law framed in para 2 of the judgment of the Full Bench answered in the negative in para 28 therein and the connected observations made in paras 18 and 24, therefore, need to be construed in this fashion. Any other interpretation will be contrary to the object and the purpose of the Act and the provisions of Section 5, and shall be in dilution of the ratio of the decision.

19. Section 5 of the MEPS Act makes a clear distinction between the appointment in the permanent and temporary vacancies. Sub-section (2) deals with the appointment to be made in a permanent vacancy, whereas sub-section (5) deals with the appointment to be made in a temporary vacancy. If the appointment is found to be made in a temporary vacancy, obviously the presumption would be that it is a temporary appointment or for a fixed period. But there is no presumption that every appointment in a permanent vacancy should be deemed to be on probation for a period of two years, as stipulated in sub-section (2). If the appointment is on a temporary basis or for a fixed period, then the School Tribunal shall not assume that it is an appointment on probation. This, however, does not mean that under no circumstances the appointment on temporary basis or for a fixed period can be treated as an appointment on probation as per sub-section (2) of Section 5. It will depend upon the facts and circumstances of each case. In a given case, the School Tribunal may hold that though the order of appointment shows that it is on temporary basis or for a fixed period in a permanent vacancy, it should be treated as one on probation and it cannot be held that the School Tribunal has no jurisdiction to record any such finding and to issue the consequential directions to the Management or to grant any such declaration.

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22. It is the burden of an employee to come before the School Tribunal with a definite case that he was selected and appointed to fill in the permanent vacancy and he was duly qualified for being appointed in a post in question. It is for the employee to make out a case for lifting of veil, or arbitrary, unreasonable, or capricious exercise of discretion by the employer in making an appointment on temporary basis or for a fixed period in a permanent vacancy to defeat the object and purpose of the Act, that is to provide security and stability in the employment. In such a case, the burden will shift upon the Management, which will have to point out the valid and tangible reasons to make such appointment and to justify the action by producing the

relevant material on record. If the School Tribunal is not satisfied about the genuineness and validity of such reasons and material, it will have a jurisdiction to pass all such orders as are necessary to protect and provide security and stability to the employee concerned to attain the object of enactment."

20. In the light of the aforesaid provisions and the well settled principles the question which arises for consideration is whether the appointment of the Petitioners was on permanent vacant posts.

21. It is to be noted that the Petitioner Kamla had not produced the appointment letter or any other material to prove that she was appointed as an assistant teacher in the year 1994. She had relied upon a copy of the certificate allegedly issued by the headmaster of the school certifying that the petitioner was employed in the said school as a full time teacher since the year 1994. The Presiding Officer of the School Tribunal has clearly observed that the Petitioner had not produced the original certificate and that the Head Master, who had allegedly issued the said certificate, had filed his affidavit disputing his signature on the same. Considering the fact that the petitioner was unable to prove the genuineness of the certificate, the learned Presiding Officer was perfectly justified in not relying upon the same.

22. It is to be noted that in the application dated 24.4.1997 (Exh.43) addressed to the Respondent no.1 the Petitioner had stated that she had learnt that some temporary teachers were to be appointed in the School. She had given her bio-data and expressed her willingness to work as a temporary teacher. The appointment letter dated 11th June, 1997 indicates that the Petitioner Kamla, was appointed as an Assistant Teacher on a purely temporary basis for a period of 11 months from 15.6.1997 to 15.5.1998. The joining report dated 15.6.1997 reveals that pursuant to the aforesaid appointment order the Petitioner had joined services on 15.6.1997. The Petitioner -Kamla had also given an affidavit stating that though her qualifications were M.A. B. Ed. she was willing to work in the pay scale of 1200-2040 for the year 1997-1998.

23. Resolution dated 5.6.1998 (Exhibit-38) also reveals that the Committee had approved to appoint total 8 persons including the Petitioners as Assistant Teachers on temporary basis for the academic year 1998-1999. Accordingly by appointment letter dated 14th June, 1998 she was again appointed as an Assistant Teacher on a temporary basis for the academic year 1998-1999. The said letter also states that her appointment was purely temporary and was only for the said

academic year.

24. The Petitioner cannot be considered to be a permanent teacher solely on the ground that she was allowed to be an Examiner for SSC Board examinations particularly when the aforesaid documents vis-à-vis the appointment letters clearly indicate that the appointment of Petitioner-Kamla was purely temporary for academic years viz. 1997-1998 and 1998-1999. The said appointment letters specifically mentioned that after the expiry of the above period, her services would be terminated without any notice. The aforesaid documentary evidence particularly the appointment letters clearly indicate that the appointment of the Petitioner Kamla was purely on temporary basis.

25. Similar is the case of the Petitioner -Sudhakar Kamu though he has claimed that he was in continuous service of three years, the records reveal that by application dated 30th April, 1997 the Petitioner had applied for the post of Assistant Teacher. He was issued appointment letter dated 13.6.1997 whereby he was appointed as an Assistant Teacher for 11 months from 17.6.1997 to 17.5.1998. The said appointment letter clearly states that the appointment was purely temporary for a fixed period of 11 months and that after expiry of the

said fixed period his services will be liable to be terminable without any notice. The copy of the joining report shows that the Petitioner had joined service on 17.6.1997. By another appointment order dated 14.6.1998 he was once again appointed as an Assistant Teacher for the academic year 1998-1999. This appointment was also temporary for a fixed period.

26. As stated earlier, Rule 9 (9) (a) of MEPS Rules enables the management to appoint a person temporarily on an year to year basis on a post reserved for particular category, if a candidate from that category or the other categories as specified in sub rule 7 is not available. Suffice it to say that this enabling provision does not confer any right on such person for being appointed on the reserved post. In the instant case the Respondents no.1 and 2 had claimed that the Petitioners were not appointed on permanent vacancies. The Tribunal has held that non production of muster roll is insignificant as the same would not be of any assistance in deciding whether the appointment was on permanent post or whether the appointment was temporary. The Tribunal has taken note of the fact that the Education Officer had not approved the appointment of the petitioners for the academic year 1998-99. Upon considering the Roster at Ex 39, the Tribunal has

recorded a finding that there was backlog of one SC and one VJ/NT with the respondent till 30.12.2004. The Petitioners have not specifically challenged these findings. Furthermore, the petitioners have not established that they were appointed on permanent vacancy after following the prescribed procedure. The Petitioners have also failed to establish that subsequent to their termination the Respondent had appointed any other teacher in general category. The Petitioners have thus failed to prove that their appointment was on permanent vacancies. Consequently the Petitioners cannot claim right of appointment on the said posts.

27. Now coming to the decisions relied upon by the Petitioners, it is seen that in ***Adarsh Education Society*** the Teacher was in continuous service for a period of six years without break. It was held that the fact that the services of the Teacher could not be dispensed with for a considerable long period clearly indicated that his services were not temporary. Similarly in ***Jagdamba Education Society*** despite availability of permanent vacancy, the Assistant Teacher was appointed on year to year basis and he continued to work as such for a period of six years. Under these circumstances it was held that the appointment of the said Assistant Teacher was on probation against permanent

vacancy and he could not be removed without following procedure laid down in Section 5 of the MEPS Act.

28. In the instant case, as stated earlier the appointment of the Petitioners was not on permanent vacancies. They were appointed temporarily for fixed period for two academic years. There is nothing on record to indicate that despite availability of permanent vacancies, the Respondent Nos.1 and 2 had appointed the Petitioners for a fixed period on temporary basis and had thereby turned permanent vacancies into temporary vacancies. The aforesaid judgments therefore are distinguishable and are not applicable to the facts of the present case.

29. To sum up, the Petitioners have failed to prove that they were appointed on permanent vacancies and that their termination was illegal. On the contrary the material on record indicates that the appointments of the Petitioners were temporary for a fixed period and they their services were terminated with efflux of fixed time. In the light of above, no fault can be found with the findings rendered by the Presiding Officer of the School Tribunal.

30. Under the circumstances, the Writ Petitions have no merits and are hereby dismissed.

(ANUJA PRABHUDESSAI, J.)