

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO. 2231 OF 2003

...

The General Secretary,
Bal Sanskar Kendra

....Petitioner

V/S

Shanta Anil Sutar & Anr.

....Respondents

...

Smt. Geeta P. Mulekar for the Petitioner.
Shri.S.G.Kudle for the Respondent No.1.
Shri A.R.Metkari, AGP for State.

...

CORAM : A.A. SAYED, J.**DATED : 4 MAY 2017****ORDER:**

1 The challenge in this Petition under Articles 226 and 227 of the Constitution is to the judgment and order dated 30/01/2003 passed by the School Tribunal, Pune Region, Solapur, in an Appeal filed by the Respondent No.1/original Appellant under section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (MEPS Act). By the impugned judgment and order the termination order dated 31-3-1997 issued by the Petitioner-Management to the Respondent No.1-teacher was set aside. The operative part of the impugned judgment reads as follows:

ORDER

1. Appeal allowed with costs.
2. The order of termination i.e. relieving order at the end of academic year 1996-97 dated 31/3/1997 O.No.254/96-97 issued by Secretary of the Management Respondent No.1 is hereby quashed and set aside.
3. Appellant shall be deemed to be in continuous service from the date of her first appointment order from 25 June 1992 and promotion in the B.Ed scale from 23/7/1992 till her termination vide termination order dated 31/3/1997 w.e.f. 1/05/1997 and thereafter till date of this order and thereafter till Appellant is reinstated in her service by virtue of present order.
4. The Appellant will not be entitled to backwages from date of her termination on 1/05/1997 till filing of the appeal i.e. 28/02/2000. The Appellant will be entitled for 2/3 of the backwages from 1/03/2000 till her actual reinstatement in the service by virtue of present order. The Appellant will be entitled to all the consequential benefits of service like yearly increments, pay fixation, pensionary benefits etc. from date of appointment from 25 June 1992 and even promotion w.e.f. 23/07/1992 onwards. This backwages shall be paid by management within three months from date of this judgment.
5. The Respondent 1 & 2 are directed to comply with above directions within a period of 35 days granted as per provisions of section 11(4) of M.E.P.S. Act.
6. Inform parties accordingly.”

2 The case of the Respondent No.1/original Appellant before the School Tribunal was, inter alia, as follows:

She was appointed as Assistant Teacher in the primary section of the Ashram School which is aided school of the Management by order dated 25-6-1992 against a clear and permanent vacancy. By an order dated 16-07-1992, she was promoted as Assistant teacher in B.Ed. scale with effect from 23 July 1992. After expiry of the academic year 1992-93 she was, however, relieved by an order dated 29-03-1993 with effect from 30-04-1993. Though her promotion was in place of ST candidate, her initial appointment was on clear and permanent post in the D.Ed. Scale. Hence rules of reservations are not applicable. The contention of the Management that the post is reserved for ST candidate was unfounded. She was again reappointed by an order dated 7/06/1993 for the academic year 1993-94 and in the said appointment order at the footnote it is stated that her appointment was in the place of ST candidate. By order dated 28-03-1994, she came to be relieved after office hours on 30-04-1994. Since the candidate for ST was not available, by order dated 7/06/1994 she was reappointed with effect from 14/06/1994 for the academic year 1995-96. There was no subject-wise reservation in the Ashram School, hence she was never appointed in place of reserved candidate. Since she was initially appointed against a regular and vacant

post, when she was promoted, the rules of reservations would not be applicable to her, because it is a transfer from a primary section to secondary section of the Ashram school. Thus right from 1992-93 till the academic year 1996-97 the candidate from the ST category was not available even though an attempt was made by the Petitioner/Management as alleged. She was appointed for teaching Marathi subject and an advertisement was never issued stating that the Assistant teacher for Marathi subject is to be filled in by way of appointing candidate from ST category of reservation, hence, the alleged version that her appointment continued to be in the place of ST candidate is unfounded and not supported by Roster maintained by the Management which is duly certified by the Competent Authority. She completed her probationary period satisfactorily and there was no occasion to discontinue her from service from the academic year 1997-98. She was never served with the relieving order, but the Management produced the same in Writ Petition No.1072 of 1999. She was assured that she will be permitted to work during the next academic year. However, she was not allowed to join the duty from the next academic year 1997-98 and she was kept waiting for years together. She had approached this Court by filing Writ Petition No.1072 of 1999 for regularizing her services in the light of Government Resolution dated 25-01-1990. The Writ Petition was

disposed of by directing her to approach the School Tribunal as she had an alternate remedy under section 9 of the MEPS Act. There are several judgments and Government Resolutions to the effect that if a candidate from the open category is appointed in place of reserved candidate and in the event of non-availability of such candidate, the services of the open category candidate are to be regularized, if such reserved category candidate is not made available for five academic years. As the candidate from any category of reservation was not available during the academic year 1997-98 for teaching Marathi subject, she ought to have been continued for the academic year 1997-98 and throughout and till the date the candidate from the ST category is not made available and she is entitled to continue in service as a matter of right as contemplated under section 5 of the MEPS Act. Her services cannot be dispensed with contrary to the provisions of Rule 28 of the MEPS Rules. It was expected of the Management to submit a proposal to the concerned authorities for getting the post de-reserved, since there is a provision of de-reserving the post in question in the event the same is not filled in for a considerable length of time. The theory of reservation is not supported by any roster point, as certified by the Competent Authority and her initial appointment was against the open category and moreover she came to be promoted in the B.Ed. scale, and as far as transfer is concerned, the

Rules of Reservation, if any, cannot be made applicable. She was therefore entitled to reinstatement with full backwages by setting aside the termination order.

4. The Petitioner-Management had filed Written Statement and denied the contentions of the Respondent. The case of the Petitioner-Management was, interalia, as follows:

The contention of the Respondent No.1 that her appointment was against the permanent vacancy was not true. By order dated 16-07-1992 she came to be promoted as Asst.teacher with effect from 23-07-1992 and her services continued during the academic year 1992-93 is also not true. The Respondent No.1 was appointed on 1-07-1992 on the post of reserved candidate of ST. She was appointed to this post since after giving advertisement no candidate from ST category was available, as per rules and after taking the approval of Project Officer she was appointed for one year. The Respondent No.1 was appointed by following the same procedure upto 30-4-1996. The Respondent No.1 was appointed on 1-07-1992 on purely temporary basis on the post reserved for ST candidate. She was not a permanent employee and was continued on the post reserved for ST candidate as the candidate from ST category was not available. She was appointed with the Primary

section on 1-07-1992. Thereafter, she was appointed on 16-07-1992 in the Secondary section and in the appointment order it is clearly mentioned that her appointment is from 23-07-1992. As per rules, the seniority list in the secondary school teacher is prepared and in that seniority list Mrs.Khasabade is shown as appointed from 13-07-1992 who has passed M.A.B.Ed. in Marathi subject and the Respondent No.1 is trying to take the support of temporary appointment order given to her in the primary school. The services of the Respondent No.1 against the reserved post is not for a period of five years continuously. She was terminated from her service on 30-04-1993 in the year 1992-93 and thereafter after 45 days, she was appointed on 16-06-1993 and in the year 1993-94 on 30-04-1994 her services were terminated. Thereafter, after 42 days she was appointed on 14-06-1994 in the year 1994-95 and her services were terminated on 30-04-1995. After 45 days on 16-06-1995 she was appointed and on 1-5-1996 her services were terminated in the year 1995-96. Thereafter, after 47 days she was appointed on 1-08-1996, and this way she worked only for four years with a break of 181 days during those four years. Therefore, she had not worked for five years in the post reserved for ST candidate. As per the Government Resolution dated 23-07-1991 if the candidate of the category for whom the post was reserved is not available for five years, the post can be filled

in by ST candidate by interchange. Accordingly, the Project Officer had granted approval to ST candidate Shri Ramchandra Dattu Ingale belonging to Hindu Mahar community. The said Ingale left the job for better prospects. Thereafter two more candidates Shri Survase and Shri Ratan More belonging to ST caste held the job for short duration. Thereafter, one Shri Sanjay Kharatmal belonging to ST caste was appointed and is holding the post till date with the approval of the Project Officer. In the year 1996-97 when Shri Ingale was appointed as ST candidate on the post held by the Respondent No.1, the Respondent No.1 was also given an appointment on 1-08-1996 for one year as the strength of the students was 295 and there was need of additional teacher. In the year 1997-98, since the strength of the students dropped to 232, the Respondent No.1 was terminated from services as she was junior-most teacher at that time. The Respondent No.1 had suppressed all the above facts from the Court. As per GR dated 23-07-1991, the post did not become open as it is occupied by ST candidate. Since the Respondent No.1 was appointed throughout on the post reserved for ST candidate on temporary basis and she does not belong to either SC or ST, she has no right to the post. Her last appointment was purely on temporary basis due to increase in strength of students and she was terminated as strength of the students was reduced. Respondent No.1

was asked by the General Secretary of the Petitioner-Management whether she would be ready to join a school run by the Petitioner at Lamboti, Taluka Mohol or at Boroti, Taluka: Akkalkot. However, she was not ready to leave Vairag. Presently, there is no vacancy in either of the Schools. The Petitioner-Management, therefore, prayed for dismissal of the Appeal.

5. After hearing the parties, the School Tribunal passed the impugned order as indicated in para 1 above. The School Tribunal concluded that the appointment of the Respondent No.1 was against permanent vacancy and she was entitled to reinstatement and back-wages to the extent stated in the impugned order.

6 I have heard the learned Counsel for the Petitioner Management and learned Counsel for the Respondent No.1.

7 While admitting the Petition this Court had granted stay to the impugned order to the extent of back-wages only. The Court is informed that thereafter Respondent No.1 was continued in employment and has since retired at the end of the year 2015.

8 The Respondent No.1 was initially appointed on D.Ed. scale in the Primary section by an appointment order dated 25 June 1992 in the Ashram School. The said appointment order dated 25 June 1992 stated that the appointment was purely on temporary basis with effect from 1 July 1992 till the end of the year 1992-93. Thereafter, vide order dated 16 July 1992 she was promoted as Assistant Teacher in the Secondary section on B.Ed. scale with effect from 23 July 1992. The said appointment order stated that the post was reserved for Scheduled Tribe candidate. On 7 June 1993 on her Application she was again appointed with effect from 16 June 1993 till the end of the academic year 1993-94 purely on temporary basis. The said appointment order stated that the appointment was on the post of reserved category Scheduled Tribe candidate. Similar orders were issued for the year 1994-95, 1995-96 and 1996-97 on her Applications.

9 It is not disputed before the Court that right from her initial appointment the Respondent No.1 teacher was appointed on temporary basis. The Respondent No.1 had applied for fresh appointment and the appointment orders also bear out that the Respondent No.1 was appointed on temporary basis. It is also an admitted position that the approval to the appointment of the Respondent No.1 was granted by the

Education Officer on year to year basis.

10 The primary issue which arises for consideration is whether a teacher/employee who has been appointed on temporary basis can claim protection of services, in that, whether he can claim that though he is appointed on temporary basis, his appointment is deemed to be on probation under the provisions of section 5 of the MEPS Act. This issue is considered by various judgments of the Supreme Court as well as this Court including by a Full Bench.

11 In **Hindustan Education Society and Anr. vs. Sk.Kaleem SK.Gulam Nabi and Ors.**, (1997) 5 SC 152, the Supreme Court has considered section 5 of the MEPS Act. In paragraphs 4, 5 and 6, the Supreme Court held as follows:

“4. Thus, it could be seen that the appointment of the first respondent was only a temporary appointment against a clear vacancy

5. In view of the above and the order of appointment, the appointment of the respondent was purely temporary for a limited period. Obviously, the approval given by the competent authority was for that temporary appointment. As regards permanent appointments, they are regulated by sub-sections (1) and (2) of Section 5 of the Act according to which the Management shall, as soon as possible, fill up, in the manner

prescribed, every permanent vacancy in a private school by appointment of a person duly qualified to fill in such vacancy. Every person so appointed shall be put on probation for a period of two years subject to the provisions of sub-section (4) and (5). He shall, on completion of the probation of period of two years, be confirmed.

6. Under these circumstances, the appointment of the respondent cannot be considered to be a permanent appointment. As a consequence, the direction issued by the High Court in the impugned judgment dated July 31, 1996 in writ petition No.5821/95 that he was regularly appointed is clearly illegal and cannot be sustained.”

12 In **Bharatiya Gramin Punanarrachana Sanstha vs. Vijay Kumar & Others**, (2002) 6 SCC 707, the Supreme Court while considering the provisions of section 5 of the MEPS Act held that a plain reading of section 5(2) would show that it applies to a person who is put on probation consequent upon his appointment in a permanent vacancy. The Supreme Court held that it is clear that under sub-section (2), only when an employee has completed successfully the probation period of two years, he shall be deemed to have been confirmed. The Supreme Court noted in that case that the order of appointment specifically mentioned that after expiry of the period of two years the services of the teacher would come to an end without any notice.

13 In a recent judgment in **Pragati Mahila Samaj and anr. vs. Arun s/o Laxman Zurmure and ors.**, (2016) 9 SCC 255, the Supreme Court followed the judgment in the case of **Hindustan Education Society** (supra).

14 In **Ramkrishna Chauhan vs. Seth D.M. High School**, 2013(2) MhLJ, the Full Bench of this Court has also dealt with the very issue involved in the present Petition. The Full Bench was constituted by the Hon'ble the Chief Justice upon a reference being made by a learned Single Judge in view of the divergent opinions of different Benches of this Court. The Full Bench of this Court in its judgment in paragraph 2 has reproduced the question framed by the learned Single Judge which reads as follows:

“Would it be open to the School Tribunal to hold that an employee would be deemed to be on probation within the meaning of Section 5(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 on the ground that the appointment was made in a clear and permanent vacancy, notwithstanding the fact that the letter of appointment specifically stipulated that the appointment has been made in a temporary capacity?”

The Full Bench answered the question in paragraph 28 which reads thus:

“Accordingly, we are inclined to answer the issue in the negative. We hold that it is not open to the School Tribunal to assume as of fact that the appointment made against a clear and permanent vacancy is deemed to be on probation, within the meaning of section 5(2) of the Act. The School Tribunal cannot disregard the terms and conditions of the letter of appointment, if it expressly provides that the appointment is on temporary basis, for a limited term.”

In paragraph 18, the Full Bench has observed:

18. A priori, we have no hesitation in taking the view that neither section 5(1) nor 5(2) of the Act can be construed as forbidding the Management from making an appointment on contractual or temporary basis for a limited duration against a permanent vacancy until a suitable candidate is selected. Further, there is nothing in these provisions to indicate that every appointment made by the Management, in relation to a permanent vacancy, must be deemed to have been made on probation for a period of two years. There is no such legal fiction unlike in the case of a person appointed “on probation” for a period of two years, is deemed to have been confirmed, upon completion of that period. In other words, the parties would be bound by the terms and conditions stated in the letter of appointment, as there can be no presumption of appointment having been made “on probation” unless expressly stated in the appointment letter itself.”

In arriving at its conclusion, the Full Bench observed that it was bound by the exposition of the Apex Court in the case of **Hindustan Education Society** and followed the said decision and the decision in the case of **Bharatiya Gramin Sanstha**.

15 A learned Single Judge of this Court in the case of **Mrs. Sneh Kohli vs. The Universal English Trust and others (Writ Petition No.5247 of 1998 decided on 18 October 2016), 2016 SCC OnLine Bom 8923** followed the decision of the Full Bench in **Ramkrishna Chauhan** (supra). The learned Single Judge after discussing law of precedents did not agree with the view of another learned Single Judge (Nagpur Bench) in the case of **Shamin Azad Education Society, Giroli and others vs. Presiding Officer, School Tribunal, Amravati and others, 2004 (4) Mh.L.J. 723** and in the case of **Abdul Rafique Abdul Hamid vs. Yevatmal Islamia Anglo Urdu Education Society and others, 2014 (3) Mh.L.J. 99**, wherein the learned Single Judge (Nagpur Bench) discussed what was the ratio and what was not the ratio in the judgment of the Full Bench. The learned Judge in **Sneh Kohli** held that he was bound by the judgment of the Supreme Court in **Hindustan Education Society** and the Full Bench judgment of this Court in **Ramkrishna Chavan** and not the judgment of the learned Single Judge in **Shamin Azad Education Society** and **Abdul Rafique Abdul Hamid** which took a different view. The learned Single Judge observed that unless the Supreme Court takes a different view or the Full Bench decision is overruled by the Supreme Court he is unable to take a different view in the matter. It is noticed that the judgment of the Supreme

Court in **Pragati Mahila Samaj** (supra) and the judgment of the Division Bench of this Court in **Pramod Satuppa Oulkar Vs. The Kini Karyat Shikshan Mandal and ors.** (LPA No.340 of 2007 decided on 22 August 2016), 2016 SCC OnLine Bom 9421, were not cited before the learned Single Judge which had also taken the same view.

16 In the aforementioned case of **Pramod Satuppa Oulkar**, the Division Bench of this Court, following the Full Bench in **Ramkrishan Chauhan** (supra), held in paragraph 16 as follows:

“16. The Full Bench of this Court in the case of *Ramkrishna Chauhan* (supra) has also clearly held that the terms and conditions of the letter of appointment are binding on the candidate and the Tribunal cannot presume that the appointment was made on probation. The contention of the learned counsel appearing on behalf of the appellant that section 3 read with section 5 is applicable is without any substance because the said section is in respect of appointment which is made on probation...”.

17 In light of the above discussion, the Respondent No.1 who was appointed on temporary basis from time to time cannot claim protection of her services. In the view that I have taken it is not necessary to go into the issue whether the appointment was made on a post reserved for ST candidate. The impugned order cannot be sustained and is required to be set aside. The Writ Petition is allowed and Rule made absolute in

terms of prayer clause (b) which reads as follows:

“b) The Hon'ble Court be pleased to issue a writ of certiorari or any other writ, order, direction in the nature of certiorari and quash and set aside the order passed by the School Tribunal, Solapur in Appeal No.14 of 2000 dtd. 30/1/2013.”

18 There shall be no orders as to costs.

(A.A. SAYED, J.)