

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3178 OF 2000

1. Faizul-U-Loom Primary School
Rahematnagar, Parbhani,
Tq. Parbhani, Dist. Parbhani,
(Through its Head Mistress,
Kaniz Azari Begum, age 30 years,
Occu. Service, R/o Parbhani)
2. Faizal-U-Loom Education Society,
Postman Colony, Parbhani,
Tq. Parbhani, Dist. Parbhani,
(Through its Secretary
Mohammed Sami Ullakhan,
age 36 years, Occupation :Service,
R/o Parbhani, Tq. and Dist.Parbhani. **...Petitioners.**

VERSUS

1. Nazahattunnisa Begum d/o Meheboob
Khan, Age : 40 years, occu.-Nil,
R/o Vidya Nagar, Parbhani,
Tq. And Dist. Parbhani.
2. Education Officer (Primary),
Zilla Parishad, Parbhani,
Tq. and Dist. Parbhani. **...Respondents.**

Mr.Vivek Dhage, Advocate for the petitioner
Mr. S.P.Sonpawale, AGP for respondent No.2.

CORAM : RAVINDRA V. GHUGE, J.

DATE : 07/05/2018

ORAL JUDGMENT :

1. This matter was heard on 23/03/2018 during the final hearing of old matters. By consent of the parties, the matter was posted today in a special drive for taking up old final hearing service matters.

2. The contesting respondent Nos.1 has relied upon the written notes of arguments tendered on 23.3.2018. None appeared for the contesting respondent No.1.

3. I have, therefore, heard the learned advocate for the petitioners, the learned AGP on behalf of respondent No.2- Education Officer and I have considered the written notes of arguments and submissions of respondent No.1.

4. The petitioner/Management is aggrieved by the judgment and order dated 28.06.2000 delivered by the School Tribunal, Aurangabad in Appeal No.21/1996 by which, the termination of respondent No.1/appellant by order dated 16/02/1996 was set aside and the appellant was granted reinstatement with continuity and full back wages till 24/06/1999 and 80 % back wages thereafter.

5. By the order of this Court dated 7/8/2000, status-quo was directed to be maintained. This petition was, thereafter, admitted by order dated 30/01/2001 and the ad-interim relief granted earlier was continued.

6. There is no dispute that the appellant was issued with an order of appointment dated 13/02/1994. Clause 3 of the order mentions that the appellant was appointed on probation for a period of two years. It is equally undisputed that the proposal of the appellant for seeking approval for confirmation from the Education Department, was not forwarded by the petitioner/Management.

7. The appellant has taken a ground that she was orally terminated on 16/02/1996 against which she approached the School Tribunal. Learned advocate for the Management points out the order of termination dated 16/02/1996 by which, the services of the appellant as a probationer was to be brought to an end on 18/02/1996. A remark on the copy of the termination order is said to indicate that the appellant declined to accept the termination order.

8. Learned advocate for the petitioner submits that the appellant has effectively worked from 19/02/1994 and was terminated on 18/02/1996. It is further submitted that the appellant was age barred when she was issued the order of appointment. No proposal was forwarded to the Education Department for seeking relaxation in the age. The appellant would be attaining the age of superannuation in the month of January 2019.

9. Learned advocate for the petitioner/Management relies upon the judgment delivered by this Court in the matter of ***Smt. Mangala Keshave Mule Vs. President, Manav Samaj Unnati Mandal decided on 22/07/2016*** and in particular the observations of the Honourable Apex Court in paragraph No. 11 of the Judgment delivered in the case of ***Priyadarshani Education Trust Vs. Ratis (Rafia) Bano d/o Abdul Rashid 2007 (6) All M.R.238***. It is, thus, contended that the Management is willing to pay compensation to the appellant in the form of six months salary with all allowances as per Section 11(2)(e) of the Maharashtra Employees of Private School Act (in short 'M.E.P.S. Act 1977'), in the event this Court concludes that the termination of the

respondent/appellant was unsustainable. Reliance is also placed upon the judgment of the learned Division Bench of this Court in the matter of *Chandramani Tiwari Vs. Secretary Smt. R.B.Tiwari, Sanskratik Kendra, 2008(3) Maharashtra Law Journal 274* in support of the contention that the benefit of deemed permanency is available only when the employee proves that he was selected by following the due process of law.

10. The written notes of submissions submitted by the appellant indicate that she had earlier worked as a 'Assistant Teacher' from 1983 to 1985 at Sailu, District Parbhani. Thereafter, she worked from 1985 till 18/02/1994 as a 'Assistant Teacher' in Faizul-U-Loon Primary School at Nanded. She quit her job and joined the petitioner/Management, on probation, on 19/02/1994.

11. The petitioner/Management is unable to indicate from the record that the performance of the appellant was reviewed every six months. It is also not indicated that any shortcomings in her performance as a probationer were brought to her notice and she was given an opportunity for improving her performance. The termination

order dated 16/02/1996 placed on record does not assign any specific reason or that the performance of the appellant is said to be not suitable for the organization. What is stated in the order of termination is that since the respondent would be completing two years in service on 18/02/1996, her service stands concluded after working hours on 18/02/1996, and hence, she would be relieved from service w.e.f. 18/02/1996. This cannot be countenanced.

12. Considering the facts and situation as stated above, it is apparent that though the Management appointed the appellant as a probationer and did not evaluate her performance during probation, the termination would, therefore, be rendered unsustainable. It is settled law that a Management has the right to evaluate the performance of the probationer and assess as to whether such candidate would be suitable for the organization. Without making such subjective assessment, termination made after completion of two years as a probationer, cannot be said to be permissible at the hands of the employer. The doctrine of *pleasure* cannot be invoked in such circumstances. The termination, therefore, cannot be sustained.

13. Therefore, the issue that survives is as to whether the respondent/employee would be entitled for continuity in service, back wages and other service benefits.

14. Though the appellant has contended that there was an advertisement published sometime in 1993 and she was appointed pursuant to the said advertisement, the order of appointment indicates that she had made an application on 10/06/1993. There is no documentary evidence before the Court to indicate that the said application was pursuant to an advertisement, whether any selection committee was constituted and whether the appellant was interviewed by such a validly appointed selection committee as a procedure for appointing her in employment. It, therefore, appears that after the respondent made an application directly to the Management, she has been appointed in a particular pay scale w.e.f. 14/2/1994 or the date on which, she reports for duty.

15. In the case of Chandramani Devraj Tiwari (*Supra*), this Court has concluded that the selection as a probationer must be based on a procedure of selection. In the absence of following a selection

procedure, an employee cannot be said to be legally appointed. The appeal of the appellant Chandramani (*supra*) was, therefore, rejected and the learned Division Bench concurred with the view taken by the learned Single Judge.

16. In the instant case, I am therefore, required to consider the following two aspects i.e.

(a) Whether the appellant herein was made to believe that she is being appointed on probation and had the hope of confirmation in employment ?

(b) Whether the appellant, who is out of employment from 18/02/1996 till this date, could be granted continuity in service and wages alongwith reinstatement ?

17. It is obvious that the appellant had left her earlier employment to take up an employment with this petitioner. She apparently must be under the impression that she would be regularized in employment.

18. However, the appellant has not brought any evidence before the School Tribunal or even before this Court that after she was

terminated from employment, she has made applications to other organizations for seeking an alternate employment. There is no evidence to indicate that despite her efforts, she could not secure alternate employment and therefore she would be entitled for full back wages alongwith reinstatement. She has put in two years in service as a probationer and is out of employment for more than 22 years as on date.

19. In my view, it would be appropriate to grant compensation by payment of six months salary with all allowances as applicable to the 'Assistant Teacher' under Section 11(2)(e) of M.E.PS.Act and at the same time impose costs on the petitioner for having not followed the procedure laid down in law for assessing the performance of a probationer and causing the termination of the appellant.

20. In the light of above, this petition is partly allowed. The impugned judgment of the School Tribunal dated 28/06/2000 is set aside and compensation is granted to the appellant in the following terms :

(a) As per the statement made by the

petitioner/Management, the appellant shall be paid six months salary alongwith all allowances payable to an Assistant Teacher as per the 7th Pay Commission Scale (if not applicable, as per the 6th Pay Commission recommendations) within a period of eight weeks from today, failing which, the said amount shall carry interest @ Rs. 6 % per annum from the date of the judgment of School Tribunal which is 28/06/2000.

(b) For the conduct of the Management in terminating the service of the probationer without following the due procedure of law, the petitioner shall pay an additional compensation of Rs. 1,00,000/- (Rupees One Lac only) to respondent No.1 which shall also be paid within the same duration as set out hereinabove, failing which the same amount of interest would be applicable from the date of this judgment.

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

(RAVINDRA V. GHUGE, J.)