

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4927 OF 1999

1. Uddeshwar Shikshan Prasarak Sanstha,
Savargaon, Tq. Udgir, Dist. Latur.
Through its Secretary.
2. The Head Master,
Uddeshwar Vidyalaya, Savargaon,
Tq. Udgir, Dist. Latur. ...Petitioners.

Versus

1. The State of Maharashtra.
2. Ramrao madhavrao Malkari,
Age. 30 years, Occ. Nil,
3. The Education Officer [Secondary],
Zilla Parishad, Latur.
4. Rajkumar Baburao Panchal,
Age. 30 years, Occ. Service as Laboratory Attendant
in Uddeshwar Vidyalaya, Sawargaon,
Tq. Udgir, Dist. Latur.
R/o. Sawargaon, Tq. Udgir, Dist. Latur. ...Respondents.

Advocate for Petitioner : Mr. B.L. Sagar Killarikar.
AGP for Respondent Nos. 1 & 3 : Mr. S.K. Tambe.
Advocate for Respondent No. 2 : Mr. P. G. Rodge.

(Respondent No. 4 /Intervenor brought on record as per
Court's Order dated 12/03/2010, passed in Civil Application
No. 4986/1999)

CORAM : RAVINDRA V. GHUGE, J.
Dated : 06th December, 2018

ORAL JUDGMENT :

1. The petitioner/Management is aggrieved by the judgment and order delivered by the School Tribunal dated 26/08/1999, by which the Tribunal has allowed Appeal No. 33/1997, filed by the respondent/appellant and has directed the petitioner to reinstate the original appellant in service and pay back wages with continuity of service. Consequentially, the oral termination dated 03/03/1997, has been quashed and set aside.

2. I have considered the strenuous submissions of the learned advocates for the respective sides. Learned counsel for the petitioner has relied upon the judgment of the learned Full Bench of this Court in the matter of Ramkrishna Chauhan Vs. Seth D.M. High School and others [2013 (2) Mh.L.J. 713] and the

judgment of the Hon'ble Apex Court in the matter of *Pragati Mahila Samaj and another Vs. Arun and others [AIR 2016 Supreme Court 3450]*. Learned advocate for the employee has relied upon the judgment of this Court in the matter of *National Education Society's High School and Junior College Vs. Mrs. Lulomool Monachary [(1987) 2 BCR 521]*, *Ms. Bilquis Wahab Quraishi Vs. Chikitask Samuha S.S. & L.S. Patkar College and others [95 (1) BCR 34]* and judgment of the Hon'ble Apex Court in the matter of *Shri Rabinarayan Mohapatra Vs. State of Orissa and others [AIR 1991 Supreme Court 1286]*.

3. By an order dated 14/10/1999, this Court had stayed the impugned judgment by granting interim relief to the Management and the petition was admitted. The Management was, however, directed to deposit the back wages from 03/03/1997, which is the date of termination of the respondent/appellant till 14/10/1999. An amount of Rs. 82,000/- was deposited in this Court. By order dated 29/08/2001, passed on Civil Application No. 2394/2001, this Court has allowed the appellant to withdraw the entire amount of Rs. 82,000/-. The appellant makes a statement that he has withdrawn the said amount pursuant to the said order.

4. The thrust of the petitioners submissions is that the appellant was appointed on year to year basis vide specific appointment orders beginning from 06/09/1993. All the appointment orders are placed on record. Consequentially, by virtue of the first appointment order, the appellant worked for about seven months in the academic year 1993-1994. The title of the appointment order indicates that it was issued under Rule 9 (5) read with Schedule D of the MEPS Rules, 1981 framed under the MEPS Act, 1977. The subsequent two orders dated 29/07/1994 and 26/06/1995, are also indicative that they have been issued under the said rules. In effect, the appellant worked in three academic years as a Laboratory Attendant. The approval granted by the competent education department also indicates that his temporary engagement was approved.

5. The petitioner contends that once an employee agrees to accept an appointment order, it goes without saying that the terms and conditions set out therein are acceptable to him and hence, he has taken up the said employment. He is precluded from refuting the terms and conditions after having accepted the orders and having worked in three academic years. He was intimated of his last day in employment by the third appointment order and as

such there was no termination in the eyes of law as his contractual employment came to an end by efflux of time.

6. The contention of the appellant is that he was appointed on a permanent vacant post. The earlier incumbent Mr. Manik N. Kamble, was promoted and the post of Laboratory Attendant fell vacant. The appellant was selected on the said post and was appointed by the order of the management. Since, he came from a poor and humble back ground he had no choice but to accept the appointment order. He had no bargaining power. He could neither bargain nor negotiate with the Management. Since, he was unemployed, he accepted the appointment order as it came. Had he refused to accept the order, he would have remained unemployed and somebody else would have been appointed in his place.

7. Section 5 of the MEPS Act, prescribes the manner of filling in a permanent vacancy. The deeming fiction under Sub Section 2 of Section 5 would indicate that every person who is appointed for filling up a permanent vacancy, except a Shikshan Sevak, shall be on probation for two years and upon completion of the probation period, he shall be deemed to have

been confirmed. Learned counsel for the appellant relies on this provision to contend that having worked for three academic years, he is deemed to have become permanent. Reliance is placed on the judgment in the matter of National Education (Supra) in which this Court concluded that such a person would be deemed to have been appointed on probation. Reliance is also placed on Ms. Bilquis (Supra) to support his contention. The judgment relied upon in Shri Rabinarayan (Supra) would not be any assistance to the appellant as the appointment of a teacher for 89 days followed by a break of one day and continued in employment, was the issue.

8. The learned Full Bench of this Court was constituted by the learned Chief Justice in view of a reference made by the learned Single Judge of this Court brother Justice Dr. D.Y. Chandrachud (as his Lordship then was), in view of conflicting judgments of the Single Judges of this Court. This is evident from paragraph No. 1 of the judgment delivered in Ramkrishna Chauhan (Supra) which reads as under :

“1. This Full Bench has been constituted by the learned Chief Justice in the light of reference made by the learned Single Judge of this Court Brother Justice Dr. D.

Y. Chandrachud, in Writ Petition No. 315 of 2006, on 22nd January, 2007, by a speaking order. His Lordship in the reference order has adverted to the two line of decisions of this Court and also to the decisions of the Apex Court. His Lordship, has opined that in view of the law laid down by the Apex Court, in Hindustan Education Society and ors. vs. S. K. Kaleem S. K. Gulam Nabi and ors., 1997 (3) Supreme 292 and the subsequent decisions in the case of Bhartiya Gramin P. Sanstha vs. Vijay Kumar and Co., 2003 (1) Mh.L.J. 563 = (2002) 6 SCC 707 and Kalpataru Vidya Samastha Vs. S. B. Gupta, (2005) 7 SCC 524 it may not be within the jurisdiction of the Tribunal to hold that an employee, who has been appointed on temporary basis, to be deemed to be appointed on probation, on the ground that there was a clear and permanent vacancy. Further, even the Division Bench of this Court, in the case of Venkatraman Shankar Vs. Jasbir Kaur Anand and ors., decided on 6th August, 1999 in Review Petition No. 16 of 1997, in appeal No. 273 of 1997, in Writ Petition No. 2799 of 1990 has taken the same view. On the other hand, the exposition in two decisions of learned Single Judge of this Court, in the case of Shri. Sairam Education Trust Vs. Lalsaheb More and anr., decided on 25th August, 2005 in Writ Petition No. 902 of 1993 and in the case of Shikshan Prasarak mandal vs. Presiding Officer, School Tribunal, 2005 (4) Mh.L.J. 485 = 2005 (6) BCR 311 is contrary to the principle enunciated by

the Apex Court as well as the Division Bench of this Court. In the reference order, other decisions adverted to are in the case of National Education Society's High School vs. Lulomool Monachary, decided on 27th March, 1987 in Writ Petition No. 1751 of 1986 = 1987(2) Bom.C.R. 521, Anil Vasant Chaudhari vs. People's Education Society, decided on 5th August, 1987 in Writ Petition No. 4714 of 1987, Kazi Safiruddin Muzaffaruddin vs. State of Maharashtra and ors., decided on 28th November, 2005 in Writ Petition No. 2668 of 2005, Kazi Safiruddin Muzaffaruddin vs. State of Maharashtra, decided on 18th April, 2006 in appeal No. 228 of 2006 arising out of Writ Petition No. 2268 of 2005, Siddharth Charitable Trust vs. Pandurang Maruti Dhumal, decided on 7th July, 1999 in Writ Petition No. 3488 of 1999 (This decision has been upheld by the Supreme Court in SLP (C) No.14795 of 1999 decided on 22nd November, 1999), Mathuradas Mohta College of Science, Nagpur vs. R. T. Borkar and ors., 1997(2) Mh.L.J. 790 = 1997 (1) ALL. M.R. 149, Kalpataru Vidya Samasthe (R) and ors. vs. S.B. Gupta and ors., 2005 (7) SCC 524."

9. The judgment cited by the appellant in National Education Society (Supra) was also considered by the learned Full Bench which dealt with the following issue recorded in paragraph No. 2 :

"2. Accordingly, the learned Single Judge directed the

Registry to place the papers before the learned Chief Justice, in order to constitute Larger Bench to answer the following question :

“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?”

10. By considering the provisions of the MEPS Act, the rules thereunder and the various judgments cited, the learned Full Bench concluded that unless the specific procedure laid down in law is followed, the Tribunal cannot presume that the employment of an employee should be deemed to have been made on probation. The conclusions of the learned Full Bench in Ramkrishna (Supra) in paragraph Nos. 26 to 28 read as under :

“26. However, we are bound by the exposition of the Apex Court in the case of Hindustan Education Society (supra), which had occasion to consider section 5 of the Act. In that case, the appointment of Respondent No. 1

therein was against a clear vacancy but on purely temporary basis, for a limited period of eleven months. The Court, after considering section 5(1) and (2) of the Act, opined that the said respondent cannot be treated to be appointed as a permanent employee or that he was appointed on probation. Even in the case of Bhartiya Gramin P. Sanstha (Supra), the Apex Court was dealing with person appointed for a period of two years. No doubt, in that case, the appointment was on purely temporary basis, because of non-availability of reserved candidate to fill in permanent vacancy. But, the principle restated in this decision, is that, when the appointment letter expressly states the terms and conditions, it is not open to assume that the appointment was on probation, merely because of availability of permanent vacancy. Even in the unreported decision of the Apex court in the case of Chatrapati Shivahji Shikshan Prasark Mandal (supra), the same view has been reiterated. In the case of Priyadarshini Education Trust (supra), the Division Bench of this Court has culled out the gist of the decisions on the point, in paragraph 9 thereof. Notably, the issue was directly considered by the learned Single Judge after the decision in Hindustan Education Society (supra), in the case of Pandurang Maruti Dhumal (supra). As a matter of fact, the learned Single Judge expressed his inability to take a different view because of the said decision of the Apex court. His Lordship granted leave to appeal under Article 133 read with 134A of the

Constitution of India, as prayed by the Petitioner, as the issue was recurring one and involved in large number of matters. However, due to dismissal of the SLP (Civil) No. 14795 of 1999 against the decision in Writ Petition No. 3488 of 1999 in the case of Pandurang Dhumal, vide order dated 7th July, 1999, it is clear that the Apex court did not find it necessary to examine the question any further, having been answered in the decision in Hindustan Education Society (supra).

27. *The Counsel for the Writ Petitioner, however, relied on the decisions of the learned Single Judge of this Court in the case of Enteshan Baig (supra), Shri. Sairam Education Trust (supra), Shikshan Prasarak Mandal, 2005(4) Mh.L.J. 485 (supra) and Jagdamba Education Society (supra). For the view that we have taken, we do not agree with the exposition of the learned Single Judge of this Court in the above said decisions. No doubt, attempt has been made in the case of Shikshan Prasarak Mandal (supra) to distinguish the Judgment of the Apex Court in the case of Hindustan Education Society (supra). Further, the reason to distinguish the decision of the Apex Court decision in the case of Hindustan Education Society (supra), will be of no avail. That reason cannot be the basis to discard the exposition, in particular, in Paragraphs 5 and 6 of Hindustan Education Society (supra). Because, it clearly proceeds on the admitted position that the appointment order of*

Respondent No. 1 indicated that the appointment was on purely temporary basis, against a clear vacancy. Counsel for the Writ Petitioner, however, was at pains to persuade us to take a view that the expression “clear vacancy” may have different connotation than the expression “permanent vacancy”. In case of permanent vacancy, the manner of appointment can be only on probation. However, we are not impressed with this logic.

28. 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.”

11. I find from the record, contrary to the submissions of the appellant, that this Management had not followed the procedure laid down in law for making a selection of a candidate, when the appellant was appointed. He contended that the procedure was followed. There is, however, nothing on record to indicate that the permission of the Education Department was taken for filling

in the vacancy. There was no advertisement published and it does not appear that a selection process was followed by which certain candidates competed with each other. It, however, cannot be ignored that this Management on account of its internal rift, did not choose to oppose the appeal by filing a written statement. However, a person claiming to be a Secretary filed his say and supported the case of the appellant.

12. The Hon'ble Apex Court in the matter of Pragati Mahila Samaj (Supra) dealt with a somewhat similar issue and concluded that if the procedure for selection and appointment laid down under Section 5 (1 and 2) of the MEPS Act, was not followed, the service of a candidate appointed for a fixed period would conclude after the said tenure expires.

13. As such, the conclusions arrived at by the School Tribunal vide the impugned judgment dated 26/08/1999, cannot be sustained in view of the judgment delivered by the learned Full Bench and the Hon'ble Apex Court in the above cited cases.

14. This case can however be looked at from yet another angle considering the submissions of the appellant that he was

dependent upon this appointment, had a legitimate expectation that he would be confirmed in service and as such, he litigated with the Management and succeeded before the School Tribunal. It was on account of the admission order passed by this Court that the judgment of the Tribunal was stayed and he suffered unemployment for the last 21 years.

15. The MEPS Act, specifically makes a provision for considering a case wherein reinstatement may not be possible and therefore, the said employee could be granted compensation.

Section 11 (2) is reproduced as under :

“2. Where the Tribunal, after giving reasonable opportunity to both parties of being heard, decides in any appeal that the order of dismissal, removal, otherwise termination of service or reduction in rank was in contravention of any law (including any rules made under this Act), contract or conditions of service for the time being in force or was otherwise illegal or improper, the Tribunal may set aside the order of the Management, partially or wholly, and direct the Management,-

(a) to reinstate the employee on the same post or on a lower post as it may specify;

(b) to restore the employee to the rank which he held

before reduction or to any lower rank as it may specify;

(c) to give arrears of emoluments to the employee for such period as it may specify;

(d) to award such lesser punishment as it may specify in lieu of dismissal, removal, otherwise termination of service or reduction in rank, as the case may be;

(e) where it is decided not to reinstate the employee or in any other appropriate case, [to give to the employee twelve months' salary (pay and allowances, if any) if he has been in the services of the school for ten years or more and six months salary (pay and allowances, if any) if he has been in service of the school for less than ten year], by way or compensation, regard being had to loss of employment and possibility of getting or not getting suitable employment thereunder, as it may specify; or

(f) to give such other relief to the employee and to observe such other conditions as it may specify, having regard to the circumstances of the case."

16. It would be noteworthy that the Management could have followed the procedure of recruitment and appointment under Section 5. The contention of the appellant is that Shri Manik Kamble, was promoted as he was a permanent employee and was

eligible for promotion. This would indicate that the position of Laboratory Attendant which he had occupied, fell vacant. The appellant contends that he was appointed in place of Mr. Kamble. No stand was taken by the Management before the Tribunal to deny this aspect. If Mr. Kamble, was occupying the permanent position of Lab Attendant and was promoted, an inference can be drawn that the permanent post fell vacant.

17. There is not explanation forth coming from the Management as to what prevented it from publishing an advertisement and resorting to a regular selection process as enshrined in Section 5 of the Act. It is admitted that the Management is a grant in aid institution. The rules, therefore, strictly bind such Management. The selection of a candidate should have been in accordance with the procedure and if the appellant was a candidate who would have been selected, the Management would not have been in a position to take a stand that his appointment was on fixed term basis. The Management cannot be permitted to take advantage of its own wrong. I am of the view that Section 11 (2) (e) would permit the Tribunal or this Court to grant an appropriate relief to the appellant, if reinstatement is not possible or permissible.

18. Learned counsel for the Management sounds correct that the employee was never precluded from searching for an employment after his disengagement. If he has not made attempts for seeking employment without prejudice to his rights in the litigation, he alone could be blame.

19. In the peculiar facts as recorded above, though the appellant would not be entitled for reinstatement, I find that the manner in which the Management appointed him for three years against a position which can be inferred to be vacant, the appellant deserves the relief of payment of six months salary inclusive of pay and allowances as per his last drawn monthly salary, in lieu of reinstatement.

20. In view of the above, this petition is partly allowed. The impugned judgment of the School Tribunal dated 26/08/1999 is quashed and set aside. The appellant is deprived of the relief of reinstatement and instead is granted the relief of payment of six months salary as prescribed under Section 11 (2) (e), keeping in view that he has worked for less than ten years.

21. Learned advocate for the appellant is not aware as to what

was his last drawn monthly salary. The petitioner/Management is therefore directed to calculate his six months salary at the rate of his last drawn salary and if the amount is more than Rs. 82,000/- which the appellant has already withdrawn, the Management would make the payment of the said amount within eight weeks from today. However, if the amount is less than the amount withdrawn by the appellant from this Court, the Management would not seek recovery from the said employee who has been out of employment for the last twenty years.

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

(RAVINDRA V. GHUGE, J.)