

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

LETTER PATENT APPEAL NO.183 OF 2008  
WITH CA/1664/2012 IN LPA/183/2008

- |    |                                                                         |                      |
|----|-------------------------------------------------------------------------|----------------------|
| 1. | The Secretary,<br>Bukhari Education Society,<br>Majalgaon, Dist. Beed   | <b>...APPELLANTS</b> |
| 2. | The Head Master,<br>Bukhari Education Society,<br>Majalgaon, Dist. Beed |                      |

**Versus**

- |    |                                                                                                           |                       |
|----|-----------------------------------------------------------------------------------------------------------|-----------------------|
| 1. | Smt.Shaikh Kausar Rizwana<br>D/o. Abbas Ali,<br>Age-45 years, Occu-Service,<br>R/o. Majalgaon, Dist. Beed | <b>...RESPONDENTS</b> |
| 2. | The Education Officer,<br>Zilla Parishad, Beed                                                            |                       |

Mr.S.S.Kazi, Advocate for the appellant  
Mr.V.D.Salunke, Advocate for respondent No.1

**CORAM :   SUNIL P. DESHMUKH &  
              S.M.GAVHANE,JJ.**

**DATED :    14.12.2018**

**J U D G M E N T [PER: SUNIL P. DESHMUKH, J.]**

.                   Heard learned counsel for the parties.

2.                   Undisputed factual position from the record and submissions advanced on behalf of parties appears to be respondent No.1 had joined service of appellant society in its Bukhari Education Society, Majalgaon,

Dist. Beed as an Assistant Teacher. While she had joined service, she had been SSC. She had acquired diploma in education (D.Ed.) on 16.07.1986, a qualification for appointment to said post.

3. Order dated 18.08.1988 was passed by appellants terminating services of respondent No.1 effective from 20.08.1988. Said termination had been challenged by present respondent No.1 in appeal before school tribunal. Present appellants had resisted the claim by respondent No.1 before the tribunal contending that respondent No.1 been only SSC pass and had been appointed as primary teacher on temporary basis. She had been granted leave for the period from 13.07.1987 to 25.09.1987, treating the same as leave without pay, since respondent No.1 had not furnished medical certificate. It was contended that respondent No.1 had been guilty of absence without leave. School Tribunal had rejected the appeal on 25.01.1989.

4. It had not been disputed that respondent No.1 had acquired the D.Ed. qualification on 16.07.1986 and from that day onwards, the tribunal observed, her service will have to be treated as on probation for a period of two years. It was considered by the tribunal that respondent No.1 cannot be treated as a permanent employee as she had not completed probation period of two years. The tribunal has further referred

to that respondent No.1 had been absent for more than 7 days which entails consideration of abandonment of service pursuant to Rule 16(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Rules, 1981. The tribunal, thus, considered that the termination order is not liable to be intercepted for respondent No.1 herself had abandoned the service.

5. Respondent No.1 had approached this court under writ petition bearing No.582 of 1989 and the same had been admitted.

6. Learned Hon'ble Single Judge in his decision in the writ petition dated 04.07.2008, the subject matter of challenge in present Letters Patent Appeal, had observed, it has been contended on behalf of respondent No.1 that the tribunal has recorded a finding to the effect that from the date of acquisition of D.Ed. qualification respondent No.1's services will have to be treated as on probation. In the circumstances, it had been submitted that the termination order pursuant to Rule 28(1) would be patently erroneous. It had been contended by respondent No.1 that there had been no case at all by the appellant about abandonment of service by petitioner.

7. It had been noted by Hon'ble learned Single Judge that an

affidavit had been filed on behalf of respondent No.1 about her having not been gainfully employed at any point of time.

8. Learned Hon'ble Single judge has also referred to submission on behalf of the appellants that observation of the tribunal in paragraph No.17 of its judgment, to the effect that employment of the petitioner will have to be treated as on probation is not a finding. It was sought to be contended that respondent No.1 had never been regularly appointed and respondent No.1 had not placed on record any order of appointment. The appellants had relied on decision in the case of *Priyadarshani Education Trust and others Vs Ratis (Rafia) Bano d/o. Abdul Rasheed and others 2007(6) Mh.L.J. 667*. It had been claimed in view of the decision, respondent No.1 can not claim permanency as she has not been appointed regularly. It was further submitted on behalf of the appellants that in view of the decision in the case of *Priyadarshani Education Trust* (supra) observation of the tribunal in paragraph No.17 are erroneous and illegal.

9. Learned Hon'ble Single Judge also noted that according to the appellants the education officer had rejected application by the appellants for grant of permission to suspend the petitioner. Referring to communication by the education officer dated 12.07.1988 it was

contended that record depicts abandonment of service and accordingly its cognizance has been taken by the tribunal. As such, the order by tribunal was sought to be justified.

10. Learned Hon'ble Single Judge in paragraph No.12 of judgment in the writ petition had considered the cases put up on either side and found that in the termination notice/letter it had referred to that conduct of the petitioner not being satisfactory and it had been resolved in the meeting dated 24.04.1988 to remove the petitioner from employment. The notice/letters specifically refers to Rule 28(1) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Rules, 1981 while terminating service with effect from 20.08.1988. It was thus, observed that the termination is by invoking Rule 28(1). The Hon'ble learned Single Judge has also noticed that in the termination order dated 18.08.1988 there had been no allegation of abandonment of employment by the petitioner. It was found by the learned Judge that notice/letter proceeds on assumption that respondent No.1 had been in the employment on 18.08.1988 and further had noticed that there had been no dispute about the position that respondent No.1 had been continuously in employment from 01.01.1982 and that respondent No.1 had passed D.Ed. Course on 17.06.1986. The learned Judge further found that there had been no contention raised with regard

to abandonment of employment by respondent No.1. He had reproduced the observations of the tribunal contained in paragraph No.17 of its judgment.

11. It is significant to note that learned Single Judge had found that the tribunal had not at all addressed itself on the issue of legality of order of termination dated 18.08.1988 which was assailed before it. It was further observed by him that it had been attempted to argue on behalf of the appellants that the contents of paragraph No.17 of the judgment of the tribunal are merely observation and not findings. However, that submission was not found to be in keeping with judgment by the tribunal. It was found by the learned Hon'ble Single Judge that tribunal has recorded a clear finding that from the date of acquisition of qualification, respondent No.1 will have to be treated to be on probation.

12. The Hon'ble learned Single Judge has further considered despite the pendency of the writ petition from 1989 till 2008, there had not been any effort whatsoever on behalf of the appellants to file any reply and even while an affidavit had been filed in 2003 by respondent No.1, referring to that in spite of request, copies of the appointment orders and approval had not been supplied by the appellants. It was considered by learned Hon'ble Single Judge that the appellants by their

conduct would be estopped from posing challenge to or to dispute the position emerging from observations in the decision by the tribunal. After reproducing Rule 28(3) of Maharashtra Employees of Private Schools (Conditions of Service) Regulations Act, 1977 the learned Single Judge had found that in the background of finding recorded in the paragraph No.17 by the tribunal, the termination under Rule 28 would not be legal. It was, thus, found by him that in the circumstances an attempt had been made on behalf of the appellants to resile from the situation by assailing finding recorded under paragraph No.17 by the tribunal. Learned Single Judge has then referred to a decision in the case of *Waman Deoram Sonawane Vs Shri Ganesh Mandir, Dhulia and another* (1984 Mh.L.J.791) wherein it is observed that a finding which is not subjected to challenge, it would not be permissible to agitate (make grievance) against such finding since a writ petition would not be an appeal. It had been found by learned Hon'ble Single Judge that for about 19 years no illegality had been imputed to the finding and thus has considered that those findings would hardly be amenable to disturbance.

13. The learned Single Judge further found that case about abandonment had not been raised by the appellants. The appellants had never taken such a stand.

14. Learned Hon'ble Single Judge, thus, had found that the appeal preferred challenging the order of termination passed under Rule 28(1), the tribunal could not have recorded a finding about the deemed abandonment of service and considered that the tribunal has committed grave error and illegality. Rule-28 is not applicable to the employees on probation. The tribunal has found that from July, 1986 the petitioner will have to be treated as on probation. The Hon'ble learned Single Judge then had referred the aspect of gainful employment by respondent No.1 and to the affidavit filed in 2003. The Hon'ble learned Single Judge had allowed the writ petition, setting aside the termination order directing reinstatement of respondent No.1 with 50% backwages.

15. The decision by learned Hon'ble Single Judge has been taken to letters patent appeal before division bench of this court. The division bench had admitted the appeal but had refused to grant interim relief. Subsequently, in 2012 an application for interim relief had been filed that as well had met with failure.

16. Learned counsel Mr.Kazi vehemently submits that from the situation it emerges that the appointment if at all to be considered, would not be said to be regular appointment and would be an appointment in breach of Section 5(2) of MEPS Act. This being the situation, according to

him, the direction to reinstate and to pay 50% backwages under the decision of learned Hon'ble Single Judge would be unsustainable particularly referring to the decision in *Priyadarshani's* case (supra). He further contends that even otherwise that respondent No.1 had not been able to place any appointment order on record and her appointment was on purely temporary basis. He submits that failure to resist the claim under writ petition by filing reply would not entail an order as has been passed in writ petition by learned Single Judge. Due to conduct of respondent No.1, lot of difficulties had been faced by the management and there were lot of complaints against her and she had not improved her performance. According to him, even otherwise, observations as recorded would reflect that respondent No.1 had not been attending duties and should tantamount to abandonment of service and that had been aptly considered by tribunal.

17. Learned counsel purports to refer to and rely on a decision in the case of *Narendra Keshavrao Meshram Vs Presiding Officer, School Tribunal reported in 2014(3)Mh.L.J.881* to submit that respondent No.1 cannot stake claim as a permanent employee since she had not been qualified though she had been appointed. In paragraphs No.5 of said cited judgment, it is observed thus:

"5. The undisputed factual position is that the minimum

*qualification for appointment to the post of an Assistant Teacher were graduation and training i.e. B.Ed. The petitioner was possessing the qualification of B.Com, but was not possessing the training qualification of B.Ed., when he was initially appointed by an order dated 15.07.1999 or even subsequent to it till his termination. The order of appointment was on purely temporary basis for a period of one Session from 19.07.1999 to 07.05.2000. the second order of appointment was issued on 25.06.2000, purely on temporary basis for a period of one session from 01.07.2000 to 07.05.2001. Although, there is no third order of appointment issued, it seems that the petitioner was continued in service till the issuance of an order of termination dated 09.07.2002. The School Tribunal has held that the appointment of the petitioner on both these occasions and its continuation cannot be termed as appointment and continuation on probation in terms of sub-section (2) of Section 5 of MEPS Act for the reason that the petitioner was not qualified to be appointed to the said post."*

18. Aforesaid case is distinguishable on facts. As in present case, the employee concerned in cited case had never acquired qualification till his termination.

19. Learned counsel Mr.Kazi has also refers to paragraphs No.4 and 5 of the case of *Rajasthan Adult Education Association and another Vs Kumari Ashoka Bhattacharya and another reported in AIR 1998 SC 336* . It was decided on facts observing thus:

"4. The Division Bench in appeal against the judgment of the learned single Judge did not consider the merit of the case of its own and by the impugned judgment merely observed that there was no reason to

*interfere with the judgment of the learned single Judge allowing the writ petition and setting aside the order of termination of services of the respondent.*

5. *We do not think High Court has examined the issue involved in the case in its proper perspective. The respondent was not holding any regular appointment with the appellant. She was employed for a particular project. At the most she was on probation during the period of her appointment. She was told to show improvement in her work. Not only that she was told so in writing by letter dated March 11, 1989 but the matter was discussed with her on other occasions as well. When the appellant found that the work of the respondent was not up to the mark and she was not showing any improvement during her probation period, her services were dispensed with. Her employment was purely temporary. Letter terminating her services does not cast any stigma on the respondent. Termination of her services was not by way of any punishment. It was a termination simpliciter. The appellant was within its right to terminate the temporary employment of the respondent."*

20. Thus no analogy can be drawn from said judgment, as would be applicable to the present facts and situation.

21. Learned counsel refers to paragraphs No. 9,10,11 and 12 of *Priyadarshani's* (supra) case to support submissions that appointment of respondent No.1 is not by following the process as referred to therein and that, treatment had been received by respondent therein, shall be given to the present factual position as well.

22. In the first place one will have to give regard to that, it had never been the case of the appellant that respondent No.1's appointment had not been by following proper procedure at any point of time before the tribunal. In the case of *Hindi Vidya Bhavan Vs Presiding Officer, School Tribunal, Bombay reported in 2007(6) Mh.L.J.* it has been specifically observed by the Court that while it would be imperative to adhere to the appointment procedure by the Act and Rules, yet the Management cannot take disadvantage of its own wrong to contend that no procedure was followed or no appointment letter was issued and on that ground would terminate member of staff holding required qualifications appointed on permanent post.

23. There is no dispute that the petitioner had been appointed by the Management while it needed her services and continued her employment for quite a few years. After she had acquired requisite qualifications, her services were continued for more than two years. In the process probationary period of her employment after the acquisition of qualifications had been completed and over.

24. It is not disputed that the termination order does not refer to abandonment of service at all. Even it needs to be taken into account that it is the stand of the appellant the termination of service is by following

procedure and by passing order pursuant to Rule-28(1).

***"Rule-28-Removal or Termination of Service.***

*(1) The service of a temporary employee other than on probation may be terminated by the Management at any time without assigning any reason after giving one calendar month's notice or by paying one month's salary (pay and allowances, if any) in lieu of notice.*

*In the case of an employee entitled to vacation, the notice shall not be given during the vacation or so as to cover any part of the vacation or within one month after vacation."*

25. Looking at it either way the rule in the first place as observed by the learned single judge would not be applicable to present fact situation. The respondent's services are deemed to be service on probation since the date of acquisition of qualification. Even if it is to be considered, on hypothecation, Rule 28 requires one month notice or payment of salary in lieu of period of notice. Admittedly, there is no compliance of either condition. Secondly, we may have to observe that while there is no dispute about that respondent had acquired the D.Ed. qualification on 16.07.1986 by the time the termination order had been issued, it is a period well beyond two years. In such a case, petitioner's services, having regard to provisions of law ought to have been dealt with in accordance with procedure for removal of employees who acquired deemed permanency. In the circumstance it does not appear that Letters Patent Appeal carries any force. The same is dismissed.

26. It appears that the respondent No.1 had already been

reinstated pursuant to the order of learned Single Judge. Said order had been assailed before the Supreme Court, however the payment of backwages has been stayed. Learned counsel submits that in these circumstances so far as the backwages are concerned, its implementation be stayed for. However, since it being order for payment of money, it may not be necessary to pass order of stay.

27. In view of dismissal of the LPA, the civil application does not survive and is disposed of.

**[S.M.GAVHANE,J.]**

**[SUNIL P. DESHMUKH, J.]**