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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3259 OF 2017

Irgonda Appasaheb Patil

... Petitioner

vs.

The President, Jay Shivray

... Respondents

Shikshan Prasarak Mandal & Ors.

Mr. Sanjiv G. Punalekar for the Petitioner.

Mr. Satyajeet A. Rajeshirke for Respondent nos. 1 and 2.

Ms. Vaishali Nimbalkar -AGP for Respondent no. 3

CORAM : A.K. MENON, J.

DATE : 26th MARCH, 2018

P. C.

1. By this Writ Petition the petitioner challenges the judgment dated 18th August, 2016 in appeal under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (the MEPS Act) whereby the impugned order dated 9th July, 2013 terminating the services of the petitioner was dismissed and therefore the petitioner is aggrieved.

The facts in brief are as follows :

2. Respondent no. 1 is an educational institution managed by respondent no. 2 – Trust of which respondent no. 1 is the President of the Trust and respondent no. 2 is its Head Master. Respondent no. 3 is the Education Officer and sanctioning authority in respect of the school run by respondent no. 2 – Trust. The Trust owned a school in which the petitioner was appointed apparently on a clear permanent vacancy as Assistant Teacher on probation on or about 13th June, 2005. It is

contended that the petitioner had become permanent employee on completion of two years probation period and he continued to work at the school for about 8 years thereafter continuously without a break. The petitioner contended that he worked regularly during 2012-13, teaching mathematics in class 8th to 10th. The petitioner contended that he had obtained oral permission of the school to work in a Junior College in the morning session, which he did.

3. On or about 9th July, 2013 the petitioner was not allowed to sign the muster and was told that his services were terminated. The petitioner contended that the respondent had not followed mandatory provisions of law and procedure regarding the termination of a deemed permanent employee and therefore challenged the act of termination. It is the petitioners case that his name was included in a report sent to the State Government when the Trust sought grant-in-aid and according to him, if the roster is perused, at the time of appointment of the petitioner, there were three vacant post available in the open category.

4. The impugned judgment records that the school became ineligible for receiving grant from the State and the school contended that the petitioner was not a permanent employee and that he was appointed in backward class reserved category for the year 2005-06 and not to a permanent vacant post. The school disputed that he had worked for eight years continuously and in order to fill up the backlog for backward class, though the post was approved, the petitioner did not attend school regularly or signed the muster. The school denied there was a vacant post in the open category. According to the school the petitioner was involved in subversive activity and the police used to visit the school regularly to inquire about

the petitioner and his brother after which the petitioner stopped attending school. The school contended that the petitioner had been working in other school / junior college without permission and the school had after termination of the petitioner's services appointed Mr. M. K. Satpute from the reserved category for two years on probation from 23rd July, 2013. The Tribunal found that the petitioner was not appointed in a clear and vacant post by following due process of law and that the petitioner had failed to establish that the termination of the services on 9th July, 2013 by the respondent was illegal and liable to be quashed. The appeal therefore came to be dismissed.

5. Mr Punalekar, learned counsel appearing for the petitioner submitted that the impugned order is perverse inasmuch as the petitioner had been employed in the open category and on permanent basis. He had worked for eight years continuously and the oral termination was bad in law and without any justification. According to Mr. Punalekar there was no reason to fault the petitioner's conduct and he was an efficient teacher. He submitted that the only reason why the petitioner was deprived of his post was that prior to his appointment no advertisement has been issued inviting applications and in the absence of an advertisement prior to appointment, the appointment could not be validated by any length of service. Mr. Punalekar submitted that the publication of the advertisement was not mandatory.

6. Mr. Punalekar relied upon judgment of this Court in the case of ***Jagdamba Education Society, Nagpur vs. Rajendra Baburao Golhar and Ors. [2009(2)***

Mh. L. J. 522] and submitted that in that case the Court had held that appointment made on permanent vacancies on probation was deemed to be confirmed on completion of the period of probation and that the deemed confirmation becomes effective immediately on completion of services of two years and no specific order declaring completion of probation is required. It was further held in the said judgment that after confirmation of services, the employee's services cannot be terminated without following procedure for removal of a permanent employee as per Rules.

7. In the facts of that case, the petitioner therein was appointed to the post of Assistant Teacher with effect from 28th June, 1986. At the end of the academic session 1986–87 and in the year 1987 a similar appointment order was made for the next academic year. Appointment was on a temporary post for one year and there were no disputes when the appointments were made. He completed six years of service in the school and it was found that the management had not issued any orders appointing the petitioner on probation nor did they submit any proposal for approval to the Education Officer. At the end of the six year period, when he attended school he was not allowed to resume duty and his services came to be terminated. The petitioner contended that he had been appointed following due process of law. After considering the facts, the Court held that there was no dispute that the petitioner therein was sufficiently qualified and that he had been subjected to six appointment orders between 1986–1992. Relying upon the procedure laid down for appointment of staff the Court found that employee was not liable to be treated as permanent employee and that he could not be removed without following

proper procedure laid down by the Section 5 of the MEPS Act and said that no such procedure had been followed and was illegal and liable to be set aside. The petition was therefore dismissed. Mr. Punalekar contended that the facts in the present case were very similar to that of *Jagdamba Education Society (supra)* and merely because advertisement had not been issued will not render the appointment bad. He therefore submitted that the impugned order is illegal, perverse and unjust and liable to be set aside.

8. Mr. Rajeshirke learned Advocate for the respondent supported the impugned order. According to him the failure to insert an advertisement prior to appointment of the petitioner goes to the root of the matter and the appointment must be treated to be as invalid. He submitted that in order to claim benefit of deemed permanency teacher must be duly selected and the appointment must not be for a fixed period. Appointment order must also specify that the employee is on probation and upon successful completion of probation, if all conditions as specified under section 5 of the MEPS Act are complied, he would be entitled to be treated as permanent. However, it was necessary to ensure that there was strict compliance with provisions of section 5 prior to appointment and the appointment would necessarily mean that the provision of Rule 9 of the MEPS Rules have been followed inasmuch as the persons were duly appointed in a prescribed manner. This entails invitation of the applications by publishing an advertisement that in the instant case the procedure had not been followed and therefore the appointment was found to be invalid. He relied upon the decision of *Priyadarshini Education Trust and others vs. Ratis (Rafia) Bano, 2007 (6) [2007 (6) Mh.L.J. 667]* and the

judgment of the full bench in the case of ***Tanaji Madhukar Barbade vs. State of Maharashtra and Ors. [2010 (6) Mh. L. J]*** . He therefore submitted that the impugned order does not call for any interference.

9. I have heard the learned counsel at length and having perused the record, I am of the view that the impugned order correctly holds that the publication of the advertisement was a pre-requisite and that the advertisement inviting applications for the appointment of teachers to the open category posts had not been issued prior to appointing the petitioner. It was also found that completion of eight years service could not be legalised in the absence of having followed due procedure. Furthermore, it was not clear whether permission of the respondent no. 3 had been obtained, as at the time of appointment of the petitioner the school was an unaided school. The MEPS Act does not differentiate between aided and unaided school as far as procedure to be followed prior to selection of a candidate. The judgment in the case of ***Arun Baban Nangare vs. Presiding Officer School Tribunal in Writ Petition No. 2307 of 2012*** was adverted to. When that petition was decided, along with a group of petitions, a single Judge of this Court has held that the issuance of advertisement should be preceded by permission of the Education Officer. In the instant case what is material is that the advertisement was not issued at all.

10. In the case of ***Tanaji Madhukar Barbade (supra)*** the full bench of this Court has held in terms that sub-rule (3) of Rule 9 of the MEPS Rules requires candidates seeking a teaching or non teaching posts provide all particulars of their

name, qualification, experience, etc. and attach true copies of certificates. The Rule gives right to every candidate to apply for vacancy in a private school and in order to make it meaningful. The management is duty bound to give wide publicity that there is vacancy in the school so that all eligible candidates could apply and without such publicity the right created by sub rule (3) of Rule (9) of the MEPS Act would be meaningless. It was held therefore that the management was under obligation to advertise the same. In my view the appointment in the present case being without issuing an advertisement could not have been said to be validly made. In the circumstances, fails the test of due procedure being followed. Appointments made without following due process would also entail violation of Article 14, given the fact that the fundamental requirement of law would have been overlooked by making a direct appointment.

11. In the circumstances I do not agree with the view of the petitioner that Rule 9 is only a procedural and that the advertisement was not necessary. Pursuant to sub rule (3) of Rule 9 not to publish an advertisement would entail denial of opportunity to all persons seeking employment and as held in *Priyadarshini Education Trust and Ors (supra)* would promote nepotism and must be held to be invalid. In the circumstances, I find nothing perverse in the impugned order and the petition fails. Accordingly, I pass following order :

- (i) Writ Petition is dismissed.
- (ii) No order as to costs.

(A.K. MENON, J.)