

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

LETTERS PATENT APPEAL NO. 356 OF 2011
IN
WRIT PETITION NO. 1020 OF 2002

Bhairavnath Shikshan Mandal & Anr. .. Appellants

Versus

Raju Haribhau Thombe .. Respondent

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- Mr. Narendra V. Bandiwadekar for the Appellants
- Mr. Dilip Bodake for the Respondent

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CORAM : AKIL KURESHI &
S.J. KATHAWALLA, JJ.

Reserved on : AUGUST 22, 2019.
Pronounced on : AUGUST 27, 2019.

JUDGMENT (Per Akil Kureshi, J.)

1. This Letters Patent Appeal ('**LPA**' for short) is filed to challenge the judgment of the learned single Judge dated 12.2.2009 passed in Writ Petition No. 1020 of 2002.

2. Brief facts are as under:-

Appellant No. 1 is a trust under which one

Bhairavnath Secondary School is functioning. Appellant No. 2 is its headmaster. The respondent herein was employed as a teacher in the said school. The teacher had approached the School Tribunal, Pune ("**Tribunal**" for short) challenging his termination dated 30.3.1996 by filing appeal under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977. He pointed out that he was appointed as a drawing teacher on 24.6.1995. He was teaching in Class V to VII. He had necessary qualifications. He belongs to Scheduled Caste category. He was illegally terminated by order dated 30.3.1996. The case of the school management was that the vacancy was reserved for Scheduled Tribe candidate and because of non-availability of the candidate, he was appointed on purely temporary period for one year.

3. The Tribunal, by its judgment dated 4.1.2002 allowed the appeal of the teacher. The termination was set aside. The employer was directed to reinstate the teacher in service with full back wages. The Tribunal held that as per the rules, if a candidate belonging to the reserved category

for which the vacancy is earmarked is not available, the post should be filled up by selecting the candidate from other reserved category. Only if no person from any of the reserved categories is available, the post can be filled up by an open category candidate and only in such a case, the post should be filled on temporary basis. The Tribunal held that the teacher belonged to scheduled caste category. Candidate belonging to scheduled tribe category for which the post was reserved was not available. His appointment, therefore, should have been made on permanent basis.

4. The school management challenged this judgment of the Tribunal by filing Writ Petition before this Court. Learned Single Judge by the impugned judgment dated 12.2.2009 dismissed the petition. Learned Single Judge confirmed the view of the Tribunal that as per the rules, the vacancy is reserved for particular reserved class candidate and the candidate belonging to such category is not available, then the candidate belonging to other reserved category can be appointed on regular basis. Temporary appointment can be made only if for non-availability of

candidate belonging to any of the reserved categories, such post is required to be filled up by general category candidate.

5. We have heard learned counsel for the parties. To judge the correctness of the judgment of the learned Single Judge, we need to refer to sub-rule (9)(a) of Rule 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 ("**Rules**" for short). Relevant portion of the said Rule reads as under:-

"9. Appointment of staff

(1)

(2)

(3)

(4)

(5)

(6)

(7)

(8)

(9) (a) In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in order specified in sub-rule (7) and if no person from any of the categories is available, the post may be filled in temporarily on an year to year basis by a candidate not belonging to the Backward Classes."

6. We may also refer to Rule 7 of the Rules which reads as under:-

"The Management shall reserve 34 percent of the total number of posts of the teaching as well as non-teaching staff for the members of the Scheduled Castes, Scheduled Castes converts to Buddhism, Scheduled Tribes, Denotified tribes, Nomadic Tribes and other Backward Classes as follows, namely:-

- | | | |
|-----|--|------|
| (a) | Scheduled Castes and Scheduled
Castes converts to Buddhism | 13% |
| (b) | Scheduled Tribes including those
living outside the specified areas | 7% |
| (c) | Denotified Tribes and Nomadic Tribes | 4% |
| (d) | Other Backward Classes | 10%" |

As per Rule 7, thus, the management has to reserve 34% of the total number of posts for teaching as well as non-teaching staff for appointment of members of various reserved category candidates such as Scheduled Castes, Scheduled Tribes, Denotified Tribes and Nomadic Tribes and other backward classes in specified proportion. Sub-rule (9) of Rule 9 provides that in case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other

remaining categories in the order specified in sub-rule (7). If no person from any of the categories is available, the post may be filled in temporarily on an year to year basis by a candidate not belonging to the Backward Classes.

7. This rule thus clearly permits switching of the post reserved for one reserved category of candidate to another if the category for which the post is reserved is not available. Such appointment after switching of the category would also be on a permanent basis. Only if no candidate belonging to any of the reserved categories is available, the post would be filled up from a general category candidate and in which case, the appointment would be temporary on year to year basis. In the present case, the candidate belonged to Scheduled Caste category was appointed on the post reserved for Scheduled Tribes category since the candidate belonging to such category was not available. Therefore, as correctly held by the Tribunal as well as the Single Judge that such appointment was on permanent basis and not on temporary basis. We, therefore, do not find any error in the view of the Tribunal as well as Single Judge in setting aside

the order of termination.

8. Learned counsel for the School Management submitted that the teacher has already been reinstated pursuant to such orders and continues to be in service presently. He submitted that in any case, the direction for payment of back wages should be set aside. This contention is opposed by the learned counsel for the teacher.

9. Record would suggest that the appeal filed by the teacher was somewhat belated and was entertained after condoning delay. Further, there is no justification for awarding 100% back wages for the entire past period. The teacher who was qualified arts teacher could have looked for gainful employment in the meantime. Increasingly, the trend of the Courts is not to grant 100% back wages automatically upon setting aside the order of termination. In the result, we dispose of this LPA with following directions:

- (i) The direction for setting aside the order of termination and consequential reinstatement with continuity in service is confirmed.

- (ii) He would be entitled to 50% back wages for the intervening period.
- (iii) Entire period would however be counted as continuous for all other purposes such as pay fixation and qualifying service for pension.

[S.J. KATHAWALLA, J.]

[AKIL KURESHI, J]