

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3385 OF 2015

Bhagyashri Shrikrishna Chandratre

.. Petitioner

Vs.

The Secretary

.. Respondents

Gokhale Education Society and Ors.

Mr. Anant Vadgaonkar a/w. Mr. Amey Deshpande for the Petitioner.

Mr. Vishwanath Suresh Talkute for Respondent nos. 1 and 2.

Ms. M. S. Bane, AGP –Respondent no. 3.

Mr. Samarth Raju Moray for Respondent nos. 4 and 5.

CORAM : A.K. MENON, J.

DATED : 13th FEBRUARY, 2019.

P.C. :

1. This writ petition challenges an order dated 26th August, 2014 passed by the School Tribunal, Nashik in Appeal no. 46 of 2012.

The facts in brief are as follows

2. Respondent no. 1 is a private institution which runs respondent no. 2 Junior college. Respondent no. 3 is the Deputy Director of Education, Respondent nos. 4 and 5 are teachers who are presently working in the respondent no. 2- Junior college managed by respondent no. 1. The case of the petitioner is that she was appointed as teacher in Marathi subject in the

year 2008. The first appointment letter is dated 30th July, 2008 by which she was appointed for the period 1st August, 2008 to 30th April, 2009. On expiry of that period she was once again appointed vide appointment letter dated 29th June, 2009 with effect from 1st July, 2009 to 30th April, 2010 as part time teacher vide letter dated 12th July, 2010. She was appointed as full time Shikshan Sevak from 13th July, 2010 for academic year 2010-11. Once again vide letter dated 30th August, 2011 she was appointed from 2nd September, 2011 till 30th April, 2012 on contractual basis as part-time teacher.

3. The grievance of the petitioner is that this arrangement is not renewed inasmuch as on 30th March, 2012 during the currency of her employment in the academic year 2011-12 her services were terminated with effect from 30th April, 2012 which was the last working day of that academic year. It is the contention of the petitioner that having worked for four academic years she was bound to be considered as a permanent employee and her services could not have been terminated in the manner sought to be done. She therefore filed an appeal with the School Tribunal, Nashik which came to be heard and decided on 26th August, 2014.

4. Mr. Vadgaonkar, the learned counsel for the petitioner contended that the impugned order overlooks the fact that the petitioner has worked continuously for a period of four years and she was deemed to be permanent

employee. Learned counsel for the petitioner has invited my attention to the observation in the impugned order, in respect of issue nos. 1 and 2 where the tribunal held against the petitioner and found that the petitioner was not entitled to relief on the basis that she was not appointed on clear and permanent vacant post. The impugned order in paragraph 35 and 36 concludes that the petitioner failed to establish that there was clear and permanent vacancy in the first place for teaching Marathi. It was held that advertisements had been issued from time to time for appointments purely on temporary basis and there is no question of clear and vacant post and therefore petitioner was not appointed on a permanent basis.

5. In the course of submissions today Mr. Vadgaonkar learned counsel for the petitioner invited my attention to the advertisements issued from 7th May, 2008, 17th June, 2009, 3rd June, 2010 and 25th May, 2011 as also 23rd June, 2012 copies of which have been filed along with a compilation of documents. All advertisements being similar, they have invited applications for the posts mentioned as full time posts with specifically mentioning of part time /full time posts. What is material to note is that the tribunal had recorded that the petitioner had failed to produce any document that the first appointment in 2008 was against clear and permanent vacancy. These advertisements all specify that the post as being advertised were on a temporary basis and on contract basis (*emphasis supplied*). The advertisements therefore will not come to the assistance of the petitioner.

6. My attention was invited to the advertisement dated 30th April, 2014 and initially it was submitted that pursuant to this advertisement respondent nos. 4 and 5 were appointed to these posts for the same subject for which the petitioner was working. This impression was short lived because the record indicates that the respondent nos. 4 and 5 were appointed immediately after the petitioner's contract employment ended. The petitioner's submission overlooks the fact that in respect of advertisements for the academic year 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17 there were no permanent vacancies. In my view in the absence of a permanent vacancy there was no question of appointment by fresh advertisements 2014 and onwards. The number of teachers engaged apparently varied with the requirements from time to time depending on the students strength.

7. The impugned order has dealt with the facts of the case as contended in the appeal and considered the relevant submissions, findings of fact and cannot now be assailed in this Writ Petition. Mr. Vadgaonkar also relied upon judgment of this Court in Writ Petition No. 115 of 1998 in which the Court after having considered the facts of that case observed in paragraph 16 and 17 that breaks in service were artificial due to summer vacations. In that case the petitioner was appointing on probation for three years. The facts being completely different, the judgment is of no assistance to the petitioner.

8. Apropos the order in Writ Petition No. 67 of 1994 Mr. Vadgaonkar relied upon the observation in para 10 to the effect that in that case the teacher concerned was deemed to be in service even during summer vacation because salary of the said teacher had been paid. In facts at hand the petitioner had not been paid salary during the vacations. The appointments though repetitive and similar except for the change from part-time to full-time, were all contractual for fixed terms and not on probation.

9. Mr. Talkute learned counsel for the respondent relied upon a full bench decision of this Court in the case of *Ramkrishna Chauhan vs. Seth D. M. High School and Ors.* [2013 (2) Mh. L.J.] and the decision of the single Judge in *Satmala Banjara Shikshan Sanstha and Ors. vs. Prithviraj and Ors*[WP/4789/2015].

10. In *Ramkrishna Chauhan (supra)* the full bench observed that the power of the management to make a contractual appointment is not taken away by virtue of section 5(2) of the MEPS Act and that it is not open for the School Tribunal to assume that an appointment made against a clear and permanent vacancy is deemed to be on probation within the meaning of section 5(2) of the Act. Specific reference was made to the effect of section 5(2). Paragraph 15 of the judgment which reiterated that the provision is only enabling provisions requiring the management to fill a permanent vacancy by a person qualified on probation for two years. That section 5(2)

cannot be construed as a deeming provision or a legal fiction to treat every appointment made against a permanent vacancy must be on probation. That the deeming provision or legal fiction only applies to person referred to in second portion of sub-section (2) of Section 5 that to a person who has been appointed on probation and completes the probation period of two years. Such a person is deemed to have been confirmed and that the second part of the sub-section (2) cannot be taken advantage of by person who is appointed on temporary basis for limited period. In the present case it is not in dispute that the petitioner was not appointed on probation and hence cannot take advantage of her having continued in that post of Shikshan Sevak for a subsequent period some time. For ease of reference section 5(2) of the MEPS Act is reproduced :

5 (2) Every person appointed to fill a permanent vacancy [except[Assistant Teacher (probationary)] shall be on probation for a period of two years. Subject to the provisions of sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed :

[Provided that, every person appointed as [Assistant Teacher (Probationary)] shall be on probation for a period of three years]

12. In *Satmala Banjara Shikshan Sanstha (supra)* the Court considered the case of the petitioner who was appointed temporary for

two academic years and whether such an appointment could be considered to be on probation. It has also considered the issue whether the petitioner could be presumed to be appointed on probation as a person in non-teaching category and whether he could be given benefit of section 5(2) of the MEPS Act and deemed to be confirmed in employment. The Court found that the employee in question had signed muster roll for limited period indicating that he was appointed on temporary basis. In the case of one of the respondents he had worked for three years and claimed that he was deemed to be confirmed. He also contended that he was replaced by another teacher and that he deserved to be reinstated in service. However the Court found that the respondents were appointed contractually or for temporary periods and could not be deemed to have been appointed on probation. Section 5(2) was therefore not applicable.

13. In the facts of the case at hand separate letters of appointment for each academic year were issued. The fact that the letters will not provide for appointment on probation is evident. Furthermore for the academic year 2010-11 she was appointed as full-time teacher. Thus it is evident that even that appointment was not on probation. On facts therefore I am unable to find any infirmity in the impugned order

14. In my view the order of the tribunal cannot be faulted on the grounds raised. The impugned order calls for no interference. This challenge fails. I pass the following order :

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

(A.K. MENON,J.)