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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1018 OF 2012**

Usha Ashok Kare	..Petitioner
Vs.	
Education Inspector, Greater Bombay (South Division) & ors.	..Respondents

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Mr. Mihir Desai, Senior Counsel I/b. Mr. Jadhav Swaraj Sanjay
for petitioner.
Mr. Himanshu Takke, AGP for respondent Nos.1, 3 & 4.
Mr. V.S. Talkute for respondent No.2.

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**CORAM : S.C. DHARMADHIKARI &
M.S. KARNIK, JJ.**

**RESERVED ON : 28th JANUARY, 2019
PRONOUNCED ON : 13th FEBRUARY, 2019**

JUDGMENT (PER M.S.KARNIK, J.):

Rule. The respondents waive service. By consent,
Rule is made returnable forthwith.

2. The jurisdiction of this Court is invoked under Article 226 of the Constitution of India, to challenge the order dated 12th January, 2012, issued by the respondent No. 1 – Education Inspector, Greater Bombay (South Division), holding that the

petitioner cannot be absorbed in any other aided school.

3. The facts of the case in brief are thus :-

The petitioner was appointed as a part time permanent librarian in Sheth D.G.T. High School, Girgaon, run by respondent No.2 – Gokhale Education Society. The petitioner having acquired the qualifications as S.S.C. and Library Training, was qualified to be appointed as a part time Librarian in the school run by respondent No.2 – Society. The petitioner was appointed on 1/7/1998 in accordance with the procedure prescribed and her appointment was approved vide approval letter dated 15/4/1999 and 18/11/2000. It is the petitioner's case that in accordance with the accepted recommendations of the Chiplunkar Committee, in schools where there are more than 500 students, an additional post of part time librarian was to be sanctioned. As the strength of the students in 1998 was more than 500, the petitioner was appointed as a part time librarian on a sanctioned post. The petitioner was continuously in service since 1/7/1998 and has unblemished service record.

4. In the academic year 2010-2011, in view of the reduced strength of the students, the post of part time librarian was abolished and accordingly, the petitioner's services were terminated vide letter dated 11/8/2010. The petitioner by her communication dated 21/10/2010, addressed to the respondent No.4 – State of Maharashtra, pointed out that she has worked continuously as a part time librarian for a period of 12 years since the date of her appointment. She further pointed out that as per the decision of the School Tribunal in Appeal filed by one Smt. Shraddha Subhash Wani, a part time librarian, the Education Inspector absorbed Smt. Shraddha Subhash Wani in the post of Assistant Librarian in a college which had a vacancy. The petitioner pointed out that in the Mumbai Division, there are some vacant posts of part time librarian vacant where she can be absorbed.

5. By a communication dated 20th August, 2011, the respondent No.1 informed the respondent No.3 – Deputy Director of Education that though the teachers who were

terminated along with the petitioner are absorbed, however, it is not possible to absorb the petitioner as there is no provision to protect the services of a part time librarian. The petitioner by the impugned communication dated 12th January, 2012 was informed that as the school where the petitioner was working has closed down, the petitioner cannot be absorbed. It is further informed that as per the provisions of The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as 'the said Act' for short), there is no provision for protection of the services of the petitioner.

6. Learned Senior Counsel for the petitioner submits that when all other full time employees of the school which closed down are absorbed in other aided schools, singling out the petitioner for the purpose of absorption and/or not including her name in the surplus list only on the ground that there is no provision for absorption of a part time librarian is arbitrary and discriminatory. He urged that there are ample provisions in the Act and Rules which protect a part time librarian.

7. It is the submission of learned Senior Counsel that the petitioner was a part of permanent non teaching staff of the school run by respondent No.2 – Society and therefore ought to have been declared surplus and absorbed in another school. Learned Senior Counsel submits that the provisions of the said Act and the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (hereinafter referred to as 'the rules' for short) framed thereunder do not make any distinction between a full time non teaching staff or a part time non teaching staff. According to him, the petitioner was appointed in a sanctioned post of a part time librarian and when there exists provisions in the Act and the rules framed thereunder for absorption of permanent non teaching staff in other schools in the event of abolition of post on account of there being reduction of strength of students or on closing of a school, there is nothing in the Act which prohibits conferring similar benefits on part time librarians like the petitioner appointed on a permanent sanctioned post. In his submission, the reading of the relevant provisions, more particularly Sub-

section (7) of Section 2 of the Act which defines “employee”, Rule 10 and Rule 16 of the rules, make it clear that the provisions for declaring an employee surplus or entitling him for absorption applies even to part time librarians.

8. Learned Senior Counsel would submit that the sanctioned post of part time librarian is created on the basis of the number of students strength. The sanctioned post of part time librarian is therefore made available in every school which crosses the prescribed strength of the students. He would thus submit, that in the event, the post of part time librarian is abolished on account of reduction of students' strength or closing of a school, there is no reason why the benefit available to the permanent non-teaching staff on a full time basis should not be granted to a part time librarian when there is nothing in the Act or Rules to indicate otherwise.

9. Learned Senior Counsel for the petitioner placed reliance on the following decisions of this Court dealing with similar issue :-

(a) Writ Petition No. 3996/2008, The President/Secretary, Manohar Kotwal Trust vs. Smt. Vaishali Manohar Parulekar & anr., dated 18th December, 2008 ;

(b) Letters Patent Appeal No.92/2011, The Secretary, Sonupant Dandekar Shikshan Mandali & anr v/s. Madhubala Vishwanath Pune & ors. Dated 15th June, 2011;

(c) Writ Petition No.7905/2008 Shri Shaikh Barkatullah Hussein v/s. Muslim Education Committee, Sangli, dated 1st October, 2010 ;

(d) Shri Laxmi Vidya Mandal v/s. State of Maharashtra & ors. (2003 (3) ALL MR 229) dated 25th March, 2003.

10. Learned AGP appearing on behalf of the respondent No.1, on the other hand contended that there is no dispute that petitioner was working as a part time librarian on a sanctioned post. He submits that consequent to the reduction in the students' strength, the Secondary Division of the school had to be closed down. Inviting our attention to the impugned order dated 12th January, 2012, learned AGP contended that there does not exist any provision in the Act by virtue of which the

petitioner can claim protection of her services. Since the services of the petitioner are terminated as per Rule 25-A of the Rules, the question of absorbing the petitioner in any other school does not arise as she was working on a part time basis. He has also invited our attention to the affidavit-in-reply filed by Shri Bajrang Dattatraya Puri, Deputy Education Inspector, South Zone, on behalf of the respondent No.1. An objection is raised that the order of termination dated 11/8/2010 is not challenged before the School Tribunal. He urged that the only remedy against the termination order which the petitioner has is to file Appeal before the School Tribunal. In his submission, the petitioner has an alternate remedy and on this count alone the present Petition need not be entertained. In the affidavit-in-reply, it is stated that the services of teaching and non teaching staff working on full time basis have been absorbed/transferred. However, the petitioner is not entitled for absorption under the said Act and the rules as the petitioner was a part time employee.

11. Learned counsel for the respondent No.2 – Management submitted that as there exists no provision for absorbing a part time employee, and as the petitioner's services as a part time librarian are terminated under Rule 25-A the only remedy for the petitioner was to file an Appeal against the order of termination.

12. We have considered the submissions made by the learned counsel for the parties. We have gone through the Memo of the Petition and the annexures thereto. We have also gone through the affidavits-in-reply filed on behalf of the respondent Nos.1 and 2.

13. The undisputed fact is that the petitioner was appointed as a part time librarian in a sanctioned post. It is also not in dispute that on account of reduction in the students' strength, the entire Secondary Section of the school had to be closed down. It is further not in dispute that insofar as teaching and non teaching staff of the said school which closed down, the respondent No.1 directed the respondent No.2- Management to

absorb the staff in the other schools run by the respondent No.2 – Management. It is only the petitioner who could not be absorbed, as according to the respondent No.1 there exists no provision in the Act and the Rules for absorption for a part time librarian. It is the stand of the respondent No.1 that only the teaching and non teaching staff working on a full time basis are entitled for absorption under the provisions of the Act and the Rules.

14. The question that arises for consideration is whether a permanent part time librarian who was working on a sanctioned post of a part time librarian is entitled for absorption and/or for inclusion of his name in the list of surplus non teaching staff in the event the school where he was working has closed down on account of reduction of students' strength.

15. To appreciate the controversy it would be material to refer to some of the relevant provisions of the Act and the Rules. The Act of 1977 was enacted to regulate recruitment and conditions of service of employees in certain private schools. Sub-section (7) of Section 2 defines “employee” to mean any

member of the teaching and non-teaching staff of a recognized school (and includes *shikshan sevak*). The term “School” as per sub-section (24) of Section 2 means a primary school, secondary school, higher secondary school, junior college of education or any other institution by whatever name called including technical, vocational or art institution or part of any such school, college or institution, which imparts general, technical, vocational, art or, as the case may be, special education or training in any faculty or discipline or subject below the degree level. It would also be material to refer to Section 3 of the said Act, which reads thus :

Section 3. (1) the provisions of this Act shall apply to all private schools in the State of Maharashtra, whether receiving any grant-in-aid from the State Government or not.

(2) Notwithstanding anything contained in sub-section (1), the provisions of this Act shall not apply to the recruitment [of the Head of a minority school and] any other persons (not exceeding three) who are employed in such school and whose names are notified by the Management to [the Director or as the case may be,] the Deputy Director for this purpose.

16. It would thus be clear that under the Act, “employee” means any member of the teaching and non teaching staff of a

recognized school. The petitioner, a part time librarian, is obviously an “employee” within the meaning of the term. There is no dispute that the school where the petitioner was working falls within the definition of “School” as defined by sub-section (24) of Section 2. Section 3 (1) mandates that the provisions of Act shall apply to all private schools in the State of Maharashtra, whether receiving any grant-in-aid from the State Government or not. Sub-section 2 of Section 3 excludes the applicability of the provisions of the Act to recruitment of Head of a minority school and any other persons (not exceeding three) who are employed in such schools and whose names are notified by the Management to [the Director or as the case may be] the Deputy Director for this purpose. Reading of this provision would reveal that a part time librarian is not excluded from the applicability of the Act.

17. It would also be material to refer to the provisions of Section 4, more particularly sub-section (5) and (6), which read thus :

“Sub-section (5) – No employee working in a private school shall work in any coaching class. If any employee, in contravention of this provision, works in any coaching class, his services shall be liable to be terminated by the Management, provided that no such order of termination shall be issued unless the employee concerned has been given a reasonable opportunity of being heard.

Sub-section (6) - No employee of a private school shall be suspended, dismissed or removed or his services shall not be otherwise terminated or he shall not be reduced in rank by the Management, except in accordance with the provisions of this Act and the rules made in that behalf.”

18. Thus, reading of these provisions indicate that the same are applicable to all employees of the school whether working on part time or full time basis in a recognized school. As indicated earlier, there are specific provisions in the Act excluding certain categories of employees from the applicability of the Act. The plain reading of the provisions of the Act, therefore, makes it clear that a part time librarian is very much an “employee” within the meaning of the Act.

19. Let us now consider some of the relevant provisions of the Rules of 1981. The Rules of 1981 have been framed by

virtue of the powers conferred on the State Government under Section 4(1) of the said Act. Sub-section (1) of Section 4 empowers the State Government to make rules providing for the minimum qualifications for recruitment (including its procedure), duties, pay, allowances, post-retirement and other benefits, and other conditions of service of employees of private schools and for reservation of adequate number of post for members of the backward classes ;

Sub-section (2) of Section 4 provides that every employee of a private school shall be governed by such Code of Conduct as may be prescribed. On the violation of any provision of such Code of Conduct, the employee shall be liable to disciplinary action after conducting an inquiry in such manner as may be prescribed.

20. Clause (2) of Rule 2 of the said Rules provides that “words and expressions used but not defined in these rules shall have the meaning respectively assigned to them in the Act”. Rule 9 deals with “Appointment of staff”. Clause (3) of Rule 9

provides for every appointment to be made in a school, for a teaching or a non-teaching post. Rule 10 which has much bearing on the controversy reads thus :

“10. Categories of Employees.

(1) Employees shall be permanent or non-permanent. Non-permanent employees may be either temporary or on probation.

(2) A temporary employee is one who is appointed to a temporary vacancy for a fixed period.”

Thus Rule 10 categorically provides that employees shall be permanent or non permanent and that non-permanent employees may be either temporary or on probation. Clause (2) of Rule 10 mentions that a temporary employee is one who is appointed to a temporary vacancy for a fixed period.

21. The petitioner being a permanent part time librarian working in a sanctioned post therefore does not fall in Clause (2) of Rule 10. Clause (1) of Rule 10 provides that non-permanent employees may be either temporary or on probation. The petitioner being a permanent part time employee does not fall in this part of Clause (1) either.

22. Neither is the petitioner appointed for temporary vacancy for a fixed period so as to be categorized as a temporary employee. The petitioner, therefore, necessarily falls in the category of employees who are permanent. There is nothing in the provisions of the Act and the Rules which excludes the applicability of the said Act and the Rules to a part time librarian who is appointed in a permanent sanctioned post.

23. The petitioner is a part of the non-teaching staff of the respondent No.2 – School and therefore, is 'an employee' as defined by sub-section (7) of Section 2 of the said Act. The said definition of the term “employee” includes any member of a non-teaching staff which would obviously include a permanent part time librarian appointed in a sanctioned post. In respect of those employees who are excluded from the cover of the said Act are specifically mentioned in sub-section (2) of Section 3. In his capacity as a permanent part time librarian, working on a sanctioned post, the petitioner qualifies to be a permanent employee within the meaning of Rule 10.

24. The Act and the Rules also make provisions for a detailed procedure in respect of the mode of appointment and also for the purpose of disciplinary action to be taken against teaching and non-teaching staff. Based on the strength of the students, the post of part time librarian is sanctioned. A part time librarian is appointed after following the same procedure applicable to a full time librarian. Even the rules of discipline are common to permanent teaching and non-teaching staff appointed on a sanctioned post whether on full time or part time basis and the Act does not make any distinction between a full time librarian or a part time librarian in that regard.

25. It is not disputed the GR dated 30/8/1997 was issued in view of the recommendations of the report of the Chiplunkar Committee, which resulted in creation of the post of a part time librarian. The post of a part time librarian was created on the condition that the strength of the students should not be less than 500. This Court had an occasion to consider similar issue in the case of **President/Secretary, Manohar**

Kotwal Trust (*supra*). This Court was considering a case of a part time librarian whose appointment was approved but later on as a result of reduction in the students' strength which fell below 500, the post of part time librarian came to be abolished. The Management, therefore, terminated his services. This Court considered the provisions of the Rule 26 of the Rules which deals with retrenchment on account of the abolition of the post.

This Court directed the Education Officer to take steps to declare the part time librarian as surplus. We are not unmindful to the fact that though said order appears to have been passed on some concessions made by the Education Inspector, whereupon, a declaration is made to include the petitioner in the list of surplus employees.

26. Let us deal with the case of the learned Senior Counsel for the petitioner that he should have been declared as a surplus part time librarian as per Rule 26. To deal with this submission we may refer to Rule 25A and Rule 26 of the Rules

which reads thus :-

“25A. Termination of Service on account of abolition of posts.

(1) The services of permanent employee may be terminated by the Management on account of abolition of posts due to closure of the school after giving him advance intimation of three months to the effect that in the event of closure of the school, his services shall automatically stand terminated. In the case of closure of school due to de-recognition, such advance intimation of three months shall be given by the Management to the permanent employees after receipt of a show cause notice from the Deputy Director.

Explanation – For the purposes of this sub-rule, the expression 'closure of the school' shall include -

- (i) Voluntary closure by the Management of the entire school if it is imparting instruction through one medium or a part of the school comprising one or more media of instruction if it is imparting instruction more than one medium ; and
- (ii) closure of the school due to de-recognition by the Department

(2) The names of the employees in aided schools, whose services stand terminated in accordance with sub-rule (1) on account of de-recognition and who are not directly responsible for such de-recognition shall be taken on a waiting list by the Education Officer in the case of Primary and Secondary Schools or by the Deputy Director in the case of Higher Secondary Schools and Junior College of Education and same shall be recommended by him to the Managements of newly opened aided Schools or of the existing aided schools which are allowed to open additional Division or classes for consideration.]

26. Retrenchment on account of abolition of posts.

(1) a permanent employee may be retrenched from service by the Management after giving him 3 months notice, on any of the following grounds, namely -

- (i) reduction of establishment owing to reduction in the number of classes or divisions ;

(ii) fall in the number of pupils resulting in reduction of establishment ;

(iii) Change in the curriculum affecting the number of certain category of employees ;

(iv) closure of course of studies ;

(v) any other bonafide reason of similar nature.

(2) The retrenchment from service under sub-rule (1) shall be subject to the following conditions, namely :-

(i) The principle of seniority shall ordinarily be observed ;

(ii) Prior approval of the Education Officer in the case of Primary and Secondary Schools or, of the Deputy Director in the case of Higher Secondary Schools and Junior Colleges of Education shall be obtained by the Management in each case of retrenchment including such cases in which the principle of seniority is proposed to be departed from and a senior member of the staff is proposed to be retrenched when a junior member should have been retrenched, stating the special reasons therefor ;

(iii) The employees from aided schools, whose services are proposed to be retrenched shall be absorbed by the Education Officer in the case of Primary and Secondary Schools or by the Deputy Director in the case of Higher Secondary Schools and Junior Colleges of Education. The order of absorption of such employees shall be issued by registered post acknowledgment due letter and till they are absorbed the Management shall not be permitted to effect retrenchment on account of any reasons mentioned in sub-rule (1).

(3) In case any employee refused to accept the alternative employment offered to him under clause (iii) of sub-rule (2), he shall lose his claim for absorption and the Management of the school shall be allowed to retrench such employee from the services after completion of 3 months' notice period.

27. Rule 25A deals with termination of service of a

permanent employee on account of abolition of posts whereas Rule 26 deals with retrenchment of services of a permanent employee on account of abolition of posts (emphasis supplied by us). From the materials on record it will have to be determined whether the Management should have resorted to termination of services under Rule 25A or retrenchment under Rule 26. The abolition of posts by the respondent – Management is a consequence of closure of school. The closure of school includes voluntary closure by the Management of the entire school if it is imparting institution through one medium or of a part of the school consisting one or more medium. Rule 25A also contemplates de-recognition of school by the Department.

28. As narrated earlier, as a result of the reduction in the students' strength, the Secondary Division of the school had to be closed down which resulted in petitioner's services being terminated. Under Rule 26, a permanent employee may be retrenched from service by the Management after giving him 3 months notice, on any of the grounds mentioned therein which

includes reduction of establishment owing to reduction in the number of classes or divisions ; fall in the number of pupils resulting in reduction of establishment. Sub-rule (2) of Rule 26 provides for retrenchment of permanent employees from the services on the ground of fall in the number of pupils resulting in reduction of establishment. The term “establishment” is not defined either under the Act or the rules. Black's Law Dictionary defines the term “Establishment” as 1. The act of establishing ; the state or condition of being established. 2. An institution or place of business. 3. A group of people who are in power or who control or exercise great influence over something.

29. From the order of termination it appears that as a result of reduction of students' strength, the Secondary Division of the school had to be closed down. The respondent No. 2 – Educational Institution runs several schools and the secondary school which closed down was a part of its establishment. It is not in dispute that respondent No. - Management runs more than one school. In fact, clause (d) of Rule 27 provides that in

case the Management runs more than one school and in case the retrenchment is to be effected under rule 26 in any one of the schools run by it, or in case any one of its schools is required to be closed, either due to withdrawal of recognition or due to the decision of the Management to close it, while effecting retrenchment, the principle of common seniority of employees working in all the schools conducted by it shall be observed along with the other principles laid down in Section 27. A reading of these rules clearly indicates that the termination of the services of the petitioner is not covered by Section 25A. The Management is therefore not justified in resorting to Rule 25A while effecting termination of petitioner's services. It should have proceeded as per Rule 26. We however, are not inclined to declare the termination illegal as the petitioner has not resorted to the statutory remedy of filing an Appeal before the School Tribunal challenging termination of his services. Nor are we inclined to grant any back wages and even learned Senior Counsel on instructions does not press the claim of back wages and reinstatement in view of the order we propose to pass.

Having observed that the Management ought to have proceeded under Rule 26, the petitioner is entitled to get the protection provided in Rule 26 to declare him as a surplus employee.

30. In our opinion, in this case where the Management is running more than one school, the Management should have resorted to retrenchment of the petitioner under Rule 26 as admittedly the closure of Secondary Division on account of reduction in strength. In other words, closure of Secondary Division by the Management is nothing but a reduction of establishment on account of fall in students strength. Rule 25A has no application in the present facts. Hence the following order.

ORDER

(a) The petitioner is declared as a surplus part time librarian.

(b) The respondent No.1 is directed to include the petitioner's name in the list of surplus part time librarians

to be absorbed in accordance with Rule 26.

(c) The claim for reinstatement and back wages is rejected.

(d) The Petition is allowed in the above terms.

31. Rule is made partly absolute with no order as to costs.

(M.S. KARNIK, J.)

(S.C. DHARMADHIKARI, J.)