

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 3851/2019

NATIONAL URDU EDUCATION AND WELFARE SOCIETY, THROUGH ITS SECRETARY, & ANOTHER
VS.

MOHAMMAD KAFEEL ANWAR S/O ABDUL RAFIQUE & ANOTHER

Office notes Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri A.C.Dharmadhikari, Advocate for petitioners.
Shri A.J.Kadu, Advocate for respondent no.1.
Shri S.Bissa, Assistant Government Pleader for respondent no.2.

CORAM : A.S.CHANDURKAR, J.

DATED : NOVEMBER 25, 2019.

Heard the learned counsel for the parties at length.

2. The challenge raised in the present writ petition is to the judgment dated 16.04.2019 passed by the learned Presiding Officer, School Tribunal, Amravati in the appeal filed under Section 9 of the Maharashtra Employees of Private School (Conditions of Service) Regulation Act, 1977 (for short, 'the said Act') by the respondent no.1-employee challenging the order of termination dated 04.07.2017. By the impugned judgment dated 16.04.2019 that appeal has been allowed after setting aside the order of termination. Services of the respondent no.1 have been directed to be reinstated with continuity and full back-wages.

3. It is the case of the respondent no.1 that he had acquired qualifications of H.S.S.C. D.Ed. While pursuing the Bachelor of Arts course in 2011, he was appointed on the post of Assistant Teacher at the petitioner no.2-School for teaching classes 6th and 7th. Recognition was initially granted to classes 8th to 10th and the School was receiving grant-in-aid from the State

Government. Classes from standard 5th to 7th were being run on no grant basis. The initial order of appointment of the respondent no.1 was on 3.11.2011 on probation for a period of two years. Since the School was being run on no grant basis, the respondent no.1 was not paid his regular salary. In the year 2017, standards 6th and 7th were brought on 20% grant. The respondent no.1 acquired qualifications of Bachelor of Arts in 2013-14 and also completed his B.Ed. training in 2015. Pursuant to another advertisement dated 14.07.2015, the respondent no.1 made an application for appointment and by the order dated 31.07.2015 the respondent no.1 was given appointment on the post of Assistant Teacher on probation for a period of two years. His appointment was approved by the Education Officer on 31.08.2015. Despite rendering satisfactory service from 01.08.2015, the Management on 04.07.2017 proceeded to terminate his services with retrospective effect from 31.08.2015. Being aggrieved by the said order of termination, the respondent no.1 filed an appeal under Section 9 of the said Act.

4. The Management filed its written statement opposing the prayers made in the appeal. Issuance of advertisement dated 14.07.2015 was not disputed. The appointment of the respondent no.1 on 31.07.2015 was also not disputed. A stand was taken that the respondent no.1 was a temporary employee and as he remained continuously absent from 01.08.2015 without making any application for leave, it was deemed that he had abandoned his services. The order of termination was not stigmatic and therefore the respondent no.1 was not entitled for any relief whatsoever.

5. The learned Presiding Officer after considering the entire material on record held that the petitioner had been appointed by following the prescribed procedure under Section 5

of the said Act. His appointment was as a probationer and the order of termination was bad in law as it had been issued with retrospective effect and that there was no reasonable basis to terminate his services. Accordingly by the judgment dated 16.04.2019 the appeal was allowed in the manner stated hereinabove.

6. Shri A.C.Dharmadhikari, learned counsel for the petitioners submitted that the appointment of the respondent no.1 was for a temporary period of two years from 01.08.2015 to 31.07.2017. Referring to the provisions of Rule 10 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short, 'the said Rules') he submitted that the appointment of the respondent no.1 was on non permanent basis. A non permanent employee could either be appointed for a temporary period or on probation. Since the appointment of the respondent no.1 was of a temporary nature as mentioned in the order of appointment, his services were rightly terminated. Even if it is found that the appointment of the respondent no.1 was on a probation his services could also have been terminated prior to completion of period of probation. He submitted that along with the order of termination one month's salary had also been given with a view to comply with the provisions of Section 5(3) of the said Act. It was then submitted by relying upon the provisions of Rule 16(2) of the said Rules that a non permanent employee would be deemed to have abandoned his services if he failed to apply for leave within seven days from the date of his absence. As the respondent no.1 remained absent continuously from 01.08.2015, it was deemed that he had abandoned his services being a non permanent employee. There was also no reason to grant full back-wages. On these counts, it was submitted that the learned Presiding Officer erred in allowing the appeal preferred by

the respondent no.1. He therefore submitted that the impugned judgment was liable to be set aside.

7. Shri A.J.Kadu, learned counsel for the respondent no.1 supported the impugned order and submitted that it was rightly found by the learned Presiding Officer that the appointment of the respondent no.1 was after following the prescribed procedure. It was made on a clear and vacant post on probation. This was clear from the order of appointment itself. The appointment had been duly approved by the Education Officer. There was no material placed on record by the Management to indicate absence of the respondent no.1 continuously and without permission from 01.08.2015. Even under the provisions of Rule 16(2) of the said Rules, it was necessary for the Management to issue a notice to the concerned employee calling upon him to explain as to why his absence should not be treated as abandonment of services. In that regard, he referred to the decision in *Magasvargiya Shikshan Sanstha and anr. Vs. Bhausahab Sonaji Kakade and others 2016 (3) B.C.R. 533*. It was then submitted that the order of termination was clearly stigmatic in nature. It was stated therein that the respondent no.1 had remained continuously absent from 01.08.2015 without permission. Further the services of the respondent no.1 could not be terminated retrospectively as has been done by the order of termination. Even it was accepted that the appointment of the respondent no.1 had been made incorrectly, it was necessary to grant an opportunity to the respondent no.1 to put forth his explanation in that regard. The respondent no.1 having been appointed on probation, it was necessary for the Management to justify his termination prior to completion of the period of probation based on some material. There was no material on record to indicate any such unsatisfactory service by the respondent no.1. In that regard, he

referred to the decisions in *Anjuman-E-Taleem and anr. Vs. State of Maharashtra and anr. 2015(3) Mh.L.J. 98* and *Secretary, Niti Niketan Shikshan Sanstha Vs. Vaishali Ramdas Thote and anr. 2016 (3) Mh.L.J. 118*. It was thus submitted that only on the ground that the grants were now made admissible to standards 6th and 7th where the respondent no.1 was teaching, his services had been terminated. He therefore submitted that no interference with the impugned judgment was called for.

8. After hearing the learned counsel for the parties and after giving due consideration to the respective submissions, I find that the judgment passed by the learned Presiding Officer is liable to be maintained. The petitioners have admitted that the respondent no.1 was recruited pursuant to an advertisement issued on 24.07.2015. It is undisputed that the respondent no.1 was duly qualified to hold the post of Assistant Teacher. He was accordingly appointed pursuant to the resolution of the School Committee dated 31.07.2015. The order of appointment dated 01.08.2015 clearly indicates his appointment on probation. Merely because the period '31.07.2015' has been mentioned in the order, it cannot be said that the appointment of the respondent no.1 was for a temporary period. This fact is further substantiated from the order of approval dated 31.08.2015 issued by the Education Officer. It has been stated in clear terms that the appointment of the respondent no.1 was from 01.08.2015 on no grant basis for classes 6th and 7th. The learned Presiding Officer has rightly found that the stand sought to be taken by the Management that the appointment of the respondent no.1 was for a fixed period is not substantiated by even a single document.

9. Perusal of the order of termination indicates that in paragraph 2 thereof it is stated that the appointment of the respondent no.1 was on a temporary nature. He was continuously

absent from 01.08.2015 without permission and without moving any application. There is not a single document/notice issued to the respondent no.1 informing him that he was continuously absent from 01.08.2015 as alleged. It is well settled that even for applying the deeming fiction of abandonment of service under Rule 16(2) of the said Rules, it is necessary for the employer to seek an explanation from the concerned employee as to why the employer should not form an opinion that the employee has abandoned his services. Reference in that regard can be made to the decision in *Magasvargiya Shikshan Sanstha* (supra). A prudent employer would not wait for a period of two years to thereafter terminate the services of an employee on the ground that he was continuously absent for a period of almost two years. Hence that stand as taken by the Management by relying upon the provisions of Rules 16(2) of the said Rules cannot be accepted.

10. The services of the respondent no.1 have been terminated by the order dated 04.07.2017 with retrospective effect from 31.08.2015. It is well settled that the services of an employee are not liable to be terminated with retrospective effect. Reference in that regard can be usefully made to the decision in *Assaram Raibhah Dhage Vs. Executive Engineer and others, 1989 (II) C.L.R. 331* wherein the Division Bench of this Court has held that such retrospective termination of services is impermissible. The ratio of that decision has been followed in *Vaishali Ramdas Thote* (supra). Even on this count, the order of termination is unsustainable.

11. In para 3 of the order of termination, it has been stated that though it was intended to appoint the respondent no.1 on temporary basis, he was given appointment on probation due to mistake committed by the Head Master. Even this stand taken by the Management is by way of an afterthought and does not

deserve acceptance. There is no document placed on record to substantiate this stand. Moreover, the respondent no.1 was not put to notice that he had been wrongly issued the order of appointment by treating him as appointed on probation. Though the order of appointment is dated 31.07.2015, nothing was done by the Management for a period of almost two years to rectify the alleged mistake.

12. Though it was stated on behalf of the petitioners that assuming the appointment of the respondent no.1 on probation, the Management was within its rights in terminating his services prior to completion of the period of probation. Even that stand does not warrant acceptance. Under Section 5(3) of the said Act if in the opinion of the Management the work or behaviour of any probationer during the period of probation is not satisfactory, his services may be terminated at any time during that period after giving one month's notice or one month's salary. The order of termination does not indicate the same being issued by treating the appointment of the respondent no.1 as being made on probation. The petitioners having taken a stand that the respondent no.1 was continuously absent from 01.08.2015 which stand has not been substantiated, there does not remain any other reason for terminating his services. It was for the Management to justify the order of termination before the School Tribunal by placing on record some material to indicate unsatisfactory service rendered by the respondent no.1. No such material has been placed on record. Thus seen from any angle, the order of termination has been rightly found to be unsustainable.

13. It is thus found that the learned Presiding Officer did not commit any error whatsoever in setting aside the order of termination and directing reinstatement of the respondent no.1 in service with continuity and full back-wages. There is no reason to

interfere with that adjudication. The writ petition therefore stands dismissed with no orders as to costs.

The judgment of the School Tribunal be implemented after expiry of the period of six weeks from today.

JUDGE

Andurkar.