

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 98 OF 2016

Mrs. Maya Carvalho e Rodrigues,
major, married, Indian National,
resident of 1st Ward, near Church,
Santa Cruz, Ilhas, Goa.

.... Petitioner.

Versus.

1. State of Goa, through its
Chief Secretary, having Office at
Secretariat, Alto Porvorim,
Bardez, Goa.
2. The Director Higher Education,
Directorate of Higher Education,
Government of Goa,
Opp. Directorate of Education,
Directorate of Technical Education
Complex, Alto Porvorim, Bardez, Goa.
3. Goa University, through its Registrar,
having Office at Taleigao Plateau,
Bambolim, Goa.
4. Nirmala Education Society,
a Society registered under the Societies
Registration Act 1860, represented by its
Secretary, Miss Divya Rapheal,
Altinho, Panaji, Goa.
5. Nirmala Institute of Education,
represented by its Principal,

having office at Altinho,
Panaji, Goa.

6. Assistant Accounts Officer,
Government of Goa,
Directorate of Higher Education,
Opp. Directorate of Education,
Directorate of Technical Education
Complex, Alto Porvorim, Bardez, Goa. Respondents.

Mr. S. D. Lotlikar, Senior Advocate with Mr. T. Sequeira, Advocate
for the Petitioner.

Ms. Neha Kholkar, Additional Govt. for Respondents No.1, 2 and 6.

Ms. A. A. Agni, Senior Advocate with Ms. Jay Sawaikar, Advocate for
Respondent No.3.

Mr. S. G. Desai, Senior Advocate with Mr. Virendra Parsekar,
Advocate for Respondents No.4 & 5.

***Coram : M.S. Sonak &
Nutan D. Sardessai, JJ.***

***Reserved on : 9th March, 2020.
Pronounced on : 16th March, 2020.***

J U G M E N T : (Per M.S. SONAK, J.)

Heard learned Counsel for the parties.

2. In pursuance of an advertisement dated 5th April, 2003,
inviting applications for filling in a post of Librarian at the Nirmala

Institute of Education, Altinho, Panaji (Institute), which is a Government aided Institution, the Petitioner applied and was selected and appointed as a Librarian vide appointment Order dated 27th May, 2003 with effect from 3rd June, 2003.

3. Since the Petitioner had neither cleared NET/SET Examination, nor did she possess M.Phil/Ph.D. qualification, her appointment was on temporary basis upto to the end of Academic Year 2003-04. The appointment order dated 27th May, 2003 had clarified this position and further stated that if the Petitioner passes NET/SET Examination within the academic year, her appointment will be regularised/confirmed.

4. The Petitioner has pleaded that the Institute issued fresh advertisements each year and since no NET/SET Examination cleared candidates were available, the appointment of the Petitioner on the same terms was continued by issuance of similar appointment order upto 1st July, 2008.

5. The Petitioner obtained M.Phil qualification on 31st March, 2008 and consequently, the Petitioner was appointed on a regular basis as a Librarian with effect from 1st June, 2008.

6. This Petition mainly concerns the issue of treatment of the

Petitioner's service between 3rd June, 2003 and 31st May, 2008.

7. The case of the State Government is that the period between 3rd June, 2003 and 31st May, 2008 should be treated as '*contractual employment*' and not to be taken into consideration for any purposes like career progression, increments, etc., except for the purpose of computation of pension and pensionary benefits.

8. The Accounts Department of the Government raised audit objections and informed the Institute that an amount of ₹5,96,134/- was overpaid to the Petitioner by the Institute by failing to treat the above period as '*contractual employment*'.

9. The Institute filed a detailed response to the audit objections by pointing out that the service of the Petitioner between 3rd June, 2003 and 31st May, 2008 cannot be treated as contractual appointment and, in any case, the appointment orders were issued after obtaining necessary clearance from the concerned Department of the Government. The Institute, therefore, denied that an over-payment had been made to the Petitioner.

10. The Government, however, without affording any opportunity of hearing to either the Institute or the Petitioner, proceeded to deduct the amount of ₹5,96,134/- from out of the non

salary grants payable to the Institute.

11. The Institute, with apparent reluctance, made an order dated 21st December, 2015 ordering the recovery of the so called excess payment made to the Petitioner, relying upon the audit objections. In the order dated 21st December, 2015, the Institute stated that since the Petitioner's service between 3rd June, 2003 and 31st May, 2008 was in the nature of contractual employment, the Petitioner was not entitled to earn or accumulate any earned leave for the said Period.

12. The Institute's order dated 21st December, 2015 is based upon the Government's order dated 14th August, 2015 in which, it is stated that the service of the Petitioner between 3rd June, 2003 and 31st May, 2008 is to be considered only for the purposes of pension and recovery in terms of the audit report may be made, failing which the same would be adjusted from the future non-salary grants to be released to the Institute.

13. Accordingly, the Petitioner has instituted this Petition to challenge the order dated 14th August, 2015 and 21st December, 2015, issued by the Government and the Institute, respectively. Further, since the Institute, on the basis of the Government order has refused to consider the Petitioner's service between 3rd June, 2003

and 31st May, 2008 for the purpose of career progression, earned leave and half pay leave, the Petitioner has applied for the reliefs in that regard, as well. The Petitioner has also applied for certain additional reliefs towards increments, consequent upon her obtaining the Ph. D. Degree and consequential benefits.

14. Mr. Lotlikar, learned Senior Advocate for the Petitioner relies upon the Circular dated 22nd August, 1996 issued by the Goa University to submit that the Petitioner's period of service between 3rd June, 2003 and 31st May, 2008 could not have been treated as contractual employment, but the same was temporary service, which was liable to be counted practically for all benefits, except, perhaps, increments which, in any case, have not even been paid to the Petitioner. Besides, he submits that the Government failed to comply with the principles of natural justice before visiting the Petitioner with such serious consequences. He, therefore, submits that the reliefs, as prayed for by the Petitioner, are liable to be granted.

15. Mr. S. G. Desai, learned Senior Advocate for the Institute, submits that the employment of the Petitioner between 3rd June, 2003 and 31st May, 2008 was, indeed, on temporary basis and could not have been regarded as a contractual employment. However, taking into consideration the fact that the Government, without even

affording any opportunity of hearing to the Institute, rejected the Institute's objections to the audit report and issued the order dated 14th August, 2015, the Institute was left with no alternative, than to order recoveries from the Petitioner. He submits that the Government was not at all justified in deducting the amount of ₹5,96,134/- from out of the non-salary grants payable to the Institute and such amount must be restored to the Institute.

16. Ms. Agni, learned Senior Advocate for the Goa University, also relies upon the Goa University's circular dated 22nd August, 1996 and submits that the employment of the Petitioner between 3rd June, 2003 and 31st May, 2008 could not have been regarded as mere contractual employment. She points out that the circular, is quite consistent with the Ordinances and Statutes framed by the Goa University and such service of the Petitioner will also have to be counted towards career progression.

17. Ms. Kholkar, learned Additional Govt. Advocate supports the impugned orders by pointing out that the Petitioner was not at all qualified to be appointed as a Librarian in the first place since, she neither had the NET/SET qualifications, nor any M.Phil/Ph.D. She submits that the Petitioner obtained the eligibility qualifications only on 31st March, 2008 and could, therefore, be regularly appointed only from 1st June, 2008. She submits that the audit objections were

correctly raised and the action, consistent with the audit objections, suffers from no infirmity whatsoever. She submits that since the representation from the Institute was duly considered, there was no failure of natural justice.

18. Both, the Petitioner, as well as the Goa University have relied upon the Goa University Circular dated 22nd August, 1996. In the course of the arguments on 9th March, 2020, Ms. Neha Kholkar, on the basis of instructions from the Director of Higher Education, submitted that the Goa University Circular dated 22nd August, 1996 stands superseded by the amendments to the Statutes of the Goa University, or in any case, by the subsequent Circulars issued by the Goa University itself.

19. Ms. Agni, learned Senior Advocate appearing for the Goa University, however, reiterated that the Goa University Circular dated 22nd August, 1996 holds the field and was required to be applied to the case of the Petitioner.

20. Accordingly, we had granted liberty to the Director of Higher Education to produce on record the Statutes, as well as other material in support of the contention that the Goa University Circular dated 22nd August, 1996 was no longer valid and the case of the Petitioner could never have been considered on the basis of the

Circular dated 22nd August, 1996.

21. Though liberty was granted only to produce such material after the matter was closed for orders, the Director of Higher Education filed an affidavit-in-reply dated 11th March, 2020 and sought to produce on record a communication dated 4th April, 2000 from the University Grants Commission, as well as amendments to the Statutes of the Goa University and certain other notifications of the Goa University itself.

22. The rival contentions now fall for our determination.

23. Taking into consideration the stance of the Goa University, as articulated through its learned Senior Advocate Ms. Agni, the case of the Petitioner is required to be examined in the light of the Goa University Circular dated 22nd August, 1996. This Circular makes express reference to the Statutes and the Ordinances of the Goa University and provides that the '*Lecturers*', which will include the Librarians appointed after 31st August, 1996, are required to have the following minimum qualifications and experience :

1. Minimum qualification and experience.

- (a) *Good academic record with atleast 50% marks or an equivalent at Master degree level in the relevant subject from an Indian University or an equivalent degree from a foreign University.*

Note: If candidate has passed JRF before 1989, minimum marks in Master degree be reduced to 50%.

(b) Candidates should have cleared the eligibility test for lecturers conducted by UGC, CSIR, or similar test accredited by the UGC.

OR

Passed the M.Phil degree or has been awarded or submitted Ph.D. thesis on or before 31.12.1993.

Note : Appointment of lecturers who have not cleared NET/SET will be made on a temporary basis, initially upto the end of the academic year, only if a suitable NET/SET qualified candidate is not available. Post occupied by such candidates will be advertised every year. If the candidate fails to clear NET/SET and the appointment may be extended further on yearly basis upto two more academic years, provided suitable NET/SET qualified candidate is not available. After this period, if a lecturer has still not cleared NET/SET, the case will be placed before duly constituted selection committee for a review. Extension may be given on yearly basis upto two academic years, if the committee recommends. If a lecturer fails to clear NET/SET during this period, no further extension will be granted.

2. Explanation :

“Good academic record” : Graduation with second class.

“Relevant subjects” : Six or more papers (major) at the postgraduate level;

At least five papers (Subsidiary/ minor) in the same subject as the post graduate level at the 3/4 year undergraduate programme

OR

Has passed the post graduate examination under the change of faculty scheme, he/she could be appointed to the post of lecturer in

the subject in which he/she has passed the post graduate examination with at least 55% marks

OR

The candidate must have a M.Phil/Ph.D. Degree in the same subject in which he/she has passed the post graduate examination.

General remarks:

- 1. JRF/GATE are equivalent to NET/SET for purposes of appointments.*
- 2. The seniority as a lecturer will be counted from the date of joining as a lecturer, or the date of clearing NET/SET whichever is later.*
- 3. Service rendered as lecturer prior to clearing the NET/SET or M.Phil/Ph.D. will count towards the eligible service for purposes of career progression.*
- 4. Confirmation :*
 - (i) A Lecturer who completes the M.Phil/Ph.D. or NET/SET requirement during the probation period will be eligible for confirmation, subject to completing/satisfying other requirement at the expiry of probation.*
 - (ii) A Lecturer who completes the M.Phil/Ph.D. or NET/SET requirement after the period of probation will become eligible for confirmation, subject to completing/satisfying other requirements on the date of completing the M.Phil./Ph.D. or NET/SET requirement.*

24. The aforesaid means that there was no bar as such to the appointment of Librarians who did not possess NET/SET

qualification, or the M.Phil/Ph.D. qualification in the first instance. However, such appointments could have been made only upto the end of academic year, after recording satisfaction that no suitable NET/SET or M.Phil/Ph.D. candidates were available for selection. This process could have been continued for a maximum period of 5 years, subject, again, to the issuance of a fresh advertisement and recording of satisfaction as to nonavailability of the qualified candidates.

25. The record indicates that in the present case, the Petitioner was continued as a Librarian on the aforesaid basis from 3rd June, 2003 till 31st May, 2008. Mr. Desai, learned Senior Advocate for the Institute has submitted that the procedure prescribed under Circular dated 22nd August, 1996 was duly followed by the Institute and in fact, approvals were obtained from time to time, from the Directorate of Higher Education. No contention was ever raised either in the communication addressed to the Petitioner/Institute or in any returns originally filed regards non-compliance. In the affidavit filed on 11th March, 2020, the contention is that the Circular dated 22nd August, 1996 stands superseded and, therefore, was inapplicable. At least, there is no allegation regards non-compliance with the terms of the Circular dated 22nd August, 1996.

26. The Petitioner obtained her M.Phil qualification on 31st

March, 2008 and was appointed as a Librarian, on regular basis with effect from 1st June, 2008. This position is even accepted by the Director of Higher Education and there is really nothing amiss in the regular appointment of the Petitioner as a Librarian with effect from 1st June, 2008. The only issue raised relates to the treatment of service between 3rd June, 2003 and 31st May, 2008.

27. Now, if we have to go by the Circular dated 22nd August, 1996, it is clear that the service rendered prior to clearing the NET/SET or M.Phil/Ph.D. will count towards the eligible service for the purposes of career progression. The Government has itself stated that the service rendered by the Petitioner prior to obtaining the M.Phil. Degree can be counted for and will be counted for the pensionary purposes.

28. According to us, the insistence on the part of the auditors and thereafter by the Director of Higher Education that the service of the Petitioner between 3rd June, 2003 and 31st May, 2008 is to be treated as '*contractual employment*', cannot be upheld in the peculiar facts and circumstance of the present case. This is because even the Goa University asserts that the Circular dated 22nd August, 1996 was applicable to the case of the Petitioner.

29. However, even if we were to proceed on the basis that the

Circular dated 22nd August, 1996 was not applicable to the case of Petitioner, still, it cannot be said that the Petitioner's appointment between 3rd June, 2003 and 31st May, 2008 was a mere contractual employment. The Institute, from time to time, had applied for and obtained approvals from both, the Goa University, as well as the Directorate of Higher Education. At this stage, neither of the authorities objected to the Institution continuing the services of the Petitioner on temporary basis, pending her clearing NET/SET or M.Phil/Ph.D. qualification.

30. The Director of Higher Education, in the affidavit filed on 11th March, 2020, despite asserting that the Circular dated 22nd August, 1996 stands superseded, has very fairly accepted that the Petitioner's initial appointment was approved by the Goa University, as well as the Directorate of Higher Education. He has also stated that due to this mistake and inadvertence of the Institute, the Petitioner should not be made to suffer.

31. The relevant statements from the affidavit dated 11th March, 2020, read as follows :

*“In view of what is stated herein above, I state that the Petitioner did not possess the basic qualification for being appointed to the regular post. **However, we admit that her appointment was approved initially by Goa University and this Respondent.** I state that due to the*

mistake and inadvertence of the Institution for which the Petitioner is working, the Petitioner should not be made to suffer. However, I further state that no reliefs should be granted to the Petitioner as a matter of right as she was not qualified for the post on regular basis.”

[emphasis supplied]

32. Therefore, even if we were to proceed on the basis that the Circular dated 22nd August, 1996 were not to apply to the case of the Petitioner, taking into consideration the fact that the Petitioner's initial appointment was approved by both, the Goa University, as well as the Directorate of Higher Education, we do not feel that the belated insistence on the basis of the audit objections that the Petitioner's services between 3rd June, 2003 to 31st May, 2008 be treated as '*contractual employment*', is justified in the peculiar facts and circumstances of the present case.

33. Besides, we are of the opinion that in the matter of this nature, the Respondents were duty bound to comply with the principles of natural justice and fair play before insisting upon the recoveries from the Petitioner. In fact, the Directorate of Higher Education was also duty bound to comply with the principles of natural justice and fair play before proceeding to deduct an amount of ₹5,96,134/- from the non-salary grants payable to the Institute. Besides, the Directorate of Higher Education, as well as the Goa

University, having themselves approved the initial appointment of the Petitioner, were not at all justified in recovering from the Institute the payments admittedly made by the Institute to the Petitioner and that too without compliance with the principles of natural justice and fair play.

34. The record indicates that in fact, the Petitioner was paid a total amount of ₹10,08,134/- for the period between 3rd June, 2003 and 31st May, 2008. The Government contends that only an amount of ₹4,72,000/- was payable to the Petitioner and, therefore, there has been over-payment to the extent of ₹5,96,134/-. According to us, taking into consideration the provisions of Circular dated 22nd May, 1996 or, in any case, the approvals granted to the Petitioner's appointment from time to time, it cannot be said that the service rendered by the Petitioner between 3rd June, 2003 and 31st May, 2008, was mere contractual employment, or that there has been any over-payment to the Petitioner.

35. The Institute had filed a detailed response to the audit objections and it appears that such response was not even considered. Even the recoveries from the non salary grants from the Institute ought to have been preceded with compliance with principles of natural justice. On merits as well, such deductions were without authority of law since the Directorate of Higher Education and

Goa University had approved the Petitioner's appointments from time to time. Consequently, the order dated 14th August 2015 made by the Government is vulnerable and is required to be set aside.

36. Since the Institute's Order dated 21st December, 2015 is almost, entirely based upon the Government's order dated 14th August, 2015, even the Institute's order dated 21st December, 2015 is liable to be set aside.

37. Mr. Lotlikar, learned Senior Advocate for the Petitioner, on instructions, has made a statement that the Petitioner was already sanctioned three non-compounded increments consequent upon her clearing of Ph.D. from 1st December, 2014 and accordingly, relief in terms of prayer clause (h) was not being pressed.

38. Accordingly, we dispose of this Writ Petition by making the following order :

(A) The impugned orders dated 14th August, 2015 and 21st December, 2015 are, hereby, set aside;

(B) As a consequence of setting aside of the Order dated 14th August, 2015, the Government is directed to pay to the Institute, within a period of 8 weeks from today, the amount of ₹5,96,134/-, unauthorisedly deducted by the Government from out of the non-salary grants payable to the Institute. In case this amount is not paid

to the Institute within 8 weeks from today, the same will carry simple interest at the rate of 7% per annum.

(C) In view of the aforesaid direction, the Institute is restrained from effecting any recoveries from the Petitioner in terms of its Order dated 21st December, 2015, which, in any case, we have set aside.

(D) Service of the Petitioner between 3rd June, 2003 and 31st May, 2008 will not be treated as a mere contractual employment, and further the same will also be counted for the purposes of career progression, as well as Earned Leave. The concerned Respondents are directed to work out the entitlement of the Petitioner on this basis and award consequential financial benefits to the Petitioner, within a period of 4 months from today.

39. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

40. All concerned to act on the basis of an authenticated copy of this judgment and order.

Nutan D. Sardesai, J.

M.S. Sonak, J.