

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

LETTERS PATENT APPEAL NO.445 OF 2012

IN

WRIT PETITION NO. 5279 OF 2009 (D)

Ku. Kalpana Dadaji Rahate,
R/o C/o. Shri D. P. Warjurkar,
Janata Junior College, Pombhurna,
Dist - Chandrapur.

... **APPELLANT**

V E R S U S

1. Magaswargiya Shikshan Sanstha
Nagpur, through its Secretary,
Shri Rajesh Kisan Dongre,
R/o Gose, Tah. Paoni,
Dist - Bhandara.
2. Vinod Education Society,
through its Secretary,
Shri Rajesh Kisan Dongre,
R/o Gose, Tah. Paoni,
Dist - Bhandara.
3. Mahatma Jyotiba Fule Vidyalaya,
Chiroli, Tah - Mul, Dist. Chandrapur,
through its Head Master.
4. Education Officer (Sec.)
Zilla Parishad, Chandrapur,
Tah. & Dist. Chandrapur.
5. The State of Maharashtra,
through its Department of
Education, Mantralaya,
Madam Cama Road,
Mumbai - 440001.

... **RESPONDENTS**

Shri P. N. Shende, Advocate for appellant.

Shri Rohan Deo, Advocate h/f Shri A. A. Naik, Advocate for
respondent Nos.1 to 3.

Shri A. S. Fulzele, Additional Government Pleader for respondent
Nos.4 and 5.

CORAM: A.S. CHANDURKAR AND
G. A. SANAP, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : 07/10/2021
DATE ON WHICH JUDGMENT IS PRONOUNCED : 26/10/2021

JUDGMENT : (PER G. A. SANAP, J.)

1. In this Letters Patent Appeal, challenge is to the Judgment and order dated 26/03/2012 passed in Writ Petition No.5279/2009, whereby the learned Single Judge allowed the writ petition and set aside the Judgment and order dated 29/09/2009 passed by the learned Presiding Officer of the School Tribunal granting benefit of reinstatement and other consequential benefits to the appellant.

The facts leading to the filing of this Letters Patent Appeal are as follows :-

2. The respondent No.3 - School is managed by respondent Nos.1 and 2. It is the case of the appellant that she possessed B. A. B.Ed. qualification and belongs to OBC category. The selection process for filling up three vacancies of the Assistant Teachers in the respondent No.3 - School was conducted by the School Committee. The appellant was selected and appointed as an Assistant Teacher in a clear and permanent vacancy for period

of two years vide appointment order dated 11/07/1998. The appellant performed her duties satisfactorily. The proposal for approval forwarded by the management was returned by the Education Officer. It is alleged that the Headmistress of respondent No.3 - School all of a sudden prevented the appellant from signing the muster roll and working in the school from 25/06/1999. It is the case of the appellant that this act on the part of Headmistress would tantamount to her termination. The appellant, therefore, challenged her termination from service before the School Tribunal.

3. The respondent Nos.1 to 3 filed written statement and opposed the claim. In sum and substance, the respondents denied the material facts pleaded by the appellant. According to the respondents, the appellant was appointed on a post reserved for VJNT category, though she does not belong to VJNT category. Her appointment was temporary for period of one year w.e.f. 15/07/1998 till the end of session. This fact was specifically mentioned in the appointment order. The proposal for approval to the appointment of the appellant was rejected by the Education Officer on the ground that there was backlog of Scheduled Tribe

and Nomadic Tribe category candidates. There was no termination of service of the appellant inasmuch the appointment of the appellant came to an end by efflux of time. There was no violation of the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as "MEPS Act") and the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Rules, 1981 (hereinafter referred to as "MEPS Rules").

4. The learned Presiding Officer of the School Tribunal accepted the claim of the appellant and granted the relief of reinstatement with other consequential benefits. In the writ petition filed by the respondents, the order passed by the learned Presiding Officer of the School Tribunal was set aside and the appeal filed by the appellant before the School Tribunal was dismissed by the learned Single Judge. Being aggrieved by this Judgment and order, the appellant has come before this Court by filing this Letters Patent Appeal.

5. We have heard learned Advocates for the parties. Perused the record and proceedings.

6. Learned Advocate for the appellant submitted that the appellant is belonging to OBC category and therefore, her appointment against the vacancy reserved for VJNT category candidate was consistent with the provisions of Rule 9 Sub-rule (9)(a) of the MEPS Rules. Learned Advocate drawing our attention towards the appointment order submitted that the appointment order was for period of two years in a clear and permanent vacancy. In the submission of learned Advocate on completion of two years service in the absence of termination of service after one year of the appointment, the appellant could have attained the status of deemed confirmed employee of the respondents. Learned Advocate submitted that the service of the appellant was wrongly terminated without following the procedure laid down under Rule 28 of the MEPS Rules. Learned Advocate further submitted that the mandatory procedure was followed before the appointment of the appellant for period of two years. Learned Advocate submitted that since the appellant belongs to OBC category, she was considered for appointment against the vacancy reserved for Other Backward Class category candidate and as such, it was according to the MEPS Act and MEPS Rules. Learned Advocate by taking us through the judgment

of the learned Single Judge submitted that the learned Single Judge has not properly appreciated the material on record and as such came to a wrong conclusion. In support of his submission, learned Advocate for the appellant has placed reliance on following three decisions :-

- i] **Writ Petition No.2767/1996**
(Sharad Balaji Mankar Vrs. Presiding Officer, School Tribunal, Amravati and others) dated 06/11/2006.
- ii] **1994(1) Mh.L.J. 218**
(Shankutala Ganpatsa Shirbhate Vrs. Industrial Weaving Co-operative Society and others.
- iii] **2013(2) Mh.L.J. 713**
(Ramkrishna Chauhan Vrs. Seth D. M. High School and others).

7. Learned Advocate for respondent Nos.1 to 3 submitted that the claim of the appellant that she was appointed against the vacancy reserved for VJNT category candidate cannot be accepted inasmuch as there is no pleading to that effect in the Appeal Memo filed before the School Tribunal. Learned Advocate submitted that in the Appeal Memo, the appellant has simply stated that she belongs to OBC category. In the submission of learned Advocate, therefore, this pleading was not found sufficient

to accept the claim of the appellant that being OBC candidate, she was considered against the vacancy reserved for VJNT category candidate. Learned Advocate relying upon the appointment order submitted that the appointment was on temporary basis for one academic session. Learned Advocate submitted that the management of the respondent had right to make appointment on temporary basis against the permanent vacancy because the candidate belonging to VJNT category was not available. Learned Advocate taking us through the contents of the appointment order pointed out that on the basis of same, the appellant could not attain the status of deemed confirmed employee. In short, learned Advocate supported the Judgment passed by the learned Single Judge.

8. In order to satisfy ourselves with the correct factual position, we have minutely perused the record and proceedings. The advertisement published for undertaking process of appointment is at page No.11. It was specifically mentioned that the candidates belonging to Open, OBC and VJNT Category would be considered on priority basis. The vacancies were advertised. The appointment order is dated 11/07/1998. The appellant as

well as respondent Nos.1 to 3 have laid emphasis on Clause No.2 of the appointment order to substantiate the respective contentions. It would, therefore, be necessary to see Clause No.2 of the appointment order. It is undisputed that this appointment order is as per the proforma prescribed in Schedule-D of the MEPS Act. The perusal of the appointment order would show that the Clause No.2 has two parts. The first part deals with the appointment purely on temporary basis in the leave / deputation vacancy. It clearly provides that on expiry of period of the appointment, the services of the candidate shall stand terminated without any notice. The second part of Clause No.2 provides for the appointment on probation for period of two years. It is, therefore, crystal clear that the first part of Clause No.2 deals with the appointment on temporary basis and the second part deals with the appointment on probation for period of two years. In this case, first part of Clause No.2 is relevant inasmuch as while making the appointment, duration of appointment and the nature of the appointment has been specifically mentioned. Prima facie perusal of the appointment order would, therefore show that the appointment of the appellant was purely on temporary basis. While mentioning the duration, it was stated in words that it was

for two years. However, while mentioning the specific period, it was stated that it would be from 15/07/1998 to the end of session in the leave / deputation vacancy. So in words, it was stated that the appointment was for period of two years. While mentioning the specific period, it was mentioned that it was from 15/07/1998 till the end of the session. Even if it is assumed for the sake of argument that it was for period of two years and not for one academic session, in our opinion, it would not make much of difference. The relevant part of the appointment order which has bearing on the claim of the appellant clearly indicates that she was appointed purely on temporary basis in the leave / deputation vacancy. It is the case of the appellant that at the end of academic session 1998-1999, her services were terminated. It would, therefore prove that the appellant did not work for period of two years. It is the case of the respondents that the appointment of the appellant was for one academic session on temporary basis and therefore, it came to an end by efflux of time at the end of the academic session 1998-1999. On the basis of this appointment order, it is clear that the appellant was appointed on temporary basis even though the vacancy was clear and permanent. The appellant was not appointed on probation for period of two years.

9. The appellant relying upon the provisions of Rule 9 Sub-rule (9) contended that since she belongs to OBC category, her appointment on the post reserved for VJNT category was permissible as per this provision. It is undisputed that the appellant belongs to OBC category. It is also undisputed that the vacancy was reserved for VJNT candidate. We have no hesitation to conclude that as per Rule 9 Sub-rule (9) of the MEPS Rules, the post reserved for one backward class can be filled in by the candidate belonging to other backward tribe, category or class for which the post is reserved. Whether the provisions of Rule 9 Sub-rule(9) were invoked or not at the time of appointment is question of fact and has to be decided on the basis of the pleadings and the evidence brought on record. It is pertinent to mention that the appointment order of the appellant dated 11/07/1998 is woefully silent on this point. It is pertinent to mention that if the appellant had been appointed against the vacancy reserved for VJNT category, then there ought to have been specific mention in the appointment order. Similarly, there ought to have been contemporaneous documentary evidence to prove the same. Simply because of the fact that the appellant belongs to OBC

category would not ipso facto lead us to draw an inference to accept the contention of the appellant.

10. The appellant was required to plead and prove this fact. Perusal of the appeal filed before the School Tribunal would show that this fact has not been specifically pleaded by the appellant. The appellant has simply stated that she belongs to OBC category. In the facts and circumstances, therefore, the contention of the appellant that she was appointed on probation for period of two years cannot be accepted. Similarly, the appellant has failed to establish that being OBC category candidate, she was appointed against the clear vacancy reserved for VJNT category candidate. In the absence of pleadings and the proof, this contention cannot be accepted. It is the case of the respondents that the appellant was appointed for period of one year and on expiry of period of one year, her appointment came to an end. We have no reason to discard and disbelieve this statement in the teeth of the facts crystallized on the basis of appointment order. In our opinion, therefore, there was no need to invoke the provisions of Rule 28 of the MEPS Rules in this case.

11. On the basis of the facts and evidence, the appellant is not entitled for the relief. It would be necessary to consider the Judgments relied upon by the learned Advocate for the appellant. In the case of Sharad Balaji Mankar Vrs. Presiding Officer, School Tribunal Amravati and others in Writ Petition No.2767/1996, in the similar set of facts, learned Single Judge has held that the essential facts that if the vacancy is reserved for any of the backward class and the candidate from one of the backward classes is appointed against the said vacancy, then in that event, he must specifically make plea and prove the said fact. It is held that in the absence of specific pleadings to that effect consistent with the mandate of law, such claim cannot be accepted. In the case of Shakuntala Ganpatsa Shirbhate Vrs. Industrial Weaving Co-operative Society and others, reported in 1994 (1) Mh.L.J. 218, the Hon'ble Supreme Court has held that in case of non-availability of candidate from one backward class category, the candidate from another category specified in Rule 9(7) of the MEPS Rules can be appointed. The facts in the case before the Hon'ble Supreme Court and the facts of the case before us are identical. The Hon'ble Supreme Court had, therefore, remanded the matter back to the High Court for deciding the matter afresh

by granting an opportunity to the parties to amend the pleadings to incorporate the necessary facts consistent with the law.

12. Learned Advocate for the appellant as well as learned Advocate for respondent Nos.1 to 3 placed reliance on Full Bench decision of this Court in the case of Ramkrishna Chauhan Vrs. Seth D.M. High School and others, reported in 2013(2) Mh.L.J.713. Learned Advocate for the appellant relied upon the observations made in Paragraph Nos.13, 16, 17, 21 and 23 of this decision. Relying upon the Judgment, learned advocate for the appellant submitted that since the vacancy was clear and permanent, respondent nos.1 to 3 were not permitted to make the appointment on temporary basis and if the management wanted to make appointment on temporary basis, the reasons ought to have been recorded for doing so. Learned Advocate for respondent Nos.1 to 3 relying upon this decision submitted that the management is not without powers to appoint a candidate on temporary basis against the clear vacancy. In this case, the Full Bench has held that Section 5 Sub-section (5) of MEPS Act provides for the appointment of a person on temporary vacancy and the manner of filling of that vacancy. It is held that this

provision cannot be construed to mean as forbidding the management from making contractual or temporary appointment in respect of permanent vacancy, if the situation so warrants. It is further held that if the parties accept the terms and conditions stipulated in the appointment order, later on, it is not open to the employee to challenge that appointment being contrary to the rules or on the ground that the terms and conditions stipulated therein were not legally valid. It is held that if the appointment order mentions that the appointment is on temporary basis for a limited period then it is not open to the employee to assume that she / he was appointed on probation against the permanent vacancy nor it is open to the School Tribunal or the Court of Law to assume that fact. In our opinion, the law laid in this Full Bench decision supports the contention of respondent Nos.1 to 3, in view of the fact that the appointment order clearly states that it was a temporary appointment in leave / deputation vacancy.

13. In the case of Hindustan Education Society and another Vrs. Sk. Kaleem Sk. Gulam Nabi and others, reported in (1997) 5 SCC 152 relied upon by the learned Advocate for the respondent Nos.1 to 3, the Hon'ble Supreme Court has held that if

the appointment order clearly mentions that the appointment is purely temporary in a clear vacancy, then in that event, it cannot be construed as appointment on probation. It is held that after expiry of temporary period, the services shall stand terminated without any notice. In this case, the appointment order was reproduced. The contents of the appointment order in the reported decision and the contents of the appointment order before us are identical.

The decision in the case of **Bhartiya Gramin Punarrachana Sanstha Vrs. Vijay Kumar and others**, reported in (2002) 6 SCC 707 is relied upon by the learned Advocate for the respondents to substantiate his submissions that in view of express contents of the appointment order and the fact that the services were terminated before completion of two years period, the appellant would not become a deemed permanent employee. In this case, it is held that the provisions relating to deemed confirmed employee on completion of statutory period of probation of a person who was put on probation consequent to his appointment in a permanent vacancy would not be applicable to a person whose services were terminated before completion of

statutory probation period and who was appointed only for a specific period without being put on probation. In this case before us, the appellant was appointed on temporary basis. Besides, according to the appellant, though the order mentions that she was appointed for period of two years, she was terminated within one year. It is therefore, very difficult to accept the contention of the appellant that she became a deemed permanent employee.

On the point of absence of specific pleading and the consequences of the same, learned Advocate has relied upon the decisions in the case of Vandana Pandurang Patle Vrs. Kalpana Shikshan Sanstha and others, reported in 2017(6) Mh.L.J. 696 and in the case of Maharashtra Shikshan Prasarak Mandal and another Vrs. Kawadu Pandurangji Ghutake and another, reported in 2014(5) Mh.L.J. 151. It is held that if a party wants to show that he or she has right to a post and therefore, wants to rely upon Rule 9 Sub-rule (9)(a), he or she ought to specifically plead the necessary facts pointing out that in spite of efforts made by the management, the candidate from a particular Tribe / Caste for which the post was reserved was not available and therefore, against the said vacancy, he or she has been appointed.

14. In our opinion, the law laid down in the Judgment relied upon by the learned Advocate for the appellant does not extend helping hand to the appellant. On the other hand, in the background of the proved facts, the proposition of law laid down in the Judgments, relied upon by the learned Advocate for the respondents squarely apply to this case. Even the decision of the Full bench of this Court in the case of Ramkrishna Chauhan (supra) is of no help and assistance to the case of the appellant.

15. In view of the facts and circumstances and settled position in law, we are of the opinion that there is no substance in the appeal. The submissions advanced by the learned Advocate in the aforesaid background cannot be accepted. The submissions advanced by the learned Advocate for the respondent Nos.1 to 3 deserve acceptance. The learned Single Judge in our opinion while dismissing the appeal filed by the appellant before the School Tribunal has not committed any mistake. On the basis of material placed on record, the view taken by the learned Single Judge is the only possible view in the matter. The appeal, therefore, deserves to be dismissed. Hence, the following order :-

ORDER

- I] The Letters Patent Appeal stands dismissed.
- II] In the peculiar facts and circumstances of the case,
the parties shall bear their own costs.

(G. A. SANAP, J.)

(A.S. CHANDURKAR, J.)

Choulwar