

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

WRIT PETITION NO.2435/2020

PETITIONERS :

1. Gramin Shikshan Sanstha,
Navegaon Bandh, Tah. Sadak Arjuni,
Dist. Gondia, through its Secretary
Shri Devaji s/o Maharuji Kapgate,
Aged about 56 Years, R/o At Post,
Navegaon Bandh, Tah. Sadak Arjuni,
Dist. Gondia.
2. Shrikrushna Primary, Secondary and
Higher Secondary Ashram School,
Kokana (Jami) Navegaon Bandh,
Tah. Sadak Arjuni, Dist. Gondia
through its Head Master.

...VERSUS...

RESPONDENTS :

1. Shri Sevakram S/o Pundlik Pustode,
Aged about major, R/o Pragati Colony,
Sakoli, Tah. Sakoli, Dist. Bhandara.
2. Additional Commissioner,
Tribal Development Department,
Giripeth, Nagpur.

Shri C.S.Kaptan, Senior Advocate assisted by Shri R.S.Kalangiware and Shri P.S.
Chawhan, Advocates for the petitioners.
Shri P.N. Shende, Advocate for Respondent No.1
Ms M.A. Barbde, AGP for Respondent No.2

CORAM : AVINASH G. GHAROTE, J.

DATE : 24th/28th SEPTEMBER, 2021

ORAL JUDGMENT

1. Heard Mr. Kaptan, learned Senior Counsel assisted by Mr. Kalangiwale and Mr. Chavhan and Mr. Shende, learned Counsel for Respondent No.1 and Ms Barbde, learned Assistant Government Pleader for Respondent No.2. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel for the rival parties.

2. The facts of the case are as under :

(a) The respondent no.1 was appointed as a Shikshan Sewak by an order dated 1.4.2013, in Shrikrushna Avdhoot Adiwasi Ashram School, Kokana Jami, Tq. Sadak Arjuni, Dist. Gondia/petitioner no.2.

(b) The appointment was for the period 12.4.2013 to 11.4.2016, on probation.

(c) A communication was issued to Respondent no.1, on 4.3.2016, pointing out to him as much as seven deficiencies in his working.

(d) A report in this regard, regarding the functioning of respondent no.1 was also sent to the petitioner by the Headmaster on the same day.

(e) On 15.3.2016, a show cause notice was given to the respondent no.1.

(f) On 7.4.2016, a termination notice was given to respondent no.1, whereby his services were terminated w.e.f. 11.4.2016.

3. The respondent no.1 being aggrieved by the termination, approached the School Tribunal by way of an appeal under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, “the MEPS Act”, hereinafter). It was contended that the termination, without giving one months notice or one months salary in lieu the notice, as contemplated under Section 5 (3) of the MEPS Act, was illegal and therefore, was required to be quashed and set aside. A further contention was made that the termination was vengeful, as the demand for illegal gratification by payment of money was not

satisfied, which demand was made not only to the Respondent No.1 but also to other three employees.

4. The learned School Tribunal held that the requirement of one months notice as required under Section 5(3) of MEPS Act was not satisfied and therefore, the termination of Respondent No.1 was illegal. It further directed the reinstatement with continuity in service and payment of 90% back-wages. It is this judgment of the School Tribunal, dated 27.7.2020, which is challenged in the present petition.

5. Mr. Kaptan, learned Senior counsel for the petitioners/management by inviting my attention to para 28 of the impugned judgment submits that a finding has been recorded by the learned School Tribunal, that there was a subjective satisfaction by the petitioner/management that the work and behavior of the respondent no.1 was not satisfactory and there being no challenge to the same, this position has now attained finality. Learned Senior Counsel submits that the termination is only on the ground that a notice of one month or salary in lieu of the notice has not been paid,

placing reliance upon Section 5(3) of the MEPS Act. It is contended that Section 5(3) of the MEPS Act is not attracted, as the termination was not during the period of probation, but was at the end of probation, and therefore, there would be no requirement of the notice or salary in lieu thereof. Reliance is placed upon *Shivdutta Education Trust and another Vs. Harishchandra Rajabali Yadav and others, 2011 SCC OnLine Bom 1674* (para 18, 19 and 20).

6. Mr. Shende, learned Counsel for Respondent No.1, on the other hand contends that since the appointment of the respondent was on probation and there was an absence of the compliance of Section 5(3) of the MEPS Act, which requires notice of one month or salary in lieu thereof, before any termination could take effect during the period of probation, in view of the mandate of Section 5 (2A) of the MEPS Act, the services of Respondent No.1 stood deemed confirmed, consequent to the completion of the period of probation. He further contends that the requirement of Section 5(3) of the MEPS Act, having not been satisfied, the learned School Tribunal has rightly held the termination to be illegal. He

places reliance upon *Ram Avadh Mahel Pal Vs. Shivdutta Education Trust, 2007 (6) Mh.L.J. 659* (para 4 and 5); *Progressive Education Society, Hinghanghat and others Vs. Nitin Krishnarao Nimbalkar and others, 2006 (4) Mh.L.J. 747* (para 5); *Progressive Education Society and another Vs. Rajendra and another, (2008) 3 SCC 310* (para 2); *Deepak T. Kaul vrs. Chairman, Sanjeevani Vidhyalaya Trust, Pune and others, 2020 (2) Mh.,L.J. 523* (para 3), to contend that even if the termination is on the last date of probation, the requirement of Section 5(3) of the MEPS Act is required to be complied with. No other argument was canvassed.

7. The relevant portions of Section 5 of the MEPS Act being material, are quoted as under :

"Section 5. Certain obligations of Management of private Schools :

(1).....

(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 (4) and (5), 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.

(2A) Subject to the provisions of sub-sections (3) and (4), Assistant Teacher (Probationary) shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.

(3) If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice or salary or honorarium of one month in lieu of notice.

(4) If the services of any probationer are terminated under sub-section 3 and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purposes of sub-section (2).

(4A) Nothing in sub-section (2), (3) or (4) shall apply to a person appointed to fill a permanent vacancy by promotion or by absorption as provided under the proviso to sub-section (1).

(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in

the form prescribed in that behalf, and shall state the period of appointment of such person.”

8. The basic question which is required to be considered is the expression as occurring in Section 5(3) of the MEPS Act "during the said period", and whether a termination on the last day of the probation would be included in the above phrase so as to require issuance of a notice of one month or salary in lieu thereof.

9. The further question raised is when such notice is not given in case the termination is with the ending of the period of probation, whether the employee would be entitled to be compensated with the salary of one month and cannot claim permanency.

10. At the outset, it is necessary to record that the expression “Shikshan Sevak”, as occurring in Section 5 of the MEPS Act has been substituted by the expression “Assistant Teacher (Probationary)”, by the Maharashtra Act No.9 of 2012.

11. The very purpose of appointing a person on probation, is to test the suitability of such person in respect of the post for which the appointment is being made. The law therefore reserves a right in the employer to terminate an employee, appointed on probation, if dis-satisfied with the performance of the employee, as the continuation of such an employee, would not be conducive to the employer. The provisions of Section 5(3) of the MEPS Act, have to be considered in the above background. The provision requires a harmonious construction to be made considering the right of the employee for one month notice or salary in lieu of notice to be given, if the termination is during the period of probation vis-a-vis the right of the employer not to continue the employee, being dissatisfied with the services rendered and the engagement, with the expiry of the period of probation.

12. Unlike provisions in other statutes, Section 5 (2) of the MEPS Act, contains a deeming provision regarding the confirmation of an employee appointed on probation, which says that subject to the provisions of Sub Sections 4 and 5 of Section 5 of the MEPS Act, on completion of the period of probation he shall be deemed to have

been confirmed. The expression “on completion of this period of two years”, which in the case of the petitioner, will have to be read as three years, in view of the applicability of the proviso to Section 5 (2) of the MEPS Act, would indicate, that the deeming provision for confirmation, would apply only after the period of three years of probation, is completed and would not step into the picture, if the said period is not completed. This would mean that any plea regarding deemed confirmation, could only be raised after the last day of the period of three years, of probation, is over and not before.

13. The expression “during the said period”, as contained in Section 5 (3) of the MEPS Act will therefore have to be understood to be a period commencing from the date of appointment on probation, and the last date of the period of three years, for which duration the employee is on probation. The prefix “at any time” before the expression “during the said period” thus has to be construed as meaning a termination during the said period. The word “during”, means and indicates “in between”. This has to be juxtaposed, with the expression “ending with”. There is nothing in

the provisions of Section 5 of the MEPS Act to indicate, that the termination of a probationer, cannot be with the ending of the probation, in which case, it would not be a termination within the meaning of the expression “during the said period” as occurring in Section 5 (3) of the MEPS Act, requiring the compliance of the pre-condition for termination of a probationary employee, as in this case, there is no completion of the probation period, as contemplated in the proviso to Section 5 (2) of the MEPS Act. In this view of the matter, the question of giving one month’s notice or salary of one month in lieu notice would not arise.

14. The expression “completion of this probation period” as occurring in Section 5 (2) and “completion of probation period” as occurring in Section 5 (2A) of the MEPS Act, would necessarily mean that the entire period of probation, stands fully completed and is over with. It does not contemplate, any situation prior thereto, so as to invite the application of the deeming provision, so as to confer permanency on the employee, appointed on probation.

15. In ***Shivdutta Education Trust*** (supra) relied upon by Shri C.S. Kaptan, learned Senior Counsel for the petitioner a similar issue fell for consideration, in which placing reliance upon an earlier judgment of this Court in ***Akbar Peerbhoy College Vs. Mrs. Pramila N. Kutty, 1997 (3) Mh.L.J. 195*** it has been held as under :-

“20. The question is whether at the end of probation period the management is entitled to inform a Shikshan Sevak that due to the opinion of the management his services would no longer be required? In other words, whether at the end of probation period, the management can stop the Shikshan Sevak getting benefit of deeming provisions of sub-section (2A)? The answer, in my view, is in affirmative. If the management is entitled to terminate the services of Shikshan Sevak during the period of probation as provided in sub-section (3), one has to accept the possibility of the management deciding to express such opinion at the end of the probation period and deny such Shikshan Sevak the advantage of deeming provisions. The question would still arise as to whether at such occasion, the management is required to give one month's notice or salary/honorarium in lieu of such notice. The answer of this is in the negative. The probation period comes to an end by efflux of time. If management forms an opinion that performance of Shikshan Sevak was not satisfactory, they are at liberty to

say so even at the end of probation. At such time, there is no need to give either a notice or salary of one month. The need to give one month notice or salary would arise only if termination takes place during the period of probation. A similar situation arose in the case of *Akbar Peerbhoy College v. Mrs. Pramila N. Kutty*, 1997 (3) *Mh.L.J.* 195. The learned single Judge considered similar provision from MEPS Rules. The relevant paragraphs of the judgment would suffice the purpose:

“12. Rule 28(1) of the Rules of 1981 reads thus:

“28. Removal or Termination of Service (1)
The service of a temporary employee other than on probation may be terminated by the Management at any time without assigning any reason after giving one calendar month's notice or by passing one month's salary (pay and allowances, if any) in lieu of notice.

In the case of an employee entitled to vacation, the notice shall not be given during the vacation or so as to cover any part of the vacation or within one month after vacation.”

13. A look at the said rule would show that it provides that services of temporary employee who is not on probation may be terminated by the management at any time without assigning any reason provided one calendar month's notice or one month's

salary (pay and allowances, if any) in view of such notice has been given. In the said rule it cannot be read that where the service of a temporary employee comes to an end automatically by efflux of time as stated in the appointment order yet the management is obliged to give one calendar month's notice or to pay one month's salary to such temporary employee in lieu of notice. Rule 28(1) is attracted in a situation where either there is no period stated in the appointment order of such temporary employee and his services are sought to be brought to an end or where the period is stated in the appointment order of such temporary employee and the management intends to terminate the services of such temporary employee earlier than the period stated in the appointment order. Rule 28(1) does not contemplate nor does it envisage a situation of its compliance where the services of the temporary employee other than on probation comes to an end on the date stated in the appointment order. In other words, in a case where appointment of temporary employee is for a fixed period and the services of such a temporary employee comes to an end on the expiry of that fixed period, giving of the notice as

contemplated under Rule 28(1) is not required nor any specific termination order is required to be passed because in the appointment order itself the period of appointment is fixed and on expiry of that period the appointment comes to an end automatically. It would be relevant to mention here that Schedule 'D' appended to the Rules of 1981 provides for format of order of appointment of a temporary employee and in terms of such format the management is required to mention in the order of appointment that appointment of such employee was purely temporary for a period of particular period and after expiry of the said period the services of such employee shall stand terminated without any notice."

16. In the instant case, the order of appointment, dated 2.4.2013, indicates that the appointment of the respondent no.1, as a Shikshan Sevak, was for the duration 12.4.2013 to 11.4.2016, on honorarium, with the condition, that if the service was satisfactory the same after the period of three years would be confirmed (Clause -3 ँ). The termination order dated 7.4.2016, indicates that

the Management had found the services of the respondent no.1 unsatisfactory and therefore, his services, were being terminated from 11.4.2016, afternoon hours. The learned School Tribunal, in the impugned order, has held, that there was a subjective satisfaction by the Management that the work and behaviour of the respondent no.1 was not satisfactory. Thus, the dissatisfaction of the Management, regarding the non-satisfactory completion of the period of employment, has been found to be correct, by the learned School Tribunal. The only reason on which the termination has been set aside, is the absence of notice or one month's salary in lieu of notice. As indicated above, since the termination was ending with the probation, the question of giving one month's notice or honorarium of one month in lieu of notice did not arise at all.

17. In ***Ram Avadh Mahel Pal*** (supra) which was a reference before the Full Bench, considering the insertion of the proviso to Section 5 (2) of the MEPS Act by the MEPS (Conditions of Service) Regulations (Amendment) Act, 2007, it was held that the question in reference stood covered by the amendments as made and subject to the provisions of Sub Sections 3 and 4 of Section 5 of the MEPS

Act, a Shikshan Sevak shall, on completion of the probation period of three years be deemed to have been appointed and confirmed as a teacher. The issue raised in present petition, did not fall for consideration therein. In ***Nitin Krishnarao Nimbalkar*** (supra), the termination was on 12.1.1991, whereas the appointment of the petitioner therein on probation was on 14.4.1989 and the period of two years was to expire on 13.4.1991, thus, on facts, the case is totally different. In ***Rajendra*** (supra), the appointment was for two years on 8.8.1992, and was to expire on 7.8.1994. The termination was by the communication dated 1.8.1994 w.e.f. 31.7.1994 and therefore was during the period of probation and not otherwise and is equally not applicable in view of this position. In ***Deepak T. Kaul*** (supra), the petitioner therein, was appointed on probation for a period of two years on 1.5.1998, which ended on 30.4.2000. By a communication dated 1.3.2000, the Management indicated that it was decided not to continue with his services w.e.f. 1.5.2000, in which background, finding that the probation period of two years, stood completed on 30.4.2000 itself, the deeming provisions of Section 5 (2) of the MEPS Act were held to be attracted as the probation stood successfully completed, in view of which the

termination was set aside. The situation as extant in the present matter regarding the interpretation of the expression “during the period” as occurring in Section 5 (3) and “completion of this probation period” as occurring in Section 5 (2) of the MEPS Act, did not fall for consideration in *Deepak T. Kaul* (supra).

18. In view of the above position and since the learned Tribunal has maintained the finding regarding dissatisfaction of the Management regarding the work and behaviour of the respondent no.1, the impugned judgment, setting aside the termination on the ground of non-compliance of Section 5 (3) of the MEPS Act, cannot be sustained and is accordingly quashed and set aside. The writ petition is allowed, the appeal filed by the respondent no.1 is dismissed.

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

(AVINASH G. GHAROTE, J.)