

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.8788 OF 2018

Rani D/o Rangnath Kate
Age: 40 years, Occu.: Service,
R/o. Gandhi Nagar, Near Renuka Mata
Temple Jalna, Tq. & Dist.Jalna. ..Petitioner

VERSUS

1. Shri Tuljabhavani Shikshan Prasarak
Mandal, Jalna, Through its President
Shri Shriram S/o Sawairam Rathod
Age: Major, Occu.: Social Work,
R/o. Income Tax Colony, Jalna, Dist.Jalna.
2. The Head Master
Residential School for Handicap,
Near R.T.O. Office Jalna, Dist.Jalna.
3. Lilawati W/o Fakira Thakre
Age: Major, Occu.: Service,
R/o. C/o. Residential School for Handicap,
Near R.T.O. Office, Jalna, Dist.Jalna.
4. The District Social Welfare Officer,
Zilla Parishad, Jalna, Dist.Jalna.
5. State of Maharashtra,
Through The Secretary. Social Welfare,
Mantralaya, Mumbai - 32. ..Respondents

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Advocate for Petitioner : Shri B.R.Kedar
Advocate for Respondent Nos.1 and 2 : Shri V.D.Gunale
...

CORAM : M.G.SEWLIKAR, J.

...

RESERVED ON : 17th August, 2021
PRONOUNCED ON : 11th February, 2022

JUDGMENT :-

1. Rule. Rule made returnable forthwith.
2. With the consent of the parties, heard finally at the admission stage.
3. By this writ petition the challenge is to the order dated 26th March, 2018 in Appeal No.7 of 2015 passed by the Competent Authority and Appellate Officer - Regional Deputy Commissioner, Social Welfare, Aurangabad Region, Aurangabad vide which appeal filed by the petitioner against order of her termination from the post of Cook passed by respondent No.1 dated 21st September, 2015, is dismissed.
4. Facts in brief are that respondent No.1 is a registered Public Trust under Bombay Public Trust Act and Societies Registration Act. Respondent No.1 is running respondent No.2 - Residential School for Handicapped students. Petitioner was appointed as a Cook by following due process of law on 5th June, 1996 with prior permission of respondent No.4. Petitioner joined the services on 8th June, 1996. Petitioner was in continuous service with respondent Nos.1 and 2 since the date of joining till the year 2000. In the year 2000, respondent No.2 School was closed by

the Government. Respondent No.2 School remained closed till the year 2006. The School was reopened in the year 2006. Respondent Nos.1 and 2 recalled the petitioner and she joined the services w.e.f. 9th February, 2006. By Resolution dated 31st March, 2008, the School became aided School.

5. After the School was reopened, petitioner, while joining, had tendered certificate of fitness and character certificate. However, in the year 2010, petitioner was again asked to produce fitness certificate and character certificate. Petitioner complied with the said direction. Accordingly, proposal for approval of staff was submitted by respondent No.2 to the Commissioner for Handicapped Welfare, Pune. The Commissioner for Handicapped Welfare, (Maharashtra State), Pune granted approval to the appointment of the petitioner and other staff in terms of letter dated 22nd January 2006.

6. After receiving grant in aid, respondent Nos.1 and 2 started harassing the petitioner with oblique motive to deprive the petitioner of the benefit of continuous service. As a consequence of which, respondent Nos.1 and 2 started harassing the petitioner by not allowing her to sign the muster, by giving notices to her. It is alleged by the petitioner that respondent

Nos.1 and 2 had maintained two musters for marking the petitioner as absent. Petitioner was regular in attending the School. Despite this, respondent Nos.1 and 2 did not pay her salary for the month of March, 2014 on the ground that she was absent from duty without leave. Again her salary w.e.f. March 2015 was stopped and on 1st May 2015, respondent No.2 issued notice to her calling upon her to bring three new students in the School within a week, failing which her salary will not be released/drawn.

7. Petitioner could not bring three students, owing to which respondent Nos.1 and 2 got annoyed. They did not allow her to sign the muster. Respondent Nos.1 and 2 issued notices on 19th June 2015 and 10th July 2015 indicating therein that she was absent from duty without leave since 9th April 2015. Petitioner submits that she was present throughout. Despite this, she was marked absent as she was not allowed to sign muster.

8. On 20th July 2015, petitioner made representation to respondent No.4 - The District Social Welfare Officer, Zilla Parishad Jalna in which she put-forth her grievance that despite remaining present, notices of absence from duty were being issued. She also complained that she was being harassed

alleging that she was not a good cook. Respondent No.4 directed respondent Nos.1 and 2 to take necessary actions as per Rules.

9. Respondent No.4 conducted hearing on the complaint made by the petitioner. Respondent No.4 passed an order on 10th September 2015 directing respondent No.2 to pay arrears of salary and regular salary to the petitioner and directed the Superintendent of his Office to conduct enquiry in respect of harassment caused to the petitioner by respondent No.2.

10. Petitioner submits that by the order dated 21st September 2015, her services came to be terminated by respondent Nos.1 and 2. This order of termination was served on petitioner on 28th September 2015. Petitioner submits that this order of termination was passed without holding enquiry. The petitioner being a permanent employee, enquiry ought to have been held before terminating her services.

11. Being aggrieved by the order of termination of petitioner, the petitioner challenged this order by preferring Appeal under Section 83 of the Special School Code before the Deputy Director (Social Welfare Handicap Section) Aurangabad on 23rd October 2015. Upon hearing the petitioner, the order of termination

dated 21st September 2015 came to be stayed by respondent No.4.

12. The petitioner approached respondent No.2 with the order of stay to her termination. However, respondent No.2 did not allow her to join the duties. Respondent No.2 did not even accept the application nor he accepted the order of stay. Therefore, on 20th November 2015, petitioner dispatched the application and copy of interim order of stay to respondent Nos.1 and 2 by post calling upon them to allow petitioner to join the duties. Therefore, on 27th November 2015, petitioner brought her grievances to the notice of respondent No.4. Respondent No.4 directed respondent No.2 to let the petitioner join the duties. Even then, petitioner was not allowed to join the duties. Therefore, on 7th December 2015, she again approached respondent No.1 alongwith stay order, but respondent No.1 refused to comply with the order of respondent No.4 and did not allow her to join the duties. Therefore, on 9th December 2015, again petitioner made detailed representation to respondent No.4. Respondent No.4 issued show cause notice to respondent No.2.

13. Learned Regional Deputy Commissioner, Social Welfare,

Aurangabad, heard the appeal finally and dismissed it vide his Judgment and order dated 26th March 2018, which was received by the petitioner on 3rd April 2018, by holding that appellant (petitioner herein) is not a permanent employee and no enquiry is contemplated in case of non-permanent employee. This order is under challenge in this writ petition.

14. Respondent Nos.1 and 2 filed their affidavit-in-reply. It has admitted that petitioner was appointed as a Cook on 5th June 1996 but denied that prior permission of the District Social Welfare Officer was obtained while appointing petitioner as a Cook. They have contended that respondent No.2 School was not recognized by the Government and therefore, there was no question of appointing her with prior permission of respondent No.4. No appointment order was issued to the petitioner by respondent Nos.1 and 2 on 5th June 1996. In the year 2006, the Government accorded permission to respondent No.2 School to open the School. Respondent No.4 for the first time granted approval to the appointment of the petitioner on temporary basis vide order dated 4th May 2010. They contended that petitioner was consistently absent from duty. Respondent No.2 School is a Residential School for Handicapped students and therefore, students were facing problem of boarding. Therefore,

respondent No.2 issued several show cause notices to the petitioner and called upon her to attend the duties sincerely. She used to come to the School as per her own wish. Show cause notice was given to her calling upon her to join the duties within three days but the petitioner did not respond to the notice. Respondent Nos.1 and 2 never asked petitioner to bring three new students to the School. She was absent from duty continuously from 9th April 2015 without any intimation or without getting the leave sanctioned. Therefore, respondent No.2 issued notices on 19 June 2015 and 10th July 2015. Even then, petitioner did not join the duties. These notices were served on the petitioner.

15. Respondent Nos.1 and 2 further contended that petitioner had made a false complaint of harassment against them. The District Social Welfare Officer hold the hearing on 10th September 2015. During the hearing, petitioner admitted that she had no harassment from respondent Nos.1 and 2 but contended that she did not receive any salary. Even after the conclusion of the hearing before District Social Welfare Officer, petitioner did not attend the duties. Therefore, respondent Nos.1 and 2 were left with no other alternative than to terminate the services of the petitioner.

16. Respondent Nos.1 and 2 further contended that respondent No.4 - District Social Welfare Officer granted temporary stay to the order of termination of the petitioner. Petitioner did not turn up to the School to deliver the application or the order of stay passed by respondent No.4. They contended that petitioner was a temporary employee. The authorities also granted appointment to her as temporary employee. She was not appointed by the management by following due procedure of law. Therefore, she being a temporary employee, there was no question of holding enquiry. Therefore, the order of termination passed by respondent Nos.1 and 2 is legal and no interference is required by this Court.

17. The petitioner filed re-joinder. She contended that no prior permission from District Social Welfare Officer for appointing the staff on clear vacant post is needed. She contended that with malafide intention, appointment order was not issued though the appointment of petitioner was on clear vacant post and thereby committed breach of Clause 42(3) of Special School Code. After completion of 19 years of service, respondent Nos.1 and 2 are estopped from contending that no proper procedure was followed while appointing the petitioner.

18. The Appellate Authority held that approval to the appointment of the petitioner was granted on temporary basis vide order dated 4th May 2010 for the period from 1st April 2008 to 28th February 2009 and vide order dated 30th May 2012 from 1st April 2011 till further orders. Learned Appellate Authority further held that the provisions of Clause 80, 81 and 82 of the Special School Code for School for Handicapped students do not apply to the petitioner as petitioner was not a permanent employee. It also held that when District Social Welfare Officer held enquiry, petitioner stated that she had no harassment from respondent Nos.1 and 2. Having held this, learned Appellate Authority dismissed the appeal of the petitioner.

19. Heard Shri B.R.Kedar, learned counsel for the petitioner and Shri V.D.Gunale, learned counsel for respondent Nos.1 and 2.

20. Shri Kedar, learned counsel for the petitioner submitted that petitioner was appointed on 5th June 1996. She sincerely discharged her duties. She never remained absent. But the management with oblique motive showed the petitioner as absent by maintaining two muster rolls. He submitted that respondent Nos.1 and 2 started harassing the petitioner by

issuing false notices. They wanted to create a record about absence of petitioner from duty. He submitted that respondent No.2 School had issued a communication dated 1st May 2015 calling upon the petitioner to bring three students within eight days from reopening of the School failing which her salary would not be drawn. He submits that this shows that on 1st May 2015 petitioner was present in the School. He submitted that on 19th June 2015, a communication was made to the petitioner intimating her that she was absent from 9th April 2015 without prior intimation. If she did not report to the duties, disciplinary action will be taken against her, salary and allowances would not be drawn for the absentee period. Learned counsel for the petitioner submits that the communication dated 1st May 2015 shows that petitioner was present in the School. Therefore, the contentions in the notice dated 19th June 2015 that she was absent from 9th April 2015 are false. For the same reason, contentions in communication dated 10th July 2015 are false. By this communication, she was intimated that she remained absent without intimation. He further submitted that as she was fed-up of the harassment caused by respondent Nos.1 and 2, she wrote a letter to District Social Welfare Officer, Pune, putting forth her grievance that she was subjected to harassment by showing her absent from duty. He submits that this notice is also false

because petitioner was consistently present in the School. He submitted that the petitioner became permanent as she discharged duties for more than four years continuously i.e. from 1996 to 2000. He submitted that Clause 58 of the Special School Code for School for Handicapped students does not contemplate calling of advertisement for appointment for temporary or permanent teaching staff and non-teaching staff. The candidate has to only make an application. He further submits that the staffing pattern was created by Resolution dated 18th August 2004. It does not show that the post of Cook and other posts are temporary posts. He submits that these posts were permanent posts. In terms of Clause 57(3) of the Special School, if two years continuous service is rendered by the employee, in that case, the employee shall be deemed to have been permanent. He submits that applicant has rendered 15 years of service. Learned counsel for the petitioner submits that petitioner was recalled in the year 2006 and since then she has rendered continuous service for 11 years. Before that also from 1996 to 2000 she rendered continuous service for four years and therefore, she had acquired permanency in view of above mentioned Clause and therefore, enquiry ought to have been conducted. He further submitted that respondent Nos.1 and 2 have contended that approval was not accorded by the District

Social Welfare Officer. He submitted that approval is not necessary in view of the Full Bench Judgment of this Court in the case of ***Hindi Vidya Bhavan & Ors. Vs. Presiding Officer, School Tribunal and Ors. [2008 (1) Bom.C.R. 231]***. He also placed reliance on the following authorities :-

- (i) *National Education Societys High School & Junior College Vs. Lulomool Monachary (Mrs.) [1987 (2) Bom.C.R.521]*.
- (ii) *President Vs. Sunita Bansidhar Patole [2007 (2) Mh.L.J. 105]*.
- (iii) *Yogeshwar Vikas Sanstha & Ors. Vs. Rajendra T.Shinde & Anr. [2008(1) Bom.C.R. 297]*.
- (iv) *President, Samata Shikshan Samittee & Ors. Vs. Madhav Yadavrao Dhotre & Anr. [2009 BCI 286]*
- (v) *Moti Ram Deka Etc. Vs. General Manager, North East Frontier Railway (in C.A. No.711 of 1962) [AIR 1964 SC 600]*.
- (vi) *St.Ulai High School, through its Principal & Anr. Vs. Devendraprasad Jagannath Singh @ Anr. [2007(1) Bom.C.R. 540]*.

21. Shri Gunale, learned counsel for respondent Nos.1 and 2 submitted that petitioner was appointed on 5th June 1996 but no appointment order was issued. She had made an application on 5th June 1996 and she was allowed to join duties w.e.f. 8th June 1996. No appointment order was issued while filling the post of Cook. He submits that by order dated 4th May 2010, the approval was given by District Social Welfare Officer, Zilla Parishad, Jalna on temporary basis. Again on 30th May 2012 petitioner was appointed on temporary basis w.e.f. 1st April 2011. Holding of

enquiry before removing of employee comes into play only when appointment is on permanent basis. Since the appointment of the petitioner was on temporary basis, no enquiry was contemplated. He further submitted that appointment of the petitioner has not been approved by the District Social Welfare Officer on permanent basis but was approved only on temporary basis.

22. He further submitted that the letter dated 1st May 2015 allegedly issued by respondent No.2 calling upon the petitioner to bring three students appears to be suspicious. He submitted that it does not bear outward number. He submitted that respondent No.2 had issued notice to the petitioner on 19th June 2015 for her absence from duty since 9th April 2015. However, she did not respond to the notice. Therefore, again on 10th July 2015, another notice was issued calling upon her to join duties within seven days. She was also asked to explain her absence. By this letter, she was also asked to produce medical certificate. Even then, she did not join the duty. He submitted that respondent Nos.1 and 2 were left with no other alternative than to terminate the services of the petitioner. He submitted that the allegations regarding harassment are false to the knowledge of the petitioner as during the hearing conducted by the District

Social Welfare Officer, petitioner admitted that she did not have any harassment from respondent Nos.1 and 2. However, she complained about non-payment of salary. He submitted that respondent Nos.1 and 2 were justified in not drawing the salary of the petitioner as petitioner was absent from duty. He submitted that respondent No.2 is a Residential School for Handicapped students and therefore, being a Residential School, services of cook are of pivotal importance. He, therefore, prayed for dismissal of the petition. He placed reliance on the following authorities :-

- (i) *Judgment of this Court in the case of Shri Mahesh Madhukar Wagh and 3 Others Vs. The State of Maharashtra and 4 Others in Civil Application No.1853 of 2018 in Writ Petition No.12597 of 2017, dated 27th March, 2019.*
- (ii) *Priyadarshini Education Trust and others Vs. Ratis (Rafia) Bano d/o Abdul Rasheed and others [2007(6) Mh.L.J. 667]*
- (iii) *Md.Ashif and Ors. Vs. State of Bihar and Ors. [MANU/SC/0338/2010],*
- (iv) *Nand Kumar Vs. State of Bihar and Ors. [MANU/SC/0148/2014],*
- (v) *Judgment of Hon'ble Supreme Court in the case of Upendra Singh Vs. State of Bihar and Ors. li Civil Appeal No.2356 of 2018, dated 23rd February 2018.*
- (vi) *Punjab Urban Planning and Development Authority and Anr. Vs. Karamjit Singh in Civil Appeal No.3925 of 2019 (Arising out of*

SLP (Civil) No.29160 of 2018),

23. It is not in dispute that initially respondent No.2 School was a non-grant in aid School. Petitioner was appointed on 8th June 1996 when the School was non-grant in aid School. It is also not in dispute that the School was closed in the year 2000 and remain closed till the year 2006. The School reopened on 2nd February 2006. On 31st March 2008, respondent No.2 School received grant in aid. While appointing petitioner, appointment order was not issued is also not in dispute.

24. The primary objection raised by Shri Gunale, learned counsel for respondent Nos.1 and 2 is that appointment of the petitioner was not approved by the Competent Authority. He submitted that the approval was on temporary basis. Therefore, petitioner cannot claim permanency.

25. For appreciating submission of learned counsel for respondent Nos.1 and 2, staffing pattern will have to be looked into. Staffing pattern was sanctioned on 18th August 2004. It shows that two posts of Cook were sanctioned for respondent No.2 School. Staffing pattern does not show that these posts were created on temporary basis. Therefore, it can be inferred that these posts were permanent posts. So far as approval to

the appointment of the petitioner is concerned, Shri Kedar, learned counsel for the petitioner submitted that approval has nothing to do with the appointment of an employee. For this purpose, he placed reliance on Full Bench Judgment of this Court in the case of ***St.Ulai High School, through its Principal & Anr*** (*supra*). One of the issues referred to the Full Bench was as under :-

“Is it mandatory for every private recognized School to obtain the approval of the Education Department of the State to the appointment of every employee including a teacher employed at such School ?”

26. The Full Bench of this Court gave the decision that “neither the MEPS Act, 1977, nor the Rules framed thereunder mandate the grant of approval by the Education Officer as a condition precedent to a valid order of appointment. The requirement of approval which relates to the disbursal of grant in aid is a matter between the management and the State and want of approval will not invalidate an order of appointment”.

This answers the argument of Shri Gunale, learned counsel for the respondent management that for want of approval, the appointment of the petitioner is on temporary basis. Therefore, this argument is not available to the respondent Nos.1 and 2.

27. The next question is whether the petitioner has become permanent in view of the provisions of the Special School Code. Clause 58 of the Special School Code states that a candidate who desires of being appointed in the School for handicapped students shall make an application giving details as regard his name, date of birth, educational/professional qualification and experience and would annex true copies of the certificates to that effect. This shows that issuing of advertisement is not contemplated. Clause 57(3) of the Special School Code for Handicapped students states that after two years of continuous services an employee shall be deemed to be permanent.

28. Shri Gunale, learned counsel for respondent Nos.1 and 2 placed reliance on the decisions in the above mentioned cases for the proposition that if proper procedure is not followed in the appointment of an employee, he cannot claim permanency. In Paragraph No.14 of the case of Shri Mahesh Madhukar Wagh (supra), Division Bench of this Court held as under :-

"14. It could thus be seen that the Hon'ble Supreme Court has clearly held that theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot be held that the State had held out any promise while engaging these persons either to continue them or to make them permanent. It has been equally held that there is no fundamental right in those who

have been employed on daily wages or temporary or contractual basis to claim that they have a right to be absorbed in service. It has been held that a regular appointment could be made only by making appointments consistent with the requirement of Articles 14 and 16 of the Constitution. The employees appointed on contractual or temporary basis cannot claim to be treated equally with those who are regularly employed. It has been held in an unequivocal terms that a mandamus could not be issued in favour of employees, directing Government to make them permanent since the employees, not selected through regular selection process, cannot have a legal right to be permanently absorbed."

29. This decision of Division Bench of this Court has no application to the facts of the case in hand. In this decision, the applications were invited by the University for the posts which were purely temporary posts and also period was specified therein. The advertisement also mentions that in the event regularly selected candidates are available through the mode of Section 76, the appointment of temporary candidates would be liable to be terminated. There was a specific stipulation in the appointment order to that effect. In the case in hand, this is not the position. Post is a permanent post. Petitioner was appointed on a permanent post. Clause 57(3) of the Special School Code confers deemed permanency if two years continuous service is put in.

30. In the case of *Priyadarshini Education Trust and Others* (supra), teacher was appointed on 15th June 1987 and it was only for one academic year and on temporary basis for the years 1988-1989 and 1989-1990. Initially, it was a non-grant in aid School. Upon availability of grants, advertisement was issued but the teacher did not apply for the post. It is held that “any procedure for recruitment, which does not afford equal opportunity to all eligible and deserving candidates to compete for seeking appointment and employment, must be seen and termed as unconstitutional as being violative of Articles 14 and 16(1). The fact situation in the present case is totally different.

31. The other authorities lay down the same proposition.

32. Admittedly, petitioner was appointed w.e.f. 8th June, 1996 as a Cook. Clause 57(3) of the Special School Code show that employee, who has completed two years continuous service shall be deemed to be permanent. In the case at hand, since the petitioner was appointed on 8th June, 1996, she will become permanent in the year 1998. Staffing pattern was sanctioned in the year 2004. In the year year 2006, School was reopened and petitioner was recalled. She continued to work till 2015. Now, the management is raising the objection that petitioner was not appointed by following due procedure. Even if it is accepted for

the sake of argument that petitioner was not appointed by following due procedure, her case will be covered by the Judgment of **Secretary, State of Karnataka and Others Vs. Umadevi and Others [2006 (4) SCC 1 and 44]**. In this case, the Hon'ble Supreme Court has held as under :-

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V.Narayanappa [(1967) 1 SCR 128 : AIR 1967 SC 1071], R.N.Nanjundappa [(1972) 1 SCC 409 : (1972) 2 SCR 799] and B.N.Nagarajan [(1979) 4 SCC 507 : 1980 SCC (L&S) 4 : (1979) 3 SCR 937] and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases aboveresferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in

motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.”

33. The order of the learned Regional Deputy Commissioner, Social Welfare, Aurangabad does not indicate that this exercise was carried out by respondent Nos.1 and 2. The petitioner fulfills the qualification for the post of a Cook. Therefore, in view of the decision of the Hon'ble Supreme Court in the case of **Umadevi and Others** (Supra), the exercise of making the temporary employees permanent should have been undertaken. It seems that this exercise has not been undertaken. It can be undertaken now. It has simply proceeded on the premise that there is no approval from Education Department to this post. Therefore, it will be appropriate to remand the matter to the learned Regional Deputy Commissioner, Social Welfare, Aurangabad to give finding as to whether the petitioner has acquired the status of permanency.

34. In light of above, writ petition is allowed. The impugned order dated 26th March, 2018 passed by the learned Regional Deputy Commissioner, Social Welfare, Aurangabad, is set aside.

The matter is remanded to the learned Regional Deputy Commissioner, Social Welfare, Aurangabad to decide whether in view of Section 57(3) of the Special School Code and in view of Judgment of Hon'ble Supreme Court in the case of ***Umadevi and Others*** (Supra) petitioner has acquired permanency.

35. With these observations, writ petition is disposed of. Rule is made absolute in the above terms.

(**M.G.SEWLIKAR**)
JUDGE

SPT