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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2864 OF 2016

VAISHALI SANDESH BIBAVE,
Age – adult, Occ – Service
R/at – Sugandha Baug, Phase III,
Rajgurunagar, Wada Road,
Taluka – Khed, District - Pune

...Petitioner

~ VERSUS ~

- 1. STATE OF MAHARASHTRA,**
[Notice to be served upon Assistant
Government Pleader, High Court,
Appellate Side, Mumbai]
- 2. DEPUTY DIRECTOR OF
EDUCATION,**
Pune Region, Pune.
17, Dr Ambedkar Road,
Pune 411001
- 3. KHED TALUKA SHIKSHAN
PRASARAK MANDAL,**
C/o Hutatma Rajguru Mahavidyalaya,
Rajgurunagar, Taluka – Khed,
District – Pune 410505
[Notice to be served upon president]
- 4. PRINCIPAL,**
Hutatma Rajguru Mahavidyalaya,
Rajgurunagar, Taluka – Khed,
District – Pune 410505

...Respondents

APPEARANCES

FOR THE PETITIONER **Dr Uday Warunjikar, with Sumit Kate.**

FOR RESPONDENT NO.1- Ms SS Bhende.
STATE

FOR RESPONDENT NOS. 3 & 4 **Mr Sanjeev Sawant, with Malhar Bageshwar, i/b Samir Suryawanshi.**

**CORAM : G.S.Patel &
Neela Gokhale, JJ.**

DATED : 23rd February 2023

ORAL JUDGMENT (Per GS Patel J):-

1. **Rule.** Respondents waive service. Rule made returnable forthwith, and the Petition is taken up for hearing and final disposal.

2. The Petitioner is qualified with M.Sc and B.Ed degrees. Her Science degree is in biology. She comes from the Special Backward Class Category. She came to be appointed after a regular selection with effect from 14th June 2004 in the un-aided division of a Junior College, i.e., the junior college of which the 4th Respondent is the Principal, and which is run by the 3rd Respondent Trust. Her appointment was in the un-aided section as an Assistant Teacher. She continued in that service in the un-aided division of the college. There have never been any adverse remarks against the Petitioner about her work or performance in that post. A copy of her experience certificate is at Exhibit 'A' to the Petition. The

appointment was said to be for a fixed period. Yet, she remained in service continuously. For the Academic Year 2004–2005, she served as a part-time teacher. From 3rd August 2005 onwards, she has served as a full-time teacher.

3. The Petitioner's husband, Sandesh, also served in one of the courses run by the College. This was called the Minimum Competency and Vocational Courses ("MCVC"). He was a permanent employee and served from 6th July 1998 onwards. On 19th October 2007, while still in service, Sandesh passed away. He had completed his service until the day before 18th October 2007. The submission in paragraph 3, that the Petitioner was 'entitled' to service on compassionate ground in her husband's post, may be somewhat inaccurate. She may not have had a *right* to that appointment but only a right to *apply* for that appointment. For our purposes today, this makes little difference. For the Petitioner did in fact apply to the Respondent-Management for compassionate appointment.

4. It seems that in the meantime, for the biology subject a post fell vacant in 2011 in the aided division of the 4th Respondent-College. The Petitioner applied to the Deputy Director of Education to be appointed to that post since, according to her, she was entitled to seek compassionate appointment to the post held by her husband following a Government Resolution. She also said that she was the most senior amongst persons in the unaided section. The Deputy Director of Education took up her application. Several notices were issued to the Management. Finally, the Deputy Director passed an

order on 29th September 2014 that the Petitioner be appointed to the post of Biology created in 2011 in the aided section.

5. The management, therefore, decided to transfer the Petitioner to the aided division and an order of appointment to that effect followed. This was dated 20th October 2004, but this is the genesis of the present problem because that appointment apparently sought to position the Petitioner with retrospective effect as a *Shikshan Sevak* from 15th December 2011 to 14th December 2014 and thereafter provided for her absorption as a regular teacher in the aided section of the Junior College. A copy of that appointment order is at Exhibit 'C' to the Petition. The Petitioner joined service in the aided section following this appointment order with effect from 21st October 2014.

6. The Respondent naturally had to submit a proposal for approval of the Deputy Director of Education to the Petitioner's appointment to this post. That approval from the Deputy Director of Education followed on 19th May 2015. This also approved the Petitioner's appointment as a *Shikshan Sevak* from 17th October 2014 to 16th October 2017. In other words, the approval was as *Shikshan Sevak*, not as a regular Teacher.

7. The Petitioner's case is that she was entitled to be approved as a regular teacher in the aided section either from the date post fell vacant 1st July 2011 or, alternatively, from 15th December 2011. The latter date is the date of the appointment of the Petitioner to the post by the Respondent-Management.

8. This, in brief is the entirety of the conspectus of the Petition. In fact, the controversy is about the period from 1st July 2011 to 14th December 2011 and, specifically, which of these should be the starting date for the computation of the Petitioner's service and all attendant consequences. Prayer (c) is in the alternative to prayer(b) and prayers (b), (c) and (d) of the Petition at Pages 10 and 11 read as follows:

“b) The Hon'ble Court may be pleased to quash / set aside the Order of Approval in respect of the petition dtd. 19/05/2015 granted by the Dy. Director of Education and direct that she be given approval as Regular Teacher from 01.07.2011.

c) Alternatively and without prejudice to what is being prayed hereinabove the Hon'ble Court may be pleased to direct the Dy. Director of Education to grant approval to the petitioner's appointment from 14/12/2011 i.e., the date of appointment of the petitioner by the management in grant-in-aid divisions taking into consideration her earlier service in non grant-in-aid divisions;

d) The Hon'ble Court may be pleased to issue writ of mandamus directing the respondents to give petitioner benefits of service rendered by her from 2005 i.e., 3rd August 2005 in the non grant-in-aid divisions as well as for the purposes of giving her higher grade in scale.”

9. For our purposes, two questions of law can safely be said to arise. The first is, we believe, completely covered by not one but several decisions of this Court. As Bharati Dangre J said in Writ Petition No. 1166 of 2018, there is a misconception that in the aided section a person must invariably start as a Shikshan Sevak before appointment as an Assistant Teacher. This may be true for those

who are directly appointed to the aided section. But we have any number of cases before us where persons are first appointed in the unaided section. There, that is in sections that are not covered by grant-in-aid, there is no requirement of prior appointment as a Shikshan Sevak or of the completion of three years as a Shikshan Sevak to qualify for appointment as an Assistant Teacher. Thus, teachers are often directly appointed as Assistant Teachers in the unaided section. Then, for various reasons, there is a lateral shift to the aided section. The approach of the Government in these matters has not been accepted and, on the contrary, has been viewed with disfavour by several Division Benches of this Court. In a recent decision in *Archana Dubey v State of Maharashtra & Ors*,¹ judgment dated 16th February 2023, our attention was drawn to a Division Bench judgment in *Shekhar P. Deshmukh v. Deputy Director Education & Ors*.² Paragraphs 9, 12 and 15 of that decision³ are important for our purposes. We quoted them in the *Archana Dubey* decision, and we do so again now.

“9. On consideration of the entire gamut of the matter, it can be seen that the respondent authorities have a misconceived notion that the teacher working in an unaided section of a school cannot fill up the vacancy of an Assistant teacher in an aided section of the school and when an appointment to an aided section is to be made, it has to be by way of a fresh appointment as a Shikshan Sevak as per the scheme of the State Government, and it is only on completion of the

1 MANU/MH/0594/2023; Writ Petition (L) No.3954 of 2021, decided on 16th February 2023.

2 *Shekhar P Deshmukh v Deputy Director Education & Ors*, 2018 SCC OnLine Bom 1444: (2018) 6 Bom CR 408.

3 From the SCC Online report. Para numbering varies from the original.

requisite number of years, status of an assistant teacher can be bestowed and the regular pay scale can be made applicable.

12. The respondent authorities have misguided themselves inasmuch as taking a stand that while the petitioner came to be transferred to the aided division of respondent no. 4 school, he has to start from the beginning i.e., since it was a vacancy in the aided section, it had to be filled in by effecting an appointment as a Shikshan Sevak. This misconception of the respondent authorities is in fact deluded by the judgment of this Hon'ble Court in case of *Ms. Sandhya Laxman Ghosalkar v. State of Maharashtra* [WP No 5358 of 2012, decided on 12/9/2012] and also the subsequent judgment delivered at the Aurangabad bench in case of *Dattu Bhima Thorat v. State of Maharashtra* [WP No 2960 of 2012, decided on 11/10/2012]. The Hon'ble Division Bench of this Court in *Ms. Sandhya Ghosalkar* was dealing with grievance of the petitioner in a batch of petitions who were appointed as Assistant Teacher in Secondary school at Khopoli, District Raigad. The petitioners were subsequently transferred to an aided school run by the same management. The grievance raised by the petitioner before the Court was that they have been granted approval as Shikshan Sevak on 29th March, 2012 with the result that they would be now be required to put in another three years of service before they are confirmed as Assistant Teacher, leading to loss of seniority. **In the backdrop of these facts, this Court observed that there was no jurisdiction whatsoever for the Education Officer to grant his approval only as Shikshan Sevak and if the petitioners have been appointed as Assistant Teachers in the aided school by transfer from the unaided school, the approval ought to have been granted to them as Assistant Teachers.**

... ..

15. The judgment delivered in the aforesaid two cases have been consistently followed in catena of judgments at the principal seat as well as the other benches of this Court and **this Court has consistently taken a view that the petitioners who were working as Assistant Teachers in the unaided division of the school on being transferred into the aided schools cannot be appointed as Shikshan Sevak, and they are entitled to be appointed as Assistant Teacher in the aided division, and the respondent authorities were directed to confer approval to their appointments as Assistant Teacher and the monetary benefits accruing therefrom were directed to be disbursed. We do not see any reason to deviate from the view taken by this Court in its earlier decision where similar facts were involved.**”

(Emphasis added)

10. The observations in *Shekhar P Deshmukh* entirely apply to the case here. Apart from anything else, the view of that Division Bench on an identical issue is clearly binding on us. We are not shown any reason why we should depart from that view or why that view can be said to be not binding whether as a judgment rendered *per incuriam* or otherwise. The *Shekhar P Deshmukh* decision itself refers to previous judgments including in *Sandhya Laxman Ghosalkar v State*⁴ of Maharashtra and *Dattu Bhima Thorat v State of Maharashtra*.⁵

11. It therefore emerges as a principle of law that once the Petitioner was appointed as an Assistant Teacher in the unaided

4 Writ Petition No 5358 of 2012.

5 Writ Petition No. 2960 of 2012.

section, on a lateral transfer to the aided section of the same college (or in fact to any other college under the same management), the Petitioner could not have been reverted to a lower post than that to which she was initially appointed. This is not only illogical but it is patently arbitrary and it is for this reason that in *Archana Dube* we made reference to the settled law in *Associated Provincial Picture Houses v Wednesbury Corporation*,⁶ regarding unreasonableness, and also to subsequent pronouncements including *Council of Civil Service Unions v Minister for the Civil Service* (“CCSU”).⁷ That branch of law has been consistently accepted by our Supreme Court while addressing questions of judicial review of administrative action. The test, as Diplock LJ said in *CCSU* is to see whether the decision in question is so patently arbitrary or unreasonable that none could possibly arrive at it. In fact, Diplock LJ put it even more strongly when he described it as one outrageous in its defiance of logic or law. As we noted, there is simply no logic to a downward movement upon a lateral shift. There is nothing in law to justify such an action.

12. The other question that possibly arises is whether because she accepted her appointment and is not shown to have done so conditionally the petitioner is in any way estopped from now raising this plea. We do not see how there can be estoppel against a statute or a principle of law. Especially if a decision is arbitrary and unreasonable, it is no answer to say that the person affected has

⁶ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, [1948] 1 KB 223.

⁷ *Council Of Civil Service Unions & Ors v Minister for the Civil Service* [1983] UKHL 6 : [1984] 3 All ER 935 : [1984] 3 WLR 1174.

acted on or accepted it and therefore unreasonableness and arbitrariness must be sustained. That can never be.

13. The Affidavits in Reply begin at page 34. The first is by the Deputy Director of Education. This is actually not a combative affidavit. On the contrary, it contains an apology and a submission that a payment of back-wages has been reserved and the passing of bills and disbursement is in progress.

14. There is another Affidavit in Reply at page 40 from the Respondent No.4. This has a narrative of the facts and it does appear that both these affidavits are in compliance with series of previous orders that came to be passed.

15. There is a third affidavit at page 63. Then there is another affidavit of 10th March 2022 of the Deputy Director of Education. Here he says that he has approved the Petitioner's appointment from 17th October 2014 to 16th October 2017 on compassionate grounds with the pay-scale of a teacher. He then says that the proposal submitted by the 4th Respondent was for the period from 17th October 2014 to 28th February 2021, and that the Superintendent of the Pay & Provident Unit, Pune submitted a proposal for the Petitioner's back-wages for this period. In paragraph 5, the statement is that the Director of Education has sanctioned the proposal for the Petitioner's back-wages from 17th October 2018 to 28th February 2021. Then paragraph 6 says that the Director of Education by letter of 17th January 2022 has temporarily stayed approval till further orders. The earlier letter of 17th January

2022 has been cancelled. The bill for payment has been submitted on 10th March 2022 to the treasury office and the statement is that the Petitioner will get arrears of back-wages within a few days.

16. This does not address the question that is raised —perhaps the only question that remains in the Petition — which is from what date should the Petitioner’s service be computed. Self-evidently, the fixing of this date has multiple effects. There is the financial impact. The Petitioner’s claim for arrears in wages could be significantly affected one way or the other. Then there is the question of continuity of service, seniority, promotion, and placement in the seniority rankings. These are not trivial questions when it comes to persons who are in service. They have a career-long impacts. They also have, significantly, an impact at the end of the career on post-retiral benefits.

17. Should the approval as a teacher for the Petitioner be computed from 1st July 2011? Or should it be from 14th December 2011?

18. The first date, 1st July 2011, is the date of the Petitioner’s approval as a regular teacher. The second date, 14th December 2011, is the date of the appointment of the Petitioner by the junior college’s management but in the aided or grant-in-aid division.

19. We believe that accepting the date as 14th December 2011, is not entirely justified. It is mere accident. That transfer could have happened at any time after her initial appointment. The foregoing

discussion shows that the question is of the Petitioner being accepted as a regular teacher on a lateral transfer. Her representation has been accepted. The question is from when she should be reckoned as a regular teacher. The only logical answer seems to us to be to say, “Why, surely from the date that she was first appointed as a regular teacher.” Any other date is purely accidental, random and cannot provide a defensible basis for the action. We therefore accept the submission that the date in question must be from 1st July 2011.

20. Accordingly, we make rule absolute in terms of prayer clause (b) and prayer clause (d).

21. Prayer clause (d) is obviously necessary because that is the date of service. There is no doubt that the Petitioner entered service on 3rd August 2005. Her years of service cannot be excluded from reckoning. There is no principle by which service actually rendered and accepted can be completely effaced merely on transfer from one division to another.

22. Rule is made absolute in these terms. There will be no order as to costs.

(Neela Gokhale, J)

(G. S. Patel, J)

Digitally signed
by
SHAMBHAVI
NILESH
SHIVGAN
Date:
2023.03.20
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