



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

WRIT PETITION NO. 5654 OF 2012

Dharamchand s/o. Uttamchand Gangwal,
Age 48 years, Occu. Nil,
R/o. Deogaon Rangari,
Tq. Kannad, Dist. Aurangabad

.. Petitioner

Versus

1. Shri. Ganesh Shikshan Sanstha
Deogaon Rangari, Through its
Secretary, Tq. Kannad,
Dist. Aurangabad.
2. Shri. Ganesh Shikshan Sanstha
Deogaon Rangari, Through its
President, Tq. Kannad,
Dist. Aurangabad.
3. Head-Master,
Shri. Ganesh Vidyalaya,
Deogaon Rangari,
Tq. Kannad, Dist. Aurangabad.
4. Education Officer (Secondary),
Zilla Parishad, Aurangabad

.. Respondents

Mr. R. J. Godbole, Advocate for Petitioner;
Mr. Ashok B. Tele, Advocate for Respondents No.1 to 3;
Mrs. R. R. Tandale (Choure), A.G.P. for Respondent No.4

CORAM : S. G. MEHARE, J.
Reserved on : 22.01.2024
Pronounced on: 08.04.2024

JUDGMENT :-

1. The petitioner/employee has impugned the judgment and order of the learned Presiding Officer, School Tribunal, Aurangabad Division Aurangabad, passed in Appeal No. 8 of 1990, dated 01.02.2012.

2. The petitioner had a case that he was appointed as a Clerk by a written appointment order dated 21.07.1988 as a Junior Clerk with respondent No.3. He was appointed as a permanent Clerk against the vacant post. He rendered services for one year and four months. However, the respondent terminated his services by an order dated 12.01.1989. He claimed that since he rendered services for one year and four months, he was deemed permanent in services as provided under Section 5(2) of the Act. The procedure prescribed under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("the Act", for short), and the Rules for termination were not followed.

3. The respondent filed the written statement contending that the petitioner was never appointed by following due procedure of law. They denied that they appointed the petitioner as a permanent employee. Before the impugned order was passed, the Tribunal had passed the final order in the same appeal. Respondent impugned that order before the High Court in Writ Petition No.2841 of 1993. By order dated 12.08.2010, this Court quashed and set aside the said order on the ground that the principle, namely, '*Audi alteram partem*' was overlooked while passing the impugned judgment and order. Thereafter, the respondents contested the petition on merit. The impugned order is legal and correct.

4. Heard the respective counsels at length.

5. Before advertizing to the arguments of the learned respective counsels, it would be appropriate to discuss the reasons for rejecting the appeal by the Presiding Officer, School Tribunal. The School Tribunal held that the petitioner did not place the appointment order and advertisement published in the newspaper inviting applications for appointment on record. He has discussed the term 'due appointment' as interpreted in the case of ***Priyadarshini Education Trust and others vs. Ratis (Rafia) Bano d/o. Abdul Rasheed and others, 2007(6) Mh.L.J. 667.*** No evidence was placed on record to indicate that the appellant/employee was appointed to a permanent vacant post.

6. The learned counsel Mr. Godbole, for the petitioner, reiterated the facts of the case. He argued that the learned Tribunal recorded the finding without framing the issues on disputed facts and passed the impugned order, which is illegal. The Management was at fault for not following due procedure for the appointment.

7. To bolster his arguments, he relied on the case ***Hindi Vidya Bhavan Vs. Presiding Officer, School Tribunal Mumbai and others, 2007(6) Mh.L.J. 563*** and relied on many more case laws. The ratio laid down in those cases would be considered at the relevant time. He further added that refusal of approval to regularize the appointment is not grounds for terminating the services. The Tribunal travelled beyond the record. Relying on the

case of ***Jagdamba Education Society, Nagpur Vs. Rajendra s/o. Baburao Golhar and others, 2009(2) Mh.L.J. 522***, he argued that the advertisement for the post of Clerk is not essential. He further argued that the learned Tribunal has the power to decide the incidental issues. However, the Tribunal passed the impugned judgment and order hyper-technically. The Management never disputed the appointment of the employee.

8. He also relied on the case of ***St. Ulai High School and another Vs. Devendraprasad Jagannath Singh and another, Maharashtra Education Cases (2007), 300*** and argued that the Tribunal may consider the incidental questions. He also argued that in 1992, the post of Junior Clerk was vacant. The termination order was arbitrary and prejudicial to the petitioner. He prayed to allow the petition.

9. Mr. A. B. Tele, learned counsel for respondent Nos.1 to 3 Management, argued that the petitioner had attained the superannuation on 30.10.2022. The petitioner had applied in pursuance of the advertisement. The petitioner knew that his appointment was subject to the condition of approval. The proposal for approval was sent to the Education Officer, Zilla Parishad, Aurangabad. He refused to grant approval to the appointment of the petitioner on the grounds that there was a ban by the state government on appointing employees except for teachers. The post on which the employee was appointed was for

a reserved category. The petitioner was from the open category. The claim for deemed permanency is also incorrect because he did not complete two years of service. One of the employees from the reserved category was appointed to the post of clerk. His appointment was not challenged. The contradictory grounds were raised before the Tribunal about the terms and conditions of the appointment. There was no case of misconduct. The law laid down in the case of **Priyadarshini** (supra) is that the appointment should follow a procedure. He has placed various case laws on record. They prayed to dismiss the petition.

10. The learned counsel for the petitioner Shri. Godbole replied that the appointment order does not indicate that the petitioner was appointed against the reserve post. The termination order is also silent on that ground. However, this was not the issue before the learned Tribunal. The copy of the rejection of approval was not placed on record. The appointment was not subject to the approval. If it was so, the respondent had to pay his salary.

11. On hearing the respective counsel and considering the facts of the case, the following points arise for consideration:-

- i) Was the employee appointed following the procedure under Section 5(2) of the Act?
- ii) Was the employee deemed permanent in service after rendering services for one year and four months?
- iii) Is the impugned judgment and order legal, correct, and proper?

12. The appointment order dated 21.07.1988 placed on record reveals that the salary will be paid only after the approval of the Education Officer. It does not mention that his appointment was in place of the reserved post. His appointment was for two years on probation. The petitioner had applied to the Chairman of respondent No.1 on 1.6.1988 for appointing him to the post of Junior Clerk. The termination order dated 12.10.1989 mentions that the Government of Maharashtra banned the recruitment of employees other than teachers. Hence, Z.P. refused the approval. His services are terminated as they are not getting approval. There was no material on record showing that an advertisement inviting applicants for the appointment of a Junior Clerk was published. There is also no evidence before the Tribunal that the employee had competed with similar aspirants and was selected on merit.

13. The petitioner has a case that, pursuant to his application dated 21.06.1988, he was appointed as a clerk on probation period. However, before his probation was completed, his service was terminated on the grounds that the Government had banned the appointment of staff except for the teaching staff. Admittedly, no advertisement was issued. He had applied for himself to be appointed, and he was appointed.

14. The petitioner was appointed in 1989. At that time, the Law was that the Management was under obligation to fill every permanent vacancy in private schools as soon as possible. The

employee appointed on permanent vacancy should be appointed on two year's probation. The employee completing the probation satisfactorily was deemed to be confirmed. The Management was also empowered to fill in the temporary posts provided the order must mention the period of his appointment. The probationer's services may be terminated before probation if the Management is of the opinion that the performance and the behaviour of the probationer are not satisfactory, by a month's notice or by paying a salary of one month. For such termination, the Management is not obliged to give the reasons. Rule 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (Rules 1981 for short) provides for staff appointment. In 1989, sub-rule (3) of rule 9 was that the desirous applicant had to make an application for an appointment by giving the requisite details and documents. The candidate other than the backward category for whom the post was reserved under sub-rule 7 to state their caste in their application. Under sub-rule 7, the Management was to reserve the total number of posts for the members of the reserved community as per the percentage. The appointment letter should be in the Form in Schedule 'D,' and his acknowledgement was to be obtained. The form in Schedule 'D' specifically provides that the appointment order shall mention whether the appointment is temporary or on probation for two years. Sub-rule 8 provides for the publication of advertisements for filling in the posts reserved for backward categories in a wide

circular newspaper and to call the names of the candidates from the related offices. Sub-rule 9 (b) provided that in the case of a non-teaching post, if a person from a particular category of Backward Classes is not available, the Management shall make efforts with regular intervals to fill up the post within five years, and the post shall not be filled up during that period by appointing any other person who does not belong to the respective category of backward Class.

15. It is the obligation of the Management to fill up the vacancy if it is to be filled up by promotion. However, before filling such a vacancy, the Management shall ascertain the availability of suitable candidates on the surplus list maintained by the Education Officer. Every appointment on the permanent vacancy shall be on probation for a period of two years. Sub-Section (3) of Section 5 of the Act provides that where the Management is of the opinion that the performance and work of the employee is not satisfactory, the Management may terminate his services. Then, upon completing the probation, the employee shall be deemed to have been confirmed. If the services of the employee were terminated under Sub-Section (3) of Section 5 of the Act is reappointed by the Management of the School or any other school belonging to the Management within a year from the date of terminating his services. Then the period he had undergone as a probationary, shall be taken into consideration for calculating the

period of probation of two years.

16. Learned counsel for the petitioner relied on the case of **Nita Ramesh Danane vs. Dombivali Mitra Mandal and others, 2009 (1) Mh.L.J. 796**, to point out that the advertisement for the appointment was not necessary. An appointment can be made on an application by the candidate with the requisite details. This Court, interpreting Rule 9(3) of the M.E.P.S. Rules, 1981, held that Rule 9(3) only contemplates an application being made by a candidate with requisite details in respect of educational and professional qualifications, experience, etc. It has also been observed that Rule 9(8) provides that the reserved post must be advertised. As against this, the respondent relied on the judgment of the Division Bench in the case of **Priyadarshini** (supra). The said judgment was delivered on 16.08.2007, and judgment of **Nita** (supra) was delivered on 12.09.2008. It was a judgment of the Single Judge. In the case of **Priyadarshini** (supra), Sub-Rule (3) of Rule 9 was interpreted. In that case, the counsel for the employee had argued that Rule 9 is the only rule regarding the manner of appointment of staff and, therefore, the procedure as contained in this Rule must be taken as "*in the manner prescribed*" as contemplated by sub-section (1) of Section 5 of the Act. Referring to Sub-Rule (8), he has argued that the said Rule provides for advertisement of the vacancy in at least one newspaper having wide circulation when the Management desires

to fill in the vacancies reserved for SC/ST/DTNT/OBC. He advanced the argument before the Court that sub-rule (3) makes no such provision and, therefore, it must be inferred that there is no necessity to issue an advertisement for the purpose of filling up vacancies of open category. In response to the argument by the learned counsel for the employee, the Hon'ble Division Bench in paragraph No.11 has observed that,

“We are unable to appreciate, much less accept, such an argument. Referring to proviso to sub-section (1) of Section 5 of the Act, it is evident that, as soon as there is vacancy, the Management is required to communicate with the Education Officer, Zilla Parishad. The vacancy is to be filled in, from the list of surplus persons maintained by the Education Officer. This is the first indication of control of the State over the recruitment and appointment of staff, even of private schools. Even on reference to Sub Rule (3) of Rule 9, the candidate eligible for appointment and desirous of applying for such post, is required to apply in writing, by giving full details. We are unable to visualize a possibility of deserving candidate knowing about the vacancies in the private schools, unless the school invites applications by advertisement. The persons, who may learn about vacancies without advertisement, may only be *kith and kins* or those in close contact with the Management or at the most staff members. If arguments of Advocate Shri. Kazi is to accepted, it will be tantamount to accepting that Rule (9) is drafted in such a manner as to promote nepotism, so far as appointments of open category candidates to teaching and non-teaching posts in private schools are concerned. If the argument of Adv. Shri. Kazi is to be accepted, Rule (9) will have to read in a fashion, where reserved category

candidates are required to enter the service by competing amongst themselves, but an open category candidate may be in a position to seek an appointment without competing. Legislature could not have intended to prescribe the manner of recruitment which would discriminate between reserved and unreserved categories in respect of manner in which they can seek appointments.”

17. The interpretation of the Hon’ble Division Bench was based upon Articles 14 and 16 of the Constitution. Article 14 guarantees equality before the law. Article 16 gives equal opportunity in the public employment. Though the private Management appoints the staff, the Government pays their salaries and service benefits by providing financial assistance. Therefore, the employees of private schools also fall under the domain of Articles 14 and 16 of the Constitution of India. Articles 14 and 16 of the Constitution of India eliminate the ‘rule of discrimination’. Sub-Section (2) of Section 5 of the Act provides for the appointment of the staff on probation of two years. It includes the selection in the manner prescribed under Sub-Section (1) of the said Section. Once the employee has been selected in the manner prescribed and appointed, the Management has no choice but to appoint such person for a limited period.

18. As observed above, it is the obligation of the Management to ascertain that the appointments they are making are against the vacant posts. It is also the obligation of the Management to verify whether the appointment of any staff is made against the reserved

post. It is also the obligation of the Management to mention in the appointment order the category of the post against which the employee has been appointed.

19. The Bench of a Single Judge, in the case of **Nita** (supra), referred to the case of **Priyadarshini** (supra) by respondent Nos.1 and 2/the Management. The respondents had placed the arguments before the Single Judge that no advertisement was issued while appointing the petitioner and, therefore, it cannot be held that the appointment was valid and consequently her appointment was deemed permanent appointment. On this argument, the Court in paragraph No.10 held that the submissions of the learned counsel for respondents cannot be accepted for more than one reason. A plain reading of the letter dated 22.09.1993 indicates that the appointment was made on probation for a period of two years. The M.E.P.S. Rules require the appointment order to be issued in a particular manner. Once such an appointment order is issued, the Management cannot by means of so-called agreement reduce the term of appointment or change the nature of the status of the employee. The learned Single Judge discarded the arguments of the respondents for the reasons that the appointment was not in accordance with Rules had not been pleaded in the written statement. There was no material at all to indicate that the appointment was not valid. The law laid down by the Higher Bench is binding. The same rule has been interpreted in

the case of **Priyadarshini** (supra) in detail with legislative intent.

20. In the facts and circumstances of the case, the Court is of the view that before appointing any staff, advertisement of the posts in a widely circulated newspaper is a per-condition. This Court has discussed above that though the Management appoints a staff, the Government pays the remuneration. Therefore, such employment is public employment and fall under the domain of Articles 14 and 16 of the Constitution of India. In view of that matter and in the absence of any evidence before the Tribunal that the Management had invited application forms from the aspirants to fill up the posts of clerk by advertising the posts in widely circulated newspaper, the appointment of the petitioner on mere application to the Management is not in the manner prescribed as provided under Section 5(1) of the Act and Rule 9 of Rules, 1981.

21. The learned counsel for the petitioner also relied on the case of **Jagdamba** (supra), to support his contention that advertisement for the post of open category is not essential. The Court referred to the ratio laid down in the case of **Priyadarshini** (supra) in the said judgment. The facts of that case were that the petitioner was appointed on a year-to-year appointment orders for academic sessions. Management orally terminated his service. The Tribunal held that the Education Officer did not approve the appointment of respondent No.2 (the employee) as Assistant Teacher. As there was the vacant post of Assistant Teacher, the

appointment of respondent No.1 (employee) on that post is deemed to be on probation, and he was put in continuous services for six years, his services could not be terminated without following due procedure of law. Under this premise, the Hon'ble High Court dealt with the issues raised before it that the appointment was not following the procedure laid down in Section 5 of the Act. Merely serving for more than two years does not grant the benefit of permanency and such an employee is not protected under the Act. In that case, also, the case of **Priyadarshini** (supra) was referred to. The Court further held that from the observations in the case laws referred to in the said case, it should be clear that the Division Bench laid much emphasis on the procedure to be adopted for the purpose of selection and recruitment because the School was involved in the matter in grant-in-aid school and the School was getting grant-in-aid from the Government and, it was bound to make selection following due procedure. The ratio laid down in the case would not assist the petitioner.

22. Mr. Godbole, learned counsel for the petitioner, has raised the question that the employee cannot be terminated since the Education Officer does not approve the appointment. To bolster his argument, he relied on the case of **St. Ulai High School** (supra) and **Hindi Vidya Bhavan** (supra). The law on this point is no more *res integra*. The Full Bench Judgment of the Bombay High Court held that neither the Act nor the Rules provide that the grant

of approval by the Education Officer is a condition precedent for the appointment of the staff. To that extent, the termination of the services of the petitioner could be held illegal.

23. He also relied on the case of ***National Education Society's High School and Junior College Vs. Mrs. Lulomoll Monachary, 1987(2) Bom. C.R. 521***, and argued that the appointment could not be temporary in the sense that the employee was going to be on probation for a certain number of years that did not change the status of the employee from that of probationary to a temporary. Therefore, a permanent vacancy has been created and there is no defect in the capacity and the qualification. The appointment of such employee should have been on probation. In the case at hand there was no dispute about his appointment on probation. However, it has been vehemently argued that it was not a conditional appointment subject to approval by the Education Department. The appointment order reveals that the salary would be paid only after approval by the Education Department. At the most, it can be said that if the appointment of the employee was not by following the due procedure as provided in the law and the appointment is against the vacant post, the Education Department refused the approval for any other reason, the Management shall not deny the employee his salary.

24. As against this, the learned counsel for respondents relied on

the case of ***Jaimala Bahurao Ramteke vs. Presiding Officer, School Tribunal, Nagpur and others, 2009(5) Mh.L.J. 333*** and argued that mere approval to the appointment by Education Officer would not resolve the irregularity/illegality committed by the Management in the appointment of the employee. In this case it has been held that for the appointment of the staff to a permanent vacancy the procedure prescribed must be followed scrupulously, otherwise such appointment cannot be legal, and also held that the approval of the appointment by the Education Officer does not resolve the irregularity/illegality committed by the Management in the appointment of the staff.

25. It was not a case before the learned Tribunal that the appointment of the petitioner was against the reserved category, nor did the appointment order reveal that he was appointed on any reserved category. Therefore, it is presumed that he was appointed to open post.

26. Learned counsel for the respondents relied on the case of ***Chandramani Devraj Tiwari versus Secretary, Smt. R. B. Tiwari, Sanskrutik Kendra and others, 2008(3) Mh.L.J. 274,*** and argued that the burden was on the employee to prove that he was duly selected in the manner prescribed. The Hon'ble Division Bench in the said case held that it was necessary for the employee to prove before the learned Presiding Officer he was duly selected in the manner prescribed. Therefore, this Court does not find water

in the objections of the learned counsel Shri. Godbole, that the Management never disputed the appointment of the petitioner.

27. Though the parties are silent, the Court is bound to take care of the persons who are not before the Court whose rights may be affected by the Court orders. It is the Court's duty to examine the legality. The Court never stamp illegalities. Where the Court came across that the law has been violated, the Court should take cognizance of illegality without pleading. In view of that matter, the Court is of the view that the absence of pleading of either side, it could not be ground to ignore the provisions of law. The petitioner did not discharge the burden before the School Tribunal that he was duly selected in the manner prescribed as provided under Section 5(1) of the Act and Rule 9 of the Rules, 1981.

28. Mr. Godbole, learned counsel for the petitioner, is also correct in relying on the ratio laid down by the Hon'ble Division Bench of Bombay High Court in the case of **Arti d/o. Vithalrao Varkhede vs. Education Officer (Secondary), Zilla Parishad, Wardha and others, 2011 (1) Mh.L.J. 638**, that the School Tribunal has the jurisdiction to decide the correctness of the impugned order of the Education Officer as an incidental question. However, it appears from the observations of the learned Tribunal in the impugned order that he did not touch the order of the Education Officer. In other words, it may be stated that he did not dismiss the appeal for non-approval by the Education Officer. On

the contrary, he referred to the observations of **St. Ulai High School** (supra) and held that the approval by the Education Officer need not be considered by the School Tribunal while deciding the appeal. The learned Presiding Officer observed about the appointment, whether it was in consonance with Section 5 of the Act is required to be determined by the School Tribunal while deciding the appeal in view of **Anna Manikrao Pethe vs. Presiding Officer, School Tribunal, Amravati and Aurangabad Division, Amravati and others, 1997(3) Mh.L.J. 697 (D.B.)**. Even if it is considered that the Tribunal had not decided the decision of the Education Officer, it has considered the primary burden of the petitioner to prove his appointment as per Section 5(1) of the Act. He discussed the moot question of his appointment and correctly held that the appointment of the petitioner was not in consonance with Section 5(1) of the Act.

29. Another material question is whether the termination of the services of the petitioner was illegal. The termination order does not reflect that he has been terminated for unsatisfactory performance and good behavior. His service was terminated because the Government had banned the appointment of the staff member other than Teachers. Much has been argued that the papers of the approval were not produced on record. Therefore, the order of termination is not legally correct. The contents of the termination order were specific that the Government ban the

appointment of the staff other than teaching staff, he is unable to get the approval. The terms of the 'termination orders' were unambiguous. The burden was on the petitioner to prove that at the time of his appointment, the Government did not ban the appointment of non-teaching staff. Since his appointment was against the Government ban, his appointment was illegal and he was correctly liable to be terminated. Neither the Management nor the Education Officer have deliberately terminated his service. Therefore, it cannot be accepted that his termination is in violation of the M.E.P.S. Act.

30. The Court has considered the arguments advanced by the respective counsels, facts of the case and relevant provisions of law, and concludes that the appointment of the petitioner was in contravention of Section 5(1) of the Act and the petitioner failed to prove that his appointment was legal. Therefore, he is not entitled to protection under the Act. In the result, the petition deserves to be dismissed. Hence, the following order;

ORDER

- i) The writ petition stands dismissed.
- ii) No order as to costs.
- iii) Rule stands discharged.

**(S. G. MEHARE)
JUDGE**