



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9118 OF 2016

Smt. Ragini d/o Jalindar Atkare
Age: 28 years, Occu.: Service,
R/o. Ganpati Galli, Ambad,
Tq. Ambad, Dist. Jalna.

.. Petitioner

Versus

1. The State of Maharashtra
(Through its Secretary,
School Education Department,
Mantralaya, Mumbai-32)
2. The Education Officer (Primary)
Zilla Parishad, Jalna.
3. Vaidyaraj Sitaram Ghule Gramin
Vikas and Shikshan Sanstha,
Chikalthana, Aurangabad.
Through its President/Secretary,
Vaidyaraj Primary School, Ambad,
Tq. Ambad, Dist. Jalna.
4. The Head Mistress,
Vaidyraj Primary School, Ambad,
Tq. Ambad, Dist. Jalna.

.. Respondents

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Mr. V. A. Dhakne, Advocate for the petitioner.
Mr. K. N. Lokhande, AGP for respondent No.1 – State.
Mr. A. S. Usmanpurkar, Advocate for respondent No.2.
Mr. Vivek J. Dhage, Advocate for respondent Nos.3 and 4.

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**CORAM : MANGESH S. PATIL AND
SHAILESH P BRAHME, JJ.**

**RESERVED ON : 10 JULY 2024
PRONOUNCED ON : 20 JULY 2024**

JUDGMENT [Per Shailesh P. Brahme J.] :-

Rule. Rule is made returnable forthwith. With the consent of the parties heard finally .

2. Petitioner is soliciting direction to the respondent – Management to submit the proposal for permanent approval and the respondent No.2 Education Officer to decide it within six weeks. She also seeks direction to pay due salary since her initial appointment.

3. Petitioner claims to have been appointed on unaided post in the respondent No.4 School by order dated 08.06.2013, on probation. Her appointment was granted approval vide order dated 06.12.2014 on probation for a period from 28.06.2013 to 27.06.2015. It is the grievance of the petitioner that though she was rendering services, the respondent Management failed to forward proposal seeking permanent approval and also failed to pay salary. It is further contended that Government started providing grants to the School. She was harassed by the office bearers of the Management and threatened to be terminated. She submitted representation on 11.04.2016 requesting for unpaid salary and forwarding of proposal.

4. Learned Counsel for the petitioner Mr. V. A. Dhakne submits that petitioner was appointed after following due procedure of law and it was also approved for a period of two years on probation. She is deemed to

have been confirmed and being permanent employee entitled to the service benefits. It is further submitted that she has not been paid salary by the Management. Learned Counsel would submit that frivolous plea has been taken by the Management that the petitioner abandoned the services before completion of period of probation. He would refer to the extracts of muster and the documents produced along with a rejoinder. It is vehemently submitted that there is a correspondence of the Headmistress dated 02.02.2017, 05.01.2017 and letter dated 31.09.2021 issued by the Education Officer to show that the petitioner was rendering services.

5. Learned Counsel for the petitioner would further refer to the affidavits of the co-employees, Proforma-A and the certificate signed by Headmistress to show that she is still in the employment and has not been paid. He would rely on the judgments of **Sant Kabir Shikshan Prasarak Mandal and another Vs. Azhar Azizurraheman Khan and others**, [2016 DGLS (Bom.) 324, **Magasvargiya Shikshan Sanstha and another Vs. Bhausahab Sonaji Kakade and others**, [2016 DGLS (Bom.) 1] and **Manojkumar S. Amare and others Vs. State of Maharashtra and others**, [2020(1) Mh.L.J. 742].

6. Per contra, learned Counsel Mr. Vivek Dhage would repel the submissions on the basis of affidavit-in-reply. He would submit that petitioner was appointed vide letter dated 20.06.2013, but left the services

voluntarily since after 26.02.2015, even before completing the probation. She was not possessing TET qualification. It is further submitted that petitioner made false complaints to the Education Officer on 16.11.2016, which indicates otherwise termination. Even letter by Education Officer dated 18.01.2017 also indicates cause of action to prefer appeal against otherwise termination. It is further contended that as she abandoned the services since 26.02.2015, she is not entitled to any service benefits.

7. Learned Counsel would submit that there are disputed questions of facts. Petitioner has alternate remedy of preferring appeal against otherwise termination. Hence, petition is not maintainable. It is further submitted that attendance register of the students from June 2015 to January 2016 at Exhibit-E are forged and liable to be referred to handwriting experts.

8. We have considered rival submissions of the parties. There is no dispute that the petitioner was appointed as a Shikshan Sevak vide order dated 20.06.2013 for a period of two years. Her appointment was approved by Education Officer for a period of probation from 28.06.2013 to 27.06.2015. She made representations on 11.04.2016 and 16.11.2016, claiming unpaid salary and forwarding of the proposal. Fulcrum of controversy is as to whether the petitioner is in service of the respondent – Management so as to claim the service benefits.

9. To show that petitioner is rendering services, extracts of muster are produced at Exhibit-E, which are disputed by the respondent – Management by filing affidavit-in-reply being forged. Along with the reply, petitioner’s representation dated 16.11.2016 is filed by the Management. Apparently, it can be inferred from it that the petitioner was prohibited from rendering the duties from June 2016. She was not being allotted class and not being permitted to sign the muster. Normally, these averments would be indicative of otherwise termination, for which there is a remedy of preferring appeal under Section 9 of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as the “MEPS Act”). This submission of Mr. Vivek Dhage, learned Advocate for the respondent Management, are attractive. However, minute scrutiny of the material on record would indicate a different scenario.

10. To counter the plea of the Management, petitioner filed rejoinder with certain documents on 26.02.2024. It is reiterated that petitioner is in service, on the basis of correspondence filed on record with the rejoinder. Undisputedly, respondent No.2 Education Officer addressed a letter to Headmistress of the respondent No.3 School on 18.01.2017 calling upon the school authority to submit the explanation for grievance ventilated by the petitioner vide application dated 16.11.2016. In response to the letter dated 18.01.2017, respondent No.4 Headmistress addressed a letter on

02.02.2017 disputing the grievance of the petitioner and raising an issue that petitioner was unable to submit TET certificate. It was further contended that her performance was unsatisfactory and she was not punctual. It was also stated that petitioner be directed to submit certificate of TET so as to forward proposal for further continuation of the services. The guidance of the Education Officer was solicited as to whether the services of the petitioner should be terminated or not.

11. This letter of the respondent No.4 Headmistress clearly indicates that at-least up to 02.02.2017, the petitioner was in service and was not terminated. Had the petitioner abandoned the services from 26.02.2015, as pleaded in reply, respondent No.4 Headmistress would have clearly stated so and would have pointed out that the petitioner ceased to be an employee after 26.02.2015.

12. Before replying Education Officer on 02.02.2017, a notice was issued by the respondent No.4 Headmistress to the petitioner on 05.01.2017 calling upon her to submit the TET certificate, else her services would be terminated. This also indicates that petitioner was in service at the relevant time. Petitioner has produced affidavits of co-employees namely, Kishor Bhausahab Pival dated 30.06.2017, Bhagwan Vitthalrao Sansare dated 30.06.2017, Kantilal Khem Singh Rathod dated 01.07.2017 stating that

petitioner was in service along with them and her performance was excellent. Besides that, there are affidavits of parents of the students to show that she was rendering services.

13. Education Officer addressed a letter dated 30.09.2021 to the respondent No.4 – Headmistress in respect of the grievance made by the petitioner and to comply the service conditions of the petitioner. No reply was given to this letter by the respondent School. This was another opportunity to the Management to inform Education Officer that the petitioner was no more in service and her claim to the service benefit was illegal. Petitioner further produced documents, in all probabilities for securing grants from the Government, in which petitioner's name was also mentioned along with other teachers. The documents corroborate that petitioner is in service and she has not abandoned the services as tried to be contended in the affidavit-in-reply.

14. Respondent Nos.3 and 4 did not file any additional affidavit or surrejoinder to the rejoinder filed by the petitioner, disputing the documents produced along with it. Only during course of arguments, learned Counsel Mr. Vivek Dhage would make submissions that the correspondence issued by Headmistress on 05.01.2017, 02.02.2017 and the affidavits produced along with the rejoinder are disputed. This submission

of the respondent – Management cannot be countenanced being an afterthought.

15. The letter written by Headmistress on 02.02.2017 was in response to the letter of Education Officer issued on 18.01.2017 to her. At the cost of repetition, we find that the respondent – Management had opportunity to inform Education Officer as well as petitioner that she ceased to be employee after 26.02.2015, but that has not been done. Rejoinder and the documents referred above would belie the stand being taken by the respondent Nos.3 and 4 in the reply that petitioner had abandoned the services since 26.02.2015.

16. It is also tried to be submitted by learned Counsel that letters dated 05.01.2017 and 02.01.2017 were issued by respondent No.4 Headmistress without there being any authority or approval from the Management. There is nothing on the record to show that any action has been taken by the respondent No.3 Management against the Headmistress for issuing inconsistent letters or not apprising the Management about the same. It is pertinent to note that present petition was filed on 20.08.2016 and the letters dated 05.01.2017 and 05.02.2017 were issued by Headmistress pending the petition. We have no hesitation to hold that a false plea of abandonment of service has been taken by respondent no.3/management.

The petitioner is in service of the respondent Nos.3 and 4.

17. Petitioner's appointment is approved by Education Officer vide letter dated 06.12.2014 from 28.06.2013 to 27.06.2015. Thereafter by implication of Section 5(2) of the MEPS Act, she is deemed to have been confirmed. It is informed by the parties that the school was admissible to the grants from 01.07.2016. Respondent Nos.3 and 4 were under obligation to forward proposal seeking further approval for continuation of the petitioner on regular scale. The respondent no.3 and 4 did not forward proposal. In that case, entire liability of payment of salary would be of Management. The respondent Nos.3 and 4 would be at liberty to forward proposal seeking approval for continuation of the petitioner to the Education Department.

18. The respondent – Management has stated in reply that an amount of Rs.5,000/- per month was paid to the petitioner from 28.06.2013 till 25.02.2015. The appointment of the petitioner was not as a Shikshan Sevak, but as an Assistant Teacher. As the school was not getting grants at the relevant time and as such scheme of Shikshan Sevak was not applicable, the petitioner was entitled to the salary of a primary teacher prescribed by Schedule 'C' of the MEPS Act. The amount paid by the respondent – Management from 28.06.2013 to 25.02.2015 would be adjustable. Petitioner is entitled to receive difference of salary from

20.08.2013, that is for preceding three years of filing of petition, from the Management. The liability of the payment of salary would not be dependent upon any future claim of the Management for reimbursement from the Education Department.

19. Our attention is invited by learned Counsel for the petitioner that in case of abandonment of services, the procedure contemplated by Rule 16 (3) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (hereinafter referred to as the “Rules”) would be applicable. The respondent – Management did not call upon the petitioner by issuing notice for initiation of any disciplinary action as per Rule 16(3) of the Rules. Learned Counsel for the petitioner refers to the judgment of learned Single Judge in the matter of **Sant Kabir Shikshan Prasarak Mandal and another (Supra)**. That matter was emanating from the decision rendered by School Tribunal against Management. It was plea of the Management that from 2005, employee concerned had abandoned the duties. The plea was not accepted by the Tribunal and by learned Judge of High Court. Following is the relevant portion :-

“21. The Honourable Supreme Court in the matter of (Novartis India Ltd. Vs. State of West Bengal and others, [AIR 2008 SC (Suppl) 836] : (2009)3 SCC 124, while dealing with a case of permanent employee, having not reported at the place of transfer, concluded that the same would amount to an unauthorized absenteeism. The Management had taken a

stand that the employee has abandoned employment. The Honourable Apex Court concluded that abandonment amounts to a charge of unauthorized absenteeism and hence a disciplinary enquiry is required in such matters.

24. This Court in the matter of Sudhakar Chindu Bhadane (supra) has concluded that Rule 16(3) mandates the Management to issue a show cause notice of hearing to the permanent employee, to consider whether he does not desire to report for duties. If the said employee declares that he does not desire to report for duties, the management would then be in a position to take a decision. It was, therefore, held by this Court that a notice of hearing ought to have been given to the concerned employee and was under an obligation to prove that he was continuously absent for 3 years.”

20. The above view is further reiterated by the Division Bench in the matter of **Magasvargiya Shikshan Sanstha and another (Supra)**. In that case, the issue that fell for consideration is stated in paragraph No.4, which reads thus :-

“4. A vital issue emerges in this petition:--

"Whether under Rule 16(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 ("MEPS Rules" for short), issuance of a notice to the temporary/probationer employee before arriving at a conclusion that he/she has voluntarily abandoned employment would be a necessity?"

Thereafter, it is answered in paragraph Nos.70, 71 and 85, which

read as follows :-

70. In the case of Sudhakar Chindhu Bhadane V/s Niphad Taluka Education Society and others, [2008 (1) Mh.L.J. 448 : 2008 (1) CLR 281], this Court concluded that a mere statement without any supporting proof that the employee had abandoned service voluntarily, cannot be accepted. The term "voluntary abandonment of service" means that a permanent employee is absent from duty without leave, continuously for a period exceeding three years or more which would be the basis for presuming voluntary abandonment. This Court, therefore, held that there must be some material before the employer to form an opinion that the employee has abandoned his service. This principle would be *mutatis mutandis* applicable even to a non-permanent employee.

71. It is thus apparent that if Rule 16(2) is read in its entirety, the deeming fiction with regard to abandonment is made applicable to a non-permanent employee for an absence of even a single day. Rule 16(3) pertains to a permanent employee, wherein, his absence on a particular date and failure to file a leave application within seven days from the date of absence is to be treated as a breach of discipline. If a permanent employee is absent from duties, without leave, continuously for a period exceeding three years, he is deemed to have voluntarily abandoned his services, thereby meaning that the very length of absence could constitute enough material for an employer to form an opinion.

85. I, therefore, find it necessary, in the interest of justice, equity and fair-play, that an employer, before presuming that the employee has abandoned employment under Rule 16(2),

shall issue a notice to the employee calling upon him to explain as to why the employer should not form an opinion that the employee has abandoned employment. Upon receiving the explanation of the employee, the Management may then proceed to pass an appropriate order. This would not only enable the Management to take a decision after following the principles of natural justice, at the same time, it would enable the employee to disclose his decision whether to continue in employment or set out an explanation for his absence. This would render some protection to a non-permanent employee under Rule 16(2) and eliminate secrecy in the presumption of abandonment by the employer.”

21. Law laid down in the matters of **Sant Kabir Shikshan Prasarak and another (Supra)** and **Magasvargiya Shikshan Sanstha and another (Supra)**, was not followed by the management. The procedure laid down in Rule 16(3) of the Rules was given a go bye. The respondent Management may have a liberty to exercise the option of issuing notice to the petitioner calling upon her to explain as to why the Management should not form an opinion that the employee has abandoned the services. Needless to state that further statutory procedure will have to be followed depending upon the response of the petitioner.

22. Learned Counsel for the petitioner has rightly referred to the judgment of **Manojkumar S. Amare (Supra)** to claim parity in payment of salary as per pay revision in terms of 5th and 6th pay recommendations.

23. For the reasons assigned above, the petition succeeds. The petitioner is entitled to arrears of salary from 20.08.2013 adjusting the payment made to her by the respondent Management. She is entitled to receive salary as per scale prescribed in Schedule 'C' of the MEPS Act from filing the petition as well. Hence, we pass following order :-

ORDER

- I) Writ Petition is allowed.
- II) Respondent Nos.3 and 4 shall pay arrears of salary to the petitioner from 20.08.2013 till this date by adjusting the payment made by the Management to her, within a period of six weeks and shall continue to pay future salary, notwithstanding the reimbursement or otherwise from the Education Department.
- III) Respondent Nos.3 and 4 shall be at liberty to submit the proposal of the petitioner for grant of approval for her continuation on the regular scale within four weeks from today. The same shall be decided by the respondent No.2 Education Officer within a period of four weeks thereafter.
- IV) Rule is made absolute in the above terms.
- V) There shall be no order as to costs.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE

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