



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

Writ Petition No.932 of 2014

LATE BABANRAO WADNERE SHIKSHAN SANSTHA, AMRAVATI THROUGH ITS
SECRETARY, AND ANOTHER

VS

SUBHASH ANANDRAO KAYATE AND 2 OTHERS

Writ Petition No.4413 of 2014

SUBHASH ANANDRAO KAYATE

VS

LATEL BABANRAO WADNERE SHIKSHAN SANSTHA, AMRAVATI THROUGH ITS
SECRETARY AND OTHERS

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

(In Writ Petition No.932/2014)

Shri S.M. Vaishnav, Advocate for the Petitioners

Shri V.A. Kothale, Advocate for the respondent No.1

Ms Payal Bawankule, AGP for the respondent No.2

(In Writ Petition No.4413/2014)

Shri V.A. Kothale, Advocate for the petitioner

Shri S.M. Vaishnav, Advocate for the respondent Nos.1 and 2

Ms Payal Bawankule, AGP for the respondent No.3

CORAM : ANIL S. KILOR, J.

DATED : 30.01.2024

1. Heard.
2. These petitions take exception to the judgment and order dated 30.10.2013 passed by the School Tribunal, Amravati Division Amravati in Appeal No.110 of 1997, allowing the appeal and thereby, quashing and setting aside the termination of the appellant/respondent No.1 from 11.05.1997 and thereby directing the management to reinstate the appellant/employee on his post.

3. Since both the petitions are arising out of the above referred impugned judgment and order passed by the School Tribunal, both the petitions are heard and decided together. For the sake of convenience, parties are referred to as per their status in Writ Petition 932/2014.

4. The Writ Petition No.932 of 2014 is filed by the management, praying for quashing and setting aside the judgment and order to the extent reinstatement is granted.

5. Whereas, Writ Petition No.4413 of 2014 is filed by the employee seeking relief as regards backwages which have been denied by the learned School Tribunal.

6. The brief facts of the present case are as follows:

(a) The respondent No.1 being qualified to be appointed as Assistant Teacher, was appointed in the petitioner No.1 school for the period from 13.09.1993 till the end of academic session.

(b) Thereafter, the respondent No.1 on year to year basis and such last appointment was made for the period from 01.07.1996 till 10.05.1997.

(iii) Thereafter, since the respondent No.1 was not continued and an advertisement was issued on 29.06.1997, the respondent No.1 filed the Appeal No.110 of 1997 before the learned School Tribunal.

7. The learned Tribunal vide judgment and order dated 13.02.2007 dismissed the appeal against which the writ petition

was filed, namely Writ Petition No.1963 of 2007, which was allowed by this Court, thereby remanding the matter back to the tribunal for deciding the same afresh.

8. Accordingly, the learned Tribunal passed the impugned judgment and order, partly allowing the appeal and directing the petitioners to reinstate the respondent No.1. Hence, these petitions.

9. I have heard the learned counsel for the respective parties.

10. The learned counsel for the petitioners submits that, at the time of the initial appointment of the respondent No.1, the school had no permanent recognition and therefore, there was no permanent post available. It is therefore, submitted that the appointment of the respondent No.1 was made on year to year basis. It is submitted that since the appointment was for a fixed period, it came to an end with the period of appointment. It is therefore, submitted that, the learned Tribunal committed error in holding that, the respondent No.1 as deemed confirmed.

11. The learned counsel for the petitioners submits that, there is no legal fiction or deeming provision that every appointment made against the permanent vacancy deemed to be on probation and therefore, the appointment of the respondent No.1 cannot be treated to be on probation.

12. It is submitted that the learned Tribunal cannot go beyond the order of appointment and treat any appointment which is made for temporary period as on probation. In support of his contention, he has placed reliance on the judgment of the Full

Bench of this Court in the case of *Ramkrishna Chauhan Vs. Seth D. M. High School*¹ along with the other judgments referred in paragraph 30.

13. The learned counsel for the respondent No.1, on the other hand, points out that in the writ petition, nowhere it was the stand of the management that because there was no permanent recognition, the appointment was made on year to year basis i.e. on temporary basis.

14. It is submitted that in the written statement filed before the learned Tribunal, the only stand of the petitioners was that, the appointment of the respondent No.1 was on temporary basis and it was for fixed period, therefore, the termination of the respondent No.1, is legal. It is submitted that, however, it was never the case of the management that there was no permanent post was available because of permanent recognition.

15. The learned counsel for the respondent No.1 has also relied upon the judgment in the case of *Ramkrishna Chauhan* (supra) and submits that though the management has implicit power to appoint a duly qualified person on contractual employment even against a permanent vacancy but, that must be only an interim arrangement till a suitable candidate is found in the selection process. It is submitted that such temporary arrangement cannot be continued on year to year basis in succession.

16. It is submitted that in the case at hand, the respondent No.1 was appointed for four academic years continuously and the

1 2013(2) Mh.L.J. 713

management has not shown any reason or justification for not appointing the respondent no.1 on permanent basis or on probation despite the vacancy was permanent and clear.

17. The learned counsel for the respondent No.1/employee submits that the learned Tribunal has committed error in not granting backwages to the respondent No.1. It is submitted that once the reinstatement is granted, the learned Tribunal ought to have granted backwages to the respondent No.1.

18. In reply the learned counsel for the petitioners submits that the learned Tribunal has rightly denied the prayer for backwages to the respondent No.1/employee. He therefore, prays for dismissal of the Writ Petition No.4413/2014.

19. In light of the rival submission of the parties, I have perused the record and the impugned judgment and order.

20. There is no dispute that the first appointment order of the respondent No.1 was dated 11.09.1993 and it was for the period from 13.09.1993 to 30.04.1994. Thereafter, the respondent no.1 was continued for the academic session 1994-95, 1995-96 and 1996-97 on year to year basis. There is also no dispute that the every appointment was for the fixed period.

21. The Full Bench of this Court in the case of *Ramkrishna Chauhan* (supra), has held thus:

"13. Indeed, this provision obliges the Management to fill in the permanent vacancy "as soon as possible". The term "as soon as possible" would mean that it has to be done within a reasonable time. That is a relative term. Nevertheless, by virtue of mandate of section 5(1), there is implicit obligation on the Management to fulfill that requirement at the earliest, to wit, before commencement of the new

academic year. That is so because, a permanent vacancy is one, which is in respect of a sanctioned post and in the case of an aided school, entitles the Management to receive commensurate grants in aid from the Government. Further, the sanctioned post for a school is prescribed by the State Authority keeping in mind the benchmark to be maintained for imparting high quality education and maintaining discipline in the school-commensurate with the strength of the students in the school. Thus, keeping the permanent vacancy unfilled for a long time, may entail in dilution of imparting of quality education. A fortiori, though the Management has implicit power to appoint a duly qualified person on contractual employment even against a permanent vacancy but, that must be only an interim arrangement till a suitable candidate is found in the selection process. It cannot be continued on year to year basis in succession. If the Management holds the selection process in the prescribed manner but wants to appoint the selected candidate on temporary basis must contemporaneously record tangible reasons as to why the selected candidate is not suitable to be appointed on probation against the permanent vacancy. In that event, the Appropriate Authority can consider the challenge to the appointment on temporary basis instead of probation, against a permanent vacancy. Further, the Management, receiving grants-in-aid, from the Government, should not and cannot be permitted to appoint a duly qualified person on temporary basis against a permanent vacancy, without holding of selection process as soon as possible in the prescribed manner. Besides, inspite of availability of a suitable candidate identified in the selection process held to fill in the permanent vacancy, the Management cannot appoint him on temporary basis against a permanent vacancy. Any other view would be antithesis to the mandate of Section 5(1) of the Act and against the principle underlying the exposition of the Apex Court in the case of Ratan Lal and Ors. Vs. State of Haryana and Ors., as it would be hit by Article 14 and 16 of the Constitution of India.

16. The question is, whether the Management has unbridled power and authority to appoint a duly qualified person on temporary basis against a permanent vacancy? As aforesaid, the Management is, primarily, under an obligation, in law, by virtue of Section 5(1), to fill in the permanent vacancy as soon as possible. To wit, if a permanent vacancy is caused by any reason, before the commencement of the new academic year, the Management must take immediate steps to fill in that vacancy, by appointing a duly qualified person, after following the prescribed procedure, on probation, for a period of two years. That means, the selection process must be held to, as far as possible, culminate with selection of a duly qualified person, before the commencement of the new academic year. However, for some fortuitous or tangible reason, such selection process cannot be commenced or for that matter completed, there would be nothing wrong if the Management were to appoint a duly qualified person on contractual or temporary basis, for a limited duration, so that, in the

mean time, the prescribed procedure to select a duly qualified person, to fill in the permanent vacancy is completed and the selected person can be appointed on probation, against the permanent vacancy. There may be situation where the Management makes efforts in right earnest to complete the selection process but, at the end of the process, it is confronted with a situation where the person who participated in the selection process, though duly qualified, in its perception is not suitable for appointment. In that event, it can certainly make an appointment on contractual or temporary basis, for a limited duration, so that new selection process can be commenced and concluded within a reasonable time.

17. Ordinarily, if the selection process is commenced and at the end of the selection process a person duly qualified is available and is found to be suitable, the Management is under an obligation to appoint him on probation, to fill in the permanent vacancy. This mandate flows from conjoint reading of Sub-section (1) and (2) of Section 5. The only exception is, where a person identified in the selection process is duly qualified but is not found suitable by the Management, the Management is free to exercise its inherent power of making a contractual or temporary appointment. Indeed, whether a person, who had participated in the selection process, is suitable for being appointed or otherwise, is the subjective satisfaction of the Management. Merely because a person is duly qualified, that per se is not enough. The person must not only be duly qualified to fill the permanent vacancy but, must also be found to be suitable by the Management. However, the Management cannot be permitted to take cover under the pretext of successively rejecting the candidates in selection process on the ground of suitability; and keep on appointing same person or different persons on contractual or temporary basis for limited duration, against a permanent vacancy. In cases where the Management takes a conscious decision to appoint a duly qualified person on temporary basis, for a limited period against a permanent vacancy, it must contemporaneously record its subjective satisfaction in that behalf. For, if the appointment order on contractual basis were to be made subject matter of challenge before any Authority or Court of law, in such inquiry, it may be open to examine the controversy on the touchstone of permissibility of judicial review of such decision. If finding of colourable exercise of power by the Management is arrived at in that inquiry, appropriate direction can be issued against the Management. That will have to be examined on case to case basis." (Emphasis supplied)

22. From the above referred observations, it is evident that the management has unbridled power and authority to appoint a duly qualified person on temporary basis against a permanent

vacancy. The management has implicit power to appoint a duly qualified person on contractual employment even against a permanent vacancy but, that must be only an interim arrangement till a suitable candidate is found in the selection process.

23. The exceptions to appoint a duly qualified person on contractual employment even against the permanent vacancy are as given below:

- (a) For some fortuitous or tangible reason, selection process cannot be commenced or for that matter completed;
- (b) The management makes efforts in right earnest to complete the selection process but, at the end of the process, it is confronted with a situation where the person who participated in the selection process, though duly qualified, in its perception is not suitable for appointment.

24. Thus, if the management holds the selection process in the prescribed manner but wants to appoint the selected candidate on temporary basis must contemporaneously record tangible reasons why the selected candidate is not suitable to be appointed on probation against the permanent vacancy.

25. The above referred observations, make it further clear that though the management has implicit power to appoint a duly qualified person on contractual employee, even against the permanent vacancy, it cannot be continued on year to year basis for succession, but it must be an only interim arrangement till the suitable candidate is found in the selection process.

26. It is thus, evident that, on conducting selection process and at the end of the selection process, the person duly qualified is available and is found to be suitable, the management is under obligation to appoint him on probation, to fill in the permanent vacancy.

27. In the teeth of the above referred well settled principles of law, I revert back to the facts of the present case.

(a) In the present matter, admittedly, the respondent No.1 is qualified to be appointed as 'Assistant Teacher';

(b) The respondent No.1 was appointed for four academic year in succession on year to year basis.

(c) It is not a case of the management that, the respondent No.1 has not qualified or he was not found suitable to be appointed on probation against the permanent vacancy.

(d) In the written statement filed before the learned Tribunal, the only reason given by the management was that, the appointment was on temporary basis and for the period mentioned in the appointment order and on expiry of such period, the termination was automatic.

(e) The ground first time argued before this Court that there was no permanent recognition, was not pleaded or argued before the learned tribunal.

(f) The School started receiving 50 % grants from the academic year 1996-97 during which the respondent No.1 employee was appointed and continued.

28. In the light of the above referred undisputed facts and in absence of any tangible reason pleaded by the management as regards to the non-suitability of the respondent No.1 or as regards to any of the exceptions referred herein above to appoint the respondent No.1 on temporary basis, the only inference can be drawn that to deny the rightful claim of the respondent No.1 as a permanent employee, the management acted contrary to the mandate of sub-section (1) & (2) of Section 5 of the Act Maharashtra Employees of Private School (Conditions of Service) Regulation Act, 1977.

29. In the circumstances, I am of the considered view that no error has been committed by the learned Tribunal in holding the respondent No.1 as deemed confirmed by treating his appointment on probation.

30. In light of the judgment of the Full Bench of this Court in the case of *Ramkrishna Chauhan* (supra), the judgments cited by the learned counsel for the petitioners, which are of prior in time i.e. *Krishna ..v.. Chairman, R.P.S. Mandal², Maharashtra Shikshan Sanstha and another v. State of Maharashtra through the Secretary Department of Education Mumbai and anr.³, Shri Sadguru Dnyan Prasarak Shikshan Sanstha v. Presiding Officer, School Tribunal Amravati Division Amravati⁴, Chandrashekhar*

² 2008 (4) Mh.L.J. 309

³ 2003(2) Mh.L.J.92

⁴ 2009 SCC OnLine Bom 1853

*v. Navashakti Vidyalaya*⁵, *Sangram Vishwanath Patil v. Maharashtra Education Society, Udgir and others*⁶, *Bharatiya Gramin Punarrachana Sanstha v. Vijay Kumar and others*⁷, *Priyadarshini Education Trust v. Ratis (Rafia) Bano*⁸ and *Rayat Shikshan Sanstha and another v. Yeshwant Dattatraya Shinde*⁹, are of no assistant to the petitioners. As far as the judgment in the case of *Dnyanopasak Shikshan Prasarak Sanstha, Manora v. Ku. Rekha d/o Vishwanath Ingole*¹⁰, it is under the University Act and therefore, the same is distinguishable on fact.

31. After going through the findings recorded by the learned Tribunal, I do not find any perversity or illegality committed by the learned Tribunal in partly allowing the appeal. In the circumstances, I do not find any merits in the Writ Petition No.932/2014.

32. Moving to the prayer for backwages, the learned Tribunal has held in paragraph 41 that, if the management failed to reinstate the employee within 40 days from the date of judgment, the petitioner No.1 is liable to pay full salary from the date of the judgment and order.

33. The said judgment was passed on 30.10.2013 and the period of 40 days was over on 11.12.2013. The writ petition No.4413 of 2014 was filed by the management on 27.06.2014 and it was first time listed before this Court on 16.02.2015 i.e. after more than 65 days.

5 2010 SCC Online Bom 465

6 2001 (2) Mh.L.J. 188

7 (2002) 6 SCC 707

8 2007 Mh.L.J. 6 667

9 2009 (6) Mh.L.J. 476

10 2008 (2) Mh.L.J. 565

34. Thus, as there was no reinstatement within 40 days or no stay obtained to the reinstatement within 40 days from the impugned judgment, the respondent No.1 has become entitled for the backwages as observed in the judgment. In the circumstances, the Writ Petition No.4413/2014 does not survive.

35. In view of the observations made herein above, no order is required in Writ Petition No.4413 of 2014.

36. Accordingly, I pass the following order:

- (i) The Writ Petition No.4413 of 2014 is **disposed of**.
- (ii) The Writ Petition No.932 of 2014 is **dismissed**.

37. At this stage, the learned counsel for the petitioners prays to continue the interim relief granted by this Court on 01.04.2014 in Writ Petition No.932/2014 for the period of six weeks from today.

38. The learned counsel for the respondent No.1 strongly opposes such prayer.

39. However, considering the fact that such interim relief is operating from last 10 years, no prejudice would be caused to the respondent No.1 if it is continued for another six weeks.

40. Accordingly, the interim relief granted by this Court dated 01.04.2014 shall continue for a period of six weeks from today and on expiry of the same, it shall stand vacated automatically.

[ANIL S. KILOR, J.]