



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5996 OF 2022

Janta Shikshan Prasarak Mandal Umardari Through Its
President Shivaji Nagorao Jadhav And Another

VERSUS

Anil Gangadharrao Totawad And Another

- Mr. V. D. Salunke, Advocate for the Petitioners
- Mr. P. R. Katneshwarkar, Senior Advocate i/by Mr. A. A. Fulfagar, Advocate for the Respondent No. 1
- Mr. S. N. Kendre, AGP for Respondent No. 2/State

CORAM : R. M. JOSHI, J

DATE : MARCH 04, 2025

PER COURT :

1. This Petition takes exception to the judgment and order passed by the School Tribunal, Latur in Appeal No. 35/2015 dated 18.04.2022 filed under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short 'MEPS Act').

2. Parties are referred to as 'employer' and 'employee' for the sake of convenience.

3. The facts, which led to the filing of this Petition, can be narrated in brief as under:

Petitioner No. 1 is the Educational Institution and the Respondent No. 1 claims to be the employed as Assistant Teacher in Petitioner No. 2 School. It is the case of the Petitioners that Respondent No. 1 claims himself to be belonging to Scheduled Tribe Category (for short 'STC') and was appointed as Assistant Teacher on 01.10.1996. Petitioners claim that the said appointment was purely against the STC for temporary period of one year. It is further claimed that approval was granted by the Education Officer to this temporary appointment from 21.03.1997 till 30.04.1997 only and that there was no vacant post available. The employee came to be terminated orally on 21.12.1999. Being aggrieved by the same, he filed Appeal under Section 9 of the MEPS Act challenging the said oral termination in Appeal No. 257/1999. In the said proceeding, compromise was arrived at between the parties and the Appeal was allowed in terms of compromise dated 04.09.2004. It seems that subsequently management of the employer changed and the employer refused to permit employee join on the basis of the order of the compromise before the School Tribunal. The proceeding was initiated

before the School Tribunal and School Tribunal directed the employer to reinstate the employee by order dated 07.10.2010. This order came to be challenged by filing Writ Petition No. 1430/2010 before this Court. In the said Petition, order was passed on 04.05.2010 permitting the Petitioner to withdraw the Petition by recording statement of the employer. It is the case of the Petitioners that pursuant to the said order and also in view of the case sought to be made out by the employee before the School Tribunal, he was required to submit caste validity certificate indicating that he belongs to STC. In spite of granting several opportunities since the caste validity certificate was not submitted, services of the employee came to be terminated by order dated 22.04.2014. Employee being aggrieved by the said termination, filed Appeal before the School Tribunal being Appeal No. 35/2015. During the pendency of the Appeal, certain orders came to be passed, which were subject matter of proceedings before this Court. This Appeal finally was allowed by impugned judgment and order dated 18.04.2022. Hence, this Petition.

4. Learned Counsel for the Employer submits that the initial appointment of the Employee was purely on temporary basis and since it was not for the period of two years, question of deemed regularization of the employee does not arise. It is his submission that in Appeal No. 257/1999, it was a specific case sought to be made out by the Employee that he was appointed on the post reserved for STC and as such, non furnishing of the caste validity certificate pursuant to the order dated 04.05.2010 passed in Writ Petition No. 1430/2010 and also in view of provisions of the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000 (for short 'Act of 2000'), termination of services of the employee is justified. It is his submission that in that situation employee had no right to claim to continue in the employment. According to him, School Tribunal has committed error in not taking into consideration the pleadings of the employee in the previous Appeal and order passed by this Court in Writ Petition No. 1430/2010. On the point of back wages, it

is his submission that there is no pleading/statement made before the Tribunal about the employee being not gainfully employed during the intervening period and hence, order of granting back wages cannot sustain.

5. Learned Senior Counsel appearing for Employee has drawn attention of the Court to the written statement filed by the Employer in Appeal No. 257/1999 wherein a specific stand is taken that the employee was not appointed against the post reserved for STC. It is his submission that in any event first appointment becomes immaterial as there was a compromise arrived at between the parties in Appeal No. 257/1999 and since the appointment of the Employee has been done against the vacant post of the open category, there is no question of he submitting any caste validity certificate. He drew attention of the Court to the compromise arrived at between the parties, which according to him, is sufficient to demonstrate that this is not the case of the appointment against any reserved post. He further argued that the order dated 04.05.2010 passed in Writ Petition No. 1430/2010 is of no relevance as the said order only records the

statement of the Counsel for the Petitioner i.e., employer and as such, recording of such statement would not become a direction to the employee. In any case, according to him, since the appointment of the employee is not against reserved post, he was not bound to produce the same. On the point of back wages, he supported the impugned order and tried to draw attention of the Court to the Appeal memo filed before the School Tribunal, however, was not able to show any specific statement or even inference that he was not gainfully employed during the intervening period.

6. During the earlier proceedings, first appointment order of the employee was not brought on record. In this Petition, however, order dated 01.10.1996 is placed before this Court, which indicates that appointment of the employee was not against any reserved post, though said appointment indicates that the employee belongs to STC. However, unless the appointment is made specifically against post reserved for STC, it cannot be held that he was appointed against such reserved post, in order to require him to produce validity certificate. Similarly,

there is no dispute about the fact that against the oral termination effected of the employee, he had preferred Appeal No. 257/1999 in which compromise arrived at between the parties. The Appeal is disposed of in terms of compromise by order dated 04.09.2004.

Terms of compromise reads thus:

1) It has been agreed between the appellant and the respondent Management that, the Management shall appoint the appellant on the post fallen vacant on account of the retirement of Shri P.G. Deshmukh working as an Assistant Teacher in Narsinha Vidya Mandir, Nanded, the School run by the respondent Management.

2) It has been agreed between the appellant and the respondent Management that, after appointment as an Assistant Teacher in Narsinha Vidya Mandir, the appellant shall not claim any back benefits including amount towards his back salary. If the Department of Education, grants any amount towards the back salary to the appellant, the respondent Management has no objection to it.

3) It has been agreed between the appellant and the respondent Management that, the respondent Management after effecting the appointment of the appellant on the vacant post, shall consider the seniority of the appellant from his initial date of appointment i.e. 16.06.1997.

4) It has been agreed between the

appellant and the respondent Management that, the respondent Management after effecting appointment shall forward the proposal for approval to the Department of Education.

5) It has been agreed between the appellant and the respondent Management that, the appellant will report to the Narsinha Vidya Mandir, Nanded, on 06.09.2004 from the said date, the appellant will be allowed to resume the duty.

The terms of compromise, therefore, clearly indicate that it was a fresh appointment caused by the employer, that too in the post which fell vacant on account of retirement of Shri. P. G. Deshmukh, Assistant Teacher in Narsinha Vidya Mandir, Nanded, the school run by employer. In this settlement/compromise terms, there is no reference about the said appointment being done against the reserved post or any requirement for the employee to submit caste validity certificate.

7. In this backdrop, it would be relevant to take into consideration the order passed by this Court dated 04.05.2010 in Writ Petition No. 1430/2010. It is necessary to take note of the fact that this Petition came to be filed not from any substantial order/

proceedings. Petition was not decided on merit. The Petition was allowed to be withdrawn as sought by the Petitioner/Employer. The said order is reproduced herein below for ready reference:

1] Heard learned Counsel.

2] The petitioner's counsel seeks withdrawal, under instructions. He, however, submits that requirement the respondent No.1 being member of Scheduled Tribe will have be satisfied by the respondent in view of the terms of compromise and respondent No.1 may submit relevant caste claim certificate before the Education Officer directly. The petitioner is ready and willing to appoint respondent No.1, if approval is granted. The proposal will have to be forwarded by the petitioner. The petition is disposed of as withdrawn accordingly.

Perusal of the order indicates that Counsel for Petitioner sought withdrawal of the Petition on instructions. He made statement that employee being member of Scheduled Tribe will have to be satisfied by the respondent in view of compromise and respondent No. 1 may submit relevant caste claim certificate before the Education Officer directly. Pertinently, this Court has not gone into the terms of compromise as nothing is

recorded in this regard in the order, nor any direction is issued to the employee. Perusal of the compromise terms do not indicate that the appointment was against any post reserved and that there is neither statement on behalf of employee to that effect nor order of the Court directing the employee to submit caste validity certificate. Merely for the reason that the statement of the Counsel for Petitioner is recorded in order dated 04.05.2010, there is no obligation on the part of the employee to produce caste validity certificate.

8. Perusal of the impugned order passed by the School Tribunal indicates that all relevant facts are duly considered while recording findings that the appointment of the employee was on the open category post and there is no evidence to show that the initial appointment of the employee was against post reserved for STC. This Court finds substance in the contention of Counsel for Employee that statement of the employee in Appeal No. 257/1999 would not become estoppel for him as in the same proceeding employer has denied the contention that there was appointment of the employee against post reserved for STC. It is the employer who

is in the best position to say against which post the employee is appointed, since entire record of employment is with employer. Similarly, in view of compromise dated 04.09.2004 in Appeal No. 257/1999, no controversy survives with regard to the appointment of employee in the post vacated in general category. Thus, this averments are required to be ignored and the controversy between parties with regard to the post on which employee was appointed needs to be considered in view of the pleadings in the Appeal memo in Appeal No. 35/2015 and evidence led before the Tribunal. As recorded herein above, after taking into consideration evidence on record this Court has arrived at a finding and in absence of any perversity, no interference is called therein in exercise of writ jurisdiction.

9. In so far as back wages are concerned, it is settled position of law that employee is required to plead and substantiate before the Court of first instance that he was not gainfully employed during intervening period. In this regard, reference can be made to the judgment of Hon'ble Supreme Court in case of Deepali Gundu Surwase vs. Kranti Junior Adhyapak

Mahavidyalaya (D.Ed) and another, (2013) 10 SCC 324 has culled out propositions with regard to payment of back wages. It would be useful to make reference of the same which reads as under :-

"38.1 In cases of wrongful termination of service, reinstatement with continuity of service and backwages is the normal rule.

38.2 The aforesaid rule is subject to the rider that while deciding the issue of backwages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3 Ordinarily, an employee or workman whose services are terminated and who is desirous of getting backwages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full backwages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a

positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments."

In view of law laid down by the Hon'ble Supreme Court, it is clear that in case of wrongful termination of service, the workman would be reinstated with continuity of service and back wages. The same is however with a rider that the workman is required to either plead or at least make a statement before the adjudicating authority that he was not gainfully employed or was employed on lessor wages during the intervening period. Once the workman makes such statement, the onus would shift upon the employer to show that the workman was gainfully employed in order to deny back wages. The observation made by the Hon'ble Supreme Court in aforesaid judgment indicates that there is a shift in the view in respect of grant of back wages. Earlier in case of any termination being held as illegal, re-instatement in service with back

wages was a rule. However, now a rider is added thereto whereby the workman is required to plead or make a statement before the Court at first instance that he was not gainfully employed. The nature of burden on the workman would not be so strict that he is called upon to prove by leading positive evidence that he was not gainfully employed. Since it would not be possible to prove negative and hence statement made by workman is accepted by Court and such statement is believed to be *bona fide*. The workman is expected to make all material disclosures related to issue of gainful employment, which has bearing on determination of back wages.

10. Perusal of the Appeal memo and the record before the Tribunal do not indicate any such statement being made by the employee before the Court of first instance. Herein, the Tribunal has granted back wages with observations that the employer has not produced any documentary evidence that the employee was gainfully employed elsewhere. This finding recorded by the Tribunal is erroneous since contrary to settled position of law. The law on the point is fairly settled

to say that the initial burden is on the employee to plead and prove before the Court of first instance that he was not gainfully employed and it is thereafter burden shifts on the employer to lead evidence in rebuttal. In absence of any statement being made by the employee to that effect, onus does not shift on the employer to lead any evidence contrary. Hence, order passed by the Tribunal granting back wages cannot sustain.

11. As a result of above discussion, Petition is partly allowed. Impugned judgment and order passed by the School Tribunal, Latur in Appeal No. 35/2015 dated 18.04.2022 is maintained except for the order of grant of back wages.

(R. M. JOSHI, J.)