

(2002) 07 BOM CK 0014

In the Bombay High Court

Case No : Writ Petition No. 2883 of 2001

Ashok Asramji Gabhane

APPELLANT

Vs

Presiding Officer, School Tribunal and Others

RESPONDENT

Date of Decision : 02-07-2002

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 3, 4, 5, 5(1), 5(2)

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 28, 3(6), 9(2), 9(5)

Citation : (2002) 4 ALLMR 325 : (2003) 2 BomCR 862 : (2002) 4 BOMLR 267 : (2002) 4 MhLj 225

Hon'ble Judges : D.D. Sinha, J

Bench : Single Bench

Advocate : A.S. Mardikar, for the Appellant; Z.A. Haq and B.H. Shambharkar for respondent Nos. 2A and 3 and R.G. Agrawal, Assistant Government Pleader For respondent Nos. 4 and 5, for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Rule returnable forthwith. Heard finally by consent of Shri Mardikar, learned Counsel for the petitioner, Shri Haq, learned Counsel for the respondents Nos. 2A and 3 and Shri Agrawal, learned Assistant Government Pleader for the respondents Nos. 4 and 5. Though respondent No. 2 is not noticed, however, since petitioner is not claiming any relief against him, petition is heard finally by consent of contesting respondents.

2. The petition is directed against the order dated 23-3-2001 passed by the Presiding Officer, School Tribunal whereby appeal preferred by the petitioner u/s 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 for setting aside order of termination came to be dismissed.

3. Shri Mardikar, learned Counsel for the petitioner, states that petitioner was appointed by the respondent Management vide orders dated 20-6-1991,

16-12-1991 and 24-6-1993. The appointment was against the permanent post. The petitioner has worked for more than two years. The petitioner, therefore, is a confirmed employee and his appointment is as per Section 5(2) of the Act. The learned Counsel further states that Head Master of the School vide relieving certificate dated 9-5-1993 permitted the petitioner to undertake D.Ed. course (Vacation) and it was also mentioned in the said document that after completion of the said course, the petitioner would be absorbed in service. It is contended that the petitioner has completed D.Ed. course (Vacation) in 1995. It is contended that action of the respondent Management in not allowing petitioner to resume duty from 1-8-1994 amounted to otherwise termination and, therefore, petitioner preferred appeal before the School Tribunal u/s 9 of the Act against this action of the respondents. The impugned order is assailed by the petitioner on the following grounds :

i) The School Tribunal failed to consider provisions of Section 5(1) and (2) of the Act whereby petitioner has acquired deemed permanency since his appointment was in a clear vacancy and on a permanent basis and petitioner was also at the relevant time qualified and, therefore, finding recorded by the School Tribunal in this regard is not sustainable in law and needs to be set aside.

ii) The respondent Management did not follow the procedure prescribed u/s 4(6) of the Act and, therefore, action of the respondents Nos. 2 and 3 is also inconsistent with the above referred provisions and cannot be sustained in law. It is contended that this aspect has also not been considered by the School Tribunal and, therefore, impugned order is bad in law.

iii) The petitioner was in employment of the respondent Management as an Assistant Teacher since 1991. His appointment may be on year to year basis, but since petitioner continued to serve in employment of the respondent Management for number of years, the respondent Management could not have dispensed with services of the petitioner in the manner in which they did, which is inconsistent with the provisions of the Act and Rules and, therefore, action cannot be sustained.

iv) In view of Sub-rule (6) of Rule 3 of the M.E.P.S. Rules, the Education Officer is empowered to cancel the appointment made by the petitioner without following the procedure laid down in this rule. It is contended that if appointment of the petitioner as alleged by the Management, was not as per the procedure contemplated under the Rules, then the Deputy Director ought to have cancelled the appointment of the petitioner and School Tribunal could not have adjudicated upon this aspect of the matter. In order to substantiate the contentions, reliance is placed by the learned Counsel for the petitioner on the judgment dated 6-2-2002 of this Court in Writ Petition No. 610/2002.

4. In order to substantiate the contentions, reliance is placed on the judgments of this Court in Laxman Mahadev Teli Vs. Principal, Shri Pancham Khemraj Mahavidyalaya and Others, , National Education Society's High School and Junior

College v. Mrs. Lulomool Monachary 1997 (2) BCR 521 and Prabhudayal Birari Vs. M.P. Rajya Nagrik Aapurti Nigam Ltd., .

5. On the other hand, Shri Haq, learned Counsel for the respondents Nos. 2 and 3, supports the impugned order and states that the petitioner was appointed as Assistant Teacher purely on temporary basis for a period of one year vide order dated 20-6-1991. In the order itself, appointment of the petitioner was till 30-4-1992 and, therefore, same automatically came to an end on the said date. It is contended that second appointment order dated 16-12-1991 was issued by a person, who was not even the President at the relevant time and, therefore, the said appointment order is inconsistent with the Schedule D since same was not issued by the Head Master/Secretary of the School Committee. However, person who has issued the said order in the capacity of President was also not even the President at the relevant time since term of his office had come to an end in the month of November 1991. The learned Counsel submits that the last order dated 24-6-1993 was also issued by Mr. Indurkar. The said order also suffers from the same vice and, therefore, cannot be sustained. It is further contended that at the relevant time, the petitioner was not a qualified person since in the year 1994, he did not possess D.Ed. qualification and, therefore, in any case could not be appointed on probation in view of Section 5 of the Act and Rule 6 of the Rules. It is further contended that all these aspects were rightly considered by the School Tribunal while adjudicating the claim of the petitioner and, therefore, impugned order is just and proper. It is also contended that the last contention canvassed by the learned Counsel for the petitioner in respect of Sub-rule (6) of Rule 3 of the M.E.P.S. Rules, 1981 is also incorrect and not applicable to the case of the petitioner.

6. I have considered the contentions canvassed by the learned respective Counsel for the parties and perused the impugned order. In order to consider the controversy in question, it would be proper to consider the provisions of Section 5 of the Act. For the purpose of issue in question, the relevant provisions are Sub-sections (1) and (2) of Section 5 of the Act. Sub-section (1) of Section 5 contemplates that the Management shall fill in permanent vacancy in a private School by appointment of a person duly qualified to fill such vacancy. So the first and foremost criteria to fill up the vacancy is that the person needs to be qualified. Sub-section (1) of Section 5 contemplates that every person appointed to fill up the permanent vacancy shall be on probation for a period of two years and subject to provisions of Sections 3 and 4, on completion of probation period of two years, will be deemed to have been confirmed. Sub section (2) carves out another criteria, i.e. vacancy which is filled, should be a permanent vacancy and in such situation only, the appointment would be on probation for a period of two years.

7. In the instant case, on the date of first appointment of the petitioner, i.e. in the year 1991, the petitioner undoubtedly was not a qualified person. Similarly, there is nothing on record to show whether vacancy was permanent or not. In

the absence thereof, appointment of the petitioner could not have been on probation in the year 1991 as contemplated under the provisions of Section 5 of the Act and, therefore, contention canvassed by the learned Counsel for the petitioner in this regard is misconceived and devoid of substance and is rejected.

8. The main issue in the present case pertains to subsequent appointment orders dated 16-12-1991 and 24-6-1993 alleged to have been issued by the respondent Management. In order to adjudicate in respect of this aspect, it would be appropriate to refer to Schedule D of the M.E.P.S. Rules, which provides form of order of appointment and as per Schedule D, the order of appointment in respect of Assistant Teacher is required to be issued by the Head Master/Secretary of the School Committee. This aspect of the matter is not in dispute. In the instant case, it is not in dispute that appointment orders dated 16-12-1991 and 24-6-1993 are issued not by the Head Master/Secretary of the School Committee and, therefore, on this short ground, these cannot be termed as appointment orders in law as contemplated by Schedule D of the Rules and, therefore, no legal right can be canvassed on the basis of such orders, which are no orders in the eye of law.

9. The situation does not end here. In the instant case, the appointment orders are signed by Mr. Indurkar, who claimed to be the President of the Trust at the relevant time though President does not have any right or authority in law to issue such appointment orders in view of Schedule D. However, in the instant case, at the relevant time, Shri Indurkar was not even a President of the Trust since his term of the office of President came to an end in the month of November 1991 itself. This is evident from Annexure 2, which is filed along with submissions of respondents Nos. 2A and 3. This is a document, which is para-wise reply filed by Shri. U. M. Indurkar on affidavit in Contempt Petition No. 272/1999 moved by the petitioner employee before this Court for non-compliance of order dated 23-7-1999 passed by the School Tribunal wherein there is a categorical statement made by Shri Indurkar that term of office of the President was over in the year 1991. In view of these facts, it is undoubtedly clear that term of the office of the President came to an end in November 1991. It is not known as to how Shri Indurkar on his own issued appointment orders without any authority of law. The School Tribunal, in my opinion, has rightly considered this aspect and is justified in rejecting the contention of the petitioner in this regard.

10. Another contention canvassed by Shri Mardikar in respect of petitioner's continuance in service in the School on a temporary basis for number of years and, therefore, his services could not be dispensed with without following due procedure of law is also misconceived and devoid of substance, firstly because the first appointment order dated 20-6-1991 was for a fixed period of one year, i.e. till 30-4-1992 and, therefore, would have automatically come to an end at the end of April 1992. As far as second and third appointment orders are concerned, since they were issued by the Authority other than competent one, as

contemplated by Schedule D, the same were not valid orders in the eye of law and, therefore, no such right could accrue to the petitioner on the basis of such orders, which are basically invalid in law and ultimately the respondent Management was not under obligation to serve any notice or conduct any enquiry before terminating services of the petitioner. These orders, even otherwise, were for a specific period and came to an end on expiry thereof. In that view of the matter, the contention canvassed by the learned Counsel for the petitioner in this regard is also misconceived and cannot be sustained.

11. As far as ratio laid down by this Court in the case of Laxman Mahadev Teli Vs. Principal, Shri Pancham Khemraj Mahavidyalaya and Others, , there is no quarrel with the proposition laid down by this Court. However, in view of the facts and circumstances of the present case, same is of no use to the petitioner. Similar is the case in respect of judgment of this Court in National Education Society's High School and Junior College v. Mrs. Lulomool Monachary 1987 (2) B.C.R. 521. The ratio laid down in the judgment of Apex Court in Prabhudayal Birari Vs. M.P. Rajya Nagrik Aapurti Nigam Ltd., is also not applicable in the instant case since as per one of the conditions of service in the said case as per terms of appointment of service, it was necessary to give one month's notice or payment of one month's salary in lieu of notice by either side. There is no such condition exist in the present case as far as appointment orders of the petitioner are concerned.

12. As far as last contention canvassed by the learned Counsel for the petitioner in respect of Sub-rule (6) of Rule 3 of the M.E.P.S. Rules is concerned, Rule 3 is not attracted in the present case primarily because it deals with qualifications for appointment of Head of the Institution. The present case is concerned with appointment of the Assistant Teacher and, therefore, by very nature of the Rule, same is not applicable in the case of the petitioner. Even otherwise, by virtue of Sub-rule (6) of Rule 3, power is vested in the Education Officer or the Deputy Director of Education, as the case may be, to cancel the appointment of the Head of the Institution, which is made without following the procedure laid down in the Rules. That does not, in my opinion, take away the right of the Management to terminate the services of the employee whose appointment is de hors of the relevant Rules and procedure in this regard. If the appointment is void ab initio, illegal and de hors of the procedure, in that case, the Management possesses power independently to terminate the services of such employee irrespective of the fact whether such power is vested in the Education Officer or the Deputy Director of Education under Sub-rule (6) of Rule 3.

13. In the instant case, as stated hereinabove, the first appointment of the petitioner, which was made in the year 1991, was for fixed period and came to an end at the end of period mentioned therein and as far as subsequent two appointment orders are concerned, those were not issued by the competent Authority as contemplated vide Schedule D of the Rules and, therefore, it has already been held that those orders were not the orders in the eye of law. The

petitioner at the relevant time was not qualified and appointment of the petitioner also could not be on probation in view of provisions of Section 5 of the Act. The School Tribunal possessed the jurisdiction to adjudicate upon these aspects of the matter and in my opinion, School Tribunal has rightly done so and is justified in dismissing the appeal filed by the petitioner. In view of these facts, the observations made by the learned Single Judge in para (9) of the above referred judgment are of no use to the petitioner.

14. For the reasons stated hereinabove, no case is made out for interference. The petition is dismissed. The rule is discharged. No order as to costs.