

(2015) 07 BOM CK 0271

In the Bombay High Court

Case No : Writ Petition No. 485 of 2015, Writ Petition No. 653 of 2015, Writ Petition No. 646 of 2015, Writ Petition No. 11763 of 2014, Writ Petition No. 11764 of 2014 and Writ Petition No. 526 of 2015

Balasaheb Ramchandra Burke and Others

APPELLANT

Vs

The President and Others

RESPONDENT

Date of Decision : 29-07-2015

Acts Referred:

Constitution of India, 1950 — Article 14
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 5(2), 9
Motor Vehicles Act, 1988 — Section 47, 47(1-H)

Citation : (2015) 07 BOM CK 0271

Hon'ble Judges : R.V. Ghuge, J

Bench : Single Bench

Advocate : Gholap Ajit M., Kolpe M.B. and Wakure S.A., for the Appellant;
Bhalerao R.D., Advocates for the Respondent

Final Decision : Allowed

Judgement

R.V. Ghuge, J—Heard.

2. Rule.

3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.

4. These matters were heard on 15.7.2015 and thereafter on 29.7.2015.

5. All the petitioners claim to be the employees of the same respondent / management. All of them have been orally terminated on 15.7.2008. They are identically situated and the issue involved is identical. Respondent / management is the same. It is in these circumstances that I have heard these petitions together.

6. The contentions of the petitioners can be summarized as follows:-

(a) In 1991, the respondent Management has started the Secondary School at Padalane, Tq. Akole, Dist. Ahmednagar. The school was recognized on non grant basis.

(b) In 1995, the respondent Management had transferred respondent No. 3 School from village Padalane to village Kotul without prior permission of respondent No. 4.

(c) Respondent No. 4 had cancelled the recognition of the School since the Management had transferred the School without permission.

(d) In 1996, the respondent Management filed Writ Petition No. 99/1996 before this Court challenging the order passed by respondent No. 4 cancelling its recognition. This Court granted stay to the impugned order passed by respondent No. 4.

(e) On 01/04/2004, the Writ petition No. 99/1996 was disposed of by this Court by consent of the parties with the directions to decide the proposal for transfer of school.

(f) In 10/04/2008, respondent No. 3 has submitted the Inspection report of valuation of the School for considering the issue of grants. The Government after receiving report of inspection sanctioned 100% grants to respondent No. 3 School.

(g) On 15/07/2008, after sanction of grants the Management has terminated services of all the petitioners orally by refusing work / to sign on the muster roll.

(h) No opportunity of hearing was given by the Management.

(i) All the above petitioners preferred their appeals against their common oral termination dated 15/07/2008 u/s. 9 of The M.E.P.S. Act, 1977 before the School Tribunal at Solapur.

(j) By an interim order, the School Tribunal protected all the petitioners and their oral termination dated 15/07/2008 was stayed till decision of appeal.

(h) In 2009, respondent Nos. 1 to 3 have filed writ petition No. 8600/2009 and the group of writ petitions against other employees challenging the orders passed below Exh. 5.

(i) On 01/07/2009, this Court has disposed of Writ Petition No. 8600/2009 and the group of writ petitions by directing the School Tribunal to decide the matters within three months and parties were directed to maintain status quo.

(j) The School Tribunal dismissed all the appeals by judgments dated 7.12.2010.

(k) By judgment dated 18.12.2013, this Court partly allowed all the Writ Petitions of these petitioners and directed the School Tribunal to decide the appeals afresh.

7. The petitioners in these petitions have submitted a ready reference chart for

the assistance of this Court indicating their petition numbers, the position held with the respondent/management, their date of appointment, their date of removal and the number of years of service put in with the respondent / management. The said ready reference chart reads as under:

8. The respondent / management has submitted its written statement in each of the appeals filed by the petitioners for challenging their oral termination dated 15.7.2008. In paragraph Nos. 2, 2A, 2B, 2C and 2D of its written statement, the management has admitted the status of the petitioners and their tenure of employment. From the ready reference chart, it is apparent that one employee has worked for eleven years, two employees have worked for twelve years, one employee for seventeen years and two employees for eighteen years.

9. While dealing with these petitions, I find it necessary to first advert to the reason for termination since it is nobody's case, either before the School Tribunal or before this Court that any of the petitioners have been terminated on account of any mis-conduct. The respondent / management has come out with a clear stand that the appointment of each of these petitioners is an unlawful appointment. None of these petitioners were appointed by following the due procedure. All these petitioners have been inducted in service as back-door entries. This illegality in their appointment cannot be cured. Therefore, on 15.7.2008, the respondent / management has orally terminated the services of all the petitioners.

10. Per contra, the petitioners have contended that they were initially appointed on probation. By virtue of Section 5(2) of the the Maharashtra Employees of Private Schools (Conditions of Service) Act, 1977 ("the MEPS Act" for short) they are entitled for permanency on account of the deeming fiction provided under Section 5(2). At best, the respondent / management may allege irregularities in the appointment, but cannot take a stand that the appointments of the petitioners are illegal.

11. The petitioners further canvassed that irregularities can be done away with in the light of paragraph No. 44 of the judgment of the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, AIR 2006 SC 1806 : (2006) 6 CompLJ 1 : (2006) 4 JT 420 : (2006) 2 LLJ 722 : (2006) 4 SCALE 197 : (2006) 4 SCC 1 : (2006) 3 SLJ 1 : (2006) AIRSCW 1991 : (2006) 3 Supreme 415 . None of the petitioners can be said to be ineligible for appointments. That has not been the defence of the respondent / management. It is further submitted that the petitioners have been retained in employment for a long period. Their attendance have been marked. They have discharged their duties. Their salaries have been paid. The factum of employment and their service is not disputed. Therefore, the respondent / management is estopped from contending that these petitioners can be said to be illegally appointed.

12. These very petitioners were before this Court in the earlier round of litigation. In Writ Petition No. 1737 of 2011 and connected matters, which were

decided by this Court, vide judgment dated 18.12.2013, these petitioners had challenged the judgment and orders of the School Tribunal, delivered in their appeals dated 7.12.2010. By the said judgment, dated 18.12.2013, this Court had partly allowed the petitions, had set aside the impugned judgment of the School Tribunal, dated 7.12.2010 and remitted the appeals to the School Tribunal for fresh adjudication. While doing so, I have recorded my observations in paragraph Nos. 11 to 15, which read as under:-

"11. Nowhere in the written statement filed by the respondent/Management before the Tribunal has it been contended that the appellants /petitioners herein were otherwise just not eligible to be appointed as an Assistant Teacher /Lab Attendant / Jr. Clerk / Naik.

12. There are many such cases which have come up for the consideration of this Court. Many managements have taken such a stand while summarily / orally terminating their employees. Careers/ lives of teachers / employees are being dealt with in a casual manner by such Management. In the face of an admission in the written statement that the petitioners are working for years, the Management is now attempting to take advantage of its own wrong by contending after 12 to 18 years that the appointment orders did not carry the signature of the Head Master or that the signature of the Secretary is bogus or that there was no proper selection Committee.

13. Having gone through the impugned judgment, it is clear that the learned Tribunal has failed to deal with the said pleadings of the respondent/ Management, which are available in the petition paper book. Submissions that the appointments are irregular and the appointments amount to a back door entry have weighed too much upon the mind of the learned Tribunal despite having concluded in the impugned judgments that ""There is no doubt, that the Appellant has produced number of documents to show that he has worked with the R/M."" In my view, the impugned judgments on this count suffer from a serious legal infirmity and perversity. Such judgments ought not be sustained and are, therefore, being quashed and set aside by this order.

14. I quote Benjamin N.Cardozo, Associate Justice of the United States, Supreme Court, "Judges are supposed to use all this power to make sure that justice is done, that at some basic level the verdicts issued in their courts display a certain degree of reasonableness. The Judge,..... is under a duty, within the limits of his powers of innovation, to maintain a relation between Law and morals, between the precepts of jurisprudence and those of reason and good conscience."

15. Therefore, ends of justice would be met if the matters are relegated back to the School Tribunal for a proper adjudication. The Tribunal is expected to go through the pleadings of the rival parties and deal with each contention and even the admissions appearing in the written statement. Appreciation of oral and documentary evidence has paramount importance, which the learned Tribunal should bear in mind."

13. By the impugned judgment and order dated 30.10.2014, delivered by the School Tribunal, all the appeals preferred by the petitioners have been rejected.

14. The petitioners point out that the appeals have been dismissed, primarily on the ground that the appointments of the petitioners were illegal and since the due process of selection was not followed by the management, they deserve to be terminated. The Tribunal concluded that the oral termination of the petitioners cannot be called in question since the management had not followed the procedure, while recruiting them. The petitioners, therefore, submits that after having worked with the management for about 12 to 18 years, this ground was not available. Similarly, the Tribunal should have considered the aspect of an oral termination, which is legally unsustainable as no employer can be permitted to orally terminate its employees.

15. I must record a peculiar situation that has occurred as I heard these matters on 15.7.2015. I had posed some queries to the learned Advocate for the management. I found that he was not willing to answer the queries put to him. I, therefore, put him six questions and which I repeated three times. Yet, the learned Advocate was not inclined to answer these questions. The said questions are as follows:-

- (a) Who appointed the petitioners / employees ?
- (b) Did the management appoint these petitioners ?
- (c) Who paid salary to these petitioners for all these years of their employment ?
- (d) Who sent the proposals for approval to the Education Officer ?
- (e) Was the salary paid to the petitioners from the account of the School conducted by the respondent -management ?
- (f) As the school was derecognised in between 6.7.1995 and 1.11.2004, did the management continue the petitioners and even after restarting of the School ?

16. Notwithstanding the fact that no answer was offered to these questions, the learned Advocate for the management however submitted that a suspicious proposal was sent to the Education Officer. A suspicious resolution was prepared by the management recommending the proposals of the petitioners for approval. After the school acquired recognition on 1.11.2004, these petitioners were not working.

17. In the light of the above submissions, I asked the learned counsel for the respondent that if the petitioners are said to be not working from 1.11.2004, why did the occasion to terminate their services orally on 15.7.2008 arise. Though he did not offer an answer, he submitted that the management has taken a stand in the Written Statement that their services were terminated orally on 15.7.2008. I then asked him as to who maintains the record of appointments of Teachers and their services books. The learned counsel did not offer an answer.

18. As has been recorded on the basis of the Written Statement of the respondent / management in paragraph Nos. 2, 2(A) to 2(D) filed before the School Tribunal, the factum of employment and continuance till 15.7.2008 has been admitted.

19. The issue, therefore, is as to whether a management can be permitted to take advantage of its own wrongs in the event it is presumed that the petitioners were irregularly appointed. Similarly, the question would be as to whether the management can be permitted to utilize the services of the teaching and non-teaching staff for the periods as like in this case from 12 years to 18 years and one fine day dispense with their services under oral orders on the plea that they were irregularly appointed.

20. In my view, no management could be permitted to take such a stand. The fact that the employees have worked for long durations and in the light of the observations of the Honourable Supreme Court in paragraph No. 44 of the Umadevi's judgment (supra), even if their engagements are irregular and if they are otherwise eligible to be appointed, their services need to be regularized.

21. The learned counsel for the management has relied upon the following judgments.

(i) Priyadarshini Education Trust and The Head Master, National Urdu High School Vs. Ratis (Rafia) Bano, (2007) 6 ALLMR 238 : (2007) 6 BomCR 79 : (2007) 109 BOMLR 1663 : (2007) 6 MhLj 667 ,

(ii) Rayat Shikshan Sanstha and Another Vs. Yeshwant Dattatraya Shinde, (2010) 3 BomCR 278 : (2009) 6 MhLj 476 ,

(iii) Chandramani Devraj Tiwari Vs. The Secretary, Smr. R.B. Tiwari Sanskrutik Kendra and Others, (2008) 3 ALLMR 138 : (2008) 3 BomCR 206 : (2008) 3 MhLj 274 .

(iv) Tanaji Madhukar Barbade Vs. State of Maharashtra and Others, (2011) 1 ALLMR 912 : (2010) 6 BomCR 497 : (2010) 112 BOMLR 4587 : (2011) 128 FLR 147 and

(v) President, Late Shri Ramchandra Patil Sikhshan Sanstha and Others Vs. Haidarali Mahmahanif Inamdhar and Another, (2008) 4 MhLj 159 .

22. In the matter of Priyadarshini (supra), this Court had dealt with the claim of such employees who had worked for short duration and had claimed permanency. This Court had concluded that by following the due procedure beginning from the issuance of an advertisement for recruiting employees, would eliminate nepotism.

23. I find from the instant case that besides taking a stand before the School Tribunal and before this Court, that the procedure for appointments was not followed by the respondent while inducting the petitioners, the respondent management has neither placed on record any such procedure which is required

to be followed, inasmuch as the management has not cited even a single appointee who could be said to be comparable with the petitioners, as having been selected and appointed by following a particular procedure. I, therefore, find that the respondent / management has adopted a vexatious stand that none of the petitioners have been procedurally appointed only to defeat their claims.

24. The respondent submits that the petitioners should establish that they were procedurally selected and appointed, that they have failed to so establish and therefore, it led to their dismissal. I am unable to accept these contentions of the respondents for reasons more than one. Firstly, the same management continued the petitioners in employment from 12 years to 18 years. Secondly, in all these years, the management never realized that the petitioners were irregularly appointed. Thirdly, the management has paid the salaries of these employees without a murmur. Fourthly, proposal was sent to the Education Department by the management and the stand now taken is that somebody prepared a forged proposal. Fifthly, the management failed to identify even by way of an example before the School Tribunal or even before this Court, a single appointment of any of their employees, which could be said to have been made after following a particular procedure.

25. The respondent has relied upon the judgment of this Court in the case of Chandramani (supra), to contend that the employee has to prove that he was duly selected in order to draw the benefit of Section 5(2) of the MEPS said Act. In the said case, the concerned employee had taken a stand that he was appointed on July 1995 and then terminated on 1.10.1999. He had claimed deemed status of permanency after working for about 4 years and had alleged that he was pressurized to give in writing that he was appointed on 14.6.1999. His signatures were obtained on blank papers, which were then used to indicate his resignation. In my view, the fact that these petitioners were permitted by the respondent / management to work in between 12 years to 18 years would stopp the management from raising an issue that the petitioners were not properly selected and they ought to prove their due selection in the manner prescribed.

26. The reliance placed by the respondent on the judgment of this Court in the case of President, Late Shri Ramchandra Patil's case (supra), is also mis-placed. In the said case as well, the petitioner had worked for a short duration and had questioned his termination on the ground that he was deemed permanent. The conclusion of the School Tribunal that he was deemed permanent was set aside because the management established before this Court that the said Assistant Teacher did not hold the degree of B.Ed. and held the degree of B.P. Ed. and therefore, having not followed the due procedure of law, his appointment could not be sustained.

27. The petitioners have relied upon the following judgments:-

(i) Mrs. Chanchal Goyal Vs. State of Rajasthan -Appeal (Civil) 7744 of 1997 (Supreme Court), dated 18.2.2003 and

(ii) St. Ulai High School and Shri Adishakti Hindi Prachar Samitee Vs. Shri Devendraprasad Jagannath Singh and The Zilla Parishad, (2007) 2 ALLMR 1 : (2007) 1 BomCR 540 : (2007) 109 BOMLR 60 : (2007) 1 MhLj 597 .

28. In the case of Tanaji Madhukar (supra), it was concluded by the Full Bench of this Court that the management is under an obligation to issue advertisement in at least one newspaper and also is obliged to notify vacancies to various agencies. The observations of the Full Bench in paragraph Nos. 16 and 17 read as under:-

"16. The State Government, as observed above, has framed Rules. In our opinion, Sub-rule 3 of Rule 9, is crucial. It reads as under:

9(3) Unless otherwise provided in these rules for every appointment to be made in a school, for a teaching or a non-teaching post, the candidates eligible for appointment and desirous of applying for such post shall make an application in writing giving full details regarding name, address, date of birth, educational and professional qualifications, experience, etc., attaching true copies of the original certificates. It shall not be necessary for candidates other than those belonging to the various sections of backward communities for whom posts are reserved under Sub-rule (7) to state their castes in their applications.

17. Perusal of the above Rule shows that this Rule give a right to every eligible candidate to apply for any vacancy either for teaching or a non-teaching post in a private school. In order to make this right meaningful and effective, a corresponding duty will have to be read in the Management to give wide publicity to the fact that there is a vacancy in that school, so that every candidate who is eligible to apply can come to know of the existence of the vacancy and apply for the post. Without the Management making the existence of vacancy known, the right given by Sub-rule 3 of Rule 9 to every eligible candidate to apply will be meaningless. It is further to be seen that many private schools also receive grant-in-aid from the State Government and therefore salaries of the teaching and non-teaching staff in the Schools are paid from the public funds, and therefore considering the provisions of Article 14 of the Constitution as the salary of the teaching and non-teaching staff is to be paid from the public funds, there would be an obligation on the Management to advertise the vacancy. So far as the vacancies which are reserved for backward class are concerned, there is a specific provision made in Sub-rule 8 of Rule 9. Sub-rule 8 of Rule 9 reads as under:

Sub-rule (8) of Rule 9 For the purpose of filling up the vacancies reserved under Sub-rule (7) the Management shall advertise the vacancies in at least one newspaper having wide circulation in the region and also notify the vacancies to the Employment Exchange of the District and to the District Social Welfare Officer (and to the associations or organizations of persons belonging to Backward Classes, by whatever names such associations or organizations are called, and which are recognised by Government for the purposes of this sub-rule)

requisitioning the names of qualified personnel, if any, registered with them. If it is not possible to fill in the reserved post from amongst candidates, if any, who have applied in response to the advertisement or whose names are recommended by the Employment Exchange or the District Social Welfare Officer (or such associations or organizations as aforesaid) or if no such names are recommended by the Employment Exchange or the District Social Welfare Officer (or such associations or organization as aforesaid) within a period of one month the Management may proceed to fill up the reserved post in accordance with the provisions of Sub-rule (9).

So far as reserved vacancies are concerned, thus, the Management is not only obliged to issue advertisement in at least one newspaper, but has also to notify vacancies to various agencies. In our opinion, therefore, permitting the Management to fill in the post without advertisement, though there is a clear provision made in the Act or the Rules, would be contrary to the scheme of the Act and the Rules. In the provision in Schedule "F", which we have quoted above, what is provided is preference. Preference does not mean exclusive right of consideration. It means right to be preferred, other thing being equal. The observations made by the Supreme Court in its judgment in the case of *Sher Singh Vs. Union of India (UOI) and Others*, AIR 1984 SC 200 : (1983) 3 CompLJ 306 : (1983) 2 SCALE 531 : (1984) 1 SCC 107 : (1984) 1 SCR 464 : (1984) 16 UJ 118 in relation to the provisions of Section 47 of the Motor Vehicles Act, in our opinion, are relevant. They read as under:

This would apply *mutatis mutandis* to the present situation. But let it be made clear that while considering the application for stage carriage permit under S.47, the private operator has an equal chance to get a permit even on inter-State route if it shows that the Undertaking is either unable to provide efficient and economical service or that the private operator is better equipped to render the same. Preference in this context would mean that other things generally appearing to be qualitatively and quantitatively equal though not with mathematical accuracy, statutory provision will tilt the balance in favour of the Undertaking. Viewed from this perspective the provision contained in Section 47(1-H) would not deny equality before law and hence would not offend Article 14.

(emphasis supplied)."

29. I find it conspicuous that the respondent management permitted the petitioners to work for as long as 12 years, 17 years and 18 years and on 15.7.2008 orally drove out the petitioners without issuing an order of termination. Reasons for termination are first divulged only in the written statement, contending that these appointments are irregular in nature. Besides estoppel, paragraph No. 44 of the *Umadevi's* judgment (*supra*) would preclude the respondent / management from taking this stand.

30. The Full Bench of this Court in the case of *St. Ulai High School* (*supra*), has concluded that the grant of approval by the Education Officer is not a condition

precedent to a valid order of appointment. The respondent / management has termed its proposals sent to the Education Officer for approval of the services of the petitioners as being suspicious. This stand is also taken for the first time after 18 years with oblique motives. One who pleads fraud, has to prove it.

31. In the light of the above, I find that the impugned judgments of the School Tribunal, dated 30.10.2014 being perverse and erroneous. The impugned judgments are, therefore, quashed and set aside. The impugned oral terminations of the petitioners, dated 15.7.2008 are quashed and set aside and the petitioners are reinstated in employment with continuity in service. Their appeals, therefore, stand allowed.

32. At this juncture, I called upon the learned Advocates in the open Court, to make their submissions as regards grant of backwages. The learned Advocates for the petitioners submitted that since the Government has taken a decision to accord grant-in-aid status, the respondent / management terminated all the petitioners highhandedly under oral orders with oblique motives. They had been without earnings since 15.7.2008. They have not acquired employment in any other institution looking at their advanced age. They, therefore, pray for 100% backwages.

33. Shri Bhalerao, learned Advocate submitted that the respondent / management is not getting grants. When called upon to advance a submission on quantum of backwages, he stated that he cannot answer this question.

34. It needs to be stated that all these petitioners are of an advanced age since they have joined employment in the 1990's. They have failed to acquire an alternate employment. The highhandedness of the management is writ large from the fact that the petitioners were terminated orally in once stroke. Ever since their termination, it is informed that the petitioners had to spend on litigations, since they had to approach this Court on two occasions and on one occasion, they were the respondents when the respondent / management approached this Court for challenging the interim relief granted by the Tribunal to these employees.

35. With due circumspection and considering the above stated situation, I am granting 60% backwages to the petitioners till their reinstatement.

36. In the light of the above, these petitions are allowed. Rule is made absolute in the above terms.

37. Shri Bhalerao, learned Advocate prays that this judgment may be stayed for a period of four weeks. Learned Advocates for the petitioners have opposed the request.

38. Considering the fact that the respondent / management has litigated for a long time with the respondents, the fact that they had orally terminated all these employees and in the light of the fact that these employees are employees of in educational institutions, I am not inclined to stay this judgment.

39. Nevertheless, to the extent of the payment of backwages, the respondent / management is given time of twelve weeks to pay the backwages to these petitioners.