

(2013) 08 BOM CK 0269

In the Bombay High Court

Case No : Writ Petition No. 2590 of 2013

Gopal Siddheshwar Akhade and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 28-08-2013

Acts Referred:

Citation : (2014) 4 ALLMR 6 : (2014) 2 BomCR 807 : (2014) 4 MhLj 620

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

S.S. Shinde, J.—Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties, heard finally at the stage of admission. This writ petition takes exception to the decision of respondent No. 2 Divisional Deputy Commissioner, Social Welfare Department, Latur Division, Latur, dated 3.11.2012.

2. It is the case of the petitioners that, petitioner No. 1 is Clerk and employee of petitioner No. 2 Society and petitioner No. 3 Ashram School, receiving 100 per cent grants. It is further case of the petitioners that, as on today, near about 506 students are prosecuting their studies, which include 120 residential students, 368 non-residential students at petitioner No. 3 School. There are, as on today, 20 permanent employees (approved) working, which include (13 teaching and 7 non-teaching) 1-Head Master, 2-Trained Graduate Teachers, 10-Assistant Teachers, 1-Clerk, 1-Peon, 1-Superintendent, 2-Cook, 1-Assistant and 1-Kamathi in the said school.

3. It is further case of the petitioners that, after following due procedure the appointments are made. The Secretary of petitioner No. 2 institution, on 16.7.2007 submitted letter requesting the respondent/authorities to grant additional posts and further sought permission to fill up the posts considering the strength of the students. However, there was no response by the respondent/authorities. On 30.7.2007, an advertisement inviting applications for various

posts was published in the news paper Daily Lokmat.

4. It is further case of the petitioners that, appointment of petitioner No. 1 is after following the due procedure, as much as advertisement was issued, the petitioner No. 1 was interviewed, he came to be selected and appointed as Clerk, and accordingly, the petitioner No. 1 has joined the services of petitioner Nos. 2 and 3 on 6.8.2007.

5. It is further case of the petitioners that, there was letter by the Divisional Social Welfare Officer, Latur directing respondent No. 3 Assistant Commissioner, Social Welfare Department, Nanded to grant approval in accordance with existing norms and in the light of the strength of the students. The said letter was addressed by the said Divisional Social Welfare Officer, Nanded on 23.8.2007.

6. It is further case of the petitioners that the respondent/authorities granted approval vide communications dated 26.3.2008, 26.2.2009 and 5.7.2010. The copies of the said letters of approval are placed on record along with the writ petition. It is further case of the petitioners that though there is no requirement in law for granting approval, respondent No. 3 Assistant Commissioner, Social Welfare Department, Nanded insisted for no objection certificate from the Divisional Social Welfare Officer, Latur. It is further case of the petitioners that, though the petitioner No. 1 was in continuous service, there was technical break in granting approval and on 29.6.2011 the concerned authority has granted continuity in service by condoning technical gap in approving the services.

7. It is further case of the petitioners that, the appointment of petitioner No. 1 is in the light of provisions of section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (herein after referred to as the said Act") and since the petitioner No. 1 has completed 2 years probationary period satisfactorily, he is permanent employee of petitioner/institution and he is serving since 4.8.2007 till his services are approved by the respondent/authorities.

8. It is further case of the petitioners that, on 13.6.2012, the respondent No. 3 herein forwarded the proposal to the higher authorities for grant of no objection certificate in respect of four employees to respondent No. 2 i.e. the Divisional Social Welfare Officer, Latur.

9. It is further case of the petitioners that, (Writ Petition No. 824 of 2012) dt. 5-7-2012, was filed praying therein to direct the Divisional Social Welfare Officer, Latur to decide the pending proposal in respect of approval of services of petitioner No. 1. In the said writ petition, the Divisional Social Welfare Officer directed the concerned authority to hear and decide the said proposal, and accordingly, the said proposal is decided. The authority has passed the impugned order declining to grant further approval to the services of the petitioner No. 1. Hence, this writ petition is filed by the petitioners.

10. Learned Counsel appearing for the petitioners invited my attention to various

communications addressed to the respondent/authorities and submits that petitioner No. 1 is appointed after following the due procedure. He further invited my attention to the provisions of section 5 of the said Act and submits that in pursuant to the advertisement issued by petitioner Nos. 2 and 3, the petitioner No. 1 applied for the post and after interview he is selected.

11. The Counsel appearing for the petitioners invited my attention to the provisions of section 5 of the said Act and submitted that in the light of said provisions, once the probationary period of two years has been satisfactorily completed, the said employee has to be treated as permanent employee. It is submitted that, since the appointment order issued to petitioner No. 1 itself would make it clear that initially appointment was on probation and since petitioner No. 1 has completed probationary period of two years satisfactorily, in the light of provisions of section 5 of the said Act, he is permanent employee of petitioner Nos. 2 and 3 institution, and therefore, approval to his services should automatically follow.

12. It is submitted that in reply to letter written by the management in the year 2007, there was no reply by respondent/authorities. It is further submitted that there is no requirement of prior permission from the respondent/authorities before the appointments are made. u/s 5 of the said Act, it is only the information which is required to be given to the Education Officer/Deputy Director of Education so as to ascertain whether there are any employees on the list of surplus employees maintained by the said Officers. However, in the facts of the present case, there was no reply by the respondent/authorities. On the contrary, the respondents have accorded approval to the services of petitioner No. 1 at least on three occasions, and thereafter the respondent/authorities were also pleased to condone the period for which there was no approval granted to the services of petitioner No. 1.

13. Sum and substance of the arguments advanced by the learned Counsel appearing for the petitioners is that, in the light of provisions of section 5 of the said Act, the appointment of petitioner No. 1 is after following due procedure, as much as advertisement was published in news paper Daily Lokmat thereby inviting applications for various posts, the petitioner No. 1 had applied for the post of Clerk, the petitioner No. 1 was interviewed, selected and appointed as Clerk, and accordingly, the appointment of the petitioner No. 1 was on probation of two years. The said probation period has been satisfactorily completed and even the Officer at Nanded had recommended to the higher authorities to grant approval to the services of petitioner No. 1. There is no reason to reject prayer of the petitioner No. 1 for further approval.

14. On the other hand, learned Assistant Government Pleader appearing for the respondents invited my attention to the affidavit in reply filed on behalf of respondent Nos. 2 and 3 by one Ananda Baliram Kumbhargave, working as Social Welfare Officer, Class-II, in the office of Assistant Commissioner, Social Welfare, Nanded. Relying upon the averments in the said affidavit in reply,

learned Assistant Government Pleader submits that the appointments of petitioner No. 1 and other few employees by petitioner Nos. 2 and 3 are without seeking prior permission and approval from the respondent/authorities, and therefore, such appointments cannot be approved. It is submitted that the petitioner/management is not ready to absorb the surplus employees, and therefore, the respondents have declined to grant approval to the services of petitioner No. 1.

15. I have heard learned Counsel appearing for petitioner No. 1 and the learned Assistant Government Pleader at length. With their able assistance, I have perused the entire material placed on record, including the appointment letter of petitioner No. 1, as also letters/communications between petitioner Nos. 2 and 3 and the respondent/authorities and also the approvals granted to the services of petitioner No. 1 time to time by the respondent/authorities. Indisputably, petitioner Nos. 2 and 3 have advertised the posts in daily Lokmat. In pursuant to the said advertisement, the petitioner No. 1 and other persons applied for the available posts and after following the procedure as contemplated under the relevant Rules, appointments have been made by petitioner Nos. 2 and 3. At this juncture, it would be apt to reproduce section 5 of the Maharashtra Employees of Private Schools (Conditions of Service). Regulation Act, 1977 which read thus:-

5. Certain obligations of Management of private schools:- (1) The Management shall, as soon as possible, fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy:

[Provided that, unless such vacancy is to be filled in by promotion, the Management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, [the Education Officer, Zilla Parishad or, as the case may be, the Director or the Officer designated by the Director in respect of schools imparting technical, vocational, art or special education,] whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools and in the event of such person being available, the Management shall appoint that person in such vacancy.]

(2) Every person appointed to fill a permanent vacancy [except shikshan sevak] shall be on probation for a period of two years. Subject to the provisions of sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed.

[Provided that, every person appointed as shikshan sevak shall be on probation for a period of three years.]

[(2A) Subject to the provisions of sub-sections (3) and (4), shikshan sevak shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.]

(3) If in the opinion of the Management, the work or behavior of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice [or salary [or honorarium] of one month in lieu of notice].

(4) If the services of any probationer are terminated under sub-section (3) and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purposes of sub-section (2).

[(4A) Nothing in sub-section (2), (3) or (4) shall apply to a person appointed to fill a permanent vacancy by promotion or by absorption as provided under the proviso to sub-section (1).]

(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the period of appointment of such person.

16. Upon careful perusal of Sub-section (1) of section 5 of the said Act, there is nothing in the said section which supports the stand taken by respondent/authorities that the management has to seek prior permission for the appointments of the staff. It is only in cases of promotion, the management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, the Education Officer, Zilla Parishad or, as the case may be, the Director or the Officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools and in the event of such person being available, the Management shall appoint that person in such vacancy.

17. The contention of the learned Assistant Government Pleader that, no prior permission was obtained by petitioner Nos. 2 and 3 for the appointments to the posts cannot be accepted. If the respondent/authorities were of the opinion that such permission is not to be given to petitioner Nos. 2 and 3, then they should have promptly responded to the letter written by the President of the petitioner/institution to the Special Social Welfare Officer, Nanded. It is not the case that petitioner Nos. 2 and 3, without informing the respondent/authorities, have appointed petitioner No. 1 and other employees in pursuant to the advertisement given in Daily Lokmat. The contents of the letter, dated 16.7.2007 written by the President of the petitioner/institution make it abundantly clear that the Special Social Welfare Officer, Nanded was clearly informed the strength of students, vacancies which were available for appointment and even permission was sought for such appointments. If the respondent/authorities were convinced that no permission is to be granted or no approval is to be accorded to petitioner Nos. 2

and 3, in that case, the respondents with prompt attitude should have communicated to the petitioners. However, the material placed on record by the petitioners, in unequivocal terms, indicates that, not only that the approvals are granted to the appointments by petitioner Nos. 2 and 3 in pursuant to the advertisement, but the Special Social Welfare Officer, Nanded had written to the higher authorities to accord approval to the posts which are already filled in by the petitioner/management in pursuant to the advertisement issued in the year 2007.

18. It is evident from Exh. "G" (Page 42 of the compilation of writ petition) that, the Assistant Commissioner, Social Welfare Office, Nanded did address the letter to the Divisional Deputy Commissioner, Social Welfare Department, Latur that the office of the Assistant Commissioner, Social Welfare Office, Nanded has scrutinized the cases of S/Shri Naik V.B., Eklare Rahul Ramrao, Akhade Gopal Siddheshwar and Gotmukhale Hanmant Datta, who are appointed on the posts of Assistant Teacher, Clerk and Peon, and accordingly, no objection was given for according approval to their services. Therefore, the contention of the respondents that such appointments are without prior permission or de hors procedure or rules cannot be countenanced and deserves to be rejected in the light of letter written by the Assistant Commissioner, Social Welfare Office, Nanded to the Divisional Deputy Commissioner, Social Welfare Department, Latur.

19. The ground given in the affidavit-in-reply by the respondents to reject the prayer of the petitioners that, in Writ Petition No. 824 of 2012 directions were given to the Officer, and accordingly, the Regional Deputy Commissioner, Social Welfare Division, Latur has taken the action, cannot be accepted, rather it deserves to be rejected in the light of order passed by the Division Bench of this Court in Writ Petition No. 824 of 2012.

20. Learned Counsel appearing for the petitioners is right in contending that, the said writ petition was filed by petitioner No. 3 School and while disposing of the said writ petition, direction was given to the respondent/authorities to consider the proposal submitted by the petitioner No. 3 and take the decision. Therefore, it appears that respondent/authorities have not properly understood the outcome of Writ Petition No. 824 of 2012.

21. Upon perusal of sub-section (2) of section 5 of the said Act, the Counsel appearing for the petitioners is right in inviting the attention of this court and submitting that every person appointed to fill a permanent vacancy [except shikshan sevak] shall be on probation for a period of two years. Subject to the provisions of sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed.

22. The provisions of sub-sections (3) and (4) of section 5 of the said Act are not applicable in the facts of the present case, in as much as the petitioner No. 1 has satisfactorily completed his probationary period of two years from the date of his appointment.

23. Upon careful perusal of appointment letter, which is placed on record by the petitioners, it is abundantly clear that the petitioner No. 1 was appointed on probation and once he was appointed on probation, necessarily it follows that the probation is of two years, as contemplated u/s 5 of the said Act.

24. In the light of the discussion herein above, this Court is of the opinion that the impugned order deserves to be set aside with the observation that, if in future any vacancy arises in petitioner Nos. 2 and 3 institution, petitioner Nos. 2 and 3 will abide by the relevant Rules and accede to the directions of the respondents to accommodate the surplus employees, if any. In the light of above, following order is passed.

(i) The impugned order, dated 3.11.2012, passed by the respondent No. 2 Divisional Deputy Commissioner, Social Welfare Department, Latur Division, Latur is quashed and set aside.

(ii) Rule is made absolute in terms of prayer Clause "B".

(iii) The respondents to treat the appointment of the petitioner No. 1 in accordance with the relevant Rules and grant the approval to the services of the petitioner No. 1.

(iv) Writ petition is disposed of.