

(2004) 09 BOM CK 0049

In the Bombay High Court

Case No : Writ Petition No. 1681 of 2002

Head Master, Amar High School and Another

APPELLANT

Vs

Lata and Another

RESPONDENT

Date of Decision : 02-09-2004

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 5(2), 5(3), 9(1)

Citation : (2005) 2 ALLMR 96 : (2005) 3 ESC 1827 : (2005) 1 MhLj 1150

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : R.J. Godbole, for the Appellant; Asha Rasal and K.B. Choudhary, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

B.H. Marlapalle, J.—This petition filed under Article 227 of the Constitution has assailed the judgment and order dated 9-4-2002 passed in Appeal No. 249 of 1997 by the learned Presiding Officer, School Tribunal at Aurangabad whereby the respondent No. 1 Assistant Teacher has been directed to be reinstated in service with full backwages and other consequential benefits by quashing and setting-aside the order of termination dated 3-12-1997.

2. The petitioner No. 1 is the Head Master of Amar High School, Baijipura, Aurangabad and the said school is being run by Madan Education Society (petitioner No. 2). The said school has classes from 5th to 10th standards and is an aided private school. One Assistant Teacher by name Shri Rarhdas Limba Pawar had submitted his resignation and subsequently submitted an objection petition dated 7-11-1995 to the Education Officer, Zilla Parishad, Aurangabad, stating that he was forced to resign. He belonged to the open category and his post fell vacant. The management filled in the said post by appointing the respondent No. 1 by order dated 8-1-1996. It was on probation for a period of two years i.e. from 9-1-1996 to 8-1-1998 in the pay-scale of Rs.

1400-4-1600-50-300 EB-2600 plus other allowances as per the rules. The respondent No. 1 possessed the qualifications of M.A. B.Ed. at the time of her appointment. The Education Officer (Secondary), Zilla Parishad, Aurangabad (respondent No. 2), in response to the proposal submitted by the management, granted the approval vide his order dated 19-11-1996 to the appointment of the respondent No. 1 for a period of two years (probationary period) commencing from 4-1-1996. At that time i.e. in the academic year 1996-97 there were in all 27 teachers in the high school with the strength of 943 students. The respondent No. 1 was the juniormost teacher in the school and belongs to the open category. In the next academic year i.e. 1997-98 the strength of the students was dropped from 943 to 823 and therefore, the respondent No. 2 vide his letter dated 2-9-1997 informed the petitioner No. 2 that one division of 9th standard would be reduced for the said academic year and consequently, two teachers would be declared surplus and out of two teachers - one would be from the secondary Section and another would be from the middle school section. The pay-scale of the secondary school teachers was Rs. 1400-2600, whereas, the Assistant Teachers in the middle school Section were appointed in the pay-scale of Rs. 1200-2040 unless they were Graduate trained Teachers and appointed in 25% quota in the middle school Section (5th to 7th standards). The respondent No. 2, therefore, declared the respondent No. 1 Assistant Teacher as surplus by its communication dated 2-9-1997. Consequently, on 3-12-1997 the management issued one month's advance notice to the respondent No. 1 on 3-12-1997 informing her that on account of reduction in the teacher's strength for the academic year 1997-98, her service would not be required after 3-1-1998. In the meanwhile on 27-12-1997 the respondent No. 1 was issued a notice informing her that her appointment would be terminated forthwith on account of the appeal filed by Shri Vijay Kailash Kathar before the School Tribunal alleging his supersession in the secondary school by the appointment of the said respondent No. 1 Teacher. However, this notice was withdrawn by the management vide communication dated 26-11-1997 and in the meanwhile the respondent No. 1 was informed that she was not continued in service and she would be entitled for salary for the period she did not work.

3. Being aggrieved by the advance termination notice dated 3-12-1997 the respondent No. 1 approached the School Tribunal at Aurangabad and challenged the legality of the said order in Appeal No. 249 of 1997. She had contended that the termination was illegal, against the principles of natural justice and in breach of the guarantee under-section 5(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulations Act, 1977. It was her contention that she had attained the status of a confirmed teacher and therefore, the notice of termination was contrary to the provisions of Section 5 of the said Act.

4. The management had filed the reply before the School Tribunal and opposed the appeal. It had also raised a preliminary objection regarding the maintainability of the appeal on the ground that the issuance of the notice dated 3-12-1997 could not be attributed to the management and in fact it was on

account of the directions issued by the respondent No. 2 that the said notice was issued on the respondent No. 1 having been found surplus and being the juniormost teacher. The notice, therefore, did not amount to dismissal or removal or otherwise termination of service by an order passed by the management so as to attract the provisions of Section 9(1)(a) of the Act for filing an appeal before the School Tribunal.

5. After hearing both the parties and considering the documents brought on record the School Tribunal allowed the appeal by the impugned judgment and order and more particularly relied on the decision of the Division Bench of this Court in the case of *Prabhakar Shrikrishna Kokade v. Adivasi Magaswarg Shikshan Mandal, Sindewahi and Anr.* 1993 (1) Mh.L.J. 375 - 20 ELR 1.

6. It is contended by the petitioner management that the respondent No. 1 was appointed on probation which was to expire on 6-1-1998 and on account of reduction of one division of 9th standard the respondent No. 1 was found to be surplus being the juniormost and therefore, consequent to the directions issued by the respondent No. 2 she was issued the advance notice dated 3-12-1997 informing her that she would not be retained in service from 3-1-1998 onwards. As on 3-1-1998 she would complete the period of probation and she had not attained the status of deemed confirmed employee. At the end of the probationary period her service would come to an end unless an order of confirmation was issued so as to indicate that she would be a permanent teacher from the initial date of joining the post and therefore, the embargo of Section 5(2) of the Act was not applicable to the petitioner. In support of these contentions, the management has relied on a decision of this Court (Single Bench) in the case of *Bhandup Education Society v. State of Maharashtra and Ors.* 1997 (I) CLR 638. An employee who is declared surplus and therefore, sought to be removed before completion of the probationary period cannot be allowed to have recourse to the remedy of appeal provided u/s 9 of the Act because such a removal is not at the instance of the management and therefore, it was necessary for the school Tribunal to hold that the appeal filed by the respondent No. 1 was not maintainable, urged the learned Advocate for the petitioners.

7. The respondent No. 2 has filed an affidavit in reply and supported the petition. It is contended that in the academic year 1997-98 on account of reduction of students strength by 120, two teachers were found surplus - one each from the secondary and middle school Section and the respondent No. 1 being the juniormost Assistant Teacher in the secondary school section, the Education Department of the Zilla Parishad called upon the management to discontinue her employment by giving one month's notice. This did not amount to an action of retrenchment within the meaning of Rule 26 of the Rules of 1981. The termination of service of a permanent teacher/employee, on reduction of establishment owing to the reduction in the number of classes or divisions/fall in the number of pupils resulting in reduction of establishment, change in the

curriculum, affecting certain categories of employees, closure of courses of studies or any other bona fide reason of similar nature having been found surplus amounts to retrenchment. The teachers' strength was reduced from 27 to 25 and in the subsequent academic year 1998-99 onwards the strength of the teachers has been stable at 23 till the academic year 2003-2004. The respondent No. 2 further states that as at present there is no vacancy for the absorption of the respondent No. 1 and even at the time when she had filed an appeal before the School Tribunal there was no such vacancy.

8. The School Tribunal appears to have allowed the appeal by the impugned judgment and order mainly for the following reasons:

(a) The Education Officer had granted an approval for the probationary period of two years and the Secretary terminated her service by notice dated 3-12-1997 before completion of two years. Nothing is mentioned in this notice that her services are terminated due to unsatisfactory behaviour or performance the appellant. Thus, this order is in contravention of Section 5(3) of the Act.

(b) The impugned notice has been issued saying that it is an advance notice of one month terminating her services since 3-1-1998. Thus, the management cannot resort to such procedure when the procedure of Section 5(2) of the Act is attracted in the case of an employee who is on probation.

(c) The copy of the order dated 2-9-1997 sanctioning divisions showed that two divisions were reduced in 1997-98. However, that would not make any consequence on the appointment of the appellant. The services of the probationary shall only be terminated by resorting to the procedure of Section 5(2) of the Act. Therefore, the notice issued under Rule 28(1) of the Rules of 1982 is illegal and therefore, set-aside. Consequently, the tribunal held that the appellant is entitled for reinstatement in service.

9. The above reasoning is manifestly erroneous and contrary to the scheme of the Act as well as the Rules framed thereunder. It is evident that the Tribunal failed to appreciate the ambit and scope of Sub-sections (2) and (3) of Section 5 of the Act:

"(2) Every person appointed to fill in a permanent vacancy shall be on probation for a period of two years. Subject to the provisions of subsections (3) and (4), he shall on completion of this probation period, of two years shall be deemed to have been confirmed.

(3) If in the opinion of the management the work or behaviour 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 of one month in lieu of notice.

The teacher appointed on probation to fill in the permanent vacancy would thus attain the status of being a deemed confirmed teacher only on completion of the probationary period of two years and as on 3-12-1997 when the notice of one

month was issued to the respondent No. 1 she had not attained the status of a deemed confirmed teacher by any stretch of imagination. It is no doubt true that Sub-section (3) of Section 5 provides for termination of service of a teacher on probation on account of work or behaviour of the probationary v being unsatisfactory. This right could be exercised any time during the said period of probation but after giving one month's notice or salary of one month in lieu of notice. It is nobody's case that the petitioner's work or behaviour was found to be unsatisfactory by the management. The management received the communication from the respondent No. 2 stating that on account of reduction of students strength one division in the secondary Section (9th standard) was found to be reduced and consequently, one teacher would be surplus. As the respondent No. 1 was the juniormost teacher in the secondary Section and on probation the Education Officer rightly advised the management to discontinue the services of the respondent No. 1 from 4-1-1998. The probationary period of the respondent No. 1 was to complete on 8-1-1998. The notice dated 3-12-1997 was given in advance indicating that her employment on probation would stand dispensed with from 3-1-1998 onwards. The fact remains that no teacher has been appointed in the place of respondent No. 1 in all these years. On the other hand, the strength of the teachers has been further reduced to 23. In her case, neither the provisions of Sub-section (2) nor the provisions of Sub-section (3) of Section 5 operate. Rule 21 of the Rules deals with the procedure for removal or termination of service. Sub-rule (1) states that the service of a temporary employee other than on probation may be terminated by the management at any time without assigning any reason after giving one month's calendar notice or by paying one month's salary (pay and allowances, if any) in lieu of notice. Sub-rules (2) and (3) have been deleted. Sub-rule (5) is regarding the punishment for misconduct or on account of incompetence. Rule 29 provides for the procedure to impose penalties against the delinquent teachers and one of the penalties is termination of service. In Rule 31 of the Rules the penalties have been classified, whereas, Rule 32 provides that the procedure for imposing minor penalties and Rule 33 provides for imposing major penalties. The scheme of Rules 21 to 33 of the Rules is obviously not applicable in the instant case as the respondent No. 1 was sought to be discontinued while she was on probation and for the same reasons that one teacher in the secondary school was found surplus and she was the juniormost teacher.

10. It would not be appropriate to say that the appeal filed by the petitioner was required to be rejected on the preliminary ground as raised by the management. When the Education Officer declares some teachers to be surplus on account of reduction of establishment owing to the reduction in the number of classes or divisions, fall in the number of children resulting in reduction of establishment, change in the curriculum affecting number of certain categories or employees, closure of courses of studies or for any other bona fide similar reason the teacher concerned can urge before the Tribunal for an inquiry into the action of such surplus declaration. The Tribunal would be justified in examining the genuineness

of such declaration made by the Tribunal. This view squarely finds support in the decision of this Court (DB) in the case of Meera Babulalji Modi Vs. Education Officer (Secondary), Zilla Parishad Nagpur and others, .

11. In the case of Prabhakar Shrikrishna Kokade v. Adivasi Magaswarg Shikshan Mandal, Sindewahi and Anr., 1993 (1) Mh.L.J. 375 : 1 ELR 20, a Division Bench of this Court noted that Rule 28 of the Rules was not applicable to the probationers. It further noted that Section 5(3) of the Act permits termination of service only for one reason namely; that his work or behaviour was not satisfactory. There can be no dispute with this proposition. But in the instant case the probationary period was to come to an end on 8-1-1998 and the notice period set-out in the communication dated 3-12-1997 was to expire on 3-1-1998. Thus, leaving the remainder period of 5 days of the probationary service. The reason for the said notice was non-availability of a post of Assistant Teacher in the secondary Section on account of reduction of one division from 9th standard. I have examined in great details the correctness of the assessment made by the Education Officer regarding the strength of the students and the divisions in each class. I am satisfied that there was no error committed in that regard. For the year 1998-99 the number of posts of Assistant Teachers have been reduced from 25 to 23 and right upto the academic year 2003-2004 the strength of the teachers has remained at 23. The strength of the Graduate trained teachers has remained at 10 during all these years. If there is no vacancy available for confirmation of the probationer on account of reduction in the strength of students, the question of confirming the probationary service against a non-existing post cannot be conceived. It would be permissible in given cases that such teachers would be required to be discontinued even though their service during the probationary period was found to be satisfactory so long as this discontinuation is at the end or towards the end of the probationary period. Section 5(3) of the Act has perhaps not envisaged such a contingency but that does not mean that there is a legal bar for discontinuation on completion of the probationary period on account of non-availability of the posts. If it is accepted that such a discontinuation is not permissible the teachers on completion of the probationary period will have to be made permanent against non-existing posts when it is well established that availability of a permanent post is sine qua non for regularisation/confirmation of the service. The management is admittedly running an aided school and the teacher's salary goes from the exchequer which cannot be allowed to be burdened for unjustifiable grounds. The factum of reduction of divisions as well as the students during the academic year 1997-98 has not been disputed and even for the subsequent academic years there has been no increase in the divisions of any standard in the secondary school. It appears that the Tribunal has relied on the decision of this Court in Prabhakar Kokade 's case (supra) and held that the communication dated 3-12-1997 giving one month's notice was illegal. It was necessary for the School Tribunal to examine the issue regarding the nonavailability of regular post for the confirmation of respondent No. 1 Assistant Teacher's service on completion of

the probationary period more so when the management had made it clear that it had nothing against the respondent No. 1. This mechanical approach of the School Tribunal is not in conformity with the scheme of the MEPS Act as well as the Rules thereunder. It is required to be held that on account of non-availability of a regular post as per the staffing pattern approved by the Education Officer the management is not required to confirm the probationer's service even though the probationary period was satisfactory. The order dated 3-12-1997 was neither punitive nor stigmatic. As per the approval order passed by the Education Officer the probationary period of the respondent teacher was to expire on 3-1-1998 and therefore, her service would discontinue on completion of the probationary period for the sole reason that she was found to be a surplus teacher and the decision of the Education Officer determining her to be a surplus teacher does not suffer from any arbitrary exercise of powers. The order passed by the School Tribunal is unsustainable. It suffers from manifest errors thereby calling for interference in the impugned order.

12. In the result, this petition succeeds and the same is hereby allowed by quashing and setting aside the impugned judgment and order passed by the School Tribunal in Appeal No. 249 of 1997.-Rule is made absolute. Costs in cause.