

(2015) 09 SC CK 0195

In the Supreme Court Of India

Case No : Civil Appeal No. 4606 of 2006

Jeles Education Society and others

APPELLANT

Vs

R.T. Bhitale

RESPONDENT

Date of Decision : 30-09-2015

Acts Referred:

Constitution of India, 1950 — Article 171
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 5, 5(1), 5(2), 5(3), 5(4)
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule
16(13), 16(3), 16(4), 16(5), 42

Citation : (2016) 1 ABR 541 : (2016) 1 ESC 61 : (2016) 148 FLR 207 : (2015)
12 SCALE 253 : (2016) 1 SCT 150

Hon'ble Judges : J.S. Khehar and R. Banumathi, JJ.

Bench : Division Bench

Advocate : Vinay Navare, Satyajeet Kr. and Naresh Kumar, Advocates, for the
Appellant; Braj Kishore Mishra, Vijay Kumar and Aparna Jha, Advocates, for the
Respondent

Final Decision : Allowed

Judgement

J.S. Khehar, J—Appellant No. 1—Jeles Education Society (hereinafter referred to as "the Appellant-society") runs and operates the Mahatma Gandhi Vidyamandir School. The school is upto Class-X. One Raut was engaged by the school, as a trained Graduate Teacher, to teach the subjects of English and Sanskrit. For reasons which are not relevant for the present controversy, Raut tendered his resignation, in the middle of the academic session 1989-90. The same was accepted on 26.07.1989.

2. The Appellant-society issued an advertisement on 04.12.1987, seeking to fill up the vacancy created as a result of the resignation of Raut. An English translation of the aforesaid advertisement, is being reproduced hereunder:

WANTED

Wanted trained Graduate Teacher to teach English & Sanskrit. Priority for Backward Class. Contact immediately with certificates. Mahatma Gandhi Vidyamandir, Bandra (E), Mumbai-51.

3. It is apparent that the Appellant-society was looking out for a Trained Graduate Teacher to teach English and Sanskrit. It also emerges from the advertisement, that the choice for appointment was to be made from out of backward class candidates, if possible. The Respondent-R.T. Bhitale, who belonged to the category of "Other Backward Class" which is also amongst the backward classes, recognized for the present process of appointment, applied for the post of Trained Graduate Teacher, in furtherance of the advertisement extracted above. He was selected, and was issued the following appointment order on 07.12.1987:

With reference to your application dated 4.4.1987, I have the pleasure to inform you that you are hereby appointed as an Asstt. Teacher on Rs. 365/- per month in the scale of Rs. 365-15-500-20-660-EB-20-760 with effect from 7.12.1987 or the date you report for duty. You will be entitled to allowance such as compensatory local allowances, House Rent Allowance and dearness allowance as specifically sanctioned by Government from time to time.

2. Your appointment is purely temporary for a period of (not legible) months from 7.12.1987 to 30.4.1988 (not legible). After expiry of the above period your services shall stand terminated without any notice or (not legible).

3. The terms of your employment and conditions of service shall be as laid down in the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 and the rules made thereunder.

4. You shall have to undergo a medical examination by Dr. (not legible) within three months from the date of joining the post. Your appointment shall be conditional pending the receipt of physical fitness certificate from the doctor whose name is mentioned above.

(Emphasis is ours)

4. It is therefore apparent, that the Respondent's appointment, was for the remaining period of the academic session 1987-88, and would culminate on 30.04.1988. The School Management Committee took a decision on 29.03.1988, not to continue with the Respondent any further, and accordingly, in consonance with the letter of appointment dated 07.12.1987, his appointment came to an end on 30.04.1988. He was intimated about his termination on the same day i.e., on 30.03.1988.

5. Dissatisfied with the order, by which his services were dispensed with, the Respondent preferred an appeal assailing the order dated 30.04.1988 Under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as "the 1977 Act"). The position adopted by the Respondent was, that his appointment vide order dated

07.12.1987 was liable to be considered as permanent, since the same was against a permanent vacancy, created by the resignation of Raut. It was also his contention, that he belonged to the reserved category, for which the post had been advertised, and as such, there was no justification whatsoever for not treating his appointment as permanent.

6. The above position adopted by the Respondent, was sought to be contested by the Appellant-society. The case set up by the Appellant-society was, that the Respondent did not satisfy the conditions of eligibility, for occupying the vacancy created by Raut. In this behalf even while acknowledging the position adopted by the Respondent, namely, that the post in question was to be filled up by way of reservation out of backward classes candidates, it was pointed out, that those who had responded to the advertisement dated 04.12.1987, should have had qualifications which would enable them to teach the subjects of English and Sanskrit, namely, the subjects which Raut was handling, while in the employment of the Mahatma Gandhi Vidyamandir School. It was also the case of the Appellant-society, that whilst the Respondent possessed the qualifications to teach English, he did not possess the qualifications to teach Sanskrit, and without possessing the said qualifications, he would be useless for imparting training in the subject of Sanskrit. To substantiate, that the Respondent did not possess any qualification in Sanskrit, the Appellant-society has placed on the record of this case, a xerox copy of the B.A. (Special) degree qualification, as also, the B. Ed degree qualification awarded to the Respondent, wherefrom it is apparent, that he did not undertake any course in the subject of Sanskrit. The fact that the Respondent did not possess any qualification in the subject of Sanskrit, is not a matter of dispute, between the rival parties.

7. The School Tribunal accepted the appeal preferred by the Respondent, vide an order dated 26.06.1992. The School Tribunal arrived at the conclusion, that the appointment of the Respondent was liable to be treated as permanent, and as such, since the services of the Respondent had been terminated in violation of the statutory rules, his termination from employment, was held as not sustainable in law.

8. The order dated 26.06.1992 passed by the School Tribunal was assailed by the Appellant-society before the High Court of Judicature at Bombay (hereinafter referred to as "the High Court") by filing Writ Petition No. 232 of 1993. During the hearing of the aforesaid writ petition, the High Court passed an interim order dated 05.03.1993. The interim order passed by the High Court is available on the record of this case. Its perusal reveals, that as an interim measure, the High Court required the Appellant-society to engage the Respondent herein, on a year to year basis, without prejudice to the rights and contentions of the rival parties. It is also not a matter of dispute, that in furtherance of the interim order dated 05.03.1993, the Respondent was continued in the employment of the Appellant-society, on a year to year basis.

9. After having been reinstated in service in terms of the order passed by the

School Tribunal dated 26.06.1992, and the interim order passed by the High Court on 05.03.1993, the Respondent desired to contest elections in January, 1995. He sought leave for the above purpose. The request of the Respondent, for leave made through his representation dated 19.01.1995, was declined by the Appellant-society on 31.1.1995. The Appellant-society advised the Respondent to tender his resignation, if he desired to contest the above election, Under Rule 42(3) of the Maharashtra Private School Employees (Condition of Service) Rules, 1981 (hereinafter referred to as "the "1981 Rules"). Despite the fact, that the Respondent was denied leave for the period in terms of his representation dated 19.01.1995, the Respondent did not attend to his duties, and any how contested the above election. He also did not tender his resignation in terms of Rule 42(3) of the 1981 Rules. It is therefore, that the Appellant-society yet again terminated the services of the Respondent, by an order dated 16.02.1995.

10. The above order of termination dated 16.02.1995 was again assailed by the Respondent, by preferring an appeal before the School Tribunal, Under Section 9 of the 1977 Act. On 09.03.1995, the School Tribunal passed an interim order in favour of the Respondent, by which the impugned order of termination dated 16.02.1995 was ordered to be stayed. It is in the above circumstances, that the Respondent once again despite his termination for the second time, was permitted to continue in service.

11. The above appeal filed by the Respondent, to assail the order dated 16.02.1995, was dismissed in default on 30.04.2001. A request made by the Respondent for restoration of the same, was declined by the School Tribunal on 10.02.2003. It is in the above circumstances, that the Respondent preferred Writ Petition No. 2975 of 2003 before the High Court. By an order dated 01.12.2003, the High Court allowed the above writ petition, and ordered the restoration of the appeal preferred by the Respondent, before the School Tribunal. By its order dated 07.05.2004, the School Tribunal dismissed the appeal filed by the Respondent, against the order of his termination dated 16.02.1995. On this occasion, the Respondent approached the High Court by filing Writ Petition No. 10576 of 2004.

12. By the impugned order dated 28.10.2005, the High Court collectively disposed of Writ Petition No. 232 of 1993 filed by the Appellant-society, and Writ Petition No. 10576 of 2004 preferred by the Respondent. The High Court affirmed the order passed by the School Tribunal dated 26.06.1992 holding, that the Appellant was inducted as a permanent employee, and his services were dispensed with in violation of the statutory rules. Insofar as Writ Petition 10576 of 2004 is concerned, the High Court arrived at the conclusion, that the School Management was not justified in requiring the Respondent to tender his resignation Under Rule 42(3) of the 1981 Rules, on account of the fact that he was a permanent employee, and not a temporary employee.

13. The instant controversy, necessarily has to be examined in the background of the statutory rules relied on. First and foremost, it is essential for us to take into

consideration Section 5 of the 1977 Act. The same is being extracted hereunder:

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 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 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.

(Emphasis is ours)

14. It was the contention of the learned Counsel for the Respondent, that Section 5 of the 1977 Act envisages two water tight compartments. The first postulated through Section 5(1) which caters to appointment against permanent vacancies, and Section 5(5) caters to the second contingency, which relates to employment against temporary vacancies. In view of the above, the submissions advanced at the hands of the learned Counsel for the Respondent seems to be justified and we endorse the same, namely, that Section 5 deals with filling up of permanent as well as temporary vacancies. It is however important to highlight, that irrespective of the nature of appointment (against a permanent or temporary vacancy), both the Sub-sections of Section 5, mandate that the appointee will have to be "... a person duly qualified..."

15. The other statutory provision, that needs to be taken into consideration is Rule 9, of the 1981 Rules. A relevant extract of the same is being extracted hereunder:

9. Appointment of staff.

(1) The teaching staff of the school shall be adequate having regard to the number of classes in the school and the curriculum including alternative courses provided and the optional subjects taught therein.

(2) Appointments of teaching staff (other than the Head and Assistant Head) and those of non-teaching staff in a school shall be made by the School Committee:

Provided that, appointments in leave vacancies of a short duration not exceeding three months, may be made by the Head, if so authorized by the School Committee.

(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.

(4) xxx

(5) xxx

(6) xxx

+ [(7) The Management shall reserve 52 per cent of the total number of posts of the teaching and non-teaching staff for the persons belonging to the Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes,

Special Backward category and other Backward Classes as follows, namely:

+ Sub--rule (7) substituted by Not. No. PRASHANYA.. 1005/(94/05)/SE-2 dated 08.07.2008.

(8) 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 recognized 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).

+ The words are inserted by Not No. PST/1083/194/SE-3-Cell, dated 20.12.1984.

(9) (a) In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in Sub-rule (7) and if no person from any of the categories is available, the post may be filled in temporarily or on a year-to-year basis by a candidate not belonging to the Backward Classes.

(Emphasis is ours)

16. It was the contention of the learned Counsel for the Respondent, that Under Rule 9, which caters to appointment of teaching staff, the Respondent was liable to be appointed on a permanent post, because his appointment was against a permanent vacancy, created by Raut. It was also his contention, that he belonged to the category of backward classes (contemplated Under Rule 9(7) of the 1981 Rules). It was submitted, that even though the vacancy in question was earmarked for scheduled castes, the Respondent was entitled to be permanently appointed against the same, because of the absence of a suitable and eligible Scheduled Caste candidate or even from the other categories of backward classes, in terms of Rule 9(8) of the 1981 Rules (extracted above). Since the Respondent was selected against a permanent vacancy, which had been duly advertised, as also, against a post reserved for backward classes, his appointment was liable to be considered to be permanent, for all intents and purposes, and specially in terms of the mandate contained in Rule 9(9)(a).

17. To counter the submissions advanced at the hands of the learned Counsel for the Respondent, learned Counsel for the Appellants, has invited our attention to Section 5(1), extracted above, in order to contend, that it was imperative for the management to fill up all permanent vacancies, and that, a permanent vacancy should not be left unfilled on account of the adverse affect which was liable to be caused to the students, enrolled in the school run by the Appellant-society. Referring to Section 5(1), it was further submitted, that the selected candidate had to be "...a person duly qualified to fill such vacancy...". In addition to the above, it was the contention of the learned Counsel for the Appellants, that in the process of selection, the Appellant-society required a Trained Graduate Teacher, possessing qualifications to teach the subjects of English and Sanskrit. However, in response to the advertisement dated 04.12.1987, the Appellant-society did not find any suitable candidate possessing the above qualifications. It is in the above view of the matter, that the Appellant-society selected the Respondent, and issued an offer of appointment on temporary basis, till the end of the academic session i.e., 30.04.1988. The question that arises for our consideration is, whether the Respondent was liable to be treated as a permanent employee, or whether it was open to the Appellant-society, to appoint him on temporary basis upto 30.04.1988?

18. Having given our thoughtful consideration to the issue in hand, we are satisfied, that the effort at the hands of the Appellant-society, in the first instance, ought to have been to fill up the permanent vacancy created by Raut, on permanent basis. This mandate clearly emerges from Section 5(1) of the 1977 Act and Rule 9(9)(a) of the 1981 Rules. However, in case a candidate from the backward class was not available, it was open to the Appellant-society to fill up the post temporarily, on a year to year basis by a candidate who may not belong to the backward classes. It was however the emphatic submission of the learned Counsel for the Respondent, that in case of absence of a candidate belonging to the backward class, the only option available to the Appellant-society was to fill up the vacancy by appointing a candidate "...not belonging to the backward class". It was submitted, that the Appellant-society had no option, but to follow the said procedure, in case it desired to fill up the vacancy created by Raut, on temporary basis.

19. In our considered view, it is apparent, that the Respondent did not fulfill the desired qualifications for occupying the permanent vacancy created by Raut, inasmuch as, he did not possess the educational qualification of Sanskrit. On account of his not possessing the qualification of Sanskrit, the Respondent was clearly not eligible for filling up the vacancy created by Raut, on a permanent basis.

20. The next question that arises for our consideration is, whether the aforesaid vacancy could be filled up on a temporary basis, by a candidate belonging to the backward class? In our view, the answer to the above has to be in the affirmative. We say so because, while filling up the vacancy if a suitable

candidate was not available from the particular backward class (for which it was earmarked, in the present case-Scheduled Caste), it was open to the Appellant-society to fill up the vacancy, out of the candidates belonging to other backward classes. And if a suitable candidate belonging to the other backward classes was also not available, then as submitted by the learned Counsel for the Respondent, the vacancy could be filled up temporarily, or on a year to year basis, by a suitable candidate from the general/open category. But, how would the post be filled up if none of the candidates who had applied, is considered suitable, on account of lack of the required qualifications. In such a situation, it must be kept in mind, that if out of the candidates who had applied for the advertised post, a backward class candidate though not fulfilling the qualifications stipulated for the post, was found to be the most meritorious, he could be appointed against the advertised vacancy on temporary basis, Under Rule 9(9)(a) of the 1981 Rules. The Respondent was found to be most meritorious candidate, out of those who had responded to the advertisement dated 04.12.1987. But since he did not possess the qualifications stipulated for the advertised vacancy, it was well within the right of the Appellant-society, to offer him a temporary appointment till the end of the academic year, Under Rule 9(9)(a). Under Rule 9(9)(a), candidates can only be appointed on temporary basis, or on a year to year basis, when none of the backward class candidates is found suitable. Accordingly, when the Respondent was appointed temporarily on 07.12.1987 (upto 30.04.1988) his appointment was in conformity and in consonance with Rule 9(9)(a) of the 1981 Rules.

21. In view of the above, we are satisfied that the order of termination of the Respondent's services on 30.04.1988, was not only in consonance with his appointment order dated 07.12.1987, but was also in conformity with the statutory rules.

22. Having recorded our above conclusion, it is not necessary for us to deal with the second issue canvassed before us. Be that as it may, we feel compelled to deal with the said issue also, on account of the fact, that detailed submissions were advanced on the said issue also. To determine the validity of the second order of termination dated 16.02.1995, Rule 42 of the 1981 Rules is relevant. The same is extracted hereunder:

42. Contesting Elections: (1) Subject to the provisions of Sub-rules (3) to (6) (both inclusive), an employee may, with previous intimation to the Management in writing, contest elections to the University Senate in accordance with the provisions laid down in the respective non-Agricultural University Acts, or as the case may be, to the Maharashtra Legislative Council as provided in Sub-clauses (b) and (c) of Clause (3) of Article 171 of the Constitution of India.

(2) Subject to the provisions of Sub-rules (3) to (6) (both inclusive), an employee may, with the previous permission of the Management in writing, contest election to public offices [other than those mentioned in Sub-rule (1)] at the Local, District, State or National level.

(3) Immediately after filing the nomination form for contesting such elections and the same being declared as valid, the employee shall proceed on leave due and admissible to him; and if no leave is to his credit, he shall proceed on extraordinary leave, and shall continue to be on leave till the declaration of the election results.

Provided that the Management may require a temporary employee contesting such election to resign his post even during the election campaign, if in the opinion of the Management, the election campaign is likely to adversely affect the duties of the employee.

(4) The employee contesting such an election shall not involve the Management, employees or students of the Institution in which he is employed, in the election campaign.

(5)(a) In the event of his being elected the permanent employee shall apply for further extension of leave due and admissible to him and if no leave is at his credit, the extra-ordinary leave for the period for which he is likely to continue to hold the office; and the same shall be granted by the Management in relaxation of the limit prescribed in Sub-rule (13) of Rule 16.

(b) In case, however, if the sessions of meetings of the public office are held at intervals he may be allowed to avail himself of leave due and admissible to him or, as the case may be, the extra-ordinary leave, for the actual periods of the sessions or meetings including the periods of journey and may be allowed to attend the school during the remaining periods.

(c) The period of extra-ordinary leave availed of for the purpose, shall be counted for purposes of annual increments.

(6)(a) In the event of a permanent employee further becoming an office-bearer such as Chairman, President, Vice-President, Secretary, Joint Secretary, etc., which demands full-time attendance or long-time absence from normal duties, he shall apply for keeping his lien on the post which he held, which shall be granted by the Management.

(b) In the case of a non-permanent employee who is on leave till the declaration of election results, in the event of his being elected he shall resign the post he held immediately on his election to the public office.

(7) Provisions of Sub-rules (3), (4) and (5) shall mutatis mutandis apply to,-

(i) the permanent employees elected to public offices being further elected on the University Senate, or as the case may be, the State Board of Secondary and Higher Secondary Education, by virtue of their office;

(ii) the permanent employee nominated by the State Government on the State Board or Division Board of Secondary and Higher Secondary Education.

Under Rule 42(3), it was open to the management, to allow an employee seeking

leave to contest an election to proceed on leave. However, in extra-ordinary circumstances where it was felt, that the employees election campaign, was likely to adversely affect his duties, he could be required to tender his resignation. In furtherance of the request made by the Respondent seeking leave, the Appellant-society through its communication dated 31.01.1995, advised him to tender his resignation, Under Rule 42(3). The said advice was tendered specifically keeping in mind, the importance of the duties and responsibilities of the Respondent, in the background of the upcoming annual examinations. The Respondent did not accede to the suggestion made to him by the Appellant-society, through its communication dated 31.01.1995. All the same, he contested the election, and abstained himself from his duties, for the duration of the period for which he had applied for leave, for his election campaign. In the above view of the matter, we are satisfied, that the order of termination dated 16.02.1995 was fully justified, specially when the Respondent despite being asked, did not abide by the requirements indicated in the proviso to Rule 42(3) of the 1981 Rules. Having abstained from duties without leave, it was open to the Appellant-society to dispense with the Respondent's services. It is clear that his services were dispensed with (by the order dated 16.02.1995), in compliance with Rule 42(3). Acceptance of the prayer of the Respondent, would have the result of interpreting the above Rule, as if it was of no consequence.

23. For the reasons recorded hereinabove, we are satisfied that both the orders of termination dated 30.03.1988 and 16.02.1995 were in consonance with law. Accordingly, the impugned order passed by the Bombay High Court on 28.10.2005 holding otherwise, is hereby set aside.

24. The instant appeal is allowed, in the above terms.

25. During the course of recording this order, it was pointed out by the learned Counsel for the Respondent, that the High Court by its order dated 05.03.1993 (in Writ Petition No. 232 of 1993) had allowed the Respondent to continue in service from year to year. Insofar as the arrears of salary payable to the Respondent is concerned, as a temporary arrangement, the High Court had directed the Appellant-society to pay the Respondent a sum of Rs. 15,000/-. It was submitted, that the aforesaid sum of Rs. 15,000/-, was paid by the Appellant-society to the Respondent, as far back as in 1993. Learned Counsel for the Respondent prays, that the above amount be not recovered from him, as the Respondent was not in a position to refund the same. Having given a thoughtful consideration to the instant issue, we are of the view, that the above amount paid to the Respondent, as far back as in 1993, should not be recovered from the Respondent. We order accordingly.