
(2001) 11 BOM CK 0039

In the Bombay High Court

Case No : Letters Patent Appeal No. 62 of 2001 in Writ Petition No. 1709 of 1997

J.K. Pansare

APPELLANT

Vs

Smt. Suman D. Patil and others

RESPONDENT

Date of Decision : 09-11-2001

Acts Referred:

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

Citation : (2001) 11 BOM CK 0039

Hon'ble Judges : R.M. Lodha, J;Nishita Mhatre, J

Bench : Division Bench

Advocate : P.N. Joshi, for the Appellant; M.V. Limaye, for the Respondent

Final Decision : Allowed

Judgement

R.M. Lodha, J.—On 1-9-1989 the teacher was promoted" as Headmaster and it appears that this Letters Patent Appeal is directed against the judgment dated 15th November, 2000 passed by the learned Single Judge whereby he set aside the order dated 22-4-1995 passed by the School Tribunal and directed the present appellant to reinstate the respondent No. 1 herein in service in the Marathi medium school with continuity of service. The learned Single Judge also remitted the matter back to the School Tribunal to decide the question of entitlement of backwages in accordance with law.

2. The present respondent No. 1 was appointed as a full time teacher in Marathi medium primary school run by the present appellant J. K. Pansare Education Trust. For the sake of convenience we shall refer the present appellant as "Management" and the first respondent herein as "Teacher". The teacher worked in Marathi medium primary school run by the management upto 30th June, 1974. On 15-6-1974 the management issued fresh letter of appointment to the teacher and she was allotted duties in English medium school run by the management with effect from 17-6-1974. It appears that in the month of June, 1988 the Marathi medium school run by the management started receiving grant

in aid stage to stage while the English medium school run by the management remained unaided. The teacher filed the writ petition against the management seeking payment of salary as per the scale prescribed under the rules and for her absorption in Marathi medium school. The said writ petition was withdrawn by the teacher with liberty to her to prosecute appropriate proceeding. On 22-4-1995 a notice was given to the teacher communicating her that her services shall stand terminated with effect from 1st May, 1975. The notice of termination was issued by the management to the teacher on the ground that the management as to close down the said English medium school from the academic year commencing from June, 1995. In lieu of three months notice, the management sent a cheque of three months salary with all allowances to the teacher. In the notice the management also recorded that though they are not responsible to make alternative arrangement for her absorption in other school, the management has entered into a written memorandum of understanding with the management of Holy Cross Education Trust Primary English School, Dombivali, Kishor Niwas, by which the said trust has shown their readiness to accept the teacher in the employment on the same pay scale which was last drawn by her and therefore, she may approach the said trust for her employment. The teacher filed an appeal u/s 9 of the Maharashtra Employees of Private Schools (Conditions of Service Regulation) Act, 1977 aggrieved by her termination of service. The School Tribunal dismissed the appeal filed by teacher. Aggrieved thereby, the teacher filed writ petition before this court which was registered as writ petition No. 1709 of 1997. The learned Single Judge after hearing the parties, as noted above, set aside the order of the School Tribunal and directed the management to reinstate the teacher in service in its Marathi medium school with continuity of service and as regards backwages, remitted the matter to the School Tribunal. Aggrieved by the judgment passed by the learned Single Judge on 15-11-2000 the management has preferred this Letters Patent Appeal.

3. It transpires from the reasoning given by the learned Single Judge that management was obliged to operate the common seniority list of all the schools run by the management and as the provisions maintained in section 27(d) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (Rules of 1981) were not adhered to termination of the service of the teacher was illegal.

4. There appears to be no dispute that though initially the teacher was appointed in the Marathi medium primary school run by the management vide order dated 19-2-1974 but in the said school the teacher worked only upto 16-6-1974 and from 17-6-1974 the teacher was appointed in the English medium school. The teacher at no point of time made any grievance about her appointment to English medium school as assistant teacher since 17-6-1974. It was in the year 1988 that the Marathi medium school run by the management started getting Government aid while the English medium school remained unaided. For the first time in the year 1994 the teacher filed the writ petition before this court seeking

direction against the management for her absorption in the Marathi medium school. The said writ petition was dismissed as withdrawn. The teacher in the backdrop of these facts cannot be claimed to be the teacher appointed in Marathi medium school run by the management. In the year 1995 the management decided to close down the English medium school run by it and accordingly on 22-4-1995 the teacher was sent notice terminating her services with effect from 1-5-1995 and in lieu of three months notice the cheque of three months salary with all allowances was sent to her. The notice dated 22-4-1995 reads thus :

"Please take notice that pursuant to the permission and/or sanction granted by the Deputy Director of Education Nashik Division, Nashik to the Management to close down the Primary English Medium School (unaided) which was run and managed by the Trust from the ensuing academic year, commencing from June. 1995 by their (letter) dated 29-3-1995 bearing outward No. Prath-2/Kha Para Shaa/Shalla bandh/451/Naa Vi-95 addressed to the Education Officer, Kalyan Corporation, Education Department, Kalyan, Dist. Thane, and a copy of which endorsed upon the management, the management has to close down the said English Medium School from the academic year commencing from June, 1995.

Now, therefore, the Management has hereby taken decision and ordered to terminate your services with effect from 1-5-1995. And in lieu of three months notice in respect thereof the Management hereby give you a cheque of Rs. Five Thousand Four Hundred Rs. only. (Rs. 5,400/- being the three months salary with all the allowances, being Crossed Cheque No. 990941 drawn on State Bank of India, Kalyan, dated 22-4-1995 in your favour, the Management on 29th April, 1995.

Please note further that without admitting the responsibility of the Management, to make any alternative arrangement to absolve (absorb) you in any other School, the Management in a good faith has entered into a written memorandum of understanding being dated 11-4-1995 with the Management of Holy cross Education Trust-primary English School, Dombivali, Kishor Niwas, Subhash Road, Navpada, Dombivali (West) by which the said Trust has shown their readiness to accept you in their employment on the same pay scale which you have last drawn.

Therefore you may approach to the said Trust and give them your letter of acceptance of said offer within Fifteen days from the date of receipt of this termination order. Failing of which it will be deemed to be presumed that you are not interested in joining the said on Holy Cross Primary School (English Medium)".

5. Rules 25A, 26 and 27 of the Rules of 1981 reads thus :

"25A. Termination of Service on account of abolition of posts.- (1) The services of permanent employee may be terminated by the Management on account of abolition of posts due to closure of the school after giving him advance intimation of three months to the effect that in the event of closure of the school, his services shall automatically stand terminated. In the case of closure of school

due to de-recognition, such advance intimation of three months shall be given by the Management to the permanent employees after receipt of a show cause notice from the Deputy Director.

Explanation - For the purposes of this sub-rule, the expression "closure of the school" shall include :

(i) Voluntary closure by the Management of the entire school if it is imparting instruction through one medium or a part of the school comprising one or more media of instruction if it is imparting instruction through more than one medium; and

(ii) Closure of the school due to de-recognition by the Department.

(2) The names of the employees in aided schools, whose services stand terminated in accordance with sub-rule (1) on account of de-recognition and who are not directly responsible for such de-recognition shall be taken on a waiting list by the Education Officer in the case of Primary and Secondary Schools or by the Deputy Director in the case of Higher Secondary Schools and Junior College of Education and same shall be recommended by him to the Managements of newly opened aided Schools or of the existing aided schools which are allowed to open additional Division or classes for consideration.

26. Retrenchment on account of abolition of posts.- (1) a permanent employee may be retrenched from service by the Management after giving him 3 months notice, on any of the following grounds, namely :

(i) reduction of establishment owing to reduction in the number of classes or divisions;

(ii) fall in the number of pupils resulting in reduction of establishment;

(iii) Change in the curriculum affecting the number of certain category of employees;

(iv) closure of course of studies;

(v) any other bonafide reason of similar nature.

(2) the retrenchment from service under sub-rule (1) shall be subject to the following conditions, namely -

(i) The principle of seniority shall ordinarily be observed;

(ii) Prior approval of the Education Officer in the case of Primary and Secondary Schools or, of the Deputy Director in the case of Higher Secondary Schools and Junior Colleges of Education shall be obtained by the Management in each case of retrenchment including such cases in which the principle of seniority is proposed to be departed from and a senior member of the staff is proposed to be retrenched when a junior member should have been retrenched, stating the special reasons therefore,

(iii) The employees from aided schools, whose services are proposed to be retrenched shall be absorbed by the Education Officer in the case of Primary and Secondary Schools or by the Deputy Director in the case of Higher Secondary Schools and Junior Colleges of Education. The order of absorption of such employees shall be issued by registered post acknowledgement due letter and till they are absorbed the Management shall not be permitted to effect retrenchment on account of any reasons mentioned in sub-rule (1).

(3) In case any employee refuses to accept the alternative employment offered to him under clause (iii) of sub-rule (2), he shall lose his claim for absorption and the Management of the school shall be allowed to retrench such employee from the services after completion of 3 months' notice period.

(4) If the posts retrenched are revived or additional posts for the same Subject are created, the Management shall, by a registered post acknowledgment due letter addressed to the employee who is retrenched and absorbed in other school, give him the first opportunity of re-joining service in the school. For this purpose, the employees shall communicate to the Management, his address and availability for the job every year before April by a letter sent by registered post acknowledgement due.

(5) The retrenched person who may have been absorbed in other school, shall have an option either to get repatriated to his original school or to continue in school in which he has been absorbed.

(6) If the employee opts to continue in the school in which he has been absorbed, or if no written reply is received from the employee within a fortnight from the date of receipt of the letter addressed to him by the Management regarding the offer for re-appointment or repatriation to the school or on refusal by him to receive the letter containing such offer, the Management shall be free to fill the post or posts by appointing some other qualified person or persons.

(7) In the event of the employee opting to get repatriated to the original school, he shall be restored to his original position in pay, seniority, etc.

(8) In the event of the employee opting to continue in the school in which he has been absorbed, and even during the intervening period when he has not been given an opportunity to re-join his previous school, his services shall not be terminated by the Management under sub-rule (1) of rule 28 by treating him as temporary. If the services of such as absorbed employee are required to be terminated under rule 25A or he is to be retrenched under this rule, the procedure prescribed under rule 25A or, as the case may be in this rule shall apply. However, his seniority for the purpose of promotion in the school in which he is absorbed shall be fixed in the respective category from the date of his absorption.

(9) In case, the fall in the number of pupils, classes or divisions affects the scale of the employee or his status, the facility of absorption admissible as per

provisions of clause (in) of sub-rule (2) shall not be admissible to him and he shall have to work on the lower scale or lower post or part-time post as the case may be. In the event of such an employee showing unwillingness to work on such a post, the authorities mentioned in clause (iii) of sub-rule (2) shall permit the Management to retrench him after giving him three months notice or, as the case may be after completion of the notice period of already given.

27. Principles of Termination of Service in the event of Retrenchment - While terminating the services of employees under the preceding rule, the following principles shall also be observed;-namely:

(a) In the case of reduction in the number of classes at the High School stage, i.e., Standards VIII to X, the services of the junior-most teacher in the category of trained graduate shall be terminated.

(b) In the case of reduction in the number of classes at the Middle School stage, i.e., Standards V to VII the services of the junior-most teacher in the category of trained undergraduates shall be terminated.

(c) If there are some teachers who entered the service as (i) untrained Matric/S.S.C. or (ii) Matric/S.S.C, S.T.C. or its equivalent and changed their category on improving qualifications as (i) untrained graduate or (ii) trained graduate, respectively and if the situation demands that their services are required to be terminated under rule 26, they shall be given option either to go back to the original category of (i) untrained Matric/S.S.C. or (ii) trained Matric/S.S.C. etc. On their doing so, the services of junior most teacher in that category shall be terminated.

(d) Incase the Management runs more than one school and in case the retrenchment is to be effected under rule 26 in any one of the schools, run by it or in case any of its schools is required to be closed either due to withdrawal of recognition or due to the decision of the Management to close it while effecting retrenchment, the principle of common seniority of employees working in all the schools conducted by it shall be observed along with the above principles.

(e) When any retrenchment is to be effected, members of backward Classes already in service shall not be retrenched though liable to retrenchment according to their seniority, if their strength in the school does not exceed the percentage of reservation prescribed in sub-rule (7) or rule 9. In their place, an equal number of other non-Backward Class members of the staff shall be retrenched subject, however, to the condition that, as between the permanent and temporary employees, the temporary employee shall be retrenched irrespective of the fact that he belongs to the Backward Class.

6. From the perusal of the aforesaid rules it is clear that teacher was terminated from service due to closure of the school and her termination was under Rule 25A. Rule 25A provides the procedure to be followed by the management for termination of service of permanent employee on account of the abolition of post

due to closure of school. Rule 26 provides the procedure to be followed by management in retrenching the service of a permanent employee on account of abolition of post due to reduction of establishment owing to reduction in the number of classes or divisions; fall in the number of pupils resulting in reduction of establishment; change in the curriculum affecting the number of certain category of employees; closure of course of studies and any other bona fide reason of similar nature. The rule making authority has clearly drawn distinction in the case of termination of service of permanent employee due to closure of the school and retrenchment of the permanent employee by the management on the grounds stated by us above. In the case of retrenchment under rule 26 on the grounds enumerated therein if the posts retrenched are revived or recreated, it is obligation of the management to inform such employee about the revival or recreation of post and giving him or her first opportunity of rejoining the service in the school run by the management which is not the case where service of a permanent employee is terminated due to closure of school. Rule 27 which we have quoted above provides for retrenchment or termination of service in the event of retrenchment and it begins with the expression. "While terminating the services of employees under the preceding rule, (emphasis supplied) the following principles shall also be observed" The principles incorporated in clauses (a), (b), (c) and (d) of Rule 27 are only applicable where the service of a permanent employee has been terminated under the preceding rule viz. rule 26. In other words, the operation of rule 27 is restricted and confined to the retrenchment of the service of a permanent employee under rule 26. The word "preceding rule" occurring in rule 27 leaves no manner of doubt that rule 27 is required to be followed when the retrenchment of the permanent employee is effected under rule 26 on abolition of post on one of the grounds enumerated therein. We have no hesitation in holding that where termination of a permanent employee takes place on account of abolition of post by closure of school, it is not necessary nor it is obligatory on the part of the management to follow the principles and procedure prescribed in clauses (a), (b), (c) and (d) of rule 27. As rule. 27(d) cannot be applied to the mere termination of service of the permanent employee made on account of the abolition of post due to closure of school, the very foundation of reasoning of learned Single Judge in setting aside the order of the Tribunal does not remain and the judgment of the learned Single Judge cannot be sustained.

7. However, the learned counsel appearing for the teacher urged that the concerned Education Officer granted permission to the management for closure of school under rules 26 and 27 and, therefore, rules 26 and 27 are attracted. We do find that in the permission granted to the management vide letter dated 29-3-1995 reference has been made to rules 26 and 27 but it cannot be said on the face of the specific provision contained in rule 25A that permission of closure of school was granted under rules 26 and 27 and not under rule 25A. It is well settled that wrong reference of provision of law does not confer power on the authority if it does not have nor takes away the power of authority, if it has. The

termination of service of permanent employee by the management on abolition of post in closure of school can only be made by following the procedure prescribed under rule 25A and therefore, at best it can be said that in the letter dated 29-3-1995 in place of correct provision of rule 25A wrong reference has been made to rules 26 and 27. The learned counsel for teacher also contended that three months notice as contemplated under rule 25A was not given. We find ourselves unable to accept the submission of the learned counsel for teacher. We have already reproduced the notice dated 22-9-1995 and it is clear therefrom that in lieu of three months notice, the management sent to the teacher three months salary with all allowances which in our view substantially meets the requirement of three months notice,

8. Before we close we may note that when the matter came up before us on 19-10-2001 Mr. Joshi, learned counsel for appellant prayed for time to find out from the management whether the teacher could be reinstated in another school run by them if teacher was prepared to forego her backwages. On that day, the learned counsel for teacher submitted before us that she is prepared to forego backwages if she is reinstated in another school run by the management. Accordingly, we adjourned the matter. Affidavit has been filed by the management now wherein it is stated that on account of non-availability of students even Marathi medium school which was being run by the management has been closed and therefore, it is not possible to reinstate the teacher in the Marathi medium school. Mr. Joshi also orally submitted before us that presently, no school is run by the management. Moreover, we are informed that the teacher has already attained the age of superannuation. In view thereof also we are satisfied that the teacher is not entitled to any relief.

9. Consequently, we allow the Letters Patent Appeal and set aside the judgment of the learned Single Judge dated 15th November, 2000. No costs.