

(2008) 10 BOM CK 0017

In the Bombay High Court

Case No : Writ Petition No. 5705 of 2007

Jugalkishore Bhagwatiprasad Shukla

APPELLANT

Vs

Nirala Education Society and Others

RESPONDENT

Date of Decision : 15-10-2008

Acts Referred:

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

Citation : (2008) 6 ALLMR 641 : (2009) 2 BomCR 241

Hon'ble Judges : Dharmadhikari B.P., J

Bench : Single Bench

Advocate : Party in Person, for the Appellant; S.S. Joshi, for respondents Nos. 1 to 4 and D.B. Patel, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

Dharmadhikari B.P., J.—The petitioner/Employee in person challenges the judgment and order dated 31/10/2007 of the School Tribunal, Nagpur, dismissing his appeal STN Appeal No. 345/1994. This is third round of controversy to this Court and on 7/12/2007 while issuing "Rule" in the matter, hearing was expedited. On 4/2/2008 matter was directed to be listed in the week commencing from 21/4/2008 for final hearing and on that day respondent No. 4 obtained adjournment for engaging Advocate. This Court granted that adjournment after imposing costs of Rs. 1,000/- and thereafter matter was adjourned from time to time.

2. In appeal u/s 9 of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as MEPS Act), filed by present petitioner challenge was to his oral termination by order dated 22/7/1992 as well as order of termination dated 1/4/ 1992. Petitioner was initially appointed on 1/7/1987 and he was having at that time qualification of M.Com, M. Phil with two years teaching experience. He was appointed as Part-time Lecturer in Commerce from the opening day of Junior College during

Academic Session 1987-88. During that year only one Section of XIth standard was started by respondent No. 1 on no grant basis and in next year XII standard was also started. According to petitioner though he had full-time workload, respondent No. 5 - Deputy Director had accorded approval only as part-time employee as one Section of XIth standard was admitted to grant-in-aid during academic session 1988- 89. Respondent No. 4 Mr. Singh was also appointed along with petitioner but he was only M. Com. They were continued during academic session 1988-89 without any termination and respondent No. 5 granted approval to their appointments as full-time lecturers. Management then recommended both of them to vacation B. Ed. Course 1989-1991. They cleared that examination in June 1991. It is the case of petitioner that though he was senior, being more qualified and more in age than respondent No. 4, he was appointed only for academic session 1991-92. While according approval respondent No. 5 granted it only for academic session 1991-92 giving the reason of backlog. Post of petitioner became unreserved in view of Government circular dated 22/9/ 1986 and as he completed five years of service against that post, he was entitled to continue further and his services were protected under Government decision, Education and Employment Exchange department No. SSN-1090/2263/middle/1/ dated 22/7/1990. However, he was served with termination notice dated 1/4/1992 informing him of his termination from 1/5/1992 and petitioner then approached management and pointed out above mentioned Government circulars. He also pointed out that the backlog was required to be filled in, respondent No. 4 has to go out, being junior to petitioner. Respondent No. 1 and 2 pointed out to School Tribunal that petitioner was not duly qualified at the time of his initial appointment and therefore he was appointed in purely temporary capacity on year to-year basis. He was junior to respondent No. 4 and his post never became unreserved. Lastly they contended that by his conduct and behaviour petitioner waived right, if any to that post. The School Tribunal framed following points and answered them as under:

In view of its finding recorded against point No. 3 as also against point No. 4, School Tribunal dismissed the appeal of present petitioner.

3. In this background, I have heard petitioner (appellant before School Tribunal) in person and Advocate S.S. Joshi for respondents 1 to 4. Shri Patel, learned A.G.P. has appeared for respondent No. 5. Petitioner in person has urged that because of his continuous working with respondents No. 1 and 2, even if post is presumed to be reserved, it got de-reserved as per Government decisions. School Tribunal, therefore, correctly found that his termination was illegal. He further states that delay in filing appeal was condoned by the School Tribunal itself and challenge to this delay condonation by respondent No. 1 and 2 was rejected by learned Single Judge of this Court as also by Hon Division Bench in L.P.A. Hence, finding against point number 3 about waiver as recorded by School Tribunal is inconsistent with its earlier judgment and order condoning delay. He relies upon various judgments to show how adjudication by School Tribunal on merits in his favour is justified. I find it unnecessary to make reference to these

judgments as said conclusions in his favour have not been questioned by the respondents. Respondents No. 1 to 4 contend that issue of seniority qua respondent No. 4 cannot be reopened after several years and petitioner ought to have challenged appointment given to respondent No. 4 on 26/6/1991 and to himself on 10/7/1991 within reasonable time. Not only this but order of termination dated 1/4/1992 was also not challenged by him and he appeared for his selection again in response to advertisement for academic year 1992-93. Respondents state that duly qualified and competent candidate belonging to reserved category respondent number 3 came to be selected in that selection and he continues in employment with approval of respondent No. 5. After his non-selection, petitioner joined services with another employer and did not question alleged oral termination dated 22/7/1992 until after he lost such alternate employment. It is pointed out that while deciding L.P.A. No. 100 of 2007 on 16/8/2007, this Court left the question of waiver open for consideration by School Tribunal. It is further urged that having participated in selection process again and taken a chance of his selection therein, petitioner/appellant cannot be permitted to turnaround and challenge earlier termination vide order dated 1/4/1992 or oral termination dated 22/7/1992. Advocate Joshi is placing reliance upon certain judgments for this purpose. Learned A.G.P. has also supported the decision of the School Tribunal.

4. On 18/12/1995 School Tribunal had allowed Appeal of present petitioner and granted him reinstatement with back wages. Management then approached this Court in Writ Petition No. 2342/1996 and pointed out that appeal before School Tribunal was hopelessly barred by limitation and petitioner had secured another employment after his termination by them which he suppressed. On 11/10/2006 that writ petition came to be allowed with direction to School Tribunal to decide the question of condonation of delay and other incidental questions. School Tribunal passed order condoning delay on 20th February 2007. In that order it has also considered the other employment of petitioner as Assistant Teacher for the period from 12/7/1993 to 30/4/1994 with Kela Madhyamik Vidyalaya, Khamgaon. In paragraph 13 of that order it held that conduct of appellant in pursuing his remedies either before or after that employment revealed that he had not waived his right to challenge termination. This order was challenged by the respondents in Writ Petition 1084/2007 and on 2/4/2007 that writ petition came to be dismissed. Division Bench dismissed L.P.A. No. 100/2007 on 16/8/2007 mentioning that it was for the School Tribunal to consider the merits of the matter including the issue of waiver. Thereafter in impugned judgment dated 31/10/2007, School Tribunal has decided the issue of waiver in favour of present respondents No. 1 and 2.

5. In paragraph 18 of this judgment, School Tribunal has considered the subsequent conduct of petitioner after his termination and a judgment of Hon'ble Apex Court in Suneeta Aggarwal Vs. State of Haryana and Others, Hon'ble Apex Court observes in it as under:

4. We have heard learned Counsel for the parties. Narration of afore-stated facts would show that the appellant had disentitled herself to seek relief in the writ petition filed by her before the High Court. The appellant did not challenge the order of the Vice Chancellor declining to accord approval to her selection and, on the contrary she applied afresh to the said post in response to re-advertisement of the post without any kind of protest. Not only did she apply for the post, but also she appeared before the Selection Committee constituted consequent upon re-advertisement of the post and that too without any kind of protest and on the same day she filed a writ petition against the order of the Vice Chancellor declining to accord his approval and obtained an ad-interim order. In the writ petition she also did not disclose that she has applied for the post consequent upon second advertisement. The appellant having appeared before the Selection Committee without any protest and having taken a chance, we are of the view that the appellant is estopped by her conduct from challenging the earlier order of the Vice Chancellor. The High Court was justified in refusing to accord any discretionary relief in favour of the appellant. The writ petition was rightly dismissed.

Thus concept applied here by Hon'ble Apex Court is of estoppel by conduct and not of waiver. School Tribunal has also found in para 19 of its judgment that petitioner applied in response to advertisement, appeared for interview but was not selected. It further found that he did not challenge selection process and also did not file appeal immediately and waited for about 1 year. He also accepted service in another junior college and thus he waived his right over his employment with respondents No. 1 and 2. In Krishna Bahadur Vs. Purna Theatre and Others, Hon'ble Apex Court while explaining the difference between waiver and estoppel stated that:

8. The principle of waiver although is akin to the principle of estoppel : the difference between the two, however, is that whereas estoppel is not a cause of action : it is a rule of evidence : waiver is contractual and may constitute a cause of action : it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

9. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

The School Tribunal earlier has passed an order on 20th February 2007 condoning delay in filing of an Appeal before it. In that order it also considered other employment of petitioner as an Assistant Teacher for the period from 12/7/1993 to 30/4/1994 with Kela Madhyamik Vidyalaya, Khamgaon, and in paragraph 13 noticed that conduct of appellant in pursuing his remedies either before or after that employment revealed that he had not waived his right to

challenge termination. It is thus clear that School Tribunal was not considering the issue of waiver but of estoppel and there could not be any inference of waiver in these facts when the petitioner was constantly pursuing his grievances as his other employment was temporary and having a source of income after loss of one job cannot be viewed as waiver. He has in paragraph 4 of his appeal memo pleaded that after receipt of termination order w.e.f. 1/5/1992 he approached respondents No. 1 & 2 and pointed out to them that there was no backlog and post was de-reserved. Petitioner has stated that he was allowed to perform his duties thereafter but no muster was made available and he was being told that respondents number 1 and 2 were getting clarification from respondent number 5 Deputy Director. All of a sudden advertisements came to be issued on 8/7/1992 and 17/7/1992 for only one post. He was also asked to appear for interview with understanding that it would only be a formality. Immediately thereafter on 22/7/1992 he was orally asked not to attend the college and present respondent No. 3 came to be appointed. School Tribunal has not recorded any finding on this plea. When post was being advertised every year, in present facts, appearance for interview again by him cannot be treated as conduct sufficient to stop him from challenging the termination. While answering point number 1, School Tribunal has found that petitioner was entitled to regular appointment on permanent and clear post on probation from academic session 1991-92. While answering point No. 2 it also found that his services were not terminated as required by Section 5(3) and hence said termination was illegal. It is to be noticed that the post already stood de-reserved and this finding of School Tribunal has become final. But then because of his conduct, it has found him not entitled to any relief. estoppel by conduct is the inference to be drawn from totality of facts and here, when respondents were not accepting the fact of the de-reservation; recourse either to estoppel or waiver is uncalled for.

6. In Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others, Hon"ble Apex Court observes:

32. In conclusion, this Court recorded that the issue of estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous representation and it is on that score a further question arises as to whether there was any unequivocal assurance prompting the assured to alter his position or status-the situation, however, presently does not warrant such a conclusion and we are thus not in a position to lend concurrence to the contention of Dr. Dhawan pertaining the doctrine of estoppel by conduct. It is to be noticed at this juncture that while the doctrine of estoppel by conduct may not have any application but that does not bar a contention as regards the right to challenge an appointment upon due participation at the interview/selection. It is a remedy which stands barred and it is in this perspective in Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others, a Three Judge Bench of this Court laid down in no uncertain terms that when a candidate appears at the examination without protest and subsequently found to be not successful in the examination, question of entertaining a petition challenging the said examination

would not arise.

33. Subsequently, the decision in Om Prakash stands followed by a later decision of this Court in Madan Lal and Others Vs. State of Jammu and Kashmir and Others, , wherein this Court stated as below.

9. Before dealing with this contention we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves selected to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted . In the case of Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a Court of appeal and try to reassess the relative merits of the candidates concerned who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed, in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a Court of appeal over the assessment made by such an expert committee

34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seem to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not "palatable" to him, he cannot turn round and

subsequently contend that the process of interview was unfair or there was some lacuna in the process.

35. In that view of the matter, while we are not in a position to record our concurrence with the applicability of the doctrine of estoppel by conduct but by reason of the decisions as cited from the Bar, we do feel it required to lend our concurrence to the submissions of Dr. Dhawan, on that score as noticed above.

It is, therefore, clear that a person who has availed of a chance of selection by appearing for interview and participation in selection process cannot challenge that process or his non selection. Respondents No. 1 and 2 have to demonstrate that petitioner could have been selected and thus had a chance of selection as per that advertisement. In law, petitioner not belonging to reserved category had no chance of getting selected and, therefore, it cannot be said that having taken chance, petitioner is estopped in any manner. At the most he could have been again selected temporarily. However here petitioner/appellant has not challenged that selection process or his non selection. He has challenged his termination by pointing out that post had ceased to be reserved one, and his appointment and continuation was against a open post and was valid. In *Commissioner, Assam State Housing and Another Vs. Purna Chandra Bora and Another*, relied upon by Advocate Joshi, HonTse Apex Court observes as under:

4. The first respondent was appointed temporarily and until appointment of Accounts Assistant was made on a regular basis. He was discharged from service on the day on which five persons were appointed after selection. It is not for the first respondent to challenge the selection on the around that no written test was held nor was it necessary in these proceedings for the High Court to look at the order sheet of the selection. The five persons were on probation when appointed, but that did not mean that they were not appointed on regular basis. We find no merits in the case of the first respondent, as upheld by the High Court

7. It is obvious that in present facts, none of the rulings pressed into service by respondents No. 1 and 2 has any relevance. Firstly, petitioner who belongs to open category could not have been legally selected in response to advertisement issued for filling in reserved post. Secondly in law he was already appointed on probation on the de-reserved post in the year 1991-92. Obligations of respondents No. 1 & 2 flowing from mandate of Section 5(2) of MEPS Act and consequential entitlement of present petitioner is adequately discussed by the School Tribunal while deciding point Nos. 1 and 2 and those conclusions are not assailed by the respondents. The petitioner, therefore, is statutorily deemed to be on probation from 10/7/1991 and there is no conduct on record to show that he waived that right. The issue of estoppel by conduct can only be said to be available in the event of there being a precise and unambiguous material and in present facts such material is conspicuously absent. Petitioner was initially appointed on 1/7/1987 when he was M.Com, M.Phil with two years teaching experience. Respondent No. 4 was also appointed with him but he was only M.Com. Both were then sent for vacation B.Ed, course. They completed it in June

1991 and became eligible for grant of permanent appointment. It is also clear that when present petitioner was older in age and hence senior than respondent No. 4, he should have been appointed from 26/6/1991 and respondent No. 4 should have been given appointment from 10/7/1991. Petitioner has argued that respondent No. 4 was favoured being son of the principal i.e. respondent No. 2 and given appointment on 26/6/1991. However he never raised this issue till his termination on 1/5/1992. Moreover, this controversy is not relevant at all when it becomes clear that on 10/7/1991 present petitioner was appointed on probation against a clear and vacant post. His termination, therefore, becomes wrongful and unsustainable. His act of facing interview for selection against a reserved post cannot be construed as either act of waiver or of estoppel so as to preclude him from challenging his termination by pointing out that he was already appointed on probation against a permanent and clear post. Doing of a service to earn livelihood again is not conduct sufficient to support estoppel. There is no scope here for resorting to such a plea by the respondents. The conclusion of estoppel reached in these facts by School Tribunal is, therefore, clearly unsustainable. School Tribunal has fallen into error by recording of finding in affirmative against point No. 3.

8. Petitioner is, therefore, entitled to grant of relief of reinstatement. Subsequent selection and appointment of respondent No. 3 on reserved post is the act of management which cannot come in his way for this purpose. Respondents No. 1 and 2 as also respondent No. 5 are responsible for showing the post as reserved and for filling it in through respondent No. 3. Respondent No. 3 is not at fault in the matter. Respondents No. 1 and 2 are, therefore, duty-bound to continue him also in employment. However, as petitioner did not approach School Tribunal immediately and there is nothing before this Court to show that he was without any source of income during this period, I find him not entitled to any back wages till he is reinstated. However, for all other purposes period from 1/5/1992 till his reinstatement within period of three months from today shall be treated as continuous service and his increments, pension/gratuity and other terminal/retirement benefits will be computed accordingly.

9. Writ petition is thus allowed. Respondents No. 1 and 2 are directed to reinstate petitioner on his former post within a period of three months from today with continuity of service but without any back wages. Respondents No. 1 and 2 shall not be required to terminate services of respondent No. 3 to accommodate petitioner. Respondent No. 5 is at liberty to shift respondent No. 3 or present petitioner to any other recognised School in accordance with law without prejudice to their service and service conditions in any manner. Rule accordingly. However, in the circumstances of the case there shall be no order as to costs.