

(2009) 10 BOM CK 0002

In the Bombay High Court

Case No : Writ Petition No. 3420 of 1998

Liberal Education Society and The Headmaster, Hadas High School

APPELLANT

Vs

Smt. Vrushali Aole, The Education Officer (Secondary) and Presiding Officer, School Tribunal

RESPONDENT

Date of Decision : 16-10-2009

Acts Referred:

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

Citation : (2010) 2 BomCR 330 : (2010) 1 MhLj 491

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : A.H. Deshpande, for the Appellant; H.N. Prabhu, for Anand Parchure, for Respondent 1 and P.D. Kothari, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

R.C. Chavan, J.—This petition by Management is directed against the order passed by the learned Presiding Officer of the School Tribunal, Nagpur allowing the respondent No. 1s appeal against termination of her services on 3rd of May, 1993 and directing the petitioner to reinstate respondent No. 1.

2. When the petition was admitted ad interim relief in terms of prayer Clause (ii) was granted namely, staying the order of the School Tribunal and therefore, presumably respondent No. 1 has not been reinstated.

3. Facts which are material for deciding this petition are as under:

The respondent No. 1 was first appointed as an Assistant Teacher from 1st August, 1992 to 28th September, 1992 in a leave vacancy of one Shri L.L. Nakhale. Said Shri L.L. Nakhale retired on 30th September, 1992. Therefore, respondent No. 1 was continued from 1-10-1992 till the end of academic session 1992-1993. These appointments were approved by the Education Officer by his

orders dated 23-2-1993 and 28-9-1993. The petitioner then issued an advertisement for filling up the post on a regular basis on 3rd July, 1993. The respondent No. 1 had applied in pursuance of this advertisement, but was not selected. Her services came to an end at the end of academic session 1992-1993, which termination she challenged before the School Tribunal, Nagpur, which set it aside by the impugned order.

4. The learned Counsel for the petitioners first submitted that the appeal was presented beyond the period of limitation prescribed. The petitioners had raised an objection to the condonation of delay in preferring the appeal. The learned Presiding Officer, School Tribunal, Nagpur decided both the questions of condonation of delay as also the appeal itself by his impugned judgment. While the learned Presiding Officer, School Tribunal, Nagpur could have considered the application for condonation of delay first and then proceeded to decide the appeal along with the question of condonation of delay, this deviation did not cause such a prejudice as to vitiate the order. The learned Counsel for the petitioners placed reliance on a judgment of this Court in *N.L. Abhyankar Vs. Union of India and Others*, , where a Division Bench of this Court was considering whether writ petition could be entertained inspite of unexplained inordinate delay and laches. The observations in para 19 of the judgment may not be exactly apt since in this case on facts learned Presiding Officer of the School Tribunal, Nagpur has held that the delay was explained.

5. The learned Counsel for the petitioners next submitted that by applying in pursuance of an advertisement issued after the period of appointment, came to an end, respondent No. 1 had acquiesced and therefore, could not be heard to question of her termination. For this purpose the learned Counsel for respondent placed reliance on the case of *Suneeta Aggarwal Vs. State of Haryana and Others*, . In that case, the name of appellant had been recommended by the Selection Committee after an interview for appointment to the post of Hindi Lecturer. The Vice-Chancellor did not approve recommendation and ordered re-advertisement. The appellant again applied in pursuance of the said advertisement and appeared before the Selection Committee and simultaneously filed a petition challenging the order of the Vice-Chancellor to re-advertise the post. The Hon"ble Supreme Court held that the appellant had disentitled herself to the relief in the writ petition by not challenging the order of the Vice-Chancellor declining to approve her selection and on the contrary, had acquiesced by applying afresh for the post in pursuance of fresh advertisement without any kind of protest and also by appearing for interview before the Selection Committee. The learned Counsel submitted that a parallel could be drawn in the present case where the respondent had applied in pursuance to an advertisement and after she was selected, she choose to file an appeal before the School Tribunal, Nagpur. The learned Counsel for respondent No. 1 submitted that in a situation where employment is scarce, it is hope which keeps candidates in pursuit of their endeavour to get a job. Therefore, if the respondent applied in pursuance to the advertisement without picking up a quarrel with the

Management, she could not be held disentitled to invocation of a remedy which was available to her, namely challenging the order of termination before the School Tribunal. Though this contention is emotionally correct, in the Court of law, it may not be acceptable. If the respondent No. 1 was aggrieved by her termination, the course upon to her was to immediately challenge the same by filing an appeal before the Tribunal, rather than responding an advertisement to fill up the said post, which she had vacated, and then upon finding that she was not selected, to have seek recourse to the remedy of appeal. The learned Presiding Officer should have seen this while considering the appeal filed before him. The petitioners had pointed out before the Tribunal that the respondent No. 1 was appointed as a stop gap arrangement, but she was not considered for regular appointment since she was at the relevant time 52 years of age.

6. Learned Counsel for the petitioner next submitted that the respondents appointment was merely a stop gap arrangement first for about two months, from 1-8-1992 to 28-9-1992, and then from 1-10-1992 till the end of academic session i.e. till 3-5-1993. Therefore, he submitted that the appointment of the respondent No. 1 had come to an end very much by virtue of the terms of appointment itself and therefore, there was no question of branding her termination as illegal. The learned Counsel for respondent No. 1 submitted that when there is a clear permanent vacancy, which had occurred on 1-10-1992 on account of retirement of Shri Nakhale, the respondent No. 1 could have been appointed only on a regular basis on probation. She submitted that the terms of the appointment order are really immaterial, and howsoever worded, the appointment could have been taken as one on probation. For this purpose she relied on two judgments of this Court in Yogeshwar Vikas Sanstha and Others Vs. Rajendra T. Shinde and Another, , the teacher was appointed on 26-7-1995 for a period from 28-7-1995 to 30-4-1996. The Management contended that he had resigned but the teacher submitted that he had been prevented from signing muster roll. He claimed that appointment was made after following the procedure of advertising the post and selecting him in accordance with law and therefore, challenged termination of his service. The Tribunal granted him reinstatement with back wages from 17-7-1996. The Management challenged this order before the High Court contending that the appointment was for a fixed period and not on probation. This Court considered an earlier judgment in the Maharashtra Shikshan Sanstha and Anr. v. The Presiding Officer, School Tribunal and Ors. reported in 2006(7) Mh.L.J. 11, wherein Court had held mere use of word temporary in the appointment order would not be decisive of the character of the appointment. The Court found that irrespective of what the letter of appointment mentions the appointment must be considered as one and probation.

7. In Matoshri Ramabai Ambedkar Vidyarthi Vasatigruh Trust and Anr. v. Bharat D. Hambir and Anr. reported in 2009(2) Mh.L.J. 121, the Court noticed a growing tendency of management of private schools to appoint temporary employees for year to year, even though the vacancy is permanent. Placing teachers in a state of eternal uncertainty is destructive of the cause of education. The court found

that Section 5 of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act must be interpreted in a purposive manner by accepting interpretation, which would advance the statutory object. It held that when there is a permanent vacancy, the Management is duty bound to statutorily to fill it up by appointing a duly qualified candidate on probation after advertising the vacancy to allow equal opportunity to eligible candidates. If a regular process is held and duly qualified candidate is appointed, his appointment would be on probation. Temporary appointment could be made only when the vacancy is temporary. Referring to an earlier judgment the Court held that Management cannot choose to brand the appointment as temporary even when a permanent vacancy is available. Therefore, the learned Counsel for the respondent No. 1 submitted that irrespective of how the orders of appointment of respondent were worded, the appointment of respondent No. 1 must be taken to be regular appointment in a permanent vacancy.

8. The learned Counsel for the petitioner submitted that the judgments on which the learned Counsel for respondent relies have not taken into consideration the judgment of Hon''ble Supreme Court in Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others, . In that case, the teacher concerned was appointed on 10th June, 1992 against a clear vacancy with the stipulation that his appointment was purely temporary for a period of 11 months from 11-6-1992 to 10-5-1993 in the clear vacancy and that after the expiry of the above period his services would stand terminated without any notice. The Hon''ble Supreme Court reproduced the provisions of Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act in the judgment, and still held that in view of the order of appointment, the appointment of the teacher was purely temporary and for a limited period. It observed that only permanent appointments are regulated by Sub-sections 1 and 2 of Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act and only when such permanent appointments are made after following the prescribed procedure, such person is to be put on probation. Thus the Court had clearly ruled out the necessity of appointing a person on probation, inspite of the fact that there was a clear vacancy, merely because Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act so provided, and had held that only after following the prescribed procedure a clear appointment on probation could be made.

9. The learned Counsel for petitioners placed reliance on another judgment in Bharatiya Gramin Punarrachana Sanstha Vs. Vijay Kumar and Others, , where too the Court noted provisions of Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act. In that case, the employee had applied for the post of Laboratory Assistant in response to an advertisement and was selected and appointed on 22-6-1996 for a period of two years from 24-6-1996 to 23-6-1998. The appointment was approved by Deputy Director of Education only for the first year. The services of the employee were terminated on 17-9-1997. Subsequently, on 2-2-1998 the Deputy Director

approved the appointment of the employee even for academic year 1997-1998. The Tribunal ordered reinstatement of the employee with 75% back wages. The Management challenged the said order before the High Court unsuccessfully. It was submitted before the Hon''ble Supreme Court that the vacancy was infact meant for Schedule Tribe candidate, who was subsequently appointed to the said post. It was also contended that appointment was purely temporary for a period of two years and therefore, reinstatement of the employee could have been ordered only for that period of two years. It was specifically contended on behalf of the employee that in terms of provisions of Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, after a period of two years, the employee was entitled to be confirmed and therefore, the order of reinstatement did not warrant any interference.

10. The Hon''ble Supreme Court considered the provisions of Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act and held that those provisions applied only to a person who is put on probation consequent to his appointment on a permanent vacancy. The Court found that since the services of the employee were terminated before completion of two years and since the employee was appointed only for two years and was not put on probation, he was not entitled to be confirmed or to remain in service beyond the period of his appointment. It may seen that in that case the employee had not only been selected after a process of advertisement but had also been appointed for a period of two years, yet the Court held that since he was not put on probation, he was not entitled to be deemed to have been confirmed. Thus the Court had impliedly ruled out the contention that a person selected after a process of recruitment to fill up a clear vacancy had to be put on probation and had to be confirmed on completion of such probation. The observation of the Court that since the employee was not put on probation, his order of appointment for two years did not give him the right to seek deemed confirmation, after that period would imply that the terms of appointment order have to be read as they are and not as they ought to be.

11. The learned Counsel for petitioners submitted that both these judgments of the Hon''ble Supreme Court would rule out the proposition that u/s 5 of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, an appointment to a post on a clear vacancy had to be on probation. He pointed out that neither in Yogeshwar Vikas Sanstaha nor in Matoshri Ramabai Ambedkar Vidyarthi Vasatigruh Trust were these judgments of the Hon''ble Supreme Court noticed. He submitted that had the judgments of the Hon''ble Supreme Court in Hindustan Education Society, and particularly in Bharatiya Gramin Punarrachana Sanstha, been noticed by the learned Judges they would certainly have taken a different view.

12. While the causation in Matoshri Ramabai Ambedkar Vidyarthi Vasatigruha, namely that purposive interpretation should be preferred is extremely persuasive, the fact that the Hon''ble Supreme Court, after considering

provisions of Section 5 of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act & the fact that the employee in Bharatiya Gramin Punarrachana Sanstha was selected after the post was advertised and was appointed for two years in clear vacancy, observed towards the end of para 6 that provision of Section 5 of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act applies to a person who is put on probation consequent upon his appointment in a permanent vacancy and that the provision did not help the employee because secondly, admittedly the first respondent was appointed only for a period of two academic years of 1996-97 and 1997-98 and was not put on probation. It may be seen that in para 3 of the judgment the Hon''ble Supreme Court had specifically stated as under:

On 6-8-2001, this Court issued notice limited to the question as to why the appointment of the respondent (Respondent 1) should not be confined to the period mentioned in the order of appointment dated 22-6-1996.

Thus the specific question which Hon''ble Supreme Court was considering was about confining the appointment to period mentioned in the appointment order. In face of this, after noticing the pronouncement of the Apex Court, it may be impermissible for me to follow contrary view taken by this Court in the two Judgments referred to in preceding paragraphs.

13. After considering the rival contentions, I find that in this case first the respondent No. 1 is not shown to have been appointed after any regular process of selection. She was first appointed to fill up a leave vacancy, which continued because of the retirement of the person concerned. A regular selection process had been undertaken and on which respondent No. 1 had participated things successfully. Therefore, she could not have assailed the order of her termination at the end of term of her appointment. The impugned order cannot be sustained.

14. The petition is, therefore, allowed and the impugned order is quashed and set aside.

15. Rule is made absolute in above terms.