

(2010) 10 BOM CK 0214

In the Bombay High Court

Case No : Writ Petition No. 4716 of 2000

Mahatma Phule Krida Prasarak Mandal and The Head Master,
Savitribai Phule Prashala

APPELLANT

Vs

Smt. Sumati Tukaram Kashid alias Sumati Vijay Borade, The
Education Officer and The Presiding Officer, Addl. School
Tribunal

RESPONDENT

Date of Decision : 21-10-2010

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 5(2), 5(3), 5(4)

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule
14, 15, 16

Citation : (2011) 2 ALLMR 674 : (2011) 1 BomCR 688 : (2011) 1 MhLj 303

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : V.P. Sawant, instructed by Dilip Bodake, for the Appellant; Anita
Agarwal and S.N. Bhosale, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

Nishita Mhatre, J.—This writ petition has been filed to challenge the order passed by the School Tribunal on 26.4.1999 in Appeal No. 11 of 1980. By the impugned order the School Tribunal has set aside the order of termination issued by the petitioners against respondent No. 1. It has further directed the petitioners to reinstate respondent No. 1 with continuity of service and full back wages.

2. On 6.6.1995, the petitioners issued a letter appointing respondent No. 1 with effect from 12.6.1996 as an Assistant Teacher. According to the petitioners, this appointment order was for a temporary appointment and gave no right whatsoever to respondent No. 1 to claim permanent employment with the petitioners. The petitioners also sought an assurance from respondent No. 1 that she had accepted her appointment against a vacancy reserved for a candidate from the reserved classes for the academic year 1995-1996. This assurance or

declaration was submitted by respondent No. 1 on 12.6.1995. Approval was granted on 30.3.1996 by respondent No. 2 to the appointment of respondent No. 1 on probation for two years. An application was submitted by respondent No. 1 on 31.5.1996 again for appointment in the next academic year, according to the petitioners. Accordingly, she was appointed afresh, claim the petitioners, on temporary basis for the academic year 1996-97. A declaration/assurance was sought once again from respondent No. 1 as was sought from her in 1995. The petitioners claim that respondent No. 1 was absent unauthorizedly from 1.11.1996. Therefore the Managing Committee of the petitioners and the School Committee passed resolutions on 29.3.1997 and 31.3.1997, respectively, terminating her services.

3. Respondent No. 1 filed an appeal before the School Tribunal, Solapur in January, 1998. The delay in filing the appeal was condoned on 5.3.1999. It appears that the petitioners filed about 22 documents along with a list on 23.4.1999. The School Tribunal without considering these documents passed an order on 26.4.1999 directing that respondent No. 1 should be reinstated in service with continuity and full back wages.

4. The petitioners then preferred Writ Petition No. 3996 of 1999 challenging the order of the School Tribunal. The judgment and order of the Tribunal was set aside by consent of the parties and the matter was remanded to the Tribunal for hearing it afresh. Respondent No. 1 filed an affidavit with respect to the 22 documents which were filed by the petitioners. The matter was heard and the School Tribunal by the impugned order dated 26.4.1999 allowed the appeal directing reinstatement of respondent No. 1 with continuity of service and full back wages. Hence the present writ petition.

5. Mr. Sawant, the learned Counsel appearing for the petitioners submits that the petitioners had appointed respondent No. 1 only on a temporary basis. She had agreed to such an appointment and, therefore, had submitted a declaration/assurance accepting her appointment as a temporary employee. He therefore submits that respondent No. 1 had no right to contend that she was entitled to continue in service. He further submits that, the fact that the vacancy available with the petitioners in 1995, against which the respondent No. 1 was appointed, was for a candidate from the reserved classes, cannot be doubted as respondent No. 1 had accepted this position in her declaration. He submits that since the petitioners had found that respondent No. 1 had remained absent unauthorizedly without submitting any application for leave, a decision was taken by the petitioners not to continue her further in service after the end of the academic year. In the alternative, Mr. Sawant argues that assuming it is held that respondent No. 1 was appointed as a probationer, it was always open for the petitioners to terminate her services in accordance with Section 5(2) of the Maharashtra Employees Private School Act (in short, M.E.P.S. Act). He then submits that the Tribunal has set aside the order of termination dated 31.3.1997 although respondent No. 1 in her appeal had contended that she had been

illegally terminated from service from 9.6.1997. According to him, therefore, the Tribunal could not have set aside the order which respondent No. 1 contended, did not exist. He submits that in any event, assuming it is held that respondent No. 1 was a probationer and that she had been terminated from service on 9.6.1997, she has not completed the period of two years which is a pre-requisite for an assistant teacher to be deemed to be a permanent teacher. Further more, he submits, that there is no challenge to the order dated 31.3.1997 and, therefore, that order cannot be set aside. The learned Counsel points out that the impugned order is nothing but a reproduction of the earlier order passed by the Tribunal which was set aside by this Court. He then submits that the Tribunal has granted full back wages although there is no material on record to establish the fact that respondent No. 1 was not gainfully employed after her dismissal from service.

6. Mrs. Agarwal, appearing for respondent No. 1 submits that the Tribunal has appreciated the evidence on record in its proper perspective and has delivered the judgment based on the evidence on record. She submits that the Tribunal has accepted the contention of respondent No. 1 that the appointment order which had been issued in her favour stipulated that she was appointed on probation. She then submits that extraneous documents cannot be considered while ascertaining whether the appointment order was for a temporary appointment or an appointment on probation. She submits that an appointment order must speak for itself. She then submits that Rules 15 and 16 of the Maharashtra Employees of Private Schools Rules (in short, "M.E.P.S. Rules") read with Section 5(2) of the M.E.P.S. Act, require the petitioners to maintain the service record of an employee including an employee on probation. According to her, there was no material on record to establish the fact that either the work or the conduct of respondent No. 1 was not satisfactory. The confidential reports were not produced before the Tribunal according to the learned advocate. Apart from this, although it was the contention of the petitioners that respondent No. 1 had remained absent unauthorizedly, the leave record was also not produced before the Tribunal. She further submits that the contention of the petitioners that respondent No. 1 was appointed temporarily against a reserved vacancy, cannot be accepted since there was no material on record to establish this fact. Mrs. Agarwal relies on the judgment in the case of Shri Vinayak Vidhyadayini Trust and Anr. v. Smt. Aruna T. Prabhu and Ors. 2010 (5) All MR 200, in support of her submission that non-compliance of Rules 14 and 15 of the M.E.P.S. Rules which are mandatory, would vitiate the order of termination.

7. The appointment order which has been issued on 6.6.1995 specifically states that she was being appointed on probation for two years with effect from 12.6.1995. There is no material on record to indicate that the appointment order was issued against a temporary vacancy nor is there anything mentioned in the appointment order that the appointment was being made against a reserved vacancy. Merely because a letter or declaration has been obtained from respondent No. 1 by the petitioners stating that she had accepted her

appointment against a reserved post, on temporary basis for the academic year 1995-1996, would not in my view, change the intent of the order of appointment issued to her. In the order dated 4.6.1996 appointing respondent No. 1 from 10.6.1996 it is mentioned that the appointment is against a reserved post. However, the issuance of this order, in my opinion, is not material as the petitioners had appointed respondent No. 1 as a probationer in 1995 itself. They could not therefore have issued another appointment letter in 1996 appointing her for the academic year 1996-1997.

8. The Tribunal, in my opinion, has appreciated the evidence correctly. It has found that the Education Officer had accorded approval to the appointment of respondent No. 1 on probation for two years by issuing an order dated 30.3.1996. Therefore, in my view, the Tribunal has rightly concluded that the order issued to respondent No. 1 was for her appointment on probation and not as a temporary employee.

9. The next issue which will have to be considered is, whether the petitioners had a right to terminate the services of respondent No. 1 during the probation period. u/s 5(2) of the M.E.P.S. Act, the services of an Assistant Teacher, who is appointed on probation, can be terminated by the management, at any time, during the period of probation, after giving him/her one month's notice or salary of one month in lieu of notice. However, such action can be taken by the management if it finds that the work or behaviour of the probationer is not satisfactory. To ascertain whether the work or behaviour of a probationer is not satisfactory, it would be necessary to consider the confidential reports of an employee. Rule 14 of the M.E.P.S. Rules prescribes that a self-assessment report must be submitted by an employee to the school. Rule 15 stipulates that confidential reports of an employee have to be written annually as prescribed in the forms in Schedule "G". Every employee is to be made aware of any adverse remarks before the end of August each year. Under Sub-clause (6) of Rule 15, the performance of an employee appointed on probation is to be assessed by the Head of the school objectively and a record of such an assessment is to be maintained. There is no material on record to indicate whether such confidential reports were maintained or whether any assessment was made by the head of the school in respect of the work and behaviour of respondent No. 1. In the case of Shri Vinayak Vidhyadayini Trust and Anr. (supra), a Division Bench of this Court, while considering the import of Rules 14 and 15, has observed thus -

13. It is true that as a general principle in service jurisprudence an employee is appointed on probation to test his/her performance and suitability for the post appointed and if during this period of probation, the performance is found to be unsatisfactory, the employer has the right to discontinue the employee on completion of the probationary period and without assigning any reasons. It is also equally well settled that such an order of termination is not a stigmatic order and as per the contract of service or the terms of appointment, the employer has such a right so that the exercise of such right would not amount to an illegal

action on the part of the employer. Such an order will not by itself be a penal order and the period of probation furnishes a valuable opportunity to the master to closely observe the work of the probationer. However, the MEPS Act is a special piece of legislation and Section 5(2) of the said Act states that every person appointed to fill a permanent vacancy shall be on probation for a period of two years and subject to the provisions of Sub-Sections 3 and 4, he shall, on completion of his probation period of two years, be deemed to have been confirmed. As per Sub-Section 3 of Section 5 of the MEPS Act, if in the opinion of the management, the work or behaviour of any probationer during the period of his probation is not satisfactory, the management may terminate his services at any time during the said period after giving him one month's notice or salary of one month in lieu of notice. Thus, the appointment on probation and the termination of the service of the probationer are governed by the provisions of Sub-Sections 2 and 3 of Section 5 of the MEPS Act. In addition, Rules 14 and 15 of the MEPS Rules, 1981, have elaborately set out the procedure for the assessment of the probationer's performance and writing of his confidential reports. When a special statute like the MEPS Act has provided for a specific procedure to be followed while terminating the employment of a probationer on the ground of unsatisfactory performance, the said procedure is mandatory and non-compliance thereof would vitiate the order of termination and the School Tribunal will be fully justified to interfere with the same and set it aside by directing reinstatement of the appointee/appellant.

Therefore, the petitioners have miserably failed to demonstrate the assessment made by the head of the school in respect of the work and behaviour of respondent No. 1. Certain documents have been filed on record by the petitioners to establish their contention that the behaviour of respondent No. 1 was less than satisfactory. According to the petitioners, because of the nature of the behaviour of respondent No. 1, the other employees of the school had given a notice of an indefinite strike. It is, therefore, contended by the learned Counsel for the petitioners that they were left with no alternative but to terminate the services of respondent No. 1 in order to maintain the discipline and good behaviour in the school.

10. The Tribunal has concluded that the services of respondent No. 1 were terminated by the order dated 31.3.1997. It has not accepted the contention of respondent No. 1 that her services were terminated on 9.6.1997. The Tribunal having found that the order dated 31.3.1997 was illegal, has set aside that order. It has been contended by Mr. Sawant that the order terminating the services of respondent No. 1 has been passed within two years from the appointment order and even assuming it is held that she was a probationer, the order cannot be said to be illegal. In my opinion, this submission is without merit as there is no material on record to indicate that the behaviour and the work of respondent No. 1 was unsatisfactory. The Tribunal has found that the record has been created by the petitioners in order to establish their case that the conduct of respondent No. 1 was not satisfactory. It has found that the documents filed by the petitioners

were not genuine as there was certain interpolations made in those documents. Apart from this, the order dated 30.3.1996 passed by the Education Officer granted approval to the appointment of respondent No. 1 on probation for a period of two years from 12.6.1995.

11. In my opinion, no case for interference has been made out by the petitioners as the impugned order is not perverse nor is there any error of law apparent on the face of the record as attempted to be argued by Mr. Sawant.

12. Writ petition dismissed. Rule discharged. No order as to costs.

13. An application was made by Mr. Sawant, the learned Advocate for the petitioners, for a stay of this order. Stay refused.