

(2016) 11 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition No. 962 of 2015

Manisha

APPELLANT

Vs

Sant Kavi Mahipati Maharaj Devsthan Trust

RESPONDENT

Date of Decision : 22-11-2016

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 9

Citation : (2017) 3 ALLMR 324 : (2017) MCR 424 : (2017) 2 MhLJ 657

Hon'ble Judges : Ravindra V. Ghuge, J.

Bench : Single Bench

Advocate : Shri Dhorde Vikram R, Advocate, for the Petitioners; Shri Karpe Rahul R, Advocate, for the Respondents 1 & 2; Shri N.T. Bhagat, Advocate, for the Respondent 3

Final Decision : Partly Allowed

Judgement

Ravindra V. Ghuge, J. (Oral)—Heard learned Advocates for the respective parties.

2. Rule.

3. By consent, Rule is made returnable forthwith and the petitions are taken up for final disposal.

4. While issuing notice in these matters on 9.2.2015, I had recorded the submissions of the petitioner as follows:-

"1. Contention of Mr. Dhorde, learned Senior Advocate is that the petitioners were initially appointed as an "Assistant Teacher" on 10/06/2009. Appointment was approved and they continued till their first termination, which was called in question before the School Tribunal at Solapur in Appeal No.63/2011 and 64/2011 respectively. By the judgment and order of the School Tribunal dated 03/08/2012, their termination was set aside. They were thereafter reinstated.

2. It is further submitted that the respondent / employer issued an order dated 12/05/2014 contending therein that the Education Officer (Secondary) has not approved the appointment of the petitioners on the ground that there is a backlog and that when vacant posts for "Open" category are available, the petitioners would be reinstated. Appeal Nos.45/2014 and 46/2014, preferred by the petitioners, have been rejected by the impugned judgment dated 01/10/2014.

3. Grievance of the petitioners is that despite the said Education Officer, having been impleaded as respondent No.3 in Appeal No.63/2011 and 64/2011, he had never put forth the issue of backlog and cannot raise the said ground, which appears to be the foundation of the impugned termination. The School Tribunal has rejected the appeal by the impugned judgment.

4. Issue notice before admission to the respondents, returnable on 11/03/2015. Learned AGP waives service for respondent No.3. Till the next date of hearing, respondent No.3 shall not appoint any candidate in place of the petitioners and shall not fill in the said posts."

5. On 9.8.2016, after these matters were heard for quite some time, I had passed the following order:-

"1. I have heard the learned Advocates at length in both these matters. Their submissions have concluded. However, before dictating an order, it is submitted that the reservation roster as in 2008 / 2009 when both these Petitioners were appointed, was never placed before the School Tribunal. So also, the same has not been placed before this Court as well.

2. The learned Advocate for the Management desires to take instructions as to whether, the Management would be agreeable to file an undertaking that the available two vacant posts, which are said to be reserved for Scheduled Caste and Nomadic Tribe categories, would be filled in by accommodating these Petitioners, who have been in employment from 2009 till 2014, and any future vacancy would be utilized for recruiting candidates from the reserved categories.

3. In the light of the above, by consent of the parties stand over to 24.08.2016 to enable the Respondent/ Management to place on record the reservation roster as in 2008 / 2009 and to make a statement as desired. No further submissions would be advanced.

4. Interim relief granted earlier to continue."

6. Since the learned Advocate for the respondent submits that though the post of an Assistant Teacher for the S.T. and N.T. categories are vacant from 2009 for more than seven academic years, the management is not willing to accommodate the petitioners on the said posts. It is in this backdrop that the matters have been heard.

7. It is undisputed that both these petitioners are identically situated Assistant

Teachers, who have been appointed on 10.6.2009. It is further admitted that in the appointment orders under Rule 9(5) read with Schedule "D" of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 ("MEPS Rules" for short), it is nowhere stated that these petitioners have been appointed against the reserved category posts and that the said appointment is only for an academic year, since the posts will have to be readvertised every year, at least for the period of five years or till a candidate from the N.T./S.T. category is available, whichever is earlier. In short, none of the petitioners have the knowledge that they were appointed against any reserved post.

8. Clause 2 of the appointment order indicates that these petitioners were appointed permanently for the academic year from 15.6.2009. There is no further date mentioned in the appointment order to conclude that the said appointment is restricted for one academic year or a number of academic years. For the sake of clarity, clause 2 of the appointment order, which is identical in relation to both the petitioners reads as under:-

" 2. Your appointment is permanent for the Academic year - from 15.6.2009 to After Expiry of above period your Services shall stand terminated without any notice."

9. Learned Advocate for the respondent / management submits that Clause 6 of the appointment order, which is, "Your appointment is subject to the approval by the Education Officer, Zilla Parishad, Ahmednagar", is an all embracing clause and will bring within its fold even the aspect of appointment against the posts reserved for backward classes.

10. I am unable to accept this far fetched contention since the said clause cannot be interpreted to mean that the appointments of these petitioners would tantamount to being against reserved category posts. The petitioners need to be noticed that they were being appointed against the reserved category posts. Rule 9(8) of the MEPS Rules mandates that when vacancies are reserved under Rule 9(7) and the management desires to fill in such vacancies, they shall be advertised in at least one news paper having wide circulation in the said region and also notify the vacancies to the Employment Exchange of the District and to the District Social Welfare Officer.

11. For clarity Rule 9(7) to 9(9)(a)(b) are reproduced as under:-

" 9(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 :-

(a) Scheduled Castes

-

13 per cent

(b) Scheduled Tribes

-

7 per cent

(c) De-notified Tribes (A)

-

3 per cent

(d) Nomadic Tribes (B)

-

2.5 per cent

(e) Nomadic Tribes (C)

-

3 per cent

(f) Nomadic Tribes (D)

-

2 per cent

(g) Special Backward Category

-

2 per cent

(h) Other Backward Classes

-

19 per cent

Total

-

52 per cent

9(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 organisations of persons belonging to Backward Classes, by whatever names such associations or organisations are called, and which are recognised 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 organisations as aforesaid] or if no such names are recommended by the Employment Exchange or the District Social Welfare Officer + [or such associations or organisations 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).

9(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.

(b) In the case of a non-teaching post, if a person from the particular category of Backward Classes is not available, the Management shall make efforts with regular intervals to fill up the post within the period of five years and the post shall not be filled up during that period by appointing any other person who does not belong to the respective category of Backward Class."

12. Sub-clause (a), reproduced above below Rule 9(9), would indicate that after advertising the posts, if no candidate belonging to the particular category is available, the candidate from the open category may be appointed on a year to year basis. In the backdrop of this mandate of law, if the stand of the respondent is accepted, it would mean that they have acted surreptitiously and secretly without making either the petitioners or the competent authorities, know that two posts were reserved for the backward classes and were being filled in temporarily by appointing the petitioners. In this fact situation, the contention of the respondent / management that Clause 6 of the appointment order would be an all embracing clause, deserves to be rejected.

13. There is yet another angle to these two cases. Both these petitioners were earlier terminated on 20.6.2011, orally, on the ground that their appointment was not approved by the Education Officer. It is stated that the appointments were not approved because the management contended that both these petitioners were appointed against reserved posts. By judgment dated 3.8.2012, the School Tribunal allowed the Appeal Nos. 63 of 2011 and 64 of 2011, filed by these two petitioners and directed this management to reinstate both of them as Assistant Teachers with continuity and full back wages along with consequential benefits. There is no dispute that this management did not challenge these judgments and implemented the same by reinstating these petitioners with continuity. Full back wages as granted are yet to be paid, is the contention of the petitioners.

14. The above reason for termination having been rejected once, would not be

available for the management as well as the Education Department to be raised once again in 2014, which has led to the impugned termination of the petitioners for the same reason w.e.f. 12.5.2014. Once this issue has been dealt with by the School Tribunal and the said judgment having not been challenged by the management or the Education Officer and having accepted the said judgment by implementing it, in my view, it was not open for this management to once again fall back upon the said reason and terminate the petitioners.

15. The learned Advocate for the management has relied upon the following judgments:-

(1) Uday Bojraj Toney v. Akkalkot Education Society 2008 (1) Bom.C.R.307, (2) Anna Manikrao Pethe v. The Presiding Officer 1998 (4) Bom.C.R. 565, (3) Janta Education Society v. Prakash Babarao Shingane, 2009 6 Bom. C.R. 892 and (4) President v. Sunita Bansidhar Patole 2007 (3) Bom.C.R.829.

16. It is submitted, by placing reliance upon these reported judgments, that where an appointment is made against a reserved post, same has to be treated as temporary for the academic year and though the employee from the other categories / open category is appointed on year to year basis, he would not be entitled for regularization.

17. There can be no debate on the ratio laid down in the above cited reports. Similarly, Rule 9(9)(a) would indicate that such a candidate appointed against the category will not have a subsisting right for continuance in employment. These judgments are not applicable to the case of the respondent / management for the reason that there is not a whisper in the appointment order that these petitioners have been appointed against a particular category. Clause 2 of the appointment order indicates that both of them have been appointed permanently. On the same ground, both these petitioners were orally terminated and the School Tribunal by its earlier judgment dated 3.8.2012, has set aside the said ground and directed the reinstatement of the petitioners, which judgment has attained finality.

18. In the impugned judgment of the School Tribunal, dated 1.10.2014, it has been concluded that since the petitioners were appointed against reserved category, they cannot claim continuance or reinstatement in service. The Tribunal has completely lost sight of the above recorded fact situation and has merely accepted the contention of the respondent as gospel truth without legally scrutinizing the said contentions. When there was no advertisement as mandated under Rule 9(7) and (8), when the statutory authorities were not informed that reserved posts are being filled in and when these petitioners were not given any information in any form whatsoever, that they were being appointed against reserved posts, the impugned judgments are rendered, not only perverse and erroneous, but have actually resulted in encouraging the management to take advantage of it's own wrong.

19. The respondent / management contends that the reservation roster was

placed before the Tribunal. Per contra, the petitioners contend that there is no reservation roster carrying any date in the year 2009 to indicate that there was any reservation. I am not required to go into this controversy for the reasons and the conclusions arrived at in the foregoing paragraphs of this judgment.

20. On the issue of back wages, the petitioners submit that since back wages as per the earlier judgment dated 3.8.2012 have not been paid by this management, their malafides have been exposed. The second termination is for the same reason, which earlier has been set aside by the Court. Hence, full back wages deserve to be granted.

21. Learned Advocate for the respondent / management submits that as these petitions have not worked, the principle of "No Work No Wages" deserves to be made applicable.

22. There is no dispute that the back wages granted by the School Tribunal in the earlier judgment as against the first termination, have not been paid by the management. Shri Dhorde hastens to add that after the management accepted the earlier judgment of the School Tribunal and reinstated the petitioners on 20.8.2012, they have been working till the second termination on 12.5.2014 and have not been paid their regular salary for this entire duration and hence no sympathy deserves to be shown towards this management.

23. Considering the above, both these petitions are partly allowed. The impugned judgments of the School Tribunal dated 1.10.2014, stand quashed and set aside and Appeal Nos. 45 and 46 of 2014 stand allowed. Consequentially, the oral termination dated 12.5.2014 stands quashed and set aside and the respondent / management is directed to reinstate the petitioners in service with continuity and with 60% back wages with the further direction that the earlier back wages granted by judgment 3.8.2012 along with the regular salary till 12.5.2014, shall be paid to these petitioners within 12 weeks from today. It be noted that if the earlier wages, the unpaid salary and 60% back wages as granted today are not paid within 12 weeks, the same shall carry interest at the rate of 3% per annum to the extent of earlier back wages from August 2012 and for the unpaid salary and the back wages under this order, from the date of this judgment.

24. Rule is made partly absolute in the above terms.

25. The respondent / management prays for a direction to stay this judgment for a period of four weeks, which is opposed by the petitioners.

26. For the reasons assigned in this judgment, and having concluded that the management has tried to take advantage of its own wrongs and illegalities, request for stay is rejected.