

(1996) 09 BOM CK 0006
In the Bombay High Court
Case No : Writ Petition No. 342 of 1984

Mathuradas Mohota College of Science	Vs	APPELLANT
R.T. Borkar and Others		RESPONDENT

Date of Decision : 30-09-1996

Acts Referred:

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

Citation : (1996) 98 BOMLR 718 : (1997) 2 MhLj 168

Hon'ble Judges : M.B. Shah, C.J;S.B. Mhase, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.B. Mhase, J.—This petition is directed against the judgment and order passed by the Presiding Officer, School Tribunal Nagpur on 7.1.1984 whereby the petition was directed to reinstate the respondent No. 1 in service with effect from 17.3.1982 with continuity and seniority in service Respondent No. 1 is further held to entitled for future pay and allowances from the date he joins and the respondent No. 1 was directed to join his services forthwith or in any case on or before 30.1.1984.

2. The petitioner is a Science College and the respondent No. 1 was appointed by order dated 26.9.1991 as a part-time teacher purely on temporary basis to teach the subject of Biology (Botany) eventhough the respondent No. 1 is possessed of M.Sc. degree in Zoology. This was not a regular appointment in a clear vacancy and therefore, his appointment was on hour basis @ Rs.10/-per clock hour. It was a purely temporary appointment subject to the approval from the Education Officer and the Local Managing Committee of the College. Thus, the petitioner was in service from 1st Oct. 1981. His services were terminated by order dated 16th March 1982 with effect from 17th March, 1982 since there was no work for respondent No. 1. However, in the petitioner Institution for the academic year 1982-83 there was full work load available and, therefore, advertisement to that

effect was issued in the newspaper for the post of teachers to teach various subjects including Botany. The qualification prescribed was M.Sc. IInd Class in the concerned subject preferably with B.Ed, degree. The respondent No. 1, applied for the said post and appeared for interview. However, the petitioner Management did not select the respondent No. 1. Instead, Smt. A.V. Dange who was M.Sc. (Bombay) 1st class first from the Nagpur University and also possessed of B.Ed, degree in 1st Class with previous teaching experience of 5? years in some other colleges, was selected, by order dated 17.3.1982. The interview were held on 5.8.1982 and having found to have failed in the interview, respondent No. 1 applied on 11.8.1982 to the Deputy Director of Education making grievance in respect of his termination. However, it appears that the Deputy Director of Education has not taken cognizance of the said complaint and, therefore, respondent No. 1 filed appeal before the School Tribunal on 22.11.1982.

3. The said appeal was allowed by the impugned judgment. In the facts and circumstances, the Tribunal has held that the respondent No. 1 was appointed in the mid of session. However, his appointment was approved by the Deputy Director of Education and thereby inferred that the respondent No. 1 was qualified to teach Botany subject for the year 1981, observing that the respondent No. 1 might have taken Botany upto graduation and, therefore, his appointment was approved. It was further observed that, therefore, in the academic Sessions 1982-83, he should have been continued when the post became full-time. It was further observed that it was a clear vacancy and as the respondent No. 1 was possessed of requisite qualification, he ought to have been appointed on probation for two years and not for a specific period and, thus, the Tribunal observed that the appellant was appointed on probation of two years u/s 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 and termination of his service from 17th March 1982 is treated void, because the service rules governing the services of the respondent No. 1 were not followed.

4. The petitioner has submitted that the approach of the Tribunal was not legal. The respondent No. 1 was appointed in a temporary vacancy on clockwork basis in the mid of the session of the academic year and that too by the Principal of the College making the appointment of respondent No. 1 subject to the approval from Dy. Director of Education and the Local Managing Committee of the College. It was further submitted that the Tribunal erred in giving deeming effect of an appointment in a clear vacancy on probation of two years when, in fact, the appointment order was only on clock-hour basis @ Rs.10/-per hour. It is further submitted by the petitioner that the termination order was accepted by the respondent No. 1. He applied afresh for full-time post and when it was found that a meritorious candidate from the Scheduled Caste Category was selected by the petitioner, the respondent No. 1 started making grievance. It is further submitted that his appeal which was filed on 22.11.1982, was time-barred and the Tribunal erred in entertaining the said appeal without there being any formal application

for condoning the delay. It was submitted by the respondent No. 1 that as the appointment order dated 26.9.1981 was approved by the Dy. Director of Education, he should have been continued in the full-time post for the academic session 1982-83. Respondent No. 1 vehemently supported the order of the Tribunal.

5. It is pertinent to note that the appointment of the respondent No. 1 was mid-session appointment on clock-hour basis and was equally a purely temporary one. It appears that the said appointment was issued by the Principal of the petitioner college and, therefore, the appointment was made subject to approval of the Local Managing Committee also. Accepting this order, the respondent No. 1 worked on clock-hour basis since 1st Oct. 1981 to 17th March 1982. During this period, it was never complained that there is clear vacancy and, therefore, the respondent No. 1 is entitled to an appointment on regular basis in a time scale. So also it will be evident that after termination, in response to the fresh advertisement, he preferred application and thereafter appeared for interview also. All these facts would establish that there was no clear vacancy in the year 1981-82 so as to make his appointment of the respondent No. 1 on probation as contemplated u/s 5(1) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, the "MEPS Act"). Therefore, we hold that the Tribunal has committed an error in holding that the said appointment of the candidate is to be treated on probation for 2 years and termination of service of the probationers without-following the procedure is bad.

6. Application of Section 5 of the MEPS Act made by the Tribunal to the order in question at Annexure-A was improper. It is to be noticed that even Section 5 of the Act does not require that the Management shall make appointment of probationer. Sub-section (1) of Section 5 lays down that the management shall, as soon as possible, fill in the manner prescribed every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy. Sub-section (2) lays down 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 (4) and (5), he shall, on completion of this probation period of two years, be deemed to have been confirmed. Sub-section (5) of Section 5 provides that the Management may fill every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf and shall state the period of appointment of such person. Rule 10 of the Rules of 1981 framed under the MEPS Act provides categories of the employees. According to this rule, employees shall be permanent or non-permanent. Non-permanent employees may be either temporary or on probation. Temporary employee is one who is appointed in temporary vacancy for a fixed period. Reading Section 5 alongwith Rule 10, it is clear that as soon as possible, the Management shall fill in the permanent post by appointing a person duly qualified to fill such vacancy. It will be further clear that the non-permanent employees may be temporary or on probation and the temporary appointment is for the temporary vacancy. Thus

understood, the vacancy with the petitioner when the respondent No. 1 was appointed, was non-permanent temporary vacancy without availability of the work load required to be assigned to the teacher and, therefore, his appointment on clock-hour basis was made. Eventhough the said appointment was approved by the Deputy Director of Education, the said approval was for a period from 1st Oct. 1981 to the end of the academic session and, therefore, the Tribunal was in error in holding that the appointment of the respondent No. 1 was in a clear vacancy and, therefore, should have been an appointment on probation for two years as provided u/s 5 of the MEPS Act.

7. It is further to be noted that the post was of teacher in Botany subject which was not the subject of the respondent No. 1 as the respondent No. 1 is M.Sc. in Zoology and, therefore, it cannot be said that the respondent No. 1 was duly qualified for the said post. Apart from this, even assuming that there was a clear vacancy, the order issued was purely temporary and, therefore, it was not proper in order. However, it will be an error to treat the said order as an order u/s 5 of the Act, viz. the order for a period of two years, probation. Such legal fiction we do not find anywhere in the Act and the Rules and, therefore, the finding recorded by the Tribunal that the order is covered u/s 5 of the MEPS Act is not correct.

8. It is further to be noted that eventhough the respondent No. 1 was Scheduled Caste candidate, the candidate selected for the said post viz. Smt. A.V. Dange is also a scheduled caste candidate possessing superior qualification than the respondent No. 1 as she is M.Sc. in Botany and, therefore, the grievance of the respondent No. 1 that being scheduled caste candidate he was entitled to be appointed, is not worth-appreciating.

9. Section 9 of the MEPS Act provides that the appeal shall lie to the School Tribunal and the said appeal shall be made by the employee within 30 days from the date of receipt by him of order of dismissal, removal or otherwise termination of his service. Sub-section (3) of Section 9 provides that the Tribunal may entertain appeal after expiry of 30 days if it is satisfied that the appellant has sufficient cause for not preferring the appeal within the stipulated period. Thus, the provision has been made to entertain time-barred appeal on a sufficient cause being shown by the appellant and the Tribunal is satisfied. Eventhough this is a rule of procedure and liberally construed to impart substantive justice, it cannot be forgotten that it is a statutory provision and, therefore, it is necessary for the appellant to show sufficient cause for not preferring the appeal within the time limit prescribed. Absolute absence on the part of the appellant to explain the delay and or to furnish cause to the satisfaction of the Tribunal takes away the jurisdiction of the Tribunal to entertain the appeal. It is pertinent to note in the present matter that the services of the respondent No. 1 were terminated with effect from 17th March 1982 by order dated 16th March 1982 and, therefore, appeal should have been filed on or before 15th April 1982. However, the respondent No. 1 has filed appeal on 22nd Nov. 82 and thus, there is

inordinate delay in filing the appeal, The said delay was not explained even formally assigning any sufficient cause so that it can be considered by the Tribunal to satisfy itself to condone the delay and entertain the appeal. We also do not find in the judgment of the Tribunal any sufficient cause being considered by the Tribunal and the delay has been condoned by the Tribunal and, therefore, we feel that the Tribunal has committed an illegality in entertaining the appeal and exercising the jurisdiction u/s 9 of the MEPS Act. In view of the facts and circumstances stated above, we find that the order of the Tribunal is bad and illegal, and is required to be quashed and set aside.

10. In the result, the petition is allowed. Order dated 7.1.1984 (Annexure-1) passed by the School Tribunal, Nagpur, impugned in the petition, is quashed and set aside. Rule is made absolute with no order as to costs.