

(1997) 07 BOM CK 0065

In the Bombay High Court

Case No : Writ Petition No's. 1098 to 1102 of 1997

Meera Babulalji Modi

APPELLANT

Vs

Education Officer (Secondary), Zilla Parishad Nagpur and
others

RESPONDENT

Date of Decision : 08-07-1997

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 26, 26(5)

Citation : (1998) 1 ALLMR 54 : (1998) 4 BomCR 425 : (1998) 1 MhLj 175

Hon'ble Judges : V.S. Sirpurkar, J; B.H. Marlapalle, J

Bench : Division Bench

Advocate : A.P. Deshpande, for the Appellant; A.M. Badar and R.R. Deshpande, A.G.Ps, Z.A. Haq, for the Respondent

Judgement

V.S. Sirpurkar, J.—Rule issued against respondents Nos. 1 and 2 only. It is not necessary to issue any Rule against respondents Nos. 3 and 4 as no relief is claimed against them.

Notice for respondent No. 1 accepted by Shri A.M. Badar and Shri R. R. Deshpande, Assistant Government Pleaders. Notice for respondent No. 2 accepted by Shri Z.A. Haq, Advocate, in all the petitions.

2. Heard forthwith, with the consent of the parties.

As already stated in the operative part of the judgment, we have disposed of and rejected the abovementioned writ petitions on 8th July, 1997. Following are the reasons in support of that order :

All these five writ petitions involve a common question of repatriation of the petitioners, who were the erstwhile employees of the respondent No. 2- Chanda Shikshan Prasarak Uandal, Chandrapur (hereinafter referred to as "the Society" for the sake of brevity), and were teaching in the school run by that Society. All the petitioners were declared surplus in their school and were absorbed in some

other schools at Nagpur. These absorption orders were passed under Rule 26 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (hereinafter called "the Rules" for the sake of brevity). It seems that all of them have received a communication from the respondent No. 2 that they were being repatriated to their parent Society respondent No. 2. It is also a common factual background that all these petitioners/teachers, after they were rendered surplus, have been absorbed in the schools run at Nagpur. However, now, by the impugned order of repatriation, they are being sent to the schools run by the respondent No. 2 Society in Chandrapur district.

3. The common challenge of the petitioners is based on Rule 26(5) of the Rules. They contend that once a teacher, who is rendered excess and is adjusted and absorbed in some other school, he gets option either to get repatriated to his original school or to continue in school in which he has been absorbed. Their common ground is that they have exercised this option and they have refused to be repatriated to the original schools and, thus, the respondent No. 2 could not have ordered their repatriation as it has done by the impugned communication, and the respondent No. 1- Education Officer could not have insisted upon their going back to the original schools in pursuance of the communication made by respondent No. 2. They further contend that they, excepting one (i.e., petitioner in Writ Petition No. 1102 of 1997), are the ladies and are stationed in Nagpur and their sudden uprooting would cause a great prejudice to their family life.

4. A notice before admission was issued to the parties and the respondent No. 1 has come out with the explanations in support of the action. The Education Officer explains that the respondent No. 2-Society runs in all 14 schools in Chandrapur, Yavatmal and Nagpur districts, and since some sections in some of the schools were reduced because of the reduction in the strength of pupils; it was primarily the responsibility of the respondent No. 2-Management to absorb the surplus teachers in its other schools on vacant posts created due to either retirement or sanctioning of the additional divisions; but the respondent No. 2 failed to take the proper steps in this behalf and submitted a proposal regarding retrenchment and absorption of the excess staff, stating therein that there were no vacancies in the schools run by it and, therefore, the petitioners, who were rendered surplus, were liable to be absorbed in other private schools.

5. Respondent No. 1-Education Officer further goes on to explain that thereafter a complaint was made to the Deputy Director of Education by none else but a member of the respondent No. 2-Society, along with some other teachers, and it was found that though there were vacancies of the teachers in the other schools run by the respondent No. 2-Society, instead of absorbing the surplus staff, it had proceeded to make some new appointments. Thus, though the petitioners were not rendered surplus in the real sense of the term, they were wrongly absorbed in the schools belonging to some other Societies in Nagpur. The Education Officer further suggests that in fact the respondent No. 2-Society is rectifying its own mistake by adjusting them in the other institutions, by sending

the impugned communications and, therefore, there is no question of there being any choice in favour of the petitioners in term of Rule 26(5) of the Rules and, therefore, the petitioners will have to go back in terms of the communication issued to them by the respondent No. 2 Society.

6. Shri Z.A. Haq, learned Counsel appearing on behalf of the respondent No. 2-Society, submitted that on being rendered surplus in the school where the petitioners were working, they made representations to the respondent No. 2 and thereby sought their repatriation at Nagpur in some other Societies and, therefore, taking into consideration their representations, the respondent No. 2-Society did not insist on their absorption in the other institutions run by it and chose to recommend their repatriation in some other schools not run by the respondent No. 2-Society.

7. On this factual backdrop, it will have to be seen whether the petitioners have any option in terms of Rule 26(5) of the Rules of not going back in terms of the impugned communication and whether they have further right to stay in the very schools where they have been allegedly absorbed.

8. Shri A.P. Deshpande, learned Counsel appearing on behalf of the petitioners, invited our attention at Rule 26(5) of the Rules, which runs as under :--

"The retrenched person who may have been absorbed in other school, shall have an option either to get repatriated to his original school or to continue in schools in which he has been absorbed."

The learned Counsel contended that it was an admitted position that the respondent No. 1-Education Officer had, in fact, passed the orders of absorption and it was only in terms of those absorption orders that all the petitioners came to be absorbed in the schools at Nagpur. He, therefore contended that to ask them to go back in terms of the impugned communication would be a violation of that right. The learned Counsel, secondly, contended that this was a right earned by the petitioners in terms of Rule 26(5) of the Rules and, therefore, the action of sending them back could not have been taken against them, without hearing them. He pointed out that both the management as also the Education Officer had not heard the petitioners, and refusing to hear the petitioner, which has affected them so vitally, amounts to denial of natural justice and would invalidate the action. Thirdly, the learned Counsel contended that there being no power of review provided under the Rules, the Education Officer could not have reviewed his orders. The learned Counsel contended that in terms of Rule 26(2)(iii) of the Rules, the Education Officer had absorbed the petitioners. That absorption could not be effaced, once that absorption had become final. Lastly, the learned Counsel suggested that the principles of equity demanded that the normal practice of accommodating the petitioners in the same district should have been adhered to.

9. Rule 26 of the Rules generally provides the procedure for retrenchment on account of the abolition of the posts. It applies to the permanent employees and

there is no dispute that all the petitioners were the permanent employees. It is also not disputed either by the petitioners or by the respondents that they (petitioners) were rendered surplus on account of the reduction of the number of pupils. Clause (iii) of sub-rule (2) of Rule 26 is very vital. It suggests that the employees of the aided schools, who are proposed to be retrenched, shall be absorbed by the Education Officer, or by the Deputy Director of Education, as the case may be, and till such an employee is absorbed, the management shall not be permitted to effect the retrenchment on account of any reasons mentioned in Clause (i) of the said sub-rule (2) of Rule 26 of the Rules. In short, a permanent employee has a complete protection against the retrenchment and also has a right to be absorbed before he is considered for retrenchment.

Sub-rule (3) of Rule 26 provides that where any employee refused to accept the alternative employment offered to him under Clause (iii) of sub-rule (2), he would lose his claim for the absorption and it is only then that the management would be allowed to retrench the employee by giving him three months' notice.

Sub-rule (4) of Rule 26 provides that the posts, because of the abolition of which the employees were retrenched, are revived, or additional posts created, the management shall, by a registered acknowledgment due letter, inform the employee, who is retrenched and absorbed in other school, and give him the first opportunity of rejoining the service in the school.

Sub-rule (5) of Rule 26, which has already been reproduced earlier, gives a right to such employee either to get repatriated to his original school or to continue in the school in which he has been absorbed.

The whole scheme, therefore, would suggest that there is a complete embargo on the retrenchment of the permanent employee and he has a right to be absorbed, unless of course the said absorption is waived by such a permanent employee. All these principles are applicable where the retrenchment is sought to be made under Rule 26 for the reasons stated in that rule. Those reasons are: (1) the reduction of establishment owing to reduction in the number of classes and divisions; (2) fall in the number of pupils resulting in the reduction of establishment; (3) change in the curriculum affecting the number of certain category of employees; (4) closure of course of studies; and (5) any other bona fide reason of similar nature. The Rules provide a different mechanism in respect of the termination of service on account of abolition of posts.

10. It seems that in the present case, the absorptions have been ordered as all the petitioners were rendered surplus and were liable to be retrenched under Rule 26(2) of the Rules. There can be no doubt that where the permanent employees, like the present petitioners, are rendered surplus for any of the reasons contemplated under Rule 26 and face a retrenchment, would be entitled to the absorption; but it is equally clear that for the purposes of this protection in the shape of absorption, they must be in reality facing the danger of retrenchment. It has come out specifically from the reply of the Education Officer

that there was no question of the retrenchment of these petitioners and their proposal of the retrenchment an absorption was itself, without any basis, and to put it mildly based on incorrect facts. It has been pointed out that the respondent No. 2- Society had incorrectly reported that there were no vacancies in the schools run by it and, therefore, the retrenchment and the resultant absorption of the petitioners was recommended and prayed for. However, it was found factually that there, in fact, were vacancies of the teachers in the other schools run by the respondent No. 2- Society. Not only this, the respondent No. 2 had also proceeded to make some new appointments instead of absorbing the present petitioners who were rendered surplus, in its other schools. The Education Officer, thus, has taken a stand that the petitioners were not, in fact, rendered surplus at all, as they could have been accommodated in the other schools of the respondent No. 2-Society. The factual position could not be controverted by the petitioner in any of the petitions. There is no counter affidavit by any of the petitioners challenging the factual submissions made by the Education Officer. As if this is not enough, even the respondent No. 2 has not been able to suggest that there were no vacancies in its other schools and in reality the present petitioners had become surplus. On the other hand, Shri Haq took a specific stand that the cases of these teachers/petitioners for the retrenchment and absorption were recommended on account of the representations made by them only and that the management had merely condescended to the requests made by them (petitioners), and it was because of this that the said teachers/petitioners came to be accommodated in the Nagpur district.

11. If the factual position as suggested by the Education Officer stands established, then there was, in fact, no question of any retrenchment by the respondent No. 2 of the petitioners, as it sought to do. Consequently there was further no question of their absorption in any other schools run by any other managements, under Rule 26 of the Rules. Consequently further, the action on the part of the respondent No. 1- Education Officer in absorbing them and putting them in schools in Nagpur district was, itself, an action based on the incorrect reporting of the facts made by the respondent No. 2. That absorption, therefore, was a non est absorption. For the application of Rule 26(2)(iii) of the Rules, the employees must be such whose services are proposed to be retrenched. In fact, there was no occasion for the retrenchment of these petitioners who could have been easily accommodated in any other schools run by the same management, and the factual position suggests that there was a full scope for the accommodation, inasmuch as the respondent No. 2 thereafter proceeded to appoint new teachers. The petitioners also did not dispute this position and also did not dispute the fact that they had, in fact, made representations to the respondent No. 2-Management to recommend their cases for absorption. Thus, the retrenchment and the absorption of the petitioners was a sought-after-action. If this was so, there was no question of there being any right having been earned, muchless under Rule 26(5) of the Rules, by any of the

petitioners. The very basis of the right earned under Rule 26(5) is a legal and proper absorption as contemplated in Rule 26(2)(iii). In the present case, there being no such legal and proper absorption, the assertion on the part of the petitioners of the right under Rule 26(5) of the Rules is merely a myth. The contention of the learned Counsel, therefore, that there was a violation of the right of the petitioners under rule 26(5) of the Rules, has to be rejected. There is much scope to hold that the very basis of the right of these petitioners was an absorption brought about by the misrepresentation by the respondent No. 2 and, therefore, did not as such exist, we therefore, proceed to reject the argument of the petitioners on this account.

12. Once it is held that there was no right under Rule 26(5) of the Rules in the peculiar backdrop of the facts in these cases, there is no question of consideration of the arguments of the learned Counsel that no hearing was given to the petitioners before they were sought to be absorbed by the impugned communications. It will be against seen that the impugned communication is an order passed not by the Education Officer-respondent No. 1, but by the Secretary of the respondent No. 2 Society. It is a communication by which the petitioners have been informed that since they were rendered surplus in the schools where they were working, they were being accommodated in the other schools in Chandrapur district. If one has a look at these orders, it will be seen that all the five petitioners were serving in Janata High School, Wardha Road, Nagpur. Thus, the schools was in the Nagpur district, though the management thereof operated from Chandrapur. Since these petitioners/teachers were rendered surplus at Nagpur, it seems that all the petitioners had made representations to the respondent No. 2, as otherwise they would have been sent out of the city of the Nagpur where they were serving for almost more than 10 years. It seems that even the respondent No. 2 condescended to these representations and reported them to be the teachers liable for retrenchment when, in fact, the respondent No. 2 Society had the vacancies in its other schools, though run outside the district of Nagpur. If the petitioners were the employees of respondent No. 2 the respondent No. 2 could always have accommodated them in any other schools whether those schools existed at Nagpur or anywhere else. The anxiety on the part of petitioners not to leave Nagpur -which anxiety is not altogether unnatural, seems to be behind the chaos that has been caused, where the petitioners as also the respondent No. 2 became a party to the incorrect representation of facts on the part of the respondent No. 2. The petitioners, therefore, cannot be entirely without any blame as they have also made representations to the respondent No, 2 for accommodating them somewhere in Nagpur district, taking advantage of the Rule 26(2)(iii) of the Rules, when, in fact, that rule was not applicable to them at all. This position could not be disputed, for the learned Counsel for the respondent No. 2, Shri Haq, at the time of the arguments, disclosed that the petitioners themselves had made representations to accommodate in Nagpur district, by taking recourse to the procedure under Rule 26(2)(iii) of the Rules.

13. In view of the factual position stated above, there was no question of the petitioners having earned any right, or of denial of the right. There was also no question of hearing the petitioners by the respondent No. 1-Education Officer as the subsequent order, which is impugned in these petitions, has not been passed by the respondent No. 1-Education Officer, at all. Indeed , it is not the case of the petitioners that it is the Education Officer-respondent No. 1 who has passed any such order. Probably finding that their joint-scheme with the management was exposed, the petitioners have ventured to file these petitions treating their shifting to be an action on the part of the Education Officer. The Education Officer has, in his return, very specifically contended that it is not his action which is sought to be challenged in the petitions, but the communication by the Secretary of the respondent No. 2-Society, though he has correctly stated that the petitioners had no right whatsoever to be absorbed and, in short, the Education Officer has in a couched language admitted that his earlier action for absorption was an incorrect action having been brought about by the respondent No. 2 on the basis of the incorrect factual reporting. Under these circumstances, we do not feel that any hearing was liable to be given to the petitioners, before the impugned action, either by the management or by the Education Officer.

14. Lastly, Shri Deshpande made a desperate argument that the Education Officer had no right of review, and once the order was passed under Rule 26(2) (iii) of the Rules, it had become irrevocable. The argument is mentioned only to be rejected. The orders of absorption were undoubtedly a product of factually incorrect representation on the part of the respondent No. 2, which was more or the less brought about by the petitioners themselves. Even at the cost of repetition, we may say that the learned Counsel for the petitioners could not dispute or refute the statement made by Shri Haq, learned Counsel appearing on behalf of the respondent No. 2, that the petitioners themselves had made representations to the management for declaring them surplus and accommodating them at Nagpur. We do not blame the petitioners, as it would be very natural on their part to wish to remain at Nagpur where they were serving for more than a decade; but again their need, howsoever genuine it may be, cannot justify the incorrect reporting by the respondent No. 2 and the consequent absorption based on that report. If the action of the Education Officer of absorption was based on the incorrect factual report, there is no question of any review on his part and, in fact, the order of absorption becomes non est. The principles of review would not apply in this case, at all, as, firstly, the Education Officer had not passed any order contrary to the order of absorption and, secondly, even if he had passed such order, he would have been perfectly justified in cancelling his own order on account of the realisation of the error. In fact, the principles of review will not apply to an administrative action, at all.

15. It will, therefore, be seen that there is no scope for interfering in these petitions. It was, however, earnestly urged by the learned Counsel for the petitioners that the petitioners would be ruined as four of them are the house-wives and their families would unnecessarily suffer if they were to be sent

outside the Nagpur district. He also pointed out that all through the petitioners were the employees of the schools at Nagpur and at this juncture if they are sent out, they would be suffering great prejudice. The learned Counsel also further urges that there is a possibility of some teachers being rendered surplus in Chandrapur, who may be required to be sent to Nagpur and as against such teachers if the petitioners could be accommodated it would at least save their families. No factual position has been argued before us in this behalf, nor has it been shown that any such eventuality is possible. We, therefore, only observe that the petitioners may make a representation to the Education Officer, Nagpur, who will consider the said representation in consultation with his counterpart at Chandrapur, within a reasonable time of three months. The status quo orders as ordered by this Court on 21-4-1997 are vacated forthwith. The petitions have no merits and are dismissed with costs against the petitioners and the respondent No. 2, jointly.

16. Petitions dismissed.