

(2009) 10 BOM CK 0089
In the Bombay High Court
Case No : Writ Petition No. 601 of 2005

Mrs. Sumangala Sakharkar	Vs	APPELLANT
The State of Maharashtra and Others		RESPONDENT

Date of Decision : 12-10-2009

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 5
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 12, 12(3), 13

Citation : (2010) 1 BomCR 822 : (2010) 1 MhLj 63

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

Bench : Single Bench

Advocate : S.P. Bhandarkar, for the Appellant; T.R. Kankale, A.G.P. for Respondents Nos. 1 to 3, K.V. Thomas, for Respondents No. 4 and 5, R.S. Parsodkar and Kirti Satpute, for the Respondent

Judgement

R.C. Chavan, J.—This petition by a teacher is directed against orders passed by respondent No. 3 Education Officer (Secondary), Zilla Parishad, Chandrapur on 30.06.2004 and 02.02.2005 whereby he held the petitioner to be junior to respondents No. 6 to 8 in respondent No. 5 school run by respondent No. 5 society.

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

The petitioner who was B.A. B. Ed. was appointed as Assistant Teacher on 05.01.1981 temporarily up to the end of academic session 198081. After vacation her appointment was continued from 29.06.1981 till the end of academic session 198182. On 18.06.1992, she was again appointed for academic session 198283. She was appointed w.e.f. 27.06.1983 on a continuous basis. All these appointments were approved by respondent No. 3 from time to time.

3. The breaks in the service of the petitioner (summer vacations) from 10.05.1981 to 26.06.1981, 09.05.1982 to 17.06.1982, 08.05.1983 to

26.06.1983 were condoned. She had already been paid salary for these periods.

4. Respondent No. 8 Dhakate was appointed as Assistant Teacher on 01.02.1969. At that time he was H.S.C., D.P.Ed. He passed B.A. On 14.02.1978 and B. Ed on 05.06.1981. Thus, he came in category "C" on 05.06.1981. Respondent No. 6 More was B.Sc. D. Ed. at the time of his appointment on 15.07.1977. He too acquired B. Ed. on 05.06.1981 and thus came in category "C" from that date. Respondent No. 7 Nishane was B.A. D. Ed. at the time of his appointment on 26.08.1977 and he too acquired B. Ed. in 05.06.1981 and thus came in category "C" from that date. On 26.02.1991, respondent No. 3 fixed seniority of petitioner and respondents No. 6 to 8 as under:

(1) Petitioner, (2) Respondent No. 8, (3) Respondent No. 7, (4) Respondent No. 6. This was confirmed by respondent No. 2 by letter dated 06.05.1992. Respondent No. 8 challenged this order by filing Writ Petition No. 2237 of 1992. By judgment dated 07.09.1993, this Court directed respondent No. 3 to hear the parties and refix seniority within four months, setting aside the order dated 26.02.1991.

5. After hearing the parties, by order dated 15.01.1994, respondent No. 3 again held the petitioner to be senior to respondent No. 8. This position continued till 2004. When respondent No. 6 More again raised the same dispute. Thereafter, by the impugned orders respondent No. 3 held respondents No. 6 to 8 to be senior to the petitioner

6. I have heard learned Counsel for the parties.

7. From the facts unfolded, the position of petitioner and respondents No. 6 to 8 from time to time would emerge as under:

Date/Year

Category C (Graduate + B.Ed.)

Category D (Graduate Diploma Holder)

Category (Trained undergraduate E

01.07.1969

Resp. Dhakate. No.8

15.07.1977

Respondent More No.6

26.08.1977

Respondent Nishane No.7

1978

Respondent Dhakate No.8

05.01.1981

Petitioner Surkar* (by condoning breaks)

05.06.1981

Respondent NO.6 More Respondent No.7 Nishane Respondent No.8 Dhakate.

26.06.1983

Petitioner Surkar* (Continuous appointment)

8. The crucial question therefore, is whether petitioner's service could count for seniority from 05.01.1981 or from 26.06.1983, or in other words if the discontinuation of her appointment in three summer vacations could be ignored as condoned. The management had admittedly resolved to condone the breaks on 04.10.1985. This action was admittedly approved by the Education Officer. In the reply filed on behalf of respondent No. 3 it is stated that power to condone breaks was with the Deputy Director and not the Education Officer and thus, the approval was not by appropriate authority. The breaks condoned could count only for pensionary benefits and not for seniority. Therefore, for the purpose of seniority her service will count only from 26.06.1983. Respondent No. 6 More and respondent No. 7 Shri Nishane, in their written submissions even questioned the veracity of resolution dated 04.10.1985 condoning breaks. But they do not state that they had ever objected to seniority settled in 1994 till 2004. Respondents No. 4 and 5 the management has however, supported petitioner's cause contending that breaks in petitioner's service were condoned and for all intents and purposes the petitioner was in continuous employment in category "C" from 05.01.1981.

9. Considering the stand taken by the management, objections of respondents No. 6 and 7 to resolution condoning breaks has to be rejected. Also, as a fact the Education Officer/ respondent No. 3 has accepted that this action was approved by him, may be, without authority.

10. The learned Counsel for the petitioner submitted that once the Education Officer had settled the question of seniority in 1994, there was no reason for the Education Officer to take a contrary view in 2004. The question once settled could not have been reagitated, merely because respondent No. 6 More chose to reagitate the questions in 2004, after sleeping over the matter for ten years.

11. The learned Counsel for respondent No. 6 submitted that earlier decision dated 15.01.1994 was only on objection raised by respondent No. 8 Dhakate, who was junior to respondent No. 6, and hence, the question of interse seniority between petitioner and respondent No. 6 was never decided earlier. The learned Counsel for respondent No. 7 submitted that respondent No. 7 had in fact objected to seniority in 1994 but the objection was not decided then and therefore, justified re-fixation of seniority by impugned orders.

12. It is not necessary to go into the question of occasion or necessity for

fixation of seniority. Rather, it may be useful to consider the following aspects:

1) Whether discontinuation of appointment of the petitioner at the ends of academic sessions and her reappointment amounted to breaks which were required to be condoned ?

2) If yes, whether the management or Education Officer had the authority to condone such breaks ?

3) Whether such condonation could be only for the purpose of counting service for pensionary benefits and not for the purpose of seniority ?

13. On the first question the learned Counsel for respondent No. 6 and 7 submitted that since the petitioner herself had not come up with the case that there were no breaks and that she merely claimed that breaks had been condoned, it may be impermissible to find for a party a case which is not pleaded. The learned Counsel for the petitioner submitted that requirement of pleadings would limit an argument based on facts and not an argument about legal consequences flowing from facts pleaded. He submitted that if a legal aspect of a matter is missed by the parties, or even the authorities, it could always be raised even in the course of a hearing.

14. Having considered the rival submission on this aspect, I would hold that absence of pleadings cannot prevent a party from pointing out the consequences flowing from a provision of law. Therefore, the basic question whether there was a factual break or not would have to be decided.

15. In Punjab State Coop. Agricultural Development Bank Vs. Gurnaib Singh, , on which the learned Counsel for respondent No. 6 placed reliance, the plaintiff was appointed on 02.07.1971 for a period of six months and again on 04.01.1972 till 25.05.1972. He was not in service from 26.05.1972 till 05.03.1973. He was again appointed on 05.03.1973 w.e.f. 06.03.1973. The question was whether the service from 02.07.1971 till 06.03.1973 with breaks could be counted towards seniority of the plaintiff. The Supreme Court held that since the plaintiff himself, after the break period, subsequently made an application for appointment, earlier service could not be counted. It may be seen that the break was long one from 26.05.1972 to 05.03.1973 and not on account of vacation or institution being closed. Therefore, this judgment would not help in resolving the case at hand.

16. The relevance of judgment of the Division Bench of this Court in Yeshwant v. Director of Education, Pune, reported at 1987 LAB. I.C. 1611 is not clear, since in that case the question was about transition of service conditions of the teachers and lecturers employed under the erstwhile Madhya Pradesh State after the State of Bombay and later State of Maharashtra was formed.

17. The learned Counsel for the petitioner placed reliance on my order dated 25.02.2008 in Writ Petition No. 4645 of 2007, where I had held that discontinuation during vacations do not amount to breaks He also pointed out

that a Letters Patent Appeal by his client in that case is admitted (since his argument to the contrary was rejected) but submitted that till the judgment is set aside, it would bind me, unless it is shown that even when it was pronounced it ran counter to a view already taken by this or a superior Court. All the learned Counsel, however, agree that the question as to whether such discontinuation amounts to breaks has not been, to their knowledge, dealt with in any other pronouncement. The learned counsel for respondents No. 6 and 7 submitted that it would be open to them to show the view taken was not correct and therefore, urged that the question may be reexamined. I find that a fresh look at the finding in Writ Petition No. 4645/2007 may be appropriate.

18. The learned Counsel for respondents No. 6 and 7 submitted that for fictionally holding that a break did not exist, it would be necessary to have a rule. They submitted that Rule 13 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules only provides for payment of vacation pay to a teacher who was serving before and after a vacation, and does not add that such teacher be fictionally deemed to have continued. Therefore, such a fiction could not be created. The learned Counsel for the petitioner opposed this.

19. It may be useful to reproduce Rule 13 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 for ready reference in order to consider this argument:

13. Vacation and Vacation Pay

(1) Subject to the provisions of this rule, all the employees on the teaching staff including Head masters, Laboratory Assistants and Laboratory Attendants in a school shall be entitled to vacations as follows namely:

- (i) a short vacation which may either commence in a month of October or November every year generally to cover Diwali Festival;
- (ii) a Summer vacation which may ordinarily commence in the month of May every year.

The dates of commencement and the periods of vacations shall be notified by the Educational Inspector, or as the case may be, the Education Officer in Zilla Parishad.

(2) Nonpermanent employee shall be entitled to the salary for the period of vacation if he had served for a major part of respective term and the temporary vacancy such as vacancy on account of leave, deputation or post created for a specific period, in which he was originally appointed continues to exist beyond the period of vacation and that the employee continues to be in service after the vacation.

(3) If the Management terminates the services of a nonpermanent employee son before the commencement of Summer vacation, such nonpermanent employee shall also be entitled, in addition to vacation salary, to pay and allowances for the

gap between the date of termination of his service and the date of commencement of the vacation if the Education Officer is satisfied that the termination of his service was on the ground other than the possibility of reduction in establishment.

(4) If a permanent employee after due notice, resigns his post in the school on the last working day of the term, he shall be entitled to the vacation salary.

(5) If a permanent employee after due notice, resigns his post in the school in the middle of the term and if the school is required to appoint a substitute who would otherwise be entitled to vacation salary under Sub-rule (2), the permanent employee who has resigned shall not be entitled to the vacation salary for the same period.

(6) Untrained teachers appointed in the Secondary Schools or Junior Colleges of Education during the period from the 16th July 1969 to 6th February 1974 (both days inclusive and allowed to get trained at their own cost (by sanctioning leave for the entire period of training) shall be entitled to the vacation salary during the vacation immediately falling after their resuming duties on completion of training.

20. A break is discontinuation in service. Such a break may be physical break where the employee concerned does not perform duties on account of several reasons. But an employee not performing duties on account of institution being closed for vacation cannot obviously be an incidence of break. Here, it is not that the employee is prevented from discharging his duties by any order, peculiar to him, or by any act personally on his part. He does not perform his duties simply because the institution is closed for vacation. Thus, vacation is not a break. Now, for this period if an employee is also directed to be paid salary under the Rules, it would be obviously so because the administration considers that, but for the vacation the employee would have continued to be in employment and therefore, is held entitled to the salary for vacation period.

21. Rule 13 covers situation of employees whose employment got terminated at the commencement of vacation and began again at the completion of vacation. If an employee is held entitled to salary it may not be permissible to hold that though he drew salary he was not in employment, because ordinarily the salary comes with employment. Therefore, vacation cannot be treated as a break in service for two reasons : first, but for the school being closed for vacations, the employee would have continued, and secondly, as the employee is held entitled under Rule 13 to the salary for the said period and had actually drawn that salary. Therefore, termination at the commencement of vacation and reappointment on reopening of school could not at all be termed as a break. Therefore, even upon reexamination of the reasons given while deciding Writ Petition No. 4645 of 2007, I am not persuaded to take a different view.

22. The contention of the learned Counsel for respondents No. 6 and 7 that, a fiction could not be created by a judgment, may not be correct. That apart, the

judgment in Writ Petition No. 4645/2007 does not create a fiction. It merely restates the consequences of Rule 13, which recognizes the right of the employee, who had served the school till it closed for vacation and also recommenced service from reopening of the school, to receive salary for the period of vacation. He draws salary because fictionally administration and the Government treat such a teacher to be in employment. Payment of salary for vacation period itself creates a fictional employment. Therefore, it has to be held that there were no breaks in the employment of the petitioner from the date she joined services of respondents No. 4 and 5 on 05.01.1981, which were required to be condoned.

23. Consequently, there would be strictly no occasion for examining whether the Education Officer or the Management had the Authority to condone such breaks and whether such breaks could be condoned only for pensionary benefits and not for the purpose of seniority. All the same, it may be useful to consider those questions also. In *D.P. Gupta v. Parsuram Tiwari* reported at (2004) 13 SCC 746 on which reliance was placed by the learned Counsel for the respondent, the Supreme Court was considering the question of condonation of break in service on account of the concerned teacher taking extraordinary leave without pay for surreptitiously taking up a job of Land Valuation Officer, somewhere else. The Supreme Court held that the High Court had correctly taken a view that the teacher concerned who had taken up job elsewhere has lost lien of his service with University and thus, there was a break in his service, which could not have been condoned by the Vice Chancellor. The Court held that for the purpose of his seniority and eligibility for promotion, the service would be counted only from the date of rejoining. The learned Counsel for the respondent submitted that case at hand is similar and just as Vice Chancellor in that case had no authority, the Education Officer in our case has no authority to condone break. The decision does not help since it is on facts peculiar to the case where the teacher had lost lien by surreptitiously taking up job elsewhere.

24. The Government Resolutions and other material which is pressed in aid to support the proposition that the Education Officer had no authority to condone such breaks fortifies the finding that vacation was not at all break. First, a reference can be made to Government Resolution dated 12th November, 1976. Appendix A to this resolution refers to "interruption in service". It seems that this term "interruption in service" is used synonymously with "break". Sub-clause (3) of Clause (1) of this Appendix-A enumerates interruptions in service as on the grounds of un15 employment, part time service due to non availability of full time employment, service rendered in Night Schools, Colleges or other Institutions, not covered by the pension scheme, or service rendered in unaided and unrecognised schools, and participation in freedom struggle. This enumeration leaves out vacation. Vacation is thus, not treated as interruption. This Government Resolution would also indicate that it deals with the question of condonation of break, specifically, only for the purpose of pensionary benefits, since Clause (4) of the said Appendix refers to pensionary benefits apart from

reference to institutions not being covered by pension scheme in Clause (3).

25. Another Government Resolution dated 10th May, 1989 pertaining to condonation of breaks refers to condonation of breaks for the purpose of pensionary benefits in Sub-clause (2) of Clause 6 of the said Government Resolution. It says that the powers in this behalf had been granted to Deputy Director of Education and that the managements do not have such powers. The reference to power of condonation of breaks for the purpose of pension in the said clause would imply that there can be condonation of break for other purposes as well, like seniority. Therefore, the contention that since the power to condone breaks for the purpose of pension is given to the Deputy Director, other authorities have no power to condone breaks for other purposes may not be correct. Unless it is shown that there is a Government Resolution dealing with condonation of breaks for the purpose of seniority and unless such resolution prescribes that the Education Officer does not have such a power as an officer controlling educational institutions in the district, he may not be held to be deprived of such a power. The learned Counsel for the respondents, however, submits that a power cannot be inferred and unless the petitioner shows a specific rule or a Government Resolution empowering the Education Officer to condone breaks, his orders would be without jurisdiction.

26. I have carefully considered these contentions. It has to be noted that the petitioner is not serving a government school but a private institution. The Government comes into picture only because it pays salary as well as pension to the teachers. Therefore, where financial implications are involved it would be proper for the Government to control such action and to provide that the Deputy Director of Education alone would be entitled to condone the breaks for the purpose of pension. However, such may not be the case in respect of condoning the breaks for the purpose of seniority. This does not have any financial implications and it is only a matter between different teachers who are serving under the same management. As an employer, unless prevented from deciding the question of seniority of its teachers, the management would be entitled to do so. Rule 12 of the MEPS Rules, provides that the objections to seniority have to be considered by the management in the first place. It would be for the management to decide whether the breaks for the purpose of computation of seniority could be condoned by it. Sub-rule (3) of Rule 12 provides that the disputes in the matter of interse seniority shall be referred to the Education Officer for his decision. Therefore, his concurrence in the condonation of breaks by the management should be conclusive of the matter. Thus the Education Officer gets the authority to approve condonation of break for seniority.

27. At the cost of repetition, let it be stated that condonation of breaks for the purpose of pension need not be mixed up for condonation of breaks for the purpose of seniority. Since in the former there is financial implications involved, the Government alone would be able to prescribe the authority which can condone the breaks for such purpose. However, since no financial implication is

involved in condonation of breaks for the purpose of seniority, it would be a matter between management and its employees, subject, however, the resolution of the disputes by the Education Officer under Rule 12(3) of MEPS Rules.

28. Viewed in this light, the claim of the petitioner that breaks in her service were condoned by the management and such condonation was approved by the Education Officer, which has not been controverted, would have to be accepted, even if it is taken for a while that there were, in fact, breaks in her service. Therefore, on the second question, which has been raised earlier it would have to be held that the Education Officer had the authority to condone the breaks for the purpose of seniority. On the third point foregoing discussion would show that the reference to condonation of breaks for the purpose of pension in two Government Resolutions would indicate that there can be condonation for other purposes as well, and only in respect of condonation of breaks for the purpose of pension power has been conferred on the Deputy Director.

29. The learned Counsel for the respondents No. 6 to 8 relied on judgment of a Division Bench of this Court in Priyadarshini Education Trust and The Head Master, National Urdu High School Vs. Ratis (Rafia) Bano, , where the Bench held that in order to claim benefit of deemed permanency, a teacher must be duly selected and must be appointed in clear and permanent vacancy and his appointment must not be for a fixed period. The Bench also observed that preferably such appointment should indicate that such appointment is on probation. Only if all these conditions are fulfilled, a teacher would be able to claim deemed permanency, on completion of service of two years from the date of appointment on probation or at least by an appointment fulfilling all above conditions. The learned Counsel submitted that in this case the first appointment of the petitioner did not satisfy these requirements. The first appointment was for a fixed or limited period from 05.01.1981 till the end of academic session 198081. Even next appointment from 29.06.1981 was till the end of academic session 198182. Therefore, according to the learned Counsel, since these appointments were for fixed period the petitioner could not claim benefit of deemed permanency and therefore, would not claim seniority from the date of appointment on 05.01.1981.

30. The learned Counsel for the petitioner submitted that this judgment is on facts peculiar to that cases and do not lay down law that breaks in service, purely on account of vacations, could not be condoned or in fact, amounted to breaks at all. He submitted that the question before this Court is not one of deemed permanency, but of seniority.

31. The learned Counsel for respondent No. 6 also submitted that in Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others, the Supreme Court had considered provisions of Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act and had held that appointment order has to be interpreted as it is and only when the

management has to make permanent appointment, recourse can be had to provisions of Section 5. The contention, therefore, was that in terms of the appointment, which was for a fixed period, the petitioner's services from 05.01.1981 could not be counted and her service only from 26.06.1983 when she was appointed on continuous basis could be counted for the purpose of computing seniority.

32. The learned Counsel for the petitioner referred to a judgment of this Court in *Saramma v. S.I.C.E.S. Society* reported at 1989 Mh.L.J. 951. In that case, the Court held that a teacher with B.A., B. Ed. degree wherever he teaches takes his place, according to his date of appointment and continuous officiations irrespective of scale of pay which the teachers concerned may have been placed in. In that case, the petitioner had been initially appointed in the scale of Rs. 12041405165EB51906220 on 11.06.1973. Respondent No. 5 Malti Bhide had been appointed in the scale of pay of Rs. 165500 on 1st June, 1974. Malti Bhide was subsequently shown as senior to the petitioner. Thus, the crux of the matter in fixation of seniority is the date on which person acquired requisite qualification to come in appropriate category in Schedule-F of the MEPS Rules.

33. In the present case, there can be no doubt that the petitioner was entitled to be placed in Category-C on 05.01.1981 itself when she was first appointed and from which date she is deemed to be continuously in employment. Respondents No. 6, 7 and 8 came in category-C on 05.06.1981 i.e. five months after the petitioner. There was no warrant for considering the petitioner to have been appointed on 26.06.1983 the date on which she was actually given a continuous appointment, since vacation periods for which the petitioner was paid would not be treated as breaks, and in any case, those breaks had been condoned by the management as well as the Education Officer who had the power to condone the breaks for the purpose of computing seniority in view of the provisions of Rule 12 of the MEPS Rules the restriction for condonation of breaks by the Deputy Director alone being applicable only for the purpose of pension. The petitioner has thus to be held in continuous employment from 05.01.1981 in category-C to which category respondents No. 6 to 8 joined on 05.06.1981 after the petitioner, and therefore, would rank junior to her.

34. In view of this, the impugned orders, passed by the Education Officer (Secondary), Zilla Parishad, Chandrapur on 30th June, 2004 and 2nd February, 2005 cannot be sustained and hence, are quashed and set aside.

35. Rule is made absolute accordingly.