

(2008) 11 BOM CK 0049

In the Bombay High Court

Case No : Writ Petition No. 1373 of 2005

Nav Vikas Shikshan Sanstha

APPELLANT

Vs

Purushottam Dhawale, Head Master, Gramin Vikas Vidyalaya
and The Education Officer (Sec)

RESPONDENT

Date of Decision : 17-11-2008

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 5(2), 9

Citation : (2008) 11 BOM CK 0049

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

**Advocate : Prashant Shende, for the Appellant; P.S. Sahare, for R. No. 1 and
Learned A.G.P., for the Respondent**

Judgement

B.P. Dharmadhikari, J.—Parties jointly state that facts and dates in both the matters are same and hence both the petitions can be disposed of conveniently by common judgment. Only difference is respondent No. 1 in Writ Petition No. 1373/2005 is working as Lab Attendant, while the respondent No. 1 in Writ Petition No. 1383/2005 is working as Junior Clerk.

2. The respective respondent No. 1 approached the School Tribunal with grievance that in view of provisions of Section 5[2] of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as 'M.E.P.S. Act?'), they have attained permanency and termination of their services by the petitioner Management w.e.f. 30.07.1993 is illegal. Appeal u/s 9 of the M.E.P.S. Act filed by them, was opposed by the petitioner Management by pointing out that as per the appointment order the services were continued only upto 30.04.1993 and the termination if any, thereafter occasioned automatically on 30.04.1993. They denied that there was any termination on 31.07.1993. They also pointed out that the appeals ought to have been filed within 30 days of termination, and appeals filed by the respective respondents were therefore time barred. In this background it appears that

earlier the School Tribunal dismissed the appeals. Respective respondent No. 1 approached this Court in Writ Petition Nos. 4066 and 4094 of 2003. The said judgment of School Tribunal dismissing the appeals was quashed and set aside the matter was remanded back to the School Tribunal. The School Tribunal then heard the appeals and allowed the same on 28.06.2004. The said judgment of School Tribunal dated 28.06.2004 was then questioned before this Court by the Management. The management contended that the School Tribunal did not apply its mind on the lines of judgment of Division Bench of this Court in the matter of Anna Manikrao Pethe v. Presiding Officer, School Tribunal and Ors. 1997 (3) Mh.L.J. 697. This Court therefore remanded the matters back to the School Tribunal, vide its judgment dated 02.09.2004 in Writ Petition Nos. 3447 and 3479 of 2004. After this second remand the School Tribunal again heard the parties and passed separate judgments on issues required to be considered as per directions in case of Anna Pethe (supra), and thereafter on merits. In its judgment dated 18.10.2004 it found that school was recognized, that appointment of present respondent was made as per Section 5 of the M.E.P.S. Act and the appointment was approved by the Education Department. On 12.01.2005 it delivered judgment allowing the appeals. In the said judgment it found that the impugned termination was bad in law. In paragraph No. 9 therein, it found that termination was brought about on 28.06.1993 i.e. when the petitioner Management did not permit the respective respondent No. 1 to place their signatures on muster. It therefore, granted respondent No. 1 relief of reinstatement with continuity and backwages. These judgments are questioned in present Writ Petition by the Management.

3. On 17.06.2005 while issuing Rule in the matter this Court granted interim stay of backwages only on the condition that the respective respondent No. 1 is reinstated back in service. Accordingly, as on today the respondent No. 1 are reinstated.

4. In this background Advocate Shri Prashant Shende, for petitioner Management has contended that conclusion that the employee was terminated has been reached arbitrarily and by ignoring the provisions of Section 5[2] of the M.E.P.S. Act. He argues that unless and until service of two years on probation is rendered, the employee cannot be given permanency and cannot be deemed to have gained permanency. He contends that resolution dated 13.07.1992 passed by the Management allegedly giving permanency to the respective respondent No. 1 is contrary to law and could not have been relied upon by the School Tribunal. He further states that there was specific challenge before the School Tribunal that the appeals as filed are barred by limitation, but that challenge has not been looked into at all. Lastly, he states that the employees approached the School Tribunal with story that they were terminated on 30.07.1993. The Management had pointed out that 30.04.1993 was the last date of service as per the appointment order issued to the respondent No. 1. The School Tribunal has not recorded any finding about the exact date of termination. He argues that in appeal memo the respective employee had pointed out that after summer

vacation they reported for duties on 28.06.1993, but they were not permitted to place their signature on attendance register. He contends that the School Tribunal has found that the termination was brought about on 28.06.1993, when that was not the case of the respective respondent No. 1. According to him therefore, the entire judgment of School Tribunal shows total non-application of mind to essential aspects, and is therefore liable to be quashed and set aside.

5. Advocate Shri P.S. Sahare, for respective respondent No. 1 on the other hand states that the question of limitation cannot be raised at this stage and he points that no such ground is pleaded in present writ petitions by the petitioner / management. He contends that after earlier adjudication by this Court in petitions filed by the management the only question left open was consideration of controversy in the light of the directions given in the judgment in the case of Anna Pethe, (supra) and as such there was no question of looking into the issue of limitation by the School Tribunal thereafter. He further states that the respondent No. 1 in fact joined employment on 1.11.1989 and they were given appointment order on 1.7.1991. He further states that after this appointment order there was one more appointment order i.e. dated 25.06.1992, whereby the respondent No. 1 were appointed permanently. He contends that the resolution dated 13.07.1992 accepted by the School Tribunal recognizes this order of appointment dated 25.06.1992 and as such the School Tribunal is justified in concluding that the respective respondent No. 1 were terminated after their confirmation. Lastly and in the alternative he argues that, even if it is presumed that the services were terminated on 30.04.1993 or 28.06.1993, still as the Management did not point out that the said termination was for unsatisfactory performance or conduct, the School Tribunal's judgment directing reinstatement needs to be maintained. He therefore, prays for dismissal of both the writ petitions.

6. Respective learned Assistant Government Pleaders support the judgments of School Tribunal.

7. As already mentioned above, it is clear that after first judgment by the School Tribunal against them, the respective respondent No. 1 approached this Court in two writ petitions which were allowed on 26.6.1993. After said remand the School Tribunal allowed the appeals on 28.6.2004 and then management approached this Court in two Writ Petition Nos. 3447 and 3479 of 2004. Both these petitions were allowed by this Court on 02.09.2004 after noticing that the judgment in case of Anna Pethe (supra) was not adhered to, by the School Tribunal. It is apparent that at that stage no grievance was made before this Court that the appeals before Tribunal were time barred. During arguments Advocate Shri Shende, has relied upon the judgment of Hon'ble Apex Court in the case of Ragho Singh Vs. Mohan Singh and Others, and in the case of Madhao Sarode Vs. Jotiba Dhyan Upasak Shikshan Sanstha and Others, to contend that when there is no prayer for condonation of delay and no order of condonation of delay, the forum does not get jurisdiction to take cognizance of the controversy.

However, in the present facts it is apparent that such an argument was open when Writ Petition Nos. 3447 and 3479 of 2004 were considered by this Court. As no such ground was raised before this Court while challenging the adverse judgments of School Tribunal by the petitioners, it is clear that there after the School Tribunal was expected only to apply its mind in the light of the judgment of Division Bench in the case of Anna Pethe (supra), and any other issue was not open before it. It is also to be noted that, it was open to the present petitioners to waive the objection in relation to limitation and in present circumstances, therefore, at this stage it is not possible for me to apply to the law flowing from above referred two judgments cited by Advocate Shri Shende to the present facts.

8. However, the contention of present respondent No. 1 that they attained permanent status in view of the appointment order dated 25.06.1992 in their favour and resolution of management dated 13.07.1992 cannot be accepted. The order of appointment dated 25.06.1992 mentions that the appointment was purely permanent for a period from 25.06.1992 onwards. This sentence is further followed by a sentence that "After expiry of your services shall stand terminated without any notice." It is thus apparent that the language in these two paragraphs of appointment order is not very clear. The words "purely permanent" create some doubt about this order. Not only this, the period is also not specified. But then language of Section 5[2] is very clear. The said subsection clearly stipulates that after completion of probation period of two years the employee can be deemed to have been confirmed. Arguments of Advocate Shri Sahare that management could have confirmed the respective respondent No. 1 even before the completion of period of two years, cannot be accepted.

9. But, then this cannot be held to mean that the respondent No. 1 could not have been appointed permanently by order of appointment dated 25.06.1992. Both the respondents approached the School Tribunal with specific case that they were in employment since 1.11.1989. If their services from 1.11.1989 are taken into account, on 25.06.1992 they could have been validly given permanent appointment. Not only this, in that case, the complexion of scrutiny, of validity or otherwise of the resolution dated 13.07.1992 may also undergo a change. However, the School Tribunal has not bothered to find out the date of entry into service. It has presumed that the respective respondent No. 1 entered the service on 1.7.1991 only. Similarly, the date of termination is also not settled by the School Tribunal. The management contended that the termination was brought about on 30.04.1993. The respondent No. 1 in his appeal contended that he was prohibited from joining and from working on 30.07.1993 and therefore, termination was w.e.f. 30.07.1993. In their appeal memo the respective respondent No. 1 also contended that though they were permitted to join on 28.06.1993, they were not permitted to sign muster roll on 28.06.1993. They have also stated that they worked upto 29.07.1993 and on 29.07.1993 they proceeded on leave of one day by submitting leave application. When they went to join back on 30.07.1993, their services were terminated. This entire story or

its impact has not been examined by the School Tribunal. The School Tribunal has recorded a finding that services were terminated ?otherwise? on 28.06.1993. It is to be noted that 28.06.1993 was not the date of termination pressed into service by any of the parties. In these circumstances, I find that this finding recorded by the School Tribunal also cannot be sustained. It is no doubt true that it was open to the school tribunal to record a finding about appropriate date as date of termination, but then in present facts it could have been done only after noticing that the management could not prove that termination was brought about on 30.04.1993 or then after recording a finding that the contention of respective respondent No. 1 that their services were terminated on 30.07.1993 was incorrect, either on facts or in law. There is no such application of mind by the School Tribunal in the present matter.

10. In these circumstances, I am not in a position to sustain the impugned judgments dated 12.01.2005 delivered in Appeal Nos. 315 and 316 of 1994. The said judgments are therefore, quashed and set aside. Both the appeals are restored back to the file of the School Tribunal for rehearing the parties on the issue as framed by the School Tribunal in its judgments to find out whether there was any termination on 30.04.1993 or on 28.06.1993 or then on 30.07.1993. Also School Tribunal should find out the date of entry into employment i.e. whether it was 1.11.1989 or 1.7.1991. In the light of these dates the School Tribunal then may proceed to examine the effect of the order of appointment dated 25.06.1992 and resolution dated 13.07.1992.

11. In the circumstances, Rule accordingly. No costs. However, it is to be noted that because of interim order passed by this Court the respective respondent No. 1 are in service. The month of November is going on and I find that interest of administration itself demands that the respective respondent No. 1 should be allowed to be continued as on today, during the pendency of the appeal before the School Tribunal. However, such continuation shall not confer any additional legal right upon the respective respondent No. 1 and shall not in any way prejudice the case or defence of the present petitioner / management. The School Tribunal is therefore, directed to decide both the appeals as early as possible and in any case by 28th February, 2009.