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In the Bombay High Court

Case No : Writ Petition No. 5455 of 2005

Navjeevan Shikshan Sanstha — APPELLANT

Vs

Chandrashekhar Anandraoji — RESPONDENT

Date of Decision : 04-09-2014

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

Citation : (2014) 6 ABR 353 : (2015) 4 BomCR 342 : (2015) 1 MhLj 782

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : A. Shelat, Advocate for the Appellant; H. Rahangadale and D.B. Patel, Asstt. Government Pleader, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

A.S. Chandurkar, J.

1. This petition takes exception to the order passed by the School Tribunal Nagpur dated 11-4-2005 passed on the application for condonation of delay in filing appeal u/s 9 of the Maharashtra Employees of Private Schools (Conditions of service) Regulation Act, 1977 (for short the said Act). Similarly, order dated 18-7-2005 deciding the preliminary issues and judgment dated 8-8-2005 passed in the aforesaid appeal allowing the same are also under challenge.

2. The respondent No.1 claims to have been appointed on probation on the post of Assistant Teacher on 6-7-1999. The initial appointment was made by Sadbhawana Bahu-uddeshiya Shikshan Sanstha which was running the petitioner No.2 school. The said school thereafter was transferred to petitioner no.1 society and according to respondent No.1, he continued to serve in said institution. On 23-6-2004, respondent No.1 was not permitted to resume his duties and as his services were orally terminated on 21-9-2004 he preferred appeal u/s 9 of the said Act along with an application for condonation of delay. The learned Presiding Officer of the School Tribunal by order dated 11-4-2005 condoned the delay in

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filing the appeal. Thereafter, the parties were heard on the preliminary issues and by order dated 18-7-2005, said issues came to be answered in affirmative and in favour of respondent No.1. The appeal was thereafter considered on merits and by judgment dated 8-8-2005, the same came to be allowed by granting the relief of reinstatement with continuity in service and back wages in favour of respondent No.1. As stated above, the aforesaid three orders have been subjected to challenge by the management and said school in the present writ petition.

3. Shri A. Shelat, the learned Counsel appearing for the petitioners submitted that though the delay in filing the appeal had been condoned, the petitioner''s school subsequently obtained various documents that would falsify the case of respondent No.1 that was made a ground for condoning the delay. It was submitted that in the application for condonation of delay, respondent No.1 had stated that he was not getting his regular salary since last more than 3 years and hence, for want of funds, he could not file the appeal within limitation. It was submitted on behalf of the petitioners that since 1998, till November 2001, respondent No.1 who had enrolled himself as an educated unemployed person had received unemployment allowance for said period. The registers in that regard were sought to be relied upon, copies of which have been filed as ANNEXURE VI. It is further submitted that respondent No.1 was also working as an Insurance Agent and was receiving commission for undertaking said work. In support thereof, documents at ANNEXURES VII and VIII have been placed on record. It is, therefore, submitted that respondent No.1 had not approached the School Tribunal with clean hands and had not disclosed that he was receiving unemployment allowance as well as commission in lieu of the work of insurance done by him. He, therefore, submitted that the case of respondent No.1 should not be considered on merits. In support of the said submissions, the learned Counsel for the petitioners relied upon the decisions of the Supreme Court in the case of Pundlik Jalam Patil (D) by Lrs. Vs. Exe. Eng. Jalgaon Medium Project and Another, , M.C.D. Vs. State of Delhi and Another, , Ramjas Foundation and Another Vs. Union of India (UOI) and Others, and judgment of Division Bench of this Court reported in Sunil Gayaprasad Mishra Vs. Rashtra Sant Tukdoji Maharaj University and Others, He, therefore, submitted that the appeal preferred by respondent No.1 ought not to have been entertained on merits as the reasons furnished by him for seeking condonation of delay were false.

In so far as the merits of the findings recorded by the School Tribunal are concerned, it was urged that respondent No.1 had not shown that his appointment was made after following due procedure. He submitted that though it was averred in the memorandum of appeal that an advertisement had been issued prior to the appointment of respondent No.1, no copy of such advertisement was placed on record. He further submitted that the School Tribunal erroneously proceeded with the assumption that the appointment of respondent No.1 was on a clear and permanent vacancy. He submitted that the learned Presiding Officer had wrongly cast the burden of proving basic facts on

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the management when, in fact, such facts were required to be proved by the appellant. He further submitted that the order directing payment of back wages was illegal as there were no pleadings in that regard. The learned Counsel relied upon the decision of the Supreme Court in the case of Ramesh Gajendra Jadhav Vs. Secretary, Late S.G.S.P. Mandal and Others, a Division Bench judgment of this Court in the case of Chandramani Devraj Tiwari Vs. The Secretary, Smr. R.B. Tiwari Sanskrutik Kendra and Others, as well as the Full Bench judgment of this Court in the case of Ramkrishna Chauhan and Others Vs. Seth D.M. High School, Deputy Director of Education, The Bharat Jatiya Sangh and State of Maharashtra and Others etc. etc., He also submitted that in view of the law laid down by the Division Bench of this Court in the case of Priyadarshini Education Trust and The Head Master, National Urdu High School Vs. Ratis (Rafia) Bano, no relief could have been granted to respondent No.1 in the form of reinstatement.

4. Shri H. Rahangadale, the learned Counsel appearing for respondent No.1 on the other hand submitted that the School Tribunal had rightly condoned the delay in preferring the appeal as it was satisfied that respondent No.1 did not have sufficient funds to approach the School Tribunal within the period of limitation. He submitted that respondent No.1 was requesting the management to continue him in service and hence, he could not be blamed for the said period of delay. The learned Counsel submitted that the appointment of respondent No.1 was made after following due process of law. The management had also issued a continuation order to respondent No.1 and only after the School started receiving grants the services of respondent No.1 came to be terminated. He further submitted that the order of termination was not preceded by any enquiry and as respondent No.1 had acquired the status of permanent employee, his services could not have been terminated without holding an enquiry as contemplated by provisions of Rules 36 and 37 of the Maharashtra Employees of Private Schools Rules, 1981. The learned Counsel for respondent No.1 relied upon the Full Bench judgment of this Court in the case of St. Ulai High School and Shri Adishakti Hindi Prachar Samitee Vs. Shri Devendraprasad Jagannath Singh and The Zilla Parishad, as well as judgment of the learned Single Judge in the case of Jeles Education Society and The Head Master, Mahatma Gandhi Vidya Mandir Vs. Shri R.T. Bhitale and The Presiding Officer, School Tribunal, in support of his submissions. He, therefore, submitted that as the School Tribunal had found that the appointment of respondent No.1 was in a clear and permanent vacancy and the appointment having been made after following due procedure, there was no reason to interfere with the impugned judgment.

5. Shri D. B. Patel, the learned Assistant Government Pleader has relied on the affidavit-in-reply filed on behalf of the Dy. Education Officer, Zilla Parishad, Nagpur dated 18-1-2006 wherein it has been stated that as on the date of filing of said affidavit, all posts with petitioner No.2 School were duly filled in and there were no vacant posts available.

6. As the order dated 11-4-2005 condoning delay in filing the appeal is under

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challenge, it would be necessary to first consider whether the learned Presiding Officer was justified in condoning delay in filing appeal. The services of respondent No.1 came to be terminated with effect from 23-6-2004. The appeal challenging aforesaid order of termination was filed on 21-9-2004. Thus, excluding the period of 30 days within which an appeal could have been filed, there was a delay of about two months in filing aforesaid appeal. In the application for condonation of delay, it has been stated by respondent No.1 that he had approached the management requesting it to continue him in service and further that respondent No.1 was not getting his regular salary since last more than 3 years and hence, for want of funds, he was required to keep silent. The management opposed the prayer for condoning the delay in filing appeal before the School Tribunal. While condoning the delay by order dated 11-4-2005, the learned Presiding Officer observed that though it was the case of management that respondent No.1 was having source of income being a commission agent, no documents in that regard had been filed on record. Thus, accepting the ground made out by respondent No.1 regarding lack of funds, the learned Presiding Officer proceeded to condone the delay in filing aforesaid appeal. On the basis of the material that was available before the School Tribunal, it cannot be said that the learned Presiding Officer erred in condoning the delay of period of two months by accepting the case of respondent No.1 that he had no source of income and hence, on account of lack of funds, he could not approach the School Tribunal within limitation. The order of the School Tribunal dated 11-4-2005 in that regard cannot be faulted.

7. The management has, however, in this writ petition placed on record various documents to indicate that firstly the stand taken by respondent No.1 in the application for condonation of delay was false and incorrect and secondly that respondent No.1 was not out of funds inasmuch as he was receiving unemployment allowance as well as commission while acting as an insurance agent. Aforesaid documents including the attendance registers, receipts and documents disclosing receipt of commission have been filed at ANNEXURES VI TO VIII of the writ petition. The particulars in that regard have been pleaded in paras 12 to 15 of the writ petition. The respondent No.1 has filed submissions on affidavit dated 16-11-2005. However, there is no denial whatsoever to the aforesaid averments made in paras 12 to 15 of the writ petition. Similarly, the documents placed on record vide ANNEXURES VI TO VIII of the writ petition have also not been denied. It is in this background that the learned Counsel for the petitioners submitted that the said case of the petitioners not having been specifically denied, such conduct of respondent No.1 would disentitle him for any relief whatsoever. It is submitted that by suppressing these material documents and by not referring to aforesaid facts, respondent No.1 has set up a false case before the School Tribunal to have the delay in filing appeal condoned. He, therefore, submitted that whatever has been stated in the application for condonation of delay is, therefore, incorrect and on the basis of such incorrect statements, the delay could not have been condoned. In Pundlik Patil (supra),

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the Supreme Court in para 12 of the aforesaid judgment observed as under:

"12..... .... In our considered opinion, incorrect statement made in the application seeking condonation of delay itself is sufficient to reject the application without any further inquiry as to whether the averments made in the application reveal sufficient cause to condone the delay. That a party taking a false stand to get rid of the bar of limitation should not be encouraged to get any premium on the falsehood on its part by condoning delay [See Binod Bihari Singh v. Union of India.]"

Thereafter, in para 14 of the aforesaid judgment, it was observed thus :

"14. It is true that the power to condone the delay rests with the court in which the application was filed beyond time and decide whether there is sufficient cause for condoning the delay and ordinarily the superior court may not interfere with such discretion even if some error is to be found in the discretion so exercised by the Court but where there is no sufficient cause for condoning the delay but the delay was condoned, it is a case of discretion not being exercised judicially and the order becomes vulnerable and susceptible for its correction by the superior court. The High Court having found that the respondent in its application made incorrect submission that it had no knowledge of the award passed by the Reference Court ought to have refused to exercise its discretion. The High Court exercised its discretion on wrong principles. In that view of the matter we cannot sustain the exercise of discretion in the manner done by the High Court."

In the case of MCD (supra), it was held by the Supreme Court that a person whose case is based on falsehood can be summarily thrown out at any stage of the litigation. Similarly, in Ramjas Foundation (supra), the Supreme Court proceeded to dismiss the SLP on the ground that the petitioners therein had not approached the Supreme Court with clean hands. There cannot be any two opinions with regard to the observations made by the Division Bench in the case of Sunil Mishra (supra) in so far as para 57 of said judgment is concerned.

8. From the aforesaid it is clear that if a false case is sought to be made out or certain incorrect statements are made in an application seeking condonation of delay that by itself would be sufficient to dismiss said application. In the present case, as observed above, the material sought to be relied upon in this regard was not before the School Tribunal when it decided the application for condonation of delay. Said documents have been placed on record of the writ petition when judgment passed by the School Tribunal on merits is under challenge. In absence of any denial to the specific averments as made in paragraphs 15 to 18 of the writ petition as well as the documents at ANNEXURES VI TO VIII of the writ petition, it will have to be taken that respondent No.1 has not denied the said averments or the documents filed in support of said averments. It is, therefore, clear that on the basis of said documents the

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respondent No.1 was receiving unemployment allowance for the period from 1998 to 2001. Similarly, it can also be seen that respondent No.1 received commission while acting as an insurance agent till atleast October 2002. If the averments made in the application for condonation of delay in para 2 are considered, the same indicates that it is the case of respondent No.1 that he was not getting his regular salary since last more than three years and therefore, due to want of funds, he was required to keep silent. The period for which the explanation has been furnished and the period for which the same will have to be considered is the period of delay from 23-7-2004 till 21-9-2004. As stated above, the documents filed on record reveal that respondent No.1 received unemployment allowance from 1998 to November, 2001 and commission as an insurance agent lastly in October, 2002. From the aforesaid material, though it can be gathered that respondent No.1 received unemployment allowance for almost three years and was also acting as an insurance agent, the same is for a period prior to the oral termination of his services in June, 2004. Hence, on the basis of aforesaid documents what is clear is that for the period from 1998 till October, 2002, respondent No.1 was receiving some income either in the form of unemployment allowance or as commission. The documents as filed, therefore, cannot be relied upon to non-suit respondent No.1 on the ground that he had set up an entirely false case in so far as the period of two months from 23-7-2004 to 21-9-2004 is concerned. Therefore, by not disclosing his other avenues of income for the period from 1998 to October, 2002 when he sought condonation of delay of period of two months by filing such application on 21-9-2004, it cannot be said that he had set up a false case to have the delay condoned. Hence, I am not inclined to accept the aforesaid submissions made on behalf of the petitioners that respondent No.1 could be non-suited for having set up a false case to have the delay condoned. The writ petition, therefore, cannot be summarily dismissed on said ground.

9. Turning now to the merits of the challenge in so far as the findings recorded by the School Tribunal while allowing the appeal are concerned, it is to be noted that the Division Bench of this Court in Chandramani (supra) has held that for the purposes of claiming benefits of deemed permanency u/s 5(2) of the said Act, it was necessary for the appellant before the School Tribunal to prove that he was duly selected in the manner prescribed. In the memorandum of appeal filed by respondent No.1, it is the specific case of respondent No. 1 that after obtaining prior permission from the Education officer, an advertisement was published and pursuant thereto, respondent No.1 was duly appointed. In the reply filed on behalf of the management, it was denied that his appointment was made in a clear and permanent vacancy. It was stated that said appointment was of a purely temporary nature. While considering the issue as regards compliance that provisions of Section 5(2) of the said Act, the learned Presiding Officer held that the burden to file on record the advertisement published, was on the management and as such advertisement had not been filed on record the claim of respondent No.1 could not have been denied. In this regard, it is necessary to

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refer to another Division Bench judgment of this Court in Priyadarshani (supra). In the aforesaid judgment, it was held that if an appointment has to satisfy the requirements of Section 5(2) of the said Act, it should be proved that the employee concerned had been duly appointed in the manner prescribed. In the aforesaid case, there was no advertisement placed on record and it was only stated that the employee therein had been duly selected. The Division Bench held that it was difficult to accept that the employee therein was a candidate appointed by following due process of selection. In para 14 of the aforesaid judgment, it has been observed thus:

"14..... .... It cannot be forgotten that the teacher having approached the Court, initial burden of proof lies on the petitioner. Adverse inference, as drawn by learned Single Judge, could have been justified, only after satisfaction that the petitioner has discharged initial burden. The appointment order in the custody of the petitioner is the primary evidence and unless she cold have made out a case of having acquired right to lead secondary evidence, neither management could have been invited to produce the document, nor any adverse inference could be drawn against it. Appointment order is a document, original of which ought to be in the custody of the candidate appointed....."

Thus, from the aforesaid, it is clear that initially the burden of placing the advertisement on record was that of respondent No.1 who had approached the School Tribunal challenging his otherwise termination from service. It was his specific case that such advertisement had been issued. It is an admitted fact that no such copy of advertisement has been filed on record.

10. The Full Bench of this Court in Ramkrishna (supra) has held in para 28 that it is not open for the School Tribunal to assume as of fact that an appointment made against a clear and permanent vacancy is deemed to be on probation within the meaning of Section 5(2) of the said Act. The School Tribunal while allowing the appeal preferred by respondent No.1 has, on the contrary proceeded to assume that the appointment of respondent No.1 was against a permanent vacancy and, therefore, had to be treated on probation. This finding is thus, contrary to the law laid down by the Full Bench in the case of Ramakrishna (supra).

11. Thus, from the above, it is clear that in absence of basic material in the form of permission granted by the Education Officer for filling the posts in question and the copy of the advertisement, it would be difficult to sustain the findings recorded by the learned Presiding Officer that respondent No.1 had been appointed after following the due procedure as prescribed by Section 5(2) of the said Act. Though it has been urged on behalf of respondent No.2 that respondent No.1 was subsequently given a continuation order, that factor would not validate the initial entry of respondent No.1 in service. As observed by the Supreme Court in the case of Ramesh (supra) that the initial entry in service has to be a lawful

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entry and any irregularity in that regard cannot create any vested right in favour of the employee. It is further observed that it is not material as to who is at fault. In either event, if it is found that the entry in service is not after following prescribed procedure, such entry in service cannot be sustained.

12. In so far as other contentions raised by the learned Counsel for respondent No.1 that the termination of the services of respondent No.1 was not after following due procedure and that no enquiry was held in that regard, the same are of no avail when it is found that the initial entry in service of respondent No.1 was not in accordance with law. Similarly, the submissions made by the learned Counsel for the petitioners as regards grant of full back wages in absence of any pleadings in that regard are not required to be considered in view of the findings recorded hereinabove.

13. Thus, the judgment of the School Tribunal is contrary to the law laid down by the Supreme Court as well as by this Court. The jurisdiction having been exercised with material irregularity, a case for interference in writ jurisdiction is made out. In view of aforesaid, the writ petition is partly allowed. The orders dated 18-7-2005 and 8-8-2005 are quashed and set aside. The appeal preferred by respondent No.1 stands dismissed.

14. There would be no order as to costs.

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