
(2003) 07 BOM CK 0075
In the Bombay High Court
Case No : Writ Petition No. 1267 of 2000

Nilam Trivedi

APPELLANT

Vs

University of Mumbai and Others

RESPONDENT

Date of Decision : 29-07-2003

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 9(9)

Citation : (2004) 1 BomCR 789 : (2004) 1 MhLj 164

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : S.C. Chaturvedi, instructed by S.C. Chaturvedi and Co, for the Appellant; R.A. Rodrigues and A.L. Gore for Respondent No. 1 and C.M. Jha, for Respondent Nos. 2, 3 and 5, for the Respondent

Final Decision : Dismissed

Judgement

R.M.S. Khandeparkar, J.—Heard the learned Advocates for the parties. Perused the records.

2. The petitioner challenges the judgment and order dated 10th March, 2000 passed by the Mumbai University and College Tribunal at Mumbai dismissing the Appeal filed by the petitioner against the order of termination dated 18th August, 1999 issued by the respondent Nos. 1 and 2. The challenge is three-fold. Firstly, that the petitioner, being selected by following regular procedure for selection, was appointed on probation and her services being satisfactory could not have been abruptly terminated. Secondly, the petitioner having been appointed on regular basis prior to September, 1991, she was not required to undergo NET/SET Examination, and thirdly, that the services of the petitioner could not have been terminated on the ground that she does not belong to reserved category unless the post itself was one that was meant for reserved category candidate as per the roster.

3. As regard the first ground of challenge, it is the contention of the petitioner

that, right from 19th August, 1993, she was appointed on probation in the post of a lecturer in the college of the respondent Nos. 2 and 3 and her services were satisfactory besides being that her appointment was duly approved by the University and that, therefore, her services could not have been terminated abruptly as otherwise has been done by the respondents under the letter dated 18th August, 1999. Attention is also drawn to the said letter which apparently disclosed that the services rendered by the petitioner were appreciated by the institution. The reliance was also placed in the decision of the Apex Court in the matter of *The State of Punjab Vs. Dharam Singh*, , while distinguishing the decision of the Apex Court in the matter of *Dr. (Mrs.) Chanchal Goyal Vs. State of Rajasthan*, on the ground that in *Dr. Goyal's* case, there was no concurrence from the P.S.C. whereas in the case in hand, the appointment of the petitioner was duly approved by the University. As regards the second ground of challenge, it is sought to be contended that the circular dated 17th March, 1997 issued by the University of Mumbai clearly reveals that the teachers, who were appointed on or before 19th September, 1991 and whose appointments were approved by the University, were eligible for exemption from passing the prescribed NET/SET examination provided there was no break in his/her service for more than one year. According to the petitioner, she was appointed in Gurunanak College of Education and Research on probation, after following the regular process of selection, under the letter dated 30th July, 1991 and the same was approved by the University. The said fact was communicated to the petitioner by the Principal of the said college under the letter dated 24th December, 1991. According to the petitioner, she was exempted from necessity of passing the said examination.

4. As regards the third ground of challenge, it is the contention of the petitioner that the respondents have not disclosed that, as per the relevant roster, the post of lecturer in which the petitioner was appointed was meant for reserved category. In any case, it is also sought to be contended that the petitioner also belongs to reserved category and the same has been totally ignored by the Tribunal.

5. On the other hand, the impugned order is sought to be justified by the learned Advocate for the respondent No. 1 while placing reliance on the unreported decision of a Division Bench in Writ petition No. 1766 of 2003 delivered on 4th July, 2003 while contending that the materials on record apparently disclosed that the post in which the petitioner was appointed was meant for reserved category and her appointment was merely on ad-hoc basis and therefore, no right had accrued in favour of the petitioner to claim permanency in the said post, and once the candidate from the reserved category was available to occupy the said post, no fault could have been found with the decision of the Management in terminating the services of the petitioner and for the same reason, no fault can be found with the judgment and order of the Tribunal. The learned Advocate for the respondent Nos. 2 and 3 drawing attention to the Statute No. 417(ii)(d) has submitted that an appointment in a college requires approval from the University and in the absence of such approval, no right to the

post accrues in favour of the appointee. Further, drawing attention to the circular issued by the University dated 31st July, 1996 and the Government Resolution dated 15th May, 1996, he has submitted that it was made clear therein that a person not belonging to the reserved category having been appointed in the post meant for the reserved category, he would not acquire right to continue in the said post, moment the reserved category candidate is available to occupy such post. Further, the reliance was sought to be placed in the decisions of the Apex Court in the matter of Hindustan Education Society and Anr. v. S.K. Kaleem Sk. Gulam Nabi and Ors., reported in 1997 (3) SCC 292 and in the matter of Shakuntala Ganpatsa Shirbhate v. Industrial Weaving Co-operative Society and Ors., reported in 1994 M.L.J. SC 218, and in the decision of Karnataka High Court in the matter of Rajeshwari C.B. v. The Chancellor and Anr., reported in 1959 77 CLR 163, He has further drawn attention to the finding of the Tribunal that since 1993 onwards, the post was advertised as being a reserved post and the same was not disputed by the petitioner besides being that the University, while approving the appointment of the petitioner, had approved it not as a probationer but merely on a temporary basis, and that the same is apparent from the letter dated 23rd January, 1996 by the Registrar of the University addressed to the Principal of the institution.

6, The undisputed facts, which are revealed from the records, are that the petitioner was appointed as the lecturer from 1st August, 1991 on probation for a period of one year in Gurunanak College of Education and Research under the letter dated 30th July, 1991 but her appointment was approved by the Mumbai University, as it was then, under a letter dated 17th December, 1991 as temporary lecturer from 1st August, 1991 to 7th August, 1991 and on probation from 8th August, 1991 onwards. Thereafter, the petitioner joined the college of the respondent Nos. 2 and 3 on ad-hoc basis from 7th June, 1993 onwards, that is revealed from the order dated 3rd June, 1993 by the Principal of the said institution addressed to the petitioner. She was further appointed on probation basis for the academic year 1993-94 under the order dated 3rd September, 1993 subject to approval by the University. Further, by a letter dated 23rd January, 1996, the University informed the Principal of the said institution that the appointment of the petitioner was approved as fulltime lecturer on temporary basis from 7th June, 1993 to 20th April, 1994. She was further appointed for the academic year 1996-97 on ad-hoc basis and was also informed that her services will not be counted for further placement till she acquires NET/SET examination. Meanwhile, her appointment on probation was renewed for the academic year 1994-95 under a letter dated 4th February, 1994 by the Principal of the institution addressed to the petitioner informing that her probation period was extended from 20th March, 1994 to the end of the next academic year 1994-95 as also under a letter dated 22nd March, 1995, it was extended till June, 1995 to the last working day of the academic year 1995-96. It is also to be noted that, while continuing the petitioner on ad-hoc basis for the academic year 1996-97 under a letter dated 13th March, 1996, the previous letter dated 22nd February,

1996 was withdrawn pursuant to the Government Resolution dated 22nd December, 1996 and the circular of the University of Mumbai dated 1st March, 1996. Further, by an undated letter the petitioner was informed that her appointment was against the reserved category candidate as per the roaster and in case the candidates from reserved category were not to be available, she would stand the chance of continuation of service in the said college. However, by the letter dated 18th August, 1999, she was informed that in view of the fact that her appointment was purely on ad-hoc basis and against the reserved category and due to availability of the candidate from reserved category, the selection committee in its meeting held on 6th August, 1999, had recommended the reserved category candidate for the relevant subject and that, therefore, held that the services of the petitioner were not required with effect from 19th August, 1999. Simultaneously, it was also mentioned in the said letter that the services rendered by the petitioner in the said institution were appreciated.

7. Undisputed facts revealed as above, apparently disclose that, for the academic year 1996-97, the petitioner was appointed on ad-hoc basis and she continued to be on ad-hoc basis till her services were terminated by the letter dated 18th August, 1999. The petitioner has not been able to bring on record any material to disclose that her status as ad-hoc employee since the academic year 1996-97 till the date of her termination from the service, had changed either as a probationer or otherwise entitling her to claim any right of permanency in the said post. At the same time, it is also apparent that the Tribunal on assumption of the materials on record has found that since 1993, the post which was occupied by the petitioner was specifically advertised as reserved post and further the fact that the said post was meant for reserved category candidates was communicated to the petitioner at least in June, 1999 by the respondent/ College. Needless to say that it was not necessary for the institution to intimate specifically the same fact to the petitioner in the year 1999, once it is apparent from the record that the post was advertised as being meant for reserved category candidate and the petitioner was appointed therein purely on ad-hoc basis and further that there was no grievance made by the petitioner regarding the fact that she was appointed on the said post only on ad-hoc basis for all those years, and that too, in spite of the fact that the petitioner was earlier issued letters of appointment on probation basis and, thereafter, was issued the letter dated 13th March, 1996 of she having been appointed on ad-hoc basis for the academic year 1996-97. Certainly she would have made a grievance about such appointment if the petitioner was not aware of the fact that the post which she was occupying from the academic year 1996-97 was not meant for the reserved category candidate and would have questioned the legality and propriety of the order of her appointment from the academic year 1996-97 as ad-hoc employee or on ad-hoc basis. Apparently, there was no grievance made by petitioner at any point of time regarding such appointment.

8. Added to the above facts, as rightly submitted by the learned Advocate for the respondent, there is no grievance made by the petitioner even in the memo of

Writ Petition about the findings by the Tribunal that since 1993, the post was advertised as being one meant for reserved category candidate. The only grievance which was sought to be made in the course of arguments was that the appointment letter issued to the petitioner did not disclose the fact that the post was meant for reserved category candidates. Certainly, non-mentioning of the said fact in the appointment letter, will not enure to the benefit of the petitioner, at this stage, once it is apparent from the record that the post was infact meant for the reserved category candidates and the records nowhere disclose the absence of knowledge of the said fact to the petitioner at the time when the petitioner was appointed on ad-hoc basis in the said post. Being so, undisputed facts on record apparently reveal that the appointment of the petitioner since 1996-97 onwards was on ad-hoc basis and it was meant for the reserved category candidate and it was never the case of the petitioner that she belonged to the same reserved category for whom, the said post was reserved and that therefore, no fault can be found with the findings of the Tribunal regarding the absence of illegality on the part of the Management in terminating the services of the petitioner under the letter dated 18th August, 1999, once a candidate from the reserved category for whom the post was reserved was available to occupy the said post. The allegation of mala fide to accommodate the respondent No. 5 in the said post is totally devoid of substance.

9. As regards the second ground of challenge, the records apparently disclosed that in terms of the circular dated 17th March, 1997, the teachers who were appointed prior to 19th September, 1991 were not required to undergo NET/SET examination provided there was no break in their services for more than one year. Certainly the circular would relate to regularly appointed candidates and not for the candidates who were appointed on ad-hoc or temporary basis. In the case in hand, the petitioner was appointed in Gurunanak College of Education and Research from 1st August, 1991 to 7th August, 1991 on temporary basis and from 8th August, 1991 on probation. The petitioner joined the college of the respondent Nos. 2 and 3 with effect from 7th June, 1993 onwards. There is nothing on record to disclose that there was no break in service of the petitioner. At this stage, the learned Advocate for the petitioner however rose to submit that there was no dispute regarding the fact that there was no break in the service of the petitioner. It was also submitted that the charge report was brought to the notice of the College Tribunal. However, there are neither pleadings in the memo of writ petition nor the said point was specifically raised before the College Tribunal. At this stage, again the learned Advocate for the petitioner rose to draw the attention to the ground (I) at page 9 of the memo of the Writ Petition contending that there are pleadings in that regard. Ground (I) of the Writ Petition reads that "That because the learned Presiding Officer of the University and College Tribunal erred in considering that she had not obtained the discharge certificate from Gurunanak College, even after the copy of the discharge certificate being produced."

10. At the outset, it is to be noted that Ground (I) is a ground of challenge to the

impugned judgment. It nowhere discloses the factual foundation which was required to be laid in the memo of Appeal before the Tribunal to enable the petitioner to agitate this issue regarding the absence of break in service before the College Tribunal. It is not the contention of the petitioner in the memo of Writ Petition or in the course of arguments that such ground was specifically raised and was argued before the Tribunal and yet the Tribunal failed to take note of the same. The point as to whether there was a break in service or not is not a pure question of law. If the petitioner wanted to contend about the exemption from the necessity to appear for NET/SET examination in terms of circular dated 17th March, 1997, it was necessary for the petitioner to disclose all the relevant facts in the memo of Appeal and canvass them in the course of arguments before the Tribunal and then in case of failure of the Tribunal to deal with the same, the petitioner could have made grievance about the same in the Writ Petition or at least could have argued the same in the course of arguments. Mere contention that the charge report was submitted to the institution and it disclosed continuation of the service cannot be of any help to the petitioner to contend that there was no break in the service. Whether there was break in service or not, being a question of fact, it was necessary for the party desiring to raise contention in that regard, to disclose all the relevant facts in the memo of appeal as well as in the memo of Writ Petition. The said point being a question of fact, the Tribunal cannot be blamed for not adjudicating the same in the absence of proper pleadings in that regard and the attention having not been drawn in that regard in the course of hearing of the Appeal. The claim of the petitioner that there was no break in the service has to be rejected in the absence of sufficient materials on record. In any case, if such charge report was produced before the Tribunal, then what prevented the petitioner from producing a copy thereof in the Writ Petition? There is no explanation for non-production of the same either in the Writ Petition or even in the course of hearing of the matter particularly when it was sought to be contended that such report was produced before the Tribunal in the course of hearing.

11. The records apparently disclose that the petitioner had joined the services of the respondent/institution with effect from 7th June, 1993 on ad-hoc basis. Undoubtedly, her appointment was thereafter on probation basis in terms of the letter dated 3rd June, 1993. However, by the letter of the Registrar of University dated 23rd January, 1996 it was made very clear that the appointment of the petitioner was only on temporary basis from 7th June, 1993 onwards. Though, subsequently, the letters dated 4th February, 1994 and 22nd March, 1995 were issued to the petitioner informing that her appointment being on probation, it was made clear to her by the letter dated 13th March, 1996 that her appointment was on ad-hoc basis and there was no reaction of whatsoever nature against the said appointment by the petitioner. On the contrary, the petitioner accepted the said appointment and continued in the service on ad-hoc basis. Being so, in the facts and circumstances of the case, there is no case made out by the petitioner to claim exemption from passing NET/SET

examination.

12. As regard the third ground of challenge, as already observed above, the findings of the Tribunal disclose that the post was advertised since 1993 as being meant for reserved category candidates and the said point was not challenged by the petitioner. Besides, the petitioner was appointed on ad-hoc basis. The Circular dated 31st July, 1996 by the University also makes it abundantly clear that merely because the candidate was appointed on ad-hoc basis in the post meant for the reserved category candidate, it does not create any right in favour of such candidate and such candidate has to vacate the post, moment candidate from the reserved category is available to occupy the said post.

13. The law on the point is well settled and the decisions relied upon by the respondents make it abundantly clear that a Division Bench in Writ Petition No. 1766 of 2003 relying upon the decision of the Apex Court in *Ayurvidya Prasarak Mandal and Another Vs. Geeta Bhaskar Pendse (Mrs) and Others*, and *Dr. (Mrs.) Chanchal Goyal Vs. State of Rajasthan*, has clearly held that when there is a suitable candidate available from the reserved category, he must be appointed despite the fact that the candidate from the open category had continued for many years on the reserved category post. In *Hindustan Education Society's* case, the Apex Court has clearly ruled that "the appointment of the candidate was purely temporary for a limited period and the approval given by the competent authority was for that temporary appointment and merely because the probationer completes two years of period in the absence of specific confirmation, he cannot be considered to be a permanent appointee." In *Shakuntala Ganpatsa Shirbhate's* case, the Apex Court referring to Rule 9(9) of the *Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981*, had held that "a member of one of the backward classes referred to in the said Rule is entitled to a regular appointment in the very first year when no person belonging to a Nomadic Tribe was available and the rule enjoins year to year appointment only if an available candidate does not belong to the backward classes." The Karnataka High Court in *Rajeshwari's* case had held that the appointment made as temporary lecturer for the academic year even if continues from time to time for about five years cannot claim right to confirmation ignoring the provisions of Karnataka State Universities Act. Further, the Statute 417(ii)(d) of the University prescribes the procedure for appointment to the post of teachers. The clause (d) thereunder clearly provides that selection of a candidate is always subject to approval by the University and, in the case in hand, the appointment of the petitioner was approved by the University only on temporary basis. Being so and considering the fact that the post was meant for reserved category candidates even assuming that the petitioner's services were without any fault and appreciable, she could not have been allowed to occupy the post once the reserved category candidate was available to occupy the said post and hence, no fault can be found with the impugned decision of the Management in terminating the services of the petitioner and for these reasons, there is no case made out by the petitioner for interference in the impugned order passed by the

Tribunal.

14. As regards the decision in the matter of State of Punjab v. Dharam Singh (supra), the same rather than assisting the petitioner justifies the impugned order. The Apex Court thereunder has held that:

"Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."

In the said case, the Apex Court had also observed that Rules 6(3) of Punjab Educational Service (Provincialised Cadre) Class III Rules (1961) prohibits extension of period of probation beyond three years. Apparently, the observation was consequent to specific provisions in the law governing the service conditions of the employees. That is not the case in hand. Rather in the absence of such rules, there would not be any scope for inference that the issuance of a letter for appointment on probation would lead to conclusion that the petitioner, on expiry of the probation period, was confirmed in the post which she occupied. Rather the facts disclose that since 1996, she was appointed on ad-hoc basis. The letter of appointment is very clear in that regard.

15. The decision in Dr. Chanchal's case (supra) is sought to be distinguished on the ground that there was no concurrence from the PSC and the situation in the case in hand is not better than that of Dr. Goyal's case. Undisputedly, the Statute of the University requires approval for appointment of the teachers and in the case in hand, there was no approval by the University for confirmation of the petitioner in the said post. On the contrary, the approval for the appointment of the petitioner was for temporary one.

16. For the reasons stated above, therefore, there is no case made out by the petitioner for interference in the impugned judgment and order. The petition therefore fails and is accordingly dismissed. Rule is discharged with costs.