

(2006) 10 BOM CK 0064

In the Bombay High Court

Case No : Writ Petition No. 2342 of 1996

Nirala Education Society and Others

APPELLANT

Vs

Jugalkishore Bhagwatiprasad Shukla and Others

RESPONDENT

Date of Decision : 11-10-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96(3)
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 10, 9

Citation : (2007) 1 ALLMR 672 : (2007) 1 MhLj 695

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

Bench : Single Bench

Advocate : V.V. Bhangde, for the Appellant; A.Z. Jibhkate and P.D. Kothari, AGP for respondent Nos. 2 and 3, for the Respondent

Judgement

B.P. Dharmadhikari, J.—By this writ petition, the petitioner-employer has challenged the judgment dated 18-12-1995 passed by the School Tribunal and the subsequent orders dated 15-4-1995 and 22-4-1996 passed after decision of appeal by the very same Tribunal. On 18-12-1995, the School Tribunal has allowed the appeal of present respondent No. 1 and has directed the management to reinstate him with continuity and full backwages. The order of termination dated 1-5-1992 issued by the petitioners was set aside. It appears that thereafter the management moved application for setting aside order on the ground that it was an ex parte judgment and said application was rejected on 15-4-1996. It further appears that management had also moved an application seeking time to comply with the directions issued by the School Tribunal and that application has been rejected on 22-4-1996. Thereafter the management approached this Court and this Court initially on 4-10-1996 directed the parties to maintain status and ultimately on 7-5-1997 granted stay of the impugned judgment of School Tribunal. With the result, respondent No. 1 is not in employment.

2. I have heard Shri Bhangde, learned Counsel for the petitioners, Shri Jibhkate,

learned Counsel for respondent No. 1 and Shri Kothari, learned Assistant Government Pleader for respondents No. 2 and 3.

3. Shri Bhangde, learned Counsel has contended that the post on which respondent No. 1 was appointed was reserved post and the employee was terminated by order dated 1-4-1992 with effect from 1-5-1992. The said order was not challenged by employee till 15-11-1994. In 1993-94, respondent No. 1 worked with the Kela Hindi Madhyamik Vidyalaya and Junior College, Khamgaon, from 12-7-1993 to 30-4-1994. He filed the appeal after 2 1/2 years from the date of order of termination on 15-11-1994. Though the petitioners were served with summons and they engaged advocate, the advocate did not appear before the School Tribunal and the appeal was proceeded ex parte. On 18-12-1995, the School Tribunal condoned the delay and simultaneously also allowed the appeal on merits. Thereafter on 8-1-1996, the petitioners applied for setting aside the ex parte judgment but that request was rejected on 15-4-1996. Similarly, the request of the petitioner for extension of time to comply with the directions was also rejected on 22-4-1996. In this background, Shri Bhangde, learned Counsel has raised the following contentions. His first contention is that when the employee accepted another job without challenging the termination order, it reveals that he was not interested in service of present petitioner-employer. He, therefore, waived his right to challenge the termination before the School Tribunal by his conduct of accepting such another employment. The reliance has been placed upon the judgment of the Hon'ble Apex Court in Katikara Chintamani Dora and Others Vs. Guntreddi Annamanaidu and Others, and in Krishna Bahadur Vs. Purna Theatre and Others, . It is further contended that the employment at Khamgaon which respondent No. 1 had secured is totally suppressed from the School Tribunal and therefore, the School Tribunal was not aware that he had in fact joined other service and was challenging the termination order after he gave up such other service. He further contends that thus the fact which was relevant for deciding the maintainability of appeal and considering question of condonation of delay was not placed before the School Tribunal by respondent No. 1. He has invited attention to the affidavit of the office bearer of the petitioner-institution in this respect. He further states that this was also taken as a ground for setting aside ex parte judgment before the School Tribunal and he states that in reply affidavit filed before the School Tribunal, respondent No. 1 has accepted that he has served at Khamgaon for some period. According to him, in these circumstances, there was no sufficient cause for School Tribunal to condone delay and in any case when the School Tribunal noticed that a relevant circumstances was suppressed from it, it ought to have reopened the entire matter. He also argues that the explanation given by respondent No. 1 for condoning delay is that he was making representations to the Deputy Director of Education on the issue of backlog. He argues that law does not permit or recognize such representations as sufficient for condonation of delay. He further argues that the School Tribunal was exercising appellate powers in view of Section 10 of the Maharashtra Employees of Private Schools

(Conditions of Service) Regulation Act, 1977, and hence in terms of Order 41, Rule 10A of Civil Procedure Code, it could not have decided the application of condonation of delay along with appeal on merits. He states that when the School Tribunal decided to condone delay, it ought to have ordered its office to register the appeal and thereafter a notice should have been given to the petitioners about the registration of such appeal and for appearance therein. According to him, because of simultaneously consideration of both issues, the right of the petitioner to challenge the order condoning delay has been lost. It is further argued by him that when the School Tribunal has decided appeal without hearing the petitioner, it must be treated as an ex parte decision and refusal of the School Tribunal not to treat it so is, therefore, not correct.

4. In reply, the learned Counsel appearing for respondent No. 1 has initially stated the facts which according to him are very relevant. He contends that respondent No. 1 and son of the then Principal of the petitioner-institution were appointed together and thereafter only respondent No. 2 was terminated by giving a false reason. He states that placed in such situation, respondent No. 1 continued to make representations as advised to him by the management and was hoping for some results because son of Principal was already continued in service. He further argues that when ultimately it became clear that the representations would not give any result, the appeal was filed. He also argues that in the meanwhile, to make both ends meet, a temporary service at Khamgaon was accepted. It is his argument that such service cannot be treated as a bar for maintenance of appeal before the School Tribunal. He contends that inadvertently said service could not be pointed out to the School Tribunal and the School Tribunal has therefore rightly refused to intervene in the matter when the management approached it for setting aside the ex parte judgment. It is his argument that now the period of about 14 years have expired from the date of termination and hence no interference should be made in writ jurisdiction. He argues that the issue of limitation or all other preliminary objections sought to be raised by the petitioners should be ignored and only merit of the petition should be considered to give substantive justice to the parties. He further states that if in these circumstances the matter is remanded to the School Tribunal, respondent No. 1 would not get any result for few more years to come and till the matter could be decided, he would reach the age of superannuation.

5. From the facts discussed above, it is clear that respondent No. 1 was working with a College at Khamgaon for a period from 12-7-1993 to 30-4-1994. The nature of said appointment has not been pointed out anywhere on record. However, it is also apparent that when respondent No. 1 approached the School Tribunal for seeking condonation of delay, he has not disclosed this service to the School Tribunal. The perusal of final judgment delivered by the School Tribunal reveals that the School Tribunal has granted respondent No. 1 relief of reinstatement with full backwages i.e. backwages from the period of 1-5-1992 till 18-12-1995. It is, therefore, clear that even for the period for which respondent No. 1 was in service at Kela Hindi Madhyamik Vidyalaya and Junior College,

Khamgaon, respondent No. 1 has got all backwages from the School Tribunal. In these circumstances, when the rulings on which the learned Counsel for the petitioners has placed reliance in *Katikara Chintamani Dora v. Guntreddi Annamanaidu* (supra) is looked into, perusal of paragraph 62 therein shows that the bar to file an appeal against a consent decree in Sub-section (3) of Section 96 of the CPC is based on the broad principle of estoppel. The said sub-section presupposes that the parties to an action can, expressly or by implication, waive or forego their right of appeal by any lawful agreement or compromise, or even by conduct. In *Krishna Bahadur v. Purna Theatre* (supra), in paragraph 10, the Hon'ble Apex Court has observed that a right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct. In this background, when Section 9 of the MEPS Act is looked into, Section 9 permits an employee who is aggrieved, to file an appeal. Thus, respondent No. 1 can in certain circumstances give up his right to file appeal. The question is whether joining other services for brief period can be taken to mean such a waiver and it can be said that therefore respondent No. 1 has waived his right to file appeal or because of such alternate employment he has ceased to be an employee aggrieved within the meaning of Section 9 of the MEPS Act. However, the effect has not been considered by the School Tribunal at all. Therefore, it will not be proper for this Court to pronounce upon it for the first time in writ jurisdiction.

6. The effect of this event on prayer for condonation of delay made by respondent No. 1 also becomes relevant. If respondent No. 1 joined some other employment and was not interested in coming back to the service of petitioner, the School Tribunal would not be in a position to condone the delay. But again these issues involve a adjudication on facts and there are certain ifs and buts in the matter. Therefore, it will not be proper for this Court to pronounce upon said issues at this juncture. The only finding can be recorded at this stage is that the fact which was relevant for deciding whether to condone the delay or not has not been brought to the notice of School Tribunal by respondent No. 1 and has been brought to the School Tribunal belatedly by the petitioners. The School Tribunal has therefore not considered the effect of said fact in its finding as to the existence of sufficient cause to condone the delay. In these circumstances, I find that the cognizance of the matter taken by the School Tribunal itself cannot be sustained. I am, therefore, not inclined to enter into other arguments which the learned Counsel for the petitioners has advanced. It is also not necessary for this Court to record any finding in relation to substantive merits of the matter which the learned Counsel for respondent No. 1 want to have.

7. In these circumstances, the judgment dated 18-12-1995 is found to be unsustainable. The same is accordingly quashed and set aside. The Appeal No. STN/345/1994 is restored back to the file of School Tribunal, Nagpur. As the

matter is old and is being sent back, the School Tribunal shall decide the prayer for condonation of delay along with other incidental questions within three months from the date of communication of this order to it. If it condones the delay, it shall proceed further to decide the appeal on merits and the appeal shall be decided as early as possible within a further period of three months thereafter.

8. Before parting, it is necessary to mention the arguments advanced by learned Counsel for respondent No. 1. He contended that the School Tribunal should be directed to decide the application for condonation of delay and also the appeal on merits together so as to avoid any challenge to the interlocutory order on the point of condonation of delay as it will further delay in adjudication of appeal on merits. Such a course of action cannot be countenanced and has not been conceded to by the learned Counsel for the petitioners. Shri Jibhkate, learned Counsel also expressed possibility that the management may start recovery because the impugned order has been set aside. The learned Counsel appearing for the petitioners, upon instructions, states that the management does not plan to effect any such recovery from respondent No. 1.

9. In the circumstances, writ petition is disposed of. Rule is made absolute in above terms. There shall be no order as to costs.