
(2014) 10 BOM CK 0123
In the Bombay High Court
Case No : Writ Petition No. 652 of 2013

Pramod

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-10-2014

Acts Referred:

Maharashtra Employment Guarantee Act, 1977 — Section 10(i), 2(24), 9

Citation : (2014) 6 ABR 683 : (2015) 2 BomCR 740

Hon'ble Judges : C.V. Bhadang, J;A.P. Bhangale, J

Bench : Division Bench

Advocate : M.V. Samarth and S.J. Kadu, Advocate for the Appellant; A.D. Sonak, Assistant Government Pleader and Abhay Sambre, Advocate for the Respondent

Judgement

C.V. Bhadang, J.—Rule. Rule made returnable forthwith. The petition is heard finally with the consent of the parties. The petitioner was initially appointed as an Assistant Lecturer in the Department of Civil Engineering in the Polytechnic Institution run by the respondent No. 4 on 30.7.1977. This was after adopting due procedure for selection and appointment. The petitioner was subsequently appointed as a Lecturer (Selection Grade) with effect from 1.4.1993 and worked as the Project Officer, Community Polytechnic, Amravati from 4.2.2000 till 30.7.2007. According to the petitioner, the post of Project Officer is equivalent to the post of Head of Department. The petitioner also worked as the in-charge Head of Department of Civil Engineering from 8.8.2005 to 13.2.2008.

In the year 2007, the process for selection for the post of Head of Department (Civil Engineering) was undertaken, in which the petitioner got selected as the Head of Department. This was approved by the Directorate of Technical Education, vide communication dated 14.2.2008.

2. The present dispute relates to an appointment to the post of Principal of Polytechnic Institution run by the respondent No. 4 (respondent polytechnic) which fell vacant from 31.7.2007 on account of the then Principal Mr. R.K. Mahalle obtaining voluntary retirement. The Polytechnic Institution is governed

by the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (hereinafter referred to as the "Rules of 1981" for short) framed under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("Act of 1977" for short). As the petitioner was entitled to be appointed as the Principal, being the senior most Lecturer in the Polytechnic Institution, in view of the provisions of Rule 3(3) of the Rules, the petitioner made representation on 5.7.2007 to respondent No. 4 Society. The seniority list of the employees working in the Civil Engineering Department of the Polytechnic Institution, was drawn on 1.7.1997. The said seniority list was also approved in the meeting of the Local Management Committee (L.M.C.) on 19.9.1997. Mr. R.D. Potdar, who was at Sr. No. 1 in the said seniority list, had retired in 2005 and as such the petitioner being at Sr. No. 2 was the senior most available candidate.

However, the respondent No. 4-Society, by an order dated 9.7.2007, appointed Mr. Suresh Kitukale as the Officiating Principal of the Polytechnic Institution, treating him, the senior most Lecturer. This was challenged by the petitioner in Writ Petition No. 3230/2007. That petition was decided by a judgment and order dated 31.7.2007 relegating the petitioner to the remedy available under Section 9 of the Act before the School Tribunal. The petitioner accordingly, filed Appeal No. 39/2007, before the School Tribunal, Amravati. By an order dated 11.10.2007, the same was dismissed as being premature. This was subject-matter of yet another challenge in Writ Petition No. 5748/2007 before this court. In the meantime, the respondent No. 4-Society issued advertisement on 23.11.2007 inviting applications for the post of Principal of respondent Polytechnic Institution, by selection/nomination. It is contended that the claim of the petitioner for the post of Officiating Principal was upheld by this court on the basis of seniority in view of provisions of Rule 3(3) of the Rules. Writ Petition No. 5748/2007 came to be disposed of on 15.9.2009. This court held that the only issue which arose in the appeal before the School Tribunal was, whether the appointment of respondent No. 5 therein (one Mr. Kitukale) by order dated 9.7.2007 as officiating Principal was proper. By an earlier order dated 10.12.2007, this court had permitted the respondent No. 4 to proceed with the advertisement dated 23.11.2007.

3. The petitioner filed yet another Writ Petition No. 4235/2009 challenging the advertisement and seeking appointment as the Principal. By an interim order therein, the respondent No. 4-Society was restrained from allowing the selected candidate to join as the Principal. The contention of the respondent No. 4-Society was that the petitioner was not having the required qualification and sought permission under Rule 3(5) of the Rules for issuing fresh advertisement. Writ Petition No. 4235/2009 was allowed by a judgment and order dated 29.7.2010 permitting the respondent No. 4-Society to approach the respondent No. 2-Director seeking permission to issue fresh advertisement and also permitting the petitioner to make a representation to the Director, substantiating his claim, for the post of Principal.

Accordingly, the petitioner made a representation on 5.8.2010 before the Director, staking his claim to the post of Principal. It appears that simultaneously the respondent No. 4-Society submitted a proposal on 16-8-2010, seeking permission, to issue fresh advertisement. The respondent No. 2-Director, by an order dated 17.10.2012, granted permission to the respondent No. 4-Society, to issue an advertisement for the post of Principal of the Polytechnic Institution, in accordance with the All India Council for Technical Education (Pay Scales, Service Conditions and Qualifications for the Teachers and Other Academic Staff in Technical Institutions (Diploma) Regulations, 2010) (hereinafter referred to as Regulations of 2010 for short). That order is subject-matter of challenge in this petition. The petitioner, while praying for quashing the order dated 17.10.2012 (Annexure XVIII) is also claiming a direction to the respondent No. 4, to promote the petitioner to the post of Principal of the respondent polytechnic with effect from 9.7.2007 and certain consequential reliefs.

4. The respondent Nos. 1 to 3 have filed return. It is contended that the respondent-polytechnic is a private aided institution approved by the All India Council for Technical Education (A.I.C.T.E.) established under the All India Council for Technical Education Act, 1987 ("Act of 1987" for short). All Polytechnics and Engineering Colleges working in the country are governed by the said Act, which includes the service conditions and pay scales. All the teachers working in such Polytechnics and Engineering Colleges, both Government as well as private aided Colleges, the teachers are given benefit of the revised A.I.C.T.E. pay scales with the condition that recruitment rules for various faculty positions shall be revised in accordance with A.I.C.T.E. recommendation. In short, it is contended that the appointment to the post of Principal in the polytechnic institution would be governed by the directives issued by the A.I.C.T.E from time to time, as implemented by the State Government. Thus, the provisions of the M.E.P.S. Act and the Rules framed thereunder, cannot be applied in toto for the post of Principal in such polytechnics.

It is contended that there are 39 aided polytechnics in the State under the control of respondent No. 2 and out of them in 22 polytechnics, the appointment to the post of Principal is made through nomination as per the prevailing recruitment norms. So far as representation dated 5.8.2010 made by the petitioner, it is contended that the petitioner was given opportunity of hearing and, thereafter, the impugned order is passed.

It is contended that at present the recruitment rules for the post of Principal are notified on 10.9.2012 which provides for recruitment to the post of Principal by nomination through direct recruitment even in private aided polytechnics where M.E.P.S. Act is applicable. It is contended that, on his own saying, the petitioner was on probation period for two years as the Head of Department (H.O.D.) of Civil Engineering from 15.2.2008 and has completed his probation period satisfactorily on 14.2.2010 and his services as Head of Department of Civil Engineering were continued from 15.2.2010. As per the Recruitment Rules, vide

Government Notification dated 28.8.2008, the appointment to the post of Principal in Government Polytechnics shall be made by promotion of a suitable person on the basis of strict selection with due regard to seniority from amongst persons holding the post of Head of Department for at least 3 years and possessing essential qualifications and experience. It is contended that thus the petitioner cannot lay his claim to the post of Principal with effect from 9.7.2007, even as per the Recruitment Rules vide Notification dated 9.9.2013 issued by the Higher and Technical Education Department. The said rules were applicable till 27.8.2008.

5. Heard Shri M.V. Samarth, the learned counsel with Shri S.J. Kadu, the learned counsel for the petitioner, Shri A.D. Sonak, the learned Assistant Government Pleader for respondent Nos. 1 to 3 and Shri Abhay Sambre, the learned counsel for respondent No. 4. None for respondent No. 5 though served.

6. It is submitted by Shri Samarth, the learned counsel for the petitioner that as held by a Full Bench of this court in Anil Dattatraya Ade Vs. Presiding Officer, School Tribunal, Geetadevi Khandelwal Institute of Pharmacy and State of Maharashtra, , the institution imparting technical education, which includes a polytechnic, is governed by the provisions of the M.E.P.S. Act. He submitted that thus the appointment to the post of Principal would be governed by Rule 3(3) of Rules of 1981 framed under the said Act. He submitted that thus the appointment has to be made by promotion of a senior most employee. The learned counsel submitted that admittedly the petitioner is the senior most teacher working in the institution and as such he is entitled to be appointed as the Principal.

7. It is submitted that the impugned order which places reliance on the Government Notification dated 10.9.2012 and for the matter of that the Notification dated 28.8.2008 applies to the Government Polytechnic and not to private aided institution as in the present case. Thus, reliance placed by the Director on these rules is clearly misplaced. The learned counsel submitted that the petitioner was working as the Project Officer with effect from 3.2.2000 which is a post equivalent to the post of Head of Department. Thus, the petitioner would be qualified and eligible to be appointed as the Principal by promotion.

8. On the contrary, it is submitted by the learned Additional Government Pleader as also Shri Sambre, the learned counsel for respondent No. 4 that the Act of 1977 which has been held applicable to the polytechnic institution would be for the limited purpose of the availability of the remedy under Section 9 of the Act before the School Tribunal. It is submitted that the A.I.C.T.E. is the Apex Body which is concerned with maintaining the standard of education and prescribes the qualification etc. for appointment to various posts. It is submitted that there is a package scheme for revised pay scales which was accepted by the State Government, vide Notification dated 27.2.2003. Reliance is placed on Clause 8 thereof in order to submit that the petitioner is not holding the required qualification vide Clause 3 of Appendix-B. Reliance is also placed on Clause 9 of

the said Notification to show that recruitment to 50% cadre posts has to be strictly based on merit by open selection through open advertisement at national level and 50% by promotion on the basis of seniority-cum-merit. The submission is that the norms prescribed by the A.I.C.T.E. would apply with precedence and not the provisions of Act of 1977 or Rules of 1981 framed thereunder.

9. We have considered the rival circumstances and the submissions made. In the case of Anil Dattatraya Ade (supra), the following questions were referred by the Division Bench for determination by the Larger Bench.

(i) Whether the employees of Pharmacy institution are governed by the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ?

(ii) Whether the amendment by Maharashtra Act 32 of 1990 introduced on 6.12.1990 to the provisions of the said Act is declaratory in nature so as to have retrospective operation ?

10. The reference was necessitated on account of the Division Bench noticing the conflict of opinion in P.D. Prabhudesai v. Principal, M.T.E. Societies Walchand College of Engineering, Vishrambang at Sangli (Writ Petition No. 2719 of 1984) and Mohd. Israr Siddiqui v. Board of Technical Education through its Director and others (Writ Petition No. 1527 of 1987) on one hand and Abdullah Jameel Ahmed Ansari and Others Vs. M.H. Saboo Siddik Polytechnic and Others, on the other. In P.D. Prabhudesai and Mohd. Israr Siddiqui, it was held that the provisions of Act of 1977 would not apply to Polytechnic Institution, while in Abdullah Jameel Ahmed Ansari and others, a contrary opinion was expressed. The questions for consideration formulated by the Full Bench as noticed in para 21 of the judgment are as under :

"(i) Whether the provisions of the Act and the Rules would apply to Pharmacy Schools and other technical institutions?

(ii) Whether the Amendment Act of 1990 is declaratory and/or clarificatory in nature and has retrospective operation?; and

(iii) Whether there is inconsistency between Central Act and State Act and whether the State Act is void and inoperative to the extent of so called inconsistency or repugnancy?"

11. It may be mentioned that the dispute in Anil Ade (supra) related to an employee working in a Pharmacy institution. Be that at it may, the full bench ultimately held that the provisions of Act of 1977 and Rules of 1981 framed thereunder would apply to employees working in the polytechnic colleges as also the pharmacy institution being institutions imparting technical education, within the meaning of Section 2(24) of the Act, as amended. It has been further held that thus the School Tribunal constituted under the Act would have jurisdiction to entertain, deal with and decide the dispute in exercise of the powers conferred under the Act. Thus, the full bench held that the view taken in P.D. Prabhudesai

and Mohd. Israr Siddiqui was erroneous and was accordingly overruled while confirming the decision in the case of Abdullah Jameel Ahmed Ansari and others. It may not be out of place to mention here that the question about applicability of the provisions of Act of 1977 arose essentially in the context of a dispute, as to whether, the School Tribunal under the said Act would have jurisdiction to entertain and decide the appeals filed by the employees working in such institution.

12. All India Council for Technical Education is established under the All India Council for Technical Education Act, 1987 which is a Central Act. The statement of object and reasons of the said Act would show that the Act is enacted to provide statutory powers to All India Council for Technical Education to ensure : (i) proper planning and co-ordinated development of the technical education system throughout the country; (ii) promotion of qualitative improvement of technical education in relation of planned quantitative growth, and (iii) regulation of the system and proper maintenance of norms and standards. Accordingly, the powers and functions assigned to the AICTE, inter alia, provide laying down norms and standards for programmes and institutions, giving approval for setting up of technical institutions, prescribing guidelines for admission of students and the charging of fees etc. Section 10(i) of the Act provides, as one of the functions of the council, to lay down norms and standards for courses, curricula, physical and instructional facilities, staff pattern, staff qualifications, quality instructions, assessment and examinations.

13. It appears that the A.I.C.T.E. forwarded its recommendation about revision of pay scales and service conditions of teaching staff of the Polytechnics to the State Government vide its letter dated 30.12.1999. These recommendations were considered by the State Government and on consideration of the package scheme for revision of pay scales and the maintenance of standards of technical education, the Government had accepted the same vide Government Resolution dated 27.2.2003. Para 2 of the same reads as under :

"The A.I.C.T.E. has forwarded its recommendations about revision of pay scales and service conditions of teaching staff of the Polytechnics to the State Government vide its letter, dated 30.12.1999. These recommendations were under consideration of the State Government. After careful consideration of the package scheme for revision of pay scales and the maintenance of standards of technical education, with an intention to provide a benchmark for creating ideal Polytechnics with competent teaching staff, the State Government has now decided to implement the package scheme with the terms and conditions of service as mentioned below."

Clause 4 of the notification namely "coverage", envisages that the scheme would be applicable to all teachers including those who are working on various administrative posts in the administrative offices as a stop gap arrangement, Librarians in Diploma level technical institutions covered under the A.I.C.T.E Act. The revised scales of pay including Career Advancement Scheme and incentives

for higher qualification given under the scheme will be effective from 1.1.1996. All other terms and conditions were to be effective from 30.12.1999.

Clause 8 of the said Resolution then proceeds to prescribe minimum qualifications and experience for various teaching posts, in diploma level technical institutions as set out in Appendix-B.

Clause 3 of Appendix-B provides for the qualification and experience for the post of Principal which is as under :

Clause 9 "Recruitment", provides that 50% recruitment to all cadre posts shall be strictly based on merit by open selection through open advertisement at national level and 50% will be by promotion on the basis of seniority cum merit.

It would be necessary to set out Rule 3 of Rules 1981 on which the petitioner has placed reliance (to the extent relevant).

3. Qualifications and appointment of Head.

(1) A person to be appointed as the Head-

(a) (i) of a primary school having an enrollment of students above 200 or having Standards I to VII shall be the senior-most trained teacher who has put in not less than five years" service : and

(ii) of any other primary school shall be the senior-most trained teacher in the school;

(b) of a secondary school including night school or a Junior College of Education shall be a graduate possessing Bachelor"s degree in teaching or education of a statutory University or any other qualification recognized by Government as equivalent thereto and possessing not less than five years", total fulltime teaching experience after graduation in a secondary school or a Junior College of Education out of which at least two years" experience shall be after acquiring Bachelor"s degree in teaching or education:

Provided that, in the case of a person to be appointed as the Head of a night secondary school-

(i) he shall not be the one who is holding the post of the Head or Assistant Head of a day school, and

(ii) the experience laid down in clause (b) of sub-rule (1) may be as a part-time teacher.

(2).....

(3) The Management of a school including a night school shall fill up the post of the Head by appointing the senior-most member of the teaching staff (in accordance with the guidelines laid down in Schedule "F" from amongst those employed in a school (if it is the only school run by the Management) or schools

[if there are more than one school (excluding night school) conducted by it] who fulfills the conditions laid down in sub-rule (1) and who has a satisfactory record of service.

14. It is not in dispute that the petitioner is the senior-most teacher and has been working as in-charge Principal from 9.7.2007. The short question is, whether the appointment to the post of Principal would be governed by Rule 3(3) of the Rules of 1981 or as per the norms prescribed by the A.I.C.T.E. and accepted by the State Government. Undoubtedly, the rules as notified on 10.9.2012 govern the appointment to the post of Principal of a Government Polytechnic or equivalent institute. It was nobody's case that the respondent-polytechnic is an equivalent Institute. Thus, the rules as notified on 10.9.2012 cannot apply to the respondent-polytechnic which is private aided institute. However, as noticed earlier, the package scheme of revised pay scales as recommended by the A.I.C.T.E. which was accepted by the State Government vide Government Resolution dated 27.2.2003 would apply in this case.

15. It would be significant to note that Rule 3(3) of the Rules of 1981 in terms provide that the candidate has to fulfill the conditions as laid down in sub-rule (1) and has a satisfactory record of service. A perusal of sub-rule (1) of Rule 3 would show that a Principal of a Polytechnic Institution does not figure in sub-rule (1) of Rule 3. In our considered view, reliance placed on behalf of the petitioner on the decision of the full bench in Anil Ade's case is misplaced. The prescription of qualification, mode of appointment (i.e. either by promotion or nomination) and a remedy to an aggrieved employee, in the event of his termination, removal or dismissal, are three distinct aspects and cannot be confused with each other. We have already noticed that the dispute before the full bench and for the matter of that before the Division Benches, out of which, the reference arose, was, as to whether, the Act would apply so as to confer jurisdiction on the School Tribunal to entertain the dispute as are cognizable by it under the Act. In our considered view, the question of qualification and the mode of appointment is distinct and in deciding the same, various factors such as norms prescribed by Apex Body such as A.I.C.T.E. and the recommendations which are accepted by the State Government will have to be kept in mind. In that view of the matter, we are unable to hold that the appointment to the post of Principal in such a case has to be unnecessarily by promotion and not nomination. In that view of the matter, we find that the petition is devoid of any merit. It is accordingly dismissed. Rule is discharged, with no order as to costs.

Later on:

Shri S.J. Kadu, the learned counsel for the petitioner, prayed for continuation of ad-interim status quo as granted on 6.2.2013 and continued thereafter. Ad-interim status quo shall continue to operate for the period of six weeks.