

(1988) 08 BOM CK 0010
In the Bombay High Court
Case No : Writ Petition No. 647 of 1988

Premier Education Society and Others	APPELLANT
Vs	
I.K. Kirpalani and Another	RESPONDENT

Date of Decision : 12-08-1988

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 5, 5(1), 5(2), 5(3), 5(4)

Citation : (1988) 3 BomCR 365 : (1988) 90 BOMLR 642

Hon'ble Judges : Sujata Manohar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sujata Manohar, J.—The 1st respondent I.K. Kripalani is the Head Master of A.M. Kewalramani Premier High School, Sion East, Bombay, 400 022. This school is run by Premier Education Society (the 1st petitioner). This is a society registered under the Society Registration Act as well as under the Bombay Public Trusts Act. The said school was first founded at Karachi (Sind) in 1935. After the partition of the country the school had to be closed down at Karachi. It was started a fresh at Bombay and is established and administered by a minority community of Sindhies . It is an accepted position that this is a private school run by a minority community.

2. u/s 3(2) of the Maharashtra Employees of private Schools (Conditions of Service) Regulation Act, 1977 the management of the school as such minority school has notified the names of three persons employed in the school including the Head of the school to the Deputy Director of Education for the purposes of the said Act.

3. In November 1985 the 1st respondent was the Assistant Head Master of the said school. In November 1985 in view of the impending of the Head Master of the said school the said Society constituted a Selection Committee to appoint the

Head, the Assistant Head and the Supervisor of the said school. The Selection Committee at its meeting held on 27th November, 1985 appointed the 1st respondent who was then the Assistant Head, as the Head Master of the school, on probation in the first instance for a period of two years with effect from the afternoon of 30th November, 1985. The Selection Committee also selected the Assistant Head Master and Supervisor at the said meeting. Pursuant to the selection so made the President of the Society addressed a letter dated 30th November, 1985 to the 1st respondent informing him that he was being appointed Head Master of the Secondary and Higher Secondary Departments of the said School on probation in the first instance for two years which is likely to be extended for such further period as the School Management may in its sole and absolute discretion determine.

4. The letter also made it clear that the school being a minority school the 1st respondent would be bound by its terms and conditions of service and rules and regulations for the members of the staff which had already been accepted by the 1st respondent. The 1st respondent was also informed that he would have to discharged his administrative and academic duties as well as any other functions under the superintendence and control of N.C. Mankani who was appointed by the School Management to be in over-all charge of the various departments of the school. A copy of the minutes of the Selection Committee meeting of 27th November, 1985 were annexed to the letter and the 1st respondent was asked to sign and return the same. He was also asked to convey his acceptance of the appointment so made.

5. The 1st respondent accepted the said appointment. He also signed a copy of the minutes of the Selection Committee meeting of 27th November, 1985. He thereafter worked as the Head Master of the said school. The appointments made in accordance with the minutes of the Selection Committee meeting of 27th November, 1985 were sent to the Education Inspector, Greater Bombay for approval. By his letter dated 20th February, 1986 the Education Officer approved the three appointments so made u/s 3 sub-section (2) of the Maharashtra Employees of Private School (Conditions of Service) Regulation Act, 1977.

6. By its letter of 13th April, 1987 the said Society informed the 1st respondent that the Managing Board had considered his performance during his probationary period and had decided to extend his probationary period further by one week with effect from 1st December, 1987 with an added caution that he would show radical improvement in his functioning. Despite this extention, however, by its letter dated 26th October, 1987 the said Society terminated the services of the 1st respondent as the Head Master with effect from the after noon of 30th November, 1987, that it is to say, at the end of the initial probationary period of two years. The material part of the said letter of termination is as follows :-

"In the opinion of the school Management, your work and performance during the period of your probation as Head Master of the Secondary and the Higher Secondary Departments of the A.M. Kewalramani Premier High School are not

satisfactory.

Accordingly, the School Management is constrained to terminate your services as Headmaster on probation with effect from the afternoon of Monday, the 30th November, 1987, and this may, therefore, be treated as one month's due notice of termination of your services as per provisions in section 5(3) of the Maharashtra Employees of Private School (Conditions of Service) Regulation Act, 1977.

You will, ipso facto, return to your substantive post as Assistant Head of the School with effect from the forenoon of Tuesday, the 1st of December, 1987."

7. The 1st respondent filed an appeal from the said order before the School Tribunal, Bombay u/s 9 of the said Act. The Tribunal by its judgment and order dated 25th January, 1988 allowed the appeal and set aside the order of 26th October, 1987. He was allowed to continue as the Head Master of the said school in terms of the said order.

8. The present petition challenges this judgment and order of the school tribunal.

9. The terms and conditions of services of employees in private schools in Maharashtra are governed by the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as the said Act). u/s 3 of the said Act the provisions of the Act apply to all private schools in the State of Maharashtra whether receiving any grant-in-aid from the State Government or not. Under sub-section (2) however, (prior to its amendment in 1987) the provisions of the said Act shall not apply "to the recruitment, conditions of service and conduct and discipline of the Head of a minority school or any other persons (not exceeding 3) who are employed in such school and whose names are notified by the management to the Deputy Director for this purpose". This was the relevant part of section 3(2) at the time when the petitioner was appointed as Headmaster of the said School in November 1985.

10. On 7th August, 1987 however, by virtue of an amending Act XXX of 1987 section 3 sub-section (2) was amended. As a result the provisions of the said Act were made inapplicable "to the recruitment of the Head of a minority school or any other person (not exceeding three) who are employed in such school and whose names are notified by the Management to the Deputy Director for this purpose." Apparently this amendment was occasioned by a decision of the Supreme Court in the case of Frank Anthony Public School Employees' Association Vs. Union of India (UOI) and Others, . In the case before the Supreme Court the provisions of the Delhi School Education Act, 1973 were considered. The Supreme Court observed that the right guaranteed to religious and linguistic minorities by Article 30(1) is two fold, to establish and to administer educational institutions of their choice. The Supreme Court upheld the provisions in the Delhi Act to the effect that the scales of pay and allowances of employees of a recognised private school shall not be less than those of the employees of schools run by appropriate Government. It observed in paragraphs

15 and 16 that a mere prescription of scales of pay and other conditions of service would not jeopardise the right of the management of the minority institutions to appoint teachers of their choice. In view of these observations of the Supreme Court it seems that section 3(2) was amended providing to a minority school right to recruit the head of the institution and any other persons not exceeding three whose names are notified by the management but their conditions of service and conduct and discipline which were not effected from 7th August, 1987 sought to be regulated under the Act.

11. u/s 5 of the said Act as it stood prior to 7th of August, 1987 sub-section (2) and (3) were as follows :-

"5 (2) Every person appointed to fill a permanent vacancy shall be on probation for a period of two years, subject to the provisions of sub-sections (4) and (5), he shall on completion of this probation period of two years, be deemed to have been confirmed.

(3) If in the opinion of the Management, the work or behaviour of any probation, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice."

12. Section 5 sub-section (3) was amended on 7th August, 1987 permitting the Management to give salary of one month in lieu of notice.

13. By the Amending Act XXX of 1987 sub-section (4-A) was added to section 5. Sub-section (4-A) is as follows :-

"(4-A) Nothing in sub-section (2), (3) or (4) shall apply to a person appointed to fill a permanent vacancy by promotion or by absorption as provided under the proviso to sub-section (1)".

14. The 1st respondent was appointed as a Head Master with effect from 30th November, 1985. He was appointed on probation for two years. In view of section 3 sub-section (2) as it then stood his recruitment was not subject to the said Act. Even after the amendment Act of 7th August, 1987 this part of section 3 sub-section (2) remains the same.

15. It is however, the contention of the 1st respondent that on the date when his services as Head Master were terminated section 5(4-A) had come into operation. He contends that by virtue of section 5(4-A) he cannot be considered as a person appointed on probation and that the termination of his services were on the footing that he was on probation is not valid in law.

16. To appreciate the arguments advanced in this connection it is necessary to consider the scheme of section 5. u/s 5 sub-section (1) the management has the obligation to fill in every permanent vacancy in a private school by appointment of a person duly qualified. Under sub section (2) every person appointed to fill a permanent vacancy shall be on probation for two years. Under sub-section (3) if

the work or behaviour of any probationer is not satisfactory the Management may terminate his services as provided under the said section. Thus sub-sections (1) and (2) deal with appointment and sub-section (3) deals with termination of services. Appointments which were made prior to the amendment came into effect and the terms of such appointment cannot be affected by subsequent amendment of the Act, unless the amendment expressly so provides. All statutes are ordinarily prospective in their operation. In the present case also the amendment would be prospective unless there is anything in the special context which gives a retrospective operation. In the present case there is nothing to show that the Amending Act XXX of 1987 in so far as it amend section 5 was intended to alter retrospectively appointments already made. The appointment of the petitioner as the Head Master, therefore, on probation for two years is not in any way affected by the amendment made on 7th August, 1987.

17. The termination of his services however, was effected after coming into force of the amendment of 7th August, 1987. Therefore, termination of his services would not certainly be affected by any relevant provisions of the amendment. Section 5 sub-section (4-A) which was in existence when his services were terminated stated that sub-sections (2), (3) or (4) shall not apply to a person appointed to fill a permanent vacancy by promotion. In other words sub-section (4-A) provides that a person who is appointed to fill a permanent vacancy by promotion need not be appointed on probation for 2 years during which his services could be terminated by the amendment under sub-section (3). In the case of the petitioner however, since his appointment was already made prior to the coming into operation of sub-section (4-A) there will be no question of sub-section (4-A) being applied to his appointment. The petitioner, under the appointment order of 30th November, 1985, was in fact appointed on probation for two years. This was in conformity with section 5 sub-section (2) as it stood at the relevant time, even though it was not strictly applicable at the date of the appointment. Even otherwise, as a minority school, the petitioners were entitled to make the appointment of a Headmaster on their own terms. They appointed the petitioner on probation for two years. They had a right to terminate the services of the 1st respondent at the end of the probationary period if he was found unsuitable. Even section 5 sub-section (3) gives to the management the right to terminate services during the period of probation if the work or behaviour of the probationer is not satisfactory. Section 5(3) was applicable when the 1st respondent's services were terminated because of the amendment. Even otherwise this right was available to the petitioners in view of the nature of appointment of the 1st respondent. In view of this provision the management terminated the services of the petitioner at the end of the initial period of probation on the ground that his work was not satisfactory.

18. In this context it is not necessary to consider whether the petitioner was appointed on promotion or whether he was selected by the Selection Committee. Because even if he is considered as a person appointed to fill a permanent vacancy by promotion, the conditions under which he was appointed prior to the

coming into force of section 5(4-A) cannot be affected by the subsequent coming into operation of section 5(4-A).

19. Nevertheless since some arguments were advanced on this point I will examine this position. The minutes of the Selection Committee show that in view of the impending retirement of the present Headmaster the Selection Committee was set up, *inter alia*, to select the Headmaster of the school. For this purpose the Selection Committee looked into the personal files, confidential reports etc. of a number of members of the staff. It took into account the personal record of the 1st respondent who was the senior-most person and decided that despite some blemishes which were disclosed he may improve in his work if he were to be entrusted with the duties of a Headmaster. The Selection Committee therefore decided to appoint 1st respondent as headmaster on probation for two years. The 1st respondent was clearly not promoted simply because he was the senior most member of the staff. Other members of the staff, presumably junior to him were also considered. The Selection Committee however, decided to appoint the 1st respondent on probation for two years. His appointment on probation has a direct link with some "blemishes" which the Selection Committee took note of. As a result the Selection Committee also took care to lay down its expectations from the 1st respondent in the form of guidelines which were sent to the 1st respondent. The appointment of 1st respondent, in these circumstances, cannot be considered as a promotion simpliciter. It appears to be a fresh appointment. It is true that persons other than the members of the staff were not considered by the Selection Committee. But this being a minority institution it was open to it to appoint the Head of the school in such manner as it deemed proper. It decided to give this authority to the Selection Committee. The Selection Committee decided to consider first some of the existing members of the staff for the post. This does not entail that the person who was selected was entitled to be promoted and he was appointed to the post only by promotion. In any event, the appointment on probation having been made prior to section 5(4-A) that sub-section cannot retrospectively alter the nature of the appointment and make it a permanent appointment. The question therefore, whether the first respondent was selected and freshly appointed or whether the first respondent was selected and promoted need not be answered as it is not directly relevant. Looking however to the terms of the appointment letter 1st respondent was appointed on probation for two years.

20. A person who is appointed on probation may be relieved from service if he is found unsuitable. It is well established that such removal does not cast any stigma provided it is only removal on the ground of probationer's service being unsatisfactory or unsuitable. As observed by the Supreme Court in the case of *Hari Singh Mann Vs. State of Punjab and Others*, to hold that the words "unfit to be appointed" are a stigma would rob the authorities of the power to judge fitness for work or suitability to the post at the time of confirmation. Termination of services on account of inadequacy for the job or for any temperamental or other defect not involving moral turpitude is not a stigma which can be called

discharge by punishment. Fitness for the job is one of the most important reasons for confirmation.

21. Of course a mere form of the order terminating services simpliciter is not conclusive. If in fact the order of termination is passed in attendance of circumstances which indicate that it is by way of punishment such circumstances can be looked into and the order of termination can be quashed if it is found that it was in fact by way of punishment. In the case of *Jarnail Singh and Others Vs. State of Punjab and Others*, the Supreme Court has summarised the position as follows :

"The position is now well-settled on a conspectus of the decisions referred to hereinbefore that the mere form of the order is not sufficient to hold that the order of termination was innocuous and the order of termination of the services of a probationer or of an ad hoc appointee is a termination simpliciter in accordance with the terms of the appointment without attaching any stigma to the employee concerned. It is the substance of the order i.e. the attending circumstances as well as the basis of the order that have to be taken into consideration. In other words, when an allegation is made by the employee assailing the order of termination as one based on misconduct, though couched in innocuous terms. It is incumbent on the Court to lift the veil and to see the real circumstances as well as the basis and foundation of the order complained of. In other words, the Court, in such case will lift the veil and will see whether the order was made on the ground of misconduct, inefficiency or not".

22. In the present case, therefore, one must examine the order of 26th October, 1987 and the attendant circumstances. It is the case of the petitioners that the work of the 1st respondent as the Head-master of the school was not satisfactory. The petitioners have relied upon extensive correspondence exchanged between Mankani who was appointed to supervise the work of the 1st respondent and the 1st respondent as also between the Secretary as well as the President of the 1st petitioner society and the 1st respondent which indicate that the 1st respondent's work was not satisfactory. It is not for me to go into the question whether the 1st respondent should or should not have been asked to function under the supervision of Mankani. The Selection Committee however, seems to have had some reservations about appointing the 1st respondent as the Head of the school without there being any supervision or guidance. The school authorities decided to supervise the work of the 1st respondent as the Headmaster. For this purpose they appointed Mankani on their behalf to supervise the work of the 1st respondent. It was, presumably, on account of these reservations which the Selection Committee had left that the 1st respondent was appointed on probation. The purpose was to watch his work and to confirm him in the post if the work was satisfactory. The correspondence indicates that the school authorities and Mankani were not satisfied with the work of the 1st respondent as the Headmaster of the institution. The statement, therefore, in the first paragraph of the order of termination dated 26th October,

1987 that in the opinion of the school Management the 1st respondent's work and performance during the period of his probation as Headmaster were not satisfactory appears to be genuine assessment of the 1st respondent work during the period of probation. This does not appear to be punishment for any misconduct or inefficiency. The termination is entirely on account of unsatisfactory work of 1st respondent as the Head of the institution.

23. The whole purpose of probation is to assess whether a person can function properly in the post to which he is appointed. The termination during the probationary period for not coming up to the requirements of the post cannot be considered as punishment. There was therefore, no question of holding any enquiry in a case such as the present case.

24. It is submitted by learned Advocate for the 1st respondent that under the order of 26th October, 1987 he has been reverted to his substantive post as Assistant Headmaster. This is bound to cause injury to the 1st respondent. It will also make it difficult for the 1st respondent to obtain elsewhere the post of a Headmaster. Hence the order of termination of 26th October, 1987 must be considered as casting a stigma on the 1st respondent. This submission must also be rejected. It is true that when a person is not confirmed in a post this fact may have some bearing if he applies for a similar appointment elsewhere. This by itself cannot be considered as casting a stigma. If that were to be so, the whole purpose of appointing a person on probation would be lost since in every case of non-confirmation such a consequence will follow.

25. The second part of the order reverning him as Assistant Headmaster is of the benefit of the 1st respondent. If he apprehends that his reversion in the same institution will harm him in any way, he may decline that offer and leave the institution if he so desires.

26. It is also submitted by learned Advocate for the 1st respondent that under the order of 26th October, 1987 the 1st respondent is reverted to the post of Assistant Head master. This clearly indicates that his initial appointment as the Head Master was on promotion. Since he was promoted as the Headmaster he should not have been appointed in probation for two years in view of section 5, sub-section (4-A). As stated earlier provisions of section 5(4-A) came into operation after the appointment on probation of the 1st respondent. They do not therefore govern the terms of his appointment.

27. A mere reversion of a person who is holding a higher post on probation because he is unfit to be confirmed in a higher post does not cast a stigma. As pointed out by the Supreme Court in the case of Dhanjibhai Ramjibhai Vs. State of Gujarat, ,the function of confirmation implies the exercise of judgment by the confirming authority on the overall suitability of the employee for permanent absorption in service. Non-confirmation on the ground of the person's unsuitability does not cast a stigma. In the premises the School Tribunal has misdirected itself in law in holding that the order of termination carried a stigma

of reduction of rank.

In the premises the petition is allowed and the rule is made absolute in terms of prayer (a).

In the circumstances there will be no order as to costs.

On the application of the 1st respondent interim order dated 21st March, 1988 in Appeal No. 373 of 1988 in the present petition to continue for a period of four weeks from today.