

(2005) 12 BOM CK 0035

In the Bombay High Court

Case No : Writ Petition No. 2013 of 1994

Ramchandra Keshavrao Deo

APPELLANT

Vs

Presiding Officer, School Tribunal and Others

RESPONDENT

Date of Decision : 13-12-2005

Acts Referred:

Bombay Civil Services Pension Rules, 1959 — Rule 2
Constitution of India, 1950 — Article 226, 309
Maharashtra Civil Services (Pension) Rules, 1982 — Rule 10, 2, 66
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 16, 16(3), 16(4), 4, 4(1)

Citation : (2006) 3 ALLMR 61 : (2006) 2 MhLj 862

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

Bench : Single Bench

Advocate : Prabhu, holding for Anand Parchure, for the Appellant; Sudhir Moharir, for respondents No. 2 and 3 and B.H. Lanjewar, AGP for respondents Nos. 1, 4 and 5, for the Respondent

Judgement

B.P. Dharmadhikari, J.—By this writ petition under Article 226 of Constitution of India, the petitioner an ex-employee in the employment of respondents No. 2 and 3 has challenged the Government Resolution dated 9-9-1988 along with the orders dated 5-10-1991, 10-14992 of his employer management and 24-2-1994 of School Tribunal. By the Government Resolution mentioned above, the management of Private Schools have been empowered to order compulsory retirement of their employees in accordance with the procedure prescribed thereunder. On 5-10-1991, in exercise of that power, respondents No. 2 and 3 ordered compulsory retirement of present petitioner with effect from 10-1-1992. By order dated 10-1-1992, the petitioner has been relieved accordingly. The petitioner challenged said order in an appeal u/s 9 of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, (hereinafter referred to as the Act or MEPS Act), before respondent No. 1 -School Tribunal and said Tribunal, by its judgment dated 24-2-1994 dismissed his appeal.

2. The petitioner joined the services on 4-7-1967 as Assistant Teacher and at that time he was graduate with B.Sc. Degree, He obtained B.Ed. Qualification in 1970 and thereafter M.Ed, in 1975. The petitioner was terminated with effect from 17-12-1984 but said termination was quashed and set aside on 30-4-1986 and he was reinstated with continuity and backwages. Thereafter in 1990, he was also made Assistant Head Master for brief period. It is in this background that he received the communication dated 5-10-1991 from Deputy Director of Education, Nagpur. The said authority conducted the hearing on 3-10-1991 in the matter of compulsory retirement of petitioner and as per procedure prescribed in Government Resolution dated 9-9-1988, permitted management to issue three months" advance notice to the petitioner informing him that he would not be retained in service beyond 55 years of his age. The said notice of three months was then issued by the management on 9-10-1991. Against this notice, the petitioner preferred a representation before the President of respondent No. 2 institution on 16-10-1991 but that representation was rejected on 15-11-1991. The petitioner was supplied with these proceedings and report along with relieving order on 10-1-1992.

3. In his appeal before the School Tribunal, the petitioner basically contended that respondents No. 2 and 3 could not have terminated him in mode and manner not recognised by the Act. It was his contention that the permanent employee is bound to continue till attaining the normal age of superannuation i.e. 58 years in his case and he could not have been discontinued on the ground of compulsory retirement after reaching 55 years of age. In support, the petitioner pointed out the provisions of Section 4 Sub-section (6) of the Act and contended that no procedure as prescribed in Act (MEPS Act) for his dismissal was followed. The further contention was that the Government Resolution authorising the management to compulsorily retire the petitioner was ultra vires the provisions of MEPS Act and for that purpose, reliance was placed upon proviso to Section 4 Sub-section (1) of the Act. The School Tribunal considered this issue in its judgment and found that the action of compulsory retirement of the petitioner has been taken as per Government Resolution dated 9-9-1988 and as such his compulsory retirement did not constitute termination so as to enable him to file appeal before the School Tribunal. It has then scrutinised the procedure followed for compulsory retirement in the light of abovementioned Government Resolution and has found that the procedural requirements as prescribed therein have been complied with. In view of these findings, the Tribunal dismissed the appeal.

4. Heard Smt. Prabhu, Advocate holding for Shri Parchure, learned Counsel for the petitioner, Shri Moharir, learned Counsel for respondents No. 2 and 3 and Shri Lanjewar, learned AGP for respondents No. 1, 4 and 5.

5. The learned Counsel for the petitioner has raised only one point for consideration before this Court. According to her, prior to 9-9-1988, there was no power with the management of any private school to order compulsory retirement of any employee. She states that the service conditions of petitioner

are regulated by the provisions of MEPS Act and the petitioner can be removed from service only in accordance with the provisions made in the said Act and 1981 Rules made thereunder. She invites attention to provisions of Section 4 Sub-section (6) of the Act in support of this contention. She further contends that by Government Resolution dated 9-9-1988, a new manner and mode of termination has been introduced without amending the provisions of MEPS Act or Rules made thereunder. She invites attention to proviso to Sub-section (1) of Section 4 to contend that the services of employees of private schools cannot be varied to his disadvantage by any rules and his service conditions are to be prescribed in this respect only by the rules framed by the State Government. According to the learned Counsel, therefore, respondents No. 2 and 3 did not possess power to terminate the services of the petitioner under the guise of ordering compulsory retirement. The termination, therefore, is liable to be quashed and set aside. She has placed reliance upon the judgment of the Full Bench of this Court in the case of Suryakant Sheshrao Panchal Vs. Vasantrao Naik Vimukta Jati, Bhatakya Jamati Adarsh Prasarak Mandal and Others, .

6. Shri Moharir, learned Counsel for respondents No. 2 and 3, on the other hand, has invited attention to the provisions of Government Resolution dated 4-11-1968 to show that since 1968, the provisions of Bombay Civil Services Pension Rules are made applicable to the employees working in Private Schools. According to him, therefore, entire rules i.e. including the provision for voluntary retirement and compulsory retirement were applicable to the petitioner since 1968 and therefore, the bar under proviso to Sub-section (1) of Section 4 is not attracted. He has further argued that the Government Resolution dated 9-9-1988 has only the effect of prescribing procedure for exercising a power which management already had. According to him, no new service condition has been prescribed after the coming into force of MEPS Act and hence according to him, challenge raised is totally misconceived. He also invites attention to provisions of Bombay Civil Services Pension Rules and corresponding provisions in Maharashtra Civil Services Pension Rules to substantiate his contention. He invites attention to Sub-rule (b) of Rule 2 of both these rules to show that said rule is made applicable by State Government to any person for whose appointment and condition of employment special provision is made by or under any law for the time being in force. It is his argument that such special provision has been made in relation to conditions of employment and appointment of the petitioner and therefore, earlier Bombay Civil Services Pension Rules and now Maharashtra Civil Services Pension Rules are applicable and the management, therefore, always possessed the power to order compulsory retirement.

7. The learned Assistant Government Pleader appearing for respondents Nos. 1, 4 and 5, adopted the arguments of Shri Moharir and stated that the perusal of preamble of Government Resolution dated 9-9-1988 shows that the pension scheme as per Bombay Civil Services (Pension) Rules has been made applicable to the petitioner and his service from 4-11-1968 and hence, there is no new condition of service introduced by Government Resolution dated 9-9-1988. He

has argued that the controversy is rightly appreciated by the School Tribunal in the impugned judgment and therefore no case is made out for interference in writ jurisdiction.

8. The perusal of provisions of Bombay Civil Services (Pension) Rules, 1959, particularly Rule 2 thereof shows that it is applicable unless it is otherwise expressed or implied. These rules have been made applicable to all members of services and holders of posts whose conditions of service the State Government is competent to prescribe. The provisions of Rule 2 of Maharashtra Civil Services Rules, 1982 are identically worded. Said rule reads:--

2. Extent of application.

Except where it is otherwise expressed or implied, these rules apply to all members of services and holders of posts whose conditions of service the Government of Maharashtra are competent to prescribe. They shall apply to --

(a) any person for whose appointment and conditions of employment special provision is made by or under any law for the time being in force.

(b) any person in respect of whose service, pay and allowances and pension or any of them special provision has been made by an agreement made with him, in respect of any matter not covered by the provisions of such law or agreement, and

(c) Government servants paid from local funds administered by Government, except rules relating to the foreign service.

There is no dispute that these rules are framed in exercise of powers conferred under proviso to Article 309 of Constitution of India upon him by Hon'ble Governor of Maharashtra. The words members of services and holders of posts used in substantive part of Rule 2 denote the members of services of State Government and holders of posts in employment of State Government i.e. whose services are at the pleasure of Hon'ble Governor. The post of Assistant Teacher in a Private School is not a post under the State Government and Assistant Teacher is not member of public services of State Government. Therefore, by itself, neither Bombay Civil Services Rules nor Maharashtra Civil Services Rules could apply to petitioner or any other Assistant Teacher. The Government Resolution mentioned by the learned Counsel for the respondents i.e. dated 4-9-1968 or the Government Resolution dated 9-9-1988 itself would not have been otherwise required to be issued, the very fact that these resolutions are issued separately show that these provisions ipso facto are not applicable to the petitioner and other Assistant Teachers. The preamble of G. R. dated 9-9-1988 itself shows that the pension scheme has been extended to employees working in private aided schools by Government decision dated 30-8-1972 and to employees working in junior colleges by Government decision dated 22-9-1982. The issue of extending benefit of voluntary retirement provision as contained therein was under consideration of State Government and first decision in this

respect was taken on 3-3-1987. However it was applicable to employees completing 30 years of service. The issue of extending it to those who have put in 20 years of qualifying service was also receiving attention of State Government and said decision has been reached and incorporated in resolution issued on 9-9-1988. The scheme as contained in Rule 66 or Rule 10 of Maharashtra Civil Services (Pension) Rules, 1982 has been accordingly made applicable to them through it. This history shows that such power to retire compulsorily was not available with management earlier. This is sufficient to negate the arguments of learned Counsel for respondents and to hold that a new condition of service has been added through this Government resolution.

9. As already stated, Rule 2 of Bombay/Maharashtra Civil Services Rules expressly states that it would apply if there is no other provision to the contrary. The provisions of MEPS Act and Rules of 1981 thereunder specifically regulate the service conditions of petitioner. Section 4 of MEPS Act is clear and said section reads as under :

4. Terms and conditions of service of employees of private schools : (1) Subject to the provisions of this section, the State Government may make rules providing for the minimum qualifications for recruitment (including its procedure), duties, pay, allowances, post-retirement and other benefits and other conditions of service of employees of private schools and for reservation of adequate number of posts for members of the backward classes :

Provided that, neither the pay nor the rights in respect of leave of absence, age of retirement and post-retirement benefits and other monetary benefits of an employee in the employment of an existing private school on the appointed date shall be varied to the disadvantage of each employee by any such rules.

(2) Every employee of a private school shall be governed by such Code of Conduct as may be prescribed. On the violation of any provision of such Code of Conduct, the employee shall be liable to disciplinary action after conducting an enquiry in such manner as may be prescribed.

(3) If the scales of pay and allowances, post-retirement and other benefits of the employees of any private school are less favourable than those provided by the rules made under Sub-section (1), the Director shall direct in writing the management of such school to bring the same up to the level provided by the said rules, within such period or extended period as may be specified by him.

(4) Failure to comply with any direction given by the Director in pursuance of Sub-section (3) may result in the recognition of the school concerned being withdrawn, provided that the recognition shall not be withdrawn unless the management of the school concerned has been given a reasonable opportunity of being heard.

(5) No employee working in a private school shall work in any coaching class. If any employee, in contravention of this provision, works in any coaching class, his

services shall be liable to be terminated by the management, provided that no such order of termination shall be issued unless the employee concerned has been given a reasonable opportunity of being heard.

(6) No employee of a private school shall be suspended, dismissed or removed or his services shall not be reduced in rank, by the management, except in accordance with the provisions of this Act and the rules made in that behalf.

As per Sub-section (1) of Section 4 of the Act, the State Government may make rules providing for the minimum qualification for recruitment (including its procedure), duties, pay, allowances, post-retirement and other benefits and other conditions of service of employees of private schools and also for reservation of adequate number of posts for members of the backwards classes thereof. The proviso to this sub-section puts rider upon the power of Government to frame rules and it has been prescribed that neither the pay nor the rights about leave of absence, age of retirement and post retirement or other monetary benefits of an employee in the employment of an existing private school on the appointed date shall be varied to the disadvantage of such employee by any rules. It shows that these conditions of service as prevalent on the appointed date are to be preserved. The said appointed date is 15-7-1981. Thus, the service condition in relation to age of retirement, post retirement benefit and other monetary benefits of petitioner prevalent on 15-7-1981 cannot be altered to his disadvantage by the State Government. Under Sub-section (6) of Section 4 of the Act, it is expressly mentioned that the petitioner cannot be suspended, dismissed or removed from his service except in accordance with the provisions of the Act or Rules made on that behalf. It is not in dispute that the petitioner has not been, if Government resolution dated 9-9-1988 is ignored, dismissed or terminated after following the provisions of the MEPS Act or 1981 Rules.

10. It is an admitted position that the petitioner has been compulsorily retired as per the procedure prescribed in Government Resolution dated 9-9-1988. The defence of respondents is that the said procedure prescribed by the Government Resolution dated 9-9-1988 is in accordance with the Rules in MEPS Act. In this background, when the provisions of Section 16 of the Act are looked into, the State Government has been authorized to make Rules for carrying out the purposes of this Act by notification in the Official Gazette. The various heads under which the rules can be made are prescribed thereunder and it includes the post-retirement and other benefits, conditions of service including leave, superannuation, re-employment and promotion, disciplinary matters and also any other matter which is required to be or may be prescribed. In short, the provisions of the Act make exhaustive provisions for regulating the conditions of service of Assistant Teacher like petitioner. It is complete Code in this respect, and therefore, it is not possible to hold that his service conditions can be laid down by any other provisions or instrument which is not relatable to or issued under the MEPS Act or Rules made thereunder and which is not issued in accordance with requirements of Section 16 of the MEPS Act. Sub-section (3) of

Section 16 provides that rules made under this Act shall be subject to condition of previous publication and Sub-section (4) of Section 16 also prescribes that the rules so made are to be laid before each House of the State Legislature. The respondents have not demonstrated that before issuing Government Resolution dated 9-9-1988, any such procedure was followed by the State Government.

11. In this background when the Government Resolution dated 9-9-1988 is looked into, its preamble and also the relevant portion dealing with retirement after reaching 50/55 years demonstrates that the Government till 9-9-1988 was considering the issue of extending said provision of compulsory retirement or voluntary retirement to the employees working in private schools. That decision having been taken on that day, the Government Resolution prescribing the procedure thereof has been issued. This Resolution, therefore, itself demonstrates that prior to 9-9-1988, there was no such power and procedure prescribed. In view of this, the arguments of learned Counsel for the respondents that no new service condition has been added or service condition has not been varied to prejudice of the present petitioner, after appointed date, cannot be accepted. The said condition of ordering of compulsory retirement is added for the first time by the Government Resolution dated 9-9-1988. It is a power given to management which can be used to the detriment of employees and therefore, service conditions have been varied to his disadvantage. Permission given to such employee to retire voluntarily cannot be construed as condition added to his prejudice. It is apparent that this could not have been done in view of proviso to Sub-section (1) of Section 4 of the Act. It is also apparent that in this petition respondents failed to show that Government Resolution dated 9-9-1988 is issued in accordance with provisions of MEPS Act or the Rules framed thereunder and therefore, it has effected the termination of present petitioner contrary to the mode and manner prescribed under Sub-section (6) of Section 4 of the Act. The said resolution consists of total 8 paragraphs and perusal of last but third para numbered as 6 shows that Government was/is aware of need to amend 1981 Rules and it stipulates that appropriate amendment in 1981 Rules should be deemed to have been effected and necessary amendment in Rules will be undertaken in due course. No steps for amending Rules actually as warranted by Section 16 of Act are yet taken and by deeming fiction requirements of Section 16 cannot be defeated and avoided. Conclusion is inevitable and by such executive feat the provisions of either the Act or the 1981 Rules cannot be amended or deemed to have been amended to confer a new power on management to remove permanent employee in mode and manner contemplated in G. R. dated 9-9-1988.

Reference in this respect can be made to Division Bench judgment reported in Anil Dattatraya Ade Vs. Presiding Officer, School Tribunal and Others, where in the act of management was found to be contrary to provisions of Section 5 of MEPS Act. Observations in sub-para of paragraph 17 of the judgment state :--

17. ...

Applying the provisions of Section 5(2) of the Act, the petitioner had completed two years of probation period on 30th June, 1983. There is no doubt that the management had issued one letter dated 7-3-1983 purporting the extension of the probation period of one year. In the eyes of law, this letter has no meaning and has to be ignored and the same is to be construed as under misconception of legal provision. Since the petitioner had completed the two years probation period on 30th June, 1983, he was deemed to have been regularized and he was deemed to have acquired permanent status of an employee of the institution. The order of termination dated 29-6-1984 purporting to terminate the services of the petitioner on 30-6-1984 is ex facie illegal and contrary to the provisions of the Act, which prescribes mandatory provisions to be followed before terminating the permanent employee from the employment. The impugned order of termination dated 29-6-1984, therefore, was passed wholly under the misconceived legal position that the petitioner did not acquire the status of permanent employee and that he still continued to be on probation merely because the respondents fancifully thought so regardless of the legal provision under the Act, which was binding on them. The impugned order of termination is simpliciter termination order and not on the ground that during the probation period the work of the petitioner was unsatisfactory. There is not even a whisper of unsatisfactory work of the petitioner. On the contrary the petitioner has relied on good service certificates, issued by the management.

The Full Bench of this Court in judgment reported at *Suryakant Sheshrao Panchal Vs. Vasantrao Naik Vimukta Jati, Bhatakya Jamati Aadarsh Prasarak Mandal and Others*, , considers the question whether remedy of an appeal u/s 9 of MEPS Act can be provided to employees of Ashram School by Ashram School Code. Conclusions in paragraph 17 are important:--

17. We now come to the Ashram Schools Code as formulated by the State Government in the year 2001. It is well established in law that the provisions of a statute cannot be amended by administrative orders, circulars or Codes. The provisions of Section 9 of the MEPS Act state that notwithstanding anything contained in any other law or contract for the time being in force any employee in a private school who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank by the order passed by the management or who is superseded by the management while making an appointment to any post by promotion shall have a right of an appeal and may appeal against any such order or supersession to the Tribunal constituted u/s 8 of the said Act. When a statute has provided a remedy to an employee in a private schools such a remedy cannot be extended to an employee in any school and the meaning of the terms "employee" and "private school" cannot be altered or amended by formulating a Code.

Thus it is apparent that the respondents before this Court have failed to point out as to how the Government circular dated 9-9-1988 can be permitted to override provisions of Section 4(1) and (6) of MEPS Act. Independent of said circular, they

have not pointed out any provision either in Act or in 1981 Rules which enables management/employer to order compulsory retirement.

12. The petitioner has prayed for quashing and setting aside the Government Resolution dated 9-9-1988. However, in view of discussions above, I find that it is not necessary for this Court to quash and set aside the said Government Resolution. The respondents have not been in a position to demonstrate the source of power under which the said Government Resolution came to be issued and made applicable to the Private Schools or employees working thereunder. The learned Counsel for the petitioner has invited attention of the Court to the Government Circular dated 27-10-1997 bearing No. PEN1097/58703/(143) issued by SE(6), Department of Education on the subject of Voluntary Retirement. It makes reference to Writ Petition No. 1772 of 1997 between Namdeo Bikkad v. State of Maharashtra and it further mentions that the High Court has modified its earlier interim order on 20-10-1997 and restricted it to the compulsory retirement only and it is in Government Resolution dated 9-9-1988 and 9-10-1990. The Government Resolution dated 9-10-1990 is not available on record of present writ petition. Fate of said writ petition is also not known. In such circumstances, it is not possible and also it is not necessary for this Court to quash and set aside the Government Resolution dated 9-9-1988 itself or to hold that it is ultra vires the Act. However, as the services of present petitioner have been terminated in a manner not provided for in or supported by MEPS Act and 1981 Rules framed thereunder, the order of termination dated 5-10-1991 along with relieving order dated 10-1-1992 are quashed and set aside. The judgment of School Tribunal dated 24-2-1994 is also quashed and set aside. The petitioner is reinstated back in service with continuity and full backwages. As the petitioner has already reached the normal age of superannuation, respondents No. 4 and 5 shall release the consequential benefits in his favour as early as possible and in any case within a period of four months from the date of communication of this order to them.

13. Writ petition is disposed of accordingly. Rule is made absolute in above terms. There shall be no order as to costs.