

(2009) 07 BOM CK 0111

In the Bombay High Court

Case No : Writ Petition No. 1552 of 2001

Sarode Jalindar Devram

APPELLANT

Vs

Saraswati Vidya Mandir and Others

RESPONDENT

Date of Decision : 15-07-2009

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 9(9)
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 9(7), 9(9)

Citation : (2009) 111 BOMLR 3371 : (2009) 6 MhLj 146 : (2010) 2 SLR 327

Hon'ble Judges : R.M. Savant, J;P.B. Majmudar, J

Bench : Division Bench

Advocate : N.R. Bubna, instructed by A.A. Garge, for the Appellant; Kirankumar Phakade, instructed by S.S. Pakale, for the Respondent Nos. 1 to 4 and D.A. Nalawade, Government Pleader for the Respondent No. 5, for the Respondent

Judgement

R.M. Savant, J.—The petitioner above named is a teacher working as " Shikshan Sevak" in the respondent No. 1 " School which is run by the respondent No. 2 . S.G.J. Educational Trust. By the above Writ Petition, the petitioner inter alia seeks a direction against the respondent No. 1 " School to treat his appointment as on probation as an Assistant teacher from 22nd November, 1999, and to pay him all the benefits and perquisites of service including back wages and continuity, with effect from the said date. The petitioner also seeks a direction that the respondent No. 3 " Education Officer be directed to approve the appointment of the petitioner in respondent No. 1 " School as on probation with effect from 22nd November, 1999, and the last direction sought is to cancel the appointment of the petitioner as " Shikshan Sevak" .

2. Such of the facts which are necessary to be cited are stated thus:

The petitioner was appointed as an Assistant Teacher in the pay scale of 4500-7000 on 22nd November, 1999, in the respondent No. 1 " School

temporarily upto 30th April, 2000 or till the last working day of the second term of the Academic year 1999-2000 which ever was earlier. The post on which the petitioner was appointed was meant for the Category of the Nomadic Tribe (B). The petitioner, admittedly, belongs to the Category of Nomadic Tribe (C). The petitioner's appointment was approved for the said period by the Education Inspector vide his letter dated 5th November, 2000. In the said approval letter, it is inter alia recorded that the petitioner was appointed as an Assistant Teacher in a clear vacancy on account of the retirement of one Shimpi.

It appears that the respondent Nos. 1 & 2 issued an Advertisement for appointment of an Assistant Teacher on the said post in which the petitioner was working though, the petitioner's services were not terminated, this was in keeping with the appointment letter issued to the petitioner which specified the tenure of the petitioner. The petitioner was not allowed to resume his duties in the respondent No. 1 " School from the Academic Year 2000-2001. The petitioner was appointed as a " Shikshan Sevak" on 24 July, 2000, in terms of the Scheme of the State Government. The petitioner executed the necessary documents in the form of Bond etc. as contemplated under the said Scheme. The said appointment of the petitioner as " Shikshan Sevak" was approved by the respondent No. 3 i.e. the Education Inspector on 1st November, 2000. The petitioner made representations to the Authorities of the Education Department from November, 2000 to March, 2001, requesting the Authorities to correct the injustice caused to him, by granting him a continuation letter as an Assistant Teacher from 22nd November, 1999. Receiving no response to the said representations, the petitioner has filed the instant Writ Petition. In terms of the Scheme of the State Government, the petitioner completed three years service as " Shikshan Sevak" in the year 2003 and therefore, on the said completion he was appointed as an Assistant Teacher. However, the grievance of the petitioner is that he ought to have been continued as an Assistant Teacher as he was appointed in a clear vacancy on 22nd November, 1999.

3. On behalf of the respondent Nos. 1 & 2 and the Education Officer, Affidavits have been filed dealing with the claims and the contentions of the petitioner. The Writ Petition is sought to be opposed by the respondents on the ground that the petitioner was appointed against a post meant for Nomadic Tribe (B) whereas the petitioner belongs to Nomadic Tribe (C) Category. It is further the case of the respondents that the petitioner having accepted the appointment as " Shikshan Sevak" and having executed a Bond, now cannot turn back and claim the reliefs that he has sought in the instant Writ Petition.

4. We have heard the learned Counsel for the parties. Mr. N.R.Bubna, the learned Counsel on behalf of the petitioner submitted that though the petitioner was appointed on the post meant for Nomadic Tribe (B), the petitioner was entitled to continue as an Assistant Teacher in terms of Rule 9(9)(a) of the Maharashtra Employees of Private Schools (Conditions of Service), Rules, 1981. The learned Counsel further submitted that the acceptance by the petitioner of the post of "

Shikshan Sevak" cannot come in the way of the petitioner. The petitioner being left with no choice had to accept the said post. The learned counsel for the petitioner relied upon the Judgment of the Apex Court reported in 2006(1) Mh.L.J. in the matter of Kankavali Shikshan Sanstha and Ors. v. M.R. Gavali and Ors. in support of his submission. The Apex Court has held in the said Judgment that a candidate not belonging to a particular Category, if appointed, in view of the provisions of Rule 9(9)(a) of the Maharashtra Employees of Private Schools (Conditions of service) Rules, 1981, is entitled to an appointment on a regular basis. The Apex Court relied upon its earlier Judgment reported in AIR 1994 SC 36 in the matter of Shakuntala Ganpatsa Shirbhate v. Industrial Weaving Co-operative Society and Ors. wherein also Rule 9(9)(a) had come up for interpretation. Paragraphs 13, 14 and 15 of the Judgment in Kankavali Shikshan Sanstha's Case are relevant which are reproduced herein under:

13. This rule came up for consideration before this Court in Shakuntala Ganpatsa Shirbhate Vs. Industrial Weaving Co-operative Society and others, . That was a case where the appellant who belonged to a backward class was appointed initially as a Teacher in biology for a period of one year. The appointment was thereafter extended from year to year on several occasions and the last appointment was until further orders. The vacancy was earmarked to a candidate belonging to a Nomadic Tribe. In the absence of a candidate belonging to a Nomadic Tribe, the appellant was appointed. The appointment of the appellant came to be terminated immediately upon a candidate belonging to a Nomadic Tribe becoming available. This Court upheld the contention of the appellant that since the appellant was a member of one of the backward classes referred to in the rule, she was entitled to a regular appointment in the every first year when no person belonging to Nomadic Tribe was available. The Court held the argument of the appellant was well founded. The fourth respondent in this case was available for appointment later on in 1988. This Court noted that on the first occasion when the post was being filled up there was no member of Nomadic Tribe available for appointment. This Court then held thus:

(9)(a) In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in Sub-rule (7) and if no person from any of the categories is available, the post may be filled in temporarily on an year to year basis by a candidate not belonging to the Backward Classes".... Since the appellant is a member of one of the backward classes referred to in the said Rule, she was entitled to a regular appointment in the very first year when no person belonging to a Nomadic Tribe was available. The argument of the learned Counsel appears to be well founded. Admittedly the respondent No. 4 was available for appointment only in 1988. On the first occasion when the post was being filled up, there was no member of a Nomadic Tribe available for appointment. In the absence of a candidate belonging to a Nomadic tribe, the Rule enjoins year to year appointment only if an available candidate does not

belong to the backward classes. The question, therefore, is whether the appellant belongs to a backward class.

14. The law laid down by this Court on the interpretation of Rule 9(9)(a) is in our view resolves the controversy in the present case. The first respondent was appointed in 1994. The vacancy was reserved for an ST candidate. At that stage there was no candidate belonging to ST available. There is no dispute about the fact that the first respondent belongs to the Hindu Mali community which is an OBC. In the circumstances, in terms of the provisions of Rule 9(9)(a) since no other candidate belonging to ST was available, the first respondent was entitled to appointment on a regular basis. This Court, in the above case, held that in the absence of a candidate belonging to the reserved category concerned, the rule enjoins year to year appointment only if a available candidate does not belong to a backward class. The respondent belonging as he does to a backward class was entitled to a regular appointment. The subsequent appointment of P.B.Lohar, the 3rd respondent herein again, operates to displace the first respondent because in any event much prior thereto the first respondent had duly crystallised the right. In any event, it has not been demonstrated before this Court that the 3rd respondent was appointed subsequently in the vacancy created by the termination of the first respondent.

15. It was argued on the side of the Management that the High Court gravely erred in placing reliance on the judgment of this Court in *Shakuntala Ganpatsa Shirbhate vs. Industrial Weaving Co-op. Society* (supra) inasmuch as the facts involved in these two cases are entirely different. In the said cited case, the appointment of the appellant therein was initially for a period of one year which was extended from year to year several times and the last order passed in his favour mentioned the appointment until further orders. However, it was further argued that the appointment of respondent No. 1 in the instant case is only for the academic year 1995-96 wherein it is made clear to the said respondent that the said appointment is liable to be terminated after the said period. Thus, the said case would not be applicable to the facts of the present case. This contention, in our view, has no force. In the instant case, the appointment was extended from time to time on year to year basis on several occasions. This Court has clearly held that in the absence of a candidate belonging to a Nomadic Tribe the rule enjoins year to year appointment only if an available candidate does not belong to the backward classes. The appointment order also clearly stipulates that terms of appointment and conditions of service shall be as laid down in the M.E.P.S. (Conditions of Service) Regulation Act, 1977 and the rules made thereunder and that the appointment is conditional subject to the approval of the Education Department and that the post is reserved for SC and if candidate of that category will be available, the services will be terminated. In the instant case, the appointment of the first respondent was approved by the Education Department on all occasions and that the Management, the Teacher and the Department are all aware that the post in question has been granted on totally temporary basis due to the backlog of ST

candidate. It is also a matter of record that the appointment of the first respondent was sanctioned on the basis of the approval and NOC of three-member Committee..

5. Mr. N.R.Bubna, the learned Counsel for the petitioner has also relied upon an Order of a Division Bench of this Court [A.P.Shah, J. (as he then was) & S.J.Vazifdar, J.] dated 20th February, 2001. In virtually, an identical factual situation the Division Bench has held that the appointment of the petitioner in that Writ Petition as " Shikshan Sevak" was unjustified in the light of the fact that the petitioner therein was appointed as an Assistant Teacher in a clear vacancy and in a post meant for the Category to which the said petitioner belongs. Placing reliance on the said Judgment the learned Counsel for the petitioner submitted that in terms of Rule 9(9)(a) the petitioner is entitled for continuation from the date of his initial appointment i.e. 22nd November, 1999.

6. Per contra, Mr. D.A. Nalawade, the learned Government Pleader, and the learned Counsel for the respondent Nos. 1 & 2 submitted that the petitioner having been appointed in a post meant for the Nomadic Tribe (B) to which the petitioner does not belong could not be continued beyond the period mentioned in the appointment letter. The learned counsel contended that the petitioner's appointment came to an end in terms of the appointment letter and thereafter, after a gap of about 80 days the petitioner was re-appointed as " Shikshan Sevak" . The learned Counsel, therefore, submitted that the petitioner's case for continuing him from 22nd November, 1999, could not be accepted. The learned counsel also made a faint attempt to distinguish the Judgment of the Division Bench cited (Supra) on the basis of the facts of the present case.

7. We have heard the learned Counsel for the parties. In the instant case, it would be pertinent to note that the post of Assistant Teacher in which the petitioner was appointed was on the petitioner's tenure coming to an end was filled by appointing the petitioner as a " Shikshan Sevak" . The appointment letter of the petitioner as a " Shikshan Sevak" shows that it was reserved for Nomadic Tribe (B). We are at a loss to understand how the said post of Assistant Teacher could have been converted to one to be filled up by a " Shikshan Sevak" . The only conclusion that could be drawn was that the same was done to defeat the right, if any, of the petitioner under Rule 9(9)(a).

It would therefore be relevant to reproduce Section 9(9)(a) of the Maharashtra Employees of Private Schools (Conditions of service) Rules, 1981.

Rule 9(9)(a) : In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in Sub-rule (7) and if no person from any of the categories is available, the post may be filled in temporarily on an year to year basis by a candidate not belonging to the Backward Classes.

From a reading of the said rule, it can be gathered that the said rule postulates

that a vacancy in a teaching post meant for a particular category could be filled in by a candidate from the other remaining categories in the order specified in Sub-rule (7). The said rule had come up for interpretation before the Apex Court in the Judgment cited (Supra). The Apex Court has in terms held that the candidate, even if belonging to some other Category would in terms of the said rule be entitled to appointment on a regular basis.

Though, the learned Government Pleader sought to distinguish the Order of the Division Bench on the basis of the facts of the instant case, in our view, even if there is slight difference in facts insofar as the Order of the Division Bench is concerned, however, in the light of the Judgment of the Apex Court (Supra), the petitioner having been appointed in a clear vacancy would be entitled to the relief of confirmation as an Assistant Teacher from 22nd November, 1999.

8. The question that arises is as to what other consequential reliefs the petitioner would be entitled to. Insofar as the payment on account of difference in pay, increment is concerned, that the petitioner would be entitled on the basis of his continuation as an Assistant Teacher from 22nd November, 1999. Mr. N.R.Bubna, the learned Counsel for the petitioner fairly states on instructions of the petitioner, who is present in Court that the petitioner is not interested in burdening either the respondent Nos. 1 & 2 or respondent No. 3 and therefore, would not claim the arrears on account of difference in pay, increments etc. We accordingly record and accept the said statement made on behalf of the petitioner. However, insofar as the fixation of the pay of the petitioner is concerned, the pay of the petitioner would be fixed by notionally taking into consideration the increments that the petitioner would have been entitled to from 22nd November, 1999 to this date. On such pay fixation, the petitioner would be entitled to the pay fixed from 15th July, 2009. It is further clarified that if any amount is found payable to the petitioner, other than the amount in respect of which a statement is made by the learned Counsel for the petitioner, the same would be paid by the respondent Nos. 1 & 2 from their own funds. It is also clarified that the petitioner would be entitled to all other consequential benefits like seniority etc. from the date of his initial appointment i.e. from 22nd November, 1999. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs.