
(2014) 11 BOM CK 0205
In the Bombay High Court
Case No : Writ Petition No.1240 of 2000

Secretary, Pimpalner Education Society	APPELLANT
Vs	
Mahendra Somnath Kothawade	RESPONDENT

Date of Decision : 24-11-2014

Acts Referred:

Citation : (2015) MCR 158

Hon'ble Judges : A.V. Nirgude and A.I.S. Cheema, JJ.

Bench : Division Bench

Advocate : Shri R.J. Godbole, Advocate, for the Petitioner; Shri S.P. Brahme, Advocate, for the Respondent No.1; Mrs. A.V. Gondhalekar, A.G.P, for the Respondent/State

Final Decision : Disposed Off

Judgement

A.I.S. Cheema, J.—The petitioner Society has filed this Writ Petition against judgment and order passed by the School Tribunal on 9.7.1998, vide which order the application for condonation of delay filed by the employee Mahendra Somnath Kothawade - respondent No.1 was allowed and delay of two years in filing of the Appeal No.16/1997 was condoned. The Writ Petition is also challenging the order dated 30.9.1999, vide which order the petitioner has been directed to reinstate the respondent No.1 to his original post of Junior Clerk and to pay him salary of 12 months towards compensation.

2. The case of the petitioner is that, the Society runs three schools, one Junior College and one Senior College. The respondent No.1 was appointed as Junior Clerk in the Junior College in M.C.V.C. Course on condition that his service is temporary and for fixed period of 24.9.1993 to 30.4.1995. The appointment was subject to confirmation by Education Officer and if Education Officer sends backward class Teacher, the service of the respondent No.1 could be terminated at once. As per the scheme of M.C.V.C. Course, petitioner could not have directly made appointment. The appointment could be made only on approval of Deputy Director of M.C.V.C., Nasik. In this regard, procedure was indicated in letter

dated 10.5.1994 addressed to Principal of one Ambar Medical Foundation. Petitioner came to know that the post of Clerk was not sanctioned in M.C.V.C. Course, against which respondent No.1 was appointed and the service of respondent No.1 was discontinued on 31.12.1994 and he was appointed as Junior Clerk for remaining period of 1994-95 in the school of petitioner namely Karmaveer A.M. Patil Vidyalaya, Pimpalner vide order dated 31.12.1994. As per order dated 21.3.1995, the Deputy Director of Vocational Course, Nasik sent letter to Principal of the Vidyalaya and rejected the proposal of petitioner to appoint respondent No.1 on the ground that the post of Clerk was not sanctioned and procedure for appointment was not followed. As respondent No.1 was appointed for specific period as temporary employee, one month's notice was given on 30.3.1995 and the service was brought to an end w.e.f. 30.4.1995. Thereafter, one Sahebrao Yedhate, a N.T. candidate was promoted as Junior Clerk w.e.f. 1.7.1995 against the post of respondent No.1. Till 9.6.1997 the respondent No.1 did not do anything and then suddenly filed appeal before School Tribunal with application for condonation of delay. Petitioner opposed the same. Even respondent No.2 Education Officer filed reply before School Tribunal, but the School Tribunal condoned delay and has also allowed the appeal. At the time of condoning of delay, respondent No.1 had relied on a letter dated 15.7.1995 which was fabricated document. Thus, the present petition.

3. Respondent No.1- employee has filed affidavit-in-reply disputing claims made by the petitioner. Respondent No.1 has claimed that, he was qualified for the post of Junior Clerk and respondent issued advertisement in Daily Lokmat dated 15.9.1993. The advertisement did not mention anything about post-wise reservation. Respondent No.1 was qualified, and in response to the advertisement, he applied for the post of Clerk in M.C.V.C. Course and after following due procedure, he was selected and appointed. His appointment was on probation for two years against post which was not reserved. The clause of probation in the appointment order was not struck out and so, it cannot be said that, his appointment was for specific period. If the advertisement and appointment order are collectively seen, they show that the respondent No.1 was appointed against permanent vacant post as per section 5(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (Act in brief) and Rules of 1981 (Rules in brief). In the Tribunal, petitioner took stand that the appointment was against reserved category, but now petitioner was trying to show that the appointment was not in accordance with the procedure of appointment in M.C.V.C. The letter dated 10.5.1994 regarding procedure in appointment under M.C.V.C. Course was not brought before the Tribunal. The respondent No.1 claims that on 1.10.1994 he was transferred to Secondary School of the petitioner due to retirement of one G.T. Ahire. He is relying on resolution of the petitioner Society, dated 29.9.1994. It is claimed that, on 19.11.1994, Chairman of the School Committee sent proposal to Education Department, disclosing this, for approval. As per respondent-employee, there was no reason to issue another appointment order dated 31.12.1994 appointing

him on probation. Resolution dated 18.1.1995 of the School Committee of petitioner does not support the petitioner that, because post of Junior Clerk in M.C.V.C. was not sanctioned, so the respondent-employee was discontinued and reappointed on 31.12.1994. Service certificate issued by Principal of Junior College, dated 15.7.1995 shows that, respondent-employee was in service up to 30.6.1995 and he was lured to believe that he will be re-appointed. The Education Officer granted approval up to 30.6.1995. The alleged termination order dated 30.3.1995 was not acted upon and the respondent-employee served even after 30.4.1995. The order dated 9.7.1998 of the Tribunal, condoning delay was not challenged and present challenge in petition after more than one year was not maintainable. Letter dated 15.7.1995 of the Principal of Junior college was considered for condoning delay and genuineness of the letter was not challenged before School Tribunal.

4. We have heard counsel for both sides who argued on above lines. Respondent-employee has relied on advertisement dated 15.9.1993 in Daily newspaper (Exh.W Page 84) to claim that, in response to the advertisement he had applied for being appointed as Clerk. However, Exh. W (Page 84) does not show that the advertisement was for "Lipik" i.e. Clerk. The appointment order dated 23.9.1993 (Exh.A Page 21) shows that the respondent-employee was appointed as Clerk. Para 2 reads as under :

"2. Your appointment is purely temporary for a period of 30.4.95 from 24.9.93 to 30.4.95 in the leave deputation vacancy. After expiry of above period your service will be terminated without any notice. Your appointment is on probation of two years."

5. The conditions below the appointment order show that, the appellant will be confirmed provided Education Officer Zilla Parishad, Dhule/ Deputy Director of M.C.V.C. approves. It appears from Resolution dated 29.9.1994 (Exh. X Page 87) that Society decided to appoint him at the High School as one Senior Clerk was retiring on 30.9.1994. He seems to have been asked to work at the school from 1.10.1994 and as there were disputes in Management and Head Master was not cooperating, proposal (Exh.Y Page 88) was sent by Chairman to Education Officer on 19.11.1994. Record shows that, the petitioner gave another appointment to the respondent-employee on 31.12.1994 (Exh.C Page 25) as Junior Clerk in KARM-AMP Vidyalaya, Pimpalner. Exh.B (Page 23), a letter dated 10.5.1994 from Office of Vocational Education, addressed to one Amber Medical Foundation shows that, for posts to be filled of M.C.V.C. Course, the same could be filled in only after the employee selected was first approved and only then joining order could be issued and in default, the liability was to remain of the management. The order dated 21.3.1995 (Exh. D- Page 27) of the Education Officer received shows that the Principal of the K.A.M.P. Vidyalaya was informed that the appointment of respondent-employee was not as per the procedure approved by Government and was not against any approved post and so, the appointment could not be approved.

6. Thus, the respondent-employee, after having secured appointment order dated 23.9.1993 (Exh.A Page 21) in the Junior College, accepted the fresh appointment to the school from the petitioner vide order dated 31.12.1994 (Exh.C Page 25). He must be presumed to have accepted appointment to be as per letter dated 31.12.1994.

7. The petitioner claims that, the appointment of respondent-employee in the school was brought to an end vide letter dated 30.3.1995 w.e.f. 30.4.1995. Against this, it has been argued by the respondent-employee that, the order dated 30.3.1995 (Exh.E Page 31) was not acted upon. Respondent employee claims that, he worked in the school till 30.6.1995. Observations of the School Tribunal show that, the Education Officer filed reply before the Tribunal, claiming that, the Education Officer has granted approval for the appointment of respondent-employee only for the period from 12.3.1995 to 30.6.1995 and had also paid him salary for the said period. Copy of the letter dated 28.12.1995 of the Education Officer is also before this Court (Exh.C Page 72). We find substance in the defence of respondent No.1- employee that he was working in the school till 30.6.1995.

8. Coming to the letter (Exh.C- Page 25) dated 31.12.1994, para 2 of the same reads as under :

"2. Your appointment is purely temporary for a period of 1994-95 from _____ to _____ in the leave/ deputation vacancy. After expiry of above period your services will be terminated without any notice. Your appointment is on probation of two years."

Condition 1 reads as follows :-

"1. Your appointment will be confirmed provided E.O. Z.P. Dhule/ Deputy Director of M.C.V.C. Regional Nasik of salary etc. Till then no responsibility lies upon the management regarding payment of your salary."

9. There is no material to show that any selection procedure was followed for the above appointment in the Vidyalaya i.e. the school. There is no material to show that except for the period of 12.3.1995 to 30.6.1995, as seen in Exh.L Page 72, there was any approval to this appointment from the Education Officer. Thus, the appointment, except for the period approved, was at the risk of the petitioner as regards salary etc. Letter Exh. B (Page 23) shows that if appointment of the candidate in M.C.V.C. is without prior approval, it will be at the risk of management Although the petitioner claims that, the appointment was for a specific period. Para 2 reproduced above from the order dated 31.12.1994 shows that, portion of the appointment to be on probation of two years was not scored out. Portions for mentioning period were not filled in. The respondent-employee is rightly claiming that the appointment should not be treated as appointment for specific period and the appointment should be treated as regular. Section 5 of the Act reads as under :

"5. Certain obligations of Management of private Schools :-

(1) The Management shall, as soon as possible, fill in, in the manner prescribed every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy :

Provided that unless such vacancy is to be filled in by promotion, the management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, the Education Officer, Zilla Parishad or, as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools; and in the event of such person being available, the Management shall appoint that person in such vacancy.

(2) Every person appointed to fill a permanent vacancy except Assistant teacher (Probationary) 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. Provided that, every person appointed as Assistant Teacher (Probationary) shall be on probation for a period of three years.

(2A) Subject to the provisions of sub-sections (3) and (4), Assistant Teacher (Probationary) shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.

(3) If in the opinion of the Management, the work or behaviour of any probationer, 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 or salary or honourarium of one month in lieu of notice.

(4) If the services of any probationer are terminated under sub-section (3) and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purposes of sub-section (2).

(4A) 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).

(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the period of appointment of such person."

10. There is nothing to show that the petitioner took any steps as required by the proviso to sub-section (1) mentioned above to find if there was any surplus candidate, before making appointment. Once having made the appointment as per Exh.C Page 25, the appointment could not have been brought to an end in the manner tried to be shown vide Exh.E Page 31. Vide this document, petitioner claims that the respondent-employee was informed that his services are "no more required" and that the service has been terminated w.e.f. 30.6.1995. Once respondent employee was on probation, termination could be only for reasons mentioned in sub-section (3) of Section 5. General principles of Service Jurisprudence also require compliance as provided in sub-section (3). The service of respondent-employee could not have been simply orally brought to an end on 30.6.1995 also (at the end of period approved by Education Officer- of 12.3.1995 to 30.6.1995). We thus find that the order of the Tribunal finding that the termination order of respondent employee w.e.f. 1.7.1995 needs to be set aside, cannot be faulted with.

11. The argument that the School Tribunal should not have condoned delay has no substance. Looking to the reasons recorded by the Tribunal and the fact that the order was not challenged when the same was passed, and the petitioner conceded to argue the appeal before the Tribunal, and the Appeal was thereafter decided on merits, there is no substance in challenge to condoning of delay.

12. Although we are approving the order of the Tribunal finding termination of the respondent-employee as illegal, we are not in agreement with the Tribunal that salary of 12 months needs to be paid as compensation. After the termination, at the end of June 1995, for a considerable time, the respondent employee did not move the School Tribunal and thus, it would not be appropriate to pass orders of payment of compensation.

13. We find that, the respondent-employee deserves to be reinstated. He was terminated before two years of probation could complete, starting from 31.12.1994, vide Exh.C (Page 25). The petitioner will be at liberty to observe the work and behaviour of the respondent-employee in the remaining period of probation and take suitable decision. As mentioned earlier, appointment Exh.C was also, subject to approval of Education Officer/Deputy Director, M.C.V.C. Looking to passage of time, the question of such approval shall be considered within three months from today by these authorities, looking to present position of vacancies. The confirmation in service shall be subject to satisfactory completion of probation and approval as mentioned, till when the liability of payment of salaries etc. will be of the petitioner. There shall be no back wages, claim to seniority etc.

14. Rule stands discharged accordingly.