

(2011) 12 BOM CK 0169

In the Bombay High Court

Case No : Writ Petition No's. 10753 and 10754 of 2011

Shivdutta Education Trust and Another

APPELLANT

Vs

Harishchandra Rajabali Yadav and Others

RESPONDENT

Date of Decision : 19-12-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 10, 11, 12, 2, 2(7)

Citation : (2012) 4 BomCR 132

Hon'ble Judges : Nirgude A.V., J

Bench : Single Bench

Advocate : Raju Morey instructed by Ms. Ushajee Peri, for the Appellant; Aarti P. Bhide and S.D. Rayrikar, A.G.P., for respondents No. 2 and 4, for the Respondent

Final Decision : Allowed

Judgement

Nirgude A.V., J.—These writ petitions can be decided by this common judgment as the facts are identical. These writ petitions are filed under the provisions of Articles 14, 226 and 227 of the Constitution of India challenging the judgment and order dated 17th October, 2011 in Appeals Nos. 17 of 2009 and 18 of 2009 passed by the learned Presiding Officer, School Tribunal, Mumbai. The facts leading to the litigation can be stated as under. The petitioner No. 1 is the Education Trust which runs a School at Kandivali (E), Mumbai. On 16th June, 2000 under a Scheme of the Government of Maharashtra, the petitioner No. 1 appointed the respondents (respondent No. 1 in both the cases) as Shikshan Sevak on payment of honorarium. As per the Government Resolution, this appointment was approved by the concerned Officer of the Government. The Scheme of Shikshan Sevak was subject-matter of writ petition and certain order was passed by this Court. So in October, 2000, a new Government Resolution was issued for implementing this scheme with little modification. Soon after the Government Resolution was issued on 19th November, 2000, the petitioner No. 1 issued revised appointment letter to the respondents. The petitioner No. 1 after

assessing the performance of the respondents terminated their contracts w.e.f. 30th April, 2001. Aggrieved respondents went before the grievance committee in an Appeal. It allowed their appeal on 8th October, 2003 and directed the petitioner No. 1 to reappoint the respondents with immediate effect. It held that the period in between was not to be counted as continuation of service. Accordingly, on 3rd December, 2003 the respondents were reappointed. This time, the contractual period was of 25 months 17 days. Their contract was ending on 16th January, 2006. On 20th January 2006 on the basis of performance appraisal of the respondents, the petitioner No. 1 decided not to continue the contract of the respondents. They informed them vide their letter dated 16th January, 2006 that their services were not required w.e.f. 20th January, 2006. In other words, their services were not continued after the contractual period. The respondents again filed appeals before the grievance committee. During the pendency of this appeals, the MEPS Act came to be amended w.e.f. 30th April, 2007. So on 30th March, 2009 the respondents withdrew their appeals and took them before the School Tribunal. That is how their appeals Nos. 17 of 2009 and 18 of 2009 came before the School Tribunal.

2. The respondents came up with a case that since they have completed 3 years of probation period, they are deemed to be appointed as Assistant Teachers and if the petitioner No. 1 had intended to terminate their services, they ought to have held a departmental enquiry. They also contended that if it is held that during the pendency of the probation period their services were terminated, the petitioner No. 1 ought to have given them either a notice of one month or a salary of one month.

3. The learned Presiding Officer of the Tribunal held that the respondents had completed 3 years of probation and, therefore, they were deemed to be permanent Assistant Teacher and so in absence of departmental enquiry, this termination was illegal. He directed the petitioner nos. 1 and 2 to reinstate the respondents w.e.f. 20th January, 2006 with continuity of service and full back wages and should treat them as permanent Assistant Teachers.

4. The petitioners have challenged this judgment and order by filing the writ petition.

5. The learned Counsel appearing for the petitioner asserted that having regard to the facts and the law which is applicable to the case, the petitioner No. 1 could lawfully terminate the respondents' services on the day, they had completed their probation. The question, therefore, is whether the termination of the respondents was illegal ?

6. The Government of Maharashtra floated a scheme permitting the private Schools to appoint "Shikshan Sevak" on payment of honorarium on contractual basis. It is common ground that the said scheme further contemplated that once the Shikshan Sevak is appointed, his appointment should not be less than 3 years and that if such appointment is approved by the Education Officer, then,

the Government would pay him fix sum as honorarium for the period of his appointment. This still would be considered a contract between an employer and an employee. The scheme further contemplated that the Head Master of School would assess the performance of a Shikshan Sevak and keep a record of the same. It further contemplated that if the performance of the Shikshan Sevak is not found satisfactory, he should be given a warning and sufficient opportunity for improvement. If the management still does not find his performance up to mark, they would take such "suitable action" against such erring Shikshan Sevak as may be "prescribed by the Education Officer".

7. In this case, the respondents were given contract of work which was more or less of 3 years. As said above, their contract was coming to an end on 20th January, 2006. The Head Master of the petitioner No. 2 School maintained a record in respect of the performance of the respondents and recorded from time to time that their performance was not upto mark and the such appraisal was intimated to them. They were given warnings also. Ultimately, few days prior to the last date of contract, the petitioner No. 1 passed a resolution in their managing committee meeting that since there was no improvement in the work of the respondents, their contract should not be extended. So on 16th January, 2006, a letter was sent to that effect This was the letter of termination.

8. In this background, let me now examine the law that prevailed at the relevant time. The employment of "Shikshan Sevak" was initially governed by Government Resolutions issued from time to time for implementing "Shikshan Sevak" scheme. The scheme was floated firstly in April, 2000 and thereafter on 13th October, 2000, a Government Resolution was issued for implementation of the scheme. Thereafter various changes were made in the scheme and ultimately on 15th February, 2007, the Government of Maharashtra issued a notification to consolidated and update all the previous decisions. This notification mentions appointment of service of Shikshan Sevak. Paragraph No. 5 mentions that Shikshan Sevak shall be appointed for 3 years and there shall not be any extension of 3 years. Paragraph 7 mentions that the Head Master or the Principal of a School should supervise work of a Shikshan Sevak. If it is not found satisfactory, then the management is entitled to reconsider" the appointment of such Shikshan Sevak. It lays down a rule that in case, despite opportunities a Shikshan Sevak does not improve his work, the management would be entitled to take "suitable action" against such Shikshan Sevak with the "consent of the Education Officer". The paragraph 17 provides that appointment of one member grievance committee would decide all complaints regarding appointment and other issues of Shikshan Sevak.

9. The Government of Maharashtra thereafter amended the MEPS Act vide Maharashtra Act No. 14 of 2007 w.e.f. 13th April, 2007. For the first time, the Act defines term "Shikshan Sevak".

By inserting Clause (24-A) in section 2, section 2. It reads as under.

(24-A) "shikshan sevak" means a member of base teaching cadre appointed on honorarium and subject to such terms and conditions as specified in the Government Resolution published in the Maharashtra Government Gazette, Extraordinary, No. 12, Part I -Central sub-section, dated 15th February, 2007, for eventual appointed as a teacher;

10. Section 5 of the MEPS Act was also amended to insert new sub-sections, After amendment to section 5, it 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 Shikshan Sevak] shall be on probation for a period of two years. Subject to the provisions of sub-sections (3) and (4) he shall, on completion of this probation period of two years, be deemed to have been confirmed:

(2-A) Subject to the provisions of sub-sections (3) and (4). Shikshan Sevak 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 honorarium] 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).

(4-A) Noticing 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.

11. The amending Act also provided a saving clause which reads as under.

12. (1) Notwithstanding anything contained in the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, all shikshan sevaks appointed in accordance with the provisions of the Government Resolution published in the Maharashtra Government Gazette, Extraordinary, No. 12, Part I - Central sub-section, dated the 15th February, 2007, shall be deemed to have been appointed as base cadre shikshan sevak under the said Act, for appointment as teachers on completion of three years service as such shikshan sevak rendered here to before or here to after, as the case may be.

(2) The terms and conditions prescribed by Government for appointment of Shikshan Sevak, by issuing Government Resolutions, from time to time, before the date of commencement of the Bombay Primary Education and the Maharashtra Employees of Private Schools (Conditions of Service) Regulation (Amendment) Act, 2007, shall continue to be in force unless modified or revoked.

12. With implementation of this amendment, there occurred a drastic change in the service condition and method of appointment of Shikshan Sevak.

13. The Single Judge of this Court in case of Principal, Our Lady of Salvation High School Vs. Rashmi Upadhyay and Others, held that once a comprehensive statutory remedy was provided for resolving disputes in matters of termination, dismissal reduction in rank and supersession etc of Shikshan Sevak, the appeal should lie u/s 9 before the School Tribunal and not before the one member grievance committee appointed by the Government Resolution. While discussing the effect of the amendment, the learned single Judge observed as under.

8. The consequence of the amendment is that Shikshan Sevaks who have been appointed since 13th October 2000 are now brought within the purview of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977. That is evident from the definition of the expression "Shikshan Sevak" in Clause (24-A) of section 2. In a judgment of the Full Bench of this Court dated 31st August 2007 in Ram Avadh Mahel Pal Vs. Shivdutta Educational Trust and Others, it was noted that the Gazette notification dated 15th February 2007 which is referred to in the definition of the expression "Shikshan Sevak" in Clause (24-A) of section 2 incorporates the Government Resolution dated 13th October 2000. The legislative intent is placed beyond doubt by the savings provision contained in section 12 of the Amending Act. The savings provision begins with a non-obstante clause and enunciates that all Shikshan Sevaks appointed in accordance with the Government Resolution dated 15th February 2007 shall be deemed to have been appointed as base cadre Shikshan Sevaks under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,

1977. Sub-section (2) of section 12 lays down that the terms and conditions prescribed by the Government for the appointment of Shikshan Sevaks by the issuance of GRs before the date of commencement of the Amending Act shall continue to be in force until modified or revoked.

9. The expression "employee" in section 2(7) of the Ram Avadh Mahel Pal Vs. Shivdutta Educational Trust and Others, Regulation Act, 1977 has been amended so as to include a Shikshan Sevak. Section 9 of the Act provides for the remedy of an appeal to the School Tribunal to employees of private schools. The remedy is comprehensive in nature and includes within its purview an appeal against dismissal, removal, termination, reduction in rank and supersession. The Tribunal before whom the appeal lies u/s 9 is statutorily constituted u/s 8 of the Act. The powers of the Tribunal are those of an Appellate Court under the Code of Civil Procedure, 1908, by virtue of the provisions of section 10. u/s 11, the Tribunal is conferred with the power to grant appropriate reliefs and to issue directions. The decision of the Tribunal is made final and binding by section 12.

10. The Legislature intended to bring Shikshan Sevaks within the purview of the statutory protection which is extended to teachers under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 though with certain modifications such as in relation to the period of probation. In other words, the services of Shikshan Sevaks would no longer remain in the realm of contract, to be governed by mere executive instructions, but would be governed by the statutory provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977. What was earlier a matter of contract is converted statutorily into status, to use the descriptive context of service jurisprudence. The appointment and conditions of service of Shikshan Sevaks cease to be merely a matter of contract and have been statutorily embodied into the provisions of the Act of 1977. Their position is not purely of contractual appointees any longer but is governed by legislation, with effect from 13th October 2000. The Government Resolution of 13th October 2000 provided for the redressal of grievances before a Grievance Committee. However, after the enactment of the Amending Act which was brought into force with effect from 30th April 2007, the remedy of an appeal before the School Tribunal, which is a duly constituted judicial body, is available to Shikshan Sevaks inter alia against a termination of service. Besides the language which has been used in the Amending Act, the object of the amendment must be borne in mind in determining whether the remedy of an appeal u/s 9 is available. Bringing the Shikshan Sevaks within the purview of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, was an important aspect of legislative policy, the object of which is to bring an element of security to the services of Shikshan Sevaks instead of relegating them purely to the realm of a contractual position. The remedy of an appeal before the School Tribunal is part of the statutory scheme conceived of by the legislation as a measure of protection to teachers and to the non-teaching staff of private schools. Hence, in respect of those matters where a remedy of an appeal is provided by section 9,

recourse to the Grievance Committee would stand superseded to that extent. It is true that the mechanism of the Grievance Committee is embodied in the G.R. dated 13th October 2000. However, once Shikshan Sevaks have been brought within the purview of the statutory protection of the MEPS Act, 1977, the remedy of an appeal u/s 9 of the Act would be available in respect of those matters where an appeal lies. At the cost of repetition, it has to be emphasised that an appeal u/s 9 is available to an employee of a private school and the expression "employee*" is defined specifically to include a Shikshan Sevak. What subsection (2) of section 12 saves are the terms and conditions prescribed by the Government Resolution for appointment. These would include conditions such as qualification, eligibility and pay scales. Once a comprehensive statutory remedy has been provided for resolving disputes in matters of termination, dismissal, removal, reduction in rank and supersession, that will enure to the benefit of Shikshan Sevaks. An appeal to the Tribunal shall be maintainable u/s 9 and the jurisdiction of the Grievance Committee shall to that extent stand denuded.

14. In view of this judgment, the appeals of the respondents which were pending before the grievance committee were withdrawn and the present appeals were filed before the School Tribunal. The learned Counsel appearing for the respondents asserted that although the amendment was effected in the Act, the saving clause quoted above would still regulate the terms and conditions of the respondents' service. She thereby suggested that the terms and conditions quoted above from the Government Resolution would apply and would prevent the petitioner management from issuing termination order. She said that having regard to the specific provision mentioned in paragraph No. 7, there was no possibility of termination of the respondents at all. She said, if at all, the respondents were to be terminated at the end of their probation/contractual period, the management was under obligation to take consent of the Education Officer and since such consent was not taken, the letter of 16th January, 2006 terminating the services of the respondents was illegal. She next submitted that the total period of service of the respondents was more than 3 years and if the provisions of section 5(2-A) is applied, her clients would be deemed Assistant Teachers.

15. She argued further that assuming her clients were under probation, the assessment of their performance was not objectively made as per the law laid down by the Supreme Court in the case of Progressive Education Society and Another Vs. Rajendra and Another, .

16. On the other hand, the learned Counsel appearing for the petitioner asserted that in view of the judgment of the learned Single Judge, the amendment was made retrospectively applicable and so the provisions of the above quoted paragraphs No. 7 of Government Resolution would not apply to the case. Besides he said his clients were entitled to express their opinion about the work of the respondents and terminate their services at the end of probation period which was not longer than three years.

17. The first question that arises for my consideration is whether the provisions of resolution would apply to this case or whether sub-section (3) of the amended section 5 would apply ? Having regard to the law laid down by this Court in the judgment quoted above, specially the underlined portion there is no doubt that the amended provisions of the Act would have retrospective effect. The amendment provided better protection to persons who were appointed as Shikshan Sevak. Their appointment was no longer treated as contractual but as probation. They were specifically included in the definition of term employee of a private school etc. In view of this comprehensive change, while examining the legality of the impugned termination the Court would ignore the provisions of the paragraphs from the Government Resolution. Even the learned Presiding Officer of the School Tribunal did not doubt this position and proceeded to examine the case in the light of the provisions of amended MEPS Act.

18. In this case, the termination of the respondents was made effective from the date they completed their probation period which was not longer than three years. The learned Presiding Officer held that since the termination was made effective after the completion of the probation period, it should be held that they had completed the probation of 3 years and should therefore be deemed to have been appointed and confirmed as Assistant Teachers. He thereby made provisions of sub-section (2-A) of section 5 applicable to this case. I think the learned Presiding Officer while doing so completely ignored the provisions of sub-section (3) of section 5. He also ignored the case of the petitioner that during the period of probation there was assessment of work of the respondents and the management has formed an opinion that the work of the respondents was not satisfactory. Provisions of sub-section (2-A) are specifically made amenable to provisions of sub-sections (3) and (4). Sub-section (2-A) would operate only if the management forms an opinion that the work of Shikshan Sevak during the period of probation was satisfactory. In this case, from time to time, the petitioner management intimated to the respondents that their work was not satisfactory and that they should improve etc. As provided in sub-section (3), the petitioner management in this case could have terminated the services of the respondents during the period of probation. Had they taken such decision, they were under obligation to give either one month notice or salary/honorarium of one month in lieu of such notice. However, the termination did not occur admittedly during the probation period. It occurred at the end of the probation.

19. The question is whether at the end of probation period the management is entitled to inform a Shikshan Sevak that due to the opinion of the management his services would no longer be required ? In other words, whether at the end of probation period, the management can stop the Shikshan Sevak getting benefit of deeming provisions of sub-section (2-A) ? The answer, in my view, is in affirmative. If the management is entitled to terminate the services of Shikshan Sevak during the period of probation as provided in sub-section (3), one has to accept the possibility of the management deciding to express such opinion at the end of the probation period and deny such Shikshan Sevak the advantage of

deeming provisions. The question would still arise as to whether at such occasion, the management is required to give one month's notice or salary/honorarium in lieu of such notice. The answer of this is in the negative. The probation period comes to an end by efflux of time. If management forms an opinion that performance of Shikshan Sevak was not satisfactory, they are at liberty to say so even at the end of probation. At such time, there is no need to give either a notice or salary of one month. The need to give one month notice or salary would arise only if termination takes place during the period of probation. A similar situation arose in the case of Akbar Peerbhoy College and others Vs. Mrs. Pramila N. Kutty and others, . The learned single Judge considered similar provision from MEPS Rules. The relevant paragraphs of the judgment would suffice the purpose.

12. Rule 28(1) of the Rules of 1981 reads thus:

28. Removal or Termination of Service.- (1)

The service of a temporary employee other than on probation may be terminated by the Management at any time without assigning any reason after giving one calendar month's notice or by passing one month's salary (pay and allowances, if any) in lieu of notice.

In the case of an employee entitled to vacation, the notice shall not be given during the vacation or so as to cover any part of the vacation or within one month after vacation.

13. A look at the said rule would show that it provides that services of temporary employee who is not on probation may be terminated by the management at any time without assigning any reason provided one calendar month's notice or one month's salary (pay and allowances, if any) in view of such notice has been given. In the said rule it cannot be read that where the service of a temporary employee comes to an end automatically by efflux of time as stated in the appointment order yet the management is obliged to give one calendar month's notice or to pay one month's salary to such temporary employee in lieu of notice. Rule 28(1) is attracted in a situation where either there is no period stated in the appointment order of such temporary employee and his services are sought to be brought to an end or where the period is stated in the appointment order of such temporary employee and the management intends to terminate the services of such temporary employee earlier than the period stated in the appointment order. Rule 28(1) does not contemplate nor does it envisage a situation of its compliance where the services of the temporary employee other than on probation comes to an end on the date stated in the appointment order. In other words, in a case where appointment of temporary employee is for a fixed period and the services of such a temporary employee comes to an end on the expiry of that fixed period, giving of the notice as contemplated under Rule 28(1) is not required nor any specific termination order is required to be passed because in the appointment order itself the period of appointment is fixed and on

expiry of that period the appointment comes to an end automatically. It would be relevant to mention here that Schedule "D" appended to the Rules of 1981 provides for format of order of appointment of a temporary employee and in terms of such format the management is required to mention in the order of appointment that appointment of such employee was purely temporary for a period of particular period and after expiry of the said period the services of such employee shall stand terminated without any notice.

20. The third contention of the learned Counsel for the respondents is that as per the judgment of the Supreme Court in the case of Progressive Education Society and Another Vs. Rajendra and Another, and Progressive Education Society and Others Vs. Nitin Krishnarao Nimabalkar and Others, even in this case before terminating the services of the respondents, the petitioner management was under obligation to follow Rule 15 of the Maharashtra Employees of Private Schools Rules, 1981. Rule 15 reads as under.

15. Writing of confidential reports etc. -The confidential reports shall be written annually in the respective Form in Schedule "G". The reporting authorities in respect of the employees and the Head shall be the Head and the Chief Executive Officer respectively. Confidential reports shall be written in respect of the employee or the Head who had worked for six months or more during an academic year commencing from June. If the Head or a teacher is the Secretary of the Management the confidential report in his respect shall be written by the President of the Management.

(2) The confidential reports so written in respect of the employees and the Head shall be reviewed by the Chief Executive Officer and the President of the Management respectively. The confidential report of the Head or a teacher written by the President shall be reviewed by the Managing Committee.

(3) The respective reporting authority shall arrange to communicate confidentially in writing adverse remarks, if any, to the concerned employee or the Head, as the case may be, before the end of August every year.

(4) Representation, if any, from any employee against the adverse remark communicated to him in accordance with sub-rule (3) above shall be decided by the School Committee. Similar representation, if any, from the Head shall be decided by the Managing Committee.

(5) Failure to write and maintain confidential reports and to communicate adverse remarks to the employees within the period prescribed in sub-rule (3) shall have the effect that the work of the employee concerned was satisfactory during the period under report.

(6) Performance of an employee appointed on probation shall be objectively assessed by the Head during the period of his probation and a record of such assessment shall be maintained.

21. I am afraid even this submission is not helpful to the respondents. It has

come on record that from time to time the respondents were given warnings and communications in writing that the management was not finding their work satisfactory. They were given opportunities after opportunities for improvement. So it cannot be said that respondents were not communicated with the adverse remarks. It also cannot be said that the performance of the respondents were not properly assessed or that the record of such assessment was not maintained.

22. There is one more aspect to this case. I am told that the respondents despite approval of their appointment were not paid salary/honorarium from December, 2003 till their termination dated 20th January, 2006. After the reappointment of the respondents in 2003 pursuant to the judgment and order of the learned member of the grievance committee dated 8th October, 2003, the respondent Nos. 2 and 3 have not approved the appointment of the respondents as Shikshan Sevak. They have not released their salary for the period between December, 2003 till 20th January, 2006. The respondent Nos. 2 and 3 should be directed to take decision on approval of the respondents as Shikshan Sevak w.e.f. 3rd December, 2003 till 20th January, 2006 and pay their honorarium for this period directly to them. This shall be done within a period of 6 weeks from today.

23. Writ petition stands allowed and the impugned judgment and order stands set aside. At the request of the respondents Counsel, the earlier direction directing the petitioner to keep two posts vacant for the two respondents is continued for a period of six weeks from today.