

(2008) 01 BOM CK 0082

In the Bombay High Court

Case No : Letters Patent Appeal No. 118 of 1998 in Writ Petition No. 2211 of 1997

Shree Ramdeobaba Smarak Sarvajanic Samiti and Shree
Ramdeobaba Kamla Nehru Engineering College

APPELLANT

Vs

The Hon''ble Presiding Officer, University and College Tribunal
and Dr. Ayyagari Prabhakara Rao

RESPONDENT

Date of Decision : 29-01-2008

Acts Referred:

Nagpur University Act, 1974 — Section 37, 39, 42

Citation : (2008) 3 ALLMR 131 : (2008) 3 BomCR 114 : (2008) 110 BOMLR 524

Hon'ble Judges : R.C. Chavan, J;A.P. Deshpande, J

Bench : Division Bench

Advocate : R.K. Deshpande, for the Appellant; S.V. Purohit, for the Respondent

Final Decision : Allowed

Judgement

R.C. Chavan, J.—This appeal is directed against the order of learned single Judge dismissing Writ Petition No. 2211 of 1997. The appellant management raises question as to whether the first appointment of teacher in an institution can itself be of a permanent nature.

2. Respondent No. 2 Dr. A.P. Rao was appointed as Principal of appellant's college after his selection by duly constituted selection Committee and approval by the university. He joined his duties on 26.09.1994. On 13.06.1995 he was informed that his work was not satisfactory. On 05.08.1995 the management decided to terminate services of respondent No. 2 and by order dated 09.08.1995 services of respondent No. 2 Dr. Rao were terminated after paying him a month's salary in lieu of notice. He challenged his termination before the University and College Tribunal. The Tribunal by its judgment dated 15.07.1997 held in favour of respondent No. 2 and allowed the appeal. It held that the appointment of respondent No. 2 was not on probation but in confirmed status as Principal of the college and therefore his services could not have been terminated

as a probationer. The management challenged this order by filing writ petition which, as already observed, came to be dismissed by judgment of the learned single Judge dated 27th February, 1998 giving rise to the present appeal.

3. The only point urged in this appeal is, whether respondent No. 2 could at all have been appointed as confirmed Principal and whether he could have forced the management to continue him in service. We would not go into the factual aspects of respondent No. 2's appointment. The appointment order dated 04.08.1994 is vague and therefore sought to be interpreted as an appointment on permanent basis till respondent No. 2 attained age of sixty years. Having regard to the ambiguous nature of the order the nature of the initial appointment order needs to be interpreted. The next question is, whether the management could have made such an appointment in the face of binding provisions in the Statute and Ordinance of Nagpur University.

4. Learned Advocate Shri R.K. Deshpande for the appellants submitted that appointments of university teachers are governed by Ordinance No. 24 popularly known as 'College Code'. Schedule 'A' to the College Code prescribes an agreement to be entered into by the management and the teacher to be appointed, and it is this contract of appointment which governs appointment of teacher. This provides, among other things, for appointment in the first instance on probation for a period of one year. Learned Advocate Shri Deshpande pointed out that the question, as to whether the appointment can be made on terms other than those in this Schedule-A was considered by the Full Bench of this Court in *Premlata Sudhakar Sathe v. Governing Body of G.S. Tompe College and Ors.* reported at 1981 Mh.L.J. 332 and the Full Bench categorically held that the appointment is not contemplated in any other manner except in the form prescribed in Schedule-A and that it was not open to the parties to vary the terms of the written contract. The Full Bench also held that non-execution of the contract did not vitiate the appointment or enforceability and binding nature of the contract, itself and therefore, even in the absence of the contract the appointment would be governed by Schedule-A to Ordinance No. 24, implying that the appointment, in the first place, can only be on probation for a period of one year extendable to two years.

5. Learned Advocate Shri Purohit for respondent No. 2 submitted that the crucial words in the judgment in *Premlata's* case are that "the contract cannot be altered to the disadvantage of the teacher". He further submitted that it would be open to the employer to alter the terms of the contract to the advantage of the teacher and, therefore, a permanent appointment can be made even though Ordinance requires appointment on probation for a period of one year, in the first instance. Learned Advocate Shri Purohit next submitted that Ordinance No. 24 dealt with 'Principals' in the separate Chapter IV, whereas selection and appointment of teachers are dealt with in Chapter V. He submitted that Schedule A has been referred to only in Chapter-V relating to appointments of teachers and reference to Schedule-A is conspicuous by its absence in Chapter IV. He,

therefore, submitted that it would be impermissible to read Schedule-A in appointment of Principals, though Principals too are included in definition of Teachers. Therefore, according to learned Advocate Shri Purohit Ordinance No. 24 cannot be invoked to conclude that a person to be appointed as a Principal must be first appointed on probation.

6. Statute No. 53 was pressed in aid by learned Advocate Shri Deshpande for the appellant to support his contention that 'Teacher' includes 'Principal' and a teacher, subject to procedure of selection and appointment, can be appointed in a clear vacancy in first instance only on probation for two years. He, therefore, submitted that ambiguity, if any, in Ordinance No. 24 is removed by the provisions of statute 53 which would prevail over Ordinance No. 24.

7. Learned Advocate Shri Deshpande pointed out that affairs of University are conducted by various authorities, which include Senate and Executive Council. Senate is a larger body and Executive Council is a smaller body. Whereas senate can make statutes and executive council makes Ordinances. The subjects on which statutes can be made are enumerated in Section 37 of the Nagpur University Act, 1974, whereas subjects on which Executive Council may make Ordinances are enumerated in Section 39 of the said Act. Section 42 of the Act specifically provides that Senate shall make statutes to govern the manner, mode, selection and appointment of Principals and Teachers, reasonable period of probation and confirmation and other matters in relation to teachers and other employees of affiliated colleges. Learned Advocate Shri Deshpande, therefore, submitted that the power to provide for selection and appointment of Principals, and prescribing a reasonable period of probation and confirmation by statute is conferred upon Senate. The Senate has accordingly provided for these aspects by enacting statute No. 53. Objection of learned Advocate Shri Purohit to the applicability of the statute on the ground that the statute relates to confirmation of teachers has to be rejected because the statute even provides for the manner in which appointment of teacher may be made in the first instance. Therefore, if the statute provides that a teacher can be appointed in the first instance on probation for two years it would govern the actions of the management in appointing a teacher, including a Principal.

8. Learned Advocate Shri Purohit submitted that though the relevant rules may provide for a longer period of probation at the first appointment, it is not necessary that the employer must make such appointment prescribing full period of probation and it would be open to the employer to employ a person without putting him on probation. He submitted that the powers to appoint a person on probation are enabling in nature and it would be always open to the employer not to exercise such a power. For this purpose he drew our attention on judgment of the Supreme Court in State of Punjab and Others Vs. Sukhwinder Singh, . In that case the question of nature of appointment of Sukhvinder Singh had been raised. It was contended by the department that he had been appointed on probation and in this context in paragraph 8 of the judgment the

Court observed that it was always open to the employer to employ a person without putting him on probation. The Court had referred to observations in earlier judgment in *Ajit Singh and Others Vs. State of Punjab and Another*, .

9. In *Ajit Singh*, in paragraph 8, the Court ruled that use of expression 'shall', while providing for an appointment on probation, does not take away the power of appointing authority to refuse to prescribe any period of probation, or prescribe a shorter period of probation. In view of these judgments, learned Advocate Shri Purohit submitted that, notwithstanding what statute No. 53 provided, it would always be open to the employer to prescribe that an employee may be appointed on a shorter period of probation or no period of probation at all. He further submitted that the question as to whether there was any escape from the rigours of Statute No. 53 had been raised before the Tribunal and the learned Counsel for the appellant-management had fairly conceded that there would be no bar, in reality for making a permanent appointment of a teacher.

10. Learned Advocate Shri Deshpande submitted, first, that there can be no question of a concession being made against the express provisions of the statute. He drew our attention to a judgment of the Supreme Court in *Union of India (UOI) and Others Vs. Arun Kumar Roy*, . The case arose out of termination of service of a person on extended period of probation. In that case the employee sought to rely on the terms embodied in the order of appointment. Relying on judgments of constitution Bench in *Roshan Lal Tandon Vs. Union of India (UOI)*, and *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, the Court observed as under:

18. The question whether the terms embodied in the order of appointment should govern the service conditions of employees in government service or the rules governing them is not an open question now. It is now well settled that a government servant whose appointment though originates in a contract, acquires a status and thereafter is governed by his service rules and not by the terms of contract. The powers of the government under Article 309 to make rules, to regulate the service conditions of its employees are very wide and unfettered. These powers can be exercised unilaterally without the consent of the employees concerned. It will, therefore, be idle to contend that in the case of employees under the government, the terms of the contract of appointment should prevail over the rules governing their service conditions. The origin of government service often-times is contractual. There is always an offer and acceptance, thus bringing it to being a completed contract between the government and its employees. Once appointed, a government servant acquires a status and thereafter his position is not one governed by the contract of appointment. Public law governing service conditions steps in to regulate the relationship between the employer and employee. His emoluments and other service conditions are thereafter regulated by the appropriate statutory authority empowered to do so. Such regulation is permissible in law unilaterally without reciprocal consent. This Court made this clear in two judgments rendered by two Constitution Benches of

this Court in *Roshan Lal Tandon v. Union of India* and in *State of J. & K. v. Triloki Nath Khosa*.

19. Thus it is clear and not open to doubt that the terms and conditions of the service of an employee under the government who enters service on a contract, will once he is appointed, be governed by the rules governing his service conditions. It will not be permissible thereafter for him to rely upon the terms of contract which are not in consonance with the rules governing the service.

11. In our view, whatever may be the contract of appointment an employee in public employment would be governed by the rules governing his service conditions, consequently it would be impossible to hold that the employment of respondent No. 2 was not on probation in face of provisions of Ordinance No. 53 specifically prescribing a two years" probation.

12. Next, learned Advocate Shri Deshpande submitted that if a document was susceptible of different interpretations it would have to be interpreted in tune with the rules rather than in conflict with the rules. He pointed out that the appointment order of respondent No. 2 does not at any place categorically say that respondent No. 2 was appointed as a permanent or confirmed teacher expressly deviating from requirement of Statute No. 53. It only gave an impression that an appointment might have been made without prescribing a period of probation. In such an eventuality, learned Advocate Shri Deshpande submitted that the appointment order would have to be interpreted as having been issued in conformity with the requirements of Statute No. 53. Since respondent No. 2 was not a teacher already working with the appellant and it was his first appointment with the appellant, ordinarily the requirement of probation would have to be read into the appointment order.

13. In any case, when an employee claims to have been appointed on a permanent basis in the first instance, it would be necessary for the employee to establish this with unimpeachable evidence. When a document is susceptible to an interpretation in tune with the statute as well it would not be open to interpret it otherwise and, therefore, in this case, in the absence of categorical expression in the appointment order that respondent No. 2 was appointed as a confirmed Principal it would not have been permissible for the University and College Tribunal or the learned Single Judge to hold that respondent No. 2 was not appointed on probation. If the management gave an impression to respondent No. 2 that he was appointed on permanent basis, or if the college had lured respondent No. 2 into accepting appointment making him believe that it was a permanent appointment, respondent No. 2 may have his own remedies against the management for a civil wrong. For seeking enforcement of statutory protections, or knocking the doors of a writ Court it would be necessary for the employee to show that his rights under the statutory rules have been breached.

14. In this view of the matter, we find that the Tribunal as well as learned Single Judge erred in holding that respondent No. 2's appointment was, since

inception, of a confirmed nature and that, therefore, respondent No. 2 could not have been relieved during the period of such probation. The appeal is, therefore, allowed.

15. We would, however, direct that payments, if any, made to respondent No. 2 during the pendency of the litigation, shall be left undisturbed and neither management nor respondent No. 2 shall make any claims against each other as a consequence of the appeal being allowed.