

(2017) 10 BOM CK 0046

In the Bombay High Court

Case No : 98 of 2010 IN WRIT PETITION No 601 of 2005

Shri M.N. More

APPELLANT

Vs

Mrs. Sumangala w/o Manoharrao Sakharkar, & Ors.

RESPONDENT

Date of Decision : 31-10-2017

Acts Referred:

Citation : (2017) 10 BOM CK 0046

Hon'ble Judges : B.P. Dharmadhikari, Swapna Joshi

Bench : DIVISON BENCH

Advocate : R.S. Parsodkar, S.P. Bhandarkar, M.a. Barabde

Final Decision : Dismissed

Judgement

1. Judgment dated 12.10.2009, delivered by the learned Single Judge of this court in Writ Petition No. 601/2005, allowing Writ Petition filed by respondent no.1 Mrs. Sakharkar (maiden name - Ku. Surkar), has been questioned before this Court. Learned Single Judge has found respondent no.1 senior to present appellant and came to the conclusion that she has continued in Category "C" of Schedule-F of Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981, (hereinafter referred to as "the 1981 Rules" for short) since 05.01.1981. While the present appellant entered that category on 05.06.1981.

2. This Letters Patent Appeal has been admitted for final hearing on 02.03.2010, and at this stage is it not in dispute that the appellant Shri More and respondent no.1 Mrs. Sakharkar, both have retired after attaining their age of superannuation. Respondent no.1 actually functioned on the promotional post as Headmistress, but, because of pending dispute, her salary has been paid only as Assistant Teacher. Appellant claims that post. Thus, dispute now survives only to find out a person entitled to the amount of difference in salary payable to Headmaster and to Assistant Teacher.

3. Short submission of Shri Parsodkar, learned counsel for the appellant is, there are about 4-5 breaks in service of respondent no.1 and her last continuous

service only can be looked into. He submits that said service is from 26.06.1983, when she was appointed on probation and service rendered by her prior there to cannot be held to be relevant at all. He further states that as against this, present appellant has been in Category "C" right from his entry into the employment i.e. from 15.07.1977 and as such, he cannot be treated to have entered into Category "C" from 05.06.1981. He has taken us through the history of previous litigation between respondent no.1 and one Shri V.S. Dhakate, in order to demonstrate that Shri Dhakate was teaching middle school only and therefore, admittedly junior to the present appellant. He has relied upon judgment of Hon'ble Supreme Court reported at (2003) 10 SCC 235 (Punjab State Coop. Agricultural Development Bank .vrs. Gurnaib Singh), to urge that service separated by breaks cannot be clubbed with continuous service and seniority cannot be counted from first day of entering the employment.

4. Inviting attention to government resolution dated 10.05.1989, he points out that condoning breaks in service, is the power given only to Deputy Director of Education, and that power can be exercised only for the purpose of computing qualifying service to calculate pension. Breaks cannot be condoned for the purpose of adding to seniority. The observations of learned Single Judge in this respect contained in paragraph nos. 24 and 26 are urged to be misconceived and erroneous. He submits that the controversy arose when in seniority displayed in the year 2003, respondent no.1 was shown senior to present appellant. According to him, in this situation, the post of Headmaster could not have been conferred upon respondent no.1 and it is appellant who is legally entitled to it.

5. He has also invited our attention to stand on condonation of breaks taken by the Education Officer while opposing Writ Petition before the learned Single Judge. He submits that as pointed out therein, the Education Officer did not possess powers either to condone break or to grant approval to such condonation and break cannot be looked into for the purpose of calculating total length of service for computing seniority. He submits that this express assertion of Education Officer has been ignored by the learned Single Judge.

6. As against this Shri Bhandarkar, learned counsel appearing for respondent no.1 by relying upon previous history and impugned judgment of learned Single Judge submitted that the appellant was never senior to respondent no.1. He heavily relies upon earlier orders to demonstrate how respondent no.1 is found senior to everybody, including the present appellant. According to him, government resolution no where prohibits the employer from condoning breaks in service for the purpose of calculating seniority. He states that only for the purpose of conferring benefit of pension, as public revenue is involved, intervention of a responsible officer like Deputy Director of Education is envisaged. He therefore, supports the judgment delivered by the learned Single Judge.

7. We find that for the purpose of present controversy discussion can very well be undertaken by referring to communication dated 26.02.1991 sent by the

Education Officer to the Headmaster. It is on the subject of interse seniority between the appellant/respondent no.1 Shri Dhakate and Shri Nishane. He has after pointing out their educational qualifications and year of acquiring degree as also date of birth, arranged them. Respondent no.1 has been shown as senior most, followed by Dhakate and thereafter Shri Nishane. Present appellant Shri More is shown at Sr. No.4 i.e. at the bottom of the communication. In communication dated 06.05.1992, Deputy Director of Education has written to Shri V.S. Dhakate, and pointed out to him that Shri Dhakate was in Category "D" on 05.01.1981, while respondent no.1 was in Category "C". The said officer therefore has upheld the order of education officer dated 26.02.1991 holding respondent no.1 to be the senior most.

8. This order dated 26.02.1991 formed subject matter of Writ Petition No. 2237/1992, which was filed by Shri Dhakate. Division Bench of this court has on 07.09.1993 disposed of the Writ Petition and directed education officer to hear parties and to pass reasoned order for fixing seniority of teachers. The exercise was to be completed in time bound manner. Thus, there was a direction by the Division Bench to fix the seniority of all teachers in terms of Rule 12 of the 2012 Rules, and accordingly this direction has been complied with on 14/15.01.1994. The order of Education Officer mentions that he has heard both sides. The consideration is basically revolving around the condonation of breaks in service extended to respondent no.1. The order mentions that before June, 1983, respondent no.1 worked in academic years 1980-81, 1981-82 and 1982-83, from first day till last day. In other words, she did not work only during summer vacations. Order also mentions that she had been paid salary even for this period of vacation of 50 days, 60 days and 50 days. It mentions that School Committee has accordingly passed a resolution and condoned the breaks. This action of the school committee has been approved by the education officer. He has therefore, found that respondent no.1 continued in employment continuously from 05.01.1981 and accordingly the entry has been taken in her service book.

9. At the end of this adjudication, the education officer has again recorded that respondent no.1 happens to be senior to Shri Dhakate. This order and adjudication has attained finality and does not appear to have been questioned by anybody.

10. The publication of seniority list in the year 2003-04 appears to have given rise to the present controversy. In the seniority list, name of respondent no.1 appears at sr.no.3, name of Dhakate at sr.no.4, name of present appellant also appears at sr.no.6. Name of Shri Nishane is at Sr.No.5. Thus, the position which was worked out on 26.02.1991 attained finality when the education officer passed fresh orders on 14/15.01.1994 and it continued till 2003-04.

11. It appears that at that juncture objection to seniority list was raised by present appellant and that has been looked into and that was accepted by the education officer. Education officer has taken note of the fact that the breaks in service of respondent no.1 Sou. Sakharkar, were condoned by the school

committee on 04.10.1985, but, those breaks could have been condoned only for the purpose of calculating pension and not for computing seniority. Hence, the sequence in seniority list has been reversed and name of appellant has been shown at sr.no.1, Nishane at Sr.No.2, Dhakate at Sr.No.3 and name of respondent no.1 Sou. Sakharkar, is placed at Sr.No.4. This order dated 30.06.2004 has been set aside by the learned Single Judge vide the impugned judgment dated 12.10.1999.

12. Perusal of the judgment delivered by the Hon'ble Supreme Court in case of Punjab State Coop. Agricultural Development Bank .vrs. Gurnaib Singh (supra), reveals that there question of condonation of breaks in service did not fall for determination. Thus last continuous service therefore has been accepted for the purpose of computing seniority. This judgment, therefore, is not useful in present matter.

13. Government Resolution dated 10.05.1989, is after resolution passed by the management and also after approval given by the education officer. Relevant clause therein stipulated that when condonation of breaks in service affects pension amount, the power to condone such break is given to the Deputy Director of Education.

14. This government resolution does not show that the breaks cannot be condoned for the purpose of seniority, if no burden is being cast on public revenue. We have looked into the resolution dated 04.10.1985 filed on record of writ petition by respondent no.6. The resolution takes note of the fact that during summer vacation, salary has been paid to Ku. Surkar i.e. present respondent no.1. The break was condoned therefore on 04.10.1985 and this was also acted upon and approved by the education officer. Reply filed by education officer in writ petition before the learned Single Judge only points out that for pension purpose education officer cannot condone break in service. Learned Single Judge has accepted said fact only. We therefore do not find any perversity in the conclusions drawn by the learned single Judge in this respect.

15. The challenge to seniority list of respondent no.1 has been engaging attention of education department and of this court since February, 1991. In this situation, when Division Bench of this court directed determination of seniority vide judgment dated 07.09.1993 in Writ Petition No. 2237/1992, and education officer thereafter decided the seniority on 14/15.01.1994, after a period of about 10 years, that order is sought to be reviewed or controversy is sought to be reopened by the present appellant. The controversy has been reopened only because of alleged absence of power in education officer to condone the break or then with reason that such breaks cannot be condoned for the purpose of calculating seniority. The order which had attained finality and was in force and seniority list drawn every year accordingly which must have been published in terms of Rule 12 is, therefore, set aside indirectly by very same authority. We may mention here that respondent no.1 did receive salary continuously for the entire period and breaks are being alleged only due to distinct appointment

orders. Practically these were/was no break. All these factors are looked into and thereafter, only it has been held that she has entered Category "C" on 05.01.1981 itself. The present appellant has obtained B.Ed. (training) qualification on 05.06.1981, and hence, he could not have entered Category "C" before 05.06.1981. In this situation, we find that the controversy is covered by order dated 14/15.01.1994 and learned Single Judge has rightly appreciated the same.

16. No case is therefore, made out warranting interference in appellate jurisdiction. Letters Patent Appeal is accordingly dismissed. No costs.