

(2015) 10 BOM CK 0084

In the Bombay High Court

Case No : Writ Petition Nos. 2440/2014, 2444/2014, Contempt Petition No. 147/2015 in Writ Petition No. 237/2014, Contempt Petition No. 166/2015 in Writ Petition No. 2958/2014 and C.A.O. No. 356/2015 in M.C.A. St. No. 3596/2015 in W.P. No. 2443/2014

Smita and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 16-10-2015

Acts Referred:

Citation : (2015) 6 ABR 664

Hon'ble Judges : B.P. Dharmadhikari and P.N. Deshmukh, JJ.

Bench : Division Bench

Advocate : P.S. Tiwari, Advocate, for the Appellant; M.N. Hiwase, Asstt. Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—In all these matters, the Assistant Teachers who joined the employment between the years 2004-2007, as Untrained candidates on the post of Shikshan Sevak, claim the pay-scale prescribed for an Untrained teacher, after they completed initial period of three years as Untrained candidates i.e. as Untrained Shikshan Sevaks. In Contempt Petitions, prayer is to direct the respective employer to abide by the judgments/directions issued by this Court in favour of the petitioner employees (Assistant Teachers) and punish their employers for not obeying the same.

2. In matters decided by this Court earlier, or even in matters presently under consideration, the respective learned Counsel appearing for the petitioners rely upon the judgment dated 24.04.2012 in Writ Petition No. 7116/2011 delivered by the Aurangabad Bench. That judgment has been followed by this Bench in Writ Petition No. 629/2013 decided on 27.06.2013; in Writ Petition No. 2077/2013 decided on 03.07.2013 and in bunch of Writ Petitions having Writ Petition No. 427/2013 and others, at Bombay decided on 03.10.2013. This Court

has while deciding Writ Petition Nos. 237/2014, 4767/2013 and other connected matters on 18.06.2014, has again followed that judgment. It is also followed on 13.02.2015 while deciding Writ Petition No. 6569/2015, on 30.01.2015 while deciding Writ Petition No. 341/2015. Writ Petition No. 2443/2014 has been allowed on 31.10.2014 following the very same judgment delivered at Aurangabad on 31.10.2014. One of us (B.P. Dharmadhikari, J) is party to that order. Needless to reiterate that all these later orders or judgments follow the above mentioned judgment dated 24.04.2012 in Writ Petition No. 7116/2011 delivered at Aurangabad Bench.

3. Petitioners rely upon the terms and conditions of the appointment to urge that after untrained candidates join as Shikshan Sevaks and complete probation period of three years satisfactorily, the pay-scale prescribed for an untrained teacher ought to have been extended to them. Submission is, grant of pay-scale to them only after they procure regular training qualification is contrary to law. Prayer therefore is, to release them the said pay-scale after they satisfactorily complete their probation and then to fix them accordingly in corresponding pay-scale prescribed for trained teacher, after they acquired training qualification. Various judgments mentioned supra have been pressed into service. Orders passed by the Hon"ble Supreme Court on 04.09.2015 dismissing Special Leave Petition against the judgment and order dated 18.06.2014 in Writ Petition No. 237/2014 at Nagpur, is also relied upon by them. The judgment reported at State of Rajasthan and Another Vs. Milap Chand Jain and Another Etc., is relied upon to point out that earlier adjudication by this Court has to operate as res-judicata. Opposing the M.C.A. review petition filed by the employer Zilla Parishad, Wardha Kamlesh Verma Vs. Mayawati and Others, is also relied upon to urge that the fetters placed on powers of this Court to review its earlier order/judgments.

4. The learned counsel appearing on behalf of the Zilla Parishad, while opposing the contempt petitions and writ petitions state that when Writ Petition No. 7116/2011 was decided at Aurangabad on 24.04.2012, the complete policy and entire material was not available and could not be pressed into service before that Bench. The law laid down in that judgment, therefore, cannot be said to be correct and a binding precedent. Later orders or judgments of this Court apply very same law, and as the correct position has not been pressed into service even before later Benches, the question of res-judicata does not arise at all. They submit that the appointment of an untrained candidate was allowed only by way of an exception and that too in limited cases. The untrained candidates so recruited therefore, did not occupy the post of shikshan sevak and period of their probation never commenced. They occupy post of shikshan sevaks only after obtaining training qualification and from that date only, their respective period of probation needed to be calculated. After completion of probation period of three years as trained shikshan sevak, the incumbents have been designated as assistant teachers. Hence, their service as untrained candidate is not relevant and there is no question of granting any pay-scale even of an untrained teacher to the incumbents working as untrained shikshan sevaks. It is pointed out that

because of orders passed by this Court in various matters, an unforeseen burden running into few hundred crores of rupees has been cast upon the employer Zilla Parishad.

5. In the alternative and without prejudice, it is submitted that a person recruited as trained shikshan sevak receives honorarium which is less than wages of an untrained teacher in pay scale as sought. Thus, an untrained incumbent who puts in three years service has been allowed to draw wages in pay-scale prescribed for untrained teacher which are much better than honorarium paid to trained shikshan sevaks. If such untrained incumbent does not procure necessary training qualification within a stipulated period, he can be terminated and in that situation, the injustice which is caused to trained shikshan sevak becomes apparent. Respective counsel appearing for Zilla Parishads, as also learned A.G.P. submit that pay scale for untrained teachers were prescribed only when training qualification was introduced as essential for teachers for the first time. Any incumbent who is recruited as untrained shikshan sevak cannot claim that salary, as he cannot be equated with an untrained teacher. All of them therefore pray for dismissal of the writ petitions. They also submit that in this situation, the prayer for Review deserves to be granted and the contempt petitions need to be disposed of as the judgments or directions therein have been issued without looking into all relevant factors.

6. In brief reply arguments, respective counsel for the petitioners state that some Zilla Parishads have already obeyed the directions and payments have been made to the Assistant Teachers accordingly, hence, the petitioners cannot be subjected to hostile discrimination by denying to them the similar benefit.

7. We find it appropriate to consider the terms and conditions prescribed for an incumbent in the scheme formulated to govern the Shikshan Sevaks. The policy decision of the State Government to implement modified scheme for providing employment as primary shikshan sevaks is dated 27.02.2003. It makes reference to earlier government decision and then to various High Courts orders on it. An adjudication by Aurangabad Bench dated 04.07.2001 in Writ Petition Nos. 817/2001 and 949/2001 has been mentioned. Reference to fact of filing of Special Leave Petition No. 19081/2001 and orders of the Hon'ble Supreme Court, setting aside the High Court judgment is also seen. The Hon'ble Apex Court directed High Court to rehear the matter. It appears that in the meanwhile at Principal Seat at Bombay, while deciding Writ Petition No. 2940/2000, certain amendments to original shikshan sevak scheme were felt necessary. Lastly it is stated that Writ Petition No. 817/2001 came to be decided by the Aurangabad Bench on 11.10.2002 and after considering all these factors, State Government formulated a modified scheme to be implemented from the academic year 2003-04, and that modified scheme is at Annexure-A with this policy decision/government decision.

8. Clause [2] of said Schedule-A stipulates SSC/HSC, D.Ed. or other equivalent qualification as necessary qualification for appointment as shikshan sevak. Such

shikshan sevak is to be paid Rs. 3000/- per month as honorarium. Shikshan Sevaks appointed in terms of clause [7] is to be paid honorarium of Rs. 1500/-. Its" clause [4] which deals with honorarium mentions that this honorarium is payable to backward class candidates who are untrained and have passed 12th standard examination. As per clause [5], such an appointment on a clear and vacant post is to be for a period of three years. Clause [7] speaks of exemption from educational qualification.

9. As per clause [7], candidates holding qualification prescribed under clause [2] are only to be appointed as Shikshan Sevaks. These words "holding qualification" and "only to be appointed" are highlighted in clause [7] itself by the State. But, then it is further mentioned that if for making appointments on the reserved posts i.e. on posts reserved for backward classes, if candidates belonging to Scheduled Caste or Tribe, Other Backward Classes, Nomadic Tribes or Special Backward Class candidates with training qualification are not available. H.S.C. pass candidates from such backward categories can be appointed subject to certain terms and conditions. These conditions require such an untrained candidate to procure training qualification at his own cost within three years. The fees or charges for such training prescribed by the State Government from time to time are to be paid by such untrained candidates. If such shikshan sevak fails to obtain training qualification through correspondence within prescribed time limit, such an untrained shikshan sevak can be given further extension of one year and thereafter his services are liable to be terminated. It is also mentioned that those shikshan sevaks who could not, on account of unavoidable reasons, take advantage of first opportunity and could not appear for training through correspondence, one extension of one year can be given to them.

10. Clause 10 of this Scheme is on the subject of absorption of the shikshan sevaks. If a shikshan sevak satisfactorily works for three years on the post as shikshan sevak, he is to be appointed on a regular post of a primary teacher on the regular pay scale. It's sub-clause [2] lays down that services rendered by him as such Shikshan Sevak are to be computed for calculating his pension and other retirement benefits. Schedule-B appended with this resolution or scheme is the proforma of appointment order. Clause [d] in this form is in consonance with clause 10 mentioned supra. Clause [f] states that all Shikshan Sevaks appointed will be paid an honorarium of Rs. 1500/- or Rs. 3000/-. Thus, an incumbent occupying the post of Shikshan Sevak, after he satisfactorily completes the probation period of three years, can be appointed on a regular post of primary teacher. Clause 10 of the model appointment order or then proforma appointment order, does not show that an untrained Shikshan Sevak can be appointed on a post of an untrained primary teachers after he satisfactorily completes probation period of three years. On the contrary, it is apparent from the scheme reproduced above, that there is no post of an untrained primary teachers on the establishment of any school. As such, there is no question of an untrained incumbent working against a vacancy of the post of Shikshan Sevak to contend that if he puts in service of three years as an

untrained Shikshan Sevak, he should be given pay scale of an untrained primary teacher. In view of the shikshan Sevak scheme, the regular vacancy which otherwise would have been of the or in the cadre of an assistant teacher is transformed into a post of a shikshan Sevak for three years. An eligible incumbent duly selected as a shikshan Sevak, earns a fixed honorarium for three years and after completion of three years of satisfactory service, becomes an assistant teacher and is borne on regular cadre. Thus, the post of shikshan Sevak occupied by him itself gets converted into post of assistant teacher. There is no creation of a new or another post of assistant teacher for his absorption thereby resulting in a vacancy in the cadre of shikshan sevak. No law creates a post of an untrained teacher in a primary or secondary school, and a post occupied by an untrained candidate as shikshan Sevak can not get converted into the post of a trained teacher after three years. As such, the contention that post of an untrained teacher is created or then an untrained incumbent becomes entitled to salary as an untrained teacher is not supported by this scheme.

11. On 11.03.2005, the Tribal Development Department of State Government has issued a government resolution on the subject of appointing untrained backward class candidates. It follows and extends the above mentioned resolution dated 27.02.2003, issued by the State Government (School Education Department) even to Ashram Schools. It mentions that while appointing such untrained candidates, on second or then subsequent occasion as a shikshan Sevak, the appointing authority has to again ascertain that trained candidates are not available. If trained candidates are available, those candidates are to be appointed first and if any posts are left vacant thereafter, then only such untrained candidates can be reappointed against said vacancy.

12. On 29.01.2008, the Education and Sports Department of State of Maharashtra has issued a Government Resolution which is on the subject of extending time limit for acquiring B. Ed. Qualification for assistant teacher working on the post to be filled in by a graduate trained teacher. It is also on the subject of protecting employment of untrained primary Shikshan Sevaks. It mentions that, if services of such untrained primary teachers are terminated for their failure to acquire D.Ed. qualification within the stipulated period, they should be taken back in the employment as a special case. Their employment has been protected till they are selected and nominated for training under postal D.Ed. scheme. On 17.09.2011 the State Government through its School Education and Sports Department issued a Government Resolution on the subject of hike in honorarium payable to Shikshan Sevaks. As per this government resolution, while prescribing hike for trained primary Shikshan Sevaks, the honorarium has been enhanced to Rs. 6000/- per month; for untrained Shikshan Sevaks, it is increased to Rs. 3000/- per month. Clause [2] thereof stipulates that untrained Shikshan Sevaks working as on that date i.e. on 17.09.2011, will not get the pay scale of untrained primary teacher, they will earn honorarium at half the rate of the honorarium payable to trained Shikshan Sevaks. Clause [6] further stipulates that as trained D.Ed. Shikshan Sevaks are

available in sufficient number in backward class category, the enabling provisions allowing appointment of an untrained incumbent on the post of Shikshan Sevak i.e. concession made in government resolution dated 27.02.2003 has been cancelled.

13. Before 17.9.2011, the School Education and Sports Department of State Government has issued government resolution on 16.12.2009, and as per that government resolution, the recruitment to the post of Shikshan Sevaks has been prescribed through a competitive examination through centralized process. Clause 3 thereof mentions that the period of appointment shall be of three years as stipulated in government resolution dated 27.02.2003. The duration of appointment for untrained Shikshan Sevaks has been stated to be till they acquire training qualification in consonance with the above government resolution dated 29.01.2008. It is to be noted that this decision is prior to above government resolution dated 17.09.2011.

14. Our attention has also been drawn to a communication dated 24.04.2007, sent by the State Government to the Chief Executive Officers of all the Zilla Parishads. It is on the subject of pay scale of untrained teachers or deemed trained teachers. Vide entry 2, it mentions category of untrained and SSC pass and all other teachers to whom pay scale of Rs. 260-495 was admissible prior to 01.01.1986. The corresponding revised pay scale of Rs. 975-1600 is shown from 01.01.1986, and thereafter pay scale of Rs. 3200-4900 has been mentioned as payable from 01.01.1996. It is therefore, obvious that it mentions incumbents working as untrained teachers and not as Shikshan Sevaks. The scheme of Shikshan Sevak has been brought into play definitely from 27.02.2003, and this communication does not refer to the post of Shikshan Sevaks at all.

15. This Court had no occasion and the first judgment delivered at Aurangabad on 24.04.2012 does not find consideration at length in any of the later judgments or orders of this Court. In said judgment dated 24.04.2012 delivered by the Aurangabad Bench of this Court, petitioner Selma Take was appointed as Shikshan Sevak by Zilla Parishad Beed on 04.11.2004. Her appointment order contained the above mentioned condition regarding satisfactory completion of services of three years as Shikshan Sevak and then appointment as a primary teacher in regular pay scale. The petitioner then made a representation and sought pay scale admissible to untrained teachers as per 5th and 6th Pay Commission wage revisions. Her first representation was dated 16.08.2011 where she mentioned that as postal D.Ed. course was discontinued, she had been enrolled for B.Ed. Course. It was also pointed out that Zilla Parishad, Beed had given similar benefit to other similarly placed persons. The communication dated 24.04.2007 mentioned supra, was pressed into service to point out the extension of pay scale to untrained teachers. Zilla Parishad in reply pointed out that letters of government dated 24.04.2007 and 09.09.1999 were about untrained teachers appointed as such prior to implementation of the Shikshan Sevak scheme, that the petitioner Seema was appointed on 04.11.2004 and the

government resolution dated 17.09.2011 clearly stipulated that the pay scales were not applicable to untrained teachers. In judgment paragraph No. 8, the Division Bench of this Court has looked into the communication dated 24.04.2007, noted its contents and found that separate pay scales were prescribed for teachers having training qualification and for untrained teachers. It is further found that petitioner completed three years of service as Shikshan Sevak in 2007, and therefore, in terms of clause [e] of the appointment order, she became entitled to be considered for appointment as a primary teacher in regular pay scale, provided her performance was satisfactory. As she completed that period in 2007, and reply did not point any unsatisfactory performance, the Division Bench found that she became entitled to pay scale of untrained primary teacher. It also held that her this right could not have been defeated by the subsequent Government resolution dated 17.09.2011.

16. Thus, because of stipulation in clause [e] of the appointment order of petitioner Seema, a particular view has been reached. All other government resolutions having bearing on the subject were then not pressed into service and have not been looked into by the said Bench. Beed Zilla Parishad did not point out all relevant developments. Similarly, the respondent No. 1 State Government in Writ Petition No. 7116/2011 also did not press the same. Clause [e] of the appointment order issued to petitioner Seema in that writ petition is not produced before us by the parties. It also appears that Beed Zilla Parishad had in past extended similar benefit to untrained shikshan sewaks who had satisfactorily completed three years.

17. Terms and conditions stipulated in the model appointment order are already mentioned by us supra. The proforma appointment order is Annexure-B with the government resolution dated 27.02.2003. Clause 10 of the appointment order envisages consideration for regularization on a regular post of primary teacher after satisfactory completion of three years as a Shikshan Sevak. Such Shikshan Sevak after 3 years is to be given pay scale of a primary teacher. Thus, he starts at the initial stage of pay scale of a primary teacher after he has put in three years of satisfactory services as Shikshan Sevak. The model appointment order vide clause [d] is on same lines. This clause [d] does not mention that the incumbent will be given appointment on a post of a untrained primary teacher, if he completes satisfactorily three years services as an untrained Shikshan Sevak.

18. Petitioner in Writ Petition No. 2440/2014 before this Court assails the order of recovery of amount paid to her in excess for period from 01.07.2007 to 29.06.2011. The appointment order issued to her show that she was selected for postal D.Ed. course in 2007-08 as per communication dated 28.04.2009. As per order dated 17.04.2008, her employer (a private education society), extended her pay scale available to untrained primary teacher. Fault has been found because of government resolution dated 17.09.2011. She has completed D.Ed. on 30.06.2011 i.e. before 17.09.2011.

19. Writ Petition No. 2444/2014 is filed by 137 teachers. All of them have joined

in January, 2004 and completed three years on different dates in January, 2007 as untrained Shikshan Sevaks. They have acquired training qualification i.e. D.Ed. on various dates as given in Annexure-A with that writ petition. Most of them have acquired that qualification before 17.09.2011. While 4 of them have acquired that qualification on 03.01.2012, and one has acquired it on 28.06.2012. None of them have been fixed in any pay scale as untrained primary teachers. Their employer - respondent No. 3 Zilla Parishad, Gondia has not extended said benefits to any untrained person working as Shikshan Sevaks. Facts in other petitions are on same lines. It is not the case of any of the petitioners that their employer has fixed any of untrained incumbent working as Shikshan Sevak in the pay scale of a untrained primary teachers after three years. By placing reliance upon the above mentioned judgment of Aurangabad Bench, they are trying to point out parity.

20. We have found that in judgment delivered by the Aurangabad Bench in Writ Petition No. 7116/2011, the employer Zilla Parishad, Beed had released that benefit (rightly or wrongly), to certain other untrained Shikshan Sevaks, and it was denied to petitioner Seema therein. Clause [e] in her appointment order perhaps entitled her to pay scale of a untrained primary teacher also. Here both these facts are lacking. Petitioners are not in a position to claim parity, qua, any other employees in employment with their respective employer or then a right flowing from a stipulation in their appointment order.

21. Perusal of Clause 7 of 2003 scheme which contemplates relaxation or exemption from educational qualification, prescribed in its clause [2] for appointment as Shikshan Sevaks, shown that it is restricted only to backward class candidates who needed to be recruited to achieve the requisite percentage of reservation. Thus, a backward class candidate to be recruited against an open roster point was not made eligible for such relaxation or exemption. This concession was therefore, only to give adequate representation to backward classes while making recruitment to the post of Shikshan Sevaks against reserved roster points. The recruiting agency was obliged to verify whether the trained persons i.e. those who satisfy the educational qualifications prescribed vide clause [2], were available or not. Only after reaching the satisfaction that such trained qualified persons were not available for recruitment against reserved roster point, untrained backward persons were allowed to be recruited. Petitioners before this Court have obtained D.Ed. qualification later on and have also been given approval. It therefore, appears that their entry into employment is in consonance with clause 7 mentioned supra.

22. But, then as it is apparent from clause 7 itself, it is a concession made available in favour of backward class candidates to protect and maintain constitutional reservation. This concession does not enable the incumbent to claim right to pay scale as untrained primary teacher after three years on completion of service. Clause 10 of the government resolution is very clear, and as per that clause, if a Shikshan Sevak puts in three years of satisfactory service

on the post of Shikshan Sevak, he is to be appointed on a regular post of primary teacher. There is no post with any Zilla Parishad or employer which can be stated to be a post of an untrained primary teacher. Hence, when clauses 2, 7 and 10 are read together, it is clear that the government resolution dated 27.02.2003 does not enable the petitioners to claim pay scale of untrained primary teacher, merely because they have put in three years of service as untrained Shikshan Sevaks. They must be regularized/absorbed on the post of a regular primary teacher only. When the scheme of Shikshan Sevaks formulated on 27.02.2003 is looked into in its entirety, it is apparent that the period of probation itself may not began to run till a person fully qualified to hold the post is appointed on it. Performance of an untrained incumbent, therefore, may not be relevant and decisive to find out whether he has satisfactorily completed period of probation. However, in the light of the findings reached above, and as this issue has not been urged before us, we do not record any conclusive finding on it. We also do not find it necessary to evaluate the contention that in no case an untrained incumbent completing three years as a shikshan sevak, can draw wages more than the honorarium payable to a trained Shikshan Sevak. We prefer to leave these issues open for its due evaluation in more appropriate facts and circumstances. We also find that the present petitioners have woken up only after orders of Court at Aurangabad and were not vigilant enough to exercise the alleged right within period of limitation or in reasonable time.

23. In this situation, as we find that the judgment of Aurangabad Bench mentioned supra dated 24.04.2012 does not lay down any law of universal application, present petitions filed simply placing reliance upon it are misconceived and are liable to be dismissed. Petitioners have failed to demonstrate any right in them to enable them to claim pay scale of an untrained primary teacher after putting in three years of service as untrained Shikshan Sevak. Dismissal of a SLP by the Hon. Apex Court against one order or judgment of this Court does not and can not improve the situation for the petitioners. Writ Petitions are accordingly dismissed. Rule discharged. However, in the circumstances of the case, there shall be no order as to cost.

24. As far as contempt petitions are concerned, the orders or judgments of this Court are final and cannot be reviewed by us in this jurisdiction. The judgment of Aurangabad Bench dated 24.04.2012 in Writ Petition No. 7116/2011 cannot operate as res judicata and therefore, we have dismissed the fresh writ petitions which have come up for the first time before this Court. But, then because of the view reached therein, judgment/orders which have otherwise attained finality cannot be re-opened by us. Hence, in Contempt petitions we grant time of 6 months to respective employers to fulfill the obligations cast upon them by the respective judgment and/or orders of this Court.

25. Civil Application No. 356/2015 has been filed by Zilla Parishad, Wardha for condoning delay of 82 days in filing M.C.A. St. No. 3596/2015. That M.C.A. is filed for review of judgment and order dated 31.10.2014 in Writ Petition No.

2443/2014. Review is sought on the ground that untrained service period is not relevant for any purposes and letter dated 24.04.2007 does not prescribe any pay scale for untrained Shikshan Sevaks. The terms and conditions of government resolution dated 27.04.2003 already mentioned supra have been relied upon.

26. Said Writ Petition No. 2443/2014 has been decided after hearing all the concerned. Review applicants were also then heard through their Advocate while deciding that petition and thereafter, the view as taken at Aurangabad Bench on 24.04.2012 in Writ Petition No. 7116/2011 has been followed and acted upon. Other judgments/orders added at Nagpur were also looked into then. Thus, the order has been passed after extending full opportunity to the review applications. Present review is, therefore, an appeal in disguise against that adjudication. Therefore, though we condone the delay, we find that no case is made out warranting interference in review jurisdiction. Accordingly, M.C.A. St. is rejected.

27. In this view of matter, we do not find any merit either in writ petitions or the review petition. The same are dismissed. In contempt petitions we direct the respective employer to deposit the amounts as per binding directions of this Court with the registry of this Court within next six months. Accordingly Writ Petition Nos. 2440 and 2444 of 2014 and Review Petition No. C.A.O. No. 356/2015 in M.C.A. St. No. 3596/2015 in W.P. No. 2443/2014 are dismissed. Rule discharged therein with no order as to costs. List the Contempt Petition Nos. 147 and 166 of 2015 for further consideration on 5th April, 2016.