

(2009) 09 BOM CK 0139

In the Bombay High Court

Case No : Writ Petition No. 1417 of 1999

Subhash Nagar Education Society and Ravindranath Tagore
Bahudhushiya Shikshan Sanstha

APPELLANT

Vs

Ku. Rekha Ramkrushnaji Rewatkar and Others

RESPONDENT

Date of Decision : 10-09-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 5, 9, 9(2), 9(3)

Citation : (2009) 09 BOM CK 0139

Hon'ble Judges : S.R. Dongaonkar, J

Bench : Single Bench

Advocate : H.A. Deshpande, for the Appellant; A.R. Shelat, for Repsodnent No. 1 and C.N. Adgokar, A.G.P. for Respondent Nos. 2 to 4, for the Respondent

Judgement

S.R. Dongaonkar, J.—Heard Shri Deshpande, advocate for petitioner, Shri A. Shelat, advocate for respondent No. 1, Shri Adgokar, AGP for respondent No. 2 to 4. None present for respondent No. 5 & 6.

2. By this petition, under Articles 226 and 227 of the Constitution of India, petitioners are challenging the order passed by the School Tribunal, Nagpur in Appeal No. STN/17/1996 filed by the respondent No. 1 against the termination of her services w.e.f. 9.5.1989.

3. Brief facts leading to this petition can be stated thus. Respondent No. 1 was appointed as Assistant Teacher with the petitioner from the academic session 1985-86 to 1989-89. According to the petitioner, she was being appointed every year on purely temporary basis as an Assistant Teacher. Her services came to be terminated on 9.5.1989. The respondent No. 1 then preferred appeal before the School Tribunal u/s 9 of the Maharashtra Employees of Private Schools [Conditions of Service Regulation] Act 1977 [for short M.E.P.S. Act] challenging the her termination. This appeal was preferred on 16.1.1996. In the proceeding

of appeal before the School Tribunal, Nagpur notices were issued to the present respondents and the Deputy Director of education and Education Officer, Nagpur. The management/ petitioner filed their reply to resist the appeal. However other respondents including the Education Officer did not file any reply. Learned Presiding Officer, School Tribunal, found that the respondent No. 1 was wrongly terminated and order of termination issued was illegal, so the School Tribunal set aside that order and directed reinstatement of the appellant in the same post immediately. However, her claim for back wages was rejected.

4. When the matter was heard by this Court at the time of admission, the stay in terms of prayer Clause (ii) was granted. Prayer Clause (ii) reads thus:

(ii) pending decision of this petition, stay the effect, operation and execution of the Judgment of the School Tribunal, Nagpur dated 1.4.1999 passed in Appeal No. 17/1996

Therefore, stay was granted to the effect, operation and execution of the judgment and order passed by the School Tribunal. Therefore, it so happened that the respondent No. 1 was reinstated on 1.4.1999 and after an order of stay on 10.9.1999, she was away from the services. It is necessary to extract the part of the relevant order of this Court i.e. from the order dated 9.10.2000 as under:

Considered the contentions raised by the respective learned Counsel. It is, however, true that the effect and operation of the Judgment of the School Tribunal is stayed by this Court on 10th September, 1999. However, in the intervening period i.e. 1.4.99 to 10.9.99, the respondent No. 1 was reinstated. However, there is some confusion of the fact that whether the respondent No. 1 has factually worked during the said period. In that view of the matter, it will be appropriate to direct the Management to deposit the salary of the respondent No. 1 for the period 1.4.99 to 10.9.99 in this Court within a period of four weeks from today. Thereafter, the appropriate orders will be passed for withdrawal of the amount. In the meanwhile, the parties are entitled to file appropriate affidavit or reply. The Education Officer is directed to place the material on record in this regard

5. The learned Counsel for the petitioner, while challenging the order of the learned Presiding Officer, School Tribunal has mainly and seriously contended that the appeal of the respondent No. 1 u/s 9 of the M.E.P.S. Act was hopelessly barred by limitation. According to him, such appeal should have been filed within a period prescribed u/s 9 of the said Act. In the present case, the alleged termination of the respondent No. 1 was in the year 1989. She had preferred the appeal in 1996. There was no sufficient reason for condonation of delay by the learned Presiding Officer, School Tribunal. In fact the reasons referred by him are not at all appearing from the record and the inference is perverse to the record. According to him, the claim made by the respondent No. 1 to show that he was preferring an application before the Education Officer and Deputy Director of Education for her grievance of illegal termination, were the documents which

could not have been relied by the learned Presiding Officer, School Tribunal. According to him, those documents are got up documents. Even otherwise, if they are to be taken into consideration as they were xerox copies; the learned Presiding Officer, School Tribunal should not have relied on the same, inasmuch as those were pieces of secondary evidence and there was no application for allowing to lead secondary evidence for justification of claim for condonation of delay. According to him, the appointment of respondent No. 1 was not made in accordance with the relevant rules. She was also not qualified for being appointed on the post of Assistant Teacher as she was untrained Teacher inasmuch as she had training qualification of only "B.P.Ed." According to him, respondent No. 1 had miserably failed to discharge her burden of proof that she had bonafide reason for not preferring the appeal within the prescribed period of 30 days, u/s 9(2) of the M.E.P.S. Act and there was no sufficient reason to seek condonation of delay or sufficient cause for not preferring an appeal within the said period u/s 9(3) of the said Act. According to him, she has also not discharged the burden of proof to show that she was properly appointed and was a trained teacher who can be appointed on the post of Assistant Teacher. According to him further, the petitioner - management had every right to appoint person on temporary basis, even on permanent post. Therefore, when the respondent No. 1 was appointed on temporary basis, every year and she had accepted the said appointment, her termination could not be faulted with. In support of this contention, he has relied on some authorities which I would discuss later on at the appropriate place. At this stage it is necessary to note his further contention that the impugned order is liable to be set aside as the School Tribunal has not framed the preliminary issues as mandated in the Division Bench Judgment of this Court reported in 1997(3) Mh. L.J. 697 Anna Manikrao Pethe v. Presiding Officer, School Tribunal, Amravati and Aurangabad Division, Amravati and Ors. wherein it been held as under:

When applications u/s 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, are filed before the School Tribunals by the teachers challenging any act of termination on the part of the management, it will be necessary for the Tribunal to frame and decide three preliminary issues viz. whether the school was a recognized school as defined under the M.E.P.S. Act; whether the appointment of the concerned teacher was made as per Section 5 of the M.E.P.S. Act and the Rules there under; and whether such an appointment has been approved by the Education Officer in pursuance of the provisions of the Act as well as the Rules framed there under including the Government Resolutions issued from time to time regarding reservations etc. These preliminary points are required to be framed and decided before the appeal proceeds on merits and even if such points are not raised by any of the parties to the appeal, it would be proper on the part of the Tribunal to frame such issues suo motu before examining the merits of the case. In case the finding to any of the preliminary issues are in the negative, the appeal must fail then and there itself, so far as the relief of reinstatement / continuation in

service is concerned.

6. He has pointed that in *St. Ulai High School and Shri Adishakti Hindi Prachar Samitee Vs. Shri Devendraprasad Jagannath Singh and The Zilla Parishad*, , the Full Bench of this Court has considered the direction of framing the issue whether such appointment has been approved by the Education Officer in pursuance to the provision of the Act as well as the rules framed there under including the G.Rs. issued from time to time. According to him in the present case, the Tribunal was obliged to frame two issues as referred in *Anna Pethe's* case as preliminary issues and as the same was not done, matter was required to be remanded, in case, if the objection of the petitioner as regards appeal of the respondent of being time barred is not upheld. Thus, according to him, the petition needs to be allowed by setting aside the order impugned in this petition on the ground that the appeal of the respondent was hopelessly barred by limitation and if it is found that there was sufficient cause to prefer the appeal after the period of limitation, then the matter be remanded back to the School Tribunal for fresh disposal according to law after framing of preliminary issues as laid down in *Anna Pethe's* case which was approved by the Full Bench of this Court in *St. Ulai High School and Shri Adishakti Hindi Prachar Samitee Vs. Shri Devendraprasad Jagannath Singh and The Zilla Parishad*, .

7. Learned Counsel for the respondent *Shri Shelat*, has submitted that respondent No. 1 had preferred representations before the Deputy Director etc. to get redressal of her grievances. She has filed relevant documents on record to show that in fact her representations were pending before the concerned authorities and after she was informed by the Deputy Director that he has no authority to deal with the grievance of the respondent No. 1, she had preferred the instant appeal u/s 9 of the M.E.P.S. Act.

8. Therefore, according to him, while preferring the appeal, the delay has been properly explained demonstrating sufficient cause for condonation of delay and the learned Presiding Officer, School Tribunal accepting the same decided the appeal on merits. Therefore, according to him, the impugned order can not be assailed on the ground of delay. He has relied on certain authorities to contend that the pursuance of remedy before other authority is a good ground or sufficient ground for condonation of delay in preferring the appeal. He has particularly relied on *Sandeep Netke Vs. State of Maharashtra and Others*, . and *Kisanrao Khobragade Education Society and Principal, Yeshwantrao Chavan College Vs. Bhojraj Motghare, University and College Tribunal, Nagpur University and Nagpur University*, .

9. It is further his contention that the scope of Article 227 can not be enlarged so as to interfere with the discretion of the Tribunal. According to him in view of judgment in *M/s. Hotel Rosalia (P.) Ltd. Vs. M/s. Metro Hotels and Others*, . powers under Article 227 of the Constitution are to be used sparingly and only in appropriate case. According to him appropriate documents were produced before the School Tribunal upon which School Tribunal had taken a view that the delay

in the matter needs to be condoned and therefore, condonation of delay in this case is justified. To the interesting submissions made by learned Counsel for petitioner for mentioning of the applications which are produced by respondent No. 1 before the Tribunal to show that she was pursuing remedy before other authorities, he has also stated that all the applications were submitted to the concerned officers. According to him, respondent No. 1 was duly qualified for appointment as Assistant Teacher inasmuch as she was graduate and having B.P.Ed. training qualification. Such appointments were regularized as per Government Resolution of 1985. Therefore, according to him, her appointment was proper and continuous for more than 2-3 years and therefore, she was permanent teacher whose services could not have been terminated by respondent by the relevant order without appropriate inquiry.

10. As regards the framing of preliminary issues, and decision on the same, before the Presiding Officer starts to decide the appeal u/s 9 of the Act, on merits on the basis judgment in case Anna Pethe, his submission is that this submission was not raised by learned Counsel in the proceedings of an appeal and therefore, it can not be raised for the first time before this Court. He has also argued that the answers to the preliminary issues which are expected to be framed as per the Anna Pethe's case are obvious so also their answers and therefore, merely because those issues are not framed by the Tribunal, matter cannot be remanded back. According to him, the reasons recorded by the learned Presiding Officer, School Tribunal, are well justified from the facts of the case.

11. He has relied on the judgment reported in 2007(2) Mh.L.J. 105 President Mahila Mandal, Sinnar and Anr. v. Sunita Bansidhar Patole to contend that merely because the management chooses to issue appointment orders every year, the appointment of the respondent can not become a temporary one. Thus, it is submitted by the learned Counsel for respondent that the grounds of appeal have been dealt with properly by the School Tribunal. Respondent was qualified and eligible for the appointment as an Assistant Teacher and her termination could not be without any enquiry as her appointment would be treated as appointment on permanent basis.

12. Learned A.G.P. Shri Adgokar, has submitted that, respondent was in service from June 1985 to 1989 and after the school was admitted to grants in June 1992, hence there was no necessity of approval to her appointment by Education Officer nor was so granted to the appointment of respondent from 1985 to 1989. Reply was not filed in the appeal proceeding by the Education Officer inasmuch as his stand there was that it was a matter between management and employee inasmuch as the school was on no grant basis. According to him respondent was terminated in 1989. Appeal was preferred in 1996, it was decided on 1.4.1999. He submitted that the point of limitation should have been considered by the Presiding Officer, School Tribunal in proper perspective. Respondent No. 1 appears to have joined services on 9.4.1999. She was there till 10.9.1999 and

the salary for that period was paid. Now there is no vacancy in the school. According to him; delay can be said to be rightly condoned, though as it was discretion of the School Tribunal. He has however, pointed out that there is possibility of respondent No. 1's leaving school as it was on no grant basis at the relevant time and therefore, she might have filed the appeal after the school came on grant basis. He has however, not made any submission as to whether the respondent No. 1 was duly qualified and eligible for the appointment on the post of Assistant Teacher.

13. Respondents have also relied on some authorities which I would discuss at appropriate places as may be necessary. Few admitted things however that need to be noted in the present petition are that the appellant / respondent No. 1 was working with the petitioner from 1985 to 1989. She was terminated on 9.5.1989.

14. Relevant provisions regarding limitation as regards the appeals before School Tribunal can be found in section 9(2) of the M.E.P.S. Act which read as under:

9(2) Such appeal shall be made by the employee to the Tribunal within thirty days from the date of receipt by him of the order of dismissal, removal, otherwise termination of service or reduction in rank, as the case may be;

Provided that, where such order was made before the appointed date, such appeal may be made within sixty days from the said date.

(3) Notwithstanding anything contained in Sub-section (2), the Tribunal may entertain an appeal made to it after the expiry of the said period of thirty or sixty days, as the case may be, if it is satisfied that the appellant has sufficient cause for not preferring the appeal within that period.

Admittedly the appeal has been filed in 1996 i.e. after more than 6 years of her termination. Therefore, she was required to make out a case to the satisfaction of the Tribunal that she had sufficient cause for not preferring an appeal within that period. The crucial question in the present case is whether it can be said that the appellant had sufficient cause to prefer the appeal after such a long delay.

15. In order to appreciate the contentions of the learned counsel, it is necessary to peruse the observations of the School Tribunal, contained in paragraph 7, 8, 9 and 10 which reads thus:

7. In this case, it is obvious that the appeal has not been preferred within the prescribed limitation. Therefore, it is to be seen if the appellant had sufficient cause for not filing the appeal within limitation. The appellant has explained that she had approached the various educational Authorities and when ultimately she was informed by the Deputy Director of education vide his letter dated 8.1.1996, she has filed the appeal on 18.1.1996 which according to her is within the prescribed limitation. She has also filed copies of her representation, alleged to have been sent by her to the Educational Authorities after terminating of her services.

8. The management has however, denied the appellant's contentions that she was prosecuting her remedy before the Education Authorities. It has even questioned the genuineness of the copies of the representations filed on the record of this appeal. There are in all copies of twenty representations alleged to have been sent by the appellant to the Education Authorities between 14.5.1989 to 2.1.1996 and there is a copy of the Deputy Director's letter dated 8.1.1996 informing the appellant that there was no provision for preferring appeal to his office against termination of services. There appears no any doubt about those documents and as such, there is no reason to disbelieve the same.

9. The learned Advocate for the Management has vehemently contended that the appellant has even not filed any application for condonation of the inordinate delay of 80 months and hence according to him, since the appellant has failed to explain the delay, the appeal can not be entertained. However, as it is held in an authority reported in AIR 1966 Mad 137 Meghraj v. Jesrats written application for condonation of delay is not necessary and even Section 9(3) of the Act does not contemplate any such application. Therefore, it is not possible to agree with the contention of the learned advocate for the management in that regard.

10. Consequently, I am satisfied that the appellant had sufficient cause for not preferring the appeal within the prescribed limitation therefore, I hold that the appeal is not barred by limitation and answer this point in the negative." It clearly appears that the Presiding Officer was influenced by the fact of many representations which had been sent by appellant to the authorities between 14.5.1989 to 2.1.1996 and the copy of the letter sent by Deputy Director dated 8.1.1996 informing the appellant / respondent No. 1 that there was no provision of preferring an appeal to his office against termination of services.

16. It is necessary to have a glance on the said letters. Needless to say that all of them are xerox copies. The first letter is dated 14.5.1989 addressed to the Education Officer, Zilla Parishad, Nagpur, which seems to have been received by Shri B.K. Mule, which bears no date of receipt. Next representation is dated 30.4.1989 which also bears acknowledgment of Shri B.K. Mule, it bears no date. Similarly is the case of representations dated 25.6.21989, 23.7.1989, 27.8.1989, 20.10.1989, 5.10.1990, 22.4.1990, 27.10.1991, 15.3.1992, 13.7.1993, 14.3.1994, 7.7.1995. Thus, it will be seen that all these letters are allegedly acknowledged by Shri B.K. Mule who is stated to be Superintendent, Education Department, Zilla Parishad, Nagpur by way of stamp below his signature. Only representation dated 10.7.1992 seems to bear the date 8.8.1997. Coincidence of accepting all the material letters by the same person in the office for all those years and his not putting dates below his signature was required to be satisfactorily explained.

17. As already dated above, all these are xerox copies. Learned Counsel for the petitioner has raised objection that the xerox copies should not have been considered by the School Tribunal inasmuch as the permission for leading secondary evidence was not sought. He has strongly relied on the judgment of

this Court reported in Bank of Baroda Vs. Shree Moti Industries and Others, wherein the procedure of leading secondary evidence was explained. According to him, therefore, the learned Presiding Officer, School Tribunal should not have considered these documents as sufficient proof of her representations to the Education Officer, in view of the observations of this Court in that judgment and therefore, there was no proof of sufficient cause for delay in filing appeal by respondent No. 1.

18. It is obvious that there is nothing on record in the shape of affidavit of this B.K. Mule. He has not mentioned dates and on these representations except one dated 10.7.1992, as to when they were received. In these circumstances, those representations are not prima facie free from doubts.

19. Even if it is assumed for a moment that the xerox copies can be referred for the purpose of justification of condonation of delay as sufficient case, fact remains that it does not suggest as to when these representations were received by particular office and that they were not considered and lastly after representation which was received on 8.3.1997, the letter was issued by the Deputy Director of Education, upon which the appellant claims that she was advised that there was no provision of appeal against termination or for restoration of her services, with the office of the Deputy Director.

20. This takes me to consider the relevant letter of the Deputy Director of Education upon which it claimed that she was intimated that the remedy of appeal is not with the office of the Education Officer, or Deputy Director. Relevant letter seems to be dated 8.1.1996. Same reads thus:

No. Madhya/A/ /96

Office of the Deputy Director of Education, Nagpur Division, Nagpur

Date: 8th January 1996

To, Smt. R.R. Revatkar, Plot No. 81, Pathan Layout, Parsodi Ring Road, Nagpur -22

Subject: Regarding allowing the applicant-teacher to join duties Reference: Your application dated 2.1.96 With reference to above referred letter you are informed that there is no provision for appeal with this office against the termination of services.

sd/- Deputy Director of Education, Nagpur Division, Nagpur

It is obvious that this letter gives reference to the application of the respondent No. 1 to the letter dated 9.1.1996. Therefore, at the most, it can be said that the representation, if any, issued by the respondent to the Deputy Director, which was considered was dated 9.1.1996. It is obvious that this was about six years after her alleged termination.

21. Coming to the letter/ representation of the respondent No. 1 which bears the

date of the acknowledgment as dated 10.7.1992 which seems to have been received on 8.8.1997. Learned Counsel for respondent No. 1 has tried to suggest that the date is not 8.8.1997, it can be only 8.8.1993 or some other date. Prima facie it is difficult to accept this submission on bare perusal of the said date below acknowledgment. But even otherwise, the fact remains that the said Shri B.K. Mule's evidence is not on record as to show, when he received earlier representations. It is also not known as to whether the respondent No. 1 had tried to pursue the matter when the Deputy Director prior to her letter which is referred in the communication by the Deputy Director.

22. All these aspects does not seem to have been considered by the learned Tribunal, though this objection seems to have been raised by the respondent counsel for the petitioner.

23. It seems that the Presiding Officer, School Tribunal has cursorily disposed of these issues by holding that the representations are properly proved. That show that the appellant was making representation to the educational authorities for such long period and lastly she was informed that the Deputy Director had informed on 8.1.1996 that there was no provision for preferring the appeal to his office against termination of services. Application for condonation of delay was also not sought, holding that Section 9(3) of the M.E.P.S. Act does not contemplate such application. In my opinion, such an approach of the Tribunal while passing impugned order was not at all warranted.

24. As regards the framing of the preliminary issues, it would be seen that in Anna Pathe's case [cited supra] in paragraph 15, it was observed thus:

15. While disposing of this petition, we deem it appropriate to observe that when such applications u/s 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 are filed before the School Tribunals by the teachers challenging any act of termination on the part of the management, it will be necessary for the Tribunal to frame and decide three preliminary issues viz. whether the school was a recognized school as defined under the M.E.P.S. Act; whether the appointment of the concerned teacher was made as per Section 5 of the M.E.P.S. Act and the Rules there under; and whether such an appointment has been approved by the Education Officer in pursuance of the provisions of the Act as well as the Rules framed there under including the Government Resolutions issued from time to time regarding reservations etc. These preliminary points are required to be framed and decided before the appeal proceeds on merits and even if such points are not raised by any of the parties to the appeal, it would be proper on the part of the Tribunal to frame such issues suo motu before examining the merits of the case. In case the finding to any of the preliminary issues are in the negative, the appeal must fail then and there itself, so far as the relief of reinstatement / continuation in service is concerned.

This judgment was reported in Mathuradas Mohota College of Science Vs. R.T.

Borkar and Others, . The impugned order appears to have been passed on 1.4.1999. Needless to say the decision of this court should have been followed by the School Tribunal.

25. The learned Presiding Officer has framed only following points for consideration:

1] Whether the appeal is barred by limitation?

2]

3] Whether appellant's services have been terminated illegally?

What reliefs ?

It is obvious that he has failed to take into consideration the law laid down by this Court in Anna Pethe's case at the relevant time.

26. Judgment of Full Bench of this Court reported in St. Ulai High School and Shri Adishakti Hindi Prachar Samitee Vs. Shri Devendraprasad Jagannath Singh and The Zilla Parishad, , has not overruled the whole of the judgment in Anna Pethe's case. Therefore, in my opinion, the preliminary issues should have been framed by the learned Presiding Officer School Tribunal before embarking on the decision of the appeal on merits.

27. Therefore, even without referring to the other contentions of the learned Counsel for the parties, it would be necessary, in the interest of justice, to remand the matter to the School Tribunal, Nagpur by setting aside its order; for a consideration of matter afresh in order to grant fresh opportunity to all parties, to present their case before the School Tribunal.

28. In my opinion, in these circumstances of the case, it would be necessary; rather compelling; to remit the matter to the School Tribunal for disposal according to law afresh after hearing parties and allowing them to lead proper evidence on the point of sufficient cause for condonation of delay and all other points which are necessary, in view of the preliminary issues that are required to be framed. In this view of the matter petition partly succeeds. Judgment & order of the School Tribunal, Nagpur is hereby quashed and set aside. The matter is remitted back to the School tribunal, Nagpur for fresh consideration after allowing parties to lead evidence as may be necessary and hearing parties afresh on merits. Issue of limitation is kept open to be considered by the Presiding Officer, School Tribunal, besides the preliminary issues he has to frame in pursuance to the judgments of this Court, referred above.

29. it is made clear that the observations made above shall not in any manner influence the learned Presiding Officer, School Tribunal, Nagpur, while deciding the matter on merits.

30. School Tribunal is directed to dispose of the said appeal as expeditiously as possible in any case within a period of six months from the date of appearance of

parties.