
(2008) 10 BOM CK 0067

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 2051 of 2008

Urmila Pravinchandra Malaviya

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 23-10-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Secondary School Code — Rule 68.2
University Act, 1975 — Section 57(6)

Citation : (2009) 2 BomCR 463 : (2008) 110 BOMLR 3636 : (2009) 1 MhLj 644

Hon'ble Judges : Swatanter Kumar, C.J;S.A. Bobde, J

Bench : Division Bench

Advocate : M.M. Vashi, for the Appellant; S. Sreedharan, Assistant Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, C.J.—In this Petition under Article 226 of the Constitution of India, the Petitioner prays for issuance of appropriate writ or order requiring the Respondents to produce the record and after examining the propriety and legalities of the letter dated 1st July 2006 as well as the Resolution of the Management dated 16th October 2006 and the letter dated 19th July 2008, the said letters and the resolution be quashed and set aside and further the Respondents be restrained from recovering the sum of Rs. 1,26,226/or any other amount from 3 the Petitioner. The Petitioner also prays for some other incidental directions.

2. The necessary facts as they emerge from the record are that the Petitioner is a trained Graduate Teacher who joined the Anandilal Podar High School, Santacruz (W), Mumbai as Assistant Teacher on 26th July 1983. On 10th September 1991, she was rendered surplus and she joined Sheth Chimanlal Nathuram School, Respondent No. 5 herein, and according to her, pay scale was fixed taking her appointment as 2nd July 1984 instead of 26th July 1983. Since

the Petitioner completed twelve years of service, she was granted senior grade taking the first date of her appointment as 2nd July 1984 and she started drawing the salary in the said pay scale. Certain objections were raised by the Auditor regarding grant of senior grade from 1st July 1996. It was directed to recover the dues from the Petitioner and entries in the service book were also directed to be corrected by restamping the pay scale of the Petitioner cancelling old stampings. Against this action, the Petitioner filed an Appeal. She relied upon a Circular of the Government dated 29th October 1980 which stated that break in service can be counted for fixation of pay scale and even a substitute teacher can get benefit of service rendered by him/her. On 16th October 2006, the School Committee, as directed by the Deputy Director of Education, ordered restamping in the service book with regard to the pay fixation and the sum of Rs. 1,26,226/was ordered to be recovered from the Petitioner in 26 equal installments. This order was challenged by the Petitioner by filing Writ Petition No. 2175 of 2007 which was finally disposed of by the Division Bench by passing the following order :

1. Learned Counsel for the State submits that without prejudice to their rights and contentions, the State would grant a hearing to the Petitioner and would also consider the effect of the G.R. issued by the Government at page 48 of the paper book and then pass appropriate order within two weeks from today. He further states that the impugned order will not be given effect to.

2. In view of the Statement, nothing survives in this petition. The impugned order shall not be given effect to. The petitioner will be heard and appropriate orders will be passed within two weeks. Deductions already made need not be refunded but no further deduction will be made till two weeks after passing of the order, in question.

3. Writ Petition is disposed of.

3. Thereafter the Petitioner was heard and again a resolution was passed by the Management relying upon the letter of Director of Education on 19th July 2008 directing recovery of Rs. 1,25,718/to be made from the Petitioner, the operative part of the said order reads as under :

6. Considering all the pros and cons of the matter, the working group has decided the same on 7.12.2005 and 5.1.2006. Accordingly today on 27.6.2008 the said decisions arrived at by the working group in their meeting on 7.12.2005 and 5.1.2006 are hereby confirmed and therefore the amount of Rs. 1,25,718 paid by the Government is required to be recovered.

The correctness and legality of this order is being questioned by the Petitioner in the present Writ Petition.

4. According to the Petitioner, the Petitioner has actually rendered her services and in terms of the Circular of the Government, she was entitled to have the period 2nd July 1984 to 13th June 1988 taken into consideration for the purpose

of seniority, pay fixation, etc. though she was treated as a substitute. The action of the Respondents thus is arbitrary, in violation to the Government Circular and in any case on the principle of equitable estoppel the Petitioner would be entitled to the same pay scale.

5. The Respondents oppose this prayer of the Petitioner primarily on the ground that the Petitioner was working in a leave vacancy in Poddar High School at Santacruz from 26th July, 1983 to 12th June, 1988. The said appointment of the Petitioner was on a purely temporary basis in a leave vacancy where the original incumbent one Smt. Desai had proceeded on leave as she had to go abroad. Thereafter, the said Smt. Desai applied for extension of leave on 4th November, 1983, 28th May, 1984 and 30th June, 1984. Thereafter, the said teacher Smt. Desai resigned from the post expressing her inability to join duty. In the process, the Petitioner was appointed on a temporary basis in a leave vacancy vide different letters Exhibits 6 to 9 to the reply and vide letter dated 13th July, 1987 the Education Inspector granted approval for provisional appointment only for a period of one year. On 8th August, 1988 the Education Inspector approved the Petitioner's appointment with effect from 13th June, 1988 to the said post on permanent basis. She has been granted all benefits as per the Rules.

6. An employee appointed on temporary basis and who renders temporary services on the post cannot claim absorption or other benefit for that period. As long as the post was occupied by the permanent employee, the Petitioner could not have been appointed, as the two persons, one temporary and the other permanent, cannot be appointed to the same post and take same pay scale. The Head Master of the School had sanctioned her bills in the higher pay scale and this discrepancy inadvertently remained unnoticed but it was continued for a considerable time and detected during the course of inspection only in the year 2005. A meeting was held to look into the complaint of the Account Department and a decision was taken on 7th December, 2005 which was communicated to the concerned Accounts Officer and to the Petitioner through the Headmaster, on 5th January, 2006.

7. Thereafter, in response to the letter of the Headmaster dated 3rd April, 2006, the Office of the Deputy Director of Education, Mumbai Region, vide its letter dated 1st July, 2006 intimated the decision of the working group dated 16th May, 2006. The Petitioner at that time had relied upon the Government Resolution dated 20th October, 1980 which was considered by the Committee and a decision was taken on 16th May, 2006 that the said circular was not applicable in the Petitioner's case and resultantly, recovery was directed. This order was questioned in the Writ Petition No. 2175 of 2007 which was disposed of by the Court and in furtherance to which the Respondents again considered the claim of the Petitioner even while keeping in view the Circular dated 20th October, 1980 and the orders passed by the authority earlier were confirmed. Thus, the Petitioner's claim was refuted and it is claimed that the Writ Petition be dismissed.

8. The Respondents have placed on record copies of the correspondence and applications filed by the regular incumbent in support of the averments made in their reply. In fact, there is really not much dispute raised by the Petitioner in regard to this aspect of the case that the Petitioner originally was appointed against the leave vacancy of Smt. Desai, who was the permanent incumbent in the post. Infact, the Petitioner herself has placed on record the earlier orders passed from which it is clear that the Petitioner was working in a leave vacancy and was appointed on a purely temporary basis.

9. The copy of the English translation of the Circular dated 29th October, 1980, which has been relied on by the Petitioner, reads as under :

Sub: Pay fixation/dt of increment for nongovernmental (Aided) Secondary School Teachers having break in service.

The issue of how to fix the pay scale/date of increment of teachers who have worked in a school, and, if subsequently, the teacher leaves the school and returns back to rejoin the school or any other school; in this case what criteria has to be applied for pay fixation upon return of the teacher and will the teacher get the benefit of service worked earlier ?

Govt. Resolution Education Dept. No. I.F.S. Clause No. 1874/25646G dated 30/7/1974 provides the following order. The above stated clause is reproduced herewith which has justifications to the same.

If a teacher working in a nongovernmental institution takes a break in service and later joins a school wherein the teacher acquires the same pay scale as the earlier school worked with then in such cases the teacher will receive the benefit provided the person concerned has not worked other than leave vacancy in any other school during the break period.

All nongovernmental aided schools are requested to convey the above circular to the teaching staff.

Sd/- Director of Education, Maharashtra, Pune - 1.

10. The said Circular is hardly of any application for the grant of benefit to the teachers who have worked against the leave 11 vacancies. The application of the circular is further indicated by the opening line of the said Circular "where a teacher who has gone on leave and was working in a school joined back her duty, how the salary of such a teacher is to be fixed" is guided by the Circular. The said Circular on facts has no application to the present case.

11. In the impugned order the authorities have given reasons for declining the relief to the Petitioner. Firstly it is stated that on one and the same post, two employees cannot be given service benefits. Secondly, the services rendered by the Petitioner were purely on a temporary basis and as a stopgap arrangement against the leave vacancy. Thus, it cannot be considered as approved services for the purpose of retirement pension under the relevant Rules. Lastly, it is stated

that there is no resolution issued by the Competent Authority and it was merely a letter written by the Director of Education, Pune to Deputy Director and in fact was not even in consonance with the Rule 68.2 of the Secondary School Code.

12. In the case of *State of Kerala Vs. Mother Anasthasia, Superior General and others*, , dealing with the status of a temporary teacher in contrast to a teacher working on permanent post against the permanent vacancy relating to a teacher working under the University Act, 1975 and prayer for preferential claim for appointment as the teacher had been discharged because of the abolition of course in terms of Section 57(6) of the Act, the Supreme Court rejected the prayer, stating that the temporary teacher in a leave vacancy can neither be considered as discharged nor can claim the status as discharged employee and consequently was not entitled to benefits.

13. It is a settled principle of law that ad hoc or temporary services even for a long period by itself could not convert the temporary service into a regular service to claim status of a permanent or regular employee. In the case of *State of Orissa and Another Vs. Dr. Pyari Mohan Misra*, , the Supreme Court stated as under :

4. Admittedly, there is no order communicated to the respondent appointing him in a substantive capacity as Director. The only order passed in his favour was of 2271972. That order clearly shows that he would continue temporarily until further orders in terms of the order of appointment made on ad hoc basis on 1281971. In other words, mere prolonged continuous ad hoc service does not ripen into a regular service to claim permanent or substantive status. He would remain to be on ad hoc basis until further orders. ...

14. Equally settled is a principle that a person appointed on ad hoc or temporary basis cannot be granted regularization unless and until his initial appointment is regularized through a prescribed agency and in accordance with the rules of selection for being appointed. [*Dr. (Mrs.) Chanchal Goyal Vs. State of Rajasthan*, .]

15. Applying the above principles to the facts of the present case, it is clear that the Petitioner is hardly entitled to any relief from the Court. She was working on a leave vacancy which was extended on back to back basis which could be coordinated with the application for leave/extension of leave of the regular incumbent. Her appointment for the first time was approved by the Competent Authority on a regular basis from which day she has been given all benefits.

16. Consequently, we see no reason to interfere with the order passed by the Respondent Authority. The Writ Petition is, therefore, dismissed, leaving the parties to bear their own costs.