
(2017) 07 BOM CK 0002
In the Bombay High Court
Case No : 3364 of 2008

Vilas Laxman Gavai

APPELLANT

Vs

Dnyandeo Uttamrao Dhandar & Ors.

RESPONDENT

Date of Decision : 01-07-2017

Acts Referred:

Maharashtra Employees of Private Schools??(Conditions of Service) Regulation Act, 1977, — Section 5

Citation : (2017) 07 BOM CK 0002

Hon'ble Judges : Kum. Indira Jain

Bench : SINGLE BENCH

Advocate : A.Z Jibhkate, V.A. Kothale, S.W. Deshpande, H.D. Dubey

Final Decision : Allowed

Judgement

1.] Both these petitions take an exception to the judgment and order dated 8.7.2008 passed in Appeal No.25/1998 by the learned Presiding Officer, School Tribunal, Amravati and they are disposed of by this common judgment.

2.] The facts giving rise to the petitions may be stated in brief as under : WRIT PETITION NO.3364 OF 2008

(i) Petitioner was appointed on 2.7.1993 on the post of Peon with respondent no.3. Approval to the appointment of petitioner was granted on 12.12.1995. As the post of Laboratory Attendant was vacant, respondent no.1 was appointed on the said post from 1.10.1996. The contention of petitioner is that the post of Laboratory Attendant was filled in without any advertisement, interviews and without following the procedure prescribed under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 with Rules, 1981. (hereinafter referred to as "MEPS Act & Rules")

(ii) Petitioner made representation to the management and requested for his appointment to the post of Laboratory Attendant. On 24.8.1997, petitioner was promoted to the post of Laboratory Attendant. Education Officer granted

approval to the said post on 27.12.1997.

(iii) Respondent no.1 filed an appeal before the School Tribunal and the School Tribunal, vide order dated 8.7.2008, allowed the appeal filed by respondent no.1 and declared that otherwise termination of respondent no.1 from the post of Laboratory Attendant was illegal and void. Management was directed to reinstate respondent no.1 with continuity in service and back-wages. Petitioner, being aggrieved by the order of School Tribunal, has preferred present petition.

3.] Heard Shri Jibhkate, learned counsel for petitioner, Shri Kothale, learned counsel for respondent no.1, Smt. Deshpande, learned counsel for respondent nos.2 & 3 and Shri Dubey, AGP for respondent no.4. WRIT PETITION NO.4434 OF 2008

4.] This petition is by the management. According to management and school authority, appointment of respondent no.1 was not in accordance with Section 5 of the MEPS Act and Rule 9 of MEPS Rules. As an appointment was not in accordance with the law and rules, submission is that respondent no.1 is not entitled to the protection of his services. The grievance is that the appointment which was not in accordance with the law has been protected by the impugned judgment and order of the School Tribunal.

5.] Respondent no.1 has seriously resisted both the petitions and filed affidavit-in-reply. It is submitted that respondent no.1 was appointed on the post of Laboratory Attendant and continued on the same post but management and school authority in collusion with petitioners filed complaint on the basis of manipulated documents. The submission is that considering the collusive stand of management, school and the petitioner, School Tribunal had rightly allowed the appeal and no interference is warranted in writ jurisdiction.

6.] Heard Smt. Deshpande, learned counsel for petitioners, Shri Raut, learned counsel for respondent no.1, Shri Dubey, learned AGP for respondent no.2 and Shri Jibhkate, learned counsel for respondent no.3.

7.] According to learned counsel for petitioners burden of establishing that appointment was made on a clear and permanent post by following the procedure laid down under the Act and Rules was not on the management but on respondent no.1. It is submitted that respondent no.1 has failed to establish that he was appointed on the post of Laboratory Attendant by following the procedure prescribed under the Act and the Rules and, therefore, he was not entitled to protection. The learned counsel pressed into service the decision of this court in case of Rayat Shikshan Sanstha and another .vs. Yeshwant Dattatraya Shinde [2009 (6) Mh.L.J.476] laying down the proposition that burden of establishing that appointment was made on a clear and permanent post by following procedure laid down under the Act and Rules is on the employee and not on the management. So far as entry in service is concerned, submission of learned counsel for petitioners is that appointment of respondent no.1 was for a temporary period and it was not against the permanent post. In such

circumstances, oral termination of respondent no.1, according to petitioners, was just and proper and the School Tribunal ought not to have interfered with the order of oral termination, as entry of respondent no.1 in service was the back-door entry. In support of submissions, reliance is placed on : (i) Ramkrishna Chauhan .vs. Seth D.M. High School and others. [2013 (2) Mh.L.J. 713]

(ii) Navjeevan Shikshan Sanstha, Bhishnur and another .vs. Chandrashekhar Anandraoji Rewatkar. [2015 (1) Mh.L.J. 782] and

(iii) Judgment dated 6.5.2014 in Writ Petition No.3681/2002. [Civil Station Education Society and one .vs. Education Officer (Secondary), Nagpur and one].

8.] Per contra, learned counsel for respondent no.1 submitted that burden of establishing that appointment was made on a clear and permanent post by following the procedure under the Act and the Rules was on management and not on respondent no.1. The learned counsel invited attention of this court to letter of approval granted by Education Officer and submitted that post was approved and management could not show absence of respondent no.1 from duty in the months of July, August and September, 1997 which would clearly negative the contention of management that appointment was of temporary nature. The learned counsel submits that proper procedure for termination of service of respondent no.1 was not followed and in such a situation finding of fact recorded by the tribunal cannot be interfered with in the exercise of extraordinary writ jurisdiction. The learned counsel pressed into service the following decisions : (i) Sadhana Janardhan Jadhav .vs. Pratibha Patil Mahila Mahamandal and others. [2013 (2) Mh.L.J. 484]

(ii) Shri Krishan and others .vs. Union of India and others. [2015 (2) Mh.L.J. 170].

(iii) Ram Bahadur Pandey and another .vs. State of Uttarakhand and others. [(2015) 2 SCC 142].

(iv) Manisha Sambhaji Jadhav .vs. Sant Kavi Mahipati Maharaj Devasthan Trust, Taharabad and others. [2017 (2) Mh.L.J.657].

9.] The learned AGP contends that proposal was moved and the Education Officer has granted approval on 7.12.1996 to the appointment of respondent no.1 for a specific period and academic session 1996-97. It is submitted that appointment of respondent no.1 was on a temporary basis for a particular period and, therefore, approval was granted by the Education Officer for a specific period that is one academic session. Submission is that appointment being for a specific period, question of extending protection would not arise.

10.] Upon hearing the respective parties and on going through the impugned judgment and order passed by the School Tribunal, this court finds that the contention of respondent no.1 that burden of establishing that his appointment was made on a clear and permanent post by following the procedure laid down under the Act and the Rules was on the management is misconceived. Section 5

of the MEPS Act casts certain obligations on Management of private schools. Every permanent vacancy in a private school is required to be filled in in accordance with the procedure prescribed in Section 5. It is not in dispute that the appointments are made by private managements against sanctioned posts and for that purpose the workload available in each school is worked out by the education department as per the norms laid down by the State Government in this respect. The appointment under Section 5 of the Act cannot be made privately or through back-door. The judgment of the Hon'ble Constitution Bench in case of Secretary, State of Karnataka .vs. Umadevi [AIR 2006 SC 1806] and the judgment of the Division Bench of this Court in case of Uttam and others .vs. Municipal Council, Darwha and others [1972 Mh.L.J. 874] clearly negatives the submissions advanced by learned counsel for respondent no.1 that appointment of respondent no.1 made by the management was not through the backdoor.

11.] In view of the decision of this court in case of Rayat Shikshan Sanstha (supra) burden lies on respondent no.1 and not on the management. It was for respondent no.1 to show that his appointment was made on a clear and permanent post. There is nothing on record to suggest that respondent no.1 was working on a clear and permanent vacant post. In the absence of pleadings and evidence in respect of compliance of sub-section (1) of Section 5 of the MEPS Act, the appointment of respondent no.1 could not be treated as on probation for a period of two years in terms of subsection (2) of Section 5 of the MEPS Act. The Tribunal has, therefore, committed an error in holding that appointment of respondent no.1 was on a clear and sanctioned post.

12.] Further the observations in paragraph 13 of the impugned judgment and order would indicate that there are no pleadings of either parties that lawful recruitment process was followed while giving appointment to respondent no.1 that is no advertisement was published to fill up the post, no other candidate was called for interview and there was no selection process undertaken. Despite these observations , Tribunal held that the management is not entitled to take benefit of its own wrong. Considering the fact that respondent no.1 was appointed by the management for an academic session 1996-97, responsibility came to be fastened on the management and the Tribunal held that the appointment of respondent no.1 needs to be protected.

13.] The above observations are contrary to the settled position of law that in the absence of compliance of Section 5 of the MEPS Act, back-door entry and appointment cannot be protected. As respondent no.1 has failed to establish his case before the Tribunal, there is no question of going into the defence raised by the management in response to memo of appeal. At the most, on the basis of material placed on record, it can be said that management, without following the procedure prescribed under Section 5 of the MEPS Act, appointed respondent no.1 for a temporary period. As respondent no.1 failed to establish that his appointment was on a clear and permanent post by following the procedure laid down under the Act and the Rules, this court finds it unnecessary to go into the

action of management in appointing respondent no.1 for a temporary period. However, considering the fact that respondent no.1 had no right to post, relief of reinstatement could not have been granted to him. As this court finds that impugned judgment and order is contrary to the settled proposition of law, interference is warranted in writ jurisdiction. Hence, the following order : (i) Writ Petition No.3364/2008 Writ Petition is allowed. Rule is made absolute in terms of prayer clauses (a) & (b). No costs.

(ii) Writ Petition No.4434/2008 Writ Petition is allowed. Rule is made absolute in terms of prayer clause (i).

No costs.