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Court : Mumbai Nagpur

Decided On : Feb-11-2014

Judge : R.K. Deshpande

Appeal No. : Writ Petition No. 5920 of 2012

Appellant : Head Master, Shri Gurudeo Post Basic Ashram and Another

Respondent : Prabhakar and Others

Judgement :

Oral Judgment:

1. Rule, made returnable forthwith. Heard finally by consent of the learned counsels appearing for the parties.

2. The School Tribunal, Chandrapur, has allowed Appeal No.STN 218/1995 filed by the respondent No.1 under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (œthe MEPS Act?) challenging his termination from service from the post of a Clerk, by its judgment and order dated 31-8-2012. The School Tribunal has recorded the finding that the appointment of the respondent No.1 was in a permanent vacancy and the same should have been made on probation. The respondent No.1 had worked continuously for the period from 1-7-1993 to 30-4-1995 and his services could not

have been terminated, except on the ground of unsatisfactory work, conduct or behaviour.

3. The undisputed factual position is that by an order dated 1-7-1993, the respondent No.1 was appointed as a Clerk with effect from 1-7-1993 until further order. The order of appointment stipulates that the appointment was purely on temporary basis. By another order dated 15-9-1994, the respondent No.1 was reappointed as a Clerk with effect from 11-9-1994 till 30-4-1995 on temporary basis. Both these appointments were made by the Competent Authority. By an order dated 3-3-1995, the Project Officer granted his approval to the appointment of the respondent No.1 for a period of one session, i.e. from 15-9-1994 to 30-4-1995. By an order dated 30-3-1995, the services of the respondent No.1 were terminated with effect from 30-4-1995 on the ground that the approval to his appointment was granted only upto 30-4-1995. This was the subject-matter of challenge before the School Tribunal in appeal.

4. The stand of the Management before the School Tribunal was that the appointment of the respondent No.1 as a Clerk was purely on temporary basis and only for one academic session, and after his termination on 30-3-1995, the advertisement was issued for the said post and the interviews were held, but further appointments were not finalized for verification of roster. According to the Management, the decision regarding roster was pending with the respondent No.3-Project Officer.

5. The question involved is whether the initial appointment of the respondent No.1 made on 1-7-1993 could be treated as one on probation as per the provisions of Section 5 of the MEPS Act.

Hence, Section 5 of the MEPS Act is reproduced below:

œ5. Certain obligations of Management of private Schools.

(1) The Management shall, as soon as possible, fill in, in the manner prescribed every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy:

Provided that unless such vacancy is to be filled in by promotion, the management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, the Education Officer, Zilla Parishad or, as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools; and in the event of such person being available, the Management shall appoint that person in such vacancy.

(2) Every person appointed to fill a permanent vacancy except Shikshan Sevak shall be on probation for a period of two years. Subject to the provisions of sub-sections (4) and (5), he shall on completion of this probation period of two years, be deemed to have been confirmed.

Provided that, every person appointed as shikshan sevak shall be on probation for a period of three years.

(2A) Subject to the provisions of subsections (3) and (4), shikshan sevak shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.

(3) If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice or salary or honorarium of one month in lieu of notice.

(4) If the services of any probationer are terminated under sub-section (3) and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purposes of subsection (2).

(4A) Nothing in subsection (2), (3) or (4) shall apply to a person appointed to fill a permanent vacancy by promotion or by absorption as provided under the proviso

to sub-section (1).

(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the period of appointment of such person.?

6. It was not the stand taken by the Management before the Tribunal that the appointment of the respondent No.1 was not made in a manner prescribed under the provisions of sub-section (1) of Section 5 of the MEPS Act read with Rule 9 of the Rules framed thereunder. No case was made out under the proviso therein. It was not the stand of the Management that the appointment was in a temporary vacancy, as contemplated by sub-section (5) of Section 5. The respondent No.1 was qualified for being appointed on the post of a Clerk. The appointment was made in a permanent vacancy. There is no reason stated in the written statement for appointing the respondent No.2 on temporary basis. In such a situation, the Management cannot avoid its statutory obligation of making appointment on probation under sub-section (2) of Section 5 of the MEPS Act.

7. In terms of subsection (4) of Section 5, even if the respondent No.1 was reappointed to the post in the next academic session, the said period will have to be treated as on probation. Undisputedly, the termination of the respondent No.1 from service was not on the ground of unsatisfactory work, conduct or behaviour, as contemplated by subsection (3) of Section 5 of the MEPS Act. Hence, no fault can be found with the view taken by the School Tribunal that the appointment of the respondent No.1 was in a permanent vacancy and it should be treated as one on probation.

8. The stand of the Management in their reply to the appeal before the School Tribunal was that they were required to verify whether the roster was followed while making an appointment. It was not the stand of the petitioners before the School Tribunal that the post in which the respondent was appointed on 1-7-1993 and continued on 15-9-1994, was reserved for any backward class category candidate. It was not the ground stated in the order of termination. It was also not the stand of the petitioners that the advertisement indicated that the post was

reserved for any backward class category candidate. The petitioners cannot go on searching for the reason to justify their action of termination. Even otherwise, the roster is not produced on record to justify the stand that the appointment was made in a post reserved for backward class candidate.

9. The termination was only on the ground that the appointment of the respondent no.1 was approved only for one academic session. It was not the stand of the Management that the approval was sought from the Education Officer for appointment on probation beyond the period of one year. In view of this, it cannot be said that the appointment of the respondent No.1 is to be treated as one on temporary basis, as it is a total breach of the statutory obligations created upon the Management under Section 5 of the MEPS Act. There is absolutely no explanation as to why the appointment of the respondent No.1 was made on temporary basis. Under these circumstances, no fault can be found with the view taken by the School Tribunal.

10. Shri Marathe, the learned counsel for the petitioners, has relied upon the decision of this Court in the case of Ashok s/o Balaji Biradar v. Mahesh Shikshan Prasarak Mandal, Udgir and others, reported in 2010(1) Mh.L.J. 211. In para 18 of the said decision, to which he has invited my attention, the finding of fact is recorded that the petitioner therein was appointed purely on temporary basis, as was stipulated in the order of appointment, and his appointment was not on probation under Section 5 of the MEPS Act. The decision turns on the facts of that case. In the present case, the totality of the circumstances taken into consideration indicates that the Management had no option but to make an appointment of the respondent on probation. The said decision is, therefore, of no help to the learned counsel for the petitioner.

11. So far as the question of grant of back wages is concerned, the School Tribunal has awarded full back wages to the respondent No.1. The termination dated 30-3-1995 has been set aside and the respondent No.1 is directed to be reinstated in service by the School Tribunal by its judgment and order dated 31-8-2012. Hence, the back wages were counted from 30-3-1995 till the date of reinstatement of the respondent No.1 in service. The School Tribunal has

recorded the finding that the affidavit dated 9-8-2012 has been filed by the respondent No.1 stating on oath that after his termination on 30-3-1995 and during the pendency of the appeal, he was not engaged in any gainful employment, and this fact is not controverted by the Management. The Management has not led any evidence in rebuttal disputing the fact. Keeping in view the fact that there was a delay caused in filing an appeal, the amount of back wages awarded by the School Tribunal needs to be reduced to 50%. The judgment and order of the School Tribunal, therefore, to that extend, needs to be modified.

12. In the result, the petition is partly allowed by setting aside the order of payment of full back wages to the respondent No.1, and it is held that the respondent No.1 would be entitled to 50% of the back wages from the date of termination, i.e. from 30-3-1995 till the date of reinstatement. Rest of the order passed by the School Tribunal does not call for any interference.

13. Rule is made absolute in above terms. No order as to costs.

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