

CASE NO.:
Appeal (civil) 7553 of 2005

PETITIONER:
Kankavali Shikshan Sanstha & Ors.

RESPONDENT:
M.R. Gavali & Ors.

DATE OF JUDGMENT: 16/12/2005

BENCH:
Ruma Pal & Dr. AR. Lakshmanan

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P. (Civil) No. 12153 OF 2004)

Dr. AR. Lakshmanan, J.

Leave granted.

Kankavali Shikshan Sanstha and two others are the appellants in this appeal. This appeal was filed against the judgment and final order dated 05.02.2004 passed by the High Court of Bombay in Writ Petition No. 3000 of 2003 whereby the High Court allowed the said writ petition of the first respondent herein - Manohar Ramchandra Gavali by setting aside the order dated 31.03.2003 of the School Tribunal, Kolhapur and directed that the first respondent shall be entitled to reinstatement in service with continuity of service and back-wages.

The short facts of the case are as follows:-

Respondent No. 1 - M.R. Gavali was appointed as Assistant Teacher in the S.M.Junior College w.e.f. 18.06.1994 on purely temporary basis for the academic year 1994-1995 i.e. for the period from 18.06.1994 to 02.05.1995 against the backlog of SC/ST and NT category. Clauses 2,3,7 & 8 of the appointment order read as follows:-
"2. Your appointment is purely temporary for a period from 18.06.1994 to 02.05.1995 in the leave/deputation vacancy after expiry of the above period your services shall stand terminated without any notice. OR

3. The terms of your employment and condition of service shall be as laid down in the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 and the rules made thereunder.

7. Your appointment is conditional subject to the approval of the Education Department.

8. This post is reserved for Schedule Caste and if candidate of that category will be available, your service will be terminated."

The Deputy Director of Education approved the said appointment by his letter of approval dated 04.04.1995.

The appellant-Institution sought to fill up the backlog against the reservation by publishing advertisement in the newspapers. However, the particular backward class candidate was not available. On account of non-availability of the ST reserved category candidate, respondent No.1 - M.R. Gavali was again appointed temporarily on 08.06.1995 for the academic year 1995-96. It was made clear that the said appointment is liable to be terminated as and when a candidate from the backward class is made available and that the said appointment was subject to the approval of the Education Department.

Respondent No.1 submitted an affidavit on 24.11.1995 stating that his appointment in the 3rd appellant college was only till 02.05.1995 and that his appointment is totally temporary and on the backlog of SC, ST and NT and only for the

academic year 1995-96. On 31.01.1996, respondent No.1 again submitted an affidavit on a bond paper stating that the said appointment is temporary and that he will not claim any permanent right on the said post. On the basis of the aforesaid affidavit, the Deputy Director of Education approved the said appointment on totally temporary basis for the year 1995-96 due to the backlog of SC/ST candidate.

Despite repeated efforts, due to non-availability of SC/ST reserved category candidate, and as the said post was filled on purely temporary basis for the academic year 1995-1996, the appellant issued a notice of termination on 26.03.1996 to respondent No.1 terminating his services at the end of the academic year viz., from 30.04.1996. The termination notice reads thus:-

"Termination Notice

Shri M.R.Gavali

(M.A. B.Ed)

Asst. Teacher

S.M. Jr. College of Sc. & Commerce,

Kankavli, Dist. Sindhudurg

Sub: Termination as Asstt. Teacher after completion of your service.

Ref-Deputy Director Kolhapur Division

UM-1/KV/SM/95-96/5428-30 dt. 13.2.1996

Sir,

Your appointment was as an Asst. Teacher in S.M. Jr. College, Kankavli against the post reserved for (S.C./S.T./N.T.). The management made many efforts to fill post of the said category candidate. As per S.S. code No.9, Sub-rule No.9(1), the post was filled as a temporary teacher only for the academic year 1995-96 and the education department had approved the above post for only the said academic year. As per the above reference letter your appointment is coming to a close. So as per this letter we intimate you that you are terminated. (Your services are terminated).

You have to hand over all your educational matter, the library books and intimate the office before 30.4.1996.

Sd/-

Chairman

School Committee

S.M. High School Kankavli

Dist. Sindhudurg

Place \026 Kankavli

Dt. 26.3.1996"

Respondent No.3 - P.B.Lohar (respondent No.5 in the High Court) who belongs to the OBC category and being duly qualified was transferred since 10.06.1996 in the said vacant post as he had served in the appellant-Institution for 20 years at Secondary School. Being aggrieved by the order of termination dated 26.03.1996, respondent No.1 approached the School Tribunal, Kolhapur by filing Appeal No.50 of 1996 under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as the "M.E.P.S. Act"). The Tribunal, vide judgment and order dated 31.03.2003, dismissed the said appeal filed by respondent No.1 and held that in view of the documentary material placed on record, respondent No.1 was appointed on a temporary basis and that P.B. Lohar - respondent No.3 in this Court (respondent No.5 in the High Court) was entitled to be appointed on the said vacant post. Respondent No.1 challenged the order passed by the Tribunal dated 31.03.2003 in the High Court by filing a writ petition. The High Court allowed the said writ petition by the impugned order dated 05.02.2004 by setting aside the order dated 31.03.2003 of the School Tribunal, Kolhapur and directed that respondent No.1 shall be entitled to reinstatement in service with continuity of service and back-wages. Aggrieved by the order dated 05.02.2004, the appellant-Management has filed the above appeal in this Court.

Learned counsel appearing for the Management Mr. Shivaji M. Jadhav submitted that the High Court has gravely erred in not considering the documentary evidence on record which, inter alia, includes the affidavits given by respondent No.1

himself stating that he was appointed on purely temporary basis and that he would not claim any right of permanency on the said post. It was further submitted that the approval to the said appointment of respondent No.1 was given purely on temporary basis only for the academic year 1995-96 and, therefore, respondent No.1 could not be entitled to reinstatement by way of permanency on the said post.

Learned counsel for respondent No.1 - Mr. M.D. Adkar submitted that the first respondent had been appointed under the provisions of Rule 9(9)(a) since no candidate belonging to the backward class category was available during the year 1995-96 and that the tenure of his appointment would come to an end upon the conclusion of the academic year upon which his services would end. The respondent filed an appeal under Section 9 of the M.E.P.S. Act before the School Tribunal contending that he had completed two years of service and was entitled to the protection of having attained the status of a permanent employee under Section 5(2) and that since the respondent belongs to the Hindu Mali community which is recognized as an OBC he was entitled to the benefit of Rule 9(9)(a) of the Maharashtra Employees of Private Schools Rules, 1981 (hereinafter referred to as the "M.E.P.S. Rules") and in that capacity to permanency and continuity of service.

On the other hand, it has been urged on behalf of the Management that the view of the School Tribunal was correct and that the first respondent cannot be held as a deemed permanent employee or cannot claim protection under Rule 9(9)(a) of the M.E.P.S. Rules.

The appeal was opposed by respondent No.2 \026 the Deputy Director of Education. It was submitted that the appellants are bound to keep desired percentage of backward class communities as laid down in Rule 9(7) of the M.E.P.S. Rules and thus are duty bound to fill in the new vacancies as per backlog of OBC categories and since the appellants have given temporary appointments for the academic year to respondent No.1 during 1994-95, 1995-96 and thus have been accepted in writing by respondent No.1, the provisions of Rules 9(8) and 9(9)(a) do not attract in this case. It was further contended that the appointment of respondent No.1 during the year 1994-95 and 1995-96 were purely temporary and for one academic year each and that the appointments are rather tenure appointments and as such the appointment of respondent No.1 was rightly been terminated by the appellants by the end of the academic year 1995-96 as per provisions of Rule 28 sub clause (1) of the M.E.P.S. Rules. It was further contended that since the vacancy was earmarked for reserved category other than OBC category as there was no backlog of OBC category at the relevant time and such as the same should not have been treated as clear vacancy for OBC category. On the contrary, the said vacancy should have been treated as clear vacancy of reserved categories of which the backlog existed. Under the circumstances, the provisions of Section 5(2) of the M.E.P.S. Act and Rule 9(9)(a) of the M.E.P.S. Rules are not applicable in the case of respondent No.1. It was further argued by counsel for respondent No.2 that since the appointment of respondent No.1 was purely temporary it has rightly been terminated as per provisions of Rule 28(1) of the M.E.P.S. Rules and that respondent No.3 - P.B. Lohar being already in permanent service and being eligible for appointment by transfer from secondary section to higher secondary/Junior College Section, he came to be appointed accordingly and, therefore, the action of the appellant is as per the rules and need be upheld.

Rule 9(9)(a) of M.E.P.S. Rules, 1981 provides as follows:-

"9(9)(a) \026 In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in sub-rule (7) and if no person from any of the categories is available, the post may be filled in temporarily on a year to year basis by a candidate not belonging to the Backward Classes."

This rule came up for consideration before this Court in Shakuntala Ganpatsa Shirbhate vs. Industrial Weaving Co-operative Society and Others, AIR 1994 SC 36. That was a case where the appellant who belonged to a backward class was appointed initially as a Teacher in biology for a period of one year. The appointment was thereafter extended from year to year on several occasions and the last appointment was until further orders. The vacancy was earmarked to a candidate

belonging to a Nomadic Tribe. In the absence of a candidate belonging to a Nomadic Tribe, the appellant was appointed. The appointment of the appellant came to be terminated immediately upon a candidate belonging to a Nomadic Tribe becoming available. This Court upheld the contention of the appellant that since the appellant was a member of one of the backward classes referred to in the rule, she was entitled to a regular appointment in the very first year when no person belonging to Nomadic Tribe was available. The Court held the argument of the appellant was well founded. The fourth respondent in this case was available for appointment later on in 1988. This Court noted that on the first occasion when the post was being filled up there was no member of Nomadic Tribe available for appointment. This Court then held thus:

"(9)(a) In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in sub-rule (7) and if no person from any of the categories is available, the post may be filled in temporarily on an year to year basis by a candidate not belonging to the Backward Classes"\005..

Since the appellant is a member of one of the backward classes referred to in the said Rule, she was entitled to a regular appointment in the very first year when no person belonging to a Nomadic Tribe was available.

The argument of the learned counsel appears to be well founded. Admittedly the respondent No.4 was available for appointment only in 1988. On the first occasion when the post was being filled up, there was no member of a Nomadic Tribe available for appointment. In the absence of a candidate belonging to a Nomadic Tribe, the Rule enjoins year to year appointment only if an available candidate does not belong to the backward classes. The question, therefore, is whether the appellant belongs to a backward class."

The law laid down by this Court on the interpretation of Rule 9(9)(a) is in our view resolves the controversy in the present case. The first respondent was appointed in 1994. The vacancy was reserved for an ST candidate. At that stage there was no candidate belonging to ST available. There is no dispute about the fact that the first respondent belongs to the Hindu Mali community which is an OBC. In the circumstances, in terms of the provisions of Rule 9(9)(a) since no other candidate belonging to ST was available, the first respondent was entitled to appointment on a regular basis. This Court, in the above case, held that in the absence of a candidate belonging to the reserved category concerned, the rule enjoins year to year appointment only if a available candidate does not belong to a backward class. The respondent belonging as he does to a backward class was entitled to a regular appointment. The subsequent appointment of P.B. Lohar, the 3rd respondent herein again, operates to displace the first respondent because in any event much prior thereto the first respondent had duly crystallised the right. In any event, it has not been

demonstrated before this Court that the 3rd respondent was appointed subsequently in the vacancy created by the termination of the first respondent.

It was argued on the side of the Management that the High Court gravely erred in placing reliance on the judgment of this Court in *Shakuntala Ganpatsa Shirbhate vs. Industrial Weaving Co-op. Society (supra)* inasmuch as the facts involved in these two cases are entirely different. In the said cited case, the appointment of the appellant therein was initially for a period of one year which was extended from year to year several times and the last order passed in his favour mentioned the appointment until further orders. However, it was further argued that the appointment of respondent No.1 in the instant case is only for the academic year 1995-96 wherein it is made clear to the said respondent that the said appointment is liable to be terminated after the said period. Thus, the said case would not be applicable to the facts of the present case. This contention, in our view, has no force. In the instant case, the appointment was extended from time to time on year to year basis on several occasions. This Court has clearly held that in the absence of a candidate belonging to a Nomadic Tribe the rule enjoins year to year appointment only if an available candidate does not belong to the backward classes. The appointment order also clearly stipulates that terms of

appointment and conditions of service shall be as laid down in the M.E.P.S. (Conditions of Service) Regulation Act, 1977 and the rules made thereunder and that the appointment is conditional subject to the approval of the Education Department and that the post is reserved for SC and if candidate of that category will be available, the services will be terminated. In the instant case, the appointment of the first respondent was approved by the Education Department on all occasions and that the Management, the Teacher and the Department are all aware that the post in question has been granted on totally temporary basis due to the backlog of ST candidate. It is also a matter of record that the appointment of the first respondent was sanctioned on the basis of the approval and NOC of three-member Committee.

While challenging the order of termination as illegal the first respondent, in his appeal before the Tribunal, prayed for an order to make him permanent in service which reads thus:

1) Since I have completed two years of service in 1994-95 and 1995-96.

I think that there is no authority to terminate my services (in accordance with Rule 4(6) of Service Rules). Similarly since I have completed two years service, I am entitled for protection to be permanent in service as per Rule 5(2) of M.E.P.S. (Condition of Service) Rules, 1977. Therefore the termination order is illegal and not executable.

2) I am myself belonging to Hindu Mali OBC category and therefore I am protected under rule 9(7). Similarly as my appointment is as per rule 9(9)(a) and I am from OBC, I am entitled to be made permanent and continue the service. It is requested that this may also be considered. The information in brief is as follows:

1. Since two years service is completed (Probation period) Protection for condition of service is granted u/s 4(6) & 5(2) of the Act.

2. I am Hindu Mali and belong to OBC category. Hence entitled for protection & continuity of service under rule 9(7) & 9(9)(a) of the Rules.

In our opinion, the High Court has rightly placed reliance on the decision of this court in Shakuntala Ganpatsa Shirkhate vs. Industrial Weaving Co-op. Society (supra). It was brought to our notice by the first respondent in the counter affidavit filed

by him a decisive and clinching document has been unfortunately withheld by the appellant before this Court and it was filed before the High Court. It is the certificate dated 19.06.1996 issued by the principal of the appellant institution which categorically confirms the fact that respondent No.1 worked as a full time Assistant Teacher during the period 18.06.1994 to 01.05.1996. In view of the above certificate, it is submitted that the finding recorded by the Tribunal is clearly erroneous and, therefore, cannot be sustained. This document has been marked as Annexure-C1 which is the copy of the Experience Certificate dated 19.06.1996 issued by the principal of the appellant institution which reads thus:

"Kankavali Shikshan Sanstha's

SHIVAJI MEMORIAL HIGH SCHOOL

Late Karanaveer Yashwantrao Naik Technical Wing
&

Junior College of Science & Commerce, Kankavali,
Dist. Sindhudurg

EXPERIENCE CERTIFICATE

This is to certify that Shri Manohr Ramchandra Gawali, M.A. B.Ed. was in service of this School's Higher Secondary Section as full time Assistant Teacher to teach Marathi subject from 18.6.1994 to 1.5.1996. He has been paid pay of Rs.2000-3500 of the Higher Secondary level.

His School work during period of service was very much satisfactory.

Hence issued this certificate.

Kankavali

Dated: 19.6.1996

Sd/-

Principal

S.M. Junior College of Science
& Commerce Kankavali

In our opinion, the High Court taking into account of the relevant facts of the case arrived at an accurate and correct conclusion as regards the rights of respondent No.1. It may not be out of place to mention that the post occupied by respondent No.1 was a reserved post and as per the rules in the case of certain contingencies of non-filling of the posts, a person belonging to some other reserved category can occupy the said post and respondent No.1 being belonging to OBC could have occupied the said post. However, the appellant removed respondent No.1 and surprisingly transferred respondent No.4 to the said post and as such respondent No.4 also belongs to the same reserved category as of respondent No.1. It may not also be out of place to mention that in the affidavit filed by the State, the State has specifically pointed out the failure on the part of the appellant to abide by the rules governing the appointment.

It has been demonstrated before us that the third respondent was appointed subsequently in the vacancy created by the termination of the first respondent. It was also submitted at the time of hearing that the third respondent has retired from service.

The first respondent lost his job on 26.3.1996 in spite of Rule 9(9)(a) of the M.E.P.S. Rules and the judgment of this Court in the case of Shakuntla Ganpatsa Shirbhate vs. Industrial Weaving Co-op. Society & Ors. (supra). During the course of arguments, a statement was made on behalf of respondent No.1 that respondent No.3 \026 Mr. P.B. Lohar, has retired and such statement was not contradicted by the counsel for the Management. During the course of arguments, we indicated that respondent No.1 will be entitled for the job with immediate effect. However, the back-wages can be granted only from the date on which the third respondent \026 Mr. P.B. Lohar has retired. Mr. S.M. Jadhav, learned counsel appearing for the appellants informed us that Mr. P.B. Lohar retired on 28.2.2005.

In such circumstances, we are of the opinion that the direction should be issued to the appellant to take back respondent No.1 in service in the vacancy caused due to the retirement of respondent No.3 and to allow him to discharge the function on the post to which he was appointed. We make it clear that respondent No.1 will not be entitled to back wages from the date of his termination till his appointment. He will be entitled for the job with immediate effect with back wages only from 1.3.2005. We feel that this direction of ours would meet the ends of justice.

For the foregoing reasons, we hold that the appeal filed by the appellant \026 Institution is devoid of any merit and hence we dismiss the same by modifying the order dated 5.2.2004 passed by the High Court as indicated above. The interim order passed on 21.7.2004 stands vacated in view of the final order and directions issued in the main appeal. However, there shall be no order as to costs.