The Secretary and another Vs Shri Chintamani Birjaprasad Dubey and others

Court: Bombay High Court

Date of Decision: Dec. 23, 1999

Acts Referred: Constitution of India, 1950 â€" Article 226, 227
Limitation Act, 1963 â€" Section 3, 5
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 â€" Section 9

Citation: (2000) 2 ALLMR 64 : (2000) 2 BomCR 601 : (2000) 2 BOMLR 648 : (2000) 2 MhLj 267

Hon'ble Judges: J. A. Patil, J

Bench: Single Bench

Advocate: S. J. Panicker, for the Appellant; B. S. R. Singh, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

J. A. Patil, J.
By this writ petition under Articles 226 and 227 of the Constitution of India, the petitioners have impugned the order dated

4-4-1998 passed by the School Tribunal, Mumbai, in Appeal No. BOM/1/1996. The impugned order directed the appellants to promote

respondent No. 1 to the post of Laboratory Assistant with effect from 3-1-1996 with all the benefits of that post including salary and allowances.

2. There is a High School by name Shri Jamnadas Adukia Balika Vidyalaya at Kandivali (East) Mumbai-400 101. It is run by a Public Trust of

which petitioner Ho. 1 is the Secretary and petitioner No. 2 is the Headmistress. Respondent No. 1 was appointed in the said School as a Peon in

the year 1972. In the course of his service, he was promoted to the post of Laboratory Attendant. In 1984, respondent No. 1 improved his

educational qualification by passing S.S.C. Examination and thereby became eligible for being promoted to the post of Clerk or Laboratory

Assistant. Accordingly, he made several applications to the Management of the School requesting them to promote him to the said post but all his

requests went unheeded. According to respondent No. 1, there was a vacancy in the post of a Clerk in the year 1985, but the Management told

him that the said post was reserved for B.C. or O.B.C. candidate and thereafter one Sarosh Panchal was appointed to the said post. Again, in

1991, there was a vacancy in the post of Clerk, but that time also the claim of respondent No. 1 was ignored and respondent No. 2 came to be

appointed as a Clerk. Respondent No. 1 thereafter made a representation to the Lokayukta, Maharashtra. But, according to respondent No. 1, he

was advised to approach the School Tribunal. Accordingly, respondent No. 1 filed the above-mentioned appeal before the School Tribunal,

Mumbai, on 3-1-1996. Since, there was a considerable delay in filing the appeal, respondent No. 1 also filed a separate application for

condonation of delay.

3. The petitioners, who were respondents in that appeal, filed their written-statement, contending that the appeal was not maintainable as there was

inordinate delay of five years. The petitioners further contended that there was no justifiable ground for condoning the delay. The petitioners denied

that respondent No. 1 was entitled to be appointed to the post of Clerk or alternatively to the post of Laboratory Assistant. It was pointed out that

it will not be convenient to appoint respondent No. 1 as a Laboratory Assistant for the classes of 8th, 9th and 10th standards as the students of

these classes are all adolescent girls.

4. The learned Presiding Officer of the School Tribunal felt that the delay in filing the appeal was properly explained by respondent No. 1 and,

therefore, the same deserved to be condoned. He further held that the appeal was perfectly maintainable u/s 9 of the Maharashtra Employees of

Private Schools (Conditions of Service) Regulation Act, 1977 (for short, M.E.P.S. Act). The learned Presiding Officer further held that by

appointing respondent No. 2 to the post of clerk, there was an implied supersession of respondent No. 1. The learned Presiding Officer took the

view that respondent No. 1 cannot claim the post of Clerk without first being appointed as Laboratory Assistant. It is this order which is impugned

by the petitioners.

5. I have heard Shri Panicker, the learned advocate for the petitioners and Shri B.S.P. Singh, learned advocate for respondent No. 1. None

appeared for respondent Nos. 2 and 3. Shri Panicker made two submissions before me. The first is that there was inordinate delay on the part of

respondent No. 1 to file the appeal and that the said delay was not at all satisfactorily explained by him. The second submission of Shri Panicker is

that the school tribunal acted without jurisdiction by granting a relief which it was not empowered to grant. Shri Singh, on the other hand,

supported the impugned order and submitted that there is no reason to disturb the same. As regards the delay, Shri Singh submitted that in such

matters a liberal view is required to be taken for doing substantial justice. He pointed out that the delay was mainly on account of the fact that none

of the representations made by respondent No. 1 was replied to by the Management. Shri Singh further submitted that section 11(2)(f) of the

M.E.P.S. Act empowers the School Tribunal to grant the alternative relief which was prayed for by respondent No. 1.

6. Section 9(1) of the M.E.P.S. Act gives a right to an employee in a private school to file an appeal before the School Tribunal in cases where

there is dismissal, removal, otherwise termination, reduction in rank or supersession. Respondent No. 1 filed his appeal on 3-1-1996, praying for

quashing and setting aside the order of appointment of respondent No. 2 and for a direction to the present appellants to appoint him to that post or

in the alternative to the post of Laboratory Assistant. Admittedly, there was delay on his part to file the appeal. Therefore, he filed a separate

application for condonation of delay wherein he stated that he was superseded while filing the post of Clerk in the year 1985. He further stated in

the application that there was delay of four years in filing the appeal. The learned Presiding Officer of the School Tribunal did not decide the

application separately and heard it along with the appeal itself. In fact, it would have been appropriate if the application for condonation of delay

had been first decided on merits in order to ascertain whether or not there was sufficient ground for not preferring the appeal within the prescribed

period of limitation. Perusal of the impugned judgment shows that the learned Presiding Officer dealt with this issue cursorily and he did not raise

any specific point for determination on that count. In my opinion, this approach of the learned Presiding Officer was not proper.

7. The alleged supersession of respondent No. 1 took place when respondent No. 2 was appointed to the post of Clerk on 20-8-1991. There

was, therefore, a delay of more than four years and four months in filing the appeal as against and prescription of thirty days. There is absolutely no

explanation by respondent No. 1 as to why he could not file an appeal u/s 9 of the M.E.P.S. Act within the prescribed period of limitation after the

appointment of respondent No. 2 to the post of Clerk. It was tried to be submitted by Shri Singh that respondent No. 1 made several

representations to the Management but he was not given any reply. Therefore, according to him, the respondent No. 1 was waiting for the reply. I

do not think that this sort of explanation is in anyway satisfactory to explain the long delay of more than four years. The learned Presiding Officer

has observed in para 26 of his judgment that respondent No. 1 first approached the Lokayukta, who directed him on 20-12-1995 to approach the

School Tribunal. Therefore, according to the learned Presiding Officer, the delay deserves to be condoned. In my opinion, the learned Presiding

Officer of the school Tribunal has clearly, acted in contravention of the provisions of the M.E.P.S. Act in condoning the delay.

8. The provisions of sub-sections (2) and (3) of section 9 of the M.E.P.S. Act read as under:

(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 came 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.

Thus, sub-section (2) prescribes the limitation of thirty days from the date of receipt of the order of dismissal, removal, otherwise termination of

service or reduction in rank. It does not speak of any order of supersession, obviously because in the case of supersession, there is no order. The

appointment of a junior employee to the promotional post itself amounts to supersession. Therefore, there is no dispute of the fact that an appeal in

the case of supersession has to be filed within a period of thirty days from the date on which such supersession occurs. Sub-section (3) gives

power to the School Tribunal to maintain an appeal even after the expiry of the prescribed period, if it is satisfied that the appellant has sufficient

cause for not preferring the appeal within that period. In this connection, reference may be made to certain decisions relied upon by both the

learned advocates. Shri Singh relied upon a decision in Collector, Land Acquisition, Anantnag v. Katiji AIR 1997 SC 1353, in which the Supreme

Court considered the question of condonation of delay in an appeal filed by the State of Jammu and Kashmir. It was pointed out that the State

represents the collective cause of the community and does not deserve a litigant non grata status. It was, therefore, held that treatment similar to

any other litigant ought to be accorded to the State also and that step motherly treatment to State Government in such matters is not warranted. I

do not think, in the peculiar facts of that case, where there was delay of only four days, the said decision will be of any help to respondent No. 1.

9. As against this decision, Shri Panicker relied upon three decisions. The first of which is Mathuradas Mohota College of Science, Nagpur v. R.T.

Borkar, 1997(1) All.M.R. 149. It was a case under the M.E.P.S. Act itself and there was a delay of over seven months. The Division Bench of

this Court observed:

.....Thus, the provision has been made to entertain time-barred appeal on a sufficient cause being shown by the appellant and the Tribunal is

satisfied. Even though this is rule of procedure and liberally construed to impart substantive justice, it cannot be forgotten that it is a statutory

provision and, therefore, it is necessary for the appellant to show sufficient cause for not preferring the appeal within the time limit prescribed.

Absolute absence on the part of the appellant to explain the delay and or to furnish cause to the satisfaction of the Tribunal takes away the

jurisdiction of the Tribunal to entertain the appeal. .....

It was, therefore, held that the Tribunal had committed an illegality in entertaining the appeal and exercising the jurisdiction u/s 9 of the M.E.P.S.

Act. The second decision relied on by Shri Panicker is Ashis Kumar Hazra Vs. Rubi Park Co-opeative Housing Society Ltd. and others, , wherein

it was observed: ""Unless proper explanation is given, the valuable right created in favour of the respondents u/s 3 of the Limitation Act, cannot be

defeated"". The third decision relied upon by Shri Panicker is Mahavira Trading Company v. Smt. Nayan N. Teli 1994(4) All.M.R. 57, wherein the

learned Single Judge of this Court held that the explanation for condonation of delay has to be bona fide.

10. Having regard to the provisions of sub-sections (2) and (3) of section 9 of the M.E.P.S. Act, it cannot be said that respondent No. 1 had any

sufficient cause for not filing his appeal within the prescribed period of limitation. The learned Presiding Officer has, therefore, acted illegally in

condoning the delay without properly ascertaining the existence of sufficient cause. Therefore, on this count alone, the appeal filed by respondent

No. 1 was not maintainable. Consequently, it must be held that the learned Presiding Officer of the School Tribunal committed an illegality in

entertaining the appeal.

11. Coming to the second submission of Shri Panicker, it may be noted that the right of appeal given to an employee in a private school is available

only in five cases which are stated in sub-section (1) of section 9 of the M.E.P.S. Act as under:

9. (1) Notwithstanding anything contained in any law or contract for the time being in force, any employee in a private school.

(a) who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank, by the order passed by the Management;

or

(b) who is superseded by the Management while making an appointment to any post by Promotion: and who is aggrieved, shall have right of

appeal and may appeal against any such order or supersession to the Tribunal constituted u/s 8.

It is the case of respondent No. 1 that the appointment of respondent No. 2 to the post of Clerk has resulted in his supersession. It is material to

note that respondent No. 2 was not appointed to the post of Clerk by way of promotion. She was appointed to that pot by direct recruitment.

Supersession takes place when a junior employee is promoted to higher post by overriding the claim of a senior employee of his cadre. It is in this

context that the words ""while making an appointment to any post by promotion"" occurring in sub-clause (b) are material and relevant. The case of

respondent No. 1 would have been covered by sub-clause (b) if respondent No. 2 had been appointed to the post of Clerk by way of promotion.

That is, however, not so. As pointed out above, she was not an employee of the school earlier and she was directly appointed to the post of Clerk.

Therefore, there is no question of respondent No. 1 being superseded by respondent No. 2. The view taken by the learned Presiding Officer that

there was an ""implied supersession"" of respondent No. 1 is not proper and correct and it ignores the provisions of sub-clause (b) of sub-section

(1) of section 9 of the M.E.P.S. Act.

12. The learned Presiding Officer allowed the appeal by granting the alternative relief of appointment to the post of Laboratory Assistant.

According to Shri Panicker, the School Tribunal is not empowered to grant such relief. Shri Singh, however, relied upon the provision of section

11(2)(f), which empowers the Tribunal ""to give such other relief to the employee and to observe such other conditions as it may specify, having

regard to the circumstances of the case."" In fact, when there is no case of supersession of respondent No. 1, no question of granting to him any

relief including the alternative relief arises. Therefore, it must be said that by granting the alternative relief, the learned Presiding Officer of the

School Tribunal has exceeded his power u/s 11 of the M.E.P.S. Act. Consequently, the impugned order suffers from serious illegality and,

therefore, liable to be quashed and set aside.

13. In the result, the writ petition, being Writ Petition No. 2691 of 1998, is allowed, and the impugned order dated 4-4-1998 passed by the

School Tribunal, Mumbai, in Appeal No. BOM/1/1996 (Exhibit K to the petition) is quashed and set aside. In the circumstances of the case, there

will be no order as to costs.

14. On the request of Shri Singh, the learned advocate for the respondent, ad-interim relief granted earlier in terms of prayer clause (b) is

continued for a period of four weeks.

Certified copy expedited.

Petition dismissed.