

CASE NO.:
Appeal (civil) 6778-6779 of 2001

PETITIONER:
LAXMAN DUNDAPPA DHAMANEKAR & ANR.

Vs.

RESPONDENT:
MNGT. OF VISHWA BHARATA SEVA SAMITI & ANR.

DATE OF JUDGMENT: 27/09/2001

BENCH:
V.N. Khare & B.N. Agrawal

JUDGMENT:

V.N. KHARE, J.

Leave granted.

There is an organisation known as Vishwa Bharata Seva Samithi (hereinafter referred to as the Samithi). The Samithi is running a Higher Secondary School (hereinafter referred to as the Institution) in the town of Belgaum, Karanataka. The institution is imparting education upto higher secondary level. The institution is a private government aided school, recognised by the Government of Karnataka. The method of appointment and condition of services of the teachers and employees working in the institutions are governed by the Karnataka Private Educational Institutions (Discipline and Control) Act, 1975 (hereinafter referred to as the Act) and the Rules framed thereunder known as the Karnataka Private Educational Institutions (Discipline and Control) Rules, 1978 (hereinafter referred to as the Rules). In the year 1984, a post of Assistant Teacher in the institution fell vacant. The Management of the institution advertised the said vacancy and invited applications for appointment to the said post. Appellant No. 1, and others, in response to the said advertisement submitted applications and for that purpose a Selection Committee was constituted in accordance with the provisions of the Act and the Rules framed thereunder. Appellant No. 1 was selected and recommended by the Selection Committee for appointment as Assistant Teacher. The Management, by a resolution dated 24.6.85, resolved to appoint appellant No. 1 on probation for a period of one year. Consequently, appellant No. 1 joined the service at Madhyamika Vidyalaya Mattiwade w.e.f 1.7.85 on a pay scale of Rs. 750/- to Rs. 1,500/-. It is alleged that appellant No. 1 continued to teach till June 1994 when he was prevented by the Management of the School from performing his teaching assignment. Similarly, appellant No. 2 after having been selected by the Selection Committee constituted under the provisions of the rules was appointed as Assistant Teacher in the institution on probation for a period of one year. It is alleged that appellant No. 2 continued to work, but subsequently he was also prevented from performing his teaching duties. In such circumstances, the appellants herein, preferred separate appeals before the Tribunal constituted under the Act. The Tribunal allowed both the appeals and directed for reinstatement of the appellants. Aggrieved, the Management filed two Civil Revision Petitions before the High Court of Karnataka. The case of the Management, inter alia, was that, since appellant No. 1 was absent from 25.11.1991 to 1.6.1992, 1.7.92 to 6.7.92, 27.7.92 to 27.7.92, 3.8.92 to 14.8.92 and thereafter from 15.8.92 onwards remained absent and, as such, the services of the appellant stood

automatically terminated and that the appellant was appointed on probation subject to the approval of Director of Public Instructions, Belgaum and there being no approval to the appointments, the appellants have ceased to be teacher in the institution. However, the case of the appellants before the High Court was that they were appointed on probation and after the expiry of the probationary period, they automatically became regular teachers and since no order of termination having been passed in accordance with the provisions of the Act and Rules framed thereunder, the action of the Management in not permitting the appellants to perform their duties was wholly illegal and arbitrary. It was also their case that there being no provision either under the Act or the Rules for obtaining approval for appointment as Assistant Teacher, the appointments of the appellants were in accordance with law. The High Court was of the view that since the Management did not obtain the approval of the concerned Inspecting Officer in regard to appointments of the appellants as Assistant Teacher, the appellants have ceased to be teacher in the institution. In that view of the matter, the Civil Revision Petitions filed by the Management were allowed and the order of the Tribunal was set aside. It is against the said judgment and order of the High Court, the appellants have preferred these appeals by way of Special Leave Petitions.

Learned counsel appearing for the appellants urged, firstly, that there being no requirement either under the Act or Rules for the Management to obtain approval of the Head of the Department in respect of the appointments of the appellants as Assistant Teacher in the institution, the view taken by the High Court is erroneous. Secondly, that the method of appointment and conditions of service of teachers in private government aided institution being governed by the provisions of the Act and Rules framed thereunder, any requirement of approval of regular appointments of teachers under the non-statutory administrative orders contained in grant-in-aid code would not make the appointments of the appellants invalid. Thirdly, that the appellants having been appointed on probation, the appellants automatically became confirmed teachers of the institution after completion of their probationary period and fourthly, that, in any case, there being no provision under the Rules for automatic termination of service in the event of the teacher being absent, the alleged automatic termination of service of the appellants is illegal.

Whereas, learned counsel appearing for the respondent urged that the grant-in-aid rules, though may be administrative in nature, it provides for requirement of obtaining approval of the Inspecting Officer in the matter of appointment of teachers in the government aided institutions and in the absence of such approval, the appointment of the appellants was nullity and they were not entitled to continue in service.

On the argument of learned counsel for the parties, the first question that arises for consideration is whether there was any requirement of law for the Management to obtain approval in regard to appointment of teachers in the institution. Section 3 of the Act provides that subject to other provisions of the Act, the State Government, after previous publication of the rules may, by notification, make rules in respect of matters relating to the code of conduct and conditions of service of employees. Sub-section (3) thereof provides that every private government aided institution shall send intimation of having adopted the model rules or modified its rules consistent with the rules framed by the State government to the Director of Technical Education or to an Officer not below the rank of a District Deputy Director of Public Instructions. Sub-section (4) of Section 3 further provides that where a private educational institution fails to take action as required, the rules as framed by the State government shall be deemed to have been adopted by such institution and they shall be the rules governing its employees. Section 6 provides for termination of service and procedure for imposing penalties. Section 15 provides that the State Government may by notification and after previous publication, make rules to carry out the purposes of this Act.

In exercise of power conferred by Sections 3 and 15 of the Act, the Government of Karnataka has framed the rules. Rule 6 provides method of recruitment. It would be appropriate to reproduce rule 6 of the Rules which runs as under:

6. Method of recruitment. - (1) Any appointment arising for a period of more than three months in any institution shall be made by selection from among persons who had applied in pursuance of an advertisement in news papers:

Provided that an employee in one institution may be appointed in another institution under the same or different Management in accordance with rules approved by Government in respect of each category of institution.

(2) For the purpose of recruitment under sub-rule (1) the Board of management shall constitute -

(a) a selection committee for appointment of the teaching and non-teaching posts other than the post of the head of the institution consisting of-

(i) the President or the Head of the Board of Management or his nominee;

(ii) the Head of the Department or his nominee;

(iii) the Head of the Institution;

(iv) an educationist or an expert in the subject to which recruitment is to be made, to be selected by the Board of Management from a panel of names furnished by the Head of the Department.

A perusal of Rule 6 would show that there is no requirement for Management to take any approval from the Head of the Department who is the Director of Public Instructions, in respect of regular appointment of a teacher selected by the Selection Committee constituted under sub-rule (2) of Rule 6 of the Rules. Whereas, under sub-rule (5) of Rule 6, if the Management appoints any teacher for a period of 3 months or less, or for part time, such an appointment is required to have the approval by the Head of the Department. It appears that the omission to obtain approval of Head of the Department in case of a regular teacher under the rules is deliberate. Reason being that the Head of the Department himself or his nominee sits in the Selection Committee and it is because of that reason, the approval of the Head of the Department in case of a regular appointment has been dispensed with under the rules. Whereas, if the appointment is made on a ad hoc basis by the Management for a period of 3 months or less, or for part time, the same is required to have the approval of the Head of the Department apparently for the reason that the Head of the Department or its nominee is not party to the decision to make ad hoc appointment in the institution. We are, therefore, of the view that the rules do not contemplate for obtaining approval of the Head of the Department i.e. the Director of Public Instructions where the appointment is to be made on the basis of the recommendation of Selection Committee constituted under sub-rule (2) of rule 6 of the Rules.

Learned counsel appearing for the respondent urged that even if the rules do not provide for obtaining approval of the Head of the Department, in case of appointment of a regular teacher, the same is required under non-statutory rule 16 of Grant-in-Aid Code for Secondary Schools. What he argues is that even though the rules contained in the Code are non-statutory and are merely administrative instructions, yet they supplement the rules and, therefore, any breach of administrative or executive instruction will make the appointment of the appellants invalid.

We noticed earlier, the appointment and conditions of service of teachers in private government aided institution are governed by the provisions of the Act and the statutory rules. The said provisions are self-contained code relating to the appointments of teachers in private aided institutions. The field relating to method of appointment of regular teacher in a government aided institution is fully covered by the provisions of the Act and the rules and we do not find any provisions either in the Act empowering the Government to supplement the rules by executive instructions. It is no doubt true that if the Act had empowered the State Government to issue administrative instructions by way of supplementing the rules, the position would be different. In such a case, the Government would have power to fill up the gaps in the rules by issuing administrative instructions if the rules are silent on the subject provided the same is not inconsistent with the statutory rules already framed. In the present case, the Act does not empower the State Government to supplement the rules by issuing administrative instructions or orders. In the absence of such provision in the Act, it is not open to the government to supplement the rules by the executive orders. If we accept the argument of learned counsel for the respondent, it would be repugnant to Sections 3 and 15 of the Act.

The matter can be examined from another angle. Rule 16 of Grant-in-Aid Code for Secondary Schools runs as under:

16. General Conditions of aid:- Grant-in-aid is permissible only to those institutions which have been recognised by the Department. It is subject to the following conditions:-

(i) The Management shall have deposited the stability fund as indicated in rule 9 (d) of Chapter III.

(ii) The Management shall credit the prescribed fees collected, into the Treasury as prescribed in rule 69.

The other amounts collected by way of grants, donations, interest on endowments, deposits, and other items realised by the institutions shall be credited to the accounts of the institution and shall be reflected in annual receipts and expenditure statement of the institution.

Failure on the part of the Management or the Head of the Institution to collect and to credit the fees so collected to Government funds as directed above, may entail stoppage of grants and withdrawal of recognition.

(iii) The Management shall maintain the account of the Institution and furnish monthly and other periodical returns to the Department in accordance with the prescribed rules.

(iv) The Management shall get the accounts of the Institutions audited by an auditor not connected

with the management in any way, from the list of auditors approved by the Education Department.

(v) The Management shall keep the accounts of the Institution open to inspection and audit by Inspecting and other officers deputed by the Director or by the Accountant General or by their nominees.

(vi) (a) The Management shall appoint teachers and other staff of the Institution in accordance with the rules prescribed in this behalf and shall observe the conditions of service prescribed therein.

(b) The Management shall make available the staff members selected by the Additional Director of Examinations for being utilized for purposes of Public Examinations conducted by the Department or Board. Their period of absence in all such cases will be treated as on other duty and their salary during that period will be admitted for grant purposes.

(vii) The Management shall report to and obtain the approval of the inspecting officer concerned for all appointments and changes made in the staff of the institution. It shall be competent for the inspecting officer to prohibit the employment of any person who is not duly qualified or who, for any other reasons to be recorded in writing, is considered unfit to be on the staff. Persons who are suffering from contagious diseases or serious physical defects should not be appointed by the Management as teachers in Schools. In doubtful cases a reference may be made to the inspecting officer concerned and his instructions obtained. An appeal against the decision of the inspecting officer shall lie with the next superior authority whose decision shall be final.

The aforesaid non-statutory rule was substituted in the Code by government order dated 17.6.67 and whereas the statutory Rules governing the method of appointment of teacher came to be published in the gazette on 31.1.78. It is, therefore, manifest that non-statutory Rule 16 was never intended to supplement the statutory Rules and, therefore, not applicable in the case of appointment of teacher in private government aided institutions. Yet, there is another reason why the non-statutory Rule 16 is not applicable in the case of appointment of teachers in the institution. The administrative instructions pertaining to grant-in-aid for secondary schools have been issued with the object of extending and improving institutions, and for that purpose a sum of money is annually allocated by the government for distribution as grant-in-aid to schools subject to observance to the conditions specified therein. The conditions embodied in Rule 16 of the grant-in-aid code provide for the conditions under which financial assistance would be made available to the Management of the institution by the government. If there is a breach of the conditions of the grants-in-aid, it is open to the government either to suspend or cancel the financial grant to the institution. But, such breach of conditions of the grant-in-aid code would not make the appointment of a teacher in the institutions invalid when the method of appointment of teachers in the institution is fully covered by the Act and the statutory rules. It is, however, true that for breach of administrative instructions which have no statutory force, a public servant or the person guilty of such a breach can be subjected to disciplinary action; but the same

cannot be pressed into service for action which has the effect of modifying the statutory rules. We are, therefore, of the view, that breach of non-statutory Rule 16 would not render the appointments of appellant invalid.

So far the second question that arises for consideration is whether the appellants having been appointed on probation they would be deemed to have become regular teachers on expiry of probationary period, we are not inclined to go into that question in view of the fact that even though the appellants were probationers, their services could not be ceased to have effect either by non approval by the Head of the Department or by their remaining absent from their respective duties. There is no provision either in the Act or the Rules providing for automatic termination of services of a teacher on account of being absent without leave. If any teacher remains absent without any leave, it is open to the Management to terminate the services of such teachers only after complying with the provisions of the Act and the rules or principles of natural justice. In the present case, we do not find any provision either in the Act or Rules providing for automatic termination of service of a teacher in the event of a teacher remaining absent without leave. In the absence of such a provision in the Act or Rules, the alleged deemed termination of services of the appellants without giving any opportunity to the appellants was unlawful and deserves to be set aside.

Before we part with the case, we would like to observe that we are in agreement with the view taken by the High Court that it is unbelievable that the appellants were not paid their salary for the last 10 years, as at no point of time, the appellants had made any grievance either to the Head of the Department or to the Management in respect of non-payment of salary. If the appellants were not paid salary, they ought to have made representation to the Head of the Department or gone to a court of law for recovery of arrears of salary which they did not do so. Therefore, they are not entitled to arrears of salary for the last ten years. Under such circumstances, we are of the view that the appellants are entitled to arrears of salary only for the last 3 years. In the present case, we also find that the management was guilty of wilful default and non-observation of Rules. Assuming there was requirement of obtaining approval of Head of the Department in regard to appointment of the appellants, which the management is now contending, it does not appear to reason why management did not take any steps for obtaining approval of the Head of the Department and permitted the appellants to teach in the institution for long period of ten years and suddenly the management treats the services of the appellants having automatically terminated. For such wrongful act on the part of the Management, we direct that arrears of salary to the appellants shall be paid by the Management from its own funds and not from the financial assistance received from the Government.

For the aforesaid reasons, we are of the view that the appeals deserve to be allowed. The judgment under challenge is set aside. The appeals are accordingly allowed. There shall be no order as to costs.

...J.
(V.N. KHARE)

...J.
(B. N. AGRAWAL)

September 27, 2001