

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 11936 OF 2016
WITH
WRIT PETITION NO.12143 OF 2016

1 The President,
Mahatma Phule Education Society,
Parbhani, Jintoor Road, Parbhani.
Taluka and District Parbhani.

2 The Headmaster,
Mahatma Phule Vidyalaya,
Jintoor Road, Parbhani,
Taluka and District Parbhani.

...PETITIONERS

-VERSUS-

1 Babu Nagappa Phulari,
Age : 56 years, Occupation : Service,
R/o Mamta Colony, Karegaon Road,
Parbhani, Taluka and District Parbhani.

2 The Education Officer (Secondary),
Zilla Parishad, Parbhani.

3 The Deputy Director of Education,
Aurangabad,
Taluka and District Aurangabad.

...RESPONDENTS

...
Advocate for Petitioners : Shri V.D.Salunke h/f Shri Gunale V.D.
Advocate for Respondent No.1 : Shri M.V.Ghatge.
AGP for Respondents 2 and 3 : Shri S.P.Sonpawale.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 08th December, 2016

Oral Judgment :

1 Rule. Rule made returnable forthwith and heard finally by the
consent of the parties.

2 The first Writ Petition No.11936/2016 is filed on 16.11.2016.
The second Writ Petition No.12143/2016 is filed on 25.07.2016, but was
not circulated and therefore, it's registration number is after the first
petition was circulated.

3 It needs mention that these two petitions have been filed by
the Petitioner Management for challenging interlocutory orders, when the
Appeal of the employee is at the final stage before the School Tribunal.

4 The Petitioner Management has challenged the following
three orders:-

- (a) Writ Petition No.12143/2016 :- Order dated 16.07.2016
passed by the School Tribunal, Latur on application Exhibit-
51 in Appeal No.20/2015.
- (b) Writ Petition No.11936/2016 : Orders dated 06.10.2016
passed by the School Tribunal, Latur on applications Exhibits
59 and 61 in Appeal No.20/2015.

5 I have heard the strenuous submissions of Shri Salunke, learned Advocate for the Petitioner/ Management, Shri Ghatge, learned Advocate for Respondent No.1/ original Appellant and the learned AGP on behalf of the State/ Education Department authorities.

6 These litigating sides had been before this Court earlier in Writ Petition No.11714/2015 filed by Respondent No.1 upon being aggrieved by the rejection of his application for interim relief Exhibit-5 by order dated 09.10.2015 passed by the School Tribunal. The controversy noted before this Court while dealing with the said petition was that Respondent No.1/original Appellant claimed that he was being disallowed from signing the muster roll and from marking his attendance as well as from discharging his duties from 2013 and he had posted representations running into about 30 to 40 pages in between 04.04.2013 and 20.04.2015. After he preferred his Appeal under Section 9 of the MEPS Act, 1977 on 24.09.2015, the Petitioner/ Management filed it's Written Statement and contended before the School Tribunal that Respondent No.1/ Appellant was dismissed from service on 30.04.2014 after conducting a full-fledged departmental enquiry. Respondent No.1 insisted that his oral termination is dated 30.04.2014 and the Petitioner Management also insisted that the termination is dated 30.04.2014, but by a written order.

7 Thus, in the earlier round before this Court, I expedited the appeal keeping in view that Respondent No.1/ original Appellant was to retire in March, 2017 and directed the School Tribunal to scrutinize the rival pleadings and the record available and decide the nature of the termination dated 30.04.2014 and in the event there is an enquiry conducted, to consider whether, the enquiry can be sustained under Rules 36 and 37 of the MEPS Rules, 1981.

8 In the above backdrop, Respondent No.1/ Appellant filed an application before the School Tribunal praying for leave to amend the appeal so as to assail the written order of dismissal dated 30.04.2014 and for challenging the domestic enquiry which the Petitioner/ Management claimed to have conducted. The said application is allowed and Respondent No.1/ Appellant amended the appeal.

9 After filing the copy of the amended appeal, Respondent No.1/ Appellant moved an application Exhibit-28 contending inter-alia that notwithstanding the contentions set out in the appeal, by way of abundant precaution the application for condonation of delay is being filed on record so as to enable the School Tribunal to consider the said application while deciding the appeal. The School Tribunal, in my view,

has passed an unusual order dated 23.06.2016. Rather than dealing with the delay as was admitted by Respondent No.1/ Appellant, the School Tribunal went into the aspect as to whether, there actually was any delay and concluded in a manner which does not clearly disclose as to what were the reasons behind passing the order and what exactly was the conclusion of the School Tribunal.

10 In paragraph 16 of the order dated 23.06.2016, the School Tribunal observed that "*The respondent management rightly objected such vague claim of the appellant as such type of delay condonation claim is not permitted by the law*". In paragraph 17, it has observed that "*It was requisite for the appellant to claim delay condonation, not till filing of the appeal, but till filing of present application, from the date of alleged termination*." In paragraph 19, the School Tribunal observed that "*Then why the appellant has filed such type of vague application. It is for him to make specific claim and stood on his own legs by showing sufficient grounds so as to condone the delay*." In paragraph 24, it concluded that "*However, the said stage is yet not come as appeal is not heard on merit and it is for the appellant to claim specific and correct delay condonation, establish the same to be on sufficient grounds or show the appeal is within limitation from the date of knowledge*." Finally, the School Tribunal concludes in paragraph 25

that *"I come to the conclusion that the appellant has not proved that there is delay of 10 months and 25 days in filing the appeal and the same is caused due to sufficient grounds."* With such conclusions, the application Exhibit-28 was "dismissed with costs".

11 It is undisputed that this order has not been challenged by Respondent No.1/ Appellant and after passing of this order, the School Tribunal has proceeded to entertain the appeal.

12 On 08.07.2016, the Petitioner/ Management preferred an application Exhibit-51 contending that as the delay was not condoned by the School Tribunal, the Appeal cannot proceed. By order dated 16.07.2016, impugned in the petition filed on 25.07.2016, the School Tribunal has arrived at a conclusion in paragraph 11 as under:-

"11. *The delay condonation application Exhibit 28 is not dismissed due to want of sufficient cause as is submitted by Advocate Shri P.G.Rudrawar of respondent No.1 and 2 or it is not dismissed because of the appeal is perfectly within limitation as is submitted by Advocate Shri R.N.Kazi of appellant. The same is dismissed because of alternate, vague, uncertain, technical claim of the appellant."*

13 Based on the above observations, the School Tribunal concluded that the appeal cannot be dismissed as not maintainable on the

ground of delay. This order dated 16.07.2016 was challenged by the Petitioner/ Management on 25.07.2016 before this Court in Writ Petition No.12143/2016. The said petition was not moved for a hearing and the School Tribunal, therefore, proceeded with the appeal filed by Respondent No.1/ Appellant.

14 In the petition filed on 16.11.2016 before this Court, the Petitioner/ Management is aggrieved by the order dated 06.10.2016 by which applications Exhibits-59 and 61 filed by the Petitioner/ Management have been rejected.

15 Shri Salunke submits that though the order below Exhibit-51 was challenged in the earlier petition filed on 25.07.2016, he cannot state as to why the said petition was not circulated before this Court. He, however, submits that he has a right to file the applications under whichever provision of law as is available. Exhibit-59 was, therefore, filed under Order 41 Rule 3 of the Code of Civil Procedure praying that as the delay was not condoned, the appeal could not be entertained. The application Exhibit-61 was also filed under Order 41 Rule 3 of the Code of Civil Procedure along with Rule 39(3) of the MEPS Rules, 1981 contending that firstly, the appeal could not progress as the delay was not condoned and secondly, the order of dismissal was not produced by

Respondent No.1/ Appellant along with his amended appeal.

16 Insofar as the order dated 16.07.2016 below Exhibit-51, which was filed under Order 7 Rule 11 of the Code of Civil Procedure, is concerned, the School Tribunal concluded that the appeal cannot be dismissed because the issue of delay in application Exhibit-28 was not considered. By observing in paragraph 13 of the impugned order that prima facie the Management has not proved that the appeal is not maintainable due to delay, the application Exhibit-51 was rejected.

17 Though the Petitioner/ Management approached this Court immediately on 25.07.2016 after the impugned order was passed on 16.07.2016, this petition was not circulated. While considering the other petition filed on 16.11.2016, the papers in this petition filed on 25.07.2016 were called for. Thus, the Management allowed the Tribunal to proceed with the Appeal, which is now at the final stage as the Appellant has already concluded his final submissions.

18 In the above backdrop, it is obvious that the Petitioner/ Management first filed application Exhibit-51 praying that the appeal be dismissed because the delay is not condoned. The said application was rejected. Then, application Exhibit-59 is filed by the Management praying

that the delay is not condoned and therefore, the appeal be dismissed. By the impugned order 06.10.2016, the said application is rejected on the ground that Exhibit-51 was also filed putting forth the same prayers and that application has also been rejected. By the impugned order dated 06.10.2016, the application Exhibit-61 is also rejected by the School Tribunal on the ground that firstly, the dismissal order is already on record as the Management has produced it and hence, the appeal need not be dismissed for non compliance of Rule 39(3) of the MEPS Rules, 1981. Secondly, the same prayer of dismissal of appeal was sought on the ground that the delay is not condoned and hence, Exhibit-61 was also rejected.

19 In the facts as above, since the order dated 16.07.2016 was already challenged in Writ Petition No.12143/2016 filed on 25.07.2016, in my view, the School Tribunal has rightly rejected Exhibit-59 for the reason that the same prayer was put forth (as was set out) in Exhibit-51 only with a difference that the provisions of the Code of Civil Procedure were invoked for praying that as the delay is not condoned, the appeal should be dismissed. So also, Exhibit-61 was rejected because the same prayer made in Exhibits-51 and 59 was once again put forth that the delay is not condoned, the appeal be dismissed. In the light of these facts, Writ Petition No.11936/2016 challenging orders on Exhibits 59 and 61, stands

dismissed and Rule is discharged.

20 In Writ Petition No.12143/2016, though the order dated 16.07.2016 was challenged on 25.07.2016, the Management for reasons best known to them, did not circulate the said petition before this Court until the papers were called for by this Court on 06.12.2016. During this period of about five months, the School Tribunal progressed with the Appeal and heard the final arguments of Respondent No.1/ Appellant on 05.11.2016. Laches on the part of the Petitioner/ Management are evident for two reasons. Firstly, that after making an application Exhibit-51 contending that the delay is not condoned and the appeal be dismissed, which led to the rejection of the application, the Management which approached this Court on 25.07.2016, should have got the matter circulated so as to test the legality and validity of the order dated 16.07.2016. It did not do so and allowed the School Tribunal to proceed with the appeal.

 Secondly, thereafter, the application Exhibit-59 for the same cause as in Exhibit-51 is filed on 23.09.2016 and then the application Exhibit-61 is filed for the same cause as in Exhibit-51 on 29.09.2016.

21 It appears from the conduct of the Management that they were obstructing the progress of the appeal at every stage despite the fact

that the order below Exhibit-51 dated 16.07.2016 was challenged before this Court in the petition filed on 25.07.2016 which was not circulated and no orders from this Court were sought. Keeping this petition pending, the Management kept on filing application after application for the same cause seeking dismissal of the appeal only with a difference that Exhibit-59 invokes Order 41 Rule 3 of the Code of Civil Procedure and Exhibit-61 invokes Order 41 Rule 3 of the Code of Civil Procedure along with Rule 39(3) of the MEPS Rules, 1981.

22 Shri Salunke has relied upon the judgment of the Honourable Supreme Court in the matter of *Ragho Singh vs. Mohan Singh*, **AIR 2001 SCW 2351**, to contend that if there is delay, unless the delay is condoned, the appeal cannot be decided on its merits. Shri Salunke has further relied upon the judgment of the learned Division Bench of this Court in the matter of *Mathuradas Mohta College of Science, Nagpur vs. R.T.Borkar*, **1997 (2) Mh.L.J. 168**, to contend that the learned Division Bench has concluded that if the appeal is barred by limitation and if sufficient cause is shown, the appeal can be entertained.

23 The order below Exhibit-28 dated 23.06.2016 by which the School Tribunal came to the conclusion that "*the appellant has not proved*

that there is delay of 10 months and 25 days in filing the appeal and the same is caused due to sufficient grounds.", has actually created the confusion. The said order is interpreted by the Management as being refusal to condone the delay since the said application has been dismissed. Considering the observations set out in paragraph 25 of the order dated 23.06.2016, the conclusion of the School Tribunal also creates an impression that Respondent No.1/ Appellant has not been certain in specifically demonstrating what is the extent of the delay. With these observations, the School Tribunal has proceeded with the appeal which can only be interpreted to mean that this aspect of delay will have to be considered by the School Tribunal while deciding the appeal.

24 There can be no dispute insofar as the contentions of Shri Salunke are concerned that the delay must be condoned before registering the appeal. However, it cannot be ignored that the Management has not challenged the registration of the appeal even after filing its Written Statement and even after the application Exhibit-5 for interim relief was considered and decided by the School Tribunal, over a period of one year. Had the Management, immediately after receiving the notice of the School Tribunal on the appeal, raised an objection and had sought de-registration of the appeal until the delay is condoned, the said argument could have been entertained. After the matter is heard on the application for

condonation of delay and when Respondent No.1/ Appellant has canvassed his final submissions and the Management is to put forth its final arguments, at the fag end of the adjudicatory process, the prayer that the appeal should not be registered or be dismissed, cannot be entertained on the ground of equity.

25 In the peculiar facts as above and to ensure that ends of justice are met, I find that the School Tribunal will have to be directed that while deciding the appeal finally, it shall first come to the conclusion as to whether, there is a delay and whether, the delay can be condoned keeping in view Order 7 Rule 6 of the Civil Procedure, as has been rightly pointed out by the learned AGP. It cannot be disputed that in normal circumstances an appeal cannot be registered until the delay is condoned, but in the peculiar facts as recorded herein above and the confusion created owing to the Order below Exhibit-28, neither Respondent No.1/ Appellant who has lost his employment could be put to any disadvantage, nor can the contention of the Management on delay be ignored.

26 In the light of the above, Writ Petition No.12143/2016 filed on 25.07.2016 is partly allowed and the School Tribunal is directed to decide Appeal No.20/2015 after hearing the final submissions of the Management on the next date. In doing so, the School Tribunal shall first

conclude as to whether, there is any delay and whether, the said delay deserves to be condoned. Only after this stage, it may then decide the appeal on its merits. For clarity, if it concludes that the delay has been caused and the said delay does not deserve to be condoned, it shall pass an appropriate order without touching the merits of the matter. Rule is made partly absolute in the above terms.

27 At this stage, Shri Salunke, learned Advocate for the Petitioner/ Management prays for staying of this order for three weeks in order to avail a remedy. Shri Ghatge has opposed the said request.

28 During the pendency of these petitions, the appeal before the School Tribunal was not stayed for these past six months. I have also concluded that the Management allowed the School Tribunal to proceed without circulating the petition filed on 25.07.2016 and has inappropriately filed vexatious applications Exhibits 59 and 61, though for the same cause the order on Exhibit-51 was already passed. Considering the conduct of the Management, the request for stay is rejected.