

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****WRIT PETITION NO. 3556 OF 2014**

**Babar Manohar Sonyabapu,)
of Mumbai, aged 51 years, residing at)
503, Shalini Niwas, Adarsh Nagar,)
Hanuman Mandir Road, Kanjurmarg(E),)
Mumbai – 400 042)**

**..... Petitioner
(Orig. Appellant)**

VERSUS

**1. The President,)
Yashwantrao Chavan Shikshan Prasarak)
Mandal, having its office at 92/8, Geeta)
Building, Opp.Sion Bus Depot, Sion (E),)
Mumbai – 400 022)**

**2. The Chief Executive Officer,)
Yashwantrao Chavan Shikshan Prasarak)
Mandal, having its office at 92/8, Geeta)
Building, Opp.Sion Bus Depot, Sion (E),)
Mumbai – 400 022)**

**3. Gagangiri Night High School,)
Municipal Marathi School No.1,)
Kanjur Marg, Bhandup(E),)
Mumbai – 400 042)**

**4. The Education Inspector,)
North-Zone, New Administrative Building)
No.2, IInd Floor, R.C.Marg, Chembur,)
Mumbai – 400 071)**

**5. The Dy. Director of Education,)
(Secondary) for Greater Mumbai,)
Jawahar Balbhavan, Charni Road,)
Mumbai – 400 004)**

6. Shri Madhukar Namdeo Jadhav,)

**Residing at B-003, matoshreekripa)
R.C.F.Colony, Bhandup Village,)
Bhandup (E), Mumbai – 400 042)**

**7. Shri Ashok Tatyaba Godse,)
Residing at Chawl No.1, R. No.2,)
Tavate Niwas, Behind Saraswati High)
School, Kanjur Village, Kanjur Marg (E),)
Mumbai – 400 042)**

**8. The Director of Education (Secondary))
State of Maharashtra, Central Building,)
Pune – 1)**

**..... Respondents
(Orig. Respondents)**

Ms.Kumud Bhatia for the Petitioner.

Mr.Nitin Dhumal for Respondent nos. 1 to 3, 6 and 7.

Mr.A.R.Metkari, A.G.P. for the State – Respondent nos. 4, 5 and 8.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 22nd MARCH, 2016

PRONOUNCED ON : 6th APRIL, 2016

JUDGMENT :

Rule. Learned counsel appearing for the respondents waive service. By consent of parties, matter is heard finally.

2. By this petition filed under Articles 226 and 227 of the Constitution of India, the petitioner (original appellant) has impugned the order dated 25th October, 2013 passed by the learned Presiding Officer of the School Tribunal, Mumbai allowing an application filed by the respondents challenging the jurisdiction of the school tribunal on the ground that the school tribunal had no subject matter jurisdiction. Some of the relevant facts for the purpose of deciding this petition are as under :-

3. The petitioner is qualified as M.A.,B.Ed. On 14th June, 1993, the petitioner was appointed as an Assistant Teacher in the respondent no.3 Night High School situated at Kanjur Marg.

4. On 30th June, 2008, the post of Head Master in the said school fell vacant due to the resignation of Mr.B.R.Ghanwat w.e.f. 30th June, 2008.

5. On 1st July, 2008, the respondent nos. 1 and 2 appointed Mr.Madhukar Namdeo Jadhav, respondent no.6 as an In-charge Head Master of the said school. On 9th September, 2008, the petitioner by his advocate's letter called upon the respondent nos. 1 and 2 to consider his willingness to work as Head Master of the said school by promoting to the said post by taking into consideration his service record. It was alleged in the said letter that the service record of the senior most teacher Mr.M.N.Jadhav and other two senior most teachers Mr.A.T.Godse and Mr.A.B.Rane and also of the two junior most teachers viz. Mr.S.N.Bhosale and Mr.C.D.Desai was not satisfactory.

6. On 1st October, 2008 the petitioner met the Chief Executive Officer of the respondent no.1 and expressed his desire to work as a Head Master.

7. On 1st November, 2008, the petitioner made a representation to the respondent nos. 4 and 5 to direct the respondent no.1 to fill up the Head Master in the said school as per the Rule 3 of the M.E.P.S.Rules. Since there was no favourable response from the respondent nos. 1 to 5 inspite of the representation made by the petitioner, the petitioner filed a writ petition (2767 of 2008) in this court inter alia praying for writ of mandamus directing the respondent nos. 1 and 2

to appoint the petitioner as Head Master and for other reliefs. By an order dated 2nd April, 2009 this court directed the respondent nos. 1 and 2 to look into the grievance of the petitioner.

8. By their advocate's letter dated 26th June, 2009, the respondent nos. 1 and 2 informed the petitioner that it was found that the respondent no.6 was senior to the petitioner and hence he was promoted as Head Master and a proposal of approval of his appointment was sent to the Education Officer on 2nd May, 2009.

9. The petitioner through his advocate's letter dated 31st July, 2009 made a representation to the Director of Education, Pune-1 and called upon him to cancel the appointment of respondent no.6 as Head Master and to take action against the management for their acts of misconduct and inefficiency.

10. Sometime in the month of October 2009, the petitioner filed an appeal(42 of 2009) before the School Tribunal, Mumbai inter alia praying for setting aside the promotion of the respondent no.6 to the post of the Head Master to the respondent no.3 school w.e.f.1st January, 2009, for a declaration that the respondent nos. 7 and 8 were not competent to be considered for promotion to the post of Head Master as per the provisions of Rule 3(3) of the M.E.P.S.Rules and for an order and direction against the respondent nos. 1 and 2 to appoint the petitioner to the post of the Head Master in respondent no.3 school w.e.f.1st January, 2009 and for consequential benefits of difference in pay and allowances of Head Master. On 8th December, 2009, the contesting respondents filed their joint written statement contesting the appeal filed by the petitioner on various grounds.

11. On 21st December, 2009, the petitioner made an application for amendment

of the appeal memo to place on record certain acts of alleged misconduct of the respondent nos. 6 to 8 teachers by which those teachers had alleged to have fabricated the answer-sheets of the students. The petitioner also annexed the answer-sheets of those students in support of his amendment application.

12. On 2nd February, 2010, the respondents made an application before the school tribunal inter alia praying for framing the preliminary issue of jurisdiction of the school tribunal to entertain the appeal filed by the petitioner. The petitioner filed a reply on 5th March, 2010 opposing the said application and contended that the school tribunal had jurisdiction to try and decide the appeal filed by the petitioner.

13. On 25th October, 2013, the learned Presiding Officer, School Tribunal, Mumbai rejected the appeal (42 of 2009) filed by the petitioner on the ground of lack of jurisdiction of the school tribunal to entertain the said appeal and allowed the application filed by the respondents challenging the jurisdiction of the school tribunal to entertain the said appeal. The petitioner has impugned the said order dated 25th October, 2013 passed by the Presiding Officer of the School Tribunal in this writ petition on various grounds.

14. Learned counsel appearing for the petitioner submits that the petitioner was superseded to the post of Head Master of the respondent no.3 school by promoting one of the respondent by ignoring the merits of the petitioner and overlooking the unsatisfactory record of service of the respondent nos. 6 and 7. It is submitted that under rule 3(3) of the said M.E.P.S.Rules, a person can be appointed as a Head Master by promotion only if he has satisfactory record of service along with his seniority and must fulfill the qualification as laid down in Rule 3(1) of the

M.E.P.S. Rules, 1981. It is submitted that the management of school including the night school has to fill up the post of the Head Master by appointing senior most member of teaching staff in accordance with the guidelines Schedule F.

15. It is submitted by the learned counsel for the petitioner that respondent nos. 6 and 7 did not have satisfactory record of service. The petitioner had pointed out by placing on record the answer-sheets of the students which were alleged to have been fabricated by the respondent nos. 6 to 8 which was a serious act of misconduct on their part. It is submitted that since the promotion to the post of Head Master was not only based on the seniority but also on the merits including satisfactory record of service, the respondent nos. 1 and 2 could not have appointed the respondent no. 6 merely on seniority. She submits that while deciding the appeal under section 9 filed by the petitioner alleging supersession of the petitioner based on these submissions, the school tribunal had ample power and jurisdiction to decide all such incidental issues in the said appeal filed under section 9(1) (b) of the M.E.P.S.Act. She submits that the M.E.P.S.Rules specifically provided for the qualification and criteria of promotion of teacher as a Head Master by promotion.

16. It is submitted by the learned counsel that though the petitioner had furnished the documents showing adverse record of service of respondent nos. 6 and others, the school tribunal erroneously rejected the appeal filed by the petitioner and failed to exercise its jurisdiction to decide the said issue contrary to section 9 of the M.E.P.S.Act. It is submitted that since there was a dispute raised by the petitioner in the criteria of deciding the seniority list with regard to the satisfactory service of the person promoted to the post of the Head Master by the respondent nos. 1 and 2, the petitioner could have agitated such issue only by

filing an appeal before the School tribunal under section 9 of the said M.E.P.S.Act, 1977. She submits that the issue of jurisdiction raised by the respondents was a mixed question of facts and law and could not be decided as a preliminary issue.

17. Learned counsel for the petitioner submits that even while deciding the stay application by the school tribunal on 13th November, 2009, the school tribunal had specifically expressed and recorded its view in the said order that the grievances of the petitioner that the respondent no.6 had no satisfactory record and had quoted several instances showing misconduct of the respondent no.6 but at the interim stage, the school tribunal could not consider those allegations unless there was evidence. The school tribunal however while rejecting the stay application on these ground expedited the hearing of the appeal. She submits that though the appeal was filed by the petitioner in the year 2009 and the written statement was filed by the respondents on 8th December, 2009, the respondents filed an application on 2nd February, 2010 for framing a preliminary issue which came to be decided by the school tribunal on 25th October, 2013 after more than three years. She submits that since the hearing of the appeal was already expedited by the school tribunal, the school tribunal could have decided the said appeal itself including the issue of promotion of the respondent nos. 6 and 7 in accordance with rule 3 of the M.E.P.S.Rules, 1981.

18. Learned counsel appearing for the petitioner placed reliance on the judgment of this court in case of **Umesh Balkrishna Vispute vs. State of Maharashtra and others** reported in **2001(1) Mh.L.J. 486** and would submit that the dispute relating to supersession in the matter of promotion squarely falls within the jurisdiction of the tribunal under section 9(1) (b) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977. She submits that the determination of inter se seniority is a disputed question of facts and can be

incidentally decided by the school tribunal. She submits that whether the respondent no. 6 was having satisfactory record of service or not and had merits for being promoted or not itself is a disputed question of fact and thus the school tribunal could not have dismissed the appeal filed by the petitioner at this stage.

19. Learned counsel appearing for the petitioner also placed reliance on the judgment of Supreme Court in case of *N.C.Das vs. Gauhati High* Court reported in **(2012) 2 SCC 321** and would submit that since the promotion could be granted to the respondent nos. 6 and 7 not only on the basis of seniority but also on the basis of merits, the school tribunal could not have dismissed the appeal at the preliminary stage without giving an opportunity to the parties to prove whether respondent no. 6 had satisfied both the conditions i.e. seniority cum merit for being promoted to the post.

20. Learned counsel for the contesting respondents i.e. respondent nos. 1 to 3 and 6 and 7 on the other hand submits that the petitioner was admittedly junior to respondent nos. 6 and 7 in the seniority list. The respondent no.6 was at serial no.1 in the seniority list whereas the petitioner was at serial no.4. He submits that the Director of Education has ample power to hold enquiry under section 4(A)(1)(b) if the management has neglected or has refused to hold an enquiry against the employee in accordance with the provisions of M.E.P.S.Act and the rules made in that behalf. He submits that the allegations of mal-practice etc. made by the petitioner against respondent nos. 6 and 7 could not be decided by the school tribunal. He submits that the school tribunal has rightly rejected the appeal filed by the petitioner on the ground that the only education department was competent authority to decide those questions raised by the petitioner and if satisfied has to take action for the same. He placed reliance on the reasons recorded by the school

tribunal and would submit that since the respondent nos. 6 and 7 were admittedly seniors to the petitioner, they were rightly appointed as Head Masters and thus there was no question of any supersession of the petitioner. He submits that since there was no supersession of the petitioner, the appeal filed by the petitioner itself was not maintainable under section 9(1)(b) of the M.E.P.S.Act, 1977.

21. Learned counsel for the contesting respondents submits that the petitioner had also filed a separate writ petition in this court inter alia praying for his appointment to the post of Head Master on various grounds which were also raised in the appeal filed before the school tribunal. He submits that this court did not grant any relief in favour of the petitioner in the said writ petition. He submits that the management had thereafter looked into the allegations made by the petitioner against the respondent nos. 6 and 7 and having not found any substance in those allegations made by the petitioner conveyed their decision to the petitioner. He submits that the petitioner could not have agitated those issues once again before the school tribunal. He place reliance on the judgment of this court in case of ***Mohan Bapurao Shinde vs. Terana Charitable Trust & Ors.***, reported in **2010(6) Bom.C.R.203** and would submit that since the petitioner was junior to the respondent nos. 6 and 7, promotion of respondent nos. 6 and 7 cannot amount to supersession of the petitioner and thus the appeal under section 9(1)(b) filed by the petitioner alleging supersession itself was not maintainable. He submits that the petitioner was thus not replaced by the respondent nos. 6 and 7 by promotion but those respondents were promoted in view of their seniority over the petitioner.

22. A perusal of the order passed by the school tribunal indicates that the entire order is passed on the premise that the respondent nos. 6 and 7 were admittedly senior to the petitioner. Insofar as the documents produced by the petitioner

against the respondent nos. 6 and 7 including some answer-sheets in support of the submission that due to adverse service record of the respondent nos. 6 and 7, they could not have been promoted as Head Masters as per Rule 3(3) of the M.E.P.S.Rules, 1981 is concerned, the school tribunal has rejected the said submission on the ground that the question of qualification of a person to any post could not be the subject within the purview of section 9 of the M.E.P.S.Act, 1977. It is held that the question regarding point of supersession was a ground of disqualification which could not be considered by the school tribunal and could be considered only by the education department.

23. It is not in dispute that the petitioner had filed an appeal in the year 2009. The contesting respondent had already filed their reply in the year 2009. The application made for framing of preliminary issue of jurisdiction was filed by the contesting respondent on 2nd February, 2010. While refusing to grant interim relief to the petitioner, the school tribunal by an order dated 13th November, 2009 had though expedited the said appeal, rejected the said interim relief on the ground that the grievances of the petitioner that the respondent no.6 had no satisfactory record in respect of which he had quoted many instances showing the misconduct of the respondent no.6, those allegations could not be considered by the school tribunal at that interim stage unless there was evidence. Though the appeal was expedited by the school tribunal by an order dated 21st December, 2009, instead of deciding the appeal itself, the school tribunal decided the preliminary issue which was raised on 2nd February, 2010 by the respondents which contentions were disputed by the petitioner on 5th March, 2010, by deciding the issue of jurisdiction on 25th October, 2013. In my view since the school tribunal had refused to grant interim relief on the ground that those allegations could not be considered by the school tribunal at the interim stage unless there was evidence, in my view, the school tribunal after

refusing to grant interim relief could not have considered the preliminary objection after expiry of three years and ought to have disposed of the appeal itself on merits after giving an opportunity to both the parties to lead oral evidence.

24. There is no dispute that the promotion to the post of Head Master could be considered not only on the basis of seniority but could be considered only on the basis of the seniority cum merit under rule 3(3) of M.E.P.S.Rules. There was serious allegation made by the petitioner against the respondent nos. 6 and 7 not only in the appeal before the school tribunal but also in the earlier writ petition filed by the petitioner. The petitioner had also produced some documents in support of his these allegations before the school tribunal. In my view since the criteria for granting promotion under Rule 3(3) of the M.E.P.S.Rules was seniority cum merit, the school tribunal ought to have considered both the aspects and not only the seniority in the appeal filed by the petitioner.

25. In my view if the school tribunal upon considering the evidence would have come to the conclusion that the respondent nos. 6 and 7 had no satisfactory record of service, though they were seniors to the petitioner, the promotion granted to the respondent nos. 6 and 7 by the management would have been set aside. The allegations made by the petitioner challenging the alleged satisfactory record of the respondent nos. 6 and 7 were disputed questions of fact which had bearing on the promotion granted to the respondent nos. 6 and 7 and thus could not have been brushed set aside by rejecting the same by deciding the same as a preliminary issue. The entire order is based on the premise that the petitioner being junior to the respondent nos. 6 and 7 could not alleged supersession of the petitioner by respondent nos. 6 and 7 and thus the appeal was not maintainable under section 9(1)(b).

26. In my view the issue of jurisdiction of the school tribunal has to be decided on the basis of averments made in the appeal filed by the appellant and not on the basis of the defence raised by the respondents. If the petitioner was able to prove before the school tribunal by leading oral as well as documentary evidence that the respondent nos. 6 and 7 were not meritorious and had adverse service record, the respondent nos. 6 and 7 could not have been promoted as Head Master in view of the criteria for promotion being seniority cum merit. In my view the school tribunal thus while deciding the issue of supersession could have incidentally decided the issue of merits of the respondent nos. 6 and 7 including the issue as to whether they had adverse service record and whether could not have been promoted inspite of such adverse service record though they were found senior to the petitioner.

27. In my view, by dismissing the appeal at the preliminary stage, the school tribunal has not exercised its jurisdiction to decide the criteria for promotion described under Rule 3(3) of the M.E.P.S.Rules, 1981. The school tribunal in my view has failed to exercise its jurisdiction to look into the allegations of non-fulfillment of the criteria for making promotion of the respondent nos. 6 and 7 which had the effect of supersession of the petitioner by the management by appointing the candidates who may not satisfy the condition of Rule 3(3) of the M.E.P.S. Rules, 1981.

28. In my view the order passed by the school tribunal holding that such allegation of mal-practice or adverse record of service of the respondent nos. 6 and 7 could be decided by the authority under the provisions of M.E.P.S.Act read with M.E.P.S.Rules, 1981 and the tribunal could decide only if the petitioner was

superseded by appointment of respondent nos. 6 and 7 is patently erroneous. In my view the school tribunal had jurisdiction to decide the issue of respondent nos. 6 and 7 not having satisfied the criteria for being promoted under rule 3(3) which would have bearing on the supersession of the petitioner. Judgment of the Division Bench of this court in case of **Umesh Balkrishna Vispute** (supra) and judgment of Supreme Court in case of **N.C.Das** (supra) would assist the case of the petitioner.

29. Insofar as judgment of this court in case of **Mohan Bapurao Shinde** (supra) relied upon by the learned counsel for the contesting respondents is concerned, there was no issue raised before this court in the said judgment challenging the appointment of the contesting respondents on the basis of seniority cum merit. The judgment of this court in case of **Mohan Bapurao Shinde** (supra) thus is not be applicable to the facts of this case and is clearly distinguishable.

30. I, therefore, pass the following order :-

(a) The impugned order dated 25th October, 2013 passed by the Presiding Officer, School Tribunal, Mumbai below Ex.12-A allowing an application of the contesting respondents and dismissing the appeal filed by the petitioner on the ground of jurisdiction is set aside. Application made by the contesting respondents (Ex.12-A) is dismissed. Appeal No.42 of 2009 filed by the petitioner is restored to file.

(b) The Presiding Officer, School Tribunal, Mumbai shall decide the Appeal No.42 of 2009 filed by the petitioner in accordance with law without being influenced by the

observations and conclusions drawn in the impugned order dated 25th October, 2013 including the issue whether the contesting respondents had fulfilled the conditions for granting promotion under rule 3 of the M.E.P.S.Rules expeditiously.

(c) Rule is made absolute in the aforesaid terms. No order as to costs.

[R.D. DHANUKA, J.]