

By this petition filed under Articles 226 and 227 of the Constitution of India, the petitioner seeks to impugn the order dated 19th September, 2002 passed by the

learned Presiding Officer, Additional School Tribunal, New Mumbai in Appeal No. 68 of 2000 thereby quashing and setting aside the appointment of the respondent no.1 with retrospective effect i.e. from 7th July, 1999 which was issued by memo dated 13th April, 2000 and directing the management to reinstate the respondent no.1 on the same post. The school tribunal also declared that the respondent no.1 shall be entitled for continuity of his services w.e.f. 7th July, 1999 with all consequential benefits, including the salary of his work done from 7th July, 1999 to 24th April, 2000, by recovering the same from the petitioner if paid to her within three months from the date of the said order. The school tribunal directed the Deputy Director of Vocational Training, respondent no.4 herein to consider the proposal of the appointment of the respondent no.1 sent by the management at an early date. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The respondent no.2 is a society which runs a junior college at Navi Mumbai. The respondent no.3 is a Principal of the said college. The petitioner was appointed as full time instructor on 1st October, 1995 in M.L.T. (MCVC) in the college run by the respondent no.2 subject to the approval of the Deputy Director, Vocational and Training Education Department. It is the case of the petitioner that the approval to the appointment of the petitioner was granted by the respondent no.4 from time to time. It is the case of the petitioner that though the work of the petitioner was satisfactory during the two years probation period, by an order dated 20th April, 1999, the management terminated the services of the petitioner on the ground that under misconception that the petitioner had attained superannuation though the petitioner was only 34 years old.

3. It is the case of the petitioner that the petitioner thereafter made

various representations to the management as well as to the respondent no.4 against the said action on the part of the management in terminating the services of the petitioner on the ground that the alleged superannuation. The management thereafter appointed the respondent no.1 to the said post. The respondent no.4 however did not grant approval to the appointment of the respondent no.1 which was alleged to have been made on 7th July, 1999. Being aggrieved by the said order passed by the management, the respondent no.1 herein filed an appeal before the School Tribunal, Navi Mumbai being Appeal No.68 of 2000 on various grounds inter alia praying for setting aside the said order and for various reliefs. The said appeal filed by the respondent no.1 was resisted by the petitioner herein and also by the management by filing their reply.

4. There was a delay in filing the said appeal filed by the respondent no.1. An application for condonation of delay was filed by the respondent no.1 in the said appeal. By an order dated 15th June 2002, the school tribunal condoned the delay in filing the said appeal filed by the respondent no.1. The said appeal was thereafter heard on merits. By an order and judgment dated 19th September, 2002, the learned Presiding Officer, Additional School Tribunal, New Mumbai allowed the said appeal filed by the respondent no.1 and quashed and set aside the cancellation of the appointment of the respondent no.1 with retrospective effect i.e. 7th July, 1999 by the memo dated 13th April, 2000.

5. The school tribunal also directed the management to reinstate the respondent no.1 on the same post within 40 days from the date of the said order and directed that the respondent no.1 was entitled for continuity of his service w.e.f. 7th July, 1999 with all consequential benefits, including the salary of his work done from 7th July, 1999 to 24th April, 2000 by recovering the same from the

petitioner herein if paid to her within three months from the date of the said order. The school tribunal also directed the respondent no.4 to consider the proposal of the appointment of the respondent no.1 sent by the management at an early date.

6. Mr.Malte, learned counsel appearing for the petitioner invited my attention to the various documents annexed to the petition and also from the compilation of the papers and proceedings in the appeal (68 of 2000) filed by the respondent no.1 before the School Tribunal, New Mumbai. It is submitted by the learned counsel for the petitioner that the petitioner belong to an open category and was appointed in the same post as an open category candidate. He submits that since the petitioner was appointed on probation for a period of two years and since the work of the petitioner was found satisfactory upon completion of the probation period of two years, the petitioner has become a permanent employee. The management could not have terminated the services of the petitioner on an erroneous premise that the petitioner had attained the age of superannuation though the petitioner was only 34 years old on the date of such termination order issued by the management.

7. It is submitted by the learned counsel for the petitioner that the findings of the school tribunal that the petitioner was appointed as a reserved category candidate and that the procedure regarding the appointment of the petitioner was not followed by the management is contrary to the material produced on record before the school tribunal by the parties. He submits that there was no ground raised in the appeal filed by the respondent no.1 before the school tribunal regarding the appointment of the petitioner in the memo of appeal filed by the respondent no.1 before the school tribunal. The school tribunal did not frame any issue in the said appeal filed by the respondent no.1 insofar as alleged illegal

appointment of the petitioner is concerned. The petitioner has not rendered any opportunity by the school tribunal to deal with the issues raised by the respondent no.1. He submits that the school tribunal has framed an issue for the first time in the impugned order and judgment directly which is not permissible in law. He submits that there was no pleading or prayer in the memo of appeal filed by the respondent no.4 for seeking reinstatement of the respondent no.1 for the post on which the petitioner herein was appointed and was relieved by the management.

8. Learned counsel for the petitioner invited my attention to the letters dated 12th January 1996 and 3rd November 1997 issued by the Deputy Director of Education to the management granting approval to the appointment of the petitioner.

9. Learned counsel for the petitioner placed reliance on the written statement filed by the Education Officer in the appeal filed by the respondent no.1 stating that the appointment of the petitioner was not made as a reserved category candidate but he relied upon the open category. He submits that the school tribunal however did not consider the written statement filed by the Education Officer though the same was on record.

10. Insofar as finding of the school tribunal that the petitioner was an average candidate is concerned, it is submitted that the petitioner in any event could not have been relieved on the ground that she was alleged to be an average candidate without conducting any enquiry against the petitioner.

11. Insofar as the issue as to whether the Deputy Director could have issued any direction to the management to continue the services of the petitioner is

concerned, it is submitted by the learned counsel that the said direction issued by the Deputy Director was an administrative act while performing his duties and was not a quasi judicial order. He submits that the Deputy Director had noticed an irregularity in the order passed by the management and had issued such direction to the management which could not have been faulted with by the school tribunal. He submits that the said direction issued by the Deputy Director was admittedly not challenged by the management or by the respondent no.1 herein. It is submitted that even this court can independently issue direction to the management to continue the services of the petitioner.

12. Learned counsel for the petitioner placed reliance on the following judgments in support of various submissions made aforesaid :-

- (a) Judgment of this court in case of ***Central Bank of India vs. Sion Bakers & Confectioners Pvt.Ltd. & Ors., 2008(5) ALL MR 126*** (Paragraph 24)
- (b) Judgment of Supreme Court in case of ***Press Council of India vs. Union of India and another, (2012) 12 SCC 329*** (Paragraph 6)
- (c) Judgment of Supreme Court in case of ***Reserve Bank of India and Anr. vs.Cecil Dennis Solomon and Anr., JT 2003(10) SC 156*** (Paragraph 10)
- (d) Judgment of this court in case of ***Mahatma Phule Krida Prasarak Mandal & Anr. vs. Sumati Tukaram Kashid alias Sumati Vijay Borade & Ors., 2011 (1) Bom.C.R. 688*** (Paragraphs 7 and 8)
- (e) Judgment of this court in case of ***Anna Manikrao Pethe vs. The Presiding Officer, School Tribunal & others, 1998(4)***

Bom.C.R.565 (Paragraphs 7 and 8)

(f) Judgment of this court in case of ***Shailaja Ashokrao Walse vs. State of Maharashtra & others, 2000(1) Bom.C.R. 18*** (Paragraphs 12 and 13)

(g) Judgment of Supreme Court in case of ***Sakiri Vasu vs. State of U.P. and Ors., AIR 2008 SC 907*** (Paragraphs 18 to 21)

(h) Judgment of Supreme Court in case of ***Union of India and another vs. Paras Laminates (P) Ltd., AIR 1991 SC 696*** (Paragraph 8)

(i) Judgment of Supreme Court in case of ***State of Karnataka vs. Vishwabharathi Housing Building Cooperative Society and ors.,in Appeal (Civil) No.9927 of 1996*** dated 17th January, 2003 (Paragraph 12)

(j) Judgment of Supreme Court in case of ***Dwarka Nath vs. Income Tax Officer, Special Circle D-Ward, Kanpur and Anr., AIR 1966 SC 81*** (Paragraphs 18.1 and 18.2)

(k) Judgment of this court in case of ***Chandrashekhar Dhaniram Patel vs. Navshakti Vidyalaya & Ors., 2010(3) Bom.C.R. 283*** (Paragraphs 18.1 and 18.2)

13. Mr.Bodake, learned counsel appearing for the respondent no.1 on the other hand placed reliance on the additional affidavit filed by the respondent no.1 before the school tribunal and also various findings recorded by the school tribunal in the impugned order and judgment thereby allowing the appeal filed by the respondent no.1. He submits that admittedly the petitioner had not challenged the order of termination issued by the management thereby terminating the

services/relieving the petitioner from the services. He submits that the said post on which the petitioner was appointed by the management was a reserved post. He submits that the respondent no.1 was appointed after issuance of the advertisement by the management and after taking his interview and by following requisite procedure for making such appointment. He submits that the management could not have terminated the services of the respondent no.1 on the ground that the Education Officer had not granted approval to his appointment. He submits that if the petitioner desires, the petitioner could have filed the cross objection in the appeal filed by the respondent no.1 before the school tribunal for challenging the order of termination issued by the management insofar as services of the petitioner is concerned. He invited my attention to the prayer clause (c) of the appeal filed by the respondent no.1 before the school tribunal by which the respondent no.1 had applied for setting aside the termination letter issued by the management and so far as termination of the services of the respondent no.1 is concerned. He submits that the respondent no.1 was not required to challenge the order of the Deputy Director and the Education Officer in the said appeal filed by the respondent no.1.

14. Learned counsel appearing for the respondent no.1 placed reliance on the judgment delivered by the Full Bench of this court in case of ***St.Ulai High School & Anr. vs. Shri Devendraprasad Jagannath Singh & Anr., 2007(2) ALL MR 1*** in support of his submission that the management could not have terminated the services of the respondent no.1 on the ground that the approval to the said appointment was not granted by the Education Officer. He submits that the school tribunal itself could have decided the issue of seniority as an incidental issue while deciding the said appeal challenging the order passed by the management.

15. Learned counsel appearing for the respondent no.1 placed reliance on the judgment of this court in case of ***The Secretary, Niti Niketan Shikshan Sanstha & Anr. vs. Smt. Vaishali Ramdas Thote & Anr., 2016(2) ALL MR 371*** and in particular paragraph 12 in support of his submission that the services of an permanent employee cannot be terminated with retrospective effect. He submits that in any event the petitioner was not affected in any manner whatsoever by the order passed by the school tribunal directing the management to reinstate the respondent no.1.

16. Learned counsel appearing for the respondent no.1 placed reliance on the judgment of Supreme Court in case of ***Educational Society, Tumsar & Ors. vs. State of Maharashtra & Ors. 2016(2) ALL MR 947 (SC)*** and would submit that if this court comes to the conclusion that the petitioner was wrongly terminated by the management and in view of the fact that the management did not challenge the order of the school tribunal insofar as payment of backwages is concerned, the court may direct the management to pay the backwages and other consequential benefits to the respondent no.1.

17. Learned counsel appearing for the respondent no.1 placed reliance on the judgment of his court in case of ***Secretary Chowke Panchkiroshi Shikshan Prasarak Mandal vs. Dilip A.Narvekar & Ors. 1992(II) CLR 672*** which has been adverted to by the school tribunal in the impugned order and judgment. Learned counsel also placed reliance on the judgment of Supreme Court in case of ***K.Shekar vs. V.Indiramma & Ors., 2002(2) ALL MR 581 (S.C.)***.

18. Mr.Deshmukh, learned counsel appearing for the management invited my attention to a letter of appointment issued by the management insofar as the

petitioner and the respondent no.1 are concerned. He placed reliance on the order of approval issued by the Education Officer in respect of the petitioner. He also placed reliance on the documents and the affidavits filed by the management as well as by the Education Officer before the school tribunal. He submits that the appointment of the petitioner was made on temporary basis and was made in a reserved post though the petitioner belonged to an open category. He submits that the petitioner had not challenged the order of termination issued by the management by filing any independent proceedings. He placed reliance on the various findings of fact recorded by the school tribunal and would submit that this court cannot interfere with such findings of fact.

19. Learned counsel for the petitioner in rejoinder submits that the respondent no.1 had filed an additional affidavit before the school tribunal which has been considered by the school tribunal in the impugned award though such additional affidavit was not served upon the petitioner by the respondent no.1. He submits that no opportunity was given to the petitioner by the school tribunal to deal with the allegations made by the respondent no.1 in the said additional affidavit. My attention is invited to the Roznama of the school tribunal for the relevant period on record to show that the additional affidavit was tendered by the respondent no.1 on the last date of the hearing without effecting service thereof upon the petitioner.

20. It is submitted by the learned counsel for the petitioner that the termination of the services of the petitioner could not be with retrospective effect. My attention is invited to the averments made in the affidavit filed by the petitioner in this proceedings on 13th April, 2016 stating that the respondent no.1 has been working as a executive at Wockhardt Hospitals which allegation has not

been denied by the respondent no.1. He submits that the respondent no.1 therefore is not entitled to the claim even the backwages. He submits that since the respondent no.1 is already working in the said Wockhardt Hospitals for quite sometime as stated in the said affidavit, the respondent no.1 could not have been granted the reinstatement with continuity of service by the school tribunal.

21. Insofar as issue of locus standi raised by the respondent no.1 against the petitioner is concerned, it is submitted by the learned counsel for the petitioner that though the petitioner had not filed a separate appeal impugning the order of termination or relieving the petitioner from the said post on the ground that the petitioner had attained the age of superannuation, it is not in dispute that the respondent no.1 had already impleaded the petitioner in the appeal filed before the school tribunal on the ground that the petitioner was likely to be affected by the decision, if any, that would be rendered by the school tribunal. He submits that the respondent no.1 thus cannot be allow to raise any issue of locus standie against the petitioner in this proceedings at this stage. Learned counsel for the petitioner distinguished the judgment relied upon by the learned counsel for the respondent no.1 and would submit that the fact before the Supreme Court in those judgments were totally different and are clearly distinguishable in the facts of this case. He also placed reliance on the affidavit in reply filed by the Education Officer in this proceedings in support of his contention that the petitioner was appointed in the open category post and not on the reserved post.

REASONS AND CONCLUSIONS

22. A perusal of the order indicates that the school tribunal has allowed the appeal filed by the respondent no.1 on the following grounds:-

(a) The petitioner herein had not challenged the termination order dated 20th April, 1999 issued by the management relieving her services from 20th April, 1999 by filing an appeal before the school tribunal. The services of the petitioner were rightly terminated by the management.

(b) The post was reserved for scheduled caste category whereas the petitioner belong to an open category. The appointment of the petitioner was not made by following due procedure as contemplated under the provisions of MEPS Act. No advertisement was issued inviting applications for the said post by the management.

(c) The termination letter dated 20th April, 1999 was thus binding on the petitioner herein and also on the management.

(d) The appointment of the respondent no.1 herein (original appellant) was filled up after following due procedure on a clear and permanent vacancy which had arisen after termination of the services of the petitioner.

(e) The order passed by the Deputy Director of Vocational Education and Training to continue the appointment of the petitioner amounted to an illegal interference and was without jurisdiction and thus liable to be ignored.

(f) The termination of the respondent no.1 without notice or pay was in violation of the MEPS Rules and was illegal. The respondent no.1 was entitled to backwages for work done from 7th July, 1999 to 24th April, 2000 by recovering the same

from the petitioner herein if the same is paid to her, within three months from the date of the said order.

(g) The petitioner is not entitled for continuing her services as per illegal directions given by the Deputy Director of Vocational Training.

23. A perusal of the record indicates that insofar as termination of the services of the petitioner is concerned, the letter of termination clearly indicates that she was relieved from her services on the ground that she was superannuated though she was 34 years old on the date of the said order passed by the management. In my view the termination of the services of the petitioner on the ground that she was superannuated at the age of 34 itself was ex-facie illegal and contrary to the provisions of MEPS Act and the Rules.

24. A perusal of the affidavit in reply filed by the management before the school tribunal on 16th September, 2000 indicates that it was the case of the management before the school tribunal that the petitioner was appointed as a full time instructor in M.L.T. on 1st October 1995 subject to the approval of the Deputy Director, Vocational and Technical Education Department. The said Deputy Director had granted approval to the appointment of the petitioner from time to time and was satisfied by the satisfactory work of the petitioner during her two years probation period and thus had approved her appointment by order dated 3rd November, 1997 until further orders. It is stated in the affidavit in reply filed by the management before the school tribunal that the vacancy had occurred by relieving the petitioner from the said post which was filled up by an order of appointment dated 4th July, 1999 thereby appointing the respondent no.1 on the said post subject to the approval of the Deputy Director. In the said affidavit, the

management has also referred to a letter dated 27th March, 2000 addressed by the Deputy Director informing the management that the services of the petitioner were extinguished in the illegal manner by the management and against the established rules and was therefore unjustifiable.

25. In the said letter the Deputy Director also mentioned that the petitioner had worked for 4 ½ years i.e. more than two years satisfactorily and had become permanent and thus the appointment of the respondent no.1 herein could not be approved. In the said letter, the Deputy Director however opined that the appointment of the respondent no.1 be cancelled with immediate effect and in his place the petitioner be appointed with retrospective effect. Pursuant to the said letter dated 27th March, 2000 the management issued a memo dated 13th April, 2000 thereby cancelling the appointment of the respondent no.1 on the ground that his appointment was not approved by the Deputy Director of Vocational Training.

26. The management similarly issued its memo dated 13th April, 2000 thereby informing the petitioner that her earlier appointment order was continued. The petitioner on 27th April, 2000 joined the post vacated by the respondent no.1 herein and informed the Deputy Director of Vocational Training vide their letter dated 11th May, 2000 about the joining of the post by the petitioner on 27th April, 2000. The management had opposed the stay application filed by the respondent no.1 before the school tribunal by placing all these facts on record and had contended that the said stay application has become infructuous.

27. I am thus not inclined to permit the learned counsel for the management to make any submissions contrary to the submissions made by the management before the school tribunal before this court. It is clear on perusal of

the record that the management had opposed the appeal filed by the respondent no.1 and had justified their action in re-appointing the petitioner to the said post.

28. A perusal of the affidavit in reply filed by the Deputy Director of Vocational and Training, the respondent no.3 herein before the school tribunal clearly indicates that the appeal filed by the respondent no.1 herein was opposed by the respondent no.3 on the ground that the respondent no.1 was not appointed in a clear vacancy. It is further stated in the said affidavit that the petitioner was appointed by nomination as an instructor on M.L.T. Course by the management in the academic year 1995-96 on an unreserved post and the appointment of the petitioner w.e.f. 1st October, 1995 to the end of academic year was approved by the respondent no.3 vide his letter dated 12th January, 1996. The petitioner was re-appointed by the management stating that the post of the instructor for M.L.T. course was unreserved as per roaster submitted by the management. The respondent no.3 had accordingly approved the appointment of the petitioner on the basis of the roaster submitted by the management.

29. In the said affidavit, the respondent no.3 had stated that the appointment of the petitioner was on probation period of two years w.e.f. 1st October, 1995 to 30th September, 1997 and on completion of the probation period, the management had submitted a proposal for permanency in respect of the petitioner by stating that her work was satisfactory and the post was unreserved. The respondent no.3 had accordingly approved the services of the petitioner on permanent basis vide letter dated 3rd November, 1997. The Deputy Director of Vocational Training confirmed in the said affidavit that the appointment of the petitioner was on the clear vacancy. It is further stated that since the post of the instructor was already filled up by the appointment of the petitioner, the services of

the respondent no.1 were accordingly not approved by the respondent no.3. It is further stated in the affidavit that the respondent no.3 had not approved the appointment of the respondent no.1 w.e.f. 10th July 1999 on the ground that the management had submitted the proposal and had falsely stated that the petitioner had been relieved due to her superannuation on 20th April, 1999 which was totally incorrect. It is stated that the management had shown the said post reserved for reserved category employee at the time of the appointment of the respondent no.1 though the said post was shown as unreserved in the proposal for permanency submitted by the management in respect of the petitioner. The Deputy Director of Vocational and Training also opposed the said appeal filed by the respondent no.1 on various grounds and has contended that the management had falsely relieved the petitioner from her services on the false ground of superannuation. The learned A.G.P. relied upon the affidavit filed by the respondent no.4 before the school tribunal.

30. A perusal of the order indicates that the school tribunal has totally ignored the record produced and the averments made by the management and the respondent no.4 in the impugned order. In my view, finding of the school tribunal that the petitioner was appointed on a reserved post is contrary to the records is perverse.

31. Insofar as the finding of the school tribunal that the petitioner was an average candidate and on that ground also the petitioner could not have been promoted by the management is concerned, a perusal of the record indicates that the petitioner was never communicated with any such observation alleged to have been made by the management about the work of the petitioner. In my view if the services of the petitioner was required to be terminated after expiry of the

probation period, the management was required to conduct any enquiry against the petitioner. This finding of the school tribunal in my view is thus totally perverse.

32. Insofar as the finding of the school tribunal that the Deputy Director of Vocational Training could not have issued any direction to the management to continue the services of the petitioner on the ground that such direction was beyond his powers is concerned, though the Deputy Director of Vocational Training cannot give such specific direction to the management to continue the services of a teacher, there is no dispute that the duty is cast on the Deputy Director or an Education Officer to ensure that the teacher with requisite qualification are appointed and the provisions of law are duly followed by the management. In my view the directions issued by the Deputy Director of Vocational Training in this case cannot be construed as a mandatory order against the management to continue the services of the petitioner. In the facts of this case, the appointment of the petitioner having been terminated on the ground that the petitioner had attained the age of superannuation at the age of 34 was totally illegal and thus the petitioner even otherwise was entitled to be reinstated to the said post in accordance with law. It is not in dispute that the direction issued by the Deputy Director of Vocational Training to the management to continue the services of the petitioner was neither challenged by the respondent no.1 nor by the management.

33. Insofar as judgment of Division Bench of this court in case of *Shailaja Ashokrao Walse* (supra) and in case of *Anna Manikrao Pethe* (supra) relied upon by the learned counsel for the petitioner is concerned, Full Bench of this court in case of *St.Ulai High School & Anr.* (supra) has considered both these judgments and have partly overruled the said two judgments insofar as the view taken by the Division Bench in those two judgments that the approval of the

Education Officer to the appointment of any teacher was mandatory and/or was required is concerned.

34. A perusal of the record indicates that the school tribunal has considered the additional affidavit filed by the respondent no.1 before the school tribunal few days before the date of closing of the hearing and which was not even served upon the petitioner. Learned counsel appearing for the petitioner is right in his submission that since the petitioner was not granted any opportunity to deal with the additional affidavit filed belatedly by the respondent no.1, the school tribunal could not have considered such additional affidavit filed by the respondent no.1.

35. A perusal of the record indicates that the school tribunal has relied upon the allegations made by the respondent no.1 against the petitioner in the said additional affidavit though the same was not served upon the petitioner. The impugned order passed by the school tribunal thus deserved to be set aside on this ground also.

36. Insofar as finding of the school tribunal that since the order of termination of the services of the petitioner was not challenged by the petitioner by filing any appeal under section 9 of the MEPS before the school tribunal and thus the petitioner had not locus standi to oppose the reliefs claimed by the respondent no.1 in the appeal filed by him before the school tribunal is concerned, there is no dispute that the respondent no.1 himself had impleaded the petitioner in the said appeal filed before the school tribunal, having found the petitioner as a necessary and/or proper party in the said appeal. The petitioner had opposed the said appeal before the school tribunal by filing an affidavit. The school tribunal has

considered the case of the petitioner also on merits and has rendered various findings about the alleged illegal appointment of the petitioner in the impugned order.

37. In my view since the respondent no.1 was appointed in the vacancy having arisen in view of the illegal termination of the petitioner and the petitioner having been impleaded as a party respondent in the said appeal filed by the respondent no.1, the petitioner had locus standi to oppose the said appeal filed by the respondent no.1. The school tribunal did not direct the respondent no.1 to delete the name of the petitioner from the arena of the said appeal filed by the respondent no.1. The finding thus rendered by the school tribunal that the petitioner had no locus standi to oppose the appeal filed by the respondent no.1 on the ground that the petitioner had not challenged the order of termination of her services is totally untenable and deserves to be set aside.

38. Insofar as finding of the school tribunal that since the approval of the Education Officer was not required, the management could not have terminated the services of the respondent no.1 on the ground that the respondent no.4 had refused to approve the appointment of the respondent no.1 is concerned, there is no dispute about this proposition of law laid down by the Full Bench of this court. However, since the services of the petitioner were illegally terminated by the management on the ground that the petitioner had attained the age of superannuation at the age of 34 and the respondent no.1 was appointed in the said vacancy having arisen in view of the illegal termination of the services of the petitioner, the appointment of the respondent no.1 made by the management on the said post was even otherwise illegal and thus no reliefs could have been granted by the school tribunal in favour of the respondent no.1.

39. Insofar as the submission of the learned counsel for the respondent no.1 that the services of the respondent no.1 could not have terminated with retrospective effect is concerned, a perusal of the record indicates that the services of the respondent no.1 were not terminated by the management with retrospective effect.

40. Insofar as submission of the learned counsel for the respondent no.1 that even if it is held by this court that the management had wrongly terminated the services of the petitioner and had wrongly promoted the respondent no.1 to the said post of headmaster, the salary of the respondent no.1 for the work done by the respondent no.1 will have to be paid by the management is concerned, the respondent no.1 in my view has rightly placed the reliance on the judgment of Supreme Court in case of *Educational Society, Tumsar & Ors.* (supra). However, a perusal of the affidavit filed by the petitioner in this petition indicates that the petitioner had brought on record that the respondent no.1 has been working as an executive with Wockhardt Hospitals which fact is not disputed by the respondent no.1. In my view the school tribunal thus could not have directed the management to recover the salary paid to the petitioner to enable the management to pay to the respondent no.4 in the facts and circumstances of this case. The appointment of the petitioner was illegally terminated by the management and thus the petitioner could not have been asked to refund the payment of salary paid to the petitioner though the services were rendered by the petitioner.

41. Insofar as the finding of the school tribunal that the management had not issued any advertisement for inviting applications to the post of Assistant teacher when the petitioner was appointed to the said post and that the appointment

of the respondent no.1 was made by the management after following requisite procedure is concerned, a perusal of the affidavit in reply filed by the management as well as by the respondent no.4 before the school tribunal clearly indicates that the appointment of the petitioner was made by the management after following requisite procedure and such appointment was approved by the respondent no.4 from time to time. The approval granted by the respondent no.4 to the appointment of the petitioner was not challenged by the respondent no.1 or by the management.

42. Insofar as appointment of the respondent no.4 is concerned, since the termination of the services of the petitioner by the management is totally illegal, the management could not have appointed the respondent no.1 to the said post and thus the school tribunal could not have held that the services of the respondent no.1 could not have terminated by the management, which appointment was alleged to have been made after following the requisite procedure by the management.

43. Insofar as judgment of Supreme Court in case of ***K.Shekhar vs. V.Indiramma & Ors. 2002(2) ALL MR 581 (S.C.)*** relied upon by the learned counsel for the respondent no.1 is concerned, in my view the said judgment is not applicable to the facts of this case even remotely and thus the reliance placed on the said judgment is misplaced.

44. Insofar as judgment of Supreme Court in case of ***Akola Education Sty. And anr.*** (supra) relied upon by the learned counsel for the respondent is concerned, it is held by the Supreme Court that if the school is an unaided one, the school tribunal has to take into consideration the financial condition of the school while awarding the backwages is concerned, there is no dispute about this

proposition of law laid down by the Supreme Court. The said judgment however would not assist the case of the respondent no.1 insofar as facts in this case are concerned.

45. Insofar as judgment of this court in case of ***The Secretary, Niti Niketan Shikshan Sanstha & Anr.*** (supra) relied upon by the learned counsel for the respondent no.1 is concerned, it is held by this court that if the services of the teacher is terminated due to unsatisfactory performance which was not periodically brought to the notice of the teacher with intent to intimating shortcoming and affording opportunity to improve, such termination would be illegal and is set aside is concerned, in my view the said judgment of this court would not assist the case of the respondent no.1 but would assist the case of the petitioner.

46. In my view the impugned order passed by the school tribunal is totally contrary to the provisions of MEPS Act and MEPS Rules and contrary to the well settled principles of law laid down by the Supreme Court and this court in various judgments referred to aforesaid and thus deserves to be set aside.

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

(a) Writ Petition No. 5900 of 2002 is made absolute in terms of prayer clauses (a) and (b).

(b) The impugned order and judgment dated 19th September, 2002 passed by the school tribunal in Appeal No. 68 of 2000 is set aside.

(c) Appeal No. 68 of 2000 filed by the respondent no.1 before the learned Presiding Officer, Additional School

Tribunal, Navi Mumbai is dismissed.

- (d) Rule is made absolute in the aforesaid terms.
- (e) In view of the disposal of the writ petition, civil applications pending if any, are also disposed of.
- (d) No order as to costs.

[R.D. DHANUKA, J.]