

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

WRIT PETITION NO.522 OF 2008

Vasant s/o.Dnyanoba Darade,
Age: 33 Years, Occu: Service,
R/o. C/o. Mahatma Phule Secondary
and Higher Secondary School,
Ekapur, Tq.Kandhar, Dist.Nanded **PETITIONER**

VERSUS

1. The State of Maharashtra
Through Secretary
Education Department,
Mantralaya, Mumbai-32.
2. The Deputy Director of Education
Latur Division, Latur
3. The Education Officer [Secondary]
Zilla Parishad, Nanded.
4. The Secretary,
Mahatma Phule Gramin Shikshan
Prasarak Mandal Shekapur,
Tq.Kandhar, Dist. Nanded.
5. The Head Master,
Mahatma Phule Secondary and
Higher Secondary School,
Shekapur, Tq. Kandhar,
Dist. Nanded.

RESPONDENTS

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Mr.R.R.Suryawanshi, Advocate for the
petitioner
Ms.S.S.Raut, AGP for respondent-State.
Mr.A.S.Kale, Advocate holding for
Mr.S.B.Talekar, Advocate for respondent nos.4
and 5.

**CORAM: S.S.SHINDE &
S.M.GAVHANE, JJ.**

Reserved on : 18.04.2018
Pronounced on : 27.04.2018

JUDGMENT: (Per S.S.Shinde, J.):

1] This Petition is filed with the following prayers:

C. By issue of writ of certiorari or any other appropriate writ, order or directions, to quash and set aside the impugned suspension order dated 2.3.2001 passed by the respondent No.5-Head Master.

D. By issue of writ of mandamus or any other appropriate writ, order or directions to direct the respondent No.2 to 5 to reinstate the petitioner in service on the post of Assistant Teacher in respondent No.5 – School and release the payment of salary from the date 2.3.2001 to till this date as per rules.

E. By issue of writ of mandamus or any other appropriate writ, order or

directions to direct the respondent No.2 to 5 to release and pay the subsistence allowance to the petitioner from 2.3.2001 to till this date and continue as per the Rules.

2] It is the case of the petitioner that, on 01.07.1997, the petitioner was appointed as an Assistant Teacher in respondent no.5—School. On 15.11.2000, the Education Officer [Secondary], Zilla Parishad, Nanded has granted permanent approval to the services of the petitioner. On 01.03.2001, one Mr. Nivrutti Baswante has filed criminal complaint against the petitioner and other persons with the Kandhar Police Station. On the basis of said complaint, the Kandhar Police Station registered Crime No.31/2001 against the petitioner and other persons. Thereafter, on 02.03.2001, respondent no.5 issued suspension order without following due procedure of law

as prescribed under the provisions of the Maharashtra Employees of Private Schools [Conditions of Service] Rules, 1981 [for short 'the Rules of 1981']. On 08.06.2001, the petitioner filed application for bail before the Judicial Magistrate First Class, Kandhar, and after hearing the parties, the Magistrate has granted bail to the petitioner, and since then the petitioner is on bail.

3] It is further the case of the petitioner that, after release on bail, the petitioner has approached to respondent nos. 4 and 5 and requested them to allow him to join the duty, and also requested to pay him subsistence allowance from the date of suspension i.e. from 02.03.2001, but respondent no.5 has not paid any heed to the request of the petitioner. Thereafter, the petitioner has made several representations to respondent nos.2 and 3 praying therein to

direct respondent nos.4 and 5 to allow the petitioner to join the duty and to release the subsistence allowance from 02.03.2001. Instead of releasing the subsistence allowance and instead of allowing him to join the duties, the Head Master, by letter dated 25.01.2003, communicated the petitioner that, the matter of the petitioner will be recommended to respondent no.3 for grievance of the petitioner and further communicated that, not to make correspondence with respondent no.5 – school. On the very same day, respondent no.5 written letter to respondent no.3 and sought guidance in regards to release of subsistence allowance to the petitioner. Thereafter, the petitioner has made several representations to respondent no.3 and requested to allow the petitioner to join the duty, and also for payment of subsistence allowance, but respondent no.3 has not taken any pains and

kept the representations of the petitioner pending.

4] It is further the case of the petitioner that, respondent no.3 did not consider that, mere filing of the criminal case is not sufficient ground to suspend the petitioner, but the conviction is the condition precedent, but the said principle is ignored by respondent no.3 and placed the petitioner under suspension for more than 6 years, which is patently illegal, and as such the impugned suspension order is also liable to be quashed and set aside. The respondents did not consider that, the alleged offence is not proved against the petitioner as yet in the Criminal Court, and as such, the petitioner cannot be placed under suspension for more than 6 months, but the settled principle of law is ignored by the respondents and till this date have not

released the subsistence allowance to the petitioner.

5] Learned counsel appearing for the petitioner submits that, the suspension order dated 02.03.2001 issued by respondent no.5 is unreasonable, arbitrary and against the principles of natural justice. The suspension order is issued without following the procedure under Rule 28 [5], 33 [1] and not compliance the provisions as per the Rule 33 [5], [6] of the Rules of 1981, therefore, the suspension order is unjust and illegal.

6] On the other hand, learned counsel appearing for respondent nos.4 and 5 relying upon the affidavit-in-reply filed on behalf of respondent nos.4 and 5 submits that, the petitioner alleged to have committed offence punishable under Sections 376 [g], 302 and 34 of the Indian Penal Code. The charge sheet has been filed in the aforesaid crime on

21.03.2002. The Deputy Director of Education, Aurangabad had directed respondent no.4 society to place the petitioner under suspension immediately subject to the provisions contained in Rules 31 and 32 of the Rules of 1981 on 02.03.2001. The Education Officer [Secondary], Zilla Parishad, Nanded has accorded suspension of the petitioner vide order dated 02.03.2001. Thereafter, respondent no.4 placed the petitioner under suspension as directed by the Deputy Director of Education, Aurangabad as well as the Education Officer [Secondary], Zilla Parishad, Nanded. The communication dated 05.12.2002 addressed to the Education Officer [Secondary], Zilla Parishad, Nanded sent by the petitioner was received by respondent nos.4 and 5. Thereafter, respondent no.5 sought guidance in respect of the said communication dated 05.12.2002 from the Education Officer [Secondary], Zilla

Parishad, Nanded, vide letter dated 25.01.2003. Respondent nos. 4 and 5 did not receive any guidance from the Education Officer, Zilla Parishad, Nanded. The petitioner stopped to attend the school, however, the petitioner was placed under suspension vide order dated 02.03.2001. After order of suspension, neither the petitioner remained present in the school, nor he signed the muster roll. Except the communication dated 05.12.2002, the petitioner never approached respondent nos.4 and 5 to ask for subsistence allowance. The Judicial Magistrate First Class, Kandhar has committed the case of the petitioner to the Additional Sessions Judge, Kandhar, and the same is pending for trial. Since the petitioner was placed under suspension against the criminal proceedings, which is pending, it is not possible for respondent nos.4 and 5 to reinstate the petitioner.

After suspension, petitioner did not attend the school, therefore, it was not possible to release the subsistence allowance. The petitioner has 40 acres of agricultural land and most of the land is irrigated.

7] It is submitted that, as per Rule 33 [4] of the Rules of 1981, the employee under suspension shall not leave the Headquarter during the period of suspension without approval of the Chief Executive Officer. The petitioner never sought permission to leave the headquarter during the suspension period. On the contrary, the petitioner remained absent without prior approval of the Chief Executive Officer. The petitioner is not entitled to get subsistence allowance on account of breach of provisions of Rule 33 [3] and [4] of the Rules of 1981.

8] Respondent nos.4 and 5 have also filed additional affidavit-in-reply. It is

stated in the said affidavit-in-reply that, the petitioner was suspended by respondent no.5, pursuant to the direction of the Deputy Director of Education, Aurangabad, vide order dated 02.03.2001. Thereafter, respondent no. 5 time and again directed the petitioner to remain present in the school during his suspension period, however, the petitioner did not pay any heed to the request / direction of respondent no.5. Respondent no. 5 informed the petitioner vide communication dated 10.03.2003 that, the Education Officer had directed him to reinstate the petitioner and not to pay any subsistence allowance since the petitioner did not attend the school during the suspension period despite several reminders. Despite repeated reminders / directions to the petitioner to join the school, he failed to obey the said direction, therefore, respondent no.4 was constrained to issue show cause notice on 25.06.2004,

seeking explanation about absenteeism. Thereafter, the petitioner did not reply to the said notice, therefore, respondent no.5 sought permission from the Education Officer, Nanded, to fill up the post that had fallen vacant due to absenteeism of the petitioner since the students were suffering great hardship, which is evident from the communication dated 16.09.2004. Respondent no.5 issued a communication on 20.04.2005 to the petitioner thereby informing him that, if he did not resume his duties, the disciplinary action would be initiated against him. The petitioner did not even bother to reply to the aforesaid notice, therefore, respondent no.5 issued few more communications dated 20.06.2006, 13.08.2007 and 15.07.2008 to the petitioner directing him to remain present in the school.

9] It is further stated that, despite repeated reminders to the petitioner, he did

not turn up to the school. Respondent no.5 has published a public notice in local daily news paper '*Prajawani*' in its issue dated 20.12.2008, seeking presence of the petitioner in the school, however, the petitioner did not resume his duties. The services of the petitioner were deemed to have been voluntarily abandoned due to his continuous absence without leave for a period exceeding five years as per Rule 16 [3] of the Rules of 1981, and the same was communicated to the petitioner vide communication dated 05.01.2009 by respondent no.5. Respondent no.5 sought permission from the Education Officer, Zilla Parishad, Nanded to publish an advertisement to fill up the post fallen vacant due to the absenteeism of the petitioner vide communication dated 06.07.2009. Accordingly, the permission was granted by the Education Officer, Nanded to fill up the said post. One Smt.Rekha Atmaram

Gite was appointed on the said post vide order dated 15.01.2010, by following due selection process so also her appointment was also duly approved by the Education Officer vide communication dated 30.01.2013. Thereafter, on 27.05.2011 and 30.07.2011, the petitioner approached respondent no.5 with a request to allow him to join the school so also to pay him arrears, however, respondent no.5 informed the petitioner that, his services are already terminated as per Rule 16 [3] of the Rules of 1981.

10] Learned AGP appearing for respondent – State relying upon the averments in the affidavit-in-reply filed on behalf of respondent no.3 submits that, as per Rule 33 [5] of the Rules of 1981, if an employee is detained in police custody or judicial custody for a period exceeding forty eight hours, he shall not be allowed to draw any pay and allowances for such period until the

termination of the proceedings taken against the employee. The petitioner has admitted in the Petition that, he was in jail for a period of 90 days. Therefore, the request of the petitioner regarding subsistence allowance with effect from suspension i.e. from 02.03.2011 to the date of release on bail i.e. 08.06.2001 is not legal. After release on bail, the petitioner could have submitted representation to respondent nos.4 and 5 in respect of joining of the service. Therefore, the petitioner submitted his representation to the office of respondent no.5 i.e. the Head Master vide letter dated 05.12.2002. After receiving the representation, respondent no.5 made communication to the petitioner vide letter dated 25.09.2003 regarding joining of service and the said communication is annexed to the petition. Thereafter, respondent no.5 has taken cognizance of the petitioner's

application and communicated the petitioner to join the services. The suspension order dated 02.03.2001 issued by respondent no.5 is reasonable as per Rule 33 [5] of the Rules of 1981. The respondent has made communication vide letter no. 7329 dated 19.06.2008 to respondent no.5 Head Master to take proper action as per Rule 33 [5] of the Rules of 1981. As per Rule 33 [5] of the Rules of 1981, the petitioner is not entitled for the subsistence allowance for the aforesaid period. Therefore, there is no substance in the petition and the same deserves to be dismissed.

11] Learned counsel appearing for the petitioner relying upon the rejoinder to the replies filed by respondent nos.4 and 5 submits that, it is not true that the petitioner left the headquarters during the period of suspension, and the petitioner remained absent without prior approval of the

Chief Executive Officer, Zilla Parishad, Nanded. It is also not true and correct that, the petitioner has 40 acres of agricultural land and the same is irrigated, there is no any land in the name of petitioner and he is not getting income from any other source except the payment of the service. After granting bail in Crime No.31/2001, the petitioner approached the Headmaster of the School and Secretary of the Management to join the duties, but respondent no.5 did not allow him to join the duties. Thereafter, petitioner approached respondent no.3 Education Officer and requested to take action against respondent nos.4 and 5 as they have not permitted the petitioner to join the duties and also requested to make an arrangement for joining his duties. The petitioner filed written representations through RPAD and personally to respondent nos. 3 to 5. The petitioner approached

respondent nos.3 to 5 and requested for subsistence allowances as per the Rules. Respondent nos. 4 and 5 did not allow the petitioner to enter into the premises of the school and they have given threats to the petitioner and warned the petitioner not to come in the school. Respondent nos. 4 and 5 specifically admitted in the affidavit in reply that, since the criminal proceedings are pending against the petitioner, it has not been possible for them to reinstate the petitioner, this contention of respondent nos. 4 and 5 are against their own version that, the petitioner never came to the school for joining the duties, is totally incorrect, and they also not paid subsistence allowance to the petitioner during the suspension period. The documents annexed with the additional affidavit in reply by respondent nos. 4 and 5 are manipulated and fabricated only to show that they have performed their

part. The letters, which were issued by the respondents to the petitioner, were not received by the petitioner at any point of time. Respondent nos.4 and 5 have tried to show that, they have made communication to the petitioner and called upon him to join the duties. The documents annexed by respondent nos. 4 and 5 at page 103 to 122 at Exh.R1 to R8 of the additional affidavit in reply are manipulated and fabricated one.

12] It is further submitted that, respondent nos.4 and 5 knowingly and intentionally issued the public notice in daily '*Prajawani*', which is circulated in Nanded city only. Respondent nos.4 and 5 had knowledge about the resident of the petitioner i.e. Ahmedpur Taluka, District Latur. The respondent nos.4 and 5 should have published the said notice in widely circulated news paper in Latur District. Without doing so, respondent nos. 4 and 5

intentionally and knowingly issued the said public notice in daily Prajawani, which is circulated in Nanded City only. The petitioner had no knowledge about publication of the aforesaid notice, as he was residing at Latur District. The letter dated 05.01.2009 sent by respondent nos.4 and 5 is not received by the petitioner, and therefore, the petitioner was unable to take steps as against the said letter. Respondent no.4 had never issued termination order to the petitioner, otherwise the petitioner can file appeal against the said order before appropriate Forum. The petitioner had no knowledge about the letter dated 06.07.2009 at Exh.R9 and R.10. The communication dated 26.09.2011 was not received by the petitioner at any point of time, and the said document is manipulated and fabricated. There is no signature of the petitioner on the said document in respect of receipt of the same.

According to the petitioner, another person has signed on the said document. In other documents also, it is shown that one Rekha Vasant Darade has received the said documents, but the signature on the said documents are manipulated one only to show that, the petitioner has served with the said letters. Therefore, respondent nos. 4 and 5 have intentionally and deliberately sent the letters to the petitioner by UPC, but they have not taken any pains to send it by RPAD only to avoid the service of the letters issued by respondent nos.4 and 5. Thereafter, the petitioner has filed Appeal No.25/2012 before the School Tribunal, Latur, challenging the oral/otherwise termination dated 02.03.2001 along with application for condonation of delay. The application filed by the petitioner for condonation of delay has been dismissed by the School Tribunal on 16.01.2016. Thereafter, the said order was

challenged before the High Court by way of filing Writ Petition Stamp No.20359/2017 and the same is pending for admission.

13] It is further submitted that, pursuant to the crime No.31/2001, charge sheet has been filed, and the case was committed to the Special Court and it is numbered as Special [Atrocities] Case No.37/2003 [New] [Special [Atrocities] Case No.8/2002 [Old]. After hearing the parties and after considering the documents placed on record, the Ad-hoc Additional Sessions Judge, Kandhar was pleased to acquit the present petitioner of the offence punishable under Sections 376, 376 [2] [g], 309, 109 of the IPC r/w. Section 3 [2] [v] of the Scheduled Castes and Scheduled Tribes [Prevention of Atrocities] Act, 1989, whereas accused no.2 namely Chandrakant Vithal Puttewad is convicted by the judgment and order dated 09.03.2011. Respondent nos.4 and 5 had knowledge about

the said judgment of acquittal of petitioner and they have apprehension that, the Education Department may direct respondent nos. 4 and 5 to reinstate the petitioner as the criminal court has not held him guilty in any of the offences and only to avoid the reinstatement of the petitioner, respondent nos.4 and 5 have served the notices to the petitioner by manipulating the documents. Therefore, the petitioner did not turn to join the duties. Before and after acquittal, the petitioner submitted the representation before respondent nos.3 to 5 and requested them to reinstate the petitioner on his post and to pay him subsistence allowance. The said representations have been filed before respondent nos.3 to 5 and also higher authority i.e. Deputy Director of Education, Latur, personally as well as by RPAD. In spite of acquittal, the said representations of the petitioner have not been considered by

respondent nos.3 to 5. The postal acknowledgment receipts in respect of making representations to respondent nos.4 and 5 are placed on record by the petitioner along with rejoinder-affidavit.

14] It is further submitted that, by letter/communication dated 18.06.2008, the Education Officer [Secondary], Zilla Parishad, Nanded, directed respondent no.5 by giving reference of letter dated 25.04.2008 that, as the petitioner is arrested by the police in criminal case and if he put behind the bars for more than 24 hours then as per Rule 33 [5] of the Rules of 1981, he is deemed to have been suspended. It is also stated that as per the provisions of the Rule 34 [1] [a] [b] [1] [2] of the Rules of 1981, subsistence allowance is payable. Subject to said provision, subsistence allowance be made payable to the petitioner and bill be accordingly preferred. It is further stated

that, if the Criminal Court acquits the petitioner from the aforesaid criminal proceeding, then as per the provisions of Rule 33 [5] and [6] of the Rules of 1981, appropriate action be taken and report be submitted to that effect within three days. Therefore, in spite of said letter / communication, respondent no.5 has not submitted the report to the Education Officer, and has not paid subsistence allowance to the petitioner. After acquittal from the criminal case, the petitioner filed Writ Petition No.6545/2012 before this Court, seeking directions against the respondents to allow the petitioner to join the duty and to pay him all consequential benefits. After hearing the parties, the High Court was pleased to dispose of the said Writ Petition on 13.08.2012 that, the petitioner is entitled to resort to alternate statutory remedy, in case the petitioner has not been

allowed to resume his duties.

15] It is further submitted that, there is specific provisions laid down in the MEPS Act and Rules, Rule 35 i.e. condition for suspension, the rule 35 [2] is specifically stated the period of suspension shall not exceed four months except with the prior permission of such appropriate authority. Respondent Nos.3 to 5 have not followed the said provisions and not allowed the petitioner to resume the duties after completion of four months. The petitioner is permanent employee and serving as an Assistant Teacher in respondent no.5-School. Respondent no.3 has granted permanent approval to the appointment of the petitioner on the said post in respondent no.5-school. Therefore, it is necessary to follow the procedure before termination of the services of the petitioner as per the provisions of the Maharashtra Employees of Private Schools

[Conditions of Service] Regulation Act and Rules and to appoint Enquiry Committee as per the provisions of Rule 36 of the Rules 1981.

16] It is further submitted that, respondent nos.4 and 5 have not followed the procedure as per Rule 36 [2]. Respondent nos.4 and 5 never constituted Enquiry Committee, and therefore, without departmental enquiry they could not have terminated the services of the petitioner. The petitioner has not given an opportunity of hearing, and respondents have not sent any correspondence to the petitioner by RPAD as per the provisions of Rule 36 [1] [2] of the Rules of 1981, therefore, the act of respondents is illegal. Respondent nos.4 and 5 have not followed the procedure of inquiry as per the provisions of Rule 37 [1] [2] [a], [iv], [6] of the Rules of 1981. Therefore, the respondents have not followed the procedure contemplated in the Rules of 1981.

17] We have considered the submissions advanced by learned counsel appearing for the petitioner, learned A.G.P. appearing for the Respondent/State, learned counsel appearing for Respondent nos.4 and 5. With their able assistance, we have carefully perused the pleadings in the Petition, annexures thereto, the averments made in the affidavit in reply and additional affidavit in reply filed by respondent nos.4 and 5, reply filed by respondent no.3 and the rejoinders filed by the petitioner to the affidavits filed by respondents.

18] At the outset, it is necessary to mention that, as alleged by respondent nos.4 and 5 as per Rule 16(3) of the Rules of 1981, the post on which the petitioner was working, has been voluntarily abandoned due to his continuous absence without leave for a period of exceeding five years. Hence, as per Rule

16(3) of the Rules of 1981, the services of the petitioner has already been terminated, and the post on which the petitioner was working, has been filled up by the respondent Nos.4 and 5 by appointing another Assistant Teacher on 15th January, 2010.

19] We have considered the rival contentions on merits, and in our opinion the petitioner was rightly placed under suspension in accordance with relevant provisions and procedure. Admittedly, suspension has been followed by termination of the services of the petitioner. The petitioner has filed an appeal challenging termination of his services. Hence the relief claimed in the petition in terms of prayer clauses "C" and "D" stands rejected.

20] Admittedly, the petitioner came to be appointed in respondent No.5 school as Assistant Teacher on 1st July, 1997.

Thereafter, the Education Officer has granted approval to the appointment of the present petitioner as Assistant Teacher on 15th November, 2000. The petitioner has worked on the post of Assistant Teacher since from the date of his appointment in Respondent No.5 school run by Respondent No.4 – Trust. On 1st March, 2001, one Mr. Nivrutti Baswante has filed criminal complaint against the petitioner and other persons with Kandhar Police Station, which came to be registered as Crime No.31/2001 against him and other persons. Due to registration of aforementioned Crime, Respondent No.5 had issued order on 2nd March, 2001 for placing the petitioner under suspension. As stated by the petitioner after release on bail, approached respondent Nos.4 and 5 to allow him to join the duty, and also requested to pay him subsistence allowance from the date of suspension i.e. from 2nd March, 2001 but

respondent no.5 has not paid any heed to the said request of the petitioner. However, according to respondent nos.4 and 5, though the petitioner was asked to join duty, he abandoned the service and then his services were terminated.

21] At this juncture, it would be necessary to mention here that, as per rule 35(5) of the Rules of 1981, if any employee has been placed under suspension, then it is the duty of the respondent – Management to pay the subsistence allowance to the said employee during his suspension period. The rule 35(5) of the Rules of 1981 reads thus :-

"Rule 35(5) : the subsistence allowance shall not be withheld except in cases of breach of provisions of sub-rule (3) or (4) of Rule 33".

22] In the present case, the petitioner has been placed under suspension, vide

suspension order dated 2nd March, 2001 and hence, the petitioner is entitled to get the suspension allowance during his suspension period. It is the duty and obligation of respondent nos.4 and 5 to pay the subsistence allowance to the petitioner, but inspite of repeated requests being made by the petitioner, respondent nos.4 and 5 have not paid the subsistence allowance to the petitioner.

23] So far as period of suspension is concerned, it is not desirable under writ jurisdiction to undertake exercise of disputed questions of fact. Whether the petitioner sought permission to leave the headquarter and he abandoned the services are disputed questions of facts. In that view of the matter, we grant liberty to the petitioner to make fresh representation to the Deputy Director of Education, Latur. In case such representation is made, the Deputy

Director of Education shall issue notices to the petitioner, respondent-Education Officer and other respondents and after giving them opportunity of hearing and placing on record relevant documents take the appropriate decision within six months from today. Parties shall extend full co-operation to the Deputy Director of Education, Latur. So far as undisputed period of suspension is concerned, respondent nos.4 and 5 shall pay subsistence allowance to the petitioner, if already not paid.

24] In the light of above, Writ Petition stands disposed of. Rule stands discharged.

[S . M . GAVHANE]
JUDGE

[S . S . SHINDE]
JUDGE