

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 14242 OF 2018

Mrs. Gaur Pratibha (Ms. Thakur Pratima
Jagatsingh) and Ors. ... Petitioners

V/s.
The State of Maharashtra through
the Secretary and Ors. ... Respondents

**WITH
WRIT PETITION NO. 11022 OF 2018**

Shri. Sumedha Sunil Abhyankar and Ors. ... Petitioners

V/s.
The President/Secretary,
The Education Society Ambarnath and Ors. ... Respondents

**WITH
WRIT PETITION NO. 11695 OF 2018**

Shri. Kishor Gopal Jagtap ... Petitioners

V/s.
The State of Maharashtra through the
Secretary Education Department and Ors. ... Respondents

**WITH
WRIT PETITION NO. 3970 OF 2018**

Shri. Ramesh Chandrasing Patil ... Petitioners

V/s.
The State of Maharashtra through
the Secretary and Ors. ... Respondents

**WITH
WRIT PETITION NO. 14256 OF 2018**

Mrs. Pramodini Bapu Sawant	... Petitioner
V/s.	
The State of Maharashtra through	
the Dept of School Education and Ors.	... Respondents

**WITH
WRIT PETITION (ST) NO. 32036 OF 2018**

B.Ed. Niyukta Madhyamik Shikshak Sangh	
Through its Chairman and Anr.	... Petitioners
V/s.	
The State of Maharashtra through	
the Secretary and Ors.	... Respondents

**WITH
WRIT PETITION (ST) NO. 33510 OF 2018**

Mr. Sonawane Kondaji Radhaji and Ors.	... Petitioners
V/s.	
The State of Maharashtra through the	
Secretary Education Department and Ors.	... Respondents

**WITH
CONTEMPT PETITION (ST) NO. 8326 OF 2018**

Mrs. Usha L. Naag and Anr.	... Petitioners
V/s.	
The State of Maharashtra through	
its Secretary and Ors.	... Respondents

Mr. N.V Bandivadekar with Mr. S.A. Mane for the Petitioner in WP/14242/2018, WP/3970/2018, WP/14256/2018, WPST/32036/2018 and WPST/33510/2018.

Ms. Pranita Hingmire for the Petitioner in WP/11695/2018.

Mr. A.A. Garge I/b Mr. J.H. Oak for the Petitioner in WP/11022/2018.

Mr. Kedar Dighe with Mrs. Rupali M. Shinde and Mr. S.B. Kalel, AGP for Respondent – State in all writ petitions and contempt petition.

Mr. Mihir Desai, Senior Advocate I/b Mr. S.S. Jadhav, for Respondent No.5 in WP/3970/2018.

Mr. Rameshwar Gite for Respondent Nos. 4 and 5 in WP/11695/2018.

Mr. Rajesh Kolge for Respondent No. 7 in WP/14242/2018.

Ms. Anupama Shah for Respondent Nos. 5 to 7 in WPST/32036/2018.

**CORAM: B.R. GAVAI &
DAMA SESHADRI NAIDU, JJ.
RESERVED ON: 28th MARCH 2019
PRONOUNCED ON: 9th April 2019**

JUDGMENT (PER: DAMA SESHADRI NAIDU, J.)

Introduction:

Two sets of persons, with diverse qualifications, enter service as Secondary School Assistants, at different times. They are placed in different categories of seniority, not based on their date

of joining, but based on their qualification. With time, the teachers who are placed in lower category rise through the rungs, after acquiring additional qualifications. Thus, most may get paced in one common higher category, sooner or later. But those who scale up and reach that particular category later may have actually joined the service earlier.

The Questions:

2(a). Here, the question is, once persons from different sources enter a common category, how should their seniority be reckoned?

2(b). Is it from the date of their entering and continuously officiating in the service or from the date of their acquiring qualification to reach that common category?

2(c). Is there any universal principle for this proposition or does it depend on the rules of service?

Facts:

WP No.14242 of 2018:

3. In W.P.(C) No.14242 of 2018, there are 13 petitioners; they all work as assistant teachers in the fifth Respondent school. All the petitioners, in fact, entered the service as trained graduate

teachers, possessing the requisite qualifications. The school is Government recognised, with both aided and unaided secondary divisions. It is governed by the Maharashtra Employees of Private Schools (Conditions of Services) Regulation Act, 1977, and the eponymous Rules, 1981.

4. The fifth Respondent school has also appointed a few persons as trained undergraduate teachers. Some of those teachers later acquired B.Ed., qualification. Thus, they too have become trained graduate teachers. Annually, the school prepares a seniority list of all teachers working in it. That seniority list must accord with the statutory mandate in schedule F, under Rule 12 of the Rules. Based on their entry into service and their qualifications, the teachers have been placed under Categories C to H.

5. As the record reveals, some of the untrained undergraduate teachers joined the service earlier than the trained graduate teachers. Across the state, these teachers, as it is pleaded, have demanded that once they acquired the requisite qualification while in service, their seniority must be reckoned from the date of their initial appointment and continuous

officiation. These claims by the trained undergraduate teachers and the counterclaims by the trained graduate teachers have engendered much subordinate legislation—Government Resolutions (GR)—and unavoidable litigation, too.

6. The Government Circular dated 24th January 2017 and the Government Circular dated 14th November 2017, that is exhibits G and H respectively, are the regnant government resolutions that hold the field. In fact, guided by these circulars, the Respondent school prepared Exhibit D seniority list. In that list, the petitioners were shown below the fifth and sixth Respondent teachers. These Respondents earlier had their entry as trained undergraduate teachers but rose in the ranks with their later-acquired qualifications.

7. Aggrieved, the petitioners challenged exhibits G and H circulars and, consequently, sought the invalidation of Exhibit D seniority list, as well.

WP (ST) No.33510 of 2018:

8. In this writ petition, there are 96 petitioners. None of the rival contenders to the seniority finds arrayed as a respondent, though.

WP No.11022 of 2018:

9. Here, there are 19 petitioners. As with WP No.33510 of 2018, no rival contender is seen arrayed.

WP (ST) No.32036 of 2018:

10. In this Writ Petition there are two petitioners; they have a seniority dispute with the Respondents 5, 6 7. In fact, the first petitioner is a registered association of the teachers having B.Ed., qualification.

WP No.3970 of 2018; WP No.11695 of 2018; WP 14256 of 2018:

11. In each of these writ petitions, there is a sole petitioner. He has his seniority dispute with the respondent teachers, as arrayed in each one.

Submissions:

Petitioners':

12. In summary, the petitioners' counsel have argued that the impugned circulars violate the statutory scheme of seniority. To elaborate, they contend that the teachers in the secondary schools must have their seniority governed by the category they belong to, rather than the date they have been appointed on. In

the light of the impugned circulars and the consequential revised seniority, many trained graduate teachers have been denied promotion. In some cases, those promoted earlier were reverted.

13. The learned counsel assert that to be placed in the proper category, the teacher ought to possess the basic qualification, that is B.Ed. Indeed, they have also elaborated on how the petitioner teachers have formed a committee and continued to plead with and represent to the education authorities on the issue.

14. Besides taking us through the statutory scheme, the petitioners' counsel have also relied on a profusion of precedents. We will refer to the regnant regulations and the decisions soon. Though the learned counsel appearing for the petitioners in different cases have also brought to our notice minor factual variations among those cases, we disregard them. For the issue essentially turns on a disputed question of law about the seniority.

Respondents':

15. Compendiously considered, the counsel for the Respondent teachers in all the Writ petitions have offered an

identical defence to the petitioners' claim of seniority. Here too, we avoid reference to individual contentions of minor variations.

16. The counsel for the Respondent teachers initially admit that those teachers entered the service in categories below "C". But they assert that once they acquired graduation, say BA, besides having D. Ed.; with their seniority, they ought to be treated as trained graduate teachers. According to them, D. Ed., equals B.Ed.

17. In the alternative, the learned counsel also contend that the petitioners' initial entry into Category C entails them to nothing in terms of seniority unless they have also completed ten years' service. And that completion must precede the Respondent teachers'. In other words, a teacher's getting into Category C and earning graduate scale do not affect the seniority to be prepared in the ascending order based on their continuous length of service and officiation.

18. Relying on certain decisions, such as *Sunil v. Amravati Zilla Parishad*^[1], the counsel for the Respondent teachers also contend that to reckon the seniority, the statute does not

¹[] 2016 (6) Mh.LJ 576

distinguish between the primary teachers and the secondary teachers. According to them, in both cases the seniority has to be reckoned from the date of initial appointment. In other words, once an untrained graduate teacher enters category C with improved qualifications, the length of service alone matters.

19. Finally, the learned counsel maintain that the impugned circulars do not suffer from any legal infirmity. On the contrary, they accord with the statutory mandate, besides complying with the judicial mandate frequently emanating from this Court and the Supreme Court.

Government's:

20. The learned Assistant Government Pleader has submitted that the authorities have followed the numerous precedents of the Supreme Court as well as this Court to fine-tune the reckoning of seniority in private schools. Besides drawing our attention to an avalanche of authorities on the issue, he eventually stresses that the Supreme Court has recently rendered two conflicting judgments—through coequal Benches, at that. According to him, the Government acted on the earlier one and redefined the “Seniority” and redrawn the seniority lists. Now the

later one may unsettle what has already been settled. For, as he maintains, the later of the two coequal-Bench decisions must prevail. Those decisions are *Viman Vaman Awale v. Gangadhar Makhriya Charitable Trust*^[2] and *Bhawana v. State of Maharashtra*.
[3]

21. Heard Shri N. V. Bandiwadekar, Shri A.A. Garg and Ms. Pranita Hingmire, the learned counsel for the respective Petitioners. Also heard the learned Senior Counsel Shri Mihir Desai, the learned counsel Shri Rameshwar Gite, Shri Rajesh Kolge, Ms. Anupama Shah, and learned AGP Shri Kedar Dighe for the respective Respondents.

Analyses:

Issues in Perspective:

22. The dispute centers on seniority; seniority between two classes of Assistant Teachers in Secondary Schools. The petitioner-teachers entered the service as trained graduate teachers; they possessed B.Ed. Thus, they were placed in Category C of Schedule F. The respondent-teachers, on the other hand, entered the service as trained undergraduate teachers or

²[] (2014)13 SCC 219

³[] AIR 2019 SC 238

as untrained Assistant Teachers in Secondary Schools. For they did not possess B.Ed., or other essential qualification. Indisputably, they were placed, initially, in categories below C. These respondent teachers later acquired qualification, say, B.Ed. They thus scaled up in rank and found a place in Category C, having become trained graduate teachers. Initially, the petitioner-teachers were placed higher in seniority because they entered Category C first, though they entered service after the respondent teachers had.

23. But because of the Government Circulars, dated 24th January 2017, and dated 14th November 2017, the Schools have revised the Seniority. In the revised Seniority, the petitioner teachers found themselves pushed down. They were placed below the respondent teachers. Only the length of service—but not the qualification, nor even the teacher's entry in Category C—was considered for seniority.

24. So we should first examine the impugned Government Circulars.

The Impugned Circulars:

25. The Government Circular dated 13 October 2016, in para 5, mentions how the post of trained graduate should be understood. According to it the meaning of 'Graduate' indicates a person with a degree in any faculty along with D. Ed., or B.Ed. If "the teachers passed 10th and 12th" before entering the service, and if they acquire a degree while in service, such teachers should also be treated as trained graduates. Their seniority "should be fixed as per the directions of the High Court." (as gathered from the translated copy).

26. The Government Circular, dated 24 January 2017, refers to para 5 of the earlier circular and proceeds to lay down the method of calculating the seniority of both the primary and secondary teachers. It emphasises the need of maintaining a common seniority list, based on a learned Single Judge's judgment, at Nagpur Bench, in a batch of Writ petitions: W.P. (ST) No.2280 of 1997 and others.

27. According to the circular, the guidelines for seniority read:

1. Unless the candidate acquires the degree qualification, he shall not acquire a place in the subject-wise graduate seniority list.

2. While preparing the seniority list of graduate primary teachers, the school authorities must fix their seniority based on their initial appointment; that is, without considering the date of their acquiring the degree.

3....

4. For promotion, instead of the seniority list of graduates or the subject-wise seniority list, the common seniority list as per the provisions of schedule F to the MEPS Rules, 1981, should be held valid. (taken with modification from the translated copy)

28. Later, through a circular, dated 14 November 2011, the government further mandated:

1. The graduate seniority list should be considered for sanction of the graduate pay scale to the teacher concerned.

2. Common Seniority list should be considered for promotion.

3. The Degree, such as B.A./B.Com./B.Sc., “is of educational nature” and that qualification is only an additional qualification, besides the basic qualification necessary for the post of primary teacher.

4. After acquiring the degree, the teacher concerned will be included in the list of graduate teachers. His seniority in the list will be reckoned from the date of his first appointment to the post of teacher and his continuous service.

5. The Common Seniority list prepared based on the teachers' first appointment shall be considered for promotion. At the time of promotion, if the teacher concerned is possessing the educational and professional qualifications along with the necessary experience, then the teacher concerned should be considered for promotion.

6. For being included in category C of scheduled F as per Rules 12 of the MEPS Rules, 1981, the teacher concerned should possess the qualification prescribed for category C (E.g. STC/Dip. ED. (One-year course)) or equivalent professional qualification besides having completed ten years' service.

7. The common seniority list to be considered for promotion should also be considered for secondary (standard 9 to 10) and higher secondary (standard 11 to 12) levels along with primary level. [taken with modification from the translated copy]

29. So we must examine these two circulars in the light of the Act and the Rules. For that, we ought to analyse both the MEPS Act and the Rules.

Statutory Scheme:

30. The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("MEPS Act"), regulates the recruitment and the service conditions of the employees in "certain private schools." As defined in Section 2

(7), the term "employee" includes the teaching and the non-teaching staff of a recognised school. Even an Assistant Teacher on probation must be reckoned as an employee. And Sub-Section (18) defines "primary education" to mean education imparted "in such subjects and up to such standards as may be determined by the State Government, from time to time," located either in a primary or secondary school. And the Government treats Standards I to V in a school as "primary education".

31. The definitional dynamics further examined, "School" in Section 2 (24) of the Act has a compendious, comprehensive definition: it can be a primary school, secondary school, higher secondary school, junior college of education, or any other institution by whatever name called. The "Primary School" stands defined in Section 2(19): a recognised school, or a part of such school in which primary education is imparted. A "private school", according to Sub-Section (20), is a recognised school established or administered by a Management, other than the Government or a local authority.

32. Whether a school receives any grant-in-aid or not, every private school in the State of Maharashtra, as Section 3 stipulates, stands covered by the Act. Of course, the minority schools largely remain unaffected by the Act. And Section 4 empowers the State Government to make rules providing for “the minimum qualifications for recruitment (including its procedure), duties, pay, allowances, post-retirement and other benefits, and [service] conditions” of private school employees. The State Government can regulate the rules of reservation, too, in private schools. Subsection (5) obligates the private-school management to fill up, at the earliest, every permanent vacancy with a qualified person and by adhering to the statutory mandate.

33. Section 8 of the Act deals with the constitution of School Tribunals. And Section 9 confers on the private-school employees the right of appeal. Indeed, the Tribunal’s decision is final and binding, as declared under Section 12 of the Act.

34. Moreover, Section 16 deals with the delegated legislative power: the State Government can make rules, among other things, for carrying out the purposes of the Act. The rule-making power covers the employees’ qualifications, their scales of pay,

their post-retirement and other benefits; and all other conditions of service of such employees including leave superannuation, re-employment, and promotion. The Executive has the retrospective, yet conditional, rule-making power, too.

The Rules:

35. From a cryptic enactment comes a large set of rules. And these rules engender a rash of Government Resolutions; these Resolutions have inevitably become breeding grounds for burgeoning litigation.

36. To begin with, we must refer to a few definitions. Rule 2, the lexical clause, defines many terms. We will, however, examine only those terms that bring to bear on the controversy. Sub-Rule (j) defines "trained graduate" to mean a person possessing the qualifications mentioned in sub-sections (i) to (vi) of clause (1) of item II in the Schedule "B". "Trained" here confines itself to the prescribed qualification, rather than to its denotational process of getting trained. And a "trained teacher", as per Sub-Rule (K), is a teacher "who has secured a professional certificate, a diploma or a degree recognised by the Department which qualifies him for a

teaching post in a school.” Here too, “trained” is qualification specific and nothing beyond.

37. Rule 6 provides for the “qualifications of teachers.” It, however, directs us to Schedule “B” for this purpose. Besides that, its first proviso allows the school management “to appoint untrained Science graduate teachers for teaching Mathematics and Science subjects”. It also empowers the management to appoint “untrained Arts or Commerce graduates for teaching other subjects”. These out-of-turn appointments in secondary schools may happen under exceptional circumstances, though.

38. As classified under Rule 10, the employees of a school can be permanent or non-permanent; those non-permanent employees may be either temporary or on probation. Pivotal is Rule 12, which deals with seniority, the bone of contention here. It plainly declares that every management prepare and maintain seniority list of the teaching staff and non-teaching staff in the School “in accordance with the guidelines” laid down in Schedule “F”.

39. Under Rule 25, every employee desirous of earning higher qualifications must get the employer's leave. But this limitation does not apply to "professional courses, such as B.Ed. or D.Ed., which are "prerequisites of a teacher." Mere intimation will suffice.

Schedules:

40. Indeed, "seniority" is not a stand-alone statutory benefit; it depends, as the statutory scheme may dictate, on myriad factors. Here it depends on "qualification." So let us examine what Schedule B says about qualifications.

(a) Primary Teachers:

41. As per this Schedule, to be appointed a Primary Teacher, a person must have passed

- (a) S.S.C., or
- (b) Matriculation, or
- (c) Lokshala examination, or
- (d) any other examination recognised as equivalent.

Besides possessing the above qualification, that person must also possess

- (i) a Primary Teachers Certificate, or
- (ii) a Diploma in Education examination, or
- (iii) a Diploma in Education (pre-primary of two years' duration).

42. The “Note”, however, clarifies that a person holding a Diploma in Education (pre-primary of two years' duration) can only teach standards I to IV. But certain Primary School teachers shall be regarded as trained S.S.C., teachers. To be regarded so, they must satisfy two prerequisites: (a) must have possessed S.S.C. and S.T.C. or T.D. or D.T. (one year) or Diploma in Education (one year); (b) must have been appointed by 30th September 1970.

43. Now, let us see how the Schedule deals with the Secondary and other Teachers:

(b) Teachers in Secondary Schools and Junior Colleges:

(1) For Graduate Teachers:

- (i) a bachelor's degree in Teaching or its equivalent; or

(ii) a Teaching Diploma of any statutory University (if appointed before the 1st October 1970); or

(iii) a Secondary Teachers' Certificate of the Education Department of Maharashtra State (if appointed before the 1st October 1970); or

(iv) a Diploma in Education of the Graduates Basic Training Centres; or

(v) a Diploma in Physical Education or its equivalent; or

(vi) any other degree, diploma, or certificate which Government or the Inter University Board may sanction as equivalent to any of the above qualifications.

(2) For Undergraduate Teachers:

(i) a Diploma in Education of Nagpur and Bombay Universities, awarded two years after Secondary School Certificate Examination; or

(ii) a Secondary Teachers' Certificate of the Education Department of Maharashtra State;

(iia) the Teachers' Diploma of any statutory University (if appointed before the 1st October 1970); or

(iii) a Certificate in Physical Education recognised by Government (if the person acquired that qualification before 31st May 1971 and was appointed by the 20th September 1978); or

(iv) a Diploma in Education (Primary) awarded by Government; or

(v) any other equivalent diploma or certificate approved by Government or Inter-University Board.

44. Though Schedule B also deals with other teachers, such as Drawing Teacher and Crafts Teachers, those categories may not be relevant for our purpose. So are the posts of Teachers in Junio Colleges.

Seniority:

45. Now, we should examine the “Seniority”. In terms of Rule 12, Schedule “F” provides the guidelines for fixing the seniority. And the Schedule F reads:

Schedule F:

1. Guidelines for fixation of seniority of teachers in the primary schools:

The Seniority of primary school teachers in Primary Schools shall be based on continuous officiation counted from the date of acquiring the educational qualification as prescribed under "Schedule B' appended to these rules.

2. Guidelines for fixation of seniority of teachers in the secondary schools, Junior Colleges of Education and Junior College Classes attached to secondary schools and Senior College:

For the purpose of Fixation of Seniority of teachers in the secondary schools, Junior Colleges of Education and Junior College classes attached to Secondary Schools the teachers should be categorized as follows:

Category A: Heads of Secondary schools having an enrolment of students above 500 and Principals of Junior Colleges of Education having more than four Divisions on the basis of the dates of their appointments to the respective posts.

Category B: Heads of secondary schools having an enrolment of students of 500 and below, Principals of Junior Colleges of Education having four or [fewer] Divisions and Assistant Heads of Secondary schools having more than 20 classes on the basis of the dates of their appointments to the respective posts.

Category C: Holders of -

M. A. /M. Sc./M. Com., B.T./B. Ed., or its equivalent; or

B. A./B. Sc./B. Com., B. T./B. Ed., or its equivalent; or

B. A./B. Sc./B. Com. Dip. T. (old two years course); or

[B. A./B. Sc./B. Com., S. T. C. /Dip. Ed./Dip. T. (one year course) with 10 years post-S. T. C. etc. service.

[B. A. or its equivalent plus Senior Hindi Shikshak Sanad with five years' service; or Junior Hindi Shikshak with ten years' service [after obtaining both academic and training qualifications.]]

Category D: Holders of-

B. A., B. Sc./B.Com./S. T. C./Dip. Ed. (one-year course) [Senior or Junior Hindi Shikshak Sanad] or its equivalent.

. . .

Category E: Holders of -

S. S. C., S. T. C./Dip. Ed./Dip. T. (one-year course) [Senior or Junior Hindi Shikshak Sanad] or its equivalent.

Category F: Untrained Graduates or holders of equivalent qualification.

Category G: Untrained Matriculates or holders of equivalent qualification.

Category H: All teachers other than those mentioned in categories A to G.

46. The Guidelines are in two parts: (1) those that concern the Primary Teachers; and (2) those that concern Teachers in

Secondary Schools, independent Junior Colleges or those attached to Secondary Schools, and Senior Colleges.

(a) Teachers in Primary Schools:

47. First, we will examine the Guidelines that affect primary schools. Indeed, a primary school teacher's seniority depends on that teacher's "date of joining service and continuous officiation". Thus, the primary school teacher's seniority is independent of the teacher's educational qualification beyond the basic one; the teacher's acquiring additional qualifications hardly affects the seniority.

(b) Teachers in Secondary Schools, independent Junior Colleges or those attached to Secondary Schools, and Senior Colleges:

48. Seniority in the secondary schools, junior colleges of education, junior college classes attached to secondary schools, and senior colleges follows gradation: Categories A to H. In Categories A and B, the seniority counts from the date of appointment. In Categories C to H, the teachers' seniority depends on the "total service rendered by the person in a particular cadre." The Rulemaking authority, as judicially noted on

many earlier occasions, was conscious of this gradation; so it prescribed a descending order of gradation to the holders of category 'C, D, E or F'. That is, a teacher in category 'F' or 'G' could in no manner rank senior to a teacher in category 'C', 'D' or 'E'. Then, let us examine how the gradation pans out.

49. As we understand, Categories A and B are post-specific; they have nothing to do with the qualification, barring the basic one. In other words, they are similar to the teachers in Primary Schools; their seniority counts from the date of appointment. On the other hand, Categories C to H are qualification-specific. To put it explicitly, on their joining the service, based on their entry-level qualification, the teachers will, by default, belong to one particular category. In that default category, they will have their seniority reckoned based on the date of their joining.

50. While in service, teachers may desire better career prospects. For that they may earn higher degrees. As they keep on acquiring additional qualifications, they move up the categories. Then, the teachers' seniority is reckoned in each "moved-up" category based on the date of their qualifying.

51. To illustrate this inter-category movement and the resultant seniority, Schedule F has numerous notes attached to it. We will now consider those that throw light on the controversy we are grappling with. As Note 1 demonstrates, teachers, appointed on or after 1st October 1970, with S. T. C., T. D., Jr. P. T. C. Dip., T. Dip. Ed. (post S.S.C. one-year course) qualifications shall be regarded as untrained. So they stand placed in Category 'F' or 'G'. As the teachers in these categories keep on acquiring qualifications, they move up in the category ladder. Moreover, Note 2 lists the qualifications—D. Ed. (2 years), T. D. (Bombay University), and Dip. Ed. (Nagpur University)—with which these untrained teachers get the grade and become the trained teachers.

52. To dispel any ambiguity, Note 4 clarifies that the categories—especially the categories (C) to (H)— represent the ladder of seniority in descending order.

53. A leaned Division Bench of this Court in *Nandini Arunkumar Kalaskar v. State of Maharashtra*^[4] has taken the view that as per the Act and the Rules, qualifications for primary

⁴[] Writ Petition No. 4644 of 1997

teachers are as mentioned in Schedule B-I. And qualifications for secondary teachers are as mentioned in Schedule B-II of the Rules. That is, Schedule B-I prescribes D.Ed. as a requisite qualification for a primary teacher; Schedule B-II prescribes B.Ed., for higher secondary teachers. That means, B.Ed. is not a requisite qualification for primary teachers.

54. In *Jayashree Sunil Chavan v. The State Of Maharashtra*⁵¹, another Division Bench has, among other issues, considered whether B.Ed., can be taken as a qualification higher than D.Ed., and on that basis whether it could be treated as a requisite qualification. To answer that, *Jayashree Sunil Chavan* has held that both B.Ed. and D.Ed., are to operate in separate and distinct fields:

“There is no question of there being one qualification higher than the other particularly with regard to the requirement of the primary school. It is, therefore, not possible to accept the argument that B.Ed. being the Bachelor's Degree, in comparison with D.Ed., being the Diploma, the degree would be higher than the diploma and, there from on that very count alone a holder of B.Ed. would be superior to D.Ed. holder and hence can be employed as a primary school teacher.”

The Way Forward:

⁵¹[] AIR 2000 Bom 394

55. True, it is not a case of first impression—that is, *res integra*. This Court and the Supreme Court, too, have grappled with the issue of seniority. In fact, ironic as it may sound, the Government cites precedential compulsion for its issuing the Circulars: altering the method of seniority. So it pays to examine the precedents, a tad too many to anyone's comfort, to ascertain the prevailing judicial position on this recurring issue. The learned Government Pleader has stressed that *Viman Vaman Awale* and *Bhawana* conflict with each other. According to him, a later coequal Supreme Court Bench has decided *Bhawana* unaware of the earlier *Vimal Vaman Awale*.

56. According to the learned Government Pleader, the Government has drawn the secondary teachers' seniority and has even promoted some, guided by *Viman Vaman Awale*. Now, if this Court follows *Bhawana*, a later judgment, it will cause chaos and upset the whole apple cart, as it were. He nevertheless wants us to resolve this decisional dilemma or precedential tangle. An unenviable task!

57. Granted, *Bhawana* does not refer to *Viman Vaman Awale*. But do they precedentially take a conflicting course? To unravel this seeming conflict, we must first ascertain this: Of a decision, what binds the courts under Article 141 of the Constitution? Is it the ratio, or holding, or conclusion? Then, this begets another question—a fundamental one. What is the precedent?

What is the Precedent?

58. Salmond defines a precedent as a judicial decision “which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*.” According to him, it is “the abstract ratio decidendi which alone has the force of law as regards the world at large.” Professor John Chipman Gray in his *The Nature and Sources of the Law*^{6]} stresses that “it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be obiter dictum.”

59. Putting both the above views in perspective, Allen in his *Law in the Making*^{7]}, observes that “any judgment of any Court is authoritative only as to that part of it, called the *ratio decidendi*,

⁶[] (2d ed. 1921) 261

⁷[] (2d ed. 1930) 155

which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the Court, of whatever degree, which is called upon to consider the precedent, to determine what the true ratio decidendi was."

60. Oft-quoted are the views of Holt C.J., and Lord Mansfield. In *Cage v. Acton*^{8]}, the former has held that "the reason of a resolution is more to be considered than the resolution itself." Then, the latter has held in *Fisher v. Prince*^{9]} that "the reason and spirit of cases make law; not the letter of particular precedents." But in contrast is the now-widely-accepted principle that the *ratio decidendi* of a case must not be sought in the reasons on which the judge has based his decision.

61. If we consider the recent jurisprudential rumblings on the never-ending debate of what part of judgment will have precedential force, comes to mind the articulation advanced by Garner, et al. In a recent commentary on *stare decisis*—*The Law of Judicial Precedent*^{10]}—the learned authors have elaborately

8[] 12 Mod. 288, 294 (1796)

9[] 3 Burr. 1363, 1364 (1762)

10[] Thomson Reuters, 2016, pp.44-46

treated this principle. According to them, there can be no cavil about what binds of a decision as a precedent. It is the holding.

62. And holding emerges when the ratio—the pure principle of law—is applied to the facts of a case. That is, a holding is what the court decides after combining the facts of a case with the legal principles those facts attract. While holding might be thought to equate more nearly with the court's determination of the concrete problem before it, *ratio decidendi* is normally seen, according to them, "as a genus-proposition of which the concrete holding is one species or instance." They do admit that the distinction is a fine one for those who observe it. In the end, they declare that ratio requires adherence to the extent possible, but the holding compels compliance fully. Thus, *stare decisis* admits of no exception to a 'case-holding' in the adjudicatory hierarchy.

63. Then, we can adopt Arthur L. Goodhart's assertion ^[11] that it is not the rule of law "set forth" by the court, or the rule "enunciated", which necessarily constitutes the principle of the case. There may be no rule of law set forth in the opinion, or the rule when stated may be too wide or too narrow. Goodhart

¹¹[1] Determining the Ratio Decidendi of a Case, Yale Law Journal, Dec., 1930

quotes from Oliphant's *A Return to Stare Decisis* (1927) that the predictable element in a case is "what courts have done in response to the stimuli of the facts of the concrete cases before them. Not the judges' opinions."

64. That said, it is necessary for us to know what the judge has said about his choice of the facts, for what he does has a meaning for us only when we know what facts he has relied on. "A divorce of the conclusion from the material facts on which that conclusion is based is illogical and must lead to arbitrary and unsound results." To cap it, we will once again recall how Goodheart sums up a curious mind's quest to ferret out the elusive ratio decidendi or holding: If an opinion gives the facts, the first point to notice is that we cannot go behind the opinion to show that the facts appear to be different in the record. We are bound by the judge's statement of the facts even though it is patent he has misstated them, for it is on the facts as he, perhaps incorrectly, has seen them that he has based his judgment.

65. With this prefatory jurisprudential underpinning, we will examine both *Viman Vaman Awale* and *Bhawana*.

A Tale of Two Cases:

(a) Viman Vaman Awale:

66. In *Viman Vaman Awale*, decided on 13.08.2014, the appellant and the fourth respondents are assistant teachers; first, the appellant joined in 1979, followed by the fourth respondent in 1980. By the time they joined, both had the basic qualification—D.Ed.,—to be assistant teachers. But the fourth respondent, by then, had an additional qualification: B.A. The fourth respondent, after joining service, acquired B.Ed., in 1984. The appellant, a non-graduate, too, went on acquiring additional qualifications: first B.A., in 1984; later B.Ed., in 1986; and finally M.A., in 1997.

67. In short, both had the requisite qualifications when they joined the service, and both went on acquiring additional qualifications in their service. But at the time of joining, the fourth respondent had a “superior qualification”, and acquired B.Ed., too, before the appellant did. There arose a dispute of seniority between them.

68. To begin with, they both were placed in Category-D of Schedule F. Yet in the seniority list, the appellant was shown below the fourth respondent—the better qualified, but later joined

teacher. On the appellant's challenge, the Tribunal ruled that "seniority is to be considered from the date of [a candidate's acquiring] this professional qualification, that is being the 'Trained Teacher'". This Court affirmed the Tribunal's findings. Undaunted, the appellant appealed to the Supreme Court.

69. The Supreme Court has ruled in the appellant's favour. It has held that among various alternative qualifications prescribed for the post of Primary School Teachers, one is the Diploma in Education Examination (D.Ed.). So a person's holding this qualification would be treated as satisfying the qualification stipulated in Rule 6. Then, that person should be treated as 'Trained Graduate', as defined in Rule 2(1)(j) of the Rules. Reasoning thus, the Court disregarded the additional qualifications.

70. To conclude as above, *Viman Vaman Awale* has relied on Rule 12 of the Rules, which deals with seniority. The clear and unambiguous criterion for determining the seniority, according to *Viman Vaman Awale*, is "the continuous officiation counted from the date of acquiring the educational qualification" under

Schedule "B". So it has held that as the Appellant has the requisite qualification to be an assistant teacher in a Primary School, her seniority must be reckoned based on her "continuous officiation."

71. To put the issue in perspective, we may note on facts that when the appellant and the fourth respondent entered the service, they both had the D.Ed., qualification—that is, they both were "trained graduates". But the fact remains that the appellant joined the service first. So her seniority prevailed. We reckon from the facts of *Viman Vaman Awale* both the teachers started their career as *Primary Assistant Teachers*. The threshold qualification fulfilled, the additional ones, in the same category, serve only an ornamental purpose, so to say.

(b) Bhawana:

72. In *Bhawana*, decided on 04.01.2019, the appellant and the fifth respondent are assistant teachers in a secondary school. But the appellant initially was appointed in 1994 as an untrained Teacher in a High School. Her appointment was purely temporary. She acquired her B. Ed qualification and "became a trained

teacher” in September 1997. Just a month before that, the 5th Respondent was appointed as a “trained Assistant Teacher”.

73. Yet the appellant was made senior “in the category of Assistant Teacher”. Responding to the 5th respondent’s challenge, the Competent Authority ruled in his favour. The authority observed that the 5th Respondent was appointed as a trained teacher in August 1997, whereas the appellant remained untrained teacher till September 1997. Thus, the 5th respondent placed himself in Category C one month before the appellant did, by acquiring the necessary qualification: B.Ed. The appellant’s appointment in 1994 remained inconsequential for she was an untrained Assistant Teacher until one month after the 5th respondent’s joining the service.

74. When the matter waded its way to the Supreme Court, the appellant’s counsel asserted that “practically inter se seniority is not an issue.” Instead, he cited “salary escalation” as the cause for the appellant’s grievance. Yet as the judgment reads, the arguments were also advanced on either side covering, primarily, the seniority. The appellant’s principal argument is that seniority

is based on the “longer officiation of service in the cadre”. So the appellant’s acquiring B.Ed., and her becoming a trained Assistant Teacher later, the counsel further asserted, would not take away the appellant’s right to seniority.

75. Repelling the appellant’s arguments, *Bhawana* holds—in fact, reiterates—that seniority in the primary school is based on the date of the teacher’s “joining service and continu[ed] officiation.” On the other hand, the seniority “in the secondary schools, junior colleges of education, and junior college classes attached to secondary schools and senior colleges,” stands graded into separate categories, from A-H. As to the persons holding various qualifications falling in categories C to H, their seniority is determined, *Bhawana* clarifies, based on the total service rendered by the teacher “in a particular cadre”. And the method of promotion, then, stands explained in Note 5.

76. Illustratively, *Bhawana* observes that a person who is a member of category 'F' or 'G' can in no manner rank senior to the teacher who is in category 'C', 'D' or 'E' merely based on his or her

“continuous service rendered in the category to which th[at] person belongs.”

77. On facts, *Bhawana* declares that the appellant entered the service indisputably as an untrained teacher, falling in category 'F'. But the 5th Respondent entered the service as a trained teacher, falling in category 'C'. After acquiring the B.Ed., qualification, the appellant entered Category C, but only after the 5th respondent's entry. So the appellant “could not have claimed seniority over the 5th Respondent in category 'C' of Schedule F annexed to Rule 12 of Rules, 1981.”

(c) Coequal Benches & the Conundrum of Precedential Conflict:

78. Precedentially, the predominant jurisprudential view—at least until recently—is that among the conflicting judgments of co-equal Benches, the latest should prevail. This school of thought, I am afraid, no longer holds good. Various High Courts, through Benches of varying strength, have ruled on that issue, but still unanimity has eluded.

79. In *Jaisri Sahu v. Dubey*^[12], the Supreme Court has observed that “law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions.” So it has advocated as desirable that if a conflict is found, the question should be authoritatively settled. The better course for the Bench hearing the case would be, according to *Jaisri Sahu*, to refer the matter to another Bench of superior numerical strength. It is inadvisable for the Bench of lesser strength to take upon itself the task of deciding whether it should follow one decision or the other.

80. But as we see, *Jaisri Sahu* confines itself to intra-court precedential conflict. That is, it does not refer to the coequal conflicting-judgments of the Supreme Court vis-à-vis the High Courts and other courts down the judicial establishment. This proposition, again, stands affirmed in *Delhi Development Authority v. Ashok Kumar Bahel*^[13]. According to it, two conflicting principles on the same point by the same Court should not be allowed to operate simultaneously.

¹²[] AIR 1962 SC 83

¹³[] AIR 2002 SC 2940

81. The erstwhile Nagpur High Court has held in *D.D. Bilimoria v. Central Bank*^[14] that the 'the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other'. In *Vasant Tatoba Hargude v. Dikkaya Muttaya Pujari*^[15], a Division Bench of this Court was dealing with a similar question under Art.141. It has held that if a clear conflict occurs between two decisions of the Apex Court of an equal number of Judges, the later decision will bind the High Court. Many other High Courts, too, have held the same view: *Gujarat Housing Board, Ahmedabad v. Nagajibhai*^[16], *Gopal Krishna Indley v. 5th Addl. District Judge, Kanpur*^[17], *Govindanaik G. Kalaghatigi v. West Patent Press Co. Ltd.*^[18], *Deputy Commissioner v. Anandan*^[19].

82. Yet earlier, another Division Bench of this Court in *Manasing Surajsingh v. The State Maharashtra*^[20], has quoted with

14[] AIR1943 Nag 340

15[] AIR 1980 Bombay 341

16[] AIR 1986 Guj. 81(FB)

17[] AIR 1981 All. 300

18[] AIR 1980 Kar. 92(FB)

19[] 1987 (1) KLT 192 (DB).

20[] (1968) 70 BOMLR 654

approval Salmond's observations in his treatise on *Jurisprudence*²¹:

"Where authorities of equal standing are irreconcilably in conflict, a lower court has the same freedom to pick and choose between them as the schizophrenic court itself. The lower court may refuse to follow the later decision on the ground that it was arrived at per incuriam, or it may follow such decision on the ground that it is the latest authority. Which of these two courses the court adopts depends, or should depend, upon its own view of what the law ought to be."

83. Long back, a Constitution Bench of the Supreme Court in *Atma Ram v. State of Punjab*,^[22] has however termed this "doctrine of choice" for the subordinate courts "an embarrassment of preferring one view to another, both equally binding upon them."

84. Faced with this ineluctable embarrassment, later a Full Bench of this Court, in *Kamleshkumar Ishwardas Patel v. Union of India*, has referred to a Special Bench decision of Calcutta High Court in *Bholanath v. Madanmohan*.^[23] It concerns the course to be followed by the High Court when confronted with contrary decisions of the Supreme Court emanating from Benches of co-equal strength. *Bholanath*, in fact, notices the two schools of

21[] 12th Edition Page 153

22[] AIR 1959 SC 519

23[] (1988) 1 CAL LT 1 (HC)

thought: (1) that the High Court has no option but to follow the later one; (2) that the High Court is not necessarily bound to follow the one which is later in point of time, but may follow the one which, in its view, is better in point of law.

85. Then, *Bholanath* has preferred the latter view. In that context it has referred to the ancient Jurist Narada's *Dharmashastra Virodhe Tu Yuktiyukta Vidhe Smrita* (the Dharmashastras or the Law Codes) and the modern-day Jurist Seervai. That said, *Bholanath* has acknowledged that highly embarrassing it may be "for the High Court to declare one out of the two or more decisions of the Supreme Court to be more reasonable, implying thereby that the other or others is or are less reasonable." But if such a task falls upon the High Court, it further observes, because of irreconcilable contrary decisions of the Supreme Court emanating from Benches of co-ordinate jurisdiction, the task, however uncomfortable, has got to be performed.

86. As noted in *Bholanath*, indeed, the redoubtable constitutional expert H.M. H. M. Seervai, in his treatise, the *Constitutional Law of India*, (as often quoted in various

judgments) has observed that the Supreme Court judgments “which cannot stand together present a serious problem to the High Courts and to subordinate Courts. It is submitted that in such circumstances the correct thing is to follow that judgment which appears to the court to state the law accurately or more accurately than the other conflicting judgments.”

87. And this Court’s Full Bench in *Kamleshkumar Ishwardas Patel* has held that the law as enunciated in *Bholanath* “has our unqualified concurrence”: that the High Court “may follow the one which, in its view, is better in point of law”.

(d) Yet Another View:

88. A Special Bench of Five Judges of the Madhya Pradesh High Court in *Jabalpur Bus Operators Association v. State of Madhya Pradesh*,^[24] examined the precedential value of conflicting judgments of coordinate Benches. It has eventually held that if a conflict occurs between judgments of two Division Benches of equal strength, the decision of earlier Division Bench shall be followed unless it is explained by the latter Division

²⁴[] AIR 2003 MP 81

Bench in which case the decision of latter Division Bench shall be binding.

89. Indeed, *Jabalpur Bus Operators Association* has observed that High Courts and Subordinate Courts should lack the competence to interpret decisions of Apex Court since that would not only defeat what is envisaged under Article 141 of the Constitution of India but also militate against the hierarchical supremacy of Courts.

(e) The Icing on the Cake:

90. In *Sundeeep Kumar Bafna v. State of Maharashtra* AIR ^[25], a two-Judge Bench of the Supreme Court faced the conflicting judgments of two “three-Judge Bench” decisions on the question of “custody and arrest.” In that context, *Sundeeep Kumar Bafna* has observed that the view of the coordinate Bench of earlier vintage must prevail, and this discipline demands and constrains the courts to adhere to the former decision, rather than the later. It pays to quote the Supreme Court’s observations:

It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and

²⁵[] 2014 SC 1745

comity of Courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. *A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam.*

(italics supplied)

91. So now, the judicial dictum is unmistakable: A decision or judgment can be per incuriam if it conflicts with the ratio of a previously pronounced judgment of a co-equal or a larger Bench.

(f) Do *Viman Vaman Awale* and *Bhawana* Conflict?

92. We do not think they do. *Viman Vaman Awale* concerns the Primary Assistant Teachers; *Bhawana*, the Secondary Assistant Teachers. So the former case interprets the “Guidelines for fixation of seniority of teachers in the primary schools”, under Schedule F, under Rule 12. The latter the “Guidelines for fixation of seniority of teachers in the secondary schools Junior Colleges of Education and Junior College classes attached to secondary schools and Senior Colleges.”

93. In *Viman Vaman Awale* both the teachers had their basic qualifications when they entered service, their additional qualifications notwithstanding. And as per Clause (I) of Schedule F, the seniority of primary school teachers shall be based on the date of joining service and continuous officiation. Both the candidates duly qualified, *Viman Vaman Awale* upheld the seniority of the teacher that joined the service first.

94. In *Bhawana*, as we have already observed, the teacher who entered the service first had no prerequisite qualification—B.Ed. So she joined the service as an untrained teacher, falling in category 'F'. The other teacher entered the service as a trained teacher and placed himself straightaway in C Category. The first teacher could get the B.Ed., and enter that Category only later. So as per Clause (II) of Schedule F—and as clarified by Note 4—the categories mentioned in Schedule F represented the ladder of seniority in descending order. Thus, *Bhawana* has held that a teacher in Category F, on later migration to Category C, cannot steal a march over a teacher already ensconced in that Category.

95. Therefore, we conclude that *Viman Vaman Awale* and *Bhawana* do not conflict with each other; they have taken no

divergent precedential paths. Though *Bhawana* may not have been aware of *Viman Vaman Awale*, both decisions have displayed remarkable interpretative consistency.

Precedential Pandora's Box:

96. Now, we must address the avalanche of authorities the parties on either side have relied on. As to the collection of ratio or holding, a single precedent may cause no concern; but a congeries of case law on the same issue always does. For judicial decisions are accumulated articulations. Each builds on another. We expect the later one to coalesce with the previous one, but most often ever so subtly it shifts its stand--imperceptible in a single instance yet almost divergent in a continuum. Precedents thus are "clear at the core but blurred at the edges."

97. In *Sunil*, a Division Bench of this Court has considered how the seniority of primary teachers should be determined. It has held that the primary teachers' seniority must be reckoned based on their date of joining and continuous officiation. *Sunil* has pertinently observed that a primary teacher's obtaining B.Ed. gives him no march over others. In *Sau. Mamta Pandurang Nimje*

v. State of Maharashtra^[26], a Division Bench of this Court at Aurangabad has held that the seniority of a graduate trained teacher must be reckoned from the date of his or her qualifying, but not from the date of joining the service. In fact, the petitioner, in this case, filed a review petition and sought to rely on *Viman Vaman Awale*. But the Court has repelled the petitioner's contentions, holding that the decision applies only to primary teachers. Rightly so.

98. In *Anjali Jayant Khati v. Bal Mandir Sanstha*^[27], another Division Bench has tellingly observed that the date of appointment is not the only criterion for fixing the seniority. While the authority's fixing the seniority, the date of a candidate's acquiring B. Ed. qualification would also become material. Unless one acquires or possesses such qualification as B. Ed. or another professional qualification, notes *Anjali Jayant Khati*, one cannot go up in the ladder. If a teacher is a graduate but does not hold "training" or professional qualification, he cannot fall in Category 'C'. He may enter 'C' category the day he acquires training or professional qualification. The ladder is in descending order.

²⁶[] W.P. No.1679 of 2018, decided on 15th January 2018

²⁷[] (2009) 1 Bom.C.R. 2016

Further observes *Anjali Jayant Khatib* that a trained teacher would be put above an untrained teacher though the untrained teacher may be senior, in the literal sense. Referring to Schedule 'F', *Anjali Jayant Khati* lays down that the seniority must be fixed mainly on three criteria: (a) the length of continuous service; (b) the acquisition of professional qualification; and (c) the age if two or more candidates or teachers are appointed on the same day.

99. *Ashok Narayan Sathe v. Education Officer (Secondary), Zilla Parashad*^[28], another Division Bench decision, in fact, is a precursor to *Sau. Mamta Pandurang Nimje* and *Anjali Jayant Khati*. All these three squarely accord among themselves in their judicial dicta, as was later echoed in *Bhawana*. Not to proliferate, we may note that *Pushpanajali Subodha Shenvi v. Nagrik Seva Mandal*^[29], too, takes the same stand. In *Shantaram Dhondu Ahire v. Education Officer (Secondary), Zilla Parishad*^[30], a learned Single Judge has followed *Anjali Jayant Khati*. The same precedential path is taken by *Chagan v. Education Officer (Secondary), Zilla Parishad*^[31], another decision by a learned Single Judge.

28[] 2007 (4) Mh. LJ 358

29[] 2016 (5) Mh.LJ 856

30[] WP No.7113 of 2015, decided on 10th October 2017

31[] 2018(3) Mh.LJ 720

100. The earliest among these decisions is *Vitthal v. Zilla Parishad, Chandarpur*³², to which one of us (B.R. Gavai J) is a party. Though *Vitthal's* stand is unmistakable on the efficacy of a teacher's acquiring higher qualification, it nevertheless concerns pay scale among the primary teachers. So it needs no elaboration.

101. In *R.B. Desai v. S.K. Khanolkar*³³, the Supreme Court has held that "if at the time of consideration for promotion, the candidates concerned have acquired the eligibility, *then unless the Rule specifically gives an advantage to a candidate with earlier eligibility*, the date of seniority should prevail over the date of eligibility." The Rule in *R.B. Desai* has given no priority to the candidates acquiring earlier eligibility. Here it has. Granted, in service law, seniority has its own weightage. But as guardedly observed in *R.B. Desai*, the Rule can "specifically exclude this weightage of seniority."

102. In *Sahakar Vidya Prasarak Mandal v. Shreelekha Sunil Garg*³⁴, a learned Single Judge has relied on *Viman Vaman Awale*

³²[] 2006 (2) Mh.LJ 124

³³[] AIR 1999 SC 3306

³⁴[] W.P. No.1153 of 2018, decided on 4th May 2018

to hold that “D.Ed., qualification is sufficient along with the SSC and the Diploma. It is not material to obtain a B.Ed., degree for the purpose of computing seniority; rather it would be on the basis of continuous officiation . . .” But in review^[35], this judgment was recalled and the matter was restored to file. So *Shreelekha Sunil Garg*, as a precedent, if it were, has ceased to exist.

103. In *Satish Ramchandra Kamdi v. State of Maharashtra*^[36], the petitioner had the requisite qualification by the date of his appointment (13.07.1983). The 5th respondent was only an untrained teacher on the date of his appointment (23.07.1983). Following *Viman Vaman Awale*, a learned Single Judge has held that the petitioner is the senior of the two.

104. In *Vivek v. The Education Officer*^[37], the petitioner joined the service in July 1970. The law mandates that a person, with a diploma of any statutory University, appointed before 1st October 1970 and continued as a teacher with or without any break, is to be treated as a trained teacher in the Secondary School. So, because of this peculiar fact, *Vivek* concludes that the

³⁵[] Review Petition No.86 of 2018, decided on 27th September 2018

³⁶[] W.P. No.983 of 2016, decided on 9th March 2018

³⁷[] 1998 (2) Bom.CR 534

petitioner is the senior despite his lacking the qualification. Thus, *Vivek* turns on its own facts—especially that the petitioner joined before the 1st October 1970.

105. In *Chgan v. Education Officer (Secondary)*^[38], as gathered from the judgment, the petitioner was appointed as an Assistant Teacher in the respondent School on 01.08.1985 for teaching 5th to 7th standards. He was fully qualified, as he was possessing S.S.C., and D.Ed. Respondent 4 to 7, on the other hand, were holding Graduation and B.Ed. The fourth respondent was initially appointed temporarily on 16.07.1985. Later, on 24.11.1988 he was appointed in a regular vacancy, to teach higher standards. Respondent Nos. 5 to 7, too, were appointed on 15.07.1989, to teach higher standards. All had the necessary qualifications of Graduation with B.Ed.

106. In course of time, after his acquiring B.Sc., the petitioner was brought into the category in which the requisite qualification is Graduation. He came into that category on 21.02.1997. The petitioner has contended that he was appointed on 01.08.1985 in a post for which he was holding the requisite

³⁸[] WP No.1391 of 2016, decided on 25th March 2019

qualification. And the respondents 4 to 7 were appointed later, although to teach higher standards in the school. When the question of seniority for the post of Headmaster arose, the petitioner contended that because of his longer continuous officiation, he was the senior most, and so he ought to have been appointed as the Headmaster.

107. The respondents have, however, contended that the petitioner's earlier joining the service in "the primary or middle section" of the school was irrelevant because seniority based on continuous officiation was relevant only in case of primary school teachers.

108. A learned Single Judge, after referring to almost the entire case law on the issue of seniority, has held that "when the petitioner and respondent nos. 4 to 7 were all holding the necessary qualifications for being appointed as Headmaster, the seniority between them could be determined only on the basis of initial date of appointment."

109. But, to our mind, going by *Viman Vaman Awale* and *Bhawana, Chagan* seems to accord with neither the statutory mandate nor the precedential position holding the field. It is

undisputed that the petitioner completed graduation, acquired the qualification of B.Ed., and was brought into category C later. When the petitioner entered that Category, the respondents 4 to 7 had already been there from date of their initial appointment.

110. True, *Chagan* refers to Rule 3 of the MEPS Rules. Rule 3(1)(b) of the Rules spells out the eligibility for appointment as Headmaster of a Secondary School. Further true is the fact that the petitioner, as well as the respondents 4 to 7, is qualified. Thus, they may have apparently been placed on an even keel. Yet can we ignore the respondents' seniority—seniority at an elevated category? Regrettably, we cannot. The promotion is not as a Primary Teacher; it is as a Secondary Teacher. In fact, *Chagan* falls foul of *Bhawana*, so to say. So we hold, with respect, *Chagan* is *per incuriam*.

111. A Full Bench of this Court in *Vadanath v. Secretary, Marathwada Shikshan Prasarak Mandal*^[39], has on reference considered this question: For promotion to the post of Head Master of a Primary School, is a teacher's seniority counted from the date of initial appointment or from the date of his acquiring

³⁹[1] 2006 (6) Bom.CR 804

the educational and training qualification? The reference was because of conflicting judicial dicta from two Division Benches.

112. On the facts, the petitioner's date of initial appointment as a primary school teacher was 1-3-1972; then, he had S.S.C. He, however, improved his qualification in 1981, by passing Diploma in Education (D.Ed.). On the other hand, the respondent No. 2 was initially appointed on 1-7-1973; then he too had S.S.C. But he acquired the D.Ed., in 1980; that is, one year before the petitioner could. If the seniority was to be reckoned from the date of initial appointment and continuous officiation, the petitioner would emerge senior. If the seniority was to be counted from the date of the teacher's acquiring the requisite qualification (D.Ed. in the present case), respondent No. 2 would be senior.

113. The learned Full Bench has observed that an employee must belong to the same stream before he can claim seniority *vis-a-vis* others. With an improved qualification, the person may join the regular stream. At that point of confluence with the regular stream, those who have already been in the stream "can claim seniority vis-a-vis those who join the same stream later." Emphatic is the observation that "the late comers to the regular

stream cannot steal a march over the early arrivals in the regular queue.”

114. Agreed, in *Chagan*, the petitioner joined as a primary teacher. And he had all the qualifications for that post. But he was not staking seniority as a primary teacher. He later joined the stream of secondary teachers. In that category, with later acquired qualifications, he cannot, as held in *Vadanath*, steal a march over others who had been there in that stream. Had *Vadanath* been brought to the notice of *Chagan*, perhaps the result would have been different.

Conclusion:

115. This Court’s series of judicial pronouncements as cited above, with the final cap by the Supreme Court’s *Viman Vaman Awale* and *Bhawana*, unmistakably lays down the law: Among Primary Teachers, the seniority is counted from the date of the teacher’s joining service. On the other hand, among the Secondary Teachers, the seniority is counted based on when the teachers had been placed in a particular category—for their seniority stands graded and categorized by the date of their very joining. This categorization is qualification-dependent. Placed in

the descending order of category, the teachers rise in ranks of seniority with their additionally acquired qualifications under Guideline (2) of Schedule F, appended to Rule 12 of the MEPS Rules.

116. Once a few teachers reach a common category, equal they may have all been in rank, but their seniority depends on who entered the specific category first. And this entry depends on the date of the teacher's acquiring qualification, not on the date of his or her joining service.

117. Thus, a teacher who is a member of a lower category can in no manner rank senior to the teacher who is already a member of a higher category. Such a claim could be based neither on his continuous service nor on his acquiring the qualification and reaching the higher category. To be specific a teacher, for example, in Category D, E, or F, on later migration to Category C, cannot steal a march over a teacher already ensconced in that higher Category. That teacher's seniority by length of service and by his or her later acquiring the requisite, additional, or even superior qualifications does not defeat the right of teachers already found placed in Category C. What applies to Primary

Teachers cannot apply to Secondary Teachers, for the Rules do keep these two streams of teachers unmixed.

Answers:

118. Once, secondary teachers enter a common category from different sources, how should their seniority be reckoned: is it from the date of their entering and continuously officiating or from the date of their acquiring qualification to reach that common category?

119. The seniority must be reckoned from the date they entered the desired category; that is, from the date they acquired the necessary qualification, but not from the date of their entry into service.

120. Is there any universal principle for this proposition or does it depend on the rules of service?

121. No. the seniority in any cadre depends on the statutory position—principal or subordinate—that governs the employees of an establishment. Here, it is governed by the Guidelines in Schedule F, under Rule 12, of MEPS Rules.

122. We therefore allow all the writ petitions, holding:

(a) The two Government Circulars of 24th January 2017 and 14th November 2017 may stand unaffected vis-à-vis the Primary Teachers.

(b) Those two Government Circulars, however, cannot be sustained *vis-à-vis* the Secondary Teachers, to the extent those GRs mandate that the teachers' seniority be reckoned from the date of their first appointment and continuous service.

(c) The Government and the authorities concerned, including the School Managements, will recalibrate the relative seniority of the Secondary Teachers based on the Category they belong to and based on when they have entered that Category.

So we declare. No order on costs.

(Dama Seshadri Naidu, J)

(B.R. Gavai, J)