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

WRIT PETITION NO.12714 OF 2018

1. Mahadeo Dnyanu Lingade
2. Loksewa Udyog Sheti Va Shikshan
Vikas Sanstha

.. Petitioners

Vs.

The State of Maharashtra
through the Secretary,
School Education Department & Ors.

.. Respondents

Mr. N.V. Bandiwadekar I/b. Ms. A.N.Bandiwadekar for the petitioners.

Mrs. Vaishali Nimbalkar, AGP, for respondent nos.1 to 3.

Mr. A.V. Anturkar, Senior Advocate, a/w Rajaram Deshmukh for respondent
no.4.

CORAM : A.K. MENON, J.

DATED : 21st FEBRUARY, 2019.

P.C. :

1. The challenge in this writ petition is to an order dated 22nd October, 2018 by which the 4th respondent was declared as senior to the 1st petitioner. Considering the nature of the dispute and the scope of the petition, it was felt appropriate that the petition can be disposed finally at the stage of admission. Accordingly, by consent of parties, petition is taken up for final disposal at the stage of admission.

2. Rule. Rule returnable forthwith.

3. The facts in brief are as follows;

The 2nd petitioner is managing one school which employs 1st petitioner and the 4th respondent. The 1st respondent is the State of Maharashtra, the 2nd respondent being the Deputy Director of Education, Pune Region and the 3rd respondent is the Education Officer(Secondary), Zilla Parishad, Solapur. The 1st petitioner and the 4th respondent joined as an Assistant teachers in a school managed by the 2nd petitioner. The school is recognized by the State and aided institution which manages classes of standard 5 to 10 on aided basis and a classes of standard 11 and 12 for the Arts faculty on an unaided basis. The 1st petitioner and the 4th respondent were appointed one after the other. The 1st petitioner was born on 1st June, 1961 and was appointed in the open category having qualified with a B.A. in Marathi in 1985 and B.Ed Marathi/History in 1988. He was qualified to be appointed as an assistant teacher in the secondary school. By an order dated 22nd September, 1988, the 1st petitioner came to be appointed as assistant teacher with effect from 1st October, 1988 enjoying a pay scale of a trained graduate teacher. He worked in this position till 11th June, 1989. On and from 9th June, 1989, the 1st petitioner was continued in service on a permanent basis as assistant teacher effective from 12th June, 1989 without a break in service. The 2nd petitioner sought

approval of the appointment of the 1st petitioner which respondent no.3 granted on or about 24th June, 1999. Meanwhile on 2nd February, 1989 respondent no.4 was appointed as an assistant teacher in the school.

4. The 4th respondent was also born on 1st June, 1961. He secured qualifications of B.A. in 1984 and B.Ed in 1987 and M.A. in 1988. The 4th respondent was appointed as an assistant teacher with effect from 2nd February, 1989. The 3rd respondent granted approval to the appointment of the 4th respondent also vide order dated 24th June, 1999. By order dated 13th January, 1994 the 3rd respondent granted approval of the appointment of the petitioner no.1 on permanent basis by way of continuity from 12th June, 1989. Thus, 1st petitioner was appointed as teacher from 1st October, 1988 and 4th respondent from 2nd February, 1989. The 3rd respondent granted approval to both these persons from the dates of appointment. It transpires that upon retirement of the head master of the school on 31st May, 2018, the 1st petitioner was promoted as incharge head master from 1st June, 2018 till regular promotion was granted. The 2nd petitioner submitted a proposal to the 3rd respondent for approval and was granted approval on 20th June, 2018 as incharge head master permitting him to sign pay bills and to look after day to day administration of the school for the period from 1st June, 2018 to 31st August, 2018.

5. On 3rd September, 2018 the 3rd respondent extended the signing authority to 1st petitioner from 1st September, 2018 to 30th November, 2018. Some internal disputes are stated to have arisen in the management which also led to dispute in seniority claims between the 1st petitioner and the 4th respondent. At that stage, the 2nd respondent was requested to conduct a hearing and decide the matter of inter-se seniority. As a result of the dispute, it appears that the management called upon the 2nd respondent vide letter dated 22nd June, 2018 protesting the promotion of 1st petitioner as head master. The 2nd respondent, however, made enquiries with 3rd respondent. In this behalf the 3rd respondent addressed a letter dated 17th July, 2018 to the 2nd respondent informing him of the developments as to the dispute in seniority. 2nd respondent was requested to conduct a hearing and decide the dispute. The 2nd respondent on 11th September, 2018 informed the 3rd respondent of a hearing scheduled on 27th September, 2018 copies were also sent to the petitioners and 4th respondent and after permitting the parties to file their written submissions the hearing was held. The 2nd respondent reportedly considered the dates of appointment and vide order dated 22nd October, 2018 held that 4th respondent was senior to 1st petitioner as per government circular dated 14th November, 2017 issued by 1st respondent as well government resolution dated 5th October, 2015. The management

was therefore directed to submit a proposal to the 3rd respondent seeking approval of the promotion of respondent no.4 as head master of the school. Approval was then granted on 31st October, 2018. It is these orders that the petitioners have challenged.

6. Mr. Bandiwadekar, the learned counsel for the petitioners submitted that the 1st petitioner was appointed as a teacher from 1st October, 1988 whereas the 4th respondent was appointed only on 2nd February, 1989 approval was granted to these two persons only from their dates of appointment and therefore the petitioner was senior to the 4th respondent not only on the basis of their appointments but also on the basis of continuous officiation. The 1st petitioner he submitted was in continuous service right from his date of appointment whereas seniority of the 4th respondent could be assessed only from 2nd February, 1989 on the basis of continuation of the officiation. He submitted that the management prepared the seniority list. The 1st petitioner was shown as being appointed on 1st October, 1988 and the 4th respondent on 2nd February, 1989. Therefore the 1st petitioner was placed above 4th respondent in the assistant teacher category. The 1st petitioner came to be appointed as incharge head master on 1st June, 2018 and once again the seniority list, 1st petitioner was placed above the 4th respondent. In the year 2013-14, however, the petitioner no.1 was shown below 4th respondent although the dates of appointment

were shown as 1st October, 1988 and 2nd February, 1989.

7. Mr. Bandiwadekar submitted that although this was an incorrect representation the 1st petitioner did not deem it necessary to raise an objection at that stage to the seniority list. According to him, in the academic year 2018-19 when the seniority list was prepared, 1st petitioner was at serial number 1 and 4th respondent at serial no.2 as he was then a supervisor, the 4th respondent having been promoted to that post in the year 1998. It is only upon the head master of the school superannuating on 31st May, 2018, that the issue of promoting the 1st petitioner was taken up.
8. Mr. Bandiwadekar submitted that the impugned order is illegal and passed without jurisdiction. He submitted that the representation of the management could have been decided only by the 3rd respondent who was the Education Officer. He submitted that the disputes as to inter-se seniority would necessarily have to be decided by the Education Officer and in the instant case the matter was referred by the Education Officer to the Deputy Director of Education, 2nd respondent, which could not have been done. According to Mr. Bandiwadekar it was incumbent upon the 3rd respondent to decide the issue himself and therefore the order passed by 2nd respondent is without jurisdiction and therefore invalid.

9. Mr. Bandiwadekar contended that under Rule 12 of the MEPS Rules, only the 3rd respondent would have exercised jurisdiction in the matter of inter-se seniority and this could not have been referred to the Deputy Director. He invited my attention to the provisions of Rule 12 sub rule (3) which sets out that disputes in the matter of inter-se seniority shall be referred to the Education Officer for this decision. He therefore submitted that the order being passed without jurisdiction, could not be sustained. According to Mr. Bandiwadekar, the 2nd respondent being not vested with jurisdiction under Rule 12 could not have exercise his discretion and ordered the change in the seniority. According to Mr. Bandiwadekar, the 2nd respondent would have jurisdiction only when the dispute of inter-se seniority was between the teachers working in a higher secondary school or junior college and therefore the order impugned is not sustainable. He submitted that respondent no.4 is also believed to have made a representation with regard to the appointment of 1st petitioner as incharge head master claiming that he was senior to the 1st petitioner. Thus, clearly there was a dispute which is correctly described as one pertaining to inter-se seniority and in the face of such a dispute only the 3rd respondent could have exercised jurisdiction. He reiterated that there was no justification in the 3rd respondent referring the matter to the 2nd respondent. The rules in question did not provide for such a course of

action. Despite the fact that the 2nd respondent was superior in rank to the 3rd respondent, the 3rd respondent could not avoid his responsibilities and request the 2nd respondent to conduct the hearing.

10. Mr. Bandiwadekar, therefore submitted that the 2nd respondent had erred in passing the impugned order that even on facts and on the basis of continuous officiation the 4th respondent could not be treated as senior. He submitted that service book of the 1st petitioner also reflected this fact of seniority and therefore there is no occasion for the 2nd respondent to adopt the course of action that he has. According to him, the service book showed the 1st petitioner as senior to the 4th respondent and 4th respondent has not taken any objection at the relevant time. Although on some occasions 1st petitioner was shown below the 4th respondent, the date of appointment of the 1st petitioner was undoubtedly prior to that of 4th respondent.

11. Mr. Bandiwadekar then submitted that the 2nd respondent who also failed to consider the provisions of Schedule F of the MEPS Rules which provided that seniority of teachers had to be counted on the basis of continuous officiation and that there was no doubt of the dates on which the petitioner had assumed charge. The service book of 4th respondent had showed his initial date of appointment is from 2nd

February, 1989. However, the next year he has shown as from 12th June, 1989 whereas there is a break in service on 30th April, 1989 this break in service was from 1st May, 1989 to 11th June, 1989. For this reason also it is submitted that 4th respondent could not have been treated as senior to the 1st petitioner. Mr. Bandiwadekar, the learned counsel for the petitioner submitted that no other criteria could be gone into for determining the seniority such as date of birth, qualifications etc. The reliance placed on the government resolution was stated to be misconceived. Furthermore, the fact that 4th respondent held higher educational qualification that of a Master of Arts did not entail any change in the seniority position and that the seniority list of 1999-2000 wherein the petitioner no.1 was placed after respondent no.4 by itself did not weaken the case of the petitioner since in the subsequent seniority list, the petitioner was placed above respondent no.4 to which no objection was raised by the 4th respondent.

12. Furthermore, the fact that 4th respondent having passed diploma management school and having completed training was not relevant. Mr. Bandiwadekar further submitted that the government resolution dated 14th November, 2017 is in breach of Schedule F and the rules has already in challenge in various writ petitions. Mr. Bandiwadekar then submitted that the impugned order has proceeded on the basis of the

promotion given to the 4th respondent as supervisor from 15th June, 1988 and to which approval was granted by 3rd respondent on 18th January, 1989. The 2nd respondent failed to consider that only because of 4th respondent promoted as supervisor did not change the seniority position of either party. In other words, the promotion to the post of supervisor is of no consequence. It is was further contended on behalf of the petitioner that during the hearing before the 2nd respondent, it was contended that the order dated 24th June, 1999 which was projected as revised approval order was fabricated by virtue of which a footnote was inserted showing that the earlier approval granted to the 1st petitioner was cancelled and that the revised order has been issued while impugned order had not taken this into consideration. Thus, in these circumstances, the order must be quashed.

13. Mr. Bandiwadekar further submitted that after the writ petition was filed on 30th October, 2018 the matter was mentioned before the Court and circulation was granted for admission on 19th November, 2018 since the Courts were remained to be closed during the Diwali vacations. This petition was sought to be served by hand delivery on 3rd and 4th respondent but 4th respondent declined to accept the same and ultimately it is accepted on 6th November, 2018. On 1st November, 2018 the 4th respondent contended that he had already been granted

approval as head master of the school by 3rd respondent. Although at that time the petitioner had not received any communication from 3rd respondent, he submitted that application was made under the R.T.I. Act on behalf of 2nd petitioner and in response thereto, a copy of the office noting granting approval to 4th respondent as well as an order dated 31st October, 2018 issued by respondent no.3 granting approval to the promotion of 4th respondent as head master was provided. The petition was therefore amended to challenge the order dated 31st October, 2018. It is the petitioners contention that 3rd respondent acted as hastily and in order to frustrate the writ petition and there was no question of the management submitting any proposal to the 3rd respondent seeking approval of the 4th respondent as headmaster. It is contended that there was a dispute among the members of the management and a rival group which is not really involved in the affairs of the 2nd petitioner trust and the school had been instrumental in the 4th respondent's appointment. Accordingly, it is contended that there was violation of principles of natural justice inasmuch as 3rd respondent tried to overreach the orders that this Court may pass by issuing the impugned order inspite of being informed that the writ petition being filed would be coming up for admission on 19th November, 2018.

14. *Mr. Bandiwadekar relied upon the following judgments:*

*(1) Harshad Chimani Lal Modi v/s. DLF Universal Ltd. & Another*¹

*(2) I.C.I.C.I Ltd. And another v/s. Sharad Khanna and others*²

15. The petition is opposed on behalf of 4th respondent by Mr. Anturkar who relied upon the contents of an affidavit in reply dated 29th November, 2018. Mr. Anturkar submitted that the petitioner had suppressed the material facts and had not disclosed the true and correct facts. He submitted that the petition is not maintainable since the signatory to the petition is not the Secretary of the Lokseva Udyog Sheti Shikshan Vikas Seva Trust. It is submitted that the appointment of the 1st petitioner and the 4th respondent was given on 12th June, 1989 but there was break in service from 12th June, 1989 and the appointment of both 4th respondent and the 1st petitioner was to be treated as continuous from 12th June, 1989 and both 1st petitioner and 4th respondent were born on the same date. After considering all factors permanent approval was granted by the Education Officer, Secondary, on 13th January, 1994 and in that approval 4th respondent is shown at serial number 1 and was therefore treated as senior to the 1st petitioner. That from 1st June, 1990 to 31st October, 1993, 4th respondent was working as head master of the school and thereafter

¹ (2005) 7 SCC 791

² 1993 (1) Mh.L.J. 448

considering the seniority he was appointed as a supervisor on a promotional post on 15th June, 1998. That in 1998 a seniority list was prepared and that the 4th respondent was shown at serial number 1. The seniority list is also signed by the petitioner who has never disputed the seniority list. Not having disputed the seniority list, it was contended that the 1st petitioner could not challenge the seniority today. That the date of birth and the date of joining of both the candidates were the same and therefore the higher qualification should be taken into consideration. That the 2nd respondent had considered all the issues and come to the conclusion that the 4th respondent was senior most. The 4th respondent had obtained a Diploma in School Management as well as training as headmaster having completed the National Secondary Education Programme. However, 1st petitioner had not completed this training and clearly 4th respondent has a higher qualification. That 4th respondent was also working as a supervisor since 1998 apart from the headmaster from 1st June, 1990 to 31st October, 1993.

16. Mr. Anturkar contended that 2nd respondent is a higher and superior officer to the Education Officer who had the jurisdiction to entertain the dispute of the seniority. It is further contended by Mr. Anturkar that 4th respondent has been senior to the 1st petitioner since 1989. In

this behalf he referred to a statement at Exhibit H-4 to the affidavit in reply being the seniority list wherein the 4th respondent is shown at serial number 1 and the 1st petitioner at serial number 2. It is further contended that after the order was passed by 2nd respondent, the 4th respondent has taken charge, submitted the salary bills and has been functioning in the capacity as head master since 31st October, 2018. In that sense the order of the Deputy Director of Education has already been implemented and the management has acted upon the same.

17. On behalf of the respondents, it is further submitted that the petitioners grievance relates to supersession and approval granted was on the basis of 4th respondent having been appointed as supervisor in 1998 that the appointment of supervisor was on the basis of seniority in the year 1998 which was not challenged. Being a matter of supersession it will be for the school tribunal to decide the issue in accordance with the decision in *St. Ulai High School v/s. Devendraprasad Jagannath Singh and another*³.

18. I have heard the learned counsel for the parties at length and considered the factual matrix which prima facie indicates that there are disputed questions of fact which need to be gone into. The 1st petitioner and 4th respondent are born on the same date and have been

3 2007(1) Mh.L.J. 597

shown senior to one another at different stages without protest on either side. In the petition, the petitioners have reiterated that although “on some occasions” 4th respondent was shown as senior to 1st petitioner but the 1st petitioner did not think it necessary to object to the seniority list. Thus the petitioners admit that the 4th respondent was shown as senior to the 1st petitioner and yet the 1st petitioner did not think it necessary to question the seniority list. The dispute in the management of the 2nd petitioner has also resulted in controversy over authorization of the 2nd petitioner to pursue the matter before this Court. It is a common ground that the dispute pertaining to the management of the 2nd petitioner trust is engaging the attention of Charity Commissioner and it is on this basis that the Education Officer has proceeded to request the 2nd respondent Deputy Director of Education to consider the issue and take a decision in the matter.

19. A perusal of the order impugned in this petition reveals that the Education Officer who is the appropriate authority to take decision. vide his letter dated 17th July, 2018 requested the Deputy Director of Education–2nd respondent to take decision on the disputed aspects. Vide his letter, he has informed the 2nd respondent that the proposal for approving the 2nd petitioner as head master was made by the Secretary of the 2nd petitioner trust whereas the proposal for approval of the 4th

respondent was made by the Chairman/Secretary of the trust. One request followed was closely by the other. The petitioners proposal having been sent on 26th June, 2018 and the 4th respondent's on 2nd July, 2018, the Education Officer was of the view that it cannot be ascertained whether either of the two persons was authorized to submit proposals and in this context the Education Officer- 3rd respondent had sought information relating to a change report is said to be pending before the Charity Commissioner. The Education Officer therefore took a view that unless the change report was allowed, approval could not be granted. Since the 1st petitioner was appointed initially he has been given authority to sign the salary bills on a temporary basis from 1st June, 2018 to 31st August, 2018, disputes as to seniority between the 2nd petitioner and the 4th respondent having arisen, it was thought fit to appoint another person. There were further issues pertaining to seniority list inter-se between the persons next in line and it is in these circumstances the Education Officer has decided that the concerned parties may be heard by the Deputy Education Officer and a decision be given.

20. Mr. Bandiwadekar had relied upon copies of the appointment orders dated 29th September, 1988 and 9th June, 1989 in respect of the 1st petitioner as also approvals of appointment of 1st petitioner and 4th

respondent dated 24th June, 1999 and 13th January, 1994 as also the communication dated 17th July, 2018 written by the 3rd respondent to the 2nd respondent. Reliance was also placed on the submissions made by the 1st petitioner to 2nd respondent in which the 1st petitioner has made submissions on merits. There was no challenge to the authority, jurisdiction or competence of 2nd respondent to decide the issue. The hearing was accordingly proceeded with without any protest.

21. Although Mr. Bandiwadekar had submitted that merely because the hearing was conducted before a wrong forum and the 1st petitioner had participated it will not make the decision valid, I am of the view that the Act does not contain any provision which disqualifies the Deputy Director on a request of the Education Officer hearing the matter specially since the matter was referred to him by the Education Officer. The matter relating to disputes in the management obviously could not have been dealt with by the Education Officer whose jurisdiction would be restricted within the four corners inter-se seniority matters. I am therefore, unable to accept the contention of Mr. Bandiwadekar that although the 1st petitioner attended the hearing without protest, made submissions and invited a decision it would render the decision bad for want of jurisdiction.

22. Mr. Bandiwadekar also relied upon the joining report and resolutions passed by the School Committee on 14th June, 1998, approval granted on 18th January, 1995 and the government resolution dated 5th October, 2015 which inter alia deals with the aspect of preference of a candidate with higher educational qualifications. The decision of the 2nd respondent was inter alia also based on consideration of this resolution. It is on the basis of this resolution that the higher qualification of the 4th respondent has been considered. One of the contentions of Mr. Bandiwadekar is that the compilation of documents was relied upon by the petitioners will show that the 4th respondent was granted benefit of senior scale after 12 years of the service and selection grade after 24 years of service with effect from 2nd February, 1989. However, at the hearing before the Deputy Director and before this Court, the 2nd respondent contended that date of continuous officiation was not 2nd February, 1989 but 12th June, 1989 therefore the claim of the 4th respondent was false. He submitted that the information was on the basis of R.T.I. application dated 1st November, 2018 which shows that the appointment of 4th respondent was shown from 2nd February, 1989. At this stage, in light of view that I have taken, I do not consider to deal with the matter pertaining to applicability or otherwise of the government resolution dated 5th October, 2015 to the facts of the present case and this aspect is left for

consideration before the appropriate forum as and when the order impugned is challenged before the appropriate forum.

23. In the course of arguments, one of the submissions advanced was that under Rule 12(3) matters of inter-se seniority shall be referred to Education Officer for his decision. The fact remains that the Education Officer has in the facts of the case and having observed that there was serious dispute amongst the management had referred the matter to the 2nd respondent-Deputy Director of Education who has heard the parties and passed an order. Although Rule 12(3) does provided for disputes of inter-se seniority to be referred to the 3rd respondent, it is on account of the disputes in the management that the Education Officer has referred the matter to the superior authority. Nothing in the M.E.P.S. Act and Rules prohibits the Deputy Director of Education from taking a decision in the matter specially since the parties have appeared before him and had agitated the issues raised in the present petition. There are also disputes pertaining to the entries in the service book extracts of 1st petitioner and 4th respondent. One of the contentions taken up by the respondent is that owing to the disputes between the parties custody of the service book and the entries therein are not authentic. These also give rise to the disputed questions of fact.

24. Mr. Bandiwadekar had relied upon the decision in Harshad Chimanlal Modi (supra) in support of his contention that an order which was required to be passed by the authority should be in accordance with law and in the present case the dispute of inter-se seniority list ought to have been referred to the Education Officer who has required to decide the same. It is not a case where the Deputy Director- 2nd respondent has usurped powers of some other authority viz. the 3rd respondent. Although Mr. Bandiwadekar had referred to a resolutions of the management, the fact that serious disputes exists among the management is admitted and I am of the view that the decision cited by Mr. Bandiwadekar on behalf of the petitioners are of no avail.

25. On the other hand, in the case of St. Ulai High School (supra) the full bench has held that where action has been taken by the management against an employee on the basis of such a determination of the Education Officer, an appeal could be filed before the school tribunal. It is only in cases where no consequential action has been taken by the management, it would be open to the employee to take recourse against the decision under Rule 12 in accordance with law. It is also a trite law that the decision of the Education Officer is not final. It is also to be noted that after the petition was filed on 30th October, 2018 no application was made for ad-interim relief but only circulation was

sought and was granted on 19th November, 2018. No application for ad-interim relief was made nor was an attempt made to move the vacation Court or leave sought to move the vacation court. In the meantime, the impugned order was given effect to. No doubt there may have been some haste in giving effect to the order but the amendments carried out to the petition also made allegations of fabrication of document as can be seen from paragraphs 28 and 29 of the petition. These are matters that there cannot be considered in this writ petition. These are aspects that can be conveniently decided in proceedings before the appropriate forum.

26. In view of the fact that the 1st petitioner claims to have been deprived despite the seniority he claims that to be entitled to and given the effect of the close contest between the parties and which is compounded by disputes in the management, I am of the view that this is not a fit case that interference more so because the 4th respondent has already been in office for sometime and has been officiating as headmaster. It is also in the interest of the institution that they have some stability of attending to administrative matters in the school. Even otherwise the decision of the Education Officer is not final on the aspect of inter-se seniority. In the instant case, the hearing may have been conducted by the 2nd respondent at the request of the 3rd respondent. The decision is

effectively at the behest of the 3rd respondent. In this case consequential action has already been taken by the management although there is a dispute within the management itself. It would in my view constitute an action falling within Section 9(1)(b) of the MEPS Act and the decision taken to appoint the 4th respondent is deemed one under Rule 12(3). It is made clear that this Court has not taken any view on merits of the rival claims between the 1st petitioner and the 4th respondent. It is clarified that filing of this writ petition will not bar the filing of an appeal, if any filed and if in the event of any delay having occasioned, the tribunal will consider the duration of the pendency of this writ petition in any application for condonation of delay. In these circumstances, I am of the view that the impugned order does not call for interference in the writ jurisdiction of this Court. It will be open for the petitioner to approach the school tribunal for redressal of his grievances. I therefore, pass the following order;

- (i) Writ petition is dismissed.
- (ii) No orders as to costs.

(A.K.MENON,J.)