

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

924 WRIT PETITION NO.8533 OF 2018

The Rahuri Education Society
Rahuri, Tq. Rahuri, Dist. Ahmednagar
Through its Secretary
Shri. Manoj s/o. Ashok Bihani
Age: 51 years, Occu: Agri. & Business,
R/o. Rahuri, Dist. Ahmednagar **.. Petitioner**

Versus

- 1] The State of Maharashtra
- 2] The Education Officer (Secondary)
Zilla Parishad, Ahmednagar.
- 3] Dilip Punja Kasbe
Age: Major years, Occu: Service,
R/o. "Deep-Punj", Popalghat Estate,
Munjoba Nagar, Rahuri,
Dist. Ahmednagar.
- 4] The Deputy Director of Education (Secondary)
Maharashtra State, Pune. **.. Respondents**

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Advocate for Petitioner:
Mr. Vinayak Sudhakar Bedre
AGP for Respondent Nos.1, 2 & 4: Mr. S. K. Tambe
Advocate for Respondent No.3: Mr. P. R. Nangare

...

**CORAM: RAVINDRA V. GHUGE
AND
ARUN R. PEDNEKER, JJ.**

DATE: 25th AUGUST, 2022

ORAL JUDGMENT (*Per Ravindra V. Ghuge, J.*):

1. **Rule.** Rule made returnable forthwith and heard finally by the consent of the parties.

2. The Petitioner Management has put-forth prayer clauses 'B' and 'C', as under:-

 "B) By issuing appropriate writ in the nature of direction and order, to quash and set-aside the order passed by the respondent No.2 by its letter dated 11.07.2018 (Exhibit-G) in the interest of justice.

C) Pending hearing and final disposal of this Writ Petition, the execution and operation of the order passed by the respondent No.2 by its order / letter dated 11.07.2018 (Exhibit-G) may kindly be stayed in the interest of justice."

3. Respondent No.3, the original appellant before the School Tribunal, was the Headmaster of

the school. It was alleged that he indulged in serious misconducts. The prior permission of the Education Officer was obtained on 18.03.2015, in order to place him under suspension. Accordingly, the appellant was suspended on 25.04.2015. He challenged the Departmental Enquiry as well as the order of suspension, in Writ Petition Nos.4049 of 2015 and 6106 of 2015. The first Petition was dismissed. The second Petition i.e. Writ Petition No.6106 of 2015, challenging the order of suspension, has been subsequently withdrawn by the appellant.

4. After the Departmental Enquiry commenced on 25.06.2015, the Management was not able to conclude the enquiry within three (03) months. Upon completion of the same, the appellant was dismissed from service on 18.01.2016. The Management had moved an application on 05.09.2015 for seeking extension of the suspension. The Education Officer (Secondary) passed an order on 22.09.2015, declaring that the extension is not being granted and the appellant be reinstated on

the post of Headmaster. This order was not challenged by the Management and it has attained finality.

5. The appellant again approached this Court by preferring Writ Petition No.14828 of 2017, alleging that the enquiry has not been completed within 120 days and, therefore, he should be granted all consequential service benefits. By order dated 03.05.2018, this Court disposed of the Writ Petition with a direction that the entitlement of subsistence allowance after lapse of 120 days can be verified by the concerned authority. By the impugned Communication dated 11.07.2018, Respondent No.2 directed the Petitioner to pay 100% subsistence allowance, from the date of suspension, to the appellant and refund the amount of subsistence allowance paid to the appellant by the State. It is in this backdrop that the Petitioner Management is before the Court challenging the order dated 11.07.2018, by which the Education Officer directed the Management to pay an amount of Rs.306097/- to the appellant and

refund the amount of Rs.104239/- paid by the Education Department, towards suspension allowance beyond 120 days of the suspension period.

6. The learned Advocate representing the appellant submits that he would not be concerned with the dispute between the Management and the Education Department as regards who should pay the suspension allowance. He is a suspended employee and he is entitled to the suspension allowance strictly in accordance with Rules. He relies upon an order passed by this Court on 24.10.2016 in Writ Petition No.9825 of 2016, filed by Smt. Rukhamin Ashruba Andhale Vs. The Deputy Director and others, more particularly, Paragraph No.8 which reads as under:-

"8. In my view, paragraph No.9 of the judgment of the Honourable Supreme Court in Vidya Vikas Mandal and another Vs. Education Officer and others [2007 (3) Mah.L.J. 801], is a clear guideline to the respondent / management to pay subsistence allowance from the date of termination. Similarly, as per the judgment of the

learned Division Bench of this Court in Writ Petition No.2137 of 2013 (Umakant G. Kalkotwar Versus Mahatma Gandhi Vidhya Mandir Nasik), dated 25.2.2015, the petitioner would be entitled for subsistence allowance at the rate of 50% initially for the period of 4 months under Rule 34(1)(b)(i) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 and at the rate of 75% after 4 months of suspension."

7. The learned AGP relies upon Rule 35 (3) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (*hereinafter referred to as the '1981 Rules'*). He contends that after an employee is suspended with the prior approval of the Education Officer, the subsistence allowance is paid at the rate of 50%, for the initial period of 4 months. Thereafter, the payment has to be made by the Management, if the Education Officer does not extend the permission to suspend.

8. Rule 35 of the 1981 Rules, reads as under:-

"35. Conditions of suspension.

(1) In cases where the Management desires to suspend an employee, he shall be suspended only with the prior approval of the appropriate authority mentioned in rule 33.

(2) The period of suspension shall not exceed four months except with the prior permission of such appropriate authority.

(3) In case where the employee is suspended with prior approval he shall be paid subsistence allowance under the scheme of payment through Co-operative Banks for a period of four months only and thereafter, the payment shall be made by the Management concerned.

(4) In case where the employee is suspended by the Management without obtaining prior approval of the appropriate authority as aforesaid, the payment of subsistence allowance even during the first four months of suspension and for further period thereafter till the completion of inquiry shall be made by the Management itself.

(5) The subsistence allowance shall not be withheld except in cases of breach of

provisions of sub-rules (3) or (4) of rule 33."

9. He then refers to the order dated 22.09.2015 passed by the Education Officer, to support his contention that the request of the Management for seeking extension of the suspension beyond 120 days, has not been approved by the Education Officer.

10. In this context, the learned Advocate for the Petitioner relies upon **Hamid Khan Nayyar Habib Khan Vs Education Officer, Secondary, Zilla Parishad, Amravati & others, 2004 (4) Mh.L.J. 513** and points out from Paragraph No.8, that the prior approval of the Deputy Director of Education is required to extend the period of completion of the enquiry in the light of Rule 37(2)(f), which reads as under:-

"Rule 37(2)(f):-

The inquiry shall ordinarily be completed within a period 120 days from the date of first meeting of the Inquiry Committee or from the date of suspension of the employee, whichever is earlier, unless

the Inquiry Committee has, in the special circumstances of the case under inquiry, extended the period of completion of the inquiry with the prior approval of the Deputy Director. In case the inquiry is not completed within the period of 120 days or within the extended period, if any, the employee shall cease to be under suspension and shall be deemed to have rejoined duties, without prejudice to continuance of the inquiry."

11. He further contends that the Education Officer could not have passed an order refusing to extend the suspension period. The proposal of the Management should have been placed before the Deputy Director of Education for seeking appropriate orders. He, therefore, contends that as no decision was communicated by the Education Officer, the suspension of the Petitioner is deemed to have been extended.

DEEMED EXTENSION OF SUSPENSION

12. We would deal with the last contention, at the threshold. It does not call for any debate that a deeming provision has to flow from the

statute. There has to be a specific provision to indicate that after a decision is not arrived at within a particular time frame, the request of the applicant would be deemed to have been granted.

For example:-

(a) Under CHAPTER-VB of the Industrial Disputes Act, 1947 the provision for seeking permission to close down an industry under Section 25(0), is prescribed. An employer is mandated to issue a notice of minimum 90 days for declaring a closure and move an application to the appropriate Government for seeking permission. Sub-Section 3 of Section 25(0) prescribes a period of 60 days from the date of the application for the appropriate Government to grant approval. If, by the expiration of 60 days, the appropriate Government does not take any decision of granting or refusing the permission to close down, the employer is deemed to have been granted the permission to close down with the

expiration of the period of 60 days, to be effected 30 days thereafter.

(b) Under CHAPTER-VI-Control of development and use of land included in development plans under the Maharashtra Regional Town Planning Act, 1966, Section 45 prescribes grant or refusal of permission for development. A period of 60 days is prescribed for the Planning Authority to take a decision either to grant or refuse the permission for development. Sub-Section 5 specifically provides that when such permission is neither granted nor rejected within 60 days, such permission shall be deemed to have been granted to the applicant on the day immediately following the date of expiry of 60 days.

(c) Similarly, Section 44 of the Maharashtra Land Revenue Code, 1966 in relation to the procedure for conversion of the use of land from one purpose to another,

provides 90 days for taking a decision as regards the change of user. After the expiry of the period of 90 days for taking a decision or within 15 days from the date of receipt of the application for a temporary change of user or where an application has been duly returned for the purpose mentioned in Clause (b) of Sub-Section (2), then within 90 days or as the case may be, within 15 days from the date on which it is again presented duly complied with, the permission applied for shall be deemed to have been granted, but subject to any conditions prescribed in the rules made by the State Government in respect of such user.

13. As such, in the absence of a specific provision under the MPES Act, 1977 or the MEPS Rules, 1981 prescribing a deeming provision, we cannot accept the submission of the Petitioner that as the Deputy Director of Education did not take a decision on the extension application, that the suspension of the appellant is deemed to have

continued. Moreover, the Petitioner had never applied to the Deputy Director of Education. It had applied to the Education Officer vide letter dated 17.08.2015.

IMPUGNED ORDER

14. The Petitioner is before this Court questioning the direction of the Education Officer that the Petitioner should pay 100% subsistence allowance after 120 days of the suspension, as, without an extension, the suspension stands revoked.

15. It would be apposite to reproduce Paragraph Nos.7 to 11, in **Hamid Khan Nayyar Habib Khan Vs Education Officer, Secondary, Zilla Parishad, Amravati & others** (supra) hereunder:-

"7. The decision of the Full Bench establishes that normally an employee of a recognised school can be placed under suspension only after obtaining prior permission of approval of the authority concerned as specified in Rules 33 and 35. In the present case it has been stated that an application was moved

before the Education Officer on 28th March, 2003, to which there was no reply. Be that as it may, in the second proposition it has been enunciated by the Division Bench that in extraordinary circumstances and in emergent situations, where an employee is alleged to be guilty of grave charges and there is reason to believe that he will be subjected to a major penalty in the event of guilt being established he may placed under suspension without obtaining the prior approval of the authority. In the present case, the statement of allegations has been placed on the record together with the additional affidavit dated 30th March, 2004. A perusal of the allegations would reveal that the allegations essentially relate to the period 2000-01. There is no material before the Court to indicate that there were any extraordinary circumstances or an emergent situation that warranted an order of suspension without taking recourse to the approval of the authority as contemplated in the judgment of the Full Bench. No such circumstances of an extraordinary or emergent nature have been drawn to the attention of the Court. Nothing has been placed on the record

before the Court to indicate any extraordinary or emergent circumstances between 26th March, 2003 when the Education Officer is stated to have been moved and the order of suspension. The Full Bench has laid down that where an employee of a recognised school is placed under suspension without approval, sub-rule (4) of Rule 35 will apply and the management shall be liable to pay subsistence allowance as laid down in the said provision. This direction must apply in the present case.

8. The next ground of challenge on behalf of the petitioner is with regard to Rule 37(2)(f) which provides as follows:

"Rule 37(2)(f) - The inquiry shall ordinarily be completed within a period of 120 days from the date of first meeting of the Inquiry Committee or from the date of suspension of the employees, whichever is earlier, unless the Inquiry Committee has, in the special circumstances of the case under inquiry, extended the period of completion of the inquiry with the prior approval of the Deputy Director. In case the inquiry is not completed within the period of 120

days or within the extended period, if any, the employee shall cease to be under suspension and shall be deemed to have joined duties; without prejudice to continuance of the inquiry."

9. Rule 37(2)(f) postulates that the inquiry has to be ordinarily completed within a period of 120 days from the date of the first meeting of the Committee or from the date of the suspension of an employee. The word "ordinarily" indicates that the period of 120 days is not an inflexible rule. The inquiry shall not stand vitiated upon the expiry thereof. Power has been conferred by the Rule to allow the inquiry Committee in "special circumstances of the case under inquiry", to extend the period for the completion of inquiry with the prior approval of the Deputy Director of Education. However, it has been spelt out that in case the inquiry is not completed within a period of 120 days or within the extended period, the employee shall cease to be under suspension and shall deemed to have rejoined duties without prejudice to the continuance of the inquiry. In view of the provisions of this Rule, the learned Counsel appearing on behalf of the

petitioner has fairly stated that it is not his submission that he inquiry stands invalidated upon the expiry of 120 days. After the expiry of the period of 120 days the consequence that has been laid down in Rule 37(2)(f) in regard to the suspension necessarily comes into force. In that view of the matter, the suspension ceases to operate and the employee is deemed to have rejoined his duties without prejudice to the continuance of the inquiry. Hence, we are of the view that there is merit in the contention of the petitioner. The petitioner is entitled to the benefit of the provisions of Rule 37(2)(f). In the present case the management has not convened even the Enquiry Committee. The attention of the Court is not drawn to any steps having been taken for progressing with the enquiry. Save and except for a bold averment there is nothing to show that the conduct of the petitioner is the reason for the failure to hold and complete the enquiry.

10. The learned Counsel appearing on behalf of the 4th respondent has made a statement before the Court that the

inquiry shall be concluded within a period of 3 months from today.

11. The petition is accordingly disposed of by directing that the suspension of the petitioner shall upon the expiry of 120 days cease to be in operation; that the petitioner should be deemed to have rejoined duties and that he shall be entitled to consequential benefits that would flow out of the aforesaid direction in terms of Rule 37(2)(f). The payment of the arrears shall be the liability of the management in view of the decision of the Full Bench and shall be effected within a period of three months from today. There shall be an order in these terms. No costs."

[Emphasis supplied]

16. The conclusion arrived at by this Court in Paragraph No.8, clearly settles the issue that though the enquiry may not be invalidated after the expiry of 120 days, since it was not concluded within the said period, the suspension would cease to operate and the employee is deemed to have rejoined his duties without prejudice to the continuance of the enquiry.

17. In this backdrop, we cannot ignore the fact that the appellant has retired from service on attaining the age of superannuation on 31.05.2017. There is, therefore, no question of either reinstating the appellant or treating him to be on duty as on date. However, applying the law laid down in **Hamid Khan** (supra), the suspension of the appellant would stand revoked after the completion of 120 days as there is no permission granted by the Deputy Director.

18. The contention of the learned AGP that the Education Officer has already rejected the request for extension on 22.09.2015, would not be a well placed argument, though such order has been passed, in the light of the conclusion of this Court in Paragraph No.8 in **Hamid Khan** (supra).

19. Sub-Rule 3 of Rule 35 of the 1981 Rules clearly indicates that in the case where an employee is suspended with the prior approval, he shall be paid subsistence allowance from the salary grants for a period of 4 months only and

thereafter, the payment shall be made by the Management concerned. If an employee is suspended by the Management without obtaining the prior approval of the appropriate authority, the payment of subsistence allowance even during the first 4 months of suspension and thereafter, till the completion of enquiry, shall be made by the Management. Of course, Sub-Rule 4 of Rule 35 of the 1981 Rules will not apply in a case as like the one decided by the Hon'ble Supreme Court in **Vidya Vikas Mandal and another Vs. Education Officer and another**, 2007 (3) Mh.L.J. 801, more particularly, in view of the conclusion drawn in Paragraph No.9, vide which, the Hon'ble Supreme Court has held that when an enquiry conducted against a delinquent is held to be vitiated, the order of dismissal would stand neutralized and from the date of dismissal till completion of the enquiry, from the stage at which it was vitiated or a de-novo enquiry as the case may be, the delinquent would be deemed to be under suspension. Since such conclusion or direction is in view of

the law crystallized by the Hon'ble Supreme Court, in such cases, Sub Rule 4 of Rule 35 of the 1981 Rules would not be applicable.

20. The learned Advocate for the Petitioner submits that the calculations made by the Education Officer are not correct. The learned Advocate for the appellant submits that he is entitled to 100% salary after 120 days. We are of the view that this issue would be better left to the Education Officer to be considered. In the event, the Management decides to approach the Education Officer and which shall be done in 15 days, if they so desire, they shall first implement the impugned order.

21. In view of the above, we do not find that the impugned order issued by the Education Officer dated 11.07.2018, could be termed as being perverse or erroneous.

22. This Petition, being devoid of merit is, therefore, dismissed. Rule is discharged.

23. No order as to costs.

[ARUN R. PEDNEKER, J.]

[RAVINDRA V. GHUGE, J.]

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