

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 2354 OF 2022

1) Lady Yashodabai Joshi Ladies Club,
through it's Secretary,
Opposite Vidut Bhawan, Shivaji
Nagar, Amravati, Tq. & District
Amravati.

2) The Head Master,
Golden Kids English High School,
Amravati, Tq. & District Amravati.

.... **PETITIONERS**

VERSUS

1) Smt. Shilpa Sanjay Khandekar,
Aged about 55 years, Occupation – Nil,
R/o Pannalal Nagar, Behind Aasmista
School, Tq. and District Amravati.

2) The Education Officer (Secondary),
Zilla Parishad, Amravati.

.... **RESPONDENTS**

Mr. J.T. Gilda, Senior Counsel assisted by Mr. A.J. Gilda, Counsel for the
petitioners,
Mr. V.A. Kothale, Counsel for respondent 1,
Mr. S.M. Ukey, Addl.G.P. for respondent 2.

CORAM : ROHIT B. DEO, J.

DATE OF RESERVING THE JUDGMENT : 02-05-2022
DATE OF PRONOUNCEMENT OF THE JUDGMENT : 12-08-2022.

JUDGMENT :

Heard Mr. J.T. Gilda, learned Senior Counsel for the petitioners, Mr. V.A. Kothale, learned Counsel for respondent 1 and Mr. S.M. Ukey, learned Additional Government Pleader for respondent 2.

2. **Rule.** Rule made returnable forthwith. With consent, the petition is heard finally.

3. Petitioner 1 is a registered Public Trust, which administers petitioner 2-school (petitioners shall be collectively referred to as “the management”).

4. The management is assailing the judgment and order dated 01-4-2022 rendered by the Presiding Officer, School Tribunal, Amravati (Tribunal) in Appeal 12/2020, whereby the appeal preferred by respondent 1 (employee) is partly allowed, the notice of termination dated 16-4-2019 is set aside, the employee is deemed to be in continuous service from 16-7-2019 and is held entitled to all service benefits excluding the benefit of earned leave, the management is directed to pay full back-wages to the employee from 16-7-2019 till the date of judgment, the management is directed to follow the procedure contemplated in Rule 27(d) and (e) read with Rule 25A of the

Maharashtra Employees of Private Schools (Conditions of service) Regulation Rules, 1981 (Rules) and the employee is held entitled to full salary from 02-4-2022 till the compliance of the directions supra.

5. **PLEADINGS IN APPEAL 12/2020 :**

(i) The employee approached the Tribunal challenging the termination notice dated 16-4-2019 made effective from 16-7-2019 purporting to terminate her from the post of Assistant Teacher.

(ii) The employee holds qualifications B.Sc. B.Ed. and was appointed as Assistant Teacher in clear and permanent vacancy by following the due recruitment process vide order dated 13-9-2001. The Education Officer approved the services of the employee.

(iii) The management administers the Golden Kids English/ Marathi High School, Amravati, which imparts instructions in English, Marathi and Semi-English medium.

(iv) The management did not pay the employee salary in accordance with the Rules and she along with her colleagues preferred Writ Petition 4172/2017. Writ Petition 7979/2017 was preferred against the management seeking service benefits like maintenance of common seniority of teachers in the schools administer by the

management.

(v) During the pendency of the writ petitions supra, the notice of termination impugned was issued which the employee challenged by preferring Civil Application 2757/2019 in Writ Petition 7979/2017, which application the High Court disposed of vide order dated 15-10-2019 reserving liberty to challenge the termination before the appropriate forum.

(vi) Recognition was granted to the management to administer the Golden Kids High School from 1997-98 on permanent no grant-in-aid basis for imparting instructions in English medium parallelly with Marathi medium from standard 5th to 10th.

(vii) Hoping to receive grant-in-aid in future, the management submitted proposal dated 13-4-2007 to the Education Department for converting the Marathi medium classes from permanent no grant-in-aid basis to no grant-in-aid basis and for grant of permission to appoint independent Headmaster. In response to the said proposal, the Education Department issued communication dated 28-11-2007 permitting appointment of independent Headmaster for the Marathi medium classes, subject to certain conditions.

(viii) On the basis of the communication dated 28-11-2007 the management took a stand that there are two segments i.e. English medium and Marathi medium and, therefore, two separate schools.

(ix) The employee contends that in response to protests by the teachers in the Marathi medium segment, the Education Officer conducted an enquiry and held that the management is required to maintain a common seniority list.

(x) The employee came to be appointed on 18-6-2001, and admittedly at the relevant time, even according to the management, the same school was imparting instructions partially in English medium and partially in Marathi medium for standard 5th to 10th. Even if it is assumed, that the two mediums are now bifurcated, the management is obligated to maintain common seniority list of teachers, which is, as a fact, maintained by the management. The name of the employee is recorded at serial 8 in Category 'C' and Assistant Teachers at serials 11 to 26 are shown working in English medium.

(xi) The impugned notice is issued invoking Rule 25A of the Rules without seeking the prior approval of the Education Officer.

(xii) The basis of the notice impugned is factually incorrect since Marathi medium school is part and parcel of English medium school

and further the notice of termination is illegal since no permission was obtained as is required under Clause 7.5 of the Secondary School Code.

(xiii) The provisions of Rule 25A of the Rules apply only for voluntary closure of the entire school or closure due to de-recognition.

(xiv) The impugned termination notice is issued in contravention of Rule 25A read with Rule 27 of the Rules.

(xv) While the employee is shown as appointed in the Marathi school, she is well qualified and eligible for imparting instructions in English medium.

6) **WRITTEN STATEMENT :**

(i) The decision to close the Marathi medium school was on account of financial constraints and the indifferent attitude of the teachers which was adversely affecting the interest of the students.

(ii) The management proposed to increase the fees. The proposal was not approved in the Parent-Teacher Association meeting.

(iii) The Government Resolution dated 12-6-2009 is not applicable to an unaided school which was not pointed out to the High Court when Writ Petition 1341/2012 was decided since there was no

appearance on behalf of the management and, therefore, the employee cannot claim the benefit of the said judgment.

(iv) The transfer of teachers are effected inconsonance with Rule 41 of the Rules.

(v) Common seniority list was prepared by the management, and which is relied on by the employee in Writ Petition 7979/2017.

(vi) Prior approval of the authority is not required under the provisions of the Secondary School Code for closure of the school and all that is required is to intimate the said authority, which intimation was duly given.

(vii) The notice of termination is issued in accordance with the provisions of Rule 25A of the Rules. In case of voluntary closure of school, it is Rule 25A which is applicable and Rule 26 of the Rules does not come into play.

(viii) The principle of common seniority is not applicable while issuing notice of termination under Rule 25A of the Rules. The conditions stipulated in Rule 26 of the Rules cannot be read into Rule 25A of the Rules.

7. **CONSIDERATION BY THE TRIBUNAL :**

(i) The Tribunal held that the school was recognised under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (Act) and the appointment of the employee was made in accordance with the provisions of Section 5 of the Act and the Rules. The Tribunal held that the notice of termination is illegal.

(ii) The Tribunal rejected the contention of the management that since retrenchment and closure are not covered by Section 9 of the Act, the appeal is not maintainable and the employee ought to have approached the civil Court. In fairness to Mr. J.T. Gilda, such submission was not canvassed before me.

(iii) The Tribunal considered the provisions of Rules 25A, 26 and 27 of the Rules and the decision of the Full Bench (to which I am a party) in ***Kanhaiyyalal s/o Sonbaji Gajbhiye vs. Bhartiya Jagruti Shikshan Sanstha & Ors., 2021(3) All MR 21***, which has held that while effecting termination under Rule 25A of the Rules, the principle of common seniority as prescribed in Rules 27(d) and (e) of the Rules must be followed.

(iv) The Tribunal considered and rejected the submission canvassed on behalf of the management that it is the Education Officer

who can decide the dispute touching closure.

(v) The Tribunal further rejected the submission that the issue of seniority lies within the exclusive domain of the Education Officer and the High Court, and cannot be considered by the Tribunal. The Tribunal held that the issue of common seniority is only incidental to the issue of legality of termination under Rule 25A of the Rules.

(vi) The Tribunal held that the notice of termination is illegal since the procedure contemplated in Rule 27(d) and (e) of the Rules is not followed.

(vii) The Tribunal held the employee entitled to the relief, which is noted supra considering the admitted fact that the management is administering multiple schools and that the educational qualification for appointment in Marathi medium and English medium is not different. The Tribunal noted that it is not even the contention of the management that the employee is not qualified to work in English medium school or other school/s. The Tribunal noted that the management avoided to prepare combined and common seniority list and terminated the services of the employee without following the mandatory provisions of the Rules supra.

8. Mr. J.T. Gilda would submit that the rules clearly make a distinction between the termination of the employee/s due to closure of school and retrenchment of employee/s on the grounds enumerated in Rule 26 of the Rules. Mr. J.T. Gilda would submit that if the permanent employee is terminated on account of closure of school, the management is not obligated to follow the principles and procedure prescribed in Clauses (d) and (e) of Rule 27 of the Rules. Mr. J.T. Gilda would argue that the said provisions of Rule 27 of the Rules come into play only while effecting retrenchment under Rule 26 of the Rules.

9. Mr. J.T. Gilda would submit that the observation of the Tribunal that separate and distinct identity to Marathi medium school was granted in the year 2013, is contrary to record and that such separate identity was granted to the Marathi medium school in the year 2007. It is further submitted that the observation that the management avoided to prepare combined and common seniority list, is again contrary to record. Mr. J.T. Gilda would then argue that the Tribunal committed a serious error in law by awarding full back-wages from 16-7-2019 in the absence of pleadings that the employee was not in gainful employment.

10. Mr. V.A. Kothale would submit that the primary question which arises for determination is not *res integra* and is concluded by the

authoritative decision of the Full Bench of this Court in *Kanhaiyyalal s/o Sonbaji Gajbhiye* (supra). Mr. V.A. Kothale would submit that the issue is not whether the management did prepare common and combined seniority list or whether the findings of the Tribunal on that aspect is contrary to record, the issue is, whether the common and combined seniority list was followed while effecting termination, as is the mandate of the Full Bench decision *supra*. Mr. V.A. Kothale would emphasize that it is not even the case of the management that the employee is junior to the other teachers, who are retained in service or that even after following the law declared by the Full Bench decision *supra*, the axes would still have fallen on the employee's service. On the aspect of the relief of back-wages, Mr. V.A. Kothale would submit that since the termination is patently illegal, the Tribunal did not commit any error in awarding full back-wages. Mr. V.A. Kothale would rely on certain decisions, to which a reference shall be made at an appropriate stage.

11. Mr. J.T. Gilda would submit that while he is alive to the position of law declared by the Full Bench in *Kanhaiyyalal s/o Sonbaji Gajbhiye* (supra), the said decision is rendered without due consideration to certain situations and unintended results and consequences which may follow if the principles of common seniority engrafted in Rule 27(d) and

(e) are imported in Rule 25A of the Rules. Mr. J.T. Gilda would give an illustration of the management administering two schools which impart instructions in English and Gujarati medium and would argue that if in such a situation the principle of common seniority is applied, the unintended result would border on the unworkable since a teacher appointed to impart instructions in the English medium may not, and in every probability is not, likely to be equipped to teach the students in Gujarati medium. In rebuttal, Mr. V.A. Kothale would submit that the Full Bench having spoken authoritatively, it would not be permissible for a Bench of lesser strength to deviate from the law declared on the premise that certain situations were not considered in the binding decision.

12. I have given anxious consideration to the submissions canvassed by Mr. J.T. Gilda, on the aspect of the unintended consequences which may ensue if the principle of common seniority are applied, without any exception, to the action under Rule 25A of the Rules. While at the first blush, the said submission does appear worth a deeper scrutiny, I am not inclined to delve deeper. I am respectfully bound by the decision of the Full Bench (*supra*) which has held that the provisions of Rule 25A of the Rules do not constitute a complete scheme and cannot be considered as stand alone provision. The Full Bench has categorically

held that the principle of common seniority as prescribed in Rule 27(d) and (e) of the Rules will have to be followed if the management administers more than one school. The decision is rendered in the context of the relevant statutory provisions. While the submission canvassed by Mr. J.T. Gilda can certainly be considered in a challenge to the decision of the Full Bench or by the Legislature, it would not be permissible for me, and indeed would militate against judicial discipline to make any positive observation.

13. **IS THE EMPLOYEE ENTITLED TO 100% BACK-WAGES :**

It is discernible from the memo of appeal that the employee has not stated that she is not in gainful employment. This omission can perhaps be explained by the short duration between the termination and the filing of appeal. However, it further appears that such an assertion was not made by the employee at a later stage either by amending the memo of appeal or filing an additional affidavit. The learned Tribunal has not culled out any material or circumstance to suggest that the employee did plead or contend that she was not in gainful employment. Having noted thus, the management too did not make any effort to invite the Tribunal to consider the burden of proof, by taking a plea in the written statement that the employee was, as a fact, in gainful employment. Illuminating are the observations of the

Hon'ble Supreme Court in ***Shambhu Nath Goyal v. Bank of Baroda and others, (1983) 4 SCC 491***, which read thus :

“17.
 The management is thus seen to have been taking steps periodically to see that the dispute is not disposed of at an early date one way or the other. The blame for not framing an issue on the question whether or not the workman was gainfully employed in the intervening period cannot be laid on the Tribunal alone. It was equally the duty of the management to have got that issue framed by the Tribunal and adduce the necessary evidence unless the object was to make up that question at some later stage to the disadvantage of the workman as in fact it has been done. The management appears to have come forward with the grievance for the first time only in the High Court. There is no material on record to show that the workman was gainfully employed anywhere. The management has not furnished any particulars in this regard even before this Court after such a long lapse of time. The workman could have been asked to furnish the necessary information at the earliest stage. The management has not resorted to that course. The workman was not expected to prove the negative. In these circumstances, we do not think that it would be in the interest of justice to prolong any further the agony of the workman whose power to endure the suffering of being out of employment for such a long time and to oppose the management Bank, a nationalised undertaking with all the money power at its disposal in this prolonged litigation is very limited by allowing the Bank to have the advantage belatedly sought in the application dated February 8, 1979 in an industrial dispute which arose as early as in 1965.”

14. Mr. J.T. Gilda has invited my attention to the decision of the Hon'ble Supreme Court in ***Allahabad Bank and others v. Avtar Bhushan Bhartiya, 2022 SCC OnLine SC 499*** to buttress the submission that the burden shall shift on the employer only if the employee takes a stand in

the forum at the first instance that he or she was not in gainful employment.

15. In *Allahabad Bank and others* (supra), the principles elucidated in *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed) and others, (2013) 10 SCC 324* are extracted and considered. The Hon'ble Supreme Court, after considering the articulation in *Deepali Gundu Surwase* (supra), observes thus :

“32. Even if we apply the propositions enunciated by this Court in Deepali Gundu Surwase (supra), the Officer-employee may not be entitled to full back wages. This is for the reason that there is nothing on record to show whether he was gainfully employed after his dismissal from service. A careful look at the pleadings in the writ petition WP No. 1403 of 2013 would show that he has not pleaded about his non-employment. Though in paragraphs 36 to 38 of his writ petition, the employee has pleaded about the sudden set back to his health in the year 2011 and the financial hardships he was facing, there was no assertion about his non-employment. The employee had his pleadings amended after the dismissal of his appeal during the pendency of the writ petition. Even in the amended pleadings, there was no averment relating to his non-employment. Therefore, even if we apply the ratio in Deepali Gundu Surwase (supra), the employee may not satisfy the third proposition found in para 38.3 thereof.”

16. Considering the ratio in *Deepali Gundu Surwase* (supra), the Hon'ble Supreme Court did not accept the contention of the employee that he was entitled to full back-wages. Notably, the Hon'ble Supreme

Court affirmed the decision of the High Court awarding 50% back-wages to the employee observing that the High Court has actually struck balance which need not be upset.

17. Mr. V.A. Kothale, in rebuttal, press in service the decision of the Hon'ble Supreme Court in *Pradeep s/o Rajkumar Jain v. Manganese Ore (India) Limited & Ors., 2022 ALL SCR 566* to buttress the submission that even if it is assumed that the employee did earn some amount, considering that the termination is illegal and was effected for the reason that the employee and her colleagues took up cudgels against the management on certain issues, the employee is entitled to 100% back-wages. It is trite law that a judgment cannot be read or understood as statute. In *Pradeep Rajkumar Jain* (supra), the Hon'ble Supreme Court did note that the employee who was a Chartered Accountant, did earn some amount from accountancy work during the period of termination, and yet proceeded to strike a balance by directing the payment of lump-sum amount. The decision in *Pradeep Rajkumar Jain* (supra) turned on the facts involved and cannot be understood as laying down a proposition that the employee is not obligated to first state that he or she was not in gainful employment.

18. It would be apposite to extract the principles set out in *Deepali*

Gundu Surwase (Supra) in paragraph 38 which read thus :

“38. The propositions which can be culled out from the aforementioned judgments are:

38.1 In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2 The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3 Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4 The cases in which the Labour Court/Industrial Tribunal exercises power under [Section 11-A](#) of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/

Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5 The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under [Article 226](#) or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6 In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in [Hindustan Tin Works \(P\)Ltd. v. Employees.](#)

38.7 The observation made in [J.K. Synthetics Ltd. v. K.P. Agrawal](#) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three-Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.”

19. Perusal of paragraph 38.3 would reveal that the Hon’ble Supreme Court has categorically stated that ordinarily an employee whose services are terminated, and who is desirous of getting back-wages, is required to plead or at least make a statement before the adjudicating authority or the Court of first instance that he or she was not gainfully employed or was under employed. It is observed that once employee shows that he was not employed onus lies on the employer to specifically prove that the employee was gainfully employed and was getting the same or substantial similar emoluments.

20. In my considered view, neither the employee nor the employer has made any effort to invite the Tribunal to frame an appropriate issue and to have the same adjudicated. Whether the employee was gainfully employed, has not been considered by the Tribunal. However, since the Tribunal has found the termination illegal and in egregious breach of the statutory provisions as interpreted by the Full Bench, I am not inclined to remand the matter to the Tribunal to decide on the quantum

of back-wages. While the employee may not be entitled to 100% back-wages, balance can be struck by directing the management to pay the employee 50% of the back-wages which she would have otherwise earned from the date of the termination till the delivery of the judgment by the Tribunal i.e. from 16-7-2019 to 01-4-2022. Rest of the findings and the reliefs and the directions issued by the Tribunal, are confirmed.

21. The petition is partly allowed in the afore-stated terms.

JUDGE

The request of the learned Counsel Mr. A.J. Gilda for stay of the judgment for eight weeks is rejected.

JUDGE

adgokar