

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR
WRIT PETITION NO. 5189 OF 2009

Ku. Pratibha D/o Sahebrao Patil
 (Nee) (Mrs. Pratibha w/o Shrikant Gawande)
 Aged about 48 years, Occ: Service,
 R/o Ramkrishna Vihar, Pushpak Colony, Near
 Gadgadeshwar Mandir, Akoli Road, Amravati,
 Tq. & Distt. Amravati.

... **PETITIONER**

...VERSUS...

1. The Presiding Officer,
 School Tribunal, Amravati Division,
 Amravati, Tq. And Distt. Amravati.
2. Ku. V.D. Patharkar (Nee) (Mrs. S.S. Bhoyar)
 Aged about 48 years, Occ: Service,
 R/o C/o Sharda Kanya Vidyalaya, Sharda
 Nagar, Amravati, Tq. and Distt. Amravati.
3. Maratha Shikshan Sanstha,
 Amravati, Through its Scretary,
 C/o Maratha Mangal Karyalaya,
 Sharda Nagar, Amravati, Tq. & Dist.
 Amravati.
4. Education Officer (Secondary),
 Zilla Parishad, Amravati, Tq. And Distt.
 Amravati.

... **RESPONDENTS**

 Shri A.D. Mohgaonkar, Advocate for petitioner.
 Ms Shamsi Haider, AGP for respondent nos.1 and 4.
 Shri G.N. Shinde, Adv.h/f Shri M.A. Vaishnav, Advocate for Resp. nos.2& 3.

CORAM : AMIT BORKAR, J.
DATED : SEPTEMBER 15, 2022.

ORAL JUDGMENT :

1. By this petition, a teacher whose claim for appointment as a Headmistress of a school had been rejected by the School Tribunal by the impugned judgment on the following reasons:

- i. Petitioner was not available on the establishment on the date of appointment of respondent no.2 as a Headmistress.
- ii. Petitioner had not made her claim on the post of Headmistress.
- iii. The aggrieved employee by appointment under Rule 3(5) of the Maharashtra Employees of Private Schools (Condition of Service) Regulation Rules, 1981 (for short, 'MEPS') has remedy to challenge such appointment to Deputy Director of Education under Rule 3(6) of the MEPS and hence Appeal under S.9 is not maintainable.

2. The facts relevant for the adjudication of the petition are as under:

(a) The petitioner was appointed as a trained graduate teacher on 09.08.1984, who holds qualification BA, BEd. However, on 06.05.1988, the services of the petitioner were terminated. The petitioner challenged the termination by way of appeal before the School Tribunal, and School Tribunal, by order dated 21.06.1988, granted a stay to the termination. The order of stay of termination was in force till 13.12.1990.

(b) In the meantime, respondent no.2 was appointed initially as an untrained teacher with effect from 09.08.1984 who

acquired the qualification of B.Ed. In September 1987. Therefore, for the purpose of seniority, it will have to be counted from the date of acquisition of the qualification, i.e. from September 1987.

(c) Despite the order of stay to the termination, the Management on 03.05.1990 appointed respondent no.2 as Headmistress, effective from 01.06.1990. The petitioner had challenged the said appointment by filing Appeal No.178/1992-A. However, the said appeal has been dismissed by an impugned judgment for the reasons stated above. The petitioner has, therefore, filed the present petition.

3. This Court, on 05.01.2010, issued notice for final disposal; thereafter, on 25.01.2010, this Court issued Rule in the present petition.

4. The record discloses that on 03.08.2021, on behalf of advocate for respondents nos.2 and 3, an adjournment was sought as he was out of the station. Thereafter, on 04.10.2021, none appeared for the parties. On 03.01.2022, the advocate for respondents nos.2 and 3 was absent. On 20.06.2022, again advocate for respondents nos.2 and 3 was absent and therefore in order to give one more opportunity the petition was adjourned.

On 14.07.2022, the advocate for respondents nos.2 and 3 was absent. Therefore as and by of indulgence, the writ petition was kept on 21.07.2022 by passing an order that if on the next date none appears for the respondents, the writ petition will be decided on its own merit. Thereafter, the matter was adjourned at the instance of either petitioner or respondents. Today again, an adjourned is sought on behalf of respondents on the ground that the advocate for respondents nos.2 and 3 is at outstation court and cannot attend this Court.

5. With a view to disposing of old final hearing matters, Thursday and Friday are days fixed exclusively for final hearing matters. A specific note is published on all days of the week stating that in final hearing matters, no adjournment shall be granted to any party on any ground. The board of final hearing is published on the evening of Friday, i.e. on 08.09.2022. Therefore, it was obligatory for the advocate for respondents to appear in this matter and to make his submissions on merits. Unless the advocates cooperate with the Court for disposal of the final hearing matter, it is not possible to dispose of the final hearing old matters. It is expected from the members of the Bar that they must cooperate with the Court for the disposal of old matters,

particularly when there is a specific note published on the board stating that no adjournment shall be granted on any ground.

6. Adjournment of cases reached for hearing according to the final hearing list should be an exception and not a matter of course. The grant of adjournment by a court has to be on a party showing special and extraordinary circumstances. It cannot be routine. No adjournment can be granted at the request of a party, except where the circumstances are beyond the control of the party. The past conduct of the party in the conduct of the proceedings is an important circumstance that this court must keep in view whenever a request for adjournment is made.

7. In the facts of the present case barring a few dates, the advocate for the respondent nos.2 and 3 is consistently absent despite passing a specific order that no adjournment shall be granted on the next date. The advocate for respondents no. 2 and 3 is busy in outstation court is hardly a ground for adjournment. Such conduct on the part of the advocate cannot be countered, and therefore I have heard advocate for the petitioner.

8. Shri Mohgaonkar, learned advocate for the petitioner, submitted that petitioner having been appointed on 09.08.1984 and respondent no.2 having acquired qualification in September

1987, there is no serious dispute that the petitioner was senior most teacher on the date of appointment of respondent no.2 as a Headmistress. He submitted that by order dated 21.06.1988 granting stay to the termination of services of the petitioner, the Tribunal was not justified in holding that the petitioner was not on the establishment on the date of appointment. He submitted that Rule 3(5) of the MEPS would be applicable only when teachers, as contemplated under Rule 3(3), are not available. Therefore, impugned judgment deserves to be quashed and set aside.

9. Considering the petitioner's appointment date, i.e. 09.08.1984 and the date of acquisition of respondents' qualification, i.e. in September 1987, I am satisfied that the petitioner was a senior-most teacher on the date of appointment of respondent no.2 as Headmistress.

10. The right of the petitioner to remain in the establishment had been recognized by the order dated 21.06.1988 granting a stay to the termination of services of the petitioner. With the result in law, the petitioner continues to be in service of the Management. Therefore, the Tribunal was not justified in holding that the petitioner was not on the establishment on 03.05.1990. There is

no serious dispute that on 03.05.1990, the order dated 21.01.1988 was in force.

11. Based on the third reason in the impugned judgment following question arises for consideration.

“Where the power to make subordinate legislation arises under the same primary legislation which confers the right, if the subordinate legislation does curtail the right in the manner held by tribunal, does the statute authorise the making of subordinate legislation in those terms?”

12. For determination of the aforesaid question, it is relevant to note Rule 3(6), which reads as under:

“3(6) The Education Officer or the Deputy Director shall direct the Management to cancel the appointments made without following the procedure laid down in this rule.

Explanation- For the purpose of this rule, the record of service shall be deemed to be satisfactory if there is nothing adverse in the annual confidential reports of the teacher concerned during the previous five years. Adverse remarks not duly communicated in writing to the teacher concerned, shall be disregarded for this purpose.”

13. On perusal of the said rule, it appears that it confers power on the Education Officer or Deputy Director of Education to issue a direction to the Management to cancel the appointment if it is

made without the following procedure under the rule. Evidently, it is a power derived from subordinate legislation. It cannot be forgotten that rule 3(6) is merely subordinate legislation to the statute under which it is made. The said power under subordinate legislation is enabling power that cannot be construed to circumscribe the statutory right of appeal conferred on the Tribunal under primary legislation. Subordinate legislation cannot have greater force than the provisions of the statute itself. The right to file an appeal under the section of the act being vested right cannot be taken away by subordinate legislation. Such a remedy under subordinate legislation cannot supplant or curtail the remedy of appeal granted by the empowering statute; at best, it can be construed as a supplementary remedy. Therefore, for non-availing of the additional or supplementary remedy provided by the subordinate legislation, an aggrieved person cannot be non-suited in a statutory appeal provided by the parent enactment.

14. To decide the controversy of applicability of Rule 3(5) in contradistinction with Rule 3(3), it is necessary to consider the scheme of Rule 3 of MEPS. Rule 3(3) and 3(5) of the MEPS read as under:

“3(3) The Management of a school including a night school shall fill up the post of the Head by appointing the senior

most member of the teaching staff (in accordance with the guidelines laid down in Schedule “F” from amongst those employed in a school (if it is the only school run by the Management) or schools [if there are more than one school (excluding night school) conducted by it] who fulfills the conditions laid down in sub-rule(1) and who has a satisfactory record of service.

[Explanation - For the purpose of this rule, the Management shall communicate any occurrence of vacancy of the Head to the senior-most qualified teacher having satisfactory record of service and ask him to submit his willingness for appointment to the post within a period of fifteen days from the date of receipt of the communication. The claim of the senior-most qualified teacher having a satisfactory record of service, for appointment to the post of Head, may be disregarded only if he, of his own free will, gives a statement in writing to the Education Officer that he has voluntarily relinquished his claim to the post. This shall not debar him from being considered for subsequent vacancies as and when they occur. Such a teacher shall record his statement in his own handwriting before the Education Officer within a period of fifteen days from the date of receipt of the communication as aforesaid and the Education Officer shall endorse it as having been recorded in his presence. A statement once duly made by such teacher before the Education Officer shall not be allowed to be withdrawn. In the event of the teacher failing to submit his willingness for appointment to the post or to give a statement to the Education Officer within a period of fifteen days, it shall be assumed that he has relinquished his claim on the said post :

Provided that, where an unforeseen vacancy of Head occurs owing to reasons like resignation without giving due notice, death, termination of services, reduction in rank or otherwise, the senior-most teacher desirous of relinquishing his claim for appointment to the post shall, within seven days from the date of receipt of a communication by him of occurrence of such vacancy from the Management, communicate to the Management in writing about the same so as to enable the Management to finalise the appointment. Such a teacher shall thereafter as soon as possible and in any case within a period of fifteen days from the date of receipt of the communication as aforesaid record his final statement before the Education Officer to enable him to approve the appointment, or as the case may be, to disapprove the appointment if such teacher states in his statement before the Education Officer that the communication sent by him in writing to the Management was obtained from him by the Management under duress. In the event of the teacher failing to record a final statement within a period of fifteen days as aforesaid it shall be assumed that he has relinquished his claim on the said post;]

3(5)(a) If a suitable teacher possessing qualifications laid down in the foregoing provisions of this rule is not available to fill in the post of a Head of a school, the Management shall, with the prior permission of the Education Officer in case of primary schools, or of the Deputy Director in the case of other schools, advertise the post and select and appoint a person possessing the requisite qualifications and experience.

(b) The application for permission to advertise the post shall be made at least two months in advance. The period of two months may be relaxed by the Education Officer or the

Deputy Director, as the case may be, in the case of new schools or in emergency cases wherein the vacancy could not have been anticipated. The advertisement shall be given after the permission of the Deputy Director or the Education Officer is received. Management shall ensure that the advertisement appears in at least [two daily newspapers, one of which shall be a Marathi news paper,] having wide circulation in the region wherein the primary schools or secondary schools or Junior College of Education is located.”

15. On perusal of sub-rule 3 of Rule 3, an obligation is cast on the Management to fill up the post of Head by appointing senior-most teacher from the teaching staff from amongst those employed in the school. Such a candidate must fulfil the condition as laid down in sub-rule 1 in regard to qualification and experience. Undoubtedly, such a candidate should have a satisfactory record of service. The Management must communicate the occurrence of a vacancy of the post of Head to the senior-most qualified teacher having satisfactory record of service and ask him his willingness for appointment to the post within fifteen days of such communication. Only if such senior-most qualified teacher of his own free will gives a statement in writing to the Education Officer that he has voluntarily relinquished his claim to the post of Head of the school the procedure under Rule 3(5) of the MEPS can be resorted. It is

necessary that such statement of a teacher has to be in his own handwriting made to the Education Officer, and the Education Officer must endorse such statement having recorded in his presence. In the event senior-most the teacher fails to submit his willingness for the appointment to the post or if he statement to the Education Officer within fifteen days, it shall be assumed that such senior-most teacher has relinquished his claim on the said post. A conjoint reading of sub-rule 3 of rule 3 and sub-rule 5 of rule 3, it is clear that it is only in the absence of a statement of own handwriting of the senior-most teacher or failure to communicate willingness within fifteen days that the procedure under rule 3(5) can be resorted.

16. In the facts of the case, the petitioner was appointed on 09.08.1984 and respondent no.2, having acquired requisite qualification in September 1987, the petitioner was a senior-most teacher on 03.05.1990. Therefore, in the absence of the procedure under rule 3(3) being followed, the Management was not justified in the following procedure under rule 3(5). Therefore, in my opinion, the School Tribunal failed to exercise jurisdiction vested in it by law and has committed an error of jurisdiction calling for

interference at the hands of this Court. I, therefore, pass the following order:

- i. The impugned judgment and order dated 22.09.2009 passed by the learned Presiding Officer, School Tribunal, Amravati, in Appeal No.178/1992-A is quashed and set aside.
- ii. The petitioner, having superannuated during the pendency of proceedings, shall be entitled to all monetary emolument of the post of Headmistress from 01.06.1990 till the date of superannuation from the management.

Rule is made absolute in the above terms. No order as to costs. Pending civil application(s), if any, stand(s) disposed of.

JUDGE

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