

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

WRIT PETITION NO. 6132 OF 2019

SURENDRA S/O SUKHADEO WADKAR

VERSUS

**THE EDUCATION OFFICER(SECONDARY), ZILLA PARISHAD, AKOLA AND
TWO OTHERS.**

Shri N.B.Kalwaghe, Advocate for petitioner.

Ms H.N.Jaipurkar, Assistant Government Pleader for respondent nos. 1 and 3.

Ms. Sonali Saware, Advocate for respondent no.2.

CORAM :- A.S.CHANDURKAR AND M. W. CHANDWANI, JJ.

ARGUMENTS WERE HEARD ON : 14th OCTOBER, 2022

ORDER IS PRONOUNCED ON : 11th NOVEMBER, 2022

In view of notice for final disposal issued earlier, the learned counsel for the parties have been heard at length.

2. The challenge raised in this writ petition is to the communication dated 08.08.2019 issued by the Education Officer (Secondary), Zilla Parishad, Akola to the extent a direction has been issued to recover excess payment made to the petitioner on the post of Head Master for the period from 01.07.2010 to 30.09.2016.

3. The facts giving rise to the aforesaid communication dated 08.08.2019 are that the petitioner was appointed on the post of Junior College Teacher on 26.07.1993 at the school run by the second respondent which is an education Society. The petitioner's appointment was duly approved on 01.03.1994. In the seniority list published on 15.03.2010 the

petitioner was shown to be senior to one Pandit Rajaram Wankhede. The Society through its office bearers passed a resolution on 30.06.2010 resolving to appoint the petitioner on the post of Head Master on promotion. On 30.06.2010 the petitioner came to be promoted on the post of Head Master. A dispute was raised by Shri Pandit Wankhede on the petitioner being shown senior to him in the seniority list. The Education Officer (Secondary) on 16.10.2010 held that Shri Pandit Wankhede was senior to the petitioner. Being aggrieved the petitioner challenged the said order dated 16.10.2010 by filing Writ Petition No.5164 of 2010. The learned Single Judge by the judgment dated 08.02.2011 set aside the order passed by the Education Officer (Secondary) holding Shri Pandit Wankhede to be senior on the ground that there were no reasons contained in the said order to indicate as to how Shri Pandit Wankhede was senior to the petitioner. On remand the Education Officer (Secondary) passed an order on 16.05.2011 and held that Shri Pandit Wankhede was in fact senior to the petitioner. The petitioner being aggrieved by the aforesaid order preferred Writ Petition No.2484 of 2011 and by the judgment dated 12.06.2012 the learned Single Judge held that since the petitioner had already been promoted to the post of Head Master, it would be necessary for Shri Pandit Wankhede to challenge his supersession by initiating appropriate proceedings. In view of this adjudication Shri Pandit Wankhede preferred an appeal under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, the Act of 1977). The learned Presiding Officer by his judgment dated 31.01.2013 dismissed

the said appeal and upheld the promotion granted to the petitioner on 30.06.2010. This judgment of the School Tribunal was challenged by Shri Pandit Wankhede by preferring Writ Petition No.1121 of 2013.

4. During the pendency of the writ petition the petitioner on 30.09.2013 furnished an undertaking to the Education Officer (Secondary) stating therein that on account of pendency of the writ petition no decision was being taken on the proposal for approving the promotion granted to the petitioner. In the undertaking it was stated by the petitioner that the approval be granted to his promotion subject to final outcome of the said writ petition. The petitioner undertook to permit deduction of any excess payment made to him on that basis. In view of such undertaking the Education Officer (Secondary) granted approval to the appointment of the petitioner on the post of Head Master on 09.10.2013. In the order of approval it was specifically mentioned that the same was in view of the undertaking furnished by the petitioner and subject to final outcome of Writ Petition No.1121 of 2013.

On 14.09.2016 the petitioner made an application to the Society stating therein that for personal reasons he was not desirous of functioning on the post of Head Master. He sought to be relieved of that responsibility. The Society on 24.09.2016 accepted that request and reverted the petitioner on the post of Junior College Teacher. The Deputy Director of Education on 07.11.2016 therefore cancelled the approval granted to the petitioner's appointment on the post of Head Master. The writ petition preferred by Shri Pandit Wankhede came to be decided on 11.06.2019. The learned Single

Judge held that Shri Pandit Wankhede was senior to the petitioner and was entitled to be promoted on the post of Head Master from 01.07.2010. The judgment of the School Tribunal came to be set aside and the Society was directed to promote Shri Pandit Wankhede on the post of Head Master. It was declared that he was entitled to be treated as Head Master from 01.07.2010 and was also entitled to all consequential reliefs including financial benefits. As a consequence of this direction, the Education Officer (Secondary) on 08.08.2019 directed recovery of the excess payment made to the petitioner on the post of Head Master from 01.07.2010 to 30.09.2016. A similar direction was also issued to recover the excess payment made to one Shri G.T.Pohankar who had been appointed as Head Master on 01.10.2016 to 30.06.2019. The petitioner is thus aggrieved by the direction to recover the excess payment made to him.

5. Shri N.B.Kalwaghe, learned counsel for the petitioner submitted that the petitioner having worked on the post of Head Master it could not be said that any excess payment was made to him on that post. After the petitioner was promoted on 01.07.2010 the dispute was pending in this Court for a considerable period. Writ Petition Nos.5164 of 2010 and 2484 of 2011 preferred by the petitioner came to be allowed and the petitioner was directed to continue to function as Head Master. Even the appeal preferred by Shri Pandit Wankhede came to be dismissed by the School Tribunal on 31.01.2013. In the writ petition preferred by Shri Pandit Wankhede challenging that judgment there was no stay operating to the petitioner's functioning as a Head Master. Thus in effect the petitioner

worked on the post of Head Master from 01.07.2010 to 30.09.2016. It could not be said that the petitioner had held the post of Head Master in an illegal manner. There was no requirement for the Education Officer (Secondary) to have obtained the undertaking dated 30.09.2013 from the petitioner. There was no provision under the Act of 1977 to obtain such undertaking. Merely because the petitioner had furnished an undertaking, the same would not mean that it was legal for being enforced. Placing reliance on the decision in *State of Punjab and others Vs. Rafiq Masih (White Washer) and others [(2015) 4 SCC 334]* it was submitted that since the petitioner had discharged duties on the post of Head Master and was paid accordingly, there was no reason to recover the excess payment. Moreover, such excess payment was made for a period exceeding five years before the order of recovery came to be issued. It was then submitted by the learned counsel that the benefit of salary on the post of Head Master received by the petitioner could not be withdrawn since such benefit was received during the pendency of the litigation. In that regard reliance was placed on the decision in *Maruti Tukaram Bagawe and others Vs. State of Maharashtra and another [(2020) 13 SCC 298]*. As regards furnishing of the undertaking by the petitioner is concerned, it was submitted that the ratio of the decision in *High Court of Punjab and Haryana and others Vs. Jagdev Singh [(2016) 14 SCC 267]* would not be applicable since the undertaking in that case was required to be submitted under the Service Rules. That was not the position in the present case. Reliance was also placed on the decision in *State of Jharkhand through its Chief Secretary and others Vs. Abdul Qayum and*

others [(20210 1 JLJR 270(HC))] to substantiate the stand of the petitioner. It was thus submitted that the impugned communication by which direction to recover excess payment was issued was liable to be set aside.

6. Ms H. N. Jaipurkar, learned Assistant Government Pleader for the respondent nos. 1 and 3 supported the impugned communication. According to her, the petitioner having furnished an undertaking that he would not object to recovery of any excess payment made to him on the post of Head Master could not now be permitted to urge that such undertaking was not binding. The writ petition preferred by Shri Pandit Wankhede had been allowed and he had been held entitled to the post of Head Master from 01.07.2010 with all consequential benefits. As result of this direction, the salary on the post of Head Master would be required to be paid to two persons namely, the petitioner as well as Shri Pandit Wankhede. Same would not be permissible and hence the excess payment made to the petitioner was rightly directed to be recovered. The petitioner had submitted the undertaking voluntarily and the Education Officer (Secondary) had acted upon the same by granting him approval. It was thus submitted that there was no illegality committed in directing recovery of excess payment as made to the petitioner.

Ms Sonali Saware, learned counsel for the respondent no.2 submitted that the impugned communication was issued by the Education Officer (Secondary) and the Society had obeyed various orders passed by the Courts.

7. Having heard the learned counsel for the parties at length and having perused the material placed on record, we find that the Education Officer (Secondary) was justified in issuing the impugned communication dated 08.08.2019 thereby directing recovery of excess payment made to the petitioner on the post of Head Master from 01.07.2010 to 30.09.2016. Undisputedly, the order of promotion dated 01.07.2010 issued to the petitioner was subjected to challenge by Shri Pandit Wankhede. Though such challenge based on his supersession was not accepted by the School Tribunal when it dismissed the appeal preferred by Shri Pandit Wankhede, Writ Petition No.1121 of 2013 preferred by him came to be allowed on 11.06.2019. While holding the denial of promotion to Shri Pandit Wankhede as illegal a direction was issued that he would be entitled to be treated as Head Master with effect from 01.07.2010 and to all consequential reliefs including financial benefits. It is thus clear that this Court has found Shri Pandit Wankhede entitled to the post of Head Master from 01.07.2010 for all purposes.

8. Though the petitioner was promoted on the post of Head master from 01.07.2010, approval was not granted to him on the ground that the proceedings were pending in the Court. Though the School Tribunal dismissed the appeal preferred by Shri Pandit Wankhede on 31.01.2013, Shri Pandit Wankhede had preferred Writ Petition No.1121 of 2013 in this Court. On noticing that sometime would be spent in having the dispute finally adjudicated, the petitioner on his own volition submitted an

undertaking on 30.09.2013 to the Education Officer (Secondary). In that undertaking the petitioner clearly stated that the dispute with regard to his promotion was likely to be pending for sometime. With that aspect in mind the petitioner requested that his promotion on the post of Head Master be approved subject to final outcome of Writ Petition No.1121 of 2013. He specifically undertook that he would not oppose the recovery of any excess payment made to him in that regard. Acting on this undertaking the Education Officer (Secondary) granted such approval to the petitioner's appointment on the post of Head Master from 01.07.2010. In the order of approval dated 09.10.2013 it was specifically mentioned that it was granted subject to final outcome of Writ Petition No.1121 of 2013 and in view of the undertaking furnished by the petitioner. It was also mentioned that such undertaking was also given by the President of the Society.

From the aforesaid it becomes clear that the petitioner on his own furnished such undertaking with a view to have his appointment on the post of Head Master approved. Having voluntarily furnished that undertaking and with due awareness of the consequences therein, it would not now be permissible for the petitioner to turn around and urge that notwithstanding such undertaking the payment made to him on the post of Head Master was not liable to be recovered. It is to be noted that the approval was granted to the petitioner's appointment only in view of the undertaking furnished by him and without such undertaking the Education Officer (Secondary) was not inclined to grant approval. Having furnished the undertaking and thereafter having obtained benefit on that basis, the petitioner could not be

permitted to approbate and reprobate in such manner. It is not the case of the petitioner that the said undertaking was given under duress or any coercion. This conduct of the petitioner disentitles him to urge that the said undertaking was not binding on him.

9. The contention raised on behalf of the petitioner that the Act of 1977 and the Rules framed thereunder do not contemplate furnishing of such an undertaking and hence the petitioner may not be held to be bound by it cannot be accepted. But for such an undertaking, the Education Officer (Secondary) would not have approved the appointment of the petitioner on the post of Head Master. It would have been a different matter if no consequential benefits having financial implications would have been granted to Shri Pandit Wankhede in Writ Petition 1121 of 2013 while holding him entitled to the post of Head Master. In such situation, it could be considered as to whether the petitioner having worked on the post of Head Master, the excess payment made could be directed to be recovered. However, when a specific direction has been issued in favour of Shri Pandit Wankhede holding him entitled to all consequential benefits with financial implications for the post of Head Master, the Education Officer (Secondary) cannot be faulted for directing such recovery since the State is not expected to make payment to two persons on a singular post of Head Master. The decisions thus relied upon by the learned counsel for the petitioner do not assist the case of the petitioner as urged.

10. For all these reasons we do not find that the present is a fit case to exercise extra ordinary jurisdiction in favour of the petitioner and relieve him of voluntary undertaking submitted by him. However, it would be open for the petitioner to seek the aforesaid difference in the amount of salary of the post of Head Master and Junior College Teacher from the second respondent, if so advised. In the facts of the case the amount due shall be recovered in twelve monthly instalments.

The writ petition is dismissed with no order as to costs.

(M. W. CHANDWANI, J.)

(A.S.CHANDURKAR, J.)

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