

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.407/2023

JAIRAM N. KERKAR, age 56 years,
H.No.123/2, Cuxem-Corjuem, Aldona,
Bardez Goa.

... PETITIONER

Versus

1. THE STATE OF GOA, Through
its Chief Secretary, Porvorim, Bardez-
Goa.

2. THE DIRECTOR OF EDUCATION,
Directorate of Education, Porvorim,
Bardez-Goa.

3. MANAGING COMMITTEE,
Through its Chairman, Dnyanprakash
Mandal Bicholim Higher Secondary
School, Mulgao, Assonora-Goa.

4. MR. LAXMIKANT M. PARAB,
Age 55 years Presently working as
Principal, Dnyanprakash Mandal
Bicholim Higher Secondary School,
Mulgao, Assonora-Goa.

... RESPONDENTS

Mr Vivek Rodrigues with Mr Kevin Braganza, Advocates for the
Petitioner.

Mr Neehal Vernekar, Additional Government Advocate for
Respondent No.2.

Mr D. Lawande with Mr P. Dangui and Ms Akshaya Joglekar,
Advocates for Respondent No.3.

Mr Gajendra Usgaonkar, Advocate for Respondent No.4.

**CORAM: M. S. SONAK &
BHARAT P. DESHPANDE, JJ.**

**Reserved on: 31st OCTOBER 2023
Pronounced on: 4th NOVEMBER 2023**

JUDGMENT: (Per M. S. Sonak, J.)

1. Heard Mr Vivek Rodrigues who appears along with Mr Kevin Braganza for the Petitioner, Mr Neehal Vernekar, learned Additional Government Advocate appears for the first and second respondents, Mr D. Lawande who appears along with Mr P. Dangui and Ms Akshaya Joglekar for the third respondent and Mr Gajendra Usgaonkar for the fourth respondent.

2. The petitioner, the senior-most teacher in the feeder category, challenges his supersession and the consequent promotion of the fourth respondent to the post of headmaster of the Dnyanprakash Mandal Bicholim Higher Secondary School (said school) as vitiated by malafide and breach of the Goa School Education Act, 1984 (said Act) and the Goa School Education Rules, 1986 (said Rules).

3. Rule. The Rule is made returnable immediately at the request of and with the consent of the learned counsel for the parties. Even otherwise, considering the history of litigations in

this matter, notice was issued on 13.03.2023 by indicating that an endeavour would be made to dispose of this petition finally at the admission stage.

4. Mr Vivek Rodrigues, the learned counsel for the petitioner submits that the action of the managing committee in superseding the petitioner is actuated by malafides. He submits that this management has gone to great lengths to declare the fourth respondent as senior to the petitioner. After that attempt failed, an attempt was made to spoil the petitioner's Confidential Reports (CRs). Mr Rodrigues pointed out that from 1994 till 2021, there were no adverse remarks communicated to the petitioner. In fact, in 2020, the management felicitated the petitioner for completing twenty-five years of meritorious service. He pointed out that it was only after the school management started favouring the fourth respondent on the issue of seniority which was in fact settled in the year 2007, that the petitioner protested and the managing committee responded by attempting to spoil the petitioner's CRs. He submitted that the adverse CRs were finally communicated to the petitioner only after 31.07.2022, i.e. the date on which the vacancy for the position of principal arose. He submitted that such CRs, apart from being issued malafide, could not have been considered for filling up the vacancy that arose on 31.07.2022. Mr Rodrigues relied on *Union of India & Ors. v/s. N. R. Banerjee & Ors. - (1997) 9 SCC 287*, *S. B. Bhattacharjee v/s. S. D. Majumdar & Ors. - (2007) 10 SCC 513* and *Shubhangi Manerkar v/s. State of Goa & Ors. - (Writ Petitions No.410 and 808 of 2019 decided on 18.12.2019)* in support of his contentions.

5. Mr Rodrigues submitted that the issue of seniority was settled by the Director's order dated 21.01.2021. The Tribunal dismissed the appeal against the said order by declining to condone the delay on 12.04.2023. Earlier the Tribunal vacated the stay on the Director's order dated 21.01.2021 by order dated 19.08.2022. Writ Petition No.443/2022 challenging this order was dismissed by this Court on 04.10.2022. The Tribunal and this Court made *prima facie* observations about the collusion between the managing committee and the fourth respondent. Even Special Leave Petition (C) No.18728 of 2022 against this Court's Order dated 04.10.2022 was dismissed by the Hon'ble Supreme Court of India on 31.10.2022. Mr Rodrigues submits that despite all this, the fourth respondent still raises the issue of seniority, and if the minutes of the Departmental Promotion Committee (DPC) are perused, it is apparent that even the DPC has defied the Director's order and Tribunal's order on the issue of seniority. Mr Rodrigues submits that in any case, the *prima facie* findings about collusion between the management and the fourth respondent stand, inter alia for want of challenge to the Tribunal's order dated 12.04.2023.

6. Mr Rodrigues submits that the petitioner's case is almost identical to the case of *Shubhangi Manerkar (supra)*, who was also sought to be denied promotion despite her seniority position based upon trumped-up charge memoranda issued to her after she made representations and approached the Court to require the managing committee to constitute a regular DPC and consider her case for promotion to the post of principal. Mr

Rodrigues submits that the present case is no different because suddenly after twenty-five years the management commenced a tirade against the petitioner, with the sole motive of favouring the fourth respondent and denying promotion to the petitioner who is the senior-most in the feeder category. Mr Rodrigues submits that the impugned action is in gross breach of Rule 86 of the said Rules as interpreted by the Division Bench of this Court in *Smt Malini M. Xete v/s. The Director of Education, Government of Goa & Ors. - (1999) 3 Bom CR 618* and *Pratibha A. Agranayak v/s. Director of Education, Panaji-Goa & Ors. - 2001 (1) Mh.L.J. 796*.

7. For all the above reasons Mr Rodrigues submitted that the Rule in this petition may be made absolute and directions be issued for the promotion of the petitioner to the post of principal in the said school w.e.f. 31.07.2022, with all consequential benefits, after striking down the promotion/appointment of the fourth respondent to the said post.

8. Mr Lawande, learned counsel for the school management (third respondent) submitted that the adverse remark for the year 2020-21 was communicated to the petitioner on 20.11.2021 i.e. before the vacancy of principal arose on 31.07.2022. Though the petitioner had instituted an appeal, there was no stay. Therefore, the DPC was entitled to consider this adverse remark. Further, he submitted that even the adverse remark for the year 2021-22 was communicated to the petitioner on 21.11.2022 i.e. before the DPC met on 14.11.2022. He submitted that the DPC therefore correctly took into consideration the two adverse remarks against

the petitioner and based thereon found the petitioner to be unfit for promotion. He submitted that the DPC also assessed the relative merits between the petitioner and the fourth respondent. He submitted that such an assessment of relative merits by the DPC is generally immune from judicial review because the Courts do not sit in appeal over the assessments of the DPC. He joined Mr Usgaonkar, learned counsel for the fourth respondent in relying on *Smt Nutan Arvind v/s. Union of India & Anr. - (1996) 2 SCC 488* and *State of Bihar & Ors. v/s. Bateshwar Sharma – (1997) 4 SCC 424*.

9. Mr Lawande submitted that the DPC had gone by the provisions of Rule 86 of the said Rules and based upon the material which was placed before it, including reports from the managers, memos, adverse remarks, etc. concluded that the fourth respondent was the best qualified and most competent person for appointment to the post of principal. The DPC recorded cogent reasons to bypass the petitioner assuming that the petitioner was senior to the fourth respondent. He submitted that even the Director's representative concurred with the opinion of the school management, and finally, the Deputy Director approved the promotion of the fourth respondent. Mr Lawande submitted that on all these grounds this petition must be dismissed.

10. Mr Usgaonkar, learned counsel for the fourth respondent submitted that the material on record shows that the fourth respondent was senior to the petitioner. He submitted that the fourth respondent obtained his training qualification before the

petitioner. Besides, the petitioner's training qualification was through long-distance education. For all these reasons Mr Usgaonkar submitted that the fourth respondent was not only senior to the petitioner but better qualified. He submitted that the mandate of Rule 86 is to select the best qualified and most competent person among those available for appointment. He therefore submitted that there was no infirmity in the recommendation of DPC and appointment of the fourth respondent as principal. He submitted that the decision in the case of *Dominic Araujo v/s. State of Goa & Ors. - 1989 Mh.L.J. 538*, relied upon by the Director for determining the seniority was not applicable because the same was based on the provisions of the Grant-in-aid Code and not the said Act or the said Rules.

11. Mr Usgaonkar submitted that this Court should not sit in appeal over the assessment of the DPC members who had assessed the relative merits and determined that the fourth respondent was most meritorious. Mr Usgaonkar submitted that even if the issue of seniority is kept aside, the fourth respondent, being more meritorious, was correctly appointed as the principal. For these reasons, he submitted that this petition ought to be dismissed.

12. Mr Vernekar, learned Additional Government Advocate also sought to defend the approval granted by the Deputy Director of Education to the appointment of the fourth respondent. To the Court's specific query as to whether the Director, who had passed the order dated 21.01.2021 holding the petitioner to be senior to the fourth respondent, had read the

DPC minutes, which had squarely attacked the Director's order, Mr Vernekar submitted that the Director had not read the minutes because the Deputy Director granted this approval. To the question of whether the Director's nominee at the DPC or the Deputy Director could have joined or approved the criticism of the Director's Order dated 21.01.2021, Mr Vernekar was unable to respond. Mr Vernekar also did not have any response to the issue of whether the CRs communicated after the principal's vacancy arose on 31.07.2022 could be considered for filling up such vacancy. Still, he submitted that the fourth respondent's promotion was in terms of Rule 86 of the said Rules because the DPC considered not only the adverse remarks but also other material based on which the fourth respondent was adjudged as more meritorious.

13. The rival contentions now fall for our determination.

14. A reference to the basic and mostly undisputed facts is essential to appreciate the rival contentions.

15. The petitioner, the fourth respondent and another teacher were appointed on 23.06.1994 but w.e.f. 01.07.1994. Since the three teachers were appointed on the same date, the eldest was shown as senior and so on. Accordingly, the petitioner was shown at the second position and the fourth respondent was shown at the third position. The fourth respondent did not protest his placement below the petitioner in the grade of teacher.

16. The petitioner was granted the senior scale on 01.07.2006 and the fourth respondent on 07.09.2006. Again, there was no protest from the fourth respondent. A seniority list was drawn up in 2007 in which the petitioner was ranked at sr.no.3, and the fourth respondent was ranked at sr.no.4. Again, the fourth respondent did not protest his ranking below the petitioner in the seniority list of teachers. The petitioner was granted the selection scale on 01.07.2008 and the fourth respondent was granted the said scale on 07.09.2008. Again, there was no protest from the fourth respondent. In fact, up to 2020, there is no record of any controversy about the Petitioner being senior to the fourth respondent.

17. Thus, between 1994 and 2008, even though the school management consistently regarded the petitioner as senior to the fourth respondent, there was no protest or challenge from the fourth respondent. The challenge, if at all, comes only in the year 2020, when after all these years, the management began to openly side with the fourth respondent and make efforts to place him senior to the petitioner.

18. At the beginning of the year 2020, since there was absolutely nothing adverse against the petitioner, the school management or rather, the Chairperson of the school management, felicitated the petitioner on his completion of twenty-five years of meritorious service. None of the respondents have denied this fact. However, in the latter part of 2020, suddenly, the management decided to openly side with the fourth respondent and, by communication dated 01.09.2020, circulated

a seniority list showing the fourth respondent as senior to the petitioner. The petitioner justifiably contends that all this was to create grounds to deny promotion to the petitioner to the post of principal which was to fall vacant on 31.07.2022.

19. The petitioner appealed under Rule 87-A to the Director of Education against the management's decision to place the fourth respondent senior to the petitioner. This appeal was allowed by the Director of Education by order dated 21.01.2021. This order was made after hearing the petitioner, the school management and the fourth respondent. This order gives detailed reasons why the Petitioner's seniority position could not have been disturbed by the management and how the fourth respondent's claim was unjustified.

20. The school management, which should have normally remained neutral in such matters filed a review petition before the Director, knowing fully well that no review jurisdiction was vested in the Director. A petition was also filed in this Court to agitate the same issue. Ultimately, the alternate remedy of instituting an appeal before the fourth respondent availed the Tribunal. The Tribunal granted ex-parte stay on the Director's order dated 21.01.2021. The petitioner contended that such a stay was obtained by grossly misrepresenting the facts. After the correct facts were placed before the Tribunal, the Tribunal by its order dated 19.08.2022, vacated the ex-parte stay and made observations about the *prima facie* collusion between the school management and the fourth respondent.

21. The school management and the fourth respondent put up a united front on the issue of seniority. Mr Rodrigues pointed out that Mr Usgaonkar, who now appears for the fourth respondent, appeared for the school management and the fourth respondent at the same time. He submitted that the school management was never neutral or impartial, and the Tribunal was therefore justified in making observations about the *prima facie* collusion between the school management and the fourth respondent. Mr Rodrigues pointed out that during the pendency of this dispute about seniority but notwithstanding the Director's order dated 21.01.2021, the school management appointed the fourth respondent as the in-charge principal, even though the petitioner was the senior-most teacher in the feeder category.

22. Since the school management was not holding a regular DPC or implementing the Director's order dated 21.01.2021, the petitioner was constrained to institute a Writ Petition No.1334/2022 (F) before this Court which was disposed of by order dated 27.07.2022 directing the school management to implement the Director's order. Since this was not complied with, the petitioner was forced to file Contempt Petition No.1916/2022.

23. The fourth respondent instituted Writ Petition No.443/2022 to challenge the Tribunal's order dated 19.08.2022 vacating the ex-parte stay on the Director's order dated 21.01.2021 placing the petitioner as senior to the fourth respondent. This petition was dismissed on 04.10.2022, after

upholding Tribunal's finding about the *prima facie* collusion between the school management and the fourth respondent.

24. The observations in the above regard are found in paragraph 12 of this Court's Judgment and Order dated 04.10.2022 and the same read as follows: -

“12. In the facts of the present case, no prima facie case was made out for grant of any stay, much less an ex-parte stay. But, that apart, the finding about prima facie collusion also finds support from the conduct of the Management going to great lengths to institute review and appoint the Petitioner as in-charge Principal even though in terms of the seniority list, the Petitioner does not continue to be senior to Jairam Kerkar.”

25. The fourth respondent challenged this Court's Judgment and Order dated 04.10.2022 in Writ Petition No.443/2022 before the Hon'ble Supreme Court by instituting Special Leave Petition (C) No.18728 of 2022. This SLP was dismissed by the Hon'ble Supreme Court on 31.10.2022. Thus, even the finding about *prima facie* collusion between the third and fourth respondents was not interfered with.

26. The Tribunal by a detailed order dated 12.04.2023 dismissed the fourth respondent's Misc. Civil Application No.106/2022/COND/EDU. Consequently, even the fourth respondent's appeal against Director's order dated 21.01.2021 finalizing the seniority came to be dismissed. Again, the Tribunal,

reiterated its finding about collusion between the school management and the fourth respondent by the great lengths that the school management had gone to favour the fourth respondent. Significantly, neither the third nor the fourth respondents have bothered to challenge the Tribunal's order and the finding therein. Accordingly, the issue of seniority has attained finality, and the fourth respondent was not justified in once again attempting to raise the same in this petition.

27. Even otherwise, the record bears out that the petitioner, fourth respondent and yet another teacher were appointed in the said school by orders dated 23.06.1994 w.e.f. 01.07.1994. the seniority was then fixed based on the age of the appointees. The third teacher, who was senior to both the petitioner and the fourth respondent was adjudged the senior-most. The petitioner is admittedly senior in age than the fourth respondent and consequently was placed senior to the fourth respondent in the seniority list circulated in 2007. Significantly, the fourth respondent did not challenge this seniority list of 2007 in which he was shown junior to the petitioner.

28. The record also reveals that the petitioner was granted the senior scale on 01.07.2006 and the fourth respondent was granted senior scale on 07.09.2006. Similarly, the petitioner was granted the selection scale on 01.07.2008 and the fourth respondent was granted the selection scale on 07.09.2008. Therefore, at least until 2020, there was no dispute raised about the petitioner being senior to the fourth respondent. In fact, in 2020, the petitioner was felicitated by the Chairperson of the

School Managing Committee for twenty-five years of meritorious service in the said school.

29. Thus, based on the above, it is apparent that the petitioner was always senior to the fourth respondent in the feeder category. This position was accepted by the school management and the fourth respondent at least up to the year 2020 without any protest. The school management, in the year 2007 circulated a seniority list in which the petitioner was shown as senior to the fourth respondent. This was never challenged by the fourth respondent. In any case, the Director's order dated 21.01.2021 has now attained finality for want of challenge either by the school management or the fourth respondent.

30. Despite all this, both the school management and the fourth respondent continue to harp that the fourth respondent is still senior to the petitioner. If the fifteen-page annexure to the DPC minutes is perused, it is apparent that the DPC, without any authority of law, has virtually purported to sit in appeal over the Director's order dated 21.01.2021 and pick holes in the Director's finding that the petitioner was senior to the fourth respondent. The unfortunate part of this matter is that the Director's nominee, who was a constituent of the DPC has also signed the DPC minutes which specifically refer to the fifteen-page annexure as forming a part of the DPC minutes. This means that this nominee who is himself a Deputy Director has either not bothered to read the DPC minutes or felt nothing in criticising his director's order, even after the Tribunal upheld such an order.

31. From the tenor of the DPC minutes, including the fifteen-page annexure forming a part of the DPC minutes, it is apparent that the DPC was primarily interested in establishing that the fourth respondent was senior to the petitioner, the Director's order dated 21.01.2021 notwithstanding. This kind of obstinate insistence on the part of the DPC to go into the issue of seniority which had already attained finality by the Director's order dated 21.01.2021 and the Tribunal's order dated 12.04.2023, vitiates the decision-making process.

32. Although Mr Lawande submitted that the DPC accepted the petitioner to be senior to the fourth respondent but bypassed the petitioner because he was not found to be fit for promotion, at least the fifteen-page annexure to the DPC minutes shows that this so-called unfitness of the petitioner was introduced, only to overcome the Director's order dated 21.01.2021, which had adjudged the petitioner as senior to the fourth respondent. Otherwise, there was no reason for the fifteen-page annexure to the DPC minutes devoting so much of time and space to the issue of seniority which had since been finalized by the Director's and Tribunal's orders.

33. At this juncture, it is also necessary to note the *prima facie* findings recorded by the Tribunal about the collusion between the school management and the fourth respondent. These *prima facie* findings were upheld in this Court's order dated 04.10.2022 dismissing the fourth respondent's Writ Petition No.443/2022. This Court also noted the extent to which the management was

prepared to go to deny promotion to the petitioner and to consequently promote the fourth respondent as principal, even though, the fourth respondent was adjudged as junior to the petitioner. From the DPC minutes, including in particular the fifteen-page annexure, it is apparent that the school management was determined to promote the fourth respondent and deny promotion to the petitioner for reasons that cannot be called legitimate.

34. The learned counsel for the parties agreed that the promotions in this case were governed by Rule 86 of the said Rules. Rule 86 came up for interpretation in *Malini Xete (supra)*. Paragraph 5 of this decision is instructive and therefore, transcribed below for convenience of reference: -

“5. Rules governing the matter of promotion may prescribe different factors which will have to be taken into consideration in the decision making process. Seniority, merit and fitness are normally considered as relevant in such matters, but which factor should weigh more in comparison with other factors for consideration depends on the language used in the relevant Rules. In some Rules the seniority may play a prominent role, whereas in some others, merit may be the dominant factor. The phraseology used in the Rule will determine as to what importance the Selection Committee will have to give to each of the items for consideration. The Rule quoted above has not in one place but in three places clearly indicated that the Rule does want that the seniority has to be given importance. The first

sentence of the portion quoted above directs the management to explore the possibility of selecting the senior most teacher. Then the Rule prescribes that seniority shall be the first criteria and if the name of the senior most eligible teacher is to be by-passed, the reasons have to be recorded in the minutes and lastly, the Rule reminds that the claim of the senior qualified teacher shall not be by-passed arbitrarily without tangible reasons. A cumulative reading of all the norms under sub-Rule (2) of Rule 86 goes to show that the Rule requires that normally a senior qualified teacher will have to be selected. It is only when there are tangible reasons to by-pass the claim of such person, any person junior to him can be selected. The Rule does not give equal importance to seniority and merit. Admittedly, the petitioner is senior most among the eligible persons. We are told by the learned Counsel for the Management that the Departmental Promotion Committee selected the respondent No.5 on the basis of the appreciation of the relative merit. The report of the Departmental Promotion Committee mentions the following remarks in respect of the working of the petitioner and the respondent No. 5.”

35. *Malini Xete (supra)* was followed and reiterated in *Pratibha Agranyak (supra)*. Thus, it is clear that Rule 86 of the said Rules gives primacy to seniority. It provides that seniority cannot be bypassed unless there is cogent material to show that the senior-most teacher in the feeder category is positively unfit for promotion. The seniority cannot be bypassed by evaluating the

relative merits and concluding that the junior teacher is more meritorious than the senior teacher. There must be a positive finding of unfitness based on reliable and cogent material. The DPC, in this case, has failed to adhere to this principle. The reasoning of the DPC is neither consistent with the express words of rule 86 of the said Rules nor the decisions in *Malini Xete (supra)* and *Pratibha Agranayak (supra)*. This also vitiates the decision-making process and warrants interference with the management's action in the exercise of powers of judicial review.

36. For example, the DPC, based on the qualifications of the petitioner and fourth respondent, concludes that the fourth respondent had better qualifications. However, the record shows that the petitioner had two Post Graduate Degrees (M.A.), out of which one was through distance education. The petitioner had a B.Ed. with a total teaching experience of twenty-eight years. The fourth respondent had only one Post Graduate Degree and a B.Ed. His experience was also lesser than that of the Petitioner. Still, strangely, the DPC holds that the fourth respondent has better qualifications than the petitioner. As noted above, even a better qualification would not be sufficient to bypass the seniority position given the provisions of Rule 86 of the said Rules and the decisions of this Court in *Malini Xete (supra)* and *Pratibha Agranayak (supra)*.

37. The DPC also curiously relied upon some certificates issued by the school manager, who is nothing but an appointee of the school management. These self-serving certificates certify that the fourth respondent is most competent and the petitioner is unfit

for promotion. Based on such self-serving certificates from the manager, the DPC could not have concluded that the petitioner was unfit for promotion.

38. Besides, such certificates must be considered in the background of the apparent collusion between the school management and the fourth respondent, which was noted and adversely commented upon by the Tribunal. This Court upheld such comments. The SLP against this Court's order was also dismissed. Such certificates also have to be considered in the background of the fact that in 2020, i.e., hardly two years earlier, the school management felicitated the petitioner for twenty-five years of meritorious service. Such certificates must be evaluated on the background that for almost twenty-five years, not a single adverse remark was communicated to the petitioner.

39. The DPC has considered two adverse remarks and, based on the same, concluded that the petitioner was unfit for promotion. The first adverse remark pertains to the year 2020-2021. This adverse remark was communicated to the petitioner on 20.11.2021 vide communication dated 19.11.2021. A perusal of this communication on pages 167-168 of the paper book would show that this was a tentative remark, and therefore, the petitioner was called upon to submit his reply within thirty days failing which, he was informed that action deemed necessary and fit as per rules would be taken.

40. Upon receipt of the communication dated 19.11.2021, the petitioner filed a detailed response within thirty days to the school

management. Besides, by way of abundant caution, the petitioner filed an appeal under rule 90(4)(5) of the said Rules to the Director/Deputy Director. In the explanation and the appeal, the petitioner pointed out how, throughout his tenure of almost twenty-five years, not a single adverse remark was ever communicated to him. He pointed out how the management had suddenly turned against the petitioner because the petitioner was defending his seniority position qua the fourth respondent. The petitioner's appeal under rule 90(4)(5) of the said Rules is admittedly still pending.

41. The petitioner's explanation to the tentative adverse remark dated 19.11.2021 was surprisingly disposed of only on 31.10.2022, i.e., after this Court directed the school management on 04.10.2022 to hold the DPC immediately. This explanation was disposed of after the fourth respondent and the management failed to succeed before the Tribunal, the High Court, and the Hon'ble Supreme Court in establishing that the fourth respondent was senior to the petitioner. Therefore, Mr Rodrigues is justified in contending that there was no finalised adverse remark in the petitioner's confidential rolls as of 31.07.2022 when the vacancy arose for the post of principal. The DPC, in facts of this case, therefore, was not justified in considering this remark.

42. The second adverse remark for the year 2021-2022 was also served upon the petitioner only on 31.10.2022. Therefore, even this adverse remark would not relate to the vacancy which arose on 31.07.2022. From the sequence of events, it is more than apparent that these adverse remarks were to deter the petitioner

from agitating on his seniority position. It is further apparent that these adverse remarks were communicated hurriedly to defeat the orders made by this Court for holding a DPC and considering the petitioner's case for promotion to the post of principal. From the sequence of events, it is also apparent that these adverse remarks were communicated no sooner than the school management and the fourth respondent lost before the Director, Administrative Tribunal, High Court, and the Hon'ble Supreme Court on the issue of seniority and the petitioner was adjudged as the senior-most in the feeder category. The school management and the fourth respondent have jointly attempted to overreach the orders made by the Director, Tribunal, High Court, and even the Hon'ble Supreme Court by almost post facto fabricating grounds to declare the Petitioner unfit or the fourth respondent most competent.

43. Ordinarily, the position of CRs as of the date of the vacancy must be considered. The school management cannot delay holding the DPC and, during the delayed period, communicate adverse remarks to a teacher whose services were found to be blemish-less for more than twenty-five years and who was felicitated by this very management for meritorious service. Although the decisions in *N. R. Banerjee (supra)* and *S. B. Bhattacharjee (supra)* are in the context of office memoranda governing promotions of government servants, the principle that even if a DPC that meets after delay, it must consider the position as on the date of the vacancy, laid down therein would apply in this matter. The material that comes into existence or that is

manufactured after the vacancy arises must at least ordinarily not be considered by the DPC.

44. The adverse remarks for the year 2021 are also quite vague because they allege that the petitioner was “*not easy in his relationship*” with colleagues and students or that he was “*indifferent*” with his superiors. There is a remark about the petitioner being “*indisciplined*”. There is also a reference to a warning letter in the context of interaction with in-charge principal. The petitioner has offered a full explanation. The explanation is rejected belatedly with a single line that the same was not satisfactory. Besides, there is no explanation why, suddenly, in the year 2021, vague adverse remarks surfaced when, precisely a year earlier, the management felicitated the petitioner for twenty-five years of meritorious service.

45. The adverse remark dated 31.10.2022 cites that the petitioner’s service is not satisfactory or that he is indifferent and ‘indisciplined’. There is a reference to the petitioner having a poor attitude with colleagues, and there are instances of his triggering conflicts amongst the colleagues. Again, apart from vagueness, there is no explanation why these remarks surfaced no sooner than the management and the fourth respondent lost their seniority battle before the Director, Tribunal, High Court, and the Hon’ble Supreme Court. There is no explanation for why such vague remarks surfaced after the management felicitated the petitioner for completing twenty-five years of meritorious service.

46. Mr Rodrigues is justified in submitting that the facts in this case are quite similar to those in *Shubhangi Manerkar (supra)*. There, the petitioner was complaining about the school management delaying the holding of DPC to make regular appointment to the post of headmaster. In the meanwhile, a junior teacher was made in-charge headmaster. Shubhangi therefore petitioned the High Court and obtained orders for holding of a regular DPC within a time bound schedule. The management, to frustrate the orders of the High Court or to otherwise teach Shubhangi a lesson served two charge-memoranda upon her and started disciplinary proceedings. Based upon the same, Shubhangi, who was the senior-most, was denied promotion.

47. This Court, in its Judgment and Order dated 18.12.2019 considered the background and the charges and held that the charge-memoranda deserved to be quashed. The Court noted that these charge-memoranda were issued only to deny promotion to Shubhangi and therefore, there was lack of good faith. This Court considered the provisions of Rule 86 of the said Rules and rejected the contentions very similar to those now raised by the school management and the fourth respondent. The reasoning in *Shubhangi Manerkar (supra)* therefore applies to the present case.

48. Once the adverse remarks and the self-serving certificates issued by the school manager are excluded from consideration, it is apparent that there is no material on record to conclude that the petitioner was unfit for promotion. In fact, the records show

that the petitioner was better qualified than the fourth respondent. The Director's order dated 21.01.2021 firmly establishes the petitioner's seniority over the fourth respondent. The Director's order has attained finality given the orders of the Administrative Tribunal. The Tribunal, in its order dated 12.04.2023, has reiterated the collusion between the school management and the fourth respondent. Even this Court commented upon the extent to which the school management has gone to favour the fourth respondent. In such circumstances, this petition needs to be allowed.

49. There is a serious flaw in the decision-making process because the DPC considered the CRs, which were neither relevant nor issued in good faith or bonafide. The CRs were never finalised or communicated before the vacancy arose. The DPC relied on manager's certificates, which were self-serving and not at all cogent. The ground of bad faith applies to such certificates manufactured by the school management. The finding about collusion between the school management and the fourth respondent vitiates the decision-making process because even the so-called expert was nominated by the school management. The Deputy Director failed to apply mind to the provisions of Rule 86 and the Director's order dated 21.01.2021. The approval granted in this case was not by the Director but by the Deputy Director, possibly without going through the DPC minutes, which had virtually criticised the Director's order dated 21.01.2021, even though the Administrative Tribunal had not interfered with the same. For all these reasons, the impugned action of the respondents warrants interference.

50. This is not a case where this Court is considering an appeal over the assessment of relative merits by a DPC. Therefore, the decisions in the case of *Nutan Arvind (supra)* or *Bateshwar Sharma (supra)* will not apply. This is a case where the DPC failed to follow the mandate of Rule 86 and the decisions of this Court in *Malini Xete (supra)* and *Pratibha Agranayak (supra)*. This is a case where the CRs, communicated or finalised after the vacancy date, were considered by the DPC. This is a case where the adverse remarks were not issued in good faith by the school management but were issued only to frustrate the various Court orders in favour of the petitioner. This is a case where the school management manufactured the manager's certificates post facto, and the same were relied upon by the DPC. This is a case where the DPC virtually sat in judgment over the Director's order determining seniority, even though this order had attained finality. This is a case where the DPC refused even to consider the fact that the Petitioner was senior to the fourth respondent throughout and was felicitated for 25 years of meritorious service in 2020. Thus, all relevant considerations were excluded, and irrelevant or extraneous matters were considered by the DPC. All these are sufficient grounds to exercise powers of judicial review.

51. The Dy Director's role as a part of the DPC or the other Dy. Director's role in approving the DPC minutes also leaves a lot to be desired. The DPC minutes launched a virtual attack on the Directors order dated 21.01.2021 on the issue of seniority. Still one of the Dy. Director endorses them, at least by implication. Another Dy. Director grants approval without application of

mind to the breaches of Rule 86 of the said Rules, possibly by not even going through the minutes that had squarely criticised his director's order even though the Tribunal dismissed the appeal against that order. A Deputy Director nominated by the Director on the DPC is not expected to either sit in appeal or criticise the Director's order made by the Director in a quasi-judicial capacity. This is more so after the appeal against such an order was dismissed by the Administrative Tribunal.

52. Mr Vernekar, AGA, did his best in the matter. But, to the Court's specific query as to whether the Director, who had passed the order dated 21.01.2021 holding the petitioner to be senior to the fourth respondent, had read the DPC minutes, which had squarely attacked the Director's order, Mr Vernekar submitted that the Director had not read the minutes because the Deputy Director granted this approval. To the further question of whether the Director's nominee at the DPC or the Deputy Director could have joined or approved the criticism of the Director's Order dated 21.01.2021, Mr Vernekar was unable to respond. Mr Vernekar also did not have any response to the issue of whether the CRs communicated after the principal's vacancy arose on 31.07.2022 could be considered for filling up such vacancy. The two Deputy Directors should have considered all these matters.

53. The whole purpose of having a Director's nominee on the DPC or conferring powers of approval on a Director is to ensure that the DPCs do not bypass legal provisions or legal procedures. Many times, there are differences among teachers or staff

members or differences between the school management and the teachers or staff members. Due to this, objectivity or impartiality that is normally expected from school management could be compromised. To control or check such tendencies, the law requires a Director's nominee to be on the DPC. The law prescribes a further check by way of approval from the Director. These are not empty formalities, and due application of mind is essential on the part of the Director's nominee on the DPC and the Director or his delegate (assuming such power can be delegated) at the stage of approval. At least the DPC minutes must be carefully perused before the granting of approval to see whether legal provisions and legal procedures are complied.

54. In *Shubhangi Manerkar (Supra)*, this Court issued a mandamus to promote her after noting how the school management had issued charge memoranda just before the DPC met and considered the promotions. This case is not much different, as discussed above. Still, considering the prayer clauses, the ordinary rule of directing a review DPC can be adhered to. However, looking at the conduct of the school management since 2021 and the lengths to which it has gone to deprive the Petitioner or unduly favour the fourth respondent, some directions are called for in the context of the review DPC, which must now be held in a time bound manner.

55. A fresh DPC must be convened within a maximum of three months from today. Given the animus that the school management bears against the petitioner or the affinity which the school management bears towards the fourth respondent, it is

only proper that the Director of Education nominates an educationist on the DPC. Therefore, the fresh DPC should now be held by the DPC comprising the Chairperson of the managing committee, an Educationist nominated by the Director of Education, and another Educationist to be nominated by the Director of Education. This fresh DPC must not consider the two so-called adverse remarks or the manager's self-serving certificates. Further, the fresh DPC must abide by Rule 86 as interpreted in *Malini Xete (Supra)* and *Pratibha Agranayak (Supra)*. Under no circumstances should the review DPC ignore the Directors order on the Petitioner's seniority.

56. Now that the fourth respondent's promotion is being set aside, it is only proper that the petitioner assumes charge of the principal's post forthwith. The normal rule is that the senior-most teacher in the feeder grade is appointed the in-charge principal until regular promotion follows. There is no case made out to deviate from this normal rule. In fact, any deviation would amount to giving a premium to the school management and the fourth respondent who have not acted in good faith in this matter.

57. The Petitioner was forced to file and defend several litigations in the last two years due to the school management and the fourth respondent trying to upset the seniority position that had been settled in 2007. The school management and the fourth respondent have openly colluded with each other and tried to spoil the Petitioner's CRs belatedly after the Petitioner was felicitated in 2020 for completing 25 years of meritorious service.

The petitioner was also denied promotion unfairly for extraneous reasons. The school management funds such litigation through the Society's funds. On one occasion, the managing committee and the fourth respondent were represented by a common Lawyer. However, the Petitioner has to spend from his own pocket for all such litigations. The school management must, therefore, pay some costs to the Petitioner in this case, though we must record that Mr Lawande's approach was reasonable and balanced.

58. Accordingly, for all the above reasons, we allow this petition and issue the following orders and directions:

- (a) The DPC minutes dated 14.11.2022 and the recommendations contained therein are quashed and set aside.
- (b) The appointment of the fourth respondent as principal and the approval dated 13.12.2022 granted therefor is also quashed and set aside. But no recoveries must be made from the fourth respondent.
- (c) The third respondent is directed to appoint the petitioner as principal-in-charge forthwith until a regular appointment is made to the post of principal. The first and second respondents must ensure that this is done, and that the petitioner is not forced to file a contempt petition again.

(d) The third respondent must hold a review DPC with composition as indicated in paragraph 55 within a maximum period of two months from today for filling up the post of principal on a regular basis effective from 31.07.2022. The DPC must, however, not consider the impugned adverse remarks or the manager's certificates declaring the petitioner as unfit and the fourth respondent as most competent. The DPC must abide by the parameters of rule 86 of the said Rules as interpreted by this Court in the case of *Malini Xete (supra)* and *Pratibha Agranayak (supra)*;

(e) The Director of Education must take a decision in accordance with the law on the recommendation of the review DPC within 30 days from the receipt.

(f) The school management shall pay costs of ₹25,000/- to the petitioner within 15 days from today.

59. The rule is made absolute in the above terms with costs.

60. All concerned must act on an authenticated copy of this order.

BHARAT P. DESHPANDE, J.

M. S. SONAK, J.

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SUCHITRA NANDAN
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Date: 2023.11.04
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