

Shabnoor

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.4909 OF 2024

Vijay Shripati Padalkar

Age: 56 years, Occupation: Service

Residing at 790/21 B

Gulabnagar, Pachgao Road, Kolhapur,

District-Kolhapur 416 007

... Petitioner

V/s.

1. The President,

Navjeevanshikshan Prasarak Mandal

Residing at Shiye, Taluka Karveer,

District Kolhapur 416 122

2. The Head Master,

Shiye High School and Jr. College Shiye,

Taluka Karveer, District- Kolhapur 416 122

3. The Education Officer (Secondary)

Zilla Parishad, Kolhapur

4. Krushnat Vishwanath Basagre

Age: 56 years, Occupation: Service

Shiye, Taluka Karveer

District Kolhapur 416 122

... Respondents

Mr. Chetan G. Patil i/by Mr.Mandar G. Bagkak for
Petitioner.

Ms. Komal Bhoir a/w Ms.Vijayata Sunil Shinde for
Respondent No.1.

Mr. Prajakt Arjunwadkar for Respondent Nos.2 & 4.

Mrs. D. S. Deshmukh, AGP for State/Respondent
No.3.

CORAM : AMIT BORKAR, J.

DATED : JULY 2, 2024

ORAL JUDGMENT:

1. **Rule.** Rule made returnable forthwith.
2. By the present writ petition, the Petitioner is challenging an order passed by the School Tribunal exercising power under Section 9 of the Maharashtra Employees of Private Schools (Condition of Service) Regulations Act, 1977 (hereinafter referred to as "**MEPS Act**") holding petitioner junior to respondent No.4 considering his date of temporary appointment on the post of Assistant Teacher under the provisions of MEPS Act.
3. The facts relevant to the adjudication of the issue involved are as under:

The Petitioner was initially appointed on 11th June 1990 for a fixed period of academic year 1990-1991. On the date of his appointment, he was holding a B.Sc. B.Ed is an essential qualification for appointment of Assistant Teacher under Schedule 'F' of the Maharashtra Employees of Private Schools Rules, 1981 (for short "**MEPS Rules**"). According to the Petitioner, therefore, he entered the category 'C' of Schedule 'F' on 11th June 1990. The Education Officer, by an order dated 8th September 1990, approved the appointment of the Petitioner. Since the Petitioner was appointed on the post reserved for backward class candidates, and since he belonged to the open

category candidate, the Petitioner was appointed under Rule 9(9)(a) of the MEPS Rules, which permits such appointment in case the candidate belonging to the backward class or other backward class is not available.

4. After the summer break, the Petitioner was again appointed on 1st June 1991 for the academic year 1991-1992. The term of his second appointment was from 1st June 1991 to 30th April 1992. Again, his appointment was approved by the Education Officer on 4th September 1991 for a period of one year. On 1st June 1992, the Petitioner was again appointed on probation for a period of two years, ending on 30th April 1993. The Education Officer approved his appointment for a period of one year. His appointments after that are not the subject matter of the dispute.

5. Respondent No.4 was appointed for the first time on June 19, 1991. On the date of his appointment, he also held qualification B.A. B.Ed. Therefore, on the date of his appointment, he entered under category 'C' of Schedule 'F' of MEPS Rules.

6. Respondent No.4 was appointed as Head Master with effect from 1 June 2022. According to the Petitioner, Respondent No. 4 is junior to him and was promoted, resulting in the Petitioner's supersession. Therefore, the Petitioner filed an appeal under Section 9 of the MEPS Act.

7. The Tribunal dismissed the Petitioner's appeal mainly on

the ground that the Petitioner was appointed to the post reserved for Schedule Tribes candidates, and his appointment was temporary for the academic years 1990-1991, 1991-1992, and 1992-1993. The Petitioner has, therefore, filed the present petition.

8. Mr. Patil, learned Advocate for the Petitioner, relying on the judgment of this Court in the case of **Sumangala w/o Manoharrao Sakharkar Vs. State of Maharashtra and Ors.** reported in 2010 (1) Mh.L.J. 63 submitted that the break in service of an Assistant Teacher during vacation when the institution is not imparting education cannot be termed as a break in continuous service. He submitted that the first appointment of the Petitioner was made as per Rule 9(9)(a) of the MEPS Rules. Therefore, even if the appointment is termed as a temporary appointment, the same as in accordance with the Rules, the experience gained by such a teacher needs to be included as legal experience for the purpose of counting his seniority. He, therefore, prayed to set aside the School Tribunal's order.

9. Mr. Arjunwadkar, learned Advocate for respondent Nos.2 and 4, on the contrary, submitted that the appointments of Petitioner for academic years 1990-1991 and 1991-1992 were for a fixed period. The term of Petitioner ended by 30th April of each academic year. The appointment of the Petitioner for the academic year 1991-1992 and 1992-1993 was a fresh appointment. Therefore, the Petitioner's service cannot be

termed as continuous service for the purpose of counting experience gained by the Petitioner in the post of Assistant Teacher. In support of his contentions, he relied on the judgment of the Apex Court in the case of **Asha Shamkumar Patil Vs. Sadhana Rajan Kamble & Ors.** reported in 2007 (6) Bom. C.R. 402.

10. Rival submissions fall for consideration. Based on submissions made on behalf of both sides, the following questions arise for consideration:

(i) Whether the experience gained by an Assistant Teacher appointed on a temporary basis but in accordance with the Rule can be counted towards experience for the purpose of seniority ?

(ii) Should the appointment of an Assistant Teacher for a fixed period of one academic year each, with a vacation break, be termed continuous service for seniority?

11. For the purpose of considering the issues involved, it is necessary to set out relevant provisions of the MEPS Rules, which read as follows:

Rule 9(9)(a). In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of backward classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in sub-rule (7), and if no person from any of the categories is available, the post may be filled in

temporarily on a year-to-year basis by a candidate not belonging to the backward classes.

“Schedule ‘F’

[See rule 12]

[1. Guidelines for fixation of seniority of teachers in the primary schools:—

The seniority of primary school teachers in Primary Schools shall be based on continuous officiation counted from the date of acquiring the educational qualification as prescribed under Schedule “B” appended to these rules.]

2. Guidelines for fixation of seniority of teachers in the secondary schools, Junior Colleges of Education and Junior College classes attached to secondary schools and Senior Colleges :—

For the purpose of fixation of seniority of teachers in the secondary schools, Junior Colleges of Education and Junior College classes attached to Secondary Schools the teachers should be categorised as follows: —

Category A: Heads of secondary schools having an enrolment of students above 500 and Principals of Junior Colleges of Education having more than four Divisions on the basis of the dates of their appointments to the respective posts.

Category B: Heads of secondary schools having an enrolment of students of 500 and below, Principals of Junior Colleges of Education having four or less Divisions and Assistant Heads of Secondary schools having more than 20 classes on

the basis of the dates of their appointments to the respective posts.

Category C : Holders of—

M.A./M.Sc. M.Com./, B.T./B.Ed., or its equivalent; or B.A./B.Sc./B.Com., B.T./B.Ed., or its equivalent; or B.A., B.Sc./B.Com., Dip. T. (old two years course); or B.A./B.Sc./B.Com.,S.T.C./Dip. Ed./Dip. T. (one year course) with 10 years post-S.T.C. etc. service.

[[B A or its equivalent Plus Senior Hindi Shikshak Sanad with five years service; or Junior Hindi Shikshak with ten years service [after obtaining both academic and training qualifications]]”

12. The question in relation to parameters governing the seniority of primary and secondary teachers came up for consideration before the Division Bench of this Court in the case of **Gaur Pratibha and Others Vs. State of Maharashtra, through the Secretary and Others**, reported in 2019 SCC OnLine Bom 597. The Division Bench of this Court held that the seniority of primary teachers shall be based on continuous officiation, whereas in the case of secondary teachers, seniority shall be counted from the date such teachers enter category 'C' of Schedule 'F'. It is held that the teacher's entry under the category 'C' of Schedule 'F' shall be the date when he acquires the necessary qualifications.

13. In the facts of the case, both Petitioner and respondent No.4 were qualified on the date of their appointments. It is not

in dispute that the appointment orders issued in favour of the Petitioner cover the entire academic year, i.e., June 1990 to April 1991 and June 1991 to April 1992. It can also not be disputed that the secondary Educational Institutions have a vacation break in May of each academic year.

14. It is, therefore, necessary to consider the judgment in the case of **Sumangala w/o Manoharrao Sakharkar** (Supra). In the facts of said case, the Petitioner therein was appointed as Assistant Teacher temporarily from 5th January 1981 till the end of the academic session, i.e. 1980-81. After vacation, her appointment was continued from 29th June 1981 till the end of the academic session, and thereafter, she was again appointed for the academic session of 1982-1983. The question, therefore, framed by the Single Judge in paragraph 12 reads as under:

“12. It is not necessary to go into the question of occasion or necessity for fixation of seniority. Rather, it may be useful to consider the following aspects :

- 1) Whether discontinuation of appointment of the Petitioner at the end of academic sessions and her reappointment amounted to breaks which were required to be condoned ?
- 2) If yes, whether the management or Education Officer had the authority to condone such breaks ?
- 3) Whether such condonation could be only for the purpose of counting service for pensionary benefits and not for the purpose of seniority ?”

15. While answering the said question, learned Single Judge in paragraph 20 observed as under:

“20. A break is discontinuation in service. Such a break may be physical break where the employee concerned does not perform duties on account of several reasons. But an employee not performing duties on account of institution being closed for vacation cannot obviously be an incidence of break. Here, it is not that the employee is prevented from discharging his duties by any order, peculiar to him, or by any act personally on his part. He does not perform his duties simply because the institution is closed for vacation. Thus, vacation is not a break. Now, for this period if an employee is also directed to be paid salary under the Rules, it would be obviously so because the administration considers that, but for the vacation the employee would have continued to be in employment and therefore, is held entitled to the salary for vacation period.”

16. The Single Judge ultimately held that for the purpose of counting seniority, the break during the vacation when the institutions are closed, cannot constitute break in service. I am in respectful agreement with the view taken by the Co-ordinate Bench of this Court in the case of **Sumangala w/o Manoharrao Sakharkar** (Supra).

17. Moreover, the judgment of the Apex Court in the case of **Direct Recruit Class -II Engineering Officers Association Vs. State of Maharashtra**, reported in (1990) 2 SCC 715 is instructive on the point counting of experience for the purpose of seniority. The Supreme Court elaborated the concept of

seniority by holding that once an incumbent is appointed to a post according to the rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only *ad hoc* and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority. If the initial appointment is not made by following the procedure laid down by the rules, but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

18. Seniority is the manifestation of official experience gained by an employee through lawful appointment. Seniority is normally measured by the length of continuous officiating service. Officiating service, generally speaking, refers to that period of service rendered by an employee prior to his substantive induction to the cadre to which a post in which he is officiating belongs.

19. It is not in dispute that the Petitioner was initially appointed on 11th June 1990 for a fixed period of academic year and thereafter continued for subsequent academic years, whereas respondent No.4 was appointed on 19th June 1991. Rule 9(9)(a) of MEPS permits open category candidates to be appointed on a post reserved for the backward class category if any backward class or other backward class candidate is not

available. It is undisputed that on the date of Petitioner's temporary appointment, i.e. on 11.06.1990, neither backward class nor other backward class candidate was available. Therefore, the appointment of Petitioner in the year 1990 was in terms of rule 9(9)(a) of Rules. Such an appointment, though temporary, cannot be termed illegal. Hence, the experience gained by the Petitioner by way of temporary appointment to the post of Assistant Teacher needs to be counted towards seniority while considering his claim for appointment for the post of Head Master. The Petitioner was, therefore, entitled to the benefit of official experience for the academic year 1990-1991 and 1991-1992 while counting his seniority for the post of Headmaster and appointment of Petitioner for a fixed period of one academic year each with a vacation break, needs to be termed continuous service for seniority.

20. For the aforesaid reasons, the Tribunal committed an error apparent on the face of the record by denying relief to the Petitioner. Hence, the petition succeeds.

21. Rule is made absolute in terms of clause (a).

22. At this stage, the learned Advocate for respondent No.4 requested a stay of execution of the order. Considering the issue involved, the effect of the order is stayed for a period of four weeks from today.

(AMIT BORKAR, J.)