

(2005) 08 BOM CK 0115
In the Bombay High Court
Case No : Writ Petition No. 2093 of 1990

Javed Iqbal

APPELLANT

Vs

Administrator, Jawahar Urdu High School and Others

RESPONDENT

Date of Decision : 29-08-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 9
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule
3, 3(1), 3(3)

Citation : (2006) 1 ALLMR 244 : (2006) 2 BomCR 701 : (2006) 1 MhLj 635

Hon'ble Judges : S.T. Kharche, J;D.D. Sinha, J

Bench : Division Bench

Advocate : A. Shelat, for the Appellant; S.P. Hedao, for respondent Nos. 1 and 2 and Y.B. Mandpe, Addl. Government Prosecutor for respondent Nos. 3 and 4, for the Respondent

Judgement

D.D. Sinha, J.—Heard learned counsel for the petitioner as well as learned counsel for the respondents.

2. The learned counsel for the petitioner has stated that the petitioner was employed as Assistant Teacher in Jawahar Urdu High School, Ashti, run by respondent No. 1-Management. The respondent No. 2 was also appointed in the same School. It is submitted that in the present writ petition, the petitioner has challenged the order of appointment of respondent No. 2 as Head Master on the ground that the petitioner was eligible and entitled to be appointed on the post of Head Master from 1-6-1990 till 7-5-1997 i.e. the date on which he was made to retire as Assistant Teacher.

3. The learned counsel for the petitioner contended that the petitioner has acquired qualification i.e. B.Sc. B.Ed, before he was appointed as Assistant Teacher and therefore, on the date of appointment i.e. on 26-8-1975 the petitioner was B.Sc. B.Ed. On the other hand, the respondent No. 2 was

appointed as Assistant Teacher on 15-7-1973 and at the relevant time he only had B.A. qualification.

4. The learned counsel for the petitioner further contended that one Mr. M.M. Quereshi, who was the Head Master, was suspended by order dated 15-2-1982 and on his suspension, the petitioner being the senior-most teacher was appointed as incharge Head Master of the School. It is submitted that the order of appointment of the petitioner as incharge Head Master shows that the Management had specifically mentioned therein, that petitioner being the senior-most teacher was directed to receive the complete charge from Mr. M.M. Quereshi, suspended Head Master and was asked to look after the affairs of the School as incharge Head Master. The learned counsel for the petitioner therefore contended that in the year 1982 itself the petitioner was senior most teacher and therefore he was made incharge Head Master by the Management. The learned counsel for the petitioner further contended that the appointment of the petitioner as incharge Head Master was approved by the Education Officer vide letter dated 23-3-1982.

5. The counsel for the petitioner has contended that at the later point of time, for the personal reasons, the petitioner wrote a letter dated 5-7-1983 to the respondent-Management for reverting the petitioner from the post of incharge Head Master to his original post of Science Teacher. It is contended that Mr. Quereshi was terminated from service w.e.f. 3-3-1990 and after his termination, regular vacancy occurred for the post of Head Master and therefore, as per provisions of Explanation to Sub-clause (3) of Rule 3 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981, the petitioner who was the senior-most teacher was required to be considered by the respondent-Management for appointment to the post of Head Master.

6. It is further contended that though the Management, after the petitioner was reverted back to his original post of Science Teacher, has appointed respondent No. 2 as incharge Head Master, who continued to be the incharge Head Master till 1990, could not have been continued after the termination of Mr. Quereshi in the year 1990 and when the regular vacancy occurred for the post of Head Master then as per Sub-clause (3) of Rule 3, it is the senior-most teacher alone who is entitled to be considered for the post of Head Master and as per Explanation to Sub-clause (3), the petitioner ought to have been considered for the post of Head Master and should have been appointed as Head Master of the School w.e.f. 1-6-1990 and the Management should have given the pay scale applicable to the post of Head Master with all consequential benefit including the pension which is applicable to the post of Head Master.

7. The counsel for the respondent Nos. 1 and 2 has not disputed the above referred facts placed before us by the learned counsel for the petitioner, however, contended that once the petitioner having opted for reversion from the post of Head Master in the year 1983, he lost the claim for the post of Head Master. It is submitted that when Mr. Quereshi, the then Head Master of the School, was

suspended and in his place petitioner being the senior-most teacher was promoted as Head Master, however, petitioner declined to continue in the said post of Head Master vide letter dated 5-7-1983 and therefore, was reverted back to his original post of Assistant Science Teacher and the respondent No. 2 was made incharge Head Master who continued to hold the post till the services of Mr. Quereshi came to be terminated in the year 1990 and thereafter was appointed as Head Master on regular basis. It is contended that the petitioner, having given up the claim, was not eligible to be considered for the post of Head Master in the year 1990 after termination of Mr. Quereshi. The respondent No. 2 who was incharge Head Master since 1983 was given regular appointment on the post of Head Master in the year 1990 after the services of Mr. Quereshi were terminated by the Management.

8. The counsel for the respondent Nos. 1 and 2 further contended that the petitioner has not exhausted the alternate remedy of appeal contemplated u/s 9 of the M.E.P.S. Act and therefore, this Court may not exercise the extra ordinary jurisdiction under Article 226 of the Constitution of India since the petitioner failed to exhaust the alternative remedy and the petition should be dismissed on the ground of alternate remedy.

9. We have considered the contentions canvassed by the respective counsel and perused the provisions of Rule 3 of M.E.P.S. Rules as well as Explanation to Sub-clause (3) of Rule 3 of the Act.

10. In the instant case, it is not in dispute that one Mr. M. M. Quereshi was the Head Master of the School in the year 1982 and was suspended by the Management vide order dated 15-2-1982. It is also not in dispute that the petitioner at the relevant time was the senior-most assistant teacher and therefore, the Management had promoted the petitioner to the post of incharge Head Master in the year 1982. The Education Officer also had granted approval to the appointment of petitioner as incharge Head Master vide letter dated 23-3-1982. However, it appears that the petitioner vide letter dated 5-7-1983 communicated to the respondent-Management the inability to continue on the post of incharge Head Master and opted for reversion to his original post of Assistant Science Teacher. The Management therefore reverted him to his original post of Assistant Teacher and the respondent No. 2 who was next senior to the petitioner was appointed as incharge Head Master during the suspension period of Mr. Quereshi. It is also not in dispute that the services of Mr. M. M. Quereshi came to be terminated by the Management in the year 1990 and therefore, the regular vacancy occurred for the post of Head Master in year 1990 and therefore, the question which falls for our consideration in the present writ petition is whether in such situation the claim of the petitioner for the post of Head Master could have been considered by the Management in the light of provisions of Sub-clause (3) of Rule 3 of M.E.P.S. Rules, 1981, as well as Explanation to Sub-clause (3) of Rule 3.

11. Sub-clause (3) of Rule 3 of M.E.P.S. Rules, 1981, contemplates that the

Management of the school shall fill up the post of head by appointing senior-most member of the teaching staff who fulfils the conditions laid down in Sub-rule(1) and who has satisfactory record of service. The Explanation to Sub-clause (3) contemplates that, the claim of the senior most qualified teacher having satisfactory record of service, for appointment to the post of head, may be disregarded if only he on his own free will, gives a statement in writing to the Education Officer that he has voluntarily relinquished his claim to the post. At the same time the further part of the Explanation clearly contemplates that, this shall not debar him from being considered for subsequent vacancies as and when they occur.

12. In the instant case, the petitioner communicated his inability to continue as incharge Head Master to the Management vide communication dated 5-7-1983 and therefore, he was reverted back to his original post of Assistant Teacher. However, subsequently regular vacancy in the cadre of Head Master occurred in the year 1990 after the termination of services of Mr. M. M. Quereshi, the then Head Master. Therefore, in view of the Explanation to Sub-clause (3) of Rule 3, the petitioner was not debarred from being considered in the said vacancy which occurred for the post of Head Master. The petitioner only declined to continue as incharge Head Master, however, at the later point of time i.e. in the year 1990 when the vacancy occurred for the post of Head Master, the petitioner being senior-most teacher with satisfactory record of service, in view of Explanation to Sub-clause (3) of Rule 3 of M.E.P.S. Rules, 1981, in our considered view, ought to have been considered for the appointment on the post of Head Master and his claim for the said post cannot be given go-bye by the respondent-Management merely on the ground that in the year 1983 the petitioner declined to continue as incharge Head Master, particularly when subsequent vacancy in the cadre of Head Master occurred in the year 1990, in view of Explanation to Sub-clause (3) of Rule 3. Hence, we answered the above referred question in affirmative.

13. So far as the alternate remedy u/s 9 of the M.E.P.S. Act is concerned, it is well settled that as far as possible the High Court should be slow in exercising extra-ordinary jurisdiction under Article 226 of the Constitution when there is alternate, effective, efficacious remedy available to the petitioner. However, the present petition was admitted in the year 1990 and it will be highly unfair for the petitioner who is retired teacher to ask to pursue the alternate remedy provided u/s 9 of the Act. Therefore, in view of the peculiar facts and circumstances of the present case, the contention canvassed by the respondent Management in this regard cannot be accepted.

14. The learned AGP for respondent Nos. 3 and 4 has stated that so far as the salary payable to the post of Head Master is concerned, the same has been released by the Education Officer in favour of the respondent Management to be paid to respondent No. 2 and therefore, it is for the Management to pay the difference of salary, if any, to the petitioner from their own pocket and the Management is not entitled to get the reimbursement in this regard from the

Education Officer.

15. For the reasons stated hereinabove, we direct the respondent No. 1-Management to treat the petitioner as notionally appointed in the post of Head Master of the School w.e.f. 1-6-1990. Since the petitioner was continued in the post of Assistant Teacher and received salary applicable to the post of Assistant Teacher till retirement, we direct the respondent No. 1-Management to pay the arrears of difference of salary in the pay-scale applicable to the post of Head Master and Assistant Teacher including the other consequential benefits, if any, w.e.f. 1-6-1990 till 7-5-1997, as early as possible in any case not beyond the period of 4 months from today. The respondent-Management is also directed to calculate the pension and pensionary benefits of the petitioner on the basis of pay-scale applicable to the post of Head Master and pay the difference of pensionary benefits within a period of four months from today.

16. Rule made absolute in above terms with no order as to cost.