

(2011) 09 BOM CK 0122

In the Bombay High Court

Case No : Writ Petition No. 10032 of 2010

Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and
Nandanvan Vidya Mandir Primary School

APPELLANT

Vs

The State of Maharashtra, Education Department, The
Education Officer (Primary), Zilla Parishad and Deepali Gundu
Surwase

RESPONDENT

Date of Decision : 28-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 107

Evidence Act, 1872 — Section 106

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 10, 11, 11(2), 4(6), 9

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule
35 , 37(3)

Citation : (2012) 3 BomCR 390 : (2012) 1 MhLj 370

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : S.K. Kulkarni, holding for D.J. Choudhari, for the Appellant; D.V.
Tele, A.G.P. for Respondent No. 1., U.B. Bondar, for Respondent No. 2. and B.L.
Sagar Killarikar, for Respondent No. 3., for the Respondent

Judgement

S.S. Shinde, J.—Heard Learned Counsel for Petitioners.

Rule. Rule made returnable forthwith and heard finally by consent of Learned Counsel for respective parties. Learned Counsel for respective Respondents waive service of Rule.

2. This writ petition is filed challenging the judgment and order dated 20.06.2009, passed by the Presiding Officer, School Tribunal, Aurangabad, in Appeal No. 15/2007.

Petitioners herein are Respondents No. 1 & 2 in the said appeal and Respondent No. 3 herein is the original Appellant. The said appeal was filed by Respondent No. 3 herein challenging the order of termination dated 15.06.2007. The copy of

the appeal memo and also grounds taken in the appeal are placed on record at Exhibit-A on pages 17 to 69 of the compilation of this Writ Petition. Therefore, the facts leading to filing of such appeal are not repeated herein since those are extensively stated by the Appellant in the appeal memo.

It appears that after recording the evidence, considering pleadings of the parties and documentary evidence, the Presiding Officer, School Tribunal, Aurangabad, by his judgment and order dated 20.06.2009, allowed the appeal filed by Respondent No. 3 herein thereby setting aside the termination and also awarding back wages. Hence this writ petition.

3. Learned Counsel appearing for the Petitioners submits that the Presiding Officer, School Tribunal, has failed to appreciate that if the inquiry committee constituted by the Management is in violation of the Rules, the Presiding Officer, School Tribunal, Aurangabad, ought to have directed the Management to constitute the Committee afresh and then conduct denovo inquiry, as directed in various judgments and this aspect has not been taken into consideration. It is further submitted that subsistence allowance is paid to the Appellant and even the inquiry does not vitiate on the ground of non payment of subsistence allowance as the Appellant remained present for inquiry, regularly. It is further submitted that the proceedings of the Committee reveal that the Appellant as well as her representative have not cooperated with the inquiry and their conduct show that they behaved arrogantly during the course of the inquiry. It is further submitted that the School Tribunal has failed to appreciate that all the documents were supplied to the appellant, full opportunity was given in the inquiry and even the questionnaire was supplied to the Appellant. Therefore, there was no violation of principles of natural justice, as alleged by the appellant.

4. It is further submitted that the Tribunal should have taken into consideration that the Appellant has not worked during pendency of appeal and, therefore, the principle of "No work, no pay" is applicable in the instant case, as such, granting full back wages to the Appellant is illegal, contrary to the settled position of law. Even otherwise, the Appellant failed to show that the appellant was not gainfully employed during the pendency of appeal and not complied the conditions to grant back wages. It is further submitted that the School Tribunal has not framed the issues as required and not replied it and, therefore, the impugned judgment and order is required to be set aside. It is further submitted that the whole approach of the Presiding Officer, School Tribunal, was prejudiced against the Petitioners herein and he has recorded the findings on presumptions and assumptions, which is not sustainable in the eye of law. It is further submitted that the School Tribunal has given much weightage to the letter dated 18.05.2005 seeking assistance of the employees to pay tax of the school building taken on rent and there was understanding that later on the said amount would be repaid to the employees after getting rent from the Government or after making arrangement by the owner. It is further submitted that the alleged charges in the charge sheet are proved and inquiry report dated 29.05.2007 is

based on documentary evidence and, therefore, the Management has rightly terminated the services of the appellant.

5. It is further submitted that the Committee was properly constituted. The inquiry committee was consisting of a teacher from the panel approved by the Education Department and who is a National Awardee. There was also representative of the employee namely Mrs. Sulabha Mundhe, serving as a teacher in Sarasvati Bhuvan School. Mrs. Sonia D. Bagade was convener member of the Committee and, therefore, the Committee was properly constituted. It is submitted that the School Tribunal is not correct in holding that the Committee was consisting of a retired teacher and, therefore, the Committee was not properly constituted. Learned Counsel for the Petitioners has invited my attention to the reported judgment of this Court in the case of Sudha Vs. Yashodabai Shikshan Sanstha and Others, and submitted that this Court has taken a view that the rule does not disqualify an Awardee teacher if he is above 65 years of age nor limits his association to only one inquiry committee at a time. Therefore, according to the Learned Counsel for the Petitioner, merely because one member was a retired teacher, it could not have been held that the Committee is not properly constituted.

6. Learned Counsel further submits that the evidence of two independent witnesses is not properly considered by the School Tribunal. In fact, two witnesses, namely Santosh and Anita were independent witnesses and, therefore, the School Tribunal should have believed evidence of Santosh and Anita, being independent witnesses. It is further submitted that the complaint, which was submitted by the Appellant, should have been forwarded through proper channel. It is further submitted that the findings recorded by the School Tribunal are without application of mind. The findings recorded by the School Tribunal are perverse. The School Tribunal is not correct in holding that the evidence of the witnesses is stereo type. In fact the witnesses have stated different versions in their statements. It is further submitted that, if the School Tribunal reached to the conclusion that the Committee is not properly constituted, in that case, the findings / report of the Committee need not have been considered and the Tribunal should have given liberty to the Petitioner-Management to make fresh inquiry after constituting proper Committee. According to the Learned Counsel for Petitioners, the School Tribunal should not have proceeded to decide the matter on merits, if the Tribunal was convinced that the Committee is not properly constituted as per Rules and, therefore, the inquiry conducted by the Committee is vitiated, in that case, the Petitioner-Management should have been given an opportunity to further constitute the Committee and make afresh inquiry. Learned Counsel for the Petitioners pressed into service the reported judgment of the Apex Court in the case of U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another, , and submitted that the Tribunal should not mechanically set aside punishment order on the ground that the Committee is not properly constituted. Learned Counsel invited my attention to para 25 of the said judgment and submitted that when the forum comes to the

conclusion that due to some technical reason the enquiry conducted by the Committee is vitiated, in that case, the concerned forum should direct reinstatement of the employee with liberty to the authority / Management to proceed with the inquiry by placing the employee under suspension and continuing the inquiry.

7. Learned Counsel further submitted that in the absence of any specific pleadings, prayers and evidence brought on record, the School Tribunal should not have granted back wages to the Respondent No. 3. In support of this contention, Learned Counsel placed reliance upon the reported judgments of the Supreme Court in the case of J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, and in the case of Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, , and also reported judgment of this Court in the case of Zilla Parishad and Another Vs. Prakash Nagorao Thete and Another, . Learned Counsel submitted that the School Tribunal has considered the oral arguments of the Counsel appearing for the Appellant and granted back wages. In fact, the law laid down by the Supreme Court and also by this Court is that, there should be specific pleadings, prayer and also evidence on record and thereafter only the Court / Tribunal should adjudicate the said issue and award back wages. However, in the instant case, admittedly there are no pleadings, prayers or evidence brought on record by the Appellant - Respondent No. 3 herein and, therefore, in the absence of such pleadings, prayer or evidence, no back wages should have been granted to the Appellant. Learned Counsel also invited my attention to the pleadings in the petition, grounds therein, annexures thereto and also other documents, written notes of arguments and submitted that this writ petition deserves to be allowed.

8. On the other hand, Learned Counsel for the Respondents, relying upon averments and grounds taken in the appeal memo, submitted that writ petition is devoid of any merits and same deserves to be dismissed.

9. Learned Counsel appearing for Respondent No. 3 - original Appellant has invited my attention to Section 4(6) and Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, "M.E.P.S. Act"). He has also invited my attention to the general powers and procedure laid down in Section 10 of the said Act. It is, however, submitted that the powers vested with the School Tribunal are like any other Civil Court which are traceable in the Civil Procedure Code. Learned Counsel, in support of his contention, placed reliance upon the reported judgment of the Full Bench of this Court in the case of Saindranath Jawanjil Vs. Pratibha Shikshan Sanstha and The Presiding Officer (Additional), School Tribunal, . Learned Counsel has also invited my attention to the provisions of Section 11 and submitted that in sub-section (2) of Section 11, provision is made for granting relief to the parties and, therefore, the School Tribunal, by exercising powers u/s 11 of the M.E.P.S. Act, has granted the relief. Learned Counsel further submitted that since 1995, Respondent No. 3 i.e. original Appellant is in service of the Petitioner-

Management, however, service book is not prepared and seniority is also not fixed. It is also submitted that the date for appointment for the post of Head Master may be reckoned from acquiring D. Ed. qualification. It is submitted that the Petitioners wanted to deprive the Appellant from the post of Head Master and therefore, they have terminated services of the Appellant without her fault.

10. Learned Counsel invited my attention to page No. 322 of the compilation of the writ petition and submitted that the Petitioners were demanding share in the salary. It is submitted that the school building and residence of the Trustee is in the same premises. The taxes and water charges are not only in respect of school building but even the facilities used at the residence of Trustee are also taxed by the authorities and the Management wanted to recover the said amount from the employees. It is submitted that the Management, with a mala fide intention, issued 37 memos to the Appellant. The service record of the Appellant is unblemished. It is further submitted that only in extraordinary situation, the Management can suspend the employee without prior approval of the Education Officer. In the instant case, there was no any extraordinary situation, however, the Management on 14.11.2006, terminated services of the appellant and, therefore, such suspension was without prior approval of the Education Officer and as such was illegal. Learned Counsel also invited my attention to the provisions of Rule 35 of the M.E.P.S. Rules, 1981 and contended that for suspension prior approval of the Education Officer is must, unless there is extraordinary situation not to take such prior approval. Where prior approval is not taken, ex post facto sanction from the Education Officer for such suspension is necessary. However, in the instant case, the Education Officer has declined to grant any approval for such suspension. On the contrary, the Education Officer appointed the Committee to look into the affairs of the Society and make enquiry and accordingly the Committee was constituted and Administrator was appointed for three years by the Education Officer to look after the Management of the Petitioner- Trust.

11. Learned Counsel further submitted that the Inquiry Committee was not properly constituted. The Chairman of the Committee is daughter of Mrs. Bagade. There is total influence on the Management by Bagade family. Six relatives of Mrs. Bagade are in the Management of the Petitioner-Trust. The entire approach of the Management was biased against the Appellant since the appellant declined to contribute money demanded by the Management. It is further submitted that the Management did not file any application before the School Tribunal that they want to reconstitute the Committee and then hold the enquiry, rather the Management continued the enquiry with the two members, though the Committee was consisting of three members. In fact, the report of the Committee should have been signed by three members, however, the said report is signed by only two members. The nominee of the Appellant Mrs. Sulbha Mundhe was not allowed to participate in the inquiry proceedings, however, this Court directed to allow her to participate in the proceedings of the Committee and thereafter she was allowed to participate in the inquiry conducted by the

Committee. It is submitted that out of five witnesses, which were examined by the Management, three are relatives of Mrs. Bagade. It is further submitted that the mandate of sub-rule (3) of Rule 37 was not followed by the Inquiry Committee.

12. Learned Counsel further submitted that the School Tribunal is empowered and has jurisdiction to go into all aspects of the matter and to inquire even into the charges, to record the evidence and to render findings. Therefore, it cannot be said that the School Tribunal should not have proceeded further to record evidence on each aspect, if the Tribunal was convinced that the Inquiry Committee is not properly constituted and, therefore, the findings / report of the said Committee is vitiated. In fact, the School Tribunal has powers and jurisdiction to entertain all points raised before it. Learned Counsel, in support of this contention, placed reliance upon the Full Bench judgment of this Court in the case of Saindranath Jawanjal Vs. Pratibha Shikshan Sanstha and The Presiding Officer (Additional), School Tribunal, and also reported judgment of learned Single Judge of this Court in the case of Yavatmal Islamia Anglo Urdu Education Society and Anr. v. Mujib Ahmed Abbas Ali and Anr. reported in 2010 (1) ALL MR 810. Therefore, according to the Learned Counsel appearing for the Appellant, the School Tribunal has not only held that the Committee was not properly constituted, but has given categorical findings on merits of the matter and ultimately reached to the conclusion that the charges levelled against the Appellant are disproved. Therefore, in case the charges are disproved, if the contention of the Petitioners is accepted that the Management should be given further opportunity to make inquiry, it would be allowing the inquiry of those charges which are disproved by the competent judicial forum. The School Tribunal is a competent forum having jurisdiction to decide all issues and once such forum has decided the issues raised before it and has even given categorical findings on each aspects, in that case, the Appellant should not be again subjected to inquiry. Therefore, according to the Learned Counsel for the Appellant, when the School Tribunal has recorded its findings on each aspects after taking into consideration evidence brought on record by the parties, and reached to the definite conclusion and allowed the appeal and awarded back wages, and such findings are not perverse, in the facts of this case, this Court may not interfere in the writ jurisdiction in the judgment and order passed by the School Tribunal.

13. Learned Counsel appearing for Appellant - Respondent No. 3 herein would submit that the back wages are rightly granted by the School Tribunal. The provisions of Section 11 of the M.E.P.S. Act would make abundantly clear that, granting of such relief is a consequential relief. Once termination order is set aside, consequences are followed. There is specific provision u/s 11 of the M.E.P.S. Act and, therefore, the School Tribunal, taking recourse to the said provision, has awarded back wages and, therefore, this Court may not interfere in the order of the Tribunal granting back wages to the Appellant.

14. Learned Counsel invited my attention to para 40 of the judgment of the School Tribunal and submitted that during the course of arguments, it was argued that the Appellant was kept under suspension from 14.11.2006 till this date. She was not gainfully employed anywhere during this period and hence she is entitled for back wages from the date of her suspension. There was no rebuttal argument by the other side and, therefore, the School Tribunal held that the Appellant is entitled for back wages. Therefore, relying upon the observations / findings recorded in para 40 of the impugned judgment, Learned Counsel for the Appellant - Respondent No. 3 herein would submit that the back wages are rightly awarded by the School Tribunal and, therefore, this Court may not interfere. It is submitted that granting of back wages is a consequential relief. The termination of services of the Appellant was illegal and consequently same came to be set aside and, therefore, back wages are rightly awarded. Learned Counsel has invited my attention to the reported judgment of the Supreme Court in the case of Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, .Relying on the said judgment, Counsel for the Appellant - Respondent No. 3 herein, would submit that if the services are illegally terminated either by dismissal, discharge or retrenchment, the employee / workman will be entitled to full back wages except to the extent he was gainfully employed during enforced idleness, in case such termination/ dismissal, discharge or retrenchment is set aside.

15. Learned Counsel has further invited my attention to another judgment of the Supreme Court in the case of U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another, , and submitted that once the illegal termination is set aside, the necessary consequence would be that the employee is entitled for the consequential relief. Therefore, the School Tribunal has rightly awarded the back wages. The Learned Counsel has also placed reliance on the notes of arguments reiterating the grounds taken in the appeal memo, oral arguments advanced before this Court and also the law declared or pronounced by the Supreme Court and this Court in the following judgments:

I Yavatmal Islamia Anglo Urdu Education Society & another v. Mujib Ahmed Abbas Ali & another, reported in 2010 (1) ALL MR 810;

II Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, ;

III State of Kerala and Others Vs. E.K. Bhaskaran Pillai, ;

IV Saindranath Jawanjal Vs. Pratibha Shikshan Sanstha and The Presiding Officer (Additional), School Tribunal, ;

V Awdhesh Narayan K. Singh v. Adarsh Vidya Mandir Trust reported in 2004 (1) ALL M.R. 364 (FB); and

VI Vidya Vikas Mandal and Anr. v. Education Officer and Anr. reported in 2007 (2) ALL MR 461.

16. It is further submitted that in the present case, taking benefit of Rule 37(3), purported absence of member nominated by the Appellant/delinquent, two members proceeded with and completed the inquiry and its correctness and deliberateness is decided by the Tribunal. Therefore, present case is different and law declared in Vidya Vikas Mandal & another v. Education Officer & another, reported in 2007 (2) ALL MR 461 (supra) may not be applicable in the present case, since, in that case, provisions of Rule 37(3) of the M.E.P.S. Rules is not considered. Therefore, the present case is different by its facts and circumstances. It is further submitted that the Management cannot be permitted to take a "premium" of its own and deliberate, wilful wrong. Therefore, relying upon the averments in the appeal, grounds taken therein, other annexures thereto, certain documents from original record, findings recorded by the School Tribunal, written notes of arguments placed on record before this Court and various pronouncements of this Court and Supreme Court, cited supra, Learned Counsel for the Appellant - Respondent No. 3 herein would submit that the writ petition is devoid of any merit and same may be dismissed.

17. Learned Counsel appearing for Respondent No. 2 - Education Officer (Primary), Zilla Parishad, Aurangabad, invited my attention to affidavit-in-replies filed by Respondent No. 2 and submitted that so far as question of seniority is concerned, same cannot be adjudicated in the present proceedings. The aggrieved teacher has filed writ petition in respect of seniority and certain directions are issued in that respect. It is further submitted that so far as payment of back wages to the Appellant is concerned, the Education Officer did not grant approval to the suspension of the Appellant and, therefore, it is the responsibility of the Management to pay back wages, if they have illegally suspended and subsequently terminated services of the appellant.

18. The learned Assistant Government Pleader, appearing for Respondent No. 1-State, neither filed any reply nor advanced any arguments.

19. With the assistance of Learned Counsel appearing for respective parties, I have perused the impugned judgment and order passed by the School Tribunal. I have also perused the documents placed on record, grounds taken in the appeal memo, annexures to the appeal, grounds taken in the writ petition, annexures thereto and other documents placed on record by the respective parties. On careful perusal of the impugned judgment and order passed by the School Tribunal, certain relevant facts are necessary to be mentioned hereinafter.

20. Respondent No. 3 is a duly appointed teacher and she has completed her probation period and she is deemed permanent employee. The school is recognised and receives 100% grants-in-aid. Head Mistress Smt. Bhimavati Bagade is President of the Trust. Her daughter Sonia Dulichand Bagade is Secretary of the Trust. The school was run in the premises owned by Shri Dulichand Bagade, who happened to be husband of Head Mistress and President of the Trust and father of Sonia Bagade (Secretary). The record shows that said premises are rented premises. As per the report of fact finding Committee, the

School is opened in the year 1991-92. It is also not disputed by the Petitioners herein that rent of the premises was due and so Head Mistress made call for financial help and for contributing funds to the staff members of the school, to pay tax amount to the tune of Rs. 79,974/-. The Appellant and other teachers responded to the said call, however, it appears that subsequently, they refused to contribute regularly. The School Tribunal, from perusal of the record, found that some of the staff members have contributed Rs. 500/- per month, however, subsequently they declined to contribute the amount to be raised for payment of tax amount to be paid to the Municipal Corporation. It further appears that representation was made by the staff members to the Education Officer (Primary), Zilla Parishad, Aurangabad.

21. The School Tribunal, after taking note of the relevant facts, has recorded a finding in para 11 that, "I may say here that this was starting point of dispute between Head Mistress and other staff members specifically with this appellant".

On perusal of the reply filed by the Management, it reveals that the afore-stated facts have been simply denied, however, said facts are not categorically denied and, therefore, the finding recorded by the School Tribunal, in para 11, appears to be in consonance with the material brought on record by the parties.

The School Tribunal, further in para 13, has recorded that the Head Mistress has issued as many as 25 memos to the Appellant thereafter. Therefore, the position, which clearly emerges, is that the starting point of dispute between the Head Mistress and other staff members and the Appellant, was refusal by the staff members and Appellant to contribute amount for payment of tax amount to the Corporation. The Petitioner has not brought anything on record to suggest that the Appellant, who was appointed in 1995, till 2005 has indulged in any misbehaviour or any other activities which would cause damage to the school. Therefore, it appears that from 1995 till 2005, service record of the appellant is clean and unblemished. Therefore, if the starting point of dispute between Head Mistress and other staff members starts from refusal of amount for payment of tax to be paid to the Corporation, there is no manner of doubt that the Management has grudge against the Appellant i.e. Respondent No. 3 herein and everything followed including suspension of Appellant and subsequent termination of her services.

22. There is also claim of the Appellant that the Head Mistress did obtain signatures of other staff members on blank papers by misleading them that, those would be used for making correspondence with the Corporation in regard to tax amount. It is also claimed that due to this behaviour of Head Mistress, staff members have made representation to the Education Officer that they are going on hunger strike from 07.01.2006. It is also claimed that such hunger strike gone till 17.01.2006 and same was discontinued because of the intervention of Education Officer, Zilla Parishad, Aurangabad.

23. It also appears that a fact finding Committee was appointed by the Education

Officer on 23.01.2006 and said Committee submitted its report wherein it was suggested that, the Administrator should be appointed to look after the affairs of the Petitioner-Management and it has further come on record that the Administrator was appointed and he continued for about three years. However, under Rules, the Administrator cannot be continued for further period and, therefore, again affairs of the Management are entrusted with the original trustees.

24. It has also come on record that the Appellant was suspended by suspension letter dated 14.11.2006. The Appellant made representation to the Education Officer. The Education Officer refused to approve suspension of the Appellant as per his letter dated 22.11.2006. From careful perusal of the material brought on record, I do not find that, there arose extraordinary situation to suspend services of the Appellant without taking prior approval of the Education Officer, as contemplated under Rules. No doubt, the Management can suspend services of an employee without prior approval of the Education Officer, but for that there should be extraordinary situation. However, in the facts of this case, nothing is brought on record to suggest that there was extraordinary situation existing so as to take emergent steps to suspend services of the Appellant without taking prior approval of the Education Officer (Primary), Zilla Parishad, Aurangabad. It is also not in dispute that the Education Officer declined to approve suspension of the Appellant as per his letter dated 22.11.2006.

Therefore, taking into consideration facts involved in the present case, conclusion is reached by the School Tribunal that the Management of the Petitioner-school/ Institution is dominated by the members of Bagade family.

25. On perusal of para 18 of the impugned judgment, it appears that the School Tribunal has considered the letter dated 18.03.2005, representation / reply given by the employees to the Head Mistress, which was signed by five teachers, the report of fact finding Committee appointed by the School Education Department, suspension letter dated 14.11.2006, further document showing refusal by the Education Officer to grant approval to the suspension of the Appellant and show cause notice / charge sheet given to the Appellant. All these documents have been carefully gone into by the School Tribunal and ultimately the School Tribunal has reached to the definite conclusion on the basis of appreciation of contents of the said documents. Therefore, in writ jurisdiction, it is not possible for this Court to interfere with the conclusions reached by the School Tribunal, since nothing contra has been brought on record by the Petitioner-Management to reject / disapprove such conclusions reached by the School Tribunal on appreciation of the documents placed on record.

26. So far as the Committee, which was appointed for inquiry, is concerned, Smt. Sonia D. Bagade, being the Secretary of the Management, remained as Chief Executive of the Inquiry Committee. The Management has appointed Mr. L.G. Kale, a retired teacher as member of the Committee, being awardee teacher. The Appellant objected for appointment of Mr. L.G. Kale on the ground that he is a

retired teacher and relevant rules do not permit appointment of a retired teacher. The School Tribunal referring to the judgment of this Court in Writ Petition No. 5867/2008 in the case of Lilatai Annappa Patil v. State of Maharashtra and Ors., has taken a view that said Mr. L.G. Kale, who is a retired teacher, is not competent to be member of the Committee. The discussion in respect of said point is in paragraph 38 of the impugned judgment. I do not see any reason to interfere in the said finding / conclusion reached by the School Tribunal. I find some substance in the arguments of Learned Counsel appearing for the Appellant that Smt.Sonia Bagade, being daughter of Head Mistress Mrs. Bagade, has some grudge and bias against the Appellant while conducting the inquiry. It has also come on record that Smt. Sulabha Mundhe was appointed as a nominee of the Appellant, however, she was not allowed to participate in the inquiry. It further appears that said grievance was brought before this Court and this Court granted liberty to said Smt. Sulabha Mundhe, nominee of the Appellant, to participate in the inquiry proceedings. It is also not disputed by the Management that the report of the Committee was signed by only two members and not by three members. Therefore, findings, which are recorded by the School Tribunal in respect of appointment of member of the Committee and also on other aspects, need no interference.

27. The submission, which is advanced by the Learned Counsel for the Petitioners is that, if the constitution of the inquiry committee is held to be illegal by the Tribunal, the Tribunal ought to have directed re-inquiry without recording its own findings on the basis of the record of the inquiry proceedings prepared by such illegally constituted Committee. It is submitted that whatever record, prepared by such illegally constituted Committee, was illegal and, therefore, non est. Due to such nature of record of inquiry proceedings, the exercise undertaken by the School Tribunal to examine and assess correctness and propriety of the findings and report of such inquiry committee, was uncalled for. In this respect, it is necessary to find out whether the School Tribunal is empowered to do further exercise even if it finds that the Committee was not properly constituted. If the School Tribunal has jurisdiction and powers to record findings on each and every aspects and if such findings are recorded in consonance with the evidence and documents brought on record by the parties, in that case, such arguments advanced by the Petitioner, cannot be accepted. The Full Bench of this Court, in the case of Saindranath Jawanjil Vs. Pratibha Shikshan Sanstha and The Presiding Officer (Additional), School Tribunal, , held thus:

54 In the above scenario; the question is: whether the School Tribunal dealing with the appeal under the Act challenging punitive action could cure the defect of enquiry exercising its powers by taking on record additional evidence either on the request of the management or the employee concerned or on its own to find out truth and to do complete justice between the parties. To hold that the School Tribunal dealing with the appeal preferred by the employee, who has been terminated on the ground of major misconduct, has absolutely no power to permit the party to lead additional evidence before it, would result in depriving

an opportunity to the party to the appeal in placing his side before the Tribunal, even though, he may be in a position to prove his contentions.

55 At the cost of repetition, we may mention that the powers of the Tribunal are circumscribed by the provision of Order 41, Rule 27 of Code of Civil Procedure, which enumerates the circumstances in which the School Tribunal can admit additional evidence whether oral or documentary in appeal. The are: where the original authority has improperly refused to admit evidence which ought to have been admitted; or where such additional evidence was not within the knowledge of the party or could not, after exercise of due diligence, be produced by him at the time when the original authority passed the order; or where the Appellate Court itself requires such evidence either (a) to enable it to pronounce judgment or (b) for any other substantial cause.

56 Now the question comes: how and at which stage the School Management is expected to seek leave from the Tribunal to lead evidence in exercise of its right. In our considered view, such right should be exercised, as soon as there is challenge to the action of the management, in appeal before the Tribunal, contending that there was no sufficient evidence to prove the charges levelled against the Appellant/employee. In the event of exercise of such right by the school management, the Tribunal is expected to consider the question of grant of leave to lead additional evidence subject to compliance of provision of Order 41, Rule 27 of CPC In the event of grant of leave opposite party-employee would also get an opportunity of placing his side before the School Tribunal i.e. when the School Management is allowed to lead additional evidence on the question of misconduct before the Tribunal.

57 At the same time, if the employee comes before the Tribunal challenging the punitive order on merits in appeal contending that the evidence is not sufficient to prove alleged misconduct or that he has some additional evidence in his possession to establish his innocence, which he could not produce for want of knowledge in spite of due diligence at the time when the enquiry was conducted; in such circumstances, there is no fetter on the power of the School Tribunal to admit such evidence at the instance of the employee. It is, thus, always open for the School Tribunal to take such additional evidence on record for the reasons to be recorded, after giving rival parties fair opportunity following principles of natural justice. This power, however, has to be exercised by the Tribunal before expressing its opinion about validity or invalidity of the punitive action of the management challenged in appeal. In every case, the management cannot be allowed to lead de novo evidence before the Tribunal because that right is circumscribed with certain conditions laid down under Order 41, Rule 27 as indicated here in above.

58 The Tribunal, therefore, has power to take additional evidence on record only in the contingency, where the management or employee wants to supplement the evidence already on record by leading additional evidence to prove their contentions, however, subject to the provisions of section 107 read with Order

41, Rule 27 of CPC After leading the evidence by both the parties in support of their contentions, it is always open to the Tribunal, in exercise of its power of judicial review, to reappraise the said evidence so as to find out whether or not action of the school management can be sustained.

65 But this should not be understood as placing fetters on the powers of the Tribunal. It is always open to the Tribunal to exercise its powers on the peculiar facts and circumstances of each case as it deems just and necessary in the interest of justice. Take a case where the Management is not in a position to hold enquiry because of the situation brought about by the employee himself making it impossible for the management to hold enquiry before taking punitive action against him, in such contingency, the School Tribunal is not powerless to permit the School management to lead evidence to prove the act of misconduct before it to support its action. This legal sanction in law is implicit in sub-rule (b) of Rule 27 of Order 41 of CPC which reads as ".....for any other substantial cause". This clause gives wide discretion to the Tribunal, which, no doubt, is required to be exercised judiciously for the reasons to be recorded. But, exercise of such powers in every case; in a routine manner would take away the very object of the legislation meant to provide the employees security and stability of service to enable them to discharge their duties effectively and efficiently. Therefore, such power is available for being exercised only in the extremely exceptional cases and in compelling circumstances and not in a routine manner in every case.

Therefore, on reading the above mentioned paragraphs from the Full Bench judgment of this Court, it is crystal clear that the Tribunal has power to take additional evidence on record only in the contingency where the Management or employee wants supplementary evidence on record to prove their contentions, subject to provisions of Section 107 read with Order 41, Rule 27 of the Civil Procedure Code.

28. The learned Single Judge of this Court, in the case of Yavatmal Islamia Anglo Urdu Education Society & another v. Mujib Ahmed Abbas Ali and another, reported in 2010 (1) ALL MR 810, relying upon the Full Bench judgment of this Court, has taken a view that:

It is the duty of the Tribunal to refer to and address each and every pleading which is relevant and material and consider the submissions made by the parties, so also the evidence tendered before it and then address itself on those aspects. After all, School Tribunal is a first Court or Tribunal exercising the powers of the first Court or the trial Court though the proceedings before it are termed as "appeal".

(Emphasis supplied)

Therefore, it follows from the authoritative pronouncements of this Court in aforementioned two decisions, that the School Tribunal is empowered and it is the duty of the Tribunal to refer to and address each and every pleading which is material and consider the submissions made by the parties and ultimately give

finding/decision on the said aspects.

29. In the present case, admittedly Petitioners herein did not file any application or made prayer for reconstituting the inquiry committee and to proceed further for inquiry by newly reconstituted committee. On the contrary, from reading the reply filed by the Petitioners herein before the School Tribunal, it is abundantly clear that the Petitioners went on justifying constitution of the Committee and stating in the reply that no fault can be attributed with the constitution of the Committee. Therefore, in absence of such prayer, the School Tribunal proceeded further and dealt with all the charges which were levelled against the Appellant i.e. Respondent No. 3 herein. Therefore, in my opinion, further adjudication by the Tribunal on merits of the matter cannot be said to be beyond jurisdiction or powers of the School Tribunal. In the facts of this case, as it is apparent from the findings recorded by the School Tribunal, that as the case in hand is a case of victimization and Petitioner- Management as well as the Inquiry Committee having joined hands against the delinquent right from the beginning, no premium can be put over the action of the Petitioner-Management and Inquiry Committee who threw the principles of natural justice in the air. It would be a travesty of justice, in these circumstances, to allow the petitioner-Management to once again hold inquiry in such a extreme case.

30. This Court, in the case of Yavatmal Islamia Anglo Urdu Education Society (supra), in some what similar circumstances has taken a view that it would be a travesty of justice, in these circumstances, to allow the Petitioner Management to prove mis-conduct before the tribunal in such a extreme case. Therefore, in my considered view, the School Tribunal has rightly gone into the merits of the matter and such adjudication by the Tribunal is perfectly within the jurisdiction of the Tribunal.

31. The School Tribunal has considered the statements of witnesses in paras 31 and 32. Though the Counsel appearing for Petitioners strenuously contended that statements of two witnesses, namely Anita and Santosh have not been properly considered by the School Tribunal, said argument cannot be accepted, merely because those two witnesses are independent witnesses. In all five witnesses were examined and the School Tribunal found that out of five, three witnesses are relatives of Head Mistress Smt. Bagade. The School Tribunal, in para 32, has reached to the conclusion that the statements of witnesses are stereo type with some minor changes. The School Tribunal has also considered the fact that more than 25 memos were issued by the Head Mistress to the Appellant and the person, on whose complaint or grievance, inquiry was initiated, is not examined. In short, Head Mistress Smt. Bagade is not examined as a witness in the inquiry.

32. The School Tribunal, in paragraphs 34 to 36, has discussed about the charges levelled against the Appellant. It appears that, the charges are originally in Marathi, however, the School Tribunal, while dealing with the said charges, has translated the same into English. The School Tribunal found that the first charge is general in nature and no specifications have been quoted and, therefore, the

Tribunal held that since those charges are general in nature, such charges cannot be sustained. The second charge is in respect of Appellant as well as other staff members who have gone on hunger strike. The allegation made against the Appellant is that she instigated other staff members. However, the School Tribunal, on in depth examination of the material produced on record, found that the Appellant cannot be blamed that she has defamed by publishing news item in the news paper and instigated other staff members. Unless and until there is a document to show that the Appellant and other staff members have brought reporter of the news paper, they cannot be blamed for such activity of the news publisher. Therefore, the School Tribunal reached to the conclusion that the charge of instigating other staff members, levelled against the Appellant and further report about hunger strike published in the news paper cannot be said to be on the instigation of Appellant or other staff members. So far as charge in respect of not performing duty is concerned, the School Tribunal found that no specific instances have been given by the Management and, therefore, such charge cannot be sustained. So far as another charge i.e. wearing of black dress is concerned, the School Tribunal, after appreciating the evidence brought on record, held that simply wearing black blouse on Independence Day or on the day of Death Anniversary of Dr. Ambedkar, would not amount to violation of any circular or any rules. It is observed that in the absence of any circular or in absence of any guidelines, simply wearing black blouse on the said days, would not amount to showing disrespect. The School Tribunal has also considered other charges i.e. refusing to receive memos, etc. and ultimately in para 36, observed thus:

36 To conclude here from the initial point of this inquiry is that demanding of money for payment of tax, going on hunger strike and thereafter issuance of memos itself show that it is a revengeful act on the part of the Management and Head Mistress with mala fide intention and with prejudice mind.

Appointment of retired teacher as objected for the same is not considered by the Chief Executive Officer.

Though nominee of the Appellant wanted in the proceeding she was not allowed to participate by hook or crook i.e. by blaming her she was humiliate by sending letters. It is surprised to me that when the natural right is with this Appellant to appoint nominee as per provisions of inquiry laid down by M.E.P.S. Rules, she has to rush to Hon"ble High Court Bench at Aurangabad for the same. Thereafter also Smt. Mundhe was called upon to bring permission from her Management, though there is no such provision in the Act or Rules, which is also brought on record even then he was not allowed indirectly to participate in the proceeding.

The manner in which inquiry is conducted appears to be totally exparte inquiry.

Key witness Head Mistress is not examined. There was no chance or opportunity granted to this Appellant to cross examine witnesses. In the absence of cross examination, it is Rule of Evidence Act that such evidence cannot be considered

at all.

New grounds and issues have been brought after conducting inquiry. In the absence of one member i.e. Nominee of the appellant, inquiry was conducted and concluded, even report of inquiry dated 11-5-2007 consisting of two members only was submitting to the Management and the 3rd member nominee of the Appellant was neglected.

All these aspects gone against respondents.

Therefore, in my considered view, the School Tribunal, after in depth examination of the documents produced on record, after recording evidence and after hearing the parties, has reached to the correct conclusion in para 36 of the judgment, which is reproduced hereinabove.

33. Therefore, in my opinion, the order of reinstatement of the Appellant cannot be faulted and needs no interference.

34. It appears that the School Tribunal, while directing reinstatement of Appellant, in clause 3 and 4 of the operative order, directed Respondents No. 1 to 3 in the appeal, to deposit full back wages i.e. pay and allowance of the Appellant from the date of her termination till the date of her reinstatement in service, within 45 days before the Tribunal and in clause 5 of the order, further held that the Appellant will be entitled to withdraw the said amount from the Tribunal immediately after it is deposited by the original Respondents.

When this writ petition was heard for admission, this Court, while issuing notices to the Respondents, stayed the direction for payment of back wages.

35. Learned Counsel appearing for the Petitioners, relying upon the judgment of this Court in the case of Zilla Parishad, Gadchiroli (supra), strenuously contended that in the absence of pleadings and evidence that the Appellant was not in gainful employment during the relevant period, no such relief of back wages should have been granted by the School Tribunal to the appellant.

36. Learned Counsel appearing for Respondent No. 3 herein - original Appellant, relying upon the provisions of Section 11(2) of the M.E.P.S. Act, 1977, vehemently argued that setting aside the impugned termination order is a main relief and granting of other discretionary and consequential reliefs, would automatically follow. It is further submitted that the School Tribunal has powers under the provisions of Section 11(2) of the M.E.P.S. Act, 1977, to grant relief of back wages since it is discretionary and consequential relief, this Court may not interfere in exercise of extraordinary jurisdiction so as to upset the direction given by the School Tribunal to pay back wages to the Appellant. Learned Counsel appearing for Respondent No. 3 herein - original appellant placed reliance upon two judgments of the Honourable Supreme Court in the case of Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Others, and in the case of State of Kerala and Others Vs. E.K. Bhaskaran Pillai, and submitted that once the termination is held to be illegal,

normal rule is that the back wages should follow. Learned Counsel for the Appellant has invited my attention to the relevant observations of the Honourable Supreme Court, in above mentioned two judgments, and submitted that the principle "No work, no pay" cannot be accepted as a rule of thumb. Learned Counsel also invited my attention to paras 4 and 5 of the judgment of the Honourable Supreme Court in the case of State of Kerala (supra) and submitted that this Court may not interfere in the direction of the School Tribunal directing the Petitioners to pay back wages to the appellant.

37. I have carefully perused the entire material placed on record. I do not find any specific pleading in respect of back wages raised by the Appellant. This Court, in the case of Zilla Parishad, Gadchiroli (supra), while considering the point of back wages, in paras 15 to 17, held thus:

15 It is also material to note that even though Respondent No. 1 had claimed full backwages, he had nowhere pleaded nor he had deposed on oath that he was not gainfully employed after his termination. The Labour Court held that in the case of reinstatement, the backwages are to be given in the normal course. I am unable to accept this proposition. It is necessary for the workman not only to plead but also to depose on oath that he was not gainfully employed. Once, this onus discharged, the burden would be on the employer to show that he was actually gainfully employed.

16 In J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, , the Supreme Court has observed as follows-

16 There has also been a noticeable shift in placing the burden of proof in regard to back wages. In Kendriya Vidyalaya Sangathan, this Court held: (SCC P. 366, para 16)

When the question of determining the entitlement of a person to backwages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places material in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.

In U.P. State Brassware Corpn. Ltd., this Court observed : (SCC P. 495, para 61)

61 It is not in dispute that the Respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of section 106 of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.

18 Coming back to backwages, even if the Court finds it necessary to award backwages, the question will be whether backwages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case any income received by the employee during the

relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding backwages, in addition to the several factors mentioned in Rudhan Singh and Uday Narain Pandey. Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any

income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employee. Be that as it may.

17 Relying on the above authority, learned Single Judge of this Court in Maharashtra State Road Transport Corporation Vs. Nanuram Verma, , held that initial burden is on the employee to show that he was not gainfully employed. Similar view was taken by another learned Single Judge of this Court in President, Damini Bahuddeshiya Sevabhavi Sanstha and Another Vs. Dnyanoba Dhawate and Another, .

In the aforesaid pronouncement, this Court has taken into consideration the judgment of the Honourable Supreme Court in the case of J.K. Synthetics Ltd. Vs. K.P. Agrawal and Another, and other judgments of the Supreme Court including judgment in the case of Kendriya Vidyalaya Sangathan.

38. In the present case, the School Tribunal, while directing the Petitioners to pay back wages to the Appellant, in para 40, held that:

40 Before parting with this judgment Learned Counsel for Appellant in course of arguments argued that Appellant was kept under suspension from 14-11-2006 till to-day. She is not gainfully employed any where during this period and hence she is entitled for back wages from the date of her suspension. No rebuttal argument by other side. I agree with this submission and find that Appellant is entitled for full back wages subtracting subsistence allowance already paid to her.

Bare perusal of above reproduced para 40 of the judgment of the School Tribunal would make it abundantly clear that, the advocate for the Appellant, in the course of arguments, argued that the Appellant was kept under suspension from 14.11.2006 till the appeal is finally heard. It was argued that the Appellant was not gainfully employed anywhere during the period of suspension and termination and therefore, she is entitled to back wages from the date of her suspension. The Tribunal has observed that no rebuttal argument by other side. Therefore, it appears that, the School Tribunal has considered only oral submissions of the Counsel appearing for the Appellant, in the absence of any specific pleadings, prayers and evidence for payment of back wages. There was no application or pleadings before the School Tribunal on oath by the Appellant stating that she was not gainfully employed from the date of suspension till reinstatement. Therefore, in my considered opinion, finding recorded by the Tribunal in clauses 3 to 5 of the operative order, in respect of payment of back

wages, cannot be sustained, in the light of law laid down by this Court and Honourable Supreme Court in respect of payment of back wages.

39. This Court, while considering impugned judgment, noticed that, the Presiding Officer, School Tribunal, Aurangabad, has frequently used the words "silly count" and "silly ground". The Judicial Forums are expected to use appropriate words befitting the judicial standards. This Court expresses displeasure over using words "silly count" and "silly ground" frequently in the impugned judgment by the Presiding Officer, School Tribunal, Aurangabad.

40. In the result, Writ Petition partly succeeds. The judgment and order dated 20.06.2009, passed by the School Tribunal, Aurangabad, in Appeal No. 15/2007, except para 40 and clauses 3 to 5 of the operative part of the order which relates to the payment of back wages, stands confirmed. The direction of the School Tribunal in clauses 3, 4 and 5 of the operative part of the judgment, in respect of back wages, is quashed and set aside. However, it is clarified that the order of Tribunal, setting aside the termination order dated 15.06.2007, stands totally confirmed. The original Appellant - Respondent No. 3 herein need not be subjected to further inquiry by the Management / Inquiry Committee on same charges, which are disapproved by the School Tribunal. The respondent No. 3 i.e. original Appellant, is not entitled for back wages.

41. Rule is made absolute to the above extent. No order as to costs. Writ Petition stands disposed of. Copy of this Judgment should be circulated to all the Judicial Officers working in District Court, C.J.S.D., C.J.J.D., all Tribunals and all Judicial Forums within the territorial jurisdiction of the Bombay High Court.