

(2002) 10 BOM CK 0130

In the Bombay High Court

Case No : Writ Petition No's. 2672 and 2678 of 2002

Laxman Awale

APPELLANT

Vs

The State of Maharashtra, Education Officer (Secondary) Zilla Parishad, Shri Vyankatesh Secondary and Higher Secondary School and Secretary, Vyankatesh Shikshan Sanstha
 Babasaheb Suryawanshi, Incharge Headmaster, Venkatesh Secondary and Higher Secondary Vidyalaya Vs The State of Maharashtra, Deputy Director of Education, Education Officer (Secondary) Zilla Parishad, Shri. Venkatesh Shikshan Sasntha and Awale Laxman Babarao

RESPONDENT

Date of Decision : 16-10-2002

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 10, 12, 24, 7
Societies Registration Act, 1860 — Section 16, 4

Citation : (2002) 10 BOM CK 0130

Hon'ble Judges : A.P. Deshpande, J

Bench : Single Bench

Advocate : R.J. Godbole and V.D. Salunke, for the Appellant; P.B. Varale, Assistant Government Pleader, for respondent Nos. 1 to 3, V.D. Salunke, for respondent No. 4, S.S. Deo, for respondents Nos. 3, 4 and 5, R.J. Godbole, for the Respondent

Judgement

A.P. Deshpande, J.—In Writ Petition No. 2672 of 2002 the petitioner has prayed for quashing of an order dated 24-6-2002 passed by the Education Officer (Secondary), Zilla Parishad, whereas in Writ Petition No. 2678 of 2002 enforcement and implementation of the said order is prayed for and as such both the petitions are heard together. For the purpose of convenience, the parties in both these petitions are described in this order as described in Writ Petition No. 2672 of 2002 viz. the petitioner and the respondent No. 4.

2. The order in question passed by the Education Officer dated 24-6-2002 is an order adjudicating the question of inter se seniority of the petitioner and the

respondent No. 4. The factual background, giving rise to the filing of the instant petitions, is set out here in below.

3. The petitioner and the respondent No. 4 are in the employment of an educational society by name Venkatesh Shikshan Sanstha, Latur, which is registered as a Public Trust so also under the Societies Registration Act. Both, the petitioner and the respondent No. 4, are working as Assistant Teachers in Venkatesh Secondary and Higher Secondary School, Latur. The petitioner joined the employment pursuant to his appointment made as and from 1-7-1971. While being in employment he improved his educational qualifications and acquired degree of Bachelor of Science (B.Sc.) on 30th January 1973. He then passed B.Ed. on 13-5-1974. As against this service career of the petitioner, the respondent No. 4 joined the employment with the society as an Assistant Teacher with effect from 2-11-1971. At the time of his appointment he was possessing Degree of Bachelor of Commerce (B.Com.). He improved his qualification by acquiring teaching qualification of Bachelor of Education (B.Ed.) on 13-5-1974. The relevant dates are set out in a tabular form to have a comparative chart:

A perusal of the said dates clearly reveal that so far as the initial appointment is concerned, the petitioner was appointed prior in point of time, whereas the respondent No. 4 has acquired degree qualification prior in point of time than the petitioner and both, the petitioner and the fourth respondent, acquired the teaching qualification i.e. Bachelor of Education (B.Ed.) on the same date i.e. 13-5-1974.

4. One more relevant fact which needs to be stated, is that the petitioners date of birth is 6-6-1945 as against, the date of birth of the fourth respondent being 15-11-1945. It requires to be noted that the petitioner is senior by age to the fourth respondent. In the above stated factual backdrop, the question that arises for consideration, in the instant petitions is, as to whether the petitioner or the fourth respondent is to be treated as senior in category C of Schedule "F" of the Maharashtra Employees of Private of Schools (Conditions of Service) Rules 1981. Whosoever is found to be the senior will be entitled to claim the promotional post.

5 .The service conditions of the employees working in private schools are governed and regulated by the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act 1977 and the rules made thereunder viz. the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (hereinafter referred to as "the Act" and "the Rules" for brevity). Section 4 and Section 16 of the Act empowers the State Government to frame rules laying down the conditions of service of employees of the private school. Rule 12 of the Rules which provides for preparation and maintenance of seniority list of the teachers lays down thus:

"Seniority List.-- (1) Every Management shall prepare and maintain seniority list of the teaching staff including Head Master and Assistant Head Master and non-teaching staff in the School in accordance with the guidelines laid down in

Schedule "F". The seniority list so prepared shall be circulated amongst the members of the staff concerned and their signatures for having received a copy of the list shall be obtained. Any subsequent change made in the seniority list from time to time shall also be brought to the notice of the members of the staff concerned and their signatures for having noted the change shall be obtained. An employee who has a grievance relating to the seniority list may submit his representation to the Head within a period of fifteen days from the date of circulation of the seniority list or a change in the list as the case may be.

(2) Objections, if any, to the seniority list or to the changes therein shall be duly taken into consideration by the Management within 15 days from the date of receipt of the representation, as per procedure laid down in rule 24.

(3) Disputes, if any, in the matter of inter se seniority shall be referred to the Education Officer for his decision.

(4) If the management or the employee is aggrieved by the decision of the Education Officer, the aggrieved party may submit an appeal to the Deputy Director of Education within 30 days from the date of decision. The decision of Deputy Director of Education shall be final."

The Management is obliged to prepare and maintain the seniority list of teaching and non teaching staff in the school in accordance with the guidelines laid down in Schedule "F". The seniority list so prepared is required to be circulated amongst the members of the staff and if any objection is raised to the seniority list, the management is expected to take it into consideration and refer the dispute to the Education Officer for his decision. Hence, under the Rules, it is the Education Officer, who is appointed as a competent authority to adjudicate the dispute in the matter of inter se seniority. In the instant case it may be stated that the Education Officer has held that the respondent No. 4 is senior to the petitioner. To decide the question of inter se seniority, the guide lines laid down in Schedule "F" would be decisive and no other criteria for determination of seniority could be pressed in service. In the present case I am called upon to adjudicate the inter se seniority of the petitioner vis-a-vis the fourth respondent in category C. Let us examine the scheme contained in Schedule "F". Clause 1 of Schedule "F" relates to criteria for fixing the seniority in the primary schools and we are not concerned with it.

6) Clause 2 of Schedule "F" lays down the criteria for fixation of seniority of teachers in the secondary schools, Junior Colleges of Education and Junior College attached either to secondary schools or Senior Colleges. Said Clause 2 of Schedule "F" postulates 8 categories of teachers and the categories are set out as categories A to H. So, a member of the teaching staff working in a secondary school will find place in one of the said categories. Those categories finding place in Clause 2 of Schedule "F" represent the ladder of seniority and have been mentioned in the descending order. This position is clear from Note 4. Perusal of Note 4 leaves no room of doubt that a teacher falling in category "A" will be

treated to be senior to a teacher falling in category B and in similar fashion a teacher falling in a higher category will be treated to be senior to a person falling in lower category, as the ladder of seniority is in the descending order.

7. In the present case, the petitioner so also the fourth respondent have undisputedly entered Category "C" on the same date i.e. 13-5-1974 as the petitioner and the fourth respondent acquired the qualification of a trained graduate teacher viz. B.Sc. B.Ed. and B.Com. B.Ed. The relevant question is as to who of the two is senior in category "C" and whosoever is found to be senior in category "C" will be treated as senior and will be entitled to the promotional post. For the purpose of adjudicating the seniority interpretation of Note 3 and Note 5 would be important, as the same will clinch the issue. Note 3 reads thus:

"In the case of teachers whose date of continuous appointment in one and the same category is common, the teacher who is senior by age will be treated as senior."

So, in case of teachers whose date of continuous appointment in one and the same category is common, a teacher senior by age will be treated senior. Note 5 read thus:

" Where a management runs more than one school and where Junior College classes are or are not attached to any one or more of such schools, the seniority list for a particular cadre shall be a combined seniority list of all persons in that cadre working in all the schools (excluding night schools, if any), or Junior College classes attached to schools of the Management. The total continuous service rendered by the persons in a particular cadre in any school or Junior College class shall be taken into consideration for the purpose of seniority and for the purpose of promotion"

8. The learned counsel appearing for the petitioner has contended that continuous appointment referred to in Note 3 postulates continuous appointment in a given category in which the seniority is to be reckoned. In his submission, the phrase "continuous appointment" is referable to continuous appointment in a category/cadre and cannot be read so as to mean continuous appointment from the date of initial appointment in down below categories/cadres. In his submission, seniority in that very category is only material and to count the seniority in a given category, earlier service and/or service rendered in down below categories would be wholly irrelevant. The petitioner has contended that, as the exercise to determine seniority in category "C" is to be carried out, for the purpose of determination of seniority in the said category, as both the teachers have entered category C on the same date, the only criteria to determine the seniority would be the age and no other factor can be permitted to creep in. The counsel for the petitioner has ably tried to find support to his submission by placing reliance on the latter part of the rule contained in Note 5.

It is contended that Note 5 is in two parts.

The first part provides that when the management runs more than one school the seniority list for the particular cadre shall be a combined seniority list of all persons in that cadre working in all schools and the second part, which is material and which is taken in aid to interpret the phrase "continuous appointment" used in Note 3 lays down that, the total continuous service rendered by the persons in a particular cadre shall be taken into consideration for the purpose of seniority and for the purpose of promotion. It is, as such, contended that the phrase "continuous appointment" used in Note 3, for the purpose of determination of seniority, has to be continuous service rendered in a particular category/cadre. A conjoined reading of Note 3 and Note 5, in the submission of the learned counsel, would clearly demonstrate that earlier service rendered in down below categories is wholly irrelevant factor for the purpose of determination of seniority, on which determination a person is entitled to promotion. In contra, the learned counsel for the respondent No. 4 has submitted that the phrase "continuous appointment" used in Note 3 denote "continuous appointment" and hence it cannot be construed as continuous appointment in a category/cadre but has to be construed as continuous appointment which is to be counted with reference to service rendered in the next below cadre. What is interesting to note is that the learned counsel is not contending that continuous appointment needs to be construed as continuous appointment from entry in service as an Assistant Teacher. The reason is obvious. If the phrase "continuous appointment" is considered as continuous appointment in service, still the respondent No. 4 will be treated to be junior to the petitioner having regard to the fact that the petitioner has joined the employment as an Assistant Teacher on 1-7-1971, whereas the respondent No. 4 has joined the service on 2-11-1971. Realising this problem, the learned counsel for the fourth respondent wants to submit that continuous appointment need to be given the meaning so as to count the service from the next below cadre, again for the obvious reason that the respondent No. 4 has acquired graduation viz. B.Com., prior in point of time to the acquisition of the said qualification by the petitioner viz. B.Sc. and thereby the fourth respondent had entered the Category "F", i.e., untrained graduate, prior in point of time. Both the contesting teachers have shifted from Category "F" straightway to Category "C" by virtue of acquisition of teaching qualification viz. B.Ed.

9. The learned counsel appearing for the fourth respondent has placed reliance on a reported judgment of a learned Single Judge of this Court (Shri. S.D. Gundewar, J.) in the case of Baliram Maharaj Shikshan Sasntha v. Education Officer, Zilla Parishad, Amravati (2002 (1) Mah LR 169 . Few facts of the said case, which are relevant are reproduced herein below.

The date of birth of petitioner No. 2 was 20-8-1945. He was appointed as an Assistant Teacher on 1-7-1972 and his qualification then was under graduate. While being in service he improved his qualifications and passed B.Sc. on 13-7-1974 and B.Ed. on 26-5-1976. Whereas, respondent No. 2 was born on 5-5-1946. He was appointed as an Assistant Teacher in the same school on

1-7-1972. He was an untrained graduate when he joined the service. He passed B.Ed. on 26-5-1976. Perusal of the dates clearly reveals that, the date of entry in service was same viz. 1-7-1972 and the date of acquiring the teaching qualification viz B.Ed. was also same, it being 26-5-1976. The only difference was that the petitioner acquired Degree of Bachelor of Science on 13-7-1974, whereas the respondent No. 2 was already a graduate when appointed. The learned counsel has pointed out that the facts in the said case are almost akin to the facts in the present case. And rightly so. On the above set of facts the learned Single Judge has concluded that the respondent No. 2 is senior, for the sole reason that he acquired graduation prior in point of time and was senior in down below category viz. Category "F". From the ratio laid down in the said judgment, which I will proceed to deal with shortly, one thing is clear that if the said ratio is applied to the facts of the present case, the respondent No. 4 will have to be treated as senior to the petitioner. The learned counsel for the petitioner has strenuously urged that the ratio laid down in the said judgment requires reconsideration. He has further contended that, the ratio laid down in the said judgment is not correct and that the same runs counter to the ratio laid down by a Division Bench of this Court in Saramma Varghese v. Secretary/ President, S.I.C.E.S. Society and others reported in 1989 Mh.L.J.951. I proceed to examine the reasons which promoted the learned Single Judge to conclude that the second respondent is senior to the petitioner No. 2 in the said case.

10. The learned Judge, from paragraphs 15 onwards proceeds to interpret Note 3 of Schedule "F". The Court notices the fact that initial appointment of petitioner No. 2 was in Category "G" (an untrained matriculate), whereas the initial appointment of the respondent No. 2 was in category "F" (an untrained graduate). The Court further finds that the petitioner No.2 occupied place in category "F" on 13-7-1974 whereas, the respondent No. 2 was in the said category from 1-7-1972. Having found that in category "F" the respondent No. 2 was senior, the Court concluded that the second respondent will have to be treated as senior. The learned Single Judge did not apply the rule contained in Note 3, i.e., a person senior by age to be treated as senior. The reasoning and logic, which promoted the learned Single Judge to reach the said conclusion is dealt with in para 18 of the said judgment. While interpreting the phrase "continuous appointment" used in Note 3 the Court has found that the words "entry in that category" are absent in the said Note and, therefore, proceeded to hold that for determining inter se seniority the principle regarding date of birth will have no application. The learned Judge has further observed that there is no specific rule providing for fixing of inter se seniority in the situation like the one arises. By placing reliance on a judgment of the Apex Court in A. Janardhana Vs. Union of India (UOI) and Others, , and relying on the observations made in para 31 thereof, the learned Single Judge concluded that in the absence of any rule, continuous officiation would be the only available rule for determining inter se seniority. Applying the ratio laid down in A. Janardhana's case (supra) the learned Single Judge held the second respondent to be senior to the petitioner

No. 2.

11. True it is that, the words "in a particular cadre" are missing after the words "continuous appointment" in Note 3 but, in my opinion, that by itself cannot permit applying some other rule to the exclusion of rule contained in Schedule "F" for determination of inter se seniority. For the purpose of interpreting Note 3 this Court can always take assistance of the language used in Note 5, for giving correct and complete meaning to the words "continuous appointment" used in Note 3. The first part of Note 5 clearly refers to the seniority list for a particular cadre, to be the combined seniority list of all persons working in that cadre. The later part of Note 5 can be taken aid of for interpreting Note 3 which in no uncertain terms, lays down that the total continuous service rendered by the person in a particular cadre in any school shall only be taken into consideration for the purpose of seniority and for the purpose of promotion. If Note 3 is to be interpreted in the light of the legislative intent expressed in Note 5, the words "continuous appointment" used in Note 3 will have to be given its true and correct meaning and what is required to be read in Note 3 is continuous appointment in a particular category/cadre. The said exercise is necessary for two reasons. (1) if it is not so interpreted, it brings in a criteria for adjudicating inter se seniority, which is wholly absent in the scheme contained in Schedule "F" vis. seniority in down below cadre and/or continuous officiation in the down below cadre. This criteria is nowhere present in Schedule "F". The only criteria to determine seniority in a given cadre is entry in the said cadre/category. It is settled principle of interpretation of statute that there has to be a harmonious construction. If Note 3 is interpreted disjunctively from Note 5 the same would result in an absurd situation nullifying the effect sought to be achieved by the Legislature, which finds place in Note 5. With a view to avoid conflict and/or absurd results it would be permissible to read the words "continuous appointment" as "continuous appointment in a particular cadre" and if so read Note 3 and Note 5 would go hand in hand. For these reasons I am in respectful disagreement with the ratio laid down by the learned Single Judge in the judgment cited supra.

12. The learned counsel for the petitioner has placed reliance on the judgment of a Division Bench of this Court reported in 1989 Mh.L.J. 951 wherein, after considering the scheme in regard to the fixation of seniority contained in the Act and the Rules so also the scheme contained in the Secondary Schools Code, the Division Bench has held that on analysis of the provisions contained in the act, Rules and the Code the following principles deduce from the same:

"Firstly, the act and the Rules clearly stipulate that all teachers having B.A., B.Ed. or B.Sc. B.Ed. rank together for the purposes of fixation of seniority. (Note 1 paragraph 2, Schedule "F" to the Rules).

Secondly, the act, Rules or the Code make no distinction based on the Division of the School in which a teacher teaches. The only distinction made is between permanent and temporary teachers (Rule 10, Categories of Employees Rule 68.1,

Chapter III, Section II of the Code).

Thirdly, the Rules and the Code reject the relevance of pay scale for the purpose of seniority. That is why Note 8 quoted at foot-note 26, enjoins the School to prepare a combined seniority list of teaches, notwithstanding the fact that trained graduate teachers in Junior Colleges draw higher scale of pay, (Note 8, Paragraph 2, Schedule F to the Rules).

Fourthly, for the purpose of appointment of Head Masters and Supervisors in the S.S.C. level Schools, the trained teachers with M.A./M.Sc./M.Com. are considered equal to trained teachers with B.A./B.Sc./B.com. degree. Therefore, a higher academic qualification too is not relevant for fixation of seniority of trained teachers (Note 3, Annexure 45 of the Code).

Fifthly, the only criterion for fixation of seniority of trained graduate teachers is the continuous officiation in such post of teacher (Notes 1,2 and 3 below paragraph 2 of Schedule F to the Rules) depending upon, their position on the ladder."

The fifth principle which is stated to emerge from the conjoint reading of the above Act, the Rules and Code, the Division Bench held that only criterion for fixation of seniority of trained graduate teachers is continuous officiation in such post. Here again the emphasis is on continuous officiation in such post meaning thereby the post in a given cadre. The Division Bench further proceeded to observe in para 24 that once a person is a graduate teacher with B.Ed. degree, she ranks in seniority according to the date of continuous officiation. While considering the scheme contained in the act and the Code, which is held to be analogous, the Court observed in para 19 "that the inter se seniority of teachers falling in any single category has to be determined on the basis of the continuous service in that category in a single school or schools of the same management". This observation supports the contention put forth by the petitioner in regard to interpretation of Note 3. The learned counsel appearing for the respondent has contended that the said observation is not really the ratio of the judgment but is obiter. He submits that while taking a resume of the provisions contained in Annexure 45 of the Code which are analogous to the provisions contained in Schedule "F", the Court has made the said observation that the inter se seniority of teachers falling in any single category has to be determined on the basis of the continuous service in that category in a single school or schools of the same management.

13. Two more judgments are relied upon by the learned counsel appearing for the respondent. The first one is *Sopan s/o Bhagwan Kinage v. Director of Education Pune and others* reported in 1990 Mh.L.J.97. The said case was one in which the seniority was regulated by the provisions contained in M.P. Secondary Education Act, 1951. Vidarbha Region of the State of Maharashtra, prior to States Reorganization, was part of the erstwhile State of Madhya Pradesh. The said Act continued to apply to the Vidarbha Region up to 31-12-1965. It is only

thereafter, with effect from 1-1-1966, that the Secondary School Code came into force. Under the M.P. Secondary Education Act, 1951, training qualification (teaching qualification) such as, B.Ed., D.Ed. etc. was not an essential qualification of eligibility, for being appointed as a teacher. Only an undertaking was obtained and a condition was inserted in the appointment order (contract) that the teacher will undergo training qualification as and when deputed for the same. In this position of law, in the said case, the petitioner was appointed on 1-7-1958 and he was a graduate and had also obtained degree of B.Ed. On the same day the respondent was appointed as a teacher who was more in age than the petitioner. The respondent obtained a B.Ed. degree in 1961. In these facts the Court held that the person who is senior by age will have to be treated as senior, for the reason that teaching qualification was not an eligibility criteria. To that extent the said judgment supports the case of the petitioner. But it is also true that the said judgment is rendered in a different set of facts and law and as such cannot be taken much assistance of.

14. The next judgment i.e. Madhav Govindrao Budhe v. Education Officer, Zilla Parishad, Nagpur and others reported in 1994 Mh.L.J. 42 is again rendered in the similar situation, in the backdrop of the provisions of the M.P. Secondary Education Act. The Court was interpreting Note 5 of Annexure 45 of the Secondary Schools Code which relates to determination of seniority of teachers working in Non-Government secondary schools conducted in Nagpur region, who were permanent on 31st December 1965 and who were earlier governed by the statutory provisions contained in M.P. Secondary Education Act 1951. Here again the Division Bench while referring to clause 3 of Annexure 45 of the Secondary School Code, in para 17 observed that:

"Clause 3 of the revised guidelines more specifically mandates that inter se seniority of teachers falling in any single category should be determined on the basis of their length of continuous service in that category. Therefore, it will have to be held that the respondent No. 3 is senior to petitioner in category "B". (emphasis supplied)."

15. The learned counsel appearing for the respondent here again submitted that the said judgment is rendered in a different legal and factual position and as such ought not to be relied upon. Taking a retrospect of the judgments holding the field, I am doubly convinced that determination of inter se seniority in a particular category/cadre need to dependent upon adjudication of seniority in that particular category/cadre. The criteria of seniority in down below cadres cannot be taken into consideration, as the said criteria is totally absent in the scheme of Schedule "F".

16. This brings me to the judgment of the Apex Court in A Janardhana's case relied upon by the learned Single Judge. The Apex Court, in the facts of that case, has taken a view that in the absence of any other rule to regulate and decide the seniority, continuous officiation would be the only available rule. In my opinion, the said judgment has no application to the present case as there very

much exists an enforceable rule contained in Note 3 which provides that a person senior by age be treated as senior. As the said rule contained in Note 3 is capable of being enforced in determination of inter se seniority, the ratio laid down by the Apex Court in A. Janardhana's case has no application to the facts of the present case or for that matter while determining inter se seniority of teachers in Schedule "F".

17. The learned counsel appearing for the petitioner has submitted that as the judgment rendered by the learned Single Judge in Baliram Maharaj Shikshan Sasntha 2002(1) Mah L.R.169 is not in tune with the law laid down in Sopan Bhagwan (1990 Mh.L.J. 97 Saramma Varghese 1989 Mh.L.J. 951 and Madhav v. Education Officer 1994 Mh.L.J. 42 a contrary view can be taken by this Court by holding that the said judgment delivered by the learned Single Judge is per incuriam. I am not fully convinced that the above referred three judgments make a definite authoritative pronouncement on the question involved and as such it would not be in the fitness of things to reject the said judgment, by terming it as a "judgment per incuriam". Propriety demands making a reference of this matter to the Hon'ble the Chief Justice of the Bombay High Court.

18. As I am in respectful disagreement with the view taken by the learned Single Judge (Shri. S.D. Gundewar, J.) in the case reported in Baliram Maharaj Shikshan Sasntha v. Education Officer, Zilla Parishad, Amravati 2002 (1) Mah LR 169 and as I am of the opinion that the question of law involved can be more advantageously heard and decided by two or more Judges as deemed appropriate by the Hon'ble the Chief Justice of the Bombay High Court, in exercise of powers under rule 7 of Chapter I of the Bombay High Court Appellate Side Rules, I make a report to the Hon'ble the Chief Justice.

19. The Registry is directed to place both these petitions before the Hon'ble the Chief Justice of Bombay High Court for formation of appropriate Larger Bench.