

(2016) 05 BOM CK 0067

In the Bombay High Court

Case No : Writ Petition No. 7923 of 2015

Mrs. Vidyalata Nilkanth Patil

APPELLANT

Vs

Chairman/Secretary, Shikshan Prasarak Samiti

RESPONDENT

Date of Decision : 06-05-2016

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 9(1)(b)
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 12

Citation : (2016) 5 BCR 594 : (2016) 4 MhLJ 106

Hon'ble Judges : R.D. Dhanuka, J.

Bench : Single Bench

Advocate : Ms. Anupama Shah, Advocate, for the Appellant; Ms. Rita Joshi with Mr. Swapnil Kamble, Advocate, Ms. Vaishali Nimbalkar, A.G.P, Mr. N.V. Bandiwadekar i/b Mr. Sagar Mane, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

R.D. Dhanuka, J. (Oral) - Rule, returnable forthwith. The respondents waive service.

2. By this petition filed under Article 227 of the Constitution of India the petitioner seeks writ of certiorari or any other writ, order or direction in the nature of writ of certiorari for quashing and setting aside the order dated 16th July, 2015 passed by the Education Officer (Secondary) under Rule 12 of the Maharashtra employees of private schools (Conditions of Service) Rules, 1981 (for short "MEPS Rules") thereby declaring the respondent no.5 as senior to the petitioner. Some of the relevant facts for the purpose of deciding this writ petition are as under :

3. The respondent no.1 is a trust/society registered under the provisions of the Bombay Public Trust Act, 1950 and conducts the respondent no.2 school. The petitioner passed B.A. Examination in the year 1980 and obtained B.Ed. degree

in the year 1983. The petitioner belongs to O.B.C., whereas the respondent no.5 belongs to open category.

4. It is the case of the petitioner that on 4th July, 1983 the petitioner was appointed in the respondent no.2 school in a clear and permanent vacancy as an assistant teacher in the trained under graduate scale. The petitioner was though appointed in clear and permanent post was given temporary appointment upto the year 1980 and was continued. It is her case that her appointment was approved in clear and permanent vacancy from 4th July, 1983 vide approval dated 16th March, 1984. The respondent no.5 was appointed as an assistant teacher on 24th June, 1987 in the respondent no.2 school.

5. On or about 29th March, 1989, the services of the petitioner came to be terminated by the respondent no.1 management without any reasons. The petitioner impugned the said action on the part of the management by filing an appeal before the School Tribunal (41 of 1989). The petitioner was thereafter taken back in service by the respondent no.1. The said appeal filed by the petitioner was accordingly disposed of.

6. It is the case of the petitioner that when the respondent no.5 was appointed on 24th June, 1987, she was appointed purely on temporary basis and for a fixed period i.e. from 24th June, 1987 to 30th April, 1988. The respondent no.5 came to be placed in trained graduate scale. It is the case of the petitioner that the petitioner objected to the said appointment of the respondent no.5 orally to the said post of assistant teacher in trained graduate scale on the ground that the petitioner already had possessed such qualification and could have been accommodated in the said trained graduate scale, the petitioner having been appointed in the year 1983.

7. It is the case of the petitioner that when the seniority list of the respondent no.2 school was circulated by the management in the year 2008, the petitioner was shown junior to the respondent no.5 though she was possessing the degree of B.A. B.Ed. when she was appointed in the year 1983 itself in the respondent no.2 school. The petitioner accordingly signed the said seniority list under protest. It is the case of the petitioner that from the year 2009 onwards the petitioner was shown senior to the respondent no.5.

8. In the academic year 2009, the petitioner was shown at serial no.5, whereas the respondent no.5 was shown at serial no.6 in the seniority list. For the academic years, 2010, 2011 and 2012, the petitioner was shown at serial no.3, whereas the respondent no.5 was shown at serial no.4. For the academic year 2013, the petitioner was shown at serial no.1, whereas the respondent no.5 was shown at serial no.2 in the seniority list dated 1st July, 2013. It is the case of the petitioner that from 2009 till 1st July, 2013, the respondent no.5 did not raise any objection in respect of the seniority list circulated by the management showing the petitioner senior to the respondent no.5. The respondent no.5 however, raised an objection in respect of the seniority list dated 1st July, 2013

reserving her right to the post of Headmistress.

9. It is the case of the petitioner that prior to the date of circulating the said seniority list, the respondent no.1 management passed a resolution in its meeting proposing to promote the petitioner as Headmistress of the respondent no.2 school being senior most assistant teacher. On 30th April, 2013, the petitioner came to be promoted as Headmistress vide an appointment letter dated 30th April, 2013 issued by the management with effect from 1st May, 2013. It is the case of the petitioner that on 21st July, 2013, the respondent had sent a proposal of the petitioner for approval for the post of Headmistress to the Education Officer (Secondary). On 15th May, 2013, the respondent no.5 placed her objection on record with the respondent no.1 management contending that she was B.A. B.Ed. appointed in the month of June, 1987 and there was going to be vacancy of the post of Headmistress and thus she shall be appointed to the said post. She contended that if any teacher, who was junior to her if appointed, she had strong objection for the appointment of such junior teacher as Headmistress.

10. On 1st July, 2014, the respondent no.5 objected to the seniority list dated 1st July, 2014, wherein the name of the petitioner was shown at serial no.1 and the name of the respondent no.5 was shown at serial no.2. It is the case of the petitioner that though the petitioner was senior most in the respondent no.2 school and the proposal of the petitioner for approval was sent by the management to the Education Officer (Secondary), the Education Officer (Secondary) was giving the approval quarterly.

11. It is the case of the petitioner that a local MLA, taluka Dahanu had addressed a letter on 9th March, 2015 to the Education Officer (Secondary) for looking into the grievance of the respondent no.5. Pursuant to the said letter addressed by the local MLA, the Education Officer (Secondary) issued a letter on 18th March, 2015 to the respondent no.1 management and also to the respondent no.5 calling upon the parties for hearing after a span of merely two years of the promotion of the petitioner as Headmistress.

12. On 27th March, 2015, the petitioner replied to the said notice issued by the Education Officer (Secondary) and contended that the petitioner was already working as Headmistress from 1st May, 2013 and the proposal was sent by the management to the Education Officer (Secondary) on 21st April, 2013. The Education Officer (Secondary) had approved the appointment of the petitioner quarterly from 1st May, 2013 to 30th April, 2014.

13. The Education Officer (Secondary) thereafter heard the petitioner, respondent no.5 and also the representative of the respondent no.1 management and passed an order on 16th July, 2015. It is held by the Education Officer (Secondary) that the petitioner who was B.A. B.Ed., was appointed on 4th July, 1983 but was appointed in trained under graduate scale, whereas the respondent no.5, who was B.A. B.Ed. came to be appointed on 24th June, 1987

in "C" category and therefore, the respondent no.5 was senior to the petitioner. This order of the Education Officer (Secondary) is impugned by the petitioner in this writ petition.

14. Ms.Shah, learned counsel appearing for the petitioner submits that there is no dispute that the petitioner had obtained B.A. degree in the year 1980 and B.Ed. degree in the year 1983. She submits that though the petitioner was appointed in a clear and permanent vacancy to the post of the assistant teacher in the year 1983, the petitioner was appointed in trained under graduate scale. She submits that though the respondent no.5 had obtained B.Sc. degree in the year 1985 and B.A. degree in the year 1987 and was appointed on 24th June, 1987 in open category to the post of assistant teacher in trained graduate scale. She submits that the petitioner being senior to the respondent no.5 having obtained B.A. B.Ed. much prior to the date of the appointment of the respondent no.5, the petitioner was senior to the respondent no.5 in all respects.

15. It is submitted by the learned counsel that the difference in pay scale cannot be a ground for declaring the petitioner as junior to the respondent no.5. In support of this submission, she placed reliance on the judgment of this Court in case of Maharashtra Mandal & Ors. v. Mrs.Anjali Ramesh Shah, 2009 (1) Bom. C.R. 456 and more particularly paragraphs 2, 4, 6 and 7. She submits that the respondent no.5 thus could not have been placed by the management in the category "C" in the year 1987 contrary to the judgment of this Court in case of Maharashtra Mandal & Ors. (supra) and contrary to the provisions of MEPS Act and Rules. Reliance is also placed on the judgment of the Division Bench of this Court in case of Saramma Varghese v. Secretary/President, S.I.C.E.S. Society & Ors. 1990 (1) Bom.C.R. 185 and in particular paragraphs 3 and 5 in support of her submission that merely because the petitioner was placed in trained under graduate scale on the date of her appointment in the year 1983 though she possessed B.A. B.Ed. degree and not under the category of "C", that would not affect the seniority of the petitioner over the respondent no.5.

16. It is submitted by learned counsel that the respondent no.5 did not raise any objection in respect of the seniority list prepared by the respondent no.1 management during the period 2009 till 30th June, 2013 when the petitioner was shown as senior to the respondent no.5. Learned counsel invited my attention to a letter dated 1st July, 2013 addressed by the respondent no.5 to the respondent no.1 management requesting that her appointment to the post of Supervisor which had fallen vacant in view of the retirement of the then Supervisor Mr.Gopinath B. Ambhire, on the basis of her seniority with effect from 1st July, 2013. It is submitted that the respondent no.5 was accordingly appointed as a Supervisor with effect from 1st July, 2013. She submits that once the respondent no.5 had applied for her promotion as Supervisor after the promotion of the petitioner as Headmistress already made by the respondent no.1 management from 1st May, 2013, the respondent no.5 cannot be allowed to urge that she was senior to the petitioner.

17. It is submitted by learned counsel for the petitioner that the respondent no.5 could not have applied for adjudication of the seniority under Rule 12 of the MEPS Rules after promotion of the petitioner to the post of Headmistress and the only remedy of the respondent no.5 was to file an appeal under section 9 of the MEPS Act before the School Tribunal on the ground that the respondent no.5 was alleged to have been superseded by the petitioner. She submits that the grievance in respect of the seniority list of the petitioner was made by the respondent no.5 after she was already promoted by the respondent no.1 management to the post of Headmistress and thus the Education Officer (Secondary) had no jurisdiction or power to pass any order under Rule 12 of the MEPS Rules and to determine the seniority amongst the petitioner and the respondent no.5. She submits that the order passed by the Education Officer (Secondary) is thus without jurisdiction and illegal. In support of this submission, learned counsel placed reliance on the judgment of this Court in case of *Bhagwant Sheshrao Borale v. Education Officer & Ors.*, 2009 (5) Bom. C.R. 146 and in particular paragraphs 2 to 5. Reliance is also placed on the judgment of this Court in case of *Mangala Vasant Yadav v. Poona Sevasadan Society & Ors.*, 2008 (2) Bom. C.R. 197 and more particularly paragraphs 17 and 18.

18. It is submitted by the learned counsel for the petitioner that in view of the misconduct committed by the respondent no.5, the management had imposed a minor penalty on the respondent no.5 and even on that ground the respondent no.5 could not have made any claim on the post of Headmistress. It is submitted that the respondent no.5 was given year to year appointment by the management and thus such period when the respondent no.5 was appointed on year to year basis could not be considered for the purpose of computing the seniority of the respondent no.5. The fullfledged appointment given to the respondent no.5 was in the year 1991. In support of this submission, learned counsel for the petitioner relied upon certain averments made by the respondent no.1 management in its affidavit in reply filed before the School Tribunal.

19. It is submitted by learned counsel for the petitioner that since the respondent no.5 being an open category candidate even otherwise could not claim any permanency in the reserved post of the assistant teacher. In support of this submission, learned counsel placed reliance on the judgment of this Court in case of *Vilasrao Sarjerao Patil v. Asarondi Panchkroshi Shikshan Prasarak Mandal & Ors.*, 2004 (6) Bom. C.R. 609 and in particular paragraphs 7 and 8 thereof. It is submitted that the petitioner is due for retirement in 2017 and the respondent no.5 not having challenged the promotion of the petitioner to the post of Headmistress since 1st May, 2013 by filing an appeal under section 9 of the MEPS Act till date, the writ petition filed by the petitioner deserves to be allowed on this ground also.

20. Mr. Bandiwadekar, learned counsel for the respondent no.5 opposes this writ petition on the ground that there is no cause of action for the petitioner to approach this Court to challenge the order passed by the Education Officer

(Secondary) on 16th July, 2015 by exercising powers under Rule 12 of the MEPS Rules. He submits that the petitioner herself has admitted in the writ petition that no order of appointment was issued to her by the management and thus the petitioner could not claim any right over the said post and also could not claim any appointment on the regular/permanent basis. He submits that admittedly the petitioner was appointed in the pay scale of trained under graduate i.e. H.Sc. D.Ed. He submits that there is no dispute that the respondent no.2 is secondary school and the qualification for the post of assistant teacher in secondary school is B.A./B.Sc./B.Com and B.Ed. He submits that the petitioner was admittedly not holding the qualification of D.Ed. when the petitioner was appointed and thus the petitioner at the outset could not have been appointed as an assistant teacher on the said post and thus on the basis of such illegal and void-ab-initio appointment, the petitioner could not claim any benefits and more particularly the benefit of seniority by counting the length of service.

21. It is submitted that admittedly the petitioner was given temporary appointment in the year 1983 till 1989 and there used to be break in service every year. The petitioner was given a fresh appointment in the subsequent academic year and thus there was no continuity of service of the petitioner. The petitioner thus could not claim seniority on the basis of service from the year 1983. It is submitted that the petitioner has not produced any material on record to show that the order of termination of her services on 29th March, 1989 was set aside by the School Tribunal or was withdrawn by the management which also would clearly indicate that there was no continuity of service of the petitioner.

22. It is submitted by learned counsel for the respondent no.5 that his client was holding a qualification of B.Sc. B.Ed on the date of her appointment as assistant teacher on 24th June, 1987 and was appointed in trained graduate scale in the respondent no.2 school carrying pay scale of Rs.365-15-500-20-760. He submits that in the appointment letter issued to the respondent no.5 by the management, there was no reference to the said appointment having been made in the post of assistant teacher reserved for reserved category. No objection about such appointment was ever made either by the management or by the petitioner at any stage.

23. Learned counsel for the respondent no.5 invited my attention to the averments made in the petition as well as in the affidavit in reply filed by the management contending that the petitioner was working in the trained under graduate scale and was subsequently promoted/upgraded to the vacant post of trained graduate scale in the same school. He submits that up-gradation of any teacher from trained under graduate scale to the post of trained graduate scale is not permissible under any of the provisions of the MEPS Acts and Rules. He submits that even if such up-gradation was carried out by the management insofar as the petitioner is concerned, such up-gradation will not relate back to the date of initial appointment. In support of this submission, learned counsel

placed reliance on the judgment of this Court delivered on 10th December, 2009 in case of Sou. Sunita Chandrakant Nagotkar v. State of Maharashtra & Ors. in Writ Petition no.1850 of 2009 and in particular paragraphs 1 to 4.

24. It is submitted by the learned counsel for the respondent no.5 that since the petitioner was appointed as an assistant teacher on the trained under graduate scale in view of the fact that no post of trained graduate teacher was available when the petitioner was appointed, the period during which she continued to work as the assistant teacher on trained under graduate scale, such service period could not be counted for the purpose of seniority and promotion. He submits that even according to the petitioner, the petitioner was given trained graduate scale only in the year 1989. He placed reliance on Schedule-B of the MEPS Rules and would submit that the petitioner not having diploma in education when she was appointed to the said post of assistant teacher, she was not eligible for the appointment to the said post, which was meant for the person holding a diploma in education.

25. It is submitted that admittedly in the seniority list prepared as on 13th June, 2005, the petitioner was admittedly placed at serial no.9, whereas the respondent no.5 was placed at serial no.8. He submits that even according to the said seniority list, which was not objected by the petitioner, the name of the petitioner was placed under category "E" on 4th July, 1983 and was placed in category "C" with effect from 12th June, 1989. He submits that the respondent no.5 was already placed in category "C" on 12th June, 1989. It is submitted that since the respondent no.5 was placed in category "C" earlier in point of time than the petitioner, the respondent no.5 was eligible for the post of Headmistress under Schedule-C of the MEPS Rules, 1981.

26. Learned counsel appearing for the respondent no.5 placed reliance on the order of approval dated 20th September, 1988 and would submit that even the said order of approval of the appointment of the petitioner would indicate that the petitioner was appointed in the scale of trained under graduate teacher in the pay scale of Rs.290-540, whereas the respondent no.5 was appointed in the pay scale of Rs.365-760. He submits that there was endorsement on the said order of appointment that the approval granted to the petitioner was as a special case only for that academic year and in the next year trained graduate teacher should be appointed. Learned counsel placed reliance upon the order of approval of the respondent no.5 dated 15th June, 1992 and would submit that the appointment of the respondent no.5 was approved with effect from 15th June, 1987 as assistant teacher in the trained graduate scale.

27. Insofar as the submission of the petitioner that the respondent no.5 could not have applied for adjudication of the seniority dispute under Rule 12 of the MEPS Rules after the promotion of the petitioner to the post of Headmistress and ought to have filed an appeal under section 9 of the MEPS Act is concerned, it is submitted by learned counsel for the respondent no.5 that the dispute as to the seniority has to be referred only to the Education Officer (Secondary) under rule

12(3) of the MEPS Rules. He submits that the aggrieved party could have filed an appeal under section 9 of the MEPS Act only if any consequential effect to the order passed by the Education Officer (Secondary) under rule 12 of the MEPS Rules was given and not prior thereto. In support of this submission, learned counsel placed reliance on the Full Bench judgment of this Court in case of St. Ulai High School & Anr. v. Devendraprasad Jagannath Singh, 2007 (1) Mah. L.J. 597 and in particular paragraphs 11 and 13(v).

28. It is submitted that the respondent no.5 is not disputing the maintainability of the writ petition on the ground that the petitioner ought to have filed an appeal under section 9 of the MEPS Act against the order of the Education Officer (Secondary) passed under rule 12. It is submitted by learned counsel for the respondent no.5 that insofar as minor penalty inflicted by the management against the respondent no.5 is concerned, the respondent no.5 had challenged the said action by filing an appeal. It was proposed by the management that if the respondent no.5 would withdraw the said appeal, the management also would withdraw the said punishment. He submits that the management had accordingly withdrawn the said punishment and thus the said original order of the management inflicting penalty upon the respondent no.5 was of no consequence.

29. It is submitted by learned counsel for the respondent no.5 that the petitioner never raised any objection before Education Officer (Secondary) that he had no jurisdiction to decide the inter-se seniority between the petitioner and the respondent no.5 on the ground that the petitioner was already appointed as Headmistress prior thereto. He submits that no such ground is even raised in the writ petition filed by the petitioner and thus the petitioner cannot be allowed to raise this issue across the bar. He submits that paragraph 11 of the judgment of the Full Bench in the case of St. Ulai High School & Anr. (supra) would apply to the facts of this case.

30. Mr. Bandiwadkar distinguished the judgment of this Court in case of Saramma Varghese (supra) and Maharashtra Mandal & Ors. (supra) on the ground that the facts before this Court in both the matters were totally different. He submits that the judgment of the Full Bench in case of St. Ulai High School & Anr. (supra) was not brought to the notice of this Court in case of Maharashtra Mandal & Ors. (supra). He submits that in any event the Education Officer (Secondary) in the impugned order has not directed the management to promote the respondent no.5 based on such adjudication of the said seniority list under rule 12 of the MEPS Rules and thus the petitioner could not have filed the present writ petition inter-alia for impugning the said order passed by the Education Officer (Secondary). He submits that in any event the order of the Education Officer (Secondary) is not final.

31. Insofar as the judgment of this Court in case of Vilasrao Sarjerao Patil (supra) relied upon by the petitioner is concerned, it is submitted by the learned counsel for the respondent no.5 that since neither in the appointment letter of

the petitioner nor in the approval granted by the Education Officer (Secondary) it was stated that the appointment of the petitioner was made in the reserved category post, the said judgment of this Court would not assist the case of the petitioner. He submits that if the candidate from the reserved category is not available, the candidate from open category could be appointed to the said post.

32. Mr. Bandiwadekar then submits that there was no objection raised by the respondent no.5 in respect of the seniority list for the period 2009 till 30th June, 2013, since there was no occasion for the respondent no.5 to challenge the said seniority list prepared by the management. He submits that there was no bar from raising this issue even at the later stage in view of the fact that preparation of seniority is a recurring process. He submits that in any event the petitioner did not raise any such issue before the Education Officer (Secondary) and cannot be allowed to raise this issue in this writ petition. He submits that the management cannot be allowed to support the case of the petitioner in view of the fact that the management has not filed any separate writ petition impugning the order passed by the Education Officer (Secondary). He submits that the order passed by the Education Officer (Secondary) is thus binding on the management.

33. Learned counsel appearing for the respondent no.5 invited my attention to the seniority list for the year 1985-86 and would submit that the management had prepared a separate seniority list of the trained graduate teacher and trained under graduate teacher. He submits that the name of the respondent was placed in the list of trained graduate teachers, which was not objected to by the petitioner at any stage. He submits that there was a separate seniority list prepared of the teachers placed in the trained graduate teacher which did not place the name of the petitioner in the said list. He made an attempt to distinguish the judgment of this Court in case of Bhagwant Sheshrao Borale (supra) on the ground that the said judgment is not relevant. This Court had considered the case where an additional section was created in respect of standard 5 to 7 and the issue was whether two posts should be sanctioned or not. He submits that in this case the petitioner was appointed in respect of standard 8 to 10 and not for standard 5 to 7.

34. Ms. Joshi, learned counsel appearing for the management invited my attention to the averments made in the affidavit in reply and would submit that the petitioner has rightly filed the present writ petition inter-alia praying for setting aside the order passed by the Education Officer (Secondary). She submits that the respondent no.5 could not have applied for adjudication of the seniority dispute after promotion of the petitioner to the post of Headmistress. Learned counsel supported the case of the petitioner.

35. Mrs. Shah, learned counsel appearing for the petitioner in rejoinder distinguished the judgment of the Full Bench of this Court in case of St. Ulai High School & Anr. (supra) on the ground that the respondent no.5 did not challenge the seniority list declared by the management during the period between 2009 to 2013. The respondent no.5 herself had addressed a letter dated 1st July, 2013 to

promote her as a Supervisor as per her seniority and thus could not challenge the seniority of the petitioner. She submits that if according to the respondent no.5, she was superseded by the management by promoting the petitioner to the post of Headmistress, the only remedy available to her was to challenge the said order of supersession by filing an appeal under section 9. She submits that since the management had already promoted the petitioner to the said post, an adjudication of the alleged seniority dispute thereafter did not survive. It is submitted by learned counsel that even if the petitioner had not raised any issue of jurisdiction before the Education Officer (Secondary) or by raising any specific ground in the writ petition filed by the petitioner, the Education Officer (Secondary) having exercised his jurisdiction illegally after promotion of the petitioner to the post of Headmistress, this Court can consider such issue of law raised by the petitioner even at this stage. She submits that there was lack of inherent jurisdiction in the Education Officer (Secondary) to decide the issue of seniority after promotion of the petitioner to the post of Headmistress.

36. It is submitted by the learned counsel that the order passed by the Education Officer (Secondary) was at the instance of local MLA. No notice was issued to the petitioner. She submits that since the said order passed by the Education Officer (Secondary) was at the instance of the local MLA and being contrary to law, the writ petition filed by the petitioner is maintainable. She lastly submits that since the petitioner is due to retire in the year 2017 and since the respondent no.5 has not impugned her promotion since 2013, the petitioner has made out a case for setting aside the impugned order passed by the Education Officer (Secondary) to obviate any action from the management to give effect to the said illegal order passed by the Education Officer (Secondary) against the petitioner and in favour of the respondent no.5.

Reasons And Conclusions :

37. Insofar as the maintainability of this writ petition against the order passed by the Education Officer (Secondary) is concerned, since the respondent no.5 has not raised any issue of maintainability of this writ petition impugning the order passed by the Education Officer (Secondary), this Court did not go into the issue of maintainability of the writ petition on that ground.

38. Short question that arises for the consideration of this Court is whether the respondent no.5 could have applied for adjudication of the seniority under rule 12 of the MEPS Rules after promotion of the petitioner to the post of Headmistress on 1st May, 2013 or the remedy of the respondent no.5 to challenge the said promotion of the petitioner to the said post of Headmistress was by way of an appeal under section 9(1)(b) of the MEPS Act.

39. It is not in dispute that the respondent no.5 had made a representation to the management raising dispute about the seniority of the petitioner and had applied for promotion to the said post of Headmistress only after 1st May, 2013. There is also no dispute that the Education Officer (Secondary) had issued a

notice for adjudication of the said dispute only after 1st May, 2013. The petitioner as well as the management of the school and the respondent no.5 had appeared before the Education Officer (Secondary) at the time of hearing. The Education Officer (Secondary) had thereafter passed an order on 16th July, 2015 holding that the respondent no.5 was senior to the petitioner. No action has been initiated by the management pursuant to the said order passed by the Education Officer (Secondary) against the petitioner and in favour of the respondent no.5 thereby giving effect to the said order passed by the Education Officer (Secondary).

40. The submission of learned counsel for the respondent no.5 was that since the management had not taken any action on the said order dated 16th July, 2015 passed by the Education Officer (Secondary) determining the seniority under rule 12 of the MEPS Rules, respondent no.5 was not required to file any appeal under section 9(1)(b) of the MEPS Act. It is also the submission of the respondent no.5 that if the management would have promoted the respondent no.5 on the said post of Headmistress by implementing the order passed by the Education Officer (Secondary), the petitioner could have filed an appeal against the said decision of the management. It is however, the case of the petitioner that since the petitioner was already promoted to the post of Headmistress prior to the said decision of the Education Officer (Secondary) rendered on 16th July, 2015, the only remedy of the respondent no.5 was to challenge the said decision of the management by filing an appeal under section 9(1)(b) of the MEPS Act.

41. Mr. Bandiwadekar, learned counsel for the respondent no.5 in support of his submission placed reliance on the judgment of the Full Bench of this Court in case of *St. Ulai High School & Anr.* (supra) and more particularly paragraphs 11 and 13. He submits that the dispute, if any, in the matter of inter-se seniority has to be referred to the Education Officer for his decision. The Full Bench of this Court in the said judgment has referred to the decision of this Court in case of *Saramma Varghese and Atmaram Raghunath Pashte*. In case of *Saramma Varghese* (supra), the Division Bench has considered an issue that if in pursuance of the order of the Education Officer consequential action was taken by the management and if an employee was aggrieved by that action, he could invoke the provisions of section 9 of the Act and file an appeal, that however, did not mean that the action of the Education Officer could not be challenged in a petition under Article 226. It is held by the Full Bench that once the consequential action falling under clauses (a) and (b) of sub-section (1) of section 9 is taken by the management on the basis of determination, an appeal lies under section 9 and while exercising its jurisdiction on an appeal, the Tribunal can as an incidental issue, decide the correctness of the determination of inter-se seniority.

42. The Full Bench of this Court has held that a decision of the Education Officer on the issue of inter-se seniority under rule 12 of the MEPS Rules is not final. If any action is taken by the management against an employee on the basis of such

determination and where an action falls within the decision contained in clauses (a) and (b) of section 9(1), an appeal before the School Tribunal for challenging an action of the management would be maintainable. The Tribunal would have jurisdiction while deciding the lawfulness of the action of the management to adjudicate upon the correctness of the determination of the Education Officer under rule 12 as an incidental question. Where no consequential action has been taken by the management, on the basis of the determination of the Education officer, it would be open to the employee concerned to seek a recourse of his remedy against the decision under rule 12 in accordance with law.

43. The learned single Judge of this Court in case of Bhagwant Sheshrao Borale (supra) has considered a question as to whether Education Officer could have re-fixed the seniority once an employee was already promoted and could have held that the other employee was senior to the employee who was already promoted. The learned single Judge after adverting to various judgments of this Court in the said judgment considered a case where the challenge to the seniority was made after the petitioner was promoted. The learned single Judge adverted to the judgment of the Division Bench of this Court in case of Sou.Saroj Yeshwant Deopujari v. Education Officer, decided on 31st March, 1989 in Writ Petition No.546 of 1989 and has held that under section 9 (1)(b) of the MEPS Act, the Tribunal is empowered to entertain an appeal against the order of supersession while making an appointment by promotion and while adjudicating the validity of the order of the supersession passed by the management, the validity of the seniority list and all objection to it can also be considered as an incidental question.

44. The Division Bench in case of Ramchandra Narayan Jamkar v. Sou. Saroj Yeshwant Deopujari, W.P. No. 1309/91 decided on 19.6.1991 held that determination of issue under rule 12 of MEPS Rules is not made final and conclusive and not binding on the School Tribunal under section 9(1) of the MEPS Act and the said issue can be decided by the School Tribunal as an incidental question. The learned single Judge in the said judgment held that the question of seniority, once the promotion is granted and appointment is made has to be decided by the School Tribunal and the Education Officer will have no jurisdiction to fix the seniority and demote a person already appointed. This Court held that the Education Officer could not have entertained a complaint about seniority and decide to re-fix the seniority once the petitioner was already appointed on a promotional post. It is held that the scheme of the Act itself is such that an employee who feels that he has been superseded has to approach the School Tribunal under section 9. Rule 12 in such cases does not come into play. This Court has accordingly set aside the order passed by the Education Officer deciding seniority after promotion of the petitioner in that matter had already been made, having found the said order illegal.

45. Insofar as the submission of learned counsel for the respondent no.5 that since the petitioner did not raise any objection before the Education Officer

(Secondary) challenging the maintainability of the application made by the respondent no.5 for determination of seniority on the ground that the petitioner was already promoted as Headmistress prior to the date of such representation made by the respondent no.5 and thus cannot be allowed to challenge the said order passed by the Education Officer (Secondary) on that ground is concerned, there is no dispute that the petitioner was already promoted to the post of a Headmistress prior to the date of the respondent no.5 making a representation to the management to appoint her as a Headmistress. In my view, merely because an objection was not raised by the petitioner before the Education Officer (Secondary) not to determine the seniority between the petitioner and the respondent no.5 on the ground that the petitioner was already promoted as a Headmistress is concerned, the said question being question of law and adjudication of the seniority by the Education Officer (Secondary) being contrary to rule 12 of MEPS Rules and contrary to the law laid down by this Court, not raising such objection before the Education Officer (Secondary) would not confer any jurisdiction in the Education Officer (Secondary) to adjudicate upon the seniority after promotion to the post which was already made.

46. Be that as it may, a perusal of the reply filed by the petitioner before the Education Officer (Secondary) clearly indicates that the petitioner had brought it on record before the Education Officer (Secondary) that she was already promoted as a Headmistress in the same school on 1st May, 2013. The Education Officer (Secondary) thus was aware of the fact that the petitioner was already promoted as a Headmistress prior to the representation made by the respondent no.5 based on the seniority of the petitioner according to the management and thus in my view the Education Officer (Secondary) could not have adjudicated upon the said representation made by the respondent no.5 under rule 12 of the MEPS Rules.

47. In my view, the Education Officer (Secondary) has thus acted without jurisdiction in determining the seniority under rule 12 of MEPS Rules in view of the petitioner already having been promoted to the post of Headmistress. It was a clear case of inherent lack of jurisdiction of the Education Officer (Secondary) to determine seniority after promotion of the petitioner was already made. In my view, the only remedy in these circumstances of the respondent no.5 was to file an appeal under section 9(1)(b) of the MEPS Act by challenging the alleged supersession of the respondent no.5 by the petitioner. If the respondent no.5 would have filed an appeal before the School Tribunal under section 9(1)(b) of the MEPS Act, the School Tribunal would have decided the issue on seniority also incidentally.

48. It is held by the Full Bench of this Court that adjudication of the seniority by the Education Officer (Secondary) is not final, conclusive and binding on the School Tribunal. In my view, if an appeal would have been filed by the respondent no.5, the respondent no.5 and the petitioner would have produced relevant records before the School Tribunal in support of their rival claim in

respect of seniority. The judgment of the Full Bench of this Court in St.Ulai High School & Anr. (supra) does not assist the case of the respondent no.5 in view of the fact that promotion of the petitioner was already made much prior to the representation made by the respondent no.5. The judgment of this Court in case of Bhagwant Sheshrao Borale (supra) and Mangala Vasant Yadav (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgments.

49. Insofar as the other submissions made by the learned counsel for the respondent no.5 to demonstrate as to how the respondent no.5 was rightly declared as senior to the petitioner and the rival submissions of the petitioner and the management as to how the petitioner was senior to the respondent no.5 and on the issue whether the respondent no.5 having accepted the post of Supervisor and thus whether could still claim seniority over the petitioner is concerned, in my view since the adjudication of seniority by the Education Officer (Secondary) is not final, conclusive and binding on the School Tribunal, if any appeal is filed by the respondent no.5 under section 9(1)(b) of the MEPS Act, all such issues can be incidentally decided by the School Tribunal while hearing the appeal filed by the respondent no.5, if any. This Court therefore, does not propose to go into all these issues raised by both the parties in this petition since this Court is of the view that the remedy of the respondent no.5 was to challenge the alleged supersession of the respondent no.5 by the petitioner by filing an appeal under section 9(1)(b) of the MEPS Act and not to seek adjudication of seniority of the respondent no.5 over the petitioner under rule 12 of the MEPS Rules after promotion of the petitioner to the post of Headmistress was already made. All other issues raised by the parties which are summarised aforesaid are thus not dealt with and are kept open.

50. I therefore, pass the following order :-

- a). The impugned order dated 16th July, 2015 passed by the Education Officer (Secondary) at Exhibit "O" is set aside.
- b). The issue as to whether the respondent no.5 is senior to the petitioner or not is kept open and can be adjudicated upon by the School Tribunal, if any appeal is preferred by the respondent no.5 under section 9(1)(b) of the MEPS Act as an incidental issue.
- c). If any appeal under section 9(1)(b) of the MEPS Act is filed by the respondent no.5, the School Tribunal shall decide the same on its own merits without being influenced by the observations made by the Education Officer (Secondary).
- d). All the other contentions of both the parties on the issue of seniority are kept open.
- e). Rule is made absolute in aforesaid terms. No order as to costs.