

(2023) 03 BOM CK 0113
In the Bombay High Court
Case No : Writ Petition No. 3273 Of 2022

Namdeo

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 03-03-2023

Acts Referred:

Maharashtra Employees Of Private Schools (Conditions Of Service) Rules, 1981 — Rule 3, 3.1, 3.3, 3(6), 12, 12(2), 12(3)
Maharashtra Employees Of Private Schools (Conditions Of Service) Regulation Act, 1977 — Section 3, 4, 4A, 4(6), 5, 6, 7, 8, 9, 9(1)(b), 10, 11, 12, 13, 14, 15

Citation : (2023) 03 BOM CK 0113

Hon'ble Judges : Mangesh S. Patil, J;Nitin B. Suryawanshi, J;Y. G. Khobragade, J

Bench : Full Bench

Advocate : S.T. Shelke, S.B. Yawalkar, S.V. Natu, P.B. Shirsath

Judgement

Mangesh S. Patil, J

1. This reference to the Larger Bench as per the order of the Hon'ble the Chief Justice arises on the backdrop of the following facts:-

i) The petitioner as well as the respondent no. 5 have been serving as teachers in the school being run by the respondent no. 4 – management.

ii) The respondent no. 4 - management appointed the petitioner as the Headmaster with effect from 01-06-1019.

iii) The management forwarded the proposal to the respondent no. 3 - Education Officer for approval to the appointment of the petitioner in terms of the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Act, 1977 (hereinafter MEPS Act) and rule 3.1 and rule 3.3 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (hereinafter MEPS Rules), by communication dated 28-05-2020.

iv) The respondent no. 5 raised an objection with the respondent no. 4 - management and the respondent no. 3 - Education Officer.

v) Apart from the respondent no. 4 even one Kindhe Sureskha Janardhan also raised an objection to the seniority list prepared and maintained by the management showing the petitioner to be the senior most amongst the teachers.

vi) In writ petition no. 10346 of 2018 dated 11-09-2018, the respondent no. 3 - Education Officer was directed to hear all and decide the issue regarding inter se seniority.

vii) By the order dated 05-01-2019, the respondent no. 3 - Education Officer after hearing the parties held one Kurhe Pandurang Rangnath as the senior most and the petitioner to be the second senior in the seniority list.

viii) Since only Kurhe Pandurang Rangnath and the petitioner were found to be senior most and second senior most respectively, the respondent no. 5 filed writ petition no. 674 of 2019 but it was dismissed.

ix) The management promoted the petitioner as the headmaster and the respondent no. 3 - Education Officer granted approval on 28-05-2020.

x) The respondent no. 5 approached the respondent no. 2 - Deputy Director of Education and submitted the complaint objecting to such appointment and approval of the petitioner.

xi) On a complaint filed by the respondent no. 5 with the respondent - Deputy Director of Education, he heard Gorakshnath Kurhe and the respondent no. 5 and observing that the dispute amongst the management was pending before the Charity Commissioner and since the dispute regarding inter se seniority of the petitioner and Mr. Pandurang Kurhe was pending before the High Court, the approval granted to the appointment of the petitioner as a Headmaster was improper and he cancelled it by further directing that till the time matter before the Charity Commissioner and the High Court were decided, a senior most teacher of the school be appointed as an Incharge Headmaster, by order dated 19-04-2021. This order was communicated to the petitioner by the respondent no. 3 - Education Officer on 05-05-2021.

xii) Petitioner challenged the order passed by the respondent no. 2 - DDE in writ petition no. 6442 of 2021 arraying the respondent no. 5 as respondent in that petition. This Court disposed of the petition with following observations and directions on 18-11-2021 :-

"9. The Deputy Director of Education, certainly can consider legality of the order of approval issued by the Education Officer, as he is higher authority. The contention of the petitioner that, the Deputy Director of Education did not have jurisdiction to decide the issue in dispute is not accepted. However, the manner in which the Deputy Director of Education has decided is improper. Now the respondent No. 5 also contends that he is appointed as Head Master. All these aspects will have to be considered by the Deputy Director of Education.

10. The Deputy Director of Education can certainly consider whether the

petitioner is having necessary qualification to be appointed as Head Master and other aspects required for granting approval. The parties can agitate all these aspects before the Deputy Director of Education.

11. In the light of the above, the impugned order is quashed and set aside. The Deputy Director of Education, Pune Region Pune shall reconsider the issue afresh. All the parties shall appear before the Deputy Director of Education, Pune Division, Pune on 30.11.2021. The Deputy Director of Education shall consider all the aspects of the matter regarding qualification, the appointments made of the persons as Head Masters and shall take decision afresh with regard to the approval granted to the petitioner as Head Master by the Education Officer after hearing all the parties concerned and consider their stand, the order of approval. The issue of seniority between the petitioner and Mr. Kurhe is irrelevant as on date petitioner claims to have been appointed Mr. Kurhe already stood retired with effect from 31.05.2019. The petitioner claims the said post from 01.06.2019. The Deputy Director of Education shall also consider all the orders passed and produced before it. The same shall be decided afresh, expeditiously and preferably within a period of four (04) months from the date of appearance of the parties. As date of appearance is given before the Deputy Director of Education, the Deputy Director of Education is not required to issue notice to the parties."

xiii) Pursuant to such directions, the respondent no. 2 cancelled the petitioner's appointment and the approval granted by the respondent no. 3 - Education Officer by holding that in spite of several orders, the petitioner and the management had failed to produce documents regarding his educational qualification and concluded that he was not having educational qualification as per Government resolution dated 25-11-1988 and further directed the respondent no. 4 - management to appoint the senior most teacher and forward a proposal for approval to the respondent no. 3 - Education Officer within 15 days, by his communication dated 03-01-2022.

xiv) The petitioner assailed that decision in writ petition no. 1018 of 2022 and finding that he was unable to produce the document because of some sufficient cause, by order dated 19-01-2022 as modified on 21-01-2022, this Court directed the respondent no. 2 to take a decision afresh by extending an opportunity to the petitioner.

xv) By the communication which is impugned in this petition, dated 18-02-2022 the respondent no. 2 once again maintained his earlier decision dated 03-01-2022 cancelling the appointment and the approval.

xvi) In the meanwhile, the petitioner challenged the order of this Court in writ petition no. 6442 of 2021 before the Supreme Court but the Special Leave Petition was dismissed as withdrawn on 03-01-2022.

2. Noticing that the directions of this Court in writ petition no. 6442 of 2021 whereby the respondent no. 2 - DDE was directed to decide the issue was

contrary to the earlier two Division Bench decisions in the matter of Saroj Yashwant Deopujari Vs. Education Officer, writ petition no. 546 of 1989 dated 31-03-1989 and in the case of Ramchandra Narayan Jaykar Vs. Saroj Yashwant Deopujari in writ petition no. 1309 of 1991 dated 19-06-1991 as well as another Division Bench decision in the matter of Umesh Balkrushna Vispute Vs. State of Maharashtra and others; 2000 (4) Mh.L.J. 564, by the order under reference dated 06-04-2022, and pursuant to the directions of the Hon'ble the Chief Justice, following questions have been posed for determination :

(i) Whether the Deputy Director of Education could have recalled the earlier order of approval granted by the Education Officer on the ground that the Teacher, whose approval was already granted, was not the senior most Teacher or not ?

(ii) Whether the issue of seniority, including issue of qualification having bearing on seniority, if raised by the aggrieved Teacher or an employee, could have been decided only by the School Tribunal in the appeal filed by such person impugning the order of supersession or promotion, under Section 9(1) (b) of the MEPS Act read with Rules ?

(iii) Whether the Education Officer or the Deputy Director of Education has power to direct the management to cancel the appointment of an employee if found having been appointed without following the due procedure laid down in Rule 3 by adjudicating upon the dispute about seniority ?

(iv) Whether power of Education Officer or Deputy Director of Education under Rule 3(6) of the Rules is inconsistent with the powers of School Tribunal under Section 9(1) (b) of the MEPS Act or not and if so, whether Section 9(1)(b) of the MEPS Act will prevail ?

3. We have heard the learned advocates of both the sides extensively and we have also perused the decisions of this Court (supra).

4. In order to appreciate the controversy, it would be proper to understand the scheme of the MEPS Act and the MEPS Rules which would enable us to precisely understand and decide the controversy.

5. With a view to regulate the recruitment and conditions of service of employees in certain private schools in the State and with a view to providing such employees security and stability of service to enable them to discharge their duties towards the pupils and their guardians in particular, as well as the institution and the society effectively and efficiently and also with a view to lay down the duties and functions of the employees to ensure that they become accountable to the management and would contribute in improving the standard of education and having felt it necessary to make certain supplemental, incidental and consequential provisions, the MEPS Act was brought on the statute book.

6. The MEPS Act contains the provisions regarding the terms and conditions of

service (section 4), directors powers to hold or order holding of enquiries (section 4A), obligations of the management (section 5), obligations of head of a private school (section 6). Procedure for resignation by employees (section 7), constitution of school tribunals (section 8), right of appeal to tribunal (section 9), general powers and procedure of tribunal (section 10), powers of tribunal to grant appropriate relief or directions (section 11), declaring the decision of the tribunal to be final and binding (section 12), penalty to the management for failure to comply with the tribunal's directions (section 13), exclusion of legal practitioners from appearance before the tribunal (section 14) and transfer of appeals (section 15). Section 16 then enables the State Government to make rules to achieve the purpose of the Act providing for minimum qualification, pay scales and allowances, post retiral benefits, leave, superannuation, promotion, the code of conduct and disciplinary matters, the manner of conducting enquiries.

7. Pursuant to such rule making power elaborate rules have been framed inter alia in respect of conditions of service in the form of MEPS Rules which inter alia include qualification and appointment of head of school (section 3) and qualification and appointment of other staff, their inter se seniority (rule 12).

8. Relevant provisions of the MEPS Act are as follows:-

"Section 4A. Director's power to hold or order holding of inquiries. -

(1) Notwithstanding anything contained in sub-section (6) of section 4 or any other provisions of this Act or the rules made thereunder, where in any case of alleged misconduct or misbehaviour of a serious nature or moral turpitude of an employee-

(a) an inquiry is held by an Inquiry Committee in to such allegations and the Director is of the opinion that the Inquiry Committee has unreasonably exonerated the employee, he may call for and examine the record and proceeding of such inquiry for the purpose of satisfying himself as to the correctness of the decision on the basis of its findings, and may either annul, revise, modify or confirm the said decision or may direct the Inquiry Committee to make further inquiry for taking such additional evidence as they may think necessary or he may himself take or authorize any other officer not below the rank of the Education Officer to take such additional evidence; and while making an order under this clause, if the Director is satisfied that the charges of serious misconduct, misbehaviour, or as the case may be, moral turpitude have been substantially proved, he shall direct the Management to impose on such employee any of the penalties as specified in sub-section (4):

Provided that the Director shall not record any order under this sub-section without giving the party affected thereby and the Management an opportunity of being heard;

(b) the Management has either neglected or refused to hold an inquiry against such employee in accordance with the provisions of this Act and the rules made

in that behalf, the Director shall direct the Management to initiate action within thirty days from the receipt of such direction for holding inquiry into the allegation against such employee and to complete the same in accordance with such provisions and rules.

(2) Where there is a failure on the part of the Management to initiate action as directed under clause (b) of sub-section (1) to hold an inquiry and to complete the same within the period prescribed under the rules the Director may himself hold, or direct any officer not below the rank of Education Officer to hold, such inquiry.

(3) While holding an inquiry the Director or the officer authorized by him shall follow the same procedure as is followed by the Inquiry Committee under the rules made under this Act as if the Director or the officer so authorized were an Inquiry Committee for the purpose of holding such inquiry.

(4) On holding such inquiry by the Director himself or on receipt of the report of the inquiry officer if the Director is satisfied that the charges of serious misconduct, misbehaviour or as the case may be, moral turpitude have been substantially proved, he shall, by an order in writing, direct the Management that a penalty of dismissal, removal from service, termination of service, or as the case may be, reduction in rank as he may, in the circumstances of the case deem fit, be imposed on the employee concerned:

Provided that, no such order shall be passed by the Director unless the employee and the Management concerned are given a reasonable opportunity of showing cause against the proposed order.

(5) The order of the Director under clause (a) of sub-section

(1) or sub-section (4) shall be binding on both the Management and the employee and the same shall be complied with by the Management within such period as may be specified by the Director.

Section 5. Certain obligations of Management of private schools. -

(1) The Management shall, as soon as possible fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy;

Provided that unless such vacancy is to be filled in by promotion, the Management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, the Education Officer, Zilla Parishad or, as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the event of such person being available, the Management shall appoint that person in such vacancy.

(2) Every person appointed to fill a permanent vacancy except Assistant Teacher (Probationary) shall be on probation for a period of two years. Subject to the

provisions of sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed.

Provided that, every person appointed as Assistant Teacher (Probationary) shall be on probation for a period of three years.

(2A) Subject to the provisions of sub -sections (3) and (4), Assistant Teacher (Probationary) shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.

(3) If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice or salary or honorarium of one month in lieu of notice.

(4) If the services of any probationer are terminated under sub-section (3) and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purposes of sub-section (2).

(4A) Nothing in sub-section (2), (3) or (4) shall apply to a person appointed to fill a permanent vacancy by promotion or by absorption as provided under the proviso to sub-section (1).

(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the period of appointment of such person.

Section 6. Obligations of Head of a private school. - (1) If -

(a) the Head of a private school or any person duly authorized by him in that behalf,-

(i) makes unauthorized alterations in the date of birth of any student recorded in the General Register of the school or gives a school leaving certificate with the date of birth different from that recorded in the General Register; or

(ii) admits any student from an unrecognized educational institution without a written order of Deputy Director; or

(iii) gives accelerated promotion to, or detains any student, either of his own accord or at the instance of the Management, in contravention of the rules made in that behalf; or

(b) the employee of a private school is dismissed or removed or his services are otherwise terminated on account of misconduct, gross negligence of duties, moral turpitude, misappropriation of school money or material, negligence or

misconduct or both in connection with the examinations or creation of communal disharmony; then the Director may, after making such enquiries as he thinks fit, by an order in writing debar the Head or such authorized person or such employee from holding that post for a period of five years from the date of the order. If after the said period of five years, the Head or such authorized person or such employee is found to have committed any of the acts aforesaid again, then he may, after giving him a reasonable opportunity of being heard, be permanently debarred by the Director from holding such post in any private school.

(2) After making any order under sub-section (1), the Director shall cause the name of such Head or authorized person or employee to be entered in a Black List Register maintained for the purpose, and communicate the name of the Head or such person or employee to all Managements of private schools in the State.

Section 9. Right of appeal to Tribunal to employees of private schools. -

(1) Notwithstanding anything contained in any law or contract for the time being in force, any employee in a private school-

(a) who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank, by the order passed by the management; or

(b) who is superseded by the Management while making an appointment to any post by promotion;

and who is aggrieved, shall have a right of appeal and may appeal against any such order or supersession to the Tribunal constituted under section 8:

Provided that, no such appeal shall lie to the Tribunal in any case where the matter has already been decided by a Court of competent jurisdiction or is pending before such Court, on the appointed date or where the order of dismissal, removal, otherwise termination of service or reduction in rank was passed by the Management at any time before the 1st July 1976.

(2) Such appeal shall be made by the employee to the Tribunal, within thirty days from the date of receipt by him of the order of dismissal, removal, otherwise termination of service or reduction in rank, as the case may be:

Provided that, where such order was made before the appointed date, such appeal may be made within sixty days from the said date.

(3) Notwithstanding anything contained in sub-section (2), the Tribunal may, entertain an appeal made to it after the expiry of the said period of thirty or sixty days, as the case may be, if it is satisfied that the appellant has sufficient cause for not preferring the appeal within that period.

(4) Every appeal shall be accompanied by a fee of five hundred rupees, which shall not be refunded and shall be credited to the Consolidated Fund of the State.

Section 11. Powers of Tribunal to give appropriate reliefs and directions.-

(1) On receipt of an appeal, where the Tribunal, after giving reasonable opportunity to both parties of being heard, is satisfied that the appeal does not pertain to any of the matters specified in section 9 or is not maintainable by it, or there is no sufficient ground for interfering with the order of the Management it may dismiss the appeal.

(2) Where the Tribunal after, giving reasonable opportunity to both parties of being heard, decides in any appeal that the order of dismissal, removal, otherwise termination of service or reduction in rank was in contravention of any law (including any rules made under this Act), contract or conditions of service for the time being in force or was otherwise illegal or improper, the Tribunal may set aside the order of the Management, partially or wholly, and direct the Management,-

(a) to reinstate the employee on the same post or on a lower post as it may specify;

(b) to restore the employee to the rank which he held before reduction or to any lower rank as it may specify;

(c) to give arrears of emoluments to the employee for such period as it may specify;

(d) to award such lesser punishment as it may specify

in lieu of dismissal, removal, otherwise termination of service or reduction in rank, as the case may be;

(e) where it is decided not to reinstate the employee or in any other appropriate case, to give to the employee twelve months' salary (pay and allowances, if any) if he has been in the service of the school for ten years or more and six months salary (pay and allowances, if any) if he has been in service of the school for less than ten years, by way of compensation, regard being had to loss of employment and possibility of getting or not getting suitable employment thereafter, as it may specify; or

(f) to give such other relief to the employee and to observe such other condition as it may specify, having regard to the circumstances of the case.

(3) It shall be lawful for the Tribunal to recommend to the State Government that any dues directed by it to be paid to the employee, or in case of an order to reinstate the employee any employments to be paid to the employee till he is reinstated, may be deducted from the grant due and payable or that may become due and payable in future, to the Management and be paid to the employee direct.

(4) Any direction issued by the Tribunal under sub-section (2) shall be communicated to both parties in writing and shall be complied by the

Management within the period specified in the direction, which shall not be less than thirty days from the date of its receipt by the Management.”

Relevant rules of the MEPS Rules are as under:-

“Rule 3. Qualifications and appointment of Head -

(1) A person to be appointed as the Head -

(a) of a school having Standards I to VIII as per the norms and the Standards provided in the Schedule under the Heading ‘NORMS AND STANDARDS FOR A SCHOOL’ appended to the Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009):

Provided that, the senior most teacher who has not put less than five years’ of service, shall be appointed as the head of the primary school.

(b) of a secondary school including night school or a Junior College of Education shall be a graduate possessing Bachelor's degree in teaching or education of a statutory University or any other qualification recognized by Government as equivalent thereto and possessing not less than five years' total full-time teaching experience after graduation in a secondary school or a Junior College of Education out of which at least two years' experience shall be after acquiring Bachelor's degree in teaching or education:

Provided that, in the case of a person to be appointed as the Head of a night secondary school -

(i) he shall not be the one who is holding the post of the Head or Assistant Head of a day school, and

(ii) the experience laid down in clause (b) of sub-rule (1) may be as a part-time teacher.

(2) In the case of appointment to the post of Head of a secondary school including night school or a Junior College of Education if there is no person with the teaching experience mentioned in clause (b) of sub-rule (1) available on the staff of the school or if the qualified persons, though available and eligible, relinquish their claims for the post of Head and if a Management desires to appoint a person, from the teaching staff of the school who does not possess the requisite teaching experience mentioned in clause (b) of sub-rule (1), it shall apply to the Deputy Director for relaxing the requirement. The Deputy Director may, after recording reasons in writing, grant or refuse such relaxation. In such cases, the appointment shall not be made without obtaining the previous approval of the Deputy Director.

Note: In the case of a graduate teacher already in service in a secondary school or Junior College of Education for more than fifteen years on the 1st June 1963, the Deputy Director shall relax the requisite qualifications for appointment of such teacher as a Head.

(3) The Management of a school including a night school shall fill up the post of the Head by appointing the senior most member of the teaching staff (in accordance with the guidelines laid down in Schedule "F" from amongst those employed in a school (if it is the only school run by the Management) or schools if there are more than one school (excluding night school) conducted by it) who fulfills the conditions laid down in sub-rule (1) and who has a satisfactory record of service.

Explanation - For the purpose of this rule, the Management shall communicate any occurrence of vacancy of the Head to the senior-most qualified teacher having satisfactory record of service and ask him to submit his willingness for appointment to the post within a period of fifteen days from the date of receipt of the communication. The claim of the senior-most qualified teacher having satisfactory record of service, for appointment to the post of Head, may be disregarded only if he, of his own free will, gives a statement in writing to the Education Officer that he has voluntarily relinquished his claim to the post. This shall not debar him from being considered for subsequent vacancies as and when they occur. Such a teacher shall record his statement in his own handwriting before the Education Officer within a period of fifteen days from the date of receipt of the communication as aforesaid and the Education Officer shall endorse it as having been recorded in his presence. A statement once duly made by such teacher before the Education Officer shall not be allowed to be withdrawn. In the event of the teacher failing to submit his willingness for appointment to the post or to give a statement to the Education Officer within a period of fifteen days, it shall be assumed that he has relinquished his claim on the said post:

Provided that, where an unforeseen vacancy of Head occurs owing to reasons like resignation without giving due notice, death, termination of services, reduction in rank or otherwise, the senior-most teacher desirous of relinquishing his claim for appointment to the post shall, within seven days from the date of receipt of a communication by him of occurrence of such vacancy from the Management, communicate to the Management in writing about the same so as to enable the Management to finalize the appointment. Such a teacher shall thereafter as soon as possible and in any case within a period of fifteen days from the date of receipt of the communication as aforesaid record his final statement before the Education Officer to enable him to approve the appointment, or as the case may be, to disapprove the appointment if such teacher states in his statement before the Education Officer that the communication sent by him in writing to the Management was obtained from him by the Management under duress. In the event of the teacher failing to record a final statement within a period of fifteen days as aforesaid it shall be assumed that he has relinquished his claim on the said post;

(4) In the case of a girls' secondary school or Junior College of Education for Women, the senior most lady teacher fulfilling the conditions laid down in clause

(b) of sub-rule (1) and having satisfactory record of service, shall be appointed as the Head of that school irrespective of her seniority vis-a-vis the male teachers.

(5) (a) If a suitable teacher possessing qualifications laid down in the foregoing provisions of this rule is not available to fill in the post of a Head of a school, the Management shall, with the prior permission of the Education Officer in case of primary schools, or of the Deputy Director in the case of other schools, advertise the post and select and appoint a person possessing the requisite qualifications and experience.

(b) The application for permission to advertise the post shall be made at least two months in advance. The period of two months may be relaxed by the Education Officer or the Deputy Director, as the case may be, in the case of new schools or in emergency cases wherein the vacancy could not have been anticipated. The advertisement shall be given after the permission of the Deputy Director or the Education Officer is received. Management shall ensure that the advertisement appears in at least two daily newspapers, one of which shall be a Marathi news paper, having wide circulation in the region wherein the primary schools or secondary schools or Junior College of Education is located.

(6) The Education Officer or the Deputy Director shall direct the management to cancel the appointments made without following the procedure laid down in this rule.

Explanation. - For the purpose of this rule the record of service shall be deemed to be satisfactory if there is nothing adverse in the annual confidential reports of the teacher concerned during the previous five years. Adverse remarks not duly communicated in writing to the teacher concerned, shall be disregarded for this purpose.

Rule 12. 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.

(2) Objections, if any, to the seniority list or the changes therein shall be duly taken into consideration by the Management.

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

9. The rules inter alia provide for qualification and appointment of the head of

the school as well as the other staff members. So far as the qualification and appointments of head is concerned, Rule 3 provides that the senior most teacher who has put in not less than 5 years of service shall be appointed as the head of the primary school, whereas in case of a secondary school, a person must be possessing bachelors degree in teaching or any other qualification recognized by the government equivalent thereto and possessing not less than 5 years total full time teaching experience after graduation, in a secondary school or junior college out of which at least two years experience shall be after acquiring bachelors degree.

10. Clause 3 of rule 3 then requires the management to fill up the post of the head by making an appointment of the senior most member of the teaching staff in accordance with the guidelines laid down in schedule F from amongst those employees in the school if only a school is being run by the management or schools if there are more than one school.

Explanation to this clause mandates management to communicate occurrence of the vacancy of the head to the senior most qualified teacher having satisfactory record of service and calling his willingness for appointment to the post of head within 15 days. It further lays down that the claim of such senior most qualified teacher having satisfactory record can be discarded only if he expresses his desire by giving statement in writing to the Education Officer but at the same time protects him from again being considered for the subsequent vacancies.

11. In view of such rules providing for qualification and appointment of head and entitlement of the senior most teacher for being appointed to the post, the issue regarding inter se seniority becomes prominent, more so since apart from seniority, this provision requires the senior most teacher to have a satisfactory record of service. There could certainly be instances as is comprehended by the legislature since satisfactory performance is a prerequisite in addition to the seniority.

12. In order to address this dispute regarding seniority list, rule 12 requires every management to prepare and maintain seniority list of the teaching staff as well as non-teaching staff in accordance with the guidelines laid down in schedule 'F' and requires it to be circulated amongst the members of the staff, making it imperative to obtain signature of the staff for having received a copy of the seniority list. It also requires any subsequent change in the seniority list effected from time to time to be brought to the notice of the staff members in the same manner. Clause 2 of rule 12 expects the staff members to raise a dispute as to the seniority list or the change effected therein to raise an objection with the management. Clause 3 then lays down that any dispute in the matter of inter se seniority shall be referred to the Education Officer for his decision.

In view of such scheme of the MEPS Act and the Rules, it is to be considered as to whether a teacher aggrieved by supersession in appointment as a head has to approach the Education Officer under rule 12(3) or should prefer an appeal to

the Tribunal under section 9.

13. Apart from the earlier decisions of the Division Benches in the matter of Saroj Yashwant Devpujari (supra) and Ramchandra Narayan Jamkar, another Division Bench in the matter of Umesh Balkrushna Vispute (supra) had the occasion to address the issue. It had elaborately dealt with section 9 and rule 12, followed the earlier two Division Bench decisions and concluded that the issue was no more res integra in following words:-

"19. We may at once state that the question involved in this petition was not res integra in view of two unreported judgments of Nagpur Bench in the matter of Sou. Saroj Yashwant Deopujari v. Education Officer, in Writ Petition No. 546 of 1989 decided on 31st March, 1989 (Deshpande and Ghodeswar, JJ.) and Ramchandra Narayan Jamkar v. Sou. Saroj Yashwant Deopujari, in Writ Petition No. 1309 of 1991 decided on 19th June, 1991 (V.A. Mohta and M.B. Ghodeswar, JJ.) which were not brought to the notice of the learned Single Judge of this Court when the judgment in Burondi K. Lodghar v. Vilasrao M. Desai (supra) was passed. The Division Bench of this Court in Sou. Saroj Yashwant Deopujari v. Education Officer (supra) has said:

"..... It is clear that this order was passed before the present writ petition was filed and since the main contention in this petition is with regard to the petitioner's eligibility to the appointment on the basis of her seniority, the matter would clearly fall within section 9(1)(b) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 which authorizes the Tribunal to consider the grievance of an employee who is superseded by the Management while making an appointment to any post by promotion.

..... It is not necessary to go into that question at this stage because here the appointment of the respondent No. 4 has already been made as Assistant Head Master and if the petitioner has a grievance that she has been superseded because she was senior to the respondent No. 4, the question of seniority will have to be decided by the Tribunal for reaching a finding as to whether the petitioner has been superseded or not by the appointment of the respondent No.

4. We make it clear that all questions which would be required to be determined for considering whether the petitioner has been superseded by the appointment of the respondent No. 4 would fall for consideration before the Tribunal for determining whether the respondent No. 4 has superseded the petitioner or not and the Tribunal would have the jurisdiction to decide these and incidental questions which might arise." (emphasis supplied)

The perusal of the aforesaid findings of the Division Bench clearly lay down that Clause (b) of section 9(1) of the Act empowers the Tribunal to entertain the appeal against the order of supersession while making appointment by promotion and while adjudicating the validity of the order of supersession passed by the Management, the validity of the seniority list of objection to it can also be considered as an incidental question.

20. The second judgment in the matter of Ramchandra Narayan Jamkar v. Sau. Saroj Yeshwant Deopujari (supra) also clearly lays down that the determination of the dispute under Rule 12 of the Rules is not made final. Section 9(1) of the Act has overriding effect. The Division Bench while dealing with this aspect of the matter has observed as under:

"It is next contended that the order of the Education Officer in the matter of finalization of seniority list in terms of Rule 12 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (the Rules) had become final and conclusive and was binding on the School Tribunal. We do not see any substance in this point either. Section 9 of the Act is an overriding provision as is clear from the non-obstante clause with which it begins. It confers jurisdiction to adjudicate upon validity of order of supersession by the Management while making appointment to any post of promotion. For the final decision of that point, adjudication on the validity of seniority list is sometime inevitable as it is an incidental question. The proviso to section 9 no doubt makes certain exceptions but those relate to the question which are either already decided by a "Court" of competent jurisdiction or are pending before it. By no stretch of imagination the Education Officer can be said to be a Court a term not defined under the Act. It is also pertinent to notice that the determination of the dispute under Rule 12 of the Rules is not made final." (emphasis supplied)

21. We, after having heard the parties at length and after having considered the aforesaid judgments, are of the considered view that finalization of the seniority list in terms of Rule 12 of the Rules is not final and conclusive and not binding on the tribunal and section 9(1) of the Act has overriding effect as it opens with non-obstante clause and the dispute relating to seniority list can also be considered by the Tribunal as an incidental question while deciding the controversy in regards to the supersession. The dispute relating to supersession in the matter of promotion squarely lies within the jurisdiction of the Tribunal. The view taken by the learned Single Judge of this Court in Burondi K. Lodghar v. Vilasrao M. Desai (supra) cannot be said to be a good law. We, therefore, have no difficulty in upholding the jurisdiction of the Tribunal to go into the question of seniority of the teachers. The Tribunal can also go into the question of supersession by the Management while making promotion."

14. The above observations, in our considered view, put at rest any controversy and the points referred to us can be aptly answered with above observations.

15. Pertinently, none of the afore-mentioned three decisions of the Division Benches which were earlier in point of time were cited before Division Bench of this Court which decided writ petition no. 6442 of 2021.

16. Pertinently, in the matter of Bhagwant Sheshrao Borale Vs. Education Officer (Secondary), Zilla Parishad, Buldhana; 2009 (6) Mh.L.J. 478, a Single Judge of this Court had an occasion and decided the matter by referring to the observations in the matter of Umesh Balkrushna Vispute (supra) and had made

following observations in the concluding paragraph:-

" ...

Thus it is very clear that the question of seniority, once promotion is granted and appointment is made is to be decided by the Tribunal. Education Officer will have no jurisdiction to fix the seniority and thus demote a person already promoted. Here in the instant case Education Officer could not have entertained a complaint about the seniority and decide to re-fix the seniority once petitioner was already appointed on a promotional post. Scheme of the Act itself is such that a person 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. Education Officer as already observed, can enter into arena where only seniority list is prepared and if there are objections and disputes and no promotion is made on the basis of it. Shri B. S. Deshpande learned counsel for the respondent had relied on a decision reported in *Burundi Karajgaon Lodghar Panchkroshi Shikshan Sanstha and Others Vs. Vilasrao Maruti Desai and Others*; 1999(2) Mh.L.J. 779. This decision is no more good law since the said decision has been overruled by decision in *Umesh's case* cited supra. I do not propose to enter into the question as to who is senior amongst petitioner and the respondents. That question can be determined by the School Tribunal if at all the respondents approach the School Tribunal. In this petition the petitioner has only challenged the authority of the Education Officer to decide the seniority after he was promoted and I find that decision of the Education Officer is patently illegal. In the circumstances the petition is allowed. The order passed by the Education Officer on 29.12.2008 is quashed and set aside. No order as to costs."

Even one of the members of the Division Bench which has passed the order which forms the basis of this reference had the occasion to consider this aspect elaborately in the matter of *Vidyalata Nilkanth Patil Vs. Chairman / Secretary, Shikshan Prasarak Samiti, Badapokhran and others*; 2016 (4) Mh.L.J. 106.

17. Rule 12 requires an objection to the seniority list to be raised with the management first and it is only thereafter that any dispute can be raised with the Education Officer. Conspicuously, the Deputy Director of Education who could be administratively senior to the Education Officer has not been provided with any power or jurisdiction to sit over and examine legality or otherwise of the decisions taken by the Education Officer under rule 12 more so in the matters which pursuant to such a dispute regarding inter se seniority would result in supersession of an employee who can approach the tribunal under section 9 of the Act.

18. There could be two contingencies. Firstly, when the dispute regarding inter se seniority results in somebody being superseded in appointment to the post of Headmaster, where as per rule 3, a senior most teacher has to be appointed as the Headmaster. Secondly, there could be instances where there may not be a supersession per se since pursuant to such determination by the Education

officer under rule 12, no appointment or promotion is given based on such seniority. It is to be noted that the jurisdiction of the Tribunal under section 9 is limited to providing a remedy of appeal to an employee who is dismissed, removed, terminated or who is reduced in rank or who is superseded by the management while making appointment to a promotional post. Therefore, if the dispute decided by the Education Officer under rule 12 ultimately results in supersession of an employee, the only remedy to him would be to prefer an appeal before the Tribunal under section 9 of the Act and such inference is easily deducible.

19. However, there could be the circumstances where no such provision of appeal which is a statutory right is available to an employee who is aggrieved by the decision of the Education Officer while deciding the dispute regarding the seniority list as contemplated under rule 12.

20. It is only in such cases where the decision of the Education Officer results in either granting or confirming the approval or appointment to the promotion post that an aggrieved person will have a right of appeal to the School Tribunal but when it does not result in supersession, an employee aggrieved by the decision of the Education Officer would be remediless.

21. In our considered view, therefore, if and when an employee cannot approach the School Tribunal in respect of the decisions of the Education Officer under section 12, we cannot in an appropriate case, deprive such a person from approaching the DDE if he is administratively superior to the Education Officer, pointing out the errors committed by the Education Officer while deciding the dispute to the seniority list. It is only if such a pragmatic view is taken that an employee who may not have been superseded but is aggrieved by the decision of the Education Officer in respect of inter se seniority of the staff members that he can seek redressal by approaching the superior officer to rectify it. It would be unfathomable and grossly inconvenient to hold that in the absence of right to appeal he could neither approach the School Tribunal nor could he put up a grievance before an officer administratively superior in rank to the Education Officer.

22. It is necessary to note that rule 3 only prescribes qualifications and appointment of head but the appointment has to be made by the management. Its clause (6) enables the Education Officer or a Deputy Director of Education to cancel the appointments made without following the procedure laid down in this rule. It is being posed as to if this power to cancel the appointments conferred by the Education Officer or the DDE is inconsistent with the powers of the School Tribunal to sit in appeal over the alleged supersession. It would appear that there is some conflict in these two provisions, inasmuch as if the Education Officer or the DDE can cancel the appointments made without following the procedure why an employee may have to prefer an appeal under section 9 to the School Tribunal. In our considered view, both these provisions need to be harmoniously construed.

There could be a contingency that though the appointment of a head is not in accordance with the prescribed provisions but nobody raises any issue or where inter se seniority is fixed by the management but nobody raises any dispute that the Education Officer under rule 12, a person is appointed as head by way of promotion and the Education Officer or the DDE examine the legality of such appointment not only by taking into consideration the dispute regarding the seniority but even in respect of educational qualification, satisfactory work and the experience required.

There could be instances where a person is having a questionable record or is having less than five years of experience but there is no inter se seniority dispute, is appointed as Headmaster. Does it mean that the decision of the management cannot be questioned. To our mind, with a view to provide / meet such a contingency, the officers of the government have been empowered to cancel the appointments made without following the procedure irrespective of the fact somebody raises a dispute or otherwise.

23. In such a circumstance, it could easily be discerned that these two provisions would operate in different spheres.

24. There could be one more instance where a person is not superseded and, therefore, cannot prefer an appeal under section 9 of the Act but intends to bring to the notice of the Education Officer or the DDE the mismanagement in appointment where the candidate is either not senior most teacher or is not educationally qualified enough or has not sufficient experience as is required by rule 3 even such a person, in our opinion, could approach the Education Officer or the DDE who can independently examine this aspect under clause (6).

25. It is trite that as far as possible the provisions have to be interpreted harmoniously. This principle, in our considered view, enables us to hold that there would be no conflict in putting clause 6 of rule 3 and section 3(1)(b) to optimum use if they are harmoniously considered. They can easily operate to meet two distinct contingencies. If an employee intends to question his supersession in the promotion, he cannot invoke clause 6 of rule 3 and only remedy available to him is to prefer an appeal to the School Tribunal under section 9. But a person who is not superseded but intends to raise a dispute regarding legality of appointment of a head, he can certainly approach the Education Officer or the DDE under clause (6) of rule 3.

26. Hence we answer the points of reference as under :

Point no. (i) Whether the Deputy Director of Education could have recalled the earlier order of approval granted by the Education Officer on the ground that the Teacher, whose approval was already granted, was not the senior most Teacher or not ?

Answer : Since the respondent no. 5 was aggrieved by the appointment of the petitioner as Headmaster, the only remedy available to him was to prefer an

appeal under section 9(1)(b) of the MEPS Act and the DDE could not have recalled the earlier order of approval granted by the Education Officer to the petitioner's appointment.

Point no. (ii) Whether the issue of seniority, including issue of qualification having bearing on seniority, if raised by the aggrieved Teacher or an employee, could have been decided only by the School Tribunal in the appeal filed by such person impugning the order of supersession or promotion, under Section 9(1) (b) of the MEPS Act read with Rules ?

Answer : Yes.

Point no. (iii) Whether the Education Officer or the Deputy Director of Education has power to direct the management to cancel the appointment of an employee if found having been appointed without following the due procedure laid down in Rule 3 by adjudicating upon the dispute about seniority ?

Answer : Yes.

27. Point no. (iv) Whether power of Education Officer or Deputy Director of Education under Rule 3(6) of the Rules is inconsistent with the powers of School Tribunal under Section 9(1) (b) of the MEPS Act or not and if so, whether Section 9(1)(b) of the MEPS Act will prevail ?

Answer : There is no inconsistency in rule 3(6) of the Rules and section 9(1)(b) of the MEPS Act. The powers under rule 3(6) of the Rules can be exercised by the Education Officer or the DDE independently but not at the instance of an employee who can prefer an appeal under section 9(1)(b) of the MEPS Act.