

(2024) 01 BOM CK 0115
In the Bombay High Court
Case No : Writ Petition No. 3153 Of 2011

S. K. Azra Praveen

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 08-01-2024

Acts Referred:

Bombay High Court Appellate Side Rules, 1960 — Rule 7, 9, 9(A), 9(B), 9(C)
Code Of Civil Procedure, 1908 — Section 98
Code Of Criminal Procedure, 1973 — Section 392

Citation : (2024) 01 BOM CK 0115

Hon'ble Judges : Revati Mohite Dere, J; Manish Pitale, J; Sharmila U. Deshmukh, J

Bench : Full Bench

Advocate : S. B. Talekar, Madhavi Ayyappan, P. P. Kakade, B. V. Samant

Final Decision : Dismissed

Judgement

Sharmila U. Deshmukh, J

1. Reference was made to the Larger Bench for consideration of following issues :

"i] Whether the petition is maintainable.

ii] Whether the order dated 31.12.2005 for cancellation of admissions to postal D.Ed. Course and based on the enquiry report submitted in May 2005, despite the fact that most of the candidates had completed their postal D.Ed. Course prior to the submission of the report or prior to the order of cancellation of admission, is sustainable in law.

iii] Whether the order of termination dated 15.2.2011, is sustainable."

2. We have thought it fit to examine whether the Reference was warranted in view of the objection raised by Mr. Talekar, learned counsel appearing for the petitioner. Mr. Talekar submits that the Reference is made under Rule 7 of Chapter-I of the Bombay High Court Appellate Side Rules, 1960 [for short "the

Rules of 1960"] which is not applicable as the said Rule enables the Reference to be made where there is difference of opinion between Judges of the Division Bench and Reference is required to be made to the third Judge. Pointing out to the newly inserted Rule 9 of Chapter-I of the Rules of 1960, he would submit that under the said Rule, Reference to the larger bench would arise only when one Division Bench differs from the decision of any other Division Bench upon a point of law. He would urge that by the order of Reference, the Division Bench has not recorded any disagreement with the judgment of other Division Bench and, there being no disagreement, neither Rule-7 of Chapter-I nor Rule-9 of Chapter-I of the Rules of 1960 would apply.

3. Before dealing with the submission of Mr. Talekar, it would be necessary to advert to the facts of the case giving rise to this Reference. Writ Petition No. 3153 of 2011 is preferred by the petitioner challenging the order dated 15th December 2011 cancelling the petitioner's initial appointment as Shikshan-Sevak with effect from 24th November 2005 resulting in termination of her services as an assistant teacher in primary school run by the Municipal Corporation of Malegaon and the consequent relieving order dated 15th February 2011 passed by the headmistress. Prior to the filing of the present Petition, the Petitioner was one of the petitioners in Writ Petition No.689 of 2006 filed before the Aurangabad Bench of this Court seeking quashing of the order dated 31st December 2005 cancelling the admission of petitioners to the Postal D.Ed. Course. The Petition was filed by 22 petitioners, of which the petitioner herein claims to be petitioner no.18, although there appears to be some discrepancy as far as the name of the petitioner is concerned.

4. Vide order dated 22nd April 2008 passed in group of petitions, i.e. Writ Petition Nos. 6154 of 2007, 3773 of 2007, 3772 of 2007, 3770 of 2007, 3771 of 2007, 5105 of 2007, 5108 of 2007, 5110 of 2007, 5111 of 2007, 6155 of 2007, 6156 of 2007 and 6153 of 2007, which also sought to challenge the cancellation of the admission to Postal D.Ed Course of the Petitioners therein, came to be dismissed by the learned Division Bench. (Coram: J.N.Patel and S.B. Deshmukh JJ). It was held by the learned Division Bench in paragraph 2 of the said order that the reason that the petitioners had initially filed a petition in the year 2006, which was later withdrawn in the year 2007, with liberty to file a fresh petition as a ground for condonation of delay and laches on the part of the petitioners is not a good and sufficient reason. The learned Division Bench held in paragraph 3 that even if the petitions are taken up for consideration, it may not sub-serve the purpose as no relief can be granted in favour of the petitioners due to lapse of time as Postal D.Ed. Course of the academic session, in which the petitioners seek admission is concluded. The Petitions came to be dismissed with liberty to the petitioners to seek admission in Postal D.Ed. Course / D.Ed. Course, if they are otherwise eligible and entitled to in accordance with the rules which govern admissions to such courses.

5. As far as Writ Petition No.689 of 2006, which included the present petitioner,

and Writ Petition Nos.571 of 2006 and 688 of 2006 are concerned, vide order dated 11th April 2007, learned Division Bench (Coram: Naresh Patil and R.M. Borde, JJ) held that considering the requirement to screen individual cases in relation to the record, the petitioners to file petitions at least district-wise making the respective managements as party respondents. We are informed that no independent Petitions were preferred as directed by the order of 11th April, 2007.

6. Subsequently, Review Applications were filed in Writ Petition Nos.6154 of 2007, 3771 of 2007, 3772 of 2007, 3770 of 2007, 3773 of 2007, 5105 of 2007, 5108 of 2007, 5110 of 2007, 5111 of 2007, 6155 of 2007, 6156 of 2007 and 6153 of 2007 seeking review of the order dated 22nd April, 2008. The Review Applications came to be listed for hearing along with Writ Petition Nos.2528 of 2008, 571 of 2006, 688 of 2006 and 689 of 2006. The learned Division Bench (Coram: J.N. Patel and S.B. Deshmukh, JJ) held that the observations in paragraph 3 of the order under review is error apparent on record as the Petitioners had already completed Postal D.Ed. Course as per earlier scheme. The learned Division Bench held that enquiry was duly conducted in the matter of the petitioner's initial appointment as primary teacher (untrained) which was found to be improper on various counts because of which they were found to be ineligible for being admitted to the Postal D.Ed. Course. The learned Division Bench listed the nature of deficiencies and held that in none of the petitions there is challenge to the impugned order whereas the petitions have been filed in a group of more than 10 petitions by agitating general grounds. The learned Division Bench held that if the initial recruitment was void ab initio for non compliance of the reasons given in the impugned order by the individual candidate and institution such candidates could not have availed the benefit of scheme and it is for the institution to continue them and pay their salary, if they so desired. The learned Division Bench held that as the Court had dismissed group of petitions which raised identical issue, all the petitions stood dismissed for the same reason. The Special Leave Petitions preferred challenging the said order came to be dismissed in limine by the Apex Court.

7. Subsequently, another group of petitions being Writ Petition No.610 of 2006, 258 of 2006, 592 of 2006, 593 of 2006 with connected writ petitions, totaling 77 in number, challenged the en-block cancellation of the Petitioners' admission to the Postal D.Ed course vide order dated 31st December 2005 issued by the Maharashtra State Educational Research and Training Council, Pune. The learned Division Bench (Coram: B.R. Gavai and R.M. Borde, JJ) after hearing the Petitions on merits vide judgment dated 7th December 2010 allowed the petitions quashing the impugned order passed by the respondent authority cancelling the admission of petitioners holding that the respondents have utterly failed to substantiate their allegations regarding fraud.

8. The Learned Division Bench whilst hearing the petitions considered the earlier orders dated 22nd April, 2008 and 4th June, 2008 passed by the Co-ordinate Bench and held that the order of 22nd April 2008 dismissed the petitions in

limine on the ground of laches and not on merits. As regards the order dated 4th June 2008, the learned Division Bench observed that the Co-ordinate bench was concerned with the appointments of petitioners therein whereas the Petitions before the learned Division Bench concerned the issue of cancellation of admissions granted to the Petitioners. The Learned Division Bench held that in any event, the Co-ordinate Bench had dismissed the petitions in limine at the admission stage without hearing the parties on merits of the matter and, as such, the order cannot constitute a binding precedent.

9. Subsequently, third group of petitions challenging the order dated 31st December, 2005 cancelling the admissions of the Petitioners to Postal D.Ed course came up for hearing before another Division Bench (Coram: Nishita Mhatre and S.S. Shinde, JJ) being Writ Petition Nos. 793 of 2006, 794 of 2006, 807 of 2006 and 813 of 2006 which came to be allowed by common judgment dated 18th March 2011 in light of the common judgment dated 7th December 2010.

10. The present Petition No. 3153 of 2011, giving rise to the Reference, was filed questioning the order dated 15th December, 2011 cancelling her initial appointment as Shikshan Sevak dated 24th November, 2005. The Learned Division Bench (Coram: B.H. Marlapalle and Smt. Nishita Mhatre JJ) before whom the petition was listed for hearing, considered the order and judgment passed by the Co-ordinate Division Benches dated 22nd April 2008, 4th June 2008 and 7th December 2010. The learned Division Bench observed that the judgment dated 7th December 2010 has taken a different view and has distinguished the view taken in the earlier common judgments dated 22nd April, 2008 and 4th June, 2008. The learned Division Bench also observed that the judgment of 18th March 2011 was rendered by the Division Bench presided over by one of the Judges of the Bench (Smt. Nishita Mhatre, J.). The learned Division Bench held that to resolve the controversy between the different views taken by co-ordinate benches, a case is made out to refer the petition to larger bench under Rule-7 of Chapter-I of the Rules of 1960.

11. The view taken by the learned Division Bench is that orders of the Division Bench dated 22nd April 2008 and 4th June 2008 on one hand conflicts with the view taken by the co-ordinate Division Bench in its judgment dated 7th December 2010 on the other hand and as such a Reference is made to the larger bench.

12. The Reference has been made under Rule-7 of Chapter-I of the Rules of 1960, which reads thus:

"The point of difference of opinion between Judges of a Division Bench shall be decided in the manner provided for in section 98 of the Code of Civil Procedure or section 392 of the Code of Criminal Procedure as the case may be. After the third Judge to whom the reference is made has given his opinion, the matter shall be placed before the Division Bench which had originally heard the matter

and it shall pronounce the final judgment or order disposing of the matter:

Provided that, where one of the Judges constituting such Division Bench has ceased to be a Judge of the High Court or has for the time being ceased to sit at Bombay, Nagpur, Aurangabad or Goa, as the case be (the Division Bench whereof originally heard the matters), the matter shall be placed before the Division Bench of which the other Judge is a member:

Provided further that where both the Judges have ceased to be the Judge of the High Court or have ceased to sit at Bombay, Nagpur, Aurangabad or Goa, as the case be, the Division Bench whereof originally heard the matter shall be placed before a Division Bench dealing with the class of cases to which the referred matter belongs.

And the Division Bench mentioned in the provisos shall pronounce the final Judgment or order disposing of the matter.”

13. At the time when reference was made, Rule-9 of Chapter-I was not introduced and came to be introduced subsequently w.e.f 24th June, 2022 in Bombay High Court Appellate Side Rules, 1960. Plain reading of Rule-7 of Chapter-I of the Rules of 1960 would indicate that in the event of difference of opinion between two judges of a Division Bench, the same is required to be decided in the manner provided by Section 98 of the Code of Civil Procedure, 1908. Section 98 of CPC provides that where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority of such Judges and if the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

14. It is thus evident from the reading of section 98 of the CPC and Rule 7 of Chapter-I of the Rules of 1960 that when there is difference of opinion between the Judges constituting the Division Bench, the rule can be invoked and Reference can be made to a third judge to give his opinion and thereafter the matter is required to be placed before the Division Bench which had originally heard the matter.

15. Rule 9(A) to 9(C) of Chapter-I of Rules of 1960 has been incorporated in the Rules on 24th June 2022, which provides that whenever one Division Bench differs from the decision of any other Division Bench upon a point of law or usage having the force of law, the case shall be directed to be placed before the Chief Justice for decision by a larger Bench. In such a case of difference of opinion on a point of law, the Division Bench referring the case shall state the point on which it differs, formulate the question or issue to be answered and refer the case to the Chief Justice for decision by a larger Bench.

16. Rule 7 of Chapter I would apply where there is difference of opinion between the Judges constituting the Division Bench in which case Reference can be made to third Judge. The present Reference Order does not record any disagreement amongst the Judges constituting the Division Bench. In fact one of the Judges on the Bench has followed the common judgment dated 7th December, 2010 whilst deciding the subsequent group of Petitions. Rule 9 of Chapter I would apply where one Division Bench differs from the decision of Co-ordinate Division Bench upon a point of law which is also not the case here.

17. Although Rule 9 of Chapter I was introduced w.e.f 24th June, 2022, it must be noted that it is an accepted principle that in case of doubt or disagreement about the decision of the earlier Bench the later Bench would refer the case to a larger Bench. The Constitution Bench of the Apex Court in the case of Central Board of Dawoodi Bohra Community v. State of Maharashtra [(2005) 2 SCC 673] held in paragraph 12 as under :

"Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms :-

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

(2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions :

(i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and

(ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was

the situation in Raghubir Singh & Ors. and Hansoli Devi & Ors.(supra)."

18. The position in law has been settled by the Apex Court that where the later Bench of equal strength expresses a doubt about the correctness of the view taken earlier by a Co-ordinate Bench, reference can be made to the larger Bench. Considering the settled position in law irrespective of whether the Rules provide for reference to the larger Bench or not, in event the correctness of the view taken by the earlier Bench of equal strength is doubted by the later Co-ordinate Bench, reference can be made to the larger Bench.

19. Mr. Talekar would submit that the Reference was not justified since disagreement among the judges of two division benches on point of law was not recorded in the Reference Order..

20. In the present case, the learned Division Bench has vide order dated 12th October 2011, referred the matter to the larger Bench noting that there are different views taken by earlier two Benches of equal strength. As discussed above, the reference to larger Bench is warranted in cases where there is a doubt expressed about the correctness of the view taken by the earlier Bench of equal strength. The order seeking reference does not express disagreement with the view taken by the Co-ordinate Benches, however, the Reference is made, as according to the learned Division Bench there is conflict of views in the orders dated 22nd April 2008 and 4th June 2008 on one hand and judgment dated 7th December 2010 on the other.

21. We have therefore examined whether there is any conflict of views. Perusal of the order dated 22nd April 2008 would indicate that the Petitions were dismissed in limine on the ground of delay and laches. While dealing with the Review Applications, the learned Division Bench accepted that there is an error apparent on the face of record as far as the observation in paragraph 3 of the order dated 22nd April 2008 is concerned, however, it held that as the Court had dismissed the group of petitions raising identical issues, the petitions stood dismissed. The Co-ordinate Division Bench by order dated 7th December 2010 heard the petitions on merits as regards the cancellation of admission to Postal D.Ed. Course by order of 31st December 2005 and allowed the petitions. While doing so, the learned Division Bench has considered the orders dated 22nd April 2008 and 4th June 2008 passed by the co-ordinate Division Bench and held in paragraph 22 to 27 as under :

"22] That leaves us to deal with the ground raised by the learned AGP regarding the 2 orders passed by the Division Bench of this court. In so far as the order dated 22nd April, 2008 is concerned, we find that it would be of no assistance to the respondents, inasmuch as, the petitions have been dismissed only on the ground of laches and not on merits. The present petitions have been admitted after hearing the parties. Not only that, but after hearing the parties, interim reliefs have also been granted in this group of petitions. In any case, in so far as the grounds of laches etc. are concerned, it would not be permissible for this

court, to non-suit the petitioners on some hyper technical grounds at this stage. In that view of the matter, we find that the said order would be of no assistance to the case of the respondents.

23] That leads us to consider the order passed by the same Division Bench, dated 4th June, 2008. It appears that applications were also made before this court, by the petitioners whose petitions were dismissed, to seek review of the order dated 22nd April, 2005. Said applications were also considered and, therefore, the Court appears to have passed a combined order in the writ petitions as well as review applications. From the perusal of para. 4 of the said order it could be seen that the court has observed that :

“What we find is that an enquiry was duly conducted in the matter of the petitioners initial appointment as a primary teacher (untrained) which was found to be improper on various counts because of which they were found to be ineligible for being admitted in Postal. D.Ed. Course, and each petitioner has been informed of the reasons which are annexed in Writ Petition No.2528/2008 from Page No.23 to 100.”

24] We may clarify that in the present case, we are not concerned with the appointments of the petitioners either as untrained teachers or trained teachers. What we are concerned with is only the cancellation of admission which is granted to the petitioners.

25] From perusal of para.8 also, it appears that the court in the said matters was mainly concerned with the appointments of the petitioners therein. In any case, the said petitions have been dismissed in limine at the admission stage without hearing the parties on merits of the matter. Not only that, but the Special Leave Petitions, preferred thereagainst, challenging the said order have also been dismissed in limine. The Apex court in the matter of “Union of India Vs. Jaipal Singh” reported in 2004(1) SCC 121, has observed thus :-

“On a careful consideration of the matter and the materials on record, including the judgment and orders brought to our notice, we are of the view that it is well accepted that an order rejecting a special leave petition at the threshold without detailed reasons therefor does not constitute any declaration of law by this Court or constitute a binding precedent. Per contra, the decision relied upon for the appellant is one on merits and for reasons specifically recorded therefor and operates as a binding precedent as well.”

26] It is thus clear that in view of the aforesaid judgment, the dismissal in limine of some petitions by this court and the dismissal of the SLP in limine by the Apex Court, would not constitute any declaration of law by either this Court or the Apex Court and as such, it would not be a binding precedent. It is further to be noted that when the learned Judges of the Division Bench were informed about the pendency of the present petitions, the learned Judges of the Division Bench observed thus :-

"Shri S.B. Talekar, learned counsel for the petitioners submitted that in some cases this court had issued Rule and granted ad-interim relief where identical questions are raised and placed reliance on the decision rendered by the Supreme Court in the matter of "Bir Bajrang Kumar Vs. State of Bihar and others." reported in AIR 1987 SC 1345 and in the matter of "S. Rammu Vs. Union of India" reported in 1986, Pat LJR (SC) 29. The learned A.G.P. Pointed out that those were exparte orders and the respondents are moving the court for vacating such orders. In so far as those petitions are concerned, they will be dealt by the court at the time those petitions are taken up for hearing because we do not find any substance in the case filed by the petitioners and nothing has been placed on record to show that the petitioners admission came to be cancelled contrary to rules and regulations and the scheme under which they were given admission."

It is thus clear that the learned members of the Division Bench have themselves observed that the contentions of the petitioners in these petitions would be dealt with by the court when these petitions are taken up for hearing.

27] As already discussed hereinabove, the aforesaid orders are passed while dismissing the petitions at the admission stage inlimine. Elaborate arguments were neither advanced at the Bar nor record of the matter was produced before this court and as such, the court did not have an occasion to consider the merits and deal with the entire record of the matter. We have heard the learned counsel for the petitioners as well as the learned counsel for the respondents at length and have permitted them to place whatever material they wanted to place on record and we have arrived at a finding, as aforesaid, after considering the entire material on record.

. As held by the Apex Court, dismissal in-limine of the petition does not constitute any declaration of law to constitute a binding precedent. The orders, on which the learned AGP has placed reliance, at the cost of repetition, are pertaining to the dismissal of the petition in-limine. In that view of the matter, we find that the reliance placed by the learned AGP, on the aforesaid orders, would not be of much assistance to the case of the respondents."

22. Although not the scope of Reference as the order of Reference does not record disagreement with the views of the Co-ordinate Benches, in interest of justice, we have scrutinized the decisions dated 22nd April, 2008, 4th June, 2008 and 7th December, 2010 and we find that there is no conflict between the views taken by the Division Benches inasmuch as in the earlier judgments, the Division Bench had dismissed the petition in limine and in the review applications, the same order was maintained except as regards the error in paragraph 3 of the order. In subsequent decision of 7th December 2010, the learned Division Bench has not only heard the matters on merits but has also considered the decision of the Co-ordinate Bench and given a definite finding. The decision of the learned Division Bench dated 7th December 2010 was followed by yet another Division Bench by a common judgment dated 18th March 2011 presided by one of the Judge of the Division Bench making the Reference.

23. We are also not inclined to examine the issues referred for consideration as we find that issues referred are not the issues on point of law. As regards the first issue of maintainability of the Petition, it is for the Division Bench to consider the same in the facts of the case. Issue Nos.2 and 3 are required to be dealt with by taking into consideration the earlier judgments delivered by the Co-ordinate Benches. It is for the Division Bench to consider which view to follow while deciding the sustainability of the order of termination dated 15th February 2011.

24. Having regard to the discussion above, in our opinion, the Reference is unwarranted. Registry is therefore directed to place the Petition before the Division Bench having the roster.