

(2022) 03 BOM CK 0104
In the Bombay High Court
Case No : Writ Petition No. 2224 Of 2021

Sachin Sharadchandra Deole

APPELLANT

Vs

Education Officer (Secondary)

RESPONDENT

Date of Decision : 25-03-2022

Acts Referred:

Maharashtra Employees Of Private Schools (Conditions Of Service) Rules, 1981 — Rule 12, 12(3)
Maharashtra Employees Of Private Schools (Conditions Of Service) Regulation Act, 1977 — Section 9

Citation : (2022) 03 BOM CK 0104

Hon'ble Judges : A.S.Chandurkar, J;G.A.Sanap, J

Bench : Division Bench

Advocate : Shubhanshu S. Joshi, Anand M. Deshpande, Radhika Bajaj

Judgement

A.S. Chandurkar, J

1. RULE. Rule made returnable forthwith and heard the learned counsel for the parties.

2. The petitioner who is an Assistant Teacher is aggrieved by the non-implementation of the order dated 24.07.2020 passed by the Education Officer (Secondary) in proceedings under Rule 12 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short, 'the Rules of 1981'). By that order, the Education Officer (Secondary) has held the petitioner to be senior in service to the third respondent. The petitioner has also challenged the order dated 11.01.2021 passed by the Education Officer (Secondary) granting financial and administrative powers to the third respondent for the period from 01.01.2021 to 31.03.2021. By amending the writ petition, the petitioner has also challenged the order dated 17.05.2021 again passed by the Education Officer (Secondary) in the proceedings under Rule 12 of the Rules of 1981 wherein the third respondent has been held senior to the petitioner. Consequentially, the order of approval dated 20.05.2021 approving the

appointment of the third respondent as Headmaster from 01.01.2021 is also under challenge.

3. The facts relevant for adjudicating the writ petition are that it is the case of the petitioner that he has obtained the degrees of B.Com., M.P.Ed. The petitioner was appointed as an Assistant Teacher at the school conducted by the second respondent-Management on 12.08.1994. His services came to be approved on 01.10.1994. The third respondent was appointed on 08.05.1994 and while approving his appointment on 02.09.1994 the Education Officer (Secondary) noted that the third respondent would not be able to claim his seniority as being placed in Category 'C' of the Rules of 1981. Thereafter on 30.06.1998, the third respondent was appointed in the middle school and thereafter placed in Category 'C'. It is further the case of the petitioner that from 01.01.2008 he was shown to be senior to the third respondent in the respective annual seniority lists published by the Management every year. The petitioner was shown to have entered Category 'C' on 12.08.1994 while the third respondent was shown to have entered that Category on 07.10.1998. This position continued till the year 2018. On 01.01.2018 the Management published the seniority list in which the third respondent was shown senior to the petitioner. Being aggrieved on being shown junior to the third respondent, the petitioner invoked the jurisdiction of the Education Officer (Secondary) under Rule 12(3) of the Rules of 1981. The Education Officer (Secondary) considered the dispute of seniority between the petitioner and the third respondent and by the order dated 24.07.2020 held that since the petitioner was appointed as a Secondary School Teacher on 12.08.1994 and the third respondent was appointed as a Secondary School Teacher subsequently on 07.10.1998, the petitioner was senior in service to the third respondent. The Management was accordingly directed to correct the seniority list dated 01.01.2018 and thereafter to publish the revised seniority list.

4. It is further the case of the petitioner that despite such adjudication, the Management failed to correct the seniority list as directed and avoided showing the petitioner senior to the third respondent. The seniority list dated 01.01.2021 was thereafter published by the Management in which the third respondent was shown at Serial Number 1 while the petitioner was shown at Serial Number 2. Pursuant to this seniority list and as the post of Headmaster was vacant on account of superannuation of the earlier incumbent, the Management sought to grant of financial and administrative powers to the third respondent. The Education Officer (Secondary) granted the same on 11.01.2021 for the period from 01.01.2021 to 31.03.2021. Thereafter on 18.02.2021 the Management issued a communication to the Education Officer (Secondary) seeking approval to the appointment of the third respondent as Headmaster from 01.01.2021. An order to that effect was accordingly issued on 16.02.2021. The petitioner being aggrieved by these developments issued a legal notice to the Education Officer (Secondary) and protested that the third respondent was shown senior to the petitioner. The petitioner also issued a communication in that regard to the Education Officer (Secondary) on 22.02.2021. The Education Officer (Secondary)

on 25.02.2021 issued a notice of hearing to the Management in the matter of its proposal dated 18.02.2021 seeking approval to the appointment of the third respondent as Headmaster and also the objection raised by the petitioner to the seniority list dated 01.01.2021.

Thereafter the Education Officer (Secondary) on 07.05.2021 heard the petitioner, the third respondent and the Management in the aforesaid matter and on 17.05.2021 proceeded to review his earlier order dated 24.07.2020. He passed a fresh order holding that the third respondent was senior in service to the petitioner. Consequently, the appointment of the third respondent as Headmaster was duly approved by the Education Officer (Secondary) on 20.05.2021. It is in the light of the aforesaid events that the petitioner has approached this Court challenging the aforesaid orders.

5. Shri Shubhanshu Joshi, learned counsel for the petitioner at the outset submitted that the order dated 17.05.2021 passed under Rule 12(3) of the Rules of 1981 was an order without jurisdiction for the reason that there was no power with the Education Officer (Secondary) to review his own earlier order dated 24.07.2020. In absence of such power of review it was not open for the Education Officer (Secondary) to modify his earlier order dated 24.07.2020 and take an opposite view in the matter of seniority of the petitioner and the third respondent. It was well settled that the power of review unless conferred could not have been exercised. This contention was sought to be supported by relying upon the judgment of the Division Bench in Writ Petition No.5170 of 2012 [Devendra Tarachand Gharde Versus Education Officer (Secondary), Zilla Parishad, Nagpur & Others] dated 14.12.2012. It was then submitted that the order dated 24.07.2020 holding the petitioner to be senior than the third respondent was not challenged either by the third respondent or by the Management. Under the garb of the judgment of the Hon'ble Supreme Court Madhavi Versus Chagan & Others dated 09.12.2020 the Management tried to get over the adjudication dated 24.07.2020 by preparing the seniority list dated 01.01.2021 in a manner contrary to the adjudication dated 24.07.2020. The aforesaid decision did not concern either the petitioner or the third respondent and there was no direction issued to correct the seniority list. Without implementing the order dated 24.07.2020, the Management in disregard to that order acted in favour of the third respondent. It was sought to be highlighted that for a period of more than ten years the petitioner was consistently shown senior to the third respondent which position was altered in the seniority list dated 01.01.2018. That alteration was not found to be proper by the Education Officer (Secondary) and the same was rectified by his order dated 24.07.2020. The third respondent having failed to challenge his position in the seniority list vis-a-vis the petitioner, the third respondent could not be permitted to raise such challenge after lapse of more than ten years. Such belated challenge was not liable to be entertained and for said purpose reliance was placed on the decisions in Malcom Lawrence Cecil D'Souza Versus Union of India & Others [(1976) 1 SCC 599] and B.S. Bajwa & Another Versus State of Punjab & Others [(1998) 2 SCC

523]. On these counts it was submitted that the order dated 17.05.2021 alongwith the consequential orders passed by the Education Officer (Secondary) were liable to be set aside.

6. Mrs. Radhika Bajaj, learned counsel for the third respondent vehemently opposed the aforesaid submissions. At the outset, she submitted that as the third respondent had been promoted to the post of Headmaster on 01.01.2021 it was open for the petitioner to invoke the remedy under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, 'the Act of 1977') if the petitioner was of the view that he has been superseded. Without invoking that remedy it was not permissible for the petitioner to challenge the adjudication by the Education Officer (Secondary). Inviting attention to the judgment of the Division Bench in Umesh Balkrishna Vispute Versus State of Maharashtra & Others [2000 (4) Mh.L.J. 564] it was submitted that while considering the issue of supersession in an appeal under Section 9 of the Act of 1977, the correctness of the seniority list as prepared could be examined. It was then submitted that on 18.12.2020 the School Committee passed a resolution taking note of the adjudication by the Hon'ble Supreme Court in the case of Madhavi (supra) and resolved to prepare a fresh seniority list. Such seniority list was accordingly published on 01.01.2021 and the petitioner thereafter raised an objection to his being shown junior to the third respondent. The objection dated 22.02.2021 raised by the petitioner was considered by the Education Officer (Secondary) and in exercise of jurisdiction under Rule 12 of the Rules of 1981 it was held that the third respondent was senior to the petitioner. It therefore could not be said that the Education Officer (Secondary) had exercised the power of review while passing the impugned order. It was then submitted that the seniority list as prepared on 01.01.2021 was in tune with the judgment of the Hon'ble Supreme Court in the case of Madhavi (supra) and the said dispute pertained to the present Institution itself. It was thus submitted that the third respondent being senior in service to the petitioner, he was rightly shown at Serial Number 1 in the said seniority list. Hence, there was no reason to interfere with the order dated 17.05.2021 and the consequential orders passed on that basis. The writ petition was thus liable to be dismissed.

7. Shri Anand Deshpande, learned Additional Government Pleader for the first respondent - Education Officer (Secondary) also supported the impugned orders. He too referred to the resolution passed by the School Committee on 18.12.2020 and the fact that the Education Officer (Secondary) after taking cognizance of the petitioner's objection to the seniority list dated 01.01.2021 had adjudicated the dispute of seniority. It therefore could not be said that the Education Officer (Secondary) had exercised review jurisdiction as contended. The impugned order was the outcome of exercise of power under Rule 12(3) of the Rules of 1981 and therefore there was no merit in the challenge as raised by the petitioner.

8. We have heard the learned counsel for the parties at length and we have

perused the material on record. We have thereafter given due consideration to the rival submissions. The facts that are not in dispute are that the petitioner was appointed on 12.08.1994 and he had acquired the qualification of B.Com., M.P.Ed. The third respondent was appointed on 08.05.1994 and was thereafter taken in the Middle School on 30.06.1998. In the respective annual seniority lists from 01.01.2008 and onwards the petitioner had been shown as senior to the third respondent as he entered Category 'C' on 12.08.1994 which was before the third respondent entering that Category on 07.10.1998. It is also not in dispute that such position was shown in the respective annual seniority lists from 2008 to 2018. When this inter se position was altered for the first time in the seniority list dated 01.01.2018 the petitioner raised a dispute under Rule 12(3) of the Rules of 1981. On 24.07.2020, the Education Officer (Secondary) upheld the claim of the petitioner of being senior to the third respondent as the petitioner entered Category 'C' before the third respondent. This adjudication by the Education Officer (Secondary) was not challenged by the third respondent or by the Management. The Management had been directed to correct the seniority list dated 01.01.2018 and publish a revised seniority list as per the order dated 24.07.2020.

9. At this stage, it would be necessary to refer to the events that led to the passing of the judgment by the Hon'ble Supreme Court in the case of Madhavi (supra). The said proceedings arise from the institution run by the Management herein. The facts indicate that Madhavi was appointed as an Assistant Teacher and was placed in Category 'C' on 16.07.1985. Chagan with qualifications of S.S.C., D.Ed. was appointed on 01.08.1985 and was placed in Category 'E'. On acquiring B.Sc. Degree he was placed in Category 'D' on 21.02.1997. He thereafter acquired training qualification of B.Ed. and was placed in Category 'C' in the year 1999. On 31.05.2014, Madhavi was promoted as Headmistress by the Management and this was challenged by Chagan by filing an appeal before the School Tribunal. The School Tribunal dismissed the said appeal on 01.01.2016 by holding that Madhavi entered Category 'C' on the date of her appointment since she was duly qualified. Chagan acquired the training qualification in the year 1997. Thus when he entered Category 'C' in the year 1997 he was junior to Madhavi. The writ petition preferred by Chagan was dismissed by learned Single Judge on 25.03.2019. The review application filed thereafter by Chagan was however allowed and he was held to be senior to Madhavi. This order was challenged before the Hon'ble Supreme Court. It was held that the earlier judgment of the Hon'ble Supreme Court in the case of Bhawna Versus State of Maharashtra & Others [(2019) 4 SCC 300] was directly applicable to the case of Madhavi. While Clause 1 of Schedule F of the Rules of 1981 pertained to the seniority of Primary Teachers, Clause 2 related to the seniority of Secondary School Teachers. On this premise the appeal preferred by Madhavi was allowed and the judgment of learned Single Judge in exercise of review jurisdiction came to be set aside. The writ petition preferred by Chagan was directed to be dismissed.

It is the aforesaid adjudication that has been sought to be utilized by the Management as well as the School Committee for modifying the seniority list. The seniority list dated 01.01.2021 has accordingly been prepared showing the third respondent to be senior in service than the petitioner.

10. The issue to be considered is whether the Education Officer (Secondary) after having determined the inter se seniority between the petitioner and the third respondent on 24.07.2020 could have re-visited the same adjudication on the basis of the seniority list dated 01.01.2021 on 17.05.2021. According to the petitioner in the absence of any power of review it was not open for the Education Officer (Secondary) to modify the earlier order dated 24.07.2020 especially when the earlier order was not challenged by any party. On the other hand, according to the Management and the third respondent what has been done by the Education Officer (Secondary) is the adjudication of the grievance of the petitioner dated 22.02.2021 to seniority list published on 01.01.2021.

There can be no doubt that the power of review is not inherent in nature and the same has to be conferred by law for it to be exercised. That the Education Officer (Secondary) has not been conferred with any power of review pursuant to adjudication under Rule 12(3) of the Rules of 1981 is clear as there is no such provision either under the Act of 1977 or the Rules of 1981 conferring such power of review on the Education Officer (Secondary). This position has been considered by the Division Bench in Devendra Tarachand Gharde (supra). Incidentally, we may also refer to the judgment of learned Single Judge in Ashok Yashwant Nikam Versus Chatrapati Shivaji Vidya Prasarak Mandal, Nasik & Others [2009(3) BCR 19] wherein this very question as regards existence of the power of review with the Education Officer was considered. It was held that the Education Officer had not been conferred with any such power to review his earlier order.

11. It is thus clear that the Education Officer (Secondary) has not been conferred with the power of review to re-visit his earlier adjudication under Rule 12(3) of the Rules of 1981. A perusal of paragraph 9 of the order dated 17.05.2021 passed by the Education Officer (Secondary) makes it clear that the Education Officer (Secondary) has exercised review jurisdiction while holding the third respondent senior to the petitioner. In express words the Education Officer (Secondary) has recorded that he found it necessary to review the earlier order dated 24.07.2020 passed by him. Though it was urged by the learned counsel for the third respondent as well as the learned Additional Government Pleader for the Education Officer (Secondary) that an independent exercise was conducted by the Education Officer (Secondary) under Rule 12(3) of the Rules of 1981, a perusal of the order dated 17.05.2021 and especially paragraph 9 thereof militates against the said contention. The Education Officer (Secondary) having expressly stated that he was exercising the power of review it would have to be held that the order dated 17.05.2021 passed by the Education Officer (Secondary) is the outcome of exercise of review jurisdiction.

12. Even if we proceed on the premise that the Education Officer (Secondary) while passing the impugned order was entertaining the objection raised by the petitioner to the seniority list published on 01.01.2021 there is another factor which cannot be ignored and which would result in furnishing another ground for setting aside the impugned order. According to the Management the third respondent came to be promoted to the post of Headmaster by its resolution dated 16.02.2021. Such promotion was with effect from 01.01.2021. In other words, after the third respondent was promoted to the post of Headmaster on 01.01.2021 the Education Officer (Secondary) has proceeded to consider the objection to the seniority list dated 01.01.2021. It is now settled by various decisions of this Court that on an order of promotion to the post of Headmaster being issued by the Management and the promotee having taken charge of the post of Headmaster, the Education Officer loses the jurisdiction to determine the dispute of seniority under Rule 12 of the Rules of 1981. Reference in this regard can be made to the decisions in *Bhagwant Sheshrao Borale Versus Education Officer (Secondary), Zilla Parishad, Buldana & Others* [2009 (6) Mh.L.J. 478], *Vidyalata Nilkanth Patil Versus Chairman/Secretary, Shikshan Prasarak Samiti, Badapokharan & Others* [2016 (4) Mh.L.J. 106] and *Salim Gulab Mulla Versus State of Maharashtra & Others* [2016 (6) Mh.L.J. 617]. Such dispute on an order of promotion being issued is liable to be examined in an appeal under Section 9 of the Act of 1977 when filed for challenging the supersession by the aggrieved party. Though it is true that the petitioner had raised an objection to the publication of the seniority list on 22.02.2021, this was after the third respondent had taken charge of the post of Headmaster on being so promoted and thus the Education Officer (Secondary) did not have the jurisdiction to adjudicate that objection since the petitioner was already superseded. Even on this count, the adjudication of the issue of seniority by the Education Officer (Secondary) on 17.05.2021 is without jurisdiction and the same therefore cannot be sustained. The law as laid down in *Umesh Balkrishna Vispute (supra)* does not admit of any doubt and it is clear that while deciding the issue of supersession in an appeal under Section 9(1)(b) of the Act of 1977, the School Tribunal can examine the dispute with regard to seniority as an incidental question.

13. As a sequel to the aforesaid discussion, it is clear that the Education Officer (Secondary) had no jurisdiction to go into the question of inter se seniority between the petitioner and the third respondent in exercise of review jurisdiction. Similarly the order of promotion in favour of the third respondent having already been issued on 16.02.2021 much prior to the adjudication by the Education Officer (Secondary), the impugned order dated 17.05.2021 is without jurisdiction. Accordingly, the following order is passed:-

(I) The order dated 17.05.2021 passed by the Education Officer (Secondary) determining the question of inter se seniority between the petitioner and the third respondent is quashed and set aside.

(II) The order of approval dated 20.05.2021 passed by the Education Officer

(Secondary) shall continue to operate as an ad-hoc order to enable day-to-day administration of the school subject to implementation of the order dated 24.07.2020 passed by the Education Officer (Secondary).

(III) The Education Officer (Secondary) shall ensure compliance of the order dated 24.07.2020 within a period of four weeks from today.

(IV) It is not necessary to set aside the order dated 11.01.2021 since the same was to operate only till 31.03.2021.

(V) If the petitioner is aggrieved by the order of promotion issued to the third respondent he is free to avail the remedy under Section 9 of the Act of 1977 and all points in that regard are kept open.

14. Rule is made absolute in aforesaid terms with no order as to costs.