
(2016) 08 BOM CK 0076
In the Bombay High Court
Case No : Writ Petition No. 826 of 2015

Salim Gulab Mulla

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 31-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 5
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 &mdash

Citation : (2016) 5 AIRBomR 798 : (2016) 6 ALLMR 194 : (2017) 3 BCR 134 :
(2016) LIC 4452 : (2016) 6 MhLJ 617

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

Bench : Single Bench

Advocate : Mr. N.V. Bandiwadekar i/by Mr. Sagar A. Mane, Advocates, for the
Petitioner; Mr. A.R. Metkari, AGP, for the Respondent Nos. 1 and 2; Mr. Chetan G.
Patil, Advocate, for the Respondent No. 3; Mr. Prashant Bhavake, Advocate, for
the Respondent No. 4

Final Decision : Allowed

Judgement

R.D. Dhanuka, J.—Rule. Learned counsel appearing for the respondent waives service. By consent of parties, the petition is heard finally.

2. By this writ petition under Articles 226 and 227 of the Constitution of India, the petitioner has impugned the order passed by the Education Officer (Secondary), Zilla Parishad, Satara holding that the respondent No. 4 is senior in service to the petitioner in the cadre of Assistant Teacher in the secondary school run by the respondent No. 3 Society and directing the respondent No. 3 to submit proposal of the respondent No. 4 as Head Master to the Education Officer. The impugned order has been passed by the Education Officer in exercise of power under Rule 12 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short "the said MEPS Rules"). Some of the relevant facts for the purpose of deciding this petition are as under :-

3. The petitioner was born on 14th September, 1960 and has passed M.A.B.Ed. and is duly qualified to be appointed as an Assistant Teacher in the secondary school. The respondent No. 3 is the Education Institution registered under the provisions of the Bombay Public Trusts Act, 1950 and also the Societies Registration Act, 1860. The respondent No. 3 is running a Government recognised secondary school by name New English School at Mandhardeo, Taluka-Wai, District-Satara having classes Standard V to X. The said school was started in the academic year 1988-89 on an unaided basis and it started receiving grant-in-aid from the Government stage wise. The said school became fully aided in the year 1995-96. The respondent No. 2 is the Education Officer who has been appointed under the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short "the said MEPS Act").

4. It is the case of the petitioner that in the academic year 1990-91 when the school was being run on no grant basis, the management initiated selection procedure and after completing the same, he was selected as an Assistant Teacher in the said school. The management passed a resolution in its meeting dated 11th June, 1990 and decided to appoint the petitioner along with four other employees in the said school. The petitioner was appointed as Assistant Teacher on 13th June, 1990 vide an appointment order dated 13th June, 1990. It is the case of the petitioner that the petitioner accordingly joined the school from 13th June, 1990. Since the school was not receiving any grant-in-aid, the management as well as the Head Master of the school did not submit any proposal to the Education Officer for approval to the said appointment of the petitioner as well as the other four employees mentioned in the said resolution dated 11th June, 1990.

5. It is the case of the petitioner that from the date of joining the said school, the petitioner continuously worked in the said school without any break. During the month of May vacation, the school was closed. The petitioner however was paid salary for the said vacation by the management.

6. It is the case of the petitioner that for the academic year 1991-92, the respondent No. 3 passed a resolution dated 1st June, 1991 and appointed the petitioner as an Assistant Teacher from 19th June, 1991 on probation. The management accordingly issued an appointment letter on 4th June, 1991 in favour of the petitioner on probation for a period of two years. It is the case of the petitioner that services of the petitioner came to be continued in the subsequent academic year also.

7. By an order dated 30th March, 1993, the Education Officer granted approval to the appointments of various teaching and non teaching employees in the said school including the petitioner. The petitioner came to be granted approval from 19th June, 1991 on probation. By an order dated 12th March, 1994, the Education Officer granted approval to the appointment of the petitioner for the academic year 1993-94 in the same pay scale. By an order dated 28th January, 1994, the Education Officer granted approval to the petitioner on probation on

the same pay scale. It is the case of the petitioner that the petitioner came to be paid salary during the summer vacation in the year 1991, 1992 and 1993 and was in continuous officiation from 13th June, 1990.

8. It is the case of the petitioner that the management had prepared seniority lists of the teachers working in the said school. In the seniority lists, the date of appointment of the petitioner was shown as 13th June, 1990 and his name was placed at serial No. 1 on the basis of that date appointment. The name of Shri Erande Bhagwan Baliram who was appointed on 24th June, 1991 was placed at serial No. 2 whereas the name of the respondent No. 4 herein who was appointed on 17th June, 1992 was placed at serial No. 3. It is the case of the petitioner that neither the said Shri Erande Bhagwan Baliram nor the respondent No. 4 raised any objection to the said seniority lists and also to the placement given to the petitioner above them in the said seniority lists.

9. On 31st January, 2013, the Head Master of the school Shri P.B. Gaikwad was superannuated. It is the case of the petitioner that since the petitioner was the next senior-most teacher with good service record and being eligible and qualified to be promoted as a Head Master of the said school, the respondent No. 3 management passed a resolution dated 1st February, 2012 to promote the petitioner as Head Master from 1st February, 2012 and accordingly issued an order of appointment dated 26th January, 2012 w.e.f. 1st February, 2012.

10. It is the case of the petitioner that the petitioner took charge of the post of the Head Master of the said school w.e.f. 1st February 2012. The management thereafter submitted a proposal to the Education Officer for seeking approval to the said promotion of the petitioner to the post of Head Master. The respondent No. 2 Education Officer by his order dated 30th April, 2012 informed the management that since the approval to the appointment of the respondent No. 4 was from 14th June, 1993 whereas the regular approval to the petitioner as an Assistant Teacher was from 13th June, 1994, the respondent No. 4 was senior to the petitioner and thus approval to the said promotion of the petitioner as Head Master could not be granted.

11. The management placed reliance on the order dated 30th April, 2012 passed by the Education Officer and issued an order dated 7th May, 2012 informing the petitioner that the petitioner was reduced to the rank of an Assistant Teacher from 7th May, 2012. The petitioner herein impugned the said order of reduction in rank/reversion passed by the management on 7th May 2012 by filing an appeal (38 of 2012) before the school tribunal, Kolhapur under Section 9 of the MEPS Act against the respondent nos. 2 to 4 herein on 2nd June, 2012.

12. By a Judgement and order dated 7th March, 2013, the school tribunal allowed the said appeal filed by the petitioner and quashed and set aside the order dated 7th May 2012 issued by the management for reduction in rank having found illegal and directed the management to reinstate the petitioner to the post of Head Master with continuity of service but without any difference of

pay. The management thereafter reinstated the petitioner to the post of Head Master and submitted a proposal of the said appointment to the Education Officer. The Education Officer granted approval by an order dated 8th May, 2013 to the appointment of the petitioner as In-charge Head Master from 1st May, 2013 to 31st July, 2013.

13. The respondent No. 4 filed a writ petition (6848 of 2013) in this Court and impugned the Judgement and order dated 7th March, 2013 passed by the school tribunal allowing the appeal filed by the petitioner herein. The said writ petition appeared on board before this Court on 13th August, 2014, when the learned counsel for the respondent no. 4 herein (the petitioner in Writ Petition No. 6848 of 2013) sought liberty to withdraw the said writ petition and to independently assert his claim that he was senior to the petitioner herein by adopting appropriate proceedings in that regard before the appropriate forum. Learned counsel for the management and the petitioner therein gave their no objection for the petitioner therein to adopt such appropriate course of action as permissible in law.

14. This Court accordingly permitted the petitioner therein to withdraw the said writ petition with liberty to avail appropriate remedy available in law to assert his claim of seniority over the respondent No. 3 thereto (the petitioner herein). In the said order, this Court clarified that the appropriate forum shall decide the issue of seniority between the petitioner and the respondent No. 3 thereto on its own merit and in accordance with law, without being influenced by the observations as made in the impugned order dated 7th March, 2013 passed by the school tribunal which was subject matter of the said writ petition.

15. The respondent No. 4 herein made a representation to the Education Officer under Rule 12 of the MEPS Rules and claimed that he was senior to the petitioner herein. The petitioner herein filed his reply dated 29th October, 2014 and pointed out that he was senior in service to the respondent No. 4. The Education Officer directed the management to produce certain documents including the appointment orders of the petitioner and Shri Erande Bhagwan Baliram, the resolutions passed by the management, advertisements, roaster copy etc. which came to be submitted by the management before the Education Officer. The management reiterated before the Education Officer that the petitioner herein was senior to the respondent No. 4.

16. On 5th January, 2015, the Education Officer passed an order and informed the management that the respondent No. 4 was senior in service to the petitioner and therefore the management should submit proposal of the respondent No. 4 for Head Master of the said school. The petitioner received a copy of the said order on 9th January, 2015 and made a representation on 12th January, 2015 to the Education Officer and contended that the order passed by the Education Officer was not proper. The Education Officer informed the petitioner that he had already passed an order and there was no question of reconsidering the said issue. Being aggrieved by the said order dated 5th

January, 2015, the petitioner filed this writ petition under Articles 226 and 227 of the Constitution of India.

17. Mr. Bandiwadekar, learned counsel for the petitioner invited my attention to the order of appointment of the petitioner dated 13th June, 1990, the resolution passed by the respondent No. 3 management dated 24th November, 1991, the order of appointment dated 4th June, 1991 appointing the petitioner on probation as an Assistant Teacher for a period of two years, approvals granted by the Education Officer on 30th March, 1993, 12th April, 1994 and 28th November, 1994 and Seniority lists in the year 1997 etc. It is submitted by the learned counsel that in the seniority lists prepared and circulated by the management, the name of the petitioner was placed at serial No. 1 showing the date of the appointment of the petitioner as 13th June, 1990 whereas the name of the respondent No. 4 was placed at serial No. 3 and the date of the appointment shown as 17th June, 1992. The respondent No. 4 did not challenge any of the seniority lists prepared by the management. He submits that on 31st January, 2012, Shri P.B. Gaikwad, the then Head Master retired. On 24th February, 2012 the management passed a resolution to promote the petitioner to the post of Head Master w.e.f. 1st February 2012 and also issued a letter of promotion to the petitioner for the said post.

18. Learned counsel for the petitioner invited my attention to the order dated 30th April, 2012 passed by the Education Officer rejecting the proposal of the management to grant approval to the appointment of the petitioner as Head Master on the ground that the respondent No. 4 was granted approval on 14th June, 1993 whereas the petitioner was granted approval on 13th June, 1994 and thus the respondent No. 4 was senior to the petitioner. He submits that on the basis of the said illegal order passed by the Education Officer, the management reverted the petitioner to the post of Assistant Teacher by its order dated 7th May, 2012. He invited my attention to various findings recorded by the school tribunal in the Judgement and order dated 7th March, 2013 allowing the appeal (38 of 2012) filed by the petitioner under Section 9 of the MEPS Act challenging the order of reversion dated 7th May, 2012.

19. It is submitted that the respondent No. 4 herein was a party to the said appeal and was impleaded as the respondent No. 3. He submits that the school tribunal in the said Judgement and order held that seniority was to be reckoned from the date of officiation in a particular cadre and not on the basis of approval granted by the Education Officer. On perusal of the approval which was accorded to the petitioner as well as the respondent No. 4 on the same date i.e. 14th June, 1993, the letter dated 30th April, 2013 by the Education Officer in which the respondent no. 4 has been treated as senior the school tribunal has held that the said order of approval was totally misconceived. The school tribunal held that there was no hesitation to record the finding that the petitioner was senior to the respondent No. 4 herein and answered the said issue in affirmative.

20. The school tribunal declared that the order of the management for reduction

in rank without any inquiry was per se illegal and void ab initio. It is held that the petitioner was entitled for reinstatement to the said post of the regular Head Master forthwith. The school tribunal accordingly directed the management to reinstate the petitioner to the post of Head Master forthwith with continuity of service and other incidental benefits except the difference of pay. The school tribunal rejected the prayer for back wages as difference of pay for the post of Head Master to Assistant Teacher. The management accordingly reinstated the petitioner to the post of Head Master. The management thereafter submitted proposal to the respondent No. 2 Education Officer for approving the appointment of the petitioner to the said post of Head Master.

21. Learned counsel for the petitioner submits that by an order dated 13th August, 2014 passed by this Court in the Writ Petition (6848 of 2013) which was filed by the respondent No. 4 herein impugning the order of the school tribunal granting reinstatement to the petitioner herein, the said Judgement and order dated 7th March, 2013 passed by the school tribunal was not set aside. The petitioner had withdrawn the said writ petition with liberty to pursue the appropriate proceedings. He submits that the petitioner had given his no objection for the respondent no. 4 herein to adopt such appropriate course of action as permissible in law. He submits that the petitioner was already promoted to the said post of Head Master pursuant to the said Judgement and order dated 7th March, 2013 passed by the school tribunal.

22. It is submitted that once the petitioner was already promoted to the said post of Head Master, the respondent No. 4 herein could not have filed any representation before the Education Officer for determination of seniority dispute under Rule 12 of the MEPS Rules. He submits that the said representation itself was without jurisdiction and untenable. In support of this submission, learned counsel for the petitioner placed reliance on the Judgement of this Court in the case of Bhagwant Sheshrao Borale v. Education Officer, (Secondary), Zilla Parishad, Buldhana & Ors., reported in 2009 (6) Mh.L.J. 478 and in particular paragraph 5 thereof. Reliance is also placed on the judgement of this Court in the case of Vidyalata Nilkanth Patil v. Chairman/Secretary, Shikshan Prasarak Samiti, Badapokharan and Ors., reported in 2016 (4) Mh.L.J. 106 and in particular paragraphs 20, 27, 42 to 49 and would submit that after adverting to the Judgement of the Full Bench of this Court in the case of St. Ulai High School and Anr. v. Devendraprasad Jagannath Singh, reported in 2007(1) Mh.L.J. (Full Bench) 597 and the Judgement of this Court in the case of Bhagwant Sheshrao Borale (supra), it is held by this Court in the said Judgement that the Education Officer has no jurisdiction to adjudicate upon the seniority dispute after an appointment or promotion is already made by the management to a particular post. The issue of seniority can be decided by the school tribunal as an incidental issue while considering the appeal against the order of supersession, reduction in rank etc.

23. It is submitted that since the petitioner was already promoted to the post of

Head Master, representation made by the respondent No. 4 under Rule 12 of the MEPS Rules for determination of inter se seniority dispute between the petitioner and the respondent No. 4 was not an appropriate remedy in law. He submits that the impugned order passed by the Education Officer determining the seniority between the petitioner and the respondent No. 4 after promotion to the post of Head Master already having been granted to the petitioner by the management was without jurisdiction and contrary to the law laid down by this Court.

24. Without prejudice to the submissions made aforesaid, the next submission of the learned counsel for the petitioner is that the impugned order passed by the Education Officer refusing to grant approval to the appointment of the petitioner and directing the management to submit proposal of the respondent No. 4 for the said post of Head Master on the ground that the approval to the appointment of the respondent No. 4 was granted earlier in point of time than the appointment of the petitioner is ex facie illegal, perverse and without application of mind. He submits that for the purpose of appointment, promotion or for determining the seniority, the date of approval granted by the Education Officer is not relevant. He submits that the date of appointment of the employee is relevant for the purpose of seniority and promotion.

25. It is submitted that the petitioner was appointed by an appointment order dated 13th June, 1990 as full-time Assistant Teacher and had joined the said school with effect from that date. The petitioner has been continuously working since then in the respondent No. 3 school. He submits that the petitioner was also granted salary for the vacation period from time to time by the management. My attention is also invited to the resolution passed by the management on 1st February, 2007 thereby condoning the so called break during the period 1st May, 1991 to 18th June, 1991, 1st May, 1992 to 12th June, 1992, 1st May, 1993 to 13th June, 1993 and 1st May, 1994 to 12th June, 1994 totalling into 179 days. He submits that by the said resolution, the period to 179 days was condoned with payment for vacation period and for the purpose of seniority.

26. It is submitted that the seniority of the petitioner thus had to be counted from 13th June, 1990 or in any event w.e.f. 19th June, 1991 whereas the respondent No. 4 was admittedly appointed on 17th June, 1992 i.e. much after the appointment of the petitioner. In support of this submission, the learned counsel for the petitioner placed reliance on Rule 13 of the MEPS Rules and note 5 of Schedule "F" to the MEPS Rules. He submits that there is no provision under the MEPS Act or Rules considering the date of approval for the purpose of promotion or seniority. He submits that vacation salary for all the vacations had already been paid to the petitioner. He placed reliance on the Judgement of the Division Bench of this Court in the case of Anjali Jayant Khatri v. Bal Mandir Sanstha & Ors., reported in 2009(1) Bom.C.R. 206 and in particular paragraphs 2, 8 and 10 thereof. Reliance is also placed on the Judgement of this Court in the case of Sumangala w/o Manoharrao Sakharkar v. State of Maharashtra & Ors.,

reported in 2010 (1) Mh.L.J. 63 and in particular paragraphs 20, 21, 26, 28 and 33 thereof.

27. Learned counsel for the respondent No. 3 adopts the submissions made by Mr. Bandiwadkar, learned counsel for the petitioner and submits that the petitioner was all throughout senior to the respondent No. 4. He submits that the Education Officer has no jurisdiction to decide the issue of seniority after promotion of the petitioner to the post of Head Master by the management.

28. Mr. Bhavake, learned counsel for the respondent No. 4, the contesting respondent invited my attention to the paragraphs 4 and 5 of the writ petition and submits that in the said paragraphs, the petitioner himself had relied upon the alleged resolution dated 1st June, 1991 thereby appointing the petitioner as a assistant teacher from 19th June, 1991 on probation. He submits that the management itself had appointed the petitioner vide order of the appointment dated 9th June, 1993 for a period of one year w.e.f. 14th June, 1993 to 30th April, 1994. He submits that if the petitioner was already appointed on probation as assistant teacher from 19th June, 1991 as claimed by the petitioner, the management would not have appointed the petitioner on 9th June, 1993 as assistant teacher for a period of one year from 14th June, 1993 to 30th April, 1994. He submits that it is thus clear that the petitioner was not appointed on probation w.e.f. 19th June, 1991 as claimed by the petitioner.

29. Learned counsel appearing for the respondent No. 4 also placed reliance on resolution dated 1st February, 2007 alleged to have been passed by the management purporting to condone the break of 179 days which was granted to the petitioner. He submits that even in the said resolution, it is provided that the petitioner was appointed w.e.f. 13th June, 1994. He submits that thus the respondent No. 4 having been appointed in the year 1992 whereas the petitioner was appointed in the year 1993, the respondent No. 4 was senior to the petitioner.

30. It is submitted by the learned counsel for the respondent No. 4 that if the petitioner would have been appointed on probation in the year 1991, the petitioner could not have taken benefit of the break of the vacation period. It is submitted that this court while granting liberty to withdraw the writ petition filed by the respondent No. 4 on 13th August, 2014, the management as well as the petitioner herein did not oppose the grant of liberty sought by the respondent No. 4 for withdrawal of the said writ petition (6848 of 2013). He submits that this court while granting liberty to the petitioner to file appropriate proceedings in the said order dated 13th August, 2014 had clarified that the appropriate forum shall decide the issue of seniority between the petitioner and the respondent no.3 on its own merits and in accordance with law without being influenced by the observations as made in the impugned order passed by the tribunal.

31. It is submitted that since there was a dispute in respect of the seniority between the petitioner and the respondent No. 4, the said seniority dispute could

be decided at the first instance by the education officer under Rule 12 of the M.E.P.S. Rules and thus the representation made by the respondent No. 4 for deciding the seniority between the petitioner and the respondent No. 4 before the education officer was the right and appropriate remedy exercised by the respondent No. 4. He submits that the petitioner herein or the management did not raise any issue before the education officer contending that the education officer had no jurisdiction to decide the seniority issue on the ground that the petitioner herein was already promoted to the post of headmaster when such representation was made by the respondent No. 4.

32. It is submitted by the learned counsel for the respondent No. 4 that the petitioner had come to this court with a false case that he was appointed in the year 1991. He submits that the appointment order purported to have been issued by the management in favour of the petitioner in the year 1991 was ex-facie fabricated.

33. Insofar as Judgement relied upon by the learned counsel for the petitioner is concerned, it is submitted that the management in this case in any event could not have condoned the break after several years. He submits that it is however his case that his client was appointed earlier in point of time than the appointment of the petitioner and thus this court shall not interfere with the order passed by the education officer.

34. Mr. Bandiwadkar, learned counsel for the petitioner in rejoinder reiterates the submission that for the purpose of promotion and computation of seniority, the date of initial appointment of the teacher is relevant and not the date on which his appointment was approved by the education officer. He submits that the appointment of the petitioner made by the management in the year 1990 and in the year 1991 had not been challenged by the respondent No. 4 in any proceedings till date. He submits that since the petitioner was in continuous service since the date of initial appointment, the seniority of the petitioner has to be considered on the basis of the date of his appointment. He submits that in any event since the education officer had already granted approval to the appointment of the petitioner in respect of the appointment made at least in the year 1991, the education officer could not have been granted approval to the petitioner subsequently w.e.f. 13th June, 1994 for one year. He submits that the order passed by the education officer is ex-facie without application of mind and contrary to law laid down by this court.

35. It is submitted that the approval granted by the education officer for the appointment of the petitioner made in the year 1991 and 1993 are on record. The education officer could not have been ignored the earlier approval already granted to the petitioner. The learned counsel for the petitioner placed reliance on the proposal submitted by the management vide their letter dated 19th March, 2012 to the education officer for the appointment of the petitioner made in the post of assistant teacher on probation. He submits that allegations made across the bar by the respondent that appointment of the petitioner in the year

1990 or 1991 is fabricated is totally baseless.

Reasons and Conclusions :-

36. It is not in dispute that by an order dated 13th August, 2014 passed by this court in the said Writ Petition No. 6848 of 2013, the order passed by the learned Presiding Officer, School Tribunal, Kolhapur allowing the appeal filed by the respondent No. 4 is not set aside. The appointment of the respondent No. 4 to the post of headmaster w.e.f. 1st February, 2012 is also not set aside. The question that arises for consideration of this court is (i) whether the education officer could have determined the seniority dispute raised by the respondent No. 4 though the petitioner herein admittedly was already acting as headmaster since 1st February, 2012, (ii) whether the education officer could have considered the date of approval to the appointment of the petitioner for the purpose of computing the seniority or ought to have considered the date of appointment of the petitioner i.e. 13th June, 1990 or 19th June, 1991, (iii) whether the education officer could have directed the management to submit a proposal of the respondent No. 4 for approval for the post of headmaster under any of the provisions of MEPS Act.

37. It is not in dispute that the respondent No. 4 herein had made representation to the education officer after this court passed the said order dated 13th August, 2014 in Writ Petition No. 6848 of 2013. The petitioner as well as the management appeared before the education officer. The education officer passed the impugned order holding that the respondent No. 4 was senior to the petitioner herein and directed the management to submit proposal of the respondent No. 4 as headmaster of the respondent No. 2 school. The education officer passed the said order on the premise that the seniority of the petitioner shall be considered on the basis that the education officer vide order dated 28th November, 1994 had granted approval to the appointment of the petitioner on probation showing the date of appointment on 13th June, 1994.

38. In my view since the petitioner was already promoted to the post of headmaster by the management vide an order dated 26th January, 2012 w.e.f. 1st February, 2012 and the petitioner had already taken charge of the headmaster of the school and since then he has been performing his duties as headmaster, the education officer did not have jurisdiction to determine the alleged seniority dispute under Rule 12 of the MEPS Rules. This court in case of Bhagwant Sheshrao Borale (supra) after adverting the Judgement of this court in case of Umesh B. Vispute v. State of Maharashtra and others 2000 (4) Mh.L.J. 564 has held that once the promotion is granted and the appointment is made, the question of seniority has to be decided by the school tribunal and the education officer will have no jurisdiction to fix the seniority and to demote a person already promoted. This court in case of Vidyalata Nilkanth Patil (supra) has after adverting the several judgements of this court including the Judgement in case of Bhagwant Sheshrao Bolare (supra) has held that the education officer could not have determined the seniority under Rule 12 of the MEPS Rules in view

of the teacher already having been promoted to the post of headmistress. This court held that the said decision of the education officer was totally without jurisdiction and was illegal. This court accordingly in the said Judgement has set aside the order passed by the education officer determining the seniority under rule 12 of the MPES Rules after the petitioner in that case had already promoted to the post of headmaster. The judgements referred to aforesaid squarely apply to the facts of this case. I am respectfully bound by the aforesaid judgements. In my view the impugned order passed by the education officer holding that the respondent No. 4 was senior to the petitioner though the petitioner was already promoted to the said post of headmaster as far back as on 1st February, 2012 is totally without jurisdiction and is illegal.

39. In my view the directions issued by the learned education officer to the management to submit the proposal of the respondent No. 4 as the headmaster of the school of the respondent No. 2 while determining the seniority of the respondent No. 4 is also without jurisdiction and contrary to the provisions of MEPS Act and the MEPS rules. In my view no such direction could have been issued by the education officer to the management to submit the proposal of the respondent No. 4 as headmaster. The appointment of the headmaster has to be made by the management and not by the education officer.

40. I shall now consider the issue whether the learned education officer could have considered the date of approval granted by the education officer to the appointment of the petitioner and not the date of his appointment for the purpose of computation of seniority is valid or illegal.

41. It was the case of the management that the date of initial appointment of the petitioner was 13th June, 1990 and since then the petitioner had been working uninterruptedly without any break in service. However since the respondent No. 2 was not receiving any grant-in-aid at the relevant time when the petitioner was appointed as an assistant teacher on 13th June, 1990, the management did not seek any approval to the said appointment of the petitioner and also other employees who were employed at the relevant time by sending proposal to the education officer. The management however subsequently passed a resolution on 1st June, 1991 and appointed the petitioner as an assistant teacher on 19th June, 1991 on probation. The education officer by an order dated 30th March, 1993 had granted approval to the appointment of the petitioner as assistant teacher w.e.f. 19th June, 1991. The education officer however passed another order on 12th March, 1994 granting approval to the appointment of the petitioner for the academic year 1993-94 on probation basis. In my view, the education officer could not have changed the date of appointment shown in the record of the management while granting approval to the appointment of the teachers appointed by the management.

42. The post of the headmaster in the respondent No. 2 school fell vacant in view of the superannuation of Mr. P.B. Gaikwad on 31st January, 2012. The management having found the petitioner as a senior most teacher in the

respondent No. 2 school, eligible and qualified to the said post of the headmaster, passed a resolution in the meeting held on 24th February, 2012 and appointed the petitioner to the said post of headmaster w.e.f. 1st February, 2012. The education officer however allegedly informed the management that as approval to the appointment of the respondent No. 4 was from 14th June, 1993 and since the approval to the appointment of the petitioner was 13th June, 1994, the respondent was senior to the petitioner and thus the approval to the appointment of the petitioner as headmaster could not be granted. The management thereafter issued an order on 7th May, 2012 based on the order passed by the education officer and reverted the petitioner to the post of the assistant teacher w.e.f. 7th May, 2012. The school tribunal has already set aside the said order dated 7th May, 2012 by the management by a Judgement and order dated 7th May, 2013.

43. A perusal of the record clearly indicates that the petitioner had been paid salary even for the vacation period since the date of his appointment as assistant teacher and was condoned the artificial break granted by the management. The management has confirmed this fact in their affidavit in reply filed in this petition. My attention is also invited to the resolution passed by the management to this effect which is forming part of the record of the proceedings. Under Rule 13 of the MEPS Rules, 1981, all the employees and the teaching staff including the headmasters, laboratory assistants and laboratory attendants in a school are entitled to vacations mentioned therein. Non-permanent employees are entitled to the salary for the period of vacation if they had served for a major part of respective term and the temporary vacancy such as vacancy on account of leave, deputation or post created for a specific period, in which they were originally appointed continue to exist beyond the period of vacation and that the employees continue to be in service after the vacation.

44. Admittedly the petitioner in this case was paid salary for the vacation period and the post on which the petitioner was appointed as an assistant teacher continued to exist beyond the period of vacation. There was thus continuity of the service of the petitioner since the date of his appointment as assistant teacher till he was promoted to the post of headmaster and even thereafter. This court in case of Sumangala Manoharrao Sakharkar (supra) has considered this issue in detail. This court considered the fact that the management had resolved to condone the break granted during the summer vacation and held that the employee does not perform his duty simply because the institution is closed in vacation and thus the vacation is not a break. This court interpreted Rule 13 of the MEPS Rules and has held that the vacation cannot be treated as a break in service for the reason that the school being closed for vacations the employee would have continued, and secondly as the employee is held entitled under Rule 13 to the salary for the said period and had actually drawn that salary. It is held that the termination at the commencement of vacation and reappointment on reopening of the school could not at all be termed as a break.

45. The Division Bench of this court in case of Anjali Jayant Khati (supra) has interpreted Rule 13(3) of the MEPS Rules and has held that even during the vacation, an employee is deemed to be on duty though the termination order may have been issued. It is held that if an employee is deemed to be on duty there is no reason why the period of summer vacation should not be calculated to treat the employee's service as continuous. Even during the vacation period, it must be assumed for all purposes that he was on duty and was discharging his duties during that period. It is held that whenever such salary is paid, the said person must be deemed to be on duty continuous and his services must be deemed to be continuous and without any break. The Judgement of Division Bench of this court in case of Anjali Jayant Khati (supra) and Judgement of this court in case of Sumangala Manoharrao Sakharkar (supra) squarely apply to the facts of this case. I am respectfully bound by the said judgements.

46. In my view, even if the petitioner was granted artificial break initially, in view of the vacation, since the said post on which the petitioner was appointed continuous to exist and the management has condoned the break and has paid salary to the petitioner even for the vacation period, the appointment of the petitioner was deemed to have been continued without any break. The date of the initial appointment of the petitioner as assistant teacher thus ought to have been considered for the purpose of computing the seniority and promotion. In this case the petitioner was admittedly appointed as assistant teacher on the permanent post w.e.f. 19th June, 1991 on probation and thus at least the said date ought to have been considered for the purpose of seniority and promotion.

47. The Division Bench in case of Anjali Jayant Khati (supra) has considered the issue at length as to whether the services of an employee could be said to be continuous from his initial date of appointment or could be said to be continuous as mentioned by the education officer in the seniority list as prepared by him. This court has held that although the appointment of the employee may be temporary, the fact remains that he was appointed against the vacant post and therefore when he was confirmed, his confirmation relates back to the date of initial appointment. It is held by the Division Bench that once the management had sent a seniority list prepared on the basis of the date of the initial appointment of the teacher, the education officer has no right to change the date unless he has had some other material before him to do so. It is held by the Division Bench that for the purpose of reckoning the seniority of the employee, their initial dates of appointment as mentioned in the petitions should be taken into account. In my view the Judgement of Division Bench of this court in case of Anjali Jayant Khati (supra) squarely applies to the facts of this case.

48. In my view, the impugned order passed by the Education officer holding that the respondent No. 4 was senior to the petitioner on the basis of the date of approval dated 28th November, 1994 granted to the appointment of the petitioner on probation which was later than the date of approval granted to the respondent No. 4 i.e. w.e.f. 14th June, 1993 is totally perverse, without

application of mind and contrary to the provisions of MEPS Act and Rules and also the law laid down by this court in case of Anjali Jayant Khati (supra) and thus deserves to be set aside on that ground also. The education officer cannot change the date of appointment shown by the management in the seniority list for the purpose of computing the seniority of the employee. The approval once granted by the education officer relates back to the date of original appointment.

49. Insofar as submission of Mr. Bhavake, learned counsel for the respondent No. 4 that the petitioner was not appointed on probation w.e.f. 19th June, 1991 since the management had appointed the petitioner vide appointment letter dated 19th June, 1993 for a period of one year w.e.f. 14th June, 1993 to 30th April, 1994 is concerned, a perusal of the record clearly indicates that it was an undisputed position that the petitioner was already appointed as assistant teacher from 19th June, 1991. The management has reaffirmed this position by filing affidavit also in this court. The appointment of the petitioner was also approved by the education officer to the post of the assistant teacher on 30th March, 1993 with effect from 19th June, 1991. There is thus no merit in this submission of the learned counsel for the respondent No. 4.

50. Insofar as submission of the learned counsel for the petitioner that in resolution dated 1st February, 2007 passed by the management purporting to condone the break of 179 days to the petitioner and in the said resolution it was provided that the petitioner was appointed w.e.f. 13th June, 1994 and thus it could not be canvassed by the petitioner that he was appointed in the year 1991 is concerned, there is no merit in this submission of the learned counsel for the petitioner. The petitioner had produced sufficient proof in this regard before the school tribunal in the appeal which was filed by the appellant which appeal was allowed by the school tribunal and also for perusal of this court. The management has also confirmed before the school tribunal as well as before this court that the appointment of the petitioner was made on probation w.e.f. 19th June, 1991.

51. Insofar as submission of the learned counsel for the petitioner that when the petitioner filed representation before the education officer for determination of seniority after this court granted liberty to the petitioner to avail of appropriate remedy is concerned no objection was raised by the petitioner is concerned, even if the petitioner did not raise any objection before the education officer not to determine the seniority in view of the petitioner already having been promoted to the post of headmaster and the said appointment was in place, the same would not confer any jurisdiction upon the education officer to decide the seniority issue though the petitioner was already promoted to the post of headmaster. This court in case of Vidyalata Nilkanth Patil (supra) has held that since the education officer had no jurisdiction to determine the seniority after promotion of the employee already having been made, even if an objection is not raised by the employee before the education officer not to determine the seniority between him and another employee, the same would not confer any jurisdiction in the

education officer to adjudicate upon the seniority after promotion to the post was already made.

52. The Judgement of this court in case of Vidyalata Nilkanth Patil (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgement. In my view the impugned order passed by the education officer was totally without jurisdiction. Be that as it may, the impugned order holding that the respondent No. 4 was senior to the petitioner on the basis of the date of approval granted by the education officer and not on the basis of the date of initial appointment is ex-facie perverse and illegal, the same deserves to be set aside. In my view the petitioner being senior most teacher and being qualified and eligible was rightly promoted as headmaster by the respondent No. 3 w.e.f. 1st February, 2012.

53. I therefore pass the following order :-

- (a) Writ petition is made absolute in terms of prayer clauses (b) & (c).
- (b) The education officer is directed to grant approval to the promotion of the petitioner to the post of headmaster within four weeks from the date of submission of the proposal by the management to the education officer with effect from the date of his appointment as 1st February, 2012 as headmaster.
- (c) The management shall apply for approval of the appointment of the petitioner to the post of headmaster after two weeks from today.
- (d) Rule is made absolute in the aforesaid terms.
- (e) No order as to costs.
- (f) The parties to act on the authenticated copy of this order.