
(2012) 09 BOM CK 0066
In the Bombay High Court
Case No : Writ Petition No. 3705 of 2012

Sanjay Pachpole

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 24-09-2012

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 9

Citation : (2012) 6 ALLMR 567 : (2012) 114 BOMLR 3518 : (2013) 1 MhLj 670 :
(2013) 1 MhLj 308

Hon'ble Judges : R.M. Borde, J

Bench : Single Bench

Advocate : P.R. Katneshwarkar, for the Appellant; S.B. Pulkundwar, A.G.P. for
Respondent Nos. 1 to 4, Mr. P.B. Patil, Advocate for Respondent Nos. 5 and 6 and
Mr. Vinod P. Patil, Advocate, for the Respondent

Judgement

R.M. Borde, J.—Rule. Rule made returnable forthwith and heard finally by consent of learned Counsel for respective parties. The petitioner, who is serving as a teacher with Respondent No. 6 school run by Respondent No. 5 Institution, is seeking writ of certiorari for quashing and setting aside order dated 09.04.2012, passed by Respondent No. 4 - Education Officer (Secondary), Zilla Parishad, Jalgaon. The petitioner is also seeking a direction to declare that the petitioner is senior to Respondent No. 7 and for a further direction to Respondents No. 1 to 6 to correct the seniority list showing placement of the petitioner at appropriate serial number.

2. The petitioner came to be appointed as an Assistant teacher in the school run by Respondent No. 5-Institution on 03.07.1997. His educational qualification on the date of appointment is B.A., B.Ed.. Whereas, Respondent No. 7 has been appointed as Assistant teacher on 01.12.1997 and his educational qualification on the date of appointment is B.A., B.P.Ed. (Physical Education). The petitioner is trained Graduate teacher on the date of appointment and he has been awarded D.Ed. pay scale at the time of appointment. Whereas, it is contended that,

appointment of Respondent No. 7, at the inception, was as a graduate teacher. However, there appears to be some dispute as to whether initial appointment of Respondent No. 7 was also in the D.Ed. pay scale. The petitioner has presented Civil Application No. 7500/2012 and along with the application, copy of appointment order of Respondent No. 7 is placed on record, which shows that Respondent No. 7 has been appointed on 23.11.1997 as an Assistant teacher in D.Ed. pay scale i.e. Rs. 1200-2040.

3. According to the petitioner, Respondent No. 5-Institution prepared seniority list for the first time in the year 1999-2000 wherein petitioner has been shown as a senior most teacher. The Institution prepared seniority list for the year 2000-2001 wherein name of petitioner was listed in category "E" at Sr. No. 3, whereas, name of Respondent No. 7 was listed in category "C" at Sr. No. 10. The seniority list for the year 2002-2003 was prepared by the Institution wherein name of petitioner has been shown in category "E" at Sr. No. 3, whereas, name of Respondent No. 7 is listed in category "C" at Sr. No. 7. The Institution prepared seniority list for the year 2003-2004 wherein names of petitioner as well as Respondent No. 7 were shown in category "C" and name of petitioner is listed at Sr. No. 7, whereas, name of Respondent No. 7 is listed at Sr. No. 6.

4. The petitioner tendered an application objecting to his placement below Respondent No. 7 in the seniority list by tendering an application to the Education Officer on 01.07.2004. The petitioner, on earlier occasion, had objected to award of trained graduate teacher's pay scale to Respondent No. 7 in the year 2000. According to the petitioner, petitioner and Respondent No. 7 were appointed in D.Ed. pay scale, however, Respondent No. 7, though possessing qualification as B.A., B.P.Ed., has been awarded trained graduate teacher's pay scale earlier than that of the petitioner. The seniority of the petitioner, in the matter of award of trained graduate teacher's pay scale has been bypassed. The petitioner, therefore, tendered an application to the Education Officer through the Head Master, however, no cognizance of the application was taken by the Education Officer. In his application dated 01.07.2004, tendered to the Education Officer, petitioner has made a grievance in respect of award of trained graduate teacher's pay scale to Respondent No. 7 earlier than him. The petitioner has been awarded trained graduate teacher's pay scale since 01.07.2003, however, he was entitled to claim higher pay scale from the date on which it was awarded to Respondent No. 7 i.e. in the year 2000. The petitioner has also contended, in his application, that he is senior than Respondent No. 7 and his name is required to be shown at an appropriate place above the name of Respondent No. 7. The petitioner has objected to the seniority list prepared by the Institution.

5. The Education Institution did not take cognizance of the application tendered by the petitioner, as such, he tendered an appeal to Respondent No. 4 - Education Officer (Secondary), Zilla Parishad, Jalgaon, as contemplated by Rule 12 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981, on 15.07.2004. The petitioner prayed for quashment of the

seniority list prepared by the Institution and requested for placement of the petitioner at an appropriate place in the seniority list showing him senior to Respondent No. 7. Petitioner also claimed B.Ed. pay scale since 01.04.2000 and monetary benefits in pursuance to such declaration.

6. On consideration of the appeal tendered by petitioner, the Education Officer passed an order on 09.07.2010 directing the Institution to correct the seniority list. It was directed to list name of petitioner at Sr. No. 2 in the seniority list in category "C". Whereas, it was directed to place name of Respondent No. 7 at Sr. No. 3 in the seniority list in category "C". The order passed by the Education Officer was reviewed by him on his own on 20.08.2010 and earlier position, prior to issuance of order dated 09.07.2010, was directed to be maintained.

7. Since the order was passed by the Education Officer without extending opportunity of hearing to the petitioner, he approached this Court seeking quashment of the order by presenting Writ Petition No. 10131/2010. After hearing respective parties, writ petition presented by petitioner came to be allowed and the order passed by Education Officer on 20.08.2010 came to be quashed and set aside. It was directed to the Education Officer to take fresh decision after extending an opportunity of hearing to both the parties. In pursuance of the order passed by this Court in W.P. No. 10131/2010, on 12.01.2011, the Education Officer reconsidered the matter, however, directed to maintain order dated 20.08.2010.

8. The petitioner again approached this Court by presenting Writ Petition No. 4151/2011 challenging the decision of the Education Officer dated 19/21.03.2011. The writ petition presented by the petitioner came to be allowed by this Court and order passed by the Education Officer was quashed and set aside and the matter was again remitted back to the Education Officer. This Court, while remitting the matter back to the Education Officer, directed him to consider the reported judgments cited therein as well as Government Resolution dated 25.06.1992. The directions issued by this Court, expecting consideration of certain aspects from the Education Officer, are contained in para 7 of the order, which reads thus:

7. On perusing the judgment passed by the Education Officer, it is manifest that the Education Officer has not discussed about the judgments which are referred by the learned counsel in the present petition. The Education Officer has solely based his judgment on the Government Resolution dated 25.06.1992. According to the learned counsel for the petitioner, efficacy of the said G.R. is already considered by the learned Single Judge of this Court in a case of Mrs. Lakhwinder Kaur referred supra and it has been held that said Government Resolution would not override the rules. Be that as it may, the same does not appear to have been considered by the Education Officer. The Education Officer has also not considered about the judgments delivered by the Division Bench of this Court in the cases of Madhav Budhe and Saramma Varghese referred supra. Moreover, the objection about laches as raised by the present respondent No. 7 also is not

considered by the Education Officer. What would be the effect of the endorsement made by the petitioner on the seniority list that is not acceptable to him and whether if any objection is raised, it is the duty of the management to refer the dispute to the Education Officer as per Rule 12(2) of the M.E.P.S. Rules. All these aspects are required to be considered by the Education Officer on merits.

9. The Education Officer, however, solely relying upon the judgment delivered by the Supreme Court in the matter of Shiba Shankar Mohapatra & others Vs. State of Orissa & others, reported in 2010 AIR (SC) 706; and Government Resolution dated 16.02.1995, proceeded to dismiss the appeal presented by petitioner and confirmed the stand taken earlier in the order dated 20.08.2010.

10. On perusal of the impugned order passed by the Education Officer, it is evident that the Education Officer has not dealt with the matter, as directed by this Court and has not followed the directions issued in paragraph No. 7 of the order dated 21.10.2011, passed by this Court in W.P. No. 4151/2011. The Education Officer has not at all taken into consideration the judgment of learned Single Judge of this Court in the matter of Lakhwinder Kaur Gurai Vs. Garison Children Education Society and Others, ; so also judgment delivered by this Court in the matter of Madhav Govindrao Budhe Vs. Education Officer, Z.P. Nagpur, reported in 1994 (1) Mh.L.J. 42; and Saramma Varghese Vs. Secretary/ President, S.I.C.E.S. Society and Others, . In Mrs. Lakhwinder Kaur Gurai's matter, the learned Single Judge has held that the Government Resolution does not overrule the Rules.

11. Shri Katneshwarkar, learned Counsel appearing for the petitioner, contends that considering date of appointment of the petitioner to be 03.07.1997, he ought to be considered as senior than Respondent No. 7, who has been appointed on 01.12.1997. The petitioner holds qualification as B.A., B.Ed., whereas, Respondent No. 7 holds qualification as B.A., B.Ed. (Physical Education). It is contended that both, the petitioner as well as Respondent No. 7, are required to be placed in category "C" of the seniority list prepared in accordance with Schedule-F, Rule 12 of the Rules. Para 1 of Schedule F provides that the seniority of teachers in primary school shall be based on the date of joining service and continuous officiation.

Category "C" consists of -

Holders of M.A./M.Sc./M.Com., B.T./B.Ed., or its equivalent; or B.A./B.Sc./B.Com., B.T./B.Ed., or its equivalent or B.A./B.Sc./B.Com. Dip. T. (old two years course); or B.A./B.Sc./B.Com., S.T.C./Dip.Ed./Dip.T. (one year course) with 10 years post-S.T.C. etc. service.

[B.A. Or its equivalent plus Senior Hindi Shikshak Sanad with five years service; or Junior Hindi Shikshak with ten years service (after obtaining both academic and training qualifications)].

Category "D" consists of -

Holders of B.A., B.Sc./B.Com./S.T.C./Dip. Ed. (one year course) [Senior or Junior Hindi Shikshak Sanad] or its equivalent.

[Explanation - On and after the date of publication of this notification in the Official Gazette and without affecting the promotion made until that date, the inter se seniority of teachers with qualification Senior Hindi Shikshak Sanad or Junior Hindi Shikshak Sanad in service should be fixed in Category "C" with reference to the date of their acquiring both the qualifications i.e. B.A. Or its equivalent and the Senior (5 years) or Junior Hindi Shikshak Sanad (10 years) as the case may be by the teachers concerned.]

Category "E" consists of -

Holders of S.S.C., S.T.C./Dip.Ed./Dip.T. (one year course) [Senior or Junior Hindi Shikshak Sanad] or its equivalent.

It is contended that the petitioner, who is a graduate trained teacher at the time of his appointment, ought to have been placed in category "C" along with Respondent No. 7. Category "E" consists of holders of S.S.C., S.T.C./Diploma in Education/Diploma in Teacher's Education. Since the petitioner is a trained graduate teacher, he cannot be included in category "E". It is the contention of petitioner that the date of confirmation of trained graduate teacher's pay scale has no relevance for prescribing seniority list of teachers. It is specifically contended by the petitioner that petitioner as well as Respondent No. 7 were appointed as Assistant teacher eligible to draw D.Ed. pay scale.

12. On perusal of the order of appointment annexed along with the application tendered by petitioner, it is apparent that initially Respondent No. 7 was also held eligible to draw D.Ed. pay scale while he was appointed on 23.11.1997. It is contended that drawal of pay scale by a teacher is not the criteria for his placement in the seniority list. Merely because Respondent No. 7 is held eligible to draw B.Ed. pay scale, it cannot be taken as para meter for his placement in category "C". It is contended that Respondent No. 7 has been wrongly given trained graduate teacher's pay scale earlier than that of the petitioner.

13. Respondents have opposed the contentions raised by petitioner and it is contended that appointment of Respondent No. 7 is in pursuance to an advertisement issued by the Management on 05.11.1997. The advertisement was issued for filling up the post of trained graduate teacher (B.A., B.P.Ed.) and in pursuance to the selection process initiated by the Management, Respondent No. 7 has been appointed as a trained graduate teacher. So far as petitioner is concerned, the advertisement issued on 25.06.1997, requires qualification of teacher as S.S.C., D.Ed. and petitioner has been appointed as untrained teacher in the D.Ed. pay scale and as such, he is not entitled to be placed in category "C". Reliance is placed by the Respondents on Government Resolution dated 25.06.1992 wherein it has been prescribed that the graduate teachers, appointed

as against a vacancy for non graduate teachers, would not be entitled for trained graduate teacher's pay scale. It is also laid down in the Government Resolution that such teachers will not be placed in category "C" of Schedule-F and their seniority will not be considered along with teachers who are placed in category "C" of Schedule-F. It is, thus, contended that the Education Officer has rightly taken a decision holding Respondent No. 7 senior than petitioner. Respondents have also placed heavy reliance on the judgment of the Supreme Court in the matter of Shiba Shankar Mohapatra & others Vs. State of Orissa & others, reported in 2010 AIR (SC) 706. Relying upon the said judgment, it is contended that belated claim of seniority should be rejected since it seeks to disturb vested rights of other persons regarding seniority, rank and promotion which have accrued to them during intervening period. The Respondents, thus, contend that since petitioner has lodged the claim, objecting to the seniority list, at a belated stage, his claim shall not be entertained. In paragraph 16 of the judgment of Supreme Court in Shiba Shankar's matter, it is observed thus:

16. The question of entertaining the petition disputing the long standing seniority filed at a belated stage is no more *res integra*. A Constitution Bench of this Court, in *Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others*, , considered the effect of delay in challenging the promotion and seniority list and held that any claim for seniority at a belated stage should be rejected inasmuch as it seeks to disturb the vested rights of other persons regarding seniority, rank and promotion which have accrued to them during the intervening period. A party should approach the Court just after accrual of the cause of complaint. While deciding the said case, this Court placed reliance upon its earlier judgments, particularly in *National Bell Co. and Gupta Industrial Corporation Vs. Metal Goods Mfg. Co. (P) Ltd. and Another*, , wherein it has been observed that the principle, on which the Court proceeds in refusing relief to the petitioner on the ground of laches or delay, is that the rights, which have accrued to others by reason of delay in filing the writ petition should not be allowed to be disturbed unless there is a reasonable explanation for delay. The Court further observed as under:-

A party claiming fundamental rights must move the Court before others' rights come out into existence. The action of the Courts cannot harm innocent parties if their rights emerge by reason of delay on the part of person moving the Court.

14. In the instant matter, the petitioner has objected for awarding trained graduate teacher's pay scale to Respondent No. 7 in the year 2000, overriding his claim of seniority. After the seniority list was published for the year 2003-2004 wherein names of petitioner as well as Respondent No. 7 were enlisted in category "C", name of petitioner was shown below the name of Respondent No. 7. He tendered an objection to the Education Officer on 01.07.2004 and requested for effecting correction of his placement in the seniority list. He also tendered an appeal to the Education Officer on 15.07.2004 and requested for effecting correction in the seniority list prepared by the

Management in the year 2004. The appeal tendered by the petitioner was initially considered favourably by the Education Officer and order was passed on 09.07.2010, which was later on recalled by order dated 20.08.2010. The placement of the petitioner in category "C" is by virtue of the seniority list published by the Management in the year 2004 and petitioner has objected to his placement below name of Respondent No. 7 in the same year i.e. 2004. It cannot be said that objection has been raised by petitioner at a belated stage and after the list has been acted upon and rights are crystallised in favour of Respondent No. 7. The view taken by the Education Officer that the challenge raised is at a belated stage is erroneous.

15. The contention raised by Respondents that since Respondent No. 7 has been awarded higher pay scale earlier than petitioner, he shall have to be considered as senior, is also unacceptable. The award of pay scale has no bearing on the placement of an employee in the seniority list. In this regard, reliance can be placed on the judgment in the matter of Baliram Maharaj Shikshan Sanstha and Another Vs. Education Officer (Secondary), Zilla Parishad and Another, . It has been observed in paragraph No. 17 of the judgment, that award of higher pay scale is not relevant for the purposes of fixation of seniority of a teacher. It is also observed that switching over to higher category on improving qualification cannot be said to be a promotion in that category. In the instant matter, petitioner as well as Respondent No. 7 were possessing trained graduate teacher's qualification at the time of their appointment. The petitioner is admittedly senior than Respondent No. 7. Merely because, Respondent No. 7 has been awarded trained graduate teacher's pay scale earlier than that of petitioner, will not entitle him to claim seniority over the petitioner. A reference would be apt to the judgment in the matter of Lakhwinder Kaur Gurai Vs. Garison Children Education Society and Others, . In paragraph No. 6 of the judgment, it has been observed thus:

6. The B.A./B.Sc./B.Com. Degree qualification together with the B.Ed. qualification falls in Category C. Note 4 lays down that the categories which are mentioned in Schedule F represent a ladder of Seniority and have been mentioned in descending order. In so far as the petitioner is concerned, on the date of her initial appointment i.e. 4th August, 1988, she had both the B.Sc. and B.Ed. qualification. Consequently, immediately upon her appointment, the petitioner belonged to Category C. In so far as the third respondent is concerned he was not on the date of his initial appointment qualified to fall in Category C in the absence of a B.Ed. qualification. The Education Officer has proceeded on the basis that the petitioner was functioning in the B.Ed. pay scale (Category C) from 1st October, 1991 whereas, the third respondent was functioning in the B.Ed. pay scale (Category C) from June 1989. Plainly, the Education Officer confused between the entitlement of a teacher to be placed in Category C with the grant of the B.Ed. pay scale. The entitlement of a teacher to be placed in one of the categories included in Category C is dependent on whether the teacher fulfills the qualifications and experience stipulated in a particular sub-category included

therein. The grant of a higher pay scale is not a relevant consideration. That has indeed been the position of law settled authoritatively in the decision of a Division Bench of this Court in *Saramma Varghese Vs. Secretary/President, S.I.C.E.S. Society and Others*, . The Division Bench specifically held that teachers in Category C even if they hold a graduate or post graduate degree but do not hold a B.Ed./B.T. qualification would rank as untrained teachers and their seniority would be fixed in a lower rung of the ladder. It has been held that a higher pay scale is not relevant for the purposes of fixation of Seniority of teachers. A teacher with a B.A. and B.Ed. wherever he teaches will take his place according to the date of appointment and continuous officiation. (see para 16 at page 954). In view of the judgment of the Division Bench and the plain language contained in Schedule F, it is evident that the petitioner is entitled to be placed in Category C from the initial date of appointment since from the date of appointment she held the qualification required for placement in that category. Contrary wise the third respondent obtained the B.Ed. qualification in 1989 and it is only thereafter that he would rank in Category C. The Education Officer's determination is clearly in the teeth of the statutory rules.

16. This Court has reaffirmed the position that higher pay scale is not relevant for the purposes of fixing seniority of teachers. The learned Single Judge has also considered the judgment of Division Bench in the matter of *Saramma Varghese Vs. Secretary/President, S.I.C.E.S. Society and Others*, .

17. In the instant matter, since petitioner is appointed in the year 1997, he shall have to be held as senior than Respondent No. 7 who was appointed at later point of time. Merely because Respondent No. 7 was awarded trained graduate teacher's pay scale in the year 2000, whereas, petitioner has been awarded higher pay scale in 2003, will not make Respondent No. 7 eligible to claim seniority over the petitioner. So far as Government Resolution dated 25.06.1992 is concerned, the learned Single Judge, in *Lakhwinder Kaur's* matter, has observed that Rules have statutory force and character and the Government Resolution cannot supplant the provisions of the rules. It can only be read in an area where the rules are silent. In paragraph 8 of the judgment, Government Resolution dated 25th June, 1992 has been considered and it has been observed thus:

8. It was next urged on behalf of the third respondent that in a Government Resolution dated 25th June, 1992 it has been provided that even if a teacher holds the qualification which has been prescribed in Category C of Schedule F, those teachers who are working as untrained graduate teachers would not be entitled to be included in Category C. In my view, the field is covered by the Rules made in pursuance of the power conferred by the legislature under the Act. The Rules have a statutory force and character. The Government Resolution cannot supplant the provisions of the rules. It can only be read in an area where the rules are silent. In the present case, in so far as the rules are concerned, Schedule F makes the provision expressly clear and Category C defines those

holders of stipulated qualifications who are entitled to inclusion therein. In the circumstances, the entitlement of the petitioner which flows out of the statutory rules cannot be defeated relying on a Government Resolution.

18. Thus, reliance placed by Respondents on the Government Resolution dated 25th June, 1992 is misplaced and in the facts and circumstances of the case, although, both - petitioner and Respondent No. 7 were awarded D.Ed. pay scale at the time of their appointment, since petitioner is appointed at earlier point of time, he shall have to be considered as senior than Respondent No. 7.

19. A reference can also be made to a judgment in the matter of Madhav Govindrao Budhe Vs. Education Officer, Zilla Parishad, Nagpur & others, reported in 1994 (1) Mh.L.J. 42, wherein it has been prescribed that inter se seniority of teachers falling in any single category should be determined on the basis of their length of continuous service in that category. In the instant matter, petitioner ought to have been placed in category "C" in the seniority list, whereas, he has been placed in category "E", which is erroneous.

20. In the matter of Saramma Varghese Vs. Secretary/President, S.I.C.E.S. Society and Others, , the Division Bench has laid down that seniority of primary school teachers shall be based on the date of joining service and continuous officiation. It has also been laid down that higher pay scale is not relevant for the purposes of fixation of seniority of teachers. A teacher with B.A. B.Ed., wherever he teaches, will take his place according to the date of appointment and continuous officiation.

21. Respondents have placed reliance on the judgment of Division Bench in the matter of Ashok Narayan Sathe Vs. Education Officer (Secondary), Zilla Parishad, Solapur, reported in 2007(4) Mh.L.J. 358. The judgment arises out of different set of facts and has no relevance for deciding the matter. Reliance is also placed on the judgment of the Full Bench in the matter of St. Ulai High School and Shri Adishakti Hindi Prachar Samitee Vs. Shri Devendraprasad Jagannath Singh and The Zilla Parishad, . The Full Bench has held that in respect of those matter, upon which an appeal lies to the Tribunal under clauses (a) and (b) of sub-section (1) of Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, the jurisdiction of Civil Court is impliedly barred. Relying upon this judgment, it is contended that since the Tribunal has jurisdiction to adjudicate upon the validity of an order of supersession passed by the management while making appointment to a post by promotion. Where for a final decision on the validity of an order of supersession or adjudication as to the validity of seniority list is inevitable, it can be decided as an incidental issue. In the instant matter, there is no challenge to any order of supersession or to an appointment to a post by promotion. The order under challenge is that of Education Officer dismissing the claim of the petitioner for his placement in the seniority list.

22. In the light of the discussion as above, claim of the petitioner deserves

acceptance. The order dated 09.04.2012, passed by the Education Officer (Secondary), Zilla Parishad, Jalgaon, deserves to be quashed and set aside and same is quashed and set aside. Respondent Nos. 1 to 6 are directed to declare the petitioner as senior to Respondent No. 7 and accordingly correct the seniority list by showing petitioner as senior to Respondent No. 7.

23. Rule is accordingly made absolute. There shall be no order as to costs. Civil Application No. 7500 of 2012 does not survive and stand disposed of accordingly.