

(2015) 10 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition No. 2318 of 2015

Shrishkumar

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 08-10-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 9

Citation : (2016) 1 BomCR 414

Hon'ble Judges : S.S. Shinde and A.M. Badar, JJ.

Bench : Division Bench

Advocate : S.R. Choukidar, Advocate, for the Appellant; S.G. Chincholkar, AGP,
for the Respondent

Final Decision : Dismissed

Judgement

S.S. Shinde, J.—This Petition is filed with following prayer:

B] Rule may be made absolute and by issuing appropriate writ, order or direction, following reliefs may be granted:

i] To quash and set aside decision contained in the communication dated 17-01-2015;

ii] To hold and declare that petitioner is senior most employee on the establishment of New English School, Bhalod and direct respondent nos.1 to 3 to place the petitioner at serial no.1 in the seniority list of the employees from the establishment of New English School and based thereon, extend consequential benefits of appointment as Head and other consequential benefits flowing from the placement in the seniority list and extend to the petitioner the benefit of appropriate pay scale with effect from 1-06-2007 and pay arrears of salary and grant approval to the appointment of as Head of the school by directing appointment as Head of the school.

2. The learned counsel appearing for the petitioner submits that, the petitioner possessed of educational qualification namely S.S.C.D. Ed. at the time of entry in service and was appointed as an Assistant Teacher. The petitioner had, while in service, completed B.A. in the Year 1986 and B.Ed. in the Year 1995. The respondent No. 4 was possessed of B.Sc. B.Ed. qualification. He was appointed as an Assistant Teacher on a D.Ed. scale and continued his appointment on such terms until 05.11.1990. He was extended B.Ed. scale for the first time on 05.11.1990. It is submitted that, the respondent No. 5 was appointed as an Assistant Teacher and possessed of B.Sc. B.Ed. qualification while entry in the service and was extended the B.Ed. scale for the first time on 30.06.1990. The respondent No. 5 was appointed as Assistant Head Master on 30th August, 2008. It is submitted that, the respondent No. 6 is possessed of B.Sc. B.Ed. qualification which he had completed in the year 1987. On 30th August, 2008, the respondent No. 6 was appointed on the post of Supervisor. From 16.06.2007 to 07.08.2007, the seniority list of the employees serving on the establishment of the school was circulated, wherein the respondent Nos. 4 to 6 were shown above the petitioner because of their completion of B.Ed. course earlier in the point of time than the petitioner. The said placement was objected by the petitioner by placing reliance on Circular dated 16.02.1995 issued by the Director of Education. It is the contention of the learned counsel appearing for the petitioner that, the objection raised by the petitioner to the seniority list was erroneously turned down by the Education Officer. It is submitted that, the Hon'ble Supreme Court in the unreported Judgment in the case of Viman Awale Vs. Gangadhar in Civil Appeal No. 7699 of 2014, decided on 13th August, 2014, had an occasion to consider as to whether the acquisition of B.Ed. qualification at a later date, even when such higher qualification is requisite qualification for the higher post, is determinative factor for fixing the seniority list. While answering the said issue, the Hon'ble Supreme Court held that, the said factor i.e. acquisition of B.Ed. qualification is not determinative factor for fixing the seniority. It is submitted that, the petitioner had filed representations with the respondent Nos. 1 to 3 for re-determination of the seniority list, based on the law laid down by the Hon'ble Supreme Court, however, the respondent Nos. 1 to 3 have rejected the prayer of the petitioner. Hence this Petition.

3. On the other hand, the learned AGP appearing for the Respondent - State submits that, there is inordinate delay, in taking an exception to the seniority list, and also to the appointment of the respondent No. 4 as a Head Master and to overcome point of limitation in availing appropriate remedy, the present Petition is filed. It is submitted that, the Petition raises disputed questions of fact, and therefore, the Petition may not be entertained.

4. The learned counsel appearing for the respondent Nos. 3 to 6 invited our attention to the affidavit-in-reply and submits that, the order of approval in giving B.Ed. pay scale to the respondent No. 4 has been acted upon with effect from 30th June, 1999, and the same is not challenged by the petitioner at the relevant time. It is submitted that, the respondent No. 4 possessed the

educational qualification i.e. B.Sc. B.Ed. at the time of appointment, and therefore, the respondent No. 4 was appointed as an Assistant Teacher. In fact, though answering respondent ought to have been appointed on B.Ed. scale, however, he was appointed on a D.Ed. scale and the approval was also received to that effect. It is submitted that, the petitioner was given a trained graduate scale i.e. B.Ed. scale on 30th June, 1999, and considering the qualification and scale, the petitioner has accepted the order in the Year 1999 and no challenge was made to that effect and no objection was raised. Therefore, it is a matter of record that, the objection, which was taken by the present petitioner, was in fact not tenable at that stage, in view of the fact that, the present petitioner has accepted the order in the Year 1999 itself. It is submitted that, the petitioner did not point out or not placed any document on record which would show that, the petitioner was senior upto the Year 2007 to the respondent No. 4. It is submitted that, the respondent No. 4 herein was appointed as a Head Master of the school. The present petitioner did not challenge the action of appointing the respondent No. 4 as a Head Master, by way of filing appeal before the School Tribunal, and therefore, filing the present Writ Petition belatedly after lapse of 8 years from the appointment of the respondent No. 4 as a Head Master, that too, by passing the remedy of statutory appeal under Section 9 of the MEPS Act, cannot be countenanced, and therefore, the Petition deserves to be rejected.

5. It is submitted that, the representation / application filed by the petitioner to the Education Officer was misconceived inasmuch as the Education Officer could not have set aside the promotion given to the respondent No. 4 as Head Master. It is submitted that, though the Education Officer can decide the seniority as per Rule 12, but it is a matter of record that, the present petitioner did not submit any application or raised any objection on or after 1st July, 1999, and first time objection was raised in the Year 2007, and the Education Officer has rightly decided the said application by his order dated 1st July, 2008. It is submitted that, as per Schedule-F of the said Act, which clearly mandates that, the fixation of seniority of teachers in secondary school is given as per the category "C". The holders of graduate trained qualification will have to be placed in category "C", so the present petitioner, in fact, while entering in the service was not having B.Ed. qualification, but he was having D.Ed. qualification. It is submitted that, the respondent No. 4 has been rightly placed above the petitioner in the seniority list i.e. in the category "C". It is submitted that, the schedule-F clearly mandates that, the holder of qualification should be placed, in the seniority list according to their qualifications and not on the basis of pay scale. It is submitted that, it is a matter of record that, the respondent No. 4 was appointed in the Secondary School since beginning, and therefore, on the basis of qualification, the management placed him in the seniority list. Simply because at the time of initial appointment of the respondent No. 4, a D.Ed. pay scale was given to him, that does not take away any statutory right of the respondent No. 4. It is submitted that, the Petition deserves to be rejected on the ground of laches and for not availing the remedy of appeal under Section 9 of the MEPS Act, 1977. Therefore,

relying upon the averments in the affidavit-in-reply, the learned counsel appearing for the respondent Nos. 3 to 6 submit that, the Petition may be dismissed.

6. We have heard the learned counsel appearing for the petitioner, learned AGP appearing for the Respondent - State, and the learned counsel appearing for the respondent Nos. 3 to 6. With their able assistance, perused the pleadings and grounds taken in the Petition, annexures thereto, reply filed by the respondent Nos. 3 to 6, and also the relevant provisions of the MEPS Act and Rules. It is undisputed position that, the order of approval granting B.Ed. pay scale in favour of the respondent No. 4 with effect from 30th June, 1999, has been acted upon at the relevant time. However, the petitioner did not raise any objection till the Year 2007. It further appears that, the seniority list was drawn, and accordingly, the respondent Nos. 4 to 6 were shown above the petitioner in the seniority list, and the respondent No. 4 came to be appointed as Head Master in the year 2008. The objection raised by the petitioner to the seniority list was turned down by the Education Officer on 29.11.2007. The respondent No. 4 was appointed as Head Master of the New English School and Junior College, Bhalod, in the Year 2008. The petitioner did not challenge the order of the Education Officer dated 29.11.2007, and the action of the respondents to appoint the respondent No. 4 as Head Master of the said School. It is also not in dispute that, the remedy of appeal as provided under Section 9 of the said Act, was available to the petitioner so as to challenge the appointment of the respondent No. 4 as a Head Master. However, nothing has been brought on record to show that, the order of appointment of the respondent No. 4 as a Head Master was challenged by the petitioner before the Appellate Forum. If the prayer of the petitioner is perused carefully, the prayer is two fold; firstly to re-draw the seniority list of the employees working in the New English School, Bhalod, and secondly, to appoint the petitioner as a Head Master in case the petitioner is shown senior to the respondent No. 4 and further consequential benefits be extended to the petitioner.

7. As already observed, it is admitted position that, the objection raised by the petitioner to the seniority list was turned down by the Education Officer in the year 2007-08. The petitioner did not take further steps by availing appropriate remedy, so as to challenge the decision of the Education Officer rejecting his objection to the seniority list. It appears that, by way of filing application / representation once again in the Year 2015, to the respondent Nos. 1 to 3, the petitioner, so as to overcome the limitation to challenge the decision of the Education Officer taken in the Year 2007 itself, has filed such applications / representations, and thereafter, the present Writ Petition. Not only that, there is inordinate delay in taking exception to the seniority list by way of filing present Writ Petition, but admittedly the petitioner has not availed the remedy of statutory appeal so as to take exception to the appointment of the respondent No. 4 as a Head Master. Therefore, there is inordinate and unexplained delay in challenging the seniority list, and also the appointment of the respondent No. 4

as a Head Master, that too, by passing remedy of appeal. It is true that, there is no specific provision prescribing limitation for filing the Writ Petition, however, the Hon'ble Supreme Court in the case of *The Moon Mills, Ltd. Vs. M.R. Meher, President, Industrial Court, Bombay and Others*, held thus:

It is true that the issue of a writ of certiorari is largely a matter of sound discretion. It is also true that the writ will not be granted if there is such negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. The principle is to a great extent, though not identical with, similar to the exercise of discretion in the Court of Chancery. The principle has been clearly stated by Sir Barnes Peacock in *Lindsay Petroleum Co. v. Prosper Armstrong Hurd, Abram Farewell, and John Kemp*, (1874) 5 PC 221 at p.239, as follows:

"Now the doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party, has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that namely, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

In the case of *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, the Supreme Court held that, it may be stated that a citizen who sleeps over his fundamental rights even for many years and allows third parties to acquire those rights, cannot be helped by the court in its writ jurisdiction.

Yet in another exposition in the case of *State of Maharashtra Vs. Digambar*, , the Supreme Court about exercise of power under Article 226 of the Constitution of India in para Nos. 18 to 21 held thus:

18. Coming to the exercise of power conferred upon the High Court under Article 226 of the Constitution for issuing orders, directions or writs for "any purpose", such power is discretionary, being a matter well-settled, cannot be disputed.

19. Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to

necessarily depend upon unblameworthy conduct of the person seeking relief, and the Court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blame-worthy conduct.

20. Laches or undue delay, the blame-worthy conduct of a person in approaching a Court of equity in England for obtaining discretionary relief which disentitled him for grant of such relief was explained succinctly by Sir Barnes Peacock, long ago, in *Lindsay Petroleum Co. v. Hurd* (1874) 5 PC 221 thus:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation, in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar any statute or limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of Justice or injustice in taking the one course or the other, so far as it relates to the remedy."

21. Whether the above doctrine of laches which disentitled grant of relief to a party by equity court of England, could disentitle the grant of relief to a person by the High Court in exercise of its power under Article 226 of our Constitution, when came up for consideration before a Constitution Bench of this Court in *Moon Mills Ltd. v. M.R. Meher*, President, Industrial Court, Bombay, it was regarded as a principle that disentitled a party for grant of relief from a High Court in exercise of its discretionary power under Article 226 of the Constitution.

In the case of *Shri Santoshkumar Shivgonda Patil and Others Vs. Shri Balasaheb Tukaram Shevale and Others*, , the Supreme Court held thus:

11. It seems to be fairly settled that if a statute does not prescribe the time-limit for exercise of revisional power, it does not mean that such power can be exercised at any time; rather it should be exercised within a reasonable time. It is so because the law does not expect a settled thing to be unsettled after a long lapse of time. Where the legislature does not provide for any length of time within which the power of revision is to be exercised by the authority, suo motu or otherwise, it is plain that exercise of such power within reasonable time is inherent therein.

8. Therefore, in the light of the discussion herein above, it is clear that, there is inordinate delay in filing the present Writ Petition. Secondly to overcome the point of limitation in availing appropriate remedy so as to take exception to the

seniority list, and the appointment of the respondent No. 4 as a Head Master, the present Writ Petition appears to have been filed by the petitioner, which also raises disputed questions of fact.

9. Apart from inordinate and unexplained delay in filing the Writ Petition, if the facts of the present case are considered, the respondent No. 4 has stated in the affidavit-in-reply that, he was appointed in the Secondary School since beginning and he was placed in the seniority i.e. in the category "C". However, it appears that, in the case of Viman Awale [supra], the Supreme Court has considered different facts situation inasmuch as the petitioner therein and the respondent No. 4, at the initial stage were not possessing B.Ed. qualification, but they were only D.Ed. Therefore, they were placed in category-D of Schedule "F". However, as stated by the respondent No. 4 in his affidavit-in-reply, since beginning he was placed in category-C of Schedule "F". In that case, the petitioner therein did avail remedy of appeal, and upon dismissal of appeal, filed Writ Petition, and thereafter, Special Leave Petition.

10. While exercising the writ jurisdiction, it is not desirable to undertake exercise of adjudication of the disputed questions of fact. As already observed, the respondent No. 4 claimed that, he was appointed from beginning in the Secondary School, and since he possessed B.Ed. qualification at the entry point, he was placed in the seniority list in category-C of Schedule-F. For adjudication of such rival claims, the petitioner ought to have availed appropriate remedy at the appropriate time within limitation provided under the relevant Statutes / Rules / procedure. We also find considerable force in the submission of the counsel appearing for respondent Nos. 4 to 6 that, the Education Officer cannot decide the issue of the appointment of the Head Master, in view of the remedy of appeal provided under Section 9 of MEPS Act.

11. In the light of the discussion in the foregoing paragraphs, inevitable conclusion is that, it is not desirable to entertain the Writ Petition, which raises disputed questions of fact, and also there is inordinate delay in filing the Petition, challenging the decision of the Education Officer, rejecting the objection of the petitioner in the Year 2007-08 to the seniority list, and also to take exception to the appointment of the respondent No. 4 as a Head Master in the Year 2008.

12. In the result, the Writ Petition stands rejected. However, we make it clear that, we have not expressed any opinion on merits of the matter, and if the petitioner is advised, he may avail remedies made available, with prayer for condonation of delay. However, we make it clear that, we have not expressed any opinion, either on merits, or delay in availing such remedies.