

(2000) 08 BOM CK 0028

In the Bombay High Court

Case No : Writ Petition No. 6487 of 1999

Umesh Balkrishna Vispute (Shri)

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 01-08-2000

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 9, 9(1)
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 12, 3

Citation : (2001) 3 ALLMR 25 : (2001) 2 BomCR 145 : (2001) 1 MhLj 486 : (2000) 4 MhLj 564

Hon'ble Judges : Vijay Daga, J;A.P. Shah, J

Bench : Division Bench

Advocate : N.V. Bandiwadekar, for the Appellant; R.D. Rane, A.G.P., for the Respondent

Judgement

Vijay Daga, J.—Rule.

2. Learned Counsel for the respondents waive service. Heard forthwith by consent of parties.

Relief Claimed :

3. The petitioner invoked the jurisdiction of this Court under Article 226 of the Constitution of India to challenge his suppression by the management, while making an appointment by promotion, to the post of Head Master in respondent No. 4 secondary school run by respondent No. 3 society under the name and style Adarsha Vidya Mandir, Dakiwali, Taluka Wadha, District- Thane. The petitioner has claimed directions against respondent No. 2, the Education Officer (Secondary), Zilla Parishad, Thane and respondent No. 3 society, to count his services rendered in respondent No. 4 school, from 2nd July, 1993 as Head Master and, thereafter, as Assistant Teacher from the academic year 1994-95 and claimed all further consequential service benefits including appointment to

the post of Head Master of respondent No. 4 school.

4. In order to appreciate the grievances of the petitioner and his justification to approach this Court directly under Article 226 of the Constitution, few relevant facts, together with the legal scenario holding the field, need to be noticed at the outset.

BRIEF FACTS :

5. The petitioner was appointed by respondent No. 3 society in respondent No. 4 secondary school by an order dated 1st June, 1993. The said secondary school is recognised by Government of Maharashtra. In the academic year 1993-94, the said school had only one division of 8th standard as the school itself was established and opened in the month of June 1993. Thus, according to the petitioner at the relevant time only 1-1/2 posts were admissible to the said school. Accordingly, he was appointed as Head Master in one of the admissible posts. The respondent No. 5 Mrs. Dipti Patil was appointed as Assistant Teacher by an order dated 13th June, 1993 in the balance post, which, according to the petitioner, was neither substantive nor admissible looking to the strength of the school. The petitioner has projected his own appointment as on full time basis against the substantive post.

6. In subsequent academic years commencing from 1995-96, the petitioner and respondent No. 5 both were appointed as Assistant Teacher and the said staff schedule of the school was also approved by respondent No. 2, Education Officer. However, in the year 1996-97 and 1997-98, respondent No. 5 was appointed and approved as In-charge Head Mistress.

7. The school started receiving 100% grant in aid with effect from June 1997. The petitioner having completed his 5 years of service in the said school, claimed to have become entitled to the appointed as Head Master of the school in view of Rule 3 of the Maharashtra Employees of Private Schools, (Conditions of Service) Rules, 1981 framed under the Maharashtra Employees of Private Schools, (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as "Rules" and "Act" respectively, for the sake of brevity).

8. The petitioner claimed to have approached respondent No. 3 on several occasions and requested to grant him an appointment to the post of Head Master of respondent No. 4 school being senior most confirmed teacher. However, respondent No. 3 did not issue any such appointment in favour of the petitioner. On the contrary, respondent No. 5 was given a scale of Head Master with effect from June 1998.

9. The petitioner, being aggrieved by the above decision of the management of the school, amounting to suppression, while making an appointment by promotion, made representation to respondent No. 2, Education Officer and respondent No. 3, society running respondent No. 4 school and requested them to count his length of service from June-July 1993 to determine his seniority and

further requested for appointment to the post of Head Master of respondent No. 4 school. He further asserted in his representation that respondent No. 5 was never appointed on a substantive post in the month of June 1993 and hence she ought to have been treated as junior to the petitioner. However, his representation did not receive any response either from the Education Officer or from the management of the school. The petitioner, therefore, approached this Court to impugn inaction of respondent No. 2 and action of respondent No. 3 society/the management of the school.

RIVAL CONTENTIONS :

10. At the hearing of the petition, it was principally contended on behalf of the petitioner that since the petitioner was appointed in substantive post as Head Master of the school in 1993-94, the said services rendered by the petitioner ought to have been counted for all service benefits. He after having completed 5 years of service was entitled to be appointed as Head Master of the school as per Rule 3 of the Rules. However, without taking into consideration the said length of service rendered by the petitioner, the respondent No. 3 has erroneously granted pay scale of Head Master to respondent No. 5 from 1998-99. It is further contended that though respondent No. 5 was appointed in June 1993 as Assistant Teacher but the post to which she was appointed was not admissible. Therefore, the services rendered by respondent No. 5 in the year 1993-94 could not have been counted for any purpose whatsoever. But, by so considering the said service period of respondent No. 5, she was given pay scale of the Head Master from 1998-99 and a serious injustice has been caused to the petitioner. The petitioner further submitted that the above assumption of respondent No. 3 in favour of respondent No. 5 was illegal and contrary to law. The petitioner, therefore, claimed directions against respondent Nos. 2 and 3 to count his entire service rendered by him from July 1993 with all consequential service benefits.

11. On being noticed, respondents appeared and opposed the petition on number of grounds. The respondent Nos. 3 and 4 contended that the petition suffers from gross delay and laches. It was denied that the school was having only 1-1/2 posts admissible in the year 1993-94. It was asserted that at the relevant time 2 sanctioned posts were available and respondent No. 5 was appointed in a clear sanctioned post and was working as full time teacher right from inception of her appointment. It was further contended that though respondent No. 5 was initially appointed as Assistant Teacher, she was subsequently considered as In-charge Head Mistress and promoted as such with the approval of Education Department. She was allowed to sign on all important financial and other documents as Head Mistress by the Education Officer and after completion of 5 years of service, she being senior to the petitioner, was rightly appointed as Head Mistress.

12. The respondent Nos. 3 and 4 also contended that the petition under Article 226 of the Constitution is not maintainable since there is an alternate remedy available under Rule 12 of the Rules and placed reliance on the judgment of the learned Single Judge of this Court in *Burondi K. Lodghar v. Vilasrao M. Desai*

1994(4) Bom.C.R. 294. Lastly, it was contended that this Court should not exercise the writ jurisdiction as it involves disputed questions of facts as to how many sanctioned posts were available in the school at the relevant time and, consequently, prayed for dismissal of the petition.

13. The learned Counsel for the petitioner in rejoinder contended that the determination of the dispute under Rule 12 of the Rules is not made final under the scheme of the Act and Rules. He further submitted that since the learned Single Judge of this Court has already taken a view that the school Tribunal ("Tribunal") cannot go into the question of inter se seniority between the teachers, as such, it would be proper exercise of discretion to grant the relief sought for in exercise of jurisdiction under Article 226 of the Constitution as no appeal would be maintainable in view of the judgment in *Burondi K. Lodghar v. Vilasrao M. Desai* (supra). He brought to our notice the observations of the learned Single Judge reading as :

"..... A conjoint reading of Rule 12 and section 9, which I pointed out earlier, gives different powers to the different authorities, will clearly goes to show that the Tribunal cannot go into the question of inter se seniority between the teachers, which is specifically and especially conferred upon the Education Officer under Rule 12 of the said Act. Therefore, the Counsel for the petitioner Shri Rage is right in contending that the Tribunal has over stepped the jurisdiction and decided the matter which they are not competent to decide.

4. The learned Counsel for the respondent No. 1 has argued that since the Tribunal is given power to go into suppression of a teacher in the school in giving appointment or promotion that also takes in the power to decide the seniority inter se between the teachers. Therefore, notwithstanding that a separate jurisdiction is conferred to the Education Officer, for deciding the seniority, if the suppression is coupled with the seniority, it is legal on the part of the Tribunal to decide the question of seniority also. I cannot agree with this submission. As I pointed out earlier, if the statute giving a specific power to specific authority, the authority has to confine to specific jurisdiction."

14. In view of the aforesaid legal scenario holding the field, the learned Counsel for the petitioner submitted that he had no option but to invoke the writ jurisdiction of this Court to ventilate his grievances. In his submission, he is left with no remedy but to challenge suppression by the management while making an appointment to any post by promotion. He further submitted that the remedy recognised by the learned Single Judge in *Burondi K. Lodghar v. Vilasrao M. Desai* (supra) cannot be recognised as efficacious alternate remedy, at any rate the decision of the Education Officer cannot be said to be final under the rules. Even if Education Officer decides the dispute, it has no finality in the eye of law. In the alternative, he submits that the view taken by the learned Single Judge in *Burondi K. Lodghar v. Vilasrao M. Desai* (supra) holding that the Tribunal has no jurisdiction to decide the question of seniority needs reconsideration otherwise the teacher in the school superseded by the management while making an

appointment to any post by promotion will be left with no remedy.

15. As the question raised is of great importance, at least for those who are connected with the field of education, the learned Counsel appearing for the parties assisted this Court to find out as to whether the appeal to the Tribunal u/s 9 of the Act, in the circumstances, is maintainable or not.

16. Before proceeding further with the discussion, it may be proper to read the relevant provisions for a break up of statutory limbs.

The relevant portion of section 9 reads as under :

"9. (1) Notwithstanding anything contained in any law or contract for the time being in force, (any employee in a private school, ---

(a) who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank, by the order passed by the Management ; or

(b) who is superseded by the Management while making an appointment to any post by promotion; and who is aggrieved, shall have a right of appeal and may appeal against any such order of suppression to the Tribunal constituted u/s 9:

Provided that, no such appeal shall lie to the Tribunal in any case where the matter has already been decided by a Court of competent jurisdiction or is pending before such Court, on the appointed date or where the order of dismissal, removal, otherwise termination of service or reduction in rank was passed by the Management at any time before the 1st July, 1976."

Section 9 provides for right of appeal to the Tribunal, to the employees of the private schools. This section was amended by the Maharashtra Act 30 of 1987 and thereby the legislature has properly arranged the section. By the amendment Clause (b) is added to section 9 of the Act and the word "suppression" is newly introduced therein. Thus, the employee who is aggrieved by an order of suppression passed by the Management may appeal to the Tribunal constituted u/s 8 of the Act. It is clear from the language of the section that right of appeal is given to the employees of private school who is aggrieved by an order of Management in terms of Clauses (a) and (b) of section 9(1) of the Act. Having seen the extent of operation of section 9 of the Act, let us now turn to Rule 12 to find out field of operation and its impact on right of appeal provided u/s 9 of the Act. Rule 12 of the said Rules dealing with the preparation of seniority list reads as under:

"12. Seniority List. ---Every Management shall prepare and maintain seniority list of the teaching staff, including Head Masters and Assistant Head Master and non teaching staff in the school in accordance with the guidelines laid down in Schedule F. The seniority list so prepared shall be circulated amongst the members of the staff concerned and their signatures for having received a copy of the list shall be obtained. Any subsequent change made in the seniority list from time to time shall also be brought to the notice of the members of the staff

concerned and their signatures for having noted the change shall be obtained.

(2) Objections, if any, to the seniority list or to the changes therein shall be duly taken into consideration by the Management.

(3) Disputes, if any, in the matter of inter se seniority shall be referred to the Education Officer for his decision."

The Rule 12, dealing with the preparation of seniority list, has to be read with Schedule F of the Rules. The guidelines are prescribed in the Schedule F for fixation of seniority. The Management is authorised to prepare such seniority list while the Education Officer is authorised to consider any objection to such list. The entire scheme of Rule 12 makes it clear that it deals with the dispute relating to preparation and maintenance of the seniority list together with fixation of inter se seniority.

17. With the above backdrop, the contention as now raised can be considered. The entire contention on behalf of the petitioner is that Clause (b) of section 9(1) of the Act empowers the Tribunal to entertain appeal against the order of suppression passed by the Management while making appointment to any post by promotion. The learned Counsel further submitted that while adjudicating the order of suppression passed by the Management, adjudication on validity of the seniority list is some times inevitable as incidental question. In his submission, point of seniority list can also be considered by the Tribunal while deciding the controversy of suppression. He further submitted that any finding recorded by the Education Officer while adjudicating upon the dispute relating to preparation and maintenance of the seniority list of fixation of inter se seniority is not made final either under the Act or Rules and, as such, any decision under Rule 12 of the Rules cannot bind the Tribunal. According to the petitioner, section 9(1) of the Act is an overriding provision as is clear from the non-obstante clause with which it begins.

18. The learned Counsel appearing for the respondents relying upon the judgment of learned Single Judge in *Burondi K. Lodghar v. Vilasrao M. Desai* (supra) contended that any dispute in the matter of inter se seniority has to be decided by the Management and/or Education Officer. According to him, the Tribunal has no jurisdiction to deal with the matter relating to inter se seniority and the dispute adjudicated upon by the Education Officer has to be treated as final and conclusive and binding on the Tribunal. He relied upon the findings recorded by the learned Single Judge and contended that the Tribunal cannot go into the question of inter se seniority of the teachers, as such, power is specifically and especially conferred upon the Education Officer under Rule 12 of the Rules.

19. We may at once state that the question involved in this petition was not res integra in view of two unreported judgments of Nagpur Bench in the matter of *Sou. Saroj Yashwant Deopujari v. Education Officer*, in Writ Petition No. 546 of 1989 decided on 31st March, 1989 (*Deshpande and Ghodeswar, JJ.*) and

Ramchandra Narayan Jamkar v. Sou. Saroj Yeshwant Deopujari, in Writ Petition No. 1309 of 1991 decided on 19th June, 1991 (V.A. Mohta and M.B. Ghodeswar, JJ.) which were not brought to the notice of the learned Single Judge of this Court when the judgment in Burondi K. Lodghar v. Vilasrao M. Desai (supra) was passed. The Division Bench of this Court in Sou. Saroj Yeshwant Deopujari v. Education Officer (supra) has said:

"..... It is clear that this order was passed before the present writ petition was filed and since the main contention in this petition is with regard to the petitioner's eligibility to the appointment on the basis of her seniority, the matter would clearly fall within section 9(1)(b) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 which authorises the Tribunal to consider the grievance of an employee who is superseded by the Management while making an appointment to any post by promotion.

..... It is not necessary to go into that question at this stage because here the appointment of the respondent No. 4 has already been made as Assistant Head Master and if the petitioner has a grievance that she has been superseded because she was senior to the respondent No. 4, the question of seniority will have to be decided by the Tribunal for reaching a finding as to whether the petitioner has been superseded or not by the appointment of the respondent No. 4. We make it clear that all questions which would be required to be determined for considering whether the petitioner has been superseded by the appointment of the respondent No. 4 would fall for consideration before the Tribunal for determining whether the respondent No. 4 has superseded the petitioner or not and the Tribunal would have the jurisdiction to decide these and incidental questions which might arise."

The perusal of the aforesaid findings of the Division Bench clearly lay down that Clause (b) of section 9(1) of the Act empowers the Tribunal to entertain the appeal against the order of suppression while making appointment by promotion and while adjudicating the validity of the order of suppression passed by the Management, the validity of the seniority list of objection to it can also be considered as an incidental question.

20. The second judgment in the matter of Ramchandra Narayan Jamkar v. Sau. Saroj Yeshwant Deopujari (supra) also clearly lays down that the determination of the dispute under Rule 12 of the Rules is not made final. Section 9(1) of the Act has overriding effect. The Division Bench while dealing with this aspect of the matter has observed as under :

"It is next contended that the order of the Education Officer in the matter of finalisation of seniority list in terms of Rule 12 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (the Rules) had become final and conclusive and was binding on the School Tribunal. We do not see any substance in this point either. Section 9 of the Act is an overriding provision as is clear from the non-obstante clause with which it begins. It confers jurisdiction to

adjudicate upon validity of order of suppression by the Management while making appointment to any post of promotion. For the final decision of that point, adjudication on the validity of seniority list is sometime inevitable as it is an incidental question. The proviso to section 9 no doubt makes certain exceptions but those relate to the question which are either already decided by a "Court" of competent jurisdiction or are pending before it. By no stretch of imagination the Education Officer can be said to be a Court a term not defined under the Act. It is also pertinent to notice that the determination of the dispute under Rule 12 of the Rules is not made final."

21. We, after having heard the parties at length and after having considered the aforesaid judgments, are of the considered view that finalisation of the seniority list in terms of Rule 12 of the Rules is not final and conclusive and not binding on the tribunal and section 9(1) of the Act has overriding effect as it opens with non-obstante clause and the dispute relating to seniority list can also be considered by the Tribunal as an incidental question while deciding the controversy in regards to the suppression. The dispute relating to suppression in the matter of promotion squarely lies within the jurisdiction of the Tribunal. The view taken by the learned Single Judge of this Court in *Burondi K. Lodghar v. Vilasrao M. Desai* (supra) cannot be said to be a good law. We, therefore, have no difficulty in upholding the jurisdiction of the Tribunal to go into the question of seniority of the teachers. The Tribunal can also go into the question of suppression by the Management while making promotion.

22. Having held that the appeal is maintainable before the Tribunal to challenge the order of suppression while making promotion, we are also constrained to observe that the determination of question of inter se seniority always involve disputed questions of fact. The disputed questions of fact involved and sought to be raised cannot be satisfactorily gone into or adjudicated by this Court in exercise of its jurisdiction under Article 226 of the Constitution. We feel that this Court must exercise judicial restraint so far as judicial interference in the cases of this nature are concerned. It is now well settled that this Court while exercising its jurisdiction under Article 226 of the Constitution can refuse to exercise its discretion in a given case.

23. It is also well settled that when an alternate and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not to invoke writ jurisdiction to seek a prerogative writ. It is true that existence of an adequate legal remedy does not affect jurisdiction to issue writ, but as observed by the Apex Court in *Rashid Ahmed Vs. The Municipal Board, Kairana*, , that the existence of an adequate legal remedy is to be taken into consideration in the matter of granting prerogative writs ; and wherever such remedy exists, it will be sound exercise of discretion to refuse the relief in exercise of discretion under Article 226, unless there are good grounds therefore. None of such good grounds exist in the present case.

24. Having held that the appeal before the Tribunal is maintainable, it shall be

open to the petitioner to challenge the action of the respondents before the Tribunal and canvass his grievances. In the event an appeal is preferred by the petitioner within three months from today, the Tribunal shall consider such appeal on its own merits.

25. The petition stands disposed of in terms of the above order and rule is discharged with no order as to costs.