

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 4990/2019

Nildhwaj Motiramji Kamble,
Aged about 54 years, Occ. Headmaster,
Adarsh Vidyalaya, Dongarkharda,
Tah. Kalamb, Dist. Yavatmal,
R/o 1, Khoja Colony, At Post Dongar-Khardha,
Dongar-Khardha, Tal.Kalamb, Dist. Yavatmal.

PETITIONER

.....VERSUS.....

1. The State of Maharashtra,
through its President, Department of Education,
Mantralaya, Mumbai-32.
2. The Education Officer (Sec)
Zilla Parishad, Yavatmal.
3. Adarsh Shikshan Sanstha,
Through its President, Dongarkharda,
Tah. Kalamb, Dist. Yavatmal.
4. Nitin Janraoji Ingole,
Age – 41 years, Occ. Service,
R/o C/o Adarsha High School,
Dongarkharda, Tah. Kalamb, Dist. Yavatmal.

RESPONDENTS

Shri P.P. Thakare counsel for the petitioner.
Mrs. K.R. Deshpande, Assistant Government Pleader for the respondent nos.1
and 2.
Shri A.A. Naik, counsel for the respondent no.4.

CORAM : A. S. CHANDURKAR AND SMT. PUSHPA V. GANEDIWALA, JJ.

DATE : 19TH JANUARY, 2022.

ORAL JUDGMENT (PER : A.S. CHANDURKAR, J.)

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

2. The petitioner and the respondent no.4 are serving as Headmaster and Assistant Teacher respectively at the school run by the respondent no.3. The petitioner was appointed on the post of Assistant Teacher on 09.09.1985 while the respondent no.4 was appointed as Assistant Teacher on 11.12.2002. Their appointments were duly approved by the Education Officer (Secondary). The petitioner was shown to be senior than the respondent no.4 in the seniority list that was prepared for the years 2017-18 and 2018-19. In the seniority list for the year 2018-19, the petitioner was shown at Serial Number 1 while the respondent no.4 was shown at Serial Number 6. On 30.04.2018 the Management passed a resolution promoting the petitioner to the post of Headmaster from 01.05.2018. The petitioner accordingly took charge of the post of Headmaster from 01.05.2018 and his appointment as such was approved by the Education Officer (Secondary) on 17.05.2018. It is the case of the respondent no.4 that his placement in the seniority list for the year 2018-19 was improper and he ought to be shown to be senior to the petitioner. Hence, on 31.07.2018 the respondent no.4 made a representation to the Management seeking appropriate placement in the seniority list. A copy of that representation was also addressed to the Education Officer (Secondary). It appears that the Education Officer (Secondary) in exercise of powers conferred by Rule 12 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules,

1981 (for short, 'the said Rules') passed an order on 12.06.2019 holding that in view of Government Circular dated 03.05.2019 as well as a communication from the Office of the Director of Secondary and Higher Education dated 27.05.2019, the respondent no.4 was senior to the petitioner. On the same day, the Education Officer (Secondary) directed the Management to submit a proposal showing the respondent no.4 as Headmaster for necessary approval. The petitioner protested against such direction through his communications dated 03.07.2019 and 04.07.2019. On finding that there was no response to the same from the Office of the Education Officer (Secondary) the petitioner has filed this writ petition under Article 226 of the Constitution of India challenging the communications dated 12.06.2019 by which the Education Officer (Secondary) has held the respondent no.4 to be senior to the petitioner as well as the direction issued to the Management to send a proposal indicating the respondent no.4 to be the Headmaster.

3. Shri Prashant Thakare, learned counsel for the petitioner submits that the Education Officer (Secondary) had no jurisdiction to entertain any grievance relating to the seniority list of the year 2018-19 under Rule 12 of the said Rules after the Management had on the basis of such seniority list promoted the petitioner. According to him the jurisdiction to entertain any grievance/dispute in the matter of *inter se*

seniority is available with the Education Officer (Secondary) only till such time the Management has not acted upon the same and effected any promotion. On an order of promotion being issued by the Management the person aggrieved by the same is required to challenge such order of promotion by filing an appeal under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, 'the said Act'). Since the Education Officer (Secondary) had chosen to adjudicate the dispute as regards *inter se* seniority between the petitioner and the respondent no.4 despite the fact that prior thereto the petitioner had been promoted to the post of Headmaster it was clear that the Education Officer (Secondary) exceeded the jurisdiction conferred on him by Rule 12 of the said Rules. In support of this contention, the learned counsel placed reliance on the decisions in *Umesh Balkrishna Vispute Versus State of Maharashtra & Others* [2000(4) **Mh.L.J. 564**], *St.Ulai High School & Another Versus Devendraprasad Jagannath Singh & Another* [2007(1) **Mh.L.J. 597**], *Bhagwant Sheshrao Borale Versus Education Officer, (Secondary), Zilla Parishad, Buldana & Others* [2009(6) **Mh.L.J. 478**] and *Salim Gulab Mulla Versus State of Maharashtra & Others* [2016(6) **Mh.L.J. 617**].

On merits of the adjudication, it was submitted that the petitioner was rightly shown to be senior to the respondent no.4 since 2017-18 and the claim as sought to be made by the respondent no.4 was

not liable to be accepted. It was thus submitted that the impugned communications dated 12.06.2019 were liable to be set aside.

4. Shri Akshay Naik, learned counsel for the respondent no.4 opposed the aforesaid submissions. According to him, the direction issued by the Education Officer (Secondary) to the Management to treat the respondent no.4 to be senior to the petitioner was in view of the fact that it was found that the initial placement of the petitioner in the seniority list was incorrect and that on noticing such error the Education Officer (Secondary) found that the respondent no.4 was senior to the petitioner. It was held by the Education Officer (Secondary) that the earlier placement of the petitioner pursuant to the Government Circulars dated 24.01.2017 and 14.11.2017 was incorrect for the reason that by a subsequent Government Circular dated 03.05.2019 the earlier two Government Circulars had been withdrawn. Inviting attention to the adjudication as made by the Education Officer (Secondary) he submitted that a specific reference to the Government Circular dated 03.05.2019 had been made in the communication dated 12.06.2019. Thus, according to the learned counsel the Education Officer (Secondary) merely rectified the error that was apparent in the seniority list wherein the petitioner was shown to be senior to the respondent no.4. The respondent no.4 having entered category 'C' under the said Rules prior to the petitioner he was in

fact senior in service to the petitioner. On this count, it was submitted that the impugned communications did not warrant interference.

It was then submitted that even if the Education Officer (Secondary) had wrongly exercised jurisdiction under Rule 12 of the said Rules after issuance of the order of promotion in favour of the petitioner this Court may not exercise discretion under Article 226 of the Constitution of India to set aside the impugned communications for the same would result in reviving the earlier illegal placement of the petitioner. In other words, it was submitted that if the consequence of setting aside an illegal order results in restoring or perpetuating the earlier illegality, this Court ought to refuse to exercise jurisdiction under Article 226 of the Constitution of India for setting aside such illegal order. The learned counsel by placing reliance on the decisions in *Maharaja Chintamani Saran Nath Shahdeo Versus State of Bihar & Others* [(1999) **8 SCC 16**] and *Bhartiya Seva Samaj Trust, Through President & Another Versus Yogeshbhai Ambalal Patel & Another* [(2012) **9 SCC 310**] sought to draw support for the aforesaid proposition in view of the law laid down therein. On this count too it was submitted that the writ petition may not be entertained and it be dismissed.

5. Mrs. Kalyani Deshpande, learned Assistant Government Pleader for the respondent nos.1 and 2 referred to the affidavit filed on

behalf of the Education Officer (Secondary) and submitted that the impugned communications dated 12.06.2019 were issued after giving due opportunity of hearing to the petitioner as well as the respondent no.4. The impugned communications were issued pursuant to the Government Circular dated 03.05.2019 and hence the same did not call for any interference.

6. We have heard the learned counsel for the parties at length and with their assistance we have gone through the documents placed on record. We have also given due consideration to their respective submissions and in our considered opinion, the impugned communications are liable to be set aside.

At the outset, it may be stated that the legal position as regards the point of time when the Education Officer (Secondary) can exercise jurisdiction under Rule 12 of the said Rules now stands settled in the light of the decisions in *Umesh Balkrishna Vispute*, *Bhagwant Sheshrao Borale* and *Salim Gulab Mulla* (supra). It has been held in the aforesaid decisions that the Education Officer (Secondary) can exercise jurisdiction to determine any *inter se* dispute as regards seniority that has been referred to him under Rule 12(3) of the said Rules till such time the Management has not acted upon that seniority list and has thereafter proceeded to promote an employee on that basis. In *Bhagwant Sheshrao*

Borale (supra) it has been held in clear terms that once an order of promotion is issued and an appointment is made by the Management on the basis of the seniority list, the Education Officer (Secondary) would have no jurisdiction to thereafter re-fix the seniority and demote a person already promoted. This position has been reiterated in *Salim Gulab Mulla* (supra). In *Umesh Balkrishna Vispute* (supra), the Division Bench has held that finalization of the seniority list in terms of Rule 12 of the said Rules is not final and conclusive. Such adjudication is not binding on the School Tribunal and in an appeal under Section 9 of the said Act where the dispute as regards supersession is raised it would be open for the Tribunal to go into the question of seniority as an incidental question in such appeal.

7. When the facts of the case in hand are appreciated it is seen that in the seniority list for the years 2017-18 and 2018-19 the petitioner was shown to be senior to the respondent no.4. The Management by its resolution dated 30.04.2018 resolved to promote the petitioner on the post of Headmaster. It accordingly issued an order of promotion on 30.04.2018 and the petitioner took charge of the post of Headmaster on 01.05.2018. The Education Officer (Secondary) thereafter proceeded to approve the petitioner's appointment on 17.05.2018 on the post of Headmaster. Such approval was to operate from 01.05.2018. It is not in

dispute that thereafter the Education Officer (Secondary) has chosen to entertain the dispute as regards *inter se* seniority between the petitioner and the respondent no.4 and it is in this backdrop that the Education Officer (Secondary) issued the impugned communications on 12.06.2019. Considering the legal position referred to hereinabove, which is now well settled it becomes immediately clear that the Management having promoted the petitioner on 30.04.2018 to the post of Headmaster and the petitioner having taken charge of that post from 01.05.2018, the Education Officer (Secondary) lost jurisdiction to determine the *inter se* seniority between the petitioner and the respondent no.4 thereafter. It is thus clear that the impugned communications dated 12.06.2019 by which the respondent no.4 is held to be senior to the petitioner is the outcome of an exercise without jurisdiction. On this short count, the challenge as raised by the petitioner to the communications dated 12.06.2019 ought to succeed.

8. Anticipating that such exercise of power by the Education Officer (Secondary) under Rule 12(3) of the said Rules was against law, it is urged on behalf of the respondent no.4 that as the respondent no.4 even otherwise is senior to the petitioner the communications dated 12.06.2019 may not be set aside as the consequence of setting aside those communications would result in the petitioner being wrongly shown

senior to the respondent no.4. Even assuming that the Education Officer (Secondary) had acted beyond jurisdiction under Rule 12 of the said Rules such error did not deserve to be corrected as the illegality of the petitioner being shown senior to the respondent no.4 would be revived. According to the learned counsel for the respondent no.4 this legal proposition is well settled.

In *Maharaja Chintamani Saran Nath Shahdeo* (supra) the appellant was the proprietor of an Estate which included a subsisting lease of mines and minerals therein. In compensation proceedings the appellant was paid compensation which was accepted by him. Subsequently, a fresh assessment was carried out and the amount of compensation was further enhanced which amount was also accepted by the appellant. The appellant thereafter made a complaint and sought further enhancement in the amount of compensation. He was granted such additional compensation. Subsequently, in *suo motu* proceedings the case was re-opened and it was found that the additional compensation granted to the appellant was in violation of the relevant Statute. The appellant challenged this action contending that the *suo motu* re-opening of the proceedings was without jurisdiction and the Authority concerned ought to have filed an appeal. The High Court refused to interfere in the matter by observing that even if the *suo motu* order was set aside as being without jurisdiction, it would result in

restoring an illegal order of grant of excess compensation. In that context, the Hon'ble Supreme Court observed that though the Member had no jurisdiction to pass the *suo motu* order for refund, the action taken was valid and proper. If such action was set aside it would amount to reviving an invalid order of payment of excess compensation to the appellant. This judgment has been referred to and relied upon in *Bhartiya Seva Samaj Trust & Another* (supra).

9. From the aforesaid decisions, it is clear that if the consequence of setting aside an order without jurisdiction results in reviving or restoring an illegal order, the court may refuse to entertain a challenge to such order that has been passed without jurisdiction as it would result in revival of an earlier illegal order that was set aside by such order, albeit without jurisdiction. This principle is well recognized but its application would depend on the facts of each case.

To consider whether this principle can be applied to the case in hand, it would be necessary to refer to certain aspects which have material bearing. In the seniority list for the year 2017-18 the petitioner has been shown at Serial Number 1 while the respondent no.4 has been shown at Serial Number 6. Thereafter in the seniority list for the year 2018-19 the petitioner is again shown at Serial Number 1 while the

respondent no.4 is shown at Serial Number 6. This list is dated 28.07.2018. The respondent no.4 on 31.07.2018 has raised a protest to his placement at Serial Number 6. According to him, he was senior in service to the petitioner as well as one Kumari Pradnya Ramdas Kamble, who was shown at Serial Number 5 in the seniority list. His complaint dated 31.07.2018 specifically raises objection to his being shown junior to the Assistant Teachers at Serial Numbers 1 and 5. It is thus clear that the present is not a dispute of seniority only between the petitioner and the respondent no.4 but according to the respondent no.4 he is senior even to another Assistant Teacher who is shown at Serial Number 5 in the seniority list for the year 2018-19.

The impugned communication dated 12.06.2019 which is an adjudication by the Education Officer (Secondary) under Rule 12 of the said Rules contains only one reason and it states that in view of Government Circular dated 03.05.2019 as well as the letter of the Director of Higher Education dated 27.05.2019, the respondent no.4 was senior to the petitioner. Except for reference to Government Circular dated 03.05.2019 there is no other consideration in the said adjudication. That adjudication also reveals that it is only the petitioner and the respondent no.4 alongwith the Management who were heard in the matter. As the complaint of the respondent no.4 also refers to the

placement of the Assistant Teacher at Serial Number 5 above the respondent no.4 to be incorrect, the said communication does not indicate said Assistant Teacher placed at Serial Number 5 being heard in the matter. It is true that the said Assistant Teacher at Serial Number 5 is not before the Court but the fact remains that by the impugned communication the respondent no.4 is now shown to be the senior-most amongst all Assistant Teachers. Pertinently, Government Circular dated 03.05.2019 is issued much later than the order of promotion that was issued to the petitioner on 30.04.2018. In other words, a promotion already effected is sought to be set at naught by relying upon a Government Circular that was not in existence when the order of promotion was issued. That Government Circular was issued almost a year later.

The dispute of seniority as sought to be raised by the respondent no.4 would require proper adjudication by considering all relevant aspects. Such adjudication would have to be done by taking into consideration relevant aspects on the basis of which the parties claim to be senior to each other. It would have been a different matter if the petitioner and the respondent no.4 would have been placed at Serial Numbers 1 and 2 and the dispute of seniority was only confined to them. As stated above, the petitioner was placed at Serial Number 1 while the respondent no.4 was placed at Serial Number 6. The impugned

communications dated 12.06.2019 seek to place the respondent no.4 above the petitioner. Thus from Serial Number 6 the respondent no.4 would be placed at Serial Number 1. If this communication is maintained despite being without jurisdiction it is likely to result in further multiplicity since the stand of the incumbents at Serial Numbers 2 to 5 is not before the Court. Moreover, the aspect of *inter se* seniority would require adjudication and hence the respondent no.4 cannot be declared to be senior to the petitioner in a summary manner. Yet another aspect that dissuades us from accepting the contention of respondent no.4 is that the petitioner's placement in the seniority list has resulted in the Management promoting the petitioner on 30.04.2018. This order of promotion cannot be ignored unless it is set aside in appropriate proceedings. The order of promotion would therefore have to be given its legal effect until it is set aside.

10. For all these reasons we are not in a position to record a finding that the placement of the respondent no.4 initially in the seniority list at Serial Number 6 was incorrect and that the same was rightly directed to be corrected by showing the respondent no.4 at Serial Number 1. This would require proper adjudication and in our view the earlier decisions of this Court take care of the situation. If the respondent no.4 is aggrieved by the promotion of the petitioner on the post of Headmaster resulting in

his supersession, the remedy under Section 9 of the said Act is available to him. In such proceedings the incidental question of *inter se* seniority can be gone into by the School Tribunal. Thus the contention urged on behalf of the respondent no.4 that setting aside the communications dated 12.06.2019 would result in restoring the incorrect placement of the petitioner at Serial Number 1 in the seniority list cannot be accepted as an absolute proposition. That contention would require proper adjudication. Hence for these reasons we are not in a position to accept the contention canvassed by the learned counsel for the respondent no.4 in that regard.

11. Accordingly, the communications dated 12.06.2019 bearing Outward Nos.1547 and 1548 are set aside being an outcome of illegal exercise of jurisdiction by the Education Officer (Secondary). It is open for the respondent no.4 to challenge the promotion of the petitioner on the post of Headmaster effected by the order dated 30.04.2018 issued by the Management if the respondent no.4 is so aggrieved. It is clarified that we have not examined the issue of *inter se* seniority between the petitioner and the respondent no.4. If that claim is agitated in appropriate proceedings, it shall be decided on its own merits in accordance with law.

12. Rule is made absolute in aforesaid terms leaving the parties to bear their own costs.

(SMT. PUSHPA V. GANEDIWALA, J.)

(A.S. CHANDURKAR, J.)

APTE