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MADHAVI

v.

CHAGAN & ORS.

(Civil Appeal No. 3966 of 2020)

B

DECEMBER 09, 2020

**[L. NAGESWARA RAO, HEMANT GUPTA AND  
AJAY RASTOGI, JJ.]**

*Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 – Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 – Appellant was appointed at a School on a temporary basis on 16.07.1985 – She possessed graduation and B.Ed degrees and was accordingly placed in Category 'C' of schedule 'F' of the Rules, 1981 – Respondent no.1 was appointed as Assistant teacher at the School on 01.08.1985,*

- C *he possessed qualification of Senior Secondary Certificate and Diploma in Education at the time of appointment – The School passed an order of upgradation of appellant to High School w.e.f. 24.11.1988 – Thereafter, the respondent no.1 acquired B.Sc. Degree and entered category 'D' of Schedule 'F' – The dispute arose at the time of appointment of appellant as the Head Master of the school – Respondent no.1 claimed that he was appointed on regular basis on 01.08.1985 as against appellant who was appointed against a temporary vacancy on 16.07.1985 – Respondent no.1 contended that he is senior to appellant and in terms of the Rules, he would be entitled to be promoted as Head Master – The promotion order dated 31.05.2014 promoting appellant as Head Master was challenged in appeal before the School Tribunal and the same was dismissed – Writ Petition filed by the respondent no.1 was dismissed by the Single Bench of the High Court – Thereafter, an application for review filed was allowed – On appeal, held: The judgment in Bhawna v. State of Maharashtra & Ors. is directly applicable to the present case inasmuch as appellant was holding the qualifications of B.A. B.Ed at the time of her initial appointment on 16.07.1985, though she was appointed against a regular vacancy on 24.11.1988 – However, respondent no.1 was not qualified for appointment as Assistant Teacher as he graduated in science only in the year 1997*
- H *and passed B.Ed in 1999 – He was upgraded to Category 'C' only*

upon acquiring these qualifications – Accordingly, the seniority list mentioned respondent no.1's name at serial no.10 while appellant was placed at serial no.2, though first in Category 'C' – The school in question is secondary school, therefore clause 2 of Schedule 'F' of the Rules would be referred – Keeping in view the principle laid down in Vaijanath case, the appellant was qualified for appointment as temporary teacher as she was a graduate and also possessed B.Ed degree – Her appointment was in accordance with s.5(5) of the Act – However, the respondent no.1 could not be treated to be part of Category 'C' from the date of his initial appointment i.e. 01.08.1985 as he was neither a graduate nor a trained teacher when he was appointed – Also, respondent no.1 was not even a trained teacher on the date of his appointment and thus cannot claim seniority on such ground from the date of his initial appointment – Therefore, the judgment of High Court in review cannot be sustained in law and the same is set aside.

Allowing the appeals and dismissing the contempt petition, D  
the Court

**HELD:** 1. The judgment in *Bhawna v. State of Maharashtra & Ors.* is directly applicable to the present case inasmuch as appellant was holding the qualifications of B.A., B.Ed. at the time of her initial appointment on 16.7.1985, though she was appointed against a regular vacancy on 24.11.1988. However, respondent no. 1 was not qualified for appointment as Assistant Teacher as he graduated in Science only in the year 1997 and passed B.Ed. in 1999. He was upgraded to Category 'C' only upon acquiring these qualifications. Accordingly, the seniority list circulated on 1.1.2014 mentioned respondent no. 1's name at Serial No. 10 while appellant was placed at Serial No. 2, though first in Category 'C'. [Para 20][1227-F-H]

2. Respondent no. 1 was only having senior secondary certificate and a Diploma in Education at the time of his appointment. With such qualifications, he was an under-graduate teacher falling in Category II(2)(i) or (ii) of Schedule 'B' of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981. Such teacher is assigned Category 'E' as per Schedule 'F'. Clause II(1) of Schedule 'B', is in respect of teachers possessing graduate degrees. When respondent no. 1

- A qualified B.Sc. in 1997, he climbed the ladder and became part of Category 'D' and later on after acquiring B.Ed. degree, he entered Category 'C', whereas appellant and other private respondents were already in Category 'C' since the date of their appointment being graduates and degree holders in teaching i.e. B.Ed. [Para 21][1227-H; 1228-A-C]
- B 3. Clause 1 of Schedule 'F' deals with seniority of teachers in the primary school. The fact that the School in question is not a primary school could not be controverted by learned counsel for respondent no. 1. Therefore, it is Clause 2 of Schedule 'F' which would be referred to in order to determine the seniority of teachers in the secondary school. [Para 22][1228-C-D]
- C 4. The Scheme of the Maharashtra Employees of Private Schools (Conditions of service) Regulation Act, 1977 and Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 makes it clear that primary and secondary schools have been treated differently in the same set of Rules. Rule 2(e) has entrusted the duties of Education Officer or Education Inspector in relation to secondary or higher secondary school, whereas, the Education Officer in respect of a primary school is Education Officer or the Administrative Officer of the
- D Municipal Corporation or a Municipal School Board. Similarly, Rule 3 prescribes different rules for appointment of a head of a primary school and the head of the Secondary School. Part I of Schedule 'B' prescribes qualifications for the appointment of teachers in Primary School, whereas Part II prescribes qualification for appointment of teachers in Secondary School and Junior colleges of Education. Respondent no. 1 had joined Secondary School as an untrained undergraduate teacher. He therefore falls in Clause 2 of Part II of Schedule 'B'. Similarly, Schedule 'F' deals with rule of seniority having different categories. Category 'E' is the lower-most level of the ladder which can be
- E upgraded with improvements in the qualifications of the teachers. [Para 23][1228-D-G]
- F 5. This Court finds that the High Court failed to appreciate the distinction between Clause 1 and Clause 2 of Schedule 'F' of

the Rules. Clause 1 was the subject matter of interpretation by this Court in *Viman Vaman Awale* and Clause 2 was the subject matter of interpretation in *Bhawna. Vaijanath* also dealt with promotion to the post of Head Master of a School falling in Clause 1 of Schedule 'F'. Since the School in question is a secondary school, therefore, Clause 2 of Schedule 'F' will determine the seniority. Respondent no. 1 was not a trained teacher to be part of Category 'C' at the time of his appointment on 01.08.1985 and he was rightly placed in Category 'E' on account of his qualification but he upgraded his qualifications, and hence was placed in Category 'D' and 'C' on acquiring graduation and B.Ed. degrees respectively. [Para 24][1228-G-H; 1229-A-B]

6. Keeping in view the principle laid down in *Vaijanath*, appellant was qualified for appointment as a temporary teacher as she was a graduate and also possessed B.Ed. degree. Her appointment was thus in accordance with Section 5(5) of the Act, so was the appointment of the other private respondents. However, respondent no. 1 could not be treated to be part of Category 'C' from the date of his initial appointment i.e. 01.08.1985 as he was neither a graduate nor a trained teacher when he was appointed. Also, respondent no. 1 was not even a trained teacher on the date of his appointment and thus cannot claim seniority on such ground from the date of his initial appointment. [Para 25][1229-B-D]

*Bhawna v. State of Maharashtra & Ors. (2019) 4 SCC 300 – relied on.*

*Viman Vaman Awale v. Gangadhar Makhriya Charitable Trust & Ors. (2014) 13 SCC 219 – inapplicable.*

*Gaur Pratibha & Ors. v. State of Maharashtra through the Secretary & Ors. (2019) SCC OnLine Bom 597 – referred to.*

*Vaijanath s/o Tatyarao Shinde v. Secretary, Marathwada Shikshan Prasarak Mandal, Devgiri College Campus, Aurangabad & Ors. 2006 (6) Mh.L.J. 682 – referred to.*

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- | A   | <u>Case Law Reference</u>   |        |
|---|---|--------|
| (2014) 13 SCC 219   | inapplicable  | Para 7 |
| (2019) 4 SCC 300  | relied on   | Para 9 |
| CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3966<br>B of 2020.   |   |        |
| From the Judgment and Order dated 25.03.2019 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Writ Petition no. 1391 of 2016. |   |        |
| With  |   |        |
| C   | Civil Appeal No. 3967 of 2020 and Contempt Petition (Civil) No. 647 of 2020 in SLP (Civil) No. 10046 of 2019.   |        |
| D   | C. U. Singh, Ms. V. Mohana, Rajiv Dutta, Sr.Adv., Satyajit A. Desai, Akshay Sudame, Ms. Anagha S. Desai, Somanatha Padhan, Satya Kam Sharma, Amlan Kumar Ghosh, Rahul Chitnis, Sachin Patil, Geo Joseph Advs. for the appearing parties.  |        |
| The Judgment of the Court was delivered by  |   |        |
| <b>HEMANT GUPTA, J.</b>   |   |        |
| E   | 1. The present appeals are directed against the common order of the High Court of Judicature at Bombay, Nagpur Bench, whereby, the review of the dismissed writ petition filed by respondent No. 1 <sup>1</sup> was allowed and the order passed by the School Tribunal dated 1.1.2016 was set aside.   |        |
| F   | 2. The appellant <sup>2</sup> herein was appointed with Shri Samarth Shikshan Sanstha <sup>3</sup> on a temporary basis on 16.7.1985. At that time, she possessed graduation and B.Ed. degrees and was accordingly placed in Category 'C' of Schedule 'F' of The Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 <sup>4</sup> . However, she was not appointed against regular vacancy. Chagan was thereafter appointed as Assistant Teacher at the School on 1.8.1985 for teaching the students of Vth to VIIth standards, possessing qualification of Senior Secondary Certificate and Diploma in Education at the time of appointment. He was placed in |        |
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| <sup>1</sup> Hereinafter referred to as 'Chagan'  |   |        |
| <sup>2</sup> Hereinafter referred as 'Madhavi'  |   |        |
| <sup>3</sup> For short, the 'School'  |   |        |
| H   | <sup>4</sup> For short, the 'Rules'   |        |

Category 'E' of Schedule 'F' of the Rules. Both Madhavi and Chagan were appointed for teaching the same section. The School later approved their appointments against regular vacancies on 5.9.1986 w.e.f. 2.5.1986. A

3. On 24.11.1988, the School passed an order of upgradation of Madhavi to High School Scale w.e.f. 24.11.1988. The appointment of Madhavi was purely temporary upto the Academic Session 1988-89. Some of the candidates, who are respondent Nos. 5 to 7, all graduates and holding B.Ed. qualification, were appointed at the School and placed in Category 'C' of Schedule 'F' of the Rules. It is thereafter that Chagan acquired B.Sc. degree and entered Category 'D' of Schedule 'F' of the Rules on 21.2.1997. Chagan then obtained B.Ed. degree in the year 1999 and was thus placed in Category 'C' of Schedule 'F'. B

4. The dispute arose at the time of appointment of Madhavi as the Head Master of the School. Chagan claimed that he was appointed on regular basis on 1.8.1985 as against Madhavi who was appointed against a temporary vacancy on 16.7.1985. Therefore, he contended that he is senior to Madhavi and in terms of the Rules, he would be entitled to be promoted as Head Master. The promotion order dated 31.5.2014 promoting Madhavi as Head Master was challenged in appeal before the learned School Tribunal. The challenge was also to the promotion of respondent No. 5, who was promoted as Assistant Head Master, and respondent Nos. 6 and 7, who were promoted as Supervisors of the School. Chagan claimed appointment as Head Master of the School. C

5. Chagan claimed seniority as trained graduate w.e.f. 1.8.1985 in terms of Rule 6 read with Rule 2(1)(j) of the Rules. It was contended that the post of Secondary Teacher was not vacant in the year 1985, therefore, Madhavi was illegally appointed as Primary Teacher which is Category 'E' post whereas he was appointed on 1.8.1985 and thus, he is senior to Madhavi. D

6. The learned School Tribunal dismissed the appeal on 1.1.2016 while holding as under: E

"9. It is clear from these provisions that the appellant as per his qualification is not come under the category of trained graduate at the time of his appointment on 01.08.1985. The respondent No. 3 was possessing the qualification of B.Sc., B.Ed. on the same day of her appointment on 16.07.1985. Therefore she would be G

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- A considered in the category of trained graduate teacher on the day of her appointment.

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- B 12. It was also not disputed that the appellant subsequently improved his qualification by acquiring a degree in 1997. He has also acquired a teaching experience of 10 years till that time. Therefore since the date when he completed his graduation along with 10 years teaching experience, he became eligible to enter into category-C. The appellant himself has mentioned that the respondent No. 4 was appointed as an assistant teacher on

- C 24.11.1988 when the post became vacant. Even after considering this date, it is clear that the respondent No. 4 who was possessing the qualification of B.Sc., B.Ed. in 1985 was directly entered in category-C from that date. Therefore the appellant who entered in category-C in 1997 is admittedly junior to respondent No. 4.”

- D 7. The judgment of this Court in *Viman Vaman Awale v. Gangadhar Makhriya Charitable Trust & Ors.*<sup>5</sup> referred to by Chagan was distinguished by the Ld. Tribunal for the reason that the appellant in the aforesaid case joined service prior to the respondent.

- E 8. Chagan challenged the order passed by the School Tribunal by way of a writ petition before the High Court. The same was also dismissed by the learned Single Bench with the detailed reasoning on 28.9.2017. An application for review was then filed on 2.12.2017 which was allowed with the following order:

- F “Heard. For the reasons stated in the application, the application is allowed. Until further orders, the vacant post of Assistant Head Master shall not be filled in. Disposed of.”

- G 9. It is thereafter that the learned Single Bench passed the order impugned in the present appeal whereby the writ petition filed by Chagan was allowed. The High Court relied upon *Viman Vaman Awale* to hold that the seniority is to be given from the date of first appointment whereas the judgment in *Bhawna v. State of Maharashtra & Ors.*<sup>6</sup> was distinguished observing that it was a case where the teacher was not holding the qualification of B.Ed. at the time of appointment and later

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<sup>5</sup>(2014) 13 SCC 219

<sup>6</sup>(2019) 4 SCC 300

acquired the qualification. It was however noted that in the present case, Chagan was a teacher already holding such qualification on the date of initial appointment. It is the said order which has been challenged by the School and Madhavi before this Court. A

10. Some of the relevant provisions of The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977<sup>7</sup> and the Rules are extracted hereunder: B

“ACT

2(9) “Head of a school” or “Head” means the person, by whatever name called in charge of the academic and administrative duties and functions of a school conducted by any Management and recognised or deemed to be recognised under this Act, and includes a principal, vice principal, head-master, head-mistress, assistant head-master, assistant head-mistress or superintendent thereof; C

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2(18) “primary education” means education imparted in such subjects and upto such standards as may be determined by the State Government, from time to time, located either in a primary or a secondary school; D

2(19) “primary school” means a recognised school, or a part of such school, in which primary education is imparted; E

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2(24) “School” means a primary school, secondary school, higher secondary school, junior college of education or any other institution by whatever name called including technical, vocational or art institution or part of any such school, college or institution, which imparts general, technical, vocational, art or, as the case may be, special education or training in any faculty or discipline or subject below the degree level; F

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2(26) “teacher” means a member of the teaching staff, and includes the Head of a school; G

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<sup>7</sup> For short, the ‘Act’

- A 5. Certain obligations of Management of private schools. – (1) The Management shall, as soon as possible, fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy.
- B Provided that, unless such vacancy is to be filled in by promotion, the Management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, the Education Officer, Zilla Parishad or, as the case may be, the Director or the Officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools and in the event of such person being available, the Management shall appoint that person in such vacancy.

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- D 5(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the period of appointment of such person.

Rules

- E 2(e) “Education Officer” –
- (i) in relation to a private secondary or higher secondary school or Junior College of Education in Greater Bombay, means an Educational Inspector,
- F (ii) in relation to a private primary school in the areas of any Municipal Corporation or Municipal Council, means the Education Officer or the Administrative Officer of a Municipal Corporation or a Municipal School Board, as the case may be, and
- (iii) in relation to any private school in areas elsewhere in the State of Maharashtra, means an Education Officer, in a Zilla Parishad;

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- G 2(j) “trained graduate” means a person possessing the qualifications mentioned in sub-clauses (i) to (vi) of clause (1) of item II in Schedule ‘B’;

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2(k) “trained teacher” means a teacher who has secured a professional certificate, a diploma or a degree recognised by the Department which qualifies him for a teaching post in a school; A

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Rule 3 (as it existed prior to amendment on 22.6.2017). Qualifications and appointment of Head .—(1) A person to be appointed as the Head — B

(a) (i) of a primary school having an enrolment of students above 200 or having Standards I to VII shall be the seniormost trained teacher who has put in not less than five years’ service; and C

(ii) of any other primary school shall be the seniormost teacher in the school;

(b) of a secondary school including night school or a Junior College of Education shall be a graduate possessing Bachelor’s degree in teaching or education of a statutory University or any other qualification recognised by Government as equivalent thereto and possessing not less than five years’ total full-time teaching experience after graduation in a secondary school or a Junior College of Education out of which at least two years’ experience shall be after acquiring Bachelor’s degree in teaching or education: D

Provided that, in the case of a person to be appointed as the Head of a night secondary school — E

(i) he shall not be the one who is holding the post of the Head or Assistant Head of a day school, and

(ii) the experience laid down in clause (6) of sub-rule ( I ) may be F as a part-time teacher.

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Rule 6. (as it existed prior to amendment on 22.6.2017) - G Qualifications of teachers.—The minimum qualifications for the posts of teachers and the non-teaching staff in the primary schools, secondary schools, Junior Colleges and Junior Colleges of Education shall be as specified in Schedule “B”:

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- A Provided that, the Education Officer may allow Managements to appoint untrained Science graduate teachers for teaching Mathematics and Science subjects or untrained Arts or Commerce graduates for teaching other subjects in secondary schools in exceptional circumstances, such as non-availability of trained graduates. Such appointments shall, however, be allowed on an year-to year basis, on the clear understanding that they shall have to obtain training qualification at their own cost and further subject to the condition that their services shall be liable for termination as soon as trained graduate teachers become available.
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- C Provided further that, the untrained graduate appointed as a teacher after obtaining the permission from the Education Officer before the commencement of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 and who continues to be in service in any school on the date of commencement of the Maharashtra Employees of Private Schools (Conditions of Service) (Amendment) Rules, 1984 shall, be continued in service on the condition that he obtains the prescribed training qualifications at his own cost before 1<sup>st</sup> June 1987, unless he has already obtained such qualifications, failing which his services shall be terminated.
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Rule 12. (as it existed prior to amendment on 8.10.2018) Seniority List.—(1) Every Management shall prepare and maintain seniority list of the teaching staff including Head Master 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.

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

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SCHEDEULE B

I. Qualifications for Primary Teachers (as it existed prior to amendment on 22.6.2017) – Appointment to the posts of Primary school teachers (other than special teachers-Drawing teachers) shall be made by nomination from amongst candidates who have passed S.S.C. examination or Matriculation examination or Lokshala examination or any other examination recognised as such by Government and the Primary Teachers Certificate examination or Diploma in Education examination, or a Diploma in Education (pre-primary of two years' duration). B

Note.—A person holding a Diploma in Education (pre-primary of two years duration) shall be qualified to teach standards I to IV only notwithstanding anything contained in the foregoing provisions— D

(a) Candidates who were recruited before the coming into force of these rules in accordance with the recruitment rules then in force and who were thereafter discharged for want of vacancies shall be eligible for reappointment. E

(b) Other things being equal, preference may be given to—

(i) candidates who have passed the S.S.C. or other equivalent examination with English, Mathematics and Science or any two of them; and F

(ii) eligible women candidates obtaining (the qualifications mentioned at item (i) through condensed courses.

II. Qualifications for trained teachers in secondary schools and junior colleges of education. G

(1) For Graduate Teachers:

(i) A Bachelor's degree in Teaching or Education of any statutory University or a qualification recognised by Government as equivalent thereto; H

- A (ii) A Teaching Diploma of any statutory University if a person holding it is appointed for the first time before the 1st October 1970;
- B (iii) A Secondary Teachers Certificate of the Education Department of this State, if the person holding it is appointed for the first time before 1st October 1970;
- B (iv) A Diploma in Education of the Graduates Basic Training Centres;
- C (v) A Diploma in Physical Education or a qualification recognised by Government as equivalent thereto; or Bifocal Higher Diploma in Physical Education of the Government of Maharashtra (as Physical Education with one of the method subjects) or B. P. Ed. (Marathwada University) or B. P. Ed. (Shivaji University) or B.Ed. (Physical Education) (Poona University) or B.Ed. (Physical Education) (Bombay University) or Diploma in Physical Education, Culture and Recreation awarded by Hanuman Vyayam Prasarak Mandal, Amravati; or
- D (vi) Any other degree, diploma or certificate which Government or the Inter-University Board may sanction as equivalent to any of the above qualifications.
- E (2) For Undergraduate Teachers:
  - (i) A Diploma in "Education of Nagpur and Bombay Universities which is awarded two years after Secondary School Certificate Examination;
  - F (ii) A Secondary Teachers' Certificate of the Education Department or the Teachers' Diploma of any other statutory University if the person holding it is appointed for the first time before the 1st October 1970;
  - G (iii) A Certificate in Physical Education recognised by Government if the person holding it is appointed for the first time before the 1st June 1971;
  - G (iv) A Diploma in Education (Primary) awarded by Government; or
  - H (v) Any other equivalent diploma or certificate approved by Government or Inter-University Board.

SCHEDULE F

A

1. Guidelines for fixation of seniority of teachers in the primary schools. - The seniority of primary school teachers in Primary Schools shall be based on the date of joining service and continuous officiation.

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2. Guidelines for fixation of seniority of teachers in the secondary schools, Junior Colleges of Education and Junior College classes attached to secondary schools and Senior Colleges :— For the purpose of fixation of seniority of teachers in the secondary schools, Junior Colleges of Education and Junior College classes attached to Secondary Schools the teachers should be categorised as follows:—

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Category A. -                   xx                   xx                   xx

Category B. -                   xx                   xx                   xx

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Category C. - 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.

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Category D. - Holders of— B.A. B.Sc. B.Com., S.T.C./Dip. Ed. (one year course) or its equivalent.

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Category E. - Holders of— S.S.C., T.C./Dip. Ed./Dip. T. (one year course) or its equivalent.

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Note 1. - For the purpose of categories C, D and E teachers with S.T.C., T.D., Jr. P. T.C., Dip. 1., Dip. Ed. (post-S.S.C. one year course)) qualifications appointed on or after 1<sup>st</sup> October 1970 shall be considered as untrained and their seniority shall be fixed in the 'F' or 'G' category of untrained teachers, as the case may be.

Note 2. - The following training qualifications which can be secured two years after S.S.C. Examination shall be considered as training qualification for the purpose of seniority even after 1<sup>st</sup> October, 1970:-

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(1) D .Ed. (2 years),

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- A (2) T.D. (Bombay University),  
 (3) Dip. Ed. (Nagpur University).

Note 3. - In the case of teachers whose date of continuous appointment in one and the same category is common, the teacher who is senior by age will be treated as senior.

- B Note 4 —The categories mentioned above represent the ladder of seniority and have been mentioned in descending order.”

11. Learned counsel for the appellant submitted that the School in the present case is not a primary school. The seniority of teachers in a primary school is based upon the date of joining service and continuous officiation thereof, as provided under Clause 1 of Schedule ‘F’. Whereas, guidelines for fixation of seniority of teachers in the secondary school, junior college of education and junior classes attached to secondary school and senior colleges are contained in Clause 2 of Schedule ‘F’. It was contended that the management runs the present school which is a secondary school only and not a primary school. Therefore, Clause 1 of Schedule ‘F’ cannot be applied for determining seniority of teachers in a secondary school. It was further contended that Chagan was not qualified to be appointed as a trained teacher in the secondary School. Qualifications required for teaching in the School are a professional certificate, a diploma or a degree recognised by the Department. However, Chagan graduated in the year 1997 and got a degree for teaching in a school i.e. B.Ed. only in the year 1999. Trained graduate in terms of Rule 2(j) of the Rules is a person possessing the qualification mentioned in Schedule ‘B’ of the Rules.

12. Learned counsel for the appellant also relied on a judgment of Bombay High Court, Nagpur Bench in *Gaur Pratibha & Ors. v. State of Maharashtra through the Secretary & Ors.*<sup>8</sup> in which the Court had examined both the judgments of this Court in *Viman Vaman Awale* and *Bhawna* and also the arguments that the latter judgment is *per incuriam* as the former was not referred in it. The Court held as under:

- G “96. We do not think they do. Viman Vaman Awale concerns the Primary Assistant Teachers; Bhawana, the Secondary Assistant Teachers. So the former case interprets the “Guidelines for fixation of seniority of teachers in the primary schools”, under Schedule

H <sup>8</sup>2019 SCC OnLine Bom 597

F, under Rule 12. The latter the “Guidelines for fixation of seniority of teachers in the secondary schools Junior Colleges of Education and Junior College classes attached to secondary schools and Senior Colleges.”

97. In *Viman Vaman Awale* both the teachers had their basic qualifications when they entered service, their additional qualifications notwithstanding. And as per Clause (I) of Schedule F, the seniority of primary school teachers shall be based on the date of joining service and continuous officiation. Both the candidates duly qualified, *Viman Vaman Awale* upheld the seniority of the teacher that joined the service first.

98. In *Bhawana*, as we have already observed, the teacher who entered the service first had no prerequisite qualification—B.Ed. So she joined the service as an untrained teacher, falling in category ‘F’. The other teacher entered the service as a trained teacher and placed himself straightaway in C Category. The first teacher could get the B.Ed., and enter that Category only later. So as per Clause (II) of Schedule F—and as clarified by Note 4—the categories mentioned in Schedule F represented the ladder of seniority in descending order. Thus, *Bhawana* has held that a teacher in Category F, on later migration to Category C, cannot steal a march over a teacher already ensconced in that Category.

99. Therefore, we conclude that *Viman Vaman Awale* and *Bhawana* do not conflict with each other; they have taken no divergent precedential paths. Though *Bhawana* may not have been aware of *Viman Vaman Awale*, both decisions have displayed remarkable interpretative consistency.”

13. It was also pointed out that the Special Leave Petition against the said judgment was dismissed.

14. On the other hand, learned counsel for *Chagan* vehemently argued that the Rules are common to both primary and secondary schools. Therefore, the principle laid down in *Viman Vaman Awale* would be a binding precedent and the judgment in *Bhawna* wherein the *Viman Vaman Awale*’s case was not referred is *per incuriam*. It was argued that *Viman Vaman Awale* was a case of a secondary School as per the information received under the Right to Information Act. Hence, the principle laid down in the aforesaid judgment has been rightly applied by

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- A the High Court while setting aside the appointment of Madhavi as the Head Master.
  - 15. We find that the order of the High Court cannot be sustained in law. This Court in *Viman Vaman Awale* has proceeded as if the Court is dealing with seniority of teachers in a primary school. This
- B Court also referred to Full Bench judgment of Bombay High Court reported as *Vaijanath s/o Tatyaraao Shinde v. Secretary, Marathwada Shikshan Prasarak Mandal, Devgiri College Campus, Aurangabad & Ors.*<sup>9</sup> which again decided the question of promotion to the post of Head Master of a primary school. This Court in *Viman Vaman Awale* held as under:
- C “15. The appellant herein entered the service in Respondent 3 School as Assistant Teacher of a primary school with Diploma in Education i.e. D. Ed qualification. She, thus, fulfilled the qualification for that post. B. Ed degree is not the essential qualification prescribed for this post. This is a relevant factor which is to be kept in mind for resolving the controversy in issue.
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- E 18. In the present case, as already mentioned above, the appellant was having the requisite minimum qualification for appointment to the post of Assistant Teacher in the primary school and it was not a case of appointment of an unqualified teacher when the appellant was appointed to the said post on 24-8-1979. This makes all the difference and renders the judgment in *Vaijanath* [*Vaijanath v. Marathwada Shikshan Prasarak Mandal*, 2006 SCC OnLine Bom 1131 : (2006) 6 Mah LJ 682] as inapplicable to the facts of the present case. The High Court has failed to notice this relevant distinction and mechanically applied the ratio of the judgment in *Vaijanath* [*Vaijanath v. Marathwada Shikshan Prasarak Mandal*, 2006 SCC OnLine Bom 1131 : (2006) 6 Mah LJ 682].”
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- G 16. In fact, learned counsel for Chagan relied upon *Vaijanath* in support of his arguments before the learned Single Bench. The counsel for Madhavi also referred to the said judgment in support of the arguments before the High Court. Such argument was dealt with by the High Court in the impugned judgment, which reads as under:

H <sup>9</sup>2006 (6) Mh.L.J. 682

“13. It was strenuously contended on behalf of respondent Nos. 2 to 7 that Full Bench judgment of this Court in the case of *Vaijanath Tatyaraao Shinde v. Secretary* (supra) supported their arguments and that the relevant date for determining seniority was the date when the petitioner acquired the higher qualification and entered Category C of Clause 2 to Schedule F of the MEPS Rules. But, the said Full Bench judgment of this Court has been distinguished in the aforesaid judgment of the Hon’ble Supreme Court in the case of *Viman Vaman Awale v. Gangadhar Makhriya Charitable Trust* (supra). It has been found that in the Full Bench judgment of this Court, what was being considered was a situation where at the time of initial appointment one of the teachers was not possessing the requisite training/teaching qualification and that in such a situation the *inter se* seniority between teachers could be determined only when such training/teaching qualification was obtained by such a candidate. In that context, the Full Bench of this Court held that acquisition of the requisite qualification would be the determinative factor.”

17. At this stage, it would be appropriate to refer to Full Bench judgment of Bombay High Court in *Vaijanath* which dealt with the promotion to the post of Head Master of a primary school. The question examined was whether seniority of the teacher is to be determined from the date of initial appointment or from the date of acquisition of educational and training qualifications. The High Court held that only a trained teacher is eligible and qualified to be appointed as a primary school teacher. Therefore, it was not possible to concede that the services rendered by a teacher in a primary school who does not have the requisite qualification as laid down in Schedule ‘B’ could be considered for the purpose of ascertaining seniority. The Court held as under:

“14. .... Reading of Rule 6 and Schedule “B”, in the light of section 5, which speaks of appointment of duly qualified teachers, the conclusion is inescapable that only a trained teacher is eligible and qualified for being appointed as a primary school teacher and if this be so, it is not possible to conceive that service rendered by a teacher in a primary school who does not have the requisite qualification as laid down in Schedule “B” can be counted for the purpose of seniority. No doubt, the criteria is “seniority based on the date of joining service and continuous officiation” but it cannot

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- A be lost sight of the fact that Schedule “F”, so also, Rule 12 presupposes appointment of a trained primary school teacher in conformity with the eligibility and qualification prescribed in Schedule “B”. Rule 12 and Schedule “F” cannot be read in isolation without considering the mandatory provision contained in section 5 of the M.E.P.S. Act, so also, Rule 6 and Scheduled “B” of the M.E.P.S. Rules.

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18. ... All the provisions, if read in harmony, the clear position which emerges is that no person can be appointed as primary school teacher who is not having qualification as prescribed under Schedule “B”, meaning thereby, possessing minimum educational and training qualification.

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20. In this view of the matter, we hold that for a valid appointment of a primary school teacher, a person must possess educational so also the training/teaching qualification. No person can be legally appointed who does not hold training qualification. Hence, service rendered as an untrained teacher will not qualify for being counted to determine seniority.”

18. Further, even in respect of temporary vacancy, Full Bench of the High Court held that in terms of Section 5 of the Act, the management is bound to fill the vacancy, be it permanent or temporary, by appointing a person *duly qualified to fill such vacancy*. It was reiterated that Section 5 mandates the management to fill in the permanent or temporary vacancy by appointing a person *duly qualified to fill such vacancy*. Rule 6 lays down that minimum qualifications for the post of teachers shall be as specified in Schedule ‘B’. Schedule ‘B’ in turn provides for minimum qualification for appointment to the post of primary school teachers and further prescribes the qualification of S.S.C. and D.Ed. or any other qualification equivalent to the same, as laid down in Clause 1 of Schedule ‘B’. The High Court held that if Rules 3(1)(a)(i) and (ii) are read in the light of provisions of Rule 6 and Schedule ‘B’, it is obvious that Rule 3(1)(a)(ii) only intended to relax the requirement of an experience of not less than 5 years’ service which is specifically provided for in Rule 3(1)(a)(i). The Scheme of the Act cannot be comprehended to hold that the legislature intended to do away with the requirement of the

senior-most teacher being a trained teacher. It could not have been the intention of the legislature while framing Rule 3(1)(a)(ii) to deliberately omit the word “trained”. The omission of the word “trained” is an obvious drafting error and if the said word is not supplemented, the rule cannot be harmonized in tune with the scheme of the Act and the other Rules which are referred to hereinabove.

19. In view thereof, we find that the judgment of this Court in *Viman Vaman Awale* dealt with only seniority of teachers in a primary school. The said judgment does not make any reference to seniority of teachers in a secondary school. On the contrary, the judgment of this Court in *Bhawna* is a judgment pertaining to seniority of teachers in a secondary school. This Court held as under:

“9. Undisputedly, the fifth respondent was holding the qualification of BA, BEd at the time of his initial appointment dated 13-8-1997 and became a member of Category C. At the same time, the appellant though appointed on 27-6-1994 as an untrained teacher, having acquired the training qualification i.e. BEd on 19-9-1997 and became a member of Category C after entry of the fifth respondent into service as a trained teacher, could not have claimed seniority in Category C over the fifth respondent prior to acquiring professional qualification (BEd) as envisaged under the scheme of the 1981 Rules as trained teacher and this what was considered by the authority who examined the inter se seniority of the appellant vis-à-vis fifth respondent under the 1981 Rules and confirmed by the High Court on dismissal of the writ petition preferred by the appellant.”

20. The judgment in *Bhawna* is directly applicable to the present case inasmuch as Madhavi was holding the qualifications of B.A., B.Ed. at the time of her initial appointment on 16.7.1985, though she was appointed against a regular vacancy on 24.11.1988. However, Chagan was not qualified for appointment as Assistant Teacher as he graduated in Science only in the year 1997 and passed B.Ed. in 1999. He was upgraded to Category ‘C’ only upon acquiring these qualifications. Accordingly, the seniority list circulated on 1.1.2014 mentioned Chagan’s name at Serial No. 10 while Madhavi was placed at Serial No. 2, though first in Category ‘C’.

21. Chagan was only having senior secondary certificate and a Diploma in Education at the time of his appointment. With such

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- A qualifications, he was an under-graduate teacher falling in Category II(2)(i) or (ii) of Schedule 'B' of the Rules. Such teacher is assigned Category 'E' as per Schedule 'F'. Clause II(1) of Schedule 'B', is in respect of teachers possessing graduate degrees. When Chagan qualified B.Sc. in 1997, he climbed the ladder and became part of Category 'D' and later on after acquiring B.Ed. degree, he entered Category 'C', whereas Madhavi and other private respondents were already in Category 'C' since the date of their appointment being graduates and degree holders in teaching i.e. B.Ed.

22. Clause 1 of Schedule 'F' deals with seniority of teachers in the primary school. The fact that the School in question is not a primary school could not be controverted by learned counsel for Chagan. Therefore, it is Clause 2 of Schedule 'F' which would be referred to in order to determine the seniority of teachers in the secondary school.

23. The Scheme of the Act and the Rules makes it clear that primary and secondary schools have been treated differently in the same set of Rules. Rule 2(e) has entrusted the duties of Education Officer or Education Inspector in relation to secondary or higher secondary school, whereas, the Education Officer in respect of a primary school is Education Officer or the Administrative Officer of the Municipal Corporation or a Municipal School Board. Similarly, Rule 3 prescribes different rules for appointment of a head of a primary school and the head of the Secondary School. Part I of Schedule 'B' prescribes qualifications for the appointment of teachers in Primary School, whereas Part II prescribes qualification for appointment of teachers in Secondary School and Junior colleges of Education. Chagan had joined Secondary School as an untrained undergraduate teacher. He therefore falls in Clause 2 of Part II of Schedule 'B'. Similarly, Schedule 'F' deals with rule of seniority having different categories. Category 'E' is the lower-most level of the ladder which can be upgraded with improvements in the qualifications of the teachers.

24. We find that the High Court failed to appreciate the distinction between Clause 1 and Clause 2 of Schedule 'F' of the Rules. Clause 1 was the subject matter of interpretation by this Court in *Viman Vaman Awale* and Clause 2 was the subject matter of interpretation in *Bhawna Vaijanath* also dealt with promotion to the post of Head Master of a School falling in Clause 1 of Schedule 'F'. Since the School in question is a secondary school, therefore, Clause 2 of Schedule 'F' will determine

the seniority. Chagan was not a trained teacher to be part of Category 'C' at the time of his appointment on 1.8.1985 and he was rightly placed in Category 'E' on account of his qualification but he upgraded his qualifications, and hence was placed in Category 'D' and 'C' on acquiring graduation and B.Ed. degrees respectively. A

25. Keeping in view the principle laid down in *Vaijanath*, Madhavi was qualified for appointment as a temporary teacher as she was a graduate and also possessed B.Ed. degree. Her appointment was thus in accordance with Section 5(5) of the Act, so was the appointment of the other private respondents. However, Chagan could not be treated to be part of Category 'C' from the date of his initial appointment i.e. 1.8.1985 as he was neither a graduate nor a trained teacher when he was appointed. Also, Chagan was not even a trained teacher on the date of his appointment and thus cannot claim seniority on such ground from the date of his initial appointment. B

26. Thus, we find that the judgment of the High Court in review cannot be sustained in law and the same is hence set aside. The Writ Petition is ordered to be dismissed. The present appeals are thus allowed. In view of the above, the contempt petition is dismissed. C D

Ankit Gyan

Appeals allowed and Contempt Petition dismissed.