Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4988 OF 2011
[Arising out of SLP (C) No.22040/2008]
and
CIVIL APPEAL NO. 4989 OF 2011
[Arising out of SLP (C) No.23566/2008]

The Secretary, Sh. A. P. D.Jain Pathshala & Ors. … Appellants

Vs.

Shivaji Bhagwat More & Ors. … Respondents

J U D G M E N T

R.V.RAVEENDRAN, J.

Leave granted in both the petitions.

2. The Government of Maharashtra by Government Resolution dated 27.4.2000 accorded sanction for implementation of the *Shikshan Sevak scheme* in all recognized private secondary/higher secondary schools/Junior colleges/B.Ed. colleges, in the state. The said scheme in essence provided for (i) appointment of Shikshan Sevaks for a term of one year on payment of a fixed honorarium, (ii) renewal of such appointment annually, if the work was found to be satisfactory, (iii) absorption of such Shikshan Sevaks into

service as teachers on completion of the specified years of service. It provided for constitution of a three member Grievance Redressal Committee (consisting of the concerned Divisional Deputy Director of Education, the Assistant Director and the Education Officer) to consider and decide the grievances relating to selection, appointment, re-appointment or mid-year cancellation of appointment. The scheme provided as follows:

> "All the complaints received under the Shikshan Sevak scheme are to be referred to the aforesaid Three Member Committee. This committee will hold monthly meetings and *render its decision on the complaints and would inform the same to the concerned. An opportunity to put up the case would be given to the complainant."*
>
> *(Emphasis supplied]*

3. The Bombay High Court disposed of several writ petitions challenging the said scheme, by order dated 16.8.2000, recording the submission made on behalf of the state government that it would amend the scheme by incorporating the several modifications suggested by the court. While doing so, the High Court also directed the state government to reconstitute the Grievance Redressal Committee with a retired District Judge as Chairman and the Deputy Director and Education Officer (Secondary) of the concerned region as members. The High Court further directed as follows :

> "All complaints relating to unsatisfactory work or misconduct etc. will be forwarded to the Committee who shall take decision within 30 days from the date of receipt of record after giving an *opportunity to the concerned parties to file their replies so as to avoid prolonged procedure of oral hearing.*
>
> All complaints in respect of appointment, termination etc. shall be dealt with only by the Committee constituted above and by no other authority. *As the scheme is being implemented on interim basis we direct that no Civil Court shall entertain any suit or application in respect of disputes which are required to be dealt with by the Committee*."
>
> *(emphasis supplied)*

4. In compliance with the said decision dated 16.8.2000, the State Government by Government Resolution dated 13.10.2000 modified the scheme. Clause (17) of the modified scheme implemented the direction of the High Court regarding the re-constitution of the Three Member Committee and provided that the Committee would function at Mumbai, Aurangabad and Nagpur, the area of jurisdiction of the committees corresponding to the jurisdiction of the benches of High Court at Mumbai, Aurangabad and Nagpur.

5. By order dated 21.6.2001 in subsequent writ petitions, the High Court recorded the following submissions of the State Government :

> "The learned Advocate General stated that the State Government will appoint a nine member Grievance Committee and the pending grievances of the Shikshan Sevaks will be referred to the said Grievance Committee. The Committee will be headed by a retired Civil Judge, Sr. Division, who will be appointed in consultation with the Registrar of this Court. The

> learned Advocate General assured the Court that the appointment of the Committee member will be notified within a period of six weeks from today. He also stated that the Member of the Grievance Committee will be given salary and emoluments as paid to the member of the School Tribunal and necessary infrastructure will also be provided. He stated that the Committee will hold the proceedings in Mumbai, Aurangabad and Nagpur to consider the grievances of the Shikshan Sevaks of the respective regions."

Thereafter, Government Resolution dated 27.7.2001 was issued directing that the grievances will be considered by a Single Member committee consisting of retired Judge (higher level) at Mumbai, Aurangabad and Nagpur by way of circuit bench and *resolve the complaints of Shikshan Sevaks*.

Facts of this case

6. The appellants appointed the first respondent as a *Shikshan Sevak* on 29.7.2000 for the period 1.8.2000 to 31.7.2003. The first respondent alleges that his services were orally terminated on 11.6.2001. On the other hand, the appellants allege that services of first respondent came to an end in March-April, 2001 (as his appointment was not approved due to lack of prescribed qualifications); and the first respondent joined another school as an assistant teacher in July, 2001. The first respondent challenged his termination by filing an appeal before the School Tribunal. Later he withdrew the said appeal on 18.10.2003 and filed an appeal before the Grievance Committee in

the year 2004. The appellants raised various preliminary objections about the maintainability of the complaint. As the Grievance Committee did not consider them, the appellants filed W.P. No.7597/2005 seeking a direction to the Grievance Committee to decide the preliminary issues. The High Court admitted the said writ petition was admitted, but did not stay the proceedings before the Grievance Committee. Therefore, the Committee proceeded to hear the matter and allowed the appeal by order dated 28.7.2006. It quashed the termination dated 11.6.2001 and directed the appellants to reinstate the first respondent forthwith in any of their high schools without back wages but with continuity of service with a further direction to the Education Officer to approve the appointment of the first respondent as a regular teacher/assistant teacher. The appellants filed W.P.No.6196/2006 challenging the order dated 28.7.2006. A learned Single Judge admitted the said writ petition on 2.5.2008 but refused to stay the order of the Grievance Committee. The said order dated 2.5.2008 refusing the interim relief is challenged in the second of these two appeals.

7. The first respondent filed a writ petition (W.P.No.7362/2007) in September, 2007 seeking a direction to the appellants to implement the order dated 28.7.2006 passed by the Grievance Committee. In the said writ

petition, the High Court while issuing notice on 31.3.2008, directed the Education officer to ensure the compliance by the appellants, of the order dated 28.7.2006 passed by the Grievance Committee forthwith, unless the said order was challenged and a stay obtained. The appellants filed an application seeking vacation of the said interim order dated 31.3.2008 which was dismissed by the High Court by order dated 5.8.2008, holding as follows :

(i) The Grievance Committee had the power to decide the legality of the termination.

(ii) When the Grievance Committee comes to a conclusion that the order of termination is bad or illegal, the *Shikshan Sevak* whose services are terminated, would continue to be on the rolls of the school.

(iii) As the management receives grant-in-aid in regard to *Shikshan Sevak*, the appellants were bound to comply with the direction issued by the Grievance Committee.

The said order is challenged in the first of these two appeals. This Court on 15.9.2008 while issuing notice granted interim stay of the orders dated 31.3.2008 and 5.8.2008.

The Issue

8. Under the *Shikshan Sevak* Scheme, as originally formulated by the State Government by Government Resolution dated 27.4.2000, the Grievance Redressal Committee was merely a mechanism to hear grievances of *Shikshan Sevaks* and give its recommendation to the Education Department, so that the department could take appropriate action. The Grievance Committee was not intended to be a quasi-judicial forum as was evident from the following: (a) The committee was constituted only to consider the grievances of the *Shikshan Sevaks* by giving them an opportunity of putting forth their grievances. (b) The scheme did not contemplate issue of notice to the employer, nor hearing both parties, nor rendering any adjudicatory decision. (c) The committee was a departmental committee with only the concerned officers as members.

9. The High Court while recommending various modifications to the said scheme, in its order dated 16.8.2000, issued specific directions making significant changes in the constitution and functioning of the committee. Firstly it directed a change in the constitution of the committee by requiring a retired District Judge to head the Committee. Secondly, it directed that an opportunity should be given to the 'parties', that is, the complainant

(*Shikshan Sevak*) and the person against whom the complaint was made (the employer) to file their statements/replies, before adjudicating upon the dispute. Thirdly, it directed that the committee should be the only adjudicatory authority and excluded the jurisdiction of the Civil Courts (and any other authority) to entertain any suit or application in regard to the disputes relating to selection, appointment, re-appointment or cancellation of appointment of *Shikshan Sevaks*. The aforesaid three changes by the High Court converted what was originally conceived by the State Government to be an administrative grievance redressal mechanism, into a quasi judicial adjudicatory Tribunal. This was reiterated by a subsequent order of the High Court converting the committee into a one-man Tribunal consisting of a retired Judge (of the rank of Civil Judge, Senior Division).

10. The appellants contend that the constitution of such a quasi judicial tribunal, by a judicial fiat to the state government, was without the authority of law and invalid, and consequently, the decisions by such a forum are void and unenforceable. On the contentions raised, the following questions arise for our consideration :

(i) Whether the High Court can direct the State Government to create a quasi judicial forum; and whether creation of such a forum by an

executive order, by the State Government, in pursuance of such a direction, is valid?

(ii) Whether the High Court could, by a judicial order, exclude the jurisdiction of civil courts to entertain any suits or applications in respect of disputes raised by *Shikshan Sevaks*?

(iii) Whether the High Court was justified in holding that when the Grievance Committee holds that the order of termination is bad or illegal, it does not amount to ordering reinstatement, but the *Shikshan Sevak* would as a result continue to be in the employment of the employer?

(iv) Whether the orders dated 2.5.2008 and 5.8.2008 of the High Court call for interference?

11. In the State of Maharashtra, the conditions of service of employees of private schools are governed by the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ('Act' for short). The said Act applies to employees of primary schools, secondary schools, higher secondary schools, junior colleges of education or any other institutions by whatever name called including technical, vocational or art **institutions**. The term 'employee' was initially defined as any member of the teaching and non-teaching staff of a recognized school. Section 8 provided for constitution of School Tribunals consisting of single member who is an officer of the rank of Civil Judge (Senior Division). Section 9 gave a right of appeal to the employees of private schools to the Tribunal. The Tribunal was given the power to give appropriate reliefs and directions to the management

including reinstatement, awarding of lesser punishment, restoration of rank, payment of arrears of emoluments etc., and also the power to levy penalty. When the *Shikshan Sevak Scheme* was introduced in the year 2000, it was assumed that the *Shikshan Sevaks* were not "employees" of private schools and therefore will not be entitled to approach the School Tribunals for relief. Therefore, the scheme provided a grievance redressal mechanism. When the validity of the scheme was challenged, the High Court was also of the view that the Act would not apply to *Shikshan Sevaks* as they were not 'employees' as defined under the Act. The High Court however was of the view that *Shikshan Sevaks* should have recourse to remedies similar to the regular employees of private schools and therefore directed reconstitution of the grievance committees on the lines of the School Tribunal. The Act was amended by Amendment Act 14 of 2007 whereby the definition of 'employee' was expanded to include *Shikshan Sevaks.* Ever since the amendments to the Act, by Act 14 of 2007, came into force, *Shikshan Sevaks* have the remedy of approaching the statutory School Tribunals constituted under the Act for redressal of their grievances and the Grievance Committees became redundant. Thus what falls for consideration in this case is the position that existed prior to the 2007 Amendment to the Act.

Re: Question (i)

12. Chapter VI of the Constitution of India deals with Sub-ordinate Courts. Article 233 of the Constitution of India relates to appointment of District Judges. Article 234 relates to recruitment of persons other than District Judges to the judicial service and provides that appointment of persons to the judicial service of a State (other than District Judges) shall be made by the Governor of the State in accordance with the Rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Article 247 provides that notwithstanding anything contained in Chapter I of Part XI of the Constitution, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by the Parliament or of any existing laws with respect to a matter enumerated in the union list.

13. Part XIV-A of the Constitution of India deals with Tribunals. Article 323A provides for the creation of Administrative Tribunals. Article 323B provides that the appropriate Legislature may by law provide for the adjudication or trial by Tribunals of any disputes, complaints or offences with respect to all or any of the matters specified in clause (2)

thereof with respect to which such Legislature has power to make laws. The matters enumerated in clause (2) of Article 323B do not include disputes relating to employees of educational institutions. This Court in *State of Karnataka vs. Vishwabharathi House Building Co-op., Society* – 2003 (2) SCC 412 has clarified that Articles 323A and 323B enabling the setting up of Tribunals, are not to be interpreted as prohibiting the legislature from establishing Tribunals not covered by the said Articles as long as there is legislative competence under an appropriate entry in the Seventh Schedule.

14. Courts and Tribunals are constituted by the State, to invest judicial functions, as distinguished from purely administrative or executive functions, (vide *Durga Shankar Mehta v. Thakur Raghuraj Singh* – 1955 (1) SCR 267). 'Courts' refer to hierarchy of courts invested with state's inherent judicial power established to administer justice in pursuance of constitutional mandate. Tribunals are established under special Statutes to decide the controversies arising under those special laws. In *Associated Cement Companies Ltd. vs. P.N.Sharma* [1965 (2) SCR 366] this Court observed :

> "…Judicial functions and judicial powers are one of the essential attributes of a sovereign State, and on considerations of policy, the State transfers its judicial functions and powers mainly to the courts established by the Constitution; but that does not affect the competence of the State, *by*

> *appropriate measures,* to transfer a part of its judicial powers and functions to tribunals by entrusting to them the task of adjudicating upon special matters and disputes between parties."
>
> [emphasis supplied]

In *Kihoto Hollohan v. Zachillhu* [1992 Supp(2) SCC 651], this Court held:

> "Where there is a lis - an affirmation by one party and denial by another - and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a court."

In *Union of India v. Madras Bar Association* [2010 (11) SCC 1], a Constitution Bench of this Court held:

> "The term `Courts' refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for administration of justice that is for exercise of the judicial power of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, *usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute,* or to determine controversies arising out of any administrative law. Courts refer to Civil Courts, Criminal Courts and High Courts. Tribunals can be either private Tribunals (Arbitral Tribunals), or Tribunals constituted under the Constitution (Speaker or the Chairman acting under Para 6(1) of the Tenth Schedule) or Tribunals authorized by the Constitution (Administrative Tribunals under Article 323A and Tribunals for other matters under Article 323B) or Statutory Tribunals which are created under a statute (Motor Accident Claims Tribunal, Debt Recovery Tribunals and consumer fora)."
>
> (emphasis supplied)

15. Apart from constitutional provisions, Tribunals with adjudicatory powers can be created only by Statutes. Such Tribunals are normally vested with the power to summon witnesses, administer oath, and compel

attendance of witnesses and examine them on oath, and receive evidence. Their powers are derived from the statute that created them and they have to function within the limits imposed by such statute. It is possible to achieve the independence associated with a judicial authority only if it is created in terms of the Constitution or a law made by the Legislature. Creation, continuance or existence of a judicial authority in a democracy must not depend on the discretion of the executive but should be governed and regulated by appropriate law enacted by a Legislature. In this context, it is worthwhile to refer to the following observations of the European Commission of Human Rights in *Zand vs. Austria* (Appeal No.7360 of 1976 decided on 12.10.1978): "The judicial organization in a democratic society must not depend on the discretion of the executive, but should be regulated by law emanating from the Parliament".

16. Article 162 of the Constitution, no doubt, provides that subject to the provisions of the constitution, the executive power of a State shall extend to the matters upon which the Legislature of the State has competence to legislate and are not confined to matters over which legislation has been already passed. It is also well settled that so long as the State Government does not go against the provisions of the Constitution or any law, the width

and amplitude of its executive power under Article 162 cannot be circumscribed; and if there is no enactment covering a particular aspect, the Government could carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf. (See *Ram Jawaya Kapur Vs. State of Punjab* – 1955 (2) SCR 225 and *Bishamber Dayal Chandra Mohan vs. State of U.P.* – 1982 (1) SCC 39. But the powers of the State to exercise executive powers on par with the legislative powers of the legislature, is "subject to the provisions of the Constitution". The provisions of the Constitution, namely Articles 233, 234 and 247 for constituting sub-ordinate courts, and Articles 323A and 323B for constituting tribunals by law made by the legislature, make it clear that judicial Tribunals shall be created only by statutes or rules framed under authority granted by the Constitution. If the power to constitute and create judicial Tribunals by executive orders is recognized, there is every likelihood of Tribunals being created without appropriate provisions in regard to their constitution, functions, powers, appeals, revisions, and enforceability of their orders, leading to chaos and confusion. There is also very real danger of citizen's rights being adversely affected by *ad hoc* authorities exercising judicial functions, who are not independent or competent to adjudicate disputes and render binding decisions. Therefore,

the executive power of the State cannot be extended to creating judicial Tribunals or authorities exercising judicial powers and rendering judicial decisions.

17. Neither the Constitution nor any statute empowers a High Court to create or constitute quasi judicial Tribunals for adjudicating disputes. It has no legislative powers. Nor can it direct the executive branch of the State Government to create or constitute quasi judicial Tribunals, otherwise than by legislative Statutes. Therefore, it is not permissible for the High Court to direct the State Government to constitute judicial authorities or Tribunals by executive orders, nor permissible for the State by executive order or resolution create them for adjudication of rights of parties.

Re: Question (ii)

18. Section 9 of the Code of Civil Procedure provides that the courts shall, subject to the provisions of the Code, have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The express or implied bar necessarily refers to a bar created by the Code itself or by any statute made by a Legislature. Therefore, the High Court in exercise of the power of judicial review,

cannot issue a direction that the civil courts shall not entertain any suit or application in regard to a particular type of disputes (in this case, disputes relating to *Shikshan Sevaks*) nor create exclusive jurisdiction in a quasi-judicial forum like the Grievance Committee will be entitled to deal with them. The High Court, cannot, by a judicial order, nullify, supersede or render ineffectual the express provisions of an enactment.

19. Therefore, we hold that constitution of a Grievance Committee as a public adjudicatory forum, whose decisions are binding on the parties to the disputes, by an executive order of the Government is impermissible. Secondly, the High Court cannot in exercise of judicial power interfere with the jurisdiction of the civil courts vested under Code of Civil Procedure. Any such Grievance Committee created by an executive order, either on the direction of the High Court or otherwise, can only be fact finding bodies or recommending bodies which can look into the grievances and make appropriate recommendations to the government or its authorities, for taking necessary actions or appropriate reports to enable judicial Tribunals to render decisions. The Grievance Committee cannot be public quasi-judicial forum nor can its decisions be made final and binding on parties, in disputes relating to *Shikshan Sevaks*. Therefore, it has to be held that any order or

opinion of the Grievance Committee on a complaint or grievance submitted by a *Shikshan Sevak* were only recommendations to the State Government (Education Department) for taking further action and nothing more.

Re : Questions (iii) & (iv)

20. Even assuming that the committees constituted under the *Shikshan Sevaks* scheme were quasi judicial tribunals, they cannot direct reinstatement nor direct that the employees are deemed to continue in service by declaring the termination to be bad. It is well settled that courts would not direct reinstatement of service nor grant a declaration that a contract of personnel service subsists and that the employee even after removal is deemed to be in service. [See : *S.B. Dutt vs. University of Delhi* – AIR 1958 SC 1050]. The three recognized exceptions to the said rule are : (i) where a public servant having the protection of Article 311 of the Constitution is dismissed from service is in contravention of the provision; (ii) where a dismissed workman seeks reinstatement before Industrial Tribunals/Labour Courts under the industrial law; and (iii) where a statutory body acts in breach or violation of the mandatory obligation imposed by Statute. [See : *Executive Committee of Vaish Degree College, Shamli vs. Lakshmi Narain* – 1976 (2) SCR 1006]. The direction of the High Court in its order dated 5.8.2008 that when the

grievance committee holds that the termination is bad, the *Shikshan Sevak* is deemed to continue on the rolls of the management is therefore erroneous and liable to be set aside.

21. If a Grievance Committee opines that the termination or cancellation of appointment of a *Shikshan Sevak* was bad, the State Government may consider such opinion/recommendation and if it decides to accept it, take appropriate action by directing the school to take back the *Shikshan Sevak,* and if the school fails to comply, take such action as is permissible including stoppage of the grant. An opinion by the Grievance Committee that the termination of the services of a *Shikshan Sevak* is illegal can not however have the effect of either reinstating the employee into service, nor deemed to be a declaration that the *Shikshan Sevak* continues to be an employee of school. Even if a *Shikshan Sevak* is wrongly removed, the department could only direct the school to take him back into service and if it does not comply, take action permissible in law for disobedience of its directions.

22. Therefore the decision of the committee dated 28.7.2006 is not an enforceable or executable order but only a recommendation that can be made the basis by the Education Department to issue appropriate directions. It is needless to add that persons aggrieved by such directions of the state

government will be entitled to challenge such directions either before the civil court or in a writ proceedings.

23. In view of the above, the appeals are allowed and the orders dated 2.5.2008 and 5.8.2008, are set aside. The order of the Grievance Committee is treated as a recommendation rendered for the benefit of the Education Department which can on the basis of the said opinion take appropriate action in accordance with law. It is also open to the *Shikshan Sevak* to seek appropriate remedy if he is aggrieved by his termination, in accordance with law.

……J
[R. V. Raveedran]

……J
[A. K. Patnaik]

New Delhi;
July 4, 2011.