SUNIL SIKRI

v.

GURU HARKRISHAN PUBLIC SCHOOL & ANR.

(Civil Appeal No. 5562 of 2017)

JULY 28, 2022

[K. M. JOSEPH AND PAMIDIGHANTAM SRI NARASIMHA, JJ.]

Delhi School Education Act, 1973 – ss. 8 & 11 – Whether there is any express power under Sections 8 and 11 to order back wages – Held: Having regard to the words used in Section 11(6) of the Act, it may not be appropriate to describe the provision as conferring express power with the Tribunal to pass an award of back wages – Therefore, the respondent is right in contending that Section 8 read with Section 11 of the Act do not confer an express power with the Tribunal to order back wages.

Delhi School Education Act, 1973 – ss. 8 & 11 – Delhi Education Rules, 1973 – rr. 115, 117, 120 & 121 – Is Rule 121 ultra vires to ss. 8 and 11 – Held: The management is given the powers coupled with the duty to hold an inquiry and to pass an order as to whether the employee must be found to be on duty or not and for what period during his absence – The Lawgiver has conferred a power with the management – The use of the words "in its opinion" indicates that the Managing Committee must apply its mind and consider all aspects and take a view – This must, undoubtedly, be done after putting the employee on notice – The employee must be afforded an opportunity – The employee would be in a position to point out that he was not employed elsewhere – He would also be able to establish that he was fully exonerated – The order of the appellate authority in an appeal directing reinstatement may not be final as it can be impugned in the higher forum – Therefore, it may not be appropriate or apposite to find that Rule 121 is in any manner ultra vires Sections 8 and 11 of the Act.

Delhi School Education Act, 1973 – ss. 8 & 11 – Delhi Education Rules, 1973 – rr. 115, 117, 120 & 121 – Is there any conflict between Sections 8 and 11 on the one hand and Rule 121

A *on the other hand – Held: Rule 121 is part of a scheme, which consists of both Sections 8 and 11 of the Act as also Rules 115(4) and 121 – The Rules have been enacted in the same year within eight months – The Administrator, who has authored the Rules under Section 28 of the Act, has produced the Rules, which are found to*
B *be in harmony with the Act – There is no inconsistency between Section 8 read with Section 11 on the one hand and Rule 121 on the other.*

Delhi School Education Act, 1973 – ss. 8 & 11 – Delhi Education Rules, 1973 – rr. 115, 117, 120 & 121 – Whether the
C *tribunal has incidental and ancillary power to direct payment of pay and allowance on setting aside the order of termination – Held: Rule 121(1)(a) contemplates that the Managing Committee must consider and pass an order and provide for salary and allowances to be paid to the reinstated employees – Tribunal is not clothed with specific powers to grant relief of payment of the allowances –*
D *Tribunal is also not empowered to deal with the question as to whether the employee must be treated as on duty for the period when the employee remains absent on account of both the absence, whether or not, on account of suspension before the termination and compelled absence after the penalty is imposed – The Full Bench of*
E *the High Court in the impugned judgment declared that The Manager Arya Samaj Girls Higher Secondary School & Anr. v. Sunrita Thakur correctly lays down the law regarding rule 121 – No fault with the view taken by the Full Bench of the High Court.*

Dismissing the appeal, the Court

F **HELD: 1. The first question, whether the argument of the respondent that Sections 8 and 11 do not contain any express provision for ordering back wages is correct? In this context the contention of the appellant that the law giver has created a right of appeal before the Tribunal and it is to act armed with the wide powers of the court of appeal under the Code of Civil Procedure.**
G **As far as Section 8(2) is concerned, the provision proscribes dismissal, removal or reduction in rank or the termination otherwise of an employee except with the prior approval of the Director. This is indeed to safeguard the right of the employee. Section 8(3) gives the right to an employee limited under the**
H **statute to one who has been dismissed, removed or reduced in**

rank to file an appeal before the Tribunal constituted under Section 11. We have already noticed the view taken by this court in *Shashi Gaur* that any employee whose service is terminated except as declared therein and not limited to what is provided in the statute can challenge the termination before the Tribunal constituted under Section 11. The Tribunal is to consist of a person who has held the Office as District Judge or any equivalent Judicial Officer. Any indication about power of the Tribunal is to be found in Sections 11(5) and 11(6). Section 11(5) purports to empower the Tribunal to regulate its own procedure. Section 11(6) is perhaps more apposite and declares that the Tribunal for the purpose of disposal of an appeal has the power vested in the court of appeal by the Code of Civil Procedure and shall also have the power to stay operation of the order. We may incidentally also notice that Rule 120(3) declares that an employee of a recognised private school who is aggrieved by any order imposing on him the penalty of compulsory retirement or any minor penalty may appeal to the Tribunal. [Paras 12 & 14][524-A-B, E-H; 525-A-B]

2. Reliance placed on Section 107 of the CPC, if inspiration is sought to be drawn to the emphasis supplied to the words "may decide the case finally", to find that there is express power to decide on the question of emoluments as well, does not appeal to us. The purport of the provisions in Section 107 is to only declare that the Appellate Court has a wide range of options, which include the power to finally decide the case. This should be understood to only mean that there is also a power to remand the case or to grant other relief, which may not result in the final disposal of the case. This cannot be understood as meaning that the Appellate Court has the express power to grant the relief of back-wages or to decide upon the question as to whether the period of absence should be treated as duty. This is the power coupled with a duty which is squarely vested with the Management. The right of appeal under Section 8 is given with respect to the order of termination which has been interpreted by this Court in *Shashi Gaur* to include all kinds of termination except for termination which occurs by efflux of time. The argument of the appellant is that the disciplinary authority is to be treated as the original authority and, therefore, the tribunal in terms of Section 107(2) of the Code of the Civil

Procedure must be likened to an Appellate Court and what is more, the disciplinary authority must be equated with the Trial Court. Therefore, there is power to award back wages. The comparison between an Appellate Court and the Trial Court and the vesting of powers on the Appellate Court in terms of the power available to the Trial Court may not be an appropriate and apposite analogy when it comes to the tribunal considering an appeal against the order of disciplinary authority under Section 8. The tribunal will no doubt have the power to pronounce on the legality of the original order, the impugned order of termination and also order reinstatement. The events subsequent to the termination which have been recognized as relevant in cases including Deepali Gundu (supra) which decision has been relied upon by the appellant himself may not strictly be the subject matter of the appeal for reasons, which we will more elaborately dwell upon. We repel the argument of the appellant.[Para 16][525-C-H; 526-A-B]

3. The contention of the appellant is that the respondent cannot be permitted to rely upon Rule 121 for the reason that no departmental appeal is contemplated under the Rules and what is contemplated is only an appeal to the Tribunal. We are unable to accept the contention of the appellant. What Rule 54 undoubtedly contemplates is a re-instatement on the basis of an order passed in an appeal or other remedy under the Service Rules. We may describe them as a departmental remedy. Fundamental Rule 54 has been found inapplicable in *Devendra Pratap Narain Rai Sharma* when it was the civil court which declared the dismissal as non est for non-compliance with natural justice. Rule 121, in fact, specifically contemplates re-instatement of the employee whose services are terminated on the basis of the decision in an appeal and what is most important is the very premise of the re-instatement is the decision in an appeal and it is beyond dispute that the lawgiver has contemplated an appeal only to the Tribunal constituted under Section. In other words, unlike the position in *Devendra Pratap Narain Rai Sharma*, where the court had to deal with the decree of a civil court, which was outside the scope of Rule 54, in a case covered by Rule 121, the Managing Committee is to act thereunder only when there is re-instatement necessitated by an order of the Tribunal under Section

11 in an appeal. In other words, a departmental appeal under fundamental Rule 54 is to be conflated to an appeal under Section 11 in the case of Rule 121.[Para 24][530-B-F]

4. The next question which would arise is whether there is merit in the argument of the appellant that Rule 121 is to be found as ultra vires the Section 11 of the Act. It is not in dispute that the appellant has not laid any challenge to Rule 121. However, he would contend that this Court is armed with necessary power, even in the absence of any challenge, to hold that Rule 121 is *ultra vires*. What Rule 121 provides for, is the authority with the Managing Committee to consider and make two specific orders. Now the question will arise is, at what stage is the said orders to be passed and what is the nature of the order to be passed apart from how it is to be passed. The question will further arise as to whether it is a discretionary power or whether the law contemplates a mandatory duty. In our view, Rule 121 enshrines the principle of power coupled with duty. This conclusion is inevitable on account of two reasons. In the first place, the Rule-maker has employed language that the Managing Committee 'shall' consider and pass specific order. The use of the word 'shall' is crucial. It would require strong circumstances provided by the context, the purpose of the law, the consequences that would follow to dilute the mandatory consequences that ordinarily flow from the deliberate choice of the word 'shall'. Far from the context providing any material to the contrary, the setting of Rule 121, the purpose of the Rule and the consequences of not giving a mandatory flavour overwhelmingly indicate that the lawgiver has made it an inflexible duty on the part of the Managing Committee to pass an order if the elements declared in Rule 121 are present. In other words, where an employee, who has been dismissed, removed or compulsory retired challenges his termination in an appeal which must be understood as an appeal to the Tribunal constituted under Section 11 of the Act and he is re- instated, then it is not merely an enabling provision which undoubtedly it is, in the sense that it confers a power on the Managing Committee but we would go further and hold that it becomes the duty of the Managing Committee to consider and pass an order.

Any other view would put the employee at the mercy of the employer.[Para 25 & 27][530-F-H; 531-G-H; 532-A-E]

5. Now coming to what would constitute the subject matter of the order to be passed, Rule 121(1)(a) contemplates that the Managing Committee must consider and pass an order and provide for salary and allowances to be paid to the reinstated employees. The salary and allowances is to be provided for the period the employee remained absent from duty. This would include his absence from duty caused by his suspension prior to his dismissal, removal or compulsory retirement. The next specific matter which should engage the attention of the Managing Committee is as to whether the reinstated employees must be treated as on duty during the period of absence. Rule 121(2) confers a power with the Managing Committee to consider the question as to whether 'in its opinion', the employee has been fully exonerated. The plain meaning of this provision is that when the order passed by the Tribunal directing reinstatement, is implemented, the Managing Committee is duty bound to look into the proceeding culminating in the order of the Tribunal and find whether the Tribunal has fully exonerated the employee in question. If it is so found, the employee is to be paid full salary and allowances. The *proviso* to Rule 121(2) empowers the Managing Committee to come to a conclusion that the employee is guilty of delaying the proceedings instituted against him. It can be done only after giving a reasonable opportunity to make a representation, and after considering the version of the employee. It can direct that the employee need be paid only such allowances as it finds supported by reasons in writing for the period of such delay. This is subject to the limitations which are carved out in Rule 121(3). A perusal of Rule 121 would reveal that the power coupled with the duty will come into play only after the order of the Tribunal directing reinstatement is accepted by the Management. This we say for the reason that Rule 121 speaks about the employee who had been dismissed, removed or compulsory retired being reinstated by the Management. Of course, Rule 121 would also apply if but for his retirement or superannuation, the employee would have been reinstated. Both these consequences will follow only if the order of reinstatement

of the Tribunal becomes final. In other words, if the order of the Tribunal is under challenge and the stage has not arrived where the Managing Committee actually reinstates or would have reinstated but for his retirement, Rule 121 would not apply.[Para 28 & 29][532-E-H; 533-A-E]

6. Section 8(3) as also Rule 120(3) provide for a right of appeal which right must be understood in the light of the law declared by this Court as expanded to include all cases of termination except termination brought about by the efflux of time. [See Shashi Gaur judgment]. The appeal is not filed against the order of a Trial Court as such. No doubt, the power available to the civil court under the Code of Civil Procedure are showered upon the Tribunal. The Tribunal is not clothed with specific powers to grant relief of payment of the allowances. The Tribunal is also not empowered to deal with the question as to whether the employee must be treated as on duty for the period when the employee remains absent on account of both the absence, whether or not, on account of suspension before the termination and compelled absence after the penalty is imposed. The appellant relies on the judgment of *Deepali Gundu* . One of the questions, which would fall for consideration, is the question as to whether the employee was gainfully employed elsewhere during the period of compelled absence. The Tribunal is called upon to decide the legality and correctness of the penalty. It is certainly entitled to act as an appellate body and come to the conclusion that there was no basis either for reasons which are technical or on the basis that no case is made out even on merits to impose the penalty against the employee. Should the Tribunal set aside the penalty covered by Rule 121, it is always open to the management to take recourse to remedies open to it. The order of re-instatement does not become final. The employee remains absent undoubtedly on the basis of the order obtained by the Management in the superior court. What is relevant is the actual re-instatement under Rule 121 which would set the stage for holding the inquiry thereunder. The inquiry, it must be noticed is not merely limited to the question of pay and allowances. The management is given the powers coupled with the duty to hold an inquiry and to pass an order as to whether the employee must

be found to be on duty or not and for what period during his absence. The Lawgiver has conferred a power with the management. The use of the words "in its opinion" indicates that the Managing Committee must apply its mind and consider all aspects and take a view. This must, undoubtedly, be done after putting the employee on notice. The employee must be afforded an opportunity. The employee would be in a position to point out that he was not employed elsewhere. He would also be able to establish that he was fully exonerated. We have noticed that the order of the appellate authority in an appeal directing re-instatement may not be final as it can be impugned in the higher forum. Therefore, it may not be appropriate or apposite to find that Rule 121 is in any manner *ultra vires* Sections 8 and 11 of the Act. Properly appreciated and implemented, the provisions of the parent Act and the subordinate legislation can be harmonized.[Para 31][534-B-H; 535-A-C]

7. There is express power with the Managing Committee to be exercised at a particular point of time which arrives when re-instatement is effected or re-instatement would have followed but for retirement of the employee. Rule 121, in our view, while being an enabling provision must also be interpreted as a case of power coupled with a duty. The power must be exercised promptly and without fail by the Managing Committee immediately following the re-instatement of the employee which would be the result of any voluntary order of re- instatement or re-instatement, which is inevitable following the binding orders of the court. The management is duty bound to conduct an inquiry to pass the orders contemplated under Rule 121(1)(a) and (b). The presence of the words "in its opinion" do indicate a certain amount of authority with the Managing Committee. This however, is not to be confused with any right to act with arbitrariness or caprice. In other words, it is duty bound to look into all the inputs including the orders which are finally passed which led to the re-instatement of the employee. It is duty bound to act fairly. The question about the employee being gainfully employed and the amount received till the stage of reinstatement, is aptly gone into under Rule 121. After putting the employee on notice and giving him an

opportunity, the Managing Committee must provide for the matters which are provided therein, namely Rule 121.[Para 32][535-D-H]

8. The power coupled with duty takes life not only upon there being an order of reinstatement in an appeal but upon the Managing Committee proceeding to implement the direction to reinstate, issued by the Tribunal. If the power is to be exercised by the Tribunal apart from the fact that there would be situations, such as, contemplated in Rule 115 of the Rules, which would render both the Rule and right given to the Management under the said Rule, meaningless and futile, it would involve the Tribunal being called upon to exercise the duty and the power, which is best exercised by the Managing Committee. Rule 121 is part of a scheme, which consists of both Sections 8 and 11 of the Act as also Rules 115(4) and 121. The Rules have been enacted in the same year within eight months, as noticed by the High Court. The Administrator, who has authored the Rules under Section 28 of the Act, has produced the Rules, which are found to be in harmony with the Act. We are unable to cull out any inconsistency between Section 8 read with Section 11 on the one hand and Rule 121 on the other. While we are not maintaining for a moment that the Court is rendered powerless or not bound by a duty to unravel the mind of the Legislature and strike at a subordinate Legislation, where it is *ultra vires,* we do not find any scope for applying the said principle in the facts. In this regard, while we are conscious of the view taken that subordinate legislation cannot control the interpretation to be placed on the parent enactment, it is not the same as holding irrespective of irreconcilable differences between the parent enactment and the subordinate legislation not been present, full play should not be given to the latter. As far as the question of the delay in the employee getting relief on the interpretation placed by the Full Bench in the impugned Judgment, we are of the view that, though attractive, the argument must fail. While we would not be loath to place an interpretation, which is in agreement with the appellant's appeal to us, we feel that for the reasons, which we have given, the argument of the appellant is in the teeth of a scheme, which is intended to be worked in accordance with a value judgement, which reaches

justice to both sides. Undoubtedly, we make it clear that there should not be any room for needless and unjustifiable delay on the part of the Management in concluding the proceedings under Rule 121. This is different from saying, however, that such proceedings can be dispensed with or the Tribunal can or should be burdened with the task, which is aptly and appropriately timed and positioned to be performed by the Managing Committee.[Para 34-36][536-C-H; 537-A-C]

9. No doubt, the appellant has a case that in view of the fact in *Shashi Gaur* (supra), this Court enlarged the scope of the appellate remedy under Section 11 to cases of termination other than, what is provided in the Rule 121 and, what is more, Section 8 itself. He would submit that as Rule 121 is not applicable to cases which are not enumerated in Rule 121, it would create a situation where, in cases of termination not covered by Rule 121, the Tribunal would have the power to grant back-wages. Whereas the Tribunal would have the said power, in cases not covered by Rule 121. This creates an anomalous position, it is contended. In the impugned Judgment, the High Court has proceeded to hold that in view of the expanded right of appeal based on the Judgment of this Court in *Shashi Gaur* (supra), the Managing Committee would have the power to make the specific order in respect of any termination in the light of the Judgment of this Court in *Shashi Gaur* (supra). In view of the interpretation placed by this Court creating the situation, by which an appeal is permitted against an order of termination, other than specifically mentioned in, both Section 8(3) and Rule 121, This court is not in a position to find fault with the view taken by the Full Bench.[Para 38 & 39][537-D-G; 538-F-G]

Shashi Gaur v. NCT of Delhi and others **(2001) 10 SCC 445 – relied on.**

Bharathidasan University and another v. All-India Council for Technical Education and others **(2001) 8 SCC 676 : [2001] 3 Suppl. SCR 253;** *State of A.P. v. P. Narasimha and another* **(1994) 4 SCC 453;** *Karnataka Bank Ltd. v. State of Andhra Pradesh and others* **(2008)**

2 SCC 254 : [2008] 1 SCR 986; *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others* **(2013) 10 SCC 324 : [2013] 9 SCR 1;** *Devendra Pratap Narain Rai Sharma v. State of Uttar Pradesh and others* **AIR 1962 SC 1334 : [1962] 1 Suppl. SCR 315;** *Union of India v. Madhusudan Prasad* **(2004) 1 SCC 43 : [2003] 4 Suppl. SCR 1026;** *Smt. Ujjam Bai v. State of Uttar Pradesh* **AIR 1962 SC 1621 : [1963] 1 SCR 778;** *Shanmugam v. Commissioner for Registration* **(1962) 3 LR 200 PC - referred to.**

Case Law Reference

[2001] 3 Suppl. SCR 253	**referred to**	**Para 8**
(1994) 4 SCC 453	**referred to**	**Para 8**
[2008] 1 SCR 986	**referred to**	**Para 8**
(2001) 10 SCC 445	**relied on**	**Para 8**
[2013] 9 SCR 1	**referred to**	**Para 8**
[1962] 1 Suppl. SCR 315	**referred to**	**Para 8**
[2003] 4 Suppl. SCR 1026	**referred to**	**Para 8**
[1963] 1 SCR 778	**referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No.5562 of 2017.

From the Judgment and Order dated 14.05.2015 of the High Court of Delhi at New Delhi in Writ Petition (C) No.8058 of 2011.

Anuj Aggarwal, Vipin Kumar Jai, Advs. for the Appellant.

A. P. S. Ahluwalia, Sr. Adv., Abinash Kumar Mishra, Ms. Aakanksha Kaul, Bhakti Vardhan Singh, Aman Shukla, B. V. Balaram Das, B. Krishna Prasad, Advs. for the Respondents.

The Judgment of the Court was delivered by

K. M. JOSEPH, J.

1. The Delhi School Education Act 1973 (hereinafter referred to as "the Act") was promulgated on 9th April, 1973. In the very same year on the 31st December, 1973, the Delhi School Education Rules, 1973

A were promulgated. The said Rules are referred to as "the Rules". Chapter IV of the Act deals with the terms and conditions of Service of Employees of recognised Private Schools. What is relevant to the lis are Sections 8 and 11 of the Act, and they read as follows:

> "8. Terms and conditions of service of employees of recognised
B private schools.—
>
> (1) The Administrator may make rules regulating the minimum qualifications for recruitment, and the conditions of service, of employees of recognised private schools:
>
> Provided that neither the salary nor the rights in respect of
C leave of absence, age of retirement and pension of an employee in the employment of an existing school at the commencement of this Act shall be varied to the disadvantage of such employee:
>
> Provided further that every such employee shall be entitled to opt for terms and conditions of service as they were applicable
D to him immediately before the commencement of this Act.
>
> (2) Subject to any rule that may be made in this behalf, no employee of a recognised private school shall be dismissed, removed or reduced in rank nor shall his service be otherwise terminated except with the prior approval of the Director.
>
E
> (3) Any employee of a recognised private school who is dismissed, removed or reduced in rank may, within three months from the date of communication to him of the order of such dismissal, removal or reduction in rank, appeal against such order to the Tribunal constituted under section 11.
>
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> (4) Where the managing committee of a recognised private school intends to suspend any of its employees, such intention shall be communicated to the Director and no such suspension shall be made except with the prior approval of the Director:
>
> Provided that the managing committee may suspend an
G employee with immediate effect and without the prior approval of the Director if it is satisfied that such immediate suspension is necessary by reason of the gross misconduct, within the meaning of the Code of Conduct prescribed under section 9, of the employee:
>
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Provided further that no such immediate suspension shall remain in force for more than a period of fifteen days from the date of suspension unless it has been communicated to the Director and approved by him before the expiry of the said period.

(5) Where the intention to suspend, or the immediate suspension of an employee is communicated to the Director, he may, if he is satisfied that there are adequate and reasonable grounds for such suspension, accord his approval to such suspension.

11. Tribunal. —

(1) The Administrator shall, by notification, constitute a Tribunal, to be known as the "Delhi School Tribunal", consisting of one person:

Provided that no person shall be so appointed unless he has held office as a District Judge or any equivalent judicial office.

(2) If any vacancy, other than a temporary absence, occurs in the office of the presiding officer of the Tribunal, the Administrator shall appoint another person, in accordance with the provisions of this section, to fill the vacancy and the proceedings may be continued before the Tribunal from the stage at which the vacancy is filled.

(3) The Administrator shall make available to the Tribunal such staff as may be necessary in the discharge of its functions under this Act.

(4) All expenses incurred in connection with the Tribunal shall be defrayed out of the Consolidated Fund of India.

(5) The Tribunal shall have power to regulate its own procedure in all matters arising out of the discharge of its functions including the place or places at which it shall hold its sittings.

(6) The Tribunal shall for the purpose of disposal of an appeal preferred under this Act have the same powers as are vested in a court of appeal by the Code of Civil Procedure, 1908 (5 of 1908) and shall also have the power to stay the operation of the order appealed against on such terms as it may think fit."

2. Next, we may notice the provisions in the Rules. Rule 115 deals with suspension. We need notice only Rule 115(1) and 115(4),*inter alia*:

"115. Suspension

A (1) Subject to the provision of sub-sections (4) and (5) of section 8, the managing committee may place an employee of a recognised private school, whether aided or not, under suspension: —

a) where a disciplinary proceeding against such employee is contemplated or pending; or

B (b) where a case against him in respect of any criminal offence is under investigation or trial; or

(c) where he is charged with embezzlement; or

(d)where he is charged with cruelty towards any student or other employee of the school; or

C

(e)where he is charged with misbehaviour towards any parent, guardian, student or employee of the school; or

(f) where he is charged with the breach of any other code of conduct.

D

xxx xxx xxx

(4) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon an employee is set aside or rendered void, in consequence of or by, a decision of a court of law or of the Tribunal; and the disciplinary authority on a consideration of

E the circumstances of the case decides to hold further inquiry against such employee on the same allegations on which the penalty of dismissal, removal or compulsory retirement was originally imposed, such employee shall be deemed to have been placed under suspension by the managing committee from the date of

F original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders: Provided that no such further enquiry shall be ordered unless it is intended to meet a situation where the court has passed an order purely on technical grounds without going into the merits of the case."

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3. Rule 117 deals with penalties and disciplinary authority. Under the category of major penaltiesare reduction in rank, compulsory retirement, removal from service and dismissal from service. Rule 120 deals with procedure for imposing major penalty. Rule 121 which is at the centre stage of the controversy provides as follows:

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"121. Payment of pay and allowances on reinstatement - A

(1) When an employee who has been dismissed, removed or compulsorily retired from service is reinstated as a result of appeal or would have been so reinstated but for his retirement on superannuation while under suspension preceding the dismissal, removal or compulsory retirement, as the case may be, the B managing committee shall consider and make a specified order: -

(a) with regard to the salary and allowances to be paid to the employee for the period of his absence from duty, including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be; and C

(b) whether or not the said period shall be treated as the period spent on duty.

(2) Where the managing committee is of opinion that the employee who had been dismissed, removed or compulsorily retired from service had been fully exonerated, the employee shall be paid the D full salary and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired from service or suspended prior to such dismissal, or compulsory retirement from service, as the case may be:

Provided that where the managing committee is of opinion E that the termination of the proceedings instituted against the employee had been delayed due to reasons directly attributable to the employee, it may, after giving a reasonable opportunity to the employee to make representations and after considering the representation, if any, made by the employee, direct, for reasons to be recorded by it in writing, that the employee shall he paid for F the period of such delay only such proportion of the salary and allowances as it may determine.

(3) The payment of allowances shall be subject to all other conditions under which Midi allowances are admissible and the proportion of the full salary and allowances determined under the G proviso to sub-rule (2) shall not be less than the subsistence allowance and other admissible allowances."

4. Having set out the statutory framework, the time is now ripe to notice the relevant facts which led to the litigation. We may notice the facts as set out in the impugned judgment: H

"The second respondent was appointed as a PGT (Chemistry) by the Guru Harkishan Public School, admittedly a minority institution, on July 02, 1984. As per the school, on January 22, 1994 the respondent No.2 not only misbehaved but even molested a newly married employee of the school in full public view and when the tormented lady complained to the principal of the school, on being summoned the said respondent not only profusely apologized but to save his honour and respect so that no stigma was cast tendered a voluntary resignation on January 22, 1994 and requested the principal of the school to accept the same forthwith. The principal forwarded the letter of resignation to the Chairperson of the Managing Committee of the School who accepted the same; and thus ceased the employer-employee relationship between the school and the second respondent. The respondent No.2 disputes the version and claims that the resignation was the result of coercion and that the letter of resignation was withdrawn the next day on January 23, 1994 before it could be acted upon. He also questions the competence of the Chairperson of the Managing Committee of the school to accept the same. It is in this backdrop that appeal No.14/1994 fell in the lap ofthe Delhi School Education Tribunal for decision. Unfortunately, the appeal came to be decided after 17 years of it being filed. Vide order dated August 18, 2011 the Tribunal held that the letter of resignation submitted by the said respondent was withdrawn before it was accepted and thus could not be acted upon. The Tribunal has also held that the Chairperson of the Managing Committee was not the Competent Authority to accept the resignation. As a result, the termination of the second respondent's service has been held to be illegal. The said respondent has been directed to be reinstated in service: 50% back wages have been directed to be paid. The writ petition challenges the award granting 50% back wages."

5. The Learned Single Judge noting the conflicting opinions between two learned Judges referred the matter to the Larger Bench. The point of controversy is this. The writ petitioner contended that the Tribunal did not have the power to decide on the issue of back wages. The said question is squarely covered by provisions of Rule 121. Under Rule 121, it is the Managing Committee, which is to take a decision.

6. The Full Bench, by the impugned Judgement, proceeded to answer the reference in the following manner:

"45. We answer the reference as under: - A

(i) The law declared by the learned Single Judge of this Court in the decision reported as 43 (1991) DLT 139 *The Manager Arva Samaj Girls Higher Secondary School & Anr. Vs. Sunrita Thakur* correctly lays down the 1aw concerning the interpretation of Rule 121 of the Delhi School Education Rules, 1973 and the B view taken by the learned Single Judge in the decision dated January 17, 2006 in W.P.(C) No.7617/2000 *The Managing Committee Heera Lal Jain Vs. Shri Chander Gupt Sharma & Ors.* is overruled.

(ii) Rule 121 of the Delhi School Education Rules, 1973 would C apply to minority unaided schools recognized under the Delhi School Education Rules, 1973."

7. The appellant before us is the second respondent in the writ petition. We have heard learned counsel for the appellant Anuj Agrawal and Shri A.P.S. Ahluwalia, learned Senior Counsel appearing on behalf D of the respondent.

8. The appellant would dub Rule 121 as *ultra vires*. He would point out that it would be open to this Court to pronounce the Rule unconstitutional despite the fact that the Rule has not been challenged before the High Court. In this context, he relies upon the Judgment of E this Court in *Bharathidasan University and another v. All-India Council for Technical Education* and others[1]. It is the appellant's further case that the Tribunal under Section 7 has the same power as are vested in the court of appeal under the Code of Civil Procedure. The Appellate Court has the power as the court of original jurisdiction possesses.It is pointed out that the court of original jurisdiction is the Managing committee, F and therefore, the power of the Tribunal extends to awarding back wages. It is further contended that the Tribunal already has incidental and ancillary powers to make the express statutory powers effective.He relies upon the judgment of this Court in *State of A.P. v. P. Narasimha and another*[2] and *Karnataka Bank Ltd. v. State of Andhra Pradesh and others*[3]. G The Lawgiver intended to create a Specialised Tribunal.Being a Specialised Tribunal, it has all the power of an Appellate Court. The

[1] (2001) 8 SCC 676
[2] (1994) 4 SCC 453
[3] (2008) 2 SCC 254

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A statutory Rule cannot be inconsistent or repugnant with the parent Act. Rule 121 is confined to cases of dismissal, removal and compulsory retirement. In *Shashi Gaur v. NCT of Delhi and others*[4], this court has taken the view that an aggrieved employee can challenge all kinds of termination of service. If that is so, in cases not falling within the ambit of Rule 121, it would empower the Tribunal to award back wages, whereas it would be prevented from doing so in regard to cases falling under Rule 121. It is contended that the Tribunal has the power to award back wages. The Tribunal must have the power to decide the issue of back wages in all cases in view of the factors and guidelines laid down in *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others*[5]. The correctness of the impugned judgment in regard to the finding that Rule 121 applies to all institutions, including minority institutions, is not questioned. It is contended that Fundamental Rule 54 applies only to a departmental appeal. In the case of a complaint about subsistence allowance, a departmental appeal lies; otherwise, there is no provision for any departmental appeal.The appellant relies on *Devendra Pratap Narain Rai Sharma v. State of Uttar Pradesh and others*[6] and *Union of India v. Madhusudan Prasad*[7].

9. *Per contra*, the contention of the respondent is as follows,*inter alia*. The Tribunal under Section 8 read with Section 11 of the Act does not possess any express power. Reliance is placed on the judgment of this Court in *Smt. Ujjam Bai v. State of Uttar Pradesh*[8]. It is further pointed out that the view taken in the impugned Judgment by the Full Bench has been followed in a large number of cases. It is contended that if a judgment has been consistently followed for a long time,the principle of certainty of law requires that it should not be disturbed. The spirit of the law is that after the Tribunal directs re-instatement it would direct the Managing Committee to conduct an inquiry under Rule 121.An aggrieved employee can challenge the proceedings in the appropriate forum and clothing the Tribunal with the power to award back wages would render Rule 121 redundant and superfluous. The Managing Committee would decide the matter after an inquiry and it is even stated after recording evidence.The Tribunal may award damages in an arbitrary manner without determining relevant facts relating to gainful employment,

[4] (2001) 10 SCC 445
[5] (2013) 10 SCC 324
[6] AIR 1962 SC 1334
[7] (2004) 1 SCC 43
[8] AIR 1962 SC 1621

running of any business or joining some other school during the period of absence. In our view, the following points would arise:

"(I) Whether there is any express power under Sections 8 and 11 to order back wages?

(II) Whether Fundamental Rule 54 fortifies the contention of the respondent?

(III) Is there any conflict between Sections 8 and 11 on the one hand and Rule 121 on the other hand? Is Rule 121 ultra vires to parent enactment?

(IV) Whether the tribunal has incidental and ancillary power to direct payment of pay and allowance on setting aside the order of termination?"

ANALYSIS

10. We have noticed that Section 8 provides for an appeal limited to dismissal, removal or compulsory retirement. However, this Court in the decision in *Shashi Gaur v. NCT of Delhi and others*[9] held that an appeal lies under Section 8(3) also against termination otherwise. The only exception carved out is termination of service upon the service having come to an end by efflux of time. We may in this context, no doubt, notice what this Court noticed in Paragraph 8.It reads as under:

"8. In this view of the matter, we are persuaded to take the view that under sub-section (3) of Section 8 of the Act, an appeal is provided against an order not only of dismissal, removal or reduction in rank, which obviously is a major penalty in a disciplinary proceeding, but also against a termination, otherwise except, where the service itself comes to an end by efflux of time for which the employee was initially appointed. Therefore, we do not find any infirmity with the order of the High Court not entertaining the writ application in exercise of its discretion though we do not agree with the conclusion that availability of an alternative remedy ousts the jurisdiction of the court under Article 226 of the Constitution."

11. We will proceed further on the basis that the provisions will apply across the board as found by the full Bench, which includes minority institutions.

[9] (2001) 10 SCC 445

A 12. The first question, we must decide is, whether the argument of the respondent that Sections 8 and 11 do not contain any express provision for ordering back wages is correct? In this context we must also bear in mind the contention of the appellant that the law giver has created a right of appeal before the Tribunal and it is to act armed with the wide powers of the court of appeal under the Code of Civil Procedure.
B Section 107 of the Code of civil Procedure, reads as follows:

> "(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-
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> (a) to determine a case finally;
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> C (b) to remand a case;
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> (c) to frame issues and refer them for trial;
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> (d) to take additional evidence or to require such evidence to be taken.
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> D (2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

13. The appellant lays store by the said provision.

E 14. As far as Section 8(2) is concerned, the provision proscribes dismissal, removal or reduction in rank or the termination otherwise of an employee except with the prior approval of the Director.This is indeed to safeguard the right of the employee. Section 8(3) gives the right to an employee limited under the statute to one who has been dismissed,
F removed or reduced in rank to file an appeal before the Tribunal constituted under Section 11. We have already noticed the view taken by this court in *Shashi Gaur* (supra) that any employee whose service is terminated except as declared therein and not limited to what is provided in the statute can challenge the termination before the Tribunal constituted under Section 11. The Tribunal is to consist of a person who has held the
G Office as District Judge or any equivalent Judicial Officer.Any indication aboutpower of the Tribunal is to be found in Sections 11(5) and 11(6). Section 11(5) purports to empower the Tribunal to regulate its own procedure. Section 11(6) is perhaps more apposite and declares that the Tribunal for the purpose of disposal of an appeal has the power vested in
H the court of appeal by the Code of Civil Procedure and shall also have

the power to stay operation of the order.We may incidentally also notice that Rule 120(3) declares that an employee of a recognised private school who is aggrieved by any order imposing on him the penalty of compulsory retirement or any minor penalty may appeal to the Tribunal.

15. As far as Section 107 of the Code of civil Procedure is concerned, it declares that subject to such conditions and limitations that may be prescribed, the appellate court has the power to determine a case finally. It is also blessed with the power to remand a case. It can also frame issues and refer the issues for trial.It is also authorised to take additional evidence or permit the evidence to be taken. Section 107(2) declares that the appellate court would have the same power and perform nearly the same duty as are conferred and imposed on the courts of original jurisdiction in respect of suits instituted therein.

16. Reliance placed on Section 107 of the CPC, if inspiration is sought to be drawn to the emphasis supplied to the words "may decide the case finally", to find that there is express power to decide on the question of emoluments as well, does not appeal to us. The purport of the provisions in Section 107 is to only declare that the Appellate Court has a wide range of options, which include the power to finally decide the case. This should be understood to only mean that there is also a power to remand the case or to grant other relief, which may not result in the final disposal of the case. This cannot be understood as meaning that the Appellate Court has the express power to grant the relief of back-wages or to decide upon the question as to whether the period of absence should be treated as duty. This is the power coupled with a duty which is squarely vested with the Management.The right of appeal under Section 8 is given with respect to the order of termination which has been interpreted by this Court in *Shashi Gaur* (supra) to include all kinds of termination except for termination which occurs by efflux of time. The argument of the appellant is that the disciplinary authority is to be treated as the original authority and, therefore, the tribunal in terms of Section 107(2) of the Code of the Civil Procedure must be likened to an Appellate Court and what is more, the disciplinary authority must be equated with the Trial Court. Therefore, there is power to award back wages. The comparison between anAppellate Court and the Trial Court and the vesting of powers on the Appellate Court in terms of the power available to the Trial Court may not be an appropriate and apposite analogy when it comes to the tribunal considering an appeal against the

order of disciplinary authority under Section 8. The tribunal will no doubt have the power to pronounce on the legality of the original order, the impugned order of termination and also order reinstatement. The events subsequent to the termination which have been recognized as relevant in cases including Deepali Gundu (supra) which decision has been relied upon by the appellant himself may not strictly be the subject matter of the appeal for reasons, which we will more elaborately dwell upon.We repel the argument of the appellant.

17. Before we proceed further, we must pause and enquire as to whether the lawgiver elsewhere has been more expressive in the matter of grant of specific power in the area of dispute. In *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and Others*[10], this Court had the occasion to deal with a case that arose under the Maharashtra Employees of Private School (Conditions of Service) Regulation Act, 1977.It is worthwhile to notice that Section 9 providedfor an appeal before the Tribunal under the said Act. Section 10 purported to set out the general power and procedure of the Tribunal. It,*inter alia*, declared that the Tribunal would have the same power as are vested in Appellate Court under the Code of Civil Procedure. This is besides any other power conferred on it by or under the Act. Section 11 provided for the powers of the Tribunal to give appropriate reliefs and directions.Section 11(2) expressly provided that the Tribunal,may *inter alia*, direct the management to give arrears of emoluments to the employee for such period as it may specify. It was also provided further with the power to give such other reliefs to the employee,*inter alia*. Apart from the fact thatprovisions similar to Rule 121 is not seen reflected in the said judgment,what makes the Judgment relevant is that this court had before it a law which provided for the right of appeal before the Tribunal and which expressly conferred power on the Tribunal to grant the relief of arrears of emoluments. Such a provision is conspicuous by its absence in Section 11 of the Act.It is on the conspectus of the said provisionsthat this Court proceeded to lay down the principles in regard to the award of the back wages. This Court,*inter alia*, laid down follows:

> "38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/ workman, the nature of misconduct, if any, found proved against

[10] (2013) 10 SCC 324

the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments."

18. We are conscious of the fact that the jurisdiction of an appellate court is not to be construed in a pedantic manner. In fact, the effort of the Court must be to not abridge the power of the appellate court. *In Shanmugam v. Commissioner for Registration*[11], no doubt, the Privy Council held as follows:

"It is argued that the Act does not contain the "express provision" required by the Interpretation Ordinance to make it applicable. Their Lordships do not agree. Upon the meaning of the words "express provision" counsel relied upon in re Meredith and stated that it must be provision the applicability of which did not arise by inference. He argued that there was no "express provision" as no reference had been made to pending proceedings. Their Lordships are of the view that it is correct to state that expression provision is provision the applicability of which does not arise by inference. The applicability, however of the provision under discussion to the present case does not arise by inference; it arises directly from the language used. The fact that the language used is wide and comprehensive and covers many points other than the one

[11] (1962) 3 LR 200 PC

> immediately under discussion does not make it possible to say that its application can arise by inference only. To be "express proivision" with regard to something it is not necessary that that thing should be specially mentioned; it is sufficient that it is directly covered by the language however broad the language may be which covers it so long as the applicability arises directly from the language used and not be inference therefrom. The argument fails."
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> (Emphasis supplied)

19. The decision in *Nalla Karumburu Kayambu Shanmugam (supra)*, arose as an appeal from the Supreme Court of Ceylon, dismissing an appeal from an Order of the Commissioner, refusing to register the appellant as a citizen of Ceylon. The relevant law insisted upon certain conditions to be fulfilled. The refusal was based on the appellant's wife not having resided in Ceylon as required and the appellant had not satisfied the requirement that he was permanently settled in Ceylon. The application of the appellant was made in July, 1951. The provision relating to the residence of the wife was, according to the applicant, inapplicable as it was made in the year 1952. However, it was given retrospective effect as follows.

> "The amendments effected by the preceding sections of this Act shall be deemed to have come into force on the date appointed under Section 1 of the principal Act; and accordingly, but subject to the provisions of Sub-section (3) of this section, the principal Act shall be deemed on and after that date to have had effect, and shall have effect, in like manner as though it had on that date been amended in the manner provided by this Act."

20. The applicant therein sought support from the following provision which formed the basis for the discussion we have referred to:

> "6(3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected –
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> (c) any action, proceeding, or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal."

21. We would think that it may not be apposite to draw any support from the said decision. It is clear that in the facts and on a conspectus of the provisions involved therein, the principle, as to whether there is an express provision, was applied, it is a matter to be decided on the inevitable effect flowing from the width of the words used. It is not a case where the court countenanced presence of express provisions on the basis of an inference which method is expressly frowned upon. In this case, we are dealing with the case of express powers with a Statutory Tribunal. We are of the view that having regard to the words used in Section 11(6) of the Act, it may not be appropriate to describe the provision as conferring express power with the Tribunal to pass an award of back wages.We feel reinforced in our findings by noticing how, in a similar legislation, a Lawgiver has expressly conferred such powers on the Tribunal.We would, therefore, conclude that we cannot but find that the respondent is right in contending that Section 8 read with Section 11 of the Act do not confer an express power with the Tribunal to order back wages.

22. In this regard, we may at once notice the case of the appellant that Fundamental Rule 54 has no application as the said Rule contemplates departmental appeal whereas Rule 121 deals with an appeal to the Tribunal.

23. In this regard the appellant seeks support from the decision of this Court in *Devendra Pratap Narain Rai Sharma* (supra). Therein theCourt considered the case which involved the question as to whether Fundamental Rule 54 stood in the way of decree of the civil court (that isthe High Court in an appeal in the suit which held that the appellant therein was not afforded the opportunity to defend him before he was visited with the punishment of dismissal) being effectuated. The High Court declared the dismissal to be void and that the appellant therein must be deemed to be in service. Fundamental Rule 54 is essentially in substance *pari materia* with Rule 121 with which we are dealing with. In the facts, this Court held as follows:

> "..This rule has no application to cases like the present in which the dismissal of a public servant is declared invalid by a civil court and he is reinstated. This rule, undoubtedly enables the State Government to fix the pay of a public servant whose dismissal is set aside in a departmental appeal. But in this case the order of dismissal was declared invalid in a civil suit. The effect of the decree of the civil suit was that the appellant was never to be

A deemed to have been lawfully dismissed from service and the order of reinstatement was superfluous. The effect of the adjudication of the civil courts is to declare that the appellant had been wrongfully prevented from attending to his duties as a public servant. It would not in such a contingency be open to the authority to deprive the public servant of the remuneration which he would have earned had he been permitted to work."

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24. The contention of the appellant is that the respondent cannot be permitted to rely upon Rule 121 for the reason that no departmental appeal is contemplated under the Rules and what is contemplated is only an appeal to the Tribunal. We are unable to accept the contention of the appellant.What Rule 54 undoubtedly contemplates is a re-instatement on the basis of an order passed in an appeal or other remedy under the Service Rules.We may describe them as a departmental remedy. Fundamental Rule 54 has been found inapplicable in *Devendra Pratap Narain Rai Sharma* (supra) when it was the civil court which declared the dismissal as non est for non-compliance with natural justice. Rule 121, in fact, specifically contemplates re-instatement of the employee whose services are terminated on the basis of the decision in an appeal and what is most important is the very premise of the re-instatement is the decision in an appeal and it is beyond dispute that the lawgiver has contemplated an appeal only to the Tribunal constituted under Section 11. In other words, unlike the position in *Devendra Pratap Narain Rai Sharma* (supra), where the court had to deal with the decree of a civil court, which was outside the scope of Rule 54, in a case covered by Rule 121, the Managing Committee is to act thereunder only when there is re-instatement necessitated by an order of the Tribunal under Section 11 in an appeal. In other words, a departmental appeal under fundamental Rule 54 is to be conflated to an appeal under Section 11 in the case of Rule 121.

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25. The next question which would arise is whether there is merit in the argument of the appellant that Rule 121 is to be found as ultra vires the Section 11 of the Act.It is not in dispute that the appellant has not laid any challenge to Rule 121. However, he would contend that this Court is armed with necessary power, even in the absence of any challenge, to hold that Rule 121 is *ultra vires*. In this regard, he sought support from *Bharathidasan University and another* (supra). In the said case, this Court was dealing with the question as to whether

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Regulations (Subordinate Legislation) framed by AICTE could oblige even a university to obtain prior approval. The contention of the appellant-University was that the AICTE Act in question made a distinction between Technical Institution and Universities. The offensive Regulations, were found to be specifically violative of the power conferred under Section 23 to make regulations subject to the limitations which were contained in specific and unambiguous language.The definition of the word "Technical Institution" excluded a university. Special care was made whenever the University was within the contemplation of the lawgiver.It was in clear violation of the limitation on the power to make regulations, namely, that the AICTE could not make any regulation to bind Universities,*inter alia*, the regulation in question was made and it was while dealing with the said case, this Court held that it may not be necessary to specifically challenge subordinate legislation. The decision must notbe understood as laying down the principle that the court may lightly depart from the ordinary rule that when a law is questioned as *ultra vires* and, therefore, unconstitutional, a proper challenge must be mounted against the same. The maker of the law must be a party before the court. We may notice in this regard that under the Act, the rule-making power is conferred on the Administrator under Section 28. A perusal of the party array would reveal that the Administrator is conspicuous by his absence. In fact, in the decision relied upon by the appellant-*Bharathidasan University and another* (supra), the Authority, which made the regulation, which was found to be *ultra vires*, was the respondent.

26. Even otherwise, it may be difficult to find that this is a case where we could hold in the absence of express and exclusive power which is conferred on the Tribunal to make an order for payment of emoluments that Rule 121 which clothes the Managing Committee with the said power,is *ultra vires*.

27. Let us now analyse Rule 121 and also the context provided by the neighbouring provisions. As we have already noticed Rule 117 provides for penalties which includes the four major penalties. Rule 120 lays the procedure for imposing the penalty. Against the major penalty of dismissal, removal or compulsory retirement, the law contemplates an appeal before the Tribunal constituted under Section 8 read with Section 11. What Rule 121 provides for, is the authority with the Managing Committee to consider and make two specific orders. Now the question will arise is, at what stage is the said orders to be passed and what is the

A nature of the order to be passed apart from how it is to be passed. The question will further arise as to whether it is a discretionary power or whether the law contemplates a mandatory duty. In our view, Rule 121 enshrines the principle of power coupled withduty. This conclusion is inevitable on account of two reasons. In the first place, the Rule-maker has employed language that the Managing Committee 'shall' consider and pass specific order. The use of the word 'shall' is crucial. It would require strong circumstances provided by the context, the purpose of the law, the consequences that would follow to dilute the mandatory consequences that ordinarily flow from the deliberate choice of the word 'shall'. Far from the context providing any material to the contrary, the setting of Rule 121, the purpose of the Rule and the consequences of not giving a mandatory flavour overwhelmingly indicate that the lawgiver has made it an inflexible duty on the part of the Managing Committee to pass an order if the elements declared in Rule 121 are present. In other words, where an employee, who has been dismissed, removed or compulsory retired challenges his termination in an appeal which must be understood as an appeal to the Tribunal constituted under Section 11 of the Act and he is re-instated, then it is not merely an enabling provision which undoubtedly it is, in the sense that it confers a power on the ManagingCommittee but we would go further and hold that it becomes the duty of the Managing Committee to consider and pass an order. Any other view would put the employee at the mercy of the employer.

28. Now coming to what would constitute the subject matter of the order to be passed, Rule 121(1)(a) contemplates that the Managing Committee must consider and pass an order and provide for salary and allowances to be paid to the reinstated employees. The salary and allowances is to be provided for the period the employee remained absent from duty. This would include his absence from duty caused by his suspension prior to his dismissal, removal or compulsory retirement. The next specific matter which should engage the attention of the Managing Committee is as to whether the reinstated employees must be treated as on duty during the period of absence. Rule 121(2) confers a power with the Managing Committee to consider the question as to whether 'in its opinion', the employee has been fully exonerated. The plain meaning of this provision is that when the order passed by the Tribunal directing reinstatement, is implemented, the Managing Committee is duty bound to look into the proceeding culminating in the order of the Tribunal and find whether the Tribunal has fully exonerated the employee in question.

If it is so found, the employee is to be paid full salary and allowances. The *proviso* to Rule 121(2) empowers the Managing Committee to come to a conclusion that the employee is guilty of delaying the proceedings instituted against him. It can be done only after giving a reasonable opportunity to make a representation, and after considering the version of the employee.It can direct that the employee need be paid only such allowances as it finds supported by reasons in writing for the period of such delay. This is subject to the limitations which are carved out in Rule 121(3).

29. A perusal of Rule 121 would reveal that the power coupled with the duty will come into play only after the order of the Tribunal directing reinstatement is accepted by the Management. This we say for the reason that Rule 121 speaks about the employee who had been dismissed, removed or compulsory retired being reinstated by the Management. Of course, Rule 121 would also apply if but for his retirement or superannuation, the employee would have been reinstated.Both these consequences will follow only if the order of reinstatement of the Tribunal becomes final. In other words, if the order of the Tribunal is under challenge and the stage has not arrived where the Managing Committee actually reinstates or would have reinstated but for his retirement, Rule 121 would not apply. We are not diluting for a moment the duty to implement the order in the absence of an order from the competent court permitting it being suspended.

30. At this juncture, we may notice the impact of Rule 115(4). Under Rule 115(4), the Lawgiver has contemplated as follows:

> If the penalty of dismissal, removal or compulsory retirement is set aside or rendered void by a decision of the court of law or Tribunal,it is provided that the disciplinary authority on a consideration of the case may decide to hold further inquiry against the employee on the same allegations on which the original penalty was imposed.The Rule provides that in such an eventuality, the employee shall be deemed to have been placed under suspension from the original order of dismissal, removal or compulsory retirement. The *proviso* mandates that the disciplinary authority cannot order further inquiry unless the penalty has been set aside purely on technical grounds. Now let us see the impact of this Rule *qua* the argument of the appellant about the availability of power under Section 11 to order back wages. In a case where

A Tribunal sets aside the penalty and it is done on a technical ground, the disciplinary authority becomes entitled to launch further enquiry. Can the Tribunal order the payment of back wages without giving an opportunity to the disciplinary authority to take a decision? Would Rule 115(4) then become *ultra vires* Section 11? We would think it would not be a reasonable interpretation to place on the
B Act and the Rules.

31. Now, let us consider the matter from another perspective. Section 8(3) as also Rule 120(3) provide for a right of appeal which right must be understood in the light of the law declared by this Court as expanded to include all cases of termination except termination brought
C about by the efflux of time.[See Shashi Gaur judgment]. The appeal is not filed against the order of a Trial Court as such. No doubt, the power available to the civil court under the Code of Civil Procedure are showered upon the Tribunal. The Tribunal is not clothed with specific powers to grant relief of payment of the allowances. The Tribunal is also not
D empowered to deal with the question as to whether the employee must be treated as on duty for the period when the employee remains absent on account of both the absence, whether or not, on account of suspension before the termination and compelled absence after the penalty is imposed. The appellant relies on the judgment of *Deepali Gundu* (supra).
E One of the questions, which would fall for consideration, is the question as to whether the employee was gainfully employed elsewhere during the period of compelled absence. The Tribunal is called upon to decide the legality and correctness of the penalty. It is certainly entitled to act as an appellate body and come to the conclusion that there was no basis either for reasons which are technical or on the basis that no case is
F made out even on merits to impose the penalty against the employee. Should the Tribunal set aside the penalty covered by Rule 121,it is always open to the management to take recourse to remedies open to it. The order of re-instatement does not become final. The employee remains absent undoubtedly on the basis of the order obtained by the Management in the superior court. What is relevant is the actual re-instatement under
G Rule 121 which would set the stage for holding the inquiry thereunder. The inquiry, it must be noticed is not merely limited to the question of pay and allowances. The management is given the powers coupled with the duty to hold an inquiry and to pass an order as to whether the employee must be found to be on duty or not and for what period during his absence.

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The Lawgiver has conferred a power with the management. The use of the words "in its opinion" indicates that the Managing Committee must apply its mind and consider all aspects and take a view. This must, undoubtedly,be done after putting the employee on notice. The employee must be afforded an opportunity. The employee would be in a position to point out that he was not employed elsewhere. He would also be able to establish that he was fully exonerated. We have noticed that the order of the appellate authority in an appeal directing re-instatement may not be final as it can be impugned in the higher forum. We would, therefore, find that it may not be appropriate or apposite to find that Rule 121 is in any manner *ultra vires* Sections 8 and 11 of the Act.Properly appreciated and implemented, the provisions of the parent Act and the subordinate legislation can be harmonized.

32. There is no express power with the Tribunal of the kind which is present in the Maharashtra Act which fell to be decided in *Deepali Gundu* (supra). There is express power with the Managing Committee to be exercised at a particular point of time which arrives when re-instatement is effected or re-instatement would have followed but for retirement of the employee.Rule 121, in our view, while being an enabling provision must also be interpreted as a case of power coupled with a duty. The power must be exercised promptly and without fail by the Managing Committee immediately following the re-instatement of the employee which would be the result of any voluntary order of re-instatement or re-instatement, which is inevitable following the binding orders of the court. The management is duty bound to conduct an inquiry to pass the orders contemplated under Rule 121(1)(a) and (b). The presence of the words "in its opinion" do indicate a certain amount of authority with the Managing Committee. This however, is not to be confused with any right to act with arbitrariness or caprice. In other words, it is duty bound to look into all the inputs including the orders which are finally passed which led to the re-instatement of the employee. It is duty bound to act fairly. The question about the employee being gainfully employed and the amount received till the stage of reinstatement, is aptly gone into under Rule 121. After putting the employee on notice and giving him an opportunity, the Managing Committee must provide for the matters which are provided therein, namely Rule 121.

33. We cannot on a conspectus of the provisions and the discussion about the context, object and consequences that would flow, agree with

A the appellant, that the Appellate Tribunal must be ceded implied powers to assume the specific powers ceded to the Managing Committee. While we are not averse to adopting a liberal view when it comes to clothing an appellate body to deal with matters arising in the proceeding in a fair and effective manner, the scheme that we have found and the consequences that ensue dissuade us from vesting such implied powers. B It involves rendering Rule 121 otiose and redundant. It would have been a different matter if the rule did not exist and more importantly, we did not unravel a distinct scheme and purpose.

34. The power coupled with duty takes life not only upon there being an order of reinstatement in an appeal but upon the Managing C Committee proceeding to implement the direction to reinstate, issued by the Tribunal. If the power is to be exercised by the Tribunal apart from the fact that there would be situations, such as, contemplated in Rule 115 of the Rules, which would render both the Rule and right given to the Management under the said Rule, meaningless and futile, it would D involve the Tribunal being called upon to exercise the duty and the power, which is best exercised by the Managing Committee.

35. We are inclined to take the view that Rule 121 is part of a scheme, which consists of both Sections 8 and 11 of the Act as also Rules 115(4) and 121. The Rules have been enacted in the same year E within eight months, as noticed by the High Court. The Administrator, who has authored the Rules under Section 28 of the Act, has produced the Rules, which are found to be in harmony with the Act. We are unable to cull out any inconsistency between Section 8 read with Section 11 on the one hand and Rule 121 on the other. While we are not maintaining for a moment that the Court is rendered powerless or not bound by a F duty to unravel the mind of the Legislature and strike at a subordinate Legislation, where it is *ultra vires,* we do not find any scope for applying the said principle in the facts. In this regard, while we are conscious of the view taken that subordinate legislation cannot control the interpretation to be placed on the parent enactment, it is not the same as holding G irrespective of irreconcilable differences between the parent enactment and the subordinate legislation not been present, full play should not be given to the latter.

36. As far as the question of the delay in the employee getting relief on the interpretation placed by the Full Bench in the impugned H Judgment, we are of the view that, though attractive, the argument must

fail. While we would not be loath to place an interpretation, which is in agreement with the appellant's appeal to us, we feel that for the reasons, which we have given, the argument of the appellant is in the teeth of a scheme, which is intended to be worked in accordance with a value judgement, which reaches justice to both sides. Undoubtedly, we make it clear that there should not be any room for needless and unjustifiable delay on the part of the Management in concluding the proceedings under Rule 121. This is different from saying, however, that such proceedings can be dispensed with or the Tribunal can or should be burdened with the task, which is aptly and appropriately timed and positioned to be performed by the Managing Committee.

37. We cannot be unmindful of the principle canvassed by the learned Senior Counsel for the respondent that the view of the Full Bench, in the impugned Judgment, is a view which upholds a line of reasoning, which has largely held the field for a long period of time. While it is not a ground to not overturn a view, which is palpably erroneous, the view taken, if it is otherwise a plausible view, must receive deference.

38. No doubt, the appellant has a case that in view of the fact in *Shashi Gaur* (supra), this Court enlarged the scope of the appellate remedy under Section 11 to cases of termination other than, what is provided in the Rule 121 and, what is more, Section 8 itself. He would submit that as Rule 121 is not applicable to cases which are not enumerated in Rule 121, it would create a situation where, in cases of termination not covered by Rule 121, the Tribunal would have the power to grant back-wages. Whereas the Tribunal would have the said power, in cases not covered by Rule 121. This creates an anomalous position, it is contended.

39. In the impugned Judgment, the High Court has proceeded to hold that in view of the expanded right of appeal based on the Judgment of this Court in *Shashi Gaur* (supra), the Managing Committee would have the power to make the specific order in respect of any termination in the light of the Judgment of this Court in *Shashi Gaur* (supra). In the case of penalty of reduction in rank (which is also a major penalty), the High Court has brought out the following distinction:

> "23. The learned Single Judge has reasoned that it would be anomalous to hold that the Delhi School Tribunal would have the power to direct full wages to be paid to an employee who has been reduced in rank but has been restored to the original rank

A but would have no power to pass such an order if an employee is reinstated in service. The reasoning by the learned Single Judge overlooks a very vital and critical fact which clearly distinguishes cases of a penalty of reduction in rank being set aside and the rank being restore.cl vis-a-vis a penalty of dismissal 1 removal or compulsory retirement being set aside and reinstatement ordered. In the former situation the employee would be working in the school, albeit at a lower post and there would be no case warranting an inquiry to be held of the kind contemplated by Rule 121 of the Delhi School Education Rules, 1973 i.e. whether the employee was gainfully employed somewhere else. But where a penalty of a kind where secession takes place is passed, the employee has not to report to the employer and may be gainfully employed somewhere else."

We would take the example of a termination of service, which was explicitly before this Court in *Shashi Gaur* (supra). The termination of the employee therein was ordered as he was not possessed of the requisite qualification. We proceed further that in such a case, the employee is placed under suspension. An inquiry is also held and the services are terminated. We further proceed on the basis that in terms of what is permitted under *Shashi Gaur* (supra), he files an appeal before the Tribunal under Section 8 and obtains an order for reinstatement. In the meantime, we further take it that it is a case where he is gainfully employed. The question would arise in his case also as to the pay and allowances to be granted. The question would further arise as to whether his period of absence should be treated as duty. This situation arises in view of the interpretation placed in the case of *Shashi Gaur* (supra). In such circumstances, in view of the interpretation placed by this Court creating the situation, by which an appeal is permitted against an order of termination, other than specifically mentioned in, both Section 8(3) and Rule 121, we are not in a position to find fault with the view taken by the Full Bench.

40. The upshot of the above discussion is that we find no merit in the Appeal and the Appeal stands dismissed with no order as to costs.

Ankit Gyan Appeal dismissed.
(Assisted by : Rahul Rathi, LCRA)