



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6046 OF 2022

Deepak s/o Madhukarrao Rajegore,
Age-43 years, Occu:Service as Peon,
Baburao Deshmukh Madhyamik Vidyalaya,
Dongarkada, Tq-Kalamnuri, Dist-Hingoli,
R/o-Shelgaon, Post-Pimpalgaon (Ma),
Tq-Ardhapur, Dist-Nanded.

...PETITIONER

VERSUS

- 1) The State of Maharashtra,
Through its Secretary,
Education Department,
Mantralaya, Mumbai-32,
- 2) The Education Officer (Secondary),
Zilla Parishad, Hingoli,
- 3) Bal Shikshan Prasarak Mandal,
Girgaon, Tq-Vasmat, Dist-Hingoli,
Through its Secretary,
- 4) Bapurao Deshmukh Ucchya Madhyamik
Vidyalaya, Dongarkada,
Tq-Kalamnuri, Dist-Hingoli,
Through its Head Master.

...RESPONDENTS

...
Mr. Sambhaji S. Tope Advocate for Petitioner.
Mr. S.J. Salgare, A.G.P. for Respondent Nos. 1 and 2.
Mr. V.V. Pawar Advocate for Respondent Nos. 3 and 4.

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**CORAM: SMT. VIBHA KANKANWADI AND
S.G. CHAPALGAONKAR, JJ.**

DATE OF RESERVING JUDGMENT : 22nd MARCH 2024

DATE OF PRONOUNCING JUDGMENT : 10th MAY 2024

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Rule. Rule made returnable forthwith. Heard learned counsel appearing for the respective parties finally, by consent.

2. Present Petition challenges the impugned order dated 23rd March 2022 issued by respondent No.2 – Education Officer (Secondary), Zilla Parishad, Hingoli and to direct respondent No.2 to accord approval to the transfer of the petitioner from partially aided to aided basis post as per the proposal submitted by respondent Nos. 3 and 4. It also challenges the Government Resolution dated 11th December 2020 issued by the School Education Department as being arbitrary and unreasonable.

3. The factual matrix leading to the Petition are that the petitioner came to be appointed as laboratory attendant (peon) on 14th June 2014. His appointment was as per the due procedure of law by respondent No.3 education society.

Respondent No.2 had granted approval to the appointment of the petitioner and also approval to the continuation by order dated 22nd November 2017. The petitioner was working in respondent No.4 school on partially aided basis on the said post. After the vacancy arose, respondent No.3 institution had transferred the petitioner from partially aided post to fully aided post of laboratory attendant (peon). Respondent No.3 is getting 100% grant-in-aid from the Government and therefore, the said transfer is effected. The petitioner also informs that the transferred post become vacant due to sad demise of one Pandit Bhagwan Kacharu, who was working on 100% grant-in-aid post of laboratory attendant (peon). The said transfer is permissible as per Rule 41 of the Maharashtra Employees of Private Schools (Condition of Service) Rules 1981. Thereafter respondent No.3 had forwarded the proposal to respondent No.2 for getting approval to the said transfer, but it came to be rejected on the ground that the said post which was then held by Pandit Bhagwan Kacharu has lapsed due to his demise in view of the Government Resolution dated 11th December 2020 and now Class-IV Post is available to be filled in only on honorarium basis. Hence the petitioner is challenging the impugned order as well as the Government Resolution.

4. Heard learned Advocate Mr. Tope for the petitioner, learned AGP Mr. Salgare for respondent Nos. 1 and 2 and learned Advocate Mr. Pawar for respondent Nos. 3 and 4.

5. Learned Advocate for the petitioner submits that by Government Resolution dated 1st July 2016, 100% grant-in-aid was given to the respondent school for the staff of 8th standard to 10th standard. The petitioner is the only laboratory attendant now working in respondent school and therefore, after the demise of Pandit Bhagwan Kacharu, who was then working on 100% grant-in-aid post, the petitioner was entitled to get the said post. The learned Advocate for the petitioner has taken us through the Maharashtra Employees of Private Schools (Conditions of service) Act, 1977 (for short "MEPS Act"), Maharashtra Employees of Private Schools (Condition of Service) Rules 1981 (for short "the MEPS Rules"), Secondary School Code and other enactments and submits that as per Rule 73.7 of the Secondary School Code , the hours of working and attendance of non-teaching staff of the school shall be 50 hours per week (inclusive of lunch recess) in the case of lower grade staff such as peons, *hamals* etc. According to him when the Secondary

School Code provides the working of peons on hour basis, the Government by way of resolution cannot abolish the post of peon. The Government Resolution cannot override the provisions of the statute. Learned Advocate for the petitioner relies on the decision of this Court in *Writ Petition No.1493 of 2018 (Suryakant s/o Janardan Muge vs. the State of Maharashtra and others)*, dated 4th July 2019, wherein the Government Circular dated 28th June 2016 has been held to be running contrary to the provisions of the statutory enactment and was held to be not valid in law. Therefore, according to the learned Advocate, the Government Resolution dated 11th December 2020 is administrative decision and cannot run contrary to the subordinate legislation as found in the rules in Secondary School Code.

6. Learned AGP for respondent Nos.1 and 2 has submitted that the staffing pattern is always settled by the Government since the opening of the school. When a school is allowed to be opened then the staffing pattern is settled and allotted to the said school under which different posts are prescribed. The staffing pattern is controlled by MEPS Act and Secondary School Code, respectively and along with the MEPS Act, the MEPS Rules

would govern the field. Even when the staffing pattern was initially declared as per the MEPS Act, MEPS Rules and Secondary School Code, thereafter also the change as per the Chiplunkar Committee regarding creation of additional posts was effected by way of Government Resolution dated 28th June 1994. Therefore, it will not lie in the mouth of the petitioner that by Government Resolutions the Government cannot make changes in the staffing pattern. The petitioner cannot say that when the staff is increased or additional posts are created then it cannot be taken away by the Government by way of Government Resolution. Only favourable things cannot be so projected. After the Government Resolution dated 28th June 1994 was issued by which in view of Chiplunkar Committee report additional posts were created, thereafter also Government Resolution dated 25th November 2005 was issued, by which changes were suggested by the committee which was then freshly appointed. There was no challenge to any of the stipulations in the said Government Resolution. All the posts which were differently named in Schedule "C" of the MEPS Rules were brought under one nomenclature i.e. "Class-IV employees". However, it appears from further Government Resolution dated 23rd October 2013 that many institutions had raised objection with the Government

and therefore the Government could not implement the Government Resolution dated 25th November 2005. So also it gave rise to some litigation and therefore once again high level committee was appointed under the chairmanship of the Principal Secretary to the State. In view of the report of the said committee, post-wise number was fixed / posts were sanctioned. By Government Resolution dated 12th February 2015, the staffing pattern as decided in Government Resolution dated 23rd October 2013 was accepted as it is and appointment to the further post was prohibited. Thereafter by Government Resolution dated 28th January 2019, improved staffing pattern for other non-teaching staff was sanctioned. But as regards Class-IV employees are concerned, it was stated that it would be considered separately and was not fixed and thereafter the impugned Government Resolution was passed on 11th December 2020. Learned AGP pointed out Clause No.4 from the said Government Resolution dated 11th December 2020, which runs thus:-

"४. वरील निकषानुसार ज्या शाळेत अपेक्षित पेक्षा जास्त चतुर्थ श्रेणी कर्मचारी पूर्वीच्या मंजूर पदांवर कार्यरत आहेत व सक्षम प्राधिका-यांकडून मान्यताप्राप्त आहेत, तेथे अतिरिक्त होणारी चतुर्थश्रेणी कर्मचा-यांची पदे त्याच संस्थेत सदरचे कर्मचारी त्या पदावर सेवानिवृत्त होईपर्यंत कार्यरत राहतील, अथवा अतिरिक्त कर्मचा-यांच्या सेवा नजिकच्या शासकीय/जिल्हा परिषद

कार्यालयांत/अनुदानित/अंशतः अनुदानित संस्थांमध्ये आवश्यकतेनुसार तात्पुरत्या प्रत्यावर्तित करण्यात येतील. सदर कर्मचा—यांच्या सेवानिवृत्तीनंतर ही अतिरिक्त ठरलेली पदे आपोआप व्यपगत होतील व त्यानंतर शिपाई भत्ता सुरु होईल.”

. English translation of above said clause No.4, reads as under:-

“4. According to the above criteria, in schools where there are more Class IV employees working in the previously sanctioned post and approved by the competent authority, the additional posts of Class IV employees will remain in the same institution until the said employee retires from that post, or the services of additional employees will be temporarily deputed / reverted to the nearest Government / Zilla Parishad offices / Aided / partially aided institutions as per requirement. After the retirement of the said employee, these additional posts will automatically lapse and thereafter peon allowance will start.”

(Translated by Senior Translator and Interpreter,
High Court of Bombay, Bench at Aurangabad)

7. Learned AGP submits that in view of above said Clause No.4 of the Government Resolution, the person who is working prior to coming into force the said Government Resolution, his post is protected till the retirement or if some Class-IV employee would turn out to be surplus, still he would continue there in the same institute till the retirement or would be absorbed in nearby Government or Zilla Parishad office / aided / partially aided

institution, as per the requirement. Therefore, all care has been taken so that those persons who have been appointed prior to 1st December 2020 should not suffer. But, thereafter there shall not be an appointment on regular post having salary by pay-scale. The Government has every power to issue such circulars, notifications, resolutions when it has the power to decide the staffing pattern. The financial constraints are prompting the Government to take such decision and it is not only in schools but in other Government offices also the Government is promoting process of outsourcing instead of employing persons under "Class-IV employees".

8. Learned AGP relies on the observations in ***State of Uttar Pradesh and others vs. Principal Abhay Nandan Inter College and others, 2021 AIR (SC) 4968: 2021 (15) SCC 600***, wherein the Hon'ble Apex Court has upheld the scheme for outsourcing issued in the State of Uttar Pradesh in respect of Class-IV employees in colleges. The challenge to the amendment to the Regulation in respect of outsourcing was considered and it was further considered that said Regulation which was in the form of a subordinate legislation was also in the form of a policy decision. A policy decision is presumed to be in public interest

and such a decision once made is not amenable to challenge, until and unless there is manifest or extreme arbitrariness, a Constitutional Court is expected to keep its hand off. Learned AGP strenuously submits that it is the policy decision that has been taken, then the petitioner has no right to challenge the said Government Resolution unless it is shown that only the petitioner is discriminated.

9. The facts are already narrated and it is to be noted that the employee is challenging the impugned order in this case. The management, whose proposal has been turned down, has not even filed affidavit-in-reply. No doubt, if the petitioner is affected by the impugned order, then he gets a right to challenge the impugned order. But then the question arises, whether he can challenge the Government Resolution. In fact the impugned order depends on the Government Resolution dated 11th December 2020. The other prayers are consequential and the main challenge is to the said Government Resolution, which is of course the outcome of the powers within the State Government to make rules in respect of staffing pattern. This Court in *Writ Petition No. 5959 of 2015 decided on 4th May 2018 (Sanskar Prabodhini Secondary School, Through its Head Mistress vs. the*

State of Maharashtra and others), had observed that the Secondary School Code has a statutory force. Here it is to be noted that the main object of the said Code is to have uniformity in the schools, especially the secondary school or higher secondary school or higher secondary multipurpose school or vocational high school, which is described in the definition of "school" in Chapter-I of the Secondary School Code. Chapter-II of the Secondary School Code deals with the recommendation, organization and management of the schools including conditions, grant, refusal and withdrawal of recognition, admissions, staffing pattern etc. But when Chapter-III of Secondary School Code lays down provisions for conditions of service of staff, records, register and inspection, then the number of clerical staff admissible to a school has been prescribed in Clause 57.5. Clause 57.7 deals with lower grade staff and all this is by virtue of Government Resolution dated 2nd January 1975. Even in respect of laboratory assistant, the pattern is fixed as per Circular dated 21st May 1981.

10. Section 16 of the MEPS Act prescribes for rules and Section 16(1) gives power to the State Government to make rules for carrying out the purposes of this Act by notification in the official

gazette. The MEPS Rules of 1981 have been framed under Section 16(1) and 16(2) of the MEPS Act and Rule 7 of the MEPS Rules deals with scales of pay and allowances and it is said that it should be as per Schedule "C". Thus, it can be seen that the ultimate power is with the State Government, which can make necessary changes by way of Government Resolutions. Various Government Resolutions, referred above, are the outcome of policy decision by the Government and out of that even Government Resolution dated 28th June 1994 was also the outcome of the report of the committee constituted under the chairmanship of Mr. Chiplunkar by the Government and it was the outcome of policy decision. The subsequent Government Resolutions of 25th November 2005, 23rd October 2013 and 12th February 2015 are also part of the policy decision and after the procedure undertaken by the Government of appointing high level committee. Merely because now the impugned Government Resolution dated 11th December 2020 makes a provision for consolidated pay for Class-IV employees after coming into force of the said Government Resolution and says that hereinafter there shall not be a regular post for Class-IV, which is not favourable to the petitioner; the petitioner cannot challenge the same as being arbitrary.

11. In the *State of Uttar Pradesh and others vs. Principal Abhay Nandan Inter College and others*, (supra), the Hon'ble Supreme Court has considered the challenge to the regulation. Though that Regulation was made by the State of Uttar Pradesh which was under the Intermediate Education Act, 1921, we cannot say that the observations from the said decision are not applicable here. In that case, the Hon'ble Supreme Court had taken note of Section 9(4) of the Intermediate Education Act, 1921, which was giving power to the State Government to modify or rescind or make any regulation. Here also we have taken into account all enabling provisions to make the rules under the above Enactment and therefore, we say that those observations / law laid down is applicable here, which is now reproduced. Para Nos. 36 to 39 of the decision in *Uttar Pradesh* (supra) reads thus:-

"36. The challenge before us is the amendment to the Regulation 101. This regulation is in the form of a subordinate legislation. A subordinate legislation can also be in the form of a policy decision. We have already noted that a policy decision has come into force in the year 2010 itself.

37. A policy decision is presumed to be in public interest, and such a decision once made is not amenable to challenge,

until and unless there is manifest or extreme arbitrariness, a constitutional court is expected to keep its hands off.

38. A challenge to a regulation stands on a different footing than the one that can be made to an enactment. However, when the regulation is nothing but a reiteration of a policy reinforcing the decision of the Government made earlier, then the parameters required for testing the validity of an Act are expected to be followed by the Court.

39. An executive power is residue of a legislative one, therefore the exercise of said power i.e., the amendment of the impugned regulation, cannot be challenged on the basis of mere presumption. Once a rule is introduced by way of a policy decision, a demonstration on the existence of manifest, excessive and extreme arbitrariness is needed."

12. Further, in Paragraph No.47 of the decision in *Uttar Pradesh* (supra), the Hon'ble Apex Court has observed thus:-

"47. The entire issue has to be looked at from different perspective as well. By the policy decision made, the appellants have abolished the post though in an indirect way by providing for "Outsourcing". Now, a court cannot create or sustain the aforesaid post. There is nothing on record to hold that the decision made is extraneous as it is obviously made applicable not only to the aided institutions but also to all government departments as well."

13. We are taking note of the fact that the Government of Maharashtra is also encouraging employment by contract in

Government offices as regards Class-IV employees are concerned and even as regards the work of cleanliness in various Government premises is concerned, it is now by way of outsourcing or giving a contract of the same by inviting tenders. Taking similar situation in account, the Hon'ble Apex Court has observed in Paragraph No.48 of the decision in *Uttar Pradesh* (supra) thus:-

" 48. Arguments are advanced to the effect that interest of poor and needy is affected by the impugned Regulation. We do not know how the interest of the poor and needy is affected by the impugned Regulation. Admittedly, no challenge has been made to the decision taken in 2010 and 2011 which was to be made applicable to all the recruitments for Group 'IV' posts in the Government, and not only for the institutions and the persons recruited by them. The entire litigation is triggered only by the institutions."

14. The Hon'ble Apex Court in *Uttar Pradesh* (supra) has clearly observed in Paragraph No.43 thus:-

"43. The Division Bench in considering the view has entered into an arena which was not required to be done. Much labouring was done in interpreting the word "Outsourcing", however, such an exercise ought to have been avoided as it stands outside the scope of judicial review. We have already noted the fact that "Outsourcing" as a matter of policy is being introduced throughout the State.

It is one thing to say that it has to be given effect to with caution as recommended by the Seventh Central Pay Commission, and another to strike it down as unconstitutional. "Outsourcing" per se is not prohibited in law. It is clear that a recruitment by way of "Outsourcing" may have its own deficiencies and pit falls, however, a decision to take "Outsourcing" cannot be declared as ultra vires of the constitution on the basis of mere presumption and assumption. Obviously, we do not know the nature of the scheme and safeguards attached to it."

15. Thus, at the cost of repetition it can be said that as the Government has issued the impugned Government Resolution dated 11th December 2020 on the basis of the powers within it under the legislative enactments and as a part of policy decision; it cannot be said to be arbitrary.

16. Now, in this case by virtue of the said Government Resolution dated 11th December 2020; upon death of one Pandit who was holding the said fully aided post, as the said post had lapsed, respondent No.3 education society could not have transferred the present petitioner in place of said Pandit. We want to make it clear that even if the said proposal of transfer of the petitioner is not accepted or approved, the petitioner would be reverted back to his old position i.e. the post which he was holding was partially aided post and the said position would

continue and not that the petitioner would be required to work on honorarium in view of the Government Resolution dated 11th December 2020. Respondent No.2 was justified in rejecting the proposal to grant approval to the appointment of the petitioner by way of transfer to the fully aided post. We, therefore, do not find any merit in the present case and it deserves to be dismissed.

17. Accordingly, the Writ Petition is dismissed. Rule stands discharged.

[S.G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

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