

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5348 OF 2003

1. Mahadu s/o Shrawan Gaikwad
Age 46 years, occ. Service,
presently working as Assistant
Teacher in Shrirampur Education
Society High School, Shrirampur,
Taluka Shrirampur, Dist. Ahmednagar.
2. Ramdas s/o Mhasu Dnawade,
Age 38 years, Occ. Service,
presently working as Assistant
Teacher in Shrirampur Education
Society High School, Shrirampur,
Taluka Shrirampur, Dist. Ahmednagar
3. Smita w/o Nandkishor Nirmal,
(Smit d/o Ganesh Lahade)
Age 41 years, occ. Service,
presently working as Assistant
Teacher in Shrirampur Education
Society High School, Shrirampur,
Taluka Shrirampur, Dist. Ahmednagar.
4. Bebinanda d/o Eknath Bhingardive
Age 35 years, occ. Service,
presently working as Assistant
Teacher in Shrirampur Education
Society High School, Shrirampur,
Taluka Shrirampur, dist. Ahmednagar.
5. Shirish S/o Laxman Suryawanshi,
Age 29 years, Occ. Service,
presently working as Assistant
Teacher in Shrirampur Education
Society High School, Shrirampur,
Taluka Shrirampur, Dist. Ahmednagar ...Petitioners

Versus

1. The State of Maharashtra,
Through its Secretary,
School Education Department,
Maharashtra State, mantralaya,
Mumbai.
2. The Director of Education,
Maharashtra State, Pune.
3. The Deputy director of Education,
Pune Division, Pune.
4. The Education Officer (Secondary),
Zilla Parishad, Ahmednagar.
Dist. Ahmednagar.
5. Shrirampur Education Society,
Shrirampur, Tal. Shrirampur,
Dist. Ahmednagar,
Through its Chairman
Shri J.Y. Tekawade
6. The Headmaster,
Shrirampur Education Society
High School at Shrirampur,
Taluka Shrirampur, Dist. AhmednagarRespondents

WITH
CIVIL APPLICATION NO. 16007 OF 2016
IN
WRIT PETITION NO 5348 OF 2003
(Nitin Vijay Thorat V. Mahadu Shravan Gaikwad and others)

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Shri. S. R. Barlinge, Advocate for petitioners
Shri. S. K. Tambe, A.G.P. for respondent-State
Shri. R. N. Dhorde, Senior Counsel i/b. Mr. R.L. Kute, Advocate for
respondents 5 and 6
Mr. A.N. Kakade, Advocate for intervenor

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CORAM : SUNIL P. DESHMUKH &
SANGITRAO S. PATIL, JJ.

RESERVED ON : 12-09-2017

PRONOUNCED ON : 20-12-2017

JUDGMENT (PER - SUNIL P. DESHMUKH, J.) :-

1. Petitioners are before this Court seeking *Mandamus* to respondents 1 to 4 viz. the State of Maharashtra, Director of Education, Pune, Deputy Director of Education, Pune, Education Officer (Secondary), Zilla Parishad, Ahmednagar to direct the institution i.e. respondent no. 5 to implement Circular dated 09-07-1987 in letter and spirit and appoint the petitioners accordingly and to give to them deemed date of appointment from the date of their eligibility to be appointed to the post of trained graduate teachers and to give them consequential benefits.

2. While issuing Rule in the present Writ Petition, the Court had directed not to make further appointments in the school without previous permission from the Court. Subsequently, there have been quite a few Civil Applications filed by respondents no. 5 and 6 viz. Civil Applications no. 12428 of 2005, 5725 of 2007, 7602 of 2008, 6405 of 2010 and 13587 of 2010 whereunder the respondent - management had been permitted to fill in the posts making clear

that appointments of the new incumbents would be subject to the result of the Writ Petition.

3. Respondent no. 5 runs respondent no. 6 school having first to tenth standards and fifth to eighth standards are attached to its primary section. According to petitioners, 75% teachers for standards first to eighth shall possess S.S.C. D.Ed. educational qualification and 25% shall be having educational qualification B.A. B.Ed.

4. Referring to Circular dated 09-07-1987 issued by Director of Education, learned counsel for petitioners submits in the case of occurrence of vacancy of trained graduate teacher teaching first to eighth standards and if trained graduate teacher working in D.Ed. scale of pay is available, then, trained graduate teacher shall not be appointed from outside or open market but should be picked up from the employees, who is trained graduate teacher working on D.Ed. scale of pay, and be paid salary of trained graduate teacher appointing him in the 25% posts strictly meant for such employees.

5. Learned counsel for the petitioners during the course of hearing, referred to decision of the Government dated 21-05-1979 purporting to be a resolution wherein in non-government secondary

schools for standard fifth to seventh, the ratio of 25% : 75% (graduates and undergraduates) should be fixed in relation to general teachers. Prelude to the resolution refers to decisions and letters dated 28-11-1977, 09-05-1978, and dated 27-09-1971, whereunder after every three trained undergraduate teachers employed to teach classes of standard fifth to seventh, fourth teacher employed is to be graduate / trained graduate.

6. The petitioners' case is that they were appointed as Assistant Teachers in the pay scale of trained undergraduate teachers (as S.S.C. D.Ed. candidates). During the course of employment, they had improved their qualifications and had acquired Graduate Degree as well as Degree in Education.

7. Learned counsel appearing for petitioners refers to clauses 3 and 4 of circular dated 09-07-1987 and contends that the same are mandatory. Learned counsel goes on to submit that the circular further clarifies that in case of vacancy of teachers occurring for eighth standard to tenth standard, subjectwise number of trained graduate teachers working in D.Ed. scale are expected to be picked up from amongst such trained graduate qualified teachers in the subject and if such an employee is not available, with the prior permission of the Education Officer, such appointment can be made from open market.

8. He contends, petitioners' representations to management as well as to the Education Officer, their legitimate requests in respect of their claim to hold the posts in 25% for trained graduate teachers, pursuant to various decisions of the State Government reflected in the resolutions and in the circulars issued from time to time, were not being attended to and were being ignored.

9. Learned counsel makes a grievance that despite the position being as aforesaid, respondent no. 5 - management had appointed about 11 teachers from open market from the date on which the first petitioner had acquired qualification of trained graduate teacher.

10. It is contended that the Education Officer ought to have objected to such appointments having regard to circular dated 09-07-1987. The Education Officer had, however, communicated that while granting approval to direct recruits, this aspect would be considered if the teachers are having qualification in relevant subject.

11. While petitioners had been making representations, yet, respondent no. 5 purported to issue an advertisement on 28-02-2002, thereupon, the petitioners had requested the management to consider them for absorption / appointment having regard to acquisition of requisite qualifications by them.

12. Learned counsel further refers to that as respondent no. 5 had not been taking up their legitimate cases for such absorption / appointment, they had been before this Court in Writ Petitions bearing no. 1246 of 2000, 1249 of 2000, 1585 of 2003, 1586 of 2003 and 1527 of 2003. Said Writ Petitions were disposed of by the High Court under orders dated 22-04-2003, observing that the Education Officer to take a decision on the representations in accordance with law and on its own merits.

13. It is further submitted that after disposal of aforesaid Writ Petitions, a detailed representation to the Education Officer had been made pointing out the circular and the relevant clauses and referring to the persons, who were appointed by respondent no. 5 from open market. Further grievance is made by petitioners that disappointingly, it has been communicated by the Education Officer that the circular does not specifically mandate that candidates having trained graduate teacher's qualification be appointed from

such trained graduate teachers working on D.Ed. scale, purporting further to observe that such appointments is the domain of the management and while appointing teachers from eighth to tenth standards, if the Government Order dated 10-07-2001 is not followed, necessary action would be taken while considering approval to such appointments.

14. According to learned counsel, proper appreciation of circular dated 09-07-1987 would reveal that it mandates that vacancies of trained graduate teachers for fifth to seventh standards shall be filled in from the staff working on D.Ed. scale possessing trained graduate teacher's qualification and the same also provides, for eighth to tenth standards, such teachers who are working on D.Ed. scale and have acquired qualification of trained graduate teachers, then, they must be considered. Even in case, if the management desires to appoint teachers for eighth to tenth standards in particular subject, if the trained graduate teacher working in D.Ed. scale is not available to teach that particular subject, then alone the management would be able to have a candidate from outside but that too with prior permission from the Education Officer.

15. It is submitted that while appointing trained teachers referred to in the representation dated 13-05-2003, the

management had not obtained prior permission of the Education Officer. Learned counsel submits that the authorities are not doing their bit and purport to act perfunctorily, may be, for extraneous considerations, yet in the process, the deserving candidates like the petitioners are met with injustice and are suffering.

16. Learned counsel further submits that quite a few appointments suggest the same having been made for extraneous considerations as persons not having proper qualifications have been appointed, who would not be qualified to teach a particular subject. He purports to refer to a couple of cases in this respect. According to his instructions, one is not qualified to teach Hindi subject whereas the other happens to be a close relative getting inducted under nepotism.

17. Learned counsel for the petitioners refers to and relies on judgment of Supreme Court in the case of *State of Maharashtra and others Vs. Tukaram Tryambak Chaudhari and others*, AIR 2007 SC (Supp.) 665. The Supreme Court in the same, had observed thus :-

“ 20. We have carefully considered the submissions made on behalf of the respective parties. Having particular regard to the fact that though standards 5 to 7 were attached to both primary schools as well as secondary schools, these classes in fact, represented the middle schools for which different standards were being followed.

21. *Conscious of such disparity in respect of teachers who are similarly situated but were treated differently on account of their being attached to primary schools and/or secondary schools, the State Government resolved to eliminate such differences and to make provisions for trained graduate teachers to be upgraded to a higher scale to the extent of 25% of the posts. The said Resolution consciously refers to in service graduate primary teachers who were eligible for appointment to the posts in the increased pay-scale. In fact, one of the conditions for appointment of in service graduate primary teachers to the converted post carrying the higher pay-scale was that such teacher should have obtained a degree in Arts or Science and had also obtained a degree in education namely, B.Ed. While adopting the aforesaid Resolution, the Government was, therefore, fully aware of the fact there were graduate teachers teaching in standards 5 to 7 in the primary schools. This fact was also referred to by the Division Bench of the High Court in its judgment under appeal. It has been mentioned that one of the contentions raised on behalf of writ petitioners was that in terms of Government Resolution dated 26th October, 1982, the petitioners were entitled to be appointed and continued as trained teachers in B.Ed. scale.*

22. *As has been pointed out by Mr. Apte, the said Government Resolution does not appear to have been brought to the notice of the Full Bench which rendered its decision on the reference made to it on the basis of the Maharashtra Rules of 1981 in respect whereof conflicting views had been taken with regard to the eligibility of a graduate, also holding the B.Ed. degree to be appointed in a primary school. The Resolution of 1979 was dealing with a situation which was prior to the enactment of the said Rules and which contemplated the existence and appointment of graduate teachers in primary schools.”*

18. The background of the case appears to have been referred to in paragraphs 2 and 3, reading thus:-

“ 2. *The private respondents in all these special leave petitions had filed several writ petitions in the Bombay High Court questioning the decision of the authorities to treat them as Untrained Teachers although they were all graduate teachers having B.Ed. qualification and approval having been granted for their appointment as trained teachers. According to the said respondents, they had all been appointed as Assistant Teachers in Primary Schools which conducted classes up to the 7th*

standard, from about the year 1988 onwards. It is only after a decision was taken to treat them as untrained teachers, despite being fully trained and qualified, that they were compelled to move the several writ petitions which were all allowed by a common judgment of the Bombay High Court dated 6th May, 2004.

3. The case of the writ petitioners before the Bombay High Court was that they were all graduate teachers having B.Ed. qualification and that they had been appointed to teach in Primary Schools conducting classes up to the 7th standard. In most of the cases, approval was granted for their appointment as Trained Teachers. Subsequently, however, in 2001, they were all informed on different dates that they would be treated as untrained teachers and would be paid their salaries accordingly. According to the writ petitioners, in terms of Government Resolution dated 26th October, 1982, they were entitled to be appointed and continued as Trained Teachers in the B.Ed. scale. The respondents in the several writ petitions, who are the appellants before us, had contended before the High Court that B.Ed. qualification was not sufficient for being treated as Trained Teacher in the Primary Schools and that what was required was a D.Ed. qualification. It was contended that before joining the school, the teacher concerned was required to hold the qualification of S.S.C. and D.Ed. and that the teacher was also required to acquire a graduation degree while in service along with a B.Ed. degree.”

19. Learned counsel has further referred to a case decided by a Division Bench of this Court reported in 2003 (2) ALL. M.R. 951. (*Kondiba S/o Dattarao Mirashe Vs. State of Maharashtra and others*)

20. Respondents no.5 and 6 have filed responses in 2003 and 2005 while the first was filed under the signature of the chairman of the trust, it has been submitted in the same, the management had issued advertisement inviting applications in August, 2002 for appointments in three subjects, namely, Hindi, Marathi and Physics - Chemistry.

21. For Hindi subject, applications from two streams were received. Petitioners pursuant to the advertisement, had also applied and the candidates who fared well in the process pursuant to the advertisement were selected on the basis of merit. Accordingly, Smt. Manisha Kardile had been appointed on 31-12-2002. It has been specifically referred to that while petitioners had also applied, their candidature was also considered, however, they could not succeed in competition on merit. So, was the case in the case of Marathi wherein Ms. Kale Kalpana Vyankatrao got selected on the basis of merit. So far as Physics and Chemistry subject is concerned, it has been contended that none of the petitioners holds Bachelors degree in Science and, particularly, in Physics and Chemistry. From the candidates who underwent the process, candidature of Mr. Chavan R.R. had been found to be fit and accordingly had been selected.

22. In response, thus, it is contended that the candidature of petitioners in the process of selection of teachers for subjects teaching in eighth to tenth standards, had not been found to be meritorious. The petitioners are not entitled to make any grievance contending that they should have been appointed on the said posts. Management has followed due procedure for making appointments

of Assistant Teachers and petitioners claim that only them be considered is not tenable and is devoid of any substance.

23. It is further submitted that while the appointments are being made for divisions from eighth to tenth standards, the claim on the basis of Government resolution dated 09-07-1987, is without any substance. Even the Education Officer had given his no-objection to such appointments being made. Education Officer has also granted approval to the appointments made.

24. The respondent - Management further contends that in the face of mandatory provisions of law under The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short "The M.E.P.S. Act") and the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Rules, 1981 (for short "The M.E.P.S. Rules"), the Government resolution which is pressed into service as the basis of the claim of the petitioners cannot be relied upon.

25. It has been referred to that petitioners M.S. Gaikwad and R.M. Dhanwade are not graduates with Hindi, Marathi or Science. Mr. M.S. Gaikwad is B.A. with English and Dhanwade is B.A. with History. Petitioners 1 and 2, as such, are not qualified to be

appointed. It is thus contended that petitioners cannot claim pay scale of graduate teachers in 1:3 ratio. Appointments were made for standards eighth to tenth. Even otherwise, according to respondents, the petitioners have filed representations on 05-10-2003 and 17-10-2003. But the appointments were already made in December, 2002. It has further been referred to that all said teachers were appointed as Shikshan Sevaks in a fixed pay scale pursuant to Government resolution dated 21-10-2003. Petitioners were drawing salary in the range of Rs. 10000/- to Rs. 12000/- per month.

26. In response of 2012, filed upon authorization of respondents 5 and 6, it is contended that Writ petition suffers from delay and laches as the petitioners have been working from 1980 to 1992 and grievance is being made by them in 2002.

27. In this response, Circular dated 09-07-1987 - Exhibit "A" to the petition is referred to as letter rather than Government resolution as referred to in the earlier response of 2004. It is submitted that said letter is contrary to the M.E.P.S. Act and the Rules thereunder. Service conditions of employees are governed solely by the M.E.P.S. Act and the M.E.P.S. Rules and not by such letter or Circular. Said letter / circular of 1987, is contrary to

provisions of Section 4 and 5 of the M.E.P.S. Act as well as Rule 6 of the M.E.P.S. Rules. Teachers are to be appointed possessing qualifications as referred to under Schedule 'B' to the rules. Government had introduced a scheme of Shikshan Sevak due to paucity of funds and under the same, every post falling vacant since 2002 was to be filled in pursuant to said scheme. According to the same, advertisements have been given in newspapers and appointments had been made. In the circumstances, only upon acquisition of qualifications, petitioners cannot be appointed on a trained graduate scale.

28. In the response, it is contended that mere improvement in qualification, an employee would not be held entitled to be appointed in 25% posts meant for graduate pay scale. It has been denied in the same that management is interested in appointing candidates from open market contending that management has to appoint candidates according to provisions of the M.E.P.S. Act and the Rules and pursuant to the Shikshan Sevak scheme. It is contended that circular dated 09-07-1987 does not have force of law.

29. It is further submitted that if petitioners want B.Ed. scale, then, they would have to compete with other candidates from

open market. Direct appointment without procedure is not possible in view of Section 5 of the M.E.P.S. Act.

30. Said response further refers to that petitioners had not been eligible to be appointed on the posts which had fallen vacant pursuant to Government resolution. It is denied that appointments had been made for extraneous consideration as alleged. The respondents refer to a chart annexed stating that none of the petitioners is eligible to the post falling vacant.

31. Respondent no.4 - Education Officer, Secondary, Zilla Parishad, Ahmednagar in his reply-affidavit, refers to that respondent no.5 management had been issued instructions to consider requirements under circular dated 09-07-1987. It has been referred to that authority to make appointments and promotions as per provisions of the M.E.P.S. Act and the M.E.P.S. Rules vests in the School Committee and no grievance can be made against the Education Officer in respect of the same for him not implementing the circular. Respondent - management has been asked to appoint / promote in-service B.Ed. teachers as graduate trained teachers as per qualifications in the subjects. It has been referred to in the same according to Rule 9(2) of the M.E.P.S. Rules, 1981 read with schedule 'A', school committee is empowered to appoint teaching staff.

32. Learned Senior Advocate Mr. R.N. Dhorde appearing for respondent contends that the petition is wholly misconceived. It is based on friable grounds. Very basis of the petitioners' claim, namely, Circular / letter dated 09-07-1987 could not be taken into account in the peculiar facts and circumstances of the present case. Petitioners do not possess necessary qualifications for appointment in the trained graduates pay scale in 25% category relied on by them pursuant to circular dated 09-07-1987. According to learned counsel, petitioners do not hold educational qualifications to enter into the trained graduate pay scale in the post in which the appointments have been made and which purportedly are cause of action for the petitioners or for that matter, the posts which have been duly filled in with the permission of this Court.

33. Learned Senior Advocate goes on to contend that statutory provisions in the M.E.P.S. Act, particularly Sections 4 and 5 therein and the M.E.P.S. Rules, particularly, Rule 6 and Rule 9 govern the field. While the appointments are to be governed according to said provisions the claim for appointments made by petitioners on the basis of so-called circular / Government decision has no legal force nor has any sanctity and is not enforceable. Implementation of such a circular in the face of provisions of law and rules is not only

not possible under regime of rule but would be patently illegal. He submits that it is not the petitioners' case at all that the appointments being made by the respondents are in contravention of any provision of law or rule.

34. He submits that reliance on decision of the Supreme Court in the case of *Tukaram Trimbak Chuadhari* (supra) is misplaced, for it was a case relating to primary schools conducting classes upto seventh standard and further the issue with regard to subjectwise appointment for standards eighth to tenth had not been involved in the same at all. As such, no reliance can be placed on the decision wherein such a question had not arisen at all. He submits that 25% reservation for appointments from trained graduates from D.Ed. scale would come into play only if the petitioners would be in a position to show that they hold qualification in the subject in which appointments were being made. Said case is not applicable in the present matter and can hardly be taken recourse to.

35. Learned Senior Advocate further goes on to submit that a Full Bench of this Court in the case of *Tanaji Madhukar Barbade V. State of Maharashtra and others*, 2011(1) All.M.R. 912, on reference has decided as under:-

" 17. Perusal of the above Rule shows that this Rule gives a right to every eligible candidate to apply for any vacancy either for

teaching or a non-teaching post in a private school. In order to make this right meaningful and effective, a corresponding duty will have to be read in the Management to give wide publicity to the fact that there is a vacancy in that school, so that every candidate who is eligible to apply can come to know of the existence of the vacancy and apply for the post. Without the Management making the existence of vacancy known, the right given by sub-Rule (3) of Rule 9 to every eligible candidate to apply will be meaningless. It is further to be seen that many private schools also receive grant-in-aid from the State Government and therefore salaries of the teaching and non-teaching staff in the Schools are paid from the public funds, and therefore considering the provisions of Article 14 of the Constitution as the salary of the teaching and non teaching staff is to be paid from the public funds, there would be an obligation on the Management to advertise the vacancy. So far as the vacancies which are reserved for backward class are concerned, there is a specific provision made in sub-rule 8 of Rule 9. Sub-rule 8 of Rule 9 reads as under:

"Sub-rule (8) of Rule 9- For the purpose of filling up the vacancies reserved under sub-rule (7) the Management shall advertise the vacancies in at least one newspaper having wide circulation in the region and also notify the vacancies to the Employment Exchange of the District and to the District Social Welfare Officer (and to the associations or organisations of persons belonging to Backward Classes, by whatever names such associations or organisations are called, and which are recognised by Government for the purposes of this sub-rule) requisitioning the names of qualified personnel, if any, registered with them. If it is not possible to fill in the reserved post from amongst candidates, if any, who have applied in response to the advertisement or whose names are recommended by the Employment Exchange or the District Social Welfare Officer (or such associations or organisations as aforesaid) or if no such names are recommended by the Employment Exchange or the District Social Welfare Officer (or such associations or organisation as aforesaid) within a period of one month the Management may proceed to fill up the reserved post in accordance with the provisions of sub-rule (9)."

So far as reserved vacancies are concerned, thus, the Management is not only obliged to issue advertisement in at least one newspaper, but has also to notify vacancies to various agencies. In our opinion, therefore, permitting the Management to fill in the post without advertisement, though there is a clear provision made in the Act or the Rules, would be contrary to the

scheme of the Act and the Rules. In the provision in Schedule "F", which we have quoted above, what is provided is preference. Preference does not mean exclusive right of consideration. It means right to be preferred, other thing being equal. The observations made by the Supreme Court in its judgment in the case of (Sher Singh Vs. Union of India and ors.), A.I.R. 1984 S.C. 200 in relation to the provisions of section 47 of the Motor Vehicles Act, in our opinion, are relevant.

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20. *In our opinion, therefore, the questions which have been referred to have to be answered thus,*

1. The Government Resolution dated 15th April, 1991 cannot be made applicable to the teaching and non-teaching staff in recognised private schools which are governed by the provisions of the M.E.P.S. Act & Rules framed thereunder;

2. Schedule "F" to the M.E.P.S. Rules does not provide for promotion to the post of junior clerk. It merely provides a preference to be given to the lower grade staffs in making appointment to the posts of junior clerk and laboratory assistant.

Order accordingly."

36. He submits that the decision posits that Government resolution / circular will not be able to hold sway over the statutory provisions of the M.E.P.S. Act and the M.E.P.S. Rules stipulate the manner in which the vacancies are to be filled in.

37. Learned counsel with reference to above also refers to decision in the case of *State of Orissa and others Vs. Prasanna Kumar Sahoo*, AIR 2007 S.C. 2588. Paragraph no. 14 from the same reads thus :-

" 14. Even a policy decision taken by the State in exercise of its jurisdiction under Article 162 of the Constitution of India would

be subservient to the recruitment rules framed by the State either in terms of a legislative act or the proviso appended to Article 309 of the Constitution of India. A purported policy decision issued by way of an executive instruction cannot override the statute or statutory rules far less the constitutional provisions."

38. In addition, referring to the case of *Chief Settlement Commissioner, Punjab and others Vs. Om Prakash and others*, AIR 1969 S.C. 33, he submits that statutory provisions must prevail over executive instructions.

39. The case of *Sanjay Lalbahadur Divedi Vs. Shrikrishna Vyayam Shala*, 2010(3) Mh.L.J. 666 is being pressed into service, to impress upon that unless a candidate qualifies the eligibility criteria, his candidature for permanent appointment would not be legitimately considered. He particularly refers to paragraph no. 18 thereunder, reading thus :-

" 18. From above discussion it follows that the government resolutions mentioned above and produced on record by petitioner Santoshkumar and relied upon by all three petitioners cannot modify the legislative mandate. They cannot claim any right to post and reinstatement by virtue thereof. Only concession made in their favour appears to be a separate quota for admission to that course and facility of in-service training. But then due to mandate of section 5 of 1977 Act permanent vacancy with institution is liable to be filled in at the earliest by appointing qualified/trained person and by putting him on probation. Such permanent arrangement at the earliest is in the interest of students and ultimately the educational goals of State administration. Trained qualified teachers become available every year and keeping some of them out because some person appointed by way of concession is getting himself trained will not only be arbitrary but also loss of talent to Nation and will amount to failure to put the expertize to its due use. It may also

be discriminatory. Therefore only legislature prescribed year to year appointment of candidates like petitioners with express mandate of replacing the untrained teacher by trained one as soon as possible. Rule 6 of 1981 Rules as applicable here does not prescribe any time limit and does not protect services of untrained teacher. He, in his own interest, has to procure that qualification as early as possible and at his own cost. When permanent vacancy can be filled in through open competitive selections in which all eligible i.e. trained graduate aspirants must participate, untrained teachers getting appointment as a concession cannot defeat that process by claiming any exemption from it. Management has to advertise the vacancy with it every year to find out whether trained teacher becomes available or not. Untrained teacher appointed on year to year basis has to apply in response to it and only when the duly qualified teacher does not surface, he can be selected. His/Their appointment is year to year and till the post is not filled in permanently through a duly selected trained teacher, they have no option but to face such selections. Even after acquiring training qualification, for their permanent selections and appointment on probation, they have to compete with others. After getting B.Ed. qualification, Legislation does not permit them to avoid competition with trained teachers when post is sought to be filled in permanently. In service training facility does not confer any precedence in their favour."

40. He further refers to and relies on a decision in the case of *Priyadarshani Education Trust and others V. Ratis (Rafia) Bano d/o Abdul Rasheed and others*, 2007 (6) Mh.L.J. 667.

41. The clauses from the circular dated 09-07-1987 as annexed to the petition, which are enumerated as 1 to 4, read thus :-

" १. इयत्ता ५ वी ते ७ वी करिता अनुज्ञेय असलेल्या पदवीधर शिक्षकांची जागा भरावयाची असेल तर अपदवीधर शिक्षकांच्या वेतनश्रेणीत काम करणाऱ्या प्रशिक्षित पदवीधर शिक्षकातील सेवाजेष्ठ शिक्षकांची त्याची गुणवत्ता लक्षात घेऊन नियुक्ती करण्यात यावी. याकरिता प्रशिक्षित पदवीधर म्हणजे पदवीधर व पी. टी. किंवा

बी.एड ही प्रशिक्षण पदवी किंवा डी.एड. ही २ वर्षांची पदविका, किंवा नागपूर/मुंबई विद्यापीठांची एस.एस.सी. नंतर दोन वर्षांनी मिळणारी पदविका किंवा एस.टी.एस./टी.डी./डीपटी. ही एक वर्षाची पदविका धारण करणाऱ्या परंतु दिनांक १-१०-१९७० पूर्वी लागलेल्या पदवीधर शिक्षकांचा त्यांच्या रुपये २९०-५४२ (प्रशिक्षित अपदवीधर) वेतनश्रेणीतील जेष्ठतेनुसार विचार करण्यात यावा. तसेच ज्या दिवसापासून पदवीधर शिक्षकांची जागा रिक्त होत असेल त्या दिवशी सदर वेतनश्रेणी काम करण्याच्या पदवीधर शिक्षकांचाच विचार करावा, त्यादिवशी पद भरले नाही तर त्या तारखेनंतर पदवीधर झाले परंतु रु. २९०-५४० या वेतनश्रेणीत आलेला शिक्षक अशा पदाकरिता हक्क सांगू शकणार नाही.

२. इयत्ता ८ वी ते ९ वी करिता या पदवीधर शिक्षकांची नियुक्ती करावयाची असेल तर रु. २९० - ५४० या वेतनश्रेणीत काम करणाऱ्या पदवीधर व बी. टी. / बी. एड. ही प्रशिक्षण पदवी धारण करणाऱ्या शिक्षकांचा त्यांच्या जेष्ठतेनुसार गुणवत्ता लक्षात घेऊन विचार करण्यात यावा. तसेच इयत्ता ८ वी ते १० वी करिता असलेली प्रशिक्षित पदवीधर शिक्षकांची जागा भरताना जर विषयाची गरज लक्षात घेऊन जेष्ठतम शिक्षकांची जेष्ठता डावलून कनिष्ठ शिक्षकाची नियुक्ती करावयाची असेल त्याकरिता संस्थेने शिक्षणाधिकार्यांची पूर्वपरवानगी घ्यावी.

३. इयत्ता ५ वी ते ७ वी करिता प्रशिक्षित पदवीधर शिक्षकांच्या जागांवर जर प्रशिक्षित पदवीधर शिक्षक २९० - ५४० या वेतनश्रेणीत काम करीत असेल तर पदवीधर शिक्षकांची रिक्त जागा खुल्या बाजारातून करण्यात येऊ नये. जर इयत्ता ८ वी ते १० वी करिता विशिष्ट विषय शिक्षकांची गरज असेल व असा विषय शिक्षक उपलब्ध नसेल तरच शिक्षणाधिकार्यांच्या पूर्व परवानगीने खुल्या बाजारातून त्या विशिष्ट विषय शिक्षकांची भरती करण्यात यावी.

४. पदवीधर शिक्षकांच्या जागा भरताना जर संस्थेच्या एकापेक्षा जास्त शाळा असतील तर अशी सर्व शाळांतील अपदवीधर वेतनश्रेणीत काम करणाऱ्या पदवीधर शिक्षकांचा विचार करण्यात यावा, जर जेष्ठतम शिक्षक पदवीधर शिक्षकांची जागा स्वीकारण्यास तयार नसेल तर तसे त्यांचेकडून लेखी नकारपत्र घेण्यात यावे."

42. The advertisement, it appears, had been issued in August, 2002 inviting applications for appointments to the posts of

Shikshan Sevaks by respondents no. 5 and 6 in Secondary school on the two posts falling vacant in the subjects Physics and Chemistry and one in Hindi, respectively. It further appears, petitioners pursuant to the same, had participated in the selection process. Petitioners were not appointed and other persons were selected and appointed as Shikshan Sevaks in the respective subjects.

43. It appears that, in December, 2002, representations were made to Education Officer (Secondary), Zilla Parishad, Ahmednagar seeking B.Ed. scale referring to various dates, as given in the annexure, of acquisition of Graduate training qualification. It has been contended in the representations that petitioners had requested for granting them B.Ed. scale from time to time upon availability of posts to be occupied by employees acquiring B.Ed. training qualification, however, whenever posts had been available, those have been filled up by making appointments of outside people ignoring the Government order dated 19-04-1981. It is further contended that on retirement of some teachers, posts have fallen vacant and were available for employees holding B.Ed. qualification. But the management had advertised the posts, which is a serious matter and, as such, purported to demand justice. It also appears that petitioners' association had also caused correspondence.

44. A few petitioners had been before this Court by filing writ petitions no. 1585 of 2003, 1527 of 2003, 1246 of 2000 and 1249 of 2000 and the Education Officer (Secondary) Zilla Parishad had been directed to consider the claim of teachers and pass appropriate orders with direction to dispose of their representations.

45. Petitioners thereafter had filed representation dated 13-05-2003 that they should be given benefit of clauses under the resolution dated 09-07-1987 and purported to refer to that a similarly situated employee had been given benefit of graduate pay scale since 1987 and such benefit being not offered to petitioners, the same has been causing discrimination which is erroneous and is in violation of Article 14 of the Constitution of India. The Education Officer (Secondary) under communication dated 15-07-2003 had communicated to petitioners that there are no specific directions for granting trained graduate pay scale to persons acquiring qualifications working in the D.Ed. pay scale and that appointments and promotions on the post are domain of the institution.

46. While the facts are considered, there does not appear any dispute about the position that appointments as were sought under the advertisement pursuant to which petitioners appear to have applied for and the posts falling vacant during pendency of the Writ Petition were the posts for teaching eighth standard to tenth

standard. If that be so, the subjectwise qualification may be necessary to be possessed. It is not a case, in selection process pursuant to the advertisement, the selection is not on the basis of merits and is not following the due procedure as prescribed under the M.E.P.S. Act and Rules.

47. All the appointments which have been made during the course of the Writ Petition have been appointments on the post falling vacant during the pendency of Writ Petition.

48. *Albeit* counsel for petitioners contended that it is only ostensibly the appointments are shown to have been made for eighth to tenth standards, yet, the said teachers are working also on the classes of middle school from fifth to seventh standards. This submission, however, is not being supported by any material worth consideration whereas learned Advocate appearing for respondents have emphatically denied such claim.

49. In the present matter, so far as advertisement of 2002 is concerned, petitioners appear to have participated without protest and after having failed, it may not be legitimate for them to turn around and question the appointments made pursuant to said advertisement. It may be worthwhile to refer to paragraph no. 14 from *Ranjan Kumar and others v. State of Bihar and others*, (2014) 16 SCC 187 ,

reading thus :-

" 14. The next submission which has been presented before us is that when the respondents had appeared in the interview knowing fully well the process, they could not have resiled later on or taken a somersault saying that the procedure as adopted by the department was vitiated. In this connection, it is apt to refer to the principle stated in Om Prakash Shukla v. Akhilesh Kumar Shukla. In the said case a three-Judge Bench, taking note of the fact that the petitioner in the writ petition had appeared for the examination without protest and filed the petition only after he realised that he would not succeed in the examination, held that the writ petitioner should not have been granted any relief by the High Court."

50. The position emerges that the posts for which petitioners had participated in the selection process under advertisement, were the posts for specific subjects of Physics and Chemistry and Hindi for secondary school i.e. eighth to tenth standards. This Court under its order, had put a condition that management while making appointments, permission be taken from this Court. Under various orders passed from time to time in the Civil Applications, permission had been given to the management to make appointments subject to decision in the writ petition.

51. So far as the appointments made pursuant to the advertisement of 2002 and subsequent appointments made under permission from this Court are appointments to secondary school in certain subjects. As far as post of English subject is concerned, an

explanation has come from the management, as to why the concerned petitioners could not be considered. In other subjects, the appointments have been subjectwise in which none of the petitioners is qualified. As such, to a large extent, not only the procedure under the rules has been followed but also largely according to conditions as would be appearing in 1987 Circular relied on, appointments in specific subjects in the secondary schools have been made.

52. The petitioners have not been able to point out a single case wherein for the classes from first to seventh standards, where subjectwise appointments would not be insisted upon, any person has been appointed disregarding the claim of petitioners. The management has referred to various aspects about the working hours, number of students, number of classes etc. Petitioners although have submitted that the persons appointed in secondary school have been performing duties in VII or lower standards, no material has been effectively placed before this Court.

53. As such, in the present writ petition, having regard to emerging position, the request made under the prayer clauses of the writ petitions, seeking appointments along with deemed date from the date of acquiring eligibility to hold the post of trained graduate teachers along with consequential benefits is difficult to be acceded

to and granted.

54. In the circumstances, it would not be necessary to go into the other aspects as argued in the present matter. The Writ Petition, as such, is dismissed. Rule stands discharged.

55. Consequently, Civil Application no. 16007 of 2016 filed in this Writ Petition does not survive and stands disposed of.

[SANGITRAO S. PATIL]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE

arp/