

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8120 OF 2011

1] Sonai Apang Vikas and Shikshan
Sanstha, Nandurbar
through its President
Shri Pandit Sukhlal Chaudhari
Age 73 years, R/o Pakhali Kunwa
Behind Amrut Theatre, Nandurbar
District - Nandurbar

2] The Head Master,
Muk Badhir Niwasi Vidhayalay,
105 / 106, Rajiv Gandhi Nagar,
Dhule Road, Nandurbar

.. PETITIONERS

VERSUS

1] Saw. Jyoti Dulesing Ranawat,
Age 33 years, Occu. Service,
R/o 6B, Ramnagar, Dhule road,
Nandurbar

2] The Social Welfare Officer,
Zilla Parishad, Nandurbar,
Nandurbar

3] The Divisional Social Welfare
Officer, Nashik Division,
Nashik

.. RESPONDENTS

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Mr. V.D. Sapkal, Advocate for the petitioner

Mr. A.G. Talhar, Advocate for respondent no.1

Mr. Apparao Yenegure, Advocate h/f Mr. P.S. Patil, Advocate for
respondent no.2

Mr. S.K. Tambe, AGP for respondent no.3

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

DATE : 27-09-2017

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

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

2. The petitioners approach this court against order dated 03-10-2011 passed by the Divisional Social Welfare Officer, Nashik Division, Nashik - respondent no. 3 herein, whereunder appeal filed by Sau. Jyoti Dulesing Ranawat - respondent no. 1 herein, against her termination under letter dated 20-12-2006 issued by the President of Deaf and Dumb Residential School, Nandurbar run under aegis of Sonai Apang Vikas and Shikshan Sanstha, Nandurbar - petitioner no. 1 herein, putting an end to her services as Cook in said school, has been allowed. Simultaneously, the petitioners also pose question about efficacy of clause 86 of the Handicapped School Code, 1997 ("अपंगाच्या शाळांकरिता विशेष शाळा संहिता, १९९७) (hereinafter "the Code of 1997").

3. It would be pertinent to succinctly refer to the factual aspects as under :-

. The petitioners run aforesaid school with approval of the State Government pursuant to relevant enactment viz. the Persons with Disabilities (Equal Opportunities, Protection of Rights & Full

Participation) Act, 1995 (hereinafter "1995 enactment"). Respondent no.1 had been appointed in said school as a Cook under order dated 07-06-1995 for a period from 07-06-1995 to 01-05-1996. Thereafter, it appears that permanent appointment order w.e.f. 01-04-1998 had been issued to respondent no. 1 under the signature of President of petitioner no. 1. It further appears that her said appointment had been approved by District Social Welfare Officer alongwith other employees under order dated 30-07-2001. Subsequently, as referred to above, her services were brought to an end under order dated 20-12-2006 referring to that she has not been punctual in attendance and had been remaining absent without any prior notice and habitually proceeding on leave. There have been complaints against her and several notices and memos were given to her and further that Social Welfare Officer, Zilla Parishad, Nandurbar had instituted enquiry. In the circumstances, from 20-12-2006, she had been removed from service. Respondent no.1 had challenged aforesaid termination order before the Divisional Social Welfare Officer, Nashik - respondent no. 3. Petitioners in the same had filed its response, contending that appeal was not maintainable before Divisional Social Welfare Officer and the appeal is not within limitation. Respondent no.1 had not been appointed by following proper procedure, her appointment was a back-door entry, she happened to be daughter-in-law of Vice President, while her husband

was Head Master and mother-in-law was Treasurer. However, a decision had been communicated to petitioners around 30-06-2011, directing to reinstate respondent no.1 with full backwages.

4. Against aforesaid decision of respondent no.3, petitioners had been before this court in Writ Petition no. 5787 of 2011. Under order dated 23-08-2011, the Hon'ble Single Judge had set aside the order and remitted the matter for consideration afresh, including the one about tenability of appeal and competence of respondent no. 3 to hear the appeal. Thereafter, under order dated 03-10-2011 referred to above, respondent no. 3 has allowed the appeal, and thus, the petitioners are before this court.

5. While the matter was being heard, learned counsel for petitioners Mr. V.D. Sapkal has laid stress on that respondent no.3 has no competence and jurisdiction to deal with the matter pursuant to sub-clause (5) of clause 86 of the Code of 1997 and to decide the appeal. Aforesaid arguments were based on the ground that creation of adjudicatory authority under clause 86 and sub-clause (5) thereof, is not relatable to any provision of rule or law or for that matter any Constitutional Article and such creation in exercise of powers under Article 162 of the Constitution of India by the executive is not valid, neither legal nor would have any efficacy. Such instructions are beyond the scope of powers under Article 162

of the Constitution of India. Said submissions are made with reference to a decision of the Supreme Court of India in the case of *Secretary, Sh.A.P.D. Jain Pathshala and others Vs. Shivaji Bhagwat More and others*, 2011 DGLS (SC) 492 : 2011(13) SCC 99. Learned counsel, during the course of his submissions had placed reliance on the observations as are appearing in paragraph no. 16 of said judgment, which reads thus :-

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

6. He further refers to that since the adjudicatory powers purportedly being conferred under clause 86 of the Code of 1997 cannot be related to any Constitutional provision or of law and much less the 1995 enactment (*supra*), said executive instructions in clause 86 are invalid under the Constitutional scheme of administration of justice. The Supreme Court has observed that doing justice is the supreme sovereign function and said function, by executive instructions cannot be delegated to any authority without backing of any sanctioned rule, legislative act or a law.

7. He further submits that this position has been made amply clear in a decision rendered by Hon'ble Single Judge of this Court in the judgment dated 19-10-2015 in Writ Petition no. 7389 of 2014 (Nagpur Bench), observing that executive power of the State cannot be extended to create judicial tribunals or authority exercising judicial powers and rendering judicial decisions. The Hon'ble Single Judge had been dealing with the very Code of 1997 *albeit* His Lordship does not make a specific reference to clause 86 of the Code of 1997, yet, the fact remains that efficacy of creation of adjudicatory authority in similar situation had been the matter under consideration in said judgment. He further purports to refer to paragraph no. 5 thereof, wherein it has been categorically observed that Regional Deputy Commissioner could not have decided the

appeal filed by the petitioners on merits, exercising the quasi-judicial powers conferred under executive instructions by the State.

8. Learned counsel Mr. Sapkal, however, fairly refers to that in any case, a person would not be without remedy and may have an avenue open as observed by Supreme Court in said decision particularly pursuant to section 9 of the Code of Civil Procedure. He submits for that matter, in present case even under Rule 20 of Maharashtra Right of Children to Free and Compulsory Education Rules, 2011 framed pursuant to the provisions of Right of Children to Free and Compulsory Education Act, 2009, a remedy may be possibly available.

9. Countering aforesaid submissions, Mr. Talhar, learned counsel appearing for respondent no. 1 vehemently submits that having regard to the provisions under the Code, it cannot be said that the authority - respondent no. 3 has travelled beyond the jurisdiction, authority and his powers, as are conferred on him under the Code.

10. Mr. Talhar, learned counsel vehemently submits that aforesaid arguments after submitting to the powers and authority of respondent no. 3 would not be legitimately available to the

petitioners. He submits that very existence of the school run by petitioner no. 1, has its recognition pursuant to the provisions of the very Code of 1997, which comprises clause 86. He, therefore, submits that the petitioners are estopped from questioning efficacy of remedy provided under said Code. He submits that conduct of the petitioners would show that they had submitted to the jurisdiction and authority of respondent no. 3. It had dealt with the matter on merits. In the circumstances, the petitioners had acquiesced in such powers of respondent no. 3 under the Code of 1997. He further purports to submit that it cannot be said that such approach before authorities created under the Code of 1997 is a solitary instance. For said proposition, he purports to rely on clutch of decisions submitted by him during the course of arguments, particularly, decision dated 06-09-2001 in the case of *Gadge Maharaj Mission and another Vs. Wasudeo Ramji Patil and another*, 2002 (4) Bom.C.R. 371 : 2002 (2) All. M.R. 512, putting emphasis on paragraphs no. 10 and 11 thereof, reading thus:-

" 10. Undisputedly, none of the authorities mentioned in the said Act as being the authorities to grant approval and recognition to a school had granted recognition to the Ashram school in question. On the contrary, the Government of Maharashtra has chosen to exclude the Ashram Schools from the ambit of the said Act and the Rules pertaining to the management of such Ashram Schools as well as the service conditions therein are being governed by separate Government Resolutions in that regard. Besides, the provisions contained in the said Act when specifically restricts its applicability to the private schools as defined under section 2(20) to be read along with other relevant provisions in the said Act, the applicability of the said Act cannot be extended to the private

schools which are not covered by the definition of the said expression under the said Act. The law laid down by the learned Single Judge in Vasantrao Naik Education Society's case cannot be held to be a binding law in view of the decision of the Division Bench in Writ Petition No. 2919/1991 delivered on 18th September, 1991.

*11. Considering the fact that the respondent No. 1 herein was the employee of Ashram School to which the provisions of the said Act are not applicable, the appeal filed under section 9 of the said Act before the School Tribunal, was not maintainable as the School Tribunal had no jurisdiction to entertain the same. The contentions raised on behalf of the petitioners in that regard are to be upheld and on that count alone, the impugned judgment is liable to be quashed and set aside. **This however, may not preclude the respondent No. 1, if so desires, to approach the competent authorities as undisputedly, in terms of various Government Resolutions issued in relation to Ashram Schools, the appellate remedy is provided thereunder to such employees.** Needless to say, that if the respondent No. 1 accordingly approaches the competent appellate authorities, the same will have to consider the fact that the respondent No. 1 was pursuing the writ remedy under the said Act till this date and, therefore, benefit claimed, if any, for exemption of period spent in pursuing such writ remedy will have to be sympathetically considered."*

11. It appears that said decision has been rendered in the background that respondent no.1 therein was employee of Ashram School to which the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 were not applicable, as such, appeal filed under section 9 of said Act before the School Tribunal was not considered to be maintainable and it has been observed that employee of Ashram School may have to approach competent authority in terms of the various Government Resolutions issued in relation to Ashram Schools, while appellate remedy is provided thereunder.

12. It may have to be taken into account that while deciding said matter, validity of adjudicatory authority under executive instructions had not been a matter under consideration nor the same was addressed to and adverted to. In any case, said decision is of 2001 much before the decision in the case of *Secretary, Sh.A.P.D. Jain Pathshala and others Vs. Shivaji Bhagwat More and others* (supra) relied on by the petitioners had been rendered.

13. Learned counsel Mr. Talhar has further referred to a Full Bench decision in the case of *Komal Rugwani Vs. State of Maharashtra and others*, 2011 (4) Bom.C.R. 459 : 2011(4) Mh.L.J. 301 and purports to rely on paragraph no. 22 thereof, reading thus :-

" 22. In so far as the questions referred to us are concerned, in our opinion, answer to those questions has to be that in view of the judgment of the Full Bench in *Suryakant Panchals* case and the judgment of the Supreme Court in *Dagdus* case, if a private primary school is recognised by a body or officer referred to in section 39(2) of the Bombay Primary Education Act, it will not be governed by the provisions of the MEPS Act and the employee working in such a school cannot file an appeal under section 9 of the MEPS Act."

Aforesaid observations can hardly be said to be relatable to the present scenario.

14. Learned counsel has further referred to a decision of Supreme Court in the case of *Dagdu Vs. President, Anandrao Naik S.P. Mandal and others*, (2006) 9 SCC 782 and paragraph no. 8 thereof reading

thus:-

" 8. The Ashram School in question imparts only primary education from Standard I to Standard VII. It has not been recognised either by the Director or by the Boards as defined under the Act. Since it is not recognised therefore it is not a "private school" within the meaning of Section 2(20). Consequently, the Tribunal would not have the jurisdiction to entertain an appeal of the Appellant since he was not an employee of a private school. The decision in Surya Kant V. Vasantrao Naik Vimukta Jati Bhatakya Jamati Aadarsh Prasarak Mandal is, in our opinion, correct, and the High Court rightly applied the principle thereof in the impugned decision."

which too deals with a situation wherein, it appears that Tribunal under Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("M.E.P.S. Act") would not have jurisdiction to entertain an appeal since the person was not an employee of a private school and was employee of an Ashram School not covered by M.E.P.S. Act.

15. Next citation relied on, on behalf of respondent no. 1 is in the case of *Matoshri Ramabai Ambdkar Vidyarthi Vasatigrh Trust and anr. Vs. Bharat D. Hambir and anr.*, 2008 BCI 1 : 2009 (2) Mh.L.J. 121, wherein it had been considered in more or less similar facts as were involved in the citations (supra) where it has been observed that in the facts of the case, the decision of the Tribunal could not be faulted with.

16. During the course of his submissions, Mr. Talhar urges us to consider that a person cannot be left without remedy. He submits

that in the very paragraph no. 16 relied on, on behalf of the petitioners, the beginning sentences do show that wherever any area is unprovided for by law, it would be within the competence of the State to issue requisite directions which would take care of area unprovided and when there is a Code framed pursuant to Article 162, it would be in accordance with law while certain areas have not been provided for under the 1997 enactment and urges us not to disturb the order passed by respondent no. 2.

17. Learned A.G.P. supports all the submissions on behalf of respondent no. 1.

18. Having regard to aforesaid submissions, it appears that genesis of the Code of 1997 indisputably is referable to the executive instructions and the powers pursuant to Article 162 of the Constitution of India, yet, the Supreme Court has observed that, executive powers of the State in issuing instructions, would not be extended to creation of judicial Tribunal for the reasons as have been observed in paragraph no. 16, which decision has been taken into account in decision in Writ Petition 7389 of 2014. It does not appear that impugned decision rendered by respondent no. 3 - Divisional Social Welfare Officer, Nashik pursuant to purported exercise of powers under clause 86 of the Code of 1997 can be said to be valid and tenable in law. There is a clear exposition by the

Supreme Court on the situation and, as such, it will have to be considered that the adjudicatory authority exercised under clause 86 by respondent no. 3 is unsustainable and the decision impugned in this Petition dated 03-10-2011 - Exhibit "H" of the Petition would be inefficacious and thus, deserves to be set aside.

19. In the circumstances, the Writ Petition is allowed in terms of prayer clause (B) leaving it open for respondent no. 1 to take appropriate recourse, as would be available in law and in the facts and circumstances and in such a case, the adjudicatory authority would give due consideration to the period consumed under the pendency of the present Writ Petition. It is further made clear that the observations appearing in aforesaid judgment have no reflection on the merits of the case on either side. All points are kept open.

20. We hope that adjudicatory forum, having regard to lapse of time before this court, would proceed with expeditiously.

21. Rule is accordingly made absolute in aforesaid terms.

[SANGITRAO S. PATIL]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE