

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10425 OF 2017

Sacchitanand S/o Radhakisan Shinde,
Age : 35 years, Occu : Service,
R/o : At Post : Laul No. 1, Tq. Majalgaon,
Laul, District : Beed - 431131 .. Petitioner

Versus

- 1] The State of Maharashtra,
Through its Secretary,
School Education Department,
Mantralaya, Mumbai - 400 032
- 2] The Education Officer (Secondary),
Zilla Parishad, Beed
- 3] Sindphana Shikshan Prasarak Mandal, Majalgaon,
Tq. Majalgaon, District : Beed,
Through its Secretary
[**Respondent No. 3 deleted**]
- 4] The Head Master,
Madhyamik Vidyalaya,
Wadwanee, Tq. Wadwanee,
District : Beed
[**Respondent No. 4 deleted**] .. Respondents

WITH
WRIT PETITION NO. 10566 OF 2017

Manisha Devidasrao Dudhal,
Age : 40 years, Occu : Service,
R/o : Vivekanand Nagar, Majalgaon,
Tq. Majalgaon, District : Beed .. Petitioner

Versus

- 1] The State of Maharashtra,
Through its Secretary,
School Education Department,
Mantralaya, Mumbai – 400 032
- 2] The Education Officer (Secondary),
Zilla Parishad, Beed
- 3] Sindphana Shikshan Prasarak Mandal,
Majalgaon, Tq. Majalgaon,
District : Beed,
Through its Secretary
[**Respondent No. 3 deleted**]
- 4] The Head Master,
Madhyamik Vidyalaya,
Takarwan, Tq. Wadwanee,
District : Beed
[**Respondent No. 4 deleted**] .. Respondents

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Mr. N.K. Chaudhari, Advocate for petitioners in both writ petitions
Mr. G.O. Wattamwar, AGP for respondent – State
Respondents no. 3 and 4 in both writ petitions deleted
as per Court's order dated 09-08-2019

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CORAM : SUNIL P. DESHMUKH &
S.M. GAVHANE, JJ.

DATE : 11-09-2019

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

1. Rule. Rule made returnable forthwith. Heard learned counsel for the appearing parties finally, by consent.
2. There is no dispute that petitioner in writ petition no. 10425 of 2017 had been appointed after following due procedure

as assistant teacher in unaided division of secondary school run by respondent no. 3 on 15-06-2011 and approval had been granted to said appointment and petitioner continued to work as assistant teacher. Petitioner in writ petition no. 10425 of 2017 had been transferred from unaided division of secondary school, Talkhed to aided division of secondary school at Wadwanee and a proposal for his transfer had been submitted to respondent no. 2 - Education Officer.

3. Petitioner in writ petition no. 10566 of 2017 had been appointed after following due procedure as assistant teacher in unaided division of secondary school run by respondent no. 3 on 15-06-2011 and approval had been granted to said appointment and petitioner continued to work as assistant teacher. Petitioner in writ petition no. 10566 of 2017 had been transferred from unaided division of Madhyamik Vidyalaya, Majalgaon to aided division of secondary school at Takarwan and a proposal for his transfer had been submitted to respondent no. 2 - Education Officer.

4. Education officer - respondent no. 2 in both the writ petitions, however, referring to circular dated 28-06-2016 and to that there are instructions not to grant approval to appointments / adjustments on aided post without verification of availability of surplus teachers to be accommodated and since there were quite a few teachers surplus who were not accommodated, declined

approval to aforesaid transfers under impugned order dated 13-07-2017.

5. In reply to both the writ petitions, justification to impugned orders dated 13-07-2017 respectively, is also with reference to the same instructions dated 28-06-2016.

6. Learned counsel Mr. N.K. Chaudhari has drawn our attention to decision of this court in a group of writ petitions bearing no. 1493 of 2018 (*Suryakant S/o Janardan Muge Vs. The State of Maharashtra and others*) and connected writ petitions dated 04-07-2019 whereunder it has been observed, thus,

“16. The circular is issued by the Secretary, School Education and Sports Department. The orders in some of the matters are referred to therein. The reference is made to the some of the writ petitions.

17. The question would be whether by way of an executive instructions, the powers of the management under Rule 41 of MEPS Act for transfer of an employee can be circumscribed, curtailed and eroded. Rule 41 is framed under the Rule making power of the Government as provided under Section 13 of the MEPS Rules. The MEPS Rule is piece of subordinate legislation. It is trite that, executive instructions cannot override the statutory Rules. Precisely, this has been held by the Division Bench of this Court at Principal Seat at Bombay in Writ Petition No. 5313 of 2017 with connected writ petitions decided on 25.04.2019. The Division Bench in the said judgment held that:

“ The circular dated 28.06.2016 can hardly be said to be Government instructions. It has no statutory force in law. Rule 41 of the MEPS Act which is the subordinate legislation, the administrative decisions which run contrary to them cannot be held to be valid in law. We find that, since Clauses 1 and 2 of the said circular, run contrary to

the provisions of the subordinate legislation as found in Rule 41, the same would not be valid in law.”

While delivering the said judgment, the Division Bench considered the earlier judgments of this Court. Sub-clauses 1 and 2 of Clause 3 of the circular has already been held to be not valid in law by the Division Bench. There is no reason for us to take different view. The impugned circular as it affects the rights of the management to transfer, as such, same is improper and does not have any enforceable status.

18. *The proposal while considering for approval certainly will have to satisfy the test of roster being adhered to, seniority been followed. We had asked the learned A.G.P. that if the management runs more than one school, one which is on grant-in-aid and other non grant-in-aid, then how the seniority list and roster is maintained. The learned A.G.P. on instructions submitted that, if a management runs two or more schools and even if one is on no grant-in-aid, still common seniority list is required to be maintained, so also the common roster is maintained for both the schools.*

19. *In such a scenario, when common seniority list is maintained and common roster is maintained for two or more schools run under the same management, then question of imbalance of reservation may not arise.*

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22. *In light of the above, we quashed and set aside the orders rejecting the approvals of petitioners.*

23. *Upon confirming about the adherence to the seniority list that is those who are transferred to aided post are senior most amongst those working on unaided post and that the roster is maintained, so also their appointments are approved on unaided post, the Education Officer shall grant approvals to their appointments. If the assistant teachers who have been transferred from unaided to aided posts had not completed three years while working on unaided post, then they will be granted approvals as Shikshan Sevaks for a period they would complete three years from the date of their initial appointments and thereafter as assistant teachers. Of course, upon satisfying about the seniority and roster. However, the Education Officer shall not reject the proposal on the ground of circular dated 28.06.2016 and that there*

is availability of surplus teachers. The Education Officer will have to consider that services of these petitioners are approved on unaided posts.”

7. There is no dispute that in the schools run by respondent no. 3, common seniority list is maintained in respect of assistant teachers whether appointed on aided or unaided division and/or schools.

8. Having regard to aforesaid, we deem it appropriate while petitioners in the present petitions are stated to have been immediately junior to petitioner in writ petition no. 10400 of 2017 which is decided under aforesaid judgment, should be met with the same treatment. There is no dispute that petitioner in writ petition no. 10425 of 2017 is immediately junior to petitioner in writ petition no. 10400 of 2017 and petitioner in writ petition no. 10566 of 2017 is next immediate junior to petitioner in writ petition no. 10425 of 2017, and are senior most among other employees of respondent no. 3.

9. In view of aforesaid, impugned orders dated 13-07-2017, respectively, in both the writ petitions are quashed and set aside. After verifying the relevant aspects as referred to in aforesaid decision dated 04-07-2019, respondent no. 2 would approve the transfers and would not reject the proposals on the ground of circular dated 28-06-2016 and for availability of surplus teachers.

10. Rule is made absolute in aforesaid terms and writ petitions are accordingly disposed of.

[S.M. GAVHANE]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE

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