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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11470 OF 2017

Sudhakar s/o Vithalrao Deshmukh
Age - 32 years, Occ - Service
R/o Kokra Now at Apegaon,
Taluka - Ambajogai, District - Beed

PETITIONER

VERSUS

1. The State of Maharashtra
Through its Secretary
Education Department,
Mantralaya, Mumbai
2. The Education Officer Sec
Zilla Parishad, Beed
3. Shri Dnyaneshwar Shikshan Sanstha
Apegaon, Taluka - Ambajogai
Through its Secretary
4. Head Master,
Jaikisan Madhyamik and Ucch
Madhyamik Vidyalaya Apegaon,
Taluka - Ambajogai, District - Beed

RESPONDENTS

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Mr. V. V. Bhavthankar, Advocate for the petitioner
Mr. S. S. Dande, AGP for respondent - State

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[CORAM : SUNIL P. DESHMUKH AND
S. M. GAVHANE, JJ.]

DATE : 17th JULY, 2019

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

1. Rule. Rule made returnable forthwith and heard finally with
consent of learned advocates for the appearing parties.

2. Petitioner had been appointed as assistant teacher in 2008 and permanent approval had been granted to his appointment, albeit, on non grant in aid basis. It is petitioner's case that during 12th November, 2012 to 21st December, 2013, Education Officer had granted approval to appointments of other employees who were appointed on the same day like the petitioner, on grant in aid basis letting them move from non grant in aid basis. While in June, 2015 petitioner's proposal for appointment on grant in aid basis, on the post falling vacant on earlier incumbent retiring on superannuation, had been moved, the same has been met with response in negative, referring to government circular dated 28th June, 2016.

3. A division bench of this court had decided a set of about 150 writ petitions bearing No. 1493 of 2018 and companion matters on 4th July, 2019, wherein, it has dealt with efficacy of circular dated 28th June, 2016 observing 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 decide don 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 do not have any enforceable status. ”

4. From aforesaid observations it would emerge that this court has considered that circular dated 28th June, 2016 would not be said to be government instructions and has referred to therein, the same is running contrary to provisions of subordinate legislation and would not be valid in law. The division bench had also observed that the impugned circular

affects rights of management to transfer. As such, the same is improper and does not have any enforceable status.

5. It may not be out of place to refer to that alongside, division bench, under its order dated 4th July, 2019 has also observed that other aspects involved, *viz.*, satisfaction of roster, seniority and if management runs more than one school, one on grant in aid basis and the other on non grant in aid basis, may have to consider in such a case, common seniority list is required to be maintained.

6. In the circumstances, we deem it appropriate to follow the suit and pass similar order and issue similar directions as in decision dated 4th July, 2019.

7. In view of aforesaid, writ petition succeeds. Impugned order dated 12th August, 2016 passed by respondent No. 2 is quashed and set aside. Proposal for approval to petitioner's appointment is restored to its position as before 12th August, 2016. Education Officer would grant approval to the appointment of the petitioner upon verifying seniority list of the employees who are transferred on aided posts, are senior most amongst the employees working on unaided posts and that their appointments are approved on unaided posts. Education Officer,

however, shall not reject proposal of the petitioner on the ground of circular dated 28th June, 2016 and that there is availability of surplus teachers. Rule is made absolute in aforesaid terms. Writ petition stands disposed of.

[S. M. GAVHANE]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE