

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 222 OF 2017

Smt. Sushma Rajabhau Jadhav,
Age-25 years, Occu-Service,
R/o. Hadulti, Tq. Ahmedpur,
Dist. Latur

...PETITIONER

VERSUS

1. The State of Maharashtra,
Through its Secretary,
School Education Department,
Mantralaya, Mumbai-32
2. The Education Officer (Primary),
Zilla Parishad, Latur
Dist. Latur
3. Kisan Shikshan Samiti,
Hadulti, Tq. Ahmedpur,
Dist. Latur,
Through its Secretary
4. Shrihari Primary Vidya Mandir,
Hadulti, Tq. Ahmedpur,
Dist. Latur
Through its Headmaster

...RESPONDENTS

Mr. S.G. Rudrawar, Advocate for the petitioner
Mr. V.C. Patil, Advocate for respondent No. 2

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

DATE : 23-09-2019

ORAL JUDGMENT [PER: SUNIL P. DESHMUKH, J.]

. Rule. Rule made returnable forthwith. With the consent of the learned counsel for the parties heard the petition finally.

2. Factual position is not in dispute that the petitioner had been appointed, in respondent No. 4 school run by respondent No. 3 in a clear, vacant, permanent and sanctioned un-aided post on 15-06-2012 on probation for a period of two years. Proposal for approval to said appointment had been sent to respondent No. 2. After due scrutiny the proposal was granted. Upon completion of two years probationary period, management had sent a proposal on 15-06-2014 for permanent approval to the appointment of the petitioner and the same had been granted. According to the petitioner, roster has been maintained by the management and same had been verified by the Assistant Commissioner B.C.Cell.

3. While in another school run by respondent No. 4 a teacher retired on superannuation on 30-06-2016, the petitioner being senior most amongst the teachers who were working on un-aided post, management had transferred him in the place falling vacant on retirement of said earlier incumbent which is an aided post. The petitioner accordingly had joined the post.

4. Thereupon, proposal had been submitted to respondent No. 2 for approval to transfer from un-aided to aided post. However, under order impugned in the present writ petition dated 16-09-2016, respondent No. 2 purported to communicate rejection of

request for approval to transfer from un-aided to aided post.

5. Learned counsel Mr. Rudrawar submits that impugned order had been passed stating that unless surplus teachers are accommodated, transfer of petitioner would not be approved. He submits that such a reason given under the impugned order is absolutely untenable. It is not disputed that the petitioner is permanent employee of respondent No. 3 and she is senior most teacher amongst the un-aided appointments made by respondent No. 2 and has worked for more than three years. She has already been a permanent employee. While transfer is in accordance with Rule 41 as per the empowerment, the same cannot be faulted with for the reasons referred to under the impugned order. In support of submission, he places reliance on decision of a division bench of this court in a group of writ petitions bearing writ petition No. 1493 of 2018 and companion matters whereunder, it has been observed in paragraphs No. 15 to 19, 22 23 as under:

“15. Rule 41 gives powers to the management of the institution to effectuate transfers for the better administration of the school and also considering the administrative exigency for convenience of the better administration of the school. The impugned circular dated 28-06-2016 lays down certain conditions for the transfer of assistant teachers from unaided to aided posts. Some of the salient features of the said circular is that the management shall confirm that there are no surplus teachers are available for filling in the posts becoming vacant on aided basis. For the said purpose, the circular makes reference to Section 5(1) of the MEPS Act and that if the surplus teachers are

available, the approval should not be given to the teachers transferred from unaided to aided posts. The senior most teacher on unaided post shall be entitled for transfer to aided post and that the said assistant teacher who was working on unaided post, his appointment is required to be approved. The further embargo is that the assistant teachers should have worked atleast five years on unaided post and if he has worked for less than five years, then an option should be taken from him that he would work for three years as Shikshan Sevak on honorarium basis if transferred to grant-in-aid post and if the assistant teacher to be transferred has worked for five years or more on an unaided post, then the teacher who has completed five years on unaided posts and upon transfer to the aided post will be entitled for 20% grant from the Government and 80% will have to be borne by the institution. For the second year he would be entitled for 40% Government grant and 60% will be borne by the institution. For the third year 60% grant would be given by the Government and 40% will be borne by the institution. After four years of transfer, 80% will be borne by the Government and 20% by the institution and after five of the transfer of the teacher who had already worked for five years on unaided post, he will receive 100% grant from the Government.

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 aid judgment held that:

“The Circular dated 28-06-20165 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 the 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 AGP 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 AGP 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.

22. In the light of 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 un-aided 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.”

6. Learned counsel for the respondents purports to submit that while surplus teachers would be available, preference would be required to be given to them having regard to the policy of the State Government and in such a case request under the writ petition may not be acceded to.

7. However, we do not deem it expedient to deviate from the view as expressed under aforesaid reproduced paragraphs from the judgment and order in the group of writ petitions, while the petitioner appears to be permanent employee of respondent No. 2 and further that it is not the case of respondents that at any point of time while the petitioner had been granted permanent approval on un-aided post and since the date of appointment of petitioner any surplus teacher had been suggested for appointment by respondents.

8. In the circumstances, impugned order is set aside. The proposal for approval to transfer of petitioner shall be considered afresh verifying the position that she is senior most amongst those

who were working on un-aided post at the relevant time and the roster is maintained and that her appointment had been approved on un-aided post and shall not reject the proposal on the ground that there is availability of surplus teachers. Accordingly, rule made absolute in above terms. The writ petition is disposed of.

[S.M. GAVHANE, J.]

[SUNIL P. DESHMUKH, J.]