

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 14664 OF 2017

Omprakash S/o Vishnu Kavhar
Age : 28 years, Occu : Service as
Assistant Teacher,
R/o : Siddhart Nagar, Hingoli,
Tq. & Dist. Hingoli

.. Petitioner

Versus

1] The State of Maharashtra,
Through its Secretary,
Education Department,
Mantralaya, Mumbai - 32

2] The Education Officer (Primary)
Zilla Parishad, Hingoli

3] Navjivan Education Society,
Hingoli, Tq. & Dist. Hingoli,
Through its Secretary

4] Late Vaijnathappa Nagnath Saraf,
Primary School, Hingoli,
Tq. & Dist. Hingoli,
Through its Headmaster

.. Respondents

...
Mr. A.B. Tele, Advocate for petitioner
Mr. V.S. Panpatte, Advocate for respondent no. 2
Mr. P.N. Kutti, AGP for respondent - State
...

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 appearing parties.

2. There is no dispute that petitioner had been appointed after following due procedure as assistant teacher in unaided division of primary school run by respondent no. 3 on 01-02-2013 and approval had been granted to said appointment and petitioner continued to work as assistant teacher since then. 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. Petitioner had been transferred from unaided division of respondent no.3 to aided division of respondent no. 4 – primary school and a proposal for his transfer had been submitted to respondent no. 2 – Education Officer (Primary).

3. Respondent no. 2, however, declined approval to said transfer, referring to circular dated 28-06-2016 as there are instructions not to grant approval to appointments / adjustments on aided post without verification of availability of surplus teachers and since there were quite a few teachers surplus being not accommodated.

4. In the reply to the petition, justification to impugned order dated 21-11-2017 is also with reference to the same instructions dated 28-06-2016.

5. Learned counsel for petitioner Mr. A.B. Tele 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. ”*

6. Having regard to aforesaid, we deem it appropriate that petitioner who is stated to have been immediately junior to petitioner in writ petition no. 10400 of 2017 which is decided under aforesaid judgment, should meet with the same treatment. There is no dispute that petitioner is immediately junior to petitioner in writ petition no. 10400 of 2017.

7. In view of the same, impugned order dated 21-11-2017 is quashed and set aside. After verifying the relevant aspects as referred to in the decision dated 04-07-2019, respondent no. 2 would approve the transfer and would not reject the proposal of petitioner on the ground of circular dated 28-06-2016 and for availability of surplus teachers.

8. Rule is made absolute in aforesaid terms and writ petition is accordingly disposed of.

[S.M. GAVHANE]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE

arp/