

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11849 OF 2016

Shaikh Salman Shaikh Haroon
Age: 24 years Occu: Service
R/o. Mohammadi Nagar, Plot No. 36,
Deopur Dhule Tq. & Dist. Dhule

.. Petitioner

VERSUS

1] The State of Maharashtra
Through Secretary,
School Education Department
Mantralaya Mumbai – 32

2] Education Officer (Primary)
Zilla Parishad, Dhule
Tal & Dist. Dhule

3] Anjuman Ishaat-e-Taleem Trust
Iqbal Road, Dhule Tq. & Dist. Dhule
Through its President

4] A.I.T Urdu Primary School
Wadjai Road, 80 Phuti Road,
Dhule Tq. & Dist. Dhule
Through its Head Master

.. Respondents

...

Mr. Shailesh P. Brahme, Advocate for petitioner
Mr. A.V. Deshmukh, AGP for respondent - State
Mr. Rahul Pawar, Advocate for respondent no. 2
Mr. A.R. Syed, Advocate for respondents no. 3 and 4

...

CORAM : SUNIL P. DESHMUKH &
B.U. DEBADWAR, JJ.

DATE : 25-02-2020

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

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

2. The petitioner is before the court aggrieved by negation of approval sought to his appointment under order dated 27-06-2016 by respondent no. 2 – Education Officer (Primary), Zilla Parishad, Dhule.

3. The factual situation is not seriously disputed by the parties that respondent no. 3 is a minority institution. In respondent no. 4 – school run by respondent no. 3 - trust, one post of Peon had been sanctioned in the approved staffing pattern continuously since 2005-2006. Incumbent who was working in said post, is stated to have died in 2012. With a view to have replacement in said post, an advertisement was issued on 24-06-2012. Upon necessary scrutiny and process, it is stated that petitioner had been appointed as Peon under order dated 08-07-2012 on probation for a period of three years.

While proposal had been sent for approval to said appointment on 09-06-2014, it is contended that there had been no response whatsoever to said proposal. It is the case of petitioner that on completion of three years service after aforesaid

appointment, he had been issued a permanent appointment order on 01-07-2015 by respondents no. 3 and 4. A proposal was sent for approval in February, 2016. The same as well had not been responded to.

However, suddenly a communication came to be issued on 27-06-2016 (impugned in present petition) to the effect that having regard to government resolution dated 02-05-2012 particularly clause 1.8 thereunder, unless 100% surplus teachers are absorbed , there shall be no employment of teachers and non-teaching staff in private or local bodies. It had been referred to that absorption of teacher and non-teaching staff/employees is pending in respect of grant-in-aid schools in Dhule district and further that under The Right of Children to Free and Compulsory Education Act of 2009 ("**RTE Act, 2009**"), the post of Clerk and Peon are not admissible in primary schools. It has been communicated that upon verification of the proposal, it transpires that the personal approval for employment of petitioner has not been given. Post of Clerk and Peon are not admissible pursuant to RTE Act, 2009 and, therefore, the proposal has been rejected.

4. Learned counsel Mr. Shailesh Brahme, appearing for petitioner vehemently contends that as a matter of fact, petitioner has been appointed on permanent sanctioned post of Peon.

Approved staffing patterns from 2004-2005 to 2015-2016 do vindicate the same. The appointment of petitioner had been after following due procedure under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short "**MEPS Act**") and the Rules thereunder. He submits that it is not the case that petitioner does not hold requisite qualifications and that there was no requirement of Peon. He contends that no surplus candidate had ever been sent by respondent no. 2 for absorption. The reasons which have been given under the impugned communication have no application to present facts and circumstances. It is not a case of respondent – State that the post had not been admissible according to approved staffing pattern. The reason given is that the post of Peon is not admissible under RTE Act, 2009 and that personal approval had not been obtained for petitioner.

5. He submits that so far as personal approval is concerned, proposal had been sent twice and last of such proposal had been sent back. There is nothing placed on record in respect of the first proposal sent. The petitioner having regard to the MEPS Act and Rules and provisions thereunder has acquired confirmed character. Approval being not granted, is not within the control of petitioner.

6. Over and above this, learned counsel for petitioner along with learned counsel for respondents no. 3 and 4 submits that reference to government resolution dated 02-05-2012 is misconceived, as the same would hardly be applicable to petitioner's case, as would emerge from decisions rendered from time to time, particularly decision of division bench of this court in writ petition no. 3707 of 2013 dated 02-09-2013 (*Parbhani Education Society, Parbhani Vs. The State of Maharashtra and another*). It appears that the division bench, to which one of us is a party, had considered that resolution dated 02-05-2012 would not hold a minority institution. It has further been observed that appointments in minority institutions would not be able to be withheld till the time surplus teachers / non-teaching staff is accommodated / absorbed. (It has not been effectively countered by or on behalf of respondent – State.)

7. Learned Counsel for respondents no. 3 and 4 Mr. A.R. Syed contends that services of petitioner are essential for the institution and without him, it is impossible to run the school. Various duties are to be performed by him; a few of such duties are referred in the affidavit-in-reply. He supported the submissions made on behalf of petitioner, that the post is admissible since 2004-2005 and has been continuously shown in the staffing pattern. He additionally submits that Bombay Primary Education Act admits

appointments to non-teaching staff. Services of non-teaching staff is not auxiliary but is essential to carry out every day work of the school. Various facilities to the students and teachers would be required to be provided by the management to the students and teachers. He refers to judgment of supreme court in the case of *Environmental and Consumer Protection Foundation Vs. Delhi Administration* reported in (2012)10 S.C.C. 197 and contends that accordingly, the management had discharged its obligation. He submits that duty has been cast on the State, to effectively implement the same and thus, it would be imperative to approve the appointment to the post.

Another limb of his submission is, respondent no. 4 purports to make effort to cater to the need of the education to section of minority who are distant from education. The stance of the State would be said to be digressed from the purpose underlying Article 21 of the Constitution of India. Care of requirements may be taken in respect of respondents no. 3 and 4 by the State, especially when the institution and school is economically weak not having any independent source of income.

8. He also refers to an interim order dated 06-11-2019 in a Public Interest Litigation bearing no. 130 of 2018 (*High Court Bar Association, Nagpur through its Secretary Vs. State of Maharashtra and others*)

by a division bench of this court at Nagpur and submits that having regard to purport underlying said interim order, it is more than necessary to grant approval to petitioner's appointment and the reasons given would not be able to hold granting of such approval.

9. On the other hand, learned Assistant Government Pleader Mr. Deshmukh vehemently submits that while RTE Act, 2009, applies to the entire State of Maharashtra, validity of which has been upheld by the Supreme Court, the same is to let free and compulsory education to the children between 6 to 14 years in consonance with Article 21-A of the Constitution of India.

He purports to go through various provisions and intendment underlying the enactment and refers to an extract of order in writ petition no. 9026 of 2014, which effectuate validity of the enactment.

Highlighting that sections 19 and 25 of RTE Act, 2009 and schedule thereunder, he contends the provisions do not admit non-teaching staff (primary) and, thus, the impugned communication had been issued. He further adverts to that the committee had been constituted for prescribing norms of non-teaching staff of secondary and higher secondary school and said committee has submitted its report to the government which in turn is submitted to the finance department for approval. Thus, the

reply as originally filed on behalf of the State resists the request under the petition, contending inadmissibility of post of Peon under RTE Act, 2009.

10. There is additional affidavit-in-reply dated 11-02-2019 filed on behalf of the State which once again reiterates submissions about RTE Act, 2009, about non-prescription of non-teaching posts of primary school under the RTE Act, 2009 and that no further consideration is required. As an annexure appended is Maharashtra Act no. XXV of 2014 enforced from 01-07-2013 which is known as the City of Mumbai Primary Education, the Maharashtra Primary Education, the Hyderabad Compulsory Primary Education and the Madhya Pradesh Primary Education (Repeal) Act, 2013.

11. There is one more affidavit dated 29-03-2019 filed on behalf of the State. In the same, it is contended that primary schools are run by the educational institutions which are registered under the Public Trust Act, 1950 or Societies Registration Act, 1860. The schools are expected to raise their own resources, for social causes and educational purposes and are not expected to rely wholly on government support. The organizations are expected to raise their own resources atleast to the extent of 10% of their total expenses while the government would bear bulk of the expenses.

It is further purportedly contended that RTE Act, 2009 does not make any provision for providing government support to non-teaching staff in primary school and, thus, the funding to such posts may not be expected from the Government.

The State government has prescribed staffing pattern for non-teaching staff for secondary and higher secondary aided/partially aided schools on 28-01-2019. It is further stated that the same is applicable only to secondary and higher secondary schools and primary schools are outside the purview of said prescription. However, primary schools are provided support, in lieu of non-teaching expenses, which is not provided to secondary schools.

12. It is further alluded to that while Government does not give any grant for non-teaching staff to zilla parishad primary schools as they are expected to manage the same from their own resources and local body schools' provide services of non-teaching staff to primary schools as and when required through their own local resources. Similar suit is expected to be followed by private aided schools. The reply further adverts to statistics with regard to private aided primary schools' staff, salaries incurred over teachers in those schools, suggesting that additional financial burden would be incurred by the State beyond the scope of RTE Act, 2009. It is

contended that the State government has taken a decision of outsourcing of class-IV employees instead of appointing them on regular posts in government / semi-government offices. The School Education Department would be bound by this policy.

13. There is one more aspect which needs to be considered that so far as non-teaching posts are concerned, there appears to be consideration of the same for secondary and higher secondary schools, however, it is contended before this court, such a facility would not be available to primary schools alone.

14. Having regard to aforesaid, position emerges that so far as reference to government resolution dated 02-05-2012 is concerned, while status of respondents no. 3 and 4 being that of minority institution, has not been seriously disputed, it may not be a case which can be said to be covered by aforesaid government resolution.

15. While reply dated 11-02-2019 annexes as an appendage the Maharashtra Act No. XXV of 2014 referred to above, section 3(2)(f) thereunder, reads as under,

“ 3.

(2) *On and from the date of commencement of the said Act, –*

....
....

(f) the salaries and existing terms and conditions of service of the teaching and non-teaching employees of the schools established under the repealed Acts and appointed as per the Government orders, issued from time to time, shall be continued as per the existing Government policy until duly altered or modified by the Government:

Provided that, the conditions of service applicable to such employees immediately before the commencement of the said Act shall not be varied to his disadvantage.”

saves the prevailing position under the old legal scenario. It further emerges that there is contention on behalf of petitioner and respondents no. 3 and 4 that due procedure as required under the law has been followed and appointment of petitioner had been made. There has been proposal for approval in respect of initial appointment and also after acquiring the status under the MEPS Act. It does not appear that lot of facts, contentions and events had been taken into account. Admissibility of the Peon under the staffing pattern as well is not considered. In the circumstances, impugned communication appears to be rather too terse and not reflective upon the relevant state-of-affairs when the appointment had been made and as to whether under the legal position prevailing then, benefits thereunder, would not be available to the petitioner.

16. In view of aforesaid, it appears to be expedient that the proposal for approval to the petitioner's appointment be reconsidered taking into account all the relevant aspects, as

contended on behalf of the petitioner and the respondents no. 3 and 4 as well as the submissions on behalf of the State. If required, the Education Officer may as well hear the parties concerned. In view of aforesaid, impugned communication is set aside reviving the proposal submitted by the petitioner for re-decision thereon by respondent no. 2.

17. It is expected that the exercise would be completed expeditiously, preferably within a period of three (3) months from the date of receipt of writ of this order.

18. Writ Petition is disposed of. Rule is made absolute accordingly.

[B.U. DEBADWAR]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE

arp/