

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

WRIT PETITION NO. 1934 OF 2017

Sayyad Manjur S/o Mujafar,
Age : 50 Years, Occu. : Service,
R/o At Post Bhatangali,
Tq. and Dist. Latur.

.. Petitioner

Versus

1. The State of Maharashtra,
Through the Secretary,
Social Justice and Special
Assistance Department,
Mantralaya, Mumbai.
- 1A. The Hon'ble Minister (State),
Social Justice and Special
Assistance Department,
Government of Maharashtra,
Mantralaya, Mumbai.
2. The Commissioner,
Handicapped Welfare,
Maharashtra State, Pune.
3. The Divisional Deputy Commissioner,
Social Welfare, Pune Division,
Pune.
4. The District Social Welfare
Officer, Zilla Parishad, Pune.
5. The District Social Welfare
Officer, Zilla Parishad, Latur.
6. Apang Kalyankari Sanstha Va
Sanshodhan Kendra Wanwadi,
Pune, through its
President/Secretary.
7. Shivani Subhash Sutar,
Age : 39 Years, Occu. : Service as

Head Master' of Apang Kalyankari
Shikshan Sanstha Va. Sanshodhan
Kendra, Wanwadi, Pune,
R/o F-9, Shivsagar Housing Society,
Jagtap Nagar, Wanwadi, Pune,
Dist. Pune.

.. Respondents

Shri V. D. Gunale, Advocate for the Petitioner.

Shri S. V. Adwant, Special Govt. Pleader for the Respondent Nos.
1 and 2.

Shri Vilas D. Sonawane, Advocate for the Respondent Nos. 3 to 6.

Shri Alok M. Sharma, Advocate for the Respondent No. 7.

**CORAM : MANGESH S. PATIL AND
SANDEEP V. MARNE, JJ.**

DATE : 03.10.2022.

JUDGMENT (*Per Sandeep V. Marne, J.*) :-

. Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing.

2. By this petition, the petitioner seeks implementation of the order dated 26.07.2016, by which he was directed to be absorbed in the respondent No. 6-school, upon been rendered surplus. The petitioner also seeks prayer for payment of salary from 26.07.2016 onwards.

3. During the pendency of the petition, the petitioner came to be granted absorption in another school viz. Residential Disabled School, Ahmedpur, Dist. Latur with effect from 02.12.2019. Therefore, the prayer for implementation of the order dated 26.07.2016 to absorb him in the respondent No. 6-school no longer survives. He is also being paid salary in absorbed school with effect from 02.12.2019. Therefore, what remains to be

decided is the prayer for payment of salary from 26.07.2016 to 01.12.2019.

4. Appearing for the petitioner, Mr. Gunale learned counsel would submit that even though he was ready and willing to join the respondent No. 6-school in pursuance of the absorption order dated 27.06.2016, he was prevented from joining the respondent No. 6-school and, that therefore, that school is liable to pay salary to him during the period from 27.06.2016 to 01.12.2019. He would submit that on account of refusal of the respondent No. 6-school to obey the absorption order dated 27.06.2016, the State Government was required to suspend the management and appoint an administrator to run the school. The adamant approach displayed by the respondent No. 6-school resulted in hardship to the petitioner. He would further submit that instead of absorbing the petitioner in pursuance of the absorption order dated 27.06.2016, the respondent No. 6 illegally granted appointment in favour of the respondent No. 7, which was clearly illegal. He would rely upon the provisions of the Rule 41(7) of the Maharashtra Special Schools for Disabled and Training Center Code, 2018 (hereinafter referred as to the “Code of 2018”) to contend that it is the liability of the respondent No. 6-school to pay salary to the petitioner on account of refusal to permit the petitioner to join the school. He relies upon the decision of the Apex Court in the case of **Shobha Ram Raturi Vs. Haryana Vidyut Prasaran Nigam Limited and others** reported in ***AIR 2016 SC 157***.

5. Per contra, Mr. Adwant, the learned Special Government Pleader appearing for the respondent-State places on record copy

of order dated 16.11.2019, by which the petitioner came to be granted absorption in Ahmedpur school. By that order, the earlier order of absorption dated 27.06.2016 has been cancelled. He would submit that while granting absorption in Ahmedpur school, the petitioner was appointed on the lower post of Special Teacher instead of Head Master, which post he was holding prior to his absorption. He would submit that the petitioner voluntarily accepted demotion in the post as the order of absorption is actually an order of fresh appointment. Relying on the provisions of the Rule 91(2) of the Code of 2018, Mr. Adwant would contend that the petitioner is not entitled to payment of salary till the date of joining. He would place reliance on the provisions of Rule 25A of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Rules, 1981 (for short "Rules of 1981") to contend that the order of absorption passed under Sub Rule 2 of Rule 25A of the Rules of 1981 is merely recommendatory in nature for consideration of the school management. He would therefore submit that the earlier order of absorption dated 26.07.2016 was merely recommendatory in nature and did not create any right in favour of the petitioner. He would submit that conjoint reading of Rule 25A of the Rules of 1981 and Rule 91(2) of the Code of 2018 would clearly indicate that an absorbed employee is entitled to payment of salary only from the date of joining and not from the date of passing of order of absorption.

6. In support of his contention Mr. Adwant would rely upon following decisions of this Court.

i. Chandrama Milind Bhatkar and others Vs. The Secretary,

Ministry of VJNT, OBC & SBC Welfare Maharashtra State, Mumbai and others in Writ Petition No. 4305 of 2014 dated 27.01.2015.

- ii. Shri Sawant Pandurang Dattatraya and another Vs. The State of Maharashtra and others in Writ Petition No. 5303 of 2014 dated 16.02.2015.
- iii. Gramin Vikas Shikshan Va Krida Prasarak Mandal Khadki and another Vs. Yamu Narayanrao Bire and others reported in 2012(3) Mh.L.J. 820.

7. In support of his submissions based on Rule 25A of the Rules of 1981, Mr. Adwant would rely upon the decision of the Nagpur Bench of this Court in the case of **Prabhakar Panjabrao Mahajan Vs. The Deputy Director of Education, Nagpur and others** reported in **2007(2) All MR 220** and the Full Bench decision of this Court in the case of **Kanhaiyyalal Sonbaji Gajbhiye Vs. Bhartiya Jagruti Shikshan Sanstha Sawari (Jawahar Nagar) and others** reported in **2020(6) Mh.L.J. 595**.

8. Mr. Adwant, would further contend that the respondent No. 6-school received a letter dated 29.06.2016 from the earlier school of the petitioner pointing out various misconducts committed by the petitioner and that the respondent No. 6-school was entitled to deny joining to the petitioner by taking into consideration the misconducts committed by him in earlier school.

9. Mr. Sonawane, learned counsel appearing for respondent Nos. 3 to 6 opposes the petition contending that his clients cannot be saddled with the liability to pay salary to the petitioner in respect of the period that he did not work with the

respondent No. 6-school. He would submit that the respondent No. 6-school was entitled to check the antecedents of the petitioner and to deny him joining on that ground. He would submit that the respondent No. 6-school rightly did not permit the petitioner to join in pursuance of order dated 26.07.2016. He would submit that order dated 26.07.2016 was in fact challenged by the management before Principal Seat of this Court, but the issue was directed to be decided in the present petition. He prays for dismissal of the petition.

10. Mr. Alok Sharma, learned counsel appearing for the respondent No. 7 submits that, since the petitioner is already absorbed in another school, he could not no claim against Respondent No. 7, who has been functioning in the respondent No. 6-school.

11. Having heard the learned counsel for the parties, the limited issue that we need to decide in the present petition is about petitioner's entitlement to receive salary during the period from 27.06.2016 to 01.12.2019. The provision for absorption of surplus teacher is to be found in Sub Rule 2 of Rule 25A of the Rules of 1981, which reads thus :

**The Maharashtra Employees of Private Schools
(Conditions of Service) Regulation Rules, 1981**

1.
2.

**[25A. Termination of Service on account of abolition
of posts. -**

- (1)

(2) The names of the employees in aided schools, whose services stand terminated in accordance with sub-rule (1) on account of de-recognition and who are not directly responsible for such de-recognition, shall be taken on a waiting list by the Education Officer in the case of Primary and Secondary Schools or by the Deputy Director in the case of Higher Secondary Schools and Junior College of Education, and same shall be **recommended** by him to the Managements of newly opened aided schools or of the existing aided schools which are allowed to open additional divisions or classes for **consideration**.

(emphasis added)

12. Thus absorption in another school is not a matter of right. The Education Officer/Deputy Director merely recommends the surplus teacher to the management of either newly opened aided school or the existing aided schools which are allowed to open additional divisions or classes for consideration.

13. The issue of entitlement of surplus teacher for absorption has been interpreted in various decisions of this Court. The Full Bench of this Court in the case of **Kanhaiyyalal Sonbaji Gajbhiye** (supra) has held in para No. 29 as under :

29. A bare reading of rule 25A would show that it deals with termination on account of abolition of posts resulting from closure, voluntary or on the ground of de-recognition of the school. It does not refer to the concept of "retrenchment" which appears to dominate the newly amended rule 26. That apart, rule 25A does not grant same degree of protection to the terminated employees as was available to them in earlier rule 26 and which was in the nature of their absorption in another school and protection of their services till absorption. Instead, rule 25A gives new kind of protection, rather privilege, to the terminated employees of aided schools. Sub-rule (2) of rule 25A lays down that if such employees from aided schools are not directly responsible for the de-recognition of the school, their names must be included in waiting list by the competent authority, who may be either the Education Officer or the Deputy Director depending upon

the class of the school. It imposes further duty upon the competent authority to recommend their names to the Managements of newly aided schools or the existing aided schools which are allowed to open additional divisions or classes for consideration.

14. In the case of **Prabhakar Panjabrao Mahajan** (supra) this Court has held in para No. 27 as under :

27/ A teacher who is terminated on account of contingency covered by rule 25A can only be considered for recommendations to the management of other school for being appointed on their establishment as a fresh candidate and such management is required to consider the case of employee for absorption and any such appointment of employee terminated under rule 25A is required to be treated as newly appointed employee who has (the petitioner in this case) suffered termination under rule 25A of the MEPS Rules. All new appointees are required to be treated as Shikshan Sevak covered under the Scheme of Shikshan Sevak framed by the Government vide Government Resolution dated 27th April 2000 read with modified Government Resolution dated 13th October 2000.

15. So far as payment of salary to the absorbed teacher is concerned, the same is governed by the provisions of Rule 91(2) of the Code of 2018, which provides that the absorbed teacher shall not be entitled to salary till the date of joining by way of absorption. The period between the date of declaration as surplus teacher till the date of joining in absorbed school is required to be treated as *dies non*.

16. The issue of payment of salary in the light of the provisions of Rule 25A of the Rules of 1981 has been dealt with by this Court in various decisions. In the case of **Gramin Vikas Shikshan Va Krida Prasarak Mandal Khadki** (supra) this Court has held in para No. 39 as under :

39. If it is closure under Rule 25A, there is no question of payment of any back wages and employee becomes entitled to placement in list of surplus candidates. If it is retrenchment under Rule 26, there can be no termination and respondent no.1 continues to earn salary every month till she is absorbed. We have already concluded that even if it is a case of closure under Rule 25A, still otherwise termination on 20.06.1997 is bad. Hence, the entitlement to relief of reinstatement or then to relief of absorption and also to relief of wages denied (back wages) turns upon the answer to question whether on 20.06.1997 respondent no.1 has been retrenched under Rule 26 or terminated under Rule 25A?

(emphasis supplied)

17. Also this Court in the case of **Chandrama Milind Bhatkar and others** (supra) and **Shri Sawant Pandurang Dattatraya and another** (supra) has denied salary prior to the date of actual joining consequent to absorption.

18. Considering the inter play between Rule 25A of the Rules of 1981 and Rule 91(2) of the Code of 2018, it is clear that absorption of a surplus teacher is not a matter of right and that upon absorption, the teacher is not entitled to be paid salary till the date of actual joining. There is yet another difficulty for the petitioner. He is seeking implementation of order dated 26.07.2016 and payment of salary in pursuance thereof. However, by subsequent order dated 16.11.2019, the order dated 26.07.2016 has been cancelled. The order dated 26.07.2016 no longer survives. The petitioner has not challenged the order dated 16.11.2019 in the present petition atleast *qua* cancellation of order dated 26.07.2016. The cancellation of order dated 26.07.2016 has thus attained finality. Therefore, the order dated 26.07.2016 can no longer be relied upon while deciding petitioner's entitlement to salary.

19. Seen from any angle, we find that the petitioner did not have any right to seek absorption in any particular school. Even though the petitioner was directed to be absorbed in the respondent No. 6-school by order dated 26.07.2016, the respondent No. 6 school had its own difficulties in not permitting him to join the school on account of serious allegations made against him in the letter dated 29.06.2016 by his previous school. The petitioner was later absorbed in Ahmedpur school, not as a Head Master, but as special teacher, which he accepted without any demur. Under the absorption scheme, the same becomes a fresh appointment. The petitioner thus got appointed afresh on 16.11.2019 in Ahmedpur school. In absence of any right to get absorbed in the respondent No. 6-school and having accepted appointment in Ahmedpur school on a lower post offered vide order dated 16.11.2019, we are afraid that the petitioner cannot seek payment of salary in respect of period from 26.07.2016 to 01.12.2019. The decision of the Apex Court in the case of **Shobha Ram Raturi** (supra) relied upon by the petitioner has no application to the present case as the issue involved therein was about grant of consequential benefits upon setting aside the order of retirement.

20. We therefore, do not find any merit in the petition. The petition is dismissed without any orders as to the costs. Rule is discharged.

[SANDEEP V. MARNE, J.]

[MANGESH S. PATIL, J.]