

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

WRIT PETITION NO. 10009 OF 2017

Shaikh Tausif Ahmed Khamar Pasha,
Age : 29 Years, Occu. : Service,
R/o Raj Galli, Near Masjid Chowk,
Majalgaon, Tq. Majalgaon,
District Beed.

.. Petitioner

Versus

1. Ambar Shikshan Prasarak Va
Bahuddeshiya Sevabhavi Sanstha,
Through its President,
Al-Jajira Hotel, Budhilane,
Aurangabad.
 2. Ambar Urdu Primary School,
Through its Head Master,
Padhegaon, Tq. and Dist. Aurangabad.
 3. Education Officer (Primary),
Zilla Parishad, Aurangabad.
 4. The State of Maharashtra,
Through its Secretary,
School Education Department,
Mantralaya, Mumbai.
- .. Respondents

Shri Sushant V. Dixit, Advocate for the Petitioner.
Shri S. S. Kazi, Advocate for the Respondent Nos. 1 and 2.
Shri Eknath P. Sawant, Advocate for the Respondent No. 3.
Shri K. N. Lokhande, A.G.P. for the Respondent No. 4.

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

CLOSED FOR JUDGMENT ON : 01.08.2022

JUDGMENT PRONOUNCED ON : 05.08.2022

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

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

2. The short question that arises for our consideration in the present petition is whether in the light of existence of factual dispute as to whether any salary is payable or not for a particular period, whether this Court can entertain the present petition only on account of the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Rules, 1981 (for the sake of brevity hereinafter referred as to the “Rules of 1981”)

3. Brief facts of the case, shorn of unnecessary details, are that the petitioner was appointed as an Assistant Teacher in the respondent No. 2 school managed by the respondent No. 1 on 15.06.2009. It is an unaided school. Approval in respect of his appointment was granted by the respondent No. 3 vide order dated 31.12.2015 for the period from 15.06.2009 to 14.06.2011 on non grant basis. There is no dispute that on account of the approval being granted on non grant basis, the responsibility of payment of salary to the petitioner rests on respondent Nos. 1 and 2.

4. Services of the petitioner were apparently discontinued with effect from 19.09.2016 and such discontinuation was challenged by the petitioner by filing appeal U/Sec. 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for the sake of brevity hereinafter referred as to the “Act of 1977”) before the Presiding Officer, School Tribunal, Aurangabad. In the appeal, compromise terms were filed by the petitioner and the management under which it was *inter alia* agreed that the petitioner would be reinstated in service as Assistant Teacher with effect from 01.03.2017. It was further agreed to treat the services of the petitioner as continuous for the purpose of pensionary benefits if admissible in law. Based on the compromise terms, the School Tribunal was pleased to allow the appeal vide order dated 28.02.2017 in terms of the compromise. The Tribunal however, specifically directed that there would not be any order as to backwages. The petitioner addressed representations dated 18.02.2017, 02.03.2017 and 03.03.2017, for the first time contending that he was not paid salary since the year 2009. The petitioner has thereafter filed present petition on 26.09.2017 with following prayers :

A) For a writ of mandamus Order or direction in nature of mandamus to respondents Nos. 1 and 2 to pay the petitioner, salary and salary arrears along with other consequential benefits w.e.f. 15.06.2009 within the period of three months and within such period as this Hon'ble Court deem fit.

B) For a writ of mandamus Order or direction in nature of mandamus to respondents Nos. 1 and 2 to pay the

petitioner, interest of 24% p.a. on the arrears till the realization of it.

5. The respondent Nos. 1 and 2 management have resisted the claim of the petitioner by filing affidavit in reply with specific averments that the petitioner has been remaining absent during various periods. There are series of pleadings thereafter filed by the parties in respect of issue of petitioner's alleged absence from service.

6. In the above backdrop, when we expressed during the course of hearing of the petition that this Court would not be in a position to go into the disputed questions of facts, Mr. Sushant Dixit, the learned advocate for the petitioner relied upon provisions of Rule 7 read with Schedule – C of the Rules of 1981 and contended that since it is a statutory duty cast upon the respondent management to pay salary in accordance with the rules, the writ petition under Article 226 of the Constitution of India is maintainable qua the prayers sought for in the petition. Shri Dixit, also relied upon the judgment of this Court in the case of **Anil Govindrao Kale and others Vs. Maharashtra Academy of Engineering and Education Research, Pune and others** reported in **2017 LAB. I. C. 2022** and submitted that it has been held that the pay scale prescribed in Schedule C of Rules of 1981 and supported by Act of 1977 are legally enforceable and that therefore writ petition seeking enforcement of provisions of the Act of 1977 and Rules of 1981 is maintainable.

7. Per contra, Mr. Kazi, the learned advocate for respondent Nos. 1 and 2 submitted that the petitioner has been consistently absent after his reinstatement and that therefore there is no question of payment of any salary to him.

8. Since it is an admitted position that the responsibility of payment of salary to the petitioner rests only on the school management, no occasion arises for us to call upon the learned advocates appearing for respondent Nos. 3 and 4 to make their submissions.

9. Entire thrust of submissions of Shri Dixit, about the maintainability of the petition is on the provisions of Rule 7 read with Schedule C of the Rules of 1981. The Rules of 1981 have been formulated under the provisions of Sub Section 1 and 2 of Section 16 of the Act of 1977. Rule 7 of the Rules of 1981 provides as under :

7. Scales of Pay and Allowances. - (i) The scales of pay for full-time as well as part time Heads, Assistant Heads, Supervisors, Teachers and the non-teaching staff in the primary schools, secondary schools including night schools. Junior Colleges and Junior Colleges of Education, shall be as specified in Schedule "C".

(ii) The allowances such as dearness allowance, compensatory local allowance and house rent allowance admissible from time to time at the place of duty to the full-time employee of a school shall be payable at the rates and according to such rules as are sanctioned by Government specifically to the employees of private schools.

(iii) The rates of dearness allowance applicable to part-

time teaching and non-teaching staff in schools including night schools be such as may from time to time be determined by the Government by general or special order.

10. Schedule C to Rules of 1981 specifies various pay scales payable under Rule 7 to various full time and part time teachers and non teaching staff.

11. No doubt, there is statutory obligation on the school management to pay salaries to its employees as specified in Schedule C of the Rules of 1981. However, the issue involved in the present case is not about the quantum or difference in the salary payable to the petitioner. It is not a case of the petitioner that salary different than the one prescribed in Schedule C of the Rules of 1981 is being paid to him. His case is that absolutely no salary has been paid to him right from the year 2009.

12. Serious factual dispute exists between the petitioner and the school management especially with regard to the period post reinstatement of the petitioner on 01.03.2017. Both the parties have filed comprehensive pleadings in support of their rival claims. While the school management has claimed that the petitioner has been consistently absent post his reinstatement on 01.03.2017 and has relied on copies of various muster rolls, the petitioner has come up with a case by way of additional affidavit dated 25.11.2019 that the school management maintains two muster rolls and does not permit him to sign one of the two muster rolls. Thus there is serious dispute of fact as to whether

the petitioner has attended the school and discharged duties or whether he has been absent from duties as alleged by the school management.

13. In the light of the above factual backdrop, let us consider the judgment of this Court in the case of **Anil Govindrao Kale and others** (*supra*) relied upon by Shri Dixit. He has invited our attention to para Nos. 22 and 23 of the judgment, which reads thus :

22. Relying on the judgments in the cases of Mrs. Satimba Sharma (*supra*), The Correspondents/Principal AROKAIMADA Matriculation Higher Secondary School (*supra*) and K. Krishnamacharyulu Vs. Sri Venkateswara Hindi College of Engineering (1997) 3 SCC 571, the learned counsel for the respondents submit that the writ petition are not maintainable. We are not inclined to accept this contention for the simple reason that this issue has been dealt with by the Nagpur Bench of this Court in the case of Mahadeo s/o Pandurang More and others (*supra*). The Court considered the case of Mrs. Satimbla Sharma and others (*supra*) and in para 28 of the said judgment clearly observed that where a statutory provision casts a duty on a private aided school to pay similar salary and allowances to its teachers, as are being paid to the teachers of government aided schools, then a writ of mandamus could be issued to enforce such statutory duty. It is further observed that the writ jurisdiction of the High Court under Article 226 of the Constitution is wide enough to issue a writ for payment of pay on par with Government employees.

23. If the provisions of the Act of 1977 and Rules of 1981 cast the duty on the minority or nonminority private unaided school to pay salary to the teachers on par with their counterparts serving in the private aided schools, the respondents are under a legal obligation to follow those provisions. If the respondents neglect or avoid to follow

those legal provisions, a writ of mandamus certainly can be issued against them. In the present case, the petitioners are claiming the pay scales as have been prescribed in Schedule 'C' under Rule 7 (i) of the Rules of 1981. The pay scales are prescribed in Schedule 'C'. Since they are supported by the provisions of the Act of 1977 as well as the Rules of 1981, they are legally enforceable and the writ petitions seeking enforcement of the provisions of the Act of 1977 and the Rules of 1981, so far as the pay scales are concerned, are quite maintainable.

14. The controversy in the case of **Anil Govindrao Kale and others** (*supra*) was about grant of equal pay to the teachers working in unaided private schools and minority unaided private schools at par with their counter parts serving in the Government schools or private aided schools. Thus, while considering the issue this Court made observations in para Nos. 22 and 23 of the judgment holding that writ petitions for enforcement of the provisions of the Act of 1977 and the Rules of 1981, so far as pay scales are concerned, were maintainable. Thus, it is specifically made clear that writ petitions are maintainable only so far as the pay scales are concerned. There were no factual disputes involved in that case, nor has this Court gone into any factual dispute. Therefore, decision in **Anil Govindrao Kale and others** (*supra*) has no application to the facts and circumstances of the present case.

15. Shri Dixit, also relied upon order of this Court **dated 01st April, 2019** in the case of **Uzma Khanam Mirza Moin Ullah Baig Vs. Maulana Azad Educational trust through its Chairman in Writ Petition No. 5805 of 2018**, in which it is held in para No. 8 as under :

8. We have held that the payment of salary is governed by the M.E.P.S. Act and Rules, more particularly, Schedule 'C'. The M.E.P.S. Act does not make any distinction between the minority and non-minority Institution, by whom salary is required to be paid. So also, it does not make any distinction between aided and unaided Institution vis a vis the payment of salary. It is not disputed that the petitioner is discharging his duties as an Assistant Teacher with the respondents Institution. He possess the necessary qualification and eligibility.

16. Again the dispute involved in the case of **Uzma Khanam Mirza Moin Ullah Baig** (*supra*) was with regard to the applicability of the revised pay scales as per amended Schedule C of Rules of 1981 with effect from 08.07.2003. No disputed questions of fact were involved in that case and, therefore, this order is again of little assistance to the petitioner.

17. On the contrary, Shri Kazi, the learned advocate for respondent Nos. 1 and 2 has relied upon order dated **06.08.2007** passed by this Court in **Writ Petition No. 3367 of 2005** in the case of **Smt. Syeda Rubeena Quadri Vs. Crescent Education Society, Aurangabad and others**, in which this Court, upon noticing dispute with regard to the genuineness of signature of the petitioner therein in the salary register, refused to maintain petition under Article 226 of the Constitution of India and relegated the petitioner to an appropriate alternate remedy.

18. In the case of **Farkhunda Jabin Quazi and another Vs. The State of Maharashtra and others** decided on **15.06.2022** in **Writ Petition No. 5419 of 2022**, this Court has held in para No. 3 as under :

3. We find that neither the State Government nor the Education Officer has any role to play in the compromise deed arrived at between the parties before the school tribunal. The petitioners, therefore, have the remedy of seeking execution of the compromise deed. A writ petition under Article 226 of the Constitution of India is not the remedy as a writ of mandamus cannot be issued against a private party on the basis of a compromise deed between such parties before the school tribunal.

19. Undisputedly, no writ can be issued to respondent Nos. 1 and 2 as there is no role of the State Government or the Education Officer with regard to payment of salary to the petitioner. Even though respondent Nos. 1 and 2 are not instrumentalities of the state within the meaning of Article 12 of the Constitution of India, writ jurisdiction is sought to be made applicable to them by attracting the provisions of the Act of 1977 and the Rules of 1981. We do not propose to take departure from the already established principle with regard to applicability of writ jurisdiction for enforcement of pay scales provided for in Schedule – C of the Rules of 1981. However, when any disputed question of fact is involved, which cannot be decided without leading evidence, writ jurisdiction of this Court cannot be invoked.

20. To put it in other words, if the dispute involves grant of erroneous pay scale or non grant of revised pay scale as provided for in Schedule C of the Rules of 1981 as amended from time to time, writ petition under Article 226 would be maintainable. However, if there is a dispute as to whether the teacher/employee is indeed entitled to salary or not on account of absence, etc., the

statutory duty under Rule 7 read with Schedule C of Rules of 1981 cannot be enforced by filing a writ petition. The entitlement to salary in such a case would depend upon first recording a finding that the teacher/employee has in fact worked for a particular period and has become entitled to salary. Such a finding, obviously cannot be recorded in writ jurisdiction.

21. In the present case, as indicated hereinabove, there is serious dispute as to whether the petitioner has been present during the relevant period. Therefore, the petitioner cannot invoke writ jurisdiction of this Court for deciding the disputed question of fact.

22. In the result, we hold that the present petition is not maintainable and deserves to be dismissed. The petitioner however, will have the liberty to file appropriate proceedings before the Court of competent jurisdiction in respect of the cause of action, if any. We make it clear that while deciding the issue of maintainability of the petition, we have not gone into the merits of the claim of the petitioner and all contentions raised in that regard are kept open.

23. The petition accordingly is dismissed without any order as to costs. Rule is discharged.

[SANDEEP V. MARNE, J.]

[MANGESH S. PATIL, J.]

bsb/Aug. 22