

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

WRIT PETITION NO. 15280 OF 2017

Neha D/o Suryakant Bhosale,
Age; 31 years, Occ; Service,
R/o; JBPC Bank Colony,
in front of Bethel Church,
Ramnagar, Jalna.

...PETITIONER

V E R S U S

1. The State of Maharashtra,
Through its Secretary,
Department of School Education,
Mantralaya-32.
2. The Deputy Director of Education,
Aurangabad Division, Aurangabad.
3. The Education Officer (Primary),
Zilla Parishad, Jalna.
4. John Wilson Education Society,
Mumbai.
Through its Secretary
Wilson College, Girgaum Chaupati
Mumbai 400 007.
5. Dr.Fraser Boy's Primary School,
Jalna - 431203, Tq. & Dist. Jalna
Through it's Head Mistress.
6. C. T.M.K. Gujrathi Primary School,
Jalna Tq. & Dist. Jalna,
Through its Head Master.

...RESPONDENTS

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 Advocate for the petitioner : Mr.Ramesh I. Wakade
 AGP for the Respondent Nos. 1 & 2 : Mrs. Vaishali N. Patil (Jadhav)
 Advocate for Respondent No. 3 : Mr.K.G. Salunke
 Advocate for Respondent No. 5 : Mr.S.S. Chillarge h/f Mr. V.G. Sakolkar
 Advocate for Respondent No. 6 : Mr. Pradeep Salunke h/f Mr. Sunil B.
 Kakade

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

**RESERVED DATE : 04.10.2022
 PRONOUNCEMENT DATE : 14.10.2022**

JUDGMENT : [PER : SANDEEP V. MARNE, J.]

1. Rule. Made returnable forthwith. With the consent of the learned Advocates for the respective parties, heard finally at the stage of admission.
2. Having been rendered surplus on 29.06.2013, Petitioner is aggrieved by her non absorption. She has sought following prayers in the petition :

"B. By issuing appropriate writ of mandamus or any other appropriate writ, order of direction in like nature, respondents may kindly be directed to absorb the petitioner being surplus teacher on the place of retired employee Smt. S.S.Ghorpade (Assistant Teacher) in the School of respondent No. 5 to release the regular salary to petitioner as per law and such exercise of absorption, may pleased be done within a period of 4 weeks.

C. By issuing appropriate writ of mandamus or any

other appropriate writ, order or direction in like nature, respondents may kindly be directed to make a payment of salary of petitioner since September, 2015 till this date in accordance with law as expeditiously as possible.

D. By issuing appropriate writ or mandamus or any other appropriate writ, order or direction in like nature, respondent No. 3-Education Officer, Z.P. Jalna may kindly be directed to take strict action against respondent No. 5 & 6 with regards to non absorption of petitioner and submit the compliance report in the present matter accordingly."

3. The petitioner was appointed on 26.11.2007 in Dr. Fraser Boy's Primary School, Jalna, (respondent No. 5-School) which is managed by respondent No. 4 Society. An approval to her appointment was granted vide order dated 17.01.2008 w.e.f. 26.11.2007. By communication dated 29.06.2013, she along with three other Assistant Teachers were informed that they were rendered surplus in accordance with the staffing pattern for the year 2013-14. They were further directed to report the duties in the Respondent No. 5-School.

4. By the order dated 27.01.2014, the Education Officer (Primary) Zilla Parishad, Jalna ordered absorption of the petitioner in C.T.M.K. Gujrati Primary School, Jalna (respondent No. 6-school). Accordingly, respondent No. 5-School relieved her w.e.f. 01.02.2014. However, respondent No. 6-school did not permit her to join duties, which fact was brought to the notice of the Education Officer by her

vide letter dated 01.02.2014. Therefore, the Education Officer wrote to respondent No. 5-School to submit her salary bills till further orders. Accordingly by order dated 26.09.2011, respondent No. 4-Management directed her to perform teaching duties in Douglas Girls' Primary School, Bethal, Jalna w.e.f. 27.09.2014. In the meantime she made correspondence with the Education Officer about the refusal by respondent No. 6-School to permit her to join duties. The Education Officer once again directed respondent No. 4-management to pay wages to her through the offline mode, till her absorption in the other School.

5. The petitioner was once again relieved by respondent No. 5-School, to join respondent No. 6-School by letter dated 16.01.2015, but it appears that respondent No. 6 once again refused to permit her to join. Therefore by letter dated 17.08.2015, respondent No. 5-School directed her to continue performing duties in respondent No. 5-School.

6. It is the case of respondent Nos. 4 and 5 that from September, 2015 the petitioner failed to attend the duties in respondent No. 5-School. This fact was brought to the notice of Education Officer by letter dated 18.09.2015. She was once again called upon to attend the duties by letter dated 16.10.2015 and on account of her failure to do so, intimation to that effect was given to the Education Officer by letter dated 07.01.2016. After long hiatus, she made representation dated 02.12.2017 to that School for payment of salary.

7. One of the Assistant Teachers in respondent No. 5-School Smt. S.S.Ghorpade retired on superannuation on 30.11.2017. The petitioner, therefore, made representation dated 04.12.2017 for her absorption against that vacancy. Immediately thereafter, the petitioner filed a petition seeking absorption against the vacancy created on account of retirement of Smt. S.S. Ghorpade.

8. Appearing for the petitioner Mr. Wakade, the learned Counsel relies upon the provisions of Sub Rule 4 and 5 of the Rule 26 of the Maharashtra Employees of Private School (Conditions of Service) Regulation Rules 1981 (for short "MEPS Rules") to contend that the petitioner has a right to seek absorption against the vacant post created on account of retirement of Smt. S.S. Ghorpade. He submits that despite willing to work, respondent No.5-School has prevented her from attending duties. He places reliance on representation dated 03.08.2018 and endorsement thereon by the Headmistress of respondent 5-School, to claim that she was prevented from performing duties. He therefore, submits that the petitioner is entitled to be paid salary from September, 2015. Alternatively, Mr. Wakade submits that one Smt. S.V. Gaikwad, who was also rendered surplus and who is junior to her in the combined seniority list of Assistant Teachers has been absorbed in Daglas Girls' Primary School, Bethel. He submits that the petitioner had prior claim of absorption against the vacant post in that School, against which Smt. Gaikwad has been absorbed.

9. Per Contra, Mr. Chillarge, the learned counsel appearing for respondent Nos. 4 and 5, opposes the petition by contending that there is no post available for the petitioner's absorption in respondent No. 5 School. He submits that as per sanctioned staffing pattern for respondent No. 5 School, only three posts of Assistant Teacher are sanctioned during the academic years 2017-18, 2018-19, 2019-20 and 2020-21 and those said three posts are being occupied by the Assistant Teachers senior to the petitioner. He contended that the petitioner has been absconding since September, 2015 and despite being repeatedly called upon to perform the duties in respondent No. 5-School for the purpose of payment of salary, she has failed and neglected to attend the duties. He would therefore contend that she cannot be paid salary from September, 2015 onwards.

10. Mr. K.G.Salunke, learned counsel appearing for Education Officer, Zilla Parishad, Jalna also opposes the petition submitting that the petitioner is disentitled either for absorption in respondent No. 5-School or for the payment of salary from September, 2015.

11. Mr. Kakade, learned counsel appearing for respondent No. 6-School would submit that no specific prayer is sought for by the petitioner against respondent No. 6.

12. After hearing the learned Counsels for the parties at length, the judgment was reserved on 04.10.2022, The Judgment was ready to be pronounced, however, on 10.10.2022 Mr. Wakade, learned Counsel

for the petitioner has moved a praecipe before the Registry to place on record, "Reply Submission on behalf of Petitioner to the Additional Reply/Submission submitted by Respondent Nos. 4 and 5", as well as few documents and judgments.

13. We must note that when the arguments were concluded and the petition was closed for judgment, Mr. Wakade, did not express any desire to place on record the additional submissions, documents or judgments. Therefore, the judgment was made ready and was about to be pronounced. At that stage, Mr. Wakade, has chosen to file additional submissions, documents and judgments, thereby prolonging the pronouncement of the judgment, as well as making us to deal with those submissions, documents and the judgments. This practice is required to be deprecated and we deprecate it. Nonetheelse, we have dealt with the additional submissions, documents and the judgments placed on record by Mr. Wakade by praecipe dated 10.10.2022.

14. The rival contentions of the parties now fall for our consideration.

15. We first examine petitioner's prayer for absorption in respondent No. 5-School against the post vacated by Smt. S.S. Ghorpade. Mr. Wakade, has placed strenuous reliance on the provisions of Sub Rules 4 and 5 of Rule 26 of the MEPS Rules 1981, which read thus:

“(4) If the posts retrenched are revived or additional posts for the same subject are created, the Management shall, by a registered post acknowledgement due letter addressed to the employee who is retrenched and absorbed in other school, give him the first opportunity of rejoining service in the school. For this purpose, the employees shall communicate to the Management, his address and availability for the job every year before April by a letter sent by registered post acknowledgement due.

(5) The retrenched person who may have been absorbed in other school shall have an option either to get repatriated to his original school or to continue in school in which he has been absorbed.”

16. It is thus clear that Rule 26 of MEPS Rules 1981, essentially deals with retrenchment on account of abolition of post. Sub-rule 4 and 5 of Rule 26 make a special provision in the event of revival of the post or creation of additional posts in the same School from where the teacher is rendered surplus. It is, therefore, necessary that the post is revived or additional post is created in the same School, from which the concerned teacher is rendered surplus. In the instant case, the petitioner bases her claim on account of retirement of Smt. Ghorpade from respondent No. 5-School from which she was rendered surplus. The prayer is also restricted to absorption against post vacated by Smt. Ghorpade. However, Mr. Chillarge has placed on record sanctioned staffing pattern for respondent No. 5-School for the years 2017-18 to

2020-21, showing that only three posts of Assistant Teachers continued to remain sanctioned during that period. He also places on record a list of teachers in respondent No. 5 School, which indicates that despite retirement of Smt. Ghorpade, three Assistant Teachers senior to the petitioner continue to work in respondent No. 5 School. This position is not controverted by the Petitioner. Thus, there is no vacant post available for respondent No. 5-School for absorption of the petitioner. Therefore, reliance of Mr. Wakade to the provisions of Sub Rule 4 and 5 of Rule 26 is of no avail.

17. Faced with the difficulty Mr. Wakade questions absorption of Smt. S. V. Gaikwad claiming her to be junior to the petitioner in the combined seniority list of teachers in all Schools of respondent Management. It is undisputed that Smt. Gaikwad has been absorbed in Douglass Girls' Primary School Bethel and not in respondent No. 5-School. Therefore, the petitioner would have no right to claim absorption in Douglass Girls' Primary School Bethel. Even otherwise, there is no prayer sought in the petition for absorption in that School. The petitioner has not impleaded Smt. S. V. Gaikwad, nor has she challenged her absorption order. Therefore, she cannot be granted any relief in that regard.

18. Thus, the petitioner has not been able to set up any valid case for absorption in respondent No. 5-School against the vacancy created by the retirement of Smt. Gaikwad. Prayer Clause-B in the petition therefore deserves to be rejected.

19. This leaves determination of prayer clause (C) for grant of salary from September, 2015 onwards. There is no dispute to the proposition that the salary in respect of surplus teachers is to be borne by the State Government till their absorption. It is also not in dispute that on account of refusal by respondent No.6-School to absorb the petitioner, the Education Officer showed willingness to bear petitioner's salary to be paid through respondent No. 5-School. Accordingly, despite being rendered surplus, she worked with respondent Nos. 4 and 5 till August, 2015 and drew salary. Thus for drawl of salary, she had to report for duties to Respondent No.5-school. However, since September 2015 she stopped attending the duties. Her defence that she was not permitted to join duties by respondent Nos.4 and 5 since September 2015, appears to be unbelievable. As observed hereinabove, she was specifically directed to attend duties in respondent No. 5-School in order to draw the salary by communication dated 17.08.2015, receipt of which is undisputed. However, she failed to attend the duties in respondent No. 5-School without citing any specific reason. The factum of she not performing the duties in respondent No.5-School was brought to the notice of the Education Officer by the School on 18.09.2015. She was once again directed to perform the duties in respondent No. 5-School by letter dated 16.10.2015, the receipt of which is again undisputed. The petitioner herself has brought copies of both the letters dated 17.08.2015 and 16.10.2015 on record at Exh. G-1 to the petition. However, no explanation is offered by her as to why

she did not attend the duties. There is no contemporaneous correspondence made by her for about two years from August, 2015 till December 2017. After long hiatus of about 2 years, she reappeared on the scene directly on 02.12.2017, when she demanded salary, *albeit* without showing any willingness to work or raising any contention that she has been prevented from attending the duties. This leads us to believe the contention of respondent Nos. 4 and 5 that she was absconding since September, 2015.

20. Mr. Wakade has laid stress on the petitioner's letter dated 03.08.2018 and the remark of Headmistress made thereon. Referring to the said letter and the endorsement, Mr. Wakade attempted to impress upon us that the Headmistress had directed the petitioner not to attend the duties. After going through the letter dated 03.08.2018, we find that the same is not submitted for the purpose of attending duties. There is no statement in that letter that the petitioner was prevented for performing duties by respondent No. 5-School. The letter was submitted requesting absorption and for payment of salary from September, 2015. On that letter, the Headmistress made an endorsement about pendency of the present petition and that therefore no decision could be taken on the issue of absorption. Thus the letter dated 03.08.2018 or the endorsement of Headmistress made thereon do not, in any manner, show that Petitioner ever requested for joining duties or that the Headmistress refused her request.

21. We have therefore no hesitation in coming to the conclusion

that the petitioner has not performed the duties in respondent No. 5-School from September, 2015. Having remained unauthorisedly absent from duties during last 7 long years, her expectation of payment of salary without working, by bleeding public exchequer, is startling. We therefore hold her not entitled to the payment of salary from September 2015 onwards. The prayer Clause-(C) in the petition is also required to be rejected.

22. In prayer Clause (D), petitioner has sought action against respondent Nos. 5 & 6 for their failure to absorb her. We do not find any illegality being committed by respondent Nos.5 or 6 warranting any action against them. Therefore, prayer Clause (D) also deserves to be rejected.

23. By way of 'reply submission' dated 10.10.2022 Mr. Wakade, has placed on record some more information, documents and the judgments. It is contended in those submissions that few more teachers viz. Smt. S.J. Nirmal, Smt. M.R. Bharati and Smt. P.S. Ingals have also retired from service on 30.06.2018, 31.08.2018 and 30.06.2021 respectively. However, there are no pleadings in this regard and it would not be appropriate to take into consideration the said submissions in absence of any pleadings. Even otherwise, it is not clear as to whether those teachers have retired from Dr. Fraser Boy's Primary School, Jalna or not. From the list of teachers submitted by the management, it appears that those teachers were not working in Dr. Fraser Boy's Primary School, Jalna. An attempt is also made in 'Reply

Submission' to demonstrate existence of posts in Douglas Primary School, Bethal, Jalna. However, in view of specific prayer made by the petitioner to seek absorption against the post vacated by Smt. Ghorpade working in respondent No. 5 School, the vacancy position of Assistant Teachers in other Schools becomes irrelevant. Some more submissions are attempted to be made in the 'Reply Submission' filed on 10.10.2022, however, none of the submissions are supported by the pleadings on record. So far as, the absorption of Mrs. S.V. Gaikwad is concerned, the issue is already dealt by us hereinabove and the additional submissions filed by Mr. Wakade, do not persuade us to change our view.

25. Mr. Wakade, has relied upon the decision of this Court in **Meera Babulalji Modi Vs. Education Officer (Secondary), Zilla Parishad, Nagpur and Others 1998 (1) Mh. L.J. 175**. The facts in that judgment are totally distinguishable. The issue involved in that case was about the erroneous declaration of teachers as surplus and their subsequent repatriation to the original School. The judgment, therefore has no application to the facts and circumstances of the present case.

26. Consequently, we find that the petition is devoid of any merit and the same deserves to be dismissed. However, it appears that respondent Nos. 4 and 5 have not yet taken any decision severing employer-employee relationship with the petitioner. It is the petitioner

who has voluntarily remained absent since September 2015. If the services of the petitioner are not yet terminated, it would be open for her to report to duties in respondent No.5-School, if so advised. With these observations, the petition is dismissed without any orders as to the costs.

27. Rule is discharged.

(SANDEEP V. MARNE)
JUDGE

(MANGESH S. PATIL)
JUDGE

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