

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 10379 of 2022

Lions Club Akkalkot & Ors.	... Petitioners
v/s.	
State of Maharashtra & Ors.	... Respondents

Mr. Shailendra S. Kanetkar for the Petitioner.
Mrs. P. N. Diwan, AGP for the AGP-state.
Mr. Vijay Killedar for the respondent no. 2

**CORAM : NITIN W. SAMBRE &
SHARMILA U. DESHMUKH, JJ**

DATED : 6th DECEMBER, 2022

P.C.:

1. The present petition is by the management and its employee-assistant teacher questioning the legality of the order dated 25/02/2019 delivered by the Education Officer, Primary i.e. respondent no. 2 whereby the prayer of the petitioner nos. 1 & 2- Management to grant approval to the appointment of petitioner no. 3 on the post of Assistant Teacher on grant-in-aid post is rejected.

2. The facts necessary for deciding the petition are as under:

3. The petitioner no. 2-primary school is run and managed by the petitioner no. 1-public trust who has appointed petitioner no. 3 on the post of Assistant Teacher on 30/09/2011 by issued order in

form as per the rule 9 sub-rule 5 of MEPS Rules.

4. The said appointment was from OBC category on non grant-in-aid basis. The service of the petitioner no. 3 was approved on the said post by respondent no. 2-Education Officer on 19/05/2012 and as such the petitioner no. 3 was on probation.

5. The petitioner nos. 1 & 2 after having noticed that the post of Assistant Teacher in grant-in-aid category fell vacant, transferred the services of the petitioner no. 3 to the classes of grand-in-aid post from non grant-in-aid vide order dated 31/03/2015. Accordingly, a proposal was sent by the petitioner no. 2 to respondent no. 2-education officer seeking approval.

6. The petitioner no. 2 was served with show cause notice alleging that one Smt. Josana Nyandev Javanjal, Assistant Teacher who was working with one Amar Jyoti Vidya Mandir, Solapur has rendered surplus. Her services were relieved from the said school and are sought to be absorbed pursuant to the proviso to sub-section 1 of section 5 of MEPS Act. It appears that the petitioner nos. 1 & 2 have not absorbed services of surplus teacher and tried to prevail upon the respondent no. 2 to approve the services of the petitioner no. 3 on grant-in-aid category.

7. Since the mandate issued by respondent no. 2 was not

complied with, show cause notice was issued to the petitioner no. 2 intimating that the petitioner is duty bound to absorb the services of the said surplus employee and non-compliance will result in not only stoppage of the salary but also lapsing of the post.

8. The petitioner-management took a stand that the petitioner no. 3 is litigating before this Court in WP/9386/2015. It is claimed that in view of matter being subjudiced, the service of the said surplus teacher were not absorbed.

9. Having regard to the provisions of section 4A of the MEPS Act which gives powers to the Director, Education to hold or order inquiries and in view of the failure to comply with the mandate of sub-section 1 of section 5, order impugned dated 25/02/2019 came to be passed.

10. While questioning the said order, the petitioner-management so also the petitioner no. 3 would invite attention of this Court to the provisions of section 5 of the MEPS Act. It is claimed that the post of Assistant Teacher is required to be filled in as soon as possible. As such, it is claimed that the management considering the merit of the petitioner no. 3 and her devotion to duty has absorbed her services in grant-in-aid category.

11. It is claimed that the petitioner no. 3 being senior most as can be inferred from the judgment in WP/9386/2015 decided on 13/12/2018 was entitled for transfer of her services. It is also claimed by Mr. Kanetkar that the post which fell vacant was for OBC category candidate. As such, the petitioner no. 3 was accommodated against the said post. It is further claimed that the action on the part of the petitioner-management is in tune with the provisions of MEPS Act and Rules framed there under.

12. Learned AGP while opposing the prayer so also learned counsel for the respondent-education officer would support the impugned order.

13. According to them, the judgment delivered by this Court in petition preferred by petitioner no. 3 is self-explanatory. It is claimed that the seniority of the petitioner no. 3 which was *inter se* decided by consent between the petitioners will not bind respondents and respondent no. 3 were permitted to take decision independent of the aforesaid order. It is further claimed that the action of the respondents are in tune with the provisions of sub-section 1 of section 5 so also the provisions of government resolution dated 28/06/2016. As such, it is claimed that the petition is liable to be dismissed.

14. We have considered the said submissions.

15. The appointment of the petitioner no. 3 by the petitioner nos. 1 & 2 on 30/09/2011 on the post of Assistant Teacher from OBC category that to on non grant-in-aid post is an admitted fact.

16. No doubt the service of the petitioner no. 3 are transferable from non grant-in-aid post to grant-in-aid post. However, while doing such transfer i.e. while accommodating the petitioner no. 3 against the clear vacancies, the law mandates that the petitioner-management must obtain clearance from the respondents pursuant to the proviso to sub-section 1 of section 5 of the MEPS Act.

17. Admittedly, in the case in hand the petitioner nos. 1 & 2 has not obtained any such clearance viz. asking for sponsoring the candidate from the list of surplus teachers maintained with the respondent no. 2. The government resolution dated 28/06/2016 reiterate the procedure in tune with said provisions of sub-section 1 of section 5. It is required to be noted that the post which are on grant-in-aid cannot be filled in the manner as has been taken recourse by the petitioner-management by transferring the services of the petitioner no. 3 to grant-in-aid post particularly when surplus teacher was already recommended by respondent.

18. Apart from above, the fact remains that the candidature of surplus teacher was duly sponsored by the respondent no. 2 to the petitioner-management. It cannot be said from the record that the petitioner-management was not having knowledge about the surplus teacher being sponsored by the respondent no. 2 to be absorbed on the pay role of the petitioner-management.

19. It appears that the petitioner-management in spite of there being repeated communications from the respondent no. 2 has not absorbed the service of surplus teacher but has given go-by to the provision of section 5 of MEPS Act. As a sequel to above, the respondents has every right to issue show cause notice to the petitioner-management, which was duly issued. While responding to the show cause notice as to why the post be not ordered to be lapsed, the petitioner-management has tried to take shelter of pendency of WP/9386/2015 decided on 13/12/2018.

20. The said petition is decided by this Court by consent entered into between the petitioner no. 3 and petitioner nos. 1 & 2. While deciding the said writ petition, this Court was sensitive to the fact that the said consent terms will not bind the education officer and as such, has made following observations in paragraph

nos. 3, 4 & 5:

"3. The two private parties would then forward the proposal to the respondent Nos. 3 and 5, who are the repository of statutory powers and/or entrusted with public duty and all that the petitioner now requests is that they should take an expeditious decision on the proposal which is forwarded by the Management to them.

4. When the Consent Terms were perused by us with the assistance of Mr. Khairadi, we brought to his notice clause 3 thereof. We also indicated to him that such a stipulation as is recorded by two private parties in the Consent Terms drawn between themselves, would never bind a public body or a statutory authority. They cannot be directed to pass a particular order or exercise their discretion in a particular manner. Their autonomy independence and freedom to exercise the statutory power, which is discretionary in nature, cannot be thus controlled. After this was brought to the notice of Mr. Khairadi and equally Mr. C. M. Lokesh appearing on behalf of the respondent Nos. 1 and 2, it is conceded that the parties never intended to bind the statutory or public bodies with the arrangement recorded *inter-se* between them.

5. In the above circumstances, by clarifying that respondent Nos. 3 and 5 are expected to pass such orders on the pending proposals as are permissible in law, we take the Consent Terms on record."

21. As such consent entered into between the petitioner-management will not bind the respondent no. 2, which fact was well within the knowledge of the petitioner-management.

22. Apart from above, the petitioner no. 3 allegedly was

transferred to the post on grand-in-aid post, however, the said post was already lapsed, which order was not questioned by the petitioner-management till this date. As on date, there does not exist post on grant-in-aid basis against which the petitioner no. 3 can be granted approval.

23. In view of aforesaid observations, this Court is of the view that the petitioner nos. 1 & 2 have conducted themselves contrary to the provisions of sub-section 1 of section 5 of the MEPS Act and the Government Resolution dated 28/06/2016.

24. That being so, no case for interference is made out.

25. Petition as such fails and stands disposed of.

(SHARMILA U. DESHMUKH, J) (NITIN W. SAMBRE, J.)