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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2518 OF 2020

Vinayak Mittulal Jadhav

.. Petitioner

v/s.

The State of Maharashtra & Ors.

.. Respondents

....

Mr. J.G. Reddy, for the Petitioner.

Mrs. P.N. Diwan, AGP, for Respondent Nos. 1 and 3.

Mr. Vijay Killedar, for Respondent No.2.

....

CORAM: SUNIL B. SHUKRE &
G.A. SANAP, JJ.

DATE : 8 APRIL 2022

P.C:-

Heard.

2. Rule. Rule made returnable forthwith. Heard finally by consent.

3. The Petitioner was initially appointed on an unaided post and, after some period of time, the Petitioner, an Assistant Teacher, was transferred to aided post in another school run by the same

Management, i.e. Respondent Nos. 4 and 5. To such transfer of the Petitioner, the approval has not been granted by the Administrator, i.e. Respondent No.2, on the ground that the transfer has been effected without making any attempt to absorb the surplus teachers, who were already available at the relevant time. Thus, transfer has been rejected by order passed on 16 April 2019 by Respondent No.2. This order has been challenged in the present petition.

4. Learned Counsel for the Petitioner submits that the issue involved in this petition is squarely covered by the view taken by several benches of this Court, including the one which decided a bunch of petitions starting with Writ Petition No.5313 of 2017 by a common judgment delivered on 25 April 2019.

5. Learned Counsel for Respondent No.2 submits that as per the order passed by this Court in **Ramesh Baburao Rathod vs. State of Maharashtra & Ors.**¹, the Petitioner is not entitled to receive approval from Respondent No.2 to his transfer from aided to unaided post because, this is not permissible as per Government Circular dated 14 October 2013. The judgment relied upon by learned Counsel for the Petitioner categorically states that the Government Resolution dated 28 June 2016 is invalid in law because it is contrary to the provisions of the subordinate legislation as found in Rule 41 of Maharashtra

1 Writ Petition No.13938 of 2018, on 13 February 2019.

Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("M.E.P.S. Act" for short). In arriving at such a view, the Division Bench considered judgments in several other matters and found that the views expressed in those judgments were what that Division Bench has observed in paragraph 12 on the issue at hand.

6. Paragraph 12 reads as under :-

"12. It can thus be clearly seen that the Division Bench has clearly held that, Clause-3, Sub-Clauses 1 and 2 of the G.R. dated 28th June, 2016 have been held to be contrary to the view taken by the various Division Benches of this Court. We are in complete agreement with the view taken by the Division Bench at Aurangabad. It is further to be noted that the Circular dated 28th June, 2016 which provides for those instructions can hardly be said to be government instructions. It has no statutory force in law. When Rule 41 of the M.E.P.S. Act which is the subordinate legislation, the administrative decisions which run contrary to them cannot be held to be valid in law. As such, though the learned Judges of the Division Bench at Aurangabad have not considered this aspect, we find that since Clauses-1 and 2 of the said Circular, run contrary to the provisions of the subordinate legislation as found in Rule 41, the same would not be valid in law. In the result, we are convinced with the view taken by the various Division Benches and that transfer of a Teacher from unaided post to aided post is permissible in law. Equally, a transfer of an employee from unaided post to an aided post in another School run by the same Management would also be permissible in law."

7. In the instant case, the impugned order has been passed following the prohibitions made in G.R. dated 28 June 2016. Sub-clauses (1) and (2) of Clause 3 of G.R. dated 28 June 2016 show that approval to transfer of an Assistant Teacher from unaided post to aided post in a school run by the same management can be approved only if conditions stipulated in Sub-clauses (1) and (2) are made. Sub-clause (1) of the G.R. contains a condition, which lays down that the Competent Officer before granting his approval, must satisfy himself that there are no surplus teachers available in accordance with Section 5(1) of the M.E.P.S. Act, 1977. Sub-clause (2) is a condition to the effect that if at the time of making of appointment on transfer from unaided post to aided post there are available surplus teachers, approval to such appointment on transfer be not granted.

8. We have already reproduced the observations of the Division Bench made in its judgment decided on 25 April 2019 in the earlier paragraph. The conditions of the said Sub-clauses have been found by the Division Bench to be invalid in law because they are contrary to subordinate legislation like the provisions made in Rule 41 of M.E.P.S. Regulation Rules, 1981. That means that by the impugned order, Respondent No.2 could not have refused to grant approval to the appointment of the Petitioner on an aided post upon his transfer from unaided post by relying upon the G.R. dated 28 June 2016. But Respondent No.2 has done it, and in our considered view illegally.

9. Now, Respondent No.2 has come up with one more explanation in order to somehow justify his illegal action. He relies upon the order of this Court dated 13 February 2019 passed in Writ Petition No.13938 of 2018, which is marked as “A” for identification. In this order, the other bench of this Court has observed that the petitioner therein had no answer to the position emerging from a reading of the Government Circular dated 14 October 2013, which perhaps refers to a prohibition imposed upon transfer of a school employee from unaided post to aided post if surplus teachers for their absorption on aided post are available. Copy of the circular dated 14 October 2013 is not so far placed before us. There is no need to place the circular before us either. The reason being that the impugned order does not rely in any manner upon the Government Circular dated 14 October 2013 and it relies only and only upon the G.R. dated 28 June 2016 which to the extent it runs contrary to the provisions of law made in a subordinate legislation as found in Rule 41 of M.E.P.S. Regulation Rules, 1981, has been held to be invalid in law by Division Bench of this Court, which position of law has not been considered in the order dated 13 February 2019 delivered in the case of **Ramesh Baburao Rathod** (supra). Therefore, as held in the case of **Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner, New Delhi & Ors.**², now it will not be open to Respondent No.2 to supply the reasons for justifying the order, which is impugned in the present case. At the cost of repetition, we say that Government Circular dated 14

² AIR 1978 1 SCC 405

October 2013 has not been relied upon by Respondent No.2 while passing the impugned order and so now it is not open to him to invent some reason to justify his impugned order.

10. The petition is, therefore, allowed. The impugned order is hereby quashed and set aside. Respondent No.2 is directed to grant his approval to the appointment of the Petitioner on aided post within a period of four weeks. We further direct Respondent Nos. 2, 4 and 5 to ensure that salary, together with admissible arrears of salary, are paid to the Petitioner by taking necessary steps within a period of six weeks from the date of grant of approval to the appointment of the Petitioner.

11. Rule is made absolute in the above terms. No costs.

(G.A. SANAP, J.)

(SUNIL B. SHUKRE, J.)