

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.8215 OF 2022

1. Friends Social Circle, Akola
Near Mustafa Baba Dargah,
Old City Akola, through its
Secretary-Mohd. Farooque Gulam Gaus
2. Mughal National Urdhu Girls High
School, Near Mustafa Baba Dargah,
Old City Akola, through its Headmaster
3. Benazeer Khan Shahabaj Khan
Aged about 45 yrs. Occ. Service,
C/o Mughal National Urdhu Girls High
School, Near Mustafa Baba Dargah,
Old City Akola.

... Petitioners

-vs-

1. State of Maharashtra,
Through its Secretary, Education
and Sport Department, Mantralaya,
Mumbai 32
2. Education Officer (Secondary)
Zilla Parishad, Akola,
District – Akola
3. Deputy Director of Education,
Amravati Division, Amravati
4. Chief Technical Director,
National Information Center,
Pune

... Respondents

WITH
WRIT PETITION NO.770 OF 2023

1. Shri Agrasen Shikshan Sanstha,
Gondia, District-Gondia, through its
Chairman
2. Shri Hariramji Agrawal Madhyamik Vidyalaya,
Rajegaon, Tah. And District Gondia, through
its Head Mistress
3. Ku. Chhaya D/o Kisan Patle,

Aged about 52 years, Occ. Service

4. Ku. Rajeshree Govindrao Dongare,
Aged about 50 years, Occ. Service

Nos.3 and 4 C/o Shri Hariramji Agrawal
Madhyamik Vidyalaya, Rajegaon,
Tah. and District Gondia

... Petitioners

-vs-

1. State of Maharashtra,
Through its Secretary, Education
and Sport Department, Mantralaya,
Mumbai 32
2. Deputy Director of Education,
Nagpur Division, Balbharati,
in front of NIT Garden Dhantoli, Nagpur
3. The Education Officer (Secondary)
Zilla Parishad, Gondia

... Respondents

WITH
WRIT PETITION NO.810 OF 2023

1. Adarsha Shikshan Prasarak Mandal
Rajura, District Chandrapur,
through its Secretary,
2. Shree Shivaji Arts, Commerce and
Science College, Rajura, District
Chandrapur, through its Principal
3. Ku. Mangala D/o Shankarrao Shende
(Smt Mangala w/o Nandkishor Ragit),
Aged 48, Occ : Service, R/o near State Bank
of India, Rajura, Dist. Chandrapur
4. Mahesh S/o Lataru Gedam
Aged 35, Occ. Service,
C/o Adv. Arun Dhote, in front of
Trends Mall, Rajura, Dist. Chandrapur

... Petitioners

-vs-

1. State of Maharashtra,
Through its Secretary, Education
and Sport Department, Mantralaya,
Mumbai 32

2. Deputy Director of Education,
Nagpur Division, Balbharati,
in front of NIT Garden Dhantoli, Nagpur ... Respondents

WITH
WRIT PETITION NO.824 OF 2023

1. Adarsha Shikshan Prasarak Mandal
Rajura, District Chandrapur,
through its Secretary,
2. Shree Shivaji Arts, Commerce and
Science College, Rajura, District
Chandrapur, through its Principal
3. Ku. Shilpa W/o Suresh Dingalwar,
Aged 40 years, Occ. Service,
R/o Shrikrupa Colony, JB Nagar,
Dist. Chandrapur ... Petitioners

-vs-

1. State of Maharashtra,
Through its Secretary, Education
and Sport Department, Mantralaya,
Mumbai 32
2. Deputy Director of Education,
Nagpur Division, Balbharati,
in front of NIT Garden Dhantoli, Nagpur ... Respondents

Shri Ram Karode, Advocate for petitioners.

Ms N. P. Mehta, Assistant Government Pleader for respondent Nos.1 to 3 in WP/8215/2022 and WP/770/2023 and for respondent Nos.1 and 2 in WP/810/2023, and WP/824/2023.

CORAM : A. S. CHANDURKAR AND MRS VRUSHALI V. JOSHI, JJ.
DATE : July 21st 2023

Common Judgment : (Per : A. S. Chandurkar, J.)

Rule. Rule made returnable forthwith and heard the learned counsel for the parties. The question that arises for consideration in this writ petition is whether the operation of a Rule framed in accordance with the provisions of Section 16(3) of the Maharashtra Employees of Private Schools (Conditions of

Service) Regulation Act, 1977 (for short the Act of 1977) can be stayed by issuing executive instructions in the form a Circular ?

2. By virtue of Notification dated 08/06/2020 the School Education and Sports Department of the State of Maharashtra amended the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short, the Rules of 1981) after publishing the same in accordance with Section 16(3) of the Act of 1977. The said Rules are called the Maharashtra Employees of Private Schools (Conditions of Service) (Amendment) Rules, 2020. Insofar as the present challenge is concerned, the same pertains to staying the operation of Rule 41A after Rule 41 of the Rules of 1981. Rule 41A as inserted reads as under:

“ 41A : Conditions for transfer of teacher from un-aided to partially aided or aided school or division :

(1) The management may transfer a teacher from un-aided school or partially aided school to the vacant post in partially aided school or aided school or division only if the following conditions are satisfied, namely :-

(a) (i) the Management and Education Officer or Deputy Director shall, before making such transfer, verify that there is no surplus persons are available as provided in sub-section (1) of section 5 of the Act;

(ii) if the surplus persons are available, the Management shall not make such transfer ;

(b) the transfer shall not be made from the teachers of self-financed school of the Management;

(c) before making such transfer, the teacher should have

completed minimum five years continuous service in un-aided school or division or partially aided school or division of the Management;

(d) the transfer shall be made in equal or same cadre. The transfer shall not be made from primary to higher primary, higher primary to secondary or secondary to higher secondary or higher secondary to D. E1. Ed. Schools or vice-versa;

(e) the transfer shall be made only by following the seniority and as per the requirement of the subject;

(f) before making transfer of a teacher, his appointment should have been approved by the Education Officer or Deputy Director, as the case may be;

(g) the transfer shall be made on the vacant post;

(h) the transfer shall be subject to the approval of Education Officer or Deputy Director, as the case may be

(2) If the post becomes vacant due to transfer, such vacant post shall be filled as per the procedure provided in rule 9.

(3) The transferred teacher shall be eligible for scale of pay and allowances as decided by the Government, from time to time.”

The aforesaid Rule thus came into operation with the publication of Notification dated 08/06/2020 in the official Gazette.

3. On 01/04/2021 the School Education and Sports Department of the State of Maharashtra issued a Government Resolution prescribing guidelines in the matter of transfer of teaching staff from un-aided School/section to partly aided or fully aided School/section. Thereafter on 01/12/2022 the School Education and Sports Department issued a Circular in which it was stated that various

irregularities in the matter of transfer of teachers in a manner contrary to Rule 41A as well as the guidelines prescribed in Government Resolution dated 01/04/2021 had been noticed. Hence it was directed that the operation of Rule 41A (5) of the Rules of 1981 as well as the Government Resolution dated 01/04/2021 would remain stayed until further orders.

4. The services of the petitioner No.3 who was appointed as an Assistant Teacher in an un-aided division at the petitioner No.2-School came to be transferred to an aided division at the said School on the ground that the incumbent who was serving at the aided division had superannuated. This transfer was effected by relying upon Rule 41A of the Rules of 1981. A proposal seeking grant of approval to such transfer of the petitioner No.3 from the un-aided division to the aided division was submitted to the Education Officer (Secondary). Since the proposal was not being decided and the Education Officer (Secondary) was bound by the Circular dated 01/12/2022, the petitioners have challenged the said Circular dated 01/12/2022 and have sought further directions to have the proposal dated 14/07/2022 decided.

4. While issuing notice in writ petition by interim order dated 21/12/2022 the Education Officer (Secondary) was directed to consider the proposal dated 14/07/2022 in accordance with Rule 41A of the Rules of 1981 by observing that the Circular dated 01/12/2022 would not operate in derogation of Rule 41A of the Rules of 1981. Pursuant thereto, the said proposal was rejected on

19/01/2023 by the Education Officer (Secondary). By amending the writ petition, the order of rejection is also under challenge.

5. Insofar as challenge to the Circular dated 01/12/2022 by which the operation of Rule 41A of the Rules of 1981 as well as Government Resolution dated 01/04/2021 is concerned, it is submitted by Shri Ram Karode, the learned counsel for the petitioners that it is not permissible for the State Government to stay the operation of a Rule framed in exercise of power under Section 16(3) of the Act of 1977 by issuing such Circular. Placing reliance on the decision in *Dr Rajinder Singh vs. State of Punjab and ors. (2001) 5 SCC 482* it is submitted that the respondent No.1 has no authority whatsoever to issue administrative instructions dated 01/12/2022 to the extent the operation of Rule 41A is sought to be stayed. Insofar as the Government Resolution dated 01/04/2021 is concerned it is submitted that the same is issued so as to prescribe the modality for the operation of Rule 41A of the Rules of 1981. A Rule validly framed ought to operate till the same is suitably amended or deleted in the manner prescribed and its operation cannot be otherwise stayed. On this count it was submitted that Circular dated 01/12/2022 was liable to be set aside.

Insofar as the order dated 19/01/2023 passed by the Education Officer (Secondary) refusing to approve the appointment of petitioner No.3 is concerned, it was submitted that despite submission of all relevant records, the said proposal has been rejected. Considering number of students who were admitted in Class-IX and X in academic year 2020-2021, it was clear that the

post in question was existing and the appointment of petitioner No.3 was required to be approved. The various grounds mentioned in the rejection order dated 19/01/2023 were unsustainable and it was urged on the basis of documents on record, the conclusion arrived at by the Education Officer (Secondary) was without any basis. The order refusing to grant approval was therefore liable to be rejected.

6. Ms N. P. Mehta, the learned Assistant Government Pleader appearing for the respondents relied upon the affidavit filed by the Deputy Secretary, School Education and Sports Department, Mantralaya, Mumbai and submitted that the State Government had noticed that despite there being a ban on the recruitment of teaching staff, various Managements/Schools were not following the Notification dated 08/06/2020 as well as Government Resolution dated 01/04/2021 in the matter of transfer of an employee from unaided or partially aided school/division to partially aided or aided school/division respectively. It was for that reason that the Circular dated 01/12/2022 came to be issued. The object was to verify whether the terms of Government Resolution dated 08/06/2020 as well as Government Resolution dated 01/04/2021 were being followed. The report in that regard was directed to be submitted within a period of three months from issuance of Circular dated 01/12/2022. It was further stated that the State Government had stayed the operation of Rule 41A temporarily to undertake the aforesaid research/verification and to enable it to come up with relevant conditions so as to ensure that Rule 41A of the Rules of

1981 is not breached.

7. We have heard the learned counsel for the parties and we have perused the documents on record. It is not in dispute that the provisions of Rule 41A of the Rules of 1981 came to be inserted vide Notification dated 08/06/2020. The manner in which a Rule is required to be made has been prescribed by Section 16 of the Act of 1977. Under sub-section (3) of Section 16, the Rules made under the Act of 1977 are subject to condition of previous publication. The Notification dated 08/06/2020 has been published in the official Gazette. It is thus clear that Rule 41A is duly inserted in the Rules of 1981 by virtue of Notification dated 08/06/2020. Once Rule 41A is validly enacted and is placed in the Rules of 1981, the same would operate till such time it is subsequently amended or deleted as the case may be. However as long as Rule 41A continues on the statute book its operation cannot be stayed by issuing a Circular as has been done on 01/12/2022. We have not been shown any power by virtue of which the operation of a validly made Rule could be stayed by issuing a Circular by the Department of School Education and Sports. The Honourable Supreme Court in *Dr Rajinder Singh* (supra) has held that it is a settled position of law that no government order or notification or circular can be a substitute of statutory rules framed with the authority of law. It may also be stated that while it is open for the Rule making Authority to supplement an existing Rule by issuing administrative instructions, it is not permissible to supplant a validly enacted Rule through administrative instructions. The same analogy would

apply when the operation of a validly framed Rule is sought to be suspended by issuing a Circular. On this count we find that the Department of School Education and Sports was not empowered to stay the operation of Rule 41A of the Rules of 1981 by issuing Circular dated 01/12/2022.

8. As regards the Government Resolution dated 01/04/2021 is concerned, the same seeks to issue various instructions with a view to ensure proper compliance of Rule 41A of the Rules of 1981. There is no challenge to the Government Resolution dated 01/04/2021 and hence it is not necessary to consider that part of the Circular dated 01/12/2022 by which operation of Government Resolution dated 01/04/2021 has been stayed. In any event existing administrative instructions can always be modified by issuing further administrative instructions. Similarly, operation of administrative instructions can also be stayed especially when the Authority finds it necessary to undertake an exercise of re-considering such administrative instructions. Hence the Circular dated 01/12/2022 to the extent it seeks to stay the operation of Government Resolution dated 01/04/2021 does not deserve any interference.

9. Coming to the challenge to the order dated 19/01/2023 in Writ Petition No.8215/2022 refusing to approve the appointment of petitioner No.3, we find that the petitioners seek to demonstrate that the reasons that weighed with the Education Officer (Secondary) for refusing to approve such appointment are incorrect in view of the material now placed on record. We find that the

petitioners' proposal dated 14/07/2022 deserves re-consideration in the light of what has been held herein above coupled with the fact that the petitioners seek to rely upon additional material in the form of documents to indicate their entitlement to such approval. For said reason we are inclined to direct the Education Officer (Secondary) to re-consider the said proposal by giving due opportunity to the petitioners to place before him all relevant material and to take a fresh decision after hearing the petitioners.

10. In Writ Petition No.770/2023 the petitioners have challenged the orders dated 31/10/2022 and 19/01/2023 passed by the Education Officer (Secondary), Zilla Parishad, Gondia refusing to approve the transfer of petitioner Nos.3 and 4. In view of the reasons indicated herein above, the interests of justice would be served by directing re-consideration of the proposals dated 15/10/2022 and 20/12/2022 in the light of observations in this judgment.

11. In Writ Petition No.810/2023, the proposal seeking approval to the transfer of petitioner Nos.3 and 4 from partially aided section to the aided section of the School has been rejected on 19/01/2023 by the Deputy Director of Education, Nagpur Division, Nagpur in view of the Circular dated 01/12/2022. Considering the reasons assigned herein above the proposal dated 05/01/2023 deserves re-consideration in the light of aforesaid.

12. In Writ Petition No.824/2023, the proposal seeking approval to the

transfer of petitioner No.3 from the partially aided section to the aided section of the School has been rejected on 19/01/2023 by the Deputy Director of Education, Nagpur Division, Nagpur in view of the Circular dated 01/12/2022. Considering the reasons assigned herein above, the proposal dated 05/01/2023 deserves re-consideration in the light of what has been held above.

13. In the light of aforesaid discussion, the following order is passed :

- (i) The Circular dated 01/12/2022 to the extent it stays the operation of Rule 41A of the Rules of 1981 is set aside for want of power with the respondent No.1 to do so.
- (ii) Rest of the Circular dated 01/12/2022 insofar as it seeks to stay the operation of Government Resolution dated 01/04/2021 and also seeks to undertake a fresh exercise in the matter is not interfered with. The respondent No.1 is free to act in accordance with the Circular dated 01/12/2022 except to the extent specified herein above.
- (iii) In Writ Petition No.8215/2022 the order dated 19/01/2023 passed by the Education Officer (Secondary), Zilla Parishad, Akola refusing to approve the appointment of petitioner No.3 is set aside to enable re-consideration of the petitioners' proposal dated 14/07/2022.
- (iv) In Writ Petition No.770/2023 the orders dated 31/10/2022 and 19/01/2023 passed by the Education Officer (Secondary), Zilla Parishad, Gondia refusing to approve the appointment of petitioner Nos.3 and 4 are set aside to enable re-consideration of the petitioners' proposals dated

15/10/2022 and 20/12/2022.

- (v) In Writ Petition No.810/2023 the order dated 19/01/2023 passed by the Deputy Director of Education, Nagpur Division, Nagpur refusing to approve the appointment of petitioner Nos.3 and 4 are set aside to enable re-consideration of the petitioners' proposal dated 05/01/2023.
 - (vi) In Writ Petition No.824/2023 the order dated 19/01/2023 passed by the Deputy Director of Education, Nagpur Division, Nagpur refusing to approve the appointment of petitioner No.3 is set aside to enable re-consideration of the petitioners' proposal dated 05/01/2023.
 - (vii) The petitioners shall appear before the Education Officer (Secondary) or The Deputy Director of Education, Nagpur Division Nagpur as the case may be in respective writ petitions on 02/08/2023 to enable re-consideration of their respective proposals.
 - (iv) The petitioners are permitted to place before the concerned Education Officer (Secondary) or the Deputy Director of Education, Nagpur Division Nagpur all relevant documents on the basis of which the appointment of concerned petitioners is sought to be approved.
 - (v) After granting an opportunity to the petitioners, a fresh decision be taken within a period of eight weeks from the date of petitioners' appearance.
14. Rule is made partly absolute in aforesaid terms. All the Writ Petitions are disposed of. No order as to costs.

(Mrs Vrushali V. Joshi, J.)

(A. S. Chandurkar, J.)