



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

WRIT PETITION NO.309 OF 2018

1. Peoples Education Society,
Madane, Through it's Chairman,
Shri J.T. Pawar, age major,
Occ. Social Worker, R/o Shahada,
Tq. Shahada, District Nandurbar
2. Suvarna Nateshar Patil,
age 30 years, Occ. Service,
R/o Adarsh Vidyalaya & Junior College,
Mandane, Tq. Shahada, Dist. Nandurbar. Petitioners

Versus

1. The State of Maharashtra,
through it's Secretary,
School and Education Department,
Mantralaya, Mumbai – 32.
2. The Director of Education,
Maharashtra State, Pune.
3. The Education Officer (Secondary),
Nandurbar. Respondents

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Mr. V.D. Sapkal, Sr. Counsel i/b Mr. S.R. Sapkal,
advocate for petitioners.
Mr. N.S. Tekale, AGP for Respondents no.1 to 3-State.
Mr. S.R. Patil advocate for applicant in Civil application

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**WITH
CIVIL APPLICATION NO. 12770 OF 2021
IN
WRIT PETITION NO.309 OF 2018**

Bhimsingh s/o Harsing Pawara,
age 72 years, Occ. Agri & Director
of Peoples Education Society,
District Nandurbar. Applicant.

Versus

1. Peoples Education Society,
Mandane, Tq. Shahada,
District Nandurbar, through it's Chairman,
Mr. J.T. Pawar, age major, occ. Social worker,
R/o Shahada, District Nandurbar.
2. Suvarna Nateshwar Patil,
age major, occ. Service,
R/o Adarsh Vidyalaya and Junior College,
Mandane, Tq. Shahada, Dist. Nandurbar.
3. The State of Maharashtra,
Through It's Secretary,
School & Education Department,
Mantralaya, Mumbai – 32.
4. The Director of Education,
Maharashtra State, Pune.
5. The Education Officer (Secondary),
Zilla Parishad, Dhule.

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Mr. S.R. Patil advocate for applicant
Mr. V.D. Sapkal, Sr. Counsel i/b Mr. S.R. Sapkal,
advocate for Respondent nos.1 and 2
Mr. N.S. Tekale, AGP for Respondents no.3 to 5-State.

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**CORAM : SMT. VIBHA KANKANWADI &
S. G. CHAPALGAONKAR, JJ.**

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**Reserved on : 15th April, 2024.
Pronounced on : 10th June , 2024.**

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JUDGMENT :- (Per S.G.Chapalgaonkar, J.)

1. Rule. Rule made returnable forthwith. Heard finally with consent of the parties at admission stage.
2. The petitioners impugns the order dated 1.9.2018 passed by the Respondent no.3-Education Officer, thereby declining

to grant approval to the appointment of the petitioner no.2 as 'Shikshan Sevak' on the ground that unless surplus teachers are recruited, no appointment can be approved. Eventually, petitioners seeks to challenge the Government Resolution dated 2.5.2012 to the extent, it prohibits the Managements from making fresh appointments in their schools, till absorption of 100% surplus teachers as stipulated in clause no.1.8. The petitioners are also seeking directions against respondent no.3 Education officer to grant approval to the appointment of the petitioner no.2.

3. Mr. V.D. Sapkal learned senior advocate i/b Mr. S.R. Sapkal appearing for petitioners submits that petitioner no.1 Educational Institution had advertised vacancy of "Shikshan Sevak" in Daily Navrajya dated 28.10.2016. Petitioner no.2 being eligible to be appointed as Shikshan Sevak, submitted her candidature. After following due procedure, she has been appointed against clear vacancy that had occurred due to retirement of one of the teacher working in the school. Consequently, proposal seeking approval to the appointment of petitioner no.2 was forwarded to the Education Officer. Said proposal was kept pending under the pretext that Government Resolution dated 2.5.2012, prohibits recruitment of teaching and non teaching staff unless surplus teachers are absorbed. However, during pendency of this petition, respondent no.3 passed impugned order dated 1.9.2018 thereby declining to grant approval on the ground that prior permission for issuing advertisement was not obtained and there were 59 surplus teachers waiting for absorption in the District.

4. Mr. Sapkal submits that clause no.1.8 in the Government Resolution dated 2.5.2012 is inconsistent to statutory scheme. The provisions contained in the Maharashtra Employees of

Private Schools (Condition of Service Regulations) Act, 1977 and Rules 1981 (for short MEPS Act and Rules), nowhere authorizes to impose absolute bar for filling up vacancies on the establishment of private schools. Omnibus, blanket directions cannot be given without ascertaining the specific data as regards to availability of the surplus teachers in particular subject. He would therefore submit that impugned clause no.1.8 be declared as invalid being unreasonable and inconsistent of the scheme of the MEPS Rules. He would submit that the Management of the private schools are obliged to fill up the vacancies of teaching or non-teaching staff under section 5 of MEPS Act. Further Section 25 of Right of Children to Free and Compulsory Education Act, 2009, mandates schools to maintain pupil teachers ratio. He would submit that although Rule 26 of the MEPS Rules enables the Education Officer to provide for absorption of surplus teachers, there is no corresponding liability of the Management of private schools. Therefore, Rule 26 of the MEPS Rules would not supersede mandate under section 5 of the MEPS Act. He would further submit that impugned clause 1.8 of GR amounts to interference in the right of private schools to administer the institutions. In support of his contentions, he relies upon the judgment of the Hon'ble Supreme Court in case of **Brahmo Samaj Education Society and others Vs. State of West Bengal and others reported in AIR 2004 Supreme Court 3358**. Mr. Sapkal, would further place his reliance on the observations of this Court in the order dated 22.1.2014 passed in the matter of **Ramnath Dada Mote Vs. State of Maharashtra and others (PIL 197 of 2013)**.

5. Mr. N.S. Tekale, learned AGP appearing for the respondent nos.1 to 3 relying upon the affidavit-in-reply of Mr. Bhanudas Rokade, the Deputy Education Officer would submit that

proviso to Section 5(1) of MEPS Act, 1977 mandates that before filling up the vacancy, Educational Institution is under obligation to approach the Education Officer and ascertain availability of surplus teachers from the list maintained by him. In the present case, petitioner no.1 advertised the post in local newspaper de-horse the procedure contemplated in Rule 5 (1), as no permission was obtained before filling up the vacancy. He would further submit that previously virus of Government Resolution dated 2.5.2012 was challenged in writ petitions no.4168 of 2012 between Mahila Vikas Mandal, Aurangabad Vs. State of Maharashtra and others with companion matters. This Court, after considering rival submissions, partly allowed the petition and declared that clause nos.1.2, 1.3, 1.4, 1.5, 1.6 and 1.7 to be unconstitutional and upheld challenge to Government Resolution to that extent, however clause no.1.8 of Government Resolution dated 2.5.2012 remained undisturbed. The Education Officer, after considering the purport of clause no.1.8 as well as the ratio laid down by this Court in various judgments found that petitioner no.1 failed to follow the procedure prescribed, while making appointment of petitioner no.2 and despite availability of surplus teachers in the subject of Geography, her appointment is made, such an illegal appointment cannot be approved.

6. Mr. Tekale, learned AGP would further invite attention of this Court to the affidavit-in-reply filed on behalf of the respondent no.1 through Mr. Imtiyaz Kazi, Joint Secretary, School and Sports Department to contend that the Educational Institutions /Managements are obliged to take prior permission before issuing the advertisement. There were 23 surplus teachers in District at the time of appointment of petitioner no.2. Therefore, any appointment made neglecting availability of the surplus teachers is

contrary to the spirit of MEPS Act and Rules and policy of the Government promulgated under various Government Resolutions.

7. We have considered the submissions advanced by the learned advocates appearing for the respective parties. We have perused the pleadings and material placed into service. The controversy raised in the present petition revolves around the provisions of section 5 of the MEPS Act, 1977. It is apposite to refer section 5 with proviso appended Sub-section (1) thereto, which reads thus :-

Section 5- Certain obligations of Management of private schools.

(1) The Management shall, as soon as possible, fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy.

*[Provided that, unless such vacancy is to be filled in by promotion, the **Management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, 2[the Education Officer, Zilla Parishad or, as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools and in the event of such person being available, the Management shall appoint that person in such vacancy.]***

(2) Every person appointed to fill a permanent vacancy [except [Assistant Teacher (Probationary)] shall be on probation for a period of two years. Subject to the provisions of sub-sections (4) and (5), he shall, on completion of this probation period of two years, be deemed to have been confirmed :

[Provided that, every person appointed as [Assistant Teacher (Probationary)] shall be on probation for a period of three years.]

[(2A) Subject to the provisions of sub-sections (3) and (4), [Assistant Teacher (Probationary)] shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.]

(3) If in the opinion of the Management, the work or behavior of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice [or salary [or honorarium] of one month in lieu of notice].

(4) If the services of any probationer are terminated under sub-section (3) and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purposes of sub-section (2).

[(4A) Nothing in sub-section (2), (3) or (4) shall apply to a person appointed to fill a permanent vacancy by promotion or by absorption as provided under the proviso to sub-section (1).]

(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the period of appointment of such person.

8. Apparently under section 5, although Management is under obligation to fill up every permanent vacancy in the private school by appointing duly qualified persons, proviso under Sub-clause (1) stipulates that the Management shall before proceeding to fill up such vacancy, ascertain from the Education Officer, whether there is any suitable person available on the list of surplus teachers maintained by him for absorption in other schools and in event of such person being available, the Management is obliged to appoint

that person against such vacancy. Exception to the aforesaid proviso is appointment on promotion. This Court in catena of judgments considered the ambit and scope of the aforesaid provisions. The Division Bench of this Court in case of **Vasant Shikshan Prasarak Mandal through its President and others Vs. State of Maharashtra (Writ Petition No. 907 of 2016 at Aurangabad)** after considering the various pronouncements on the subject, observed in paragraph no.20 as under :-

“20. In the above backdrop, it requires no debate that for filling in available permanent vacancies, if the Management intends to select fresh hands, it is obliged to approach the Education Officer and seek information as to whether, any surplus eligible teacher is available for being accommodated on the said post and if such teachers are available, the Management is under a legal obligation to absorb them.”

9. In light of the aforesaid scheme of the Act, challenge to clause no.1.8 of the Government Resolution dated 2.5.2012 needs to be examined. Clause no.1.8 of the aforesaid Government Resolution states as under :-

१.८) अतिरिक्त ठरलेले शिक्षक १००% समायोजित झाल्याशिवाय खाजगी किंवा स्थानिक स्वराज्य संस्थांच्या शाळांमध्ये नवीन शिक्षक व शिक्षकेतर कर्मचाऱ्यांची भरती करू नये.

Translation :-

“1.8 .No new teaching and non-teaching staff shall be recruited in private and local self government schools, unless 100% of the surplus teachers are absorbed.

10. Admittedly, the Government Resolution dated 2.5.2012 was issued to deal with the specific contingency that was surfaced after the special drive was conducted in each District under the

supervision of District Collector by the State Government employees, excluding employees of Education Department for population of students in private schools; result of the verification was alarming that indicates large number of excess students being shown on the record by the private Managements with intention to appoint maximum employees and procure the Government aid under that pretext. The various clauses on aforesaid Government Resolution were subjected to challenge in a group of writ petitions before the Division Bench of this Court in Writ Petition No.4168 of 2012 with companion matters. This Court, after considering the scheme of MEPS Act, Rules framed thereunder as well as effect of Right of Children to Free and Compulsory Education Act, 2009, found that the clause nos.1.2 to 1.7 cannot be sustained and, accordingly, quashed and set aside the Government Resolution to that extent. Pertinently, this Court did not disturb impugned clause no.1.8. However, Mr. Sapkal, learned senior advocate submits that this Court has not deliberated on the said clause in the judgment. He would point out that in paragraph no.8 of the said judgment, there is cursory reference of clause no.1.8. However, validity of the same is not examined by Court.

11. We have given anxious consideration to the language of impugned clause no.1.8 which purports to prohibit the Management of private schools as well as schools operated by local Self Government from appointing teaching and non-teaching staff till 100% surplus teachers in the District are absorbed.

12. As discussed above, Rule 5(1) of MEPS Act mandates Management of the school to fill in the vacancies as soon as possible. The proviso appended thereto mandates the Managements to ascertain availability of the surplus teachers before filling the

vacancy. It is, therefore, abundantly clear that the Managements are mandated to approach the Education Officer to ascertain availability of surplus teacher before vacancies are advertised and process to fill up the post is initiated. However, the impugned clause no.1.8 goes one step further and stipulates blanket prohibition to fill up the vacancy as long as 100% surplus teachers in the District are absorbed. We find that such blanket prohibition would be inconsistent with the scheme of the Act. Although there is sufficient safeguard in the form of proviso appended to clause no.1 of section 5 mandating Managements to ascertain availability of the surplus teachers before filling the vacancy, law did not put blanket embargo to fill up vacancy till absorption of 100% surplus teachers. Once Management approaches the Education Officer, it is for him to provide information as to availability of the surplus teachers and depute such teacher for appointment on establishment of the school. While dealing with similar situation, the Division Bench of this Court observed in paragraph no.5 of the order dated 22.1.2014 passed in PIL No.197 of 2013 at principal Seat as under :-

“5. While the stand may appear to be proper in the abstract, but if the number of teachers required to be absorbed is less than the number of vacant posts, for instance if the number of teachers to be adsorbed is only 40 and the number of vacant posts is 1000, there can be no justification for not initiating recruitment process for 960 posts of teachers, keeping aside 40 posts of surplus teachers. In fact, the recruitment process takes considerable time, some time even one year, and during such time a large number of teachers are also likely to retire on superannuation. We have already observed in our order dated 16th January, 2014, in PIL 181 of 2013, that the State Government should anticipate the number of vacancies in the posts of teacher likely to arise on account of retirement on superannuation, which data would be easily available from the records with the Government authorities.”

13. In light of aforesaid observations, an order dated 6.10.2021 had been passed in this petition directing the respondent no.1 to provide a subject-wise, Zilla Parishad wise list of surplus teachers for entire state of Maharashtra as on 30.9.2021. In pursuance to said directions, a list is placed on record alongwith the additional affidavit. We find that there were hardly six surplus teachers in entire Nandurbar District as on 30.9.2021. Affidavit-in reply tendered on behalf of the respondent states that there were 429 surplus teachers when the proposal seeking approval to the appointment of petitioner no.2 was considered. However, subject-wise lists were not provided. We are, therefore of the considered view that the clause no.1.8 of the Government Resolution dated 2.5.2012 cannot be construed as absolute bar for making appointment or to fill up the vacancy till 100% surplus teachers in the District are absorbed. However to maintain its validity, it can be harmoniously read down in consonance with the proviso to section 5 (1) of MEPS Act, which mandates that the Management shall be under obligation to secure information as regards to availability of surplus teachers from the office of Education Officer, however, if no surplus teacher for relevant subject is available or no response is given by the Education Officer within the reasonable period, the Management cannot be prohibited from fulfilling their obligation to fill up the vacancy in terms of section 5(1) of the Act so also obligation to maintain Pupil-Teacher ratio under Right of Children to Free and Compulsory Education Act, 2009. Therefore, instead upsetting entire clause no.1.8, it can be harmoniously read-down, so far as it incorporates precondition of absorption of 100% surplus teachers in District before making fresh appointments of Teachers. However managements would be obliged to approach education officer to ascertain availability of surplus teacher in relevant subject.

If such availability is confirmed, management shall be obliged to accommodate such surplus teacher made available for appointment.

14. As far as the challenge to the impugned order dated 1.9.2018 is concerned, it is passed during pendency of this petition when challenge to clause no.1.8 of Government Resolution dated 2.5.2012 was raised in this petition and same was pending for our consideration. We find that petitioner no.2 has been appointed on 17.11.2016 in pursuance of the advertisement issued by petitioner no.1. It appears that she holds requisite qualification and her appointment is against a clear vacancy, however, under the pretext that there were 59 surplus teachers in Nandurbar District at Secondary level, proposal seeking approval has been declined. Similarly, the Management is alleged to have flouted the proviso to section 5 (1) of the MEPS Rules. We find that the impugned order is based on mandate of clause no.1.8 in the Government Resolution dated 2.5.2012, which needs to be read-down in tune with the section 5 (1) read with proviso appended thereto. No particulars of available surplus teachers in relevant subject in District Nandurbar as on date of petitioners appointment are made available before us. There is nothing to show that any surplus teacher was deputed against vacancy available on establishment of petitioner No. 1. It would be, therefore, appropriate to direct respondent no.2 to consider the proposal afresh seeking approval to the appointment of petitioner in light of the aforesaid observations and based on policy as on date of advertisement leading to petitioners appointment. In that view of the matter, we proceed to pass the following order.

ORDER

- i. The Writ Petition is partly allowed.

- ii. The clause no.1.8 of the Government Resolution dated 2.5.2012 shall be read-down in consonance with section 5 (1) with proviso appended thereto, meaning thereby, it shall not be construed as absolute prohibition for recruitment of teaching/non-teaching staff, till 100% surplus teachers in relevant subject, available in concerned District are absorbed, however, the Management shall be under obligation to comply with the requirements of proviso appended to sub-clause (1) of section 5 of MEPS Act.
- iii. The impugned order dated 1.9.2018 passed by the Education Officer – Respondent no.3 is hereby quashed and set aside with further directions to re-consider the proposal submitted by petitioner no.1 seeking approval to the appointment of petitioner no.2 on its own merit in light of observations made above.
- iv. The Respondent no.3 Education Officer shall take decision afresh after giving an opportunity to the petitioners to submit requisite documents and remove the deficiencies in the proposal, if any.
- v. The petitioners shall appear before the Education Officer on **24th of June, 2024.**
- vi. Final decision shall be taken and communicated to the petitioners within the period of three months from the date of petitioners appearance.

vii. Writ Petition is accordingly disposed off. Rule is made absolute in above terms.

viii. Pending civil application, if any, also stands disposed off. No order as to costs.

(S. G. CHAPALGAONKAR)
JUDGE

(SMT. VIBHA KANKANWADI)
JUDGE

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