



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

WRIT PETITION NO. 5937 OF 2024

Bhaurao Shankar Potalkar

.. Petitioner

Versus

The State of Maharashtra and others

.. Respondents

Shri Yogesh P. Deshmukh, Advocate for the Petitioner.

Shri K. N. Lokhande, A.G.P. for the Respondent Nos. 1 to 3.

**CORAM : MANGESH S. PATIL AND
SHAILESH P. BRAHME, JJ.**

DATE : 12 JULY 2024.

FINAL ORDER (*Per Shailesh P. Brahme, J.*) :-

. Heard both the sides.

2. In the present petition following reliefs are claimed :

“A) By a writ of mandamus or orders or directions in the nature of mandamus, the Hon’ble Court may kindly be pleased to direct the respondents No. 4 management to transfer the petitioner on the post of grantable division for subject of biology as Assistant Teacher/Junior College Teacher as per his experience, qualification and Seniority forthwith.

B) By a writ of mandamus or orders or directions in the nature of mandamus, the Hon’ble Court may kindly be pleased to direct the respondent No. 3 to decide the representation dated 03.05.2024 filed by the petitioner forthwith (Exhibit “A”, Page No. 21).

C) By a writ of mandamus or orders or directions in the nature of mandamus, the Hon'ble Court may kindly be pleased to direct the respondent No. 3 may kindly be directed not the sanction of approval of the any other person for the subject of Biology except petitioner on the post of grantable division of the respondent Junior College.”

3. The petitioner was appointed in the respondent No. 5/Higher Secondary School on unaided post by order dated 30.06.2013. His appointment was approved by the respondent No. 3/Deputy Director of Education for unaided post by order dated 10.11.2015. His name was incorporated in the Shalarth Pranali vide order dated 09.09.2021. In the mean time his post started receiving partial grants. Fully aided post became vacant and available for the accommodation of the petitioner. He made representation on 22.12.2023 and thereafter on 03.05.2024 requesting the respondents to transfer him from partially aided post to fully aided post. It is further grievance of the petitioner that the management proposes to fill in the vacancies by direct recruitment.

4. Learned counsel Mr. Yogesh B. Deshmukh, for the petitioner would submit that appointment of the petitioner was made after following due procedure of law and it was approved. Considering vacancy of the fully aided post, the respondent/management ought to have transferred him. He would further submit that a mandamus would lie to direct the respondent/management to issue transfer orders under Rule 41

of the Maharashtra Employees of Private Schools (Condition of Service) Regulation Rules, 1981 (for the sake of brevity and convenience hereinafter referred as to the “Rules of 1981).

5. He would further submit that it is not permissible for the management to resort to direct recruitment when petitioner is eligible for transfer. He would further submit that the action of the management is against Rule 41A(1)(e) of the Rules of 1981. It is further submitted that if a vacant post is filled in by nomination then prejudice would be caused to the petitioner, in case of retrenchment. According to him only mode available is to transfer the petitioner. He would also submit that Section 5 of the Maharashtra Employees of Private Schools (Condition of Service) Regulation Act, 1977 (for the sake of brevity and convenience hereinafter referred as to the “Act of 1977) and/or Rule 9 of the Rules of 1981 have not been amended after the amendment effected to Rule 41 vide notification dated 08.06.2020.

6. Learned Assistant Government Pleader opposes the submissions. He would submit that mandamus would not lie for direction to transfer the petitioner.

7. The facts are undisputed. Short question which falls for consideration is as to whether the mandamus would lie for directing private management to transfer an employee from partially aided post to fully aided post.

8. The respondent No. 5/school is governed by Act of 1977 and Rules of 1981. The service condition of an employee in a private school like the respondent No. 5 are regulated by the statutory provisions. Transfer of an employee from unaided or partially aided section to fully aided section within same school or in the school run by the same management is regulated by Rule 41 of the Rules of 1981. By way of notification dated 08.06.2020, Rule 41A has been incorporated. The manner in which transfer can be effected and the parameters for transfer are elaborately provided by the rules. As per Rule 41A(1) of the Rules of 1981, the transfer is permissible in case of availability of vacant post. The management is entitled to fill in such vacant post by effecting transfer in accordance with clauses (a) to (h) of Rule 41A(1) of the Rules of 1981.

9. Management of the private schools is under obligation to fill in permanent vacant posts by resorting to the procedure contemplated by Section 5 of the Act of 1977 read with Rule 9 of the Rules of 1981. Thus no sooner permanent vacant post is available, it is open for the management either to resort to Section 5(1) of the Act of 1977 read with Rule 9 or to Rule 41 and 41A of the Rules of 1981. Even a vacant post can be filled in by way of promotion also. Combined reading of above statutory provisions would disclose that it is the prerogative of the management either to fill in the vacant post by direct recruitment or by promotion or by transfer.

10. We have not been shown any statutory provision which

confers right upon an employee to claim transfer. There is difference between eligibility of an employee to be transferred and statutory right to claim transfer. In absence of right, we find it difficult to accept that mandamus would lie for effecting transfer.

11. In case the management proposes to resort to mode of transfer for filling in the vacancy, then it is mandatory to follow Rule 41 and 41A of the Rules of 1981. If there is violation of the statutory provisions, there would be a cause of action for stake holder to approach Court of law. But before effecting any transfer no right can be said to have accrued to solicit direction to transfer. In the present matter, learned counsel for the petitioner would point out clauses (c) to (h) of Rule 41A of the Rules of 1981 as an attempt to claim right to be transferred. We are afraid that this interpretation is not acceptable. If the management violates the statutory provisions, court of law can step in, but not before that. Therefore, we are of the considered view that present petition is premature and no writ can be issued against the respondent/management for transferring the petitioner.

12. We have also considered Section 4(3) of the Act of 1977 in order to search for any right conferred on an employee to seek transfer. In case the service conditions/benefits are less favourable than those provided by the rules, then affected party can approach Director seeking redressal of the grievance. The case in hand does not represent that there is violation of any service conditions/benefits yet. It is trite that the management is

obliged to pay salary to the employees working on unaided section as they are at par with employees rendering services on aided section. In case of admissibility of grants from the State, the management can have reimbursement. In that view of the matter, we do not find any cause of action for the petitioner.

13. The private management has the prerogative to administer the school, albeit, within four corners of law. The management is best judge of the suitability of the post and the person. In the absence of statutory provision no Court can impose any fetters on the absolute right of the management to fill in a vacant post, in a particular manner only. It would amount to interference in the administration of the school. Therefore, for this reason also, we are not inclined to issue any direction to the respondent/management.

14. Learned counsel for the petitioner also made submission in respect of the retrenchment of the newly recruited employees to the aided post and the prejudice that would be caused to the petitioner. This proposition is based on hypothesis. As the petitioner has no statutory right, we do not approve the submissions. He would also submit that Rule 41A of the Rules of 1981 is amended, but there is no analogous amendment to Section 5 of the Act of 1977 and Rule 9 of the Rules of 1981. So far as matters of transfer are concerned, we do not find that there is any inconsistency in amended Rule 41A with Section 5 or Rule 9. By any stretch of imagination it cannot be interpreted that in case of filling in any vacancy only mode

available would be by transfer.

15. For the reasons stated above, we find no merit in the petition. Writ petition is dismissed.

[SHAILESH P. BRAHME, J.] [MANGESH S. PATIL, J.]

bsb/July 24