



(Correction has been carried out in view of speaking to the minutes order dated 13.08.2024)

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

Writ Petition No. 8111 / 2023

Huma d/o Mohammad Bin Sairy,
Age : 38 years, Occu. Service.
R/o Old Bhaji Market, Karanja Road,
Beed.

...Petitioner

Versus

1. State of Maharashtra
Through it's Secretary,
School Education and Sports Department,
Mantralaya, Mumbai.
2. The Deputy Director of Education,
Aurangabad Division, Aurangabad.
3. The Education Officer (Secondary),
Zilla Parishad, Beed.
4. The President/Secretary,
Anjuman Ishat-E-Talim, Beed.
R/o Ashaf Nagar, Near Beed High School,
Beed.
5. The Head Master,
Milliya Girls High School & Junior College,
Beed.

..Respondents

WITH

Writ Petition No. 8136 / 2023

Amar Bin Abood Choush
Age : 33 years, Occu. Service.
R/o Shahu Nagar, Bagwan Galli,
Beed.

...Petitioner

Versus

1. State of Maharashtra
Through it's Secretary,
School Education and Sports Department,
Mantralaya, Mumbai.
2. The Deputy Director of Education,
Aurangabad Division, Aurangabad.
3. The Education Officer (Secondary),
Zilla Parishad, Beed.
4. The President/Secretary,
Anjuman Ishat-E-Taleem, Beed.
R/o Ashef Nagar, Near Beed High School,
Beed.
5. The Head Master,
Milliya Girls High School & Junior College,
Beed.

..Respondents

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Advocate for the Petitioners in Writ Petitions : Mr. Vijay A. Dhakne

A.G.P. for Respondent Nos. 1 to 3 /State : Mr. K.N. Lokhande

Advocate for Respondent No.4 and 5 : Mr. Sayyed Tauseef Yaseen

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

DATE : 11 JUNE 2024

ORAL JUDGMENT [Per Shailesh P. Brahme, J.] :

. Rule. Rule is made returnable forthwith. Heard the matter finally with the consent of both the parties.

2. Both the petitions are being decided by this common judgment as facts and circumstances are identical. They pertain to selfsame education institution and the school in question.

3. Both the petitioners are challenging rejection of proposal for approval to their transfer from unaided school to the aided school run by the same respondent no.4/Educational institution. The respondent no.4 is a minority institution running various aided schools and one unaided D.Ed. College at Beed.

4. Petitioner in Writ Petition No.8136/2023 was appointed on 01.09.2017 in unaided Milliyya Urdu D.Ed. College, Beed as Assistant Art Teacher. His appointment was approved by the respondent no.3/Education Officer vide order dated 03.10.2018. Respondent no.4/management transferred him to the respondent no.5/aided secondary and higher secondary school due to vacancy of a permanent sanctioned post. Resolution was passed on 31.08.2018 and order of transfer was issued on the same date. A proposal seeking approval to the transfer was rejected by order dated 19.05.2023 which is under challenge.

5. Petitioner in Writ Petition No.8111/2023 was appointed as Assistant Teacher on 01.12.2018 in unaided Milliyya Urdu D.Ed. College. Her appointment was approved by the Education Officer vide order dated 21.09.2019. A vacancy was created in the respondent

no.5/school due to promotion of one of the teachers. Respondent/management passed resolution on 30.09.2019 and on the same date transferred petitioner to the respondent no.5. Proposal seeking approval to the transfer of the petitioner came to be rejected by the respondent no.3/Education Officer vide order dated 19.05.2023 which is under challenge.

6. Pertinently in both the petitions, proposals seeking approval for transfers are rejected only on the ground that circular dated 28.06.2016 prohibited grant of approval if surplus teachers were available. In both the petitions, respondent no.3/Education Officer has filed affidavit-in-reply raising only plea to justify impugned orders that orders of transfers are contrary to Rule 41 (A)(1)(d) of the Maharashtra Employees of Private Schools (Conditions of Services) Regulation Act, 1977 and Rules, 1981 (hereinafter referred to as 'Rules' for the sake of brevity).

7. Learned Counsel for petitioner submits that respondent No.4/Educational Institution is a Minority Institution declared by the Competent Authority and has a special privileges as envisaged by Article 30(1) of the Constitution of India. It is further submitted that order of transfers are in-consonance with Rule 41 (5). Both the petitioners have consented for the transfers. Impugned orders are contrary to law laid down by the Division Bench in the matter of **The Canossa Society & Another Vs. The Commissioner, Social Welfare &**

Others, 2015(3) ALL MR 575. It is further contended that amended provisions of Rule 41A cannot be applied retrospectively.

8. Per-contra, learned AGP would submit that in view of provisions contained in Rule 41A(1)(d) of the Rules, transfer of the petitioners from unaided D.Ed. School to aided Higher Secondary School is prohibited.

9. Respondent No.4 and 5 support the petitioners. They have filed affidavit-in-reply reiterating that respondent no.3 is minority institution and the transfer of the petitioners are with their consent.

10. Having heard both the Counsels, we find it expedient to refer to the provisions of amended Rule 41A(1)(d) which is as follows :

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

(1)...

(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.El. Ed. Schools or vice-versa;”

11. The amendment is introduced on 08.06.2020 incorporating Rule 41A. In both the petitions, the orders of transfer were effected prior to 08.06.2020. Amended provisions of Rule 41A(1)(d) cannot be made applicable retrospectively. When the transfers were effected, they were governed by Rule 41.

12. It is not disputed in both the petitions that petitioners were willing for the transfers and obviously so because they were being

transferred from unaided school to aided school. As per Rule 41(5)(a), when an employee is willing, it is permissible for the management to effect transfer from Junior College of Education to the Secondary School subject to availability of the vacancies. We find that the transfer in question was permissible under Rule 41(5)(a). It is also not disputed that in both the petitions, permanent vacancies of sanctioned posts occurred which compelled the management to effect the transfers.

13. There is no provision in Rule 41 to import or to read the parameters of Section 5(1) of M.E.P.S. Act. It is only by amended provision of Rule 41A(1)(a), the availability of surplus persons as per Section 5(1) of the Act is to be ascertained. However as we have recorded earlier the transfer orders were effected on 31.08.2018 and 30.09.2019 respectively, therefore the amended provision will have no application. We are therefore of the considered view that reason assigned by Education Officer in rejecting the proposal is wholly unsustainable.

14. There is one more facet of the matter that is special privileges conferred by Article 30(1) of the Constitution of India. A reference is made to judgment delivered by Division Bench in the matter of The Canossa Society & Another (supra). In that case, a minority institution was directed to accommodate surplus teachers. Upholding the special privilege conferred by Article 30(1) of the Constitution of

India, impugned order was quashed. The relevant paragraphs are as follows :

“21. Adverting to the settled legal position as discussed herein above it becomes clear that a minority educational institution has a fundamental right to establish and administer an educational institution of its choice. This right encompasses several facets one of them being a right to appoint teaching and non-teaching staff. It is held that the right to appoint teaching and non-teaching staff is an integral part of a right conferred under Article 30 of the Constitution of India namely to administer a minority educational institution. Merely because aid has been granted to a minority institution it would not lose its character as a minority institution and cease to enjoy constitutional guarantee conferred on it by virtue of the provisions of Article 30 of the Constitution of India. The grant of aid would not convert a minority institution into a departmentally conducted school or a department of the Government so that its autonomy of administration of an educational institution of its choice conferred under Article 30 of the Constitution of India would stand restricted. The State would be within its right to impose only such restrictions so as to maintain standards of education and to check any kind of maladministration. However, the autonomy in regard to day to day administration of the minority institution cannot be taken away by imposing any condition or restrictions which would take away the minority character of a minority institution and infringe the Constitutional guarantee conferred by Article 30 of the Constitution of India.

22. There is merit in the submissions of the learned counsel for the petitioners. In the present case by the impugned directive dated 17.6.2011 the respondent nos. 1 to 3 have foisted upon the petitioners the appointment of the respondent no.4 who is rendered a surplus employee in view of the closure of a school situate in Nanded District. Admittedly, there is no consultation with petitioner no.2-school before such appointment is thrust upon the petitioner no.2-school. The respondent-authorities have also failed to take into consideration the fact that there is no vacancy as urged by the petitioners before the authorities, in view of the appointment of Mrs.Jyotsna Thorat who came to be appointed on 30.9.2006 and whose appointment was approved on 18.8.2007. Consequence of the impugned order issued by the respondent no.1 is that the approved appointment of Mrs.Jyotsna Thorat as validly done by the petitioner No.2-institution in exercise of its right to administer a minority educational institution is being interfered, coupled with a consequence that such valid appointment would be required to be cancelled. In our considered opinion it is impermissible for respondent nos. 1 to 3 to resort to such an action of foisting appointment of respondent no.4 on the petitioner no.1-institution as it directly infringes the fundamental right guaranteed under Article 30 (1) of the Constitution of India conferred on the petitioner no.2 institution to administer and establish petitioner no.2 school. The State authorities cannot indirectly do an act which cannot directly be done. In other words, when the State has no authority to make appointment of teaching and non-teaching staff in respect of a minority institution, even if aid has been granted, such action of making an appointment cannot be taken by directing absorption of a surplus employee. This is nothing but, making appointment of a staff member in a minority institution. The law confers no such authority and power with the State Government to thrust an employee rendered surplus in other schools to

be absorbed by a minority institution. Rule 25 A of the Maharashtra Employees of Private Schools (Conditions of Services) Rules cannot be made applicable to appoint surplus staff in a minority institution unless the minority institution is consulted and concurs for such an appointment. We, therefore have no hesitation to conclude that the impugned order dated 17.6.2011 issued by respondent no.1 is wholly arbitrary and illegal as the same infringes on the petitioner's right guaranteed under Article 30 (1) of the Constitution of India."

. We follow the ratio laid down by the coordinate bench. For that reason also, impugned orders are unsustainable.

15. Impugned orders refer to the circular dated 28.06.2016. The selfsame circular suffered criticism and was held to be contrary to substantive provision contained in Rule 41. For that purpose, our attention is invited by learned Counsel for the petitioners to the judgment rendered by the Division Bench in the matter of **Suryakant Janardan Muge Vs. State of Maharashtra and Others** in Writ Petition No.1493/2018 and connected matters. We prefer to reiterate paragraph no.17 :

"17. The question would be whether by way of an executive instructions, the powers of the management under Rule 41 of MEPS Act for transfer of an employee can be circumscribed, curtailed and eroded. Rule 41 is framed under the Rule making power of the Government as provided under Section 13 of the MEPS Rules. The MEPS Rule is piece of subordinate legislation. It is trite that, executive instructions cannot override the statutory Rules. Precisely, this has been held by the Division Bench of this Court at Principal Seat at Bombay in Writ Petition No.5313 of 2017 with connected writ petitions decided on 25.04.2019. The Division Bench in the said judgment held that :

The circular dated 28.06.2016 can hardly be said to be Government instructions. It has no statutory force in law. Rule 41 of the MEPS Act which is the subordinate legislation, the administrative decisions which run contrary to them cannot be held to be valid in law. 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.

While delivering the said judgment, the Division Bench considered the earlier judgments of this Court. Subclauses 1 and 2 of Clause 3 of the circular has already been held to be not valid in law by the Division Bench. There is no reason for us to take different view. The impugned circular as it affects the

rights of the management to transfer, as such, same is improper and does not have any enforceable status."

. Thus, we have no manner of doubt that the impugned orders are unsustainable and liable to be quashed.

16. Impugned orders in both petitions passed on 19.05.2023 by the respondent no.3/Education Officer are quashed and set aside. Both the matters are relegated to the respondent no.3/Education Officer to consider the proposal seeking approval to the transfer of the petitioners afresh on its own merits.

17. The respondent no.3 shall not assign the selfsame reasons which we have disapproved in the present judgment. He shall consider the proposal by extending opportunity to the petitioners and the management and decide it within a period of four weeks from today.

18. Both the petitions are disposed of. Rule is made absolute in above terms.

SHAILESH P. BRAHME
JUDGE

MANGESH S. PATIL
JUDGE