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1279.21 wp (1).odt

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

WRIT PETITION NO. 1279 OF 2021

Smt. Anjana d/o. Madhav Channagire
Age 39 years, Occ. Service as Assistant Teacher,
R/o. Bharat Housing Society,
Nanded Road, Latur.

.. Petitioner

Versus

1. The State of Maharashtra
Through its Secretary,
School Education and Sports Department,
Mantralaya, Mumbai.
2. The Education Officer (Primary)
Zilla Parishad, Latur,
Taluka and District Latur.
3. Latur Education Society, Latur
Through its President/Secretary,
Shahu Chowk, Nanded Road, Latur,
Taluka District Latur.
4. The Head Master,
Jawahar Primary School,
Shahu Chowk, Nanded Road,
Latur, Taluka District Latur.

.. Respondents.

Mr. V.D. Gunale, Advocate for petitioner,
Mr. P.S. Patil, AGP for respondent No.1.
Mr. U.B. Bondar, Advocate for respondent No.2.
Mr. A.M. Sabnis, Advocate for respondent Nos. 3 and 4.

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

DATE : 21st February, 2024.

JUDGMENT [S.G. CHAPALGAONKAR, J.] :-

1. Rule. Rule made returnable forthwith. Heard finally by consent of learned advocate for respective parties.

The petitioner approaches this Court under Article 226 of the Constitution of India thereby impugning the order dated 28.10.2020 passed by the respondent No.2 - Education Officer (Primary), Zilla Parishad, Latur, thereby refusing to approve her transfer from un-aided to aided post in respondent No.4 School. The petitioner seeks to issue writ of Mandamus against respondent No.2 to grant approval to her transfer.

2. The petitioner contends that she is qualified as B.A. B.Ed. In pursuance of the advertisement issued by respondent No.3 Latur Education Society, she had responded and after going through the selection process, she was appointed as Assistant Teacher with respondent No.4 w.e.f. 24.4.2013. Her services were approved on non-grant basis by the Education Officer vide order dated 31.9.2013. After successfully completing the probation period, she was granted permanent approval vide order dated 24.4.2015 in Pay Scale of Rs. 5200-20200 with Grade Pay of Rs. 2800, with continuity of service from the date of her initial appointment. On retirement of Shri S.K. Chanale, one post of Assistant Teacher on grant-in-aid division became vacant. The respondent No.3 transferred petitioner to aided post vide order dated 26.4.2020. Consequently, proposal seeking approval to her transfer was forwarded to the Education Officer, however, vide impugned order dated 28.10.2020, the respondent No.2 rejected the proposal citing reason that surplus teachers are available in Latur District and unless such teachers are absorbed, the transfer of the petitioner can not be approved. The

petitioner raises challenge to the aforesaid communication being arbitrary, and illegal.

3. The respondent No.2 Education Officer filed affidavit in reply stating that the petitioner was appointed on 5th to 7th Standard on non grant basis w.e.f. 24.4.2013. However, her services are sought to be transferred by the school authorities to 1st to 4th standards receiving grant in aid. Further, such transfer is effected without the permission from the School Education Department. There are surplus teachers available for absorption. The proposal is not in conformity with Rule 41A of the MEPS Rules.

4. Mr. V.D. Gunale, learned counsel for the petitioner submits that the petitioner is a qualified teacher. She was appointed on 24.4.2013 with respondent No.4 school on non-grant in aid basis. On completion of her probation, she was continued in service vide order dated 24.4.2015. The management transferred her vide order dated 26.4.2020 against vacancy created on account of retirement of a permanent teacher. The management has every right to transfer the employee. The amended provision of Rule 41A of the MEPS Rules has no application in the present case since said amendment is introduced in statute book w.e.f. 8.6.2020. The appointment of the petitioner is prior to introduction of such amendment which has no retrospective application.

5. Mr. U.B. Bondar, learned counsel for respondent No.2 referring to the affidavit in reply, submits that prior to introduction of amended Rule 41A, the circular dated 28.6.2016 was in operation and governing transfers of teachers. The circular also contains analogous provisions which are introduced by inserting Sec 41-A in MEPS Rules

w.e.f. from June 2020. He would, therefore, justify the impugned order rejecting approval seeking transfer of the petitioner from unaided to aided division.

6. We have considered the submissions advanced by the learned advocates on behalf for respective parties. We have perused the documents annexed alongwith the petition as well as affidavit in reply. The issue that falls for consideration is, as to whether the impugned order can be justified in light of provision of Rule 41A of the MEPS Rules, 1981 read with circular dated 28.6.2016. Pe2373rtinently, this Court in ***W.P. No. 1493 of 2018 (Suryakant Janardan Muge Vs. State of Maharashtra and others)*** dealt with the provisions of Rule 41 of the MEPS Rules and observed that the management has every right to transfer the employee from unaided to aided post and circular dated 28.6.2016 would not override the statutory right of the management conferred under Rule 41 of the MEPS Rules, 1981. Previously this Court dealt with circular dated 28.6.2016 in ***W.P. No. 5313 of 2017 at Principal Seat*** at Mumbai and observed that circular dated 28.6.2016 are the Government instructions without statutory force. Rule 41 of MEPS Rules being subordinate legislation, the administrative instructions which are not in conformity with the Rules cannot be held to be valid in law. Therefore, clauses Nos. 1 and 2 of said circular were declared as invalid.

7. In view of aforesaid authoritative pronouncements from this Court, the stand taken by the respondent No.2 relying upon the circular cannot be countenanced. Mr Bonder learned Advocate appearing for respondent No.2 further seeks to rely upon Rule 41A of MEPS Rules which read 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. El. 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..”

8. Relying upon aforesaid provision it is submitted that in case of availability as surplus teachers, the transfer of petitioner from unaided to aided division cannot be approved. However we cannot accept such submissions. Apparently, Rule 41A has been inserted by amendment w.e.f. 28.6.2020. There is no factual dispute as regards the date of transfer of the petitioner which is stated to be 26.4.2020. The petitioner is transferred before the introduction of the amended Rule 41A. It is trite law that unless the statute or Rule is specifically made retrospectively applicable, it would be applied prospectively from the date of its introduction. We could not infer anything from Rule 41A to make it retrospectively applicable. The transfer of the petitioner dated 26.4.2020 can not be governed by the said provision. Resultantly, the petitioner's transfer will have to be tested in terms of Rule 41 of the Rules as it stands on 26.4.2020. Apparently, clauses introduced under Rule 41A which restricts the transfer in case of availability of surplus teachers, could not have been made applicable to the case of the petitioner.

9. In view of the aforesaid conclusions, the impugned order cannot be sustained in law. Hence, we proceed to pass following order :-

O R D E R

- [a] The writ petition is partly allowed;
- [b] The impugned order dated 28.10.2020 passed by the respondent No.2 is hereby quashed and set aside;
- [c] The respondent No.2 Education Officer (Secondary) Zilla Parishad, Latur shall re-consider the proposal for grant of approval to the transfer of the petitioner in

the light of aforesaid observations as per provisions of Rule 41 of the MEPS Rules, 1981, as it stood on the date of Transfer.

- [d] However, it would be open for the respondent No.3 to check compliance of conditions regarding seniority and reservation roster.
- [e] Respondent No.3 shall take his decision after hearing all concern within a period of 8 weeks from the date of this order and communicate same to the petitioner.
- [f] Rule made absolute in above terms. No costs.

[S.G.CHAPALGAONKAR,J]

[SMT. VIBHA KANKANWADI, J]

grt/-