



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

WRIT PETITION NO.14956 OF 2017

1. Syeda Shahana Firdaus,
Age : 40 years, Occ. Service,
R/o Plot No. 145, National Colony,
Aurangabad, Dist. Aurangabad.
 2. Zameerudding Farooqui,
Age: 42 years, Occu. Service,
R/o Plot No.6, Nagsen Colony,
Jinsi, Aurangabad,
District Aurangabad.
- ..Petitioner

Versus

1. The State of Maharashtra
through its Secretary,
School and Education Department,
Mantralaya, Mumbai-32.
 2. The Director of Technical Education,
Maharashtra State, Mumbai.
 3. Maulana Azad Education Society,
Rojabaugh, Aurangabad,
through its President.
 4. The Principal,
Kamla Nehru Polytechnic
(Pharmacy), Aurangabad,
Aurangabad.
 5. Junaid Kha s/o Sayeed Kha Pathan
Age : 31 years, Occu. Nil,
R/o Gali No.16. H3, Pir Burhan Nagar,
Workshop Corner, Nanded
- ..Respondents

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WITH
CIVIL APPLICATION NO.377 OF 2018
IN
WRIT PETITION NO.14956 OF 2017

Shaikh Sajid Shaikh Rasool,
Age 33 years, Occu. Service,
R/o. Plot No.26, Sector-L,

N-11, Near Kohinoor Masjid,
HUDCO, Aurangabad.

..Applicant

Versus

1. Syeda Shahana Firdaus,
Age : 40 years, Occ. Service,
R/o Plot No. 145, National Colony,
Aurangabad, Dist. Aurangabad.
2. Zameerudding Farooqui,
Age: 42 years, Occu. Service,
R/o Plot No.6, Nagsen Colony,
Jinsi, Aurangabad,
District Aurangabad.
3. The State of Maharashtra
through its Secretary,
School and Education Department,
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Rojabaugh, Aurangabad,
through its President.
6. The Principal,
Kamla Nehru Polytechnic
(Pharmacy), Aurangabad,
Aurangabad.

..Respondents

Mr. S. R. Barlinge, Advocate for the Petitioners.
Mr. S. K. Shirse, AGP for Respondent Nos.1 and 2.
Mr. P. S. Dighe, Advocate for Respondent Nos.3 and 4.
Mr. S. S. Kazi, Advocate for Respondent No.5.
Mr. S. V. Dixit, Advocate for the Applicant in CA.

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

**JUDGMENT RESERVED ON :- 29th FEBRUARY 2024.
JUDGMENT PRONOUNCED ON :- 18th MARCH 2024.**

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

1. Rule. Rule made returnable forthwith. With the consent of the parties, matter is taken up for final hearing at the stage of admission.

2. The petitioners have approached this Court under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus against respondent nos.3 and 4 to transfer the petitioners from unaided wing to aided wing of respondent no.4-College and award consequential benefits from the date of their respective appointments.

3. The petitioners contend that they have been appointed as Lecturers in Pharmacy at Kamla Nehru Polytechnic (Pharmacy), Aurangabad in the year 2004-2005. Their appointments have been approved by the Director of Technical Education, Maharashtra State. They are serving in the unaided wing of respondent no.4, since last decade and assumed the status of confirmed employees. The respondent no.3 is recognized as minority institution. It is registered under the Bombay Public Trust Act.

4. The petitioners further contend that their services are governed by the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act and Rules of 1981, framed thereunder. The Rules provide for the transfer of the employees from unaided to aided wings. Many such transfers are approved under the orders of this Court. According to the petitioners, considering their continuous and prolonged services and vacancies of teachers in the aided wing of respondent-Institution, the petitioners represented respondent nos.3 and 4 to transfer them against vacancies in the aided wing. However, respondent nos.3 and 4 issued an advertisement inviting candidates by way of direct recruitment. According to the petitioners, they have every

right to be considered for transfer to aided wing. The action of the respondents thereby inviting the applications for direct recruitment of the vacancies is arbitrary and detrimental to their rights.

5. The respondent nos.3 and 4 filed affidavit-in-reply and oppose the petition contending that the petitioners have no vested right to seek their transfers to aided wing. The management in its wisdom issued advertisement for direct recruitment of the qualified teachers. More than 54 candidates responded to the advertisement and 36 candidates appeared for online examination. The result of written examination communicated to the Regional Joint Director of Education. The interviews were held on 09.03.2020. The Panel consist of responsible officers/their representatives. The petitioners have also participated in the selection process. Final results are not declared in view of the interim order passed by this Court.

6. Mr. Barlinge, learned Advocate appearing for the petitioners submits that the petitioners are qualified and experienced teachers working in Kamla Nehru Polytechnic at Aurangabad and rendered unblemished valuable services. Rule 41, 41-A of the MEPS Rules, 1981 empowers management to transfer the employee from unaided to aided division. The MEPS Act and Rules framed thereunder are brought into statute book to secure the interest of the teachers against mighty management. The management is expected to exercise its powers and required to take pragmatic view in the matter of transfer of employees working in unaided wing to the aided wing. He would submit that, although the pay scale of the teachers on aided or unaided post is one and same, there are many privileges attached to the services rendered on aided post. The petitioners are deprived of such benefits. Now management has advertised the vacancies of aided posts. The petitioners could have been accommodated by transferring them against

such vacancies. He would, therefore, urge to issue Writ of Mandamus directing respondents to transfer the petitioners against such vacancies.

7. Mr. Dighe, learned Advocate appearing for respondent nos.3 and 4 would submit that the petitioners have no vested right to seek issuance of Writ of Mandamus, particularly against minority institution, privileged under Article 30 of the Constitution of India. He would submit that the petitioners have also participated in the selection process and interviewed for such vacancies. The declaration of the result is withheld due to pendency and interim order passed in this petition. Mr. Dighe, learned Advocate would place his reliance on the order of this Court in ***Writ Petition No.1451/2017*** decided on ***04.04.2019*** to contend that the teachers appointed on unaided posts have no right to seek transfer. Under statutory scheme, the discretion is left with the management to execute such transfers subject to consent of the teachers.

8. We have considered the submissions advanced on behalf of the learned Advocate appearing for the respective parties. We have gone through the record placed into service in support of such contentions. There is hardly any dispute as regards to the factual matrix of the matter. It is not in dispute that the petitioners are working as teachers with respondent no.4, since the date of their appointments and they have continuously rendered services for more than a decade. They hold necessary qualification. Their services have been approved by the competent authority. The Rule 41 of the MEPS Rules, 1981 as it exists envisaged power with the management to transfer the employees. This Court in ***Writ Petition No.1451/2017*** decided on ***04.04.2019*** elaborately considered the scope of Rule 41 of the MEPS Rules, 1981 and approved the powers of the management to transfer the teachers appointed on unaided post to aided post.

However, in present case, the question posed before us for consideration is as to whether the teachers / employees of private school have any right under the scheme of MEPS Act and Rules to seek transfer from unaided to aided post?.

9. Rule 41 and 41-A of the MEPS Rules, 1981 states as under:

“41. Transfers. -

(1) Subject to the provisions of this rule the Management conducting more than one school shall not transfer any of its employees from one school to another except on administrative grounds, promotion or at the request of the employee concerned, if it is administratively convenient to do so.

(2) Save in exceptional cases, and unless reasons are recorded in writing by the Management, such transfers shall not be effected in the middle of the term.

(3) The Management shall see that the transfers do not adversely affect the pay or pay scale of the employees concerned and that such transfer do not result into loss in the pensionary benefits as admissible to them.

(4) The expenditure on Travelling allowance and Daily allowance, if any, at the rates applicable to the Government employees of the comparable status, shall be borne by the Management. If the transfer is at the request of the employee, this expenditure shall be borne by the employee concerned. Provided that the transfer involves change of headquarters, the joining time to be allowed to an employee shall be limited to six days (excluding Sunday) and actual days of journey. Subject to this limit, the period of joining time shall be treated as "duty" for all purposes :

Provided that, an employee shall not be entitled to joining time, if transfer is effected during the vacation.

(5) Where a Management runs a secondary school or secondary schools and a Junior College of Education -

(a) Teachers in a Junior College of Education shall not be transferred to a secondary school against their will. Such transfers may, however, be made if they are at employees own requests, subject to availability of vacancies in secondary schools. In the event of such a transfer, the pay drawn by the teacher in the Junior College of Education shall not be protected. He shall be deemed to be working in a secondary school during the period he worked in the Junior College of Education, and his pay shall be accordingly refixed on his joining the secondary school.

(b) Teachers in secondary school shall not be transferred to a Junior College of Education against their will. Such transfers may, however, be made if they are at the employees' own requests, subject to the following conditions, namely :

(i) Vacancies should be available in the Junior College of Education;

(ii) The concerned employee shall retain the same place in the common seniority list; and

(iii) Their pay in the Junior College of Education shall be fixed at the same stage of pay as their existing pay or at the minimum of the scale of pay in the Junior College of Education, whichever is higher.]

[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.]”

10. The plain reading of the aforesaid provisions depicts that management is empowered to effect the transfers of the employees based on request or exigencies however, rules, no where stipulates right in favour of employees to seek transfer. Even the amended Rule 41-A opens with the words “the management may transfer”. The aforesaid provision gives discretion in favour of management to transfer the employee subject to administrative exigency. We are of the considered view that the scheme of the MEPS Act and Rules framed thereunder does not contemplate right in favour of the petitioners to seek transfer from unaided to aided post. The discretion is left to management, conducting more than one school, to transfer any of its employee from one school to another, in case of administrative exigency, promotion or request of the employee subject to administrative convenience.

11. Pertinently, respondent no.3 is recognized as minority institute and enjoys the privileges guaranteed under Article 30 of the Constitution of India. This Court in case of ***Sandeep Babasaheb Chate and Ors. Vs. Shri. Vardhaman Sthanakwasi Jain Shrawak Sangh and Ors., [Writ Petition No.1451/2017]*** disposed vide order dated **04.04.2019**, observed in paragraph no.23 thus:

“If the Government wanted to grant right to the teachers working on unaided post for transfers from unaided post to aided post, there should have been specific provision to that effect. In absence of statutory provision, the petitioners and others have no right to claim that they should be automatically transferred from unaided post to aided post of the same institute.”

12. Similarly, giving reference to the right of the minority institute under Article 30 (1) of the Constitution of India, as underlined in case of ***Modern Dental College Vs. State of M.P.***¹, this Court further observed that:

“unnecessary interference in the administration of minority institute would violate the constitutional right and it is not permissible, although there can be reasonable restrictions on such rights in order to ensure transparency, fairness and non-exploitativeness of education which is field of larger public interest.”

13. It is accordingly held that the High Court cannot issue direction under Article 226 of the Constitution of India to transfer the teachers from unaided post to aided post, particularly in case of minority institute.

14. It is trite law that the powers of Writ Court, particularly to issue Writ of Mandamus can be exercised only when the public authority fails to exercise the legal duty. The Writ of Mandamus can be issued in favour of the person, who establishes legal right in himself. Such legal duty emanates from either discharge of public duties or by operation of law. The object of issuing writ of mandamus is to prevent failure of justice. The reference can be given to the observations of the Supreme Court of India in case of ***Director of Settlements, A.P. and Others Vs. M. R. Apparao and another***². When it comes to the issuance of Writ of Mandamus against non-Governmental institute like respondent no.4, particularly, when it is recognized as minority institute, unless it is pointed that there is failure of discharge of legal duties or statutory obligations, this Court would be very slow in invoking jurisdiction under Article 226 of the Constitution of India.

1 2016 (7) SCC 353.

2 (2002) 4 SCC 638.

15. Looking to legal position as discussed above, in our view petitioners have failed to establish legal right to seek transfer from unaided to aided post, No such obligation of respondent management is discernible from provisions contained in MEPS Rules or any state policy. Writ Petition sans merit. Hence, stands dismissed.

16. In view of dismissal of the Writ Petition, pending Civil Application is disposed of.

17. Rule is discharged.

(S. G. CHAPALGAONKAR)
JUDGE

(SMT. VIBHA KANKANWADI)
JUDGE