



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO. 7976 OF 2022

Ku.Omika d/o Wasudeo Shahare,
Aged about 35 years,
Occupation – Service,
R/o. Sadak Arjuni, Tah. Sadak Arjuni,
District – Gondia

.. Petitioner

Versus

1. State of Maharashtra
Through its Secretary,
School Education Department,
Mantralaya, Mumbai – 32
2. Education Officer (Secondary),
Zilla Parishad, Gondia,
Tah. and District – Gondia
3. Mahatma Jyotiba Fule Shikshan Sanstha,
Saundad (Railway),
Through its President,
R/o. Sadak Arjuni, Tah. Sadak, Arjuni,
District – Gondia
4. Balasaheb Tirpude High School,
Shenda (Koylari),
Through its Head Master,
R/o. Sadak Arjuni, Tah. Sadak Arjuni,
District – Gondia

.. Respondents

Mr. I.N.Chaudhari, Advocate for petitioner.

Mr. A.M.Ghogre, Assistant Government Pleader for
respondent Nos.1 & 2.

Mr. R.M.Wasnik, Advocate for respondent No.3 and 4.

**CORAM : NITIN W. SAMBRE AND
ABHAY J. MANTRI, JJ.**

DATED : 05/02/2024

ORAL JUDGMENT (Per Court : Nitin W. Sambre, J.)

Rule. Rule is made returnable forthwith. Heard finally by the consent of the learned counsel appearing for the parties.

(2) The petitioner, a person belonging to reserve category i.e. Schedule Caste, possesses qualification of M.A. (English), B.Ed., D.Ed. She is also claiming to be cleared MSCIT exam.

(3) Based on the aforesaid qualification, the respondent No.3 and 4 appointed the petitioner as "Assistant Teacher" in an unaided School on 27/06/2011. The said appointment of the petitioner was since after following due process of law, the respondent No.2 – Education Officer granted approval to such appointment.

(4) The respondent No.4 – School has two vacancies, because of superannuation of two teachers on 31/12/2017. The petitioner claiming to be qualified to be accommodated on such vacancies, as such she has applied for transfer on these vacant posts. The respondent trust passed a Resolution on 26/11/2021, thereby, transferring the petitioner from unaided section to aided section of respondent No.4 – School and after the petitioner joining the duties on

29/11/2021, a proposal was submitted for grant of approval to the appointment of the petitioner. The said proposal was returned by the respondent No.2 – Education Officer, in view of having certain deficiencies. The respondent Management as such submitted a fresh proposal, the said proposal came to be rejected by the respondent No.2 vide impugned order dated 26/09/2022 on the ground that there was ban on the fresh recruitment.

(5) The contentions of the learned counsel for the petitioner are – the issue about ban on the fresh recruitment, is already dealt with and decided by the Division Bench of this Court in **Writ Petition No.8215 of 2022 (Friends Social Circle and others vs. State of Maharashtra and others)** along with connected petitions, decided on 21/07/2023. According to him, para 7 of the said judgment is squarely covered the said issue, which is sought to be canvassed. That being so, the reasons furnished in the order impugned are not sustainable.

(6) Apart from above, his contentions are – the other reasons that the petitioner's appointment was fresh one cannot be gone into, as orally submitted by the learned counsel for the petitioner in view of the settled position of law that the respondent Authorities cannot substitute the reasons by way of notings on record unless such reasons are part of the impugned order. A support is drawn from the

judgment of the Apex Court in the matter of **Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others, reported in AIR 1978 SC 851.**

(7) As against above, the learned Assistant Government Pleader would oppose the prayer based on the contentions that the appointment of the petitioner by way of transfer on the aided post is contrary to the directions issued by State Government. As such he would pray for dismissal of the present petition.

(8) We have considered the submissions. The Management has justified the appointment/transfer of the petitioner from unaided section to aided section in the respondent No.4 – School. The learned counsel for respondent No.3 – Management has drawn support from the Resolution to that effect.

(9) In the aforesaid background, if we consider the impugned communication dated 26/09/2022, what can be noticed is, the proposal forwarded by the respondent No.4 – School seeking approval to the appointment/transfer of the petitioner from unaided post to aided post, which was complete in all respect was rejected only on the ground that there was ban on fresh recruitment. The ban on the fresh recruitment has been imposed by the State Government, so as to overcome the financial hardship and also to accommodate the surplus teachers.

(10) The legality of such ban is tested by this Court in the Writ Petition No.8215 of 2022. Para 7 of the said Judgment reads thus :-

“7. We have heard the learned counsel for the parties and we have perused the documents on record. It is not in dispute that the provisions of Rule 41A of the Rules of 1981 came to be inserted vide Notification dated 08/06/2020. The manner in which a Rule is required to be made has been prescribed by Section 16 of the Act of 1977. Under sub-section (3) of Section 16, the Rules made under the Act of 1977 are subject to condition of previous publication. The Notification dated 08/06/2020 has been published in the official Gazette. It is thus clear that Rule 41A is duly inserted in the Rules of 1981 by virtue of Notification dated 08/06/2020. Once Rule 41A is validly enacted and is placed in the Rules of 1981, the same would operate till such time it is subsequently amended or deleted as the case may be. However as long as Rule 41A continues on the statute book its operation cannot be stayed by issuing a Circular as has been done on 01/12/2022. We have not been shown any power by virtue of which the operation of a validly made Rule could be stayed by issuing a Circular by the Department of School Education and Sports. The Honourable Supreme Court in Dr Rajinder Singh (supra) has held that it is a settled position of law that no government order or notification or circular can be a substitute of statutory rules framed with the authority of law. It may also be stated that while it is open for the Rule making Authority to supplement an existing Rule by issuing administrative instructions, it is not permissible to supplant a validly enacted Rule through administrative instructions. The same analogy would apply when the operation of a validly framed Rule is sought to be suspended by issuing a Circular. On this count we find that the Department of School Education and Sports was not empowered to stay the operation of Rule 41A of the Rules of 1981 by issuing Circular dated 01/12/2022.”

(11) The Division Bench of this Court as such has held that the ban imposed by executive fiat cannot override the statutory provisions and such ban cannot be considered as an impediment in the matter of consideration of the prayer of the petitioner which is also

supported by the respondent Management for grant of approval. As such the reasons on which the proposal of the petitioner for grant of approval is rejected, cannot be said to be germane to the cause.

(12) As the issue in our opinion is squarely covered by the aforesaid judgment in Writ Petition No.8215 of 2022 in the matter of ***Friends Social Circle*** (supra). In view of above, we deem it appropriate to quash and set aside the impugned communication with a direction to the respondent No.2 – Education Officer to decide the proposal afresh and communicate the decision to the petitioner within a period of **four weeks** from today.

(13) It is clarified that the respondent No.2 cannot reject the proposal of the petitioner on the ground that there was a ban on the fresh recruitment.

(14) The petition as such stands allowed in the above terms. Rule is made absolute accordingly. No costs.

[ABHAY J. MANTRI, J.]

[NITIN W. SAMBRE, J.]