
(2019) 04 BOM CK 0020

In the Bombay High Court

Case No : Writ Petition No. 1451, 5389, 9040 Of 2017

Sandeep And Ors

APPELLANT

Vs

Vardhaman Sthanakwasi Jain And Ors

RESPONDENT

Date of Decision : 04-04-2019

Acts Referred:

Maharashtra Employees Of Private Schools Act, 1977 — Section 5(1)
Maharashtra Employees Of Private Schools (Conditions Of Service) Rules, 1981 — Rule 9, 41(5)
Constitution Of India, 1950 — Article 19(1)(g), 30(1)

Citation : (2019) 04 BOM CK 0020

Hon'ble Judges : S.V. Gangapurwala, J;A.M. Dhavale, J

Bench : Division Bench

Advocate : Ajay S. Deshpande, V.N. Patil Jadhav, V. Vek Dhage, A.D. Aghav, A.S. Deshpande, M.A. Kulkarni

Judgement

A. M. Dhavale, J

1. These all writ petitions involve common question of law and facts and the parties have got these matters clubbed.
2. Rule. Rule made returnable forthwith. By consent of the parties, all these writ petitions are heard finally at the admission stage.
3. Shri Vardhaman Sthanakwasi Jain Shrawak Sangh, Jalna and Mahaveer Madhyamik Vidyalaya, Jalna are respondent Nos.1 and 2 in Writ Petition No. 1451/2017, Petitioner Nos.1 and 2 in Writ Petition No.5389/2017 and Respondent Nos.3 and 4 in Writ Petition No.9040/2017. They are herein after referred to as Vardhaman Trust and Mahaveer High School, respectively. Vardhaman Trust is running Mahaveer High School. It is claimed that it is recognized as minority Institute. It is imparting education to the students from 1st to 10th Standards. There were eight divisions in Mahaveer High School on unaided basis, while the others were on grant-in-aid basis.

4. It is not in dispute that Sandeep Babasaheb Chate and 7 others were appointed by Vardhaman Trust as Assistant Teachers in Mahaveer High School after following due process on unaided basis in 2013-14. Their appointments were approved by the Education Officer (Secondary) for probation period. Orders of appointment specifically disclose, and undertakings were also obtained from them that their appointments will be purely on unaided basis and they would not claim any benefits on grant-in-aid basis. Seven, out of eight teachers, i.e. Sandeep Babasaheb Chate and 6 others are the petitioners in Writ petition No.1451/2017.

5. By the Government Circular dated 28th June, 2016, in the light of decisions of this Court in several matters referred therein, the Government took a policy decision for approving transfer of Teachers from unaided post to aided post in the same school, on the vacancies created by way of retirement. The Circular laid down certain conditions which include that there should not be any surplus candidates available for absorption; seniority in unaided school should be followed and their appointments must have been approved by the competent authorities. In case their services on unaided basis are of less than five years, they should be ready to work as Shikshan Sevak for three years on honorarium basis. In case of Teachers who have completed five years, the Government decided to sanction grant-in-aid at 20%, 40%, 60%, 80% and 100% from first to fifth year phasewise.

6. Meanwhile, probably, under apprehension of liability under the Government Circular authorizing transfer of teachers from unaided schools to aided schools, dated 28.06.2016, Vardhaman Trust decided to fill-up the vacancies from grant-in-aid school by appointments. Vardhaman Trust accordingly issued advertisement in Dainik Lokmat dated 06.08.2016 for filling-up eight posts of Shikshan Sevak. Interviews were taken on 12th and 13th August, 2016. One of the petitioners in Writ Petition No.1451/2017, namely Sangeeta Pawar also applied for the post and appeared for the interview, but she could not succeed. Prakash Khabria and seven others were selected as Shikshan Sevak. Their proposal for approval was forwarded on 23.09.2016. The Education Officer (Secondary) Zilla Parishad, Jalna, by order dated 30.03.2017, rejected the proposal on the ground that provisions of Section 5(1) of the Maharashtra Employees of Private Schools Act, 1977 (hereinafter referred to, for brevity sake, as 'MEPS Act') were not followed and the surplus teachers were not absorbed.

7. Thereafter, Vardhaman Trust, on 12.06.2017, took a decision to close down eight divisions run on unaided basis due to financial constraints and accordingly, the unaided divisions were closed down and services of Sandeep Chate and six others, holding the post of Assistant Teachers on unaided basis were terminated from 12.06.2017.

8. Sandeep Chate and six others, have filed Writ Petition No. 1451/2017. Their contention is that they had applied for transfer from unaided schools to grant-in-aid schools and they should be absorbed on aided basis. They also claimed salary

as per pay scale from the date of their appointment till April, 2017 and thereafter regularly.

9. Subsequently, by letter dated 31.01.2019, the orders of termination of teachers from unaided school was withdrawn and they were re-posted as Assistant Teachers from the date of their termination i.e. 12.06.2017 with a rider that they would be entitled to get honorarium of Rs.8,000/- per month till the School/Management would receive grant from the Government and after receipt of 20% grant from the Government, the honorarium would be stopped.

10. Mr. Ajay Deshpande, learned Advocate for the petitioners, Sandeep Chate and six others in Writ Petition No.1451 of 2017, argued that the petitioners were duly appointed in Mahaveer High school and their appointments were approved by the Education Officer and on satisfactory completion of probation, there was further approval for their permanency and continuity by the Education Officer. As per Government Circular dated 28th June, 2016, it is the Government policy to permit teachers from unaided schools to be transferred to aided schools on the terms and conditions laid down therein. The Management and the school were bound by the Government policy. The petitioners are senior teachers having more experience and they have legitimate expectation to be absorbed on grant-in-aid basis. The learned Advocate also submitted that the petitioners are also entitled for salary as per the pay scale payable to the teachers working on grant-in-aid basis. There are several judgments in which consistent view has been taken by this Court that transfer of teachers from unaided posts to grant-in-aid posts in the school of the same Institute is legal and permissible under Rule 41(5) of the MEPS Rules.

11. Per contra, the Management and the School contended in their reply and learned Advocate Mr. Vivek Dhage representing them argued that the respondent management is a minority institute. The posts were unaided. The minority institutes have autonomy as per Article 30(1) of the Constitution. The teachers have no right to claim transfer from unaided basis to aided basis. It is the prerogative of the management. Neither the Government nor the Court can interfere with the autonomy of the minority institutes. The learned Advocate argued that as per the Rules, the petitioners are not entitled for the pay scale as per the MEPS Act. In this regard, reliance was placed on Satimbla Sharma Vs. St. Paul's Senior Secondary School, reported in 2011 AIR SCW 4643. The learned counsel argued that the management has right to fill in the vacancies on grant-in-aid basis by issuing advertisement as per section 5(1) of the MEPS Act. Due process of recruitment was followed, advertisement was issued. The petitioners could have filed application for the posts. Petitioner No.3 Sangeeta Pawar had filed application but she failed to succeed. It is submitted that only after due process, respondent Nos. 1 and 2 have appointed respondent Nos. 6 to 13 as Shikshan Sevak. Their appointment cannot be cancelled. The petitioners did not challenge the advertisement issued and now they cannot challenge the selection of respondent Nos.6 to 13.

12. Mr. Vivek Dhage, learned Advocate for respondent Nos. 6 to 13 in Writ Petition No. 1451/2017 argued on same lines. He submitted that there was no fault on the part of the respondents.

13. Writ Petition No.5389/2017 is filed by Vardhaman Trust and Mahaveer High School challenging the orders dated 30.03.2017, passed by the Education Officer (Secondary) whereby proposal for approval was rejected on the grounds that:

- (1) the petitioners herein failed to prove their minority;
- (2) there was no absorption of surplus teachers; and
- (3) procedure prescribed under section 5(1) of the MEPS Act was not followed.

14. Learned Assistant Government Pleader submitted that no certificate of minority was produced by the management and procedure for filling up the posts was not followed. Hence the Education Officer (Secondary) has rightly rejected proposal to approve the appointments.

15. Writ Petition No.9040/2017 is filed by Pradeep Rathod and Vaibhav Rathod who were appointed on unaided posts by Vardhaman Trust in Mahaveer High School in 2013-14 as Assistant Teachers. They have challenged the intimation issued by Vardhaman Trust to the Education Officer(Secondary), Zilla Parishad, Jalna about closure of unaided divisions in Mahaveer High School and consequential termination of the petitioners holding those posts. As the respondents have withdrawn the said closure of divisions and terminations, the main grievance of these petitioners does not survive.

16. Learned counsel for the respective parties have relied on number of rulings, which would be considered at the appropriate stage.

17. On the basis of the facts and circumstances referred to herein above, the points that arise for our consideration with our findings thereon are as follows:

Sr. No.

Points

Findings

1.

Whether Vardhaman Trust is a minority Institute ?

:

In the Affirmative.

2.

Whether the Teachers working on unaided basis are entitled for pay scale as per the teachers working on aided posts ?

:

In the Affirmative.

3.

Whether the Teachers working on unaided posts have fundamental right to claim transfer to aided posts in Mahaveer High School?

:

No.

4.

Whether rejection of approval to the appointment by the Education Officer is legal and proper ?

:

In the negative

5.

What order ?

:

As per final order.

18. Status of Vardhaman Trust as a minority institute has been specifically challenged. The Trust has produced a letter of Deputy Director of Education, Aurangabad dated 15.04.1985 with respect to Vardhaman Trust addressed to Education Officer, Zilla Parishad, Jalna. The letter shows that the education institute conducted by people of religion having less than 50% population should be treated as minority schools. It is stated that Vardhaman Trust is run by people of Jain religion and all the schools run by it on grant in aid basis should be treated as minority school. The Education Officer (Primary) by letter dated 23.05.1985 has issued a letter to the Secretary of Vardhaman Trust that the schools of the said institute would be treated as minority institute. We therefore hold that the minority status of respondent Trust has not been disputed by the Education Officer and Deputy Director of Education. Clause 9 of the Government Resolution dated 27.05.2013 explains that fresh certificates are not required.

19. Admittedly, Sandeep Chate and 7 others were appointed in 2013 by following due process of law as Assistant Teachers on non-grant post. There are many posts approved as grant-in-aid posts in Mahaveer school run by Vardhaman Trust. When there were vacancies, the Trust issued an advertisement and after holding interview, it selected 8 persons as Shikshan Sevak. In August, 2016, Sandeep Chate and 7 others claimed a right on the basis of Government Circular dated 28.06.2016. It is a Circular and not even Resolution. It has considered several judgments in Writ Petitions of this Court and the Education Department

was facing problem with transfers of teachers from unaided post to the aided post. In *Sandhya Ghoshalkar Vs. State* in Writ Petition No. 5258/2012 dated 12th September, 2012, the right of Management to transfer teachers from unaided post to aided post was recognized and the same view was followed by this Court in several other judgments. On carefully going through the Circular, we find that it is only enabling provision.

20. Basically, appointment of teachers on unaided post and aided post is artificial discrimination on the ground of financial constraints of the State. The right to education has been recognized as a fundamental right and the State Government is bound to provide basic education at primary level from 1st to 8th Standard to all students below 14 years of age. When the schools run by the Government or Local Bodies of the State are not in a position to provide education to all, the role of private schools come into picture. The Government after verifying several factors approves grants to private schools. Previously, many schools were on permanent no grant basis. Now by Government Resolution dated 20.07.2009, the word 'permanent' has been removed and subject to availability of funds, the unaided schools are granted grants from 5th year to 9th year @ 20%, 40%, 60%, 80% and 100%. Now, the Government Policy is to grant permission on self finance basis. Such schools are not entitled for grant at any time. In the present case, Vardhaman Trust is running schools which were having grants for some Divisions whereas there was no grant for some Divisions, but as per the Government Resolution dated 16.08.2012. Those Divisions were also entitled for grants in due course of time.

21. It is obvious the provision of grant in aid is a benefit to the Management and not to the teachers. As per the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, all the teachers are entitled for salary as per the pay scales. There is no distinction in the pay scale of teachers employed in grant in aid post and those employees on unaided post. We have discussed this in detail in Writ Petition No.10213/2018, *Anuradha Jadhav Vs. State of Maharashtra*, decided on 29.03.2019.

22. When the teachers from both, aided schools and unaided schools are getting the same salary, the teachers cannot make a claim that their salary should be paid by the Government and not by the Management. It may be practical difficulty of teachers working on non- grant post that the Management may not be paying them salary as per the Rules, but when we are considering the rights, this fact cannot be considered so as to hold that the teachers working on unaided schools have a right that too a fundamental right to claim transfers to the post on grant in aid basis from the same institute. The Government Circular dated 28th June, 2016, only enables the Management to effect transfers from unaided post to aided post. It is not the right of the teachers to claim such transfers.

23. In *Sandhya Ghoshalkar's* case and subsequent judgments, based on the said decision, the Management had effected or was willing to effect transfers from unaided to aided schools. It is not so in this case. 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 Sandeep Chate and others have no right to claim that they should be automatically transferred from unaided post to aided post of the same institute.

24. The facts disclose that public advertisement was issued for filling up the post of Shikshan Sevak on grant-in-aid post. One of the petitioners, Sangita Pawar had applied but could not succeed. The other petitioners also could have applied, but they did not apply nor they challenged the said advertisement and after some other persons were selected on the said post and started working therein as Shikshan Sevak, Sandeep Chate and others have filed the Writ Petition. Vardhaman Trust is a minority institute. It has autonomy in the matter of internal administration of the school.

25. In T.M.A. Pai Foundation Vs. State of Karnataka reported in 2002(8) SCC 481, the Constitution Bench of 11 Judges affirmed the autonomy of minority institutes and also recognized right of minority institute to carry on occupation under Article 19 (1) (g) but maintained that it is subject to reasonable restrictions. It was held in this case that the interference in the fees structure of minority institute should be minimal. Similarly, in Modern Dental College Vs. State of M.P. 2016 (7) SCC 353, the rights of minority institute under Art. 30 (1) of the Constitution were recognized and it was held that unnecessary interference in the administration of minority institute would violate the constitutional right and it is not permissible. However, it has been held that there can be reasonable restrictions on such rights in order to ensure transparency, fairness and non-exploitativeness and to prevent malpractices, exploitation, profiteering and commercialization in education which is field of larger public interest.

Similarly, in Modern School Vs. Union 2004 (5) SCC 583, the autonomy of minority institute has been recognized and it is laid down that interference in the fixation of fees structure should be minimal and only in order to avoid exploitation. In the light of these facts, in absence of statutory provisions and in absence of any right to the teachers appointed on unaided post, the jurisdiction of this Court under Art. 226 of the Constitution cannot be invoked to issue directions to the minority institute to transfer the teachers from unaided post to aided post.

26. In Writ Petition No.5389/2017, the Education Officer, Zilla Parishad by order dated 30.03.2017, refused to grant approval to the newly appointed Shikshan Sevak. The first ground for rejection is that minority status of Vardhaman Trust was not established. As discussed above, this ground cannot subsist. The 2nd ground is that there was no 100% absorption. It is now well settled that minority institute cannot be called upon to absorb the surplus teachers from other institutions against their wish. In view of Apex judgment in T.M.A. Pai Foundation, the Government has issued Government Resolution dated

13.07.2016 to that effect. Therefore, this ground is also not tenable. When these grounds do not exist, refusal to approve the appointments of Prakash Khabriya and 7 others (Petitioners in Writ Petition No.5389/2017) by Education Officer as Shikshan Sevak in Mahaveer High School is not sustainable. The writ petition, in this regard, deserves to be allowed.

27. In Writ Petition No. 9040/2017, the petitioners assailed the show cause notice dated 15.05.2017 issued by Vardhaman Trust to the Education Officer for closing down unaided divisions on financial grounds. Subsequently, on 12.06.2017, the decision was taken to close down the unaided divisions and terminate the services of the petitioners. By communication dated 31.01.2019, the Headmaster of Mahaveer High School communicated to the petitioners that the said order dated 12.06.2017 of closure of unaided divisions was recalled and the petitioners were reappointed w.e.f. 12.06.2017 on honorarium of Rs.8,000/- per month till the school would get 20 % grant from the Government. In view of these communications, the main prayer challenging the decision of the Trust to close down unaided divisions and terminate the services of the petitioners no more survives.

28. The petitioners in Writ Petition No.9040/2017 have filed Civil Application No.2685/2019 seeking amendment, to add following prayers :

(CC) The arrears of salary to the petitioner No. 2 in pay scale of Rs.9300-34800/- with Grade Pay of Rs. 4300/- w.e.f. 20.01.2014 and continuation of the same.

(DD) The arrears of salary to petitioner No. 1 in the pay scale of Rs.9300-34800/- with Grade Pay of Rs.4300/-w.e.f.02.09.2015 and continuation thereon.

(EE) Direction to the Management to transfer the petitioners from unaided divisions to aided divisions as per Government Resolution dated 28.06.2016.

Since common question of facts is involved and parties were heard, we allow the Civil Application and grant leave to the petitioners to amend the Writ Petition. The petitioners shall carry out the amendment accordingly.

29. As discussed earlier, the petitioners are not entitled for their transfer from unaided post to aided post as of right. However, the Management can transfer them from unaided post to aided post as per the Government Resolution dated 28.06.2016. Since the Management is not willing, the prayer in this regard will have to be rejected. As far as pay scales are concerned, we have already held in Anuradha Madhavrao Jadhav's case (Writ Petition No.10213/2018) that as per the contractual terms for first two years, the petitioners are entitled for honorarium @ Rs.8,000/- per month, but thereafter, on satisfactory completion of probation period, they are entitled for pay scale as per Rule 9 and Schedule 'C' which is prescribed for teachers working on both aided and unaided post and shown in the approval orders. The prayers (CC) and (DD) deserve to be allowed in this regard. The same is the case with the prayer of petitioners in Writ Petition

No. 1451/2017. They are not entitled for absorption on grant-in-aid post as of right unless the Management is willing to transfer them. However, they are entitled for honorarium for first two years and thereafter the pay scale.

30. In the light of above, we pass the following order :

O R D E R

(i) Writ Petition Nos.1451/2017 and 9040/2017 are partly allowed.

(ii) The prayers for transfer and absorption of the petitioners from unaided to aided post are rejected.

(iii) Respondent Nos. 1 and 2 (Vardhaman Trust and Mahaveer High School respectively) are directed to pay to the petitioners honorarium @ Rs. 8,000/- per month for probation period of first two years as per the terms of the contract and thereafter, as per the pay scale prescribed in Schedule 'C' and Rule 9 of the M.E.P.S. Rules.

(iv) Respondent Nos. 1 and 2 shall pay all the arrears to the petitioners within a period of four months along with interest @ 6% per annum from the date of the Petition.

(v) Writ Petition No. 5389/2017 is allowed. The order of Education Officer dated 30.03.2017 rejecting approval to the petitioners is hereby quashed and set aside.

(vi) Respondent No. 2-Education Officer(Secondary), Zilla Parishad, Jalna is directed to consider the prayer for approval afresh and decide it within a period of two months. Needless to state that he shall not reject the proposal for approval on the grounds referred in the order dated 30.03.2017.

(vii) Except Civil Application No. 2685/2019 which is allowed, all pending civil applications stand disposed of.

(viii) No order as to costs.