

**(1993) 04 BOM CK 0014**

**In the Bombay High Court**

**Case No : Writ Petition No. 2737 of 1992**

Vidya Vikas Khandekar and Others

APPELLANT

Vs

Bal Mandir Sanstha and Others

RESPONDENT

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**Date of Decision : 28-04-1993**

**Acts Referred:**

**Citation : (1993) 95 BOMLR 934 : (1993) 2 MhLj 1467 : (1993) MhLj 1467**

**Hon'ble Judges : Dhabe, J;B.V. Chavan, J**

**Bench : Division Bench**

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## **Judgement**

H.W. Dhabe, J.—These three writ petitions can be conveniently disposed of by this Common Judgment.

2. The petitioners in these writ petitions are the teachers working in the Secondary Schools of the respondent No. 1. The respondent No. 1 runs the Secondary school in Bajaj Nagar, where there are classes from 1st Standard to 10th Standard in English as well as in Marathi Medium. There is also school run by the respondent No. 1 at Neeri in Nagpur where classes from 1st Standard to Xth Standard exclusively in English medium are conducted. It is the case of the respondent No. 1 that this is not a different school, but the extension of the school in Bajaj Nagar, where there was no adequate accommodation for housing all its classes.

3. Originally, the above school of the respondent No. 1 were unaided schools. It is not in dispute that a teacher appointed in one School could be transferred to its another school by the respondent No. 1, when its above schools were unaided. It is further not in dispute that from the Academic Session 1991-92, one Section in VIIth Standard Class and all the sections in the VIIIth to Xth standard classes in Marathi Medium in the School of the respondent No. 1 at Bajaj Nagar were made admissible to 75 per cent grant by the respondents.

4. It is the case of the petitioner that by his letter dated 3-10-1992 the respondents 2 and 3 had approved the staff in the school of the respondent No. 1

at Bajaj Nagar for the Academic Session 1991-92 for the classes made admissible to grant which includes the names of the petitioners. It is thus his case that the petitioners in these writ petitions who were during the said Academic Session 1991-92 engaging the above classes to which grant-in-aid was provided by the State Government from the said Academic Sessions 1991-92 and who were also approved by the respondent No. 2 for taking the said classes were entitled to get pay and pay scale admissible to the teachers in the aided schools. However, it is his grievance that in order to deprive them of the benefit of such pay and pay scales, the respondent No. 1 immediately thereafter by the order dated 30-11-1992, transferred the petitioners in Writ Petitions No. 2737 of 1992 and 2735 of 1992 to the School at Neeri. As regards the petitioner in Writ Petition No. 167 of 1993, in Bajaj Nagar School itself, she was asked to take the VIth Standard Class and one of VIIth Standard Class which was not admissible to grants. Feeling therefore, aggrieved, the petitioner have by way of these writ petitions challenged the orders of their transfer or as the case may be the order of assignment of work so far as the petitioner in Writ Petition No. 167 of 1993 is concerned.

5. The respondent No. 1 has resisted the instant writ petitions on the ground that after the receipt of the above letter dated 3-10-1992, from the respondent No. 2, granting approval for the Academic Session 1991-92 to the staff including the petitioners to whom the regular pay and pay scale was admissible, there were representations made by the Senior Teachers in the Schools of the respondent No. 1 at Bajaj Nagar and Neeri, in which it was contended that they being senior to the petitioners in service, they being senior to the petitioners in service, they should have been granted regular pay and Pay Scale admissible to the teachers in the Aided Schools in the State. They thus strongly objected to the above approval granted by the respondent No. 2 to the teachers junior to them.

5-A. It is the case of the respondent No. 1 that after the receipt of the above representations from the senior teachers, it realised the mistake in grant of approval as per the order of the respondent No. 2 dated 3-10-1992 to the teachers including the petitioners who were at that time who the above order was issued by the respondent No. 2 on 3-10-1992 taking the classes to which the grant-in-aid was given by the State because the services of its teachers were transferable and it was just an accident that at that particular time the petitioners were engaging the above classes in question. Responding therefore, favourably, to the representations of the senior teachers, it prepared a seniority list of all the teachers in its Schools at Bajaj Nagar and Neeri and sent the same to the respondent No. 2 along with its covering letter dated 14-10-1992 requesting him to take appropriate action and to grant approval to the senior-most teachers for the purpose of the entitlement to regular pay and pay scale on the basis the said seniority list forwarded to him. It is then the case of the respondent No. 1 that the transfers of the petitioners from the classes admissible to grant-in-aid were made in view of that oral directions received from the respondent No. 2 in that regard.

6. It is thus the stand of the respondent No. 1 that since originally, the schools were unaided schools; and the services of its teachers were transferable from one School to another and since any teacher could be asked to take any of the classes in the school, the respondent No. 1 decided to apply the criteria of seniority of the teachers in its both schools for giving the benefit of regular pay and Pay scale admissible to the teachers in the aided schools in the State. It is in view of the above stand taken by the respondent No. 1 that this Court by its interim order dated 17-12-1992 directed the Education Officer i.e., the respondent No. 2 to prepare a common seniority list of all the teachers from both the schools. Accordingly, he has prepared the said seniority list, which is placed on record in the instant case. The respondent No. 1 has therefore, contended before us that in order to give the benefit of the regular pay and Pay Scale to the senior most 5 teachers on the basis of the seniority list of all the teachers in its schools, the petitioners were transferred from the classes made admissible to the grant-in-aid by the State Government so as to accommodate in the said classes five senior most teachers.

7. Apart from disputing the seniority list prepared by the respondent No. 2, the learned counsel for the petitioners has urged before us that the transfer of the petitioners from the classes made admissible to grant-in-aid by the State Government and thus depriving them of the regular pay and Pay Scale admissible to the teachers taking the said classes is illegal, because it is in breach of Rule 41 of the Maharashtra Employees of private Schools (Conditions of Service) Rules, 1981 (for short "the Rules") framed under the Maharashtra Employees of private Schools (Conditions of Service) Regulation Act, 1977 (for short "the Act"). The Principal submission canvassed under Rule 41 is that as provided in Sub-Rule (3) thereof, the Management cannot be effect transfer which would adversely affect the pay scale of the employees concerned and that such transfers should not result in loss in the pensionary benefits admissible to the teachers. It is urged that, when the grant-in-aid was made admissible to the above classes, the petitioners who were taking these classes would have been and in fact as per the letter dated 3-10-1992, were entitled to the regular pay scale and also to the pensionary benefits, which are conferred upon the employees in the Aided Schools as per Rule 70(1) of the Secondary School code. It is thus contended that the impugned transfer is in breach of Sub-rule (3) of Rule 41 of the Rules.

7-A. In view of the dispute on the question as to who should be given the regular pay and pay scale admissible as per the grant-in-aid allowed to the classes in question, it is material to see that the State Government has not uptill now released the grant-in-aid to the classes in question of the respondent No. 1 as a result of which none of the teachers in the respondent No. 1 School is getting the regular pay and pay scale admissible in the aided schools in the State.

8. Before considering the above contention raised on behalf of the petitioner, it is necessary to make it clear that as per the definition of the expression "School"

given in section 2(24) of the Act, a part of the School also falls within the scope of the said definition, if it would impart general, technical, vocational, art or, as the case may be, special education or training in any faculty or discipline or subject below the degree level. Whether the School of the respondent No. 1 at Neeri is treated as a separate School as urged on behalf of the petitioner or whether it is treated as branch, or extension, of the School of the respondent No. 1 at Bajaj Nagar, it would fall under the definition of the expression "School" referred to above. It is necessary to see that as per Section (1) of the Act, all Private Schools whether receiving any grant-in-aid from the State Government or not are governed by the provisions of the Act. If that is so, the Conditions of service laid down for the teachers in Private Schools under the Act and the rules framed thereunder would be applicable to both the Schools of the respondent No. 1 even though they were Unaided Secondary Schools.

9. Turning now to the contention whether the impugned transfers of the petitioners are illegal, it has to be seen that originally when the Schools of the respondent No. 1 were Unaided Schools, admittedly its teachers could be transferred from one school to another or could be required to take any of the classes in the Schools, which they were otherwise eligible to take. As held by us above, since the conditions of service incorporated in the rules were applicable to the teachers in the Unaided Schools also, there has to be a common seniority list of all the teachers in both the schools of the respondent no. 1 as provided in Clause 5 of Schedule F of the rules. The real difficulty has arisen when some classes in Marathi Medium were made admissible to grant-in-aid in Bajaj Nagar School by the government and only five teachers were to be approved for grant of regular pay and pay scales paid to the teachers in the Aided Schools in the State. In considering the above question, in our view, the fact that at that particular moment, a particular teachers was taking the classes in question admissible to grant-in-aid would be immaterial because of transferability of the services of the teachers. It would therefore, be necessary to evolve a proper criteria for giving the benefits of the regular pay and pay scale to the teachers who can be then posted to take classes which are admissible to grant-in-aid. The respondent No. 1, after the receipt of the representations from the senior teachers, had decided to apply the criteria of seniority of teachers for grant of benefit of the regular pay and pay scale by posting such senior teachers to take classes made admissible to grant-in-aid by the State Government. For this purpose it has prepared and sent the seniority list to the respondent No. 2 and had also transferred the petitioners elsewhere from the classes in question so that the senior teachers could be posted to take these classes and thus could get the benefit of the regular pay and pay scale admissible to the teachers in the Aided Schools in the State.

10. We do not think that looking to the transferability of the teachers in the Unaided Schools of the respondent No. 1 the criteria of seniority made applicable by the respondent No. 1 for absorbing teachers in the subsequently aided part of the School is arbitrary or irrational. According to us, the said criteria is just and

proper. It is however urged on behalf of the petitioners that the criteria of mere seniority is not enough but the teachers concerned must be qualified to take the classes in question. Although there is force in the above submission made on behalf of the petitioner, it must pertinently be seen that the criteria of seniority evolved in Schedule f of the rules itself takes care of the criteria of qualifications in determining the seniority of Head Mistress, assistant head Mistress/ Supervisors and teachers. If the transfers of the petitioners are made with a view to make posting of the teachers to take classes in question admissible to the grant-in-aid on the basis of the principle of seniority, it would not, in our view, be hit by Sub-rule (3) of Rule 41 of the Rules, because of Sub-rule (3) operates in cases where the existing pay and pay scales of the teachers in question or their pensionary benefits are adversely affected in making transfers.

11. In the instant case, it is not in dispute that in view of the representations of the senior teachers although, initially, the approval was granted by the respondent No. 2 as per his order dated 3-10-1992 to the names of the petitioners for taking the classes in question admissible to grant in aid by the State, the matter was again under consideration of the respondent No. 2 after seniority list was sent to him by the respondent No. 1 which had pointed out to him that there was mistake committed buy it in forwarding the names of the five teachers including the Head Mistress only on the basis that at that particular time they were engaging the classes in question admissible to grant-in-aid of the State Government. Since the question of approval of teachers is thus under consideration again, no grant in aid has been given to the respondent No. 1 until now. The existing pay and pay scale of the petitioner is not therefore adversely affected by the impugned transfers nor is there any question of adversely affecting the existing pensionary benefit because no pensionary benefit was available to the petitioners as teachers in the Unaided Schools of the respondent No. 1. The question really is as to who should be granted the benefit of the regular pay and pay scales or in other words who is same reason also to pensionary benefit which is granted to the teachers in the Aided Schools as per rule 70.1 of the Secondary Schools code. If the transfers of the petitioners are thus made with a view give posting to the senior most teachers in the classes admissible to grant, so that they can get the benefit of the pay and pay scales paid to the teachers in the Aided Schools in the State, it cannot be said that such transfers are within the mischief of Sub-rule (3) of Rule 41.

12. It is however, urged on behalf of the petitioners that since the names of the petitioners were sent by the respondent No. 1 to the respondent No. 2 in accordance with the requirement of Column No. 8 of the form of application for grant-in-aid given in Appendix 21 as per rule 93.1 of the Secondary Schools Code and were approved by the respondent No. 2 as per his order dated 3-10-1992, they are alone entitled to be absorbed as teachers to take the classes in question made admissible to the grant-in-aid of the State and to get the regular pay and pay scale paid to the teachers in the Aided Schools. It is emphasised that as per the said Column No. 8 of the form of application for

grant-in-aid, the scale of pay claimed for each of the teachers whose name is whom there in has to be mentioned and it is in accordance with such information and claim made for the particular teachers that the necessary salary, grant is paid by the State Government. In our view, the form of application for grant-in-aid is not decisive of the question as to who is entitled to be absorbed as teachers in the aided part of the School of the respondent No. 1. The information about the teachers supplied in this regard through mistake by the management cannot defeat the legitimate rights of the teachers in the Schools who are entitled to be absorbed in the aided part of the School. The above submission made on behalf of the petitioners cannot therefore be accepted.

13. Having thus held that the criteria of seniority as per rules can be adopted for absorption of the teachers in the aided part of the School of the respondent No. 1, the next question which needs consideration is about the dispute raised by the petitioner regarding the preparation of the seniority list by the respondent No. 2 as per our interim order dated 17-12-1992. It is clear from the submissions made on behalf of the Education Officer that he has not followed the criteria about the seniority as laid down in the rules, because according to him the rules are not applicable to the Non-aided Schools. We have held herein before that the Act and the rules are applicable to the Non-aided Schools also. As rightly pointed out by the learned Counsel for the petitioner, perusal of the seniority list prepared by the respondent No. 2 does not also actually show that it is in conformity with the principles of seniority laid down in Schedule F of the rules. It is therefore, necessary for the respondent No. 2 to prepare a fresh seniority list of the teachers including the Heads of the Schools strictly in accordance with the principles laid down in Schedule F of the rules before considering the question of grant of approval to the senior most teachers who are qualified to take the classes question to which grant-in-aid is made admissible by the State Government.

14. The learned Counsel appearing for the respondent No. 1 has brought to our notice the letter of the Education Officer dated 29-3-1993 by which he has stayed until further orders the approval of the five teachers including the Head mistress and the petitioners as per his order dated 3-10-1992. The order of approval dated 3-10-1992 is not thus given effect to by him. In the view which we have taken that the senior most teachers qualified to take the classes in question admissible to grant-in-aid should be given posting to take the said classes so that they get the benefit of the regular pay and pay scale sanctioned to the teachers in the Aided Schools in the State, the above order dated 3-10-1992 cannot also be given effect to and the respondent no. 2 has to prepare a seniority list as per rules applicable to the same under the Act and then grant approval to the teachers including the Head Mistress for being absorbed in the part of the School made admissible to grant-in-aid by the State Government.

15. It is difficult to see how the circular of the Direction of Education dated

10-11-1981 is relevant in determining seniority of the teachers in the Schools of the respondent No. 1. It may be seen that the said Circular dated 19-11-1981 contains guide lines about determination of seniority of teachers were the same management conducts aided and Non-aided Schools. At present when the teachers from amongst the Unaided Schools of the respondent No. 1 are to be assigned to the classes which are made admissible to the grant-in-aid, the seniority of the teachers in the Unaided Schools of the respondent No. 1 has to be seen which, according to Note 5 to Schedule F of the rules is a common seniority list of teachers in both the schools. However, when upon the criteria of seniority, the teachers who are qualified to take the classes in question admissible to grant-in-aid are appointed and approved, the question will arise of application of the Circular of the Deputy Director of Education dated 10-11-1981 because then the respondent No. 1 will have under its management part of the School as aided School and the rest including its branch at Neeri as Unaided School. We however make it clear that we are not pronouncing upon the legality or otherwise of the above Circular dated 10-11-1981 because for the purpose of this petition it is not necessary for us to do so.

16. The learned Counsel for the respondent No. 1 has urged before us that, if the petitioners are transferred to Non-aided Schools, because of which according to him, they would suffer pecuniary loss, it is a case of their supersession and hence the remedy of appeal before the School Tribunal under the Act is available to them. The submission thus is that because of adequate alternative remedy, we should not entertain the instant writ petition. There is no merit in the above submission made on behalf of the respondent No. 1 because the post is the same, but different pay or pay scales are given by the Management of the Schools to this post since grant-in-aid is given to some classes in the schools only. Even otherwise, the above submission is made at the fag end of the hearing after the arguments are advanced and heard on merits. After hearing parties, we do not think that this is a fit case in which we should relegate the petitioners to an alternative remedy as is urged on behalf of the respondent NO. 1 even assuming that an alternative remedy as suggested on behalf of the respondent No. 1 is available to them. The above submission made on behalf of the respondent No. 1 is thus rejected.

17. It may be seen that by our interim order, we had stayed the transfers of the petitioners till the end of this Academic Session. This factor will be taken into consideration while passing the final order in these writ petitions although we have upheld legality of the transfer orders issued by the respondent No. 1.

18. In the result the instant writ petitions shall stand disposed of in terms of the following order :-

(1) The Education Officer i.e., the respondent No. 2 is directed to prepare a fresh seniority list of all the teachers working in the Secondary Schools of the respondent No. 1 at Bajaj Nagar and at Neeri according to the criteria of seniority laid down in the Maharashtra Employees of Private Schools (Conditions of

Service) Rules, 1981 and in particular Schedule F of the said rules. The respondent No. 2 shall then, to the extent permissible under the grant-in-aid given by the State to the Classes in question viz., one Section of VIIth Standard Class and all sections of VIIIth to Xth Standard Classes in Marathi Medium from 1991-92, grant approval to the senior-most teachers who are qualified to take the above classes for their absorption in the aided part of the school of the respondent No. 1. The respondents are then directed to sanction them regular pay and pay scale which is admissible to the teachers in the aided schools in the State.

The respondent No. 2 is directed to prepare the seniority list and make necessary order of approval of teachers including the Head Mistress and their absorption in the aided part of the School of the respondent No. 1 within two months from the date of this order. The respondent No. 1 is then directed for the said purpose to supply necessary information to the respondent No. 2 within 15 days from the date of this order. If any teacher in the Schools of the respondent No. 1 desires to object to the seniority list, prepared by the respondent No. 2, he should do so within two weeks thereafter till the above process of preparation of seniority list and grant of approval is complete, it is directed that the interim stay of the orders of transfer of the petitioner granted by this Court shall continue and thereafter, if it is found that the petitioner cannot be absorbed for taking the above classes in question, the impugned orders of transfer of the petitioners can be implemented by the respondent No. 1

19. Rule made absolute in the above terms No order as to costs in these writ petition.