

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5313 OF 2017

ALONGWITH

WRIT PETITION NO. 433 OF 2019

ALONGWITH

WRIT PETITION NO. 903 OF 2018

ALONGWITH

WRIT PETITION NO. 1173 OF 2018

ALONGWITH

WRIT PETITION NO. 3128 OF 2018

ALONGWITH

WRIT PETITION NO. 3129 OF 2018

ALONGWITH

WRIT PETITION NO. 4166 OF 2018

ALONGWITH

WRIT PETITION NO. 4167 OF 2018

ALONGWITH

WRIT PETITION NO. 4168 OF 2018

ALONGWITH

WRIT PETITION NO. 4169 OF 2018

ALONGWITH

WRIT PETITION NO. 4170 OF 2018

ALONGWITH

WRIT PETITION NO. 4961 OF 2018

ALONGWITH

WRIT PETITION NO. 4962 OF 2018

ALONGWITH

WRIT PETITION NO. 5000 OF 2019

ALONGWITH

WRIT PETITION NO. 5035 OF 2017

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WRIT PETITION NO. 5309 OF 2017

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WRIT PETITION NO. 5310 OF 2017

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WRIT PETITION NO. 14572 OF 2018
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WRIT PETITION NO. 8383 OF 2017
ALONGWITH
WRIT PETITION NO. 3127 OF 2018

Miss. Devkar Dipali Kisan
and Ors.

....Petitioners

V/s.

The State of Maharashtra and Ors.

....Respondents

* * * *

Mr. N.V. Bandiwadekar a/w. Mr. S.A. Mane, Mr. Vinayak Kumbhar, Mr. Ashutosh Patil I/by. Mrs. Ashwini N. Bandiwadekar, Ms. Neha N. Bandiwadekar, Mr. M.G. Bagkar, Advocate for the petitioners.

Mr. V.M. Mali, AGP, Mr. S.B. Kalel, AGP, Mr. S.S. Panchpor, AGP, Mrs. S.D. Vyas 'B' Panel Counsel and Mrs. R.M. Shinde, AGP for respondents no.1 and 2.

Mr. Swapnil Kapadnis, Under Secretary, School Education Department, Mantralaya, Bombay is present.

CORAM : B.R. GAVAI, &

SANDEEP K. SHINDE, JJ.

Thursday, 25th April, 2019.

ORAL JUDGMENT (PER : B.R. GAVAI, J) :

1. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.
2. All these petitioners have approached this Court being aggrieved by the rejection of the proposal for transferring their services from unaided section to aided section.
3. Undisputedly, all the petitioners were initially appointed by the respective Managements against the unaided post after following the procedure prescribed by law in accordance with Section 5 of the Maharashtra Employees Private Schools Act, 1977 ("M.E.P.S. Act" for short) Undisputedly, approval for the appointment of such Teachers on aided posts were also granted by the respective Education Officers.
4. By efflux of time, either in the same School where the petitioners are working, aided post became

available on account of certain exigencies or in some cases, aided posts were available in other schools run by the same Management where the petitioners are working. As such, the petitioners were either transferred on aided posts in the same schools or in different schools under the same Management. After the transfer, the proposals for grant of approval to the transfers came to be submitted to the concerned Education Officers. However, the approvals came to be rejected relying upon the Government Resolution (G.R.) dated 25th June, 2016. As such, the petitioners have approached this Court.

5. Mr. Bandiwadekar, the learned Counsel appearing on behalf of the petitioners submitted that various Division Benches of this Court have held that, a transfer from unaided post to aided post is not a fresh appointment but is a transfer within the meaning of Rule 41 of the M.E.P.S. Rules. He further submits that, Division Benches have held that, Rule 41 sub-clause 1 would not be applicable to the said transfers. It is further submitted that

the impugned orders are not sustainable in law.

6. Mr. Mali, the learned AGP, vehemently opposes the petition. He submits that the G.R. dated 25th June, 2016 clearly provided that, prior to grant of approval for transfer from unaided section to aided section, the Education Officers are required to verify whether any surplus teachers are available and only in the event surplus teachers are not available, approval can be granted to such transfers. The learned AGP also relies upon the judgment of the Division Bench of this Court in Writ Petition No.6114 of 2018 (**Pramod s/o. Prabhakar Pokale V/s. State of Maharashtra and Ors.**) delivered by the Division Bench of this Court at Aurangabad Bench on 14th January, 2019. It will be relevant to refer to the judgment of Division Bench of this Court in Writ Petition No. 5258 of 2012 (**Ms. Sandhya Laxman Ghosalkar V/s. The State of Maharashtra & Ors.**) dated 12th September, 2012 (Coram : Hon'ble Shri. Dr. D.Y. Chandrachud, as his Lordship then was and Hon'ble Shri. A.A. Sayyed, J). The facts which came for adjudication

can be found in para-2 of the said judgment. The Division Bench in the factual position found that, once having completed the period of three years in aided section, there is no justification in granting approval only as Shikshan Sevaks and they ought to have been granted approval as Assistant Teachers.

7. Another Division Bench at Aurangabad in the case of **Dattu S/o. Bhima Thorat Versus. The State of Maharashtra and Ors.** (Coram : Hon'ble Shri. R.M. Borde and Hon'ble S.S. Shinde, JJ)) in Writ Petition No. 2960 of 2012 dated 11th October, 2012 also had an occasion to consider a similar issue. It will be relevant to refer to the following observations of the Division Bench :

“....The Education Officer has failed to make distinction so far as instant matter is concerned. Since Respondent No.2-Institution is not proposing to fill in the vacancy by appointing any new recruit, the vacancy is being filled in by transferring a Assistant teacher from the school which

does not receive grant-in-aid run by the same Institution. There is no prohibition prescribed in Government policy for effecting such transfer from unaided school to aided school. Reliance is placed on the judgment in the matter of Ms. Sandhya Laxman Ghosalkar Vs. State of Maharashtra (Writ Petition No. 5258 of 2012 and other companion matters, decided at Bombay on 12.09.2012). While dealing with an identical issue, the Division Bench of this Court has observed that there is no prohibition for transfer of an Assistant Teacher appointed in unaided school to aided school on the basis of seniority and if such transfers are effected, it is incumbent upon the Education Office to accord approval.”

. Another Division Bench of this Court again at Aurangabad in Writ Petition No. 5978 of 2014 alongwith companion matters in the case of **Sudhir Dnyandeo Gadakh and Ors. V/s. State of Maharashtra and Ors.** (Coram : Hon'ble Shri. S.V. Gangapurwala and Hon'ble Shri

A.M. Badar, JJ) decided on 9th October, 2014 also had an occasion to consider a similar petition. It will be relevant to refer to the following observations :

“We have considered the submissions canvassed by the learned counsel for the respective parties, so also, gone through the judgments. Proposal for approval to the appointments/absorption of the petitioners on the aided posts as Shikshan Sevaks has been rejected solely on the ground that at the relevant time, there was a ban on the fresh recruitment. Perusal of the Govt. Resolution in question does not reveal that the Govt. Resolution would affect the cases of the petitioners. Petitioners claim to have been appointed by following due selection process prior to the ban imposed by the State for fresh recruitment. However, they were appointed as Shikshan Sevaks on unaided posts. When vacancies arose in aided posts, they were transferred to the aided posts. It would not be a case of fresh appointment. Nothing is brought on record to show that such recourse was not permissible or there was bar for such recourse. In view of that,

the reason mentioned for rejection of approval is unsustainable.”

9. A similar view has also been taken by this Court in a bunch of petitions being Writ Petition No.11065 of 2014 alongwith companion matters in the case of **Mrs. Shilprekha Vinayak Joshi & Ors. V/s. The State of Maharashtra and Ors.** decided on 14th February, 2007 (Coram : Hon'ble Shantanu Khemkar, as his Lordship then was and Hon'ble Prakash D. Naik, J).

10. It appears that, after all these judgments were delivered, the State Government issued a Circular dated 28th June, 2016. The main Clauses of the said Circular on which the learned AGP relies are as under :

“3. Since the seniority list of the Management is common, it is necessary to take a policy decision for grant of approval to transfers made on such posts falling vacant only due to retirement. Therefore, the approval may be granted to the transfer from un-aided School of the Management to the aided School of the same Management subject to following conditions :-

1. Before making such appointment it should be ascertained by the concerned Competent Authority that there are no surplus Teachers as per the provisions of 5[1] of the MEPS Act, 1977.

2. If surplus Teacher is available at the time of appointment, then approval should not be granted to the transfer of Teacher from un-aided School to aided School.”

11. After the said Government Circular was issued, the Division Bench of this Court at Aurangabad, had an occasion to consider the impact of the said Circular in Writ Petition No. 6114 of 2018 decided on 14th January, 2019 (Coram : Hon'ble S.S. Shinde and Hon'ble K.K. Sonawane JJ) supra. It will be relevant to refer to para-16 of the said judgment :

“ The sub clause 1, 3 and 4 of Clause 3 of the Government Circular dated 28th June, 2016,

reproduced herein above, are in conformity with the discussion made herein above. But sub clause 2 of Clause 3 of the said Circular is that, till the surplus teachers are absorbed, no approval should be granted for transfer of the Assistant Teacher from unaided school to aided school of the same Institution. In our opinion said clause runs contrary to the ratio laid down in the aforesaid judgments of the High Courts.”

12. It can thus be clearly seen that the Division Bench has clearly held that, Clause-3, Sub-Clauses 1 and 2 of the G.R. dated 28th June, 2016 have been held to be contrary to the view taken by the various Division Benches of this Court. We are in complete agreement with the view taken by the Division Bench at Aurangabad. It is further to be noted that the Circular dated 28th June, 2016 which provides for those instructions can hardly be said to be government instructions. It has no statutory force in law. When Rule 41 of the M.E.P.S. Act which is the subordinate

legislation, the administrative decisions which run contrary to them cannot be held to be valid in law. As such, though the learned Judges of the Division Bench at Aurangabad have not considered this aspect, we find that since Clauses-1 and 2 of the said Circular, run contrary to the provisions of the subordinate legislation as found in Rule 41, the same would not be valid in law. In the result, we are convinced with the view taken by the various Division Benches and that transfer of a Teacher from unaided post to aided post is permissible in law. Equally, a transfer of an employee from unaided post to an aided post in another School run by the same Management would also be permissible in law.

13. The petitioners have placed on record the entire chart. The same be treated as a part of this judgment. Perusal of the chart would reveal that, all the petitioners have worked for three years and more on unaided post prior to they being transferred on aided posts. Perusal of the chart would also reveal that approvals were also granted by the respective Education Officers to the appointment of the

petitioners on the unaided posts. In that view of the matter, the impugned orders are quashed and set aside. The respondent, Education Officers are directed to grant approval to the transfer of the petitioners from unaided posts to aided post as per the proposal submitted by the respective Management. The said exercise shall be completed within a period of two weeks from the date of uploading of the order.

14. The petitioners would be entitled for regular salary from the month of June, 2019, the arrears to which the petitioners would be entitled from the date of transfer till June, 2019 within a period of six months from today.

16. Petitions are accordingly allowed and the Rule is made absolute in the aforesaid terms with no order as to costs.

(SANDEEP K. SHINDE, J)

(B.R. GAVAI, J)