

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 13231 OF 2018

- | | | |
|-----------------------------------|---|--------------------|
| 1. Shivaji Yashwant Gholap |] | |
| Age : 46 years, Occ.: Service, |] | |
| R/at Pendhari, Post Vaishakhare, |] | |
| Tal. Murbad, |] | |
| District Thane – 421 402 |] | |
| |] | |
| 2. Janseva Shikshan Mandal Murbad |] | |
| A/P. Gandhi Camp, Shivale, |] | |
| Tal. Murbad, District Thane, |] | |
| Through its Joint Secretary. |] | Petitioners |

V/s.

- | | | |
|---------------------------------------|---|--------------------|
| 1. The State of Maharashtra |] | |
| Through the Secretary, |] | |
| School Education Department, |] | |
| Mantralaya, Mumbai – 400 032. |] | |
| |] | |
| 2. The Education Officer (Secondary), |] | |
| Zilla Parishad, Thane |] | Respondents |

Mr.N.V. Bandiwadekar a/w. Mr.Vinayak Kumbhar i/b. Ms.Ashwini Bandiwadekar for Petitioner.
Ms.M.S. Bane, AGP for Respondent Nos.1 and 2.

CORAM : A.S. GADKARI, J.

DATE : 22nd October 2019.

ORAL JUDGMENT :-

1] Rule. Rule made returnable forthwith. The Petition is taken up for Final Hearing, by consent of both the parties.

2] The jurisdiction of this Court under Article 227 of the Constitution of India is basically invoked by the petitioner No.1-teacher impugning the Order dated 3rd November 2017 passed by the respondent No.2, rejecting the proposal of petitioner No.2 to transfer the petitioner No.1 from an unaided post to aided post in another school run by the same management i.e. the petitioner No.2.

3] Heard Mr.Bandiwadekar, learned counsel for the petitioners and Ms.Bane, learned AGP for the respondents-State. Perused the record annexed to the Petition and the Affidavit-in-Reply filed by Mr.Ankush Shinde, Deputy Education Officer (Secondary), Zilla Parishad, Thane, dated 24th January 2019.

4] The record indicates that, by an Order dated 31st March 2015, the respondent No.2 granted approval for appointment of the petitioner No.1 as an 'Assistant Teacher' with effect from 1st February 2014 on probation basis, initially for a period of two years on unaided post in Mahatma Gandhi Vidyalay and Junior College, Dhasai, Tal. Murbad,

District Thane. In due course of time, the petitioner No.1 became senior in hierarchy of seniority. The Assistant Teacher in Vidyamandir High School, Shivale run by the petitioner No.2 management was promoted as 'Assistant Headmistress' on 1st December 2016. Consequently, an aided post become vacant in another school run by the petitioner No.2. The petitioner No.2 therefore by passing a Resolution No.6 in its Board of Directors meeting dated 19th November 2016 decided to appoint the petitioner No.1 to an aided post in another school. A transfer Order dated 30th November 2016 was accordingly issued by the petitioner No.2. The petitioner No.1 was also issued appointment letter in that behalf. The record further indicates that, the Head Master of Vidyamandir High-School run by the petitioner No.2 thereafter sent a proposal dated 22nd March 2017 to the respondent No.2 seeking approval to transfer the petitioner No.1 to Vidyamandir High School and Junior College, Shivale. The said proposal was accompanied by necessary and relevant documents as per the provisions of law and Rules framed therein. By the impugned Order dated 3rd November 2017, the respondent No.2 has rejected the said proposal on the ground that, there are surplus teachers in the District and therefore the said proposal cannot be approved.

5] It has to be noted here that, the said issue as well as Government Circular dated 28th June 2016 came up for judicial scrutiny before the Division Bench of this Court in Writ Petition No. 5313 of 2017 and other related Petitions. The Division Bench of this Court in para No.12 of its Judgment dated 25th April 2019 has held as under :-

“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.”

It is thus clear that, the transfer of a teacher from unaided post to an aided post is permissible in law. It is further clear that, transfer of an employee from unaided post to aided post in another school run by the same Management is also permissible in law. As has been held in the said Judgment, the said Government Circular dated 28th June 2016 cannot be held to be valid in law.

6] In view of the observations made by the Division Bench of this Court in its Judgment dated 25th April 2019 in the aforesaid Writ Petition, the reason given by the respondent No.2 for rejecting the proposal of the petitioner No.1 cannot be sustained. In that view of the matter, the impugned Order dated 3rd November 2017 passed by the respondent No.2 is quashed and set-aside. The respondent No.2 is hereby directed to grant approval to the transfer of the petitioner No.1 from unaided post to aided post, as per the proposal dated 22nd March 2017 submitted by the petitioner No.2.

The necessary procedure be complied with within a period of three weeks from the date of uploading of the present Order on the High Court Website.

7] It is needless to mention that, the petitioner No.1 will be entitled for all the necessary and relevant monetary benefits as per law. The petitioner No.1 would be entitled for regular salary from the month of November 2019. The petitioner No.1 is entitled for arrears of salary from the date of transfer i.e. from 2nd December 2016 till 31st October 2019. The respondent No.2 is hereby directed to release the said salary within a period of two months from the date of uploading the present Order on the High Court Website.

8] Petition is accordingly allowed in the aforesaid terms.

9] Rule is made absolute.

10] All the concerned to act on the basis of an authenticated copy of this Order.

[A.S. GADKARI, J.]