

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

WRIT PETITION NO.1542 OF 2019

1) Ahtesham Husain Shafiqur Rehman
Quazi

2) The Progressive Education Society,
229-L, South Sadar Bazar, Solapur,
Through its Honorary Secretary

...Petitioners

Versus

1) The State of Maharashtra
through Secretary, School Education
Department, Mantralaya, Mumbai-400
032.

2) The Education Officer (Secondary),
Zilla Parishad, Solapur.

3) The Director of Education
[Secondary and Higher Secondary
[M.S.], Pune-1.

4) The Superintendent, Pay and PF
Unit, Education Department, Solapur

...Respondents

**WITH
WRIT PETITION NO.1487 OF 2019**

1) Mastan Shaukat Ali Killedar and Anr.

2) The Progressive Education Society,
Solapur, Through its Honorary
Secretary

...Petitioners

Versus

1) The State of Maharashtra
through Secretary, School Education
Department, Mantralaya, Mumbai-400
032.

2) The Education Officer (Secondary),

Zilla Parishad, Solapur

3) The Director of Education
[Secondary and Higher Secondary]
[M.S.], Pune-1

4) The Superintendent, Pay and PF
Unit, Education Department, Solapur ...Respondents

**WITH
WRIT PETITION NO.1258 OF 2019**

1) Mr. Sachin Ashok Pokale
2) Sahyadri Shikshan Sanstha
Sawarde, Tal. Chiplun, Dist-Ratnagiri
through its Chairman/Secretary ...Petitioners

Versus

1) The State of Maharashtra
through Secretary, School Education
Department, Mantralaya, Mumbai-400
032.

2) The Education Officer (Secondary),
Zilla Parishad, Ratnagiri. ...Respondents

**WITH
WRIT PETITION NO.1301 OF 2020**

1) Mrs. Rashmi Ravindra Phadke
2) General Education Society at
Chhabildas High School, Dadar (E),
Mumbai-400014 ...Petitioners

Versus

1) The State of Maharashtra
through Secretary, School Education
Department, Mantralaya, Mumbai-
400 032.

2) The Administrative Officer,
Education Department, KDMC,
Kalyan, District-Thane. ...Respondents

WITH

WRIT PETITION NO.237 OF 2020

Ms Shweta Shrikant Takale

...Petitioner

Versus

1) The State of Maharashtra
through Secretary, School Education
Department, Mantralaya, Mumbai-
400 032.

2) The Education Officer
(Secondary), Zilla Parishad,
Ratnagiri

3) Jijamata Shikshan Prasarak
Mandal, Lote, Taluka -Khed
District-Ratnagiri through its
Chairman /Secretary

4) Nutan Vidyalaya, Lote Taluka-
Khed, District-Ratnagiri, through its
Head Master

...Respondents

**WITH
WRIT PETITION NO.238 OF 2020**

1) Subhash Maroti Khandekar
2) Janseva Shikshan Mandal,
Murbad, A/P. Gandhi Camp, Shivale,
Taluka-Murbad, District-Thane,
through its Joint Secretary

...Petitioners

Versus

1) The State of Maharashtra
through Secretary, School Education
Department, Mantralaya, Mumbai-
400 032.

2) The Education Officer
(Secondary), Zilla Parishad, Thane.

...Respondents

**WITH
WRIT PETITION NO.1802 OF 2020**

1) Nilesh Ramchandra Digole
2) Atpadi Education Society, Atpadi,
District-Sangli ...Petitioners

Versus

1) The State of Maharashtra
through Secretary, School Education
Department, Mantralaya, Mumbai-
400 032.
2) The Education Officer
(Secondary), Zilla Parishad, Sangli. ...Respondents

WRIT PETITION NO.1803 OF 2020

1) Ms Archana Uttam Sawant
2) Atpadi Education Society, Atpadi,
District-Sangli ...Petitioners

Versus

1) The State of Maharashtra
through Secretary, School Education
Department, Mantralaya, Mumbai-
400 032.
2) The Education Officer
(Secondary), Zilla Parishad, Sangli. ...Respondents

**WITH
WRIT PETITION (stamp) NO.1027 OF 2020**

1) Ramesh Vilas Potdar
2) Atpadi Education Society, Atpadi,
District-Sangli ...Petitioners

Versus

1) The State of Maharashtra
through Secretary, School Education
Department, Mantralaya, Mumbai-
400 032.
2) The Education Officer
(Secondary), Zilla Parishad, Sangli. ...Respondents

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Mr. Narendra Bandiwadekar with Mr. Vinayak Kumbhar i/b. Ms

Ashwini Bandiwadekar for the Petitioners.

Mr. A.B. Kadam, AGP for the Respondent State in WP/1027/2020 & WP/1487/2020 and WP/1542/2020.

Mr. Sandeep Shinde for Respondent in WP/1301/2020

Mr. B.U. Samant, AGP in WP/1802 of 2020 and WP/1258/2020

Mrs. V.S. Nimbalkar, AGP in WP/1803/2020.

Mr. S.H. Kankal, AGP for Respondent-State in WP/238/2020 and WP/237 of 2020.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 19th OCTOBER, 2020.

P.C.:-

Rule. Rule is made returnable forthwith. With consent, taken up for final hearing at the stage of admission.

2. The Petitioners in Writ Petition Nos.1542 of 2019 and 1487 of 2019 have challenged modification of the approval order whereas the other Petitioners have challenged rejection of the proposal for transfer of services from unaided /partially aided schools /posts to aided schools/posts run by the same Management.

3. The Petitioner No.1 in respective Petitions were appointed as Assistant Teachers against unaided posts after following the prescribed procedure. The appointments of these Assistant Teachers were approved by the Education Officer.

Considering the seniority of these Assistant Teachers, the Management passed resolutions to transfer them from unaided posts/schools to aided posts/schools run by the same institutions against vacancies, which had become available due to transfer/retirement or promotion of the teachers appointed on the aided posts. Accordingly, transfer orders came to be issued transferring these Assistant Teachers from unaided/partially aided posts/schools to sanctioned aided posts/aided schools. On being relieved from unaided or partially aided schools /posts, these Assistant Teachers joined the fully aided posts /schools. The Headmasters of the respective aided schools submitted proposals to the Education Officer for approval of transfer of these Assistant Teachers from the date of the transfer.

4. The Education Officer had by order dated 27/06/2016 approved transfer of the Petitioner No.1 in WP No.1542 of 2019 and 1487 of 2019 as Assistant Teachers with effect from the date of transfer i.e. 27/02/2016 and 13/06/2016 respectively. These Petitioners were therefore entitled to receive payment of salary from the grant, which was admissible to the said posts. As per the prevalent policy, the payment of salary is made online through the process, which is called 'Shalarth Pranali'. The

Headmaster of the respective schools requested Respondent No.2 to enter the names of these two Petitioners in the Shalarth Pranali and to assign Shalarth ID Code to facilitate online payment of salary. This letter was forwarded to Director of Education, Respondent No.3 in the said petitions, who noted that the conditions imposed by Circular dated 28/06/2016 were not complied with. Respondent No.3 directed Petitioner No.2 to remove the deficiencies and further compelled the Petitioner Nos.1 in the said Petitions to give undertaking as required under Sub Clause 5(b) of Clause 3 of the Circular dated 28/06/2016. Subsequently, by the impugned orders, both dated 03/03/2018, Respondent No.2- Education Officer modified the earlier approval orders by granting approval to the transfer of the Petitioners as Shikshan Sevaks with effect from 01/03/2016 and 15/6/2016, respectively. These Petitioners have challenged the modification of approval orders dated 27/06/2016 and further release of stage wise grant as per Sub Clause 5(b) of clause 3 of the said Circular.

5. The proposal to approve transfer of Petitioner Nos.1 in Writ Petition No.1258 of 2019, Writ Petition No.1301 of 2020, Writ Petition No.237 of 2020 and Writ Petition No.238 of 2020 from unaided school to aided school has been rejected in view of

Clause 3 (2) of Government Circular dated 28/06/2016, which stipulates that if surplus teachers are available, approval should not be granted for transfer from unaided post to aided post.

6. The proposal to approve transfer of the Assistant Teachers i.e. Petitioner No.1 in Writ Petition No.1802 of 2020, Writ Petition No.1803 of 2020 and 1027 of 2020 has been returned with directions to resubmit the same as per the Circular dated 28/06/2016, with an undertaking to accept 20% of grant in the first year of transfer.

7. Shri Bandiwadekar, learned counsel for the Petitioners submits that the Petitioners have been transferred on sanctioned vacant posts on aided basis or in aided schools and that they continue to work on the said posts. He submits that in a catena of judgments, the Division Bench of this Court has held that Rule 41 of Maharashtra Employees of Private Schools (Condition of Services) Rules 1981 permits transfer of Assistant Teachers from unaided post /school to aided post/school. The transfer from unaided to aided school is not a fresh appointment and that approval of such transfer cannot be refused on the ground of non absorption of surplus teachers.

8. Mr. Bandiwadekar, submits that transfer of the Petitioners in WP No.1542 of 2020 and WP No.1487 of 2019 as Assistant Teachers was approved prior to the issuance of the Circular dated 28/06/2016. Hence, there was no justifiable reason to modify the said approval order and to approve the transfer of these Petitioners as Shikshan Sevaks on payment of monthly honorarium. He submits that the Petitioners in these two petitions could not have been compelled to give undertaking as required under Sub Clause 5 (b) of Clause 3 by retrospective application of the Circular.

9. Mr. Bandiwadekar, further submits that the Circular cannot override the statutory rules. He submits that validity of the Circular has been considered by the Division Bench of this Court in ***Pramod Prabhakar Pokale vs. The State of Maharashtra and Ors. 2019 (4) Mh.L.J. 278*** and ***Ms Deokar Deepali Kisan and Ors. vs. The State of Maharashtra and Ors. dated 25/04/2019 in Writ Petition No.5313 of 2017 alongwith other group matters*** and that it has been held that the said Circular is not valid in law. He therefore contends that the Education Officer was not justified in refusing to accord approval and /or return the proposal for approval on the basis of

the said Circular.

10. Learned AGP has also relied upon the decision in ***Pramod Pokale*** (supra) to contend that the State Government can issue directions to the Education Institution to fulfill its obligation as indicated in Sub Clause 5(b) of clause 3 of the Circular dated 28/06/2016. Learned AGP submits that Circular dated 28/06/2016 is in consonance with Section 5 of the Employees of Private Schools (Condition of Service Regulation) Act, 1977 (M.E.P.S.)

11. It is well settled that transfer of a teacher from unaided to aided posts or schools run by the same Education Institution is permissible in law. The question is whether the powers of the Management to transfer teachers from unaided school to aided school can be circumscribed by the conditions imposed under Circular dated 28/6/2016 when there is no legal embargo for effecting such transfer.

12. The Circular dated 28/06/2016 lays down certain conditions for the transfer of the Assistant Teachers from unaided to aided posts. Clause Nos. 3 (1) of the Circular provides that before making such appointment, the Competent

Authority should ascertain that there are no surplus teachers as per the provisions of Section 5 (1) of the M.E.P.S. Act, 1971. Sub Clause 2 of Clause 3 prohibits grant of approval to such transfer if surplus teachers are available at the time of appointment. Sub Clause 3 of Clause 3 provides that the senior most teacher on unaided post shall be entitled to transfer on aided post. Sub Clause 5(a) of Clause 3 provides that when the Management proposes to transfer a teacher, who has rendered less than five years service, from unaided to aided posts, an undertaking should be obtained from such teachers that he is willing to work as Shikshan Sevak for three years on consolidated pay. Sub Clause 5(b) of Clause 3 requires the teacher, who is proposed to be transferred to aided school after rendering service of five years or more in an unaided school, to give an undertaking for acceptance of stage wise release of grant as follows:-

13. That upon such transfer, the Assistant Teacher who has completed five years on unaided post would be entitled for 20% grant from the Government in the first year of his transfer and that the balance 80% will be borne by the Education Institution. Similarly, for the second, third and fourth year he will be entitled for 40%, 60% and 80% Government grant and the balance 60%,

40% and 20% respectively will be borne by the Institution. It is only on completion of five years of the transfer that the Assistant Teacher will receive 100% grant from the Government.

14. The validity of this Circular has been considered by the Division Bench of this Court in ***Pramod Pokale***. It has been held that Sub Clause 2 of Clause 3, which prohibits grant of approval till absorption of surplus teachers is contrary to the ratio laid down by the Division Bench of this Court in ***Sandhya Ghosalkar vs. The State of Maharashtra and Ors. (Writ Petition 5454 of 2004 alongwith connected writ petitions*** and in ***Dattu Thorat Vs. The State of Maharashtra in Writ Petition No.2960 of 2012*** and several other decisions of this Court. It is further held that there are no justifiable reasons to ask Assistant Teacher on unaided post, who has completed three years period on the said post, to work again as Shikshan Sevak on consolidated pay as required under Sub Clause 5(a) of Clause 3 of the said Circular. It is held that the said sub clause can be made applicable only when the Assistant Teacher has not completed three years period in an unaided school and his appointment as Assistant Teacher on regular basis has not been approved by the Education Officer. The Division Bench has

observed that when the Management can legally transfer Assistant Teacher serving in an unaided school to aided school, there is no reason to obtain an undertaking from such teacher as required under Sub Clause 5 (b) of Clause 3 of the aforesaid Circular. It is further held that the formula of proportionate salary to be disbursed by the State Government and the concerned institution in the manner stated in Sub Clause 5(b) of Clause 3 of the said Circular can be made applicable only when a fresh appointment is made on a new sanctioned post on aided basis. It is only in such cases that the State Government can issue directions to the institutions to fulfill its obligation to the extent of disbursement of salary amount as indicated in Sub Clause 5(b) (1) to (5) of Clause (3) of the said Circular. The Division Bench has held that there is no reason to ask for such undertaking from a teacher, who is transferred on existing vacant post on aided basis.

15. In ***Devkar Deepali*** (supra) the Division Bench of this Court, upon considering the earlier judgments, has reiterated that the transfer of a teacher from unaided post to aided post is permissible in law. It has been held that Sub Clauses 1 and 2 of Clause 3 of Circular dated 28/06/2016, which affect the rights of

the Management to transfer such teachers, are not valid in law. The Division Bench has further held that the Circular dated 28/6/2016, has no statutory force in law and being contrary to the subordinate legislation, the same is not valid in law.

16. In ***Suryakant Janardan Moghe vs The State of Maharashtra Writ PETition No.1493 of 2018 and other group matters*** the Division Bench of this Court has reiterated that the Circular dated 28/06/2016, which affects the rights of the Management to transfer does not have any enforceable status. It has been held that the proposal for approval has to satisfy the test of roster being adhered to and seniority being followed. It has been held that it is only when the Assistant Teacher on unaided post has worked for less than three years and is transferred to aided posts, that he will have to work as Shikshan Sevak till he completes three years of service from the date of his initial appointment on unaided post.

17. It is thus well settled that the transfer is not a fresh appointment and that the Management has a right to transfer a teacher from unaided post/school to aided post/school. The right of the Management to transfer the senior most teacher from unaided post/school to sanctioned aided post/school cannot be

circumscribed on the ground of non absorption of surplus teachers. A teacher, who has completed three years in an unaided school and whose appointment has been approved cannot be asked to work again as a Shikshan Sevak for a period of three years in an aided school. It is only when the transfer of Assistant Teacher from unaided to aided post is effected within three years from the date of his appointment that he is required to work as Shikshan Sevak till he completes three years of service from the date of his initial appointment. Furthermore, teacher transferred from unaided post to an existing sanctioned post on aided basis, is entitled to receive salary with 100% grant and that the Government cannot withhold the grant in the manner stated in Sub Clause 5 (b) (1) to (5) of Clause 3, by issuing such Circular, which has no statutory force in law.

18. In the instant case, the Petitioners were appointed as Assistant Teachers on substantive vacant posts after following the prescribed selection procedure. These Assistant Teachers are duly qualified and their appointments have been approved by the Education Officer. These Petitioners have completed the probation period. All these Assistant Teachers except Mr. Subhash Khandekar, Petitioner No.1 in Writ Petition No.237 of

2020 had worked on unaided post/school for more than three years. Taking into consideration their seniority and the services rendered by these Assistant Teachers in unaided post/school, the Management had transferred them from unaided post/school to vacant sanctioned post or in aided schools run by the respective institutions. The appointment of these Petitioners was not in contravention of any provisions under the Act or Rules framed thereunder. Hence, the Education Officer was not justified either in declining to grant approval to their transfer on a ground of non absorption of surplus teachers or in returning the proposal with directions to resubmit the same in compliance with the Circular dated 28/06/2016, which has been held to be not enforceable in law. Similar view has been taken by the Coordinate Bench of this Court (Coram: A.S. Gadkari, J.) in Writ Petition No.13232 of 2018 and other connected matters while setting aside the order dated 03/11/2017, which order is also impugned in Writ Petition No.238 of 2020.

19. It is also pertinent to note that Ahtesham Hussain Shafiqur Rehman Quazi and Mastan Shaukat Ali, Petitioner No.1 in Writ Petition No.1542 of 2019 and 1487 of 2019, respectively were transferred to aided post/school prior to the Circular dated

28/06/2016 and their transfer was also approved prior to issuance of the said Circular. Hence, these Petitioners could not have been compelled to give an undertaking as stipulated in Sub Clause 5(b) of Clause 3 of the Circular by giving retrospective effect to the said Circular. Furthermore, these Assistant Teachers had already completed three years of service on unaided posts. Hence, upon transfer, they could not have been asked to work as a Shikshan Sevaks on monthly honorarium for three years. The decision of the Education Officer is contrary to the law laid down by the Division Bench of this Court and hence cannot be sustained.

20. Hence, the following order:-

- (i) The impugned orders are quashed and set aside.
- (ii) The approval orders both dated 27/06/2016 granting approval to the transfer of the Petitioners in WP No.1542 of 2019 and 1487 of 2019 as Assistant Teachers stand restored with further direction to release the grant-in-aid from the date of their transfer.
- (iii) The Respondent No.2 -Education Officer is directed to grant approval to the transfer of the

Petitioner No.1 -Subhash Khandekar as Shikshan Sevak for a period of three years from the date of his initial appointment and thereafter as Assistant Teacher.

- (iv) The Education Officer (Respondent No.2) shall grant approval to the transfer of Petitioner No.1 in all other petitions as Assistant Teachers from the date of their transfer.
- (v) Respondent No.2 to release the grant-in-aid from the date of transfer Petitioner Nos.1 in respective petitions as Assistant Teachers.
- (vi) The aforesaid exercise shall be completed from the period of three months from the date on which this order is uploaded.

21. Rule is made absolute in above terms.

22. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(SMT. ANUJA PRABHUDESSAI, J.)