

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7614 OF 2020

Prakash s/o Dattatray Bagul,
Age-34 years, Occu-Service as
Assistant Teacher,
R/o Malewadi, Tq.Shrirampur,
Dist.Ahmednagar

-- PETITIONER

VERSUS

1. The State of Maharashtra,
Through its Principal Secretary,
School Education Department,
Mantralaya, Mumbai - 32.
2. The Education Officer
(Secondary),
Zilla Parishad,
Ahmednagar
3. Ashok Education Society,
Ashoknagar, Tq.Shrirampur,
Dist.Ahmednagar,
Through its President/Secretary,
4. New English School,
Shirasgaon, Tq.Shrirampur,
Dist.Ahmednagar,
Through its Head Master

-- RESPONDENTS

Mr.V.S.Panpatte, Advocate for the petitioner.
Mr.S.K.Tambe, AGP for respondent Nos. 1 and 2.
Mr.I.D.Maniyar, Advocate for respondent Nos. 3 and 4.

(CORAM : RAVINDRA V. GHUGE &
S.G. MEHARE, JJ)

DATE : JULY 6, 2021

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is aggrieved, to a limited extent, by the approval dated 20/07/2018, vide which, though the transfer of the petitioner from Unaided Post to Aided Post has been approved, he has been granted 20% salary through grants in aid instead of 100%.

3. We have considered the submissions of the learned Advocate for the petitioner and the learned AGP on behalf of respondent Nos. 1 and 2. Mr.Maniyar, the learned Advocate appearing on behalf of respondent Nos. 3 and 4, Management, submits that the contention of the petitioner is correct. The circular which prescribed salary benefit upto 20% grant-in-aid, followed by 40%, 60%, 80% and then 100%, has been set aside by this Court. The petitioner as well as respondent Nos. 3 and 4 placed reliance upon the judgment delivered by this Court at the Principal Seat dated 12/03/2021 in **WP Stamp No.93919/2020 filed by Sandhya d/o Balkrushna Teli and others Vs. The State of Maharashtra and others.**

4. We find it appropriate to reproduce paragraph Nos. 8 to 22 of the judgment in the case of Sandhya (supra), being squarely applicable to the case in hand, as under :-

"8. Learned counsel on behalf of the Petitioners submits that various Division Benches of this Court have held that a transfer from unaided post to aided post is not a fresh appointment; it is a transfer within the meaning of Rule 41 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ('MEPS Rules' for short). He further submits that the Division Benches have held that Rule 41, sub-clause 1 could not be applied to such transfers. Hence, he submits that the impugned orders are bad in law.

9. It will be relevant to refer to the judgment of a Division Bench of this Court in Writ Petition No.5258 of 2012 (Ms. Sandhya Laxman Ghosalkar V/s. The State of Maharashtra & Ors.) dated 12.09.2012 (Coram : Hon'ble Shri. Dr. D.Y. Chandrachud, J. as his Lordship then was, and Hon'ble Shri. A.A. Sayyed, J.). The Division Bench found that the teacher having completed her probationary period of three years in unaided section, there was no justification in granting approval only as Shikshan Sevak and approval ought to have been granted as Assistant Teacher.

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

“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.”

11. *Another Division Bench of this Court 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.”

12. *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, 2017 (Coram : Hon'ble Shantanu Khemkar, J. as his Lordship then was, and Hon'ble Prakash D. Naik, J).

13. *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.”

14. *After the said Government Circular was issued, another 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.”

15. In the said judgment, it is held that there is no provision prescribed in Government policy for effecting transfer of teachers from unaided school to aided school run by the same institution. The Division Bench also considered the ratio laid down in the case of Dattu Thorat (supra). It was held therein that Respondent No.2 institution was not proposing to fill in the vacancy by appointing any new recruit and when there was no condition prescribed in Government policy for effecting such transfer from unaided school to aided school, the decision of the Education Officer to refuse approval to such transfer was unsustainable. The ratio laid down by the aforesaid judgments (i) **Dattu S/o. Bhima**

Thorat V/s. The State of Maharashtra & Ors., (ii) Ms.Sandhya Laxman Ghosalkar [supra] has been consistently followed in the following cases decided by this Court, namely, [i] Sudhir Dnyandeo Gadakh Vs. The State of Maharashtra & others in Writ Petition No.5978 of 2014 along with connected Writ Petitions, decided on 9th October, 2014, [ii] Shri Ganesh s/o. Raghu Jadhav Vs. The State of Maharashtra & others 1, [iii] Shri Sachin Babanrao Deshmukh Vs. The State of Maharashtra & others in Writ Petition No.7813 of 2015 along with connected Writ Petitions, decided on 9th September, 2015, [iv] Mrs. Rajabai Baba Shinde Vs. The State of Maharashtra & others in Writ Petition No.3979 of 2015 along with connected Writ Petition, decided on 18th April, 2015, [v] Chandrakali Secretary, Pandurang Department of Dhongde School Vs. The Education, Mantralaya, Mumbai & others in Writ Petition No.7230 of 2011 along with connected Writ Petitions, decided on 30.11.2011 [vi] Vs. The State of Maharashtra & anr. in Writ Petition No.9173 of 2013 along connected Writ Petitions decided on 18th February, 2014, [vii] Phiroj Chandsaheb Momin & Anr. Vs. The State of Maharashtra & Anr. in Writ Petition No.3197 of 2014, decided on 16th September, 2014, [viii] Ashok Dinkar Kale Vs. The State of Maharashtra & Others in Writ Petition No.676 of 2014, along with connected Writ Petitions,

decided on 17th September, 2014, (ix) Rajashri Shahu Shikshan Sanstha Sillod through its Secretary and others Vs. The State of Maharashtra & another in Writ Petition No.11719 of 2016, decided on 9th November, 2017, [x] Rajashri Shahu Shikshan Sanstha Sillod others Vs. through The its State of Secretary and Maharashtra and another in Writ Petition No.11720 of 2016, decided on 9th November, 2017, [xi] Manisha Kisan Jadhav Vs. The State of Maharashtra & others in Writ Petition No.11216 of 2016, decided on 9th November, 2017, [xii] Rajya s/o.Divlya Tadvī Vs. The State of Maharashtra & others in Writ Petition No.10618 of 2016 along with connected Writ Petition, decided on 30.11.2017, [xiii] Shri. Laxman Shivaji Shindiwale & Anr. Vs. The State of Maharashtra & others in Writ Petition No.4871 of 2017, decided on 25th April, 2017, [xiv] Mrs. Shilprekha Vinayak Joshi Vs. The State of Maharashtra & others in Writ Petition No.11065 of 2014 along with connected Writ Petition, decided on 14th February, 2017, and [xv] Shekhar P. Deshmukh Vs. Deputy Director of Education & others in Writ Petition No.1166 of 2018, decided on 3rd July, 2018.

16. *In that view of the matter, when the transfer of teacher from unaided school to aided school is permissible what is supposed to be ascertained is, whether the Education Officer has*

granted approval to the appointment of such Assistant Teacher / Shikshan Sevak on regular basis on completion of two years & three years probation period, as contemplated under the provisions of Section 5 of the MEPS Act, 1977. Once such approval is granted in favour of the appointee by the concerned Education Officer on regular basis on completion of satisfactory probation period under Section 5 (2) of the MEPS Act, 1977, it can be safely presumed that the Education Officer has granted such approval after ascertaining compliance of the mandate of Section 5 of the MEPS Act, 1977. When the Education Officer grants approval on regular basis for appointment on the post of an Assistant Teacher, it presupposes that there were no surplus teachers on his roll, and the concerned Institution, after following the mandate of Section 5 (1) of the MEPS Act, 1977, has made such appointment. Therefore, once an appointment of a teacher is made on unaided basis in the school and approval to such appointment was granted on regular basis on satisfactory completion of two/three years period of probation by the appointee in conformity with the mandate of the provisions of the MEPS Act, 1977, and Rules framed thereunder, there is no question of making a fresh appointment of such candidate, who has already completed probation period satisfactorily, or refusing

approval to the transfer of such candidate from unaided school to aided school run by the same institution, or transfer of an Assistant Teacher working on unaided post, whose services have been approved on satisfactory completion of probation period by Education Officer, to a vacant aided post of Assistant Teacher in same school. It is only when transfer of Shikshan Sevak is made on aided basis, the Education Officer and management have to ensure that such person has completed a minimum three years service on unaided post, and his services are approved by the Education Officer and the rule of seniority is followed, meaning thereby senior most Assistant Teacher, whose services have been approved by Education Officer on unaided basis, needs to be considered first for transfer to an aided post, and thereafter, rule of seniority needs to be followed continuously. The principle of seniority shall be kept in view considering the concerned institution as one unit.

17. *When there is a vacant post in an aided school, the Institution can transfer most senior qualified Assistant Teacher working on an unaided post to fill up the said vacancy, and if such most senior teacher is available in the same school, such post on aided basis can be offered to him. There is no prohibition to adopt the aforesaid course. When the management can legally transfer an*

Assistant Teacher serving in an unaided school under the same management to aided school, there is no reason to obtain an undertaking for such transfer as stated in sub clause 5(B) of clause 3 of the aforesaid Circular. However, in case the State Government sanctions new post/posts on aided basis, and those are to be filled in afresh by giving fresh appointment/appointments, the State Government can make applicable the formula / percentage of proportionate salary to be disbursed by the State Government and the concerned Institutions in the manner stated in sub clause 5 (B) of Clause 3 of the said Circular.

18. *Upon careful perusal of sub clause 5 (A) of clause 3 of the said Circular, which provides that, if a teacher appointed on unaided basis, has rendered less than 5 years on service, in case the management wishes to transfer such teacher from unaided school to aided school, in that case, an undertaking should be obtained from such teacher to work as Shikshan Sevak on consolidated pay, prima facie such provision appears to be attractive. However, in case the candidate is appointed on the post of Assistant Teacher after following the mandate of Section 5 of the MEPS Act, 1977, and on completion of probation period, if the Education Officer has granted approval to his appointment on regular basis, and in case he is most*

senior teacher serving in the school on unaided basis run by the same Institution, he requests for his transfer from unaided school to aided school or on aided post from unaided post in same school, and if he has already completed 3 years' period, there is no justifiable reason to ask him to work again as Shikshan Sevak on a consolidated pay for three years. Sub-clause 5 (A) of clause 3 of the said Circular can be invoked when a teacher has not completed three years period after his appointment in the school on unaided basis, and he has not received approval to his services as an Assistant Teacher on regular basis.

19. *In short, if the Assistant Teacher has not completed satisfactory probation period, and if his service or services are not approved by the Education Officer on regular basis or there is no adherence to the provisions of Section 5 of the MEPS Act, 1977, only in that case, the management is not entitled to transfer such teacher from an unaided school to aided school or from an unaided post to an aided post. It is only in case where the Assistant Teacher has acquired status of regular employee on completion of two years probation period, and his appointment is in adherence to the provisions of Section 5 of the MEPS Act, 1977, and the approval is granted by the Education Officer to his appointment on regular basis*

*on the post of Assistant Teacher on completion of satisfactory probation period, and he is the most senior teacher working in the school on unaided basis, in that case, the question of invoking sub clause 5 (A) of Clause 3 of the said Circular would not arise. In such case, invoking such provision would run contrary to the judgment of the Division Bench [Coram: Dr.D.Y.Chandrachud and A.A.Sayed, JJ.] of the Bombay High Court at Principal Seat in the case of **Ms.Sandhya Laxman Ghosalkar [supra]**, wherein it is observed in para 4 that, there was no justification whatsoever for the Education Officer (Secondary) to grant his approval only as Shikshan Sevaks to the three petitioners before the Court. It is further observed that, if the Petitioners had been appointed as Assistant Teacher in the aided school by transfer from the unaided school on the basis of seniority, the approval ought to have been granted to them as Assistant Teachers. This is especially so having due regard to the fact that they were similarly circumstanced with other Teachers in whose case approval was granted as Assistant Teachers.*

20. *In a recent judgment, another Division Bench of this Court in the case of **Suryakant S/o Janardan Muge in Writ Petition No.1493 of 2018** has considered the provisions of MEPS Act visa-vis the impugned circular dated 28.06.2016. It is held therein that.....*

14. The MEPS Act applies uniformly and equally to the assistant teachers working on aided posts, so also unaided posts. No distinction is made in service conditions of the assistant teachers working on aided and unaided posts. Section 13 of the MEPS Act gives authority to the State Government to frame the Rules. Pursuant thereto, the State Government has framed Rules viz. the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981. Rule 41 of the said Rules reads thus:

“41. Transfer - (1) Subject to the provisions of this rule the Management conducting more than one school shall not transfer any of its employees from one school to another except on administrative grounds, promotion or at the request of the employee concerned, if it is administratively convenient to do so.

(2) Save in exceptional cases, and unless reasons are recorded in writing by the Management, such transfers shall not be effected in the middle of the term.

(3) The Management shall see that the transfers do not adversely affect the pay or pay scale of the employees concerned and that such transfer do not result into loss in the pensionary benefits as admissible to them.

(4) The expenditure on Travelling allowance and Daily allowance, if any, at the rates applicable to the Government employees of the comparable status, shall be borne by the Management. If the transfer is at the request of the employee, this expenditure shall be borne by the employee concerned;

Provided that the transfer involves change of headquarters, the joining time to be allowed to an employee shall be limited to six days (excluding Sunday) and actual

days of journey. Subject to this limit, the period of joining time shall be treated as "duty" for all purposes:

Provided that, an employee shall not be entitled to joining time, if transfer is effected during the vacation.

(5) Where a Management runs a secondary school or secondary schools and a Junior College of Education -

(a) Teachers in a Junior College of Education shall not be transferred to a secondary school against their will. Such transfers may, however, be made if they are at employee's own requests, subject to availability of vacancies in secondary schools. In the event of such a transfer, the pay drawn by the teacher in the Junior College of Education shall not be protected. He shall be deemed to be working in a secondary school during the period he worked in the Junior College of Education, and his pay shall be accordingly refixed on his joining the secondary school.

(b) Teachers in secondary school shall not be transferred to a Junior College of Education against their will. Such transfers may, however, be made if they are at the employees' own requests, subject to the following conditions, namely :

(i) Vacancies should be available in the Junior College of Education;

(ii) The concerned employee shall retain the same place in the common seniority list; and

(iii) Their pay in the Junior College of Education shall be fixed at the same stage of pay as their existing pay or at the minimum of the scale of pay in the Junior College of Education, whichever is higher."

15. Rule 41 gives powers to the management of the institution to effectuate transfers for the better administration of the

school and also considering the administrative exigency for convenience of the better administration of the school. The impugned circular dated 28.06.2016 lays down certain conditions for the transfer of assistant teachers from unaided to aided posts. Some of the salient features of the said circular is that the management shall confirm that there are no surplus teachers available for filling in the posts becoming vacant on aided basis. For the said purpose, the circular makes reference to Section 5(1) of the MEPS Act and that if the surplus teachers are available, the approval should not be given to the teachers transferred from unaided to aided posts. The senior most teacher on unaided post shall be entitled for transfer to aided post and that the said assistant teacher who was working on unaided post, his appointment is required to be approved. The further embargo is that the assistant teachers should have worked atleast five years on unaided post and if he has worked for less than five years, then an option should be taken from him that he would work for three years as Shikshan Sevak on honorarium basis if transferred to grant-in-aid post and if the assistant teacher to be transferred has worked for five years or more on an unaided post, then the teacher who has completed five years on unaided posts and upon transfer to the aided post will be entitled for 20% grant from the Government and 80% will have to be borne by the institution. For the second year he would be entitled for 40% Government grant and 60% will be borne by the institution. For the third year 60% grant would be given by the Government and 40% will be borne by the institution. After four years of transfer, 80% will be borne by the Government and 20% by the institution and after five years of the transfer of the teacher who had already worked for five years on unaided post, he will receive 100% grant from the Government.

17. The question would be whether by way of an executive instructions, the powers of the management under Rule 41 of MEPS Act for transfer of an employee can be circumscribed, curtailed and eroded. Rule 41 is framed under the Rule making power of the Government as provided under Section 13 of the MEPS Rules. The MEPS Rule is piece of subordinate legislation. It is trite that, executive instructions cannot override the statutory Rules. Precisely, this has been held by the Division Bench of this Court at Principal Seat at Bombay in Writ Petition No.5313 of 2017 with connected writ petitions decided on 25.04.2019. The Division Bench in the said judgment held that:

“The circular dated 28.06.2016 can hardly be said to be Government instructions. It has no statutory force in law. Rule 41 of the MEPS Act which is the subordinate legislation, the administrative decisions which run contrary to them cannot be held to be valid in law. 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.”

While delivering the said judgment, the Division Bench considered the earlier judgments of this Court. Sub-clauses 1 and 2 of Clause 3 of the circular has already been held to be not valid in law by the Division Bench. There is no reason for us to take different view. The impugned circular as it affects the rights of the management to transfer, as such, same is improper and does not have any enforceable status.”

21. *In view of the various judgments delivered by the Division Benches of this Court, the Government of Maharashtra has amended Rule 41 and inserted Rule 41(A) a condition for transfer of a teacher from an un-aided to a partially aided or aided school or division. The said amendment came into effect on 08.06.2020; it has no retrospective effect. Therefore, that amendment is not applicable to the facts of the present case.*

22. *It appears from the perusal of the facts of the case that, the petitioners were appointed after following due procedure of law and thereafter, on successful completion of probation period, approval was granted to their appointment as Assistant Teachers and they have acquired the status as Assistant Teachers on regular/permanent basis. It appears that, they have rendered more than 5 years of satisfactory services as Assistant Teachers on unaided post. The Respondents have not brought on record contra material to contest the assertions on factual score made by the petitioners. Therefore, it will have to be concluded that, the petitioners have completed more than 5 years of satisfactory service on the posts of Assistant Teachers. In that view of the matter, and if the petitioners were most senior teachers in the Institution working in a school on unaided basis at the relevant time,*

their transfer from unaided posts to aided posts due to retirement of incumbent teachers was permissible, and there was no need to make fresh appointments on the posts of Shikshan Sevak, thereby practically denying them the benefits accrued by virtue of rendering more than five years of service as Assistant Teachers on regular basis."

5. Considering the approval to the appointment of the petitioner dated 29/10/2012, it is apparent that the petitioner joined as an "Assistant Teacher" on an unaided post on 01/08/2009. He was transferred from the Unaided post to the Aided Post on 30/12/2016, by which time he had put in 7 years in employment. It is equally undisputed that the approval to his transfer has been granted by the Education Officer, but for the condition that he would be entitled for 20% salary from the grants-in-aid. The learned AGP fairly submits on the basis of the record that this condition of progression from 20% to 40%, 60%, 80% and 100%, is not applicable as this Court has set aside the said condition.

6. In view of the above, this petition is allowed. The impugned transfer order dated 20/07/2018 shall stand modified to the extent

of the denial by the Education Officer of 100% aided division to the petitioner. The petitioner would be entitled for transfer from unaided post to aided post on 100% grants in aid division. Corrected approval order shall be issued by respondent No.2, as expeditiously as possible, and in any case on or before 31/07/2021.

7. Needless to state that by this correction, as ordered, the petitioner would be entitled for such approval from 30/12/2016 and the arrears of his unpaid salaries, shall be paid as expeditiously as possible and in any case on or before 15/09/2021.

8. Rule is made absolute in the above terms.

(S.G. MEHARE, J.)

(RAVINDRA V. GHUGE, J.)