

Bhogale

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

WRIT PETITION NO. 2381 OF 2020

Geeta Yashwant Pagi
@ Geeta Subhash Varatha & anr. .. Petitioners
vs.

The State of Maharashtra & anr. .. Respondents

Mr. Vinayak Kumbhar I/b. Mrs. Ashwini Navjyot Bandiwadekar for
the Petitioners.

Mr. Prashant Kamble I/b. Mr. A.S. Rao for Respondent No.2.

Mr. S.H. Kankal, AGP for the State.

CORAM : M.S.KARNIK, J.

DATE : JANUARY 29, 2021

P.C.:-

Heard learned counsel for the parties.

2. The challenge in this Petition under Articles 226 and 227 of the Constitution of India is to an order passed by the Respondent No.2 refusing to grant approval to transfer of the Petitioner No.1 as Assistant Teacher from unaided post to aided post. The impugned order dated 29.11.2019 refusing the approval is on the ground that there are surplus teachers available in the aided school within the area of Kalyan Dombivali Municipal Corporation.

3. My attention is invited to the order of this Court in case of **Ahtesham Husain Shafiqur Rehman & anr. Vs. The State of Maharashtra & ors.** in Writ Petition No. 1542 of 2019 and other connected Writ Petitions where a similar issue had arisen. This Court followed the decision of the Division Bench in case of **Pramod Prabhakar Pokale vs. The State of Maharashtra and Ors.**¹, **Ms. Deokar Deepali Kisan and Ors. vs. The State of Maharashtra and Ors.** dated 25.04.2019 in Writ Petition No.5313 of 2017 while concluding that the Circular dated 28.06.2016 is not valid in law. It would be pertinent to reproduce Paragraphs 12, 13, 14, 15, 16 and 17 of the decision in the case of **Ahtesham Husain Shafiqur Rehman & anr. (supra)** which reads thus :-

“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

1 2019 (4) Mh.L.J. 278

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 WritPetition 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 afresh 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 year sand 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.”

4. Learned AGP tried to support the impugned order as according to him despite validity of surplus teachers the Petitioner No.1 has been transferred from unaided post to aided school and therefore according to him the approval was rightly refused by the Respondent No.2.

5. I find that the present Petition is squarely covered by the decision in the case of **Ahtesham Husain Shafiqur Rehman & anr.** (*supra*). The Petition is therefore allowed. The impugned order is set aside.

6. The Petition is allowed in terms of prayer clause (b) which reads thus :-

“b) By a suitable writ, order or direction, this Hon’ble Court be pleased to quash and set aside the impugned order dated 29.11.2019 (EXHIBIT-G) issued by the Respondent No.2 refusing approval to the transfer of the Petitioner No.1 from un-aided post aided post in the Primary School of Petitioner No.2 Institution, and accordingly the Respondent No.2 may be directed to grant approval to the said transfer as Assistant Teacher with effect from 13.06.2019, and to release the grant in aid for payment of monthly salary in pay scale, together with arrears from the said date of transfer.”

Diksha
Rane

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(M.S.KARNIK, J.)