

Aarti
G.
Palkar

Digitally
signed by Aarti
G. Palkar
Date:
2021.03.16
17:45:25
+0530

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3327 OF 2019

Shri. Sachin Sambhaji PhadtarePetitioner
vs.
The State of Maharashtra & Ors. ...Respondents

**ALONG WITH
WRIT PETITION NO.3328 OF 2019**

Shri. Santosh Hanumant HolkarPetitioner
vs.
The State of Maharashtra & Ors. ...Respondents

**ALONG WITH
WRIT PETITION NO.3329 OF 2019**

Shri. Ankush Lalasaheb SawantPetitioner
vs.
The State of Maharashtra & Ors. ...Respondents

WRIT PETITION NO.3330 OF 2019

Shri. Pravin Jagannath NimbalkarPetitioner
vs.
The State of Maharashtra & Ors. ...Respondents

Mr. V.S. Talkute for the Petitioner in all petitions.

Ms. S.S. Bhende, AGP for the Respondent-State in WP/3327/2019.

Mr. V.M. Mali, AGP for the Respondent-State in WP/3328/2019.

Ms. P.N. Diwan, AGP for the Respondent-State in WP/3329/2019.

Mr. S.B. Kalel, AGP for the Respondent-State in WP/3330/2019.

CORAM : S. C. GUPTA AND SURENDRA P. TAVADE, JJ.

DATE ON WHICH JUDGMENT IS RESERVED : 4 FEBRUARY 2021

DATE ON WHICH JUDGMENT IS PRONOUNCED : 12 MARCH 2021

JUDGMENT (PER SURENDRA P. TAVADE, J.) :

. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

2. The Petitioners in these petitions have approached this Court being aggrieved by the rejection of the proposal for transferring their services from unaided posts to aided posts in the same institution.

3. The Petitioners seek direction against Respondent No.2-Education Officer (Secondary) Zilla Parishad to grant approval to appoint all Petitioners on aided post of Assistant Teachers from their respective dates on 100% grant-in-aid in Respondent Nos.4 and 5 Schools instead of Shikshan Sevak on 20% grant-in-aid. They also seek directions to release their arrears of salary.

4. Petitioners were initially appointed as Assistant Teachers on unaided division of Respondent Nos.4 and 5 by following due procedure and against clear and vacant sanctioned posts. The appointments of Petitioners were approved by Respondent No.2.

5. By efflux of time, in the same school where the Petitioners are working, aided posts were became vacant on account of superannuation of senior teachers. As such, the Petitioners were transferred on aided posts in the same school. 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 dated 28th June 2016. As such, the Petitioners have approached this Court.

6. It is contended that Respondent Nos.4 and 5 forwarded the proposals of Petitioners for approval to Respondent No.2. Respondent

No.2 granted approval to the transfer of Petitioners on 20% grant-in-aid by placing reliance on the Government Circular dated 28.06.2016 instead of granting such approval on 100% grant-in-aid in regular pay scales. It is contended that Respondent No.2 ought to have considered the services rendered by the Petitioners on unaided basis as Assistant Teachers for more than six years and their transfer to aided division of Respondent Nos.4 and 5 on sanctioned posts, which became vacant due to retirement or voluntary retirement of earlier teachers working on the respective aided posts. It is contended that the said posts were already on 100% grant-in-aid basis, and therefore, the Petitioners are entitled to get approvals to their transfer on aided divisions of Respondent Nos.4 and 5 Secondary School on 100% grant-in-aid in regular pay scales. It is contended that while passing orders, Respondent No.2 thereby granted approvals to the transfers of Petitioners only at 20% grant-in-aid and in respect of the Petitioners as Shikshan Sevak on honorarium basis and such approvals are wrong and erroneous; the said orders be quashed and set aside and Respondent No.2 be directed to grant approvals to their transfers from unaided posts to aided posts as Assistant Teacher. They also claim arrears of salary from the date of their appointment as Assistant Teachers.

7. Respondent No.4 has filed an affidavit-in-reply through Shri. Shrikant Ramrao Jagdale. It is contended that in view of Government Resolution dated 28.06.2016, the Education Officer (Secondary), Zilla Parishad, Solapur (Respondent No.2) has issued orders of approval to the present Petitioners on 20.12.2018 and 17.02.2018, respectively, from unaided division to aided division of Respondent No.3 school management on 20% grant. It is contended that Clause 3, sub-clause (1) and (2) of the Government Resolution dated 28.06.2016 have been held to be contrary to the view taken by various Division Benches of this Court, but clause 5 of said GR is still in force and existence. It is contended that the Petitioners have admitted the condition of 20% grant of salary and

executed a bond or undertaking that they would accept salary of 20% as per GR dated 28.06.2016. It is contended that Respondent No.2- Education Officer has followed GR dated 28.06.2016 and issued approval on condition mentioned in clause 5 of the said GR. It is contended that the Court may pass appropriate orders in the interest of justice.

8. Heard learned counsel for the Petitioners and learned AGP for the Respondent-State. It is an admitted fact that by following due procedure, the Petitioners were initially appointed as Assistant Teachers in Respondent Nos.4 and 5 schools and since then they have been in continuous service. After completion of their probation period, the services of the Petitioners came to be confirmed and Respondent No.2 has even granted permanent approval to the services of Petitioners on unaided basis. It is also admitted that on account of retirement or voluntary retirement of earlier teachers in Respondent Nos.4 and 5 schools, the Petitioners were transferred from unaided division to aided division of Respondent Nos.4 and 5 schools. The proposals for transfer of the Petitioners from unaided division to aided division in Respondent Nos.4 and 5 schools were approved as per clauses of 5(B)(1)(2)(3)(4) and (5) of the Government Circular dated 28.06.2016 on the condition that the Petitioners shall get 20% grant-in-aid in first year, 40% in second year, 60% in third year, 80% in fourth year and 100% in fifth year, out of their regular pay instead of granting such approval on 100% grant-in-aid from the date of their transfers in aided division.

9. This Court has passed an order in other similarly placed teachers in Writ Petition (Stamp) No.93919/2020 wherein this Court has taken into account similar view taken by this Court in bunch of petitions.

10. 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 Rules, 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.

11. It will be relevant to refer to the judgment of a Division Bench of this Court in the following cases:-

(i) 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.) in Writ Petition No.5258 of 2012.

(ii) 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).

(iii) 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.

(iv) 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).

12. 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.

13. 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.

14. 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.

15. 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.

16. In view of the forgoing discussion, we are inclined to allow the petition. Respondent No.2 is directed to grant approval to all the Petitioners as 'Assistant Teacher' on 100% grant-in-aid in Respondent Nos.4 and 5-Schools in regular pay scales w.e.f. their date of appointments within a period of six weeks from today and release their arrears of salary accordingly.

17. The petitions are disposed of in the above terms. No order as to costs.

(SURENDRA P. TAVADE, J)

(S.C. GUPTE, J.)