

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

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WRIT PETITION NO. 7591 OF 2021

Vitthal Jagannath Gurav and Ors.

... Petitioners

Versus

State of Maharashtra and Anr.

... Respondents

Mr. Nikhil D. Waje a/w Mr. Vishesh Srivastav for the Petitioners.

Mr. N. C. Walimbe, AGP for the State-Respondents.

**CORAM: R. D. DHANUKA AND
R. N. LADDHA, JJ.**

DATE : 9th DECEMBER, 2021.

P.C. :-

. Rule. Mr. Walimbe, learned AGP waives service for the respondents. By consent of parties, petition is heard finally.

2. Learned counsel for the petitioners seek leave to amend the cause title insofar as the petitioner no.2 is concerned, who expired during the pendency of this petition and bring the legal heirs of the petitioner no.2 on record. Leave to amend is granted. Amendment to be carried out forthwith. Re-verification is dispensed with.

3. By this petition filed under Article 226 of the Constitution of India, the petitioners seek writ of certiorari *inter-alia* praying for quashing and setting aside the impugned order/letter dated 29th April, 2021 thereby rejecting the proposal dated 18th January, 2020 sent by the Management pertaining to the transfer of the petitioners from unaided

school to the aided school. The petitioners also seek an order and directions against the respondent no.2 to grant its approval upon the proposal dated 18th January, 2020 sent by the Management pertaining to the transfer of the petitioners from unaided school to the aided school and to release the salary of the petitioners w.e.f. 1st June, 2019 i.e. the date of transfer.

4. On 10th June, 2005, 11th June, 2005 and 12th June, 2006, the petitioners were appointed as Assistant Teacher by the Management in the respective schools. On 21st January, 2009, the appointment of the petitioner no.1 was approved by the respondent no.2 in the unaided school. On 30th April, 2012, the appointment of the petitioner nos.2 to 7 was approved by the respondent no.2 in the another school. On 1st June, 2019, the Management transferred the petitioners from unaided schools to the aided schools run by the same Management and thereafter applied for approval to the respondent no.2 on 18th June, 2020, in respect of such transfers from unaided schools to aided schools. On 29th April, 2021, the respondent no.2 passed the impugned order/letter thereby rejecting the proposal sent by the Management pertaining to the transfer of the petitioners from unaided schools to the aided schools on the ground of availability of surplus teachers.

5. Learned counsel for the petitioners invited our attention to some of the exhibits annexed to the petition including the impugned order annexed at Exhibit 'A' to the petition and would submit that the proposal is rejected on the ground of availability of surplus employees who were not appointed.

6. Learned counsel for the petitioners also invited our attention to some of the objections raised by the respondents in the affidavit-in-reply. He relied upon an unreported judgment of Aurangabad Bench of this Court delivered on 4th July, 2019 in case of ***Suryakant s/o Janardan Muge v/s. The State of Maharashtra and Ors.*** in Writ Petition No. 1493 of 2018 and would submit that the Aurangabad bench has considered a similar circular dated 28th June, 2016 and has held that Education Officer shall not reject the proposal on the ground of the said circular and even if there was availability of surplus teachers. The Education Officer has to consider the case of those petitioners for transfer from unaided school to aided school.

7. Insofar as the stand taken in the affidavit-in-reply that the transfer could not have been approved on the ground that conditions set out in Rule 41A of the MEPS Rules were not satisfied is concerned, the learned counsel submits that no such reasons are recorded in the impugned order passed by the Education Officer. It is submitted that even otherwise the said Rule had come into effect on 8th June, 2020 whereas the transfers of the petitioners were much prior to the Rule 41A having come into effect. He placed reliance on the unreported judgment of this Court delivered on 12th March, 2021 in case of ***Sandhya d/o Balkrushna Teli and Ors. v/s. State of Maharashtra and Ors.*** in Writ Petition (Stamp) No. 93919 of 2020 and in particular paragraph 21 and would submit that the said amendment to Rule 41 by introducing Rule 41A does not apply with retrospective effect.

8. Mr. Walimbe, learned AGP for the State invited our attention to some of the reasons recorded in the affidavit-in-reply and would submit that this Court shall consider additional reasons in support of order of rejection of transfer passed by the Education Officer against the petitioners.

9. A perusal of the impugned order clearly indicates that the transfer of the petitioners from unaided schools to aided schools has been rejected only on the ground that there appears to be surplus teachers who were not appointed before an effecting transfer of the petitioners from unaided schools to aided schools. There are no other reasons recorded in the impugned order. In our view, the respondents cannot be allowed to supplant reasons for the first time in the affidavit-in-reply. The reasons thus recorded in the affidavit-in-reply are liable to be ignored.

10. Be that as it may, insofar as issue raised by the respondents in the affidavit-in-reply that the Management had not complied with the conditions of Rule 41A of the MEPS Rules before an effecting transfer of the petitioners from unaided schools to aided schools is concerned, the said issue raised by the respondent is no longer *res-integra*. This Court in case of ***Sandhya d/o Balkrushna Teli and Ors.*** (supra) has held that the said amendment inserted by Rule 41A was brought into effect on 8th June, 2020 and has no retrospective effect. In our view, the said judgment would apply to the facts of this case. We do not propose to take any different view in the matter. In this case also the transfer of the petitioners was much prior to 8th June, 2020 and thus the

said amended provisions of Rule 41A to the MEPS Rules would not apply to the transfer in question.

11. In our view, the impugned order passed by the Education Officer thereby rejecting the transfer of the petitioners from unaided schools to aided schools has been rejected only on the ground that there appears to be surplus teachers and not having been appointed before effecting transfer of the petitioners from unaided schools to aided schools is perverse and contrary to the principles of law laid down by this Court in case of *Suryakant s/o Janardan Muge* (supra) and Rule 41(1) of the MEPS Rules.

12. We accordingly pass the following order :-

- (a) Writ Petition is allowed in terms of prayer clauses (a), (b) and (c).
- (b) The Education Officer shall grant approval to the transfer of petitioners from unaided schools to aided schools within four weeks from today. The Deputy Director of Education shall enter the name of the petitioners in the Shalarth Pranali within two weeks thereafter.
- (c) The Education Officer shall pay the salary of the petitioners w.e.f. 1st June, 2019 within two weeks.
- (d) Management is permitted to submit a fresh proposal for payment of salary in line with the order passed by this Court directing the Education Officer to grant approval to the transfer of the petitioners from unaided schools to aided schools within two weeks from the date of communication of this order to the Education Officer.

- (e) Since, the petitioner no.2 has expired, the payment found due to the original petitioner no.2 shall be paid to the legal heirs of the petitioners.
- (f) Writ Petition is allowed in aforesaid terms. Rule is made absolute accordingly. There shall be no order as to costs.
- (g) Parties to act on an authenticated copy of this order.

[R. N. LADDHA, J.]

[R. D. DHANUKA, J.]