

Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 14234 OF 2018

Ajay Vishwanath Kharade

Age: 25 yrs. Occ: Teacher,

R/o: Arsoli, post: Wanjarwadi, Tal: Bhoom

District: Osmanabad - 413 504

...Petitioner

Versus

1. State of Maharashtra,
Through its Secretary School
Education Department,
State of Maharashtra,
Mantralaya, Mumbai - 32
2. Director of Education,
Directorate of Education
(Secondary and Higher Secondary)
Maharashtra State, Pune
Having its office at Central Bldg, Pune.
3. Deputy Director of Education,
Pune Region, Pune,
17, Dr. Ambedkar Marg,
Pune-01.
4. The Education Officer (Primary),
Zilla Parishad, Solapur
5. Shri. Ganesh Shikshan Prasarak
Mandals' Institute
Sant Dnyaneshwar Primary
Vidyamandir, Barshi, Tal: Barshi, Dist.:
Solapur, Through its
Chairman/Secretary.
6. Head Master,
Sant Dnyaneshwar Primary
Vidyamandir, Barshi, Tal: Barshi,
Dist.: Solapur

...Respondents

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Mr. Akhil Kupade i/by Manoj Harit and Co. for the Petitioner.
Mr. N. C. Walimbe, AGP for the Respondent Nos. 1 to 3.
Mr. Anand S. Kulkarni for the Respondent No.4.

CORAM : R.D. DHANUKA &
R.I. CHAGLA, JJ.

Reserved on : 03 August 2021
Pronounced on : 24 August 2021

JUDGMENT : (Per R.I. Chagla, J)

1. Rule.

2. Learned AGP for Respondent Nos. 1 to 3 waives service. Learned Counsel appearing for Respondent No. 4 waives service. None appears on behalf of Respondent Nos. 5 and 6, inspite of service.

3. Heard finally by consent of parties.

4. By this Petition filed under Article 226 of the Constitution of India, the Petitioner seeks quashing and setting aside of the impugned order dated 1st March 2017 passed by the Respondent No. 4 and further directions against

Respondent Nos. 4 to accord approval to the proposal dated 1st June 2016 of the Petitioner as Assistant Teacher transferred from the unaided school to the aided school of the same institution with applicable pay scale with effect from the date of his transfer. The Petitioner has also sought direction against Respondent No. 4 to release the salary of the Petitioner from the date of his transfer i.e. 1st June 2016 from unaided to aided school.

5. The Petitioner was appointed by the Shri Ganesh Shikshan Prasarak Mandal ("**the Management**") of Sant Dnyaneshwar Primary Vidyamandir ("**the School**") as Assistant Teacher on 4th January 2014 for a period of two years from 4th January 2013 to 3rd January 2015 in the pay-scale of Rs. 5200-20200 with the grade pay of Rs. 2800/-.

6. Thereafter, the Management of the School submitted a proposal to Respondent No. 4 seeking approval for appointment of the Petitioner as Assistant Teacher in the School.

7. Respondent No. 4 after considering the proposal,

granted approval for appointment of the Petitioner as Assistant Teacher in the School, which was unaided.

8. As the Petitioner had successfully completed his probation period, the Management of the School convened a meeting on 1st May 2016, wherein it was unanimously resolved that the Petitioner will be transferred to its School, which was aided, as Assistant Teacher on account of the vacancy which had arising as one Shri. Dhanvate Kalidas Shivram was retiring by superannuation on 31st May 2016.

9. The Management of the School on 20th June 2016 submitted a detailed proposal with Respondent No. 4 to seek approval to the transfer of the Petitioner from unaided to the aided School as Assistant Teacher since clear vacancy arisen in the post of Assistant Teacher in the School.

10. Respondent No. 4 by the impugned order dated 1st March 2017 rejected the proposal of the Petitioner. Being aggrieved thereof, the present Petition has been filed.

11. Learned Counsel appearing for the Petitioner has submitted that the impugned order has been passed contrary to the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (“**MEPS Rules**” for short), especially, Rule 41 thereof. He has submitted that the impugned order places reliance upon the Government Circular dated 28th June 2016 and particularly Clause 3 Sub-Clauses 1 and 2 thereof. He has placed reliance upon several decisions of this Court including the decisions of this Court in case of **Miss. Devkar Dipali Kisan & Ors. Vs. The State of Maharashtra & Ors.**¹ which has been followed in subsequent decision of Division Bench of this Court (Bench at Aurangabad) in case of **Suryakant S/o Janardan Muge Vs. The State of Maharashtra & Ors.**². In the said decision, the Division Bench has held that the Government Circular dated 28th June 2016, in particular Clause 3 Sub-Clauses 1 and 2 thereof which provides that if surplus Teacher is available at the time of appointment, then approval should not be granted to the transfer of Teacher from unaided School to aided School, are instructions which cannot have statutory force in law. The

1 Writ Petition No. 5313 of 2017

2 Writ Petition No. 1493 of 2018

Division Bench upon placing reliance upon Rule 41 of the MEPS Rules which is subordinate legislation held that administrative decisions such as the Government Circular which run contrary to the said Rule cannot be held to be valid in law. The Division Bench accordingly, held that since Sub-Clauses 1 and 2 of Clause 3 of Government Circular, run contrary to the provisions of subordinate legislation as found in Rule 41, the same has no validity in law. Thus, it was held that the transfer of Teacher from aided post to unaided post is permissible in law. Equally, the transfer of an employee from unaided post to an aided post in another school run by the same Management would also be permissible in law. He has accordingly, submitted that since the issue that has arisen in this Petition is covered by the above referred decisions of this Court, the Petition be allowed.

12. Learned Counsel appearing for Respondent No. 4-Education Officer (Primary), Zilla Parishad has opposed this Petition. He has relied upon the Affidavit in Reply dated 1st July 2019 filed on behalf of Respondent No. 4. He has submitted that the Government Circular dated 28th June 2016 is binding on the Petitioner and since there are surplus Teachers who are

accepting salary without any work and which would affect the public exchequer and that the initial appointment of the Petitioner is unaided, claiming right on aided post as Assistant Teacher being senior most Teacher is against the principle of justice and such transfer is bad in law.

13. Learned Counsel for the Respondent No. 4 has placed reliance upon a subsequent Government Resolution dated 1st April 2021 wherein a similar direction has been issued as Government Circular dated 28th June 2016. He has submitted that it is the consistent view of the Respondent-State that in the event of there being surplus Teachers, transfer from unaided to aided post as Assistant Teachers cannot be approved.

14. The learned AGP appearing for the Respondent-State has opposed this Petition and supported the argument of the learned Counsel for Respondent No. 4.

15. Having considered these submissions, it is apparent from the decisions of this Court in the compilation

tendered by the learned Counsel for the Petitioner that the issue arising in this Petition is no longer *res integra*. It is clear from the decisions of the Division Bench of this Court in **Miss. Devkar Dipali Kisan** (supra) that the Government Circular dated 28th June 2016 and in particular, Clause 3 of Sub-Clauses 1 and 2 has been held to have no statutory force in law. The relevant Clauses of the Government Circular of which the impugned order is passed read 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.”*

16. The Division Bench of this Court in **Miss. Devkar Dipali Kisan** (supra) has placed reliance on Rule 41 of the MEPS Rules and held that the said Government Circular in particular Clause 3, Sub-Clauses 1 and 2 thereof runs contrary to the provisions of Rule 41 which is subordinate legislation and is thus, not valid in law. It is clear from this decision as well as the subsequent decision in the case of **Suryakant S/o Janardan Muge** (supra) that transfer of Teacher from unaided post to aided post is permissible in law. Equally, the transfer of an employee from unaided post to an aided post in another school run by the same Management is also permissible in law.

17. The subsequent Government Resolution dated 1st April 2021 upon which reliance has been placed by the learned Counsel for the Respondent No. 4 as well as by the learned AGP appearing for Respondent Nos. 1 to 3 cannot apply retrospectively to the transfer of the Petitioner as Assistant Teacher from unaided to aided school which transfer was on 1st June 2016.

18. In view of the well settled position in law, the

impugned order dated 1st March 2017 rejecting the proposal dated 1st June 2016 of the Petitioner as Assistant Teacher transferred from unaided to aided school of the same institution is required to be quashed and set aside. Hence, the following order is passed:-

- (i) The impugned order dated 1st March 2017 is quashed and set aside.
- (ii) The Respondent No. 4-Education Officer (Primary), Zilla Parishad is directed to grant approval to the transfer of the Petitioner as Assistant Teacher from unaided post to aided post as per the proposal dated 1st June 2016 within a period of six weeks from the date of this order.
- (iii) Respondent No. 4-Education Officer (Primary), Zilla Parishad is directed to release the salary of the Petitioner from the date of his transfer on 1st June 2016 from unaided to aided school within a period of 12 weeks from the date of this order.

(iv) Writ Petition is disposed of in the above directions.

(v) Rule is made absolute accordingly.

(vi) There shall be no order as to costs.

[R.I. CHAGLA J.]

[R.D. DHANUKA, J.]