

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.13833 OF 2016

Mrs. Latabai Pandurang Joshi & Anr.Petitioners
vs.
The State of Maharashtra & Anr.Respondents

Mr. Narendra V. Bandiwadekar a/w. Mr. Vinayak Kumbhar for the
Petitioners.

Mr. S.B. Kalel, AGP for the Respondent-State.

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

DATE ON WHICH JUDGMENT IS RESERVED : 3 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 this petition have approached this Court being aggrieved by the rejection of the proposal for transferring her services from unaided post to aided post in the same institution.

3. Petitioner No.1 seek direction against Respondent No.2-Education Officer (Secondary) Zilla Parishad to grant approval to appoint Petitioner No.1 on aided post of Assistant Teacher from her date of appointment on 100% grant-in-aid in Respondent Nos.4 and 5 Schools instead of Shikshan Sevak on 20% grant-in-aid. She also seek directions to release her arrears of salary.

4. Petitioner No.1 was initially appointed as 'Assistant Teacher' on unaided division of Petitioner No.2 by following due procedure and against clear and vacant sanctioned posts. The appointment of Petitioner No.1 was approved by Respondent No.2.

5. By efflux of time, in the same school where the Petitioner is working, aided post became vacant on account of superannuation of senior teacher or promotion of existing Teacher as Headmaster. As such, the Petitioner No.1 was transferred on aided post in the same school. After the transfer, the proposal for grant of approval to the transfers came to be submitted to the concerned Education Officer. However, the approval 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 Petitioner No.2 forwarded the proposal of Petitioner No.1 for approval to Respondent No.2. Respondent No.2 granted approval to the transfer of Petitioner No.1 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 Petitioner No.1 on unaided basis as Assistant Teacher for more than six years and her transfer to aided division of Petitioner No.2 on a sanctioned post, which became vacant due to retirement or voluntary retirement or promotion of an earlier teacher working on the same aided post. It is contended that the said post was already on 100% grant-in-aid basis, and therefore, Petitioner No.1 is entitled to get approval to her transfer on aided division of Petitioner No.2 Secondary School on 100% grant-in-aid in regular pay scales. It is contended that while passing orders, Respondent No.2 thereby granted approval to the transfer of Petitioner No.1 only at 20% grant-in-aid and in respect of Petitioner No.1

as Shikshan Sevak on honorarium basis and such approval is wrong and erroneous; the said order be quashed and set aside and Respondent No.2 be directed to grant approval to her transfer from unaided post to aided post as Assistant Teacher. Petitioner No.1 also claim arrears of salary from the date of her transfer as Assistant Teacher.

7. Heard learned counsel for the Petitioners and learned AGP for the Respondent-State. It is an admitted fact that by following due procedure, Petitioner No.1 was initially appointed as Assistant Teacher in Petitioner No.2 and since then she has been in continuous service. After completion of her probation period, the services of Petitioner No.1 came to be confirmed and Respondent No.2 has even granted permanent approval to the services of Petitioner No.1 on unaided basis. It is also admitted that on account of retirement or voluntary retirement or promotion of earlier teacher in Petitioner No.2 school, Petitioner No.1 was transferred from unaided division to aided division of Petitioner No.2 school. The proposal for transfer of Petitioner No.1 from unaided division to aided division in Petitioner No.2 school was 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 Petitioner No.1 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 her regular pay instead of granting such approval on 100% grant-in-aid from the date of her transfer in aided division.

8. This Court has passed an order in the case of 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 a bunch of petitions.

9. 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.

10. 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).

11. In that view of the matter, when the transfer of a 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 periods, 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 a 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.

12. 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.

13. Upon 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.

14. It appears from the perusal of the facts of the case that, Petitioner No.1 was appointed after following due procedure of law and thereafter, on successful completion of probation period, approval was granted to her appointment as Assistant Teacher and she has acquired the status as Assistant Teacher on regular/permanent basis. It appears that, she has rendered more than 5 years of satisfactory services as Assistant Teacher

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, Petitioner No.1 has completed more than 5 years of satisfactory service on the post of Assistant Teacher. In that view of the matter, and if Petitioner No.1 was most senior teacher in the Institution working in a school on unaided basis at the relevant time, her transfer from unaided posts to aided posts due to retirement or promotion of incumbent teachers was permissible, and there was no need to make fresh appointment on the post of Shikshan Sevak, thereby practically denying her the benefits accrued by virtue of rendering more than five years of service as Assistant Teacher on regular basis.

15. In view of the forgoing discussion, we are inclined to allow the petition. Respondent No.2 is directed to grant approval to Petitioner No.1 as 'Assistant Teacher' on 100% grant-in-aid in Petitioner No.2 school in regular pay scales w.e.f. her date of transfer within a period of six weeks from today and release her arrears of salary accordingly.

16. The petition is disposed of in the above terms. No order as to costs.

(SURENDRA P. TAVADE, J)

(S.C. GUPTE, J.)