

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.12062 OF 2022
(Umap Sunil Govind Vs. The State of Maharashtra and another)
WITH
WRIT PETITION NO.12087 OF 2022
(Someshwar Onkar Pawar Vs. The State of Maharashtra and another)
WITH
WRIT PETITION NO.12119 OF 2022
(Mangal Vikram Khare Vs. The State of Maharashtra and another)
WITH
WRIT PETITION NO.12189 OF 2022
(Satish Shripatrao Garad Vs. The State of Maharashtra and another)

Mr.Shambhuraje Deshmukh h/f Mr.Sanket S.Shinde, Advocate for the petitioner.

Mr.S.K.Tambe, AGP for the respondent Nos.1 and 2.

(CORAM : RAVINDRA V. GHUGE AND
SANJAY A. DESHMUKH, JJ.)

DATE : DECEMBER 09, 2022

PER COURT :

1. The petitioner in WP No.12062/2022 has put forth prayer clause B and C as under :-

"B. By issuing appropriate writ, order or directions in the like nature, the impugned communication dated 26.09.2022 (Exh.A) issued by the respondent No.2 thereby rejecting the proposal of transfer from unaided to aided post may kindly be quashed as set aside with further directions to issue approval to the transfer within a period of 1 month;

C. Pending the hearing and final disposal of this writ petition, the respondent No.2 may kindly be directed to maintain status quo in respect of post held by the petitioner."

2. In similar circumstances, this Court has passed a detailed order in WP No. 11751/2022 (Prashant Rameshrao Dhongde Vs. The State of Maharashtra, Through it's Principal Secretary and another), dated 09/12/2022. The learned Advocates for the respective sides submit that for the same reasons, these petitions can be disposed off. For the sake of brevity, we are reproducing the order dated 09.12.2022 hereunder :-

"1. On 02.12.2022, we had passed the following order :-

"1. We are informed that the State Government, through the School Education and Sports Department, has issued a GR dated 01.12.2022, by which certain provisions of the GR dated 08.06.2020, more particularly, with regard to Rule 41-1 (sic 41-A) of the MEPS Rules, 1981 have been suspended by the Government.

2. Issue notice to the respondents. The learned AGP waives service of notice.

3. We are posting this matter on 09.12.2022 in the urgent orders category in order to enable the learned AGP to take instructions, especially, with regard to the GR dated 01.12.2022 and make a statement."

2. The petitioner has put forth prayer clause B and C as under :-

"B. By issuing appropriate writ, order or directions in the like nature, the impugned communication dated 26.09.2022 (Exh.A) issued by the respondent No.2 thereby rejecting the proposal of transfer from unaided to aided post may kindly be quashed as set aside with further directions to issue approval to the transfer within a period of 1 month;
C. Pending the hearing and final disposal of this writ petition, the respondent No.2 may kindly be directed to maintain status quo in respect of post held by the petitioner."

3. The petitioner has been appointed as an "Assistant Teacher" on 11.12.2004 on an unaided post. Permanent approval to his selection and appointment was granted by the competent authority by order dated 12.06.2006. One teacher namely Vyankatrao Dhage belonging to the open category, retired on 31.07.2020. Considering his vacancy and the fact that the petitioner also belongs to the open category, the Management transferred the petitioner vide order dated 07.08.2022 from the unaided post to the aided post in the said school. By communication dated 26.09.2022, the proposal for seeking approval has been rejected by the Education Officer.

4. We have considered the strenuous submissions of the learned AGP on behalf of the respondents. He informs us that there are several private educational institutions that have developed a modus operandi for selecting employees, appointing them on unaided post, obtaining approvals and then transferring them to the aided post. He refers to the order passed by this Court on 02.05.2022 (Coram : Ravindra V.

Ghuge and Sanjay G. Deshmukh, JJ) in WP No.3336/2021 filed by Patekar Someshwar Rohidas Vs. State of Maharashtra and others and connected petitions. He further submits that this Court has considered the scope of Rule 41 of the M.E.P.S. Rules, 1981 and has observed in paragraph Nos. 6 to 16 as under :-

"6. *Rule 41-A has been brought in as an amendment to the MEPS Rules, 1981 vide order dated 08.06.2020. Rule 41-A reads as under :-*

"41-A. Conditions for transfer of teacher from unaided to partially aided or aided school or division :-

(1) The management may transfer a teacher from unaided school or partially aided school to the vacant post in partially aided school or aided school or division only if the following conditions are satisfied, namely :-

(a)(i) the Management and Education Officer or Deputy Director shall, before making such transfer, verify that there is no surplus persons are available as provided in sub-section (1) of section 5 of the Act;

(ii) if the surplus persons are available, the Management shall not make such transfer;

(b) the transfer shall not be made from the teachers of self-financed school of the Management;

(c) before making such transfer, the teacher should have completed minimum five years continuous service in unaided school or division or partially aided school or division of the Management;

- (d) *the transfer shall be made in equal or same cadre. The transfer shall not be made from primary to higher primary, higher primary to secondary or secondary to higher secondary or higher secondary to D.El. Ed. Schools or vice versa;*
- (e) *the transfer shall be made only by following the seniority and as per the requirement of the subject;*
- (f) *before making transfer of a teacher, his appointment should have been approved by the Education Officer or Deputy Director, as the case may be;*
- (g) *the transfer shall be made on the vacant post;*
- (h) *the transfer shall be subject to the approval of Education Officer or Deputy Director, as the case may be.*
- (2) *If the post becomes vacant due to transfer, such vacant post shall be filled as per the procedure provided in rule 9.*
- (3) *The transferred teacher shall be eligible for scale of pay and allowances as decided by the Government, from time to time.”*

7. *It is thus, obvious that Rule 41-A is exclusively in relation to the condition of transfer of a teacher from unaided to partially aided or fully aided school or division. Rule 41-A(1)(a) mandates that the Management and Education Officer or Deputy Director shall, before making such transfer, ensure that there are no surplus persons available as provided under Section 5(1) of the MEPS Act, 1977 before effecting*

an order or permitting transfer of a person from unaided to aided category.

8. *We also find from the impugned orders that while considering the availability of surplus teachers, the concerned authority has also taken into account the backlog.*

9. *In the order dated 10.03.2022 passed in **Dhanashree Borkhede (supra)**, we do not find that the issue of surplus teachers vis-a-vis available vacancies in Beed district was addressed to the Court calling for an adjudication, inasmuch as, the issue of reservation/backlog was also not raised. For the sake of clarity, we are reproducing paragraphs 2 to 7 of the order dated 10.03.2022, hereunder :-*

“2. *By this petition filed under Article 226 of the Constitution of India, the petitioner has prayed for various reliefs including the prayer to re-consider the proposal of respondent-Management dated 17.07.2021 and to accord and approval in favour of the petitioner against aided post in the school namely Shri. Shivaji Vidyalaya, Beed Taluka and District Beed.*

3. *Mr. Godbole, learned counsel for the petitioner invited our attention to the Rule 41-A of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 and also the information received by the petitioner from the Superintendent Pay and P. F. Unit under the Provisions of Right to Information Act stating that 42 posts are still lying vacant.*

4. *It is submitted that in view of this position, respondent Nos.2 to 3 shall be directed to re-consider*

the decision after considering the effect of Rule 41-A of the M.E.P.S. Rules and also the information received by the petitioner under the Right to Information Act annexed at page Nos.46 and 47 of the petition.

5. *Learned AGP for the Respondents-State does not dispute the correctness of the information supplied to the petitioner annexed at page Nos.46 and 47 of the petition and also that Rule 41-A is inserted in the M.E.P.S. Rules.*
6. *In view of the amendment filed by virtue of the 41-A of the M.E.P.S. Rules and in view of the information received by the petitioner under Right to Information Act, the impugned decision taken by the respondent Nos.1 and 2 will have to reconsider in accordance with law.*
7. *We accordingly pass the following order :*
 - (i) *The impugned order dated 30.07.2021 annexed at Exh-A to the petition is quashed and set aside.*
 - (ii) *The proceedings are restored before the Education Officer (Secondary), Zilla Parishad, Beed for reconsideration after taking into consideration the effect of Rule 41-A and the information supplied to the petitioner annexed at page Nos.46 and 47 of the petition. The order that would be passed shall be passed without being influenced by the observations made and conclusions drawn in the impugned order*

which is quashed and set aside by this order and shall be decided in accordance with law. If the order is in favour of the petitioner, the consequential benefits shall be granted to the petitioner within a period of four (4) weeks from the date of such order. If the order is adverse against the petitioner, the petitioner would be at liberty to file appropriate proceedings.

(iii) No order as to costs.

(iv) Parties to act on the authenticated copy of this order.”

10. *As such, we find that the issue of surplus teachers being available, is seriously canvassed by the learned AGP, inasmuch as, the issue of backlog is also raised by her, before us.*

11. *In our view, it is a legal obligation cast upon the Management to approach the Education Officer for filling in vacancies. Transfer from unaided category to aided category would not amount to recruitment or filling up a vacancy by recruitment. Rule 41-A permits transfer of teachers, who are working on unaided basis to vacancies in aided category as and when such vacancies arise. In our view, surplus teachers, if available and can be allocated to a particular institution, cannot be ignored while permitting transfer from unaided to aided category of regular teachers under Rule 41A(1)(a)(i and ii). If it comes to a conflict between an eligible surplus teacher, who was originally working in the aided category, when he/ she is declared surplus, his/her seniority will have to be considered vis-a-vis the candidate available for transfer from unaided to aided category in a particular school/ institution.*

12. *Similarly, the backlog will also have to be considered for the reason that a situation ought not to occur that, with the candidates being transferred from unaided category to aided category, led to the creation of backlog. For better understanding, we deem it appropriate to resort to an illustration as under :-*

(a) *Suppose in an institution X, 10 posts become available in the aided category on account of superannuation/ voluntary retirement of such teachers, etc.. Out of 10 posts, suppose there are 07, who belong to the reserved category and 03 are from the open category. While transferring 10 teachers from unaided category to such aided category, if it so happens that, out of 10 teachers only 02 are from the reserved category and 08 are from open category. If these 10 teachers are transferred to the aided category, a backlog of 05 teachers from the reserved category would be created since 02 teachers from the reserved category are accommodated against available 07 posts in the aided category and rest of the teachers from the open category would be absorbed/ transferred in the aided category.*

13. *We find that these aspects will have to be considered by the Education Officer including the issue of there being surplus teachers since these two issues have been raised before us by the learned AGP and they are borne out from the impugned orders, which does not appear to be the case before the learned coordinate Bench in the matter of **Dhanashree (supra)**.*

14. *The learned advocate for the petitioners has strenuously canvassed that in 2021, there were about 118 vacancies in Beed district. There were 36 surplus teachers. In 2022, there are still 42 vacancies in the district and there are 10 surplus teachers. This aspect*

does not seem to have been taken into account by the Education Officer when the impugned orders were passed.

15. *In view of the above, these Writ Petitions are partly allowed. We are quashing and setting aside the impugned orders and remitting the proposals of these petitioners to the Education Officer on the following conditions :-*

(a) Wherever the Managements/ respondents in these petitions have not intimated to the Education Officer as regards the available vacancies in their Institutions, such Managements shall forthwith issue communications to the Education Officer, on or before 25.05.2022 setting forth details of the vacancies available with such Institutions.

(b) While considering the above, all such communications which may have already been forwarded to the Education Officer by some of the Managements, the issue of surplus teachers vis-a-vis available vacancies in Beed district, based on their seniority and eligibility, will be considered and recommendation of surplus teachers to particular Institutions for absorption, would be considered by the Education Officer.

(c) While approving transfers from unaided to aided category as per the proposals forwarded by the respondents/ Managements, the Education Officer shall consider surplus teachers available and while approving such transfers, would also consider whether, an imbalance in reservation is likely to be created in the aided category owing to such transfers.

(d) As far as possible, the Education Officer shall ensure that an imbalance is not created in reservation while approving such

transfers to the aided category vis-a-vis vacancies that have occurred from the reserved category on account of the teachers, who are exiting employment on account of their superannuation or voluntary retirement, etc..

(e) After considering the above aspects, the Education Officer shall pass reasoned orders in the cases before him, as expeditiously as possible and preferably on or before 15.07.2022.

(f) Needless to state, those teachers, whose proposals would be approved for transfer from the unaided to aided category, would be entitled for all consequential benefits from the dates on which the transfers are approved.

(g) The above guidelines would apply squarely to the cases wherein, the transfers are effected from unaided to partially aided or fully aided or from partially aided to fully aided category, etc..

(h) In the event of any grievance of any of these petitioners or any other teacher, persisting or cropping up on account of reservation/backlog while approving transfers of teachers from unaided to aided or partially aided or from partially aided to fully aided category, the said issue will be left open if there is specific challenge to that extent.

16. At this stage, the learned advocate for the petitioners submits that though in some petitions before this Court, the issue as regards the legality of Rule 41-A(1)(a) is being raised, the said challenge is not being pressed in these petitions since the Education Officer would be reconsidering all the cases of these petitioners. In the event, the said provision comes in the way of any of these petitioners or other teachers, they would raise a challenge to the said rule in a substantive petition, which this Court may then consider. So also, the

issue of granting consequential benefits with retrospective effect from the date the vacancy has occurred, is not raised in these petitions. The same be left open to be considered in an appropriate petition."

5. *The learned AGP further submits that he has received a communication from Mr.Tushar Mahajan, Deputy Secretary, School Education and Sports Department, State of Maharashtra dated 08.12.2022. He has been conveyed that as the State Government has noticed the misuse of Rule 41-A (wrongly typed as 41-1-1), the State Government has stayed the operation of Rule 41-A in order to carry out a research on the said issue and came up with certain conditions, which would ensure that Rule 41-A is not misused.*

6. *We have perused the impugned order dated 26.09.2022. The Education Officer records a finding that the petitioner is the senior most teacher in the Organization. On this count, therefore, we do not find that his absorption on the aided post in the presence of a clear vacancy for the open category to which the petitioner belongs, could be faulted. We further find from the impugned order that the Education Officer has noticed a backlog of one seat for the VJNT/SBC, 2 vacancies for the OPC. Backlog indicates a total of 3 seats and in order to ensure that the backlog is erased, the Education Officer will have to initiate steps to assess the total number of vacancies, the number of eligible surplus teachers and balance the backlog.*

7. *The learned Advocate for the petitioner submits that considering several vacancies in Zilla Parishad, Beed and lesser number of surplus*

teachers, the Education Officer can surely reconsider the case of the petitioner by assessing the number of vacancies, the backlog and the number of surplus teachers in the light of the conditions set out by this Court in paragraph No.15 of the judgment dated 02.05.2022. We find from the impugned order that merely because there is a backlog, the Education Officer has rejected the proposal of the petitioner in a single sentence order. We do not find any assessment made as regards the available vacancies, the eligibility of the surplus teachers and as to whether the petitioner, being senior most teacher in the organization, could be considered for granting approval.

8. In view of the above, this petition is partly allowed. The impugned order dated 26.09.2022 is quashed and set aside. The proposal of the petitioner is restored to the file of respondent No.2, to be considered in the light of the conditions set out by this Court below paragraph No.15 of the order delivered in Patekar Someshwar Rohidas (supra). We expect respondent No.2 to take a decision on or before 31.01.2023. In the event, the State Government brings up amended Rule 41-A, the Education Officer would consider the effect of the said provision while implementing these directions. Needless to state, if the petitioner has any grievance, he would be at liberty to seek redressal."

3. In view of the above, for the same reasons and by applying the same directions, these petitions are partly allowed. The impugned orders are quashed and set aside and the proposals of the petitioners are restored to the file of respondent No.2 to be considered in the light

of the conditions set out by this Court below paragraph No.15 of the order delivered in Patekar Someshwar Rohidas (supra). Respondent No.2 shall take a decision in the light of the above reproduced paragraph No.8.

(SANJAY A. DESHMUKH, J.)

(RAVINDRA V. GHUGE, J.)