



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 7718/2022

PETITIONER: Nishant Madhukar Somkuwar,
Aged about 38 years, Occu: Service,
R/o at Post-Nanda Gomukh,
Tah. Saoner, District-Nagpur.

...V E R S U S...

RESPONDENTS 1] Education Officer (Secondary),
Zilla Parishad, Nagpur.

[Deleted as per
Courts order
dated 21/06/2023 for
Respondent Nos. 2 and 3.] 2] ~~Saraswati Prasadik Education Society,
Nanda Gomukh, Tahsil-Saoner,
District Nagpur.~~

3] ~~Gomukh Vidyalaya, Bichwa,
through Head Master, Tahsil-Saoner,
District Nagpur.~~

Mr. U.J.Deshpande, counsel for the petitioner.
Mr. N.S.Rao, A.G.P for State.

CORAM : **PRITHVIRAJ K. CHAVAN &**
URMILA JOSHI-PHALKE, JJ

DATE OF RESERVE : **05/10/2023**
DATE OF DECISION : **16/10/2023**

JUDGMENT : (PER : URMILA JOSHI-PHALKE, J)

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

2. The petitioner has filed this petition under Article 226 of the Constitution of India. By this petition, the petitioner seeks to quash and set aside the impugned order dated 27/07/2022, by which, the petitioner was transferred from unaided post to aided post, on a condition that he would be entitled for 20% of salary for the grants-in-aid by wrongly invoking Clause 5 (B) of the Government Circular dated 28/06/2016.

3. The petitioner was appointed as an Assistant Teacher in Saraswati Prasadik Education Society, Gomukh Vidyalaya, Bichwa, Tahsil Saoner, District Nagpur on 08/07/2010 on an unaided Section. The appointment was on probation for a period of two years. His appointment came to be approved by the Education Officer (Secondary) on 15/11/2014 from the period of probation. Subsequently, on 01/11/2019, the services of the petitioner were transferred to an aided section of the school, pursuant to the disposal of the Writ Petition No.7973/2018. The Education Officer (Secondary) on 12/03/2020 while granting approval held that such approval would be on the post of 'Shikshan Sevak' from 01/11/2019 for a period of three years.

4. The petitioner has challenged such approval by preferring the Writ Petition No. 4661/2021. This Court held that since the initial appointment of the petitioner was on the

post of 'Assistant Teacher', it was not permissible to approve his services on the post of 'Shikshan Sevak' after having rendered service which was more than nine years from his initial appointment. The services of the petitioner were liable to be approved on the post of 'Assistant Teacher'.

5. This Court directed that the services of the petitioner shall be approved on the post of Assistant Teacher in the manner prescribed in the order dated 12/03/2020 in Writ Petition No. 7973/2018. The Education Officer was directed to take the necessary steps within four weeks from the receipt of the order.

6. On perusing the said order, the respondent / Education Officer (Secondary) on 22/07/2022 granted approval to the services of the petitioner on the post of 'Assistant Teacher' from unaided post to aided post, on the condition that he would be entitled to 20% salary from grants-in-aid by wrongly invoking Clause 5(B) of the Circular dated 28/06/2016. The petitioner has challenged the said order on the ground that respondent No.1 was under obligation to grant approval to the transfer of the petitioner as 'Assistant Teacher' in the prescribed Pay Scale of Rs. 29200-92300 on a 100% grants-in-aid basis. However, the Education Officer without assigning any reason, granted approval for 20% of the said Pay Scale. The contention of the petitioner is that this Court directed to grant approval to the

post of petitioner as 'Assistant Teacher' on a 100% aided basis and not on a 20% aided basis. The respondent No.1 invoked sub-clause 5(B) of clause 3 of the said Circular dated 28/06/2016 wrongly. The order of Education Officer is arbitrary and liable to be set aside.

7. The respondent/Education Officer has opposed the said petition on the ground that the State Government has issued a Government Circular dated 28/06/2016, whereby guidelines are provided to effect the transfer from the Unaided Section to the Aided Section. Based upon the Government Resolution dated 28/06/2016, the petitioner was sanctioned 20% grant in aid. The Government Resolution specifically provides that a candidate, who completed five years or more service, in an unaided institution then the said candidate shall be brought under 20% of grant in aid and subsequently shall be granted 40%, 60%, 80% and 100% grant-in-aid in each year. The petitioner would be entitled to 100% grant-in-aid after completion of 5 years of service from the date of approval and therefore, no interference is called for.

8. Heard learned counsel Mr. U.J. Deshpande for the petitioner and Mr. N.S.Rao, learned AGP for respondent /State.

9. 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 (for short 'the MEPS Rules'), especially, Rule 41 thereof. He has submitted that the impugned order places reliance upon the Government Circular dated 28/06/2016 and particularly Clause-3 sub-clauses (1) and (2) thereof. He has placed reliance upon several decisions of this Court in the case of *Ajay Vishwanath Khaparde Vs. State of Maharashtra and others reported in 2022 (2) Mh.L.J. 649*, *Miss. Devkar Dipali Kisan V/s State of Maharashtra reported in Law Finder Doc. Id # 2034537*, *Pramod s/o Prabhakar Pokale V/s State of Maharashtra and others reported in 2019 (4) Mh.L.J 278* and *Writ Petition No. 1493/2018 along with connected petitions at Aurangabad Bench decided 04/07/2019*. In all the decisions, the Division Bench held that the Government Circular dated 28/06/2016, particularly Clause 3 sub-clauses (1) and (2) which provides that if the 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 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 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 a Teacher from an aided Post to an unaided Post is permissible in law. Equally, the transfer of an employee from an unaided Post to an aided Post in another school run by the same Management would also be permissible in law. He further 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.

10. Per contra, learned AGP Mr. N.S.Rao, for the State, opposed the petition and submitted that the Education Officer (Secondary) has passed the order on the basis of the Government Circular dated 28/06/2016, which is binding on the petitioner. The petition is devoid of merits and liable to be set aside.

11. We have heard the learned counsel for the parties and upon perusal of the record, it appears that the petitioner was initially appointed on an unaided Section on 08/07/2010. The appointment was on probation for a period of two years. His appointment was approved by the Education Officer (Secondary) on 15/11/2014 for the period of probation. Subsequently, on 01/11/2019 the services of the petitioner were transferred on an aided section of the School, pursuant to the disposal of the Writ Petition No.

7973/2018. The Education Officer (Secondary) on 12/03/2020, while granting approval held that the said approval would be on the basis of Shikshan Shevak from 01/11/2019 for a period of three years. The said order was challenged by the petitioner by preferring Writ Petition no. 4661/2021. This Court, on the basis of the decision in Writ Petition No. 5258/2012 [*Ms. Sandhya L. Ghosalkar V/s The State of Maharashtra and others*] decided at Principal Seat along with connected writ petitions on 12/09/2022 wherein in para-4 it has been observed as under:

“4. In our view, there was no justification whatsoever for the Education Officer (Secondary) to grant his approval only as Shikshan Sevaks to the three Petitioners. If the Petitioners had been appointed as Assistant Teachers in the aided school by transfer from the unaided school on the basis of seniority, the approval ought to have been granted to them as Assistant Teachers. This is especially so having due regard to the fact that they were similarly circumstanced with other Teachers in whose case approval was granted as Assistant Teachers.”

12. On the basis of the above observation, this Court has directed that the services of the petitioner shall be approved for the post of ‘Assistant Teacher’ in the manner prescribed in the order dated 12/03/2020. As per the order of this Court, the Education Officer granted the approval to the said transfer of the petitioner as Assistant Teacher not on

100% of the Pay Scale but on 20% of the Pay Scale which is not challenged in this writ petition.

13. We have considered the submissions of the learned counsel for the petitioner and learned AGP for respondent/State.

14. Learned AGP fairly submitted that the contention of the petitioner is covered by the decision of this Court. The Government Circular, which prescribed salary benefits upto 20% grant-in-aid, followed by 40%, 60%, 80%, and then 100% has been set aside by this Court in the case of ***Sandhya d/o Balkrushna Teli and others V/s State of Maharashtra and others at Principal Seat in Writ Petition (Stamp) No. 93919/2020 decided on 12/03/2021.***

15. We find it appropriate to reproduce the relevant paragraphs of the said judgment which is squarely applicable to the case in hand, as under :-

“8. 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 Act, 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.

*9. It will be relevant to refer to the judgment of a Division Bench of this Court in **Writ Petition No.5258***

of 2012 (Ms. Sandhya Laxman Ghosalkar V/s. The State of Maharashtra & Ors.) dated 12.09.2012, wherein the Division Bench found that the teacher having completed a probationary period of three years in unaided section, there was no justification in granting approval only as Shikshan Sevak and approval ought to have been granted as Assistant Teacher.

10. *In the case of Dattu s/o Bhima Thorat V/s. The State of Maharashtra and others in Writ Petition No. 2960/2012 (decided on 11th October 2012), this Court had an occasion to consider a similar issue. It is observed 'The Education Officer has failed to make distinction as far as the instant matter is concerned. Since Respondent No.2- Institution is not proposing to fill in the vacancy by appointing any new recruit, the vacancies is filled in by transferring a Assistant Teacher from the school which does not receive grant-in-aid run by the same Institution. There is no prohibition prescribed in Government policy for effecting such transfer from unaided school to aided school. Reliance is placed on the judgment in the matter of Ms. Sandhya Laxman Ghosalkar Vs. State of Maharashtra (Writ Petition No. 5258 of 2012 and other companion matters, decided at Bombay on 1.09.2012). While dealing with an identical issue, the Division Bench of this Court has observed that there is no prohibition for transfer of an Assistant Teacher appointed in unaided school to aided school on the basis of seniority and if such transfers are effected, it is incumbent upon the Education Office to accord approval.'*

16. A similar view has been taken by this Court in a bunch of petitions, being *Writ Petition No.11065 of 2014 in the case of Mrs. Shilprekha Vinayak Joshi & Ors. V/s. The State of Maharashtra and Ors. decided on 14th February, 2017.*

17. It appears that, after all these judgments were delivered, the State Government issued a Circular dated 28th June, 2016. The main Clauses of the said Circular dated 28th June, 2016 on which the learned AGP relies are 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.”

18. In the judgment of ***Sandhya d/o Balkrushna Teli referred (supra)*** in para-14, it further observed that after the said Government Circular was issued, another Division Bench of this Court at Aurangabad had an occasion to consider the said Circular in Writ Petition No. 6114 of 2018 and observed that :-

“The sub clause 1, 3 and 4 of Clause 3 of the Government Circular dated 28th June, 2016, reproduced herein above, are in conformity with the discussion made herein above. But sub clause 2 of Clause 3 of the said Circular is that, till the

surplus teachers are absorbed, no approval should be granted for transfer of the Assistant Teacher from unaided school to aided school of the same Institution. In our opinion said clause runs contrary to the ratio laid down in the aforesaid judgments of the High Courts.”

19. In para-15, it is further held that there is no provision prescribed in Government policy for effecting transfer of teachers from unaided school to aided school run by the same institution. The Division Bench also considered the ratio laid down in the case of ***Dattu Thorat referred (supra)***. It was held therein that Respondent No.2 institution was not proposing to fill in the vacancy by appointing any new recruit and when there was no condition prescribed in Government policy for effecting such transfer from unaided school to aided school, the decision of the Education Officer to refuse approval to such transfer was unsustainable.

20. In view of the above decisions, when the transfer of a teacher from an unaided school to an aided school is permissible what is supposed to be seen 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 a 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 granted approval on regular basis for appointment to 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.

21. In a recent judgment, another Division Bench of this Court in the case of **Suryakant S/o Janardan Muge in Writ Petition No.1493 of 2018** has considered the provisions of MEPS Act and the impugned circular dated 28.06.2016 and held that the MEPS Act applies uniformly and equally to

the assistant teachers working on aided posts, so also unaided posts. No distinction is made in service conditions of the assistant teachers working on aided and unaided posts. Section 13 of the MEPS Act gives authority to the State Government to frame the Rules. Pursuant thereto, the State Government has framed Rules i.e. the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981.

22. Rule 41 gives powers to the management of the institution to effectuate transfers for the better administration of the school and also considering the administrative exigency for convenience of the better administration of the school. The impugned circular dated 28.06.2016 lays down certain conditions for the transfer of assistant teachers from unaided to aided posts. Some of the salient features of the said circular is that the management shall confirm that there are no surplus teachers are available for filling in the posts becoming vacant on aided basis. For the said purpose, the circular makes reference to Section 5(1) of the MEPS Act and that if the surplus teachers are available, the approval should not be given to the teachers transferred from unaided to aided posts. The senior most teacher on unaided post shall be entitled for transfer to aided post and that the said assistant teacher who was working on unaided post, his appointment is required to be approved. The further embargo is that the assistant teachers should have worked at least five years on

unaided post and if he has worked for less than five years, then an option should be taken from him that he would work for three years as Shikshan Sevak on honorarium basis if transferred to grant-in-aid post and if the assistant teacher to be transferred has worked for five years or more on an unaided post, then the teacher who has completed five years on unaided posts and upon transfer to the aided post will be entitled for 20% grant from the Government and 80% will have to be borne by the institution. For the second year he would be entitled for 40% Government grant and 60% will be borne by the institution. For the third year 60% grant would be given by the Government and 40% will be borne by the institution. After four years of transfer, 80% will be borne by the Government and 20% by the institution and after five years of the transfer of the teacher who had already worked for five years on unaided post, he will receive 100% grant from the Government.

23. The question which arises for consideration that whether the petitioner is entitled for 100% grant. There is no dispute that the petitioner was appointed as an Assistant Teacher in *Gomukh Vidyalya, Bichwa* by an appointment order dated 08/07/2010 on an unaided Section. His appointment initially was on probation for a period of two years, which was approved by the Education Officer on 15/11/2014 for the period of probation. Subsequently, on 01/11/2019, the services of the petitioner were transferred

on an aided section of the school, in perusal of the order of this Court in Writ Petition No.7973/2018. The Education Officer (Secondary) on 12/03/2020 granted approval. By the order of this Court it was directed that the services of the petitioner shall be approved on the post of Assistant Teacher in the manner prescribed in the order dated 12/03/2020.

24. Thus, as per the norms for 100% grant, the Assistant Teacher should have worked at least five years on unaided post and if he has worked for less than 5 years, then an option should be taken from him that he would work for three years as Shikshan Sevak on honorarium basis if transferred to grant-in-aid post and if the assistant teacher to be transferred has worked for five years or more on an unaided post, then the teacher who has completed five years on unaided posts and upon transfer to the aided post will be entitled for 20% grant from the Government and 80% will have to be borne by the institution. For the second year he would be entitled for 40% Government and 60% will be borne by the institution. For the third year 60% grant would be given by the Government and 40% will be borne by the institution. After four years of transfer, 80% will be borne by the Government and 20% by the institution and after five years of the transfer of the teacher who had already worked for five years on unaided post, he will receive 100% grant from the Government.

25. In the present case, the petitioner has already worked for more than five years on an unaided post, therefore he is entitled to receive 100% grant in aid from Government. The Education Officer has passed order on the basis of the Circular dated 28/06/2016 as the Division Bench at Principal Seat in Writ Petition No. 5313/2017 decided on 25/04/2019 held that, the circular dated 28/06/2016 can hardly be said to the Government instructions. It has no statutory force in law. Rule 41 of the MEPS Act which is subordinate legislation, the administrative decisions which run contrary to them cannot be held to be valid in law. We find that, since Clauses 1 and 2 of the said circular, run contrary to the subordinate legislation as found in Rule 41, the same would not be valid in law.

26. In view of the catena of decisions delivered by the Division Benches of this Court, the Government of Maharashtra has amended Rule 41 and inserted Rule 41 (A) a condition for transfer of a teacher from an un-aided to a particularly aided or unaided school or division. The said amendment came into effect on 08/06/2020, it has no retrospective effect. Therefore, that amendment is not applicable to the facts in the present case. As the services of the petitioner were approved on the basis of assistant teacher in view of the order dated 12/03/2020 which is prior to the amendment.

27. Considering the approval to the appointment of the petitioner dated 15/11/2014 for the period of probation, subsequently on 01/11/2019, the services of the petitioner were transferred on aided Section of the school pursuant to the disposal of the Writ Petition No. 7973/2018. It is apparent that the petitioner joined as an Assistant Teacher on an unaided post on 08/07/2010. He was transferred from the unaided post to the aided post on 01/11/2019 and approval was wrongly granted to him on 12/03/2020 as a Shikshan Sevak on 01/11/2019. By the order of this Court, it was directed that services of the petitioner shall be approved on the post of Assistant Teacher in view of the order dated 12/03/2020 from 01/11/2019 for a period of three years. Thus, petitioner had put more than five years in employment on an unaided post. It is equally undisputed that the approval to his transfer has been granted by the Education Officer but the condition that he would be entitled for 20% salary from the grants-in-aid.

28. In view of above discussion, the writ petition is **allowed**. Hence, the following order is passed:

- a) The approval dated 27/07/2022 granted by the Education Officer putting the petitioner on 20% of the Pay Scale instead of 100% grant-in-aid is set aside and the petitioner would be entitled for transfer from unaided post to aided post on

100% grant-in-aid division.

- b) The corrected approval order shall be issued by the respondent as expeditiously as possible within four weeks from the receipt of this order.
- c) The petitioner would be entitled for such approval from 01/11/2019 and the arrears of his unpaid salaries shall be paid as expeditiously as possible within six weeks from the date of this order.
- d) Rule is made absolute accordingly.
- e) There shall be no order as to costs.

[URMILA JOSHI-PHALKE, J.]

[PRITHVIRAJ K. CHAVAN,J.]