
(2021) 08 BOM CK 0013
In the Bombay High Court
Case No : Writ Petition No. 14234 Of 2018

Ajay Vishwanath Kharade	Vs	APPELLANT
State Of Maharashtra And Others		RESPONDENT

Date of Decision : 24-08-2021

Acts Referred:

Constitution Of India, 1950 — Article 226
Maharashtra Employees Of Private Schools (Conditions Of Service) Rules, 1981 — Rule 41

Citation : (2021) 08 BOM CK 0013

Hon'ble Judges : R.D. Dhanuka, J; R.I. Chagla, J

Bench : Division Bench

Advocate : Akhil Kupade, Manoj Harit, N. C. Walimbe, Anand S. Kulkarni

Final Decision : Disposed Of

Judgement

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 fnally by consent of parties.

4. By this Petition fled 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 (â??the Managementâ?) of Sant Dnyaneshwar Primary Vidyamandir (â??the Schoolâ?) 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 fled.

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 (â??MEPS Rulesâ? 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. Writ Petition No. 5313 of 2017 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. Writ Petition No. 1493 of 2018. 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 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 :-

â??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.â??

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.