

(2021) 10 BOM CK 0001

In the Bombay High Court

Case No : Writ Petition No. 5811 Of 2011, 5806, 12918 Of 2018, 3403 Of 2021

Yuvraj Ananda Kamble And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 01-10-2021

Acts Referred:

Constitution Of India, 1950 — Article 226

Maharashtra Employees Of Private Schools (Conditions Of Service) Rules, 1981 — Rule 9, 11, 41

Maharashtra Employees Of Private Schools (Conditions Of Service), Regulation Act, 1977 — Section 2(7)

Citation : (2021) 10 BOM CK 0001

Hon'ble Judges : R.D. Dhanuka, J;Abhay Ahuja, J

Bench : Division Bench

Advocate : Vikas M. Mali, S.B.Kalel, Sushma S. Bhende, Kavita N. Solunke

Final Decision : Disposed Of

Judgement

,

Abhay Ahuja, J

1. Rule. Rule made returnable forthwith. Learned counsel for Respondents in all the petitions waive service.
2. By consent of learned counsel for the parties, all these petitions are heard finally.
3. By these petitions, filed under Article 226 of the Constitution of India, the employee-Petitioners are aggrieved by the orders rejecting the proposals for the grant of approval pursuant to the transfers of the employees from unaided to aided schools, in view of Government Resolutions dated 12th February 2015 and 23rd October 2013 (the "GRs").
4. For the sake of convenience the relevant facts in respect of the employee-Petitioners in the above petitions as submitted by counsel for the Petitioners, are

set forth as under:-

Sr. No

Writ Petiti on

Name of Petitioner

Post

Unaided Appointme nt

Unaided Approval

Date of Transfe r

Impugn ed Order

1.

5806/ 2018

Yuvraj Ananda Kamble

Peon

16.6.2007

18.10.201 0

1.10.2017

22.3.201 8

2.

5811/ 2018

Ashok Shivaji Fasake

Junior Clerk

9.8.2004

24.7.200 6

1.10.2017

22.3.201 8

3.

12918 / 2018

Prabhak ar Kashira m Patil

Peon

12.6.2005

24.7.200 6

1.10.2017

22.3.201 8

4.

3403/ 2021

Nasale Sitaram Ashok & Another

Peon

24.7.2004

30.11.20 09

12.7.2017

8.9.2017

The school managements are supporting the case of employee-Petitioners.

5. On behalf of Respondents No. 1 and 2, affidavits in reply have been filed in the above petitions. Learned AGP has no objection to the above facts but supports the orders of rejection submitting that the GRs are applicable to the case of the Petitioners.

6. We have perused the petitions and have heard Mr. Narendra V. Bandiwadekar, learned counsel for the Petitioners as well as Mr. Mali, Mr. Kalel, Ms. Bhende and Ms. Solunke, learned AGPs for the State in all the petitions respectively and with their able assistance we have perused the papers and proceedings in the above petitions.

7. Facts not being in dispute in all these petitions, two common issues arise for our consideration: i) whether the transfer of the employee(s) from unaided school to aided school would be a case of recruitment/ fresh appointment, ii) whether Rule 41 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (the "MEPS Rules") would apply only to teaching staff, but not to non-teaching staff.

8. In our view both the issues stand squarely covered by decisions of this Court.

9. With respect to the first issue, it has been held by the Aurangabad Bench of this Court in the case of Sudhir Dnyandeo Gadakh/Smt. Ujwala Sunil Hande/Smt. Sonali Ashok Pathare Vs. The State of Maharashtra & Ors. in Writ Petition No. 5978 of 2014 with Writ Petition No.5979 of 2014 with Writ Petition No.5980 of 2014, while considering the Government Resolution on ban on fresh recruitment that the said Government Resolution would not apply to the case of petitioners who have been transferred from unaided school to aided school having been appointed following due selection process, prior to the said ban imposed by the

State for fresh recruitment, as it would not be a case of fresh appointment. The relevant paragraph 5 of the said decision is quoted as under:-

"5] We have considered the submissions canvassed by the learned counsel for the respective parties, so also, gone through the judgments. Proposal for approval to the appointments/absorption of the petitioners on the aided posts as Shikshan sevaks has been rejected solely on the ground that at the relevant time, there was a ban on the fresh recruitment. Perusal of the Govt. Resolution in question does not reveal that the Govt. Resolution would affect the cases of the petitioners. Petitioners claim to have been appointed by following due selection process prior to the ban imposed by the State for fresh recruitment. However, they were appointed as Shikshan Sevaks on unaided posts. When vacancies arose in aided posts, they were transferred to the aided posts. It would not be a case of fresh appointment. Nothing is brought on record to show that such recourse was not permissible or there was bar for such recourse. In view of that, the reason mentioned for rejection of approval is unsustainable. "

10. In the above facts of these petitions also it is seen that the petitioner employees have been appointed prior to the Government Resolution banning the fresh recruitment, even though their transfers from unaided to aided have been after the ban on fresh recruitment. The above GRs being prior to the dates of appointment of the employee Petitioners would, in our view, also not apply to their case. We are, therefore, of the view that the Government Resolution banning fresh recruitment does not apply the case of employee-Petitioners in these petitions.

11. Further, "transfer" in our view does not amount to fresh recruitment/appointment. It would be pertinent here to quote the relevant Rule 41 of the MEPS Rules;

"41. Transfers. - (1) Subject to the provisions of this rule the Management conducting more than one school shall not transfer any of its employees from one school to another except on administrative grounds, promotion or at the request of the employee concerned if it is administratively convenient to do so.

(2) Save in exceptional cases, and unless reasons are recorded in writing by the Management, such transfers shall not be effected in the middle of the term.

(3) The Management shall see that the transfers do not adversely affect the pay or pay scale of the employees concerned and that such transfers do not result into loss in the pensionary benefits as admissible to them.

(4) The expenditure on Traveling allowance and Daily allowance, if any, at the rates applicable to the Government employees of the comparable status, shall be borne by the Management. If the transfer is at the request of the employee, this expenditure shall be borne by the employee concerned. Provided that, the transfer involves change of headquarters, the joining time to be allowed to an employee shall be limited to six days (excluding Sunday) and actual days of

journey. Subject to this limit, the period of joining time shall be treated as "duty" for all purposes :

Provided that, an employee shall not be entitled to joining time, if transfer is effected during the vacation.

(5) Where a Management runs a secondary school or secondary schools and a Junior College of Education -

(a) Teachers in a Junior College of Education shall not be transferred to a secondary school against their will. Such transfers may, however, be made if they are at employees own requests, subject to availability of vacancies in secondary schools. In the event of such a transfer, the pay drawn by the teacher in the Junior College of Education shall not be protected. He shall be deemed to be working in a secondary school during the period he worked in the Junior College of Education, and his pay shall be accordingly refixed on his joining the secondary school.

(b) Teachers in secondary school shall not be transferred to a Junior College of Education against their will. Such transfers may, however, be made if they are at the employees own requests, subject to the following conditions, namely :

(i) Vacancies should be available in the Junior College of Education;

(ii) The concerned employee shall retain the same place in the common seniority list; and

(iii) Their pay in the Junior College of Education shall be fixed at the same stage of pay as their existing pay or at the minimum of the scale of pay in the Junior College of Education, whichever is higher."

12. As can be seen from the above, Rule 41 of the MEPS Rules deals with the transfer of employees by the management from one school to another school.

13. Rule 9 of the MEPS Rules specifically refers to "appointment" of staff and Rule 11 as referred to above is in respect of "transfer" of employees. In our view, appointment herein would refer to fresh recruitment in contradistinction to appointment by transfer. The purpose of the legislation in having two specific Rules is indicative of this intention.

14. With respect to the second issue regarding applicability of Rule 41 of the MEPS Rules, to the case of the employee petitioners, it would here also be pertinent to quote Section 2(7) of the Maharashtra Employees of Private Schools (Conditions of Service), Regulation Act, 1977 ("MEPS Regulations") as under :-

"2(7)- "employee" means any member of the teaching and non-teaching staff of a recognised school; [and includes [Assistant Teacher (Probationary)] ; (emphasis supplied)

15. A conjoint reading of the above provisions leads to an undeniable conclusion that transfer of "employees" under Rule 41 of the MEPS Rules would refer to

teaching as well as non-teaching staff.

16. In this connection, the decision of this Court in the case of Namdev Tukaram Patil & Anr. Vs. The State of Maharashtra & Anr. in Writ Petition No. 3154 of 2021 (wherein one of us, R.D. Dhanuka, J., was a party), this Court has, while answering this very question, relying upon the decision of this Court in Writ Petition No. 8643 of 2019 (Rajaram S. Mandale and Anr. Vs. State of Maharashtra) held that Rule 41 of the MEPS Rules applies to all employees, both teaching and non-teaching of a recognised school and that it permits transfer of teaching as well as non-teaching staff of a recognised school. Paragraphs 9 and 10 of the said decision are apt and are quoted as under:-

"9. A perusal of impugned order passed by Respondent No.2 indicates that only reason recorded in the impugned order rejecting approval is that there was no provision for such transfer of non-teaching employee from the unaided school to aided school. In our view, the impugned order discloses total non-application of mind on the part of Respondent No.2 and indicates gross violation of Rule 41 of M.E.P.S. Rules. A perusal of Rule 41 of M.E.P.S. Rules alongwith definition of employee under Section 2 (7) would clearly indicate that 'employee' means any member of the teaching and non-teaching of a recognized school. The Respondent No.2 does not dispute that Petitioner No.2 School is recognized school. In our view, the Petitioner was holding post of Peon and was thus an employee within the meaning of employee under Section 2(7) read with Rule 41 of the M.E.P.S. Rules. (emphasis supplied)

10. The Division Bench of this Court in case of Rajaram S. Mandale (supra) has held that Rule 41 applies to all employees, both teaching and non-teaching, as defined in the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, of a recognized school. Rule 41, thus, permits transfer of teaching and as well as non-teaching staff of a recognized school."

17. In this view of the matter, the second issue also stands concluded. No fault, therefore, can be found in the transfer of the non-teaching staff viz. employee Petitioners in these petitions, from unaided to aided school and hold that Rule 41 permits such a transfer.

18. We, therefore, quash and set aside, the impugned orders dated 22nd March 2018 in the case of first three petitions, viz., Writ Petition No.5806 of 2018, Writ Petition No. 5811 of 2018 and Writ Petition No. 12918 of 2018 and the impugned order dated 8th September 2017 in the fourth petition, viz., Writ Petition No. 3403 of 2021.

19. The Respondent-Education Officer(s) are directed to consider the proposals in respect of the employee-Petitioners in the light of the aforesaid discussion and grant approval within a period of four weeks from today. The Respondents are directed to insert the names of the employee-Petitioners in the Shalarth Pranali within a period of two weeks thereafter and to release grant-in-aid with arrears, if any, within a further period of two weeks.

20. Rule is made absolute in above terms. Petitions are accordingly disposed. There shall be no order as to costs.

21. Parties to act upon an authenticated copy of this order.