

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**Review Application No.24 of 2018
In
Writ Petition No. 4457 of 2006**

- 1) The Marathwada Legal and General
Education Society
Through its Secretary
Dr. Kalpalata Patil Bharaswadkar
Age 45 years,
Occupation : Legal Profession,
R/o Aurangabad.
- 2) The Principal,
Dr. Sow. IBP Kala Mahavidyalaya
Aurangabad.

.. Applicants.

Versus

- 1) Varsha Manohar Dhongade,
Age 49 years, Occupation : Nil,
R/o B-4 Abhishekh Apartment
Vedant Nagar, Railway Station
Road, Aurangabad.
- 2) Dr. Babasaheb Ambedkar
Marathwada University
Through its Registrar,
University Campus,
Aurangabad.

.. Respondents.

Shri. V.D. Sapkal & Shri. A.B. Jagtap, Advocates, for
applicants.

Miss Pradnya Talekar, Advocate holding for Shri. S.B.
Talekar, for respondent No.1.

**Coram: T.V. NALAWADE &
SUNIL K. KOTWAL, JJ.**

Judgment reserved on : 02 February 2018

Judgment pronounced on : 14 February 2018

JUDGMENT (Per T.V. Nalawade, J.):

1) Rule, rule made returnable forthwith. Heard both the sides by consent for final disposal.

2) The application is filed for review of the judgment and order of this Court delivered in Writ Petition No.4457/2006. The writ petition was filed by present respondent No.1, teacher (Lecturer) against present applicant-management and present respondent No.2, the University. Following reliefs were claimed :

"(A) To direct the Respondents 1 and 2 to apply for de-reservation of post of Lecturer in English reserved for Scheduled Tribes and take necessary steps for de-reservation of posts, as provided under Govt. Resolution dated 5th December 1994, by issuing a writ of mandamus or any other appropriate writ, order or direction, as the case may be.

(B) To grant interim injunction restraining the respondents, their agents, subordinates and servants from making any appointment against the post of Lecturer in English pursuant to the advertisement published in daily "*Lokmat*" in its issue dated 13-5-2006 (Exh. "A-3") pending hearing and final disposal of this petition.

(C) To direct the Respondents to regularize the services of the petitioner as Lecturer in English, pending hearing and final disposal of this Petition.

(D) To grant any other relief to which the petitioner is entitled to.

(E) To quash the decision of the Management Council, Dr. Babasaheb Ambedkar Marathwada University, Aurangabad rejecting the recommendations of the University Grievance Redressal Committee in respect of regularization of services of the petitioner in its meeting held on 29.1.2003, by issuing a writ of certiorari or any other appropriate writ, order or direction, as the case may be."

3) This Court has granted following reliefs to the respondent - teacher :-

"74. (i) Writ petition is made absolute in terms of prayer clauses (A) and (E). Rule is made absolute in aforesaid terms. In view of disposal of the writ petition, civil application does not survive and is disposed of. No order as to costs.

(ii) The respondent nos.1 and 2 are directed to appoint the petitioner on the said post of Lecturer in English in open category with retrospective effect.

(iii) The petitioner would be at liberty to press relief of back wages and continuity of service in pending appeal before the University and College Tribunal. The University and College Tribunal to decide the said prayer for back wages and continuity of service after considering the observation made and conclusion drawn in this order.

(iv) The respondent nos.1 and 2 shall comply with this order within four weeks from the date of this order.

(v) Parties to act on the authenticated copy of this order."

4) Learned counsel for the applicant-management submitted that the review is necessary as there are following errors which are apparent on the face of the record.

(a) That, the respondent-teacher was never appointed as full time Lecturer and throughout she worked only as Lecturer on Clock Hour Basis and for some time on contract basis under bond and so she could not have been treated as regular employee, working as full time Lecturer. In spite of this circumstance this Court by giving the relief of regularization treated the respondent-teacher as full time Lecturer.

(b) That, the respondent-teacher was never qualified right from her initial appointment after interviews conducted by the statutory committee of the University in the year 1996 to get appointment to the post of Lecturer in English for Degree course. She had not passed NET/SET

which was the requirement since the year 1991 and even for her appointment on Clock Hour Basis ("CHB"), she was not qualified.

(c) That, from prior to 1996 the post against which the respondent-teacher was appointed on CHB was reserved for S.T. category and this post was never de-reserved even on the date of the decision of the writ petition. In the past there were two sanctioned posts for English subject. One post was for open category and one was for S.T. category and only in the year 2002-2003 the third post could have become available due to workload in that year and the said post was required to be reserved for OBC category. The respondent-teacher preferred not to apply for the open category post when it became available and she continued to work on CHB and so there was no question of confirmation of the respondent-teacher on the post which was reserved for S.T.

(d) The protection of various Government Resolutions issued by the State Government including the Government Resolution of October 2000 could not have been given to the respondent-teacher as she was never appointed as full time Lecturer.

5) Both the sides argued first on the scope of review. The learned counsel for the respondent-teacher placed reliance on some observations made in reported cases. In the case reported as **(2013) 8 SCC 320 (Kamlesh Varma v. Mayawati)** it is laid down by the Apex Court that error must be such that it is apparent on the face of record and the grounds mentioned in Order 47 Rule 1 of Civil Procedure Code need to be kept in mind while exercising the power of review by the Court. It is also laid down that the power to correct in review of the mistake is not available for substituting the other view. In the other case which was cited and reported as **(2007) 1 SCC 457 (State of Haryana v. M.P. Mohla)** the Apex Court has observed that the questions which were not raised in the writ petition cannot be raised subsequently in review.

6) In the case reported as **(2008) 8 SCC 612 (State of W.B. v. Kamal Sengupta)** the Apex Court has reiterated the aforesaid observations and it is further observed that, when there is adequate and efficacious remedy to challenge the order under review the Court should exercise power of review with greatest

circumspection. In other reported cases on which reliance was placed by the learned counsel for the respondent-teacher like **(2014) 14 SCC 77 (State of Rajasthan v. Surendra Mohnot)** and **(1997) 8 SCC 715 (Parsion Devi v. Sumitri Devi)** the Apex Court has further observed that the powers of review are not to be confused with appellate power and the Court should keep in mind the difference between error apparent on the face of record and an erroneous decision. There is no dispute over the proposition made by the Hon'ble Apex Court in the cases on which reliance is placed by the learned counsel for the respondent-teacher.

7) The learned counsel for the review applicant submitted that in the present matter there is no other alternative than to hold that there is error apparent on the face of the record of aforesaid nature. The learned counsel further submitted that the decision needs to be looked from other angle also. The learned counsel submitted that this Court being Court of Record, it is the duty of this Court to correct such mistake and that is something more than the power of review which is ordinarily vested in the

Court under the provision of Order 47 Rule 1 of the C.P.C. In support of this submission learned counsel for the applicant placed reliance on two reported cases. In the case reported as **2010 (Supp.) Bom.C.R. 464 (Lily Thomas v. Union of India)**, the observations on the point involved can be found in paragraph 52 and they are as under.

"**52.** The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement. It cannot be denied that the review is the creation of a statute. This Court in Patel Narshi Thakershi v. Pradyumamansinghji Arjunsinghji), A.I.R. 1970 SC 1273 held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice nothing would preclude the Court from rectifying the error. This Court in S. Nagraj v. State of Karnataka, 1993 Supp (4) SCC 595 held:

"Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of

justice. Even when there was no statutory provision and no rules were framed by the Highest Court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In *Prithwi Chand Lal Choudhury v. Sukhraj Rai* A.I.R. 1941 F.C. 1 the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council (*Rajunder Narain Rae v. Bijai Govind Singh*, 1836(1) Moo.P.C. 117 that an order made by the Court has final and could not be altered.

"... nevertheless, if any misprision in embodying the judgments, by errors have been introduced, these courts possess, by Common Law, the same power which the courts of record and statute have of rectifying the mistakes which have crept in ... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. Basis for exercise of the power was stated in the same decision as under:

It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard.

Rectification of an order thus stems from the fundamental principle that justice is above all. It is

exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And Clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order 40 had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order 47, Rule 1 of the Civil Procedure Code. The expression, for any other sufficient reason in the Clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order 40, Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

8) In the case reported as **AIR 2000 SC 540 (M.M. Thomas v. State of Kerala)** on the point involved observations can be found at paragraphs 13 to 17 and they are as under :

"13. In this case we are not concerned with the power of review of the Forest Tribunal. It was High Court which reviewed its own judgment and so the

question is whether the High Court has such power dehors Section 8C(2) of the Act. Power of review conferred on the Supreme Court under Article 135 of the Constitution is not specifically made applicable to the High Courts. Does it mean that the High Court has no power to correct its own orders, even if the High Court is satisfied that there is error apparent on the face of the record ?

14. High Court as a Court of Record, as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A Court of Record envelopes all such powers whose acts and proceedings are to be enrolled in a perpetual, memorial and testimony. A Court of Record is undoubtedly a superior Court which is itself competent to determine the scope of its jurisdiction. The High Court, as a Court of Record, has a duty to itself to keep all its record correctly and in accordance with law. Hence if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court's power in that regard is plenary. In *Naresh Sridhar v. State of Maharashtra*, (1966) 3 SCR 744 : AIR 1967 SC 1, a nine Judge Bench of this Court has recognised the aforesaid superior status of the High Court as a Court of plenary jurisdiction being a Court of Record.

15. In *Halsbury's Laws of England* (4th Edn. Vol.10, para 713) it is stated thus:

"The chief distinctions between superior and inferior Courts are found in connection with jurisdiction. Prima facie, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior Court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court. An objection to the jurisdiction of one of the superior Courts of general jurisdiction

must show what other Court has jurisdiction, so as to make it clear that the exercise by the superior Court of its general jurisdiction is unnecessary. The High Court, for example, is a Court of universal jurisdiction and superintendency in certain classes of actions, and cannot be deprived of its ascendancy by showing that some other Court could have entertained the particular action." (Though the above reference is to English Courts the principle would squarely apply to the superior Courts in India also.)

16. Referring to the said passage and relying on the decision of this Court in *Naresh Shridhar Mirajkar* (AIR 1967 SC 1) (supra) a two Judge Bench of this Court in *M.V. Elisabeth v. Karwan Investment and Trading Pvt. Ltd.*, 1993 Supple (2) SCC 433 : AIR 1993 SC 1014 : (1993 AIR SCW 177), has observed thus (Para 67 of AIR):

"The High Courts in India are superior Courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, or discretionary jurisdiction of the Supreme Court, the High Courts have unlimited jurisdiction. . . ."

17. If suo power of correcting its own record is denied to the High Court, when it notices the apparent errors its consequence is that the superior status of the High Court will dwindle down. Therefore, it is only proper to think that the plenary powers of the High Court would include the power of review relating to errors apparent on the face of record."

9) This Court holds that the observations made by the Apex Court in the case of *M.M. Thomas* (supra) need to be used in the present matter and this Court needs to

look to the present matter from the angle given in the case of *M.M. Thomas* (cited supra). For that, it needs to be ascertained as to whether there is error apparent in the decision given by this Court in favour of the respondent-teacher in the writ petition. In view of the nature of the power, jurisdiction, which is available to this Court, not only the aforesaid four errors mentioned in the review application can be considered but the other similar errors also can be considered to ascertain as to whether they are also apparent on the face of the record. For that some relevant facts in relation to the law developed on the points involved need to be mentioned.

10) The respondent-teacher was claiming regularization of her so called service on the post of English Lecturer which was sanctioned for Degree course. That post was receiving grant-in-aid. Admittedly this post was reserved for S.T. as per the roster. It is not disputed that the respondent-teacher had not passed NET/SET or even M.Phil. till the year 2007 and since 1991 to become eligible to get appointment on such post it was necessary to pass NET/ SET.

11) It is the case of the respondent-teacher that though she was appointed against the aforesaid reserved post, as per the Government scheme it was necessary for the management to follow the procedure and take steps for de-reservation of the post as the candidate from the S.T. category was not available. It is her case that she was working as against that post for more than 7 years. It appears that the learned counsel for the management had committed mistake in making submission in the writ petition that there was shifting of reservation and the post which was reserved for S.T. was shifted to other subject. Admittedly, the procedure given by the Government in various Government Resolutions was not followed and the University had no power in this regard. On the basis of the record it can be said that one post which was occupied by open category candidate and which was open post became vacant due to retirement and during pendency of the writ petition the said post was advertised. The respondent-teacher preferred not to apply for the said post and other candidate came to be selected and appointed on the said post.

12) The record shows that not only the respondent-teacher was claiming right to get the aforesaid reserved post but also one Smt. Pathan was claiming right to get that post. Smt. Pathan was from S.T. category and she was also given appointment on CHB at least in the year 2002-2003. When the post was advertised subsequently she had applied for the said post for appointment as full time Lecturer but she was not selected. This decision was challenged by Smt. Pathan by filing proceeding before the University Tribunal. The said proceeding came to be dismissed and the University Tribunal has held that Smt. Pathan had no vested right on the said post and as she was not selected by proper selection committee there was no question of giving the reserved post to her. Smt. Pathan had also not passed NET/SET. That decision of the University Tribunal has become final. The University Tribunal has further held that the University had no power with regard to de-reservation or shifting the reservation and the post was still reserved for S.T. This aspect including the decision of the University Tribunal is not properly considered by this Court while deciding the writ petition.

13) The submissions and the record show that the respondent-teacher was first time appointed on CHB for academic year 1994-95 but the appointment was made by the local committee and not by the statutory committee which is required to be constituted for appointment as full time Lecturer. In the year 1994 she was M.A. English and she had not passed NET/SET. It was compulsory to pass NET/SET after the year 1991 as per UGC Regulations.

14) In the year 1996, first time the aforesaid reserved post was advertised and the statutory committee conducted interviews on 22-9-1996. The respondent-teacher came to be selected for the said post. Even when the post was reserved for S.T. and the respondent-teacher had not passed NET/SET, before the approval of the selection by the University, the management gave regular appointment to the respondent-teacher. Relevant portion of the appointment order is as follows.

"The appointment is on Temporary basis and on probation for academic year 1996-97 w.e.f. 1/10/96 subject to the approval of the competent authorities. She has to report to the Principal, Dr. Sow I.B.P. Mahila Kala Mahavidyalaya, Aurangabad, by giving an acceptance letter in writing immediately."

15) The University by letter dated 12-12-1996 gave approval to the selection and for appointment of the following nature.

"With reference to your letter No.MMV/1996-97/868 dated 25/30-10-1996 on the subject noted above, I am to inform you that the Vice-Chancellor is pleased to accord approval for the Selection / Appointment of Smt. V.M. Dhongade as Lecturer in English on temporary basis upto the end of second term of the academic year 1996-97.

However, as per directives of the Government no approval to Smt. V.M. Dhongade will be given for 1997-98. Hence you are requested to advertise the post for S.T. and try to fill up the backlog next year."

16) It appears that in view of the refusal to approve the appointment as regular full time teacher, subsequently the management gave appointment on CHB.

17) The record shows that even before the interviews taken by the University Committee on 22-9-1996 the management had given appointment vide letter dated 15-7-1996 on CHB for the academic year 1996-97. Thus, the appointment which was given on 15-7-1996 on CHB was continued for 1996-97 and the respondent-teacher was not appointed as full time Lecturer even for

the year 1996-97. For the year 1997-98 again the respondent-teacher was appointed on CHB. No advertisement of the aforesaid post was given in the year 1997. This circumstance is important because as per the Government scheme every year the post is required to be advertised. No reason is given by both the sides for not publishing the post in the year 1997. Thus the appointment of the respondent-teacher made in the year 1997-98 was not made by the committee constituted by the University for appointment of full time Lecturer. The letter of approval of the University Exhibit "F" shows that the University had advised the management to advertise the post for S.T. in the next year and the appointment of the respondent-teacher was to be on temporary basis till the end of Second Term of academic year 1996-97.

18) The second advertisement for the aforesaid reserved post was published on 22-6-1998. For the year 1998-99 the respondent-teacher came to be appointed on CHB at the rate of Rs.150/- per hour. The third advertisement was published on 1-10-1999. The respondent-teacher was again appointed on CHB at the

rate of Rs.150/- per hour in the year 1999-2000.

19) No advertisement was published in the year 2000 and for that no reason is given by both the sides. The respondent-teacher was appointed on CHB for the year 2000-2001. But as no advertisement was given, it can be said that her appointment was not as per the scheme.

20) The fourth advertisement was published by the management on 24-10-2001. For the year 2001-2002 the respondent-teacher was given appointment on CHB but it was subject to the approval of the authority. There is no record of the approval to this appointment.

21) The management issued one more appointment letter on 2-1-2002 even when there was previous appointment on CHB for the academic year 2001-2002 and the appointment was of following nature.

"Madam,

In supersession of previous order No. ML & GES/1996-97/334 Dt. 1-10-1996 the management of M.L. & G.E. Society is pleased to appoint Smt. Dhongade V.M. as Lecturer in English on probation for a period of 2 years and on ad hoc basis w.e.f. 1-

10-1996 till further orders in the pay scale of Rs.2200-4000 on a basic of Rs.2200/- and other allowances admissible from time to time @ Govt. Rates.

Your appointment is subject to approval from the University & the Govt and other competent authorities.

Along with joining report you will have to submit an undertaking that you will not claim any remuneration in case Govt. authority/University cause objection to your appointment.

You will have to abide by rules of the management Govt. University from time to time."

22) The appointment order does not show that approval of the University or the Government was there to this appointment. As she had not passed NET/SET and as the post was still reserved there was no question of giving such appointment to the respondent-teacher. This appointment was not approved by the University.

23) In March 2002 5th advertisement was published in respect of the reserved posts in English subject but the reserved category was shown as Scheduled Caste (S.C.). It was published in Times of India when all the previous advertisements were published in local news papers. By order dated 13-7-2003 the

respondent-teacher was again appointed by local committee on CHB. This appointment was also subject to the approval of the authority and availability of work. For the year 2002-2003 there was no approval for appointment. There was appointment on CHB. For the year 2003-2004 also there was appointment on CHB vide order dated 13-7-2003 Exhibit Q of the writ petition. For the year 2002-2003 one Smt. Pathan, S.T. category candidate, was also appointed on CHB though by local committee. As the shifting was not done as prescribed by the Government scheme the post was still reserved for S.T. For this reason it can be said that, Smt. Pathan was available for appointment on the S.T. post though selection was made by local committee for this year. So the respondent-teacher could not have been appointed on the said post. Both, Smt. Pathan and the respondent-teacher had not passed NET/SET and in that regard they were equally placed.

24) There was ban of the Government to make appointments as full time Lecturers and the Government had introduced a scheme to make appointments on

contract basis in the year 2003. In accordance with that scheme, advertisement was published by the present management on 26-3-2003. This time, two posts were advertised for English subject. One post was shown as reserved for S.T. and the other post was shown as reserved for OBC. It is the contention of the management that from this year the third post had become available and for the reservation, as per roster, the third post fell for the category of OBC. In the writ petition, on the record, the advertisement dated 26-3-2003 is mentioned as 7th advertisement. It is already observed the previous advertisement was for S.C. post and the advertisement dated 26-3-2003 was again for S.T. post as there was no shifting of the reservation. Further, the advertisement dated 26-3-2003 was for the post which was to be filled on contract basis as the Government had banned appointments of full time Lecturers. Respondent-teacher accepted the appointment on contract basis. This time, the committee was constituted by the Government as per the scheme framed by it for selection process. In the previous year the reserved post was occupied by one Smt. Pathan but as she was not selected, she filed proceeding before

University Tribunal after the selection was made by the committee of the Government on the basis of advertisement dated 26-3-2003. These circumstances are relevant as they show that the respondent-teacher had given up her claim or right as against the full time reserved post and she had accepted the work on contract basis. She came to be appointed on contract basis on monthly fixed allowance of Rs.8000. She also gave bond containing the undertaking that she would not stake any claim on permanent post. Copy of the approval given to the selection of respondent-teacher on the post of Lecturer on contract basis was produced at Exhibit "N" in the writ petition. This relevant record is also not considered while deciding the writ petition. For getting the appointment on contract basis also it was necessary for the respondent-teacher to have necessary qualifications. She had not passed NET/SET and she had not done M.Phil. also. The authority had asked the college to supply copy of passing certificate of M.Phil (Exhibit H of the writ petition). The respondent-teacher had not done M.Phil also till the year 2007. For the year 2003-2004 she was appointed on CHB by order dated 13-7-2003. The

order at Exhibit "Q" filed in the writ petition shows that she was expected to work for 7 hours every week at the rate of Rs.150/- per hour. Prior to the approval given by the University for appointment on contract basis, order was issued on 10-5-2004 for appointment on contract basis for the period from 18-3-2004 to 17-3-2006. Exhibit "H" filed in the review application shows that she had represented that she had passed M.Phil. examination in the year 1993. The appointment on contract basis was not on regular basis.

25) When the contract period came to an end on 17-3-2006, the respondent-teacher was rendered out of service. Prior to 18-3-2004 for fixed period every time in each academic year respondent-teacher was appointed on CHB. In view of the aforesaid circumstances and inconsistent appointment orders issued by the management, it was necessary for the respondent-teacher to see that the record like report of statutory committee constituted every year for selection of full time Lecturers was produced. There were two kinds of obstacles in the way of the respondent-teacher to get regular post. She

had not completed NET/SET and she was getting appointment on CHB against the reserved post. If in any year candidate who had passed NET/SET during the relevant period had applied, that candidate could have been given priority over the respondent-teacher. Due to this possibility it was necessary to have entire record in respect of all the advertisements and the interviews conducted by properly constituted committee. Even when there was no such record this Court made order in favour of respondent-teacher. It is already observed that one S.T. candidate, Smt. Pathan had become available at least in the year 2002-2003 and she was appointed though by local committee. Due to many such circumstances of the present matter, a clear probability is created that the management was initially in favour of the respondent-teacher and only to help her various orders were issued in her favour by the management. It can be said that when the management realised that it was not possible to get the things regularised, it adopted different approach as the financial burden would have come on the management.

26) There was grant-in-aid for the aforesaid post but the Government was not made party respondent to Writ Petition No.4457/2006. Thus, there was the contest only between respondent-teacher and the management and the matter came to be decided only on the basis of the submissions made by these two parties though some record of the University was produced. Ultimately the financial burden was to come on the Government and due to that it was necessary to see that Government was made respondent in the proceeding but that was not done. This circumstance is also an error apparent on the face of the record. The submissions made and the reply affidavits filed show that at least from 2001-2002 work of only 7 hours per week was given to the respondent-teacher. Smt. Pathan was also appointed for the academic year 2002-2003 for the same subject. These circumstances also could not have been ignored by this Court. These circumstances definitely come in the way of giving direction by this Court to give appointment to the respondent-teacher on full time post and regularise her services.

27) Upto 25-1-1990 as per the policy of the State Government which was expressed in Government Resolution dated 29-9-1986 reservation could have been carried forward for 3 years. After that, de-reservation was possible and the candidate from open category who was appointed against the reserved post could have been confirmed against the reserved post. First time by Government Resolution dated 25-1-1990 the period of carrying forward of the reservation was increased to make it 5 years. Every year it was necessary to issue advertisement for filling the reserved post. In the sixth year de-reservation was made possible and confirmation of the candidate from open category appointed on the reserved post was made possible provided that the open category candidate was satisfying the eligibility conditions. Thus from 1990 it was necessary to carry forward reservation for 5 years. Admittedly, the respondent-teacher first time appeared before the committee properly constituted in the year 1996. Prior to that, another Government Resolution was issued by the State Government on 5-12-1994. As per this Government Resolution more conditions were imposed. After 5th year

it became necessary for management to take steps for shifting of the reservation from one reserved post to other reserved post like from Scheduled Tribes to Scheduled Castes. It was necessary to issue 6th advertisement for other reserved post after following the procedure given in the Government Resolution of 1994 and if the candidate of other reserved post was also not available, then it was possible to take steps for de-reservation of the post. Thus the initial period of 5 years was changed to make it 6 years. This was a policy decision of the Government and it was taken to see that the backlog of reserved category was filled. As per this Government Resolution any person who was temporarily appointed against the reserved post was to be informed about this policy of the Government and also the fact that he was not getting any vested right in the reserved post. As soon as reserved category candidate was available, the person from open category who was occupying the post of reserved candidate was liable to vacate that seat. In various Government Resolutions like of the years 1994 and 1995 the Government took these precautionary measures in the interest of reserved category candidates as in many cases

peculiar *modus operandi* was used by management to avoid giving of the appointments to the reserved category candidates. Due to such reasons, the power to approve the de-reservation was also not delegated by the State Government to other authority like University and this power was kept with the State Government. In all these Government Resolutions it was made clear that the candidate from open category can be considered for appointment as against the reserved post and then for confirmation if reserved category candidate was not available and only if he was holding necessary qualifications and he was appointed as full time Lecturer on the said post, he was regularly appointed.

28) It appears that due to various decisions given by this Court, the State Government had done away with the requirement to publish fresh advertisement after de-reservation of the post. Such Government Resolution was issued. This Government Resolution can be used only by those teachers who were holding necessary qualifications and who were appointed as full time Lecturers. The purpose behind this Government Resolution was to give

pay protection and continuity in service to the persons who were appointed as full time Lecturers against the reserved posts when the reserved category candidates were not available. The Government Resolution of 2005 can be of no use to the respondent-teacher as she had accepted the appointment on contract basis as already observed and further she was not holding the necessary qualification like passing of NET/ SET. Prior to that year, she had worked on CHB.

29) Various Government Resolutions are issued to see that the reservation policy is implemented and particularly from the Government Resolutions issued from 1990 onwards it cannot be said that possibility of automatic de-reservation was created by the State Government. In view of all these circumstances, the decisions rendered on the basis of Government Resolution dated 29-9-1986 could not have been used by this Court and this circumstance also shows that there is error apparent on the face of the record.

30) It is not disputed that from 19-9-1991 University Grants Commission (UGC) prescribed passing of NET/SET examination as one of the necessary qualifications for getting the post of Lecturer for Degree course. It can be said that due to non availability of facility for appearing for NET/SET and as for some time candidates, who had passed NET/SET were not available many teachers who had not passed NET/SET were appointed as full time Lecturers. These appointments were approved by various Universities. Due to eligibility conditions fixed by UGC and undertaking given by State Government while implementing reports of various pay commissions, the State Government took some steps and issued some Government Resolutions. In the Government Resolution dated 18-10-2001 the State Government directed the teachers who were appointed between 19-9-1991 and 11-12-1999 to pass NET/SET prior to December 2003. The State Government informed that if they fail to pass NET/ SET they would be continued in service but they may not get promotion or higher scale under the scheme like A.C.P. In that case they were to work on the prevailing scale like Rs.8000 – 13500 till their retirement.

Direction was given by the Government to remove all those teachers who were appointed after 11-12-1999 and who were not possessing necessary qualifications like passing of NET/SET before completing period of probation. Those who were appointed after 4-4-2000 and who had not passed NET/SET were to be removed immediately from service. The benefit of these Government Resolutions cannot be given to the respondent-teacher as she was never appointed as full time Lecturer in the scale quoted above. Further she never passed NET/SET.

31) In the Government Resolution dated 27-6-2013 the Government directed to regularise services of the teachers who were appointed between 24-10-1992 and 3-4-2000 subject to following conditions :-

- (a) The teacher was appointed on regular basis.
- (b) Appointment of the teacher was made as per procedure prescribed and the University had approved the appointment; and,
- (c) The University had sent proposal to the Government for approval of the Government.

The Government decided to give effect of regularization from 27-6-2013. Thus, first time by this Government Resolution the requirement of NET/SET was done away with but it was subject to aforesaid three conditions. The first condition was that the candidate must have been appointed on regular basis as full time Lecturer and his selection was made by the proper selection committee. Present respondent-teacher is not satisfying these conditions also and further from 17-3-2006 she was out of service. This Court at the Principal Seat had an occasion to consider the Government Resolution of 2013. The decision is reported in **2015 SCC OnLine Bom 6820** (*Maharashtra Federation of University & College Teachers Organizations v. The State of Maharashtra & Others*). By the decision dated 23-12-2015 this Court held that the aforesaid conditions mentioned in Government Resolution of 2013, need to be fulfilled. However, this Court has held that the services of the Lecturers can be counted from the date of appointment for the purpose of giving increments. Other benefits like giving higher scale etc. and treating such employees at par with the teachers who had passed NET/SET are denied.

32) Learned counsel for the respondent-teacher placed reliance on some observations made by this Court in the case reported as **(2007) 5 Bom CR 552 (Nitin Anbhule v. State of Maharashtra)**. The facts of this reported case were different. Nitin Anbhule was appointed as full time Lecturer on 26-8-1998 and he continued to work till 1-5-2005 on reserved post. During this period six advertisements were published for filling the post from reserved category candidate. Shifting of the reservation was done but after that also no candidate was available and so proposal was submitted for de-reservation and the University had forwarded the proposal with recommendation to the Government for de-reservation. The Government gave direction to give one more advertisement to ascertain whether reserved candidate was available and after that writ petition was filed by Nitin. In view of these circumstances, a direction was given to the Government to de-reserve the post and give approval to the Nitin's appointment as against reserved post. For giving such direction this Court referred to the decision based on the Government Resolution of 1986 reported as **2002 (2) Mh.L.J. 673**

(Kakoli Shyamlal Sircer v. Nagpur University). This Court referred to the decision of the Apex Court reported as **2007 (3) Bom.C.R. 150 (Deepa Gaurang Murdeshwar Katre v. Principal, V.A.V. College of Arts)**. This Court also referred the Resolutions of the State Government dated 5-12-1994 and 19-1-1995. Even if the circumstance that case of Kakoti Sircer (cited supra) was on the basis of Government Resolution of 1986 is ignored, the circumstance remains that Nitin was appointed as full time Lecturer when the present respondent-teacher was appointed on CHB.

33) The facts of the case reported as *2007 (3) Bom.C.R. 150* (Deepa Katre's case) were also different. Deepa was appointed as full time Lecturer in English on 22-11-1993 though on temporary basis. In the year 1994 one reserved post was advertised on which she was working but as open category candidate. The properly constituted selection committee had selected Deepa and she continued to work for about 12 years as full time Lecturer. Six advertisements were published but candidate from reserved category did not become

available. The Apex Court considered the decisions given by this Court in two similar cases and made order of de-reservation and for regularization of services of Deepa. Thus in the case of Deepa also the facts were different as she was appointed as full time Lecturer and there was no other hurdle in her appointment.

34) The facts of other reported cases on which reliance was placed by the learned counsel for the respondent-teacher viz. (1) **2009 (3) Mh.L.J. 323 (Harshendu vs. Chembur Trombay Education Society)**, (2) **2005(3) Mh.L.J. 788 (Ashok v. University of Mumbai)**, and (3) **2014(3) Mh.L.J. 487 (Ruchira v. Principal, D.G. Ruparel College)** were different from the present matter. In all these cases, the appointment was made as full time Lecturer and the point of only confirmation of open category candidate on reserved post after the aforesaid period fixed for carrying forward of reservation was involved. Other points were not involved.

35) It is already observed that this Court in most of the aforesaid cases used the decisions given in the case of

Kakoli Sircer (cited supra) which was on the basis of Government policy expressed in Government Resolution dated 29-9-1986. It is already observed that the Government subsequently changed the policy, increased the period and also kept the power of de-reservation with itself. The change in the policy was apparent to see that there is implementation of the reservation policy. It was taken in the interest of backward class community and nobody can deny that by playing mischief many times go-by is given to the reservation policy by some managements. Under the new Government Resolution the Government had made it clear that it would verify the things to ascertain as to whether real attempt was made to fill the vacancy meant for reserved category. Whenever there is such policy, the Court is expected to presume that it is in the interest not only of the reserved class but also the society as a whole and Court is not expected to interfere in such policy. The Court is not expected to verify the aforesaid things. It can be said that the Court can step in but when the Government takes decision on the proposal made for de-reservation after doing necessary verification. All these things are not considered

by this Court while deciding the writ petition.

36) Other things like conduct of the respondent-teacher of acceptance of appointment initially on CHB and then on contract basis is not considered by this Court. Even when she was not in service, she had not challenged the so called termination by filing proper proceeding before the University Tribunal. Only after pointing out these circumstances in the year 2017, with delay condonation application the respondent-teacher filed proceeding before the Tribunal and the said proceeding is still pending. It can be said that by getting decision from this Court the respondent-teacher wanted to get everything including her reinstatement. There are many disputed facts. In such a case this Court is not expected to use the writ jurisdiction.

37) The nature of order made by this Court, which is already quoted, shows that it amounts to interference in the aforesaid policy of the State Government to take decision after making necessary inquiry. This power was reserved by the State Government as a part of its policy

and so this Court was not expected to give direction of the nature given in the writ petition.

38) Submission was made about the finding given by the Grievance Committee constituted under the Statutes of the University in favour of the respondent-teacher. It is already mentioned that till last moment the management was with the respondent-teacher. Even in the representation made to the Grievance Committee the circumstance that she was never appointed as full time Lecturer and she had always worked on CHB was not pointed out. The University rightly detected the aforesaid hurdle and rejected the report prepared by the Grievance Committee.

39) Another submission was made by the learned counsel for the respondent-teacher that the ratio of the case of *Kakoli Sircer* (cited supra) needs to be followed as *stare decisis* and so in the writ petition this Court has rightly used the said decision. This submission is not acceptable. This Court has already observed that the previous case was decided on the basis of Government

policy expressed in Government Resolution of 1986 and the Government policy changed after 1990.

40) When a query was made by this Court about the nature of direction which can be given by this Court in the proceeding like the present writ petition filed by the respondent-teacher, learned counsel for the respondent-teacher placed reliance on the observations made by the Apex Court in the case reported as **(2010) 6 SCC 373 (Secretary, Cannanore District Muslim Educational Association v. State of Kerala)**. The facts of this reported case were totally different and the proceeding was filed by the institution by claiming that it had right of legitimate expectation to get sanction to higher class. In the facts of that case the matter was decided in favour of the educational institution. In the present matter it is not possible to hold that the respondent-teacher had any such right. The facts of other reported case **(2005) 12 SCC 347 (State of Kerala v. P.T. Thomas)** were also different and the observations made by the Apex Court in that case also are of no use to the respondent-teacher.

41) On the other hand, the learned counsel for the review applicant placed reliance on the observations made by the Apex Court in the case reported as **2009 AIR SCW 1644 (S.S. Balu v. State of Kerala)**. In this case the Apex Court has discussed the circumstances and the manner in which power given under Article 226 of the Constitution of India can be used. Some portion which can be used in the present matter can be found in paragraph 16. The Apex Court has referred and used the observations made by the Apex Court in the case reported as **(1974) 3 SCC 220 (State of Haryana vs. Subash Chander Marwaha)** at paragraph 11 and it is as under :

"**11.** It must be remembered that the petition is for a mandamus. This Court has pointed out in *Dr Rai Shivendra Bahadur v. Governing Body of the Nalanda College* that in order that mandamus may issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived."

The learned counsel for the review applicant placed reliance on some observations made by the Apex Court in

the case reported as **2006 AIR SCW 5994 (Indian Drugs and Pharmaceuticals Ltd. v. Workman)** The relevant observations are at paragraphs 27, 28, 38, 39, 40, 41, 43, 44 and 46 and they are as under.

"**27.** The underlined observations above clearly indicate that the casual, daily rated, or ad hoc employees, like the respondents in the present appeal, have no right to be continued in service, far less of being regularized and get regular pay.

28. In paragraph 45 this Court observed : "While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain - not at arm's length - since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment

when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (*sic*) one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution."

38. In *Dr. Surinder Singh Jamwal and another vs. State of Jammu and Kashmir and others*, AIR 1996 SC 2775, it was held that ad hoc appointment does not give any right for regularization as regularization is governed by the statutory rules.

39. In *Ashwani Kumar and others etc. vs. State of Bihar and others etc.*, AIR 1996 SC 2833, the appointment made without following the appropriate procedure under the rules/Government circulars and without advertisement or inviting application from the open market was held to be in flagrant breach of Articles 14 and 16 of the Constitution.

40. Creation and abolition of posts and regularization are a purely executive function vide. *P.U. Joshi vs. Accountant General, Ahmedabad and*

others, 2003(2) SCC 632. Hence, the court cannot create a post where none exists. Also, we cannot issue any direction to absorb the respondents or continue them in service, or pay them salaries of regular employees, as these are purely executive functions. This Court cannot arrogate to itself the powers of the executive or legislature. There is broad separation of powers under the Constitution, and the judiciary, too, must know its limits.

41. The respondents have not been able to point out any statutory rule on the basis of which their claim of continuation in service or payment of regular salary can be granted. It is well settled that unless there exists some rule no direction can be issued by the court for continuation in service or payment of regular salary to a casual, ad hoc, or daily rate employee. Such directions are executive functions, and it is not appropriate for the court to encroach into the functions of another organ of the State. The courts must exercise judicial restraint in this connection. The tendency in some courts/tribunals to legislate or perform executive functions cannot be appreciated. Judicial activism in some extreme and exceptional situation can be justified, but resorting to it readily and frequently, as has lately been happening, is not only unconstitutional, it is also fraught with grave peril for the judiciary.

43. The courts must, therefore, exercise judicial restraint and not encroach into the executive or legislative domain. Orders for creation of posts, appointment on these posts, regularization, fixing pay scales, continuation in service, promotions etc. are all executive or legislative functions, and it is highly improper for Judges to step into this sphere, except in a rare and exceptional case. The relevant case law and philosophy of judicial restraint has been laid down by the Madras High Court in great detail in *Rama Muthuramalingam vs. Dy.S.P.* AIR 2005 Mad 1, and we fully agree with the views expressed therein.

44. No doubt, in some decisions the Supreme Court has directed regularization of temporary or ad hoc employees but it is well settled that a mere direction of the Supreme Court without laying down any principle of law is not a precedent. It is only where the Supreme Court lays down a principle of law that it will amount to a precedent. Often the Supreme Court issues directions without laying down any principle of law, in which case, it is not a precedent. For instance, the Supreme Court often directs appointment of someone or regularization of a temporary employee or payment of salary, etc. without laying down any principle of law. This is often done on humanitarian considerations, but this will not operate as a precedent binding on the High Court. For instance, if the Supreme Court directs regularization of service of an employee who had put in 3 years' service, this does not mean that all employees who had put in 3 years' service must be regularized. Hence, such a direction is not a precedent. In *Municipal Committee Amritsar vs. Hazara Singh*, AIR 1975 SC 1087, the Supreme Court observed that only a statement of law in a decision is binding. In *State of Punjab vs. Baldev Singh*, 1999(6) SCC 172, this Court observed that everything in a decision is not a precedent. In *Delhi Administration v. Manoharlal*, AIR 2002 SC 3088, the Supreme Court observed that a mere direction without laying down any principle of law is not a precedent. In *Divisional Controller KSRTC vs. Mahadeva Shetty* 2003(7) SCC 197, this Court observed as follows:

" The decision ordinarily is a decision on the case before the Court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle, upon which the case was decided."

46. In view of the above observations of this Court it has to be held that the rules of recruitment cannot be relaxed and the Court/Tribunal cannot

direct regularization of temporary appointees de hors the rules, nor can it direct continuation of service of temporary employee (whether called a causal, ad hoc or daily rate employee) or payment of regular salaries to them. "

42) At least when Government's liability is involved, the necessary procedure needs to be followed. By the order made by this Court in the writ petition this Court has interfered and encroached upon both executive and legislative domain of the State. Thus, not only the errors mentioned by the learned counsel for the review applicant are the errors apparent on the face of the record but there are many other things quoted above, which are the errors apparent on the face of the record. This Court has virtually prevented the State Government from taking its decision in the matter. By the decision, this Court has apparently given something to the respondent-teacher to which she was not entitled in law.

43) The contentions made in the review application and the submissions show that the aforesaid reserved post subsequently came to be filled, during pendency of the writ petition and one reserved category candidate came to

be appointed as full time Lecturer though temporarily on the said post. It is also the contention and submission that the workload subsequently came down there was no workload for the third full time Lecturer. In any case, now, the reserved category post will not be available which can be de-reserved as one reserved category candidate is appointed against the said post. The conduct of the respondent-teacher of not applying for the open post which had become available due to retirement shows that she was sure that she will not get that post as she was not holding necessary qualifications, she had not passed NET/SET. In view of the aforesaid circumstances, it can also be said that the availability of post for giving appointment to the respondent-teacher is itself in question.

44) For the reasons given above, this Court holds that this Court has committed error by allowing the writ petition. This mistake needs to be corrected. This Court holds that relief of regularization could not have been granted by this Court in favour of the respondent-teacher. As there is no question of giving relief of regularization,

there will be no question of even giving direction to the management and the authority for taking steps for de-reservation. In the result, following order.

The review application is allowed. The decision given in favour of the respondent-teacher is hereby revoked. The writ petition stands dismissed. Rule is made absolute with no order as to cost.

Sd/-
(SUNIL K. KOTWAL, J.)

Sd/-
(T.V. NALAWADE, J.)

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