

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

WRIT PETITION NO.3653 OF 2016

Pratiksha d/o. Nivruti Kale,
Age 28 years, Occ : Service
as Assistant Teacher in
New English School,
Kankuri, Taluka Rahata,
District Ahmednagar.

PETITIONER

VERSUS

- 1] The State of Maharashtra
Through its Secretary,
Education Department,
Mantralaya, Mumbai-32.
- 2] The Assistant Commissioner,
Nashik Division, Nashik.
- 3] The Education Officer [Secondary]
Zilla Parishad, Ahmednagar.
- 4] The President/Secretary,
Kankuri Gram Vikas Kendra
Kankuri Tq.Rahata
District Ahmednagar
- 5] The Head Master,
New English School
Kankuri Tq. Rahata,
District Ahmednagar.

RESPONDENTS

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Mr.A.N.Kakade, Advocate for the petitioner
Mr.S.B.Yawalkar, Addl.G.P. for respondent—
State.
Mr.D.R.Markad, Advocate for respondent nos.4
and 5.

...

**CORAM : S.S.SHINDE &
K.K.SONAWANE, JJ.**

Reserved on : 22.01.2018
Pronounced on : 30.01.2018

JUDGMENT: (Per S.S.Shinde, J.):

1] This Petition is filed with the following prayers:

- B) That by issuing writ of mandamus or any other appropriate writ, order or directions in like nature, the letter/order dated 10.9.2013 issued by the respondent no.3 Education Officer (Secondary) Zilla Parishad, Ahmednagar, may kindly be quashed and set aside, with further letter dated 6.1.2016 issued by Respondent no.2 may kindly be quashed and set aside, with further directions to respondent no.3 to grant approval to the services of the petitioner as Shikshan Sevak w.e.f. 31.12.2011.
- C) That by issuing writ of mandamus or any other appropriate writ, order or directions in like nature, the

respondent nos 4 and 5 may kindly be directed to submit the fresh proposal of the petitioner for grant of approval to her services and respondent no. 3 may kindly be directed to grant approval to the services of petitioner as Shikshan Sevak w.e.f. 31.12.2011 and other consequential benefits.

2] Brief facts leading for filing the present Petition as disclosed in the memo of Petition are as under:

It is the case of the petitioner that she possessed the qualification of B.A. B.P.Ed. The petitioner has passed her B.A. examination in the year 2009, and has obtained the degree of Bachelor in Physical Education in the year 2010 from Rajiv Gandhi College of Physical Education, Aurangabad. She has passed her Bachelor's Degree in Physical Education in first division. Respondent no.4 society has issued an

Advertisement in daily news paper '*Gaokari*', which is widely circulated in Ahmednagar District, wherein the applications were called for the post of Shikshan Sevak, which was meant for Lady Teacher, possessing requisite qualification of B.A./M.A., B.Ed./B.P.Ed.

3] It is the case of the petitioner that, petitioner appeared before the Selection Committee and came to be selected by duly constituted Selection Committee. The petitioner came to be appointed as Shikshan Sevak vide appointment order dated 31.12.2011. She served from 02.01.2012 to 31.12.2014 in respondent no.4 school. Since the date of appointment, she is continuously in service till the filing of the present Petition. Respondent no.5 school runs classes from 5th to 10th standard. The petitioner is only Lady candidate in the teaching staff of the school run by

respondent nos.4 and 5. It is further the case of the petitioner that as per the staffing pattern for the year 2011-12, 8.5 posts were available for the teachers teaching to the classes 8th to 10th Standard. One post of teacher was available for the classes 5th to 7th [graduate trained teacher] and 3 posts of teacher were available for the classes 5th to 7th [non graduate teacher]. One post of the Head Master was also notified in the said roster. As per the roster for the year 2011-12, 13.5 posts were available and at that time only 11 teachers were working. Since there was vacancy of a teacher, and hence the management has issued an advertisement for filling of the said vacant post. In the year 2012-13, 13 posts were available. In the year, 2009, the roster was verified through Assistant Commissioner, Nashik Division, Nashik and as per said roster, 11 posts were sanctioned and actually

10 teaching staff was working. There was vacancy of one teacher, and the present petitioner came to be appointed after following due procedure on the said post. Since respondent no.3 refused to grant approval, hence this Petition.

4] Learned counsel appearing for the petitioner submits that in the year 2009, roster was verified and out of 11 posts, 2 posts were reserved for S.C. category. Already two teachers were working belonging to S.C. category. One teacher from S.T. category was working, and two posts from N.T. category were also filled in. Five persons from open category were working. In the year 2009, as per the roster there was no backlog, as 50% teachers from reserved category were already working along with five persons from open category. Learned counsel appearing for the petitioner invites our attention to the roster verified by the Assistant

Commissioner, Nashik Division, Nashik on 23rd March, 2009, and submits that the Petition deserves to be allowed.

5] Learned AGP appearing for respondent-State relying upon the averments in the affidavit in reply of respondent no.3 submits that, respondent no.3 has assigned sufficient and cogent reasons while rejecting the proposal of the petitioner for approval to her services as Shikshan Sevak. It is submitted that, respondent nos. 4 and 5 did not take prior permission of respondent no.3 to fill up the post of Shikshan Sevak, and recruitment procedure mentioned in the Maharashtra Employees of Private Schools [Conditions of Service] Rules, 1981 has not been followed. There is backlog of S.T. category in Kankuri Gram Vikas Kendra, Taluka Rahata, District Ahmednagar. The petitioner is belonging to Open Category.

6] Learned counsel appearing for respondent nos.4 and 5 relying upon the affidavit in reply filed by those respondents made following submission:

7] The petitioner possessed the qualification of B.A. B.P.Ed. The advertisement was issued by respondent no.4 society in daily news paper 'Gaokari' whereby applications were called for the post of Lady teacher possessing the qualification of B.A. / M.A., B.Ed./ B.P.Ed. The petitioner along with other candidates had appeared before the Selection Committee and were found to be meritorious candidates. It is submitted that respondent no.3 society was pleased to appoint the petitioner as Shikshan Sevak vide appointment order dated 31.12.2011 for a period from 02.01.2012 to 31.12.2014. As per the staffing pattern for the year 2011-12, 8.5 posts were available for the teachers, as per the roster 13.5 posts were available and

only 11 teachers were working and considering the vacancy, the management has issued an advertisement.

8] It is further submitted that respondent, thereafter, has filed detail proposal with respondent no.2, seeking approval to the services of the petitioner. The Education Officer has rejected the said proposal, which is subject matter of challenge in the present Writ Petition. The petitioner is appointed in the year 2011-12 by following due procedure of law. As per roster of the year 2009, admittedly, 5 candidates from reserved category were already appointed, and 5 candidates from open category were working, the respondent authorities have not at all taken into consideration the availability of posts. The Education Officer has not at all taken into consideration availability of post as well as roster. The respondent authority has also

failed to consider the representation made by the management dated 23.11.2015. The petitioner is appointed by following due procedure of law and is in service till the filing of the present Writ Petition. The work of the petitioner is satisfactory and there are no adverse remarks against her. The respondent management is ready to fill up the post from reserved category as per roster, the respondent authorities may kindly be directed to grant permission to fill up the post/posts if there is any backlog.

9] We have heard the learned counsel appearing for the petitioner, learned AGP appearing for the respondent-State, and learned counsel appearing for respondent nos.4 and 5. At the outset it would be apt to make reference to the judgment of the Full Bench of the Bombay High Court at Principal Seat in the case of *Ram Avadh Mahel Pal Vs.*

*Shivdutta Education Trust & ors.*¹ in para 4 and 5 of the said judge, it is held thus:

4. By the Amending Act, Clause 24-A has been inserted in section 2 of the Maharashtra Employees of Private Schools [Conditions of Service] Regulation Act, 1977. Under this provision the expression Shikshan Sevak is defined as follows:

(24-A) shikshan sevak means a member of base teaching cadre appointed on honorarium and subject to such terms and conditions as specified in the Government Resolution published in the Maharashtra Government Gazette, Extraordinary No.12, Part I Central sub-section, dated the 15th February, 2007, for eventual appointment as a teacher.

Section 5 [2] of the Act prior to its amendment read as follows:

Every person appointed to fill a permanent vacancy shall be on

1 2007 [6] Bom.C.R. 23

probation for a period of two years. Subject to the provisions of sub-sections [3] and [4], he shall, on completion of this probation period of two years, be deemed to have been confirmed.

As a result of the Amending Act, sub-section [2] of section 5 has been amended to insert the words except Shikshan Sevak after the words permanent vacancy. The following proviso has been inserted after sub-section [2] of section 5 :

Provided that, every person appointed as shikshan sevak shall be on probation for a period of three years.

Moreover, sub-section [2-A] has been inserted in section 5 which is to the following effect:

[2-A] Subject to the provisions of sub-section [3] and [4], shikshan sevak shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.

5. Section 12 provides for the regularization of appointments of Shikshan Sevaks in the following terms:

12 [1] Notwithstanding anything contained in the Maharashtra Employees of Private Schools [Conditions of Service] Regulation Act, 1977, all shikshan sevaks appointed in accordance with the provisions of the Government Resolution published in the Maharashtra Government Gazette, Extraordinary, No.12, Part I Central sub-section, dated the 15th February 2007, shall be deemed to have been appointed as base cadre shikshan sevak under the said Act, for appointment as teachers on completion of three years service as such shikshan sevak rendered here to before or heretoafter, as the case may be.

[2] The terms and conditions prescribed by Government for appointment of shikshan sevak, by issuing Government Resolutions, from

time to time, before the date of commencement of the Bombay Primary Education and the Maharashtra Employees of Private Schools [Conditions of Service] Regulation [Amendment] Act, 2007, shall continue to be in force unless modified or revoked.

10] The provisions of Section 5 of the Maharashtra Employees of Private Schools [Conditions of Service] Regulation Act, 1977 [for short 'Act of 1977'], reads thus:

5. Certain obligations of Management of private schools.

(1) The Management shall, as soon as possible, fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy:

[Provided that, unless such vacancy is to be filled in by promotion, the Management shall,

before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, [the Education Officer, Zilla Parishad or, as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools and in the event of such person being available, the Management shall appoint that person in such vacancy.]

(2) Every person appointed to fill a permanent vacancy [except [Assistant Teacher (Probationary)] shall be on probation for a period of two years. Subject to the provisions of sub sections (3) and (4), he shall, on completion of this probation period of two years, be

deemed to have been confirmed:

[Provided that, every person appointed as [Assistant Teacher (Probationary)] shall be on probation for a period of three years.]

[(2A) Subject to the provisions of sub-sections (3) and (4), [Assistant Teacher (Probationary)] shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.]

(3) If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice [or salary [or honorarium] of one month in lieu of notice].

(4) If the services of any probationer are terminated under sub-section (3) and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purposes of sub-section (2).

[(4A) Nothing in sub-section (2), (3) or (4) shall apply to a person appointed to fill a permanent vacancy by promotion or by absorption as provided under the proviso to sub-section (1).]

(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed

in that behalf, and shall state the period of appointment of such person.

11] On reading of the afore-mentioned provisions, the proviso to Section 5 [1] of the Act of 1977 mandates that, if there is vacancy in the school, before proceeding to fill such vacancy, the management of the School is obliged to ascertain from the Education Officer whether there is any suitable person available on the list of the surplus person maintained by the Education Officer, and if such person being available, the Management shall appoint that person in such vacancy.

In the facts of the present case, as already observed, there are no documents / material placed on record to show that the afore-mentioned provision was followed before appointing the petitioner. It is true that on completion of period of probation i.e. three

years satisfactorily in the case of Shikshan Sevak, by virtue of the provisions of sub-section [2-A] of Section 5 of the Act of 1977, the appointee, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher. In the present case, issue involved is about refusal of granting approval by the Education Officer on completion of three years probationary period by the petitioner.

12] Upon careful perusal of the documents placed on record, it is noticed that nothing is placed on record either by the petitioner or by respondent nos.4 and 5 to show that there was adherence to the provisions of sub-section [1] of Section 5 of the Act of 1977. There is no document showing that, before issuing alleged advertisement respondent nos.4 and 5 communicated respondent no.3 about available vacancies in the school. It is true that the petitioner

has placed on record copy of the advertisement published in news paper 'Gaokari' dated 29.12.2011. Upon careful perusal of the said advertisement, there is no mention of details including the post for which advertisement was issued. It is also written that only women candidates will be entitled to apply. Whether such advertisement is in accordance with procedure or not, is also not clear. It appears from the reply filed by respondent nos.4 and 5 that the petitioner was appointed and has completed three years service as Shikshan Sevak. If it is so, in view of the afore-mentioned provisions of sub-section [2-A] of Section 5 of the Act of 1977, she is deemed to have been appointed and confirmed as teacher.

13] The approval is relevant only for the purpose of receiving salary grants from the State Government. In the present case, the management has accepted that the

petitioner was appointed by them. Therefore, respondent nos.4 and 5 are obliged to pay salary to the petitioner. In the affidavit in reply filed by respondent nos.4 and 5, they have shown willingness to fill up the backlog of one candidate of S.T. category. In our opinion, no any mandatory direction can be issued to the respondents.

14] In the light of discussion herein above, we are of the opinion that respondent no.3 shall consider the case of the petitioner afresh. It will be open for respondent nos.4 and 5 to place on record documents before respondent no.3 in support of their contention that the appointment of the petitioner was after following mandate of Section 5 [1] of the MEPS Act. It will be open for respondent no.3 to look into all aspects and to take appropriate decision. We make it clear that the Education Officer shall not get influenced by the reasons

assigned in the impugned letter [Exhibit-F Page-28], and independently consider the case of the petitioner. We make it clear that we have not expressed any opinion on merits of the contentions raised by the petitioner or respondents in the present Petition, and it is left open to the Education Officer once again to re-consider the case of the petitioner, in accordance with law, as expeditiously as possible, however, within 12 weeks from today and communicate the said decision to respondent nos.4 and 5 of which copy of the said letter be sent to the petitioner on his address. The Writ Petition stands disposed of accordingly.

[K . K . SONAWANE]
JUDGE

[S . S . SHINDE]
JUDGE

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