

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

**Writ Petition No. 2535 of 2009
With
Civil Application No.10895 of 2009
Civil Application No.9897 of 2014
Civil Application No.9900 of 2014
Civil Application No.9905 of 2014
Civil Application No.9906 of 2014**

- 1) The President,
The Saraswati Vidya Mandir,
Raver, conducted by
Shree Shiv Pratishthan.
- 2) The President,
Shree Shiv Pratishthan, Raver.
- 3) The Secretary,
Shree Shiv Pratishthan, Raver.
- 4) The Head Master,
The Saraswati Vidya Mandir, Raver
Conducted by Shree Shiv
Pratishthan Raver,
Old Tamaswadi Road, Raver,
Taluka Raver, Dist Jalgaon. .. **Petitioners.**

Versus

- 1) Madan Krishnaji Saitwal,
Age 48 years,
Occupation : Service,
R/o Rath Galli, Raver,
District Jalgaon.
- 2) The State of Maharashtra
Through the Ministry of
Education, Mantralaya,
Mumbai.

- 3) The Education Officer (Primary)
Zilla Parishad, Jalgaon.
- 4) The Deputy Director of Education
The Deputy Director Office,
Nashik Division Nashik.
- 5) Sunil Shantaram Joshi,
Age 33 years,
Occupation: Nil,
R/o Pachora Taluka Pachora,
District Jalgaon. **.. Respondents.**

Shri. M.M. Bhokarikar, Advocate, with Shri. A.S. Kale,
Advocate, holding for Shri. S.B. Talekar, Advocate for
petitioner.

Shri. A.R. Syed, Advocate, holding for Shri. S.P. Brahme,
Advocate, for respondent No.1.

Shri. Y.G. Gujarathi, Assistant Government Pleader, for
respondent Nos.2 and 4.

Shri. M.K. Goyanka, Advocate, for respondent No.3.

With

Writ Petition No. 4853 of 2014
With
Civil Application No.3395 of 2016

- * Madan Krushnaji Saitwal,
Age 53 years,
Occupation : Service,
R/o Ratha Gali, Raver,
Taluka Raver, Dist. Jalgaon. **... Petitioner.**

Versus

- 1) The State of Maharashtra
Through Secretary,
School Education Department
Mantralaya, Mumbai - 32.
- 2) Deputy Director of Education,
Nashik Division, Nashik.
- 3) The Education Officer (Primary)
Zilha Parishad, Jalgaon.
- 4) The President,
Shiv Prathisthan Raver,
Tirupati Nagar, Raver,
Taluka Raver, Dist. Jalgaon.
- 5) The Head Master,
Saraswati Vidya Mandir,
Raver, Taluka Raver,
District Jalgaon.
- 6) Dilip Punamshet Agrawal,
Age 53 years,
Occupation: President
Shiv Prathisthan Raver,
R/o Near Tirupati Oil Mill,
Bhoiwada, Taluka Raver,
District Jalgaon.
- 7) Rajkumar Lilachand Jain,
Age 42 years,
Occupation: Head Master,
R/o Saraswati Vidya Mandir,
Raver, Taluka Raver,
District Jalgaon.

... Respondents.

Shri. A.R. Syed, Advocate holding for Shri. S.P. Brahme,
Advocate, for petitioner.

Shri. Y.G. Gujarathi, Assistant Government Pleader, for
respondent Nos.1 and 2.

Shri. M.K. Goyanka, Advocate, for respondent No.3.

Shri. M.M. Bhokarikar, Advocate for respondent nos.4 and 5.

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

Date: 5 APRIL 2018

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

1) The first proceeding is filed by the management of the school to challenge the decision of the School Tribunal Nashik given in Appeal No.JAL/18/2005. By the decision the School Tribunal has set aside the order of termination made by the management on 11-7-2005 and the School Tribunal has given direction to the management to reinstate respondent No.1 of this proceeding and give him back wages as per the pay scale from the date of termination. The other writ petition is filed by respondent No.1 of the first proceeding for seeking direction to pay the arrears of the salary and also for direction to pay the salary as per 6th Pay Commission's report. Both the petitions are filed under Articles 226 and 227 of the Constitution of India. Both sides are heard.

2) It is the case of the petitioners from the first proceeding that it is a Trust registered under the name "Shree. Shiv Pratisthan, Raver" and it runs pre-primary school for the children below age of 6 years. It is contended that a brother of respondent No.1 was a member of the Trust and due to his insistence and request respondent No.1 was given appointment in the year 1994 as manager in pre-primary school which is named as "Saraswati Shishu Mandir Raver." It is the contention of the petitioner-management that appointment was given on honorarium basis and respondent No.1 was expected to assist the teachers of pre-primary school in addition to doing work of maintaining the accounts of pre-primary school.

3) It is the case of the management that on 9-5-1998 at the instance of the aforesaid brother of respondent No.1 one advertisement was published by the primary-school of the petitioner-management and applications were invited for filling the post of Clerk in primary school. The primary school is also added as petitioner in the first proceeding. It is contended that on

the date of the advertisement strength of students of the primary school was less than 500 and no post of Clerk was available as per the staffing pattern prepared by the State. It is contended that only to give appointment to respondent No.1 such advertisement was published. It is contended that as per the advertisement posting was given to respondent No.1 on the post of Clerk in the pay scale of Rs.950 - 1500 for academic years 1998-99 and 1999-2000.

4) It is the case of the management that in the appointment order issued in favour of respondent No.1 from the said proceeding it was made clear that the appointment was subject to the approval of the authority. It is contended that even after issuing the aforesaid order, no regular salary was paid and only honorarium was paid to respondent No.1.

5) It is the case of the management that first time in 2003-2004 strength of the students of the primary school crossed 500 and the post of Clerk became available as per the staffing pattern. It is contended that from 2001

there was ban imposed by the Government on making appointment of new staff in schools receiving grant-in-aid. It is contended that said ban was lifted by the State in the year 2004-05. It is the case of the management that in the year 2003 when the post became available, respondent No.1 was not eligible to get the appointment against that post as he had crossed the maximum age prescribed for the post.

6) It is the case of the management that respondent No.1 from the first proceeding misused his post in the institution and he created some false record to show that he was working in primary section as a Clerk. It is contended that said conduct of the respondent No.1 was objected by the Headmaster and also the management and this circumstance was brought to the notice of the management by the authority during inspection also. It is contended that the respondent No.1 then created dispute and started quarreling with the management and also staff of the institution. It is contended that due to quarrels and the harassment the management was required to give complaint to police against respondent No.1 and

ultimately the management was required to issue order of termination against respondent No.1. It is contended that before issuing order of termination, show cause notice was given to respondent No.1 and opportunity was given to him to explain the things.

7) The contentions made by the management in both the proceedings show that it is the main contention that respondent No.1 of the first proceeding was not appointed in primary school and he was working in pre-primary section on honorarium basis. By making such contention the management wants to show that the School Tribunal could not have entertained the dispute as the School Tribunal has no jurisdiction in respect of the pre-primary school. It is also the contention of the management that appointment of respondent No.1 from the first proceeding was not as per the provisions of the Maharashtra Employees of Private Schools (Condition of Service), Rules, 1981 and on that ground also the Tribunal could not have granted the relief in favour of the respondent No.1.

8) It is the case of the respondent No.1 from the first proceeding that he has been working as Clerk with the petitioner management from the time of its inception. He has contended that he was working in the primary school right from beginning and he was allowed to sign the muster of the staff of primary school from the year 1994. It is contended that he was paid honorarium and he continued to work with the petitioner from the first proceeding with the hope that one day his service will be regularised and he will get regular pay. He has contended that in the year 1998 ultimately order of appointment on the post of Clerk was given by the management in primary school in his favour and that was done after following due procedure. It is contended that on the date of the appointment he was working with the school for more than 8 years and on the basis of his experience he was selected. It is his contention that necessary resolution was passed by the management in that regard and his appointment was made for 2 years on probation and it was on permanent post. It is contended that he continued to sign on the muster roll of the primary school and he was doing the work of the primary school. He has contended

that he was doing the work like preparing pay bills, maintaining cash book, taking care of accounts of the school, taking care of the transactions of the school, taking care of the library of the school and he was doing all other work which was asked by the management.

9) It is the case of the respondent No.1 from the first proceeding that when the post of Clerk became available in the primary school, he applied for the post and he came to be appointed. It is his case that he had requested many times to submit proposal for approval of his appointment but the management avoided that. It is the case of the respondent No.1 that the management wanted to appoint their man on the post and so the management avoided to send such proposal. It is contended that ultimately the management appointed respondent No.4 of the first proceeding and directions were given to him to hand over the charge to respondent No.4. It is contended that as per the direction he handed over the charge and then to create false record against him false allegations were made against him and then he was prevented from doing the work. It is contended that

only to create record, order of termination was issued against him and that was illegal order.

10) It is the case of the respondent No.1 of the first proceeding that as per the policy of the State Government which was disclosed in the Government Resolutions and Circulars issued in the year 2004 it was the responsibility of the management to submit proposal for regularization of his service but the management avoided to do so. It is contended that as he was in service right from 1990, the age limit could not have come in his way in view of the Government policy and even on the date of the appointment he had put in 14 years of service with the school. It is his contention that as he belongs to OBC category and as the order of termination was illegal, the School Tribunal has rightly set aside that order and has directed the management to reinstate him.

11) The School Tribunal made the order as under:

"1. अपील मंजूर करण्यात येत आहे.

2. संस्थेच्या व्यवस्थापनाचा आदेश दिनांक 11/07/2006 ज्या द्वारे अपेलंटची सेवा समाप्त करण्यात आलेली आहे. बेकायदेशीर असून रद्दबातल

करण्यात येत आहे.

3. जाब देणार क्रमांक 1 ते 4 यांना असे आदेशीत करण्यात येते की, ॲपेलंट यास पुर्ववत लिपिक पदावर सेवेत रुजू करून घेण्यात यावे आणि सदर पदास अनुज्ञेय असलेले सर्व फायदे (वेतन, भत्ते, नियमित सेवा वगैरे) सेवा समाप्तीच्या तारखेपासून ॲपेलंट यास प्रदान करण्यात यावे. या आदेशाचे अनुपालन जाब देणार क्रमांक 1 ते 4 यांनी या आदेशाच्या तारखेपासून 40 दिवसांचे आत करावे.

4. दोन्ही पक्षाने आपआपला खर्च सोसावा."

12) In view of the nature of order made by the School Tribunal it needs to be ascertained as to whether respondent No.1 of the first proceeding was appointed in the primary school of the management and whether he was legally terminated by the management. For that, there are many admitted circumstances which need to be kept in mind first. They are as under :-

(i) That, in daily news paper "Tarun Bharat" dated 9-5-1998 the post of Clerk was advertised by management and the post was meant for primary school. The post was to be filled for the academic year 1998-99. Necessary eligibility conditions were given as educational

qualification of S.S.C. or equivalent and experience. No age limit was mentioned. The post was for open category but it was made clear that appointment would be subject to the approval by the authority.

(ii) The aforesaid advertisement was signed by the President and Secretary of the institution. There is nothing on record to show that brother of respondent No.1 from the first proceeding was controlling the management and he had influence of any kind on the President and the Secretary.

(iii) That, the respondent No.1 of the first proceeding was selected in the process of selection which was started after the advertisement of the post.

(iv) That, the school committee passed resolution on 24-5-1998 and took decision to appoint the respondent No.1 of the first proceeding on probation of 2 years in the pay scale of Rs.950-1500 and the appointment was on probation from 1998-99 to 1999-2000. The school committee had also decided to send proposal for approval of the appointment on this post to the Government. Till

approval was given by the Government, the management was to pay honorarium to respondent No.1 as per this resolution. In the resolution itself it is mentioned that from the year 1994-95, from registration of the Trust, respondent No.1 of the first proceeding was working as Clerk with the management on meagre honorarium and on the date of the resolution his age was 36 years. Thus, the management considered his experience and so even when he had crossed 36 years, when the age limit for OBC category was 35 years, he was given appointment by the management.

(v) That after the resolution dated 24-5-1998 appointment order was issued in favour of respondent No.1 of the first proceeding on 24-5-1998 itself and in the appointment order it was mentioned that the appointment was for aforesaid 2 years on the post of Clerk and on probation basis though it was mentioned that only honorarium was to be paid.

(vi) That, after the appointment of respondent No.1 of the first proceeding, respondent No.1 continued to work as Clerk.

(vii) That, honorarium was paid, as per the admission given by the management, by the institution from its account, the account of the primary school in the year 2001-2002. However, it needs to be kept in mind that there is other record about the work done in primary school and so it does not matter as to from where the payment was made to respondent No.1 of the first proceeding.

(viii) That, by a Circular issued by the Director of Education (Primary) dated 26-7-2004 the post of Clerk was sanctioned to this management for the primary school and even grant was made available in respect of that post. In all 333 posts were created which include the primary school of petitioner and to the sanctioned posts salary grants were sanctioned. As per Government Resolution appointment orders were to be issued only on honorarium basis for a period of three years as per the scheme of the Government. Annexure "A" to this Government Resolution provides that the State Government had noticed that some employees were already appointed by many schools and they had crossed

age limit prescribed by the Rules on the date of the Government Resolution and in those cases some steps like relaxation of age limit were required to be taken. In this Government Resolution it was made clear that in such cases separate proposals were to be submitted by the managements for approval of such appointments and action was to be taken in respect of the employees who had crossed the age limit on the date of the appointment. In sub rule (4) of Rule 9 of the the Maharashtra Employees of Private Schools (Condition of Service), Rules, 1981 also there is provision for relaxation of the age if the candidate has experience. This Government Resolution with Annexure and Rule 3 of the said Rules are considered by the School Tribunal while considering the contentions of the management that on the date of the appointment the respondent No.1 from the first proceeding had crossed the age limit. Candidate from OBC category could have been appointed before completion of 35 years.

(ix) That, even when it was possible to submit proposal in respect of respondent No.1 for approval to the

Government, the management never submitted such proposal.

(x) That, the management admits that on the establishment of the primary school post of Clerk had become available in the year 2003 itself as per the staffing pattern as the strength of the students had crossed 500 in that year. Thus as per the Government Resolution of the year 2004 proposal for approval in respect of appointment given to respondent No.1 could have been sent but the management avoided to take such steps when the Government had expected such steps. The School Tribunal has observed that as such procedure was not followed by the management, the appointment of respondent No.4 of the first proceeding, Shri. Joshi, on the said post was illegal. Though said Joshi had filed reply in the first proceeding in support of the contentions of the management, it was submitted that subsequently Joshi left the institution by putting his resignation.

13) The record produced by the management shows that even on 30-9-2002 the strength of the students

of the primary school was 525. On 30-9-2003 the strength of the students was 513. The strength increased to 577 in the year 2004. As per the record, the management approached the Education Officer (Primary) first time on 6-6-2004 for sanction of one post of Clerk and one post of Peon as the students' strength was more than 500.

14) The correspondence made by the Education Officer on 2-2-2005 shows that he sought information from the management as to whether the staff was already appointed on the posts which had become available. He had asked the management to supply particulars. The record produced does not contain anything to show that the management supplied such information. Policy of the State Government in that regard is already mentioned. Even in the letter dated 6-6-2004 the management had not informed to the Education Officer that it had already appointed one Clerk and one Peon on the posts which had become available. Thus, the management did not want to take steps and there was the grievance of the respondent No.1 employee of aforesaid nature.

15) The record shows that the management had prepared a Resolution dated 1-6-2003 to show that Sunil Joshi, respondent No.4 was appointed on the post of Clerk and one Choudhari was appointed as Peon.

16) It is not the case of the management that necessary procedure was followed for making appointments of these two persons.

17) There is record like pay bills of pre-primary school prepared by the management to show that from April 2002 to May 2005 respondent No.1 of the first proceeding was shown as staff of pre-primary school and honorarium was paid to him as staff of pre-primary school. Though such record is produced by the management, the management admits that during that period respondent No.1 had signed on the muster roll of primary school and he was shown as staff of the primary school. There is correspondence produced by the management dated 17-7-1999 and it shows that from 3-6-1997 the management had taken name of respondent No.1 on the muster roll of primary school. There is also inspection report of the

authority of the year 1998-99 showing that respondent No.1 was shown as staff of the primary school. There is correspondence of Headmaster of the primary school showing that the record was with respondent No.1 of the school and it was taken over from him as per the directions given by the Headmaster on 25-6-2005. The record was taken over only after starting of the dispute between the management and the respondent No.1 of the first proceeding. Thus, admittedly record of the school was with respondent No.1 and it is not disputed by the management that he was working in the primary school and the work of aforesaid nature mentioned by respondent No.1 was done by him. Further, there are pay bills of the primary school showing that from 1998 - 2000 he was paid honorarium from the funds of the primary school. It is already mentioned that it does not matter as to from where the management pays and what matters is the nature of the work the employee was working. In addition to that there was the order of appointment in favour of respondent No.1 for the primary school.

18) The aforesaid additional record is produced along with civil application by the management and it is considered by this Court. Though this record was not produced before the School Tribunal, even after considering the said record it cannot be inferred that respondent No.1 of the first proceeding was working for pre-primary school. When the appointment was made for the primary school and there is record of aforesaid nature it cannot be believed that respondent No.1 was appointed for pre-primary school. There is no record of appointment of respondent No.1 for pre-primary school.

19) On the basis of the aforesaid contentions and the record inference was drawn by the School Tribunal that respondent No.1 was the employee of the primary school and not of pre-primary school. In view of the record already mentioned and the admitted circumstances, there is no reason to interfere in the order made by the School Tribunal in favour of respondent No.1. Admittedly, respondent No.1 was holding necessary qualifications, he was HSC when he was appointed. Right from the beginning he was holding such educational qualification

and on initial appointment he had not crossed 35 years of age. He belongs to OBC category. He was appointed as per the procedure given in rule 9 of the Rules, 1981. Further, there is policy of the State Government to regularise such appointments as mentioned in the Government Resolution and also in the rules. It also needs to be kept in mind that the School Tribunal has held only the management liable to pay the salary and the State Government, Zilla Parishad, are not made liable to pay the amount. The appointment was given by private school and there are aforesaid circumstances and so for this reason also no more inquiry is necessary to ascertain as to whether the appointment was legal or illegal.

20) On the point of necessity of approval to the appointment the learned counsel for the respondent placed reliance on a case reported as **2008 (1) Bom.C.R. 231 (Hindi Vidya Bhavan v. Presiding Officer, School Tribunal)**. The matter was decided by learned Single Judge. In this case it is laid down that when appointment is made on probation basis it needs to be presumed that it was as against permanent post and in such case non

approval by the Education Officer cannot make the appointment illegal. In such case the school can be made liable to pay if the procedure for appointment is not followed. There cannot be dispute over such proposition. In the case reported as **2017 (1) Mh.L.J. 90 (Trimurti Balak Mandir v. Vithabai)** another learned Single Judge held that defence that post was not available is not available when the management gives appointment and takes work from such employee for years together. In that case it was held that termination in such case without following due procedure is invalid and is liable to be set aside. There cannot be dispute over this proposition.

21) The learned counsel for the petitioner management placed reliance on some reported cases as follows :

(1) AIR 2016 SC 3450 (Pragati Mahila Samaj v. Arun).

(2) 2017(6) Mh.L.J. 812 (Vilas Gavai v. Dnyandeo)

(3) MANU/MH/2897/2017 (Anjuman Tausi-E-Taleem v. Mohmed Akhalique Mohmed)

(4) 2001 (2) Mah LR 740 (The Mahila Mandal Marathwada Shishu Vikas Mandal v. Harbanskaur)

- 5) **1996(2) Mh.L.J. 592 (Governing Body, Nirmal Education Society, Gondia v. Presiding Officer, School Tribunal Nagpur)**
- 6) **2007(2) Bom.C.R. 868 (President, Shri Saraswati Education v. Vinayak Bhagwan Karodade).**
- 7) **2008(2) Bom.C.R. 837 (Gram Vikas Seva Mandal v. Salunke Madhukar Dayaram).**
- 8) **2007(1) Bom. C.R. 129 (Nirala Education Society v. Jugalkishore Bhagwatiprasad Shukla)**
- 9) **(1997) 9 SCC 661 (S.K. Saldi v. Genaral Manager, U.P. State Sugar Corpn Ltd.)**
- 10) **(2005) 6 SCC 733 (Kasturi v. Iyyamperumal.**
- 11) **(2005) 6 SCC 745 (Mandir Shree Sita Ramji v. Land Acquisition Collector).**
- 12) **2007(3) Bom.C.R. 527 (Saindranath Jagannath Jawanjal v. Pratibha Shikshan Sanstha)**
- 13) **2008(4) Bom.C.R. 645 (Jotiram Narayan Chechar v. President, Panchganga Shikshan Prasarak Mandal)**
- 14) **2004 (Supp.2) Bom.C.R. 535 (Rajiv Shikshan Sanstha v. State of Maharashtra).**
- 15) **2003(2) Bom.C.R. 862 (Ashok Asramji Gabhane v. Presiding Officer, School Tribunal).**

22) The facts and circumstances of each and every case are always different. The present management had given appointment to the respondent No.1 from the first proceeding on a post which was treated as a permanent post. On the date of initial appointment with the

institution, in the year 1994, as per the admission given by the management, respondent No.1 was not age barred. Thus, on the date of initial appointment, he was eligible to get the post of Clerk with the petitioner management. Only because he was already working with the management, steps were taken and appointment order was given to him in the pay scale. Due to these circumstances the management cannot now say that for any reason as contended above the appointment was not legal.

23) The employee in the other proceeding has prayed for direction to the management to pay salary as per the pay scale recommended by the Pay Commission and adopted by the State Government. The law on this issue is already settled and the employees working in the educational institutions are entitled to get the pay as per the pay scales. The order of the Tribunal is also to the effect that the salary is to be paid as per the pay scale. The State Government has accepted the report of 6th Pay Commission also and so the pay admissible to the post of Clerk needs to be given by the management. Thus, such

directions can be given in favour of the employee though other reliefs claimed in his petition like appointment of Administrator at present is not necessary. In the result, following order :

24) Writ Petition No.2535/2009 is dismissed. Rule is discharged.

25) Writ Petition No.4853/2014 is partly allowed. If the management is not complying the decision given by the School Tribunal and confirmed by this Court and it is avoiding to make the payment of salary of the petitioner, the respondent authorities is expected to take steps like withdrawal of permission/recognition against the management to see that it complies the order.

26) Pending civil applications in both proceedings are disposed of.

27) Learned counsel for the management requested for continuation of stay, which was in the nature of giving stay to the recovery of back wages. Learned counsel for

the management further makes statement that the management has paid salary regularly. In view of the statement, there is no question of stay. Statement is made that the employee is allowed to resume duty as per the order made by the School Tribunal. So, there is no question of continuation of any stay.

28) Contempt petition be listed separately.

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

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

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