

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

WRIT PETITION NO.7963 OF 2016

Rajeshree Hanumantrao Rokade,
Age 27 years, Occu. Service,
R/o. Narayan Nagar,
Near Maniyar Building, Latur,
Taluka and District Latur.

PETITIONER

VERSUS

1. The State of Maharashtra,
Through its Secretary,
Department of School Education
& Sports, Mantralaya,
Mumbai.
2. The Education Officer [Primary],
Zilla Parishad, Latur,
Taluka and District Latur.
3. Dnyandan Shikshan Prasarak Mandal,
Vaibhav Nagar, Latur,
Taluka and District Latur,
Through its Secretary.
4. Primary School,
Vaibhav Nagar, Latur,
Through its Headmaster.

RESPONDENTS

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Mr.S.S.Jadhavar, Advocate for the petitioner
Mr.S.Y.Mahajan, Addl.G.P.for respondent no.1
– State.
Mr.P.R.Tandale, Advocate for respondent no.2
Mr.D.D.Sarwade, Advocate for respondent nos.3
and 4.

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**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] By issuing writ of certiorari or any other appropriate writ, order or direction, the order dated 19.03.2016 issued by respondent no.2, refusing approval to the appointment of the petitioner, may kindly be quashed and set aside;
- C] By issuing writ of mandamus or any other appropriate writ, order or direction, the respondent no.2 may kindly be directed to accord approval to the appointment of the petitioner as a permanent Assistant Teacher in respondent no.4 school;
- D] By issuing writ of mandamus or any other appropriate writ, order or direction, respondents may kindly be

directed to pay unpaid salary to the petitioner as per the pay scale applicable to the post occupied by her;

2] It is the case of the petitioner that the petitioner was appointed as a Shikshan Sevak in respondent no.4 School with effect from 22.12.2009. The appointment of the petitioner as a Shikshan Sevak in respondent no.4 School was approved by the office of respondent no.2 on 17.08.2010. The petitioner has completed period of Shikshan Sevak [i.e.three years] on 21.12.2012. In view of the provision of Section 5 of the Maharashtra Employees of Private Schools [Conditions of Service] Regulation Act, 1977 [for short 'Act of 1977'], the petitioner has acquired deemed permanency in service. After completion of period of Shikshan Sevak, proposal was submitted in the office of respondent no.2, seeking approval to the appointment of petitioner on permanent basis.

3] It is further the case of the petitioner that on 17.12.2014, respondent no.2 was pleased to reject the said proposal on the ground that there were surplus teachers in the school, and there was no vacancy. Thereafter, the petitioner had approached this Court in Writ Petition No.11340/2015 [Rajashri Hanmant Rokde Vs. The State of Maharashtra & others], challenging order dated 17.12.2014, with further prayer to direct the Education Officer to grant approval to the appointment of the petitioner. This Court was pleased to dispose off the aforesaid Writ Petition, vide order dated 18.01.2016, directing respondent no.2 to take final decision on the proposal dated 21.01.2015 submitted by the school.

4] Learned counsel appearing for the petitioner submits that it is undisputed that the petitioner was appointed as a Shikshan Sevak w.e.f. 22.12.2009, and she has

completed period of Shikshan Sevak of three years. It is also undisputed that her appointment as Shikshan Sevak was approved by respondent no.2. In the light of completion of period of Shikshan Sevak, the petitioner was entitled for deemed permanency in service, in view of the provisions of Section 5 of the Act of 1977. All these aspects of the matter were mentioned in Writ Petition No.11340/2015. Ignoring entitlement of petitioner to get approval to her appointment as an Assistant Teacher on permanent basis after completion of period of Shikshan Sevak [probation period], respondent no.2, vide order dated 19.03.2016, has refused to grant approval to the appointment of the petitioner on the ground that sanctioned posts in the said school were reduced. The reduction in the number of sanctioned posts cannot be a valid ground for refusal/denial of approval to a permanent employee. Even in the case of

reduction in the sanctioned posts, a permanent employee can be declared as surplus, and he/she should be accommodated on another vacancy in view of Rule 26 and 27 of the Maharashtra Employees of Private Schools [Conditions of Service] Rules, 1981 [for short 'Rules of 1981']. It is further submitted that the Education Officer has lost a sight of the provisions of Section 5 of the Act of 1977, so also the provisions of Rules 26 and 27 of the Rules of 1981, and has erroneously refused/denied the approval to the appointment of the petitioner, vide impugned order dated 19.03.2016. Therefore, he submits that, the Petition deserves to be allowed.

5] Learned counsel appearing for respondent no.2 relying upon the averments in the affidavit-in-reply of respondent no.2 submits that the petitioner has completed her tenure as Shikshan Sevak on 21.12.2012, as

per the staffing pattern of the said school for the academic year 2012-13, the post of Assistant Teacher is not vacant, and therefore, the personal approval for the post of the petitioner, cannot be granted. The said order has been communicated to the petitioner and the said school. There is no arbitrariness and illegality on the part of the respondent authority. It is submitted that the order impugned in this Petition is self-speaking, and cogent reasons are assigned while refusing the approval to the appointment of the petitioner.

6] We have heard the learned counsel appearing for the petitioner, learned AGP appearing for the respondent-State and its Officials, and learned counsel appearing for respondent no.2. We have also carefully perused the pleadings in the Petition, grounds taken therein, and the reply and additional affidavit filed by respondent no.

2, and all other documents placed on record by the respective parties. Upon careful perusal of the contents of the impugned communication by the Education Officer [Primary], Zilla Parishad, Latur i.e. respondent no.2 to the petitioner, it appears that, the approval to the appointment of the petitioner was rejected on the ground that the post of Assistant Teacher for the academic year 2012-13 is not available in the school, wherein the petitioner is serving. The petitioner has placed on record copy of the judgment and order passed by the Presiding Officer, School Tribunal, Latur Region, Latur in Appeal No.38/2013 [Rajashri Hanmant Rokde Vs. The Secretary, Dnyandan Shikshan Prasarak Mandal & others]. Upon careful perusal of the said judgment, it appears that the petitioner produced on record roster maintained by the management on 23rd July, 2010 below Exh.4/7, whereby the

petitioner came to be appointed on vacant post. The appointment letter was also produced on record before the Tribunal. The caste certificate was also produced on record. The extract of roster at serial No.4/9, which was produced on record before the School Tribunal, mentions vacancy of one post of Scheduled Caste. The Tribunal has observed that the aforesaid documents, which were placed on record by the petitioner herein, remained unchallenged. On the contrary, it appears that the management admitted the appointment of the petitioner on clear, permanent and vacant post. It further appears that there was termination of the services of the petitioner by the management; the stand taken by the management before the Tribunal was that there is no permanent approval to the services of the petitioner, and therefore, her services were terminated. The entire discussion in the judgment of the

Tribunal revolves around the contentions raised by the petitioner, and also reply filed by the management. It appears that though the Education Officer was made party; neither his reply is on record, nor the contentions are recorded by the School Tribunal. In ultimate conclusion, the School Tribunal held that the order of termination dated 16th August, 2013 is quashed and set aside. The Tribunal directed the respondent management to reinstate the petitioner on same post with continuity of service and back wages. The management is directed to make payment of back wages from their own funds.

7] Respondent nos.3 and 4 are served, however, no reply has been filed on their behalf. Respondent nos.3 and 4 have also not placed on record any document / information showing that they have challenged the judgment and order passed by the School Tribunal in Appeal No.38/2013 [Rajashri

Hanmant Rokde Vs. The Secretary, Dnyandan Shikshan Prasarak Mandal & others]. Admittedly, when respondent no.2 had granted approval to the appointment of the petitioner on honorarium of Rs.3,000/-, it appears that, approval given by the Education Officer is only for three years i.e. period of probation with effect from 22.12.2009. In view of the mandate of Section 5 of the Maharashtra Employees of Private Schools [Conditions of Service] Regulation Act, 1977, respondent nos.3 and 4 were obliged to inform about position of vacancy in the school to respondent no.2. Thereafter, after receiving the instructions from respondent no.2, the advertisement ought to have been issued advertising the post / posts. Upon perusal of the documents placed on the record along with Petition, a copy of the advertisement, if any, has not been placed on record by the petitioner or respondent nos.3 and 4. Even in

the judgment of the Tribunal, it is not mentioned that before appointing the petitioner, as a matter of fact, the Education Officer was informed about such vacancy, and after receiving necessary instructions from respondent no.2, the post was advertised by respondent nos.3 and 4, and after following proper procedure the petitioner came to be appointed on the post of Shikshan Sevak. It appears that the management passed a Resolution and appointed the petitioner. It further transpires from the discussion in the judgment of the School Tribunal that there was Resolution by the respondent management on 23rd July, 2010, whereby the petitioner came to be appointed on the vacant post. It further appears that the petitioner belongs to 'Chambhar' caste. According to the petitioner, the said caste is recognized as Scheduled Caste.

8] 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 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:

¹ 2007 [6] Bom.C.R. 23

Every person appointed to fill a permanent vacancy 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.

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.

9] The provisions of Section 5 of the Maharashtra Employees of Private Schools [Conditions of Service] Regulation Act, 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.

10] On conjoint reading of the aforementioned 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 is no 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.

11] As already observed, *prima facie* it appears that there is non-adherence to the proviso of sub-section [1] of Section 5 of the Act of 1977. In the impugned order, the Education Officer has given reason that there is no vacancy available in respondent no.4 school. The approval is necessary for

receiving salary grants, and in absence of it, the concerned appointee, who has completed three years of probation, would not be entitled to receive salary grants from the State Government / Zilla Parishad in absence of such approval. As already observed, the School Tribunal has ruled in favour of the petitioner, and issued directions to respondent nos.3 and 4 to pay salary to the petitioner.

12] In the light of discussion herein above and keeping in view the directions issued by the School Tribunal to respondent nos.3 and 4, in our opinion, direction sought to respondent no.2, to accord approval to the appointment of the petitioner as permanent Assistant Teacher or to pay unpaid salary, cannot be granted. However, in the light of discussion in the foregoing paragraphs, we are of the view that it is necessary to issue

directions to respondent no.2 to reconsider the case of the petitioner. In the result, the impugned order dated 19.03.2016 is quashed and set aside. Respondent no.2 is directed to reconsider the case of the petitioner for approval in accordance with law and keeping in view the discussion herein above.

13] It is needless to observe that, as directed by the School Tribunal, respondent nos.3 and 4 are under obligation to comply with the directions issued by the School Tribunal. We direct respondent no.2 to reconsider the case of the petitioner for approval, as expeditiously as possible, however, within 8 weeks from today and to communicate the said decision to the petitioner, and also to respondent nos.3 and 4. Needless to observe that it is up to respondent no.2 to offer reasonable

opportunity of hearing to respondent nos.3
and 4 and also to the petitioner.

14] With the above observations, Writ
Petition stands disposed of.

[K.K.SONAWANE]
JUDGE

[S.S.SHINDE]
JUDGE

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