

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

WRIT PETITION NO.8974 OF 2016

1. Shivsena Bahu-Uddeshiya Pratishthan, ...**PETITIONERS**
Parbhani, Dist. Parbhani,
Through its President
2. Shri Chhatrapati Shivaji Maharaj,
Primary Ashram School,
Dhangar Takli, Tq. Purna,
Dist. Parbhani, through its
Head Master
3. Rohini D/o. Sangram Aspatwar,
Age-27 years, Occu-Service as
Assistant Teacher and
Chhatrapati Shivaji Maharaj Primary
Ashram School,
R/o. Dhangar Takli, Tq. Purna,
Dist. Parbhani

VERSUS

1. The State of Maharashtra
Through its Secretary,
Department of Social Justice and
Special Assistance,
Mantralaya, Mumbai-32
...RESPONDENTS
2. The Regional Deputy Commissioner,
Social Welfare Department,
Aurangabad Region,
Aurangabad

3. The Assistant Commissioner of
Social Welfare, Parbhani,
Dist. Parbhani

Mr.V.S.Panpatte, Advocate for the petitioners
Mr.P.K.Lakhotiya, AGP for the respondent Nos. 1 to 3

**CORAM : S.S. SHINDE &
S.M. GAVHANE, JJ.**

RESERVED ON : 08.02.2018

PRONOUNCED ON : 23.04.2018

J U D G M E N T [PER:S.M. GAVHANE, J.]

. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.

2. By this petition the petitioners have claimed following substantive reliefs:

“B. By a writ of certiorari or any other appropriate writ or direction in the like nature, the letter dated 19.11.2015 issued by the respondent No.3 may please be quashed and set aside.

C. By a writ of mandamus or any other appropriate writ or direction in the like nature, the respondent No.2 and 3 may please be directed to grant approval to the services of the petitioner No.3 as untrained Assistant Teacher from 01.05.2012 to 26.08.2015 in the scale of Rs.5200-20200 Grade Pay 2000 and further to grant permanent approval to the services of the petitioner No.3 as Assistant Teacher in pay-scale of Rs.5200-20000 Grade Pay 2800 from 27.08.2015 onwards and accordingly, release the

arrears of salary of the petitioner No.3”

3. Case of the petitioners' is that petitioner No.1 is a Society registered under the Societies Registration Act, 1860 and is a Trust registered under the Bombay Public Trusts Act. Petitioner No.1 is running petitioner No.2-Ashram School since long with due permission of the authorities. The said school is on 100% grant-in-aid. Petitioner No.3 is having qualifications of H.S.C., D.Ed. and she belongs to 'Manervarlu' Scheduled Tribe. He has been appointed as untrained Assistant Teacher against post reserved for S.T. category w.e.f. 18.01.2010 by petitioner Nos. 1 and 2 by following due procedure of law, in petitioner No.2 School. Petitioner No.3 is in continuous service in petitioner No.2 Ashram School. Proposal seeking approval to the appointment of petitioner No.3 was submitted before respondent No.3 Assistant Commissioner of Social Welfare, Parbhani. Accordingly, respondent No.3 granted temporary approval to the appointment of petitioner No.3 from 18.01.2010 to 30.04.2010 as un-trained Assistant Teacher. Thereafter also respondent No.3 granted approval to the appointment of petitioner No.3 as untrained Teacher from 01.05.2011 to 30.04.2012.

4. It is further case of the petitioners that claim

of the petitioner No.3 for getting admission to postal D.Ed. came to be recommended by respondent No.3. She came to be admitted to the postal D.Ed. course for the Session 2012-2013 by letter issued by the Maharashtra State Council for Educational Research and Training, Pune. Meanwhile petitioner No.2 submitted the proposal before respondent No.3 seeking further approval in favour of petitioner No.3. However, respondent No.3 forwarded said proposal clarifying that the appointment of petitioner No.3 is as untrained Teacher against post reserved for S.T. category and she is prosecuting studies of Postal D.Ed. Course.

5. Thereafter, respondent No.2 Regional Deputy Commissioner by letter dated 14.10.2013 pointed out deficiency of non-submission of upto-date verified roster of the school, called explanation from respondent in respect of absorption of surplus teachers of petitioner No.2-school and further informed that after absorption of surplus teachers further action would be taken on the said proposal. However, respondent No.2 neither decided the said proposal nor granted approval to the services of the petitioner No.3 from 01.05.2012 till completion of postal D.Ed. Course by her.

6. According to the petitioners, petitioner No.3 successfully completed and passed the postal D.Ed. course on 27.08.2015. After passing D.Ed. Course by petitioner No.3, petitioner No.2 again submitted proposal dated 05.10.2015 before respondent No.3 seeking permanent approval as Assistant Teacher to the services of the petitioner No.3 in regular pay scale of Rs.5200-20200 Grade Pay 2800. However, respondent No.3 by letter dated 19.11.2015 returned the said proposal to the petitioner No.2 on the count that the earlier proposal seeking approval to the services of the petitioner No.3 is pending before respondent No.2 and as per Government Resolution dated 16.10.2012 there is ban to grant approvals till absorption of surplus teachers.

7. Petitioners further contended that though the petitioner No.3 has been initially appointed in petitioner No.2 school as untrained teacher against post reserved for S.T. category, approvals to her appointment are also granted from time to time temporarily till 30.04.2012 and though proposal is pending before respondent No.2 seeking approval to her appointment as untrained teacher till completion of postal D.Ed. Course since two and half years, but respondent NO.2 did not decide the same till today. Respondent No.3 ought to have

forwarded said proposal seeking permanent approval to the services of the petitioner No.3 as Assistant Teacher to respondent No.2. Since the initial appointment of petitioner No.3 is from S.T. category and in view of the completion of postal D.Ed. course by said petitioner, the ground of availability of surplus teachers is not applicable to the services of the petitioner No.3 while considering the proposal for according permanent approval to the services of petitioner No.3 as Assistant Teacher in regular pay scale. However, respondent No.3 illegally and erroneously without forwarding proposal seeking approval to the services of petitioner No.3 to respondent No.2, returned the same. Since there is no approval to her services from 01.05.2012 onwards, her salary has not been released till today which is injustice to petitioner No.3 and consequently petitioner Nos.1 and 2 are finding difficulty in properly imparting the education. As such, action of not granting approval to the services of petitioner No.3 and non release of her salary from 01.05.2012 by respondent Nos. 2 and 3 is capricious, arbitrary and violative of Articles 14, 16 and 19(1)(c) of the Constitution of India. Therefore, letter dated 19.11.2015 issued by respondent No.3 deserves to be quashed and set aside.

8. Affidavit dated 05.12.2016 of one Tejas S/o. Laxmanrao Malvadkar who is serving as Assistant Commissioner, Social Welfare, Parbhani has been filed. In the said affidavit it is stated that approval to the services of petitioner No.3 was granted by order dated 20.10.2010 w.e.f. 01.05.2010 to 30.04.2011 in the pay scale of Rs.5200-20200 with grade pay 2000. Again vide order dated 29.03.2012 approval was granted w.e.f. 01.05.2011 to 30.04.2012 in the above mentioned pay scale as untrained teacher. Considering the strength of the school in 2012-2013 there was 120 residential students and 164 non-residential students, total strength comes to 284 and as per circular dated 14.03.1984 issued by the Director of Social Welfare, Maharashtra State, Pune only one Headmaster and five teachers are permissible in the said school and accordingly, considering the said circular four permanent teachers became surplus in the said school. Considering this situation it is impossible to grant approval to the services of petitioner w.e.f. 01.05.2012. It is further stated that in 2013-2014 strength of the students in petitioner No.2 school was 319, considering the strength, permissible posts were one Headmaster and eight teachers, total 9 posts. Even considering that, one teacher became surplus. Also in 2014-2015 strength of the students was 302, posts

permissible were one Headmaster plus seven teachers i.e. total eight posts. Considering that, two posts of teachers were declared surplus in the year 2014-2015. Therefore, considering above mentioned facts and circumstances the prayers of the petitioners cannot be entertained.

9. Moreover, it is stated that appointment of petitioner (No.3) is for temporary/particular period and the approval is granted with condition that as and when strength of students is reduced or any permanent teacher is declared surplus her salary would be stopped and after that responsibility of the salary is of the Managing Committee of the said Institution. The permanent teachers of petitioner No.2 school are declared surplus and appointment of present petitioner No.3 is only for temporary period and approval is granted for a temporary period with condition. Now responsibility of payment of salary is of petitioner No.2. Considering this situation the Assistant Commissioner, Social Welfare (respondent No.3) rightly sent back the proposal of the petitioner vide order dated 19.11.2015. It is stated that there is no merit in the writ petition and that same be dismissed.

10. In the rejoinder affidavit dated 15.04.2017

submitted by petitioner No.3 for herself and on behalf of petitioner Nos. 1 and 2 she has reiterated all the contentions raised in the petition and it is stated that respondent No.3 granted approval to the appointment of petitioner No.3 on year to year basis till 30.04.2012 being untrained teacher. Thereafter, again petitioner No.2 submitted proposal dated 31.08.2012 before respondent No.3 seeking further approval in favour of petitioner No.3, however, respondent No.3 forwarded said proposal to respondent No.2 and the same is pending undecided till today. The Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the RTE Act, 2009) came into force w.e.f. 01.04.2010. As per provisions of Section 25(2) r/w Schedule of the RTE Act, since strength of the students of petitioner No.2 school in the year 2012-2013 was 284, total 9-posts of teacher including one Headmaster are permissible and not one Headmaster and five teachers as contended by the respondents in their reply. So also, strength of the students in petitioner No.2 school in the year 2013-2014 was 342 and not 319 and therefore as per section 25(1) of the RTE Act, permissible posts of teacher for the year 2013-2014 are eleven including Headmaster. For the year 2014-2015 also strength of the students in petitioner No.2 school was 323 and was not 302 and therefore as per

Section 25(1) of the RTE Act, 2009 permissible posts of teacher for the year 2014-2015 are eleven including one Headmaster and not eight. Therefore, at the most one teacher of petitioner No.2 school became surplus for the years 2012-2013, 2013-2014 and 2014-2015 and petitioner No.3 can never be declared surplus since her appointment is against S.T. category post as per roster of the school in view of the further clarification. It is stated that from the year 2015-2016 onwards, the teaching staff is to be sanctioned in the primary school as per Government Resolution dated 28.08.2015. The strength of the students of petitioner No.2 school for the year 2015-2016 is 421. As per clauses 2.1.1, 2.2.2 and 2.2.3 of the Government Resolution dated 28.08.2015, permissible teaching staff in petitioner No.2 school shall be 14. For the year 2016-2017 also the strength of the students in petitioner No.2 school is 298, permissible teaching staff in petitioner No.2 school for the year 2016-2017 shall be 11 including one Headmaster. Therefore, as per provision of section 25(1) of the RTE Act, 2009 and provision of Government Resolution dated 28.08.2015 only one teacher of petitioner No.2 school becomes surplus for the years 2012-2013 to 2014-2015 and none of the teachers of petitioner No.2 school can be surplus for the years 2015-2016 and 2016-2017.

11. It is further stated that though the initial appointment of petitioner No.3 was temporary being untrained teacher, but she passed the postal D.Ed. Course on 27.08.2015. Though the approvals granted to her appointment for the years 2010, 2010-2011 and 2011-2012 are temporary, but there is no condition in approval granted in favour of petitioner No.3. In view of the provision of Section 25(1) of the RTE Act, 2009 Government Resolution dated 28.08.2015 and the strength of the students in petitioner No.2 school for the year 2012-2013 to 2016-2017 only one teacher of petitioner No.2 can become surplus and petitioner No.3 can never be declared surplus. Her appointment being on the post reserved for S.T. category, as per Rules of procedure prescribed for declaration of employees as surplus, and since petitioner No.3 is the only candidate appointed and working on the post of Assistant Teacher reserved for S.T. category, the Government Resolution dated 16.10.2012 is not applicable to the services of petitioner No.3 and hence the impugned letter dated 19.11.2015 returning the proposal on the count that there is no sanction to the post of petitioner No.3 is not proper.

12. On behalf of respondent Nos. 1 to 3 additional

affidavit dated 24.04.2017 of Tejas Laxmanrao Malvadkar working as Assistant Commissioner, Social Welfare, Parbhani is filed. In paragraph Nos. 4,5 and 6 of the said affidavit it is stated as under:-

“4. I say and submit that, petitioner No.3 is a temporary employee the approval was granted for the temporary period as such, though petitioner is appointed from the reserve category is not entitled for the protection given under Rule 27 of M.E.P.S. Rules. I say and submit that, as per Rule 27 (e) petitioner being a temporary employee is liable to be removed from service.

5. I say and submit that, in the petitioner No.2 school 10 posts of permanent teachers are sanctioned, however, due reduction of the strength of students in the year 2013-2014, one teacher was declared thereafter in the year 2014-2015, two teachers posts were declared as surplus and in the year 2016-2017 the strength of students being 298, one post will be declared as surplus.

6. I say and submit that, the answering respondent taking into account the above position, the strength of students and staffing pattern, rightly returned the proposal of the petitioner seeking approval to the appointment of petitioner No.3.”

13. So also on behalf of respondent Nos.1 to 3 additional-affidavit-in-reply dated 09.10.2017 of Tejas Laxmanrao Malvadkar working as Assistant Commissioner, Social Welfare, Parbhani is filed pursuant to the order

passed by the Court on 13.09.2017. It is stated that earlier the Regional Deputy Commissioner, Social Welfare, Aurangabad was having authority for sanctioning staffing pattern of Social Welfare Ashram schools in Aurangabad Division. Thereafter, the Government vide Government Resolution dated 02.04.2016 has withdrawn the powers of Regional Deputy Commissioner for sanctioning pattern of the said schools and the Government has appointed new Committee under the Chairmanship of Director, VJNT, OBC, SBC, Maharashtra State, Pune and other three members i.e.

1. Regional Deputy Commissioner, Social Welfare, Department, Aurangabad,
2. Assistant Commissioner, Social Welfare, Parbhani and
3. Member Secretary, Social Welfare Officer, Class-II, of concerned Regional Deputy Commissioner Office.

Due to formation of the said Committee and its meetings for issuing the staffing pattern of the Ashram School, delay has been caused for the year 2015-2016 and 2016-2017. The Regional Deputy Commissioner, Social Welfare, vide its order staffing approval for the year 2015-2016 is issued on 09.10.2017 and staffing pattern for the year 2016-2017 is issued by newly formed committee on 06.10.2017. As per the staffing pattern for the year 2015-2016 there are ten approved posts in the petitioner's school in which only eight posts of Assistant Teacher (Primary), one post for

Graduate Teacher and one post of Headmaster are approved. Therefore, approval cannot be granted to the petitioner. Further more in the approved staffing pattern for the year 2016-2017 due to reduction of strength of students the sanctioned posts were reduced from 10 to 7 in which one post of Headmaster, six posts of Assistant Teachers (Primary) are approved. Due to reduction of strength of students sanctioned posts were already reduced and as such the proposal of the petitioner for seeking approval to the appointment of the petitioner No.3 was rejected. It is stated that there is no merit and substance in the writ petition and it may be dismissed with costs.

14. We have heard the Advocate appearing for the petitioners and Learned AGP for respondent Nos. 1 to 3. With their assistance we have perused the pleadings of the parties and the copies of documents produced by them.

15. There is no dispute that petitioner No.1 Institution is running petitioner No.2 Ashram School since long with due permission of the authorities and said Ashram School is getting 100% grant-in-aid. Petitioner No.3 was appointed as un-trained teacher in Petitioner No.2 school against post reserved for S.T. category w.e.f. 18.01.2010 by petitioner Nos. 1 and 2 by

following due procedure of law. There was advertisement in the news paper Deep Prabha dated 06.01.2010 to fill up the post of Assistant Teacher in petitioner No.2 school. At the time of her appointment petitioner No.3 was having HSC, B.Ed. Qualification and she belongs to Manervarlu S.T. category. Respondent Nos. 2 and 3 had given approval to the appointment of petitioner No.3 as Assistant Teacher from 01.05.2013 to 26.08.2015 in the scale of Rs.5200 to 20000 Grade Pay 2000 and further they had given approval to the appointment of petitioner No.3 as Assistant Teacher in the regular pay scale of Rs.5200-20200 Grade Pay 2800 from 27.08.2015 and accordingly released the salary of petitioner No.3 of the said respective period.

16. Moreover, there is no dispute that after appointment of petitioner No.3 on 18.01.2010 petitioner No.2 submitted proposal to respondent No.3 seeking approval to the appointment of petitioner No.3 and accordingly respondent No.3 by order dated 03.05.2010 granted temporary approval from 18.01.2010 to 30.04.2010 and by order dated 20.10.2010 granted approval to the appointment of petitioner No.3 as un-trained teacher from 01.05.2010 to 30.04.2011, again by order dated 29.03.2012 said respondent No.3 granted approval to the appointment

of petitioner No.3 as un-trained teacher from 01.05.2011 to 30.04.2012. There is also no dispute that in the meanwhile petitioner No.3 requested for permission to get admission to the Postal D.Ed. Course and respondent No.3 recommended the same and petitioner No.3 came to be admitted to the Postal D.Ed. Course for the session 2012-2013 by letter dated 30.01.2013 issued by Maharashtra State Council for Educational Research and Training, Pune. Petitioner NO.3 passed postal D.Ed. Course on 27.08.2015.

17. There is also no dispute that by letter (Exh.D) of respondent No.3 addressed to respondent No.2 dated 01.10.2013 it was informed that petitioner No.3 was selected for correspondence D.Ed. Course for the year 2012-2013. There is also approval to the appointment of petitioner No.3 till 30.04.2012 by respondent No.3 and therefore, request was made to grant individual approval to her appointment till completion of the training period and accordingly the proposal was submitted by letter dated 14.10.2013 (Exh.D colly) and respondent No.2 informed respondent No.3 to make compliance of certain deficiencies as mentioned in the said letter and to file explanation about the deficiencies. So also, it was stated that after inspection of the roster and after

absorption of the surplus staff as per rule, decision will be taken on the proposal. So also, by letter dated 05.10.2015 of petitioner No.2 school the proposal was submitted to respondent No.2 to grant approval to the roster of petitioner No.2 school for the year 2015-2016 and to give continuation to the services of petitioner No.3 as she has completed D.Ed. Course in August, 2015. Upon said letter respondent No.3 has given impugned letter dated 19.11.2015 (Exh.F) to the Headmaster of petitioner No.2 informing that two teachers in petitioner No.2 are declared surplus and further informed as under:

शासन निर्णय दिनांक १६ ऑक्टोबर २०१२ नुसार अतिरिक्त कर्मचार्यांचे समायोजन केल्याशिवाय कर्मचार्यांना मान्यता न देण्याबाबत निर्देश आहेत. आपल्या आश्रमशाळेमध्ये कायम मान्यता प्राप्त शिक्षक अतिरिक्त ठरले असल्याने पुनश्च श्रीमती अस्पतवार यांचे सहशिक्षकेचे पदास मान्यता देण्याबाबतचा प्रस्ताव मा.प्रादेशिक उपायुक्त, स.क.विभाग, औरंगाबाद यांचे स्तरावर प्रलंबित असतांना पुनश्च प्रस्ताव विभागीय कार्यालयास सादर करणे संयुक्तीक होणार नाही.

18. It is clear from the above admitted facts that there was advertisement, to appoint one Assistant Teacher in petitioner No.2 school, issued in public news paper stated earlier on 06.01.2010 and thereafter petitioner No.3 was given appointment as un-trained Assistant Teacher in petitioner No.2 school as per appointment order dated 18.01.2010 (Exh.A) under Rule 9(5) of the MEPS Act and Rules, 1981 by the President of petitioner No.1 school. Thus, it can be said that the appointment of

petitioner No.3 was as per Rules and procedure on the clear and vacant post of Assistant Teacher.

19. As per order dated 01.11.2017 learned AGP was directed to seek instructions as to whether the Right to Education Act would apply to Ashram school and whether the staffing pattern provided under Government Resolution dated 28.08.2015 would apply to the Ashram schools and if not reasons therefor. In this respect respondents have filed letter dated 11/12.09.2017 of respondent No.3 Assistant Commissioner, Social Welfare, Parbhani and letter dated 20.01.2015 of Joint Director of the Vimukta Jati, Nomadic Tribes, Other Backward Class and Special Backward Class Welfare, Maharashtra State, Pune. First letter shows that as per Section 23(2) of the RTE Act, 2009 un-trained Primary Teachers were given time till 31.03.2019 to obtain D.El.Ed. which was necessary to be obtained in any case and un-trained Primary Teachers in Private aided Ashram School from 1 std. to 7 std. to whom individual approval was given and were allowed to take admission in National Institute of Open Schooling for D.El.Ed. prior to 31.03.2019. The second letter dated 20.01.2015 shows that the Right of Children to Free and Compulsory Education Act, 2009 and Right to Free and Compulsory Education Rules, 2011 are applicable to the

Ashram schools' teachers in respect of minimum educational and professional qualification/eligibility etc. Thus, from the above letters it can be said that the RTE Act, 2009 is applicable to the teachers working in the Ashram schools.

20. Now it is to be seen whether there were surplus teachers in Ashram school having permanent grant and therefore, unless surplus employees are absorbed as per government resolution dated 16.10.2012 it was not possible to absorb petitioner No.3 as stated by respondent No.3 in the impugned letter dated 19.11.2015. There is no dispute that as stated earlier the petitioner No.3 was appointed as un-trained Assistant Teacher in petitioner No.2 Ashram school by petitioner Nos. 1 and 2 against the post reserved for S.T. category. Petitioner No.3 belongs to Manervarlu, S.T. category. It appears from the rejoinder affidavit (Page No.53) of petitioner No.3 that as per provision of Section 25(1) of the RTE Act, 2009 and Government Resolution dated 28.08.2015 only one teacher of petitioner No.2 school became surplus for the year 2012-2013 to 2014-2015 and none of the teachers of petitioner No.2 school can be surplus for the year 2015-2016 and 2016-2017. Considering the same and the fact that the Government Resolution dated 02.05.2012

imposing ban on appointment unless surplus teachers are absorbed is not applicable to reserved category candidate, and as petitioner No.3 is from reserved category and was appointed against the vacant post reserved for S.T. category, as per decision of Division Bench of this Court in Ashok Nilkanth Dhale Vs State of Maharashtra and ors. 2016(5) MhLJ 742, it can not be said that petitioner No.3 cannot be absorbed as stated in impugned letter dated 19.11.2015.

21. For the reasons discussed hereinabove, we are of the view that when petitioner No.3 was appointed as un-trained Assistant Teacher in petitioner No.2 school on the clear and vacant post reserved for S.T. category candidate and as she belongs to reserved category and approval was granted to her appointment from 18.01.2010 to 30.04.2011 as un-trained Assistant Teacher and from 01.05.2010 to 30.04.2012 as un-trained Teacher by respondent No.3 and when Government Resolution dated 02.05.2012 imposing ban on approval till absorption of surplus teachers is not applicable to the case of petitioner No.3 as observed earlier the impugned letter

dated 19.11.2015 issued by respondent No.3 is not sustainable and same is liable to be quashed and set aside and respondent Nos.2 and 3 are required to be directed to grant approval to the services of petitioner No.3 as un-trained Assistant Teacher and further approval as Assistant Teacher in the pay scale as claimed by petitioners. Therefore, rule is made absolute in terms of prayer clauses (B) and (C). The writ petition is allowed. No order as to costs.

[S.M.GAVHANE,J.]

[S.S. SHINDE,J.]