

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

WRIT PETITION NO. 9188 OF 2013

Maharana Pratap Shikshan Sanstha,
Sevapur, Tahat Wadwal (Na),
Tq. Chakur, Dist. Latur
Through its Secretary
Ashok s/o. Ramrao Mortale
Age 44 years, Occu. Agri.
R/o. Vishalnagar, Barshi Road,
Latur, Tq. & Dist. Latur.

....Petitioner.

Versus

1. The State of Maharashtra
Through the Secretary
Social Welfare Justice and
Special Assistance Department
Maharashtra State, Mantralaya,
Mumbai -32.
2. The Commissioner of Handicapped
Welfare, Maharashtra State, Pune.
3. The District Social Welfare
Officer Grade-I, Zilla Parishad,
Latur, Tq. & Dist. Latur.

....Respondents.

Mr. R.N. Dhorde, Senior Counsel i/b. Mr. V.D. Salunke and Mr. A.A. Nimbalkar, Advocates for petitioner.

Mr. R.V. Dasalkar, AGP for State.

Mr. S.V. Adwant, Advocate for respondent Nos. 1 and 2.

**CORAM : T.V. NALAWADE AND
SUNIL K. KOTWAL, JJ.
DATED : MARCH 22, 2018.**

JUDGMENT : [PER T.V. NALAWADE, J.]

- 1) The petition is filed under Articles 226, 227, 14 and 21-A of Constitution of India. The petitioner, a trust is running school for

handicapped students is seeking directions against respondents, Government and Government authorities to give approval to the appointments of five staff members of school of the petitioner. Both the sides are heard.

2) The petitioner is running a deaf and dumb school. Recognition was granted to the school in the year 1990 and it was for 40 students. In the year 1995 the State Government granted 100% grant in aid.

3) By Government Resolution ('GR' for short) dated 18.8.2004 the State Government created new staffing pattern for the schools of aforesaid nature in respect of teaching and non teaching staff. According to the petitioner, the staffing pattern created in the year 2004 is applicable to it's school as per the said GR and it is entitled to have the staff as per the new staffing pattern. It is the contention of the petitioner that it is entitled to have staff of 20 employees and as new staffing pattern came in, it was entitled to appoint five more staff members.

4) It is the case of petitioner that petitioner appointed five staff members from the year 2010 to 2012 and proposals for approval of those appointments came to be submitted on 16.6.2012

and 18.3.2013. It is the contention of the petitioner that the staff appointed by it is having necessary qualification and there was the requirement of such staff for the establishment. It is the case of the petitioner that the respondents have not given approval and no response is given to the aforesaid proposals made by the petitioner. It is the case of the petitioner that even if posts are not sanctioned, in view of the needs of the petitioner, it was entitled to make such appointments and there were such decisions of this High Court given in Writ Petition Nos. 7328/2007, 6898/2011, 5914/2004, 5714/2004 and 4506/2013. It is the contention of the petitioner that in those cases High Court had given directions to the respondents to give provisional approval when there were such appointments and though the orders were interim in nature, the petitioner is entitled to get similar relief.

5) The District Social Welfare Officer has filed reply affidavit. After filing the first affidavit, one more affidavit came to be filed to cover all the contentions and it was filed by other District Social Welfare Officer. The respondents have denied that the petitioner was entitled to make appointments even before getting sanction of the posts and without taking permission of the authority to make the appointments. It is the contention of the respondents that though staffing pattern was created under aforesaid GR, that

GR of staffing pattern was also not allowing the institution like petitioner to make appointments, unless the procedure given for making appointment and getting sanction in respect of posts was followed.

6) It is the case of respondents that as per the new staffing pattern, some staff became surplus in old schools which were started prior to 2004 and there was excess staff in new schools which were started afterwards. It is the case of respondents that there was problem in respect of excess surplus staff and this Court had given direction to see that the surplus staff was absorbed in some way. It is the contention of the respondents that due to such directions, steps were being taken to see that surplus staff is absorbed on other establishments and due to that no new posts were sanctioned and procedure was laid down for absorption of the surplus staff first.

7) It is the contention of the respondents that it noticed that some institutions had made the appointments illegally, without following the procedure and in some cases, the authority had given approval even when procedure was not followed by the management for getting sanction and for getting permission to make appointments and due to that respondents had issued another GR

and direction was issued to the authority to see that such approvals are cancelled. It is the contention of the respondents that whenever there are such illegal appointments, action can be taken against the management of the school.

8) It is the contention of the respondents that the petitioner is running three schools for handicapped persons, but common roster was not maintained by the petitioner. The respondents have annexed chart of expected roster and it is contended that this roster was not followed and there were vacancies in respect of reserved posts. It is the contention of the respondents that go-bye is given by the management to that procedure also.

9) It is the contention of the respondents that visit was paid to the school of the petitioner for inspection after filing of the present proceeding and it was noticed that infact there were only 26 students (not 40), but 20 staff members were engaged by the petitioner management for 26 students. It is the contention of the respondents that this single circumstance shows that the petitioner does not want to follow the staffing pattern and wants to use surplus staff also. It is the contention of the respondents that already due to new staffing pattern, there was surplus staff on the establishment of the petitioner and before taking care of that surplus staff, new

appointments came to be made. It is contended that when as per the new staffing pattern, the entitlement was of 15 staff members, the respondents were required to pay salary in respect of 17 staff members. It was submitted during arguments by the learned Special Counsel appointed for respondents that the management of the petitioner institution is in the hands of politically influential persons and due to that, they are indulging in such illegal activity. It was submitted that due to fraud committed by petitioner management, F.I.R. was also given by Commissioner, but due to influence of persons managing institution, police did not dare to take action in the said F.I.R.

10) It is the contention of the respondents that after inspection of the school of petitioner on 25.5.2017, the respondents' authority communicated that there were 10 defects and 12 deficiencies in respect of new five appointments made by the petitioner. It is contended that it was specifically informed that these appointments were illegal and no grant will be permissible in respect of those appointments. It is contended that in spite of such communication, no steps were taken and on that ground also, the petition is liable to be dismissed.

11) It is specific contention of the respondents that as per

the new staffing pattern only one post of cook is available and in the past also, as per the old staffing pattern, only one post of cook was available, but the petitioner management appointed one more cook and so, the said appointment is illegal on that ground also. It is specific contention that no sanction is there in respect of appointments of five posts and those posts are not created on the establishment of petitioner and further, the permission for appointments is also not given by the authority and so, all the appointments are illegal. It is contended that steps need to be taken first in respect of surplus staff of three persons working on the establishment of petitioner management, but the petitioner management is not co-operating in that regard. It is specific contention that there is surplus staff available with the respondents (from other establishments) and from that staff, the posts of two Sweepers, post of one Hostel Superintendent and post of one Speech Therapist can be filled and so, the appointments made by petitioner on those posts cannot be approved. It is the contention of the respondents that in Writ Petition No. 43/2004 and 574/2003, this Court had given direction to see that whenever surplus staff is there, wait list is prepared and steps are taken to see that the surplus staff is absorbed in some way.

12) It is the case of respondents that the appointments of

aforesaid five staff members are made without following procedure given in the Act and the Code and approval to those appointments will amount to give back-door entry to those five persons on the posts for which the State Government gives grant. It is contended that the appointments are void-ab-initio, made without following the procedure and there is no question of giving approval to those appointments.

13) Everything revolves around the new staffing pattern created by GR of State Government dated 18.8.2004 and its copy is on record. There are annexures with the GR showing the staffing pattern. In clause 2 of the GR, it is made clear that this staffing pattern will be applicable even to old schools, schools started prior to 18.8.2004. It is made clear in this para that first the verification of the posts sanctioned on the establishment was to be done and proposal was to be submitted for sanction of the staff, if any, required for appointment on old establishments to the Government. This was to be done in respect of both teaching and non teaching staff. In para 4, it is made clear that the schools to which permission was granted from the academic year 2003-2004 were to submit proposal for approval of the staff appointed on the basis of new staffing pattern and the Commissioner of Handicapped Welfare Department was to consider the proposal and if the appointments

were made as per the procedure and they were as per the new staffing pattern, approval was to be given. Thus, old schools were required to take steps to send consolidated, composite proposal to the Government and the Government was to consider the proposal for sanction of staff.

14) In this GR, the previous GRs dated 27.8.1997 and 10.9.2001 are referred. New staffing pattern shows that one post of Speech Therapist, two posts of Sweepers and one post of Hostel Superintendent could have been claimed by the management as per the new pattern, but verification of the working staff and the strength of students ought to have been done before sanction of the posts. There is already record to show that as against sanctioned strength of 40 students, only 26 students were there in the school of the petitioner management. Further, the petitioner management was having two more similar schools and the strength of the students from those schools and the staff of those schools could have been also verified and considered before sanction of new posts. It can be said that only due to some interim orders made by this Court, which are mentioned in this petition, the petitioner came to this Court. The record shows that in the year 2012 first time proposal was made for getting approval to the appointments even when the first appointment was shown to be made in the year 2010. It is not the

case of petitioner that immediately after making the appointments, steps were taken to get the approval. Thus, everything is fishy and it can be said that there was clear attempt on the part of the petitioner to misuse the process of law and mislead this Court.

15) The learned Special Counsel appointed for respondents drew the attention of this Court to the Handicap School Code, 1977 created for the special schools established to take care of handicapped students. Rule 43 (3) of this Code shows that only as per the Rules permanent staff can be appointed and even if temporary staff is appointed in contravention of procedure, on year to year basis action is possible against these institutions. This Rule shows that 51% reservation was to be kept which was constitutional reservation and at the time of filling the vacancies, it is to be seen that priority is given to 50% handicapped persons. In Rule 63, it is made clear that the service condition and other things in respect of the staff for other schools will be applicable to the staff of these schools also. Thus, the procedure prescribed in the Maharashtra Employees of Private Schools (Condition of Service) Regulation Act and Maharashtra Employees of Private Schools (Condition of Service) Rules needs to be followed for making appointments. In Rule 64, it is specifically made clear that the appointments of teaching and non teaching staff needs to be made by School Committee. The definition

of 'School Committee' is given in MEPS Act and Rules and so, the Committee needs to be constituted first and the Committee includes few officers from the Government Department. Rule 64 (2) shows that list of candidates available with Social Welfare Officer, Planning Officer and Tribal Development Department need to be called and the advertisement should be published for inviting applications from other candidates. Atleast 2 advertisements need to be issued as per the established procedure. The candidates need to be interviewed by the Committee and list of selected candidates needs to be sent to District Social Welfare Officer for approval. Only after getting the approval, the actual appointment can be given and if that procedure is not followed, the Government is not bound to pay the grant in respect of those posts. This procedure comes after getting sanction to the post from the Government.

16) It is already observed that in GR of 2004, there is mention of GR dated 10.9.2001. This GR shows that before sanction of new post, every department is expected to follow the procedure given in this GR. Assessment of work needs to be done and the posts already created are required to be taken in to consideration. Decision was to be taken first on surplus employees in the present pattern and after abolition of surplus staff, it was possible to create new staff. If there was surplus staff, that staff was to be distributed

to other departments category-wise to see that that surplus staff is absorbed. High Power Committee was constituted to do such work and this GR shows that there was ban created for creation of new posts unless the procedure laid down in this GR was followed. The petitioner is also not disputing that there was necessity to first submit proposal for sanctioning of posts. That procedure was admittedly not followed. It appears that in one writ petition by order dated 6.6.2008, this Court had given direction to the Government to see that surplus staff is absorbed and that order was also to be followed and accordingly, on 6.7.2010 decision was taken to see that steps are taken to absorb such surplus staff. Thus, it was not possible to sanction the aforesaid five posts, unless it was ascertained by the Government that there was no surplus staff available, who could have been given to the petitioner institution.

17) The correspondence of Handicapped Welfare Department of the State Government made with Social Welfare Officer and Zilla Parishad dated 21.4.2007 shows that as per the directions given by this Court in Writ Petition Nos. 5744/2003 and 43/2004 steps were taken for absorption of surplus staff. It was made clear that any appointment made after 29.7.2004 would be treated as illegal and that will also amount to contempt of the Court. Disciplinary action was also warned if such appointment was made. Para 5 of this

communication shows that the posts which were vacant after 29.7.2004 were not to be filled by the management. It was made clear that no appointment was to be made on the post created in GR dated 18.8.2004 and appointment, if any, made on the posts which were made available due to this GR will be treated as illegal. It was made clear that requisition was to be given by the management to Commissioner and the Commissioner was to take steps to see that surplus employees are first absorbed and that was mandatory in nature. If surplus employee was not available, then no objection certificate was required to be obtained by the management and then after following due procedure given for the appointment of staff, posts were to be filled. It was observed that there were some appointments made after 29.4.2007 and as they were in violation of aforesaid order of the High Court and directions given by the Government, the approvals, if any, given in respect of those appointments were to be cancelled immediately. Formats of applications were also supplied along with this communication as Annexures 'A' and 'B'. Thus, it was not open to the management to fill the posts created under GR of 2004 and procedure was given for filling the posts.

18) The Government had issued another communication dated 24.9.2010. In this communication, it was informed that the

old institutions like the present petitioner were not entitled to fill in the vacancies which had occurred. It was directed to see that the appointments made as against surplus staff due to GR dated 18.8.2004 were not to be approved and if, they were approved, the approval was to be cancelled. If some posts had fallen vacant and they were still available as per the staffing pattern published in GR dated 18.8.2004, they were to be filled in as per GR dated 5.6.2010, after obtaining no objection certificate from the Commissioner as already informed in the previous communications. The subsequent record of June and July 2011 shows that as already expressed the assessment of the situation was made by the Government and it was found that out of 3911 employees which had become surplus due to new staffing pattern, 1364 employees were to be absorbed on the posts which had become available as per the new staffing pattern. It was made clear that on the basis of education qualification for the absorption of remaining 2547 employees, which remained surplus employees, training was to be given to them for their absorption on equivalent posts created in new staffing pattern. This was in respect of Class III employees and option was to be given by Class IV employees who had become surplus to get absorbed on other Class IV posts which were equivalent to the posts which they were holding in the past. A decision was taken by the Government that 1825 posts which were to remain as surplus were not to be filled at

present. There are subsequent GRs dated 25.10.2012 showing that Government had decided to implement that policy decision of absorption of surplus employees.

19) In spite of aforesaid circumstances, it appears that the petitioner management made appointments in the year 2010-11 and sent proposals for approval on 16.6.2012 and 18.3.2013. It is already mentioned that no post of Cook was available even as per the new staffing pattern, but the appointment is given to one person on the post of cook when one cook was already working with the petitioner management as per the sanctioned staff. Similarly, no permission of the Commissioner was taken as mentioned above by the management and the procedure for the appointment was also not followed.

20) The learned counsel for respondents submitted that even when new staffing pattern was created by the respondents, the Government had not sanctioned the posts which could have become available as per the new staffing pattern and there were the aforesaid reasons like surplus staff for the same. The learned Special Counsel for respondents submitted that as no post was sanctioned, there was no question of making appointment as per the new staffing pattern and the sanction could have been accorded only

after verification of the things like entitlement. The learned Special Counsel submitted that for that reason, the appointments of five staff members were illegal and there was no question of giving approval to those appointments. There is force in this submission and this Court holds that the appointments of the five employees mentioned in the proceeding were illegal on that count.

21) The learned Special Counsel for respondents submitted that the procedure like advertising the posts, taking permission for advertisement after getting sanction of the posts and then following the reservation policy and selecting the candidates by the duly constituted Committee was necessary and as that was not done, the appointments cannot be treated as legal. This Court holds that this submission also needs to be accepted and on that ground also this Court holds that appointments were illegal. Such appointments affect the rights of all the aspirants and they are hit by Article 14 of the Constitution of India. The circumstance that there were 26 students, but 20 staff was shown to be appointed by the petitioner management is sufficient to show that the management was under belief that it can do anything and it will be in a position to get the approval for the appointments. Unfortunately due to the interim order made by this Court, the respondents were required to give provisional approval and bear the financial burden. This provisional

approval given as per the directions of this Court has not created vested right in petitioner management or those persons who came to be appointed. On the contrary, the respondents will be entitled to recover the amount which is required to be paid in respect of those posts from the management as everything has happened due to illegalities committed by the management.

22) The learned Special Counsel for respondents placed reliance on various reported cases of Apex Court in support of the submissions made by him that the petitioner management wants to appoint persons of their choice and not as per the procedure. He submitted that as grant-in-aid is being given and that cannot be allowed. He placed reliance on the observations made by the Apex Court in the case reported as **(2006) 4 SCC 1 [State of Karnataka Vs. Umadevi]** in support of the proposition that when the appointments are in violation of the provisions of law with regard to appointment, the State is not bound to pay the salary to such employees. The learned Special Counsel for respondents placed reliance also on the case reported as **(2008) 5 SCC 241 [Government of A.P. Vs. K. Brahmanandam]**.

23) In support of the proposition that unless and until the post is sanctioned and created for the establishment, the post

cannot be filled and if any, appointment is made against the post which is not sanctioned, salary cannot be paid in respect of that post, reliance is placed by the respondents on the case reported as **(2007) 1 SCC 408 [Indian Drugs & Pharmaceuticals Ltd. Vs. Workmen]**. On this point, reliance is also placed on the case reported as **(2007) 8 SCC 249 [State of Jharkhand Vs. Manshu Kumbhkar]**. There cannot be dispute over this proposition.

24) For respondents, reliance was placed on the observations made by the Apex Court in the case reported as **(2007) 5 SCC 524 [Mahadeo Bhau Khilare (Mane) Vs. State of Maharashtra]** in support of the proposition that if the appointment is *void-ab-initio*, not made as per the Rules given for appointment, that amounts to violation of Articles 14 and 16 of Constitution of India and those appointments need to be treated as illegal. On the point of necessity of advertising such posts, reliance was placed by respondents on the case reported as **(2011) 3 SCC 436 [State of Orissa Vs. Mamata Mohanty]** and also the case reported as **(2006) 5 SCC 493 [National Fertilizers Ltd. Vs. Somvir Singh]**. There cannot be dispute over these propositions also.

25) The learned Special Counsel for respondents submitted that by way of interim order, this Court (other bench) had given

directions to the respondents to accord provisional approval to some appointments, but those orders cannot be used for giving relief at the end in favour of the institution like petitioner. He submitted that such orders never confer any legal right on the petitioner and the petitioner cannot claim equality in such cases. Reliance is placed on the case reported as **(2011) 3 SCC 436 [State of Orissa Vs. Mamata Mohanty]** cited supra. The learned counsel submitted that the orders were of interim nature, though in Writ Petition No. 5714/2004 decided on 18.4.2015 final order was made by this Court (other bench), the facts of that case show that direction was given by the authority to the management to appoint two special teachers from OBC category. Such direction can be interpreted in other way also as the necessary procedure for appointment needs to be followed and on the basis of order, it cannot be said that in that matter, the procedure was not followed by the said management. In that case, this Court had confirmed the interim order by which provisional approval was given to the appointment.

26) The learned Special Counsel for respondents submitted that the benefits already given to the petitioner management needs to be recovered as they were given due to interim order made by this Court and the petitioner is not entitled to get the decision of the present matter in it's favour in view of the aforesaid circumstances.

On that point, reliance was placed for respondents on the case reported as **(2003) 8 SCC 648 [South Eastern Coalfields Ltd. Vs. State of M.P.]**. There cannot be dispute over this proposition.

27) On the other hand, the learned counsel for petitioner has relied on many orders made by this Court in various petitions filed by the management after the creation of new staffing pattern under GR of 2008. The facts of each and every case may be different. The relevant facts of the present matter are already mentioned by this Court. In any case, in view of the aforesaid guidelines given by the State Government and restrictions put by the State Government, it was not possible for the petitioner to make appointments on aforesaid five posts. This case is glaring instance of misuse of process of law and it can be said that the petitioner was able to mislead this Court for getting interim order and provisional approval on the basis of interim order. Interim order was made by this Court on 18.3.2014 due to the orders already made by other benches of this Court. For all aforesaid reasons, this Court holds that the Government, respondents need to take steps for recovery of the amount already paid in respect of aforesaid five posts if such amount is paid after giving provisional approval to the appointments. It is unfortunate that the institutions like petitioner which are expected to do social work are misusing the Government schemes for making

money. The submissions made for respondents that only due to political influence of the management, the management could dare to make such appointments, has force. Copy of report dated 28.1.2017 given by Commissioner of Handicapped Welfare Office is produced on the record showing that without following the procedure given in Rules of the Code, the appointments were made and it was nothing, but fraud. It was informed to police that there was contravention of the provisions of Reservation Act, 2004 and atleast, cognizance could have been taken under that Act. The submissions made show that till today no action is taken on that report. Even when there are aforesaid circumstances, the learned Senior Counsel for petitioner made a submission that action needs to be taken against the authority itself for not taking decision on the proposals submitted by the petitioner. He submitted that under sections 89 and 93 of the Rights of Persons with Disabilities Act, 2016 punishment is provided for contravention of the provisions of the Act and Rules framed thereunder. It can be said that not the respondents, but the petitioner has apparently committed the offences as appointments made are in contravention of Articles 14 and 16 of the Constitution of India and by falsely showing the strength of the students and by misusing the provisions of the Act, the management has obtained public money. The learned Senior Counsel placed reliance on some observations made by the Apex Court in the case reported as

(2017) 14 SCC 1 [Justice Sunanda Bhandare Foundation Vs. Union of India and Anr.]. The case involved altogether different facts and so, the observations made by the Apex Court cannot be used in support of the contention made by the petitioner in the present matter. Thus, there are no merits in the present petition and it is sheer misuse of process of law. In the result, the petition stands dismissed with aforesaid observations. Interim relief is vacated.

[SUNIL K. KOTWAL, J.]

[T.V. NALAWADE, J.]

ssc/