

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5083 OF 2017**

M.K. Foundation

.. Petitioner.

Vs.

Shradha Hanumant Vichare & Ors. .. Respondents.

Mr. Kishor K. Malpathak for the Petitioner.

Mr. N.V. Bandiwadekar with Mr.Mandar G. Bagkar for Respondent No.1.

Mr. J.A. Madane AGP for the State.

CORAM : A.K. MENON , J.

DATED : 31ST JANUARY, 2018

JUDGMENT.

1. Vide a separate order passed today the Writ Petition was disposed of for reasons recorded in this judgment. By this writ petition, the petitioner a registered public trust seeks to challenge the order dated 22nd February, 2017 passed by the School Tribunal, Kolhapur in an appeal filed by respondent no.1 challenging her termination on 14th July, 2015. Considering the facts of the case, this petition deserves to be disposed of finally. Rule. Rule returnable forthwith. Respondents waive service. By consent of the parties, the petition is taken up for final hearing.
2. Briefly stated the case of the petitioner is that the petitioner has taken over the management of the school - Vaman Govind Patwardhan High School, Pochari from respondent no.4 which was running the said school till about 28th October, 2015. It is case of the petitioner that the petitioner was unaware of pending proceedings in the School

Tribunal and was therefore unable to defend it. The petitioner therefore seeks to set aside the impugned order. The facts as appearing from the record before the School Tribunal reveals that respondent no.1 was appointed on 30th July, 2014 and joined on 31st July, 2014 as "Shikshan Sevak". She was appointed against permanent vacancy in the open category subject to provisions of the Maharashtra Employees of Private School Regulation Act and Rules 1977. It is alleged that respondent no.4 issued oral order of termination on 14th July, 2015 which the petitioner has challenged as illegal.

3. The management of the school published advertisement in daily "Ratnagiri Times" on 16th July, 2014 and invited applications for the post of a teacher who had completed B.Sc and B.Ed, Respondent No.1 was invited to an interview at which three candidates including respondent no.1 were present. Respondent No.1 was selected considering her marks and her performance. The management of the school issued the appointment order dated 30th July, 2014 for a period of three years as "Shikshan Sevak". She submitted a joining report on 31st July, 2014 and joined with immediate effect. She worked continuously till the date of termination of her services.

4. According to the petitioner, no adverse remarks were made in her service record and the school is an aided school having three divisions of standard VIII, IX and X. The admissible teaching staff of the school were four teachers and one Head Master. Out of four teachers, two posts were from the reserved category (one from Scheduled Caste and one from Other Backward Class) the remaining two posts were of open category which included respondent no.1.
5. On 1st February, 2015 Shri Pangale who belonged to O.B.C category was promoted as a Head Master. Due to promotion of the then Head Master, the post of Assistant teacher became vacant. As a result, out of four teachers there was a backlog of two posts in the open category and one in the Schedule Caste category. The Education department rejected the proposal to approve the appointment of respondent no.1. As per directions of the Education Officer (Secondary) Zilla Parishad, Ratnagiri, the services of respondent no.1 were terminated with effect from 1st July, 2015. According to respondent no.1, although she signed muster till 30th June, 2015 she worked continuously upto 14th July, 2015 and her services were terminated retrospectively. The communication from the Education department dated 26th March, 2015 specified two reasons for rejection of the application of approval of the respondent No.1's appointment. Firstly, that there was a

backlog of Scheduled Tribe for one post while there was no backlog of open category and secondly that respondent had not passed the Teachers' Eligibility Test (TET). It was contended that out of four teaching staff, two are from reserved category and two from open category. The reasons given for not approving the appointment are stated to be wrong. The reason that approval could not be granted because the respondent no.1 has not passed TET examination is also questionable on the basis that it is not applicable to respondent no.1 and it was not a mandatory pre-requisite.

6. Respondent No.4 filed a written statement denying respondent no.1's contentions and reiterating that respondent no.1 could not be continued in the school. What is material to note is that respondent no.4 admitted that in the academic year 2013-14 upon the post of Assistant Teacher becoming vacant, the then Head Master Shri Deepak Hanumantrao Inamdar stood superannuated, vacant post had been advertised only after receiving the directions from the Education Officer (Zilla Parishad) Ratnagiri. That as per prevailing roster of respondent no.4 the said post was shown in open category and respondent no.1 was appointed since she belonged to the open category.
7. It was contended on behalf of the petitioner that during the academic

year 2014-15 they had not received approval from the Education Officer apropos appointment of respondent no.1 and it is for this reason that vide letter dated 26th March, 2015 they requested for sanction of the proposal appointing respondent no.1 but the Education Officer instead of granting sanction by the order of the same date decided that her proposal could not be sanctioned since respondent no.1 had been given workload of Standard VIIIth to Xth and she had not passed the TET. It was contended that respondent-school had no option but to terminate her services.

8. According to respondent no.4 they had not committed breach of any provisions of M.E.P.S. Act or Rules framed thereunder and have acted within four corners of law. Respondent No.4 admitted that the contents of the petitioner's appeal were largely true but surprisingly respondent no.4 pleaded that at the time of her appointment, the post was shown in open category when in reality it was in the Scheduled Tribe category and hence her initial appointment was illegal. In the same breath respondent no.4 admitted that presently the post was vacant and but was not an open category. It is in these set of facts that the school tribunal considered the appeal of respondent no.1.
9. Before the School Tribunal, the President of respondent no.4, Head

Master and Education Officer were parties. The President and Head Master of the school contested the appeal. On rival pleadings points for determination were framed and it was found that respondent no.1 was appointed on a permanent vacant post by following due procedure of law and that she had become a permanent employee of the school. It was also found that respondent no.1 had demonstrated that directions issued on 14th July, 2015 were illegal. Thus, the appeal came to be allowed partly by setting aside termination but rejecting the claim for back wages and directing to the petitioner to reinstate respondent no.1 to original post with seniority, increment and continuity of service within 40 days of order being passed in the appeal. This order came to be passed on 22nd February, 2017. On the issue of back wages, there does not seem to be any challenge since the Tribunal held that nobody can be held responsible for monetary loss of respondent no.1.

10. Mr. Malpathak, learned counsel appearing on behalf of the petitioner foundation submitted that the school having been taken over, the respondent no.4 did not at any stage intimate the petitioner of pendency of the litigation. The petitioner had taken over the school because respondent no.4 found it difficult to provide adequate facilities to the students. Thus, effective from 28th October, 2015 the

school was taken over after the Charity Commissioner, Maharashtra State had granted a no objection certificate for taking over the administration and running the school. On account of failure to disclose pendency of the proceedings, the petitioner was unable to contest matter before the School Tribunal and was shocked to receive a copy of the order dated 9th March, 2017. After receipt of this order, the petitioner came to learn of the fact that the appointment of respondent no.1 was improper and that the termination was lawful.

11. According to Mr. Malpathak enquiries revealed that on 27th June, 2012 the then Head Master one Mr. Santosh Sitaram Narvekar had sought permission of the Education Officer to fill up the post of open category Assistant Teacher and his request was rejected on 12th July, 2012. Despite this the said Head Master published an advertisement and filled up the post when no such post was available and defied clear cut instructions not to advertise. He relied upon the contents of a communication dated 23rd July, 2012 purportedly addressed to respondent no.4, a copy of which is annexed at Exhibit-C. The Education Officer informed respondent no.4 as follows :

“This office, vide letter dated 12th July, 2012 has intimated about the Government decision dated 2nd May,

2012 in which it has been decided that during special roster inspection (3rd to 5th October, 2011), the teachers which were declared surplus had to be accommodated in the respective school and till then, no new appointments of any teacher shall be made. In spite of the intimation about the observance and intimation about the strict mentioned Government's decision, you have advertised about the fulfillment of the post of Shikshan Sevak.

It is hereby informed to you that till the surplus teachers are accommodated on vacant post, the Government's decision would be binding on you."

12. Mr. Malpathak further contended that despite this communication, respondent no.4 proceeded to advertise the post and appointed respondent no.1 as temporary Assistant Teacher from 2nd August, 2012. That in 2013, respondent no.2 once again sought permission from the Education Officer falsely representing that there was a vacancy in the post in the open category when none existed and by the letter dated 12th June, 2014 respondent no.3 granted conditional permission to advertise the post. According to Mr. Malpathak the whole process was sham and bogus especially in view of the impending change of management, only to benefit respondent no.1

and to saddle the petitioner with the illegal appointment.

13. Mr. Malpathak submitted that if the petitioner is to be continued in service her appointment will be beyond the sanctioned strength. He submitted that the petitioner cannot be presented with a *fait accompli* and be forced to retain the post of respondent no.1. He therefore submitted that the order of the School Tribunal is bad in law and had the petitioner being aware of discrepancy in the appointment he would have taken proper measures to protect his interest.

14. Mr. Bandiwadekar, learned counsel appearing for respondent no.1 opposed the petition. He submitted that the case of the petitioner is incorrect. The petitioner has taken over a running school with full knowledge of the affairs of school. That the record pertaining to respondent no.1 was available and in any event the advertisement was published seeking appointment of the teacher in the open category. He invited my attention to the draft notice published in the newspaper, a copy of which appears at Exhibit-D in which there is clear description of the post, the required qualification, subjects, number of posts vacant and whether the school is aided or not. The advertisement clearly specified that the requirement was for a

teacher who had qualified with B.Sc. B.Ed and further steps to be taken in that behalf.

15.Mr. Bandiwadekar submitted that vide communication dated 12th June, 2014 the Education Officer had issued his no objection certificate to the proposed draft advertisement submitted on 10th June, 2013. The said no objection certificate recorded the fact that Shri Deepak Inamdar having superannuated, there was no objection to advertise the post of a teacher in the open category and pursuant to this no objection certificate and the advertisement, the petitioner came to be appointed. He submitted that there is no substance in the contention that there was an error in sanctioning the post. He submitted that the reasons given by the school to terminate the services of the petitioner were lacking merit since the record indicated that an open post was available. He invited my attention Exhibit-C to the affidavit in reply dated 12th July, 2015 filed by the respondent no.1 in which he had annexed a copy of the roster.

16.Mr. Bandiwadekar submitted that out of four posts of teachers sanctioned for the school, reservation as prescribed in Section 9(7) of the Rules is about 52% and therefore two posts are for reserved category and two posts are for open category. The roster at Exhibit-C

reveals that in the reserved category and the general category there was one post each was vacant as on 9th July, 2011. The sanctioned posts remained four. The roster further reveals that of the posts representing 48% (in which two posts are available) one was filled and one was vacant. This roster was issued as of July 2013. Thus, there was no substance in the contention that there was backlog in the Scheduled Tribe category.

17. Mr. Bandiwadkar further submitted that even assuming backlog on one post of the Scheduled Tribe category, there was deficit of one post in the open category which came to be filled. As regards other objections raised by the Education Officer viz. that the respondent no.1 had not passed TET examination, it was not mandatory to pass TET examination before or at the time of appointment since the State of Maharashtra had vide circular dated 30th June, 2006 provided that all the persons appointed as teachers from 13th December, 2013 till 30th June, 2016 who had not passed TET could do so within three attempts. That merely because respondent no.1 has not passed TET was no ground to deprive her of her post.

18. Having heard learned counsel for the parties, I find it difficult to accept the contention of Mr. Malpathak that the vacancy that was

filled was incorrectly described as a one in the open category. It is equally difficult to believe that backward class category was incorrectly described as open category. Save and except for the petitioner's statement nothing has been shown to establish that respondent no.4 manipulated records. Merely by contending that the former head master has misrepresented the facts and that subsequent advertisement, pursuant to which services of respondent no.1 was confirmed in permanent vacancy, was the result of such misrepresentation, cannot be accepted. When the petitioner took over the school, it had full access to the records. The least that the petitioner would have been expected to do is to carry out a due diligence exercise before entering into the gift deed under which the petitioner claims to have taken over the school. At that stage all records of respondent no.4 were available to the petitioner to scrutinise but the petitioner probably took no steps to ascertain the correct position. It is not unreasonable to presume that such a due diligence exercise would have been carried out but the petitioner has not disclosed at what stage negotiations commenced and what steps it took after the initial talks and before the gift deed was executed.

19.Mr. Malpathak had submitted that the advertisement at Exhibit-A was inserted after approval of the Education Officer. The order of the

Education Officer conveying no objection has not been assailed and continues to be effective and valid. It is not possible to accept the contention that the advertisement was published by mistake. No fault can therefore be found with the impugned order or with the Tribunal for arriving at the conclusion it has. In my view, the impugned order is liable to be upheld.

20. At this stage it becomes necessary to consider whether respondent no.1 is willing to take Teacher's Eligibility Test for that would be important condition that requires compliance. If respondent no.1 passes TET there can be no ground to challenge the reinstatement. In the course of submissions, I inquired of Mr. Bandiwadekar whether respondent no.1 was willing to undertake to this Court that she would attempt and pass TET if she was reinstated in service, to which Mr. Bandiwadekar upon instructions of the respondent no.1 agreed. In these circumstances, the petitioner has tendered additional affidavit dated 30th January, 2018 in which it is reiterated that even assuming that respondent no.1 was bound to pass the TET, her service could not have been terminated for want of clearing TET since the Government Resolution permits three attempts to succeed in the test.

21. In the additional affidavit, respondent no.1 has undertaken that within three attempts commencing from the date of approval and her reinstatement in service and subject to the management permitting her to appear for the test, she would appear and pass the TET. The undertaking annexes to the Government Resolution dated 30th June, 2016 which reiterates that an aspiring candidate will have three chances to clear the TET. In the circumstances there is no substance whatsoever in the challenge and I pass the following order :

- (i) The undertaking filed by the petitioner vide affidavit dated 30th January, 2018 is accepted. The petitioner shall reinstate the respondent no.1 as directed in the impugned order dated 22nd February, 2017.
- (ii) As and when the petitioner intends to take the Teacher's Eligibility Test she shall intimate the school and the petitioner of her intention to do so. The petitioner shall not create impediments in her attempting TET and will grant her leave of absence for the same.
- (iii) Subject to above the writ petition is disposed of.
- (iv) No costs.

(A.K.MENON,J.)