

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

WRIT PETITION NO. 4207 OF 2017

Smt. Neeta D/o. Vasantao Aeripelwar, **...PETITIONER**
Age-37 years, Occu-Service as Shikshan Sevak,
R/o. Kinwat, Tq. Kinwat,
Dist. Nanded

VERSUS

1. The State of Maharashtra **...RESPONDENTS**
Through Secretary,
Department of School Education,
Mantralaya, Mumbai-32
2. The Education Officer (Secondary),
Zilla Parishad, Nanded
3. The President/Secretary,
Cosmopolitan Education Society,
Kinwat, Tq. Kinwat, Dist. Nanded
4. The Head Master,
Cosmopolitan Education Society,
Kinwat, Tq. Kinwat, Dist. Nanded

Mr. V.S. Panpatte, Advocate for the petitioner
Mr. S.R. Chaukidar, Advocate h/f Mr. I.D. Maniyar, Advocate for
respondents No. 3 and 4
Mr. S.S. Dande, AGP for the respondent/State

**CORAM : SUNIL P. DESHMUKH &
S.M. GAVHANE, JJ.**

DATE : 25-09-2019

ORAL JUDGMENT [PER: S.M. GAVHANE, J.]

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

2. By this petition the petitioner has prayed to issue writ of certiorari or any other appropriate writ or direction to quash and set aside the order dated 28-02-2017 (Exh.J) issued by respondent No. 2 Education Officer (Secondary) rejecting proposal seeking approval to the appointment of petitioner as Shikshan Sevak and also to issue writ of mandamus or directions to respondent No. 2 Education Officer (Secondary) to grant approval to the appointment of the petitioner as Shikshan Sevak from 23-09-2014 to 22-09-2017 and to release arrears of salary of the petitioner.

3. Briefly stated, case of the petitioner is that, respondent No. 3 Educational Institution runs respondent No. 4 secondary school on 100% grant-in-aid at Kinwat and conducting classes from 5th to 10th std. On retirement of one Assistant Teacher namely N.G. Sonale on 31-08-2014 the post of Assistant Teacher of OBC category had fallen vacant on 01-09-2014 in the respondent No. 4 school. Therefore, respondent No. 4 submitted an application to respondent No. 2 Education Officer (Secondary) and requested to either send surplus teacher on or before 19-09-2014 to hold the same post or alternatively to grant permission to fill in the post through public advertisement. It is submitted that no surplus teacher was sent and no list was forwarded to the school by respondent No. 2 Education Officer.

4. It is the contention of the petitioner that to avoid loss of students for want of teacher respondent No. 3 institution issued an advertisement on 12-09-2014 in local news paper Samata Darpan inviting applications for filling in the post of Shikshan Sevak from OBC category in respondent No. 4 school. In response to said advertisement the petitioner whose educational qualification is B.A. B.Ed. and as she belongs to Dhobi community which is recognized as OBC category had applied for the aforesaid post and she came to be selected and appointed as Shikshan Sevak in respondent No. 4 school by appointment order dated 23-09-2014 for a period of three years commencing from w.e.f. 23-09-2014 to 22-09-2017. She had reported for duty on 23-09-2014 and since then she is in continuous employment. Name of the petitioner has been appearing in the seniority list of the employees prepared by respondents No. 3 and 4 for the year 2016-2017. So also, staff sanctioned order issued by respondent No. 2 Education Officer (Secondary) shows admissibility of the posts. Further, it is the contention of the petitioner that respondent No. 4 school sent proposal for grant of approval to the appointment of the petitioner to respondent No. 2 on 20-11-2015 which was received by respondent No. 2 on 21-11-2015. As there was no response by respondent No. 2 the petitioner filed writ petition No. 11197 of 2016 seeking directions to respondent No. 2 and this court by order dated 25-11-2016 in the said writ petition directed respondent No. 2 to decide the said proposal preferably within a period of three months and also directed respondent institution not to take any adverse action

against the petitioner. By the impugned order dated 28-02-2017. Respondent No. 2 Education Officer (Secondary) rejected proposal to grant approval to the appointment of the petitioner on the grounds that there was ban to fill in the post as per government resolution dated 02-05-2012 on account of 100% absorption of surplus teachers. Therefore, the petitioner is before this Court.

5. Mr. Panpatte, learned counsel for the petitioner made submissions in the light of aforesaid contentions of the petitioner. Further he submitted that the petitioner belongs to OBC category. She was appointed as a Shikshan Sevak on clear and vacant post after retirement of N.G. Sonale after following proper procedure and giving advertisement to fill in the posts. Respondent No. 4 school had sought permission of respondent No. 2 Education Officer (Secondary) to fill in the posts, but there was no response. There is compliance of provisions of section 5 of MEPS Act. Learned counsel further submitted that in the above circumstances the Government Resolution dated 02.05.2012 does not apply in the case of petitioner and therefore respondent No. 2 ought to have granted approval to the appointment of the petitioner and therefore, impugned order is liable to be set aside.

6. Mr. Panpatte, learned counsel for the petitioner to support his submissions that Government Resolution dated 02-05-2012 is not applicable to the present case has relied upon the decision of division bench of this court at Principal Seat dated 10-07-2017 in *Sou. Munoli Rajashri Karabasappa Vs State of*

Maharashtra Thru Secretary and Ors in writ petition No. 8587 of 2016 with connected writ petitions wherein in paragraphs No. 6 and 7 it was observed thus:

“6. We find that if the Education Officer do not send the surplus teachers within reasonable time, the schools can not be expected to run without teachers for years together. Undisputedly, finding it difficult to send surplus teachers for the subjects of English, Maths and Science, the State Government itself has relaxed the rigour of government resolution dated 2nd May, 2012 vide GR dated 4th September, 2013. It could further be seen that State Government also vide that GR relaxed the ban where the selection process has already commenced on 6th September, 2012.

7. In that view of the matter, we find that in view of subsequent GRs and in view of the view taken by Division Bench of this Court, the ban would not be applicable to three categories, one where the recruitment process is already commenced prior to GR dated 2nd May, 2012, second, in so far as the appointment made for subjects of English, Maths and Science are concerned and third, where the recruitment is made to fulfil the backlog of reserved category candidates.”

7. Learned counsel for the petitioner has also relied upon the division bench decision of this court at Principal Seat in the case of *Sau. Revati Kusha Wagh and another Vs State of Maharashtra*

and another (writ petition No. 10580 of 2015 with connected writ petitions) dated 09-03-2017 wherein it has been held that ban imposed by the Government Resolution dated 02-05-2017 would not apply to the appointment which was made from reserved category after following due procedure of law. So also, learned counsel has relied upon the decision of division bench of this court dated 20-08-2018 in writ petition No. 3945 of 2017 *Anilkumar Nivruttirao Boiwar Vs State of Maharashtra and others* and the petitioner in the said case was appointed by letter dated 30-06-2015 and he had appeared before the committee for interview on 29-06-2015 after the advertisement published in the local news paper for the post of Shikshan Sevak which was fallen vacant due to retirement of senior teacher on 30-04-2015. The principal had requested the Education Officer to forward the candidate available who is surplus and if no such candidate is made available, the institute would publish an advertisement and fill in the post as per roster. After appointment of the petitioner no approval was granted to his appointment by the Education Officer and said order of Education Officer was set aside relying upon the decision in the case of *Smt. Munoli Rajashri Karabasappa* (supra). Learned counsel for the petitioner further relied upon division bench decision of this court in the case of *Ashok Nilkanth Dhale Vs State of Maharashtra and ors* 2016 (5) *MhLJ* 742, wherein it was held that ban imposed by the Government Resolution dated 02-05-2017 would not apply to the appointment which was made from reserved category after following due procedure of law. In the said case petitioner was appointed from the NT-C i.e. reserved category after following due

procedure of law on 21-08-2013.

8. Learned AGP referring the affidavit-in-reply submitted that an advertisement given in news paper on 12-09-2014 is without permission from the Education Officer. Benefit of drive of the Government to fill in the backlog from 2011 to 2014 of the post reserved for OBC category cannot be extended to the petitioner since she was appointed on 23-09-2014. As per staffing pattern of 2015-2016 total 187 teachers were declared surplus in Nanded district, amongst which 77 teachers were ordered to be absorbed on vacancies available and remaining 110 teachers were forwarded for absorption at divisional level. Even as per the staffing pattern of 2016-2017 total 110 teachers were declared surplus in Nanded district amongst which 52 teachers were ordered to be absorbed on vacancies available and remaining 58 teachers were forwarded for absorption at the divisional level. In 2013-2014 the school had 7 surplus teachers, in 2014-2015 there were 9 surplus teachers, 2015-2016 there were 9 surplus teachers, 2016-2017 there were 10 surplus teachers, 2017-2018 there were 10 surplus teachers and in 2018-2019 the respondent management had 10 surplus teachers in their school. Considering the same and that management has appointed the petitioner during the period of ban imposed by the Government Resolution dated 02-05-2012 and as there was no sanctioned post the appointment of the petitioner is not on sanctioned post, the petitioner cannot be granted approval. As per Government Resolution dated 02-05-2012 it is clear that unless and until 100% teachers who have been declared surplus are absorbed,

there shall be no recruitment to fill in the post in the school run by private management and also the local authorities. Section 5 of MEPS Act empowers the management to fill in the vacancies which are arising in the school by appointing the person duly qualified for filling such vacancy. However, the management has to ascertain from the Education Officer that there is no surplus teacher available for filling in such vacancy. It is submitted that as per the Section 5 of the MEPS Act 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 in such vacancy. As per circular dated 27-10-2016 it has been directed that unless and until the appointments which have been made after issuance of Government Resolution dated 02-05-2012 without obtaining no objection from the respective Education Officers while making appointments of teaching and non-teaching staff, no approvals shall be granted to such appointments and if at all such approval is granted, the officer granting such approval shall face disciplinary consequences. Appointment of the petitioner is not on sanctioned post. Thus, according to the learned AGP approval to the appointment of the petitioner was rightly rejected by the impugned order and it does not require interference by this Court.

9. Mr. Panpatte, learned counsel for the petitioner referring the rejoinder filed to the reply filed by respondent No. 2 submitted that the petitioner is possessing the B.Sc. B.Ed. Qualification and teaching Marathi subject. The petitioner is belonging to reserved category. Adequate percentage of OBC category is required to be

maintained on the roll of the school, therefore, in preference of the petitioner, candidates referred in paragraph No. 5 of the rejoinder have been declared as surplus in view of the provisions contained in Rule 27(E) of the MEPS Rules. The petitioner was holding a sanctioned post and her post was never surplus. The petitioner was appointed to teach Marathi subject for standard 9th and 10th. It is submitted that as per the Government Resolution dated 13-03-2018 the proposal for grant of approval shall not be rejected only because the prior no objection certificate is not obtained by the institution. Friend of the petitioner Shri Tukaram had submitted an application dated 16-03-2019 and tried to obtain information under Right to Information in respect of availability of surplus teachers in Nanded district wherein it is informed that not a single candidate has remained to be absorbed in Nanded District, wherein specific information with regard to left out surplus candidate whose absorption pending as on February, 2019 category wise was solicited. While answering the said point Education Officer vide communication dated 24-04-2019 has stated that not a single candidate is left out for absorption. Thus, according to the learned counsel objection of the respondents that unless surplus teachers are absorbed approval cannot be granted to the appointment of the petitioner is not sustainable.

10. We have carefully considered the submissions made by the learned counsel for the petitioner and the learned AGP and perused the documents placed on record by the parties.

11. There appears no dispute in respect of the fact that the petitioner is B.Sc., B.Ed.. She belongs to Dhobi community which is recognized as OBC category. There was vacancy of teacher of OBC category in respondent No. 4 school due to retirement of Assistant Teacher Shri Sonale on 31-08-2014 of OBC category. Respondent No. 4 submitted an application to respondent No. 2 Education Officer either to send surplus teacher on or before 19-09-2014 to hold the vacant post or alternatively to grant permission to fill in the said post through an advertisement. Respondent No. 2 had not responded to the said application of respondent No. 4 school. Respondent No. 3 institution issued an advertisement to fill in the post of Shikshan Sevak on 12-09-2014. The petitioner in pursuance of said advertisement being OBC category candidate applied for the post of Shikshan Sevak. Ultimately she was selected and appointed on 23-09-2014 as Shikshan Sevak. Approval was granted to her appointment by respondent No. 2 on 21-11-2015. There is also no dispute that respondent No. 4 school is getting 100% grant. From the aforesaid admitted facts it can be said that though there was vacancy of Assistant Teacher of OBC category respondent No. 2 Education Officer did not give reply to the institution on the application of the institution seeking permission to fill in the said post and then procedure is appeared to be followed by the institution to fill in the said post. Considering this aspect, the submissions of the learned counsel for the petitioner, that no surplus teacher was sent to appoint on the vacant post in the school and in view of the decisions in the case of *Ashok Nilkanth Dhale* (supra) and *Anilkumar Nivruttirao Boiwar* (supra) the reasons given

by respondent No. 2 Education Officer in the impugned order rejecting proposal, regarding the availability of surplus employees and therefore, no approval can be granted without absorption of the said surplus employees as per Government Resolution dated 02-05-2012 is not sustainable and therefore, directions are required to be issued to re-consider the said proposal by setting aside the impugned order.

12. In view of above impugned order dated 28-02-2017 is set aside, reviving the proposal submitted to respondent No. 2 for re-consideration afresh, to be dealt with without being influenced by the earlier rejection and shall not be rejected on same counts. Proposal be decided within a period of two months from the date of receipt of writ of this order. Rule is made absolute accordingly.

13. Writ petition is disposed of.

[S.M. GAVHANE, J.]

[SUNIL P. DESHMUKH, J.]