

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

WRIT PETITION NO.10741 OF 2014

AFROZKHAN S/O FIROZKHAN PATHAN
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

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Advocate for Petitioner : Mr. V. S. Panpatte, i/b Mr. L. S. Shaikh.

AGP for Respondent Nos.1 & 2 : Mr. M. M. Nerlikar.

Advocate for Respondent No.3 : Mr. Santosh B. Pulkundwar

Advocate for Respondent Nos.4 & 5 : Mr. S. R. Chowkidar, i/b Mr. Pravin B. Rakhunde.

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CORAM : **T. V. NALAWADE &
SUNIL K. KOTWAL, JJ.**

RESERVED ON : 17th January, 2019.

PRONOUNCED ON: 06th February, 2019.

ORDER: (Per T. V. Nalawade, J.)

. The petition is filed for challenging the decision of the Deputy Director of Education, Respondent No.2 by which the approval given to the Petitioner in respect of his appointment on the post of Shikshan Sevak for Respondent No.4 / school is cancelled.

2 Both the sides are heard.

3 Learned counsel for institution supported the Petitioner.

4 The Respondent No.4 runs a Government aided primary school. On 1st January, 2012 in the local newspaper by name Mahasagar published in Nanded, one post of Shikshan Sevak was advertised by Respondent No.4. The post was shown to be for open category candidate and eligibility condition was S.S.C. D.Ed. The candidates were expected to come with application and record for interview in school on 15th January, 2012 and the school is situated at Kinwat. It is the contention of the Petitioner that 10 candidates had come for interview and from them, the Petitioner came to be selected. The Petitioner had passed 12th standard examination and he had completed D.Ed at the relevant time.

5 Copies of documents like joining report of Petitioner are produced. The record shows that appointment order was issued in favour of Petitioner by Respondent No.4 under Order No.140 dated 15th January, 2012, the date of interview and he had applied to the school immediately for permission to join the duty. In the appointment letter, it was shown by Respondent No.4 that the appointment was to

be made on the post of Shikshan Sevak for the period of 3 years with effect from 22nd January, 2012 and the Petitioner was to get Rs.3,000/- as fixed pay during that period and only after satisfactory completion of the period of three years as Shikshan Sevak, he was to get appointment of primary teacher.

6 Copy of order of Education Officer (Primary), Zilla Parishad, Nanded dated 7th September, 2013 is produced by the Petitioner to show that as per the sanction of unit staff given in respect of school, Respondent No.4, on 5th March, 2013, for the year 2012-13, approval was given to the appointment made on the post of Shikshan Sevak and that was as per the list supplied by the institution. This correspondence of Education Officer even does not show the outward number of the communication of Management and even the date of letter of Management sent to Education Officer for seeking approval. With the communication of the Education Officer, there is information in tabular form in respect of the persons appointed and only on the basis of this documents it can be said that approval was given with effect from 22nd January, 2012 on the fixed pay of Rs.6,000/- per month.

7 One Mr. Mudholkar, President of Teachers Association, Nanded had made a complaint to the Director of Education on 10th November, 2012 that the Education Officer (Primary) of Nanded had indulged in illegal activity and the approvals given by him in respect of various appointments were illegal. There was grievance that he was not following the policies of the Government, which include the policy to absorb surplus teachers first in Government aided private schools. It appears that even before coming into force the Right of Children to Free and Compulsory Education Act, 2009, there were many surplus teachers and the number had increased due to implementation of this new Act. In view of this circumstance, there was even Resolution issued by Government dated 2nd May, 2012 to prevent appointments of new teachers in the Government aided schools and these schools were expected to first absorb the surplus teachers of Nanded district. The record, which this Court is mentioning also shows that the Education Officer was expected to see that surplus teachers were absorb first and no approval was given to the new appointments.

8 Correspondence dated 29th April 2013, made by the Director of Education with the Deputy Director of Education, Nanded

shows that the Director had asked him to make inquiry into the allegations. It was mentioned that in the previous correspondence dated 10th November, 2012, the Deputy Director was already directed to make inquiry into the illegalities and irregularities and the letter dated 29th April, 2013 was sent by way of reminder. This was in respect of allegations made against the Education Officer (Primary), Nanded in aforesaid regard.

9 As the aforesaid authorities were not taking any concrete and effective steps, aforesaid Mr. Mudholkar, filed Writ Petition No.5981 of 2013 at this Bench for seeking direction to the Education Department to make inquiry into aforesaid illegalities. It was submitted before this Court that the Director of Education had already issued necessary instructions for making inquiry and as assurance was given to the Court of such inquiry and action, this Court directed to complete the inquiry within six months from 16th January, 2014 and the petition was disposed of on that day. By letter dated 9th April, 2014, the Director sent another reminder to the Deputy Director to expedite the things in view of the directions given by this Court.

10 The record shows that the Deputy Director made inquiry

into all the approvals given by the Education Officer, Nanded after aforesaid Resolution of 2012 of the Government. He submitted the report to the Director on 1st July, 2014 and the copy of this report is made available to this Court. This report was accepted by the Government and the Government had given direction to take proper action in view of the illegalities and irregularities noticed. That was to be done after giving proper hearing to the concerned.

11 It appears that after receiving such instructions from the Higher ups, the Education Officer gave show cause notices to all those institutions and concerned employees, which include Respondent institution and the Petitioner. They were asked to remain present on 11th September, 2014 with explanation and notices were issued on 25th August, 2014. The notice was specifically to show cause as to why approval should not be cancelled. The Petitioner took stand that Smt.Dharnorkar, Primary Teacher from open category had taken voluntary retirement and only to fill that post, he was appointed and so his appointment was against the open category vacant post. He also contended that his appointment was approved by the Education Officer.

12 A copy of letter dated 11th September, 2014 given by the Respondent / School to the Education Officer (Primary) is produced and this subsequent correspondence shows that attempt was made by the institution to show that it was ready to fill the backlog in future. It is admitted by institution that there was a backlog of one S.T. post and it give undertaking to fill new vacancy by giving appointment to the S.T. candidate. On 10th November, 2014, the Education Officer passed order after giving hearing to the Petitioner and to the Management and he cancelled the approval. In the order of cancellation, the reason is given that there was a backlog of one post of S.T. candidate and so, the approval to the appointment of Petitioner was not possible. This cancellation order was passed within 3 years from the date of appointment of Petitioner on the post of Shikshan Sevak.

13 The record shows that when it was possible to cancel the approvals in respect of 18 such posts, the Education Officer passed order only in respect of six cases including the present case. In view of this circumstance, the Deputy Director of Education again asked the Education Officer to do the needful in respect of remaining 12 posts and such letter was sent on 29th November, 2014. This circumstance speaks volume about the approach of the Education Officer.

14 In reply affidavit dated 3rd March, 2018 of Education Officer, Nanded, the following contentions are made:

- i) Advertisement for filling the post was given by Respondent No.5 without taking prior permission of the Education Officer when such permission is mandatory under Section 5 of the Maharashtra Employees of Private Schools (MEPS) (Conditions of Service) Act, 1977.
- ii) There were 300 surplus teachers available with the Zilla Parishad, Nanded at the relevant time and they ought to have been absorbed first before giving any new appointment as the Government is required to bear the burden of salary of surplus teachers and even when they are not working.
- iii) There was a backlog of one post of S.T. candidate in this school and so it was necessary to follow the procedure as given under Section 5 of the MEPS Act and Rule 9 of MEPS Rules, 1981 and it was

necessary to see that first reserved post is filled and on that ground also the appointment of Petitioner is illegal.

- iv) The then Education Officer had committed illegality in many cases and inquiry was conducted into his misconduct and report was submitted by the competent authority to the superior officer. The present incident is one of those illegalities committed by the then Education Officer.
- v) Before cancelling the approval, opportunity was given to the Petitioner and also to the institution to show cause as to why the approval should not be cancelled, but no satisfactory explanation was given by both of them.

15 There is reply affidavit of Deputy Director of Education dated 5th March, 2018. In this reply, the Deputy Director has mentioned Government Resolution dated 6th February, 2012, in which the directions were given by the State Government to absorb surplus teachers first. He has also contended that the appointment of the

Petitioner was illegal.

16 Copy of inquiry report prepared by the Deputy Director of Education is produced on record. This report refers the relevant provisions of the MEPS Act, MEPS Rules and also various directions given by the State Government in many Government Resolutions and circulars. Those Government Resolutions and circulars are being mentioned at proper place in this order, but this Court has no hesitation to hold that the procedure, which is mentioned by the Deputy Director on the basis of provisions of the MEPS Act, MEPS Rules, Government Resolutions and circulars need to be followed by the institutions and that procedure was not followed in the present matter. The procedure which must be followed and the relevant facts, which can be gathered from the report are as under:

- i) Right from the year 2003-04, there were many surplus teachers in Nanded. On 31st July, 1987, policy decision was taken by the Government to see that surplus teachers need to be absorbed first. There is a rule viz. Rule 26(2)(3) in this regard in the MEPS Rules, 1981.

- ii) The Government had directed on 25th February, 2003 to the authorities and the institutions to see that the backlog was filled first. There were such circulars dated 5th November, 2009 and 15th August, 2010 of similar nature. Specific directions were given with regard to compliance of reservation policy. There were directions to the institutions to prepare and maintain roster with regard to reservation and then get it approved from B.C. Cell. Direction was given that unless and until such roster was there and approval was obtained to the roster, no appointment of open category is to be approved. There was specific letter of Divisional Commissioner dated 5th April, 2011 making it clear that it was necessary to produce roster in the office of Commissioner for approval and get it sanctioned.
- iii) Before approval of appointment of persons like present Petitioner, it was necessary for the Education Officer to confirm that the roster was maintained by the institution, it was approved by B.C. Cell and then the appointment was made as per the procedure laid

down. There is a letter about such procedure dated 19th June, 1995 of Education Department.

- iv) As per the Government Resolution dated 13th August, 2000 of School Education Department and Annexure 'A' of the Government Resolution, appointment of open category candidate as against the reserved post was possible only if no person from reserved category was available. To confirm that no person from reserved category was available, the procedure was to be followed and after following the procedure, the names ought to have been called from the District Social Welfare Officer, Employment Exchange and Tribal Development Officer. The procedure involved giving specific advertisement for advertising the reserved post and after confirmation that no reserved category candidate was available, it was possible to appoint the candidate from open category. However, the reservation was to be carried forward. This procedure was also already changed and only intertransfer of reserved post, appointing candidate from other reserved category for such vacant post

was required to be followed.

17 For getting more and reliable information, this Court had given direction to the learned AGP to keep some responsible officer of B.C. Cell present in the Court. One Smt. Sarita Sutrave, Assistant Commissioner of Backward Class Cell, Aurangabad remained present. She orally informed the procedure with regard to the maintenance of roster by every institution and she produced copies of relevant Government Resolutions and circulars of the State Government with regard to the reservation policy of the State Government. The relevant Government Resolutions and circulars are as under:

- i) Government Resolution dated 9th April, 1965 of General Administration Department (in short "GAD").
- ii) Government Resolution dated 5th December, 1994 of GAD for giving permission to fill the post from open category, but after following the procedure given for ascertaining reservation and making an attempt to fill the reserved post by using reserved candidate.
- iii) Government Resolution dated 15th February, 1996 of

200 points roster of GAD.

- iv) Government Resolution dated 29th March, 1997 of GAD to make reserved post internally transferable and giving the procedure to fill reserved post by using 100 points roster and 50 points roster.
- v) Government Resolution dated 18th October, 1997 of GAD giving clarification regarding roster points to be used and making it clear that till the posts of the percentage given to reserved category are completely filled, the procedure for preparing and maintaining the roster was to be followed.
- vi) Circular dated 5th April, 2003 of GAD for giving direction to the officers and authorities to see that inspection is made of the Government, Corporations of Government and also educational institutions to see that there is implementation of reservation policy of the State. The direction included taking special drive for filling the backlog.

- vii) Circular dated 5th November, 2009 of GAD giving direction to the Commissioner of B.C. Cell (established in 1974) to make inspection of all offices to verify that the roster was prepared in respect of Class-III and Class-IV employees. The Department of Government was to verify the record of Class-II and Class-I employees. Direction was given to see that every office takes approval of roster prepared by that office from B.C. Cell. Specific directions were given to take steps if open category candidates were appointed against the reserved post without following the procedure of cancellation of such appointments. Direction was also given to hold appointing authority liable for making such illegal appointments. It was made compulsory for each office to inform about such steps taken and the steps taken under the provisions of the Reservation Act, 2004 (Section 8). Annexures of this circular show that the roster was to be maintained by such institutions, it was to be examined by the Assistant Commissioner B.C. Cell and Principal Secretary was to take steps for approval.

viii) Government Resolution dated 5th December, 2018 of GAD is in respect of Socially and Economically Backward Class (SEBC). This Government Resolution need not be considered in the present matter as it is a recent development.

18 The aforesaid Government Resolutions, circulars, provisions of the Act and Rules show that it is mandatory on the institution, appointing authority to prepare roster of appropriate points as per the post sanctioned and then get it approved from the competent authority, B.C. Cell. Unless and until such approved roster was available with the institution, it was not possible for the institution to start the process of appointment and it was also not possible for the Education Officer to ascertain whether there is backlog of reserved class. If there is backlog of reserved class, no post from open category can be filled unless the aforesaid procedure is followed. It needs to be ascertained as to whether the post, which has fallen vacant was of reserved class even if one employee from open category retired and the post had become available. This is because invariably open category candidates are appointed as against the

reserved category and so it needs to be ascertained whether the post which has fallen vacant was of reserved category candidate. Thus, unless and until the roster is prepared and it is got approved, the Education Officer cannot give permission to the institution to start process of appointment of the candidate from open category. In the past, about 15 years back, candidates from reserved category were not available, but after that the candidates from all the reserved categories started becoming available and at present, even the reserved category candidates are jobless. Thus, when there is a backlog in respect of reservation, steps to fill those posts need to be taken first. Only when the post for open category candidate is clearly available, steps can be taken to fill that post. The process of appointment involves publication of advertisement and if there is backlog of reserved class, reserved post needs to be advertised and not open post. In the present matter, it is admitted by the institution that the Petitioner was appointed as against the post reserved for S.T. Thus, on this single ground, the approval could have been cancelled. Further, in the present matter, there was no roster, there was no clearance from B.C. Cell before advertisement and even the Education Officer had not given permission to advertise the post though he subsequently helped the institution by giving approval to the

appointment of the Petitioner. When appointments are made without following the said procedure, the Education Officer is not expected to give approval to such appointments.

19 The record of Respondent institution shows that it started getting 100% grants in the year 1998. 32 posts of primary teachers were sanctioned for the school. As per the roster, 4 posts are reserved for Scheduled Caste, 2 posts are reserved for Scheduled Tribe, 1 post is reserved for Vimukta Jatis, 1 post is reserved for Nomadic Tribes (NTB), 1 post is reserved for NTC, 1 post is reserved for SEBC and 6 posts are reserved for OBC. 16 posts from 32 sanctioned posts were available for open category candidates. The record shows that to candidates from open category, 22 appointments were given when only 16 posts were available for open category. Though it is contended that the Petitioner was appointed as against one S.T. post, the record shows that there was a backlog of one S.T. post, there was a backlog of Scheduled Caste, V.J., N.T. and OBC also. Thus, there was a backlog of six reserved posts when the Petitioner came to be appointed. This chart was prepared by the same Education Officer, who gave approval to the appointment of the Petitioner. In the chart, there is mention that as and when the post of

open category would become available (after retirement etc.), the candidates from reserved category will be filled. Thus, all the 32 sanctioned posts were filled and out of them, 22 employees were from open category. Thus, six more candidates from open category were appointed against the reserved posts.

20 Additional reply affidavit of the present Education Officer dated 15th January, 2019 shows that out of aforesaid six illegal appointments, five appointments were approved by the Education Officer Mr. Eknath Madavi. Thus, in all the six cases, no procedure was followed as mentioned above and six persons were illegally appointed on reserved posts. This is a glaring instance to show as to how reservation policy is defeated by the institutions and they get help of the officers of the concerned department. There is one more serious angle to this case. As 32 posts were sanctioned and there was grant in aid, the grant of 32 posts was released and it can be said that the grant in respect of 6 posts, which were to be filled by the reserved category candidates, was utilized to make payment to the candidates of open category. This was fraud payed by the intuition and the concerned officers against the reserved category candidates, who could have got the job, against the Government and public

exchequer. We need to read between lines. The institution indulges in such illegal activities to make money and the persons like Petitioner get the job by giving money to the institution. The officers who give approval to such illegal appointment do it for material gain, illegal gratification. This Court holds that to have deterrent effect, criminal action also needs to be taken for the offences punishable under Sections 420, 409, 120-B etc. of the Indian Penal Code and under Maharashtra Act No. VIII of 2004.

21 Both the sides placed reliance on many reported and unreported cases. The learned counsel for Zilla Parishad and the learned AGP placed reliance on the following cases in support of order of cancellation of approval.

- a) **2017 (5) All M.R. 649**, (*Vandana Pandurang Patle Vs. Kalpana Shikshan Sanstha, Dhanegaon and others*) Nagpur Bench of this Court. In this case, this Court has held that in view of the Rule 9(9) of the MEPS Rules, 1981, reserved post can be filled by person belonging to other reserved category if the person of reserved category is not available and such post cannot be filled from open category. This Court

held that the appointment made of open category candidate against the reserved category candidate cannot sustain in law.

- b) **2015 (6) Mh.L.J. 355**, (*Monali Laxman Nemade Vs. State of Maharashtra and others*) Aurangabad Bench of this Court. In this case also after considering Rule 9(9) of the MEPS Rules and Section 5 of MEPS Act, this Court has laid down that only if reserved category candidate is not available, open category candidate can be appointed, but on year to year basis and not on permanent post and that can be only as per the reservation policy (mentioned above). It is further laid down that there is no power to the Education Officer to give approval in respect of appointment of open category candidate if it is made against reserved post.
- c) **2007 (6) Bom.C.R. 402**, (*Asha Shamkumar Patil Vs. Sadhana Rajan Kamble & Ors*) Supreme Court. In this case, the Apex Court has laid down that in view of Rule 9 of MEPS Rules, when a post is reserved and a candidate of that category is not available, only

candidate of other reserved category can be appointed in view of the policy of the Government and on that post, open category candidate cannot be appointed.

These three cases are as per the policy decision of the State Government and as per the spirit of reservation policy.

22 On the other hand, following cases were cited by the learned counsel for Petitioner:

- a) **2015 (1) Bom.C.R 694**, (*Namita Narayan Jha & anr. Vs. Education Officer & ors.*) Nagpur Bench of this Court. The facts show that the appointment of open category candidate was not against the backlog of reserved category and so the appointment was upheld.
- b) Decision given in **Writ Petition No.8221 of 2016**, (*Sau. Jagtap Sunita Manikrao Vs. State of Maharashtra & ors.*) Principal Seat of this Court.

Three years service was completed by the Shikshan Sevak, he was from open category and the appointment was upheld when the appointment was against reserved post. In view of the decision of the Apex Court in the case of *Asha Shamkumar Patil* (supra), this case can be of no help to the Petitioner.

- c) Decision given in **Writ Petition No.8818 of 2017** and other writ petitions, which were decided at Principal Seat on 14th August, 2017. Cancellation of approval to the appointment of open category candidate was challenged on other ground, but during pendency, the decision of cancellation was withdrawn by the authority probably due to circumstance of absence of following proper procedure for cancellation.
- d) Decision given in **Writ Petition No.10133 of 2016**, (*Mrs. Shivaneesh Prasanna Deshpande Vs. State of Maharashtra & ors.*) decided with other writ petitions at Principal Seat of this Court. This Court held that cancellation of approval was not possible even when appointment was against reserved category. This

case is of no use to the Petitioner in view of the decision of the Supreme Court in the case of *Asha Shamkumar Patil* (supra).

- e) Decision given in **Writ Petition No.4455 of 2009**, (*Sandeep S/o Damodar Chavan Vs. State of Maharashtra and others*) decided at this Bench and decision given in **Writ Petition No.3945 of 2017**, (*Anilkumar s/o Nivruttirao Boiwar Vs. State of Maharashtra and others*) decided at this Bench. It appears that this Court obtained undertaking from the institution to fill backlog in future and appointed candidates of open category were protected. In view of the decision of the Supreme Court in the case of *Asha Shamkumar Patil* (supra) this decision also cannot help the Petitioner.
- f) **1978 AIR (SC) 851**, (*Mohinder Singh Gill Vs. Chief Election Commissioner, New Delhi*) Supreme Court. By referring some observations, the learned counsel for Petitioner submitted that only on the ground of appointment as against surplus teachers, the present

matter could have been considered by the authority, but the matter is decided on other grounds like reservation policy and so the decision is not tenable. This submission is not at all acceptable. In view of the aforesaid policy of the State Government, this Court holds that it was the duty of the authority to make inquiry into such matters and take decision like cancellation of approval.

23 In view of the discussion made above, this Court holds that no relief can be given to the Petitioner. This Court further holds that criminal action is warranted as against the Management for aforesaid illegal activity for aforesaid offences and other. Action also needs to be taken against the Petitioner and the Education Officer concerned as apparently there was a conspiracy to do such illegality, which amounts to fraud. Steps are to be taken by the Deputy Director of Education to see that criminal action is taken. During investigation, the investigating agency can trace out the other persons involved in the offence. The amount already paid by the Government as a salary in respect of the Petitioner is to be recovered from the institution. Further possible action also can be taken against the Respondent /

institution. The petition is dismissed. Interim relief already granted is vacated. A copy of order to be sent to Deputy Director of Education of this region.

[SUNIL K. KOTWAL, J.]

[T. V. NALAWADE, J.]

. At this stage, Mr. Chowkidar, learned counsel requested for stay of this order by submitting that he wants to challenge the decision of this Court. The request for stay is refused.

[SUNIL K. KOTWAL, J.]

[T. V. NALAWADE, J.]

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