

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5580 OF 2019

Ms Pornima Sukhdeo Patil and Anr. ...Petitioners

Versus

The State of Maharashtra and Anr. ...Respondents

WITH

WRIT PETITION NO.4239 OF 2019

Pratap Sarjerao Patil and Anr. ...Petitioners

Versus

The State of Maharashtra and Anr. ...Respondents

WITH

WRIT PETITION NO.5560 OF 2019

Arvind Raghunath Jadhav ...Petitioner

Versus

The State of Maharashtra and Ors. ...Respondents

WITH

WRIT PETITION NO.2392 OF 2019

Ms Smita Gulabrao Patil and Anr. ...Petitioners

Versus

The State of Maharashtra and Anr. ...Respondents

....

Mr. Narendra Bandiwadekar with Mr. Vinayak Kumbhar i/b. Ms Ashwini Bandiwadekar for the Petitioners.

Mrs. M.S. Bane, AGP in WP/5580/2019 and WP/5560/2019

Mr. S.L. Babar, AGP in WP/4239/2019 and WP/2392/2019

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 7th OCTOBER, 2020.

P.C.:-

. Rule. Rule is made returnable forthwith. By consent, the Petitions are heard finally at the stage of admission.

2. Respondent No.3 in Writ Petition No.5560 of 2019 and Petitioner Nos.2 in other Petitions are Education Institutions running Government recognised aided secondary schools. The Petitioners are appointed as Shikshan Sevaks in open category vacancies in the aided secondary schools of the said Education Institutions. The proposals for approval of their appointment have been rejected by the Respondent - Education Officer inter alia on the ground that prior permission was not sought before filling in the said posts and further that the recruitment was not permissible without absorption of surplus teachers. Approval is also rejected on the ground that appointments are made in the open category when there is backlog in respect of reserve category candidates. The orders of the Education Officer, declining to accord approval to the appointment of these Petitioners is under challenge in the present Petitions.

3. Mr. N.V. Bandiwadkar, learned counsel for the Petitioners submits that the appointment of the Petitioners was made on open vacant posts after following the prescribed procedure. He submits that the Education Institutions had intimated to the Education Officer about the existing vacancies and sought permission to fill in the vacant posts. Since there was no response from the Education Officer, the Education

Institutions were compelled to fill in these vacancies. He has relied upon the decision of the co-ordinate Bench of this Court (Coram : S.C. Gupte, J.) in *Ms Rekha Vithal Said vs. The State of Maharashtra*, in *Writ Petition No.13485 of 2016* and in *Ms Pallavi Shashikant Dhotre and Anr. Vs. The State of Maharashtra through the Secretary and Anr.* in *Writ Petition No.1312 of 2017* and other group matters to contend that the Management cannot be expected to keep the said posts vacant and run the schools without teachers to the detriment of the interest of the students. He has also relied upon the decision in *The President Sudhagad Education Society, District-Raigad and Ors. vs. the Deputy Director of Education and Anr.* in *Writ Petition Nos.4635 of 2009 and Writ Petition No.4637 of 2009* wherein this Court has reiterated that approval of appointments made against open category posts should not be rejected only on the ground that backlog of reserved category candidate was not filled in.

4. Per contra, Mrs. M.S. Bane, learned AGP submits that the Management had not sought permission to publish the advertisements. She submits that there is no entry in the inward register regarding receipt of the application and that copy of the application, which is annexed to the proposal does not bear any endorsement/acknowledgment of the recipient. She submits that the Management has not complied with the

proviso to Section 5 (1) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 and that the appointments are made without prior permission and without absorbing surplus teachers. Learned AGP has relied upon the decisions in ***Kum Sonal G. Tiple and Ors., 2016 (5) MhLJ 656*** and ***Vasant Shikshan Prasarak Mandal V/s State of Maharashtra and Ors.2017 (1) Mh LJ 67.***

5. The Petitioner No.2/Respondent No.3 - Education Institution are running Government recognized aided secondary schools. Posts of teachers in open category had fallen vacant in the said secondary schools run by the aforestated Education Institutions due to superannuation of the teachers appointed on the said posts. The Management had decided to fill in these vacancies and had forwarded applications to the Education Officer intimating about the existing vacancies and seeking permission to fill in the vacant posts in open category as per the prescribed selection process. The Petitioners have placed on record copies of the said correspondence which bear endorsements of the inward clerks of the office of Respondent No.2 - Education Officer, in token of having received the said applications. Though it is contended that there is no entry in the inward register as regards receipt of the said correspondence, for the reasons best known, extract of the Inward register of the relevant date has

not been placed on record. There is also no specific denial that the signature / endorsement on the copy of the application placed on record is that of the inward clerk of the office of the Education Officer. In such circumstances, the Education Officer is not justified in contending that the said correspondence was not received by their office or that there is no entry in the inward register in respect of the said correspondence.

6. It is thus evident that the Management had sought prior permission of Education Officer to fill in the existing vacancies in open category in aided secondary schools. Since there was no response from the office of the Education Officer, the Management issued advertisements inviting applications from the candidates qualified for the posts of Shikshan Sevak. The Applications were received from the Petitioners and other candidates, interviews were conducted and the Petitioners were selected and recommended for appointment as Shikshan Sevak. On the basis of the said selection, the Management passed a Resolution deciding to appoint the Petitioners as Shikshan Sevak in open category as per the roster and the Petitioners came to be appointed as Shikshan Sevaks for a period of three years. The question is whether the appointments made by the Management after due compliance of proviso to Section 5(1) of the M.E.P.S. Act can be faulted with.

7. A similar question was considered by a co-ordinate Bench of this Court (Coram: S.C. Gupte, J.) in ***Rekha Vitthal Said*** (supra), wherein it has been held as under :-

“5. There are a number of judgments of our court, making it clear that the ban on recruitment of teachers pending absorption of surplus teachers under Government Resolution dated 2 May 2012 could not be invoked by the State, when despite communication of a vacancy of a teacher’s post by the school management to the Education Officer and seeking of his permission for filling the post, the Education Officer does not reply or forward any name of a surplus teacher to be appointed in the vacancy and as a result, the school management proceeds to select and appoint a teacher in the vacant post. Admittedly, the Respondent-State has neither responded to the school management’s communication in this case nor sent any name of a surplus teacher at any stage prior to the impugned order dated 28th November, 2016. As this court has reiterated time and again, when the school management informs the education office about a vacancy in its school seeking the latter’s permission for appointment, the Education Officer is expected to either forward names of suitable persons from the list of surplus teachers maintained by him or if no surplus teacher is available for absorption, give permission to the management to appoint a teacher following regular appointment procedure. Education Officer, in the present case, has done neither of these things. The school management is not expected to carry on with the vacancy awaiting indefinitely the Education Officer’s response. The second reason cited, namely, the appointment not being in compliance of the backlog of reserved category, also does not hold water. Admittedly, the post which had become vacant and in which the Petitioner was appointed, was an open category post and there was no question of it being filled up from amongst reserved category candidates.”

8. On similar facts, in ***Pallavi Dhotre*** (supra), this Court has

reiterated that once the Management communicates the vacancies to the Education Officer and seeks permission to fill up the same, the Education Officer is expected to forward names of suitable persons from the list of surplus teachers and if such surplus teachers are not available for absorption, give a go ahead to the management to appoint the teachers through regular appointment procedure. This Court has emphasized that the school management is not expected to carry on the vacancies waiting indefinitely for the response of the Education Officer. Schools cannot function without teachers and students cannot be deprived of education. While negating the submissions of learned AGP that under the proviso to Section 5(1), the Management was duty bound to ascertain from the Education Officer of the Zilla Parishad about availability of suitable persons from the list of surplus teachers maintained by him for absorption before proceeding to fill the vacancies, this Court has observed thus:-

“ MEPS Act is a piece of welfare or beneficial legislation seeking to regulate the recruitment and conditions of service of teachers and other employees of schools. The object of the Act is to provide the teachers and other employees with security and stability of service to enable them to discharge their duties towards pupils and their guardians in particular, and the institution and the society in general, effectively and efficiently. Such welfare legislation must be construed liberally and broadly, so as to advance its object, and not strictly or narrowly. If any provision of it is capable of two constructions, that construction should be performed which fulfills the policy of the Act and is more beneficial for the persons in whose interest the Act is passed. The MEPS Act is primarily enacted in the

interest of students, and for their sake, of teachers and institutions, and generally in the interest of the society. The construction suggested by the learned AGP has the effect of impeding, rather than advancing the cause of students and education. It would have the effect of depriving students of timely appointment of their teachers and the teachers of security and stability of service.”

9. In the instant case, as noted in the foregoing paragraphs, the Education Institutions had intimated to the Education Officer about availability of vacancies in open category, which had fallen vacant on retirement of teachers. The Education Institutions had discharged their obligation as required under the proviso to Section 5(1) of M.E.P.S. Act. It was therefore obligatory for the Education Officer to respond to the said communication and forward names of surplus teachers for filling up the said vacancies. The Education Officer having failed to forward the names of suitable teachers from the list of surplus teachers, the Management advertised the said posts. The Petitioners responded to the advertisement and participated in the selection process. The Petitioners, who were duly qualified, were found to be eligible to the said post and were accordingly appointed on open category posts, after following the prescribed selection process.

10. Under the circumstances, the Education Officer was not

justified in rejecting approval of appointment of these Petitioners on the ground of not obtaining prior sanction or for non absorption of 100% surplus teachers. Refusal to accord approval on the grounds stated in the impugned order is contrary to the dictum in ***Rekha Said*** and ***Pallavi Dhotre (supra)***. Similarly, refusal to grant approval on the ground that the Management had not cleared the backlog in respect of the reserved category is contrary to the decision of this Court in ***President Sudhagad Education Society***, (supra) and other decisions.

11. The decision of the Division Bench in ***Sonal Tiple*** (supra) and of a learned Single Judge of this Court in ***Vassant Shikshan Prasarak Mandal*** (supra) do not in any manner assist the case of the Respondent. Both these decisions are totally distinguishable on facts. In ***Sonal Tiple*** (supra) fresh appointments were made after obtaining prior permission and following due selection process. The approval granted to the said appointment was canceled for not taking prior permission and for making fresh appointment without absorbing surplus teachers. Departmental action was also initiated against the concerned Education Officer, who had allegedly misused his position and power, to allow the Management to fill in the vacancies by stating that no surplus teachers were available. The Division Bench observed that the vacancies were filled in after obtaining

prior permission and on the basis of the statement that there were no surplus teachers qualified to teach the subjects. It was held that the Petitioners cannot be blamed for the state of affairs. The Division Bench while setting aside the order of cancellation directed enquiry into the matter to find out whether the Petitioners and/or the Management had acted in collusion with the concerned Education Officer. The Division Bench also observed that fresh recruitments are made without absorbing surplus teachers, who are being paid salary from public exchequer and hence directed that *"hereinafter no 'no objection' for recruitment or permission to effect direct recruitment shall be granted except with express certification by the Deputy Director of Education of concerned Division stating that no surplus teachers to teach the concerned subjects are available for absorption in State."*

12. In ***Vasant Shikshan Prasarak Mandal*** (supra), the challenge was to the order of refusal of approval. The said Petitions were dismissed as there was no evidence to indicate that the Management had complied with the proviso to Section 5(1) of the M.E.P.S. Act, 1977. While dismissing the Petition, learned Single Judge of this Court had observed that in recent times there is a growing trend of appointing new teachers by ignoring eligible surplus teachers and hence directions were given to

the Principal Secretary of the concerned Department to ensure strict compliance of the proviso to Section 5(1) of the M.E.P.S. Act and on failure to comply with the proviso to stop salary allowance as per Government Resolution dated 25/10/2004 and to initiate disciplinary action against erring Education Officer.

13. The directions given by the Division Bench in ***Sonal Tiple*** and by learned Single Judge in ***Vasant Shikshan Prasarak Mandal***, cannot be made applicable as the facts of the present Petitions indicate that the Management had complied with proviso to Section 5(1) of the M.E.P.S. Act and further that the Petitioners who are duly qualified to hold the said posts, are not responsible in any manner for the breach, if any.

14. Under the circumstances and in view of discussion supra, the Education Officer was not justified in refusing to grant approval to the appointment of the Petitioners. Hence, the impugned orders cannot be sustained. Accordingly, Writ Petitions are allowed. The impugned orders are set aside. The Respondent No.2 is directed to grant approval to the appointment of the Petitioners as Shikshan Sevaks and further to release grant-in-aid for payment of monthly honorarium as per the proposals forwarded by the respective Management. The said exercise shall be

completed within a period of six weeks from the date of uploading of this order.

15. Rule made absolute in above terms. No order as to costs.

16. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(SMT. ANUJA PRABHUDESSAI, J.)