

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10215 OF 2018

Mohan s/o Ramrao Rathod
age 36 years, occ. Service as
Assistant Teacher
R/o C/o Ghodke Sir Nivas
Sharda Nagar, Mukhed
Tq. Mukhed, Dist. Nanded.

Petitioner

Versus

1. State of Maharashtra
Through Secretary
Department of School Education
Mantralaya, Mumbai 32.
2. Regional Deputy Commissioner
Social Welfare Department
Dr. Babasaheb Ambedkar
Social Justice Bhawan
Near Market Yard, Latur
3. Assistant Commissioner
Social Welfare, Nanded.
4. Jai Shivshankar Pratishthan
Mukhed, Tq. Mukhed, Dist. Nanded
Through its President / Secretary
5. Secondary Ashram School
Manjari, Tq. Mukhed,
Dist. Nanded
Through its Head Master

Respondents

Mr. V.S. Panpatte, Advocate for the petitioner.
Mrs. V.S. Choudhary, AGP for respondent Nos. 1 to 3.

**CORAM : UJJAL BHUYAN &
M.G. SEWLIKAR, JJ.**

**RESERVED ON : 9th April, 2021.
PRONOUNCED ON : 7th May, 2021.**

JUDGMENT : (Per M.G. Sewlikar, J.)

1. Rule. Rule made returnable forthwith.
2. By consent, heard both the sides for final disposal at admission stage.
3. This writ petition under Articles 226 and 227 of the Constitution of India is filed being aggrieved by the order of the Regional Deputy Commissioner dated 27th February, 2018 whereby approval to the appointment of petitioner as Assistant Teacher has been rejected.
4. Factual matrix in this writ petition is as under :-

Respondent No. 4 is running secondary school in the name as 'Secondary Ashram School' at Manjari, Tq. Mukhed, Dist. Nanded. This school is receiving 100% grant-in-aid from State Government. This school imparts education from 8th to 10th standards.

5. It is further contended by petitioner that a senior teacher by name N.B. Chavan was due to retire on superannuation on 31st December, 2012. The post which Mr. Chvan was holding was a permanent post. In order to avoid loss in terms of education to the students of the school, respondent No. 5-school sought permission from respondent No. 3-Assistant Commissioner, Social Welfare, Nanded for filling the post which was to become vacant on 31st December, 2012.

6. Respondent No. 3 did not respond to the communication made by respondent No. 5. Therefore, respondent Nos. 4 and 5 i.e. school management and the school decided to fill in the post to be fallen vacant by following the procedure prescribed. Accordingly, an advertisement came to be published in daily 'Punyanagari' dated 29th July, 2012 inviting applications for filling up said post of Shikshan Sewak for Science subject from open category.

7. Pursuant to the said advertisement, petitioner made application. After conducting interviews, select list of candidates was published in which petitioner was declared successful and accordingly, by order dated 2nd January, 2013, he was appointed as

Shikshan Sewak for a period of three years commencing from 5th January, 2013. Accordingly, petitioner joined duties on 5th January, 2013 and since then he is rendering continuous service.

8. Respondent No. 5 – school forwarded a proposal dated 16th December, 2014, for grant of approval to the appointment of petitioner as Shikshan Sewak. Respondent No. 3, by letter dated 20th March, 2015, forwarded the said proposal to respondent No. 2 for grant of approval clarifying that the appointment of petitioner was against sanctioned post and he was having requisite qualification and recommended for grant of approval to the appointment of petitioner.

9. Respondent No. 2 did not decide the said proposal owing to which, petitioner was required to approach this Court by filing Writ Petition No. 9885/2017 in which, respondent Nos. 2 and 3 were directed to take decision on the said proposal within a period of four months. This order was passed on 29th September, 2017.

10. Respondent No. 4 made a detailed representation vide communication dated 18th December, 2017 thereby making a request to respondent No. 2 to render decision on the proposal. Respondent

No. 2, vide order dated 27th February, 2018, refused to grant approval to the appointment of petitioner as Shikshan Sewak on the ground that no permission from the office of respondent No. 2 was obtained before filling in the said post. This order is impugned in this writ petition.

11. Respondent Nos. 2 and 3 filed their affidavit-in-reply in which it is contended that roster was not attached with the proposal which made it difficult for respondent Nos. 2 and 3 to ascertain whether the post was reserved or open. Respondent-management has stated that there was one backlog of Scheduled Caste category and in the absence of roster the appointment of petitioner cannot be said to be against open category. It is further contended that there were surplus teachers on the roll of respondent Nos. 2 and 3. No fresh appointment can be permitted to be made as long as surplus teachers are absorbed. Citing these reasons, it is contended in the affidavit-in-reply that instant writ petition deserves to be dismissed.

12. Petitioner filed rejoinder to the affidavit-in-reply of respondent Nos. 2 and 3.

13. Heard Mr. Panpatte, learned counsel for petitioner and Mrs. V.S. Choudhary, learned AGP for respondent Nos. 1 to 3. Learned counsel for respondent Nos. 4 and 5 was absent when called.

14. Learned counsel Mr. Panpatte submitted that to avoid loss of students, management decided to fill in the post of Science teacher which was due to be vacant on 31st December, 2012. Respondent No. 5, therefore, sought permission from respondent Nos. 2 and 3. Said permission was sought on 8th October, 2012 and till the appointment was made, respondent Nos. 1 to 3 neither sent any surplus teacher nor accorded permission to fill in the post. He submitted that in terms of the judgment of Division Bench of this Court in Shailaja Ashokrao Walse Vs. State of Maharashtra and others reported in **1999(1) Mh.L.J. 291**, permission is deemed to be accorded. He further submitted that State Government has taken a stand that the post was of reserved category. A candidate of reserved category ought to have been appointed but a candidate from open category was appointed. He produced a roster indicating that at the time of appointment, post of open category was vacant. He submitted that this was the position in the year 2012 and, therefore,

it is not permissible for State Government to contend that post was for reserved category. He submitted that Education Officer rejected approval on the ground that prior permission of respondent Nos. 2 and 3 was not obtained before filing the post. He submitted that in terms of the decision of the Honourable Supreme Court in the case of Mohinder Singh Gill Vs. Chief Election Commissioner, New Delhi, reported in 1978 AIR (SC) 851, State Government cannot travel beyond the orders passed by the authority. He submitted that the post was reserved for open category and since approval was not rejected on that ground but it was rejected on the ground that permission was not sought, respondent Nos. 1 to 3 are precluded from raising this issue subsequently.

15. Learned AGP submitted that in the impugned order it is clearly observed that respondent No. 5 has tendered its explanation in which it has been contended that the post was reserved for reserved category and the post was filled from open category as despite giving advertisement, reserve category candidate could not be made available. Further, assurance was given that in future the said post would be filled. She submitted that it is observed in the impugned order that the roster was not produced and also, according

to own showing of respondent No. 5, the post belonging to reserved category was vacant. Therefore, since assurance was given, the authority did not consider this point. She submitted that the writ petition deserves to be rejected on this count alone.

16. It is not in dispute that Mr. Chavan was the teacher of Science subject and was due to retire on 31st December, 2012. On 29th July, 2012, respondent No. 5 published an advertisement for filling the post of Science teacher. Obviously, this was done with a view to prevent loss of students. Petitioner, while tendering rejoinder affidavit, submitted application dated 8th October, 2012 which indicates that respondent No. 5 had sought permission to fill in the post which was going to be vacant on account of retirement of Mr. Chavan, Headmaster, on 31st December, 2012. It is pertinent to note that respondent Nos. 2 and 3 neither accorded nor rejected permission nor provided surplus teacher and therefore, respondent No. 5 appointed petitioner by order dated 2nd January, 2013. Petitioner joined duties on 5th January, 2013. Having regard to the chronology of these events, it is apparent that respondent No. 5 had sought permission for appointment of petitioner well in advance. Respondent Nos. 2 and 3 neither accorded permission nor rejected

the same nor sent surplus teacher. Even now, no surplus teacher is sent to respondent No. 5 – school. Therefore, in terms of the decision of this Court in the case of Shailaja (supra), permission is deemed to have been accorded. It is observed in paragraph No. 27 of the judgment as under :-

27. In the result, the petitions are rejected. However, we direct the State Government through the Secretary, Ministry of Education, to issue the following specific directions to the Education Officers/Deputy Directors forthwith:

(a) The cases of approval of the appointment of school teachers shall be decided and the decision be communicated to the respective management/institution within a period of two months from the receipt of the said proposal, by the competent authority.

(b) In case the approval proposal could not be decided within a period of two months, the next higher authority on a specific request with reasons, may grant an extension of one month to decide the same.

(c) In case the approval proposal is not decided within a period of two months or three months, as the case may be, the concerned appointment or appointments may be deemed to have been approved, if such appointment or appointments is or are in accordance with the provisions of the M.E.P.S. Act, M.E.P.S. Rules and the Government Resolutions issued from time to time.

(d) No primary school shall appoint any untrained teacher or any teacher contrary to the provisions of the M.E.P.S. Act, M.E.P.S. Rules and the Government

Resolutions issued from time to time and if such appointments are made or continued, the recognition of the concerned school(s) shall stand withdrawn/cancelled by the Competent authority, as provided for in the Code or in the Bombay Primary Education Act, 1947.

(e) The officers who fail to comply with the above mentioned schedule for deciding the approval case(s) or grant approval to appointment or appointments contrary to the provisions of the M.E.P.S. Act, M.E.P.S. Rules and the Government Resolutions issued from time to time, shall be liable for disciplinary action on account of dereliction in duty as per the Service Rules applicable in that regard.

The State Government to submit a compliance report to the Additional Registrar of this Court, within two months.

16.1 Paragraph No. 27(c) clearly stipulates that if proposal is not decided within a period of two or three months, the concerned appointment or appointments may be deemed to have been approved, if such appointment or appointments is or are in accordance with the provisions of the M.E.P.S. Act, M.E.P.S. Rules and the Government Resolutions issued from time to time. Therefore, it was impermissible for State Government to reject approval on the ground that permission was not sought.

17. So far as the other aspect of the matter is concerned, the

impugned order states that respondent No. 5 had contended in its say that sanctioned posts for respondent No. 5-School are five, out of them, one post is of Headmaster and four posts are of Assistant Teacher. Out of those four posts, respondent No. 5 has filled in the post of Scheduled Caste. However, despite giving advertisement, candidate from Scheduled Tribe could not be made available and, therefore, candidate from open category came to be appointed and assurance was given to the effect that in future appointment from Scheduled Tribe would be made. It seems that the roster which has been produced by petitioner in this Court was not produced before respondent No. 3-Assistant Commissioner, Social Welfare, Nanded. This roster shows that posts sanctioned are four whereas as per the contention of respondent No. 5 before respondent No. 3, five posts were sanctioned and out of them, four posts are of Assistant Teacher and one post is of Headmaster. Therefore, the position is not clear. Respondent No. 5 has itself contended before respondent No. 3 that the post of Scheduled Tribe was vacant and since the candidate from Scheduled Tribe was not available, the post was filled in and, on availability of candidate in future, the backlog would be cleared. The roster produced before this Court seems to have been approved on 2nd March, 2015. Neither petitioner nor State Government has produced

the roster before this Court. From the roster produced by petitioner approved on 2nd March, 2015, it cannot be ascertained as to whether the post of Scheduled Tribe category was vacant in the year 2012. Therefore, we deem it appropriate to remand the matter to respondent No. 3 for fresh decision.

18. Petitioner is directed to produce this roster i.e. the roster approved on 2nd March, 2015, before respondent No. 3. Respondent No. 5 shall also produce its roster before respondent No. 3. Respondent No. 3 accordingly to take decision afresh on the proposal sent by respondent No. 5 for approval of appointment of petitioner. In this view of the matter, we pass the following order :-

ORDER

- i) Petition is partly allowed.
- ii) Order dated 27th February, 2018, passed by respondent No. 3 is set aside.
- iii) Respondent No. 3 is directed to reconsider the proposal of respondent No. 5 dated 16th December, 2014, for approval of appointment of petitioner within 6 (six) weeks from the date of receipt of a copy of this order.

iv) The roster which was produced by petitioner in this Court shall be produced by him before respondent No. 3.

v) Respondent No. 5 shall also produce the roster to clarify whether the post of reserved category or from open category was vacant in the year 2012 i.e. when appointment of petitioner was made.

vi) Respondent No. 3, while considering the proposal afresh, shall not reject the proposal on the ground that permission of respondent No. 3 was not sought before making appointment of petitioner.

vii) Rule made absolute on these terms.

(M. G. SEWLIKAR)
Judge

(UJJAL BHUYAN)
Judge

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