

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

WRIT PETITION NO.12813 OF 2018

Chetan Subhash Mashalkar

Age: 33 years, Occu: Service as
Shikshan Sevak (now terminated),
r/o: Nutan Primary School, Osmanabad,
Tq.: and Dist.: Osmanabad.

... Petitioner

Versus

1. The President,
Adarsha Shikshan Prasarak Mandal,
Osmanabad, Tq. & Dist.: Osmanabad.
2. The Head Master,
Nutan Primary School, Osmanabad,
Dist.: Osmanabad.
3. Education Officer (Primary)
Zilla Parishad, Osmanabad.

... Respondents

...

**WITH
WRIT PETITION NO.12814 OF 2018**

Ravikumar s/o Dashrath Mule

Age: 32 years, Occu: Service as
Shikshan Sevak,
r/o: Nutan Primary School, Osmanabad,
Tq.: and Dist.: Osmanabad.

... Petitioner

Versus

1. The President,
Adarsha Shikshan Prasarak Mandal,
Osmanabad, Tq. & Dist.: Osmanabad.
2. The Head Master,
Nutan Primary School, Osmanabad,
Dist.: Osmanabad.
3. Education Officer (Primary),
Zilla Parishad, Osmanabad.

... Respondents

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Advocate for Petitioners in both W.Ps. : Mr. V. S. Panpatte
AGP for Respondent – State : Mr. P. G. Borade
Advocate for Respondent No.2 : Mr. V. S. Undre
Advocate for Respondent No.3 : Mr. R. V. Naiknavare
Advocate for Respondent No.3 in WP/12814/2018 : Mr. Ajinkya Reddy

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CORAM : NITIN B. SURYAWANSHI, J.

RESERVED ON : 08th DECEMBER, 2021

PRONOUNCED ON : 23rd DECEMBER, 2021

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.
2. Since, in both these petitions common question of law and facts is involved, both were heard together and are being decided by this common judgment. For convenience, the litigating parties are referred to as, petitioners as 'Shikshan Sevak' and respondent No.1 as 'Management'.
3. Petitioner in W.P. No.12813/2018 possesses qualification as H.S.C., D.Ed. and belongs to Open Category. A post of open category fell vacant, due to retirement of Shri. M. D. More, on 31-05-2009. On the same day, advertisement was issued by the Management in Daily Osmanabad Times newspaper for filling the said vacant post. After holding interview, the petitioner was selected and appointed as 'Shikshan Sevak' on 15-06-2009 for a period of three years, upto

14-06-2012. The proposal for approval to the appointment of petitioner was submitted by respondent No.2 – Headmaster on 29-12-2009 to respondent No.3 – Education Officer. Respondent No.3 was not granting approval to the said appointment on the ground that there was backlog of reserve category posts. The backlog was filled and again representations were made by the Management to grant approval to the appointment of the petitioner. However, no approval was granted. It is the case of the petitioner that the approval to the appointment of the petitioner is deemed to be granted in view of the ratio of this Court in **Shailaja Ashokrao Walse Vs. The State of Maharashtra and Others**, reported in **1999 (1) Mh.L.J. 291**.

4. On 14-06-2012, the petitioner completed probation period of three years as ‘Shikshan Sevak’ and thereafter, he was continued in service. Thus, the petitioner attained status of permanent employee as per the ratio in the judgment delivered by the Full Bench of this Court in **Ram Avadh Mahel Pal Vs. Shivdutta Educational Trust and Others**, reported in **2007 (6) Mh.L.J. 659**, rendered at the Principal Seat of this Court. Since, the approval to the appointment of the petitioner as ‘Shikshan Sevak’ was not granted, the Management did not submit the proposal of getting permanent approval to the services of petitioners. According to the petitioners, permanent approval to the services of

petitioner as Assistant Teachers is deemed to have been granted in view of Government Resolution dated 14-10-2010.

5. Though approval was denied to the petitioner, respondent No.3 sent several surplus teachers for absorption to the School run by the Management and after their absorption, their services are approved, though they are absorbed subsequent to the appointment of the petitioner. All of a sudden, by order dated 14-06-2014, services of the petitioner were terminated with effect from 16-06-2014, without following procedure prescribed in Maharashtra Employees of Private Schools' (Conditions of Service) Rules, 1981 (for short 'the Rules, 1981'), on the ground that there is no approval to the appointment of petitioner and the Management is unable to pay them salary. The petitioner challenged the said termination order by filing Appeal No.53/2014 before the School Tribunal, Pune Region, Solapur. The tribunal dismissed the appeal of the petitioner mainly on the ground that appointment of the petitioner cannot be said to be as per Section 5 of the Maharashtra Employees of Private Schools (Condition of Service) Regulation Act, 1977 (for short 'the Act, 1977'). Hence, the present petition, challenging the impugned order passed by the tribunal and seeking direction to the respondents – Management to give continuity of service and full back-wages and approval to the appointment of the

petitioner.

6. The petitioner in W.P. No. 12814/2018 possesses qualification H.S.C., D.Ed. and he also belongs to the Open Category. The advertisement in this case was also issued in the same newspaper i.e. Daily Osmanabad Times on 17-08-2013 and the petitioner was appointed on 02-09-2013 as 'Shikshan Sevak' for a period of three years. The proposal for approval to the services of petitioner was submitted by respondent No.2 – Headmaster on 20-12-2013, which was not granted and by order dated 14-06-2014, the Management terminated services of the petitioner with effect from 16-06-2014.

7. The petitioner challenged this termination order by filing Appeal No.50/2014 before the School Tribunal, Solapur. The appeal was dismissed on the ground that there was ban on taking staff as per Government Resolution dated 02-05-2012 and that the Management has not obtained prior permission of the Education Department. Hence, the present writ petition.

8. Heard the learned advocate Mr. V. S. Panpatte for petitioners, learned advocate Mr. V. S. Undre for respondent No.2, learned advocates Mr. R. V. Naiknavare and Mr. Ajinkya Reddy for respondent No.3 and learned Assistant Government Pleader Mr. P. G.

Borade for respondent – State, in both the petitions.

9. The learned advocate for petitioners strenuously submits that the appointments of the petitioners were made by following prescribed procedure. An advertisement was issued, interviews were conducted and then resolution was passed by the School Committee to appoint the petitioners. By the appointment order dated 15-06-2009, the petitioner in W.P. No. 12813/2018 and by order dated 02-09-2013 petitioner in W.P. No.12814/2018, were appointed as 'Shikshan Sevak' for three years. The petitioner in W. P. No. 12813/2018 successfully completed the probation period on 14-06-2012 and was continued in service. Though proposal for approval to their services were forwarded, respondent No.3 Education Officer did not consider the same. Even reminders were sent to respondent No.3, however, no approval was granted. Therefore, as per the Government Resolution dated 14-10-2010, the petitioner in W. P. No. 12813/2018, since has completed three years continuous service as 'Shikshan Sevak', is deemed to be made permanent.

10. The learned advocate for petitioners submits that, at the time when the proposal for approval to the services of the petitioners was forwarded, no surplus teachers were available with respondent No.3

Education Officer. For the first time, respondent No.3 – Education Officer forwarded a list of surplus teachers on 15-02-2018. The tribunal has gone into the validity of appointment instead of considering the validity of termination order. The relevant judgments and the Government Resolutions which govern the cases of the petitioners are ignored by the tribunal. The tribunal, in fact, exercised jurisdiction of the Education Officer. He submits that Rule 28 of the Rules, 1981, is not followed while issuing termination order. Before termination, neither one month's notice is given nor salary is paid. He submits that, the condition of 'no objection' in clause 5 of the Government instructions dated 26-02-2019 is turned down. By pointing out the communication dated 20-10-2018 (Exhibit-R) issued by respondent No.3, Education officer, he submitted that after filing of the present writ petition the proposal for approval of appointment of petitioner is turned down by respondent No.3, which is after 9 years and 9 months of the appointment of the petitioners. In support of his submissions, he relied on the following judgments:-

- 1) **Kunda Motiram Bodalkar Vs. Swami Vivekanand Shikshan Sanstha**, reported in (2010) 6 Supreme Court Cases 712;
- 2) **Nita Ramesh Danane Vs. Dombivali Mitra Mandal and Others**, reported in 2009(1) Mh.L.J. 796;
- 3) **Shailaja Ashokrao Walse Vs. State of Maharashtra and Others**,

reported in 1999(1) Mh.L.J. 291;

4) **Nitin Bhatusingh Thakur Vs. The State of Maharashtra and Others**, in Writ Petition No. 5975 of 2017, delivered by the Division Bench of this Court;

5) **Namita Narayan Jha and Another Vs. Education Officer and Others**, reported in 2015 (I) Bom.C.R. 694;

6) **Gopal s/o Siddheshwar Akhade and Others Vs. The State of Maharashtra and Others**, in Writ Petition No. 2590 of 2013, delivered by the Single Bench of this Court;

11. The learned advocate for the Management and Headmaster supported the petitioner's case in Writ Petition No.12813/2018. The learned advocate fairly conceded that prior permission of the Education Officer was not obtained before appointment of the petitioner.

12. The learned advocate for respondent No.3 Education Officer submitted that appointments of both the petitioners were for temporary period. The word "on probation" is not mentioned in the appointment orders. By pointing out the advertisement (Exhibit-A), it is submitted that the Editor of Daily Osmanabad Times newspaper and Executive Director of the School are the same person. The appointment of petitioners is not in consonance with Schedule 'D' of Rule 9(5) of the Rules, 1981. He, therefore, supported the impugned order passed by the tribunal.

13. The learned advocate representing respondent No.3 in Writ Petition No.12814/2018 submitted that no permission is obtained by the Management before appointing the petitioner. The appointment order is for temporary period. The services of the petitioner were terminated within nine months from the date of his joining. The petitioner joined on 02-09-2013 and the termination order was issued on 14-06-2014. There was no interim protection granted in favour of the petitioner. The learned advocate supports the impugned order passed by the School Tribunal. According to him, the petitioner was not validly appointed. He further submitted that since the Management is supporting the petitioner, it is the responsibility of the Management to pay the salary of the petitioners since they are continued in services.

14. In reply, the learned advocate for petitioners submitted that Section 5(2) of the Act, 1977, is a deeming provision which states that as the petitioners have completed the probation, they are deemed to be permanent.

15. Heard the learned advocate Mr. V. S. Panpatte for petitioners, learned advocate Mr. V. S. Undre for respondent No.2, learned advocates Mr. R. V. Naiknavare and Mr. Ajinkya Reddy for respondent No.3 and learned Assistant Government Pleader Mr. P. G.

Borade for respondent – State, in both the petitions, at length. I have gone through the record.

16. The appointment orders issued to the petitioners do not mention that they are appointed on probation. Both the petitioners are appointed for a temporary period.

17. Rule 9(5) of the Rules, 1981, provides that a letter of appointment order in the form of Scheduled 'D' shall be issued to the candidate appointed to the post. The form of order of appointment is provided in Schedule 'D'. Clause 2 in Schedule 'D' provides "Your appointment is on probation for a period of two years". Admittedly, in both the petitions, the petitioners were not appointed on probation period and they both were appointed as 'Shikshan Sevak' for a period mentioned in the appointment order. Admittedly, the word "appointed on probation" is absent from the appointment orders of the petitioner. The Full Bench of this Court in **St. Ulai High School, through its Principal Vs. Shri Devendraprasad Jagannath Singh & Another**, reported in **2007 (109) Bom.L.R. 60**, held that an order of appointment cannot be at variance with the conditions prescribed in the Rules which have statutory force and effect in conjunction with Section 4(1) of the M.E.P.S. Act, 1977. Admittedly, the appointment orders issued to the

petitioners are not in conformity with Schedule 'D' of the Rule 9(5) of the Rules, 1981. In that view of the matter the petitioners' appointments cannot be said to be legal and valid.

18. The learned advocate for respondent No.3 – Education Officer was right in relying in the Full Bench decision in **Ramkrishna Chauhan Vs. Seth D. M. High School and Others**, reported in **2013(2) Mh.L.J. 713**, wherein it is held that, when appointment of an employee is on temporary basis, it is not open to the School Tribunal to assume that the appointment made against a clear and permanent vacancy is deemed to be on probation, within the meaning of Section 5(2) of the Act, 1977. The School Tribunal cannot disregard the terms and conditions of the letter of appointment, if it expressly provides that the appointment is on temporary basis, for a limited term.

19. The learned advocate for petitioners relied in the decision of the learned Single Judge of this Court in **Gopal s/o Siddheshwar Akhade** (supra), wherein it is held that Sub-section (1) of Section 5 of the Act, 1977, does not prescribe that the Management has to seek prior permission for appointments of the staff. However, since in the present case the appointments are made without following prescribed procedure and the appointment orders are not in the prescribed proforma, the said ruling would not help the petitioners' case.

20. The decision of the Hon'ble Supreme Court in **Kunda Motiram Bodalkar** (supra) was rendered in different facts and hence, would not help the petitioners' case.

21. In **Nita Ramesh Danane** (supra), the learned Single Judge of this Court held that, if the post in open category is to be filled in terms of Rule 9(8) and (3), there is no requirement of advertisement, and only the application needs to be made by the candidate with requisite details. The same would also not help the case of the petitioners.

22. In **Nitin Bhatusingh Thakur** (supra), the Division Bench of this Court in the facts of that case held that, the communications forwarded to the Education Officer were placed on record, wherein the permission from the Education Officer was sought for, before filling post of the petitioner. Even this judgment does not assist the petitioners.

23. In **Namita Narayan Jha and Another** (supra), the Division Bench of this Court at Nagpur Bench held that even if backlog existed since the petitioners were not appointed on backlog post or reserved post, availability of backlog post cannot be a reason to deny approval to the petitioners. In the case in hand, since the appointments of the petitioners are without following prescribed procedure and petitioners

were not appointed on probation, this ruling would not help the petitioners' case.

24. There appears substance in the contentions of the respondents that the appointment of the petitioners was for temporary period and the word "probation" is missing from appointment orders of both the petitioners. Since, in the case in hand, appointment orders are issued for the term of three years and the word "on probation" is missing from the same, the appointment of the petitioners have to be termed as on temporary basis for a limited period.

25. So far as the petitioner in Writ Petition No.12814/2018 is concerned, though before issuing of advertisement, permission was sought by the Management, fact remains that the petitioner was appointed for a temporary period of three years and the word "on probation" is missing from the appointment order. It is also required to be noted that the termination order was issued to the petitioner within nine months and ten days of his appointment. Hence, the petitioner did not complete even the probation period.

26. There appears substance in the arguments of the learned advocate for respondent No.3 that Editor of the local newspaper, wherein the advertisements were issued while appointing the

petitioners, and the Head of the Management are one and the same person. It, therefore, appears that the petitioners were given backdoor entry and the Management has tried to support the petitioners for regularising their appointments. Since the petitioners were not appointed on probation, their services cannot be deemed to have been confirmed on completion of probation period in terms of Section 5(2)(a) of the Act, 1977.

27. The tribunal was justified in coming to the conclusion that the appointment of the petitioners was for a temporary period and was not on a probation, and the initial appointment of the petitioners should have been on probation period in terms of Section 5(2) of the Act, 1977. The Tribunal has rightly considered the ratio of the Full Bench Decision in **Ramkrishna Chauhan** (supra), wherein it is held that:

“We have no hesitation in taking the view that neither S.5(1) nor 5(2) of the Act can be construed as forbidding the Management from making an appointment on contractual or temporary basis for a limited duration against a permanent vacancy until a suitable candidate is selected. Further there is nothing in these provisions to indicate that every appointment made by the Management, in relation to a permanent vacancy, must be deemed to have been made on probation for a period of two years. There is no such legal fiction unlike in the case of a person appointed “on probation” for a period of two years, is deemed to have been confirmed, upon completion of that period. In other words, the parties would be bound by the terms and conditions stated in the letter of appointment, as there can be no presumption of

appointment having been made “on probation” unless expressly stated in the appointment letter itself.”

28. The tribunal was justified in holding that the procedure prescribed in Section 5 of the Act, 1977, was not followed while appointing the petitioners. The tribunal has passed a reasoned order while dismissing the appeals filed by the petitioners.

29. I, therefore, find no substance in the challenge raised by the petitioners in the present writ petitions and no case is made out by the petitioners to warrant exercise of extraordinary writ jurisdiction. Both the writ petitions are, therefore, dismissed. Rule discharged.

(NITIN B. SURYAWANSHI, J.)