

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

WRIT PETITION NO. 7736 OF 2018

1. Gajanan S/o. Maroti Meharkar
Age : 26 years, Occu : Service as
Assistant Teacher in Secondary
Ashram School, Vasant Nagar,
Kotgyal, Tq. Mukhed, Dist. Nanded.
2. Ramakant S/o Kondiba Davkare
Age : 36 years, Occu : Service as
Assistant Teacher in Secondary
Ashram School, Vasant Nagar,
Kotgyal, Tq. Mukhed, Dist. Nanded.
3. Giteshwar S/o Parshuram More,
Age : 26 years, Occu : Service as
Assistant Teacher in Secondary
Ashram School, Kamlewadi,
Tq. Mukhed, Dist. Nanded.
4. Ranjit S/o. Baburao Honwadajkar,
Age : 36 years, Occu : Service as
Peon in Secondary Ashram School,
Kamlewadi, Tq. Mukhed, Dist. Nanded. ...Petitioners

VERSUS

1. The State of Maharashtra
Through the Secretary,
Social Justice and Special
Assistant Department
Mantralaya, Mumbai-32.
2. The Regional Deputy Commissioner,
Social Welfare Department,
Dr. Babasaheb Ambedkar
Social Justice Bhavan,
Near Market Yard, Latur.
3. Assistant Commissioner,
Social Welfare, Nanded,
Dist. : Nanded.

4. Vimukta Jati Seva Samiti,
Vasantnagar (Kotgyal),
Tq.: Mukhed, Dist.: Nanded,
Through its Secretary.
5. Secondary Ashram School,
Vasant Nagar (Kotgyal),
Tq. Mukhed, Dist. Nanded,
Through its Head Master.
6. Secondary Ashram School,
Kamalewadi, Tq. : Mukhed,
Dist. : Nanded, Through its Head Master. ...Respondents

...

WITH

WRIT PETITION NO. 10204 OF 2019

Sharda d/o Jaiwantrao Kale,
Age : 24 years, Occu.: Service as
Shikshan Sevak in Secondary
Ashram School, Kamlevadi,
Tq.: Mukhed, Dist.: Nanded. ...Petitioner

VERSUS

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Through the Secretary,
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Dr. Babasaheb Ambedkar
Social Justice Bhavan,
Near Market Yard, Latur.
3. Assistant Commissioner,
Social Welfare, Nanded,
Dist. : Nanded.
4. Vimukta Jati Seva Samiti,
Kamlevadi,
Tq.: Mukhed, Dist.: Nanded,
Through its Secretary.

5. Secondary Ashram School,
Kamlevadi,
Tq. Mukhed, Dist. Nanded,
Through its Head Master. ...Respondents

...

WITH

WRIT PETITION NO. 10234 OF 2019

Madhav Babarao Kawthekar
Age: 34 years, Occu.: Service as
Shikshan Sevak in Primary
Ashram School, Vasantnagar
(Kotgyal), Tq. : Mukhed,
Dist.: Nanded. ...Petitioner

VERSUS

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3. Assistant Commissioner,
Social Welfare, Nanded,
Dist. : Nanded.
4. Vimukta Jati Seva Samiti,
Vasantnagar (Kotgyal),
Tq.: Mukhed, Dist.: Nanded,
Through its Secretary.
5. Primary Ashram School,
Vasantnagar (Kotgyal),
Tq. Mukhed, Dist. Nanded,
Through its Head Master. ...Respondents

...

**WITH
WRIT PETITION NO. 7768 OF 2018**

Megha Prahladrao Kadam
Age : 28 years, Occu.: Service as
Assistant Teacher in
Primary Ashram School, Vasantnagar
(Kotgyal), Tq. : Mukhed,
Dist.: Nanded.

...Petitioner

VERSUS

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Through the Secretary,
Social Justice and Special
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2. The Regional Deputy Commissioner,
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Dist. : Nanded.
4. Vimukta Jati Seva Samiti,
Vasantnagar (Kotgyal),
Tq.: Mukhed, Dist.: Nanded,
Through its Secretary.
5. Primary Ashram School,
Vasantnagar (Kotgyal),
Tq. Mukhed, Dist. Nanded,
Through its Head Master.

...Respondents

...
**WITH
WRIT PETITION NO. 7789 OF 2018**

1. Rajkumar S/o Shivajirao Kadam
Age : 28 years, Occu.: Service as
Shikshan Sevak in Primary
Ashram School, Sullali-Dongargaon,
Tq. Jalkot, Dist. Latur.

2. Laxman S/o Raosaheb Hake
Age : 30 years, Occup.: Service as
Shiksha Sevak in Primary
Ashram School Sullali-Dongargaon,
Tq. Jalkot, Dist. Latur. ...Petitioners

VERSUS

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Social Justice and Special
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Mantralaya, Mumbai-32.
2. The Regional Deputy Commissioner,
Social Welfare Department,
Dr. Babasaheb Ambedkar
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Social Welfare, Nanded,
Dist. : Nanded.
4. Vimukta Jati Seva Samiti,
Vasantnagar (Kotgyal),
Tq.: Mukhed, Dist.: Nanded,
Through its Secretary.
5. Primary Ashram School,
Sullali-Dongargaon,
Tq. Jalkot, Dist. Latur.
Through its Head Master. ...Respondents

...

WITH
WRIT PETITION NO. 10324 OF 2019

1. Anil s/o Sayasrao Gutte
Age : 31 years, Occu.: Service as
Shikshan Sevak in Primary
Ashram School, Kamlevadi,
Tq.: Mukhed, Dist.: Nanded.

2. Satyashila d/o Avinash Panpatte
Age : 30 years, Occu.: Service as
Shikshan Sevak in Primary
Ashram School, Kamlevadi,
Tq.: Mukhed, Dist.: Nanded.

3. Manohar s/o Gangaram Jadhav
Age : 30 years, Occu.: Service as
Shikshan Sevak in Primary
Ashram School, Kamlevadi,
Tq.: Mukhed, Dist.: Nanded.

...Petitioners

VERSUS

1. The State of Maharashtra
Through the Secretary,
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Kamlevadi,
Tq.: Mukhed, Dist.: Nanded,
Through its Secretary.

5. Primary Ashram School,
Kamlevadi,
Tq. Mukhed, Dist. Nanded,
Through its Head Master.

...Respondents

...

Advocate for the Petitioners : Mr. V. S. Panpatte
AGP for Respondent Nos. 1, 2 and 3 : Mr. S. P. Tiwari
Advocate for Respondent/Management : Mr. Sachin S. Deshmukh

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**CORAM : R.D. DHANUKA. &
S.G. MEHARE.,JJ.**

**RESERVED ON : 11th April 2022
PRONOUNCED ON : 6th MAY, 2022**

JUDGMENT (PER S. G. MEHARE., J.) :-

1. Rule. The learned A.G.P waives notice for respondents nos. 1 to 3. Rule made returnable forthwith. By consent of the parties, heard finally.

2. The petitioners have impugned the communications rejecting their approvals to the appointments by respondent no. 3 / The Assistant Commissioner, Social Welfare Department. The issues involved in these petitions are common, and hence these petitions are taken up for disposal by a common judgment.

3. Respondent no. 2 has rejected the petitioners' proposal for approval for the following reasons.

- (1) Respondent no. 4 has not taken permission to recruit the petitioners, either from respondent no.2 or his senior Office.
- (2) No permission to advertise the vacancies was obtained by the Management either from respondent no.2 or his Senior Officer.
- (3) When the recruitment of the Staff was banned as per the Government Resolution of Social Justice and Special Assistance Department Mantralaya, Mumbai, dated 16.10.2012, the Management appointed the petitioners against the mandate of the said G.R.

4. The following chart is for the ready reference on factual aspects regarding the date of advertisements, applications for permission to advertise the vacancies, date of interview, and date of appointments of the petitioners.

Particulars of the Petitioners									
1	2	3	4	5	6	7	8	9	10
Writ Petition No.	Name of the Petitioner(s)	Qualification	Subject	Category of Pet.	Application for permission	Advt.	Date of Interview	Date of Appointment w.e.f.	Rejected on
7736/2018	P-1 Gajanan s/o. Maroti Meharkar	B.Sc. B.Ed.	Science	OBC	27.05.2016	17.08.2016	26.08.2016	31.08.2016	30.01.2018
	P-2 Ramakant s/o. Kondiba Davkare	B.A. B.Ed.	Marathi	OPEN	11.08.2016	24.10.2016	29.10.2016	30.10.2016	
	P-3 Giteshwar s/o. Parshuram More	B.A. B.Ed.	English	OPEN	12.09.2017	18.09.2017	26.09.2017	28.09.2017	
	P-4 Ranjit s/o. Babura Honwadajkar	Peon		S.C.	04.10.2017	09.10.2017		30.10.2017	
7768/2018	Megha Prahladrao Kadam	H.S.C. D.Ed.		S.C.	05.07.2016	18.07.2016	26.07.2016	31.07.2016	30.01.2018
7789/2018	P-1 Rajkumar s/o. Shivajirao Kadam	H.S.C. D.Ed.	All Subject	OPEN	12.09.2017	18.09.2017	26.07.2016	28.09.2017	15.01.2018
	P-2 Laxman s/o. Raosaheb Hake	H.S.C. D.Ed.		N.T.	16.07.2016	18.07.2016	26.07.2016	30.07.2016	
10204/19	P-1 Sharda d/o. Jaiwantrao Kale	D.Ed.	All Subject	OPEN	20.02.2019	20.03.2019	12.07.2019	01.04.2019	20.07.2019
10234/19	P-1 Madhav s/o. Babarao Kawthekar	D.Ed.	All Subject	OPEN	20.02.2019	20.03.2019	12.07.2019	01.04.2019	20.07.2019
10324/19	P-1 Anil s/o. Sayasrao Gutte	D.Ed.	All Subject	V.J.	20.02.2019	20.03.2019	12.07.2019	01.04.2019	20.07.2019
	P-2 Satyashila d/o. Avinash Panpatte			OPEN					
	P-3 Manohar Gangaram Jadhav			V.J.					

5. It is the case of the petitioners that soon after the post fell vacant, respondents nos. 4 and 5 made applications in advance to respondent no. 3 and requested him to send the surplus teacher or grant permission to publish an advertisement inviting applications from aspirants. The schools run by respondent no. 4 trust/society are 100% grant-in-aid. After the advertisements were published by respondent no. 4 in the local newspaper, petitioners faced the

interviews and joined their duties as per appointment orders. They have been in service since the day of their joining. They were appointed against the sanctioned vacant posts. They possess the required qualifications for the appointment to the respective posts. However, though the due procedure is followed by respondent no.4, respondent no. 3 has erroneously declined the approvals to their appointments, and the reasons assigned in the impugned orders are against the Law. Petitioners are entitled to the approval of their appointments. Hence they have prayed to allow the petitions.

6. In W.P. No. 7736/2018, and W.P. No. 7768/2018, and 7789/2018, the similar affidavits in reply of respondents nos.1 to 3, is that initially, the petitioners were appointed as Shikshan Sevaks and thereafter as Assistant teachers on a regular basis. However, the appointments of petitioners are against the ban on recruitments imposed by G.R. dated 16.10.2012. The guidelines issued in the said G.R. have not been followed by the management/ respondent no.4. There were several surplus employees of private schools. Respondents nos. 4 and 5 were bound to absorb the surplus teachers. Hence the petitioners' appointments are illegal. They have not disputed that respondents nos. 4 and 5 applied to their Offices on 11.08.2016, 17.08.2016, and 09.10.2017 for permission to advertise the vacancies. The Office of these respondents never granted permission to respondents no. 4 and 5 to advertise the vacant posts. Hence their

appointments are illegal. Though the selection procedure appears to be followed, the appointments cannot be approved as the appointments are without obtaining prior permission to advertise the vacancies from these respondents. The appointments are not binding on them.

7. In Writ petitions Nos.10204/2019, 10234/2019, and 10324, the respondent nos. 1 to 3, in addition to the similar affidavits in reply to the above writ petitions, have come with the case that since the surplus teacher was already absorbed on the vacant post available with respondents Nos. 4 and 5, the issuance of advertisement and appointment of the Petitioner is per se illegal as no such vacancy existed on the date of appointment of petitioners.

8. The rejoinder affidavit in reply filed by the Petitioner, in W.P. No. 10234/2019 is that he belongs to the Scheduled Caste category and was appointed from the same category. Before issuing an advertisement dated 20.03.2019, respondent no. 4, by its application dated 20.02.2019, had intimated to respondent no.3 that in view of the newly sanctioned posts based on the increased strength of students, one post of a teacher from the Scheduled Caste category is vacant. Respondent no.4 had requested respondent no. 3 to send surplus teachers, but no response was given for a long period, and the request was kept undecided. Hence, after following the due selection

procedure as laid down in M.E.P.S. Act and Rules he was appointed. The terms and conditions laid down in the Government Resolution from time to time have also been followed. Considering the educational loss of the students in the School/ respondent no. 5, he was appointed. Hence the above G.Rs do not apply to him or come his way. In sum and substance, he replied that due procedure was followed, and as he belongs to the reserved category, respondent no.2 cannot decline his approval. A similar rejoinder affidavit in reply is filed in W.P. no. 10324/2019 and 10204/2019.

9. We have heard the learned counsel for the respective parties at length and gone through the petitions, including the impugned communications.

10. Since the learned counsel for the petitioners would argue that once the recruitment procedure is followed, the prior permission of the competent Authority is immaterial, we would prefer to discuss the Law on the requirements of the statute. The Hon'ble Apex Court, in the case of ***Competent Authority Vs. Barangore Jute Factory, (2005) 9 Scale 493***, has held that,

"It is settled Law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone. Every word of the statute has to be given its due meaning".

11. Learned counsel for petitioners argued that the provisions of Maharashtra Employees of Private Schools (Condition of Service) Regulations Act, 1977, ("M.E.P.S. Act", for short) do not apply to the Ashram Schools. There is no legislation on the appointments of the teaching and non-teaching Staff in Ashram Schools. However, he could not point out that the M.E.P.S. Act is not applicable and lastly conceded that the M.E.P.S. Act governs the Ashram Schools.

12. To answer the question raised above by the learned counsel for the petitioners, it would be appropriate to discuss the rules and regulations relating to the recruitment of the Staff in private schools incorporated in M.E.P.S. Act and Rules.

13. Section 5 (1) of M.E.P.S. Act, mandates that as soon as possible, the Management shall fill in every permanent vacancy falling vacant in a private school by appointing a duly qualified person in the manner prescribed under the said section. The proviso to this section further provides that unless such vacancy is to be filled in by promotion, the Management, before proceeding to fill such vacancy, shall ascertain from the Education Officer, Zilla Parishad, or as the case be from the Director or the officer designated by the Director in respect of imparting technical, vocational, art or special Education, whether there is any suitable person is available on the list of surplus persons maintained by him, for absorption in other schools or not.

14. The above provision is crystal clear that the conditions mentioned therein are not empty formalities. It is a mandatory provision. Merely sending an application for ascertaining whether suitable surplus persons are available or not is the mandate of Law. After submitting such an application, the Management should wait for a reasonable period for a reply from the Authority, maintaining the list of surplus persons. The learned counsel for the petitioners and respondent no.4 did not show any provision in M.E.P.S. Act, failure on the part of the concerned Authority to inform the Management within a time prescribed the surplus persons, is a deemed permission to advertise a vacancy.

15. The Maharashtra Employees of Private Schools (Conditions of Service) Rules 1981 ("Rules 1981", for short) prescribes the procedure for the appointment of Staff. Sub-rule (2A) of *Rule 9* lays down that the Management of the private School shall advertise the vacancies for the posts of teachers in details of subjects with a roster on the online software program (P.A.V.I.T.R.A. Portal) or an agency authorized by the Government in at least one local newspaper having wide circulation in the region, and also notify the vacancies to the Employment Exchange Centre of the District and District Social Welfare Officer. Simultaneously by amendment Sub Rule (2B) was also inserted. As per the said sub-rule, the Management was to keep the advertisement open for at least fifteen days before

filling such a vacancy. The candidates who possess the requisite qualifications and experience may apply for the vacant post online with the marks secured in Aptitude Test.

16. The above rules were inserted and brought into force from 22.06.2017. However, the said rule was again substituted with effect from 8.06.2020, keeping the first part as it is but dividing it into Sub Rule (2C). This substitution provides that after completion of the period of advertisement, the Education Officer or the Director, as the case may be, shall communicate the names of candidates who have passed the Aptitude Test to the Management through online process in a proportion of 1:10 for one vacant post. The School Committee has to select the candidates after the interview. The School Committee has been given the powers not to appoint the candidates having higher marks in Aptitude Test but has to give the reasons therefor. The Management has also granted the power to appoint the candidate without the interview directly from the online merit list maintained by the concerned officer.

17. So far as the trained teachers in Secondary Schools and Junior Colleges of Education are concerned, in addition to the requisite qualifications for the appointment of the teacher or Shikshan Sevak for standard I to VIII, he must pass the Aptitude test, as provided in Schedule B of the Rules of 1981.

18. For the appointment of primary teacher, the qualification shall be as per the qualifications laid down by the National Council for Teacher Education (N.C.T.E.) under the Right of the Children to Free and Compulsory Education Act 2009.

19. Conjoint reading of the above rules clearly indicates that one can not be appointed as a teacher unless the candidates possess the requisite qualification. The qualification and the procedure laid down in the Act and Rules for selection is mandatory. The Management cannot deviate from the Law prescribed for the appointment of the Staff in private schools. It must follow the procedure and appoint the candidates possessing the qualifications prescribed under the Rules of 1981. The appointments made deviating from the rules cannot be legitimized. The Management cannot say that advertising the vacancy and holding an interview to select the candidate is in complete compliance with the provisions of the M.E.P.S. Act and rules in the absence of permission from the competent Authority. No Management on its own can dilute the provisions of Law as per its convenience.

20. In the case at hand, three petitioners in W.P. No. 7736/2018, have been appointed as trained teachers for Science, Mathematics, and English Subjects. The remaining petitioners in other writ petitions have been appointed as primary teachers on having

educational qualifications of H.S.C. D.Ed or only D.Ed.

21. In W.P. No. 7736/2018, it has been pleaded that the petitioner nos. 1 and 2 were appointed as Shikshan Sevak / Assistant teachers by orders dated 31.08.2016 and 30.10.2016. Before the commencement of the M.E.P.S.(Condition of Service) Rules 2017, the graduate and physical education teachers were not to pass the Aptitude Test. They could be appointed if holding a Bachelor's Degree with Bachelor's Degree in Education. As per Schedule B of the Rules, the teachers holding Secondary School Certificate and if the appointment is before 1st October 1970 were exempted. But every teacher appointed after the amendment of 2017 must pass the Aptitude Test. However, the appointment of Petitioner no. 3 in the said petition and other petitioners in other petitions as teachers are after 22.06.2017. Hence they would be governed by the 2017 amendment Act.

22. The argument of the learned counsels for petitioners and respondent no.4, is that the Government Resolution dated 16.10.2012 is similar to Govt Resolution dated 02.05.2012, would not apply to the recruitment of the teachers for Science, Mathematics, and English subjects and to fulfil the backlog of reserve category candidates. To bolster their case, they relied upon the Judgment of this Court delivered in the case of ***Smt. Munoli Rajashri Karabasappa Vs. State***

of Maharashtra through Secretary and others (W.P. No. 8587 of 2016, decided on 10.07.2017) on the G.R. dated 02.05.2012. It has been held by the Division Bench, in that case, that, in three conditions, the ban imposed by the Government on the recruitment of teachers would not apply, firstly, where the recruitment process was commenced prior to GR dated 02.05.2012, secondly, where the appointments are made for filling up vacancies in English, Mathematics, and Science and thirdly, where the recruitment is made to fulfil the backlog of reserve categories candidates.

23. The petitioners further relied on the P.I.L. Petition of *Ramnath Dada Mote Vs. The State of Maharashtra and others Public Interest Litigation No. 197 of 2013, decided on 22.01.2014*, decided at the Principal Seat at Mumbai of this Court. Referring to the above Judgment, they argued that since this Court has directed the State Government to fill up the posts of teachers in the entire state of Maharashtra, the recruitment process adopted by respondent no.4 is not bad in Law.

24. In the above P.I.L., the Bombay High Court had issued directions to the State Government to issue necessary instructions to commence the recruitment process for filling in vacant posts of teachers in Secondary, Higher Secondary schools, and Junior Colleges after taking into consideration vacancies likely to arise in the year

2014 and 2015 on account of retirement and superannuation. In paragraph no.5, it has been observed that the stand may appear to be proper in the abstract, but if the number of teachers required to be absorbed is less than the number of vacant posts, for instance, if the number of teachers to be absorbed is only 40, and the number of vacant posts is 1000, there can be no justification for not initiating recruitment process for 960 posts of teachers, keeping aside 40 posts of surplus teachers.

25. Learned counsel Shri Panpatte further relied on the case of the *Kunda Motiram Bodalkar Vs Swami Vivekanand Shikshan Santha and others (2010) 6 SCC 712*, and argued that where there is no other infirmity in the appointment process, the prior permission for the appointment is immaterial. The facts of the said case were that the Petitioner was appointed as Head Mistress. At that time, no other teacher in the School was eligible to be appointed as Head Mistress. Her appointment was made on the basis of an advertisement. Subsequently, her appointment was approved by the competent Authority. In these facts, the Hon'ble Apex Court held that the High Court erred in setting aside her appointment.

26. Learned counsel for the petitioners also referred to the case of *Mohinder Singh Gill Vs. Chief Election Commissioner, New Delhi 1978 A.I.R. (SC) 340*. It has been observed in paragraph no.8 of

the said case thus;

"(8) The secondary equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reason so mentioned and, cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose j. in Gordhandas Bhanji : Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actions and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older".

27. The question is, what is the purpose of imposing a condition to seek prior permission or ascertain the surplus teachers before filing the vacancy as time place in the proviso to Section 5 (1) of the M.E.P.S. Act.?

28. The Bombay High court, in the case of ***Matorshri Ramabai Ambedkar Vidyarthi Vasatigruha Trust Vs. Bharat T Hambir*** (2009) 2 Mh. L. J. 121, has dealt with the interpretation of Section 5

of the M.E.P.S. Act, the paragraph no. 5, which reads thus;

"5. The interpretation of Section 5 of the Act must be purposive-one that would attain the statutory object and not lead to the negation of statutory intent. The Management is duty-bound to fill it up by appointing a duly qualified candidate on probation. The vacancy must be advertised to allow equal opportunity to equal candidates. A regular process of selection must be held. A duly qualified candidate has to be appointed. Temporary appointments can, by definition, be made when the vacancy is temporary. In such cases, the exigencies of Education require that students must be imparted Education and vacancy even a short period will cause serious hardship."

29. The Bombay High Court in the case of ***Rajashri Hanumantrao Rokade Vs. State of Maharashtra and others 2018(3) Mh. L.J. 395***, speaking on Section 5 (1) of the M.E.P.S. Act has observed in paragraph 10 as below;

"10. On conjoint reading of the aforementioned provisions, the proviso to Section 5(1) of the Act of 1977 mandates that, if there is vacancy in the School, before proceeding to fill such vacancy, the Management of the School is obliged to ascertain from the Education Officer whether there is any suitable person available on the list of the surplus person maintained by the Education Officer, and If such person being available, the Management shall appoint that person in such vacancy."

30. We may add to the above observation that the purpose behind the condition imposed in the proviso to Section 5 (1) of M.E.P.S. Act, is to accommodate the surplus persons, who have priority over the vacant posts. They being surplus, the time spent on the recruitment may be saved, and that may eliminate the hardship to be caused to the students in imparting the Education. The students may get experienced teachers. Be that as it may, though Management has the power to appoint the Staff but is controlled by M.E.P.S. Act and Rules. It has no absolute power to make its own practice and procedure. It must adhere to the rules and regulations. The procedures for public employment are for maintaining equal opportunities to avoid chaos, bias, and monopoly. Violating the mandate of Law causes chaos and mess, and the possibility of illegality cannot be ruled out. Assuming for the sake of argument that the Education or other responsible officer fails to respond to the request of the Management ascertaining about the surplus persons to the Management. It does not relieve the Management from following the procedure laid down in rules 9, 2A, and 2B read with clause (vii) of IInd Entry in Schedule B of the M.E.P.S. Act. None of the judicial pronouncements on the exceptions to the G.R. 02.05.2012 precluded the Management from following the due procedure. Hence, the appointments made deviating from the procedure prescribed for the appointments of the Staff can not be legitimized.

31. The various provisions discussed above enumerate that the Management has to appoint the Staff as soon as the post falls vacant. However, before filling up the vacancy, the Management has to enquire with the Education Officer or the concerned officer as authorized whether a surplus person is available on the list. It is an obligation of the Education Officer, Zilla Parishad, the Director, or the officer designated by the Director in respect of the School imparting technical, vocational, art, or special Education to inform the Management at the earliest whether a surplus teacher is a person are available on the list maintained by them. The Education Officer, the Director, or the concerned officer should respond promptly to the request made by the Management seeking permission to fill up the vacancy. Indisputably, in this case, the Management had applied for permission to advertise the vacancies with respondent no. 3. However, in very few cases, the Management waited for some time. In some cases, the Management has advertised the post hastily without waiting for any response from respondent no.3 within a reasonable period. Unfortunately, respondent no.2 did not object to the procedure not adopted by the Management while considering the approval of the petitioners' appointments.

32. Learned counsel for the petitioners relying on the case of **Mohinder Singh Gill** (supra) has tried to canvass before the Court that

the order passed by an authority cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. He meant to suggest that the Court cannot travel beyond what the orders have been passed by the competent Authority, which is under challenge before the Court. In a normal situation, the above ratio may be applied. However, where the situation permits and the Court finds that fraud is played with the Court, then such a ratio would not apply. Hence, we disagree with the learned counsel for the petitioners that the ratio laid down in the above case should be applied as straight jacket formula.

33. The Court cannot close its eyes if any illegality is discovered though not pointed out by either party to the proceeding. The courts must find out the truth and eliminate the illegalities. The Courts are the caretaker of the citizens, not only coming to the courts but also the citizens who do not come to the courts. The Courts must protect the absent party's interest. Be that as it may, the catena of judgments on the recruitment process of the school staff particularly based on the first Judgment in case of **Munoli** (*supra*), this Court has taken a consistent view that in the case of three exceptions stated in the G.R dated 02.05.2012, the recruitment is not banned.

34. It is not in dispute that the posts were vacant, and the respondents have no case that either of the vacancies filled up by the Management is against the reserved post. As against this, the

respondents did not dispute that petitioners have been recruited against the sanctioned posts.

35. The Division Bench of this Court in the case of ***Shubhangi Bhagwat Chate Vs. The State of Maharashtra and others, Writ Petition No.837 of 2018 dated 13.04.2018*** has observed that in Writ Petition No.9709 of 2016, decided on 23.11.2017; this Court had ordered the Education Officer not to reject the proposal on the ground that surplus candidates were available.. The Division Bench of this Court in the case of ***Shivhar Madhav Devkamble and another Vs. The State of Maharashtra and others, Writ Petition No.8151 of 2019 decided on 08.02.2021*** was pleased to observe in para 6 as follows:

"6. Going by the reasons which have been given under the impugned communication, it is obvious that it would not be a case where it can be said that there had been no prior permission sought or any scheduled caste candidates surplus had been ever sent for absorption in the School. The ban, as it would emerge, does not hold for the vacancies of peons and for filling up the backlog of reserved category candidates."

36. The petitioners have responded to advertisements published by respondent no.4. They faced the selection process and stood merit; hence they were appointed. The petitioners cannot be faulted for the deliberate errors of hasty advertising of the vacancy without waiting for a reasonable period by respondent no.4. Respondent no.4 did not follow any of the procedures laid down even

while advertising the vacancy.

37. The Government Resolution dated 04.09.2013 was conditional permitting the recruitment of the candidates belonging to the backward class and the teachers for English, Mathematics, and Science only. As discussed above, the education department is also not seen as diligent in sending the surplus persons from the list after the management requests to fill the vacancy.

38. Considering the facts of the case, the conduct of respondent no.4 / Management raises a serious suspicion. It proves that respondent no. 4 has advertised the vacancies hastily and, without waiting for a reasonable period for a response from the competent Authority, filled up the vacancies. The conduct of respondent no.4 and the circumstances establish that it is a deliberate act committed by respondent no.4/ management. Respondent no.4 has brushed aside the provisions of M.E.PS Regulation Act and Rules, 1981. Respondent no.4 has neither advertised the vacancy in the widely circulated newspapers nor published on the P.A.V.I.T.R.A. portal.

39. The facts reveal that due to the hasty filling up of the vacancy, many other competent persons who are successful in Aptitude tests and have good experience and qualifications have been deprived of competing with other candidates. The purpose of the

proviso (2) Section 5(1) of M.E.PS Act has been apparently defeated by respondent no.4. At the cost of repetition, we observe that there was no ban on recruitment as per the Government Resolution dated 02.05.2012 and 16.10.2012, but no concession was given to the Management while recruiting the Staff to give a go-by to the recruitment rules as provided in M.E.PS Act and Rules, 1981.

40. We are of the opinion that the consistent view taken by this Court in earlier cases granting approval to the appointment of teachers belonging to the backward classes and the teachers for the subject of English, Mathematics and Science should be applied in this case also. So far as the appointment of peon is concerned, the Hon'ble Division Bench of this Court in the case of **Shivhar** (*supra*) has laid down that the ban as it would emerge does not hold for the vacancy of peon, therefore, the appointment of the peon in this case also is required to be protected.

41. Granting approval has the consequences of the burden on the State Exchequer from the date of appointment of the employees/teachers and the non-teaching Staff. In detail, we have discussed the conduct of respondent no.4 and its haste in filling up the vacancies. We find that the petitioners are innocent and were unaware of the required procedure of Law in appointing the Staff. It would be thus inequitable and unjustifiable to put the petitioners,

who are eligible by all means, including the exceptions in Government Resolution dated 16.10.2012, out of bread. The petitioners have been serving since 2016, 2017, and 2019. The petitioners who are competent by all means may lose their job prospects either by overage or by qualification.

42. On the above premise, it is to be considered whether the Court may exercise its discretionary jurisdiction under the principle of equity in their favour. He who comes into the equity must come with clean hands and is entitled to claim the equity. The doctrine of equity relates to the past conduct of the parties. It must be established that the party claiming equity must have been involved in an equitable act himself in the past. If such a person is involved in fraud or misrepresentation with respective cases, then he may not demand equity. Such a person must be fair and must come with clean hands. We observed that the petitioners are not involved in the illegalities committed by respondent no.4 nor played any fraud or misrepresentation in securing the job. Hence, we are of the opinion that the petitioners who are within the exception to the Government Resolution dated 16.10.2012 and 02.05.2012 are entitled to approval.

43. We have discussed above the effect of granting approval that shifts the financial burden on the Government Exchequer. The Government Exchequer should not be burdened for the wrongs

committed by others. Respondent no. 4 was aware of the entire procedure of the appointment of the Staff and was also knowing its consequences; still, it kept the petitioners in the dark and might have shown them dreams of getting the approval and regular salary. The petitioners might have given their services on the belief and representation made by respondent no.4. The Law is settled that every worker must get for the work done for the employer. The statutory right of the remuneration shall not be brushed aside.

44. The learned A. G. P has objected that the petitioners have an alternate efficacious remedy as provided in the Government Resolution dated 03.10.2017. To counter the objection, the learned counsel for the Petitioner vehemently replied that the said Government Resolution is on the different footings and has no application in the fact situation of the present case. He relied on the case of Swati ***Shivaji Lawhare Vs State of Maharashtra and others, a Writ petition No. 940/2018*** decided by the Bench of this Court at Aurangabad Bench on 07.05.2021. The government Resolution dated 03.10.2017, speaks of the various remedies of appeals and revisions against the grievance relating to the roster/appointments / personal approvals, promotion, A.C.Ps, compassionate appointments, grade pay, selection grade pay, seniority, backlog etc. of teachers. The Division Bench of this Court, in the case of Swati, cited supra, after the elaborate discussion, held that by executive orders, no

adjudicatory authorities can be created. It cannot be said the remedy is available under the said Government resolution. The constitution of these appellate authorities is not by statute but by executive power by passing a resolution which is not permissible in view of the judgement of the Hon'ble Apex Court in the case of ***Secretary A.P.D. Jain Pathshala Vs. Shivaji Bhagwat More and Others; (2011) 13 S.C.C. 99.*** The A.G.P did not point out any contrary view taken by the Bench of this Court or the Hon'ble Apex Court. The case of Swati cited supra is squarely applicable to the case at hand. Hence, the objection raised by the learned A.G.P. on alternate efficacious remedies is discarded.

45. In the aforesaid fact, we are of the opinion that the petitioners who have been entitled to be appointed as excepted in Government Resolution dated 16.10.2012 and 02.05.2012 shall be given approval. However, the petitioners who do not fulfil the appointment criteria excepted in the above Government Resolutions shall not be entitled to the approval. However, they are entitled to continue their services with respondent no.4 with liability to pay the arrears and future salaries till they are in service.

46. For the reasons above, we pass the following order:

ORDER

- 1) The impugned communications in Writ Petition Nos. 7736 of 2018, 7789 of 2018, and 10324 of 2019 are partly quashed and set aside.

- 2) The impugned communication in Writ Petition No. 7768 of 2018 is quashed and set aside.
- 3) The impugned communications in Writ Petition No. 10204 of 2019 and 10234 of 2019 are confirmed.
- 4) The petitioners in Writ Petition No. 7736 of 2018 namely Gajanan Maroti Meharkar, Giteshwar Parshuram More and Ranjit Baburao Honwadikar, the petitioners in Writ Petition No. 7768 of 2018 namely Megha Pralhadrao Kadam, the Petitioner in Writ Petition No. 7789 of 2018 namely Laxman Raosaheb Hake, the petitioners in Writ Petition No. 10234 of 2019 namely Anil Sayasrao Gutte and Manohar Gangaram Jadhav are entitled to the grant of approval to their appointments from the date of their appointments.
- 5) Respondent no.3 is directed to grant the approvals to the appointments of the above petitioners within one month from the receipt of this order.
- 6) Petitioner in Writ Petition No. 7736 of 2018, namely Ramakant Kondiaba Davkare, the Petitioner in Writ Petition No. 7789 of 2018, namely Rajkumar Shivajirao Kadam, Petitioner in Writ Petition No. 10204 of 2019, namely Sharda Jaiwantrao Kale, Petitioner in Writ Petition No. 10234 of 2019, namely Madhav Babarao Kawthekar and Petitioner in Writ Petition No. 10324 of 2019, namely Satyashila Avinash Panpatte are not entitled to the approval to their appointment by respondent no.3. However, they are entitled to continue

their services with respondent no.4 at their choice with the salary as per the Law until they are in service.

- 7) Respondent no.4 is directed to pay the arrears of salaries of all the petitioners from the date of their appointment as per the pay scale applicable to them till the date of approval who have granted approval and do pay the entire arrears of salaries till date, to the petitioners who are not entitled to get the approval and shall pay them the salary as per pay scale until they are in service.
- 8) Respondent no. 4 is directed to pay the arrears of salaries to all the petitioners within one month from the date of this order.
- 9) All the petitions are partly allowed. Rule is made partly absolute in all petitions.
- 10) Respondent no.4 shall bear the costs of petitioners.

(S.G. MEHARE J.)

(R.D. DHANUKA, J.)

Mujaheed//