

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7128 OF 2022**

Rakesh Subhash Sonawane & Anr. ...Petitioners
V/s.
The State of Maharashtra & Ors. ...Respondents

Mr. Jayendra Khairnar for Petitioners.
Mr. A.P. Vanarase, AGP for Respondent Nos. 1 and 2 -State.
Mr. Ashwin Kapadnis a/w Mr. Vivek Rane for Respondent No. 3.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 21st JULY, 2022**

P.C. :

1. Heard Mr. Jayendra Khairnar, learned counsel appearing for the Petitioners, Mr. Ashwin Kapadnis along with Mr. Vivek Rane, learned counsel appearing for Respondent No. 3 and Mr. A.P. Vanarase, learned AGP for Respondent Nos. 1 and 2.

2. By the present petition, the Petitioners are challenging order dated 22nd September 2020 passed by Respondent No.3- Education Officer (Primary), Zilla Parishad, Nashik. By the said order, Respondent No. 3 refused to grant approval to the appointment of Petitioner No.1 in the Petitioner No. 2-School on the post of 'Peon'. The impugned order has been passed on the ground that there was no approved staffing pattern at the relevant time.

3. Mr. Jayendra Khairnar, learned counsel for the Petitioners submitted that the Petitioner has been appointed on the post of Peon after following due process of law. He submitted that the School has issued an advertisement on 13th December 2011. He submitted that about 9 (nine) candidates applied and they were interviewed and the Petitioner was appointed by appointment letter dated 31st January 2012 as Peon w.e.f. 1st February 2012. He submitted that the approval proposal was submitted to Respondent No. 3 on 30th October 2013, which clearly specifies that the appointment is in the clear vacancy in view of superannuation of the earlier employee. He submitted that the said proposal dated 30th October 2013 was not decided for more than 7 years and therefore, the Petitioner was constrained to file Writ Petition No. LD-VC-AS-SJ-WP No. 85 of 2020 and this Court by order dated 11th August 2020 directed Respondent No. 3 to decide said proposal within a period of six weeks. Thereafter the impugned order was passed on 22nd September 2020 on the ground that the roaster/ staffing pattern was not finalised and therefore no appointment could be made.

4. He relied on following judgments of this Court :

- (i) Vikram Vilas Mane V. State of Maharashtra & Ors.
2021 (1) Maharashtra Law Journal, 552

- (ii) Shri. Gajanan Shahu Keripale V. The State of Maharashtra & Ors.
2020 (4) ALL MR 501.
- (iii) Miraj Vidya Samiti & Anr. Vs. State of Maharashtra & Anr.
2021 (1) Maharashtra Law Journal, 293.
- (iv) Vidarbha Youth Welfare Society V. State of Maharashtra & Ors, 2022 (4) Maharashtra Law Journal, 69
- (v) Smt. Munoli Rajashri Karabasappa V. State of Maharashtra through Secretary & Ors., reported in (2017) SCC Online Bom 10130.

5. On the other hand, Mr. Kapadnis, learned counsel appearing for Respondent No.3 submitted that there was ban for recruitment and appointment of Class-III and Class-IV employees by Government Resolution dated 5th June 2010. The said ban was in operation till 31st December 2011. He submitted that thereafter again the ban was extended for one more year i.e. academic year 2011-2012 and therefore the approval could not be granted as the Petitioner's appointment is during the said period of ban. He submitted that the School authorities have not got approved the roaster and therefore it cannot be said that the appointment is on clear vacancy. He submitted that the School authorities have not taken prior permission of competent authority to publish an advertisement for filling up post of Peon in the School. He therefore submitted that no interference is required in the impugned order.

6. The factual position on record clearly shows that the Petitioner No. 2- School initiated the recruitment process for appointing Peon, in view of clear vacancy, as the earlier employee has retired. The Petitioners have produced on pages 28 and 29 the approval to the staffing pattern for the academic years 2011-2012 and 2012-2013. The same clearly shows that one post of Peon is approved. It appears that the said advertisement was issued in view of clear vacancy on 13th December 2011 and the said advertisement is produced at page 48.

7. Pursuant to the said advertisement, nine candidates have applied and their interviews were held on 29th December 2011. The marks given to the individual candidates out of 50 were produced in tabular form on pages 52 and 53 and accordingly the Selection Committee of the School selected the Petitioner to the post of Peon. The said minutes of meeting dated 31st December 2011 are found at page 54. In the said minutes, it is specifically mentioned that the earlier employee working as Peon namely Shri Manohar Chindhu Shimpi has superannuated and therefore, it was necessary to appoint the Peon in his place. Thus, it is clear that the appointment was made on a clear vacancy. The School submitted the proposal on 30th October 2013 for approval to the post of the Petitioner No. 1 as Peon. As set out hereinabove, said proposal

was not decided for more than seven years and therefore the Petitioners were constrained to file Writ Petition and this Court directed Respondent No. 3 to decide the said proposal within time bound manner.

8. Thus, it is clear that the impugned order passed on the ground that the Petitioner's appointment cannot be approved as at that time the staffing pattern was not approved, is not correct. In fact, the staffing pattern was approved and the same has been produced at pages 28 and 29 of the Petition.

9. As far as the contention that there was ban during the relevant period, Mr. Khairnar relied on the judgment in the case of *Smt. Munoli Rajashri Karabasappa* (supra). The relevant paragraphs of the said judgment i.e. paragraphs 4 to 7 are reproduced hereinbelow for ready reference :

4" No doubt that, vide GR dated 2nd May 2012, the State has imposed a ban on recruitment of Assistant Teacher till there is 100% absorption of the surplus teachers. However, it is to be noted that vide subsequent GR dated 4th September 2013 itself, the ban has been relaxed in so far as subjects of English, Maths and Science are concerned.

5. The Division Bench of this Court in the cases of Sou. Revati Kusha Wagh & Anr. Vs. The State of

Maharashtra & Anr. has also taken a view that ban would not be applicable wherein the appointments are made so as to fulfil the backlog of backward class candidates.

6. We find that if the Education Officers do not send the surplus teachers within reasonable time, the schools can not be expected to run without teachers for years together. Undisputedly, finding it difficult to send surplus teachers for the subjects of English, Maths and Science, the State Government itself has relaxed the rigour of government resolution dated 2nd May 2012 vide GR dated 4th September 2013. It could further be seen that State Government also vide that GR relaxed the ban where the selection process has already commenced on 6th September 2012.
7. In that view of the matter, we find that in view of subsequent GRs and in view of the view taken by Division Bench of this Court, the ban would not be applicable to three categories, one where the recruitment process is already commenced prior to GR dated 2nd May 2012, second, in so far as the appointment made for the subjects of English, Maths and Science are concerned and third, where the recruitment is made to fulfil the backlog of reserved category candidates."

In the said judgment, it has been clarified that although there is a ban imposed by the State Government, where the recruitment process is already commenced prior to GR dated 2nd May 2012, the ban would not be applicable to such category of cases. In the present case, as

advertisement was issued on 13th December 2011, the ban will not apply. It is also significant to note that this is not the reason given in the impugned order and therefore the same cannot be taken into consideration.

10. Mr. Khairnar also relied on the judgment in the matter of *Gajanan Shahu Keripale* (supra), wherein it has been held that if a person is appointed after following due process of law and satisfactory completed probation period, then the Education Officer should not refuse the approval.

11. Mr. Khairnar also submits that in the impugned order only reason given for rejection is that the staffing pattern was not finalised and however, in the affidavit-in-reply, the contention is raised that during the said period there was ban on appointment of Class-III and Class-IV employees. He submitted that it is settled position of law that legality and validity of an order impugned before this Court should be considered on the basis of reasons assigned in the impugned order. He therefore submitted that Respondent No.3 cannot go behind the reasons given in the impugned order. To substantiate this contention, he relied on para 15 of the judgment reported in *Vikram Vilas Mane* (supra). Mr. Khairnar is right in contending that the reasons which are not

mentioned in the impugned order cannot be taken into consideration at this stage after the proposal of 2013 is rejected after 7 years in 2020.

12. Mr. Khairnar is also right in relying on paragraph 18 of the judgment in the matter of *Vidarbha Youth Welfare Society and Anr. (supra)*. The said para 18 is reproduced hereinbelow for ready reference:

"18. The reading of Section 5 of the MEPS Act, does not indicate that the prior permission of the Education Officer is necessary to fill in a vacancy. What the proviso to Section 5(1) mandates is that in case of the Management intending to fill in a vacancy by appointment, before doing so, it shall ascertain from the Education Officer, whether there is any suitable person available on the list of surplus persons maintained by the Education Officer, for absorption in other schools and in case of such person being available, to appoint such person in such vacancy. The purpose behind this is obvious, to continue the employment of a person, who was already appointed by following the due process of law. This is an obligation, obviously upon the management and not upon the person who is appointed after due selection in a clear vacant post, and **thus such appointee cannot be penalised due to the default on part of the Management in this regard, more so, when such appointee, has been permitted to continue in employment for years together. That apart there is**

nothing on record to indicate that there was any failure on part of the petitioner/Management in regard to the requirement of the proviso to Section 5(1) of the MEPS Act and that the Education Officer on this count had initiated any action against the petitioner/Management. Had there been any such a failure, the Education Department would not have permitted the continuation of the respondent no.3, in all the petitions for years together. Vasant Shikshan Prasarak Mandal (supra) relied upon by Shri Bhuibhar, learned Counsel for the petitioners, therefore on facts would not be attracted. Chandrashekhar Anandraoji Rewatkar (supra) has been set aside by the Hon'ble Apex Court in SLP No.842-843 of 2017 decided on 23/1/2017 and is of no assistance to Shri Bhuibhar, learned Counsel for the petitioners."

(Emphasis added)

The reasoning given in said paragraph 18 is also squarely applicable to the present case.

13. In view of the above discussions, I pass the following order:

ORDER

(i) The impugned order dated 22nd September 2020 passed by Respondent No.3 is quashed and set aside.

(ii) Respondent No. 3 is directed to grant approval to the Petitioner

No. 1's appointment as Peon w.e.f. 1st February 2012 and the Respondents are directed to give all consequential and allied benefits thereof to Petitioner No.1 as applicable in accordance with law from the date of appointment i.e. 1st February 2012.

(iii) The Respondents to comply with this order within three months from today.

14. Writ Petition is disposed of in above terms with no order as to costs.

BHALCHANDRA
GOPAL DUSANE

(MADHAV J. JAMDAR, J.)

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