

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

WRIT PETITION NO.220 OF 2022

Suresh Eknath Kudalkar

Age : 35 Years, Occupation: Service,

R/o: A/P, Kudal, Indraprasthanagar,

Tal. Kudal, Dist. Sindhudurg.

..Petitioner

V/s.

1. The State of Maharashtra

Through the Secretary,

School Education Department,

Mantralaya, Mumbai - 400 032

2. The Commissioner of Education

School Education Department,

Maharashtra State, Pune

3. The Director of Education (Secondary)

Maharashtra State, Pune-1.

4. The Deputy Director of Education,

Kolhapur Region, Kolhapur, having

office at Somwar Peth, Hatti Mahal,

Ganji Galli, Kolhapur-416 002.

5. The Education Officer (Secondary),

Zilla Parishad, Sindhudurg,

Having office at Zilla Parishad

Building, Sindhudurg Nagari -Oros,

District: Sindhudurg.

6. Mangaon Panchkroshi Shikshan

Prasarak Mandal, Mangaon,

Tal. Kudal, Dist: Sindhudurg,

Through its President/Secretary.

7. Vasudevanand Saraswati Vidyalaya,
Mangaon, Taluka: Kudal,
District: Sindhudurg,
Through its Head Master

..Respondents

Mr. Prashant Bhavake for the Petitioner.

Mr. V. M. Mali, AGP for the Respondent-State.

**CORAM : SUNIL B. SHUKRE AND
G. A. SANAP, JJ.**

DATE : 4 MARCH 2022.

JUDGMENT (Per G. A. Sanap, J.)

In this writ petition the petitioner challenges the order dated 5/11/2019 passed by respondent No.4 Deputy Director of Education, Kolhapur, whereby respondent No.4 cancelled the individual approval granted by respondent No.5- Education Officer to the appointment of the petitioner as Shikshan Sevak.

2. It is the case of the petitioner that he belongs to Scheduled caste category. There was a vacancy of Shikshan Sevak in respondent No.7-School. The management of respondent No.6 therefore proposed to fill in that vacancy. Advertisement dated 19/6/2015 was published. After following due procedure the petitioner was appointed by order dated 6/7/2015 as

Shikshan Sevak for a period of 3 years from 6/7/2015 to 5/7/2018. The Headmaster of respondent No.7 submitted a proposal on 6/7/2015 to respondent No.5-Education Officer for granting approval to the appointment. Respondent No.5 vide order dated 1/9/2016 refused to accord approval to the individual appointment of the petitioner. The petitioner therefore filed Writ Petition No. 14194/2016 in this Court. This Court on 23/3/2017 allowed the Writ Petition and directed respondent No.5 Education Officer to grant approval to the appointment of the petitioner as Shikshan Sevak. On 7/3/2019 respondent No.5 Education Officer granted approval to the appointment of the petitioner. Respondent No.6 and 7 on 10/8/2021 submitted a proposal for allotment of Shalarth ID to the petitioner. In the meanwhile, one Mr. Akash Tambe made a complaint to respondent No.2 and raised general objection to the order granting approval to the appointment. The complaint was forwarded to respondent No.4. Respondent No.4 issued a show cause notice to the petitioner as well as to the respondent Nos.6 and 7 and called their explanation. Respondent No.4 vide order dated 5/11/2019 passed the impugned order and thereby cancelled the individual approval granted to the appointment of the petitioner. The petitioner is before this Court against this order.

3. Respondent Nos.1 and 2 have filed a reply and opposed the petition. According to the respondents appointment of the petitioner was not according to the procedure. In the Academic Year 2015-2016, total 23 posts of Assistant Teachers were sanctioned by Respondent No.7 Secondary School, whereas 34 teachers were working at the said school. There was no vacancy at the time of appointment of the petitioner. There was irregularity in granting approval to the appointment of the petitioner. Respondent No.4 after taking all the facts into consideration cancelled the approval granted to the appointment of the petitioner.

4. It is further stated that the decision taken by respondent No.4 to review or recall approval was pursuant to the guidelines contained in Government Resolution dated 23/8/2017. A show cause notice dated 20/8/2019 was issued. They submitted a reply. Respondent No.4 granted them an opportunity of hearing. After full fledged inquiry and hearing approval being found illegal, respondent No.4 was constrained to cancel the approval.

5. We have heard learned Advocate for the petitioner and learned AGP for respondent Nos.1 to 4. We have perused record and proceedings.

6. Learned Advocate for the petitioner submitted that the appointment of the petitioner as Shikshan Sevak was made by following due procedure provided under Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 and Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (hereinafter referred to as M.E.P.S Act and Rules). Learned Advocate further submitted that appointment was for a period of 3 years and on completion of period of 3 years the petitioner became confirmed employee. Learned Advocate further submitted that in view of the order passed by Division Bench of this Court in *Nadhwade Gram Vikas Mandal, Mumbai v. The State of Maharashtra in Writ Petition No.14194/2016 and connected Writ Petitions dated 23/3/2017*, the reopening of the issue of approval was not within jurisdiction of Respondent No.4. Learned Advocate took us through the order passed by Division Bench on 23/3/2017 and submitted that a specific direction was issued to the respondent No.5 to accord approval to the appointment of the petitioner as Shikshan Sevak. Learned Advocate further submitted that in the show cause notice grounds for cancellation of the approval were not mentioned. Petitioner and respondent Nos. 6 and 7 had not been granted an opportunity of proper hearing. Learned advocate further submitted that grounds sought to be relied upon to cancel approval have not been contemplated under the relevant Government Resolution.

7. Learned AGP submitted that the appointment was contrary to the provisions of M.E.P.S. Act and Rules, inasmuch as on the date of appointment of the Petitioner there was no clear vacancy. Learned AGP further submitted that approval accorded by respondent No.5 after decision of the Division Bench of this Court was not consistent with the directions issued by this Court. In the submission of learned AGP, illegal appointment cannot be regularized on the basis of such approval. Learned AGP further submitted that respondent No.4 on the basis of material on record was justified in cancelling the approval.

8. In order to appreciate the rival submissions, we have minutely perused the record and proceedings. Undisputedly, the petitioner belongs to Scheduled Caste category. The caste validity certificate is at page 35. It is the case of the petitioner that on retirement of Mr. R.Y. Patil, Assistant Teacher on 31/5/2015 one post of Shikshan Sevak fell vacant and therefore in his place he was appointed to teach English subject. A photo copy of the advertisement dated 19/6/2015 is at Exhibit D. Perusal of the same shows that the post of Shikshan Sevak for teaching English subject was advertised. The school committee after following due procedure vide order dated 6/7/2015 appointed the petitioner as Shikshan Sevak for a period of 3 years from 6/7/2015 to 5/7/2018. In view of the provisions of Section 5(2A) of M.E.P.S. Act the petitioner was appointed on probation for a period of 3

years and the petitioner successfully completed the probationary period. Approval was initially refused on 1/9/2016 by Respondent No.5. It is not disputed that the petitioner was constrained to file Writ Petition No.14194/2016. In the said Writ Petition, the prayer made by the petitioner was allowed and Respondent No.5 was directed to accord approval to the appointment of the petitioner. Pursuant to the directions issued by Division Bench of this Court, respondent No.5 accorded approval to the appointment of the petitioner as Shikshan Sevak. On 16/5/2019 proposal was submitted to respondent No.5 for including the name of the Petitioner in Shalarth system. Respondent No.5 forwarded the same to respondent No.4 with necessary documents. Respondent No.4 vide order dated 5/11/2019 cancelled the approval granted to the petitioner on the ground that on the date of appointment, post of Shikshan Sevak was not vacant and therefore there was gross irregularity in the appointment of the petitioner.

9. It is pertinent to note that at the time the order dated 5/11/2019 the petitioner had successfully completed the probationary period of 3 years. It therefore goes without saying that the petitioner became permanent employee of the school. It is further pertinent to note that all other aspects including the aspect of availability of vacancy on the date of appointment of the petitioner was the subject matter of consideration in Writ Petition

No.14194/2016 filed by the petitioner. After considering all these aspects the direction was issued to respondent No.5 to accord approval to the appointment of the petitioner. In our view therefore it was not open either to respondent No.5 to refuse approval or respondent No.4 to cancel approval accorded pursuant to the order of this Court. On this count the order passed by respondent No.4 cannot be sustained.

10. It is further pertinent to note that on receipt of the proposal for including the name of the petitioner in the Shalarth system, respondent No.4 issued a show cause notice dated 20/8/2019. The show cause notice is conspicuously silent about the reason or the ground for cancellation of the approval. It has not been stated in the notice that any fraud or misrepresentation or suppression of fact was involved in the matter and therefore, the approval was required to be cancelled. Perusal of the order passed by respondent No.4 would show that irregularity sought to be relied upon to cancel approval is that there was no vacancy on the date of appointment. In our view since this issue was gone into by this Court and decided in favour of the petitioner it was not open to respondent No.4 to make it a ground for review. It is settled legal position that the power of review cannot be used arbitrarily. In order to invoke the power of review it must be established that either the petitioner or respondent Nos.6 or 7 were guilty of fraud, misrepresentation or suppression of facts.

These grounds can equally be made applicable to the officials of the Department where there is allegation of connivance. In order to invoke the ground of fraud or misrepresentation or suppression of fact reference to the same must be made in the show cause notice and the party whose rights are sought to be taken away must be given a reasonable opportunity of dealing with the same. In this case the ground of fraud or misrepresentation or suppression of fact has not been invoked. In our view therefore relying upon the Government Resolution dated 23/8/2017 for the reason and ground stated in the impugned order the approval could not be revoked/cancelled. The issue involved in this case has been squarely covered in the case of *Ansari Amina Muzhar Ali vs. The State of Maharashtra and Ors. in Writ Petition No.1380/2019 dated 30/3/2020*.

11. In view of the above we are of the opinion that the impugned order if tested on the above touchstone fails to pass it and as such is required to be set aside. Hence following order:

ORDER

1. The Petition is allowed.
2. The order dated 5/11/2019 passed by Respondent No.5-Deputy Director of Education is quashed and set aside.
3. Respondents No.4 and 7 are directed to forthwith

restore the individual approval granted to the appointment of the Petitioner on the post of Shikshan Sevak.

4. The name of the Petitioner be entered into Shalarth system by giving him I.D and salary/arrears of the Petitioner be paid within a period of three weeks from the date of production of this order.

5. Rule is made absolute in the above terms.

6. No costs.

(G. A. SANAP, J.)

(SUNIL B. SHUKRE, J.)