

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.219 OF 2022

Pandurang Narayan Kanekar	]	
Age: 42 years, Occupation : Service,	]	
R/o. A/p. Kankavali, Bandhkarwadi,	]	
Near School No.2, Matruchaya Chawl,	]	
Tal. Kankavali, Dist. Sindhudurg.	]	Petitioner

Vs.

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| 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. |] | |

5. The Education Officer (Secondary)]
Zilla Parishad, Sindhudurg,]
Having Office at, Zilla Parishad]
Building, Sindhudurg, Nagari-Oros]
District – Sindhudurg.]
6. Talere Panchkroshi Shikshan]
Prasarak Mandal, Mumbai,]
Having office at Varun Apartment]
Ground Floor, Dr. Ambedkar Marg]
Parel, Mumbai – 400 012.]
Through its President/Secretary.]
7. Wamanrao Mahadik Madhyamik]
Vidyalaya, Talere, Tal. Kankavali,]
District: Sindhudurg,]
Through its Headmaster.] Respondents

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Mr. Prashant Bhavake, for Petitioner.

Mr. V.M. Mali, A.G.P, for Respondent-State.

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CORAM : SUNIL B. SHUKRE AND

G.A. SANAP, JJ.

DATE : 4th MARCH, 2022.

JUDGMENT: [Per G.A. Sanap, J.]:

1. The petitioner has challenged the order dated 5th November, 2019 passed by respondent No.4 – The Deputy Director of

Education, Kolhapur Region, Kolhapur, whereby, Deputy Director cancelled the approval granted by respondent No.5 – The Education Officer (Secondary) Zilla Parishad Sindhudurg to the appointment of the petitioner as “*Shikshan Sevak*” on respondent No.7 – Wamanrao Mahadik Madhyamik Vidyalaya, Talere, Taluka – Kankavali managed by respondent No.6.

2. It is the case of the petitioner that vide order dated 21st August, 2012, he was appointed as “*Shikshan Sevak*” by respondent No.6 by following due procedure as provided under The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short “M.E.PS Act”) and The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Rules, 1981 (for short “M.E.PS Rules”). Before starting the appointment process, respondent No.6 sought an approval of a staff schedule for the academic year 2011-2012. The approval was accorded. An advertisement as required by law was published in the local newspaper. A communication was also made with the office of Employment Exchange on 5th August, 2012. In response to the advertisement, number of candidates applied for the posts. Interviews were conducted. The School committee ultimately vide

Resolution dated 21st August, 2012 decided to appoint the petitioner as “*Shikshan Sevak*” for three years. Accordingly, appointment order dated 21st August, 2012 was issued. Headmaster of respondent No.7-School submitted proposal for individual approval to the appointment of the petitioner on the post of “*Shikshan Sevak*”. The application was not processed in time, therefore, in the writ petition filed by the petitioner bearing No.6970 of 2015 vide order dated 28th July, 2015, directions were given by this Court for deciding the proposal for approval expeditiously. Respondent No.5 thereafter granted an approval for appointment of the petitioner on unaided post. The petitioner in view of this approval again filed a writ petition in this Court bearing No.5888 of 2016. This Court vide order dated 26th July, 2016 issued directions to respondent No.5 to decide the proposal submitted by the Headmaster of respondent No.7-School. Accordingly, respondent No.5 granted approval to the appointment of the petitioner on aided post.

3. Headmaster of respondent No.7 – School thereafter submitted a proposal for allotting Shalarth-ID to the petitioner. This proposal was not processed in time. In the meantime, one

Akash Tambe made a complaint to respondent No.2 dated 30th May, 2019 alleging that appointment of the petitioner was not legal inasmuch as on the date of the appointment of the petitioner, there was backlog and without filling the backlog, the appointment of the petitioner was made giving go bye to the mandate of law. Pursuant to this complaint, a show cause notice dated 20th August, 2019 was issued by respondent No.4. After hearing the petitioner and the management, respondent No.4, as stated above, vide order dated 5th November, 2019 cancelled the approval granted to the appointment of the petitioner made on the post of “*Shikshan Sevak*”. Being aggrieved by this order, the petitioner is before this Court.

4. Respondents No.1 to 4 filed reply and opposed the petition. In sum and substance, respondents No.1 to 4 justified the reasons recorded by respondent No.4 while cancelling approval to the appointment of the petitioner. It is the case of respondents No.1 to 4 that on the basis of the complaint made by Akash Tambe, the Secretary of Castes and Tribes Education Association, Sindhudurg, inquiry was warranted. A show cause notice was issued. Scrutiny made by respondent No.5 revealed that at the relevant time no

vacant post of trained under graduate category was available. Backlog of the reserve category was not filled. There was an irregularity in granting approval to the appointment of the petitioner. It is stated that as the appointment was illegal since it's inception, the subsequent approval could not have been granted to the same.

5. We have heard Mr. Bhavake, learned Counsel for the petitioner and Mr. Mali, learned A.G.P for respondents No.1 to 4. We have perused the record and proceedings.

6. Mr. Bhavake, learned Counsel for the petitioner submitted that the procedure required under section 5 of the M.E.PS Act and under Rule-9 of the M.E.PS Rules was strictly followed before appointing the petitioner. Learned Counsel took us through the documentary evidence produced on record and submitted that on the date of the appointment of the petitioner, two posts in the open category were lying vacant and, therefore, there was no question of irregularity on the part of respondent No.6 in not taking into account backlog of the reserve category candidates. Learned Counsel submitted that the appointment was for a period

of three years and on completion of a period of three years, the petitioner became a deemed confirmed employee. Learned Counsel further submitted that show cause notice issued on 20th August, 2019 does not mention any ground for initiation of the process for cancellation of his appointment and, therefore, it proved to be a handicap in the way of the petitioner to deal with the same specifically. There is no mention in the show cause notice that on the date of the appointment of the petitioner on the post of “*Shikshan Sevak*”, there was a backlog of the reserved category candidate and as such his appointment made on reserve category post was illegal. Mr. Bhavake, learned Counsel submitted that in the final order dated 5th November, 2019, the main ground relied upon to cancel approval to the appointment of the petitioner is that there was no transparency in the recruitment process inasmuch as his appointment was made without considering roster of the reserve category candidate. Learned Counsel submitted that the order passed by respondent No.4 is not sustainable and the same deserves to be set aside.

7. On the other hand, Mr. Mali, learned A.G.P submitted that during the course of inquiry, after show cause notice, the petitioner

and respondent No.6 had placed on record their side of the story. They were made aware of the scope of the inquiry. Learned A.G.P submitted that approval granted by respondent No.5, without considering the facts recorded in the order passed by respondent No.4, could not validate the illegal appointment of the petitioner. In short, learned A.G.P supported the order passed by respondent No.4.

8. In order to appreciate the rival submissions, we have minutely perused the record and proceeding. Certain relevant facts having bearing with the question involved in this petition need to be stated. Exhibit B is the approved staff schedule of respondent No.7-School for the academic year 2011-2012 by respondent No.5. Exhibit D is the copy of the list of teachers working in the academic year 2012-2013 at respondent No.7 – School. Perusal of the same would show that 14 staff members were working at the relevant time. Exhibit E dated 25th January, 2012 is the proposal of Assistant Teacher in advance for his pension. He was to retire on 31st May, 2012. It is, therefore, seen that on 31st May, 2012, one post became vacant. Appointment of the petitioner is dated 22nd August, 2012. Exhibit F is the copy of

roster of the reserve category, verified by the Backward Class Cell dated 12th June, 2012. A perusal of the same would show that as per the approved staff schedule, 7 backward class candidates were working in the school. 8 posts were meant for open category. This chart would show that two posts of open category were vacant. It is, therefore, seen that before initiation of the process for recruitment of the petitioner, necessary verification of the roster was made by respondents No.6 and 7 through Backward Class Cell. Exhibit G is the application submitted by the Headmaster of respondent No.7 to the office of respondent No.5-Education Officer seeking permission to issue advertisement.

9. It is the case of the petitioner that permission was not granted within time. Therefore, advertisement dated 1st August, 2012 was published. Advertisement is at Exhibit H. A perusal of this advertisement would show that two vacancies of *Shikshan Sevak* from the open category were advertised. A perusal of the document at Exhibit I dated 5th August, 2012 would show that the Headmaster of respondent No.7 had made a request to the Employment Exchange Officer for forwarding list of eligible candidates for recruitment. This document was duly acknowledged

by the office of the Employment Exchange. The request letter dated 5th July, 2012 for publication of the advertisement was personally delivered on 16th July, 2012.

10. A perusal of Exhibit J would show that near about 28 candidates applied for the post. Interviews were conducted. Management of respondent No.7 – School deliberated on the suitability of the candidates and selected the petitioner. The School Committee vide resolution dated 21st August, 2012 resolved to appoint the petitioner for a period of three years. The resolution is at Exhibit L. Exhibit M is the copy of the appointment order. The conditions, *inter alia*, mentioned in the appointment order contained a clause of duration of the appointment. The appointment was from 22nd August, 2012 to 21st August, 2015 for a period of three years.

11. After issuance of the appointment letter, proposal for according the approval to the appointment of the petitioner was forwarded to respondent No.5 by the Headmaster of respondent No.7 – School. Before proceeding to deal with the aspect of approval and subsequent cancellation of the approval, it would be

appropriate at this stage to consider relevant provisions for the purpose of appreciation of the submissions advanced by the learned Counsel that the appointment of the petitioner was made by following procedure provided in M.E.PS Act and M.E.PS Rules.

12. Section 5 of the M.E.PS Act provides for the obligation of the management of the private schools. Sub-section (1) provides that every permanent vacancy in a private school by the appointment of a person duly qualified must be filled in expeditiously. Sub-section(2) provides for appointment to fill up permanent vacancy. Sub-section (2A) provides for appointment of *Shikshan Sevak* (now Assistant Teacher (Probationary)). It provides that such appointment shall be on probation period of three years. It further provides that on completion of the probationary period of three years, *Shikshan Sevak* – Assistant Teacher (Probationary) by deeming fiction has to be treated as confirmed teacher. Rule-9 of the M.E.PS Rules lays down the procedure for such appointment. The School committee as per Rule-9 is mandated to issue an advertisement for appointment of teacher. Particulars of the advertisement must be in consonance with sub section 2-A. It also provides that the vacancies shall also be informed to the

Employment Exchange Center of the District and the District Social Welfare Officer. Rule-9, sub-rule-7 provides for the percentage of the teaching and non teaching persons belonging to the backward class. It provides for 52% reservation. Sub rules (8) and (9) provide a mechanism for filling up all the reserved category posts. It categorically provides that on the reserve category post, open category candidate cannot be appointed.

13. The main ground stated in the order of cancellation of the appointment is that as per the roster posts reserved for backward class candidates were not filled up and in the school staff the post of *Shikshan Sevak* was not sanctioned. In our opinion, this order cannot be sustained for two reasons. First, appointment of the petitioner was made by respondent No.6 by following the procedure as laid down under Rule-9 of the M.E.P.S. Rules and second, the show cause notice is bereft of the required particulars and more particularly, the ground on which the approval has ultimately been cancelled. It is pertinent to note that as per the provisions of section 5, sub section (2A), the order passed by respondent No.4 cannot be sustained. Appointment order was admittedly for a period of three years. Approval was granted to the

said appointment. Even if it is assumed for the sake of argument that there was no approval, in our opinion, it would not stand in the way of the petitioner because as provided under Section-5, sub section (2A) on completion of the probation period of three years, the petitioner became a permanent teacher. As can be seen from the record, two posts from the open category were vacant. Even if it is assumed for the sake of argument that there was a backlog of one reserve category candidate, the petitioner was rightly appointed on the open category post. In the background of these facts and the provisions of section 5 of the M.E.PS Act and Rule-9 of the M.E.PS Rules, it was incumbent upon respondent No.4 to specifically set out the relevant ground in the show cause notice. It was also incumbent upon him to record concrete finding based on the facts and applicable law as above and then form an opinion vis-a-vis illegality or otherwise of the appointment of the petitioner. It is seen that the show cause notice is bereft of the above particulars. Similarly, the order passed by respondent No.4 on this point is as vague as the vagueness could be. In our view, therefore, in the teeth of the above stated facts, a deemed confirmed employee cannot be dislodged from his position on the basis of such order.

14. It is seen that in order to support the decision, reliance has been placed on the Government Resolution dated 23rd August, 2017. The said Government Resolution came to be issued after considering judgment of this Court delivered on 1st August, 2017 in Writ Petition No.10133 of 2016. This Government Resolution fell for consideration of this Court in the case of **Ansari Amina Muzhar aLI Vs. State of Maharashtra and others in Writ Petition No.1380 of 2019 and in the connected matters**. This decision was considered by this Court again in **Writ Petition No.1491 of 2021 in the case of Bhushan Vikas Gawad Vs. State of Maharashtra** with other connected Writ Petitions. It is to be noted that the powers of review as per the Government Resolution cannot be used arbitrarily and in unjust manner. The power of reconsideration or review of the appointment and the subsequent approval can be done in a limited circumstances. The circumstances are, therefore, required to be spelt out in the show cause notice. The main circumstances are fraud or misrepresentation or suppression of the material fact in the process of the appointment as well as in the process of according approval. In case of fraud, misrepresentation and suppression, relevant facts are required to be spelt out in the show cause notice. The fraud, misrepresentation or suppression of

facts can be attributed to the teacher, management and to the authorities as well. In some cases, possibility of collusion cannot be ruled out. In our opinion, therefore, before reconsidering or taking review of decision, the relevant grounds must be specifically stated. In our opinion, on proof of fraud, misrepresentation, collusion or suppression of material facts, the review may be permissible. It is cardinal rule of law that the accrued benefits cannot be taken away without giving concerned person reasonable opportunity of hearing and to defend the specific allegations against him.

15. In this case, a perusal of the show cause notice would show that there is no statement in the said show cause notice attributing any fraud or misrepresentation or collusion or suppression in the entire process to the petitioner and respondents No.6 and 7. Similarly, the ground on which the review order cancelling the approval has been passed was also not stated in the notice. In our view, therefore, in the backdrop of the facts and the applicable law, this action on the part of the respondent No.5 was not justifiable. The action is in violation of the principles of law as well as the principles of natural justice. In our view, therefore, the

case of the petitioner would be squarely covered by the above decisions i.e **Ansari Amina Muzhar Ali and Bhushan Vikas Gawad** (supra). In our view, therefore, the petition deserves to be allowed. The submissions advanced by the learned A.G.P cannot be accepted. Hence, the following order.

: ORDER :

1. The petition is allowed.
2. The impugned order dated 5th November, 2019 passed by respondent No.4 – 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.]