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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1841 OF 2019

RACHANA TUSHAR PATIL,
Aged 39 yrs, Occ: Service, R/at 20,
Churchgate Mansion, A Road, Churchgate,
Mumbai 400 020.

...Petitioner

~ VERSUS ~

- 1. THE STATE MAHARASHTRA,**
Through the Secretary,
School Education Department,
Mantralaya, Mumbai 400 032.
- 2. THE EDUCATION INSPECTOR,**
Greater Mumbai, Western Region,
Having Office at Jogeshwari (E),
Mumbai 400 060.
- 3. RATNAGIRI MARATHA DNYATI
SAMAJ,**
Mumbai, Jogeshwari (E),
Mumbai 400 060,
Through its Chairman/Secretary.
- 4. BAL VIKAS VIDYAMANDIR,**
Sanghwadi, Jogeshwari (E),
Mumbai 400 060,
Through its Head Master.

...Respondents

APPEARANCES

FOR THE PETITIONER **Mr NV Bandiwadekar, Senior**
 Advocate, with Vinayak
 Kumbhar, i/b AN
 Bandiwadekar.

FOR THE **Ms PN Diwan, AGP.**
RESPONDENTS No. 1 &
2-STATE

FOR RESPONDENTS
No. 3 & 4.

Mr Sagar Ghogre, with Anita Patil,
i/b Sandeep Ghogare.

**CORAM : G.S.Patel &
Neela Gokhale, JJ.**

RESERVED ON : 24th March 2023
PRONOUNCED ON : 3rd April 2023

JUDGMENT (Per Neela Gokhale, J):-

1. **Rule.** The Respondents have filed their Affidavits in Reply. By consent, Rule made returnable forthwith.
2. The 1st Respondent is the Education Department of the State of Maharashtra and the 2nd Respondent is the Education Officer of the Western Region. The 3rd Respondent is the Institution that runs the 4th Respondent school.
3. The Petitioner assails an order dated 17th July 2018 issued by the 2nd Respondent, the Education Inspector, Greater Mumbai,

Western Region, refusing approval to the appointment of the Petitioner as '*Shikshan Sevak*' in the 4th Respondent school. She has also sought a direction to the 2nd Respondent to grant further approval as Full Time Assistant Teacher in the related pay scale with effect from 16th June 2017 and to release grant-in-aid for monthly honorarium for three years and thereafter monthly salary in pay scale, together with arrears.

4. Respondents No. 1 and 2 have contested the Petitioner's claim primarily on the ground that the post has been filled without there being a vacancy in the OBC category. Additionally, the State has also pointed out various deficiencies in the proposal submitted by the Management for approval of her post. Respondents No. 3 and 4 have supported the Petitioner.

5. FACTUAL MATRIX

- i. The Petitioner belongs to the Hindu Kunbi Caste (OBC category). According to the Petitioner, she has completed her M.A (English) and B.Ed. (English).
- ii. Responding to an advertisement dated 22nd March 2014 issued by the 3rd Respondent in the daily newspaper 'Maharashtra Times' inviting applications having qualifications of B.A and B.Ed. with reservations for SBC, NT(D) and OBC, the Petitioner

applied for the post of an English Teacher. The selection committee interviewed her and other candidates and recommended her name for appointment to the said post. Accordingly, the Petitioner was appointed as '*Shikshan Sevak*' for three years i.e. from 16th June 2014 to 15th June 2017. The school committee approved her appointment in its meeting and the Petitioner submitted her joining report.

- iii. Despite various communications made by the Management with the Education Inspector for grant of approval to the appointment of the Petitioner, there was no approval forthcoming and eventually, by letter dated 17th July 2018, the Education Inspector conveyed his refusal to grant approval to the Petitioner's appointment as '*Shikshan Sevak*' citing various deficiencies in the proposal submitted by the Management in that regard. It is this communication which has been impugned by the Petitioner by way of the present Petition.

6. SUBMISSIONS OF THE PETITIONER

- i. Mr Bandiwadekar, learned Senior Counsel appearing for the Petitioner, contends that vacancies were created in the 4th Respondent school due to retirement of teachers namely, Mrs. Madhuri Lahane (B.A., B.Ed.),

Mrs Sunanda Raut (B.A., B.Ed.) and thereafter Smt. Janhavi Tawade (M.A., B. Ed.). The Management had sought NOC from the 2nd Respondent to fill up the available vacancies for NT(D), SBC and Open category, by letters dated 21st February 2013, 25th October 2013 and 4th January 2014 respectively. The 2nd Respondent has granted the required 'no objections' by letter dated 20th October 2013 to fill up three vacancies out of which two were for English subject. According to the Petitioner, her appointment has been made in the vacancy which became available due to the retirement of another teacher namely Smt Janhavi Tawade.

- ii. The Petitioner contends that she applied for the post from the OBC category, was interviewed by the Selection Committee and pursuant to its recommendation was appointed on the post of English Teacher as '*Shikshan Sevak*'. She gave her joining report and the Management approved her appointment.
- iii. Mr Bandiwadekar contends that despite several requests and communications by the Management seeking approval for the Petitioner's appointment, there was no response from the 2nd Respondent. Copies of various such communications have been placed on record to support his contention. Copies of communications between the Deputy Director of

Education and the Education Inspector *inter se* have also been placed on record indicating his assent to grant approval subject to NOC and necessary compliance by the Management.

- iv. Ultimately, by a letter dated 17th July 2018, the 2nd Respondent refused to grant approval citing various deficiencies in the proposal submitted by the Management. The Headmistress of the 4th Respondent provided an explanation to the deficiencies raised and also brought to the attention of the Education Inspector, a Government Resolution (“GR”) dated 24th August 2018, which directed that whenever a proposal for approval in a private school was rejected on the ground of no NOC, such proposal should be reconsidered.
- v. Following the above explanation, the 2nd Respondent directed the Respondents No. 3 and 4 to remain present for a personal hearing scheduled on 5th October 2018 at 3:30 pm. The hearing was adjourned to 31st October 2018 and on that date, the Management explained the entire situation to the Education Inspector. They were told that the decision shall be communicated to them in due course. However, as per the Petitioner, till date no decision has been communicated either to the Management or to her with regard to the approval.

- vi. The Petitioner contends that the deficiencies marked in the impugned letter were curable and the 2nd Respondent ought to have given opportunity to the Management to cure the same. The deficiencies pointed out are *firstly*, there is difference in the category of the posts in the NOC, advertisement and the posts actually filled; *secondly*, the Roster Register has not been verified by the Assistant Commissioner; *thirdly*, there are various surplus teachers in Marathi Medium and they needed to be absorbed; *fourthly*, the mark sheet of the candidates present for interview were not submitted and lastly there was no document produced regarding change in name of the Petitioner.
- vii. The Petitioner insists that the deficiencies pointed out are incorrect, the appointment was made on posts created on account of retirement of some teachers, selection process was duly followed, there were no discrepancies in the NOC, category of posts or the advertisement, the chart of marks allotted to each candidate was a curable defect and she had submitted the Gazette showing change of her name. She also contends that the Management ought to have been called upon to give explanation and cure the deficiencies.
- viii. The Petitioner also relied upon various precedents of this Court including the common judgment and order dated 10th July 2017 passed in a bunch of Writ

Petitions, the lead Petition being Writ Petition No. 8587/2016, in the matter of *Munoli Rajeshri Karabasappa vs State of Maharashtra & Ors*¹ in which the Division Bench of BR Gavai J (as he then was) and RI Chagla J has held that when the appointment is made for English/Maths/Science subject, the ban on recruitment in private schools imposed under the GR dated 2nd May 2012 for the purpose of absorption of surplus teacher before new recruitments are made would not apply. This decision was followed in several other Petitions by the Hon'ble Division Benches and also by the Learned Single Judges of this Court were relied upon by the Petitioner.

- ix. The Management has also supported the contentions of the Petitioner by way of their Affidavit in Reply and has placed reliance on the same documents placed on record by the Petitioner.

7. SUBMISSIONS OF THE RESPONDENT NO. 2:

- i. Per contra, Ms Diwan, the learned AGP for the State, contests the Petition on the ground that the Education Inspector had issued NOC letter dated 20th October 2013 to appoint teachers in VJNT (D)-1, SBC-1 and Open-1 category. She emphatically points out that there was no vacancy in the OBC category. The State

1 2017 SCC OnLine Bom. 10130.

Government had catered for filling up the vacant post in the category of VJNT (D)-1, SBC-1 and Open-1 in place of the retiring teachers in the school. In the absence of vacancies, the Management had issued advertisement in daily newspaper 'Maharashtra Times' inviting applications to fill up the posts in the category of SBC, NTD and OBC to which the Petitioner responded and was eventually appointed.

- ii. In addition, the 2nd Respondent claims to have provided surplus teachers to the school and hence there was no question of appointing the Petitioner. The 2nd Respondent reiterates that he had given proper opportunity of hearing to the Management, but the Management had failed to cure the deficiencies pointed out by the 2nd Respondent. Ms Diwan further relies on the deficiencies pointed out in the impugned rejection letter dated 17th July 2018.

8. ANALYSIS:

- i. A perusal of the documents placed on record by the Petitioner and the Management indicates that the 2nd Respondent had granted NOC to fill up vacancies created by retirement of three teachers, pursuant to the requests made by the Management. The NOC was granted to fill up the three posts of teachers on aided

and full time basis in the VJ-D, SBC and Open category.

- ii. The advertisement issued by the Management clearly shows that applications were invited from interested candidates from the SBC, NT(D) and OBC category to fill up the posts of the teachers in the school. Thus, the Management sought to fill up a post in the OBC category despite the absence of any vacancy in that category.
- iii. The record further reveals that the Management sought approval of the Petitioner's appointment for the first time on 24th August 2017 i.e. after the tenure of three years of the service of the Petitioner as '*Shikshan Sevak*' was over. Undoubtedly, they sent several other letters seeking retrospective approval for the post, but the exercise was too little and too late.
- iv. The 2nd Respondent by his letter dated 17th July 2018 appears to have refused the approval as sought by the Management on the following grounds:

“1. There is difference in the category of the posts in the NOC, advertisement and the posts actually filled.

2. The Management has not got the Roster Register verified from Assistant Commissioner, BC Cell, Konkan Bhavan.

3. As per the Sanch Manyata of A.Y. 2015-16

there are several surplus Teachers in Marathi Medium in this Division and they are not yet absorbed.

4. The mark sheet of the candidates present for interview is not submitted.

5. No evidence is produced regarding change in name of Smt. Rachana Tushar Patil.”

- v. We have examined the deficiencies raised at Points No.2 to 5 of the impugned letter. The objections are untenable. The record shows that the Roster Register has been verified by the Assistant Commissioner, BC Cell, Konkan Bhavan. In so far as the objection in respect of several surplus teachers in Marathi medium is concerned, it is clear that the Petitioner has been appointed as an English teacher and hence, this objection is irrelevant. The objection relating to the submission of mark sheets of the candidates present for the interview is a curable deficiency and in fact the same has been cured. Furthermore, the Gazette in respect of change of name of the Petitioner was also furnished and hence this deficiency was also cured.
- vi. The most pertinent objection taken by the Government and which is of consequence relates to the appointment of the Petitioner in absence of a vacancy in the OBC category. It is settled law that recruitment has to be done in a regular manner and only against available post. The Management does not have a blanket power

to create new posts which were not sanctioned as to make recruitment thereon. The Management have no authority to throw the recruitment procedure to the winds and to make the recruitment in an arbitrary manner.

- vii. In the matter of *Ashwani Kumar v State of Bihar*,² the Supreme Court held that it is axiomatic that unless there is a vacancy there is no question of filling it up. There cannot be an employee without a vacancy or post available on which he can work or can be paid as per the budgetary sanction. The Apex Court has further held that if the initial entry is itself unauthorized and the appointment is not against a sanctioned vacancy, the question of regularizing of services would never arise for consideration and even if such purported regularization or confirmation is given, it would be an exercise in futility. The Supreme Court has reiterated this view in its recent judgment in the matter of *State of Bihar & Ors v Devendra Sharma*.³
- viii. The Petitioner has relied upon the judgment of the Division Bench of this Court in the case of *Munoli R. Karabasappa* and other judgments. It is evident from the perusal of the said judgments that the same are wholly inapplicable to the issues arising in the present case. The said judgments are in respect of withholding

2 (1997) 2 SCC 1.

3 (2020) 15 SCC 466.

approval for appointments by the State Government on account of ban on recruitment of Assistant Teacher till 100% absorption of surplus teachers. This Court has held that the ban has been relaxed in the cases of appointment of teachers for the subjects of English, Mathematics and Science and hence, directed the Education Officers to examine the independent cases of teachers and accordingly grant approval. The issue in the present matter does not involve any serious objection by the Respondents No.1 and 2 on account of ban on recruitment. The reason for refusing approval in the present case is on account of non availability of vacancy in the OBC category.

- ix. Another contention of the Petitioner relating to the Management not having been given a proper opportunity to cure the deficiencies is also not sustainable. As mentioned, the approval to the Petitioner's appointment was sought by the Management for the very first time only three years after the tenure of the Petitioner as Shikshan Sevak was completed. Hence, it is the Management and not the 2nd Respondent which has been negligent in pursuing the approval for the appointment of the Petitioner.

9. For the reasons stated herein above, prayer (b) of the Petition seeking to quash and set aside the letter dated 17th July 2018 issued by the 2nd Respondent No.2 refusing approval to her appointment is rejected. Consequently, directions cannot be given to the

Respondents No.1 and 2 to approve the further appointment of the Petitioner as Full Time Assistant Teacher in related pay scale and further to release the grant in aid for payment of monthly honorarium for three years and thereafter monthly salary in pay scale along with arrears.

10. It is unfortunate that the service rendered by the Petitioner for the three year tenure as '*Shikshan Sevak*' and six years thereafter in pursuance of the interim order dated 12th February 2019 passed by this Court in terms of prayer clause (d) cannot culminate in permanent employment. But the initial entry of an employee must be made against an available sanctioned vacancy by following the Rules and Regulations governing such entry. There would never arise an occasion for regularizing an appointment of an employee whose initial entry itself is tainted, especially when there is no vacancy in that particular category. Thus, this appointment cannot create any right in her favour. The error and the negligence appear to be completely on the part of the Management, i.e., the Respondents No.3 and 4. Having regard to this, we hereby direct the Respondents No.3 and 4 to pay the arrears of salary accrued to the Petitioner by 12th April 2023 and continue to pay her monthly salary on the applicable pay scale.

11. The Writ Petition is disposed of in these terms. All interim orders stand vacated forthwith. No order as to costs.

12. This order is executable against Respondents Nos. 3 and 4 for the full amount of arrears of salary to be paid by the Management to the Petitioner.

(Neela Gokhale, J)

(G. S. Patel, J)