

Shivgan

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1831 OF 2019**

DINESH SHIVAJI JADHAV,
Aged 47 yrs, Occ: Service, R/at 2A, 603,
Paradise Height, Padmanagar, Chikuwadi,
MHADA Complex, Borivali (W), Mumbai
400 094.

...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 seeks a writ of this Court quashing an order dated 17th July 2018 issued by the 2nd Respondent, the Education Inspector, Greater Mumbai, Western Region. By that order, the Education Inspector refused approval to the appointment of the

Petitioner as '*Shikshan Sevak*' in the 4th Respondent school. The Petitioner also seeks a direction to the 2nd Respondent to grant further approval as Full Time Assistant Teacher in the related pay scale and release of grant-in-aid for his 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 proposal for his approval suffered from various deficiencies. Respondents No. 3 and 4 have supported the Petitioner.

5. FACTUAL MATRIX

- i. The Petitioner belongs to the Maratha Caste (Open category). He has completed his B.Com, B.A (English) M.A (Marathi), B.Ed. (English /Maths). He has worked in various educational institutions as a Part Time/Full Time teacher from 2000 to 2006.
- 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 him and other candidates and recommended his name for

appointment to the said post. Accordingly, the Petitioner was appointed as a '*Shikshan Sevak*' for three years, i.e., from 16th June 2014 to 15th June 2017. The school committee approved his appointment in its meeting and the Petitioner submitted his 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. This is the communication impugned in 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 a NOC from the 2nd Respondent to fill up the available vacancies for NT(D), SBC and Open categories, by letters dated 21st February 2013, 25th

October 2013 and 4th January 2014 respectively. The 2nd Respondent granted the required 'no objections' by a letter dated 20th October 2013 to fill three vacancies, of which two were for English subject. According to the Petitioner, there was a backlog in the NT(D) and OBC category and an advertisement was issued inviting applications from candidates having qualifications of B.A., B.Ed. with reservation for SBC, NT(D) and OBC.

- ii. The Petitioner contends that he applied for the post from the Open category, was interviewed by the Selection Committee and pursuant to its recommendation was appointed on the post of English Teacher as '*Shikshan Sevak*'. He gave his joining report and the Management approved his 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 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, according to the Petitioner, till date no decision has been communicated either to the Management or to him 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 and *fourthly*, the mark sheet of the candidates present for interview were not submitted. The fifth and last deficiency was related to the appointment of another teacher Smt. Rachna Patil.

- vii. The Petitioner insists that the deficiencies pointed out are incorrect, the appointment was made on vacant posts created on account of retirement, that the 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 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 of 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

1 2017 SCC OnLine Bom.10130.

RI Chagla J 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 in their Affidavit in Reply and 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 and the Management had issued advertisement in daily newspaper 'Maharashtra Times' inviting applications to fill up the posts in the category of SBC, NT(D) and OBC. She emphasises that the Petitioner applied in the Open category for a post that was never advertised but was in fact selected and thereafter appointed as teacher in the school.

- 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 rejection letter dated 17th July 2018, which is impugned herein.
- iii. The Petitioner has filed an Affidavit in Rejoinder to the reply of the Respondents No.1 and 2 and has reiterated the contents of his Petition. He points to the roster and contends that there was backlog of one post in the Open Category and he was appointed only after procuring the NOC/Permission from the 2nd Respondent to fill up the vacant post as per the balance backlog. He further states that his appointment cannot be declared illegal only because the advertisement published by the Management did not mention a vacancy in the Open Category.

8. ANALYSIS:

- i. A perusal of the documents placed on record by the Petitioner and the Management indicates that the 2nd Respondent had granted a 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. The advertisement pertinently did not mention the Open category post. Despite this the Petitioner applied, was recommended for appointment and was in fact appointed on the said post. His appointment was of a three year tenure from 16th June 2014 to 15th June 2017.
- 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, the management sent several other letters seeking retrospective approval for the post.
- 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, 3 and 4. 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 also irrelevant. Furthermore, 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.

vi. The objection at Point No.1 is of some consequence. Admittedly, the vacancies for which NOC was granted

were SBC, VJ(D) and Open Category. However, the advertisement invited applications only from SBC, NT(D) and OBC category candidates. There was no advertisement inviting candidates from Open category to apply. Despite this, it is incomprehensible as to how and why the Petitioner applied in the Open category. Thus, the objection regarding there being difference in the category of posts in the NOC, advertisement and posts actually filled has some merit.

- vii.** The Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 have been framed by the State Government in exercise of the powers conferred by the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act of 1977. Rule 9 deals with provisions regarding ‘appointment of staff’. Sub-rule (8) of Rule 9 specifically provides for issuance of advertisements in at least one newspaper having wide circulation in the region for the purpose of filling up the vacancy. Furthermore, the NOC letter granted by the 2nd Respondent itself makes the NOC subject to the condition that advertisement published in the newspaper shall specify the category for which applications were being invited.
- viii.** Admittedly, the advertisement was silent in respect of inviting applications from the Open category candidates. The appointment of the Petitioner in the

Open category is, therefore in contravention of the Recruitment Rules and is also in contravention of the condition to the NOC. It is also contrary to the principles of service jurisprudence. The absence of the mention of vacancy against Open category candidates in the advertisement has deprived other eligible candidates from applying for the post. This has curtailed competition and deprived eligible candidates of a level playing field, which provides space within which equally placed competitors are allowed to apply for public posts. This is in fact the essence of Article 14 of the Constitution of India 1950.

- ix. The Petitioner has relied upon the judgments 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 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 is on account of a substantial discrepancy in the post to be filled and advertisement inviting applications. Hence, these authorities are of no assistance to the Petitioner.

- (x) Another contention of the Petitioner relating to the Management not having been given 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 after three years 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 his 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 neither an error in the advertisement nor any misconceived application by the Petitioner for an unadvertised post can create any right in his favour. The error and the negligence appear to be completely on the part of the Management, i.e., Respondents No.3 and 4. We do not see how the State Government can be faulted, nor why it should be foisted with the liability of payment once we find no infirmity in the impugned order. But it simply cannot be that the Petitioner is to be deprived of salary or continuity, also a fault of Respondents Nos. 3 and 4.

11. Having regard to this, we direct Respondents No.3 and 4 to pay the arrears of salary accrued to the Petitioner by 12th April 2023 and continue to pay him monthly salary as per the applicable pay scales

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

13. This order is executable by the Petitioner 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)