

Arjun

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

WRIT PETITION NO.4123 OF 2005

Milind Raoji Kolambakar

...Petitioner

V/s.

The Secretary, Yusuf Meherally Memorial
Education Society & Ors.

...Respondents

**WITH
INTERIM APPLICATION (ST) NO.6676 OF 2023
IN
WRIT PETITION NO.4123 OF 2005**

Milind R. Kolambakar

...Applicant

In the matter between

Milind Raoji Kolambakar

...Petitioner

V/s.

The Secretary, Yusuf Meherally Memorial
Education Society & Ors.

...Respondents

Mr. Mihir Desai, Senior Counsel a/w Ms. Rishika Agarwal, for
the Petitioner.

Ms. Anupama Shah, for Respondent Nos.1 & 2.

Mr. P. G. Sawant, AGP, for the Respondent-State.

**CORAM : MADHAV J. JAMDAR, J.
DATED : DECEMBER 15, 2023**

JUDGMENT:

1. Heard Mr. Mihir Desai, learned Senior Counsel appearing
for the Petitioner, Ms. Anupama Shah, learned Counsel appearing

for Respondent Nos.1 and 2 and Mr. Sawant, learned AGP for the Respondent-State.

2. The Petitioner is challenging the Order dated 13th June 2005 (“**impugned Order**”) passed by the learned Presiding Officer, School Tribunal Mumbai (“**Tribunal**”) in Appeal No.98 of 2000 . By the impugned Order, the learned Tribunal dismissed the Appeal filed by the Petitioner against the oral termination order dated 13th June 2000 of service of the Petitioner.

3. Mr. Desai, learned Senior Counsel appearing for the Petitioner tenders list of dates and submitted that w.e.f. 13th June 1996 the Petitioner as an Assistant Teacher is continuously in service of the Respondent No.1. The said list of dates is reproduced hereinbelow for ready reference:

<u>Sr. No.</u>	<u>Date</u>	<u>Particulars</u>	<u>Page Nos.</u>
1.	12.04.1996	On this date, there was an advertisement in the <i>Loksatta</i> , after which the Petitioner applied for the post of Assistant Teacher.	83-84
2.	13.06.1996	The Petitioner was appointed as a Full Time Assistant Teacher against a clear, vacant and permanent post on the basis of an advertisement and selection.	84-86
3.	11.03.1997	Department granted Petitioner approval to the post of Petitioner for the period of 13.06.1996 to 30.04.1997	82
4.	29.03.1997	The Petitioner was issued a termination order w.e.f. 30.04.1997	16
5.	30.04.1997	Advertisement in the <i>Loksatta</i> for the same post for the year 1997-1998	
6.	30.04.1997	Petitioner submitted his application to be considered for the post as per the advertisement	85-86
7.	1997-1998	The Petitioner was reinstated for his services in the said year vide an	87

		appointment order	
8.	15.01.1998	The Petitioner was granted approval from the 13.06.1997 to 13.04.1998	90
9.	25.04.1998	The Petitioner was issued a letter of termination terminating his services w.e.f. 01.05.1998	
10.	26.06.1998	The Petitioner was asked to continue his services.	
11.	30.03.1999	The Petitioner got approval for the period of 26.06.1998 to 29.04.1999	92
12.	30.03.1999	The Petitioner was issued a letter of termination terminating his services w.e.f. 30.04.1999	
13.	13.06.1996 to 30.10.1999	The Petitioner was placed in D.Ed. scale.	
14.	01.03.2000	The Petitioner was granted approval from 14.06.1999 to 30.10.1999.	93
15.	16.11.2000	The Petitioner was granted approval from 11.12.1999 to 29.04.2000	94
16.	1999-2000	The Petitioner was again continued in service.	
17.	22.11.1999 to 29.04.2000	The Petitioner was placed in B.Ed. scale and his salary was being paid by the government	19
18.	13.06.2000	As no termination order was issued to the Petitioner for the academic year, 1999-2000, he approached the school as usual to resume services on 13.06.2000 but Petitioner was orally removed from service.	
19.	11.07.2000	Aggrieved by the oral termination, the Petitioner approached the School Tribunal, Mumbai by filing an appeal being Appeal No.98 of 2000.	20
20.	28.07.2000	The Management filed a reply to the appeal of the Petitioner contending that the post was reserved for ST category. It also contended that in the year 1999 Shri. Ambolkar belonging to OBC category had become surplus in another school and therefore he came and replaced the Petitioner and Petitioner in turn was placed on another post namely B.A., B.Ed.	36
21.	24.01.2001	Interim order passed in favour of the Petitioner, reinstating him and allowing him 50% of his salary.	29
22.	January 2002	Petitioner filed a rejoinder and pointed out that in 1996 itself even according to the education department, he was appointed against an open post and therefore ought to have been treated on	50

		probation and should have been confirmed by the year 1998. He also contended that even assuming that the post was for ST category candidate, the Petitioner ought to have been continued on regular basis in view of Rule 9(9)(A) of the Maharashtra Employees of Private Schools Act. This is also in view of the decision of the Supreme Court in Shakuntala Shribhate's case.	
23.	04.04.2002	Affidavit was filed by Respondent Nos.3 and 4 wherein they mentioned that the Petitioner was appointed on open category post.	43
24.	13.06.2005	The school tribunal passed a judgment in which the appeal filed by the Petitioner was dismissed and the stay order was vacated.	56
25.	18.06.2005	Hence, aggrieved by the judgment, the petitioner filed the Writ Petition No.4123 of 2005	
26.	05.08.2005	Petitioner's Writ Petition was admitted and further this Hon'ble Court was pleased to grant interim reliefs in terms of prayer clause (c), and allowed the Petitioner to continue as full time assistant teacher and ordered for him to be paid full wages.	
27.	2010	Petitioner filed Civil Application bearing No.670 of 2010 as the Respondents failed to give the Applicant the benefit of the 6th Pay Revision, but during the pendency of the Application, his pay was revised and he was paid the arrears.	
28.	02.02.2023	The Petitioner filed an Interim Application bearing Stamp No.6676 of 2023, praying for arrears of 7th Pay revision from 01.01.2016 to March 2019, and to get approval as a Senior Scale Assistant Teacher w.e.f. 13.06.2008 and the consequential benefits accruing from it.	
29.	24.07.2023	The Respondent No.4 filed an affidavit in reply to the aforementioned interim application.	
30.	19.08.2023	The Respondent No.1 filed an affidavit in reply	

4. It is the submission of Mr. Desai, that the learned Tribunal has not granted the relief sought in the Appeal as the contention raised by Respondent Nos.3 to 5 is that the said post is reserved

for candidates belonging to the Scheduled Tribes (“**ST**”) category and, therefore, Petitioner’s services cannot be approved. He submitted that the said submission raised on behalf of the Respondents is contrary to the position on record. He relied on the decision of the Supreme Court in the case of ***Kankavali Shikshan Sanstha v. M. R. Gavali***¹. It is his submission that the Petitioner belongs to the Other Backward Classes category (“**OBC**”). Although advertisements for recruitment to the said post of Assistant Teacher were issued from time to time, candidates belonging to ST category did not apply and therefore Petitioner’s service should have been approved.

5. Ms. Shah, learned Counsel appearing for Respondent Nos.1 and 2 pointed out the averments in the Affidavit filed by the Education Sub-Inspector in said Appeal No.98 of 2000 and submitted that, the Affidavit in effect confirms the fact that candidate belonging to the ST category as well as Schedule Caste category (“**SC**”) could not be found and therefore the Petitioner who belongs to OBC category was appointed. She, therefore, supported the case of the Petitioner.

6. Mr. Sawant, learned AGP pointed out the contentions raised in the Affidavit-in-Reply dated 24th July 2023 filed in IA (St) No.6676 of 2023 in this Writ Petition. He submitted that

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appointment of the Petitioner is not in accordance with law and Roaster and also not as per the procedure mentioned in said Rules. The Appointment of the Petitioner is a violation of the Rule No.9(7), (8) and (9) of the said Rules. He submitted that before publishing an advertisement for any post approval of Education Department is required to be obtained. In this case no such approval is obtained by the educational institute. The Petitioner is shown to have been working in the said institute on a temporary basis since 1996 without formal approval order. However, he is working and getting a regular salary in view of the interim relief of this Hon'ble Court in Writ Petition dated 5th August 2005. He submitted that the appointment of the Petitioner, as an open category candidate having been made on a post reserved for schedule tribe, in the absence of any de-reservation having taken place cannot be approved.

7. The factual position on record clearly shows that on 13th June 1996 the Petitioner was initially appointed as a full time Assistant Teacher against a clear, vacant and permanent post on the basis of an advertisement and selection. The said advertisement dated 12th April 1996 which is at page 83 of the Writ Petition. The same clearly shows and mentions that priority will be given to a candidate belonging to the category of SC and ST. It is also an admitted position that, thereafter, again an

advertisement was issued on 30th April 1997 in daily *Loksatta*. The factual position on record clearly shows that although the advertisements were issued in daily *Loksatta* specifically mentioning that priority would be given to the SC and ST candidate, the Respondent No.1 could not get any candidate belonging to the category of SC or ST. It is also important to note that the said appointment is approved by the Education Department of the State of Maharashtra.

8. The Rule 9(9)(a) of the *Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981* (“**said Rules**”) is as follows.

“9. Appointment of staff.—

(9)(a) In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in sub-rule (7) and if no person from any of the categories is available, the post may be filled in temporarily on a year to year basis by a candidate not belonging to the Backward Classes.”

Thus, it is specifically provided in said Rule 9 (9)(a) that, in case it is not possible to fill the vacancy of a teaching post reserved for a person belonging to a particular category of Backward Classes,

the said vacancy may be filled by selecting a candidate from the other remaining categories in the order specified in Sub-Rule 7 and if no person from any of the categories is available, the said vacancy may be filled up temporarily on a 'year to year' basis by a candidate not belonging to the Backward Classes. The said Sub-Rule 7 is as follows :-

“[(7) The Management shall reserve 52 per cent, of the total number of posts of the teaching and non-teaching staff for the persons belonging to the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes as follows, namely: -

(a)	<i>Scheduled Castes</i>	<i>13 per cent;</i>
(b)	<i>Scheduled Tribes</i>	<i>7 per cent;</i>
(c)	<i>De-notified Tribes (A)</i>	<i>3 per cent;</i>
(d)	<i>Nomadic Tribes (B)</i>	<i>2.5 per cent;</i>
(e)	<i>Nomadic Tribes (C)</i>	<i>3 per cent;</i>
(f)	<i>Nomadic Tribes (D)</i>	<i>2 per cent;</i>
(g)	<i>Special Backward Category</i>	<i>2 per cent;</i>
(h)	<i>Other Backward Classes</i>	<i>19 per cent;</i>
	<i>Total</i>	<i>52 per cent.]”</i>

(Emphasis added)

9. Thus, it is clear that, as per the said Rules, it is permissible to appoint a person belonging to OBC category in case of the post reserved for ST, if it is not possible to fill the said post by a candidate belonging to ST, SC or N.T. Thus, there is substance in the submission of Mr. Desai, learned Senior Counsel that the appointment of the Petitioner is legal and valid.

10. Mr. Desai, learned Senior Counsel relied on the decision in the case of *Kankavali (Supra)* and, more particularly, on paragraph 14, which reads as under :-

“14. The law laid down by this Court on the interpretation of Rule 9(9)(a) is in our view resolves the controversy in the present case. The first respondent was appointed in 1994. The vacancy was reserved for an ST candidate. At that stage there was no candidate belonging to ST available. There is no dispute about the fact that the first respondent belongs to the Hindu Mali community which is an OBC. In the circumstances, in terms of the provisions of Rule 9(9)(a) since no other candidate belonging to ST was available, the first respondent was entitled to appointment on a regular basis. This Court, in the above case, held that in the absence of a candidate belonging to the reserved category concerned, the Rule enjoins year-to-year appointment only if an available candidate does not belong to a backward class. The respondent belonging as he does to a backward class was entitled to a regular

appointment. The subsequent appointment of P.B. Lohar, the 3rd respondent herein again, operates to displace the first respondent because in any event much prior thereto the first respondent had duly crystallised the right. In any event, it has not been demonstrated before this Court that the 3rd respondent was appointed subsequently in the vacancy created by the termination of the first respondent.”

Thus, it is clear that as per the said Rules and in the light of the decision of the Supreme Court in the case of **Kankavali** (Supra), it is clear that the Petitioner’s appointment is in accordance with law.

11. The contention raised by the learned AGP that the appointment of the Petitioner is neither in accordance with law nor as per the procedure in the said Rules, has no substance. As already held the said appointment of the Petitioner is in accordance with the said Rules and, more particularly, Rule 9(9) (a). It is significant to note that the Affidavit-in-Reply which the Education Sub-Inspector, Greater Mumbai has filed in Appeal No.98 of 2000 before the Tribunal clearly places on record that although an attempt was made to appoint a candidate belonging to ST as well as SC categories, no candidate could be found and therefore the Petitioner who belongs to OBC category was appointed and re-appointed from time to time. Thus, it is clear that the Petitioner’s appointment is in accordance with law.

12. The factual position on record clearly shows that the appointment of the Petitioner is valid, legal and in accordance with the applicable Rules.

13. Mr. Sawant, learned AGP has relied on the Government Resolutions dated 5th November 2009 and 6th February 2012. However, the said Resolutions will not apply to the present case as the initial appointment of the Petitioner was on 13th June 1996 and the same is in accordance with the said Rules, particularly, Rule 9(9)(a). The decision of the Supreme Court in *Kankavali (Supra)* is applicable to the present case. Accordingly, the Writ Petition deserves to be allowed.

14. It is also required to be noted that the Petitioner was terminated from service on 13th June 2000 by the Respondent No.1-Management. The Petitioner filed Appeal No.98 of 2000 before the learned Tribunal challenging said oral termination dated 13th June 2000 and the learned Tribunal has granted stay and the said stay granted on 24th January 2001 was operating until 13th June 2005. Thereafter, the present Writ Petition has been filed in the year 2005 and this Court by the Order dated 5th August 2005 granted interim relief in terms of prayer clause (c). Accordingly, the Petitioner is in service in terms of the interim order since 2001, till date. Thus, the Petitioner is in continuous service of the Respondent No.1 since the year 1996 till 2023 i.e.

more than 27 years as per the particulars set out in the chart mentioned in paragraph No.3.

15. In view of the facts and circumstances of this case and for the above reasons, the impugned Order dated 13th June 2005 passed by the learned Presiding Officer, School Tribunal, Mumbai in Appeal No.98 of 2000 and also oral Order of termination dated 13th June 2000 issued by Respondent No.1 are quashed and set aside. The Petitioner is entitled for consequential financial and other benefits.

[MADHAV J. JAMDAR, J.]