



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2549 OF 2018

Gitanjali d/o Prakash Patil
Age: 34 years, Occu.: Service,
R/o. Aadarsh Madhyamik
Vidyalaya, Mandane,
Tq. Shahada, Dist. Nandurbar.

.. Petitioner

Versus

1. The State of Maharashtra
Through its Secretary,
School Education and Sports
Department, Mantralaya,
Mumbai-400032.
2. The Dy. Director of Education,
Nashik Division, Nashik.
3. The Education Officer (Secondary),
Zilla Parishad, Nandurbar.
4. The Peoples Education Society,
Mandane, Tq. Shahada,
Dist. Nandurbar
Through its President/Secretary.
5. The Headmaster,
Aadarsh Madhyamik Vidyalaya
and Junior College, Mandane,
Tq. Shahada, Dist. Nandurbar.

.. Respondents

...

WITH

CIVIL APPLICATION NO.5618 OF 2018
IN WP/2549/2018

Bhimsing s/o Harsing Pawara,
Age: 69 years, Occu.: Agriculture,
& Director of Peoples Education Society,

Mandane, Tq. Shahada, Dist. Nandurbar,
R/o. At village Bhongare, Post Chandsauli,
Tq. Shahada, Dist. Nandurbar.

.. Applicant

Versus

Gitanjali d/o Prakash Patil and others

.. Respondents

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WITH

WRIT PETITION NO.2550 OF 2018

Shri. Pankaj s/o Jijabrao Pawar
Age: 37 years, Occu.: Service,
R/o. Aadarsh Madhyamik Vidyalaya,
Mandane, Tq. Shahada, Dist. Nandurbar

.. Petitioner

Versus

1. The State of Maharashtra
Through its Secretary,
School Education and Sports
Department, Mantralaya,
Mumbai-400032.
2. The Dy. Director of Education,
Nashik Division, Nashik.
3. The Education Officer (Secondary),
Zilla Parishad, Nandurbar.
4. The Peoples Education Society,
Mandane, Tq. Shahada,
Dist. Nandurbar
Through its President/Secretary.
5. The Headmaster,
Aadarsh Madhyamik Vidyalaya
and Junior College, Mandane,
Tq. Shahada, Dist. Nandurbar.

.. Respondents

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WITH

CIVIL APPLICATION NO.5651 OF 2018
IN WP/2550/2018

Bhimsing s/o Harsing Pawara,
Age: 69 years, Occu.: Agriculture,
& Director of Peoples Education Society,
Mandane, Tq. Shahada, Dist. Nandurbar,
R/o. At village Bhongare, Post Chandsauli,
Tq. Shahada, Dist. Nandurbar.

.. Applicant

Versus

Pankaj s/o Jijabrao Pawar and Others

.. Respondents

...

WITH

WRIT PETITION NO.2553 OF 2018

Shri. Dhairyashil s/o Chandrakant Patil
Age: 37 years, Occu.: Service,
R/o. Aadarsh Madhyamik Vidyalaya,
Mandane, Tq. Shahada, Dist. Nandurbar

.. Petitioner

Versus

1. The State of Maharashtra
Through its Secretary,
School Education and Sports
Department, Mantralaya,
Mumbai-400032.
2. The Dy. Director of Education,
Nashik Division, Nashik.
3. The Education Officer (Secondary),
Zilla Parishad, Nandurbar.
4. The Peoples Education Society,
Mandane, Tq. Shahada,
Dist. Nandurbar
Through its President/Secretary.
5. The Headmaster,
Aadarsh Madhyamik Vidyalaya
and Junior College, Mandane,
Tq. Shahada, Dist. Nandurbar.

.. Respondents

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WITH
CIVIL APPLICATION NO.5616 of 2018
IN WP/2553/2018

Bhimsing s/o Harsing Pawara,
Age: 69 years, Occu.: Agriculture,
& Director of Peoples Education Society,
Mandane, Tq. Shahada, Dist. Nandurbar,
R/o. At village Bhongare, Post Chandsauli,
Tq. Shahada, Dist. Nandurbar.

.. Applicant

Versus

Shri. Dhairyashil s/o Chandrakant Patil
and others.

.. Respondents

...
WITH
WRIT PETITION NO.2570 OF 2018

Shri. Deepak s/o Sahebrao Pawar
Age: 43 years, Occu.: Service,
R/o. Aadarsh Madhyamik Vidyalaya,
Mandane, Tq. Shahada, Dist. Nandurbar

.. Petitioner

Versus

1. The State of Maharashtra
Through its Secretary,
School Education and Sports
Department, Mantralaya,
Mumbai-400032.
2. The Dy. Director of Education,
Nashik Division, Nashik.
3. The Education Officer (Secondary),
Zilla Parishad, Nandurbar.
4. The Peoples Education Society,
Mandane, Tq. Shahada,
Dist. Nandurbar
Through its President/Secretary.

5. The Headmaster,
Aadarsh Madhyamik Vidyalaya
and Junior College, Mandane,
Tq. Shahada, Dist. Nandurbar.

.. Respondents

...

WITH

CIVIL APPLICATION NO.5654 of 2018
IN WP/2570/2018

Bhimsing s/o Harsing Pawara,
Age: 69 years, Occu.: Agriculture,
& Director of Peoples Education Society,
Mandane, Tq. Shahada, Dist. Nandurbar,
R/o. At village Bhongare, Post Chandsauli,
Tq. Shahada, Dist. Nandurbar.

.. Applicant

Versus

Deepak s/o Sahebrao Pawar and others.

.. Respondents

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Ms. Pradnya S. Talekar i/b Talekar and Associates, Advocate for petitioners
in all the petitions.

Mr. P. S. Patil, AGP for respondent Nos.1 to 3 – State in all the petitions.

Mr. N. E. Deshmukh, Advocate for respondent Nos.4 and 5 in all the
petitions.

Mr. Sandesh R. Patil, Advocate for applicant in all the civil applications.

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**CORAM : MANGESH S. PATIL AND
SHAILESH P BRAHME, JJ.**

**RESERVED ON : 02 JULY 2024
PRONOUNCED ON : 10 JULY 2024**

JUDGMENT [Per Shailesh P. Brahme, J.] :-

Rule. Rule is made returnable forthwith. With the consent of
the parties, heard litigating sides finally.

2. These petitions can be disposed of by common judgment and order, as relevant facts and points for determination are common. Petitioners are the employees of respondent Nos.4 and 5 Management. They are challenging common orders dated 06.02.2018 and 29.06.2017 passed by respondent No.2 Deputy Director of Education, revoking approval to their appointments.

3. The sequence of events in all the matters can be summarized as follows :-

Sr. Nos.	Events/Documents	WP/2549/2018 Geetanjali Patil	WP/ 2550/2018 Pankaj Pawar	WP/ 2553/2018 Dhairyasheel Patil	WP/ 2570/2018 Deepak Pawar
1	Advertisement	21.06.2011	08.06.2010	28.01.2004	
2	Appointment	12.07.2011	14.06.2010	02.04.2004	02.04.2004 (Promotion)
3	Approval	30.12.2011	19.10.2010	29.12.2009	29.12.2009
4	Enquiry Report of Dy. Director of Education cancelling approvals.	10.10.2013	10.10.2013	10.10.2013	10.10.2013
5	Dismissal	19.11.2013	19.11.2013	19.11.2013	19.11.2013 (reversion)
6	Dismissal set aside by Judgment and order passed by School Tribunal	28.03.2014	28.03.2014	28.03.2014	28.03.2014
7	HC judgment and order upholding judgment of School Tribunal	08.03.2016	08.03.2016	08.03.2016	08.03.2016
8	Order of Dy. Director of Education	29.06.2017	29.06.2017	29.06.2017	29.06.2017
9	Orders in review passed by Deputy Director of Education	16.01.2018	16.01.2018	16.01.2018	16.01.2018

4. It is the case of petitioners that they were appointed in respondent No.5 School after following due procedure of law. Their appointments were approved by respondent No.3 Education Officer on the dates referred in above chart. Intervenors in the present matter made complaints against the appointment and approval of the petitioners. An enquiry was conducted by respondent No.2 Deputy Director of Education, which culminated into revocation of the approvals vide report/order dated 10.10.2013. Consequently, all the petitioners were terminated and they were required to approach School Tribunals by distinct appeals. Their appeals were allowed by the Tribunal. Intervenors challenged the judgments of the Tribunal in the High Court by Writ Petition No.10004 of 2015, which was dismissed, but liberty was given to Deputy Director of Education to proceed with the report dated 10.10.2013.

5. In view of the liberty given by the High Court, Deputy Director of Education proceeded with the report and revoked the approvals granted to the petitioners. Petitioners and respondent – Management were not heard and they preferred review applications before respondent No.2 Deputy Director of Education. After hearing them, orders of revocation of approvals were confirmed, thereby dismissing applications for review, which are under challenge.

6. Learned Counsel for the petitioners Ms. Pradnya Talekar submits that respondent No.2 Deputy Director of Education had no power to revoke the approvals granted to the petitioners vide order dated 29.06.2017. When appointments of the petitioners were made after following due procedure of law and were approved, it was not open to dig out old orders of approval. It is further submitted that though the appointments of the petitioners – teachers were against reserved post, there is no backlog as on today. It is further submitted that belated submission of proposals for approval in case of non teaching members / petitioners was not within their control.

7. Learned Counsel would submit that approvals were granted subject to undertaking by the Management to comply with the reservation policy. Necessary compliance has been made. It is further submitted that in case of appointments of teachers – petitioners, intimation was given to the Education Department before proceeding for recruitment. Learned Counsel seeks to rely on the judgments of **Murlidhar s/o Datta Kayande Vs. The State of Maharashtra and others**, [Writ Petition No.13707 of 2018 with connected matters decided on 12.04.2022], **Gangadhar Baburao Shere Vs. The State of Maharashtra and others**, [Writ Petition No.11613 of 2015 decided on 04.03.2016], **Sau. Jagtap Sunita Manikrao Vs. State of Maharashtra and Ors.** [Writ Petition No.8221 of 2016 decided on

12.07.2017] and **Namdeo s/o Vishnu Sase Vs. State of Maharashtra and others, [2023(2) Mh.L.J. 598]**.

8. Per contra, learned AGP Mr. P. S. Patil supports impugned orders by referring to affidavit-in-reply. He would submit that appointments of the petitioners were not in accordance with law and necessary enquiry was not made when approvals were granted to them. Petitioners – Teachers were not eligible for the appointments against the reserved post. He would further submit that the appointments of non teaching members was found to be suspicious and made by manipulation of the record. He would further submit that it was open for the higher authorities to conduct scrutiny, as allegations were of fraud, nepotism and discrimination. After giving due opportunity of hearing, respondent No.2 – Deputy Director of Education proceeded to revoke the approvals, which cannot be faulted with.

9. He would further submit that in view of the liberty granted by High Court in Writ Petition No.10004 of 2015, enquiry was conducted and approvals were revoked by Deputy Director of Education. It is further submitted that School Tribunal had allowed appeals of the petitioners only on the ground of violation of principles of natural justice and the issue of validity of the approvals was not germane before the Tribunal. He would rely upon judgments in the matter of **Priyadarshini Education Trust and others, Vs. Ratis (Rafia) Bano d/o Abdul Rasheed and others, [2007 (6)**

Mh.L.J. 667], Afroz Khan s/o Firoz Khan Pathan Vs. State of Maharashtra and others, [2019 (4) Mh.L.J. 933] and Vandana Pandurang Patle Vs. Kalpana Shikshan Sanstha and others, [2017(6) Mh.L.J. 696].

10. Learned Counsel Mr. N. E. Deshmukh, who appears for respondent Nos.4 and 5 in all the matters, supports the petitioners and adopts the submissions.

11. Learned Counsel Mr. Sandesh R. Patil, who appears for the intervenors, adopts the submissions of learned AGP. He would vehemently submit that the appointments of the petitioners are backdoor entries. He would further submit that intervenors are deliberately not impleaded in the matters, though they are having locus. It is further submitted that impugned orders are reasonable and are in accordance with law, which call for no interference. According to him petitioners are closely related to President Jijab Rao Pawar and bypassing statutory procedure, their appointments were made.

12. Having heard learned Counsel for the litigating sides, what emerges is that petitioner, Gitanjali Patil, belongs to OBC category and appointed as Shikshan Sevak against post reserved for ST vide order dated 12.07.2011. Petitioner, Pankaj Pawar, belongs to open category and was appointed as Shikshan Sevak against category reserved for NT vide order

dated 14.06.2010. Advertisement published in newspaper "Apla Maharashtra" indicates that posts were reserved for ST and NT category. The interviews were held and other aspirants were also present for interviews.

13. At the relevant time, there was backlog in the school. No post for unreserved and OBC category was available. Duly verified roster of the School by Assistant Commissioner Backward Class Cell, indicates that there was backlog of posts, 1 - SC, 2 - ST, 1 - VJA, 1 - NT(C) and there was excess post of 1 OBC and 2 Open.

14. Petitioner/Gitanjali is alleged to be daughter-in-law of brother of the President Mr. Jijabrao Pawar and Petitioner/Pankaj Pawar is the son of Mr. Jijabrao Pawar. It is alleged that due procedure of law and policy of reservation have been bypassed.

15. In case of petitioner, Dhairyashil Patil, it is contended that he was appointed as Junior Clerk on 02.04.2004. Petitioner, Deepak Pawar, is stated to be promoted to the post of Senior Clerk from Junior Clerk vide order dated 02.04.2004. The proposals, in case of these petitioners, were forwarded on 01.06.2008 belatedly, after four years and two months. The approvals to their appointments were issued by Education Officer on 29.12.2009. It is alleged that these two petitioners were not in service at

all and a bogus record is created to show their appointments. Dhairyashil is President's sister's grandson. Deepak is nephew of the President.

16. It reveals from record that immediately after grant of approvals, complaints were made by the intervenors before respondent No.2 Deputy Director of Education for violation of due procedure of law, policy of reservation, discrimination and nepotism. Respondent No.2 being Higher Authority of respondent No.3 Education Officer, conducted enquiry and recommended to revoke the approvals given to the petitioners. The appointments of Gitanjali and Pankaj were held to be against policy of reservation and statutory procedure. The appointments of Dhairyashil and Deepak were castigated to be suspicious. These findings are confirmed by impugned orders dated 29.06.2017 and 06.02.2018.

17. It reveals from Government Resolution dated 06.02.2012 and the Corrigendum dated 23.08.2017 referred to by learned AGP that Higher Officer in the Education Department was having jurisdiction to cancel the approval, only rider was to extend opportunity of hearing to the concerned employee. In the present matter, respondent No.2 Deputy Director of Education received complaints against grant of approvals to the petitioners, which are serious in nature. By conducting enquiry and extending opportunity to the petitioners and Management, report was submitted by respondent No.2 on 10.10.2013. It is not a case of petitioners that there

was violation of principles of natural justice.

18. In pursuance of the report dated 10.10.2013, services of petitioners were terminated by distinct orders passed on 19.11.2013. They preferred separate appeals before School Tribunal, Nashik. Their appeals were allowed predominantly on the point that procedure for terminating employees appointed on probation was not followed. Intervenors challenged judgment of the School Tribunal by preferring Writ Petition No.10004 of 2015. In the concluding paragraph of the judgment, liberty was given to present respondent Nos.2 and 3 to take action in pursuance of report dated 10.10.2013 with a rider to hear the present petitioners.

19. In view of liberty granted by High Court vide its judgment dated 08.03.2016, referred above, fresh enquiry was conducted by respondent No.2 Deputy Director of Education into the validity of the approvals of the petitioners. Intervenors approached the respondent No.2 with the serious allegations against the petitioners challenging orders of approvals. Enquiry was conducted and by order dated 29.06.2017, recommendations made on 10.10.2013 were confirmed. Petitioners sought review of the orders passed on 29.07.2017 on the ground that they were not extended opportunity of hearing. As per their request, again enquiry was conducted and by order dated 16.02.2018, the revocations of approvals were confirmed.

20. If the sequence of events are considered, then we have no hesitation to hold that respondent No.2 Deputy Director of Education being Higher Officer had jurisdiction to look into the serious allegations. It is pertinent to note that the allegations were of violation of reservation policy, nepotism and discrimination, which are akin to fraud. Due to intervention of High Court, power was conferred on the respondent No.2 Deputy Director of Education. It was not power of review that was exercised by him as is being submitted by learned Advocate Ms. Talekar.

21. Learned Counsel for the petitioners refers to judgment in case of **Murlidhar s/o Datta Kayande (Supra)**, and reiterates paragraph Nos.11 and 12, which read as follows :-

“11. Be that as it may, the issue that arises for consideration of this Court is whether respondent No.2-Commissioner of Education could have interfered with the approval granted by the Education Officer on the proposal submitted by the Management in respect of these two teachers under any of the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 as well as the Rules framed under the said Act or not. The learned Counsel for the respondents could not point out any provision under the said Act and the Rules empowering the Commissioner of Education to interfere with the order of approval granted by the Education Officer on the proposal submitted by the Management.

12. *In our view, the power to interfere with the decision taken by any Authority by another authority has to be expressly provided under the provisions of the statute and cannot be exercised even if any illegalities are noticed by such Higher authority unless empowered. The Commissioner of Education admittedly has neither any appellate jurisdiction nor any power of review against the order of the Education Officer.”*

22. In the above referred matter, approval granted by Education Officer was revoked by Commissioner of Education. It was not a case of fraud, violation of policy of reservation or nepotism. Under peculiar circumstances, the orders of the Commissioner of Education were quashed holding that there did not exist either appellate or review jurisdiction. However, case in hand reflects that jurisdiction of the Deputy Director of Education was derived from express liberty given by High Court and additionally there were allegations of fraud and nepotism. We do not accept the submissions of learned Counsel for the petitioners in this regard. The judgment cited is not applicable to the matter in hand.

23. The appointments of petitioners Pankaj and Geetanjali were made in the year 2010 and 2011 respectively. At the relevant time, recruitment was regulated by Section 5(1) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as the “Act”) and Rule 9 of the Maharashtra Employees of

Private Schools (Conditions of Service) Regulation Rules, 1981 (hereinafter referred to as the “Rules”). It is apposite to refer to unamended Rule 9(8) and 9(9)(a) of the Rules and Section 5(1) of the Act, which read as follows :-

“9. Appointment of staff.

(8) For the purpose of filling up the vacancies reserved under sub-rule(7) the Management shall advertise the vacancies in at least one newspaper having wide circulation in the region and also notify the vacancies to the Employment Exchange of the District and to the District Social Welfare Officer [and to the associations or organisations of persons belonging to Backward Classes, by whatever names such associations or organisations are called, and which are recognised by Government for the purposes of this sub-rule]requisitioning the names of qualified personnel, if any, registered with them. If it is not possible to fill in the reserved post from amongst candidates, if any, who are recommended by the Employment Exchange or the District Social Welfare Officer [or such associations or organisations as aforesaid] or if no such names are recommended by the Employment Exchange or the District Social Welfare Officer [or such associations or organisation as aforesaid] within a period of one month the Management may proceed to fill up the reserved post in accordance with the provisions of sub-rule(9).

(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 or on a year-to-year basis by a candidate not belonging to the Backward Classes.”

Further, Section 5(1) of the Act, reads as follows :-

“5. Certain obligations of Management of Private Schools.

(1) The Management shall, as soon as possible, fill in, in the manner prescribed every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy:

[Provided that unless such vacancy is to be filled in by promotion, the management shall, before proceeding to fill such vacancy, ascertain from the Education Inspector, Greater Bombay, [the Education Officer, Zilla Parishad or, as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education,] whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools; and in the event of such person being available, the Management shall appoint that person in such vacancy.]”

24. When the statutory procedure was applicable, it was mandatory for the respondent – Management to follow procedure prescribed in Rule 9(8) and 9(9)(a) of the Rules. As referred above,

Section 5(1) of the Act mandates that the Management shall as soon as possible fill in permanent vacancy in the manner prescribed by appointing a person duly qualified to fill up vacancy. Petitioners Gitanjali and Pankaj were not eligible, as they are not belonging to ST or NT. If the suitable candidates to fill in reserved post were not available, then candidates from other remaining categories in the order specified in sub-rule (7) of Rule 9 were required to be appointed. If such a candidate was not available, then the post could have been filled in temporarily on year-to-year basis by candidates of unreserved category. Respondent – Management failed to follow the procedure contemplated by Rule 9(8) and 9(9)(a) of the Rules. At the most, petitioners Gitanjali and Pankaj could have been appointed temporarily on year-to-year basis, however, they were appointed on probation of three years, which is brazen violation of policy of reservation.

25. It reveals from record that along with petitioner Gitanjali, some other reserved category candidates had appeared for interview, namely, Sangle Amit Shantaram (NT), More Ravindra Bhika (NT) and More Sandip Punaji (NT). It is incomprehensible as to why petitioner Gitanjali was selected. In the case of petitioner Pankaj, Avinash Pawar (OBC), Dinesh Pawar (OBC) and Vishwas Patil (OBC) had appeared for interview and were available, but Pankaj was selected. We find that selection of petitioners Gitanjali and Pankaj was strategic and we are assigning the

reasons demonstrating element of nepotism, in the further part of our judgment.

26. Learned AGP has relied on the judgment of **Priyadarshini Education Trust and Others (Supra)**. We have gone through paragraph No.11 of the judgment. The significance of the advertisement and principles of equality of opportunity under Article 16 and equality before law contemplated under Article 14 of the Constitution of India have been discussed. Though facts are different, the principles culled down from various decisions of the Supreme Court as referred in paragraph No.12 equally apply to the case in hand. In the present case also, nepotism has been practised by the office bearers of the respondent – Management. There is every reason to infer that appointment of petitioners would amount to denial of equal opportunity to the citizens desirous of seeking employment/other candidates.

27. Learned AGP further relied on the judgment of **Afroz Khan s/o Firoz Khan Pathan (Supra)**. In that case, order of Deputy Director of Education refusing to grant approval was challenged. Appointment of the petitioner therein, was made violating policy of reservation when there was backlog of ST. We prefer to reiterate paragraph Nos.18, 21, 22 and 23, as follows :-

“18 The aforesaid Government Resolutions, circulars, of the Act and Rules show that it is mandatory on the institution, appointing authority to prepare roster of appropriate points as per the post sanctioned and then get it approved from the competent authority, B.C. Cell. Unless and until such approved roster was available with the institution, it was not possible for the institution to start the process of appointment and it was also not possible for the Education Officer to ascertain whether there is backlog of reserved class. If there is backlog of reserved class, no post from open category can be filled unless the aforesaid procedure is followed. It needs to be ascertained as to whether the post, which has fallen vacant was of reserved class even if one employee from open category retired and the post had become available. This is because invariably open category candidates are appointed as against the reserved category and so it needs to be ascertained whether the post which has fallen vacant was of reserved category candidate. Thus, unless and until the roster is prepared and it is got approved, the Education Officer cannot give permission to the institution to start process of appointment of the candidate from open category. In the past, about 15 years back, candidates from reserved category were not available, but after that the candidates from all the reserved categories started becoming available and at present, even the reserved category candidates are jobless. Thus, when there is a backlog in respect of reservation, steps to fill those posts need to be taken first. Only when the post for open category candidate is clearly available, steps can be taken to fill that post. The process of appointment involves publication of advertisement and if there is backlog of reserved class, reserved post needs to be advertised and not open post. In the present matter, it is admitted by the institution that the Petitioner was appointed as against the post reserved for S.T. Thus, on this single ground, the approval could have been

cancelled. Further, in the present matter, there was no roster, there was no clearance from B.C. Cell before advertisement and even the Education Officer had not given permission to advertise the post though he subsequently helped the institution by giving approval to the appointment of the Petitioner. When appointments are made without following the said procedure, the Education Officer is not expected to give approval to such appointments.

21 Both the sides placed reliance on many reported and unreported cases. The learned counsel for Zilla Parishad and the learned AGP placed reliance on the following cases in support of order of cancellation of approval.

a) **2017 (5) All M.R. 649**, (Vandana Pandurang Patle Vs. Kalpana Shikshan Sanstha, Dhanegaon and others) Nagpur Bench of this Court. In this case, this Court has held that in view of the Rule 9(9) of the MEPS Rules, 1981, reserved post can be filled by person belonging to other reserved category if the person of reserved category is not available and such post cannot be filled from open category. This Court held that the appointment made of open category candidate against the reserved category candidate cannot sustain in law.

b) **2015 (6) Mh.L.J. 355**, (Monali Laxman Nemade Vs. State of Maharashtra and others) Aurangabad Bench of this Court. In this case also after considering Rule 9(9) of the MEPS Rules and Section 5 of MEPS Act, this Court has laid down that only if reserved category candidate is not available, open category candidate can be appointed, but on year to year basis and not on permanent post and that can be only as per the reservation policy (mentioned above). It is further laid down that there is no power to the

Education Officer to give approval in respect of appointment of open category candidate if it is made against reserved post.

c) **2007 (6) Bom.C.R. 402**, (Asha Shamkumar Patil Vs. Sadhana Rajan Kamble & Ors) Supreme Court. In this case, the Apex Court has laid down that in view of Rule 9 of MEPS Rules, when a post is reserved and a candidate of that category is not available, only candidate of other reserved category can be appointed in view of the policy of the Government and on that post, open category candidate cannot be appointed.

These three cases are as per the policy decision of the State Government and as per the spirit of reservation policy.

22 On the other hand, following cases were cited by the learned counsel for Petitioner:

a) **2015 (1) Bom.C.R. 694**, (Namita Narayan Jha & anr. Vs. Education Officer & ors.) Nagpur Bench of this Court. The facts show that the appointment of open category candidate was not against the backlog of reserved category and so the appointment was upheld.

b) Decision given in **Writ Petition No.8221 of 2016**, (Sau. Jagtap Sunita Manikrao Vs. State of Maharashtra & ors.) Principal Seat of this Court. Three years service was completed by the Shikshan Sevak, he was from open category and the appointment was upheld when the appointment was against reserved post. In view of the decision of the Apex Court in the case of Asha Shamkumar Patil (supra), this case can be of no help to the Petitioner.

c) Decision given in **Writ Petition No.8818 of 2017** and other writ petitions, which were decided at Principal Seat on 14th August, 2017. Cancellation of approval to the appointment of open category candidate was challenged on other ground, but during pendency, the decision of cancellation was withdrawn by the authority probably due to circumstance of absence of following proper procedure for cancellation.

d) Decision given in **Writ Petition No.10133 of 2016**, (Mrs. Shivaneesh Prasanna Deshpande Vs. State of Maharashtra & ors.) decided with other writ petitions at Principal Seat of this Court. This Court held that cancellation of approval was not possible even when appointment was against reserved category. This case is of no use to the Petitioner in view of the decision of the Supreme Court in the case of Asha Shamkumar Patil (supra).

e) Decision given in **Writ Petition No.4455 of 2009**, (Sandeep S/o Damodar Chavan Vs. State of Maharashtra and others) decided at this Bench and decision given in **Writ Petition No.3945 of 2017**, (Anilkumar s/o Nivruttirao Boiwar Vs. State of Maharashtra and others) decided at this bench. It appears that this Court obtained undertaking from the institution to fill backlog in future and appointed candidates of open category were protected. In view of the decision of the Supreme Court in the case of Asha Shamkumar Patil (supra) this decision also cannot help the Petitioner.

f) **1978 AIR (SC) 851**, (Mohinder Singh Gill Vs. Chief Election Commissioner, New Delhi) Supreme Court. By

referring some observations, the learned counsel for Petitioner submitted that only on the ground of appointment as against surplus teachers, the present matter could have been considered by the authority, but the matter is decided on other grounds like reservation policy and so the decision is not tenable. This submission is not at all acceptable. In view of the aforesaid policy of the State Government, this Court holds that it was the duty of the authority to make inquiry into such matters and take decision like cancellation of approval.

23 In view of the discussion made above, this Court holds that no relief can be given to the Petitioner. This Court further holds that criminal action is warranted as against the Management for aforesaid illegal activity for aforesaid offences and other. Action also needs to be taken against the Petitioner and the Education Officer concerned as apparently there was a conspiracy to do such illegality, which amounts to fraud. Steps are to be taken by the Deputy Director of Education to see that criminal action is taken. During investigation, the investigating agency can trace out the other persons involved in the offence. The amount already paid by the Government as a salary in respect of the Petitioner is to be recovered from the institution. Further possible action also can be taken against the Respondent/institution. The petition is dismissed. Interim relief already granted is vacated. A copy of order to be sent to Deputy Director of Education of this region.”

28. We propose to follow the view taken by the coordinate bench in **Afroz Khan s/o Firoz Khan Pathan (Supra)**. The principles laid down therein would apply with equal force to the case in hand. It is useful to

refer to the judgment in the matter of **Asha Shamkumar Patil Vs. Sadhana Rajan Kamble & Ors.(Supra)**. In that matter appellant before the Supreme Court was of unreserved category but was appointed against post of reserved category. Her appointment was challenged by the respondent No.1, who was from reserved category, but could not be selected to the post in question.. High Court allowed writ petition and quashed the appointment of appellant. Being aggrieved, appellant had approached Supreme Court. Her appeal was dismissed confirming the judgment of High Court mainly for following reasons :-

“6. Having heard the learned Counsel for the parties and after going through the relevant rules and resolutions, we are of the view that no interference is called for in the present case. Admittedly, the appellant is from the general category. From the advertisement in the daily newspaper, it would be clear that the posts for which teachers were wanted were reserved for candidates belonging to ST/DT/NT and other backward classes. However, it was also clarified that if candidates from the aforesaid reserved category were not available, then, candidates belonging to scheduled caste would be considered. In this connection, we may also refer to Rule 9(a) of the Maharashtra Employees of Private Schools, 1981, which reads as follows:

Rule 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 an year to year basis by a candidate not belonging to the Backward Classes.

A plain reading of Rule 9(a), which deals with appointment of staff of a school, would show that 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 candidates, 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 an year to year basis by a candidate not belonging to the Backward classes.

7. From the above, it is, therefore, clear that the post may be filled in by a candidate belonging to the other remaining categories if no person is available from ST/DT or NT categories. If no person is available from any of the categories, then, the said post can be filled in temporarily on a year to year basis by a candidate not belonging to the classes of candidates mentioned in Rule 9(a). Here, in the present case, the appellant was appointed on a permanent status as a teacher in the said school, which under Rule 9(a) is not permissible.

Relying upon the ratio, the appointment of petitioners Gitanjali and Pankaj cannot be sustained.

29. It is necessary to refer to the judgment pointed out by learned Counsel for the petitioner in this regard. Reliance is placed on **Gangadhar**

Baburao Shere (Supra). We have considered paragraph Nos.15, 16 and 17, which read as follows :-

“15] We have heard the learned counsel appearing for the petitioner, learned counsel appearing for the respondent management, and the learned AGP appearing for the respondent nos. 1 and 2. With their able assistance, perused the pleadings in the petition, annexure thereto, reply filed by the respondent no. 2, and the relevant provisions of the MEPS Rules, 1981, and also the Judgments of the Full Bench and the Division Bench cited across the bar by the learned counsel appearing for the petitioner. It is not in dispute that, the respondent no. 3 sought permission from the Education Officer to fill in two vacant posts of Assistant Teachers. Admittedly, out of two posts, the permission was granted by the Education Officer to fill in the said post was subject to fill in one post from S.T. category. Admittedly, the advertisement was issued advertising the posts, one for S.T. category. However, according to the petitioner and the respondent no. 3, suitable candidate from the said category, possessing B.Sc. B.Ed. qualification had not applied for the said post, and therefore, in order to avoid loss to the students, the management proceeded to appoint the petitioner, who is teaching science and mathematics subjects. It is stated that, the petitioner is the only teacher, who is teaching the science and mathematics subject. Therefore, it is not in dispute that, the advertisement was issued taking prior permission of the respondent no. 2, and after following procedure, the posts were filled in. However, as directed by the respondent no. 2 to fill in one post from S.T. category, the same has not been adhered to by the respondent no. 3. There is no denial to the fact that, the

candidate, possessing B.Sc. B.Ed. qualification from S.T. category, did not apply in pursuant to the advertisement issued by the respondent no. 3

16] It is not in dispute that, the petitioner has been appointed as Shikshan Sevak on 1st February, 2011. He has rendered three years satisfactory services. Admittedly, the Respondent – management was supposed to fill in the vacancy from the S.T. category, however, circumstances are brought on record that, the candidate from the said category was not available, therefore, the petitioner was appointed. The learned counsel appearing for the petitioner has invited our attention to the judgment of the Full Bench of Bombay High Court in the case of **Ram Avadh Mahel Pal V/s Shivdutta Educational Trust and ors. [2007(6) ALL M.R. 716]** and submits that, on completion of three years successful period, the petitioner who was appointed as Shikshan Sevak on regular basis, on completion of the said period, deemed to have been appointed on regular basis. He also invited our attention to the another judgment in the case of **Lalitha Thutpi V/s C.B. Karkhanis, Presiding officer, School Tribunal Bombay and others, [1998(1) Mah.L.R.235]** and submits that, in the facts of that case, the Division Bench took a view that, if the qualifications are possessed by the candidates and two years probation period is completed, in that case, such appointment deserves to be protected, by directing the Respondent – Management to carry forward the post for the reserved category.

17] Upon perusal of those judgments, and if the ratio laid down in those judgments, is applied in the present case, we find that, in the present case also, the petitioner has completed three years service as Shikshan Sevak, and there is assurance by the

Respondent – management that, on immediate next vacancy, the Management will appoint the candidate from S.T. category. Therefore, for the reasons aforesaid and since the petitioner has completed more than three years probation period and possess requisite qualification, the petitioner is entitled for the relief claimed in the Petition.”

30. In the cited case, permission was granted by the Education Officer to fill in one post, subject to filling in another post from ST category. The candidate from ST category was not available and the petitioner was appointed, who completed period of probation. Under these peculiar facts, the petition was allowed and Education Officer was directed to reconsider the proposal. The facts in hand are totally different. Section 5(1) of the Act and Rule 9(8) and 9(9)(a) of the Rules were not pressed into service in that matter. Besides, the Maharashtra State Public Services (Reservation For Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category And Other Backward Classes) Act, 2001, (hereinafter referred to as the “Act of 2001”), with which we are dealing, was not considered by the Division Bench. This judgment is of no avail to the petitioners.

31. Reliance is also placed on the judgment of **Santosh Uttamrao Somwanshi and others Vs. The State of Maharashtra, [Writ Petition No.203of 2016 decided on 02.11.2017]**, in which petitioner of open

category was appointed against reserved category. In that case also implication of Rule 9 was not considered. Under peculiar circumstances stated in paragraph No.4, the matter was decided in favour of the petitioner. It cannot enure to the benefit of the petitioner.

32. Lastly, reliance is placed on **Sau. Jagtap Sunita Manikrao (Supra)**, which also cannot be said to have laid down law if we consider paragraph No.6 of its judgment. It is also not applicable to the present case. It is tried to be persuaded by learned Counsel for the petitioners that as of today there is no backlog. It is a matter of policy of reservation. There is violation of statutory procedure. Petitioners Gitanjali and Pankaj have deprived of two candidates of reserved category. This loss cannot be patched up by subsequent conduct. We do not approve the submission.

33. It is not out of context to refer to Sections 4(1) (3) and 6(1) of the Act of 2001. Sections 4(1)(3) and 6(1) of the Act of 2001 reads thus :-

“4. (1) Unless otherwise provided by or under this Act, the posts reserved for the Scheduled Castes, Scheduled Tribes, De-notified Tribes (*Vimukta Jatis*), Nomadic Tribes, Special Backward Category and Other Backward Class shall not be filled in by the candidates not belonging to that caste, tribe, category or class for which the posts are reserved.

(2)

(3) Reservation specified for the categories mentioned at serial numbers(3) to (6) (both inclusive) in the table under sub-

section (2) shall be inter transferable. If suitable candidates for the posts reserved for any of the said categories are not available in the same recruitment year, the posts shall be filled by appointing suitable candidates from any of the other said categories.

(4)

(5)

6.(1) If in respect of any recruitment year, any vacancy reserved for any category of persons under sub-section (2) of Section 4 remains unfilled, such vacancy shall be carried forward upto five years in case of direct recruitment and three years in case of promotion:

Provided that, on the date of commencement of this Act, if any Government order regarding filling up the posts, in case of non availability of Backward Class candidates are in force, such Government orders shall continue to be in force unless modified or revoked, by Government.”

34. There is violation of sub-section(1), sub-section (3) of Section 4 as well as Section 6(1) of the Act of 2001. In case of violation of the provisions of the Act, a penalty is attracted under Section 8 of the Act of 2001, which is as follows :-

“8.(1) Any appointing authority or officer or employee entrusted with the duty or responsibility under sub-section(1) of section 7 who willfully acts in a manner intended to contravene or defeat the purposes of this Act shall, on conviction, be punished with imprisonment for a term which may extend to ninety days or fine which may extend to five thousand rupees, or with both.”

The appointments of the petitioners/teachers are against above referred provisions and they attract penalty under Section 8 of the Act of 2001.

35. Present case demonstrates violation of statutory procedure of Rule 9(8), 9(9)(a) read with Section 5(1) of the Act. There is violation of policy of reservation. If there is a violation of policy of reservation and Sections 4, 6 and 8 of the Act of 2001, then that amounts to fraud on Constitution. Any other minor aberrations in the procedure of selection undertaken by the Management may be tolerated, but not that of policy of reservation at any cost. Therefore, the Deputy Director of Education has rightly exercised the jurisdiction and revoked the approvals of Gitanjali and Pankaj. The statutory procedure was bypassed and approvals were granted, which is discriminatory. It violates the principles of privilege of participation in the selection process.

36. There is one more aspect which needs a mention. Petitioners Dhairyashil and Deepak were appointed on 02.04.2004 and their proposals were forwarded after about four years, which delay has not been explained by the respondent – Management. It has been reported that camps are organized for the purpose of considering the proposals of approval immediately after their appointments. Despite that no endeavour was made by the Management to submit proposals which is very startling. This

conduct creates suspicion regarding appointments of those petitioners. The intervenors have rightly taken objection to their appointments and the Deputy Director of Education is justified in revoking the approvals.

37. A very glaring and undisputed fact reveals from record. Petitioner Gitanjali is daughter-in-law of brother of President. Petitioner Pankaj is the son of the President. Petitioner Dhairyashil is President's sister's grandson and Deepak is nephew of the President. These are clinching circumstances to infer nepotism and discrimination. If it is a case of fraud, nepotism coupled with violation of policy reservation, then Deputy Director of Education is justified in revoking the approvals. We find that all the petitions are devoid of any merits. Hence, we pass following order :-

ORDER

- i) All the writ petitions are dismissed.
- ii) Civil Applications for intervention are disposed of.
- iii) Rule is discharged.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE

LATER ON :-

After pronouncement of the judgment, learned Counsel for the petitioners seeks extension of the interim protection, which is in operation till this date.

As the interim order of status quo is in operation till this date, we extend the interim protection for further four (4) weeks. Thereafter, this extension shall stand vacated automatically.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE