



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11657 OF 2021

Shabana Abdul Rahim Shaikh
Age: 29 years, Occu.: Household,
R/o. Vihamandwa, Tq. Paithan,
District Aurangabad.

.. PETITIONER

VERSUS

1. The State of Maharashtra
Through its Secretary,
Education Department,
Mantralaya, Mumbai-32.
2. Education Officer,
Secondary and Higher Secondary,
Zilla Parishad Aurangabad, Aurangabad.
3. The Secretary/President,
Jagdamba Shikshan Prasarak
Mandal Vihamandwa,
Tq. Paithan, Dist. Aurangabad.
4. Head Master,
Dnyandeep Vidya Mandir
Vihamandwa, Tq. Paithan,
Dist. Aurangabad.
5. S. P. Devkar,
C/o. Dnyandeep Vidya Mandir,
Vihamandwa, Tq. Paithan,
Dist. Aurangabad.

.. RESPONDENTS

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Mr. M. V. Narwade, Advocate for the petitioner.
Mr. N. S. Tekale, AGP for respondent Nos.1 and 2 – State.
Mr. C. B. Gore, Advocate for respondent Nos.4 and 5.

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**CORAM : SMT. VIBHA KANKANWADI AND
S. G. CHAPALGAONKAR, JJ.**

**RESERVED ON : FEBRUARY 26, 2024.
PRONOUNCED ON : MARCH 07, 2024.**

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :-

. Rule. Rule made returnable forthwith. Heard learned Advocate for the appearing parties finally by consent.

2. By invoking the constitutional powers of this Court under Article 226 of the Constitution of India, the petitioner has prayed for following reliefs :-

"A) By issuing writ of certiorari or any other writ, order or direction in like nature this Hon'ble Court may be please to quash and set aside communication dated 17.08.2021 issued by respondent No.2 vide No.jipau/mavi-6/2021-22/4312 (Exhibit-"G") and issue necessary order for that purpose.

B) By issuing writ of mandamus or any other writ, order or directions in like nature this Hon'ble Court may pleased to direct the respondent No.3 to consider the claim of the petitioner on compassionate ground whereby forward the proposal to the respondent No.2 and also directs the respondent No.2 to keep the petitioner in wait list and issue necessary appointment order, in accordance with law.

C) By issuing writ of mandamus or any other writ, order or directions, the respondent No.2 may please be direct to consider the claim of the petitioner on compassionate ground and pleased to add the name of the present petitioner in wait list forthwith."

3. Heard learned Advocate Mr. M. V. Narwade for the petitioner, learned AGP Mr. N. S. Tekale for respondent Nos.1 and 2 and learned Advocate Mr. C. B. Gore for respondent Nos.4 and 5. In order to cut short, it can be said that all of them have made submissions in support of their respective contentions.

4. It is not in dispute that the husband of the petitioner, namely, Late Abdul Rahim Abdul Karim Shaikh was serving as Peon at Dnyandeep Vidyamandir and Higher Secondary School, Vihamandwa, Taluka Paithan, District Aurangabad run by Jagdamba Shikshan Prasarak Mandal, Vihamandwa. He came to be appointed as Peon on temporary basis on 01.01.1988. Thereafter, the said period was extended from time to time. His services were confirmed by order dated 08.01.1995. Her husband was transferred on administrative ground on 06.08.2007 from Vihamandwa to Wahegaon in another school run by the same institute. He was promoted on the post of Naik after a period of time. The husband of the petitioner died on 08.02.2018 in harness. The petitioner had approached respondent Nos.3 and 4 for appointment on compassionate ground in place of her husband. The application was filed on 15.10.2019. No decision was taken and, therefore, she had approached this Court by filing Writ Petition No.6209 of 2020. This Court while disposing of the said writ petition on 26.10.2020 gave directions to respondent No.2 to take

decision on the application of the petitioner. Though the said decision was not rendered within time fixed by the Court, yet on 17.08.2021 respondent No.2 has rejected the said application on the ground that there is a committee constituted for correcting the staffing pattern and, there is a decision by the government that till then vacant posts should not be fulfilled. The said order is illegal. The petitioner's husband was appointed on a permanent post and, therefore, appointment on his place cannot amount to creation of new post. She has, therefore, prayed for the above-said reliefs.

5. On behalf of respondent No.2 one Mr. Bharat Subhashrao Palve, Superintendent, Class-II, in the office of respondent No.2, has filed the affidavit-in-reply. The other facts are admitted. It is then stated that the Government Resolution dated 11.12.2020 granting staffing pattern to the post of Peon has been issued. The petitioner has challenged the communication by filing writ petition thereby seeking approval to her appointment. According to him, his office had issued letter dated 22.03.2002 to respondent No.4 stating that they should follow the Government Resolution dated 31.12.2002. Respondent No.4 had given the list of seniority who want appointment on compassionate ground and the petitioner's name is at Serial No.5. It is the stated that as on today, there is no vacant post to give appointment to the petitioner and, therefore, the petition deserves to

be dismissed.

6. Respondent No.4 has filed affidavit-in-reply. It is stated that respondent No.3 Education Society runs three schools. There were about six persons waiting in the wait list on the compassionate appointments as per the seniority list and the present petitioner is at Serial No.5. No vacant post is available with respondent Nos.3 and 4, but then it is said that after the demise of husband of petitioner, one S. P. Devkar was already appointed and he was allowed to join the vacant post.

7. Respondent No.5 came to be added as respondent during the pendency of the petition, as it was pointed out that he has been appointed in place of the husband of the petitioner. He has filed affidavit-in-reply and submits that after the application of the petitioner was rejected on 17.08.2021, he came to be appointed in view of the advertisement. According to him, he was already appointed by order dated 03.05.2008 on the post of Peon, but then he was found surplus and then absorbed. Therefore, he has been allowed to join the vacant post after the demise of the husband of the petitioner. According to him, since he has been duly appointed, the petitioner cannot claim the compassionate appointment.

8. Thus, the facts are very much clear when the petitioner's husband was a permanent employee of the school and died in harness,

the petitioner being the wife of the employee had made the application and it appears that her name was taken in the wait list and it was at Serial No.5. It appears that the impugned order passed by respondent No.2 is the reflection of the confusion of respondent No.2, as he appears to be under impression that he was asked to decide the approval to the appointment of the petitioner. When the petitioner herself is not claiming that she has been appointed and no such proposal by the management was ever submitted to respondent No.2 for approval, there was no question of grant of approval. The confusion in the mind of respondent No.2 reflects when he says that ".....याचिकाकर्त्याच्या वैयक्तिक मान्यता प्रस्तावावर....." and lastly, he says ".....असेही आदेशीत केलेले असल्यामुळे शबाना अब्दुल रहिम शेख यांना सेवक पदावर मान्यता देता येणार नाही.....". When the order/communication dated 17.08.2021 is the result of some mistaken fact or the result of confusion, it cannot be allowed to sustain. Further, it appears that at one point of time, respondent No.2 after relying upon Government Resolution dated 07.03.2019 says that staffing pattern has been fixed for non teaching staff and, therefore, fresh appointments cannot be made. Then it is a questionable fact that whether respondent Nos.3 and 4 could have made appointment of respondent No.5. Respondent No.4 in his affidavit-in-reply has not stated that respondent No.5 was, in fact, appointed in 2008 and was rendered surplus and, therefore, now he has been allowed to join in place of husband of the petitioner.

However, it appears that by order dated 03.05.2008, respondent No.2 had granted approval in view of some decision in his appeal before the school tribunal. It also appears that he was a party petitioner in Writ Petition No.7500 of 2013 before this Court. The said writ petition came to be disposed of on 22.07.2015. The said order passed by this Court appears to be on totally different issue. No doubt, it states that the petitioner therein and present respondent No.5 were included in the list of surplus candidates, who were to be absorbed and they are having B.A., B.Ed. qualification. According to them, they could not have been placed in the list below the one's who possesses the D.Ed. or A.T.D qualification. Directions were given that the petitioners should be absorbed as and when the vacancy arises for the post meant for the candidates possessing B.A., B.Ed. qualification. The post which the petitioner in the present case is demanding is Peon and, therefore, it ought to have been considered by respondent No.2 whether he could have been absorbed in place of husband of the petitioner, when the preference is required to be given to the appointment by compassionate ground.

9. It will have to be then also observed that the staffing pattern that has been now fixed cannot come in way to the petitioner for the simple reason that the post her husband was holding was a permanent post and anybody's appointment at his place, especially on the ground

of compassionate appointment, cannot amount to new appointment. Respondent No.4 will not be justified in saying that no vacant post is in existence. All these factors appears to have not been considered by respondent No.2 while passing the order/communication dated 17.08.2021.

10. As regards the above-said reliefs, especially relief 'B', it can be seen that the name of the present petitioner is already in the wait list and it is at Serial No.5. However, that wait list is then also required to be kept with respondent No.2 and for that purpose, respondent No.2 should take a decision. The decision that has been taken by him on 17.08.2021, as aforesaid, is under confusion or mistaken facts. Hence, that deserves to be set aside. Whether respondent No.2 should approve the services of respondent No.5 is a different aspect and, therefore, the matter deserves to be relegated to respondent No.2 to decide the application of the petitioner afresh. Hence, the following order is passed :-

ORDER

- I) Writ Petition stands partly allowed.
- II) The impugned communication dated 17.08.2021 by respondent No.2 is hereby quashed and set aside.
- III) The matter is relegated to respondent No.2. He should consider the fact that respondent No.4 has already kept a wait list for the compassionate appointment and name of the

petitioner is at Serial No.5. On the basis of the same, he should decide to keep her name in the wait list.

IV) Respondent No.2 should also consider as to whether respondent No.5 could have been appointed in place of the husband of the petitioner and to consider the prayer of the petitioner to direct respondent Nos.3 and 4 to appoint her on compassionate ground.

V) The entire exercise should be done within a period of two months from today.

VI) Respondent No.2 may give opportunity to the petitioner and respondent Nos.3 to 5 before taking decision as aforesaid.

VII) Rule is made absolute in the above terms.

[S. G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm