

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

WRIT PETITION NO. 5486 OF 2017

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| 1. | Smt. Sumedha Sushil Sawal |) | |
| | (Miss Sumedha Dattaram Gawade) |) | |
| | Aged Adult, Occ. Service, R/at Banda, |) | |
| | Tal. Sawantwadi, Dist. Sindhudurg |) | |
| 2. | The Banda Navbharat Shikshan Prasarak |) | |
| | Mandal, |) | |
| | 100 St. Xavier Street, Parel, Mumbai - 400012 |) | |
| | Through its Chairman |) | |
| 3. | Khemraj Memorial English School & Dr. |) | |
| | V. K. Toraskar, Arts, Science and |) | |
| | Commerce Junior College, Banda, |) | |
| | Tal. Sawantwadi, Dist. Sindhudurg, |) | |
| | Through its Head Master |) | ... Petitioners |

Versus

- | | | | |
|----|---|---|----------------|
| 1. | The State Of Maharashtra |) | |
| | Through the Secretary, School Education |) | |
| | Department, Mantralaya, Mumbai - 400032 |) | |
| 2. | The Deputy Director of Education, |) | |
| | Kolhapur Region, Kolhapur |) | ...Respondents |

Mr. Nitin Deshpande i/b Adv. Milind Parab a/w. Adv. Hemangi Pathare
for the Petitioners.

Ms. Pooja Joshi, AGP for the Respondent Nos. 1 and 2.

**CORAM : NITIN JAMDAR &
M. M. SATHAYE, JJ.**

DATED : 27 MARCH, 2024

JUDGMENT (Per M. M. Sathaye J)

1. Rule. Learned AGP waives service for Respondents/ State. Rule made returnable forthwith. Heard finally by consent.
2. The Petitioner No. 1- Employee working as Shikshan Sevak with the Petitioner No. 3- School / Junior College run by the Petitioner No. 2 - Management are jointly challenging the impugned order dated 31 December 2014 passed by the Respondent No. 2 - Deputy Director of Education, Kolhapur Region, Kolhpur by which the approval to the appointment of the Petitioner No. 1 as fulltime Shikshan Sevak is refused.
3. Few facts necessary for disposal of this case are as under. The Management is running several aided secondary schools and junior colleges including the Petitioner No. 3 School/Junior College. One full time teacher was promoted as supervisor in another school of the management and therefore the said teaching post became vacant. As per the roaster of the school, there was backlog of reservation in SC, ST, DTNT and OBC categories. Therefore the management decided to fill up the said vacancy along with vacancies in other schools. On 19 June 2012, the Management sent application to Respondent No. 2 requesting

to send surplus teachers to be absorbed in the said vacancies and if not available then to grant permission to publish advertisement to fill up the vacancies. It was communicated that there is backlog of reservation and hence recruitment is required to be made to clear said backlog.

4. Since there was no response from Respondent No. 2 and since the permission was neither refused nor any information regarding surplus teachers was sent for absorption, after waiting for almost 6 months, the Management published advertisement in the newspaper on 10th October 2012 in local news paper, inviting applications for the posts mentioned therein, with specific category-wise reservation breakup. On 21st October 2012 candidates including the Petitioner No. 1 (who is from open category) appeared for the interview. No reserved category candidates were present and available. The available candidates were interviewed and Petitioner No. 1 was selected and recommended for appointment. On 22nd October 2012, appointment order was issued to Petitioner No. 1 as Shikshan Sevak for 3 years. Accordingly Petitioner No. 1 joined by submitting her joining report on 22nd October 2012. On 9th July 2014 the headmaster of the School submitted proposal of Petitioner No. 1 to Respondent No. 2 seeking approval to the appointment. On 31st December, 2014, Respondent No. 2 by improved Order, refused to grant approval, on the ground that the appointment is after 2nd May 2012 and it is without permission of the government. It is in these circumstances, that the Petitioners have knocked the doors of this Court under Article

226 and 227 of the Constitution of India.

5. Mr. Deshpande, learned Counsel for the Petitioners submitted that in view of recent judgment of the Division Bench of this Court reported in *Rajan Sahadeo Ratul and Another vs. State of Maharashtra and Another*¹, the impugned Order cannot be sustained as the same refuses approval on the ground that permission was not taken before the appointment of the Petitioner No. 1 referring to the Government Resolution (GR) dated 2 May 2012 and 19 July 2014.

6. Inviting our attention to the Management's letter dated 19 June 2012, it is submitted that the Petitioner - Management had asked the Respondent No. 2 to communicate surplus teachers for absorption for filling up the vacancy and backlog. He submitted that this letter was neither replied for a long time nor any surplus teachers were communicated. He submitted that ultimately after waiting for long time, considering the vacancies created and need for appointing teachers for smooth functioning of the school, the Management issued public notice and followed selection process. It is submitted that the advertisement was duly published disclosing specific number of posts and the respective reservation etc. It is submitted that thereafter the Petitioner No. 1 has been selected and appointed by following due procedure and thereafter the proposal was sent for approval.

7. Learned AGP was at pains to distinguish the facts of this case from

¹ 2023 SCC Online Bom 1321

the judgment relied upon by the Petitioner. She however opposed the Petition by inviting our attention to the affidavit-in-reply dated 5 July 2018 filed by Respondent No. 2, to which only GR dated 2nd May 2012 is annexed. Respondent No. 2 has tried to justify the impugned Order. It is contended *inter alia* that though the Petitioner-Management had applied for the permission to publish advertisement in order to fill vacancies, permission was not granted, and therefore advertisement is without permission of the authorities. It is contended that considering the ban on the recruitment, appointment is illegal and the Management was not supposed to fill-in the vacancies. It is sought to be contended that appointment of Petitioner No. 1 (from open category) for *Marathi* subject is illegal as the post is reserved for ST. It is contended that as per advertisement, the Petitioner No.1 was not supposed to attend the interview for the backward category reserved posts.

8. We have considered the rival submissions and perused the record.

9. It is an admitted position that the Management's letter dated 19 June 2012 (asking for surplus teachers to fill vacancy and backlog and if not, further seeking permission to advertise) was not replied by the concerned authorities. It is seen, as in many cases before us, that reasons and grounds given in reply-affidavit to justify the impugned order, are not stated in the order itself in the first place. The impugned Order is one page order and the affidavit in reply is 5 pages of contentions including new grounds such as caste/category mismatch for the post and application

not being in conformity of advertisement. The Hon'ble Supreme Court in the judgment of *Mohinder Singh Gill Vs. Chief Election Commissioner (1978) 1 SCC 405* has settled the law that 'an order has to be judged on what is stated in the order and not on what is sought to be supplanted / improved by subsequent affidavit/s in support thereof'. The present affidavit in reply of the Respondent No. 2 needs to be rejected in the teeth of this legal position.

10. In various judgments of this Court, it is held that if the Education Authorities fail to convey to the School, within reasonable time, either permission to advertise or the information about surplus teachers from the list maintained by the Education Department, then the Management cannot be expected to wait indefinitely keeping the posts vacant. The underlying principle obviously is that the school cannot run effectively without necessary number of staff commensurate with the students' strength.

11. In the recent judgment of this Court of *Rajan Sahadeo Ratul (Supra)* relied upon by the Petitioners, interestingly same Kolhapur region was involved. It is not clear if the Dy. Director was also same. Be that as it may. After considering 5 earlier judgments of this Court on almost identical issue, co-ordinate bench of this Court has reiterated that when the school management informs the Education Department about a vacancy in its school, seeking permission for the advertisement/appointment, the Education Authority is expected to

forward the names of the suitable persons / surplus teachers maintained by the Department or if no surplus teachers are available for absorption, permit the Management to appoint teachers following regular appointment procedure. In such a situation, this Court has time and again directed the Education Department to grant approvals to the appointments made by the Management and disburse the salary as per applicable rules. It is apposite to reproduce paragraph 11 of the said Judgment, wherein even other GRs dated 6 February 2012 and 23rd June 2017 (laying down procedure to be followed by the Management and the duties of education authorities) are considered by the co-ordinate bench of this Court. It reads thus :

“11. We have also gone through the Government Resolutions (“GRs”) dated 6th February 2012 as well as 23rd June 2017, relied upon by Mr. Mali. The Department points to the duties cast upon the Management, as enumerated in the GR laying down the procedure to be followed by the Management in the selection process. Unfortunately, the Department omits to act in aid of its own obligations detailed in the very same GR. The GR specifically casts a duty on the Department to nominate a surplus candidate to fill up a vacant post as soon as the Management informs the Department of a vacancy required to be filled. The GR specifies that the Department must discharge its obligation promptly and immediately upon receiving a request from the Management. The Department cannot selectively point to the duties of the Management without first performing its own duty and refuse approval on that ground.”

12. It is seen from the record in the present case that the Management has been careful in seeking permission of the Education Department before issuance of the advertisement for regular selection process. It is only when no reply was sent and no surplus candidates were informed for filling the vacancy / backlog for almost 6 months, that the Management has proceeded to appoint the Petitioner No. 1 after following the due selection process. It is specific case of the Management that pursuant to the advertisement, no candidates from reserved category had applied or available, which is uncontroverted. It is therefore clear that the impugned Order is passed by brazenly ignoring the settled legal position, as explained above.

13. In view of the aforesaid facts and circumstances, the impugned Order cannot be sustained and therefore we dispose of the petition by passing following order.

- A) Impugned Order is quashed and set aside. The Petitioner's proposal stands restored.
- B) The affidavit-in-reply filed in this Petition shall be treated as *prima facie* opinion of the Respondent No. 2-Authority.
- C) If there are any other reasons / grounds on which the Respondent No. 2 proposes to reject the proposal of the Petitioners, he/she is directed to communicate the same to the Petitioners within a period of 3 weeks from today.

- D) The Petitioners shall thereafter submit their explanation to all grounds / objections alongwith the supporting case laws/ Government Resolutions/ Orders of this Court etc.
- E) Thereafter, within a period of 8 weeks, the Respondent No. 2 is directed to pass reasoned order on Petitioners' proposal by dealing with the Petitioners' explanations.
- F) We clarify that the Petitioners' proposal will not be rejected on the grounds stated in present impugned order. Rest of the contentions are kept open.
- G) The Petition is disposed of in the above terms. No order as to the costs.

(M. M. SATHAYE, J.)

(NITIN JAMDAR, J.)