

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

WRIT PETITION NO. 1281 OF 2018

1. Smt. Milan Ramchandra Gawade,
Aged 35 Years, Occ. Service,
R/At Bhedshi, Tal. Dodamarg,
Dist Sindhudurg.
2. The Banda Navbharat Shikshan
Prasarak Mandal, 100 St. Xavier Street,
Parel, Mumbai - 400 012.
Through its Chairman.
3. New English School,
Bhedshi, Tal. Dodamarg,
Dist Sindhudurg,
Through its Head Master.

V/s.

1. The State of Maharashtra,
Through the Secretary,
School Education Department,
Mantralaya, Mumbai-400 032.
2. The Deputy Director of Education,
Kolhapur Region Kolhapur. ... Petitioners.

**SANJAY
KASHINATH
NANOSKAR**

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Mr.Narendra V. Bandiwadekar, Senior Advocate with Aniket S.
Phapale i/b. Mandal Bagkar for the Petitioners.

Ms.Nisha Mehra, AGP for the Respondent- State.

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

DATE : 25 April 2024.

ORAL JUDGMENT : (Per Nitin Jamdar, J.)

Rule. Rule made returnable forthwith. Heard by consent of parties.

2. The Petitioner No.1 is working with Petitioner No 3- School run by Petitioner No 2- Management. The Petitioners have challenged the order dated 23 June 2015 issued by the Deputy Director of Education, Kolhapur rejecting the proposal submitted by Petitioner No.2 on 5 May 2015 for approval to the appointment of Petitioner No.1 as full-time teacher.

3. The impugned order dated 23 June 2015 has rejected the proposal on the ground that since the appointment is made after 2 May 2012 and that all applications made after 2012, when there was Government Resolution dated 2 May 2012 imposing ban on recruitment, no permission could have been granted.

4. In the context of the aforesaid objection raised, the Petitioners have pleaded in the petition that vacancy had arisen in Petitioner No.2- School because one full-time teacher Mr.Desai was

dismissed from service. He had challenged his termination before the School Tribunal and the appeal was also dismissed on 4 July 2012. Thereafter the post was vacant in the school. According to the Petitioners, the roster of the school was maintained by the Management and duly approved by the Respondent- Deputy Director of Education and the Assistant Commissioner, Backward Class Cell. Since it was necessary to fill up this post, Petitioner No.2 Management, by letter dated 19 July 2014, requested Respondent No.2- Deputy Director of Education to enquire regarding surplus teacher available. Again reminders were sent on 7 August 2020 and 21 August 2020. The Petitioners have averred that the Petitioner-Management submitted representations to various government agencies such as Employment Centre of the University, Tribal Development offices etc. and, according to the Petitioners, there was no response. Thereafter, the Petitioner- Management published an advertisement on 2 October 2014. Candidates appeared for the interview and Petitioner No.1 was selected. Petitioner No.1 was accordingly appointed in the Open Category. Thereafter when the proposal was submitted the same was rejected by the impugned order taking the above grounds.

5. In reply affidavit filed by one Subhash R. Chougule, Assistant Director of Education, the assertion that the Petitioner-Management made efforts is not specifically denied and all that is stated is that when there was ban on recruitment the appointment

could not have been made. In the reply, it is also not denied that Petitioner- Management had made representations.

6. The question regarding ban on recruitment and whether the Management can appoint the employees if there is no response from the State Government had arisen for consideration of this Court on several occasions. A review of these decisions is taken in the judgment rendered by the learned Single Judge of this Court in the case of *Ms.Pallavi Shashikant Dhotre v. The State of Maharashtra*¹. The legal position that if there is no response from the Educational Authorities as regards surplus candidate to be sent, then the Management is left with no option but to proceed to appoint the teacher so as to ensure that the education imparted is not suffered, is well established. In light thereof the objection raised in the impugned order cannot be sustained.

7. We note that the impugned order is rendered only on the above ground, however, in the reply affidavit running in to 10 pages with annexures filed by the Assistant Director of Education, another ground is taken, that is, when there was backlog of reserved categories, the appointment could not have been made even though the appointment is in the Open Category. This objection is also contrary to the settled position of law. The Petitioners have categorically asserted that there was vacancy of the open category

¹ Writ Petition No.1312/2017 and others decided on 27 June 2018.

because of removal of one Mr.Desai. This factum is not controverted in the reply affidavit. The learned Single Judge of this Court in the case of *The President, Sudhagad Education Society v. The Dy. Director of Education*², has observed that merely because there is backlog for the reserved category that does not mean that for an appointment in the open category post, approval can be refused even though the post is available. This view taken by the learned Single Judge is confirmed by the Division Bench in the order dated 5 May 2010 in Latest Patent Appeal No.63/2010 and others whereby the appeals were dismissed. Further it was confirmed by the Hon'ble Supreme Court by rejecting Special Leave Petitions of the State Government on 26 April 2011 both, on the ground of delay and on the merits. No contrary position of law is shown to us. The legal position which the Petitioner has placed on record by way of rejoinder is also not dealt with even though the decisions rendered in the year 2009 onwards are relied upon.

8. The second aspect that arises is whether the Deputy Director could have taken a new ground in the reply affidavit. It is as far back in the year 1977 that the Constitution Bench of the Supreme Court in the case of *Mohinder Singh v. Chief Election Commissioner*³, has observed thus:

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and

² Writ Petition No.4635/2009 and another decided on 16 July 2009.

³ AIR 1978 SC 851

cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad the in beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in *Gordhandas Bhanji* (AIR 1952 SC 16) (at p. 18):

"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself".

Orders are not like old wine becoming better as they grow older."

(emphasis supplied)

It is not the case of the Respondent- Deputy Director of Education that the new ground taken in the reply could not be discovered earlier when the order was passed, and it later on came to light. There is nothing stated in the reply as to why this ground was not mentioned in the impugned order and could not have been taken earlier. Therefore, taking such ground in the reply affidavit without there being any mention in the impugned order will be contrary to the law laid down by the Supreme Court in the case of *Mohinder Singh* as above. Therefore even on this ground, for lack of explanation as to why such ground could not have been taken in the impugned order, the impugned order will have to be set aside.

9. In the result, the Petitioners are entitled to succeed.

10. The impugned order dated 23 June 2015 passed by the Respondent- Deputy Director of Education is quashed and set aside. Necessary order of approval be issued within a period of six weeks. Thereafter all consequential steps be taken. Rule is made absolute in the above terms.

11. Writ petition is disposed of as above.

(M.M. SATHAYE, J.)

(NITIN JAMDAR, J.)