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**(2014) 04 BOM CK 0023**

**In the Bombay High Court**

**Case No : W.P. Nos. 651 and 2563 of 2012**

Namita Narayan Jha

APPELLANT

Vs

Education Officer

RESPONDENT

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**Date of Decision : 17-04-2014**

**Acts Referred:**

**Citation :** (2015) 5 ALLMR 236 : (2015) 1 BomCR 694 : (2014) 3 MhLj 680

**Hon'ble Judges :** P.R. Bora, J;B.P. Dharmadhikari, J

**Bench :** Division Bench

**Advocate :** A.Y. Kapgate and M.V. Samarth, Advocate for the Appellant; D. Mahajan for Respondent No. 4 in W.P. No. 2563 of 2012, N.R. Patil, Mrs. B.P. Maldhure, Asstt. Govt. Pleaders for Respondent Nos. 1 and 2 and A.K. Tripathi for Respondent No. 3, Advocate for the Respondent

**Final Decision :** Allowed

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## **Judgement**

B.P. Dharmadhikari, J.—Heard learned Counsel for respective parties. With their consent matters are taken up for final disposal by issuing Rule, making the same returnable forthwith. Two teachers recruited in open category, after following proper procedure are before this Court challenging the impugned order dated 29-4-2011. By the said order, the approval given to their appointments as Shikshan Sevaks for a period of three years on 30-3-2010, has been cancelled.

2. Shri Kapgate as also Shri Samarth, learned Counsel appearing for respective petitioners submit that the recruitment has been done after publishing an advertisement and completing proper procedure in accordance with the law. The advertisement was also published after due previous permission of the department. Petitioners were then appointed as Shikshan Sevaks for a period of three years i.e. from 22-3-2010. Their appointment was also duly approved by the department on 30-3-2010. It was all of a sudden cancelled on a complaint made by an ex-office bearer of the Trust. That cancellation was questioned before this Court in Writ Petition No. 4086/2010. The said Writ Petition was disposed of on 29-10-2010 by directing the Deputy Director of Education to hear

the respective petitioners and take a fresh decision. Fresh decision has accordingly been taken on 24-9-2011.

3. Respective Counsel appearing on behalf of the petitioners submit that when petitioners are not at fault, their otherwise valid recruitment could not have been faulted with only on the ground that backlog existed. Support is being taken from an unreported judgment of Division Bench dated 23-4-2004 in Writ Petition No. 2059/2004, Miss Sarika Rupchand Kanherkar vs. State of Maharashtra and others delivered at Bombay and a judgment of learned Single Judge of this Court in case of Anil Bhanudas Shedge Vs. Subhashnagar Education Society and Others, .

4. Shri Tripathi, learned Counsel appearing on behalf of respondent Nos. 3 and 4 supports the arguments of petitioner.

5. Learned Assistant Government Pleaders are strongly opposing the arguments. They rely upon the reply affidavit. They state that permission to recruit and permission to advertise granted by the department was questioned by one Vijaykumar Meshram in Writ Petition No. 1986/2010. This Court then noticed that representation made by said Meshram was pending and hence, Deputy Director of Education was called upon to take decision on that representation. The decision was accordingly taken, but opportunity of hearing was not extended to the petitioners, who were not parties. They filed Writ Petition No. 4086/2010 in which opportunity of hearing was directed to be given to them.

6. They submit that as per the government resolution dated 21-4-2007, recourse to recruitment in open category is not permissible till the backlog posts are filled in. Accordingly, the impugned order has found that as backlog existed, the recruitment in open category could not have been undertaken.

7. After hearing the respective counsel we find that advertisement was published on 13-3-2010 and recruitment in pursuance thereof was completed on 22-3-2010. Writ Petition No. 1986/2010 filed by Vijaykumar Meshram was disposed of behind the back of petitioners on 27-4-2010 by directing the department to decide the representation submitted by the said Meshram. The representation was accordingly decided by the Deputy Director of Education and he found fault with the approval given to the petitioners. That order was set aside on 29-10-2010 in Writ Petition No. 4086/2010.

8. Accordingly after hearing the petitioners on 29-4-2011, fresh orders have been passed.

9. Perusal of unreported judgment dated 23-4-2004 in Writ Petition No. 2059/2004 shows that there the Division Bench was considering somewhat similar situation. Out of four vacancies only one vacancy was for open category and petitioner Ms. Sarika Kanherkar was appointed against that open category. The other three vacancies were filled in from S.T., N.T. and N.T. Category candidates. Attention of said Division Bench was invited to orders dated

5-8-1997 in Writ Petition No. 1396/1997 and dated 24-6-2002 in Writ Petition No. 4378/2001. Division Bench in paragraph No. 8 found that appointment of more than 50% candidates in backward category could not have been made in one year. Following the earlier judgment in Writ Petition No. 2059/2004, the said Writ Petition was allowed.

Learned Single Judge of this Court in judgment in case of Anil Bhanudas Shedge vs. Subhashnagar Education Society and others (supra), has held that the appointment of petitioner in open category was valid and denial of approval on the ground that there was backlog of posts for reserved category was not a relevant reason to deny approval.

10. It is apparent that even if backlog existed, availability of posts in open category is not in dispute. Thus, reserved category candidates were not denied consideration by filling of open category post. Both the petitioners before this Court have been selected after proper advertisement against open posts. The department was approached and after its due permission advertisement was published. Even if in this situation if backlog existed, as petitioners have not been appointed against backlog post or reserved posts, availability of backlog post cannot be the reason to deny approval. Authorities have not found the employer guilty of not taking steps to fill in either backlog or reserved category posts. We therefore, find the impugned order dated 29-4-2011 unsustainable. The same is accordingly quashed and set aside. Orders dated 30-3-2010 granting approval to the appointment of petitioners are accordingly restored. In view of this Writ Petitions are allowed. Rule is made absolute in the aforesaid terms. However, in the facts and circumstances of the cases, there shall be no order as to costs.