
(2023) 01 BOM CK 0066
In the Bombay High Court
Case No : Writ Petition No. 3397 Of 2018

Samidha Nimkar	Vs	APPELLANT
Somaiya Vidyavihar And Others		RESPONDENT

Date of Decision : 13-01-2023

Acts Referred:

Citation : (2023) 01 BOM CK 0066

Hon'ble Judges : G.S.Patel, J;S.G. Dige, J

Bench : Division Bench

Advocate : ?Sanjay Jadhav, Lancy D?Souza, Dipika Agarwal, KK Jadhav, JK Jadhav, Himanshu Takke

Final Decision : Allowed

Judgement

GS Patel, J

1. Rule. Rule made returnable forthwith and the Petition is taken up for hearing and final disposal.
2. We have Mr Jadhav learned Counsel for the Petitioner at some length. With his assistance, we have gone through the record and considered the rival submissions. We have also heard Mr Takke on behalf of the State and, to the extent necessary, Mr D'Souza on behalf of the 2nd Respondent, an aided minority institution.
3. The Petitioner is an M.Com, B.Ed. She claims that she is entitled to be appointed as a teacher in the 2nd Respondent junior college. In this Petition, she assails an impugned order of 8th November 2017 issued by the 4th Respondent rejecting the proposal forwarded by the 2nd Respondent to grant approval for the appointment of the Petitioner as an approved teacher for Accounting and Auditing in the 2nd Respondent college.
4. Events overtook the Petition. There was a subsequent order of 4th June 2019. The Petitioner was granted leave to amend and this is challenged in prayer clause

(a)(i). Prayers (a), (a)(i) and (b) read thus:

“(a) The Hon’ble Court may be pleased to issue a writ of Certiorari or a writ, order or direction in the nature of Certiorari, quashing and setting aside the impugned order dated 08/11/2017 thereby rejecting the proposal for approval of services of the Petitioner’

(a)(i) that this Hon’ble Court be pleased to issue a writ of certiorari or any other appropriate writ, order or direction in the nature of certiorari thereby quashing and setting aside the impugned order dated 04/06/2019;

(b) that this Hon’ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction in the nature of mandamus directing the Respondents to approve the service of the petitioner as Teacher in Accounting and Auditing subject in the Respondent No. 2 w.e.f. 21/01/2016 and pay her the arrears of salary w.e.f. 21/01/2016 as per the prescribed pay scale.”

5. First, the facts. The 1st Respondent is a public charitable minority trust. It runs and operates the 2nd Respondent, a college of Science and Commerce in Mumbai. The Petitioner teaches at this college in the commerce stream.

6. Until 31st August 2014, one Suchita Acharya was the approved teacher for Accounting and Auditing in the 2nd Respondent college. She superannuated on that date. The junior college, through the Joint Director of Technical Vocational Education, therefore sent a proposal seeking a no objection certificate to appoint a full time Shikshan Sevak/teacher for Accounting and Auditing. This letter was dated 22nd June 2015. Respondents Nos. 1 and 2 also requested to the 3rd Respondent to send a list of surplus teachers so that they could be considered for appointment. The 1st Respondent is a certified linguistic minority and is therefore outside a reservation policy. There was no response from the 3rd Respondent. The 1st Respondent published an advertisement in Indian Express and Loksatta. The advertisement invited candidates for a full time Shikshan Sevak/Teacher for Accounting and Auditing and other posts. The Petitioner was one of the applicants. She received a letter calling her to an interview on 23rd December 2015. Since the 1st Respondent is registered minority institution, a local selection committee came to be formed. The Petitioner appeared before that committee. There were two candidates in question. One Sushma Pande was at Sr No 1. The Petitioner was at Sr No 2. Though selected, Ms Pande did not join her duties. The Petitioner was therefore asked to take up the post and to join duties. She did. She was given an appointment letter dated 21st January 2016. This appointed her as a teacher in MCVV Accounting and Auditing on probation for two years with effect from 21st January 2016.

7. The Petitioner took up her duties. Then the 2nd Respondent college through its governing trust forwarded a proposal for approval of the Petitioner’s services to the 3rd Respondent on 16th October 2017. It is now that the 2nd Respondent institute received the first impugned communication dated 8th November 2017 disallowing the proposal for approval of the Petitioner’s services. A copy of this

impugned communication is at Exhibit "F" at page 31.

8. The letter gives six reasons for rejection, of which three are pertinent for rejecting the 2nd Respondent application:

(i) that the 1st and 2nd Respondents had not obtained an no objection certificate in accordance with the Government Resolution dated 6th February 2012;

(ii) that there was a delay of one year and nine months in sending the proposal and

(iii) that a Government Resolution dated 2nd June 2015 imposed a condition that only 50% of the total posts are allowed for fresh recruitment and since there was here only one approved post, the Petitioner's appointment could not be approved.

9. Mr Jadhav's submission is straightforward. He says that it makes no difference whether this is tested on the principle of Wednesbury unreasonableness, proportionality or a wholesale failure of logic. Indeed, as he points out, the celebrated 1948 decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223. established three tests or criteria to assess, in judicial review, whether the decision-making body:

(i) had given undue relevance to facts that in reality lacked the relevance for being considered in the decision-making process.

(ii) had not given relevance to facts that were relevant and worthy of being considered in the decision-making process.

(iii) had made a decision that was completely absurd, a decision so unreasonable that no reasonable authority could have possibly made it.

10. Lord Greene MR explained, in *Wednesbury*:

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v Poole Corporation* [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

(Emphasis added)

11. Diplock LJ enunciated the principle in these words in the House of Lords decision in *Council of Civil Service Unions v Minister for the Civil Service*: [1983] UKHL 6 at para 410 : [1984] 3 All ER 935 : [1985] AC 374.

So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

12. Even the doctrine of proportionality can be validly invoked here, submits Mr Jadhav, for this is a test of fairness, justice and logic to assess whether, in administrative action being judicially reviewed, an appropriate balance has been maintained. There is considerable learning in India on both the *Wednesbury* principle of reasonableness and proportionality: *Union of India v G Ganayutham*; (1997) 7 SCC 463 *Om Kumar & Ors Union of India*; (2001) 2 SCC 386 *Coimbatore District Central Cooperative Bank v Coimbatore District Cooperative Bank Employees Association & Anr.* (2007) 4 SCC 669 Of these, *Coimbatore District Cooperative Bank* introduces the doctrine of flexibility. This is not a case where the selection process was held to be inherently flawed or where there are allegations of wrongdoing. *Jitendra Kumar & Ors v State of Haryana & Anr*, (2008) 2 SCC 161 In *Chairman, All India Recruitment Board & Anr v K Shyam Kumar & Ors*, (2010) 6 SCC 614. the Supreme Court explained that the principle of proportionality is more concerned with the aims of the decision-maker and whether the decision-maker has achieved the correct balance. Both *Wednesbury* and proportionality taken together must show that the decision was fair, reasonable, well-balanced, harmonious and not arbitrary or whimsical.

13. The consequential submission that Mr Jadhav makes, and which is of equal appeal, is that it simply cannot be that the duty of the 3rd and 4th Respondents is to mechanically apply some Government Resolution or the other. It must have regard to the factual scenario and the circumstances. It must most importantly have regard to who is being affected by the order that the Government authority makes. Mr Jadhav is correct in his submission, in which he is joined by Mr D'Souza, that leaving aside the personal concern of the Petitioner, this decision does not have any regard whatsoever to the interest of the students in the subject.

They are effectively being told that it is perfectly all right for them to have for their chosen course no teacher at all because there is either delay or some Government Resolution in operation.

14. As to the question of delay on the part of the 2nd Respondent to the question of not obtaining a no objection certificate, the approach of Respondents Nos. 3 and 4 is underwhelming. The 2nd and 1st Respondents did in fact apply for an no objection certificate, but the 3rd Respondent never responded. This is completely overlooked in the impugned decision. Surely there must be some accountability in Government for its failure to act. Had that no objection certificate been

refused, then all would have known precisely whether each stood and would have conducted themselves accordingly or would have sought a redress at that stage. The Government cannot be heard to take advantage of its own inaction and inactivity. We think it is hardly equitable for a Government that never responded to levy a charge of delay on the part of the 2nd Respondent institution. This is not a reasonable or balanced reason to render a post entirely vacant and leave students without a permanent teacher.

15. The third reason is the one that most completely fulfils the dictum of Lord Diplock. It is indeed outrageous. There was only one vacant post. What is being suggested is that the 2nd Respondent should have sought an no objection certificate and obtained a sanction for a second post, then applied the Government Resolution that allows for 50% sanction and filled up one post. Alternatively, and we are presuming here, the Government Resolution when applied to a single posts must necessarily result in half that post being filled in (or a half teacher being appointed).

16. Pausing briefly, we must ask for whose benefit such regulations and Government Resolutions are in place. This is not a case where the entire course was disallowed or cancelled. Had that been so, there would have been no question of appointment of any teacher to even a single post. There could not in fact have been an intake of students at all. These Government Resolutions etc are meant to ensure that there is an appropriate balance struck between the interests of the students and the number of teachers. There should not be either an excessive number of teachers, rendering some of them surplus, nor should there be a shortage of teachers, which is against the interests of students.

17. As far as the first impugned order is concerned, there was also no question at that time of the Petitioner not having the necessary qualifications.

18. We turn now to the subsequent events that led to the second impugned order. The Petitioner completed her qualification of Computerised Accounting and Office Automation from the Maharashtra State Board of Vocational Educational Examination as long ago as July 2008. Even before she applied to the present post to which he was appointed, the Petitioner was a full-time lecturer on a temporary basis from July 2011 to April 2016 in Lion Juhu Nandlal Jalan Mahila Mahavidyalaya. These two letters of qualification and full-time lectureship were submitted to the 1st Respondent charitable trust and the 2nd Respondent school at the time of her interview and after she joined duties. Paragraph 17(d) of the Petition says that while this Petition was pending, i.e., as it originally stood with a challenge to the first impugned order, the Petitioner had occasion to visit the office of the 3rd Respondent for some official work on 1st January 2021. The person at the desk office asked for her name and college and delivered to her a letter dated 4th June 2019 and demanded that she acknowledge receipt. It seemed to be some sort of official communication. The Petitioner took it and countersigned it in token of her receipt. When the Petitioner read this letter of 4th June 2019, she was alarmed to read that it purported to state that a hearing

was conducted on 3rd June 2019 about her the rejection of the proposal for her approval but that the Petitioner 'was absent'. The Petition says that the Petitioner was never sent any communication or notice of any hearing. There was no such hearing. Had there been a communication, the Petitioner had no reason to absent herself. The letter of 4th June 2019, a copy of which is at page 45-C at Exhibit "L", states that the 3rd Respondent was representing the State and the District Education and Training Officer (MCVC). That order was in fact passed by the 3rd Respondent himself. It is difficult to see how the 3rd Respondent could have passed the order if his order says that he was representing the State and himself.

19. The communication of 4th June 2019 purports to record that no letter of experience was provided at the time of the proposal. The Petitioner had, as we have noted, submitted her experience certificate and her educational training certificates. These were given to Respondents Nos. 1 and 2. The Petitioner has not responsible if these were not sent on.

20. Coming to the merits of the second impugned communication, the first ground for rejection is once again that an no objection certificate was not obtained before appointing the Petitioner. This overlooks the fact that Respondents Nos. 1 and 2 had sought an no objection certificate from the 3rd Respondent but to which the 3rd Respondent — for no reason that we are able to tell or discern from the record — failed to reply. The question that presents itself to us, as it should have to the 3rd Respondent, was how long the college was supposed to wait for no objection certificate without the post being filled in to the very considerable prejudice of students (leaving aside the concerns of the Petitioner herself). After the superannuation of the previous person, a prescribed procedure was followed including two public advertisements. The second objection was that the proposal for approval was beyond time. But surely if there is a delay, this has to be offset against the failure to respond by the 3rd Respondent and there must be an inherent power to condone the delay. It cannot be applied in so harsh a manner.

21. The third objection was that the advertisement was for the post of a Shikshan Sevak and the Shikshan Sevak scheme is not applicable to MCVC courses. The appointment letter states that the Petitioner was appointed as a teacher on probation for two years, not as a Shikshan Sevak. Even the proposal that the 1st and 2nd Respondent sent to the 3rd Respondent (and to which the 3rd Respondent for reasons best known to him did not respond), categorically stated that the application was for approval for the post of a teacher, not a Shikshan Sevak. Only because the advertisement inadvertently mentioned the word Shikshan Sevak, this could not be used to vitiate the other documents that were clearly on record.

22. The last reason in the second impugned communication, now for the first time, addressed the qualifications of the Petitioner. This was not the subject matter of the first impugned order. The tabulation at page 45 D sets out several

alternative qualifications. This is based on a Government Resolution of 27th November 2015. That Government Resolution seems to have changed or upgraded the standards for the course for vocational training. Schedule A of the Government Resolution of 27th November 2015 sets out the courses under the new enhanced or modified curriculum for vocational training, but does not itself prescribe any curriculum, course material and other modalities. Schedule C has the additional qualifications. Clause 7 of the Government Resolution says that the modified course would be implemented from the academic year 2015–2016. Clause 8 casts a duty on the 4th Respondent to impart training to teachers of the new course. The curriculum for the new course was first prescribed on 4th July 2016. Vocational training was to be brought into effect from the Academic Year 2016–2017 for the 11th standard and from Academic Year 2017–2018 for the 12th standard. In the present case, Respondents Nos.1 and 2 had sought an no objection certificate for recruitment for the Academic Year 2015–2016. That was the advertisement. That was the proposal. That was the letter of appointment. The State Board of Secondary and Higher Education Circular of 4th July 2016 clearly said that new course was to be imparted from the Academic Years 2016–2017 (11th standard) and 2017–2018 (12th standard). We are unable to see from this chronology how these revised standards could be applied retrospectively to a previous period to disqualify or render unqualified the Petitioner.

23. Once again, the question remains of whose interest are served by these actions of the State Government and Respondents Nos. 3 and 4. Certainly it is not the Petitioner, but we leave that aside. More importantly, these actions affect the interests not only of the 2nd Respondent college/school but also of enrolled students in the courses in question. What is worse is that the impugned orders present no solution. They offer no answer. Their result would be to dislodge the Petitioner from the post of a teacher and, presumably, also result in a situation where the posts would have to continue but without a full time teacher necessary to guide students.

24. As regards the question of delay, when any such situation presents itself any administrative or executive authority must have due regard to its own conduct before it blindly applies standards to an applicant before it. The impugned orders claim delay. But this presumes that the conduct of the 3rd and 4th Respondents is faultless. That is not so. The 2nd Respondent may well have been delayed. Why the consequence of this should be visited on the otherwise blameless Petitioner is never answered. The second question is how it is possible that the 3rd Respondent could so wholly elide any consideration at all of his own failure to respond to the timely application made by the 2nd Respondent.

25. Obviously, a Writ Court would have to take a balanced view in matter like this. It may be that the Petitioner seeks relief for herself. But the picture that the Petition portrays before us is undoubtedly larger than the appointment of the Petitioner to a particular post.

26. We do not see from the Affidavit in Reply filed by Kailas Sakharam Ravte, an in-charge Assistant Director, an answer to what is supposed to happen if this post is allowed to remain vacant.

27. As regards the notice to the Petitioner for hearing, Mr Jadhav points out that although the Affidavit in Reply goes on at some length about various Government Resolutions and so on in paragraph 14 at page 59 there is a curious omission to state when the Petitioner was given notice and how of this hearing. The assertion is only that the hearing was scheduled "on the principles of natural justice". Saying that one has followed the principles of natural justice is easy. Actually putting those principles into practice is a far more difficult thing. A scheduling is not enough. The Petitioner would have had to be shown to have been properly noticed. She would have had to be served. She would have had to be told what it was that she was being called to a hearing for. She had to be given enough time to prepare herself and to get her papers or materials in order.

28. It is also difficult to see how such a hearing has any merit or heft in law since the application for filling up the post was not made by the Petitioner but was made by the 2nd Respondent. There are faults attributed to the 2nd Respondent including, as we have seen, a failure to obtain an no objection certificate and a delay. It is unclear to us how the Petitioner could ever have answered these questions on behalf of the 2nd Respondent. The Affidavit does not even suggest that any notice was given to the 2nd Respondent. There is not even an averment to this effect in the body of the Affidavit. The Affidavit is significant not so much for what it says as much as it is for what it does not but should have said.

29. We believe we would be justified in accepting Mr Jadhav's submission that in this factual and jurisprudential scenario, the Petitioner is entitled to succeed and to the reliefs in terms of prayer clauses (a), (a)(i) and (b). He concludes his submission with what we believe is truly telling point. Who is prejudiced and how by the success of the Petitioner? he asks. This is some sort of technical — possibly Pyrrhic — victory for the Government if the Petition fails. In that situation, everybody suffers, including the cause of education itself. On the other hand, and Mr Jadhav presents this as a matter of balancing competing equities, balance of convenience and irretrievable prejudice, no one is prejudiced if reliefs as sought by the Petitioners are granted. To our mind, this is an irresistible argument and to one to which there can be no answer. Indeed there is none.

30. Accordingly, the Petition succeeds. Rule is made absolute in terms of prayer clauses (a), (a)(i) and (b).

31. In parting, we would be entirely remiss in our duties if we did not appreciate the preparedness, accuracy and the concision with which Mr Jadhav has argued his case, especially after we declined his request to have the case kept back for his senior in the matter.