

(2021) 12 BOM CK 0015
In the Bombay High Court
Case No : Writ Petition No.4097 Of 2019

Shailesh Deepak Ambare And Others	Vs	APPELLANT
State Of Maharashtra And Others		RESPONDENT

Date of Decision : 02-12-2021

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2021) 12 BOM CK 0015

Hon'ble Judges : R.D. Dhanuka, J;Abhay Ahuja, J

Bench : Division Bench

Advocate : Narendra V. Bandiwadekar, Vinayak R. Kumbhar, Ajinkya Navale,
Ashiwini N. Bandiwadekar, Vikas Mali

Final Decision : Allowed

Judgement

Abhay Ahuja, J

1. Rule. Rule made returnable forthwith. Mr. Vikas Mali, the learned AGP for Respondents waives service.
2. By consent of counsel for the parties, Writ Petition is heard finally.
3. By this Writ Petition filed under Article 226 of the Constitution of India, the Petitioners are seeking to challenge the order dated 5th November, 2018 issued by the 2nd Respondent-The Education Officer (Secondary), refusing approval to the proposal for grant-in-aid in respect of appointment of Petitioner No.1 as a Shikshan Sevak in the secondary school of Petitioner No.2.

PETITIONERS' CASE

4. The case of the Petitioners is stated as under :-

(i) In or about September, 2014 due to the resignation of one Smt. Shobha Chandrasingh Vasave in the school of Petitioner No.2, one post of the approved teacher (Science) became vacant and available. As per the Roster of the school,

a total of number of eight posts were sanctioned, out of which seven were filled and one was vacant. As per the provisions of The Maharashtra Employees of Private Schools (Conditions of Services) Rules, 1981 ("the MEPS Rules"), four posts were available for open category, out of which three posts were filled and as mentioned above, there was backlog/deficit of one post in open category.

(ii) In order to fill up the said vacancy, Petitioner No.2-Management made an application dated 6th September, 2014 to the 2nd Respondent seeking permission to publish the advertisement to fill up the said vacancy. However, since there was no response nor any surplus teacher was deputed to be absorbed in the said vacancy, Petitioner No.2 on 8th September, 2014 published an advertisement in the newspaper "Daily Sagar" and invited candidates for interview on 16th September, 2014. Total two posts, including one post of B.Sc., B.Ed. for Science and Mathematics subjects for candidates belonging to open category were advertised. In response to the said advertisement, Petitioner No.1 having B.Sc. (Chemistry) and B.Ed. (Science & Maths) qualifications applied in addition to eleven other candidates. Out of twelve candidates, only two candidates had B.Sc. B.Ed. qualification and, therefore, the Selection Committee conducted the interview of only two candidates including Petitioner No.1. It is submitted that Petitioner No.1 secured highest marks and came to be selected for appointment. On the basis of the selection and recommendation, the Management passed a Resolution on 23rd September, 2014 to appoint Petitioner No.1 as Shikshan Sevak from 25th September, 2014. The appointment order was issued to Petitioner No.1 as Shikshan Sevak for three years, i.e., from 25th September, 2014 to 24th September, 2017 and on that basis Petitioner No.1 joined the school on 25th September, 2014.

(iii) It is the case of the Petitioners that it is only after the aforementioned procedure for selection of Petitioner No.1 was completed, that by a letter dated 15th September, 2014 (claimed to be received by Petitioners on 18th November, 2014), Respondent No.2 informed the Head Master of the school, in response to the application made on 6th September, 2014 for permission to fill up the vacant posts, that as per the provisions of the Government Resolution dated 20th June, 2014, unless the process of absorption is completed, the permission cannot be granted to fill up the new posts. It is submitted that a similar letter dated 19th September, 2014 was also issued by the office of the 2nd Respondent and which was also received on 18th November, 2014.

(iv) It is submitted that thereafter by a letter dated 2nd December, 2015, the Head Master submitted proposal to Respondent No.2 on 2nd January, 2016 seeking approval to the above appointment of Petitioner No.1, however, there was no response even though, the Head Master repeatedly approached the office of the 2nd Respondent. It is submitted that it was orally informed that since there was ban on recruitment with effect from 2nd May, 2012, no decision could be taken on the said proposal.

(v) Mr. Bandiwadekar, the learned counsel for the Petitioners submits that even

though there was a ban imposed under the Government Resolution dated 2nd May, 2012, in view of shortage of teachers for the subjects of English, Science and Mathematics, on 4th September, 2013, the 1st Respondent issued a Government Resolution in respect of appointment of Shikshan Sevak for the three subjects. Pursuant to the said Government Resolution, there was relaxation on the ban on recruitment in respect of the appointment of teachers in the said three subjects, provided that there was 100% absorption of surplus teachers and that the said posts would be filled up from the existing vacancies and also subject to the reservation policy. It is submitted that subsequently by a judgment and order dated 10th July, 2017 passed by this Court in Writ Petition No.8587 of 2016, this Court has held that the ban on recruitment under the Government Resolution dated 2nd May, 2012 would not apply to the following appointments :-

- (1) Where the selection process had commenced prior to 2.5.2012,
 - (2) Where the appointment is made for English/Science/ Mathematics subject, and
 - (3) Where the appointment is made in reserved vacancies.
- (vi) He further submits that in the meanwhile since Petitioner No.1 satisfactorily completed three years service as Shikshan Sevak from 25th September, 2014 to 24th September, 2017, from 25th September, 2017 Petitioner No.1 has been continued in service as Full Time Assistant Teacher in pay scale.
- (vii) The Petitioners further submit that pursuant to the aforesaid judgment, the 1st Respondent issued a Government Resolution dated 24th August, 2018 directing that wherever the proposals have been refused or have not been decided for want of No Objection Certificate in respect of the appointments made in the aforesaid three categories, the proposals should be directed to be resubmitted and the Education Officers should take decision on the said proposals. As per the said Government Resolution before making appointments in the three subjects of English, Mathematics and Science, it should be ascertained that there are no surplus teachers available in the District in respect of three subjects.
- (viii) It is submitted on behalf of the Petitioners that in this view of the matter, the office of Respondent No.2 circulated a letter to all schools in the District calling upon them to submit such proposals, if the approval is not yet granted.
- (ix) By letter dated 24th September, 2018, the Head Master once again submitted the proposal in respect of Petitioner No.1 and requested Respondent No.2 for grant of approval of his appointment.
- (x) It is submitted that on 27th September, 2018, the Head Master approached the office of the 2nd Respondent when he was informed that the school has not yet submitted the Roster duly inspected by the BC Cell, Navi Mumbai. That in view of this development, the Head Master informed the 2nd Respondent that the school would get the Roster register inspected and verified by BC Cell and,

thereafter, would submit the same to the office of the 2nd Respondent and requested the 2nd Respondent not to return the proposal of Petitioner No.2 in respect of Petitioner No.1 for want of the Roster register.

(xi) The Petitioners submit that despite the aforesaid requests, on 20th November, 2018, the Head Master received an order dated 5th November, 2018 issued by the 2nd Respondent informing that for the reasons mentioned in the said order, the approval to the appointment of Petitioner No.1 was refused and the original proposal was returned back.

(xii) It is the case of the Petitioners that vide letter dated 14th January, 2019, all the deficiencies pointed out in the aforesaid rejection letter were explained pointing out that the said deficiencies have been cured/removed and roster register had been inspected by BC Cell on 12th November, 2018 and the appointment of Petitioner No.1 was made by following due selection procedure to a post, which was vacant and available for the open category. Respondent No.2 was, therefore, requested to grant the approval of the first Petitioner's appointment in the open category. However, Respondent No.2 orally informed that since the order had already been passed refusing the approval, he could not take any other decision.

(xiii) The learned counsel for the Petitioners draws our attention to the following two decisions of this Court in support of his contentions :-

(i) The President, Sudhagad Education Society, Dist. Raigad & Ors. Vs. The Dy. Director of Education & Anr. in Writ Petition No.4635 of 2009 dated 16th July, 2009.

(ii) Nitin D. Panchal Vs. The State of Maharashtra & Ors. in Writ Petition No.8166 of 2019 and connected Writ Petitions dated 7th October, 2021.

(xiv) He also seeks to rely upon a communication dated 6th March, 2010 from Joint Secretary of Respondent No.1 to the Director Education, (Secondary and Higher Secondary) to submit that the vacancy can be filled in from open category if post is available in open category even if there is backlog from S.C. and S.T. category.

5. In view of the above, the Petitioners are before us seeking the following reliefs :-

a] Rule Nisi be issued and records and proceedings be called for.

b] By a suitable writ, order or direction, this Hon'ble Court be pleased to quash and set aside the impugned order dated 5.11.2018 issued by the Respondent No.2, and the Respondent No.2 may be directed to grant approval to the appointment of the Petitioner No.1 as Shikshan Sevak in the aided Secondary School of the Petitioner No.2 for the period 25.9.2014 to 24.9.2017 on payment of monthly honorarium, and thereafter as Full Time Assistant Teacher in pay scale from 25.9.2017 onwards, and to release grant-in-aid for payment of said

monthly honorarium for 3 years and salary from 25.9.2017, together with arrears.

RESPONDENT'S SUBMISSIONS

6. On the other hand, Respondent No.2-Education Officer (Secondary), Zilla Parishad, Ratnagiri District has filed affidavit-in-reply opposing the averments in the Petition.

7. It is submitted that the order dated 5th November, 2018 issued by the Respondent No.2 is correct and proper. That though one post of teacher became available in September, 2014 for the open category due to the resignation of Smt. Shobha Chandrasingh Vasave, no details were made available to Respondent No.2 through the proposal in question. It is submitted that this fact had been brought to the notice of the Head Master of the school, run by Petitioner No.2, that the Roster duly verified and certified by the BC Cell, Navi Mumbai has not been produced. However, on verification by Respondent No.2 itself, it has been observed that there was a backlog of one S.C. and one S.T. in teaching cadre and in view of the provisions of Reservation Act, 2004, the vacancy needed to be earmarked to either of these two backward class categories.

8. It is submitted that the Management has published the advertisement without the permission of the Education Officer, which is required as per the Government Resolution dated 6th February, 2012. Moreover, the advertisement was not as per the Roster. It is contended that though there was a deficit of only one post in the open category, in the advertisement two posts are advertised for the open category and as such the advertisement is fallacious, making the procedure adopted by Petitioner No.2-Management to fill in vacancy improper.

9. It is submitted that the proposal relating to Petitioner No.1 had discrepancies/ omissions which have been pointed out to the Head Master by the order dated 5th November, 2018 refusing the approval for the appointment of Petitioner No.1 and as such Petitioner No.1 is a candidate teacher, not entitled to be accorded approval.

10. With respect to the submission dated 14th January, 2019 made on behalf of Petitioners pursuant to the impugned order dated 5th November, 2018, it is submitted that the deficiencies have not been actually removed and in fact letter dated 14th January, 2019 has never been submitted to the office of the 2nd Respondent as there are no outward or inward numbers or stamps or seal/ signature indicating receipt of such letter.

11. It is submitted that the reasons including Reasons No. 1 and 2 mentioned in the impugned order are proper and in accordance with the Government Rules. It is submitted that one teacher from SC category and one from ST category is a must and the backlog needs to be filled on a priority basis and, therefore, the vacancy cannot be earmarked to open category. It is submitted that the State

Government has not issued any orders to the effect that inspite of the backlog of backward class categories, the vacancy can be filled in from open category, if post is available for open category.

12. The learned AGP submits that therefore due to the existence of backlog, it is necessary on the part of Petitioner No.1 to first fill in the backlog from the SC and ST category and for that a duly verified Roster, certified by the BC Cell, Navi Mumbai is essential. The learned AGP relies upon the affidavit-in-reply and submits that therefore Petitioner No.2 cannot be granted any aid in the absence of approval from the Department as clearly no approval can be granted to the appointment of Petitioner No.1 in the circumstances of the case as set out in the affidavit. It is submitted that the entire liability to pay Petitioner No.1 is upon Petitioner No.2 and not on the Government.

13. In view of the above submissions, it is submitted that the Petition be dismissed.

REASONS AND CONCLUSIONS

14. We have heard Mr. Narendra V. Bandiwadekar, learned counsel for the Petitioners, Mr. Vikas Mali, learned AGP for Respondents No.1 and 2-State and with their able assistance, we have perused the papers and proceedings in the above matter.

15. During the hearing of the Petition, Mr. Bandiwadekar, has very meticulously taken us through each of the discrepancies pointed out in the order dated 5th November, 2018 and reiterates what is stated in Paragraphs 14 to 27 of the Petition.

16. The learned AGP has not been able to controvert the above submissions made on behalf of the Petitioners, either in the reply or during the submissions at the time of hearing. We also observe that neither in the reply filed on behalf of Respondent No.2 nor in the arguments advanced by the learned AGP, the submissions/explanation on behalf of the Petitioners in Paragraphs 14 to 27 of the Petition in respect of the discrepancies/deficiencies in the impugned communication dated 5th November, 2018 have been controverted.

17. It is also not in dispute that once sanctioned post of teacher (Science) became available in September, 2014 in open category due to the resignation of one permanent and approved teacher Smt. Shobha Chandrasingh Vasave to which Petitioner No.1 was appointed on 25th September, 2014 for a period of three years from 25th September, 2014 to 24th September, 2017 and after satisfactorily completing three years as Shikshan Sevak, Petitioner No.1 has been continued as Assistant Teacher in pay scale. The proposal for approval of first Petitioner appointment was firstly submitted to Respondent No.2 on 2nd January, 2016 and again resubmitted on 24th September, 2018 in view of Government Resolution dated 24th August, 2018 issued pursuant to the decision of this Court in Writ Petition No.8587 of 2016. The primary objection of the Respondents

appears to be that the first Petitioner's appointment could not have been made firstly in view of the bar on recruitment with effect from 2nd May, 2012 and secondly in view of the reservation policy, first Petitioner's appointment could not be approved in view of the backlog of reservation of one S.C. and one S.T. category.

18. In this view of the matter the following two issues arise for our consideration, viz., (i) whether a duly sanctioned open category vacancy is to be filled up from open category or if there is a backlog of reservation in various reserved categories, whether the said open category vacancy has to be filled up from the reserved category candidates and (ii) would the ban on recruitment pursuant to Government Resolution dated 2nd May, 2012 apply in the case of vacancies for the subject of English, Mathematics and Science ?

19. With respect to the first issue at hand, we observe from the decision in the case of The President, Sudhagad Education Society, Dist. Raigad & Ors. (supra) that a single judge of this Court has answered this question in Paragraph 4 of the said decision, which is quoted as under :-

"4 The short question which falls for consideration before this Court is whether the Deputy Director of Education had erred in refusing to grant approval to teachers who are appointed from the open category merely on the ground that the backlog of reserved category candidates has not been filled in by the management."

20. This Court has held in Paragraph 10 of the said order that the Deputy Director of Education has been directed in a number of cases not to refuse grant of approval only on the ground that the backlog of reserved category candidates was not filled in. Paragraphs 10, 11 and 12 of the said decision are usefully quoted as under :-

"10 This Court in number of cases had directed the Deputy Director of Education not to refuse to grant approval only on the ground that the backlog of reserved category candidates was not filled in. This Court in the following cases gave the said direction :-

Writ Petitions No.4747/2005 with 4752/2005 with 4755/2005 (orders dated 15.9.2005 and 23.9.2005). Similarly, in Writ Petitions No.9289/2004, 7244/2005, 2991/2004, 5687/2005, 5679/2005 (order dated 15.9.2005 and 23.9.2005), 7454/2005, 2948/2009 alongwith other writ petitions has consistently taken the same view.

11 The learned AGP for the State invited my attention to the affidavit-in-reply filed by the Assistant Director of Education. In the said affidavit-in-reply, no reference has been made to any provision, rule, regulation or Government Notification justifying the stand taken by the Deputy Director Education in respect of the various directions given by this Court in various petitions from time to time. The learned AGP invited my attention to one Resolution dated

22.1.2004 wherein it has been stated that in the event of their being a backlog in respect of reserved category candidates of the posts which are earmarked according to roster framed for the said category, persons from the open category candidate should not be appointed. In the said affidavit in reply, though the percentage has been given of the posts which are to be filled in from the reserved category candidates, the actual position in respect of open category candidate is not given. In my view, therefore, there was no justification for the Deputy Director of Education to refuse to grant approval to the teachers/ Shikshan Sevak. It is an admitted position that all these posts which were filled in by the said teachers belonged to the open category. The Deputy Director of Education, therefore, was duty bound to follow the ratio of the judgments referred to hereinabove. These judgments were specifically cited before him by the said teachers which is evident from the impugned order itself which refers to the said judgments passed by this Court. However, though the law laid down by this Court was brought to his notice, he has not given any reasons why the said decision is not followed by him.

12 In my view, there is no justification for the Deputy Director of Education to refuse to grant approval to the said teacher. It is an admitted position that so far as, two teachers who belonged to the OBC category are concerned, since they have applied and are permitted to apply as open category candidate, there was no justification for the Deputy Director to refuse to grant approval even these two OBC candidates who had applied to the open category posts. Taking into consideration, therefore, the view taken by the Division Bench of this Court and the learned Single Judge of this Court in the abovestated cases, the question will have to be answered in the affirmative."

21. The decision of this court in the case of The President, Sudhagad Education Society, Dist. Raigad & Ors. (supra) has also been upheld by the Hon'ble Supreme Court in Petition(s) for Special Leave to Appeal (Civil) CC No.5482-5483 of 2011 in the case of Dy. Dir. of Education & Anr. Vs. President, Sudhagad Educ. Soct. & Ors. Etc., which is quoted as under :-

"Taken on board.

Heard learned counsel for the petitioners.

There is an inordinate delay of 216 days in filing the Special Leave Petitions for which no reasonable explanation has been given. Even otherwise there is no merit in these Special Leave Petitions. The same are, accordingly, dismissed both on the ground of delay and merit."

22. The aforesaid view has also been reiterated by a Division Bench of this Court in the case of The Deputy Director of Education & Anr. Vs. Shri Hemant Kishan Gavale & Ors. in Letters Patent Appeal No.63 of 2010 with other connected matters dated 5th May, 2010 where in Paragraph 3 it has been observed as under :-

"3] It appears that the only ground on which the Deputy Director of Education has passed the impugned Order rejecting the approval of the Petitioners was that there is backlog of reservation with the Management, of ST Category and therefore he cancelled the approval of Petitioners. This issue has already been dealt by the Division Bench of this Court in couple of Petitions and the learned Single Judge has observed it in paragraph 10 of the impugned Order. None of the decision has been challenged by the State and therefore the decision of the learned Single Judge setting aside the decision of refusal of the grant of approval to the said post of teachers does not suffer from any error or illegality. We, therefore, do not find any merits in the Appeals. All Appeals are dismissed accordingly."

23. A review of the communication dated 6th March, 2010 from the Joint Secretary of Respondent No.1 to the Director Education, (Secondary and Higher Secondary) relied upon by the Petitioners also lends credence to the aforesaid views when it says in Paragraphs 3 and 4 that the State Government has expressed its no objection to fill in the open category vacancy from the open category, even if there is a backlog in the reserved category. The said communication also refers to the order of this Court dated 23rd September, 2005 in Writ Petition No.5789 of 2005 in the case of Hemant Shankar Kulkarni & Ors. Vs. The State of Maharashtra & Ors. wherein this Court has held that even if there is a backlog in the reserved category, open category vacant posts can be filled in from the open category.

24. In the said decision this Court has observed that the Petitioners belonging to open category can be adjusted against the posts for open category. Paragraph 5 of the said decision is relevant and is quoted as under :-

"5. Considering the above, it would be clear that the Petitioners can be adjusted against the posts for open category. However, that would require Respondents 3 and 4 to make an application for approval to Respondent No.2 afresh on the basis as if there were regular vacancies when Petitioners 1, 2 and subsequently Petitioner No.3 were appointed. Considering the above the following directions :

Respondents 3 and 4 after working out the vacancies after excluding 34% of the posts which are reserved for backward class candidates to consider whether Petitioners 1 and 2 can be approved from the academic year 2000-01 or subsequent thereto against vacancies for open category candidates, to apply to Respondent No.2 for approval and similarly for Petitioner No.3 from the academic year 2002-03. Respondent No.2 after working out the reservation and if the appointment of the Petitioners is against open posts, to grant approval from the aforesaid dates or such other dates from which seats become available in the open category. Respondents 3 and 4 to submit the proposal to Respondent No.2 within eight weeks from today. Respondent No.2 within six weeks thereafter to decide the same in accordance with law and intimate the same to the Petitioners and Respondents 3 and 4. If the approval is granted Respondent No.2 to release the salary grants from the dates when the said posts have become aided. "

25. In view of the aforesaid discussion, in the facts of this case as well, we see no reason to take a different view other than to say that there is no justification for the Deputy Director of Education to refuse to grant the approval to the appointment of Petitioner No.1 in the open category on the ground that there was a backlog with respect to one SC and ST category.

26. With respect to the second issue, we agree with the submissions made on behalf of the Petitioners that this Court in Writ Petition No.8587 of 2016 has clearly held that the ban on recruitment pursuant to the Government Resolution dated 2nd May, 2012 would not apply in respect of the following categories:-

(1) Where the recruitment process is already commenced prior to the Government Resolution dated 2nd May, 2012;

(2) Where the appointments made for filling up vacancies in English, Mathematics and Science;

(3) Where the recruitment is made to fulfill the backlog of reserved category candidates.

27. The decision of this Bench in the case of Nitin D. Panchal (supra) squarely covers the question. Paragraph 4 of the said decision is relevant and is quoted as under :-

"4. We have heard learned counsel for the petitioners and the respondents. Mr.Bhavake, learned counsel for the petitioners invited our attention to the judgment delivered by this Court on 10th July, 2017 in Writ Petition No.8587 of 2016 filed by Smt.Munoli Rajashri Karabasappa vs. State of Maharashtra & Ors. along with other connected writ petition. By the said judgment, this Court after considering the Government Resolution and after adverting to the judgment of this Court in Writ Petition Nos.10580 of 2015 with 1145 of 2016 decided on 9th March, 2017 held that the ban would not be applicable to three categories, (1) where the recruitment process is already commenced prior to Government Resolution dated 2nd May, 2012. (2) Insofar as the appointment made for the subjects of English, Maths and Science are concerned (3) where the recruitment is made to fulfill the backlog of reserved category candidates. The subjects involved in these three writ petitions are English, the candidate belonged to Scheduled Tribe category and the subject Marathi."

28. It is not disputed that the first Petitioner has B.Sc. (Chemistry) and B.Ed. (Science & Maths) qualifications and that he was selected and appointed in the sanctioned and aided post of Science teacher vacated by the resignation of one permanent and approved teacher. It is also not disputed that there are no surplus teachers available in respect of the three subjects waiting to be absorbed.

29. The learned AGP has also been unable to distinguish any of the aforementioned decisions nor as mentioned earlier controvert the submissions made on behalf of the Petitioners. We, therefore, do not propose to take any different view in the matter and hold that the ban pursuant to the Government

Resolution dated 2nd May, 2012 would not apply to the case of Petitioner No.1.

30. It is undisputed that Petitioner No.1, after completion of three years of service as Shikshan Sevak from 25th September, 2014 to 24th September, 2017, has been continued from 25th September, 2017 in service as Full Time Assistant Teacher. Therefore, in our view, in order to meet the ends of justice, it would be necessary to direct Respondent No.2 to grant initial approval to Petitioner No.1 as Shikshan Sevak on payment of monthly honorarium for three years, i.e., from 25th September, 2014 to 24th September, 2017 and, thereafter, further approval as Assistant Teacher in pay scale with effect from 25th September, 2017 with the release of grant-in-aid for payment of monthly honorarium for three years and thereafter monthly salary in pay scale, together with arrears.

31. We accordingly pass the following order :-

a) The impugned order dated 5th November, 2011 is quashed and set aside.

b) The Education Officer (Secondary), viz., Respondent No.2 is directed to grant approval to the appointment of Petitioner No.1 as Shikshan Sevak in the aided secondary school of Petitioner No.2 for the period from 25th September, 2014 to 24th September, 2017 on payment of monthly honorarium, and thereafter as Full Time Assistant Teacher in pay scale from 25th September, 2017 onwards, and to release grant-in-aid for payment of said monthly honorarium for three years and salary from 25th September, 2017, together with arrears.

c) The approval shall be granted within a period of four weeks from today.

d) The Education Officer shall include the name of Petitioner No.1 in the Shalarth ID within two weeks from date of grant of approval and release the arrears within two weeks thereafter.

e) Rule is made absolute in the above terms. The Writ Petition accordingly stands allowed. No order as to costs.