

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**  
**WRIT PETITION NO.6744 OF 2018**

Shri Vikram Vilas Mane	]	
Aged 41 years, Occ. Service,	]	
R/o. House No.403,	]	
Ambi Galli, Kagal,	]	
Dist. Kolhapur.	]	Petitioner

Vs.

1] The State of Maharashtra	]	
Through the Secretary,	]	
School Education Department,	]	
Mantralaya, Mumbai – 400 032.	]	

2] The Education Officer,	]	
[Secondary], Zilla Parishad,	]	
Kolhapur.	]	

3] Shri Shivray Shikshan	]	
Prasarak Mandal,	]	
Kagal, Tal. Kagal,	]	
Dist. Kolhapur – 416 216.	]	
Through its Chairman/Secretary.	]	

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Mr. N.C. Walimbe, A.G.P, for Respondents-State.

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*[Through Video Conferencing]*

Rule, returnable forthwith. By consent of learned Counsel  
for the parties, taken up for final hearing.

2/17

3. Facts germane for disposal of the Petition are as follows:

Respondent No.3 is an Educational Institution running an Aided Secondary School-Respondent No.4 at Kagal, District Kolhapur. Pursuant to resignation of a full time teacher namely Ketan Hari Shinde on 20<sup>th</sup> February, 2013 from the post of Art Teacher (ATD), the post of Art teacher in the said School became vacant.

4. Respondent No.4-Yashwantrao Ghatge High School, therefore, requested respondent No.2 to grant permission to publish an advertisement to fill up the said post along with some other posts which fell vacant, vide communication dated 10<sup>th</sup> June, 2013. Respondent No.2, however, chose neither to respond to the said letter nor deputed any surplus teacher/teachers to be absorbed in the vacancies which were proposed to be filled up by publishing an advertisement.

5. Respondent No.3- Shri Shivray Shikshan Prasarak Mandal Kagal, therefore, published an advertisement in daily '*Saka!*' dated 18<sup>th</sup> June, 2013. After interviewing the candidates for the respective post on 25<sup>th</sup> June, 2013, the Selection Committee comprising five

members found the petitioner most eligible and, therefore, recommended his name for appointment as an Art teacher.

6. The petitioner thus, came to be appointed as a 'Shikshan Sevak' for a period of three years on the post of ATD/GD Art as an open category candidate. An appointment order dated 8<sup>th</sup> July, 2013 came to be issued for a period of three years i.e till 7<sup>th</sup> July, 2016.

7. In fact, the said vacant post of Art teacher was reserved for Scheduled Tribe category, however, at the time of interview, no candidate from Scheduled Tribe category was available, the Selection Committee, therefore, thought it fit to select the petitioner on merits who belongs to an open category and recommended him for appointment.

8. A proposal by respondent No.4 to respondent No.2 seeking approval to the appointment of the petitioner was refused on the ground that with effect from 2<sup>nd</sup> May, 2012, the State Government has imposed a ban on the new recruitments in the Private Schools as the appointment of the petitioner has been made post imposition of

the said ban. Despite approaching respondent No.2 repeatedly by informing it that the appointment has been made on the vacant post of Art Teacher by following the selection procedure to which the ban on recruitment does not apply, respondent No.2 did not approve the same by issuing the impugned communication/order dated 20<sup>th</sup> April, 2018 refusing to grant approval to the appointment of the petitioner.

9. While countering the averments in the Petition, respondents No.1 and 2 in their affidavit-in-reply took a stand that the impugned order dated 20<sup>th</sup> April, 2018 passed by respondent No.2 is in consonance with the government orders in existence. Respondent-State Government has imposed a ban on recruitment vide Government Resolution dated 2<sup>nd</sup> May, 2012 which is still in force.

10. It is the contention of the respondents No.1 and 2 that the post of ATD/GD Art teacher is exclusively kept reserved for Scheduled Tribe category of backward classes. As such, it was incumbent on the part of the Management to fill in that vacancy by appointment of a Scheduled Tribe candidate. However, the management had filled the said post by appointing the petitioner who belongs to an open

category and, therefore, act of the Management is against the backlog, Rules and Regulations to that effect.

11. It is the contention of the respondents that the issue of absorption of surplus teachers is State-wise and the Commissioner of Education has directed that unless and until all the surplus teachers in the State are absorbed, no approval to any recruitment made after 2<sup>nd</sup> May, 2012 be given. The respondents also took a stand that as per the directions, the Art teachers already in service and duly approved are not to be declared surplus and as such, the question to absorb them though held surplus does not arise. It is contended that the petitioner, though appointed by respondent/management, is not an approved employee. Thus, the petitioner is not entitled to an advantage of communications dated 6<sup>th</sup> June, 2017 and 16<sup>th</sup> June, 2017. The respondents No.1 and 2 have, therefore, contended for passing necessary orders.

12. I heard Mr. Bandiwadekar, learned Counsel appearing for the petitioner and Mr. Walimbe, learned A.G.P, for respondents No.1 and 2. Mr. Bandiwadekar took me through the various

communications as well as the contents of the affidavit-in-reply. He vehemently urged to quash and set aside the impugned communication being illegal and against the various pronouncements of this Court.

13. In support of his contention, Mr. Bandiwadekar has placed useful reliance on a group of *Writ Petition bearing No.8587 of 2016 in case of Smt. Munoli Rajashri Karabasappa Vs. State of Maharashtra through Secretary and others with connected Writ Petitions decided on 10<sup>th</sup> July, 2017* (Coram: Hon'ble B.R. Gavai, the Lordship as he was then, now the Hon'ble Judge of the Supreme Court and Riyaz I. Chagla, J.). It would be apposite to reproduce paragraphs 6, 7 and 8 of the judgment which read thus;

*“6. We find that if the Education Officers do not send the surplus teachers within reasonable time, the schools cannot be expected to run without teachers for years together. Undisputedly, finding it difficult to send surplus teachers for the subjects of English, Maths and Science, the State Government itself has relaxed the rigour of government resolution dated 2<sup>nd</sup> May 2012 vide GR dated 4<sup>th</sup> September 2013. It could further be seen that State Government also*

*vide that GR relaxed the ban where the selection process has already commenced on 6<sup>th</sup> September 2012.*

7. *In that view of the matter, we find that in view of subsequent GRs and in view of the view taken by Division Bench of this Court, the ban would not be applicable to three categories, one where the recruitment process is already commenced prior to GR dated 2<sup>nd</sup> May 2012, second, in so far as the appointment made for subjects of English, Maths and Science are concerned and third, where the recruitment is made to fulfil the backlog of reserved category candidates.*

8. *We find that at the same time the State should take into consideration, that such situations arise on account of inaction of its own Education Officers. If Education Officers act promptly and ensure that the surplus teachers are absorbed in the schools wherever there is a vacancy, such a situation would not arise. However, as already observed hereinabove on account of inaction on the part of Education Officers, right which has become fundamental, in view of amendment to the constitution by which Article 21A brought in the Constitution, cannot be permitted to run without teachers for years together.*



*The State would always be at liberty to take appropriate action against its officers, on account of who's inaction the State exchequer will be burdened".*

The ratio laid down hereinabove is fully applicable in this case.

14. The sum and substance of the arguments of Mr. Bandiwadekar is that respondent No.2 has chosen not to reply the communication dated 10<sup>th</sup> June, 2013 at **Exhibit A** by which respondent No.3 had sought permission of the Education Officer-respondent No.2 to publish an advertisement for filling in the various posts including the post in question on which the petitioner came to be appointed.

15. On the aspect of the stand of respondent No.2 that action of the Management to absorb the petitioner who belongs to an open category on the post which was reserved for Scheduled Tribe, it is contended on behalf of the petitioner that it is a settled position of law that legality and validity of an order impugned before this Court

is to be considered on the basis of the reasons assigned in the impugned order. It is brought to my notice that the Officer who had passed the impugned order cannot be permitted to support the said order by assigning additional reasons, different than which are mentioned in the impugned order by filing the affidavit-in-reply.

16. Even otherwise, it is the contention of the petitioner that on merits also respondent No.2 ought to have considered that even though the advertisement stated that the post in question is reserved for Scheduled Tribe category, in fact, at the time of selection, no candidate belonging to the Scheduled Tribe category applied for the said post and, therefore, the petitioner who belongs to open category came to be appointed.

17. This fact has already been communicated to the respondent vide proposal dated 11<sup>th</sup> April, 2018. The copy of the said proposal is at **Exhibit E**. Thus, according to the petitioner, the Management made all the attempts to secure a candidate belonging to a Scheduled Tribe category, however, since no candidate was available, the selection of the petitioner was finalized.

18. The learned A.G.P for the respondents could not answer as to why there was no communication to the proposal of the petitioner from respondent No.2.

19. At the outset, it is apparent from the face of the record that respondent No.4 had applied to respondent No.2 for permission to publish the advertisement but there was no response to the same from respondent No.2. Respondent No.2 neither issued any order refusing permission nor issued any order to depute surplus teachers in the vacancies which were intended to be filled in by the Management. Under the above circumstances, the Management had no alternative than to proceed with the recruitment so that the teachers became available and the students do not suffer for want of teachers. Copy of the said communication dated 10<sup>th</sup> June, 2013 is placed on record indicating that it has been duly received by respondent No.2.

20. Mr. Bandiwwadekar has also placed a useful reliance on the judgment of this Court (Coram: S.C. Gupte, J.) in case of **Ms. Rekha Vithal Said Vs. State of Maharashtra in Writ Petition No.13485 of 2016**, on similar facts. In paragraph 5, it has been observed thus;

*“There are a number of judgments of our court, making it clear that the ban on recruitment of teachers pending absorption of surplus teachers under Government Resolution dated 2 May 2012 could not be invoked by the State, when despite communication of a vacancy of a teacher’s post by the school management to the Education Officer and seeking of his permission for filling the post, the Education Officer does not reply or forward any name of a surplus teacher to be appointed in the vacancy and, as a result, the school management proceeds to select and appoint a teacher in the vacant post. Admittedly, the Respondent-State has neither responded to the school management’s communication in this case nor sent any name of a surplus teacher at any stage prior to the impugned order dated 28<sup>th</sup> November, 2016. As this court has reiterated time and again, when the school management informs the education officer about a vacancy in its school seeking the latter’s permission for appointment, the Education officer is expected to either forward names of suitable persons from the list of surplus teachers maintained by him or if no surplus teacher is available for absorption, give permission to the management to appoint a teacher following regular appointment procedure. Education officer, in the present case, has done neither of these things. The*

*school management is not expected to carry on with the vacancy, awaiting indefinitely the Education Officer's response. The second reason cited, namely, the appointment not being in compliance of the backlog of reserved category, also does not hold water. Admittedly, the post which had become vacant and in which the petitioner was appointed, was an open category post and there was not question of it being filled up from amongst reserved category candidates”.*

***[Emphasis supplied]***

21. The case law fully covers the present set of facts. It has been observed, as stated above that there are number of judgments of this Court making it clear that ban on recruitment of teachers pending absorption of surplus teachers under Government Resolution dated 2<sup>nd</sup> May, 2012 could not be invoked by the State, when despite communication of a vacancy of a teachers post by the School Management to the Education Officer and seeking of his permission to fill in the post, the Education Officer does not reply or forward any name of surplus teacher to be appointed in the vacancy and as a result the School Management proceeds to select and appoint a teacher in the vacant post. In that case also the respondent-State had neither

responded to the School Management's communication nor sent any name of surplus teacher at any stage prior to the impugned order dated 28<sup>th</sup> November, 2016. Thus, it was observed that the School Management is not expected to carry on with the vacancy awaiting indefinitely the Education Officer's response. It is reiterated that when the School Management informs the Education Officer about the vacancy in its School seeking latter's permission for appointment, the Education Officer is expected to either forward names of suitable persons from the list of surplus teachers maintained by him or if no surplus teachers are available for absorption, give permission to the Management to appoint a teacher following regular appointment procedure. The ratio is squarely applicable to the present set of facts.

22. It is the contention of the petitioner that at the time of publishing an advertisement for the post in question, it was mentioned that the post was reserved for Scheduled Tribe candidate, however, no candidate belonging to Scheduled Tribe category was available and, therefore, a proposal to that effect had been sent to respondent No.2 on 11<sup>th</sup> April, 2018. **Exhibit E** is the photo stat copy of the said proposal forwarded to respondent No.2 seeking approval.

Copy of the proposal which is at **Exhibit E** at page No.26 on record reveals that the Management made an attempt to secure a candidate from Scheduled Tribe category but could not succeed and, therefore, the candidature of the petitioner was required to be considered to the post who admittedly belongs to open category. Even otherwise, my attention is drawn to the communications dated 6<sup>th</sup> June, 2017 and 16<sup>th</sup> June, 2017. It is apparent that respondent No.1 by letter dated 3<sup>rd</sup> July, 2017 addressed to the Commissioner (Education) Maharashtra State, Pune and a copy marked to the Director of Education [Secondary and Higher Secondary], M.S. Pune informed that the assumption mentioned in the aforesaid letters is correct and therefore, the action should be taken to exempt the Art Teachers from the process of being declared surplus online. On the basis of the aforesaid order issued by respondent No.1, the Director of Education by letter dated 12<sup>th</sup> July, 2017 informed the Education Officers (Secondary) of all the Zilla Parishads the said decision of Respondent No.1 and directed them to take immediate action for compliance of the directions issued by respondent No.1 in the letter dated 3<sup>rd</sup> July, 2017. It is clear from the aforesaid correspondence that it is the policy of the State Government that art teacher should not be

declared surplus. It is rightly submitted by Mr. Bandiwadekar that as a natural corollary, there would be no surplus teachers-art teacher who is required to be absorbed in the post in which the petitioner came to be appointed and as a consequence thereof approval should not have been refused to his appointment on the ground that there were surplus art teachers who were required to be absorbed.

23. In the premises, the impugned order passed by respondent No.2-Education Officer cannot pass muster. Rule is accordingly made absolute by quashing and setting aside the impugned order dated 20<sup>th</sup> April, 2018.

24. Respondent No.2-Education Officer is directed to grant approval to the petitioner's appointment with effect from 8<sup>th</sup> July, 2013 to 7<sup>th</sup> July, 2016 and thereafter as a full time Assistant Teacher in the pay scale with effect from 8<sup>th</sup> July, 2016. Respondent No.2-Education Officer shall release grant in aid for payment of monthly honorarium for three years and thereafter monthly salary in the pay scale together with arrears. This entire exercise shall be completed within a period of six weeks from today.



25. The Petition stands disposed of in the aforesaid terms.

26. This order will be digitally signed by the Personal Assistant of this Court. All concerned shall act on production by fax or e-mail of a digitally signed copy of this order.

**[PRITHVIRAJ K. CHAVAN, J.]**