
(2003) 07 BOM CK 0089

In the Bombay High Court

Case No : Writ Petition No's. 3646 and 3872 of 2002

Asha Raut

APPELLANT

Vs

Deputy Director of Education (Secondary) and Others

RESPONDENT

Date of Decision : 30-07-2003

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 9(10)

Citation : (2003) 4 ALLMR 430 : (2003) 6 BomCR 543 : (2003) 3 MhLj 1010

Hon'ble Judges : R.S. Mohite, J;D.D. Sinha, J;A.P. Deshpande, J

Bench : Full Bench

Advocate : R.K. Deshpande, in Writ Petition No. 3872 of 2002 and P.N. Kendurkar, in Writ Petition No. 3646 of 2002, for the Appellant; A.S. Fulzele, Assistant Government Pleader for Respondent Nos. 1 and 2, A.S. Joshi, for respondent No. 3, P.N. Kendurkar and S.B. Wahane, in Writ Petition No. 3872 of 2002 and A.S. Fulzele, Assistant Government Pleader for Respondent Nos. 1 to 3, A.S. Joshi, for respondent No. 4, Shende, in Writ Petition No. 3646 of 2002, for the Respondent

Judgement

D.D. Sinha, J.—Heard Shri Deshpande, learned Counsel for the Petitioner in Writ Petition No. 3872/2002, and Shri Fulzele, Learned Assistant Government pleader for the respondent Nos. 1 and 2, Shri Joshi, learned Counsel for the respondent No. 3, Shri Kendurkar, learned Counsel for the respondent No. 4, and Shri Wahane, learned Counsel for the respondent No. 5, as well as Shri Kendurkar, learned Counsel for the petitioner in Writ Petition No. 3646/2002, Shri Fulzele, learned Assistant Government Pleader for the respondent Nos. 1 to 3, Shri Joshi, learned Counsel for the respondent No. 4, and Shri Shende, learned Counsel for the respondent No. 6.

2. The Division Bench of this Court in view of conflicting judgments given by this Court in Raghobaji Durge v. Education Officer, Zilla Parishad, Chandrapur and Ors., (Writ Petition No. 3086/1997) and V.S. Joshi Vs. State of Maharashtra and Others, requested the Hon"ble Chief Justice to refer the issue to the larger

Bench. The Hon''ble Chief Justice has, therefore, referred the issue to us to resolve the conflict between two views. Both the writ petitions involve common question of law and, therefore, they are heard together and disposed of by the common judgment.

3. Shri Deshpande, learned Counsel for the petitioner in Writ Petition No. 3872/2002, states that the petitioner has acquired qualification of M.A. in 1975 and that of B.Ed. in 1978. The petitioner was appointed as an Assistant Teacher in respondent No. 4 School run by the respondent No. 3 Management with effect from 21-7-1979. The petitioner at the later point of time was confirmed in the aforesaid post with effect from 21-7-1979 and was further upgraded as a teacher in the, respondent No. 4 School with effect from 1-8-1988 and is working in the said capacity without any break in service.

4. Learned Counsel Shri Deshpande further states that the respondent No. 3 is a Society duly registered under Societies Registration Act, 1860 and runs three different Schools, namely,

- i) Sarvodaya Vidyalaya, Sindewahi,
- ii) Sarvodaya Kanya Vidyalaya, Sindewahi,
- iii) Sarvodaya Vidyalaya, Gadbori.

All the Schools are run on hundred per cent grant basis. A common seniority list pertaining to employees working in all the Schools is maintained by the respondent No. 3 Society. There are three posts of Head Master and one post of Assistant Head Master, which are duly sanctioned by the respondent Nos. 1 and 2.

5. It is contended by learned Counsel Shri Deshpande that in 1991, there were two sanctioned posts of Head Master and the respondent No. 5 was appointed as Head Mistress in respondent No. 4 School with effect from 1-6-1991 on the basis that she belongs to Scheduled Caste category though she was junior most female Teacher at the relevant time and even today, is junior to some of the female Teachers. It is submitted that some of the senior female Teachers had filed appeals against the aforesaid supersession. Those appeals are pending before the School Tribunal, Chandrapur since 1991. It is contended that one Smt. Sarita Charade, who was senior to the petitioner and had filed appeal before the School Tribunal challenging appointment of respondent No. 5 as Head Mistress, has retired in the year 1994. Another Teacher Smt. Shobha Sonkusale, who has also filed appeal before the School Tribunal, which is pending, is junior to the petitioner and is at the serial No. 15 in the seniority list. The petitioner at the relevant time was at serial No. 6 in the seniority list.

6. It is contended by Shri Deshpande that the petitioner being aggrieved by the appointment of respondent No. 5 as Head Mistress moved representation to the respondent Nos. 1, 2 and 3. The respondent No. 3 because of representation made by the petitioner, got offended and with the mala fide intention issued letter dated 1-11-2000 through the officiating Head Mistress to the petitioner

informing her that her position in the seniority list has been lowered to seventh place instead of sixth place and that one Smt. Rajani Maitray is shown at Serial No. 6. It was informed that the aforesaid change in the common seniority list has been carried out in pursuance of the Resolution passed by the School Committee. The petitioner immediately on the same day had filed an objection to the change in the seniority list with the respondent No. 3 Society. The petitioner had also moved respondent No. 2 Education Officer seeking redressal of her grievance regarding displacement in the seniority list and had also complained regarding appointment of respondent No. 5 as Head Mistress in spite of the fact that petitioner was the senior-most female Teacher in the respondent No. 4 School. In the same representation, petitioner requested the respondent No. 2 Education officer not to grant approval to appointment of respondent No. 5 and direct respondent Management to appoint petitioner as Head Mistress in the respondent No. 4 School.

7. It is further contended by Shri Deshpande, learned Counsel for the petitioner, that the respondent No. 3 Management is under statutory obligation to appoint the senior-most female teacher to the post of Head of the Girls' School in consonance with Rule 3(4) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (hereinafter referred to as "the MEPS Rules" for the sake of brevity). The requirement of Rule is mandatory and, therefore, its compliance is obligatory. It is submitted that petitioner at the relevant time was the senior-most female teacher and was fulfilling the conditions laid down in the said Rule and was having satisfactory record of service and her claim for appointment on promotion to the post of Head Mistress was valid and legal. The respondent No. 3 was, therefore, required to act as per provisions of Sub-rule (4) of Rule 3 of the MEPS Rules by appointing the petitioner to the post of Head Mistress in the respondent No. 4 School.

8. Learned Counsel Shri Deshpande further submits that the petitioner is the senior-most teacher in the respondent No. 4 School and same can be seen from the order dated 28-2-2001 passed by the Education Officer. In spite of that, respondent No. 3 since 1991 deprived the petitioner of her legitimate claim to be appointed as Head Mistress in respondent No. 4 School and in utter derogation of Rule 3(4) of the MEPS Rules appointed respondent No. 5 Smt. Kamal Gaikwad though she was junior not only to the petitioner, but also to other female teachers. It is contended that since 1991, respondent No. 5 has not been granted approval to the post of Head Mistress, which she is holding since Education Officer has already concluded that appointment of respondent No. 5 as Head Mistress was illegal.

9. It is contended by learned Counsel Shri Deshpande that Rule 3(4) of the MEPS Rules prescribes that the Head of the Girls' School can only be the senior-most lady teacher and policy of reservation cannot be made applicable to the promotion to the Head of the Girls' School for the reason that post of head Mistress of Girls' School is an isolated post and, therefore, it is to be filled by a

candidate belonging to the open category. It is submitted that though respondent No. 3 Society is running three Schools, there cannot be reservation to the post of Head Mistress of the Girls' School as the post of Head Mistress in the Girls' School is not interchangeable with the post of Head Master of other two Schools even though common seniority list amongst teachers of three Schools is maintained. It is pointed out that this aspect is concluded by the judgment delivered by the Division Bench of this Court on 25-8-1999 in Writ Petition No. 3086/1997. It is contended that considering these aspects, the respondent No. 2 Education Officer has rightly concluded that appointment of respondent No. 5 to the post of Head Mistress is unjustified and he refused to grant approval to the post of Head Mistress held by the respondent No. 5 since 1991.

10. Learned Counsel Shri Deshpande states that as per Rule 3(4) of the MEPS Rules, only the senior-most lady teacher can be appointed to the post of Head Mistress of the Girls' School, irrespective of her seniority vis-a-vis male teacher. It is contended that it is an exception to Rule 3(3) of the MEPS Rules. It is further contended that there is no interchangeability to the post of Head Mistress of the Girls' School and the Head Master in the Boys' School and/or coeducation Schools, save and except in the special circumstances, which cannot be a guide to determine question of interchangeability. It is submitted that Note 7 of Schedule "F", if it is read in aid of Rule 3(4) of the MEPS Rules, would indicate that a separate, independent and distinct watertight compartment or a unit of the Girls' School is sought to be created from the other Schools in which there is a solitary post of Head Mistress. It is, therefore, submitted that the post of Head Mistress in the Girls' School cannot be clubbed together with the posts of Head Master in the Schools other than the Girls' School for the purpose of reservation and/or application of roster point. In such situation, reservation of single post of Head in the Girls' School would amount to hundred per cent reservation, which is violative of Articles 14 and 16(1) of the Constitution.

11. Learned Counsel Shri Deshpande alternatively states that even otherwise, in view of Sub-rule (10)(a) of Rule 9 of the MEPS Rules, Management can reserve 24 per cent of the total number of posts (or vacancies) of Heads for the members of Scheduled Castes, Scheduled Castes converts to Buddhism, Scheduled Tribes, Denotified Tribes and Nomadic Tribes and manner of reservation is provided in the said provision. It is contended that even if it is assumed for the sake of argument that the post of Head Mistress in the Girls' School can be clubbed with the posts of Head in other two Schools in the instant case, the reservation of the post of Head in the Girls' School for Scheduled Caste candidate whether by applying roster or otherwise, would amount to 33% of reservation in three posts of Head. Since there are three posts of Head insofar as present case is concerned, 33% of reservation would be much more than the maximum limit of 13% of reservation for Scheduled Caste category as provided in the above referred Rule and would violate guarantee provided under Articles 14 and 16(1) of the Constitution. In order to substantiate this contention, reliance is placed by the learned Counsel on the judgment of the Apex Court in

Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others, .

12. It is submitted by Shri Deshpande, learned Counsel for the petitioner, that percentage of reservation has to be worked out in relation to number of posts, which form cadre strength and the concept of vacancy has no relevance in operating percentage of reservation. In order to substantiate this contention, reliance is placed by the learned Counsel on the judgment of the Apex Court in R.K. Sabharwal and others Vs. State of Punjab and others, . It is further contended that in the instant case, even if it is assumed that cadre of Head in all the three Schools is one, cadre strength would be of three posts and one of them, if it is reserved for candidate belonging to reserved category, the percentage of reservation would be much more than prescribed for that category in Sub-rule (10)(a) of Rule 9 of the MEPS Rules, which is impermissible in law.

13. Shri Kendurkar, learned Counsel for Smt. Kamal Gaikwad, petitioner in Writ Petition No. 3646/2002, who is also respondent No. 5 in Writ Petition No. 3872/2002, states that at the relevant time, i.e. sometime before 1990, Management was running three Schools and out of them, two Schools were coeducational Schools and one was Girls' School. A common seniority list was prepared and maintained by the respondent Management of all the teaching and non-teaching staff of the Schools. The petitioner Smt. Kamal Gaikwad was appointed as an Assistant Teacher with effect from 4-9-1984 in Sarvodaya Kanya Vidyalaya, Sindewahi. She acquired the qualification of M. A., B.Ed, in the year 1983, which was the prescribed qualification to be appointed as an Assistant Teacher and since then, she is serving in the said High School. Her service record is clean and unblemished.

14. Learned Counsel Shri Kendurkar further submits that as per provisions of Rule 3(4) of the MEPS Rules, petitioner Smt. Kamal Gaikwad is entitled to be appointed to the post of Head Mistress of the above referred Girls' School. It is contended that as per Government Resolution dated 17-9-1980, 50 point roster is to be maintained and it is in accordance with the said roster, that the Management was required to appoint Head of the concerned School. It is further contended that the post of Head Mistress in Sarvodaya Kanya Vidyalaya fell vacant after 1980 and that being the first vacancy, it was to be filled in from the open category and, therefore, one Shivankar was appointed. The second time when the said post fell vacant in 1991, petitioner Smt. Kamal Gaikwad being the senior-most lady Assistant Teacher in the Scheduled Caste category, was eligible to be appointed to the post of Head Mistress of Sarvodaya Kanya Vidyalaya in view of 50 point roster since the said post was required to be filled in from the Scheduled Caste category as per 50 point roster. A Resolution to that effect was passed on 3-6-1991 by the Management of the School giving promotion to petitioner Smt. Kamal Gaikwad to the post of the Head of the Girls' School with effect from 1-6-1991. The Management submitted proposal to the Education Officer for the purpose of according approval to the said promotion. However,

Education Officer declined to accord approval to the appointment of Smt. Kamal Gaikwad as Head Mistress on the ground that 50 point roster is not applicable to the post of Head Mistress of the Girls" School.

15. Learned Counsel Shri Kendurkar states that appointment of petitioner Smt. Kamal Gaikwad as Head Mistress was challenged by one Dande, another Assistant Teacher by filing an appeal before the School Tribunal vide Appeal No. STN-78/91. However, the said appeal was withdrawn by Dande on 23-7-2002. Another Assistant Teacher Smt. Shobha Khohar, who is respondent No. 5 in Writ Petition No. 3646/2002, had also challenged appointment of petitioner Smt. Kamal Gaikwad as Head Mistress before the School Tribunal vide Appeal No. STN/129/91. Smt. S.S. Charde, respondent No. 6 in Writ Petition No. 3646/2002, also filed an appeal bearing No. STN/94/91 before the School Tribunal. All these appeals are pending before the School Tribunal. It is further contended that Smt. Asha Raut, another Assistant Teacher directly filed Writ Petition No. 3872/2002 in this Court wherein it is alleged that post of Head of the Girls" School is an isolated post and, therefore, 50 point roster is not applicable and she being senior to Smt, Kamal Gaikwad (petitioner in Writ Petition No. 3646/2002) is entitled to be appointed to the post of Head Mistress in the Girls" School.

16. Learned Counsel Shri Kendurkar further states that in the instant case, Management is running two co-educational Schools and one Girls" School, but common seniority list of all the three Schools is maintained by the Management and in view of Rule 41 of the MEPS Rules, Management is entitled to transfer any of its employees from one School to another on administrative grounds, promotion or at the request of the concerned employee. The posts are undoubtedly interchangeable and, therefore, contention canvassed by Shri Deshpande, learned Counsel for petitioner Smt. Asha Raut, that the post of Head of the Girls" School is an isolated single post cadre and is also not interchangeable is incorrect and cannot be accepted. It is contended that Rule 41 of the MEPS Rules confers power on the Management to transfer its employees. from one School to another and, therefore, posts in all these Schools including those of the Head are clearly interchangeable and hence, they do not remain isolated. It is, therefore, contended that policy of reservation contemplated as per Government Resolution dated 17-9-1980 of 50 point roster as well as percentage of reservation provided under Rule 9(10)(a) of the MEPS Rules for backward classes is applicable in the instant case and hence, decision of the Education Department in this regard is bad in law and petitioner Smt. Kamal Gaikwad is entitled to get the approval to the post of Head Mistress, which is held by her with effect from 1-6-1991.

17. It is further contended by learned Counsel Shri Kendurkar that Note 7 of Schedule "F" of the MEPS Rules provides that where Management is running more than one School and if one of them is Girls" School and if Management is desirous of maintaining a separate seniority list of Teachers in the said Girls" School, the Management has to resolve accordingly and is further required to

forward a copy of the Resolution to the Education Officer. It is submitted that where Management decides to do so, then the candidates to be appointed to the teaching posts need to be given a clear understanding by the Management to the effect that they shall not have any claim on the promotional posts in other Schools run by the same Management. Similarly, the services of the members of the teaching staff in such a School shall not be permanently transferable to any other School and vice versa. It is contended that in the instant case, no such decision contemplated under Note 7 of Schedule "F" is taken by the Management in respect of Girls' School and, therefore, Girls' School cannot be treated as a separate Unit and Management is entitled to transfer the employees of one School to another in view of Rule 41 of the MEPS Rules on administrative grounds and, therefore, the post of the Head in the Girls' School in the present case cannot be treated as a single post cadre, which is not interchangeable. In support of these contentions, reliance is placed by the learned Counsel on the judgment of this Court in *Shri V.S. Joshi v. State of Maharashtra*, 2002(3) A M.R. 882.

18. Shri Wahane, learned Counsel for Smt. Kamal Gaikwad, respondent No. 5 in Writ Petition No. 3872/2002, states that respondent No. 5 was appointed on 1-6-1991 as Head Mistress of Girls' School being the senior most lady Assistant Teacher from the Scheduled Caste category. The respondent Society is justified in appointing her as Head Mistress in view of 50 point roster maintained in this regard. It is contended that appointment to the post of Head Master/Head Mistress is governed by the Government Resolution dated 17-9-1980 by which 50 point roster has been adopted and maintained by the respondent Society. It is submitted that in view of Rule 3(4) of the MEPS Rules, the post of Head Mistress can be occupied by the senior-most lady Assistant Teacher irrespective of her seniority vis-a-vis male Teacher. Similarly, as per roster point, the vacancy which occurred was meant to be filled in by the Scheduled Caste candidate as per roster point and Smt. Kamal Gaikwad being the senior-most lady Assistant Teacher from the Scheduled Caste category was rightly promoted by the Management to the post of Head Mistress. The decision of the Education Officer that the 50 point roster is not applicable in this regard is bad in law and, therefore, appropriate direction to the Education Department be given to grant approval to the appointment of Smt. Kamal Gaikwad to the post of Head Mistress of the Girls' School.

19. We have given anxious thought to the various contentions canvassed by the learned respective Counsel for the parties and perused the relevant provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as "the MEPS Act" for the sake of brevity) and the MEPS Rules as well as judgments of the Apex Court and High Courts. It will be appropriate for us to enumerate certain undisputed facts in order to appreciate the controversy in issue. Those are :

20. Respondent No. 3 in Writ Petition No. 3872/2002 and respondent No. 4 in

Writ Petition No. 3646/2002 is the common Management, namely, Vidya Prasarak Sanstha, which runs above referred three Schools, out of which Sarvodaya Kanya Vidyalaya is the Girls' School and remaining two are coeducational Schools. The vacancy in the post of Head Mistress of Sarvodaya Kanya Vidyalaya for the first time occurred in the year 1980/1981, which was filled in by open category candidate and second vacancy in the said post occurred in the year 1991. Smt. Kamal Gaikwad was appointed as Head Mistress in Sarvodaya Kanya Vidyalaya by the Management with effect from 1-6-1991 as per 50 point roster provided by Government Resolution dated 17-9-1980 since she was the senior-most lady Teacher from the Scheduled Caste category ignoring the claim of Smt. Asha Raut (petitioner in Writ Petition No. 3872/2002), who was senior-most lady Teacher from the open category. The Management forwarded a proposal to the Education Officer for grant of approval to the appointment of Smt. Kamal Gaikwad as Head Mistress in the Girls' School. However, the Education Officer declined to grant approval on the ground that 50 point roster contemplated vide Government Resolution dated 17-9-1980 is not applicable to the post of Head of Girl's School, which has resulted in filing of present two writ petitions one is by Smt. Asha Raut, i.e. Writ Petition No. 3872/2002 for quashing of appointment of Smt. Kamal Gaikwad as Head Mistress in the Girls' School on the ground that same is unconstitutional and violative of constitutional guarantee contained in Article 16(1) and (2) of the Constitution as well as seeking direction to the Management to appoint her to the post of Head Mistress in the Girls' School as well as direction to respondent Nos. 1 and 2 for grant of approval to her appointment. Other writ petition bearing No. 3646/2002 is filed by Smt. Kamal Gaikwad seeking direction to the Education Officer (Secondary), Zilla Parishad, Chandrapur to grant approval to the post of Head Mistress on which she was appointed by the Management with effect from 1-6-1991 and a direction to the Management as well as Education Department to release difference of salary payable to her as Head Mistress with effect from 1-6-1991.

21. The Division Bench of this Court in the case of Raghobaji Durge (Writ Petition No. 3083/1997) held that appointment to the post of Head of Girls' School necessarily is to be made of a lady Teacher even though common seniority list of the Girls' School and co-educational Schools is maintained. However, Head of other co-educational Schools cannot be treated as forming one cadre and these posts are not interchangeable and, therefore, policy of reservation is not applicable.

22. So far as Shri V.S. Joshi's case is concerned, another Division Bench of this Court has held that on the aspect of constitutional reservation, it is clear that respondent Society is running two different Schools and, therefore, post of Head Master in one of the Schools cannot be said to be an isolated post.

23. The question which falls for our consideration in this reference is thus : Where one Management runs different Secondary Schools, one of which is exclusively a Girls' School, whether the post of Head mistress in the Girls'

School can be treated as a single isolated post, which cannot be subjected to reservation either by applying roster or as per Rule 9(10)(a) of the MEPS Rules, 1981?

24. In order to appreciate the controversy in issue, it will be appropriate to consider the scheme of the relevant provisions of the MEPS Act and Rules.

That the Section 4 of the MEPS Act enables the State Government to make the Rules providing for minimum qualifications for recruitment (including its procedure), duties, pay, allowances, post-retirement and other benefits and other conditions of service of employees of private Schools and for reservation of adequate number of posts for members of the backward classes. Similarly, Section 16 of the MEPS Act empowers the State Government to make Rules for carrying out the purposes of the Act, In exercise of power conferred, on the State Government in view of these provisions, the Government of Maharashtra has framed Rules, which are called the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981.

25. The Rule 3 of the MEPS Rules deals with qualifications and appointment of Head and reads thus:

3. Qualifications and appointment of Head. -- (1) A person to be appointed as the Head --

(a) (i) of a primary School having an enrolment of students above 200 or having Standards I to VII shall be the senior-most trained teacher, who has put in not less than five years" service ; and (ii) of any other primary school shall be the senior-most teacher in the School;

(b) of a secondary school including night school or a Junior College of Education shall be a graduate possessing Bachelor's degree in teaching or education of a statutory University or any other qualification recognised by Government as equivalent thereto and possessing not less than five years" total full time teaching experience after graduation in a secondary school or a Junior College of Education out of which at least two years" experience shall be after acquiring Bachelor's degree in teaching or education :

Provided that in the case of a person to be appointed as the Head of a night secondary School --

(i) he shall not be the one who is holding the post of the Head or Assistant Head of a day School; and

(ii) the experience laid down in Clause (b) of Sub-rule (1) may be as a part time teacher

(4) In the case of a girls" secondary school or Junior College of Education for Women, the senior-most lady teacher fulfilling the conditions laid down in Clause (b) of Sub-rule (1) and having satisfactory record of service, shall be appointed as the Head of that School irrespective of her seniority vis-a-vis the male

teachers.

26. It is apparent that Rule 3 of the MEPS Rules provides eligibility and qualification required for appointing an Assistant Teacher on the post of Head of the School. Sub-clause (b) of Sub-rule (1) of Rule 3 provides requisite qualification and experience required for appointment to the post of Head of the Secondary School, Night School or a Junior College of Education we are concerned only with the Secondary School.

27. Sub-rule (4) of Rule 3 of the MEPS Rules contemplates that senior-most lady teacher fulfilling the conditions laid down in Clause (b) of Sub-rule (1) of Rule 3 and having satisfactory record of service is eligible to be appointed as the Head of such School irrespective of her seniority vis-a-vis male teachers. In other words, the requirement for being appointed to the post of Head Mistress in the Girls' School is that she must be a lady teacher and she should be the senior-most with satisfactory record of service. This Rule makes it clear that no male teacher irrespective of his seniority is eligible for the post of Head in the Girls' School, This Rule completely prohibits appointment of male teacher irrespective of his seniority to the post of Head of the Girls' School and, therefore, it is evident that as per mandate of this Rule, the post of Head of the Girls' School can only be occupied by the senior-most lady teacher having satisfactory record of service irrespective of her seniority vis-a-vis male teachers in the School.

28. In the instant case, though Management is running three different Schools, however, out of these three Schools, one School is the Girls' School and remaining two are co-educational Schools and, therefore, so far as the post of Head of the Girls' School is concerned, by virtue of prohibition and restrictions imposed by Sub-rule (4) of Rule 3 of the MEPS Rules, the same is meant for senior-most lady teacher having satisfactory record of service irrespective of her seniority vis-a-vis male teacher. In the instant case, the post of Head of the Girls' School, therefore, is a solitary post and same is required to be filled in as provided in Sub-rule (4) of Rule 3 of the Rules. The same is also not interchangeable with the Head of other co-educational Schools, if occupants of such posts are males and, therefore, though the cadre of Heads of Boys' School as well as Girls' School is a common cadre, however, the post of Head of the Girls' School is not interchangeable and, therefore, by necessary implication, same becomes a single post cadre.

29. It is no doubt true that Rule 41 of the MEPS Rules empowers Management conducting more than one School to transfer any of its employees from one School to another in an exceptional situation and on administrative grounds, promotion, request of employee, etc. However, this provision cannot be read in isolation and will have to be considered vis-a-vis scheme provided and prohibition created vide Sub-rule (4) of Rule 3 of the MEPS Rules. While considering this aspect, it is necessary to consider that so far as Head of the Secondary Boys' School/Co-educational School is concerned, in view of Sub-rule (3) of Rule 3 of the MEPS Rules, only the senior-most member of the teaching

staff can be appointed as the Head of such School in accordance with the guidelines laid down in Schedule "F" from amongst those employed in the School. It is, therefore, evident that so far as two co-educational Schools are concerned, only the senior-most members of the teaching staff would be eligible to occupy the posts of Head in those Schools and in the normal course, these posts would be occupied by the senior-most male Teachers since senior-most lady teacher from the lady teachers" category would opt for the post of Head in the Girls" School since her seniority vis-a-vis male teachers is immaterial in this regard. In view of prohibition created by Sub-rule (4) of Rule 3, the male teacher holding the post of Head of the co-educational School cannot be transferred by the Management even in view of powers conferred on the Management in this regard by Rule 41 to the post of Head of the Girls" School. Similarly, lady teacher, who is Head of the Girls" School may not be necessarily a senior-most member of the teaching staff and, therefore, she also cannot be transferred to the post of Head of the co-educational School in view of restriction in this regard created by Sub-rule (3) of Rule 3 of the MEPS Rules. On the backdrop of these provisions and the scheme of the relevant MEPS Rules, it is implicit that Heads of the Boys" School and Girls" School cannot be treated as a common cadre in that sense. The posts are also not interchangeable and by necessary implication, the post of Head of the Girls" School becomes a solitary post and the cadre becomes a single post cadre.

30. So far as application of constitutional reservation as well as roster to the single post cadre is concerned, law is well settled by the Apex Court in this regard way back in 1988 in Chakradhar Paswan Vs. State of Bihar and Ors, where Apex Court has in clear terms held that for a single post cadre, no reservation can be made for backward classes, which is followed by the Apex Court in the case of Smt. Chetana Dilip Motghare Vs. Bhide Girls Education Society, Nagput and others, and it has been held in the said decision that when the post is a solitary post in the cadre, roster and carry forward scheme underlying every reservation policy cannot apply. It is no doubt true that a contrary view, however, was taken by the Apex Court in the decision in State of Bihar and Others Vs. Bageshwari Prasad and Another, , Sureshchandra v. J.B. Agrawal, 1997 (5) SCC 278 and later on in three Judges" Bench decision in Union of India and Another Vs. Madhav Gajanan Chaubal and Another, wherein it is held by the Apex Court that reservation in a single post cadre by rotation of a roster point is permissible. This decision was upheld by the Apex Court in Union of India and others Vs. Brij Lal Thakur, as well as decision rendered by the Apex Court in Post-Graduate Institute of Medical Education and Research etc. Vs. K.L. Narasimhan and another etc., .

31. At the later point of time, the Constitution Bench of the Apex Court while considering the review petition in respect of decision rendered by the Apex Court in Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others, , finally set at naught the controversy in this regard by approving the view taken in Dr. Chakradhar Paswan"s case, that there

cannot be any reservation in the single post cadre and disapproved the view expressed by the Apex Court in Madhao's case, Brijlal Thakur's case and Bageshwari Prasad's case upholding reservation in a single post cadre either directly or by device of rotation of roster point and also overruled decision rendered by the Apex Court on the same lines in the case of Post Graduate Institute of Medical Education and Research. It is, therefore, now well settled that there cannot be any reservation in a single cadre post, which is not interchangeable.

32. So far as case in hand is concerned, we have already concluded that as per scheme of the provisions of the MEPS Act and Rules, the post of Head of the Girls' School being not interchangeable is a single post cadre and, therefore, question of application of reservation policy directly or by device of rotation of roster point does not arise.

33. We have given our anxious thought to all the possible situations, which can exist, such as, suppose we take a highly exceptional and remote situation wherein Head of one of the co-educational Schools is also a lady and so far as head of the Girls' School is concerned, she is bound to be a lady. In view of rule 41 of the MEPS Rules, the Management would be able to transfer the Head of co-educational School to the Girls' School and Head of the Girls' School to the co-educational School on administrative grounds, if she is senior-most teacher from the common seniority list (such situation would seldom exist).

34. If we consider this hypothetical situation and suppose we apply policy of reservation either through roster point contemplated in view of Government Resolution dated 17-9-1980 or as provided in Sub-rule (10)(a) of Rule 9 of the MEPS Rules to the post of Head of the Girls' School, then so long as the head of the co-educational School is a lady, only during such time the interchangeability of posts may be possible subject to eligibility to such post, in such rare situation. However, in the normal set of circumstances, the post of Head in the Boys' School or co-educational School is held by the senior-most male teacher and, therefore, in view of restrictions contained in Sub-rule (4) of Rule 3 of the MEPS Rules, the post of Head of the Girls' School during such time is not interchangeable with that of the post of the Head of the Boys' School or co-educational School held by the male teacher and such reservation, which is made applicable to the post of Head of the Girls' School would result in complete exclusion of lady teacher belonging to the open category, which would finally result in hundred per cent reservation of such post during such period and would undoubtedly result in violation of fundamental rights guaranteed by the Constitution under Articles 14 and 16(1) of the Constitution and, therefore, is impermissible in law.

35. The observations of the Apex Court in para (31) of the judgment in Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others, are relevant, which read thus :

"There is no difficulty in appreciating that there is need for reservation for the members of the Scheduled Castes and Scheduled Tribes and Others Backward Classes and such reservation is not confined to the initial appointment in a cadre, but also to the appointment in a promotional post. It cannot however be lost sight of that in the anxiety for such reservation for the backward classes, a situation should not be brought about by which the chance of appointment is completely taken away so far as the members of other segments of the society are concerned by making such a single post cent per cent reserved for the reserved categories to the exclusion of other members of the community even when such a member is senior in service and is otherwise more meritorious."

Similarly, in para 32 of the judgment, the Apex Court has observed thus : "Articles 14, 15 and 16 including Articles 16(4), 16(4-a) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the community who do not belong to reserved classes. Such view has been indicated in the Constitution Bench decisions of this Court in Balaji case, Devadasan case and Sabharwal case. Even in Indra Sawhney case, the same view has been held by indicating that only a limited reservation not exceeding 50% is permissible. It is to be appreciated that Article 15(4) is an enabling provision like Article 16(4) and the reservation under either provision should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the fundamental rights of the rest of the citizens. The special provision under Article 15(4) (sic 16(4)) must therefore strike a balance between several relevant considerations and proceed objectively, In this connection, reference may be made to the decisions of this Court in State of A.P. v. U.S.V. Balram and C.A. Rajendran v. Union of India. It has been indicated in Indra Sawhney case that Clause (4) of Article 16 is not in the nature of an exception to Clauses (1) and (2) of Article 16, but an instance of classification permitted by Clause (1). It has also been indicated in the said decision that Clause (4) of Article 16 does not cover the entire field covered by Clauses (1) and (2) of Article 16. In Indra Sawhney case, this Court has also indicated that in the interests of the backward classes of citizens, the State cannot reserve all the appointments under the State or even a majority of them. The doctrine of equality of opportunity in Clause (1) of Article 16 is to be reconciled in favour of backward classes under Clause (4) of Article 16 in such a manner that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality."

36. In view of the above referred observations of the Apex Court, it is evident that application of reservation policy in a single post cadre at any point of time on account of rotation of roster or otherwise if brings about a situation where such post remains reserved exclusively for the members of backward classes in complete exclusion of the members of other communities, which results in hundred per cent reservation for backward classes, is not permissible within the constitutional frame work and, therefore, would violate guarantee under Articles

14 and 16(1) of the Constitution of India. The view expressed by the Division Bench of this Court in Raghobaji Durge's case (Writ Petition No. 3086/1997) is consistent with the law laid down by the Apex Court and, therefore, is a correct view on the subject.

37. So far as view expressed by another Division Bench of this Court in the case of Shri V.S. Joshi is concerned, the learned Judges failed to consider the scheme of provisions of Sub-rule (4) of Rule 3 of the MEPS Rules whereby only senior-most lady teacher fulfilling the conditions laid down in Clause (b) of Sub-rule (1) and having satisfactory record of service alone is entitled to be appointed as head of such School irrespective of her seniority vis-a-vis male teachers, which means it is immaterial whether there are senior male teachers above such lady teachers in the common seniority list. Similarly, the learned Judges have wrongly construed Note 7 of Schedule "F" of the MEPS Rules by holding thus : "seniority is a vital issue for future promotions and that is why Note No. 7, considering this contingency, makes it obligatory for the Management to fulfil such conditions when separate seniority lists are being framed for the Boys and Girls" High Schools". In this context, we would like to reiterate that so far as Note 7 is concerned, option is given to the Management if it so desires, to maintain a separate seniority list of teachers in the Girls" School. It is neither obligatory nor mandatory for the Management to keep separate seniority lists for the teachers teaching in the Girls" School and it is totally optional in view of Note 7 of Schedule "F". Therefore, the observations made by the Division Bench in this regard are incorrect.

38. In Shri V.S. Joshi's case, the Division Bench on the basis of wrong criteria of separate seniority lists required to be maintained by the Management of the Girls" School and Boys" School in view of Note 7, treated these two Schools run by the Management as different Schools and, therefore, held that the post of Head Master in one of the Schools cannot be said to be an isolated post and observed that one of such posts shall have to be reserved for the teachers belonging to the reserved category while other post would be for teachers belonging to open category. The Division Bench did not properly appreciate the scheme of provisions of Sub-rule (4) of Rule 3 of the MEPS Rules at all, which scheme provides for eligibility in respect of appointment to the post of Head in the Girls" School and this Rule has no nexus with the provisions of Note 7 of Schedule "F", which deals with separate seniority list of the teachers in the Girls" School. Therefore, the decision arrived at by the Division Bench treating the Heads of the Boys" School and Girls" School based on separate seniority lists required to be maintained by the Management and holding these to be two different Schools run by the same Management and by observing that since the posts of Heads were more than one, reservation is applicable, does not lay down the good law in this regard. The Division Bench has not taken into consideration whether under the provisions of the MEPS Act and Rules, post of Head of the Girls" School is a single post cadre and is not interchangeable. Similarly, the aspect of application of reservation to such post would result in hundred per cent

reservation is also not considered by the Division Bench and, therefore, law laid down by the Division Bench of this Court in Shri V.S. Joshi's case is not a good law and same is overruled.

39. On the backdrop of the above referred facts, the legal position, which emerges is as follows :

i) The post of Head of the Girls' School in view of Sub-rule (4) of Rule 3 of the MEPS Rules can be filled in only by the senior-most lady teacher fulfilling the conditions laid down in Clause (b) of Sub-rule (1) and having satisfactory record of service irrespective of her seniority vis-a-vis male teachers. It is, therefore, clear that Head of the Girls' School is not interchangeable with the Head of the Boys' School/co-educational School, if the said post is held by the senior-most male teacher as per the common seniority list.

Consequently, it renders post of the Head of Girls' School a single post cadre and policy of reservation cannot be made applicable to the post of Head of the Girls' School.

ii) Similarly, if the Management is running different Schools - one of them is for Girls only and the Management wants to maintain a separate seniority list of teachers in the said Girls' School, it is required to resolve accordingly in view of Note 7 of Schedule "F" of the MEPS Rules. Such decision shall not be revocable at any time in future and the Management shall be required to give the candidates to be appointed to the teaching posts in the said Girls' School a clear understanding that they shall not have any claim on the promotional posts in other Schools run by the same Management. In such situation, the post of Head of the Girls' School, by necessary implication, would be a single post cadre since the same is un interchangeable with the Head of other Schools (Boys or coeducational School) run by the same Management and, therefore, policy of reservation directly or indirectly cannot be made applicable to the Head of the Girls' School.

iii) However, in an exceptional and rare situation, which in fact is remote, the Management, which runs more than one School and one of them is the Girls' School, in view of Rule 41 of the MEPS Rules, may be entitled to transfer services of members of the teaching staff from one School to another. So far as post of Head of the Girls' School is concerned, the same can be filled in only by the senior-most lady teacher irrespective of her seniority vis-a-vis male teachers as per Sub-rule (4) of Rule 3 of the MEPS Rules and so far as Head of the Boys' School is concerned, it can be filled in only by the senior-most male or female teacher from the common seniority list and nobody else and, therefore, Management may be in a position to transfer Head of the Boys' School, if she is a lady, whenever there is a vacancy in the post of Head of the Girls' School. However, Management cannot do it vice versa because Head of the Girls' School though is a lady, but not necessarily the senior-most teacher from the common seniority list, cannot be appointed as Head of the Boys' School, which again

renders post of Head of the Girls" School un interchangeable. However, if we presume that the Head of the Girls" School is the senior-most lady teacher from the common seniority list and if the Management in view of Rule 41 transfers her as Head of the Boys" School, interchangeability in such post would continue only so long as both these posts are held by the senior-most lady teachers from the common seniority list. In such situation, if the policy of reservation is made applicable to the post of Head of the Girls" School directly or indirectly, then the moment the post of Head of the Boys" School or co-educational School at later point of time is filled in by the senior-most male teacher from the common seniority list, interchangeability in these two posts would come to an end, resulting in hundred per cent reservation in respect of post of Head of the Girl"s School, which ultimately would violate the guarantee given to the citizens belonging to the open category under Article 16(1) of the Constitution and is impermissible in law.

40. We answer the reference as under :

Where one Management runs different Secondary Schools, one of which is exclusively a Girls" School, the post of Head Mistress in the Girls" School must be treated as a single isolated post and cannot be subjected to reservation either by applying roster or as per Rule 9(10)(a) of the MEPS Rules, 1981.

41. In the context of the above referred legal position, the contentions canvassed by learned Counsel Shri Deshpande have much force and are accepted. The contentions canvassed by learned Counsel Shri Kendurkar and Shri Wahane are misconceived and devoid of substance and hence, same are rejected. Both the writ petitions bearing Nos. 3872/2002 and 3646/2002 be placed before the Division Bench for disposal on merits.