

(1991) 04 SC CK 0017

In the Supreme Court Of India

Case No : Civil Appeal No. 1779 of 1991

Ayurvediya Prasarak Mandal and Another

APPELLANT

Vs

Geeta Bhaskar Pendse (Mrs) and Others

RESPONDENT

Date of Decision : 12-04-1991

Acts Referred:

Bombay University Act, 1974 — Section 11(6), 77C(2)

Citation : (1991) 62 FLR 771 : (1991) 2 JT 209 : (1991) 1 SCALE 706 : (1991) 3 SCC 246 : (1991) 2 SCR 282 : (1992) 1 SLJ 26 : (1991) 2 UJ 452

Hon'ble Judges : P. B. Sawant, J;M. Fathima Beevi, J

Bench : Division Bench

Advocate : M.C. Bhandare, CPU Nair, Kamini La and M.N. Shroff, for the Appellant; V.N. Ganpule, Senior Advocate, S. K. Agnihotri, A.S. Bhasme and H. Wahi, for the Respondent

Final Decision : Allowed

Judgement

P.B. Sawant, J.—Leave granted.

2. Appellant No. 1 is a Trust which runs and manages an Ayurveda College in Bombay. Appellant No. 2. is the Principal of the College. There was a vacancy in the post of a lecturer in Sanskrit for the academic year 1983-84 which was admittedly reserved for a candidate from the backward classes. The 1st respondent had applied for the said post on 19th September, 1988 even before the appellant-Trust had invited applications by advertising the vacancy as it was required to do. Subsequently, on October 13, 1983. the appellant-Trust issued an advertisement inviting applications for the post without mentioning for which academic year the appointment was to be made. The parties before us agree that it was for the academic year 1983-84. In the advertisement, it was specifically mentioned that the post was reserved for a backward class candidate and if no suitable candidate from the backward classes was available, a candidate from the non-backward classes may be appointed for an year. It appears that within a month thereafter on the 12th November, 1983, a second

advertisement was issued repeating the earlier advertisement. No application was received from any candidate from the backward classes in response even to this advertisement, and hence, the 1st respondent who had already applied as stated earlier, was appointed to the said post for the period from March 19, 1984 till April 30, 1984. The total period of service put in by the 1st respondent for the said academic year was 41 days. On April 28, 1984, the appellant-Trust issued an advertisement for the same post repeating the contents of the earlier advertisement, but for the academic year 1984-85. The applications were invited by 30th April, 1984. No candidate from the backward classes applied in response to the said advertisement. The interview was held on June 30, 1984 and the 1st respondent was appointed for the period from 21st August, 1984 to 19th April, 1985.

3. In the third academic year 1985-86, admittedly no advertisement was issued and no applications from the candidates including candidates from the backward classes were invited. However, the 1st respondent was appointed to the post from July 10, 1985 to April 30, 1986. Thereafter the 1st respondent's services were terminated w.e.f. 30th April, 1986 by a notice dated March 12, 1986.

4. No appointment was made to the said post for the academic year 1986-87. On May 1, 1987, the Trust issued advertisement inviting applications to the said post from candidates belonging to all classes since, according to the Trust, the post was dereserved during the said period. Three candidates belonging to non-backward classes including the 1st respondent and the 5th respondent was selected and appointed to the same.

5. It appears that the 1st respondent was not paid salary for the summer vacations following the academic years 1984-85 and 1985-86. She was also not paid salary from November 1985 to April 1986. She approached the College Tribunal praying for salary for (i) November 1985 to April 1986, and (ii) for the summer vacations following academic years 1984-85 and 1985-86, i.e. for the months of May and part of June 1985, and May and part of June 1986, and (iii) for setting aside her termination of service and for reinstatement. The Tribunal allowed her claim for the salary for the relevant periods, but dismissed her claim for reinstatement holding that her appointment was purely temporary and her claim that she should be deemed to have been confirmed because she had served for two academic years was not established in the circumstances of the case. This decision was delivered by the Tribunal on December 9, 1986. As stated earlier, during the academic year 1986-87, no appointment was made to the said post and it was subsequent to this decision that an advertisement was issued calling for applications from candidates belonging to all classes and 5th respondent was appointed to the said post.

Against the decision of the Tribunal the 1st respondent approached the High Court under Article 226 of the Constitution, and the High Court held that notwithstanding the break in her actual appointment, she was continuously in employment from March, 19, 1984 to April 30, 1986. She was, therefore, entitled

to the benefit of the resolutions of the State Government and the University of Bombay dated September 29, 1986 and February 27, 1987 respectively which, according to the High Court, laid down that an employee who was appointed for two consecutive academic years must be deemed to have been on probation right from the time of the first appointment and, therefore, confirmed in the post. The High Court, therefore, allowed her petition and directed the appellants to reinstate her forthwith in the post and also to treat her as if she had been in continuous employment from March 19, 1984 with the benefit of full back wages, seniority etc. The High Court also directed the University, the Director of Ayurveda, Maharashtra and the State of Maharashtra who were respondents 3, 4 and 5 respectively to the petition, and who are respondents 2, 3 and 4 to the present appeal respectively, to make appropriate sanctions including grant of money, if necessary. The High Court further granted cost and directed compliance with the orders by the appellants within six weeks from the date of its order, which is April 10, 1990.

6. Although various contentions have been raised we find that it is not necessary to go into them. According to us the appellant-Trust has violated the directions of the Government as well as of the University in the appointments in question in two major respects, as a result of which neither the appointment of the 1st respondent nor that of the 5th respondent can be said to have been validly made. Unfortunately, these aspects of the matter which are evident from the record were lost sight of both by the Tribunal and the High Court. The result has been that the illegalities which are patent on the face of the record have been perpetuated.

7. The Government of Maharashtra had issued a Govt. resolution No. USG.I177/I29387/XXX1I(CELL) on October, 25, 1977 prescribing conditions of service as shown in Appendix III to the resolution. By a further resolution of April 3, 1978, Government made it clear that the revised scales of pay which were sanctioned by the resolution of October 25, 1977 could be implemented only after statutes had been duly made by the University. Since the making of the statutes was to take some time and the revised scales of pay recommended by the University Grants Commission were to be effective from January 1, 1973 as laid down in the GR of October 25, 1977, the Vice-Chancellor exercised his powers conferred upon him u/s 11(6)(b) of the Bombay University Act 1974(hereinafter referred to as the "Act") and issued his direction No. 192 of 1978 on 7th June, 1978. This direction, among other things, laid down the mode of recruitment of the teachers and principals, as follows :-

Future recruitment to posts of Teachers and Principals of colleges shall be made through a Selection Committee, the composition of which is specified in the terms and conditions (Appendix II).

Appendix II states as follows :-

Terms and conditions attached to the revised scales of pay.

(i) x x x x x x x x (ii) All appointments of teachers in colleges shall be made on merit and on the basis of all India advertisement. The qualifications prescribed for the posts should essentially be related to the academic attainment in the subject concerned and should not be linked with language or other regional consideration. Appointment should not be made on communal or caste consideration. The Constitution of the Selection Committee for recruitment to the posts of lecturers in a college should be as follows :-

- (a) Chairman, Governing Body of the College or his nominee;
- (b) a nominee of the Vice-Chancellor,
- (c) one expert to be nominated by the University,
- (d) one nominee of the Director of Education (Higher Education),
- (e) Principal of the college; and
- (f) Head of the Department concerned of the college.

No selection shall be considered valid unless at least one expert is present. The recommendations of the Selection Committee shall be subject to the approval of the Vice-Chancellor.

x x x x x x x x (Emphasis supplied)

8. The effect of the aforesaid Government resolutions and the University directions is (a) that all appointments of teachers in colleges have to be made on merit and on the basis of all India advertisement ; (b) that the appointments have to be made by a Selection Committee which consists, among others, of a nominee of the Vice-Chancellor, an expert to be nominated by the University and a nominee of the Director of Education (Higher Education). No selection will be considered valid unless at least one expert is present for the selection.

9. Admittedly, the selection of the 5th respondent was made by a committee where neither the nominee of the Vice-Chancellor nor the expert nominated by the University nor the nominee of the Director of Education (Higher Education), i.e., in the present case of the Director of Ayurveda was present. The selection so made was, therefore, not valid. Shri Bhandare, the learned counsel for the appellant-Trust pointed out to us the letter of June 6, 1989 sent by the University of Bombay according approval to the appointment of the 5th respondent as a lecturer in Sanskrit on probation from 2nd July, 1987 and contended that in view of the said approval the invalidity of the appointment, if any, on account of the absence of the expert in the Selection Committee, should be deemed to have been condoned. We are not impressed by this contention. In the first instance, there is nothing on record to show whether when the appellant-Trust forwarded its report on appointment of the 5th respondent, the Trust had apprised the University of the absence of the expert at the time of his selection. Secondly, the University has not reserved the power to relax the rule and permit selection without the presence of the expert. There is nothing in the University's letter to

show why the University had condoned the absence of the expert. It is, therefore, obvious that the approval given by the University being in ignorance of the true state of affairs and in breach of the rule is legally ineffective and cannot validate the appointment.

10. There is further a common illegality in the appointment of both the 1st and the 5th respondent which arises on account of the failure to follow the Government Resolutions and University directions in the matter of reservation of the seats for the backward classes, which are binding on the College.

11. On 30th March 1981, the Government of Maharashtra passed a resolution in exercise of the powers conferred on it under subsection (2) of Section 77-C of the Act issuing instructions to all the non agricultural Universities in regard to the reservation of posts to be made in favour of Scheduled Castes and Scheduled Tribes while making appointments to teaching and non-teaching posts in the University affiliated colleges and recognised institutions. The reservation prescribed was as follows :-

(1) Scheduled Castes 13 p.c. (2) Scheduled Tribes 7 p.c. (3) Nomadic Tribes & Vimukta Jatis 4 p.c. Total 24 p.c.

That resolution further says that the various orders contained in the booklet "Reservations and other concessions in Government service for backward classes" will be applicable for recruitment to the teaching and non-teaching posts reserved for backward classes in the University and the affiliated colleges and recognised institutions subject to the following modifications in regard to recruitment to the teaching posts. The modifications, among other things, were as follows :-

Similarly, at any given time of recruitment to the teaching posts, only the total number of reserved vacancies and the sections from which they are to be filled in should be determined. It would be enough if the required percentage is fulfilled as a whole and not with reference to any particular post. If the reserved vacancies cannot be filled, then so many posts as cannot be filled in may be kept vacant for six months and should be again advertised thrice. Even after readvertising the posts 3 times if suitable candidates belonging to backward classes do not become available, they may be filled in by candidates belonging to the open category.

For giving effect to the aforesaid instructions, it will be necessary for the Universities to make statutes u/s 77C(1) under their respective Universities Act of 1974. For ensuring immediate implementation, the Vice-chancellors of the Universities may consider regulating the matter by issuing directions, pending making of the Statutes by their Universities, under Clause (b) of Section 11(6) of the respective Universities Act of 1974.

(Emphasis supplied)

12. By its subsequent resolution of October 20, 1983, the Government of

Maharashtra clarified its earlier resolution of March 30, 1981 and stated as follows ;

1 x x x x x x x 2. After reconsideration of the above decision, it is now directed that if suitable candidates cannot be found to fill posts reserved for backward classes in Universities, affiliated colleges and recognised institutions, those posts should be temporarily filled with candidates belonging to non-backward classes for one academic year. But as mentioned in the resolution the appointment of a non-backward class candidate to a reserved vacancy should be made only in the event of failure to find a backward class candidate even after the post has been advertised thrice.

3 x x x x x x x (Emphasis supplied)

13. Thereafter a further resolution was issued by the Government on September 29, 1986 on the subject stating therein that it had come to the notice of the Government that some institutions had not implemented the instructions contained in the earlier resolutions of March 30, 1981 and of October 30, 1983. The Government therefore directed that the said directions should be implemented strictly. This resolution further directed that the non-backward class candidates who were being re-appointed for the second and third academic years when backward class candidates were not found for appointment for the first academic year, should not be called for interview every year and that the candidates belonging to the non-backward classes should be appointed for the second and third academic year also, without calling them for interview. It is further stated in the said resolution that, similarly, as soon as the reserved post is dereserved, the appointed candidate should be confirmed in that post from the date of dereservation subject to all other terms and conditions. It was also directed that necessary statutes should be made by the University in accordance with the provisions of the Act and for ensuring immediate implementation, the Vice-Chancellor should issue directions under Clause (b) of Section 11(6) of the Act.

Pursuant to the said resolution of the Government, the Vice-Chancellor of the University issued direction on March 11, 1987 as follows:-

x x x x x x x (1) That the reserved teaching post which is filled in by appointment of a suitable non-backward class candidate in the first year by following the prescribed procedure of selection shall be advertised again for the second and third years for inviting applications only from persons belonging to Scheduled Castes, Scheduled Tribes, Denotified Tribes and Nomadic Tribes. However, applications may also be invited from persons belonging to non-backward class if the suitable non-backward class candidate already appointed in the first year is not available for reappointment in the second or third year and or his services are required to be terminated on account of unsatisfactory performance of work in the first year;

(2) That if in the second year, in response to the advertisement, a backward

class candidate is not available, then the suitable non-backward class candidate already appointed in the reserved post shall not be required to appear for interview before the Selection Committee again for the second and; or third year (s) but that he shall be reappointed in the reserved post, if he is available for reappointment;

(3) That if in response to the third advertisement in the third year, no application is received for the reserved post from candidates belonging to SC. ST, DT, or NT, the college authorities shall start the process of dereservation of the reserved post. After the process of dereservation of the post is completed, the appointment of non-backward class teacher shall be deemed to be on probation with retrospective effect from the date of his initial appointment if he has held continuous appointment for two years in the college or in any other college under the same management, and that his appointment shall be confirmed from the date of completion of two years of continuous appointment.

The aforesaid direction shall come into force with retrospective effect from the date of the Maharashtra Government Resolution, that is, of 29-9-1986, which means that non-backward class teacher who is eligible to get the benefit of the above direction shall be confirmed in his post with effect from 29-9-1986 or from any later date on which he may become eligible for confirmation in accordance with the aforesaid directions.

z x x x x x x (Emphasis supplied)

14. According to these Government resolutions and University directions (a) whenever a post is reserved to be filled in by the candidates from the backward classes, the post is to be advertised thrice within 6 months in each academic year. The post is to be kept vacant for the said 6 months if no suitable candidate from the backward classes is available; (b) the post is to be filled in temporarily for one academic year by a non-backward class candidate only after the three advertisements have been given as above; (c) the aforesaid process is to be repeated for two more academic years; (c) the candidate from the non-backward classes appointed temporarily in the first academic year for want of a backward class candidate, is to be continued as a temporary appointee for the next two academic years without being interviewed afresh for the next two years; (d) if in spite of the third advertisement in the third academic year, no application is received from a backward class candidate, the College authorities are free to start the process of dereservation of the reserved post; (e) after the process of dereservation of the post is completed, the appointment of non-backward class teacher will be deemed to be on probation with retrospective effect from the date of his initial appointment and he shall be confirmed in the post on his completing two years of his continuous service.

15. Admittedly, as pointed out earlier, the post was reserved for the academic year 1983-84. The Trust had not given three advertisements within six months for any of the academic years 1983-84, 1984-85 and 1985-86. On the other

hand, for the academic year 1983-84, it issued only two advertisements, viz., on October 30, 1983 and November 12, 1983. It is not known as to why even these two advertisements were not issued at the beginning of the said academic year. The academic year admittedly begins from June. May that be, as it is. As regards the second academic year 1984-85, it issued only one advertisement and that was on April 28, 1984. It did not issue any advertisement for the academic year 1985-86. The initial appointment of the 1st respondent for the academic year 1983-84 and her continuation for the subsequent academic years, viz., 1984-85 and 1985-86 was thus in breach of the Government resolutions and the University directions and, therefore, illegal. Similarly, since the appointment of the 5th respondent was made without following the procedure prior to dereservation, viz., three advertisements repeated every year for all the three academic years for which the post was to be reserved, his appointment to the post, as if the post stood legally dereserved, was also illegal since in the facts and circumstances of the case, it is obvious that the post could not have been dereserved to make it available for a non-backward class candidate.

16. Shri Bhandare, however, contended that in the meanwhile the appellant-Trust had taken steps to shift the reservation from the post of a lecturer in Sanskrit to the post of lecturer in Sanhita. The Trust had written a letter on July 2, 1986 for the purpose to the Directorate of Ayurveda, and the Directorate had by its letter of July 11, 1986 accorded the sanction. It may, however, be pointed out that the representation made by the Trust on July 1, 1986 for shifting the reservation from the post of lecturer in Sanskrit to the post of lecturer in Sanhita had proceeded on the basis that the Trust had made efforts to fill in the said post from the candidates of the backward classes as required by the Government resolutions and the University directions. As pointed out above, the Trust had not made the efforts as required by the said resolutions and directions. It had not issued the advertisements as it was required to do. The sanction was obtained and granted obviously on the basis of inadequate information. The sanction was, therefore, defective in law. The High Court unfortunately did not notice these infirmities in the appointment of either of the respondents.

17. Shri Ganpule, the learned counsel appearing for the 1st respondent contended that since the 1st respondent was appointed in the first academic year, viz., 1983-84 and continued for the next two academic years, viz., 1984-85 and 1985-86 she was entitled to the benefit of the directions of the University contained in Circular No. 98 of 1987 dated March 11, 1987 which had stated that if the non-backward class teacher is on probation continuously for two years he would be deemed to be on probation with retrospective effect from the date of his initial appointment. Although the services of the 1st respondent were terminated w.e.f. April 30, 1986, since she was entitled to the benefit of the vacation salary following the academic year 1985-86 she would be deemed to be in service after the completion of the vacation and, therefore, she may be said to be in service on September 29, 1986 from which date the said University direction was to be effective. This contention proceeds on the footing that her

initial appointment and the continuation of service for the next two academic years was valid. We have already pointed out above that they cannot be considered to be valid. However, assuming that her initial appointment and subsequent continuation of service was valid, she would not be entitled to the benefit of the University Direction of March 11, 1987 because her entitlement to the vacation salary does not extend her period of employment up to the end of the vacation. That is a perquisite which is conferred on every teacher who has served during the academic year. It has no connection with the continuation of the employment since even those teachers whose services are validly terminated before the beginning of the vacation period are given the benefit of the salary of the vacation period. Statute 424 of the University which is reproduced as Annexure'C to the petition makes this position clear. The argument, therefore, has no merit.

In the view we have taken the appointments of both the 1st and the 5th respondents were not valid.

18. The post was reserved for the academic year 1983-84. We are now at the end of the academic year 1990-91. A fresh appointment, therefore, will have to be made for the academic year 1991-92. In the meanwhile, several events have occurred. The appointment of the 1st respondent has already been terminated w.e.f. April 30, 1986. The 5th respondent has been in service from July 2, 1987. We are informed across the bar that today he has become overaged. The 1st respondent was overaged even at the time of her initial appointment. Although the advertisement had stated that the candidate should not be above 32 years, at the time of her initial appointment itself, she was about 40 years old. The advertisement had also not mentioned anywhere that the age was relaxable. But that is a matter of history. In the meanwhile, as pointed out above, on incomplete information, the Directorate of Ayurveda has allowed the appellant-Trust to shift the reservation from the post to the post of a lecturer in Sanhita. Taking into account all the facts and circumstances, we are of the view that an opportunity should be given to the appellant-Trust to cure the illegalities.

19. While, therefore, we maintain the order of Tribunal and set aside the order of the High Court, we direct the appellant-Trust to advertise the post three times sufficiently in advance and in any case within six months from the close of the present academic year, viz., 1990-91 as a post reserved for the backward class candidate, and if no application is received from a suitable backward class candidate, the post will be deemed to have been dereserved. The Trust will then proceed to fill in the same by a candidate belonging to non-backward classes. This fact may be made clear in all the three advertisements. The 5th respondent will be entitled to apply for the post notwithstanding the fact that he has by this time become overaged. If he is selected on the basis of his other qualifications, the Selection Committee shall relax in his favour the condition with regard to the maximum age. If he is appointed to the post, his appointment will be a fresh one and his past service will not count for the probation period. The Trust shall for

the purpose constitute a proper Selection Committee according to the rules.

The appeal is allowed accordingly. The parties will bear their own costs.

20. Before parting with this appeal, we must observe that our decision has proceeded on the basis of the Government resolutions and University directions placed before us. The resolutions and directions as pointed out above require that the posts reserved for backward class candidates should be kept vacant for six months and it is only after the third advertisement during the said six months in each academic year that they should be filled in by candidates belonging to the non-backward classes if suitable candidates from backward classes are not available. Literally interpreted, it would mean that in each academic year, there will be no teacher for the first six months, if the process of advertisement is to begin at the commencement of the academic year. This is bound to cause hardship to the students. It, is therefore, incumbent upon the institutions concerned to advertise the posts thrice within six months well before each academic year begins. Since in the present case the academic year begins in June, the process of advertisement must begin in December of the preceding year. This should be the normal practice. An exception has to be made in the present case because the decision is being given today. To overcome the hardship to the students, we would recommend that the 5th respondent may be permitted to teach as a purely temporary teacher during the period that the process is not completed for the academic year 1991-92. However, the appellant-Trust will take steps within two weeks from the receipt of this order to start the process of advertisement as directed above.