

(2010) 10 BOM CK 0145
In the Bombay High Court
Case No : Writ Petition No. 2239 of 2001

Dhanraj Patil and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 14-10-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 9
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule
12, 9(10)

Citation : (2011) 3 BomCR 361

Hon'ble Judges : Shrihari P. Davare, J; S.B. Deshmukh, J

Bench : Division Bench

Advocate : P.R. Patil, for the Appellant; D.V. Tele, A.G.P. for Respondent Nos. 1
to 3, S.P. Shah, holding for, Amol S. Sawant and A.S. Golegaonkar, for the
Respondent

Final Decision : Allowed

Judgement

Shrihari P. Davare, J.—By the present petition, filed by the petitioners under Article 226 of the Constitution of India, the petitioners prayed as follows:

[C] By appropriate writ, direction or orders in the nature of writ, the respondents be directed to maintain ratio of only 24% in respect of post Head and Assistant Head Master with respondent No. 4 Shivaji Vidya Prasarak Sanstha.

[D] By appropriate writ, direction or orders in the nature of writ, the respondent No. 4 Shivaji Vidya Prasarak Sanstha be directed to get the caste claims verified from the respective caste scrutiny committee of the teachers who have obtained benefits on the basis of reservation.

2. Respondent No. 1 is the State of Maharashtra through the Secretary, Education Department and respondent No. 2 is the Director of Education, Maharashtra State; whereas respondent No. 3 is the Education Officer

(Secondary), Zilla Parishad, Dhule and respondent No. 4 is Shri Shivaji Vidya Prasarak Sanstha, a registered public trust through its Chairman and respondent Nos. 5 to 9 are the added respondents i.e. Head Masters of respondent No. 4 school.

3. Briefly stated, the facts leading to the present petition are as under:

There are seven posts of Head Master with respondent No. 4, namely Shivaji Vidya Prasarak Sanstha. As per Rule 9(10)(a) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (hereinafter referred to as "the Rules of 1981") only 24 percent of total posts of Head Master and Assistant Head Master are to be reserved for backward classes. Hence, for seven posts, total reservation comes to 1.68 posts, of which rounded figure can be taken as two posts as per the afore said Rule. However, out of seven posts, respondent No. 4 Sanstha has given five posts to reserved category candidates i.e respondent Nos. 5 to 9 respectively. Apparently, according to the petitioners, it is more percentage than what is required as per the afore said Rule, which resulted into depriving of three teachers from open category to their rightful claims.

4. Another grievance of the petitioners is that the persons who have claimed the post on the basis of their caste, have no caste validity certificates from the Caste Scrutiny Committee. In fact, it is the contention of the petitioners that some of them have obtained their caste certificates fraudulently. Hence, it is appropriate to send the caste claims of such persons for verification before the Caste Scrutiny Committee.

5. It is also the contention of the petitioners that in view of the excess reservation, 62 Assistant Teachers of respondent No. 4 Sanstha submitted representation dated 29.12.2000 to respondent No. 4, which was duly received by it on 3.1.2001. However, it is the grievance of the petitioners that till today no decision has been taken by respondent No. 4 Sanstha in that respect. It is also submitted that similar representation was submitted to respondent No. 2 Director of Education, Pune and the Collector, Dhule was apprised about the said situation and he was requested to verify the caste claims, but no action has been taken in that regard so far. Hence, the petitioners have filed the present petition for the prayers as set out hereinabove.

6. Respondent No. 3 has filed affidavit in reply, which is sworn in by Dinesh Lala Solunke, presently working as the Education Officer (Secondary), Zilla Parishad, Dhule, and thereby opposed the present petition and denied the averments made and contentions raised by the petitioners in the present petition unless admitted specifically. It is the contention of respondent No. 3 that although as per Rule 9(10)(a) of the Rules of 1981, 24 percent of total number of posts for Heads and Assistant Heads were reserved for backward classes, the said percentage has been changed in view of the Government Resolution, dated 18.10.1997 issued by the General Administration Department, State of Maharashtra, in view of the judgment and order passed by the Hon''ble Supreme Court, in the case of R.A.

Sabarwal and Ors. v. The State of Punjab. Accordingly, now the said percentage of reservation has been increased from 24 percent to 33 percent and respondent No. 3 has annexed a copy of the said Government Resolution dated 18.10.1997 at Exh. "R1" . Respondent No. 3 also submits that the reservation for promotion is maintained in view of Annexure II of Government Resolution dated 17.9.1980. Moreover, by virtue of above said Government Resolution, 50 point model roster is followed from 17.9.1980 onwards till the issuance of Government Resolution dated 18.10.1997, copy of which is produced at Exh. "R2".

7. As regards another grievance of the petitioners, respondent No. 3 submits that the caste certificates of reserved category employees have been submitted to the Divisional Social Welfare Officer for caste verification from time to time by respondent No. 4. Accordingly, respondent No. 3 submits that in view of the afore said position, nothing survives in the present petition, and therefore, same deserves to be dismissed.

8. Respondent No. 3 also filed additional affidavit, which was affirmed by Dinesh Lala Solunke, Education Officer (Secondary), Zilla Parishad, Dhule, and reiterated the contents in the aforesaid affidavit in reply and submitted that appointments of all the teachers referred in the petition are made as per 50 point model roster, and according to the said model roster, Pradeep Damodhar Nausare, who belongs to S.T. Category is promoted as Head Master on seniority basis, since he was found seniormost in S.T.category. Moreover, Nanabhau Pundlik Deore, who belongs to S.T.category was promoted as Head Master on the basis of seniority and according to 50 point model roster; as well as Shivram Mahadu Pardeshi, who belongs to N.T. category was appointed as Head Master in place of Shri Gosawi who was retired and who was also from N.T. category, and therefore, said Shri Shivram Mahadu Pardeshi was promoted in place of N.T. category candidate according to 50 point model roster. Moreover, Zipru Kalu Pawar, who belongs to S.T.category was appointed as Head Master as per seniority according to 50 point model roster and Smt. Shobhana Onkar Jadhav, who is female teacher was appointed as Head Mistress from N.T. category and also she was appointed there as the said School is Girls School.

9. Hence, respondent No. 3 submitted that all these appointments were verified from the office of the Assistant Commissioner, B.C. Cell, Nashik Division, Nashik, and accordingly, same were verified from the competent authority. Moreover, it is submitted that these appointments were made prior to the Government Resolution dated 18.10.1997. It is further stated, according to Government Resolution dated 18.10.1997 in Schedule Column 5, it has been specifically mentioned that if the appointments are made prior to said Government Resolution more than reserved posts, then in that event those appointments shall not be affected. According to the said Government Resolution, 33 percent posts are reserved for reserved categories of different reserved castes and 67 percent posts are kept for open category. In view of the said facts and circumstances, it is submitted by respondent No. 3 that present petition bears no

substance and same is devoid of any merits and same be dismissed.

10. Respondent No. 4 also filed affidavit in reply, which was sworn in by one Prafulla Madhukarrao Sisode and thereby denied the averments made and contentions raised by the petitioners in the present petition unless admitted specifically.

11. It is submitted that each and every appointment to the post of Head Master is made in consonance with the Rules of 1981 and as per the guidelines issued by the State Government. It is also submitted that the Management is operating in all seven secondary schools, out of which two schools are Girls Secondary Schools and the list of all the teachers appointed as Head Masters and Assistant Head Masters in all the seven schools along with particulars thereof is annexed with the said reply and marked as Exh. "R1" collectively. According to respondent No. 4, all the appointments of Head Masters made by the Management are approved by the Education Officer (Secondary), Zilla Parishad, Dhule i.e. respondent No. 3. Moreover, it is also further submitted that all these appointments are made by the Management in accordance with the seniority list prepared by the Management as well as by applying 50 point model roster, and hence, there is no irregularity therein.

12. As regards further grievance of the petitioners, it is submitted by respondent No. 4 that the Management has also sent all the relevant documents of all the teachers who have been appointed as Head Masters in various schools to the Caste Scrutiny Committee for validation and the Secretary, Caste Scrutiny Committee, Nashik Division, Nashik issued the letter to the Management and returned back all the documents without verifying the same, on the ground that the said Committee has no jurisdiction to verify the caste claim of the employee who has been appointed prior to 5.7.1997, and copy of the said letter is annexed at Exh. "R5".

13. Thus, respondent No. 4 submits that the appointments made by the Management are approved by the Education Officer, and therefore, there is no irregularity committed by the Management while appointing the teachers and Head Masters in various schools, and hence, present petition is devoid of any merits and same be dismissed in limine.

14. Respondent Nos. 5 to 9 also filed their affidavit in reply and opposed the present petition vehemently, and submitted that the appointments of respondent Nos. 5 to 9, by way of promotion, have been made as per roster. It is also submitted that for the post of Head Master, persons from the cadre of Assistant Head Master are considered, as the post of Head Master falls in category "A". Moreover, post of Assistant Head Master falls in category "B" and the post of Assistant Teacher falls in category "C". It is submitted that respondent Nos. 5 to 9 have been promoted on the basis of their seniority as well as their respective roster point to the post of Head Master. It is further submitted that only persons from category "B" are being considered for promotion to the post from category

"A" as per Rule 12 of the Rules of 1981 and guidelines provided in Schedule "F" under the said Rules.

15. It is also submitted that respondent Nos. 5 to 9 have been promoted quite earlier and at the time of their promotions, present petitioners have not raised any objections and they have made representation only on 2.11.1999 and thereafter. In short, it is submitted by respondent Nos. 5 to 9 that the present petition suffers from inordinate delay and gross laches on the part of the petitioners. It is also submitted by respondent Nos. 5 to 9 that if the petitioners claim that they are senior to respondent Nos. 5 to 9, remedy of appeal against any order or supersession has been provided u/s 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, "the Act of 1977") before the School Tribunal is provided. However, none of the petitioners have either raised objection or filed appeal before the School Tribunal as provided under the Act of 1977. Accordingly, it is submitted that substantive and efficacious remedy has been provided by the Act of 1977 itself to the petitioners, but the petitioners have chosen wrong forum by filing the present petition, and therefore, present petition deserves to be dismissed on the said count itself. Accordingly, it is submitted by respondent Nos. 5 to 9 that present petition is erroneous and unsustainable, and therefore, same be dismissed.

16. Heard the learned respective counsel for the parties.

17. It is necessary to reproduce Rule 9 (10) (a) of the Rules of 1981, which reads as under:

9. Appointment of staff.

(1) ...

(10) (a) The management shall reserve 24 per cent of the total number of posts (or vacancies) of Heads and Assistant Heads for the members of Scheduled Caste, Scheduled Caste converts to Buddhism, Scheduled Tribes, Denotified Tribes and Nomadic Tribes as follows, namely:

(i) Scheduled Castes and Scheduled Castes converts to 13 per cent Buddhism.

(ii) Scheduled Tribes including those living outside the 7 per cent specified areas.

(iii) Denotified Tribes and Nomadic Tribes.

(b) In case it is not possible to fill in the post of a Head or Assistant Head for which a vacancy is reserved for a person belonging to the Castes and Tribes specified in Clause (a), the post may be filled in by promoting a candidate from the other remaining categories in the order specified in Clause (a), so however that the percentage of filling up such vacancies does not exceed the limit laid down for each such category. If candidates belonging to any of these categories are not available, then the vacancy or vacancies

(i) of the Head may be filled in by promoting any other teacher on the basis of seniority cum merit after obtaining previous approval of the Education Officer;

(ii) if the Assistant Head shall be kept unfilled for a period of three years, unless such vacancy or vacancies could be filled in by promotion of any teachers belonging to such Castes or Tribes becoming available during that period.

18. Moreover, learned Counsel for the petitioners relied upon the Full Bench Judgment of this Court (Nagpur Bench) in the case of New English High School Association and Another Vs. Baldev Ade and Another, , wherein it is held that:

From the reading of R.9(10)(a) as well as G.R. dt. 17.9.1980 it is apparent that in relation to the posts of Head Masters and Assistant Head Masters, the statutory reservation is to the extent of 24% which is divided into 13% in favour of the Scheduled Castes, 7% in favour of the Scheduled Tribes and 4% in favour of the Denotified and Nomadic Tribes.

Undoubtedly, the Constitution mandates implementation of reservation policy. However, at the same time, it assures opportunities to all the open class category candidates. The implementation of the reservation policy should not lead to absurd result. The application of reservation percentage has to be with reference to the number of posts. It is always to be remembered that the reservation percentage is to be applied and the 50 point roster is to be followed taking into consideration the total number of posts in a cadre and at the same time care has to be taken that other category candidates are not prejudiced in the sense that the statutorily recognized reservation percentage does not exceed while implementing the reservation policy. Undisputedly, the relevant rule requires 24% of reservation out of which 13% for the S.C., 7% for the S.T. And 4% for the D.T./N.T. Considering the 24% reservation if one applies the 50 point roster, it would result in reservation in excess of the statutorily specified percentage. In a cadre comprising of three posts with 24% reservation rule, if one applies the 50 point roster, then the reservation even in respect of one post would exceed 24% reservation. Onethird cannot be equated to 24%. It is settled law that the reservation cannot be allowed to exceed the percentage prescribed for reservation as it would result in injustice to the candidates falling outside the reservation category. Considering the same, 24% reservation can be applicable only in cases where there are minimum of four posts in a cadre and not otherwise. The fall out of the above discussion is that in case the cadre consists of three or less number of posts and the total percentage of reservation is 24%, there cannot be any reservation in such a case and it would be only in case of four posts that one of those will have to be filled in by the reserved category candidate. The applicability of the reservation policy would depend upon the number of posts in a cadre and the percentage of reservation. The 50 point roster can be made applicable only when the applicability thereof would not result in implementation of reservation policy in excess of the percentage statutorily prescribed for the reserved category candidates. Union of India and Another Vs. Madhav Gajanan Chaubal and Another, , 1997 (4) SCC 278 and 1995

Supp (1) SCC 432 held no longer good law. Vinayak Krishnaji Joshi dead by LRs. Nalini Joshi and Others Vs. Akola Education Society and Others, held not good law in view and Asha Raut Vs. Deputy Director of Education (Secondary) and Others, and Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others, .

19. Applying the provision of Rule 9(10)(a) of the Rules of 1981 and the ratio laid down in the afore said Ruling in the instant case, now the issue in controversy in the present case is no more Res integra, and it is crystal clear that in case where the cadre consists of three or less number of posts and the total percentage of reservation is 24 percent, there cannot be any reservation in such a case and it would be only in case of four posts, one of those will have to be filled in by the reserved category candidate. It is also undisputed that the applicability of the reservation policy would depend upon the number of posts in a cadre and the percentage of reservation. The 50 point roster can be made applicable only when the applicability thereof would not result in implementation of reservation policy in excess of the percentage statutorily prescribed for the reserved category candidates.

20. However, in the present case, out of seven posts of Head Master, respondent No. 4 filled in five posts from backward class candidates i.e. respondent Nos. 5 to 9 respectively, which is excess and beyond the reservation of 24 percent as per Rule 9(10)(a) of the Rules of 1981, which resulted into depriving of rightful claim of the open category candidates, and hence, present petition is required to be allowed partly in terms of prayer clause "C" thereof relying upon the aforesaid Full Bench judgment of this Court.

21. As regards the another grievance of the petitioners in respect of caste verification of caste claims of respondent Nos. 5 to 9 by the Caste Scrutiny Committee as prayed for in prayer clause "D" of the present petition, respondent No. 4 has categorically stated in its affidavit in reply that respondent No. 4 had already sent all the relevant documents of all the teachers who have been appointed as Head Masters in various schools to the Caste Scrutiny Committee for validation, but the Secretary of the Caste Scrutiny Committee, Nashik Division, Nashik issued a letter to respondent No. 4 and returned back all the documents along with it without verifying the same on the ground that the said Committee had no jurisdiction to verify the caste claim of the employee who has been appointed prior to 5.7.1997 and copy of the said letter has been annexed with the said affidavit in reply at Exh. "R5", and hence, in the light of the said facts, nothing survives in the prayer clause "D" of the present petition.

22. In the circumstances, present petition deserves to be allowed partly in terms of prayer clause "C" thereof, but as nothing survives in prayer clause "D", and therefore, petition is required to be disposed of in respect of the said prayer.

23. In the result, present petition is allowed partly in terms of prayer clause "C". However, since nothing survives in prayer clause "D" thereof, the petition stands

disposed of, to the extent of the said prayer.

24. Rule is made absolute accordingly in the aforesaid terms. In the circumstances, there shall be no order as to costs.