

(2017) 01 GUJ CK 0166
In the Gujarat High Court
Case No : 179 of 2010, 180 of 2010

JADHAV RAJENDRA BHIKA & ORS.

APPELLANT

Vs

STATE OF GUJARAT & ORS

RESPONDENT

Date of Decision : 09-01-2017

Acts Referred:

Constitution of India, Article 14, Article 21, Article 226, Article 19, Article 16, Article 16(4)(B) - Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions - Amendment of the Schedule - Power of High Courts to Issue certain writs - Protection of certain rights regarding freedom of speech, etc - Dissolution of a District or a Regional Council - Dissolution of a District or a Regional Council

Citation : (2017) 01 GUJ CK 0166

Hon'ble Judges : J B Pardiwala

Bench : Single Bench

Advocate : K B Pujara, Swapneshwar Gautam, Kaushal D Pandya

Final Decision : Allowed

Judgement

1. Since the issues involved in both the captioned writ applications are the same, those were heard analogously and are being disposed of by this common judgment and order. For the sake of convenience, the Special Civil Application No.179 of 2010 is treated as the lead matter.

2. By this writ application under Article 226 of the Constitution of India, the writ applicants have prayed for the following reliefs; "(A) To admit this petition and to allow the same; (B) To direct the respondents to fill up the vacancies of Marathi medium Vidyasahayaks notified for Scheduled Tribe candidates both for PTC (General Stream) and PTC (Science Stream) as notified in the advertisement dated 21.12.2009 as per Annexure-A to be filled up by the petitioners who are Marathi medium SEBC category candidates of PTC (General Stream) as there are no candidates of Scheduled Tribe Marathi medium PTC are available in the

market;

IN THE ALTERNATIVE

(C) To quash and set aside the advertisement at Annexure A and to direct the respondents to issue fresh advertisement by showing all the vacancies of Marathi medium to be filled up by the candidates of SEBC category with Marathi medium PTC (General Stream).

(D) to restrain the respondents from filling up any vacancies of Marathi medium Vidyasahayaks to be filled up by the candidates of any other medium;

(E) Pending the admission , hearing and final disposal of this petition, be pleased to direct the respondents to fill up the vacancies of Marathi medium Vidyasahayaks notified for Scheduled Tribe candidates both for PTC (General Stream) and PTC (Science Stream) as notified in the advertisement dated 21.13.2009 as per Annexure-A to be filled up by the petitioners who are Marathi medium SEBC category candidates of PTC (General Stream) as there are no candidates of Scheduled Tribe Marathi medium PTC are available in the market;

(F) Pending the admission, hearing and final disposal of this petition, be pleased to direct the respondents to issue fresh advertisement by showing all the vacancies of Marathi medium to be filled up by the candidates of SEBC category with Marathi medium PTC (General Stream).

(G) Pending the admission, hearing and final disposal of this petition, be pleased to stay the recruitment initiated by the respondent no.3 by advertisement dated 21.12.2009 as per Annexure-A in so far as the recruitment of Marathi medium PTC (Science Stream) vacancies are concerned and in so far as Marathi Medium PTC scheduled tribe candidates are concerned.

(H) To grant any other appropriate and just relief/s;"

3. The writ applicants fall in the category of Socially and Educationally Backward Class (SEBC). They have passed the H.S.C and PTC exams, and according to them, they are eligible and qualified to be appointed as the Primary Teachers/ Vidyasahayaks. It is the case of the writ applicants that they passed the H.S.C. exam in the general stream and, thereafter, were admitted to the PTC Course under the Centralized Admission System and they have completed the same. They passed the H.S.C exam as well as the PTC in the Marathi Medium.

4. They have put forward their claim to be appointed on all the vacancies available for the Marathi Medium Vidyasahayaks/Primary Teachers. It is their case that even if the vacancies are reserved for other categories such as the Scheduled Castes or the Scheduled Tribes for the Marathi Medium or even the vacancies for the Marathi Medium in the science stream , then such vacancies should be filled up by the SEBC category candidates of the Marathi Medium and general stream candidates of the Marathi Medium.

5. The respondent No.3 issued an advertisement dated 21.12.2009 for the

recruitment of 17 Vidyasahayaks for the primary schools of the Gujarat Municipal School Board. Out of the said 17 vacancies, 11 vacancies were reserved for the Scheduled Tribes and 6 vacancies were reserved for the SEBC category. Out of the said 6 vacancies of the SEBC category, 3 vacancies were earmarked for the H.S.C (General Stream), PTC candidates and 3 vacancies were earmarked for the H.S.C (Science Stream), PTC candidates.

6. It is their case that the said 3 vacancies of the H.S.C (Science Stream), PTC were wrongfully highlighted and termed as the backlog vacancies because the recruitment of the HSC (Science Stream) PTC, was never made in the past and, therefore, the question of backlog did not arise.

7. It is their case that there were no Scheduled Tribes candidates in the market and there were no SEBC candidates, possessing the H.S.C. (Science Stream) PTC. Therefore, the said 11 vacancies of the Scheduled Tribes and 3 vacancies of the SEBC category remained unfilled. The writ applicants remained without the appointment orders on the other hand.

8. In such circumstances referred to above, the writ applicants have prayed for their appointments on the said $11+3=14$ vacancies, which have remained unfilled on account of the non-availability of the concerned reserved category candidates.

9. Mr. Pujara, the learned counsel appearing for the writ applicants vehemently submitted that the issue regarding dereservation of the reserved category vacancies remaining unfilled on account of the non-availability of the candidates is squarely covered by the Apex Court judgment in the case of K.N. Sreenivasan vs. Flag Officer Commanding-in-Chief Head Quarters, Kochi, 1996(7) SC 73 as well as by a judgment of this Court in the case of Jamazar Zebakhanam Sajidahmed vs. State of Gujarat, Special Civil Application No.10895 of 2014, decided on 16th October, 2014.

10. Mr. Pujara pointed out that the respondent No.3 has admitted that there was a shortage of 15 Marathi Medium teachers on 31.08.2009, i.e. on the date of the advertisement in question. According to him, his clients were wrongfully denied the appointment at the relevant point of time. He further pointed out that even, as on date, there is a shortage of 124 Marathi Medium teachers and the respondent No.3 are availing of the services of 3+48 Pravasi Shikshaks, who are not even qualified to teach in the primary schools.

11. In such circumstances referred to above, he prays that the petition be allowed and the reliefs, as prayed for, be granted.

12. This writ application has been vehemently opposed by Mr. Pandya, the learned counsel appearing for the respondent No.3, i.e., the Primary Education School Board, Surat. He has placed reliance on the following averments made in the affidavit-in-reply filed on behalf of the respondent No.3. "6. I submit that in the petition the petitioners have mainly prayed for a direction to the respondents

to fill-up the vacancy of Marathi medium Vidya Sahayak notified for S.T. candidates, both for PTC (general stream) and PTC (science stream) as notified in the advertisement dated 21.12.2009 to be filled-up by the petitioners who are Marathi medium SEBC candidates of PTC (general stream) as there are no candidates of ST Marathi medium Vidya Sahayak in PTC are available in the market. In the alternative, the petitioners have prayed to quash and set aside the advertisement dated 21.12.2009 and also for a direction to the respondents to issue fresh advertisement by showing all vacancies of marathi medium to be filledup from the candidates of SEBC category with Marathi medium candidate (general stream) .

7. I submit that the present respondent has prepared the set-up for recruitment of Vidya Sahayak by keeping in view the guidelines issued by the State Government vide notification dated 30.9.1994 and maintained the quota for reservation. The copy of said notification dated 30.9.1994 is annexed hereto and marked as ANNEXURE-"I" to this Affidavit. It is submitted that the present respondent is also following the guidelines issued by the State Government from time to time for the recruitment of post of Vidya Sahayak in different categories.

8. I submit that recently the State Government has issued direction to the concerned Sikshan Board to bifurcate the vacancies in two parts i.e. one in PTC (general stream) and another in PTC (science stream). It is further submitted that the State Government has also approved the advertisement dated 21.12.2009 for the recruitment of Vidya Sahayak. The copy of advertisement dated 21.12.2009 is annexed hereto and marked as ANNEXURE- "II" to this Affidavit.

9. I submit that in the year 2007 the respondent No.3 herein has published advertisement for the recruitment of Vidya Sahayak in Marathi medium. Annexed hereto and marked as ANNEXURE-"III" is the copy of chart showing the recruitment of the year 2007 and 2008 and also the proposal for recruitment of 17 Vidya Sahayak for the year 2009 in Marathi medium.

10. I submit that as per the advertisement for the year 2009 there are backlog of six vacancy in SEBC quota and, therefore, three seats have been kept in PTC (general stream) and three seats have been kept in PTC (science stream) as directed by the State Government.

11. It is pertinent to note that the Six seats of SEBC quota in the backlog have been carried forward from the year 2008. It is also submitted that in the advertisement of 2008 the applications were invited for 17 posts from the candidates of SEBC for PTC in marathi medium, out of which six seats were kept for regular recruitment, whereas 12 seats were kept to fill-up the backlog. It is further submitted that all the 12 seats of backlog in SEBC have been filled-up and six of regular recruitment in SEBC were remained unfilled and the same was carried forward in the year 2009. The copy of advertisement of 2008 is annexed hereto and marked as ANNEXURE -"IV" to this Affidavit.

12. I submit that in the advertisement of 2009 the bifurcation qua PTC (general stream) and PTC (science stream) have been introduced pursuant to the direction issued by the State Government. It is also submitted that the said advertisement was also approved by the State Government.

13. I submit that at present the candidates who have passed PT'C through English medium are teaching the English and Hindi language in marathi medium school in Standard - 5 to 7. The same is also averred in the advertisement of 2009.

14. I submit that so far as the grievance qua the quota of physically handicapped candidates are concerned, I submit that in the advertisement of 2009 there is no vacancy available in the said category, as in the year 2008 there were 28 vacancies remained un-filled in ST quota and in the year 2009 in view of reduction of strength of students only proposal for recruitment of 17 Vidya Sahayak have been submitted to the State Government and the same was sanctioned by the State Government. In view of this submission, the contention regarding unfilled vacancy in the category of physically handicapped quota should be filled-up by the candidates of other disability is not acceptable.

15. I deny that the respondents have committed several illegalities and irregularities as is revealed from the information disclosed under the Right to Information Act, 2005, as alleged by the petitioner. I also deny that in the year 2007 there cannot be any backlog vacancy of ST and even then the respondent No.3 had issued advertisement for 46 backlog of vacancy of ST. I submit that in the year 2007 the advertisements were published for the recruitment of Vidya Sahayak in marathi medium for 69 posts in backlog recruitment wherein 46 seats were shown as backlog in ST. quota and the same is carried forward from the previous years. The break-up of backlog in detail is annexed hereto and marked as ANNEXURE-"V" to this Affidavit.

16. I submit that some Open category marathi medium candidates of PTC (general stream) have approached this Hon'ble Court by filing Special Civil Application No.13924 of 2009 and pursuant to the order passed by this Hon'ble Court in the said petition the respondents herein have accepted their Application. The copy of order dated 30.12.2009 passed in Special Civil Application No.13924 of 2009 is annexed hereto and marked as ANNEXURE - "VI" to this Affidavit.

17. I submit that the respondent herein has complied with the guidelines issued by the State Government from time to time for the recruitment in reservation quota and, therefore, recruitment of one quota to another quota is not permissible. It is also submitted that in the past the respondent herein have done the same only after the direction of the State Government. " 13. On 12th March, 2010, the following order was passed; "1. The petitioners herein are the students, who had applied for the post of Vidhyasahayak in the Marathi medium, in pursuance of the Advertisement dated 21.12.2009 published by respondent no.3. The petitioners in S.C.A. No.13924/2009 belong to the General Category,

whereas, the petitioners in S.C.A. No.179/2010 & 180/2010 belong to the SEBC and SC categories respectively.

2.0 Mr. Yatin Oza, learned Sr. Advocate appearing with Ms. Srushti A. Thula for the petitioners in S.C.A. No.13924/2009, has submitted that all the petitioners belong to the General Category. However, in the Advertisement dated 21.12.2009, no seats have been reserved for the General Category candidates and that all the seats have been re-converted into seats for reserved category candidates and have been considered as backlog of those seats which were not filled up in the recent years.

2.1 Learned Sr. Advocate has further submitted that the vacancies for the post of Vidhyasahayak (Science Stream) is totally a new recruitment and that the seats are proposed to be filled up from amongst the backlog seats consisting of candidates belonging to the SC, ST & OBC categories only and not the General Category. Hence, appropriate directions deserve to be issued to respondent-authorities to fill in the seats from amongst the candidates belonging to the General Category candidates.

3.0 Mr. K. B. Pujara, learned Advocate for the petitioners in S.C.A. No.179/2010 & 180/2010, has submitted that the petitioners in S.C.A. No.179/2010 belong to the SEBC category. He has submitted that in the Advertisement in question, only 3 vacancies have been earmarked for SEBC category for the PTC (General Stream) and that the remaining 3 vacancies of SEBC category (Marathi medium) have been earmarked for PTC (Science Stream), which is contrary to the data collected by the petitioners under the Right to Information Act, 2005. Therefore, appropriate directions deserve to be issued to fill up the 3 vacancies notified in the SEBC category in the Marathi medium (Science Stream) to be filled up by SEBC candidates of Marathi medium (General Stream). 3.1 Learned counsel has contended that the backlog seats falling under the SC category have not been carried forward though 7% reservation for the said category has been provided. He has submitted that out of the unfilled seats of ST category, some seats may be ordered to be transferred to the SC category and the petitioner in S.C.A. No.180/2010 may be treated accordingly.

4. Mr. Prashant G. Desai, learned Sr. Advocate appearing with Mr. Kaushal Pandya for respondent no.3, has submitted that they have filled up 25 seats from 53 vacancies and that 28 vacancies have been carried forward as a backlog in the year 2009. All the said 53 vacancies were not converted into General category seats. Respondent no.3 had re-reserved the vacant seats which were already de-reserved and converted from the seats reserved for ST / SC and SEBC category into seats for candidates belonging to the General category and has also maintained the reservation quota as directed in the Government Notification dated 30.09.1994.

5. From the reply filed by respondent no.3 and more particularly, Para-13, it transpires that out of the total number of 17 posts of Vidhyasahayaks (Marathi

medium), 9 posts are to be filled in for PTC (General Stream) and the remaining 8 posts are to be filled in for PTC (Science Stream). Out of the said 9 posts for PTC (General Stream), 6 posts are reserved for the ST category and 3 for the SEBC category, whereas, out of the 8 posts for PTC (Science Stream), 5 posts are reserved for ST category and 3 for the SEBC category. The said bifurcation of seats is in consonance with the directives issued by the State Government vis-a-vis filling-up of the backlog seats of the year 2008. The respondent no.3 has maintained the ratio of 50 : 50 while bifurcating the total number of vacancies available. In view of the above scenario, there does not remain any backlog of seats for the year 2008.

6. By way of the Advertisement dated 21.12.2009, applications for PTC (Science Stream) have been invited for the very first time. However, out of the total 8 seats for PTC (Science Stream), no seats have been reserved either for the General or the SC category. It is true that there cannot be any backlog of seats for a post for which a selection process is to be undertaken for the very first time. However, even in such cases, this Court has a very limited scope for judicial review and the only aspect which this Court has to look into is as to whether the provisions of Article 16(4)(B) of the Constitution and the principle laid down by the Apex Court have been followed or not. So far as the bifurcation of the seats is concerned, I find the same to be in consonance with the provisions of Article 16(4)(B) of the Constitution.

7. Pursuant to the order dated 30.12.2009 passed by this Court in S.C.A. No.13924/2009, respondent no.3 was directed to accept the application forms that may be submitted by the petitioners in connection with the impugned Advertisement dated 21.12.2009 and accordingly, the petitioners submitted their application forms. Today, during the course of hearing, a statement was made at the bar by Mr. Desai, learned Sr. Advocate appearing on behalf of respondent no.3, that respondent no.3 would be able to conclude the selection process within a period of about one month from today.

8. In view of the above, Rule returnable on 03.05.2010. It is observed that if at the time of selection for PTC (General Stream), no candidates are available under the (reserved) seats, as provided in the Advertisement dated 21.12.2009, the respondent no.3 shall consider the case of the petitioners for the said seats, by de-reserving the seats, which shall be subject to the final outcome in these petitions. Further, if no candidates are available for PTC (Science Stream), the selection shall be done from amongst the candidates belonging to the other categories and the same shall be subject to the further orders that may be passed by this Court at a later stage. Direct service permitted."

14. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the writ applicants are entitled to the reliefs, as prayed for, in this writ application.

15. A learned Single Judge of this Court, in the case of Jamazar Zebakhanam Sajidahmed (supra), held as under;

"2. The present petition is filed by the Petitioners under Articles 14, 16, 19, 21 and 226 of the Constitution of India and also under the Right of Children to Free and Compulsory Education Act, 2009 and also regarding recruitment of urdu medium primary teachers / vidya sahayaks for the prayer inter alia that appropriate writ, order or direction may be issued to consider the case of the petitioners and give the appointments by de-reserving the vacancies notified for the Scheduled Castes and Scheduled Tribes as there are no PTC qualified candidates belonging to Scheduled Castes or Scheduled Tribes for PTC in Urdu medium.

3. Heard learned Counsel Shri K.B.Pujara for the Petitioners and learned AGP Shri Ronak Raval for the Respondent State.

4. Learned Counsel Shri K.B.Pujara referred to the background of the facts contending that though the categories are reserved as stated in detail the posts are not filled in because such SC / ST candidates qualified for the Urdu medium are not available. With the result the posts are kept vacant over a period of time. Therefore the petitioners have prayed that such posts may be de-reserved and it could be filled up by general category candidates instead of keeping it for such category. Learned Counsel Shri Pujara referred to the order of the Hon'ble Division Bench in Special Civil Application No. 9943 of 2008 dated 13.10.2008 and submitted that the permission was granted in the same manner and the posts may be dereserved and appropriate order may be passed on the same line as per the order passed earlier in Special Civil Application No. 13924 of 2009 with Special Civil Application No. 179 of 2010 to Special Civil Application No. 180 of 2010 dated 12.3.2010 (Coram: K.S.Jhaveri,J). Learned Counsel Shri Pujara therefore submitted that let the case of the petitioners be considered against such posts.

5. Learned AGP Shri Ronak Raval strongly resisted the petition referring to the affidavit in reply and submitted that if the case of the petitioners is ordered to be considered then it would amount to giving appointment to the petitioners only even after de-reserving the posts. He submitted that it requires a larger publicity so that the others who are not before the court can also have the opportunity.

6. Therefore having regard to these rival submissions and the background of the facts where on the one hand the candidates belonging to SC / ST qualified in Urdu medium PTC are not available and the posts are kept vacant it is desirable that such posts are de-reserved and permitted to be filled up in accordance with law by general category candidates. However as rightly pointed out by learned AGP Shri Ronak Raval that if the posts are de-reserved the same has to be advertised so that all eligible candidates can apply and it will have a wider publication and an opportunity to all concerned who are eligible.

7. It is in these circumstances the Respondents are directed to de-reserve the

posts as stated in the advertisement at Annexure-C dated 25.7.2014 for Urdu medium and after the posts are de-reserved they may be advertised in the daily newspapers with wider circulation inviting applications for all eligible candidates and thereafter the same may be filled up on usual selection procedure in accordance with law.

8. These directions are given with a view to strike a balance that on one hand the posts may not remain vacant and on the other hand all eligible candidates may get an opportunity or rather equal opportunity under Article 14 and in the circumstances the court has also considered the principles laid down by the Hon"ble Apex Court regarding Article 16 and the scope of judicial review. When the seats for the PTC (Urdu medium) are not filled in resulting in the vacancies remaining as it is it is in consonance with the principles of Article 14 to provide an opportunity to the candidates who are eligible. In the circumstances the present petition stands allowed partly. The Respondent State shall de-reserve the posts of PTC (Urdu) SC / ST categories and after it is dereserved the same may be advertised in two local daily newspapers for a wider publicity inviting applications for all eligible candidates and thereafter the same can be filled up as per usual selection process in accordance with law. The exercise may be done by the Respondents as early as possible preferably within a period of three months. Rule is made absolute to the aforesaid extent. No order as to costs. Direct service permitted. "

16. The Supreme Court, in the case of K.N. Sreenivasan (supra), held as under;

"2. It appears from the letter dated 166-4991 addressed by the Commanding Manager (Administration) to the appellant as well as from the counter filed by one Commander Khanna, Chief Staff Officer in July 1993 in reply to this appeal, that there was a roster maintained for promotion to the post of the Senior Foreman, Grade I. When the incumbent of the said post, viz., Shri Pillai retired on 31.1.1991, the post fell vacant. At this stage, according to the roster, it was the turn of a Scheduled Caste candidate to fill in the post by promotion. However, no Scheduled Caste candidate was available. There is nothing on record to show that if a Scheduled Caste candidate is not available, the rule requires that the post should be offered to either a Scheduled Tribe or an OBC candidate. Nor is there any material to show that even if such a rule existed, the candidates from the said two categories were available to be appointed. On the other hand, both the said letter as well as the counter show that the stand taken by the respondents was that the said post would remain vacant and in fact it has remained vacant because no Scheduled Caste candidate was available. We are unable to understand the reasoning of the respondents. If no individual from the reserved category is available, then the procedure to be followed is to convert the post into a non-reserved post and offer the same to the candidate from the nonreserved category and carry forward the post for the reserved category for which it was meant if the carry forward rule exists and so permits.

3. In the present case, this is the second time when the reserved post was

carried forward for the Scheduled Castes. Hence the post has to be converted into a nonreserved post and offered to the appellant who even as per the counter filed on behalf of the respondent is qualified to be appointed to the same. Since it is only the second time when the post was carried forward for the Scheduled Castes, the same can be carried forward for the said category for the third time if the carry forward rule permits.

4. We, therefore, direct the respondent to consider the appellant for appointment to the said post of Senior Foreman, Grade I and if he is qualified, appoint him within four weeks from today. The appeals are allowed accordingly with no order as to costs."

17. It is very unfortunate to note that the respondents are playing with the career of the students, who are pursuing their studies in the Marathi and Urdu Medium. I am at pains to note that despite availability of the teachers with the expertise in the Marathi and Urdu Medium, the students are being taught or imparted the education by the teachers, who have no expertise in the Marathi or Urdu Medium. Despite the availability of the teachers in the Marathi as well as the Urdu Medium, if such is the position, then the Court should intervene and set right the position.

18. In view of the settled law, no further adjudication is necessary. The respondents are directed to fill-up the vacancies of the Marathi Medium Vidyasahayaks notified for the Scheduled Tribes candidates, both for PTC (General Stream) and PTC (Science Stream) as notified in the advertisement dated 21.12.2009 by appointing the writ applicants herein, who are the Marathi Medium SEBC category candidates of the PTC (General Stream) as there are no candidates of the Scheduled Tribes (Marathi Medium) PTC available. Let this exercise be undertaken within a period of six weeks from the date of the receipt of the writ of the order.

19. For the reasons recorded above, the Special Civil Application No.180 of 2010 is also allowed. The prayer in terms of para 13(b) is granted and the respondents are directed to act accordingly.

20. Rule is made absolute to the aforesaid extent in both the petitions.