

(2009) 08 BOM CK 0142
In the Bombay High Court
Case No : Writ Petition No. 3087 of 1997

Ku. Sangita

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 17-08-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Maharashtra Universities Act, 1994 — Section 59

Citation : (2009) 6 MhLj 968

Hon'ble Judges : S.R. Dongaonkar, J

Bench : Single Bench

Advocate : A.S. Kilor, for the Appellant; C.N. Adgokar, AGP, for Respondent Nos. 1 to 3, S.G. Loney and Pradip Mahalle, for the Respondent

Final Decision : Allowed

Judgement

S.R. Dongaonkar, J.—Heard Shri Kilor, Advocate, for the petitioner, Shri Adgokar, AGP, for Respondent Nos. 1 to 3, Shri Loney, Advocate, for Respondent No. 4, Shri Mahalle, Advocate, for Respondent No. 5. None present for Respondent No. 6 (Formal Party)

2. By this petition under Article 226 & 227 of the Constitution of India, the petitioner is taking exception to the order passed by the Presiding Officer, University and College Tribunal, Nagpur, in Appeal No. A-3/1996, by which the appeal of the appellant i.e. present petitioner was dismissed. The petitioner, appellant therein, had asked for continuation in the post on which she was appointed, which was reserved for certain categories, by setting aside the termination. It is necessary to note certain observations at this stage recorded by the learned Presiding Officer, University and College Tribunal, Nagpur, which read thus

1. This purports to be an appeal u/s 59 of the Maharashtra University Act, 1994, though it also needs to be noted at the outset that the prayers made in the memo of appeal do not include any prayer for setting aside the order of

termination of services of the appellant as Director of Physical Education in the respondent No. 5 College. This is also apart from the position that in para 8 of the memo of appeal, the appellant has stated that the question of filing appeal before the College Tribunal does not arise. As termination in question is not based on any other ground except the refusal on the part of the respondent No. 4, Amravati University to de-reserve the post and to continue the appellant on the said post. It is only an aside to therefore observe that having regard to the prayers and relief sought and the statement that it is not necessary to file an appeal, the present memo of appeal was in reality intended to be a writ petition to be filed before the High Court.

According to the petitioner, though she was appointed on the post reserved for Reserved Category, as the said category candidates were not available for 5 academic years, the said post should be treated as de-reserved and her appointment on that post should be treated as a valid appointment, after de-reservation in pursuance to the G.R. of the Government No. USG/1286/1179/VS-4, dated 23.5.1990. The University and College Tribunal, Nagpur, found that the claim of the petitioner/appellant could not sustain at law in view of the said G.R. dated 5.12.1994. Therefore, according to the Tribunal, there was no option with the respondent No. 5 except to terminate the appointment after the expiry of the session 1995-96 on 30.4.1996.

3. Learned Counsel for the petitioner has submitted that the date of appointment of the petitioner was 28.07.1991. The petitioner was appointed on the post of Director of Physical Education as per qualification prescribed by Respondent No. 4 -Amravati University. The appointment was initially for one year as she was not from the category of Scheduled Tribe, for which the said post was reserved. Later on also, after the completion of that academic year, as the suitable candidate from the S.C. category was not available, she was continued in that post. Thus, she was continued for 5 years. Later on also, as the suitable candidate from the said category was not available, her appointment on the said post was continued. Petitioners case is that, in view of the G.R. dated 23.5.1990, after completion of 5 years in the said post and when the suitable candidate from the reserved category was not available, the said post should have been treated as de-reserved and she should have been continued therein. Claiming this, she had moved the University and College Tribunal, Nagpur. However, the Presiding Officer, College Tribunal did not consider this aspect and relying on the G.R. dated 5th December, 1994, has wrongly rejected the claim of the petitioner. Therefore, according to the learned Counsel for the petitioner, the impugned order does not withstand to the legal scrutiny and it is liable to be set aside. He has relied on unreported Division Bench judgment of this Court in Writ Petition No. 3305 of 2001 (Smt. Sharda Sharad Gawande v. The State of Maharashtra and Ors.), wherein in para 7, it has been observed thus-

(7) On the backdrop of the above referred undisputed facts, it is apparent that provisions of Government Resolution dated 5.12.1994 are prospective in nature

and cannot be applied retrospectively and, therefore, it has no application so far as case of petitioner is concerned. Since post in question was reserved for candidate belonging to Scheduled Tribe for six years, in view of Government Resolution dated 25.1.1990, same can be de-reserved subject to permission of the State Government. However, this aspect has not been considered by the State Government and, therefore, impugned communication dated 16.11.2000 issued by the State Government is unsustainable in law in view of Government Resolution dated 21.1.1990

According to him, the operation of G.R. dated 5.12.1994 is prospective in nature. As the petitioner was appointed in 1991, the provisions of G.R. dated 23.5.1990 would be applicable and petitioners case cannot be thrown away by resorting the contents of G.R. dated 5.12.1994. According to the learned Counsel for the petitioner, therefore, the impugned judgment can not sustain at law, and it is liable to be set aside.

4. Learned AGP for Respondent Nos. 1, 2 & 3 has submitted that the appointment of the petitioner was on year to year basis and therefore, in the year 1994, when her fresh appointment was in force, her case would be governed by G.R. of 5.12.1994 and therefore, the post held by the petitioner could be de-reserved only on 7th occasion with the approval of the Government. According to him, therefore, the impugned order is correct.

5. Learned Counsel for Respondent No. 4 University submitted that the University had acted according to the Government Directions and as there was no approval from the Government, the services of the petitioner could not be continued in the Reserved Post, muchless treating it as de-reserved,

6. Learned Counsel for Respondent No. 5 has, however, submitted that under bonafide belief that the G.R. dated 5.12.1994 was in force, the services of the petitioner came to be terminated. According to the learned Counsel, the sanction of Government was required to be accorded for such appointment after de-reservation of the post in pursuance to the G.R. of 1994.

7. In order to appreciate the rival contentions, it is necessary to see the appointment letter of the petitioner. This appointment letter of 12.08.1995, reads thus-

...Your appointment is against S.T. category candidate for the fifth time upto the end of the Session 1995-96 i.e. 30th April, 1996, subject to the approval of Amravati University, Amravati.

8. At this stage, it is necessary to see the contents of G.R. dated 25th January, 1990. Relevant Para 2 reads as under

(2) Government is now issuing the directions that BACKWARD CLASS reserved posts be kept reserved for 5 employment years instead of three years and in the sixth, the said post be de-reserved and open category candidate regularized subject to holding of prescribed qualifications. In any circumstances, unqualified

open category candidate should not be appointed on the reserved posts. Similarly while making such appointments, following conditions be specified:

This appointment is against the post reserved for backward classes and the appointee shall not have any right to the post or any right whatsoever. Similar note should also be included in the advertisement for such post while de-reserving the reserved post permission from the Government be obtained.

In view of this G.R. it appears that the reserved posts were to be kept reserved for 5 employment years instead of 3 years and for the sixth year, the said post would be de-reserved and open category candidate was to be regularized subject to fulfilling the prescribed conditions. It appears that there was nothing to be done, either by the candidate or by the management for such appointment in the de-reserved post. Nothing of such requirement has been pointed out by the learned A.G.P. or counsel appearing for the University.

9. At this stage, it is necessary to see the direction 5th issued in the G.R. of 1994. The said G.R. of December, 1994, stipulates thus

DIRECT RECRUITMENT : The candidate belonging to Schedule Caste/ST, (a) NT (b), NT (c), NT (d), OBC (e). Amongst this category, if the eligible candidates are not available, then these posts are to be kept vacant for five recruiting years and if in this 5 direct recruiting years, candidates amongst from these categories are not available and during this period, the efforts are to be made to get the candidates amongst these categories. Despite the efforts, if the candidates are not available, then in the 6th year, the posts are to be filled up alternatively as under

In the 6th year, if the candidate from the same category or from another category is not available, alternatively, in the seventh year, the post to be filled up from open category and after according sanction from GAD section. For the same, the proposal duly recommended should be forwarded to the GAD section. In the sixth year, the post to be filled up alternatively from various category stated hereinbelow

It would be seen that the proposal duly recommended after appointment in de-reserved post was to be sent to the GAD. In the present case, however, it does not seem that the proposal was sent to GAD, instead it appears to have been sent to the University.

10. It is not disputed that the petitioner has now continued in the said post for about 19 years. One order in this respect passed by this Court is dated April 29, 2005, wherein it has been ordered;

Under these circumstances, as the petition is of the year 1997, it is not possible for this Court to hear it immediately. As the post is said to be vacant, the Respondent No. 5 to permit the petitioner to join on that post and to work on it during pendency of the petition. Such working shall be without prejudice to the rights of the petitioner and also without prejudice to the rights of respondent No.

5 in the matter.

It is also informed by the learned Counsel for the petitioner that there is an approval to the appointment of the petitioner for all these years.

11. The question would be whether the appointment of the petitioner in the de-reserved post can be said to be valid as the sanction was not accorded 5th by the G.A.D. in pursuance to the G.R. dated December, 1994. The crucial question, therefore, would be whether the G.R. of 1994 at all would be applicable to the present facts/ to the case of the petitioner.

12. The judgment of this Court in Writ Petition No. 3305 of 2001, referred above, clearly lays down that the G.R. dated 5.12.1994 is prospective in nature and it cannot be applied retrospectively. Here is the case where petitioner was appointed in 1991. At that time G.R. of 1990 was in force. Therefore, in view of the Division Bench Judgment of this Court, the G.R. of 1990 i.e. dated 25/1/1990 would govern the case of the petitioner. In that view of the matter, the sanction of GAD of continuing the services of the petitioner in the de-reserved post would not be necessary.

13. Admittedly the petitioner is continued in the service in the de-reserved post for about 19 years. The termination of the petitioner was by letter dated 30.3.1996, w.e.f. 30th April, 1996. As the appointment of the petitioner though on year to year basis was continued till 1996, and as her services would be governed by G.R. of 1990, I am of the opinion that the services of the petitioner could not have been validly terminated by that letter.

14. Therefore, the impugned order of the College Tribunal does not seem to be based on correct view of the matter. In my opinion, the circumstances of the case, would be governed precisely by the observations of this Court in Writ Petition No. 3305 of 2001, referred above, and more particularly by G.R. dated 25.1.1990. Further, in my opinion, as the petitioner has continued for along 19 years in the said post, and as it appears that respondents had not asked for early hearing of the matter, it is not now possible to unsettle the position of petitioner. As such, the judgment and order of the College Tribunal, impugned in this petition is liable to be quashed and set aside. Ordered accordingly. Petition thus succeeds. No order as to costs.