
(2007) 07 BOM CK 0138
In the Bombay High Court
Case No : Writ Petition No. 701 of 2007

Nitin Anbhule

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 25-07-2007

Acts Referred:

Citation : (2007) 5 ALLMR 535 : (2007) 5 BomCR 552 : (2007) 109 BOMLR 1456

Hon'ble Judges : P.V. Kakade, J;P.R. Borkar, J

Bench : Division Bench

Advocate : G.N. Chincholkar, for the Appellant; S.K. Kadam, A.G.P. for Respondent Nos. 1 to 3, V.P. Latange and S.S. Jadhavar, for the Respondent

Judgement

P.R. Borkar, J.—Rule. Rule made returnable forthwith. With the consent of the parties taken up for final hearing.

2. The petitioner was a lecturer in English in Shri Datta Arts and Commerce College, Hadgaon, Taluka Hadgaon (respondent No. 6) run by Hadgaon Taluka Shikshan Prasarak Mandal (respondent No. 5). The college was affiliated to respondent No. 4 University and getting 100% grants from respondent No. 1.

3. By this petition, the petitioner has sought direction to respondent No. 1 to de-reserve the post of English subject at respondent No. 6 college and for grant of approval to the appointment of the petitioner on the said post.

4. There are three posts of full time lecturer in English at Senior College Level and all the posts are for reserved category. Two were reserved for the S.T. (Scheduled Tribe category) and remaining were for N.T. (Ladies) i.e. Nomadic Tribe (Ladies) which is against the Government Resolution dated 24.4.1995. The Government Resolution dated 24.4.1995 lays down that there should not be subject wise reservation and, therefore all seats of lecturer in English subject cannot be reserved. Respondent Nos. 5 and 6 published advertisements as follows:

1st advertisement - published on 2.1.1998

2nd advertisement - published on 26.6.1998

3rd advertisement - published on 14.6.1999

4th advertisement - published on 19.7.2000

5th advertisement - published on 11.8.2001

6th advertisement - published on 4.12.2002

Copies of the advertisements are annexed with the petition at Exhs. "B", "B1", "B2", "B3", "B4" and "B5", respectively. It is case of the petitioner that inspite of advertisements no candidate of the Scheduled Tribe or Nomadic Tribe (Ladies) was available and the petitioner was appointed on one year basis at a time on the reserved post. Thus the petitioner first joined respondent No. 6 college on 26.8.1998 as per the appointment letter dated 24.8.1998 and thereafter he continued till 2005. As per respondent Nos. 5 and 6 the petitioner continued to work till the end of academic year 2004-05 which ended on 1.5.2005; whereas as per the petitioner he continued to work till 1.9.2005 when he was orally terminated.

5. Since, even after the 6th advertisement and exchange of reservation no candidate from reserved category was available, Principal of the college (respondent No. 6) submitted proposal to respondent No. 4 University for de-reservation of the post of lecturer in English subject and for approval to the appointment of the petitioner. Copy of the letter is produced at Exh. "C" with the petition and was received by the office of respondent No. 4 University on 21.4.2005. Thereafter the University sent the proposal with recommendations for de-reservation and for approval of the appointment of the petitioner to respondent No. 1. It is mentioned therein that the post of lecturer in English subject in respondent No. 6 college was advertised for six times and no candidate from reserved category was available and, therefore, it was necessary to de-reserve the post and give approval to the appointment of the petitioner as lecturer. The Government informed respondent No. 6 college through respondent No. 4 University that once again the advertisement may be given and it be ascertained if candidate from reserved category was available and the proposal was returned. This letter dated 10.10.2006 produced at Exh. "E" with the petition which is challenged in this writ petition, and prayer was made for giving direction to respondent No. 1 to de-reserve the post and give approval to the appointment of the petitioner who had been working as lecturer in English subject at Senior College Level in respondent No. 6 college.

6. The respondents have filed their affidavit-in-replies in sister Writ Petition No. 7684 of 2005 and want to adopt the same here. Respondent Nos. 5 and 6 stated that the petitioner was qualified as M.A. (B+), but he has neither passed NET or SET examination nor he acquired qualification of M.Phil or Ph.D. as required under the Rules framed by the University Grants Commission (UGC), the Apex

and Regulatory Body in the field. It is also pointed out that the petitioner was not appointed as permanent employee in respondent No. 6 college at any time. He was appointed at a time for one academic year i.e. for a specific period as a temporary employee. The last appointment order issued to the petitioner was on 1.7.2004 and it was for academic year 2004-05 i.e. from 18.6.2004 to 30.4.2005. The services of the petitioner automatically came to an end on 1.4.2005 by efflux of time as per last appointment order. The petitioner was deleted from muster roll after 30.4.2005 and there is no record regarding his continuation in service after 30.4.2005. He did not attend the college thereafter.

7. However, it is admitted that the petitioner was initially appointed against the post reserved for N.T.-2 (Women) category and thereafter he was appointed on the post which was reserved for S.T. category, as the N.T.-2 (Women) category candidate was appointed against the said post in the year 2000-01. The appointment of the petitioner was a time gap appointment as the candidate from reserved category was not available. It is not disputed that proposals were forwarded by respondent Nos. 5 and 6 for de-reservation of post and for appointing the petitioner on the said post. Other contentions raised in the affidavit-in-reply need not be considered as they relate to the amount due to the petitioner towards salary. Respondent Nos. 1 to 3 also filed their affidavit-in-reply, but same mainly relates to the dues claimed by the petitioner in the other writ petition. So, there is no denial regarding factual aspects mentioned in the petition.

8. In order to show that the petitioner is entitled to direction regarding de-reservation, our attention was invited to Government Resolution No. BCC. 1094/CR.57/94/16-B, dated 5.12.1994, copy of which is produced at Exh. "F". As per this resolution, if a candidate of reserved category is not available then such post should be kept vacant for five recruiting years and attempt should be made to get such candidate and if even thereafter candidate is not available, then there should be change in reservation as directed in the resolution. In case of Scheduled Tribe attempt should be made for getting the candidate of Scheduled Tribe and in case even after such effort such candidate is not available, then in 7th year, candidate can be recruited from open category, but this should be done after permission of the General Administration Department of the Government. The Government Resolution does not spell out circumstances under which the General Administration Department can refuse permission on 7th year. When discretion is given it has to be used judiciously and not arbitrarily without any reason. In this case it is case of the petitioner that no reasons are given in the communication Exh. "E" dated 10.10.2006 which merely states that one more advertisement be given and attempt should be made to get the candidate from the reserved category. It is not stated that the necessary conditions of earlier six advertisements or of exchange of reservation were not fulfilled.

9. The petitioner also relied upon Government Resolution bearing No. BUC. 1997/13209/(1223). S.E.-5, dated 2.11.2005 produced at Exh. "F-2". Therein

the Government considered that reserved vacancies are to be filled in by temporary employees whenever candidates of reserved category are not available and, therefore, teachers have to work temporarily for 10-12 years. Considering the difficulties, the continuity in service, the orders of the Courts, the Government decided that whenever reserved posts are de-reserved it is no more necessary to issue fresh advertisement from open category and the concerned teacher may be continued in same post.

10. The learned advocate for the petitioner relied upon two authorities. The first is *Kakoli Shyamlal Sircar Vs. Nagpur University and Others*, . That case is based on Government Resolution dated 29.9.1986. The said Government Resolution provided that if a candidate of Scheduled Caste category was not available on three attempts, then after 3rd year the post has to be de-reserved and person from open category who has worked should be confirmed in the same post. Even the ordinance issued by the University clearly stated that the post which is reserved can be carried forward only upto three years. Admittedly there is no more automatic de-reservation. The Government Resolution of 1986 was replaced by the Government Resolution of 1991 which itself was again replaced by the Government Resolution dated 5.12.1994 referred to earlier. So, the case cited has no application.

11. As per the Government Resolution dated 5.12.1994 attempt should be made for six years to get candidate of reserved category. There should be exchange of reservation on sixth year between Scheduled Caste and Scheduled Tribe categories and in case such candidate is not available, then in the seventh year candidate from open category can be appointed with permission of the General Administration Department. It appears from the Government Resolution that permission of General Administration Department is required mainly because the Government Resolution deals with Government employees and the Government Departments. It may also be treated as a measure to ensure that in fact the Government Resolution is followed in letter and spirit. In the case of *Deepa Gaurang Murdeshwar Katre v. Principal, V.A.V. College of Arts* 2007 (3) Bom. C.R. 150 the Supreme Court has referred to the Government Resolution No. USG/1494/16114/(2903) VISHI-4, dated 19.1.1995, copy of which is produced by the petitioner at the last moment during arguments and if we compare said Government Resolution with the Government Resolution dated 5.12.1994, it is clear that Government Resolution dated 19.1.1995 is applicable to appointments in Non-Government colleges and it refers to even Government Resolution dated 5.12.1994 referred to above.

12. The present case is squarely covered by the ratio in *Deepa Gaurang Katre* (supra). In that case, as paras 3 to 6 show, the appellant had applied for appointment in respondent No. 1 college on the post of English lecturer pursuant to vacancy. He was duly interviewed by the local selection committee and appointed as full time lecturer on 22.11.1993 on temporary post for second term subject to the approval of the University. Thereafter the college advertised

number of vacant posts for the academic year 1994-95. One of the posts was of English lecturer, but same was reserved for Scheduled Caste candidate. The advertisement, however, provided that in case Backward candidate was not available, then a candidate from the general category would be considered for appointment on year to year basis. No Backward Class candidate applied for the post. Three General category candidates applied out of which the appellant was selected and thereafter appointed as full time lecturer in the college for one academic year. It is mentioned in para 6 that earlier there was Government Resolution dated 25.1.1990 which provided that if no Backward Class candidate was available for five years, then post should be de-reserved. By way of Government Resolution dated 19.1.1995 the Government took decision that in all Government aided colleges the reserved posts of lecturers should be advertised for five years. Thereafter in the 6th year, advertisement should be issued with interchangeability clause and only if no eligible candidate is available the post should be de-reserved and the person who has been occupying the post on temporary basis should be considered for regular appointment on the post. Paras 7 to 12 clearly indicate that in the case before Their Lordships advertisements were issued year after year and since no candidate of reserved category was available, the appellant was given fresh posting every year on temporary basis. Thus, appellant who joined services in July, 1994 continued for the academic years 1995-96 to 1999-2000. In that case, the High Court was misled twice because of the misrepresentation by the University and ultimately the matter went to the Supreme Court. Apart from said misrepresentation, the facts of the case before Their Lordships and our case are identical. Their Lordships also referred in para 16 to two other similarly situated lecturers of the same college. In both cases, sixth advertisement had been issued and since the teacher had been working for number of years, the High Court held that there was no need for fresh advertisement and, therefore, directed that the petitioners in those writ petitions would be treated as permanent. Their Lordships of the Supreme Court in para 24 observed that it was not in dispute that the appellant had been in service in respondent college for 12 years. No candidate from reserved category was available for six years. The appellant continued on temporary basis year to year and hence it was a fit case where the appellant should be regularised on that post after de-reserving the same.

13. Considering the Government Resolutions dated 5.12.1994, 19.1.1995 and 2.11.2005, in our considered opinion the necessary conditions are fulfilled and, therefore, the petitioner is entitled to relief of de-reservation and approval for appointment as claimed. In our opinion, once conditions laid down in Government Resolution are fulfilled, General Administration Department has no discretion unless it can provide surplus candidate of reserved category available from any other Department/source.

14. One more aspect needs to be examined. It is argued that the petitioner has not passed NET or SET examination. He has neither obtained M.Phil degree nor he has submissions of Ph.D. So, he was not eligible for appointment to the post.

15. Our attention was drawn to the advertisements produced at Exhs. "B to B-5". The educational qualification was M.A. with 55 per cent marks with passing of SET or NET examination. Admittedly the petitioner has not passed SET or NET examination. However, it is clear from letter dated 10/11.5.2005 at Exh. "C" that as requested by respondent No. 6 college, respondent No. 4 University has recommended the name of the petitioner for approval to the post of lecturer.

16. It is also clear from appointment letter produced at Exh. "G" with the petition that appointment for the academic year 1998-99 did not prescribe passing of SET or NET examination, but the appointment letter for the academic year 2003-04 was with condition that the petitioner will have to pass the NET or SET or similar test as the case may be as laid down by the University and he will have to acquire such qualification. Copies of those appointment letters are produced on record by the petitioner himself.

17. So, it is argued by the learned Counsel for respondent Nos. 5 and 6 before us that the appointment of the petitioner cannot be approved. Our attention was drawn to the Government Resolution No. NGC/1201/11815/(38/01)/US-4, dated 18.10.2001. It is stated that passing of NET or SET examination was made compulsory by the University Grants Commission. By Government Resolution dated 11.12.1999, the recommendations of Fifth Pay Commission were made applicable to the University and College teachers as per recommendations of University Grants Commission, but the said Government Resolution also lays down passing of NET or SET examination as eligibility. It is further stated that as per Government Resolution No. 1306/2000 after 4.4.2002 no lecturer either in the University or in the College be appointed without the necessary eligibility. However, there were 6000 lecturers who had not passed either NET or SET examination and they were in service for 7-8 years and, therefore, for protecting their interest the Government has taken the decision. So, this background is necessary to note while considering the decision taken by the Government Resolution. The Government Resolution lays down that on certain conditions the lecturers appointed between 19.9.1991 and 11.12.1999 will not be terminated for non-passing of NET or SET examination. The conditions were that the lecturers should pass either of the examination till December, 2003. It is further laid down that those who would not pass either of the two examinations would not be entitled to any monetary benefits such as promotion, higher pay scale, selection grade and until retirement they will continue in the pay scale of Rs. 8000-13500. They will be entitled to higher scale, selection grade from the date on which they would pass the examination. These concessions will not be available to those lecturers who come in service after 11.12.1999.

18. Having regard to the facts of the present case, since the petitioner continued in service from 1998-99 till 2004-05 as a lecturer and the conditions of Government Resolution dated 5.12.1999 are fulfilled, the petitioner would be entitled to benefit of the Government Resolution dated 2.11.2005 and is entitled to approval for his appointment, subject to conditions laid down in the resolution.

19. As per respondent Nos. 4 and 5 the petitioner's services automatically came to an end from 1.5.2005 as his appointment for academic year 2004-05 had come to an end on 30.4.2005 and he was no more in service thereafter; whereas as per the petitioner he continued to be in service till 1.9.2005 as mentioned in para 13 of the petition and then he filed other writ petition.

20. In the facts and circumstances of the case, and in view of the ratio laid down in the case of Deepa Gaurang Katre, respondent No. 1 is directed to de-reserve the post of English subject at Senior College of respondent Nos. 5 and 6 as per the proposal Exh. "C" forwarded by respondent No. 6 through respondent No. 4 University and grant approval to the appointment of the petitioner who has been working as lecturer in English subject at Senior College Level on the said post. The order be complied within a period of three months from the date of this order. So far as salary/backwages, etc. of the petitioner are concerned, necessary orders would be passed in Writ Petition No. 7684 of 2005.

21. Rule is made absolute in the above terms. Parties are directed to bear their own costs.