

(2004) 02 BOM CK 0056

In the Bombay High Court

Case No : Writ Petition No. 4499 of 2003

Shri Somsingh Chandrasingh Thakur

APPELLANT

Vs

The Head Master, Capt. R.M. Oak High School, The Secretary,
Balak Mandir Sanstha, The Education Officer, (Secondary)
and Shri Vasant K. Sahasrabuddhe, Head Master, Capt. R.M.
Oak High School

RESPONDENT

Date of Decision : 09-02-2004

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 8, 9, 9(1)

Citation : (2004) 4 ALLMR 401 : (2004) 2 MhLj 980

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : N.V. Bandiwadekar, for the Appellant; R.S. Apte and A.A. Garge for
Respondent Nos. 2, S.M. Oak, for Respondent Nos. 1 and 4 and M.H. Solkar,
A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—Rule, returnable forthwith. Respondents waive service through Counsel. By consent taken up for hearing and final disposal.

2. This Petition is directed against a judgment and order of the School Tribunal dated 23rd June 2003 dismissing an appeal filed by the Petitioner challenging his reversion from the rank of Head Master to Assistant Teacher. A notice was issued to the parties for final disposal of the matter on 18th September 2003. All parties have been served and the matter has been accordingly considered for final disposal at the stage of admission by consent.

3. The Petitioner belongs to the Thakur Community which is a Scheduled Tribe. On 2nd July 1982 the Petitioner was appointed as a teacher in the Secondary School conducted by the First and Second Respondents. On 3rd December 1984,

the Petitioner was promoted as an Assistant Head Master. At that stage when the Petitioner came to be promoted, there was only one post of Assistant Head Master which was an isolated post. Yet the petitioner was appointed as a candidate belonging to the reserved category.

4. The then Head Mistress Mrs. Karmarkar was due to retire at the end of September 1992. One of the teachers in the school, Mrs. S.M. Duraphe filed a Writ Petition in this Court under Article 226 of the Constitution (W.P.3744 of 1992) contending that since the post of Head Master was an isolated post, it could not be filled up by promoting a candidate belonging to a backward class. The relief which was sought in the petition filed by Mrs. Duraphe was inter alia to the effect that she should be promoted to the cadre of an Assistant Head Master or in the alternative 23 a Supervision with effect from 1st May 1983 with all consequential benefits, Mr. Duraphe, it would, therefore, appeal, was claiming appointment as an Assistant Head Mistress. The Petitioner was a party to the aforesaid writ petition and was impleaded as the Sixth Respondent thereto. The Petition was admitted on 7th September 1992 and on 9th October 1992 an order was passed in terms of Minutes by which it was agreed that as and when a vacancy in the post of Assistant Head Master arose in the School, the Fifth Respondent. Mrs. Asalekar may be appointed thereto and the Sixth Respondent to the Petition (the present Petitioner) may be appointed as a Head Master subject to the result of the Petition. On 21st November 1992, a vacancy having arisen, the Petitioner received an order of his promotion as Head Master with effect from 1st October 1992 on probation. The Education Officer approved the appointment of the Petitioner on 11th February 1993.

5. The Petitioner continued to hold the post of Head Master until the petition came up for hearing on 10th February 2003. When the Petition came up for hearing and final disposal, the Division Bench noted that both the Petitioner therein, Mrs. Duraphe as well as the Fifth Respondent, Mrs. Asalekar had retired. Hence, the Court held that even if the Court were to accept the contention of the Petitioner (Mrs. Duraphe) that the post of Head Master was an isolated post and, therefore, not capable of being reserved, in view of the fact that the Petitioner before the Court in that petition as well as the Fifth Respondent had retired from service, no case for the invocation of the writ jurisdiction was made out. The petition was accordingly disposed of.

6. Thereafter, on 1st May 2003, an order was issued by the Management of the School stating that the post of Head Master was an isolated post to which reservation was not applicable and that since the Petitioner was not the seniormost teacher, he was being reverted back to the post of Assistant Teacher. The Petitioner filed a writ petition before this Court to challenge the order of reversion. On an objection raised by the Management that the Petitioner had an alternative remedy under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 before the School Tribunal, the petition was disposed of by the Division Bench relegating the Petitioner to the

remedy of an appeal. The Petitioner thereupon filed an appeal before the School Tribunal. Parties filed their replies.

7. The Tribunal dismissed the appeal by the impugned order dated 23rd June 2003. The Tribunal has held that the Petitioner was not entitled to any relief having regard to the fact that his very first promotion as Assistant Head Master was to an isolated post to which no reservation could be attracted. While going into the matter on merits, the Tribunal rejected the contentions urged by the Petitioner. However, it must also be noted that the Tribunal was of the view that the reduction in the rank in the present case was not a penalty and hence the appeal before the School Tribunal may not even be maintainable.

8. Counsel appearing on behalf of the Petitioner has argued that (i) The validity of the appointment of the Petitioner as an Assistant Head Master was not in issue before the Tribunal and had never been questioned; (ii) The Petitioner was appointed as an Assistant Head Master whereupon he fell into category-B of Schedule-F to the Rules framed under the Act (iii) As an employee in category-B, the Petitioner was senior to the Fourth Respondent and was lawfully entitled to the post of Head Master; (iv) The Management conducts two schools now for which there are two posts of Head Masters; (v) Since the post of Head Master in the second school which is an English Medium School is held by an open merit candidate, the remaining post must be offered to a Backward Class candidate; (vi) The Tribunal has erroneously held that there could be no reservation unless there were four posts based on a circular dated 28th April 1999 of the Directorate of Education; and (vii) in any event the finding of the Tribunal on the question of jurisdiction is erroneous.

9. At the outset, it would be necessary for the Court to deal with the question as to whether the School Tribunal had jurisdiction to entertain the appeal filed by the Petitioner. Counsel for the Petitioner urged that the earlier petition which was filed before this Court under Article 226 was disposed of on the ground that the Petitioner had an alternative remedy before the Tribunal in view of the objection raised by the management. Hence, it was urged that the management was estopped from challenging the jurisdiction of the School Tribunal. The question that arises before the Court is as to whether the School Tribunal has jurisdiction in the first place. That question cannot be disposed of on the question of estoppel. Jurisdiction cannot be conferred by consent. The provisions of Section 9 have to be construed. They provide thus :

"9. Right of appeal to Tribunal to employees of private school: (1) Notwithstanding anything contained in any law or contract for the time being in force, any employee in a private school,-

(a) who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank, by the order passed by the Management; or

(b) who is superseded by the Management while making an appointment to any post by promotion.

And who is aggrieved, shall have a right of appeal and may appeal against any such order or supersession to the Tribunal constituted u/s 8.

Provided that, no such appeal shall lie to the Tribunal in any case where the matter has already been decided by a Court of competent jurisdiction or is pending before such Court, on the appointed date or where the order of dismissal, removal, otherwise termination of service or reduction in rank was passed by the Management at any time before the 1st July 1976"

10. Clause (a) of Sub-section (1) of Section 9 provides an appeal against dismissal, removal, or termination of the service of an employee or against a reduction in rank effected by an order of the management. Clause (b) deals with supersession by the management while making appointment by promotion. Dismissal and removal in Clause (a) of Sub-section (1) postulates punitive action by the management against an employee. Clause (a) then refers to a case where services are "otherwise terminated". This is an all encompassing residual category. In that category, the Legislature has designedly used language of width to provide access to employees before the Tribunal. The termination "otherwise" may be in any form -- written or oral, overt or covert, as a penalty or even otherwise. A reduction in rank could in a given case be as and by way of a punitive measure. There is, however, no reason to attribute to the legislature an intention to impart a restricted meaning in using the word "reduced in rank" in Clause (a) of subsection (1) of Section 9. A reduction in rank may well take place for reasons unrelated to disciplinary reason. The plain words used by the Legislature as they stand must be construed. The Legislature not having defined those words restrictively they must be given their plain and grammatical meaning. Counsel appealing on behalf of the management sought to place reliance on the provisions of Rule 31 which classifies penalties into minor penalties and major penalties. Therein a reduction in rank is classified as a major penalty. There can be no dispute about the position that a reduction in rank can be imposed as a punitive measure. However, the language of a statute cannot be restricted with reference to a piece of subordinate legislation. There would be no justification for the Court to read the word reduction in rank in Clause (a) of Sub-section (1) of Section 9 to have the same meaning as a major penalty in Rule 31. Wide words used in a statute cannot be restrictively construed with reference to delegated legislation particularly when the provision in question has been enacted by the legislature as a means of ensuring security of service to teachers employed in private schools.

11. In so far as the merits of the matter are concerned, the Petitioner, it is an admitted position, was not the seniormost Assistant Teacher. The Petitioner was appointed on 2nd July 1982 as a teacher. The Fourth Respondent who is also a qualified teacher was appointed eleven years earlier in the same school on 14th June 1971. The Petitioner was appointed as an Assistant Head Master on 3rd December 1984 on the basis that he belongs to a reserved category. Plainly, the promotion of the Petitioner to the post of Assistant Head Master was unlawful.

The post of Assistant Head Master being an isolated post, there could be no reservation to that post. The contention of the petitioner that there was no challenge whatsoever to his appointment as an Assistant Head Master has been rejected by the Tribunal holding that it had come in the evidence before the Tribunal that many senior members of the staff had objected to the promotion of the Petitioner both as an Assistant Head Master and as a Head Master. Moreover, a petition was filed by Mrs. Duraphe, another teacher, under Article 226 of the Constitution in this Court in 1992. The present Petitioner was impleaded as a party to that petition and the specific relief which was sought by Mrs. Duraphe in her petition was that she should be promoted as an Assistant Head Master or, in the alternative, as a Supervisor with effect from 1st May 1983. Clearly with the filing of that Petition before this Court in 1992, it cannot be said that there was no objection to the appointment of the Petitioner. In the petition which was filed before this Court an agreed order came to be passed in terms of Minutes on 9th October 1992 by which it was inter alia provided that the Petitioner herein may be promoted as Head Master subject to the result of the Petition, it was thereafter that the Petitioner came to be promoted as Head Master sometime in October/November 1992. At that stage, it is common ground, that the post of Head Master was an isolated post. Obviously, the appointment of the Petitioner as Head Master was contrary to law. The Supreme Court had ruled in its decision in Chakradhar Paswan Vs. State of Bihar and Ors, that a reservation could not be lawfully made to an isolated post. The formulation in Chakradhar Paswan has subsequently been reiterated by the Supreme Court in Post Graduate Institute of Medical Education and Research, Chandigarh v. Faculty Association, 1998 (2) M.L.J. 353. At this stage what is material is that even in 1992 the appointment of the Petitioner to the post of Head Master was in pursuance of the agreement between the parties, as reflected in the order dated 9th October 1992. The promotion was subject to the outcome of the Petition. The appointment in 1992 was in the teeth of the fundamental principles enunciated by the Supreme Court in Chakradhar Paswan. The Writ Petition filed by Mrs. Duraphe was disposed of on 10th February 2003 since it had become infructuous. The Petition became infructuous since Mrs. Duraphe who moved the Court had retired from service. Upon the disposal of the petition, the management was within its rights in contending that the post must go to the seniormost employee. Rule 3(3) of the Rules framed under the Act provides that the management of a school shall fill up the post of the Head by appointing the seniormost member of the teaching staff (in accordance with the guidelines laid down in Schedule-F) from amongst those employed in a school if it is the only school run by the management or schools if there is more than one school. The qualifications for the appointment of a head are specified in Sub-rule (3) of Rule 3. As between the Petitioner and the Fourth Respondent, it is evident that the Fourth Respondent was the senior teacher. The Fourth Respondent was appointed on 14th June. 1971. Though the Petitioner was promoted as an Assistant Head Master on 3rd December 1984, the promotion of the Petitioner as an Assistant Head Master was patently unlawful since this was an isolated post to which the Petitioner could not be promoted on

the basis that he belonged to a reserved category. Hence, upon the disposal of the petition, in my view, the management was justified in determining that the post had to be filled up by appointing the seniormost teacher to the aforesaid post. The Petitioner was appointed as an Assistant Head Master on the basis of his belonging to a reserved category. This was contrary to law since the aforesaid post was an isolated post. Hence, the petitioner could not claim the post of Head Master on the basis that he was the seniormost teacher in Category B of Schedule F. Plainly, he was not.

12. In a similar case which arose before this Court, *Smt. Sulabha Govind Vidwans v. Shravan M. Shevale and Ors.*, 1995 (2) Bom.C.R. 56, the senior teacher belonging to the open category had unlawfully been deprived of her promotion to the post of Assistant Head Master and later as a Head Master by appointing a reserved category candidate though these posts were isolated posts. A similar submission as urged before this Court by the Petitioner came to be rejected by the Division Bench. The contention which was urged was that the reserved category teacher was senior to the open category teacher when a vacancy arose in the post of Head Master and was, therefore, entitled to the post. The submission was that once a reserved category candidate was appointed as an Assistant Head Master earlier than the open category candidate, he became senior and was entitled to appointment as Head Master, as the seniormost teacher. The Division Bench rejected that submission holding that no teacher could be allowed to take advantage of his own wrong since the post of Assistant Head Master to which he had been promoted was also an isolated post. The reserved category candidate who was illegally promoted to that post could not claim seniority on the basis of his appointment as an Assistant Head Master. The Division Bench, therefore, held that the original seniority as from the date of appointment of both the candidates as Assistant Teacher shall have to be taken into consideration for deciding the subject matter of the controversy. Consequential reliefs were, therefore, granted by the Division Bench by setting aside the appointment of the reserved category candidate and by declaring that the open category candidate was entitled to appointment to the post of Head Master.

13. On behalf of the Petitioner it has also been urged that the management in the present case has since set up a new English Medium School and that the post of Head Master cannot be regarded as an isolated post. Counsel for the Petitioner submitted that since the post of Head Master in the English Medium School has been filled up by an open category candidate, the Petitioner is entitled to appointment to the post of Head Master in the present case. The submission cannot be accepted for more than one reason. First and foremost, the vacancy which arose first in point of time, was that in 1992 in the present school. The Fourth Respondent as the seniormost teacher was entitled to appointment as a Head Master. The Petitioner has at no stage staked his claim to appointment as Head Master in the new English Medium School which was opened by the Management in 1995. indeed if the Petitioner were to assert his claim to that

post before the Tribunal, it was necessary for him to implead the Head Master of that School who would be directly affected by any relief granted in favour of the Petitioner. The Head Master of the English Medium School has not been impleaded as a party to the proceedings. That apart, Rule 9(10)(a) of the Rules framed under the Act provides that the management shall reserve 24% of the total number of posts or vacancies of head and assistant head for the members of Scheduled Castes, Scheduled Caste Converts, Buddhists, Scheduled Tribes, Denotified Tribes and Nomadic Tribes. The Supreme Court has laid down in R.K. Sabharwal and others Vs. State of Punjab and others, that when the State Government after carrying out the necessary exercise for reservation provides the extent or percentage of posts reserved for backward classes, that percentage must be followed strictly. The acceptance of the submission which has been urged on behalf of the Petitioner will result in a situation where 50% of the total posts of head shall be reserved for the backward classes. In the present case Rule 9(10)(a) specifically provides that reservation shall extend only to the extent of 24%. Counsel appealing on behalf of the Petitioner has referred to a judgment of a Division Bench of this Court in Shri V.S.Joshi v. State of Maharashtra, 2002 (3) M.L.R.153. That was a case where the Division Bench held that since the management was conducting two different schools, the post of Head Master in one of the schools could not be said to be an isolated post. In the present case, even if the submission of the Petitioner were to be accepted that as a result of the opening of a new school in 1995, there are two posts of Head Master which had to be filled up, the percentage of reservation prescribed in Rule 9(10)(a) cannot be ignored in view of the judgment of the Supreme Court in Sabarwal's case.

14. In the circumstances, I am of the view that the School Tribunal has duly considered all the facts and circumstances of the case. The finding which has been arrived at by the School Tribunal is borne out by the material on record. The origin of the appointment of the Petitioner as an Assistant Head Master is not lawful. The appointment of the Petitioner as Head master was in pursuance of an agreement arrived at during the pendency of the earlier petition and was subject to the result of the Petition. The Petitioner, in view of the well settled position in law cannot claim a vested right to continue merely on the basis of the fact he was continued over a period of time. The order of reversion which was upheld by the Tribunal cannot, therefore, be faulted. The Writ Petition shall stand rejected. No order as to costs.

15. Parties be given copies of this order duly authenticated by the Sheristedar/ Personal Secretary of this Court.