

(2009) 04 BOM CK 0150

In the Bombay High Court

Case No : Writ Petition No. 2173 of 2008

Shubhada Prabhakar Patil, Sharda Raghunath Gadhari and
Kshama Dattatraya Naik

APPELLANT

Vs

State of Maharashtra, Department of Education, Education
Inspector, (South Zone), Indian Education Society, Society
and A Public Trust and Indian Education Society's V.N. Sule
Guruji English Medium School

RESPONDENT

Date of Decision : 16-04-2009

Acts Referred:

Constitution of India, 1950 — Article 162, 226

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 5(2), 5(2A)

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule
9(7), 9(8), 9(9)

Citation : (2009) 3 BomCR 641 : (2009) 111 BOMLR 2074 : (2009) 4 MhLj 788

Hon'ble Judges : Swatanter Kumar, C.J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Susheel Mahadeshwar, instructed by Ranjana Todankar, for the
Appellant; J.S. Saluja, Assistant Government Pleader for Respondents 1 and 2
and R.Z. Moray and M.V. Limaye for Respondents 3 and 4, for the Respondent

Judgement

D.Y. Chandrachud , J.—Rule, by consent of the learned Counsel made returnable forthwith. Counsel appearing for the Respondents waive service. With the consent of the learned Counsel and at their request, the Petition is taken up for hearing and final disposal.

2. The three Petitioners before the Court - Shubhada Patil, Sharda Gadhari and Kshama Naik - were appointed as Shikshan Sevaks in the V.N. Sule Guruji English Medium School conducted by the Indian Education Society. The management is the Third Respondent while the School is impleaded through its Headmistress as the Fourth Respondent. The appointments were made during the academic year 200607.

The qualifications, dates of appointment and the category to which the Petitioners belong are tabulated herein below for convenience of reference:

3. The Shikshan Sevak scheme was introduced by the State Government by a resolution dated 13th October, 2000 and the Petitioners were appointed under the scheme for a period of three years. In 2007 the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 was amended in order to bring Shikshan Sevaks within the purview of the Act. Under the proviso to Sub-section (2) of Section 5 as amended, every appointment of a Shikshan Sevak is to be on probation for a period of three years. Under Sub-section (2A) of Section 5 a Shikshan Sevak, on completion of the probationary period, is deemed to have been appointed and confirmed as a teacher, subject to a satisfactory record of service.

4. The School submitted a proposal to the Education Department for seeking approval to the appointments of the Petitioners. By an order dated 12th April, 2007 the Education Inspector declined to grant approval on the ground that there was a backlog of 15 posts which were reserved for the Scheduled Tribes. The Education Inspector, however, granted his approval for the academic year 200607 by a communication dated 5th June, 2007.

5. At the material time Rule 9(7) of the Rules framed under the Act provided for a reservation of 34% of the total number of posts of teachers for persons belonging to different reserved categories. Rule 9(7) as it stood prior to 8th July 2008 was as follows:

(7) The Management shall reserve 34 per cent of the total number of posts of the teaching as well as nonteaching staff for the members of the Scheduled Castes, Scheduled Castes converts to Buddhism, Scheduled Tribes, Denotified Tribes, Nomadic Tribes and other Backward Classes as follows, namely:

(a) Scheduled Castes and Scheduled Castes converts to Buddhism. 13%.

(b) Scheduled Tribes including those living outside the specified areas. 7%

(c) Denotified Tribes and Nomadic Tribes. 4%.

(d) Other Backward Classes, 10%.

However, by a Government Resolution dated 19th June, 1996 the State had provided for a reservation of 52% posts. By a judgment dated 25th February, 2005 in Nishad Sadashiv Pawar v. Dnyanasadhana College Writ Petition 3680 of 2004 a Division Bench of this Court held that a Government Resolution issued by the State Government which was referable to the exercise of the executive powers of the State under Article 162 of the Constitution could not override subordinate legislation framed pursuant to a delegation of powers by the State legislature under parent legislation. Consequently, a direction was issued to the authorities to strictly follow Rule 9(7) in the matter of recruitment to posts governed by the Act and the Rules. A similar view was reiterated in a judgment

dated 15th September, 2005 of the Division Bench in Hira Shivaji Khulche v. State of Maharashtra (Writ Petition 4747 of 2005 and connected matters).

6. The Petitioners challenged the order of the Education Inspector declining approval before this Court in a Writ Petition under Article 226 of the Constitution on the ground that if the reservation was confined to 34% of the posts as prescribed by Rule 9(7), there would be a sufficient number of posts available for accommodating the Petitioners. By a judgment dated 17th August, 2007 the Division Bench set aside the order dated 12th April, 2007 and directed that the proposal of the management be considered by the Education Officer by providing a reservation of 34% in terms of Rule 9(7).

7. The management submitted a fresh application on 12th September, 2007 to the Education Inspector seeking approval to the appointment of the Petitioners. The contention of the management was that as a matter of fact there was an excess of reserved category posts if the Roster was worked out with reservations of 34%. According to the management of a total of 504 teaching posts, 171 would have to be reserved for the reserved categories whereas an actual number of 257 number of posts have been filled up from those categories, leaving an excess of 86 posts.

8. The Education Inspector rejected the approval application by an order dated 5th October, 2007 holding that there was a backlog of 19 posts for the Scheduled Tribes. The Education Inspector held that in the event that a candidate belonging to the Scheduled Tribes was not available, an appointment could be made on a temporary basis under Rule 9(9)(a) of the Rules. The management was called upon to disclose as to what steps had been taken by it for filling up the vacancies for the Scheduled Tribes during the academic year 200708.

The management by its communication dated 17th October, 2007 informed the Education Inspector of the steps that have been taken by it for recruiting teachers belonging to the Scheduled Tribe category. On 7th March, 2008, the Education Inspector reiterated the earlier decision on the ground that there was a backlog of 19 posts for the Scheduled Tribes and that consequently under Rule 9(9)(a) appointments could be made only for a period of one year on a temporary basis.

9. These proceedings came to be instituted in order to challenge the orders of the Education Inspector dated 5th October, 2007 and 7th March, 2008 and for seeking a direction to the State Government and the Education Inspector to grant approval to the appointments of the Petitioners.

10. The Deputy Education Inspector filed an affidavit in reply dated 10th November, 2008 stating that approval to the appointments of the Petitioners was refused on 12th April, 2007 on the ground of a backlog of 15 posts which were reserved for the Scheduled Tribes. The Education Inspector stated that approval was, however, granted purely on a temporary basis for the academic year 200607 to the appointments of the Petitioners. The Education Inspector stated

that the management while indicating the steps which have been taken to recruit Scheduled Tribe candidates had stated that after inviting applications and following the selection process only one person had been recruited and allotted to its School at Bhandup. Eight other candidates were rejected on the ground that they had completed their education in the Marathi medium though they were from the Scheduled Tribe category. This according to the Education Inspector was inconsistent because two of the Petitioners viz. Petitioners 2 and 3 who belonged to the Nomadic Tribe and OBC categories had also pursued their education in the Marathi medium despite which they had been appointed. A further affidavit was filed by the Deputy Education Inspector on 24th February, 2009 pursuant to a direction of this Court. The Deputy Education Inspector stated therein that the management ought to have included in the Roster only teachers whose appointments had been approved by the department on a permanent basis. The names of the Petitioners, according to the management, were improperly included in the register though they were approved only on a temporary basis for the academic year 200607 and the endorsement of the General Administration Department of the Government was obtained on a wrongful basis. The affidavit sets out the position of vacancies applying both a reservation percentage of 34% and 52% respectively. From the statistics it is contended that there is a backlog of ten posts in the Scheduled Tribe category and of two posts in the OBC category. According to the Education Inspector, there is an excess of three posts in the Scheduled Caste category and eight posts in the Nomadic Tribes category. As noted in the earlier part of this judgment, one of the Petitioners before the Court viz. Petitioner No. 2 belongs to the Nomadic Tribes. According to the Education Inspector there is an excess of eight appointments in the VJNT category and consequently the appointment of the Second Petitioner Sharada Gadhari - cannot be approved. Insofar as the OBC category is concerned, there is stated to be a backlog of two posts. However, it has been stated that the First and Third Petitioners who are OBC candidates were appointed by bypassing the recruitment procedure and rules. The management has, it is alleged, failed to follow the regular procedure for recruitment by notifying an advertisement and seeking the names of candidates from the employment exchange. In fact, the management is stated to have called Petitioner Nos. 1 and 3 on the telephone and to have then engaged them by bypassing the prescribed procedure under the rules. The Education Inspector also relied upon the Government Resolution dated 5th December, 1994 under which the backlog can be carried forward for five years and in the sixth year it can be interchanged with another category as indicated therein. The affidavit also relies upon a Government Resolution dated 13th October, 2000 relating to Shikshan Sevaks in which it has been stated that if a trained candidate from the SC, ST and VJNT categories is not available, then an untrained candidate from the backward classes can be appointed subject to the conditions prescribed therein. A vacant post in the ST category can be filled up by interchange with the SC category and the Petitioners who belonged to the OBC and NT category would not be eligible under the Government Resolution dated 5th December, 1994.

11. An affidavit in rejoinder has been filed by the Petitioners on 13th March, 2009. The Petitioners have relied upon the Roster maintained by the management which has been approved by the General Administration Department. The Roster, according to the Petitioners shows that as a matter of fact, the Petitioners have been appointed as against posts reserved for the category to which they belong. The details thereof are as follows:

In sum and substance, therefore, the contention of the Petitioners is that Petitioner Nos. 1 and 3 who belong to the OBC category have been appointed as against Roster point Nos. 485 and 489 which belong to that category while Petitioner No. 2 who belongs to the NT (C) category has been appointed as against Roster point 307. There is according to the Petitioners no excess reservation in the NT (C) category and the Deputy Education Inspector has deliberately clubbed the posts for NT(B), NT(C) and NT(D) to show that there is an excess of 8 NT posts. Insofar as the OBC category is concerned, it is the contention of the Petitioners that admittedly there is a backlog of two posts belonging to that category against which the Petitioners can be absorbed.

12. The Deputy Education Inspector has filed an affidavit on 26th March, 2009. The submission in the affidavit is that under a Government Resolution dated 29th March, 1997, it is permissible to club all posts in the NT category in order to arrive at the total number of sanctioned posts. Insofar as the backlog of two OBC posts is concerned, it has been stated that these can be filled up by the management by adopting the recruitment procedure as provided in Rule 9, as stipulated in the Government Resolution dated 13th October, 2000 which specifically relates to the recruitment of Shikshan Sevaks. The Education Inspector has drawn the attention of the Court to the fact that the management by its letter dated 24th August, 2006 admitted that the Petitioners were called for interview on the telephone and were subsequently appointed. In other words, it has been contended that the regular process of recruitment was not followed in the appointment of the Petitioners.

13. The rival submissions which have been urged before the Court are entirely along the lines as reflected in the affidavits filed in these proceedings. The merits of the submissions now fall for determination.

14. Rule 9(7) of the the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 prescribes a reservation of posts of the teaching and the nonteaching staff for Scheduled Castes and Tribes, Denotified tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes. Prior to its amendment in 2008 Sub-rule (7) prescribed a reservation of 34% of the total number of posts among the reserved categories. By a notification published in the gazette on 8th July, 2008 the quantum of reservation has been increased to 52%. Sub rule (7) as amended provides as follows:

(7) The Management shall reserve 52 per cent, of the total number of posts of the teaching and nonteaching staff for the persons belonging to the Scheduled

Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes as follows, namely:

- (a) Scheduled Castes 13 per cent;
- (b) Scheduled Tribes 7 per cent;
- (c) Denotified Tribes (A) 3 per cent;
- (d) Nomadic Tribes (B) 2.5 per cent;
- (e) Nomadic Tribes (C) 3 per cent;
- (f) Nomadic Tribes (D) 2 per cent;
- (g) Special Backward Category 2 per cent;
- (h) Other Backward Classes 19 per cent;

15. Rule 9(8) provides that for the purpose of filling up vacancies under sub rule (7) the management must advertise the vacancies in at least one newspaper with a wide circulation in the region and notify the vacancies to the Employment Exchange of the District, to the District Social Welfare Officer and to associations belonging to the Backward Classes for requisitioning the names of the qualified candidates. If it is not possible to fill in a reserved post from among such candidates as are recommended by the Employment Exchange, the District Social Welfare Officer or as the case may be associations of Backward Classes or from amongst candidates who have applied in response to the advertisement, the management may then proceed to fill up the reserved posts in accordance with sub rule (9). Sub rule (9) of Rule 9 provides as follows:

(9)(a) In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in subrule (7) and if no person from any of the categories is available, the post may be filled in temporarily on an year to year basis by a candidate not belonging to the Backward Classes. (b) In the case of a nonteaching post, if a person from the particular category of Backward Classes is not available, the Management shall make efforts with regular intervals to fill up the post within the period of five years and the post shall not be filled up during that period by appointing any other person who does not belong to the respective category of Backward Class.

16. Sub rule (9) provides a rule of interchangeability. The applicability of the rule comes into being if it is not possible to fill in a teaching post from a person belonging to the reserved category for which the post is set apart. In such a case, the post can be filled up by selecting a candidate from the other remaining categories in the order which is specified in sub rule (7). If no person from any of the categories is available, the post can be filled in temporarily on a year to year basis by a candidate not belonging to the Backward Classes. In the present case,

the Education Inspector declined to grant approval to the appointments of the Petitioners on the ground that there existed a backlog in the posts that were reserved for the Scheduled Tribes. A perusal of the Roster would, however, show that for the academic year 200809, two posts, according to the Roster point were available for being filled up from amongst the Other Backward Classes. Insofar as the position of the Nomadic Tribes is concerned, Rule 9(7) as amended provides a separate reservation of 3% for the Denotified Tribes (A); 2.5% for the Nomadic Tribes (B); 3% for the Nomadic Tribes (C) and 2% for the Nomadic Tribes (D). The Second Petitioner Sharada Gadhari belongs to the NT (C) category which is evident both from the reply filed by the Deputy Education Inspector on 26th March, 2009 and the affidavit in rejoinder filed on behalf of the Petitioners on 13th March, 2009. The Education Inspector has proceeded to club all the reservations in the VJNT category together relying upon a Government Resolution dated 29th March, 1997. The Government Resolution provides that for direct recruitment of Vimukta Jatis and Nomadic Tribes the reservation will be internally transferable among the categories of Nomadic Tribes - A, B, C and D. In our view, that should not be a correct reading of the provisions of Rule 9(7) as amended now in 2008 read with Rule 9(9). Rule 9(7) carves out reservations for specified categories and Rule 9 (9) contemplates a situation where a post cannot be filled in by a person belonging to a particular category of the Backward Class for which it is reserved. If a candidate belonging to a particular category in the present case Nomadic Tribes (C) is available to fill a post reserved for that category, it would be impermissible for the Education Inspector to decline to grant approval, provided all other requirements are met, merely on the ground that by clubbing all the posts in the various NT categories, an excess has been found. In the present case, the Roster and the affidavit in reply which has been filed by the Education Inspector clearly show that there was no excess of reservation in the NT - (C) category. Moreover, there was a backlog of two posts in the OBC category. Approvals to appointments in these categories could not have been refused on the ground that there was an unfilled backlog in the Scheduled Tribes category.

17. Having said this, the issue which must fall for consideration is as to whether the Petitioners came to be validly appointed by following a regular process of selection. Rule 9(8) as already noted lays down the procedure for filling up vacancies from the reserved categories. The Rule requires that an advertisement be issued in a local newspaper with a wide circulation and that the vacancies be notified to the Employment Exchange of that District, the District Social Welfare Officer and to associations representing the Backward Classes. The applications that are received have to be considered in accordance with law. In the present case, the management has not chosen to explain before the Court the procedure that was followed in making the appointments. The Shikshan Sevak Scheme was brought in by a Government Resolution of 13th October, 2000. Annexure A to the Resolution provides for the terms and conditions governing the recruitment of Shikshan Sevaks. Clause 6 allows the appointment of Shikshan Sevaks from

amongst untrained candidates from the Backward Class category if a trained candidate is not available inter alia subject to the acquisition of teaching qualifications within the stipulated period of three years. Clause 6 of the annexure also requires that the names of candidates should be called from the District Social Welfare Officer, the Employment and the Self Employment Department and the Tribal Development Department. It has been specified that a certificate should be obtained from the office of the District Employment and Self Employment Guidance Officer, the District Social Welfare Officer, Project Officer (Integrated Tribal Development Project) that a trained candidate is not available and it is only after confirming this, that the Education Officer should grant approval to the appointment of an untrained teacher. The material on the record before the Court, indicates that from time to time the Education Inspector had sought to object to the procedure that was followed by the management in the recruitment of the Petitioners. In the affidavit filed in these proceedings by the Education Inspector on 26th March, 2009 it has been contended that the management in its letter dated 24th August, 2006 had admitted that the First Petitioner was called for interview on the telephone and came to be appointed. In our view, the Education Inspector has to be satisfied that appointments to the post of Shikshan Sevak have not been made through the back door and that candidates have been furnished with an equal, fair and reasonable opportunity as contemplated by Rule 9 (8) for responding to a vacancy. That is why sub rule (8) of Rule 9 requires that a vacancy must be advertised and be notified to the Employment Exchange, the District Social Welfare Officer and to associations representing the Backward Classes in the region. The material on the record is insufficient for the Court to arrive at any conclusion one way or the other on whether the management had followed the requisite procedure as contemplated by Rule 9(8) in making the appointments of the Petitioners. In these circumstances, it would be appropriate and proper to remit the matter back to the Deputy Education Inspector for the purpose of determining whether the appointments of the Petitioners were effected after following the requisite procedure as contemplated by the rules.

18. The Petition shall accordingly stand disposed of in terms of the following directions:

- i) The Education Inspector (South Zone) shall reconsider the proposal submitted by the Third Respondent for the grant of approval to the appointments of the Petitioners as Shikshan Sevaks;
- ii) The Education Inspector is directed to do so having regard to the interpretation placed by this Court on the provisions of Rule 9(7) and Rule 9(9) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 and the factual position in relation to the Roster as recorded in the earlier part of this judgment;
- iii) The Education Inspector is directed to determine as to whether the appointments of the Petitioners were made after following the prescribed

procedure under the rules, more particularly Rule 9(8) of the the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 ;

iv) For the aforesaid purpose, it would be open to the Petitioners and the Third and Fourth Respondents to place such material on the record of the Education Inspector on which they seek to place reliance. This shall be done within a period of two weeks from today;

v) The Education Inspector shall pass a reasoned order after hearing all the affected parties within a period of eight weeks from today during which period the services of the Petitioners shall not be adversely affected.

The Petition shall stand disposed of in the aforesaid terms. There shall be no order as to costs.