

(2017) 01 BOM CK 0002

In the Bombay High Court

Case No : Letters Patent Appeal No. 181 of 2009 In Writ Petition No. 5935 Of 2009

Smt. Vijaya Arvind Kurne

APPELLANT

Vs

Smt. Jyoti Pramod Nigudkar

RESPONDENT

Date of Decision : 20-01-2017

Acts Referred:

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 9(10)(a)

Citation : (2017) 3 ALLMR 192 : (2017) 3 MhLJ 286

Hon'ble Judges : Anoop V. Mohta and P.R. Bora, JJ.

Bench : Division Bench

Advocate : Mr. S.V. Pitre, Advocate, for the Appellant in LPA No. 181 of 2009 and For Applicant in CAL No. 218 of 2009 in LPA 181 of 2009; Ms. Seema Sarnaik with Mr. Ameya Tamhane, Advocates, for the Respondent No. 1 and Applicant in CAL 8 of 2016 in LPA 181 of 2009; Ms. Indrayani Koparkar, Advocate, for the Respondents Nos. 2 and 3; Mr. N.C. Walimbe, AGP, for the Respondent No. 5

Final Decision : Dismissed

Judgement

P.R. Bora, J.—The present Appeal is directed against the Judgment dated 23rd July, 2009, passed by the learned Single Judge, in writ petition No. 5935 of 2009. The aforesaid writ petition was filed by the present Appellant challenging the order passed by School Tribunal, Mumbai, in Appeal No.1 of 2009, decided on 30th June, 2009. The aforesaid Appeal before the School Tribunal was filed by the present Respondent No.1, challenging the promotion of the present Appellant to the post of Head Mistress in supersession of her claim. The aforesaid Appeal was allowed by the School Tribunal and the school management was directed to promote the present Respondent No.1 to the post of Head Mistress, in place of the present Appellant from the date of the order, passed by the School Tribunal. The learned single Judge in the aforesaid writ petition has declined to cause any interference in the order passed by the School Tribunal and has dismissed the

writ petition.

2. The facts, which are relevant for decision of the present Appeal can be briefly narrated thus:

The present Appellant was promoted to the post of Head Mistress with effect from 20th June, 2007. It is not in dispute that when the Appellant was promoted to the post of Head Mistress, she was not the senior most teacher and the present Respondent No.1 was admittedly senior to her. However, Appellant being belonging to schedule caste, by giving benefit of the Reservation Policy, she was promoted to the post of Head Mistress. In the Appeal before the School Tribunal, it was the contention of present Respondent No.1, that at the relevant time, as per Rule 9(10)(a) of the M.E.P.S. Rules, the management was required to reserve only 24% of the total number of the posts of Heads and Assistant Heads for the members of the reserved class. It was her further contention that since there were only 3 posts of Head in the respondent-institution, for none of the posts the candidate belonging to reserve caste was liable to be appointed, giving go by to the Rule of Seniority.

3. The learned School Tribunal relying upon the judgment of the Full Bench of this Court in *New English High School Association, Nagpur and another v. Baldev s/o. Fakira Ade and another*, 2006(6) Mh.L.J. 882, held that there could not have been any reservation in the post of Head in the Respondent-institution, as the number of posts of Head was less than 4. The learned School Tribunal further observed that the management ought to have appointed a teacher, who is senior most in category "C". The learned School Tribunal had also relied upon the judgment of the Hon'ble Apex Court *R.S. Garg v. State of U.P. and ors.*, (2006)6 Supreme Court Cases 430, wherein it has been held that in the event of any conflict between the percentage of reservation and the roster the former shall prevail. Relying on the said judgment, it was observed by School Tribunal that at the relevant time according to the roster point though the post was shown to have been reserved for the candidate belonging to the schedule caste, since percentage of reservation, as provided under Rule 9(10) of the M.E.P.S. Rules, to the extent of 24% for the post of Heads and Assistant-Heads would have exceeded, the person belonging to schedule caste could not have been appointed and/or promoted to the post of Head-Mistress. Resultantly, the School Tribunal directed that the present Respondent No.1 be promoted to the post of Head-Mistress, in place of present Appellant from the date of its order.

4. The learned Single Judge in the impugned judgment has confirmed the order passed by the School Tribunal. The learned Single Judge has affirmed the conclusions recorded by the School Tribunal that the present Appellant could not have been promoted to the post of Head-Mistress, by giving benefit of her belonging to schedule caste, since none of the post of Head-Master in the three schools run by the Respondent management was liable to be reserved for the candidate belonging to the reserved class. The learned Single Judge has also relied upon the Full Bench judgment of this Court in the case of *New English High*

School Association, Nagpur, (cited supra) and the judgment of the Hon"ble Apex Court in the case of R. S. Garg, (cited supra).

5. In the present Appeal it is sought to be canvassed by Shri S.V. Pitre, the learned Counsel appearing for the Appellant that with effect from 8th October, 2008, because of the amendment brought in Rule 9(10)(a) of M.E.P.S. Rules, the percentage of reservation has been increased to 33% from 24% and as such one post of Head-Master is definitely liable to be reserved for the candidate belonging to the reserved class. The learned Counsel further contended that the Respondent No.1, when filed an Appeal on 1st January, 2009, before the School Tribunal, the amendment in Rule 9(10)(a) of M.E.P.S. Rules had already taken effect and as such no cause of action was surviving for filing an Appeal by Respondent No.1, challenging the promotion of the present Appellant. The learned Counsel submitted that this aspect has not been considered either by the School Tribunal or by the learned Single Judge. The learned Counsel further submitted that in view of the amendment brought in Rule 9(10)(a) of the M.E.P.S. Rules, the School Tribunal must have dismissed the Appeal filed by the Respondent No.1, since no cause of action was surviving on the date of filing of the Appeal by Respondent No.1.

6. We are however unable to agree with the proposition so canvassed by the learned Counsel. As rightly submitted by Ms. Seema Sarnaik, the learned Counsel for Respondent No.1, In the instant matter, the legality of the order of promotion issued, in favour of the Appellant on 20th June, 2007 was under challenge. On the said date admittedly, only 24% of the total posts of Head were reserved for the candidate belonging to reserved class. There is no dispute that at the relevant time the Respondent School Management was running 3 schools and as such there were only 3 posts of Head available. In the circumstances, as held by the Full Bench of this Court in the case of New English High School Association Nagpur, cited supra, it would only in case of 4 posts that one of those posts could have been reserved for the candidate belonging to reserved class. Thus, there could not have been any reservation in the post of Head in the Respondent Education Institution, as the number of posts of Head was less than 4. It was therefore necessary for the school management to appoint a teacher, who was senior most in category "C". It was immaterial, as to on which date Respondent No.1 filed an Appeal before the School Tribunal. What was required to be considered was the factual position as on 20th June, 2007. On the said date Respondent No.1 was admittedly senior to the present Appellant. The Appellant was thus promoted to the post of Head Master, superseding the claim of Respondent No.1. Appointment of the Appellant to the post of Head-Mistress vide order dated 20th June, 2007 was thus in violation of Rule 9(10)(a) of the M.E.P.S. Rules 1981 and hence was unsustainable.

7. In the above mentioned circumstances, it does not appear to us that any error was committed by the School Tribunal in allowing the Appeal filed by Respondent No.1 and thereby directing the School Management to promote her to the post of

Head-Mistress, in place of the Appellant. The point that has been canvassed by the Appellant of having no cause of action for the present Respondent No.1, for filing an Appeal on 1st January, 2009, in view of the amendment brought in Rule 9 (10)(a) of M.E.P.S. Rules, thereby, providing reservation of 33% for the reserved class w.e.f. 8th October, 2008 was not raised before the School Tribunal or before the learned Single Judge and has been raised for the first time in the present Appeal. However, it appears to us that even if it had been raised, it could not have impacted the decision of the School Tribunal or the learned Single Judge. We reiterate that the question for determination before the School Tribunal was "Whether on 20th June, 2007 the present Appellant could have been promoted to the post of Head Mistress, superseding the claim of the teachers senior to her by giving benefit of reservation policy, when having regard to the percentage of reservation only to the extent of 24% none of the three posts existing in the Respondent Education Institution was liable to be reserved for the candidate belonging to reserved class." and the learned School Tribunal has rightly held that the promotion so given to the Appellant was in violation of Rule 9(10)(a) of the Rules of 1981. The learned Single Judge has affirmed the decision of the School Tribunal. For the reasons recorded above we do not see any merit in the present Appeal and it deserves to be dismissed and is accordingly dismissed, however without any order as to the costs. Pending civil applications, if any, stand disposed of.

8. At this stage, learned Counsel appearing for the Appellant has sought four weeks time to stay the present order. We see there is no reason to stay the order in view of the reasons already recorded. The oral request is rejected.