

(2006) 12 BOM CK 0103

In the Bombay High Court

Case No : Writ Petition No. 5615 of 2006

Sudam Shravan Baviskar and another

APPELLANT

Vs

Education Officer (Secondary), Zilla Parishad, Jalgaon and
others

RESPONDENT

Date of Decision : 22-12-2006

Acts Referred:

Constitution of India, 1950 — Article 16, 16(4), 16(4A), 335
Maharashtra State Public Services (Reservation for Scheduled Castes, Scheduled Tribes
De-Notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and
Other Backward Classes) Act, 2001 — Section 5

Citation : (2006) 12 BOM CK 0103

Hon'ble Judges : R.M. Borde, J;Naresh H. Patil, J

Bench : Division Bench

**Advocate : P.M. Shah, with P.S. Shendurnikar, for the Appellant; D.R. Adhav,
AGP for respondent nos. 1 and 2, A.V. Deshmukh, for the Respondent**

Judgement

R.M. Borde, J.—Rule. Rule made returnable forthwith. With consent of the learned Counsel for the parties, this petition is heard finally at the stage of admission.

2. The petitioners have challenged the order issued on 17-7-2006 by the Education Officer (Secondary), Zilla Parishad, Jalgaon, thereby withdrawing the approval accorded for appointment of the petitioner No. 1 as Headmaster of A. B. Boys High School, Chalisgaon and further directing the petitioner No. 2 society to submit a fresh proposal in respect of appointment of Headmaster considering the seniority list and the relevant Rules. The petitioner No. 1 was initially appointed as an Assistant Teacher on 28-2-1978. The petitioner is a trained graduate teacher having B.A. B.Ed, qualification and belongs to Scheduled Tribe Category. The petitioner No. 1 was promoted to the post of Assistant Headmaster on 1-6-2005 and was thereafter offered promotion in place of one Shri R.G. Wani who retired on attaining the age of superannuation, by order dated 14-7-2006. The appointment of the petitioner No. 1 as an Headmaster was initially approved

by the Education Officer for the period upto 31-7-2006. However, by the impugned order, the said order of approval accorded earlier came to be withdrawn.

3. The petitioner No. 2 is a society registered under the Societies Registration Act, 1860 and is also registered as a public trust. The petitioner No. 2 society runs two High Schools; one in the name and style as A. B. Boys High School whereas the other High School is being run in the name and style as A. B. Girls High School. There are two posts of Headmaster and Assistant Headmaster available in the petitioner No. 2 institution. So far as respondent No. 3 is concerned, her date of appointment as an Assistant Teacher is 22-3-1983. the respondent No. 3 belongs to V.J.N.T. Category. Considering the fact that respondent No. 3 is a lady and belonging to reserved category, she came to be promoted to the post of Assistant Headmaster by an order dated 2-5-1990. The promotion of respondent No. 3 to the post of Assistant Headmaster in A. B. Girls High School was considered in view of the directives issued by the Education Officer directing the Management to appoint a lady teacher as an Assistant Head of the Girls High School. Such directives were issued on 2-5-1990. The respondent No. 3 has objected the promotion of the petitioner No. 1 to the post of Headmaster on the ground that she is senior in category B considering her date of appointment as Assistant Headmaster. The respondent No. 3 has also raised a challenge to the seniority list maintained by the Institute.

4. It is contended by the petitioner that although the respondent No. 3 has entered category B by virtue of her accelerated promotion to the post of Assistant Headmaster on 2-5-1990, she cannot be considered as senior to that of the petitioner who has been appointed earlier in point of time. According to the petitioner, the respondent No. 3, a roster point promotee, cannot count her seniority in the promoted category from the date of continuous officiation in the promoted post vis-a-vis the general candidate who is senior to her in lower category and was Later on promoted, i.e. the petitioner. It is also contended that the appointment of the petitioner to the post of Assistant Headmaster was itself illegal and her appointment is subject-matter of challenge in an appeal filed by the one Amrutkar before the School Tribunal. The petitioner also contended that a writ petition bearing No. 1338 of 2001 is pending in the High Court which has been filed by the members of the teaching staff who are senior to respondent No. 3 challenging the judgment of the Divisional Caste Scrutiny Committee, Nashik, which has validated the caste certificate of respondent No. 3. The petitioner as such contended that the very basis of the promotion of respondent No. 3 to the post of Assistant Headmaster i.e. the authenticity of the caste validity certificate is the subject-matter of challenge in the writ petition filed by the senior teachers in the institution and as such the respondent No. 3 cannot be considered for promotion to the post of Assistant Headmaster. It is also contended that the Education Officer has exceeded his powers in issuing directions to the management to appoint another teacher as Headmaster in place of the petitioner.

5. The respondent No. 3 has opposed the contentions raised by the petitioner contending that the seniority list which is annexed to the petition is not a proper seniority list. It is contended that the respondent No. 3 being senior in category B on the basis of her appointment to the post of Assistant Headmaster i.e. considering her initial entry in category B, ought to be considered as senior to that of the petitioner. Respondent No. 3 has supported the order passed by the Education Officer. It is further contended by respondent No. 3 that the appeal filed by Mr. Amrutkar before the School Tribunal has been dismissed for default. So also it is contended that the pendency of the writ petition in the High Court objecting to the validity certificate issued in her favour by the Caste Scrutiny Committee can have no effect so far as consideration of respondent No. 3 for promotion to the post of Headmaster.

6. At this juncture, reference is necessary to earlier litigation filed in the High Court in the form of Writ Petition No. 126 of 2001 by the educational institution and one Ramkrushna Ganpat Wani. The respondent No. 3 herein was a party to the said writ petition wherein the promotion of Shri R. G. Wani to the post of Headmaster was the subject-matter of challenge. The respondent No. 3 herein had objected to the promotion of Shri Wani and considering the objection raised by respondent No. 3, the Education Officer had refused to accord approval to the promotion of Shri Wani as Headmaster. Similar challenge as has been raised in the instant petition were also raised in the said writ petition by Shri R. G. Wani was senior to respondent No. 3 herein whose date of appointment was 12-6-1973. Respondent No. 3 raised objection to the promotion of Shri Wani on the ground that she being senior in category "B" on the basis of her promotion as Assistant Headmaster has precedence for claiming promotion to the post of Headmaster. Shri Wani was promoted to the post of Headmaster by order dated 27-1-2000. At the stage of final disposal of the said writ petition, after hearing the respondent No. 3 this Court allowed the said writ petition thereby quashing similar order passed by the Education Officer. This Court relying upon the judgment in *Ajit Singh and Others Vs. The State of Punjab and Others*, concluded that Shri Wani i.e. the petitioner in the said writ petition ought to be considered as senior to respondent No. 3 in the said writ petition who is also respondent No. 3 in the instant petition. Respondent No. 3 had also raised a challenge to the seniority list in the said petition. Considering the ratio laid down by the Apex Court, this Court held that a roster point promotee cannot count seniority in the promoted category from the date of her continuous officiation in the promoted post vis-a-vis general candidate who is senior to her in the lower category and who was later on promoted. It would be appropriate to quote the observations made in para No. 77 of the judgment delivered in *Ajit Singh's* case, which reads thus :

"We, therefore, hold that the roster point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, vis-a-vis the general candidates who were senior to them in the lower category and who were later promoted. On the other hand,

the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate, he will have to be treated as senior, at the promotional level, to the reserved candidate even if reserved candidate was earlier promoted to that level. We shall explain this further under Point No. 3. We also hold that Virpal Union of India and others etc. Vs. Virpal Singh Chauhan etc., and Ajit Singh Ajit Singh Januja and others Vs. State of Punjab and others, have been correctly decided and that Jagdish Lal Jagdish Lal and others Vs. State of Haryana and others, is not correctly decided. Points 1 and 2 are decided accordingly."

It is to be noted that the date of appointment of Shri R. G. Wani as an Assistant Teacher was 12-6-1973 and he was promoted to the post of Assistant Headmaster on 1-10-2000 and later on came to be promoted to the post of Headmaster. So far as respondent No. 3 is concerned, her date of appointment is 22-7-1983 whereas the date of appointment of the petitioner is 28-2-1983. Considering the fact that the respondent No. 3 belongs to NT (A) category and being a lady teacher was promoted to the post of Assistant Headmaster by applying 50 point roster on 11-2-1992. Merely because the respondent No. 3 came to be promoted to the post of Assistant Headmaster at an earlier point of time, on the basis of reservation, cannot be considered as senior to that of the petitioner. Similar view was taken while dealing with the challenge to the promotion of Shri R. G. Wani at the instance of respondent No. 3 in Writ Petition No. 126 of 2001. In the instant petition, similar challenge is raised by respondent No. 3 and considering the judgment and order passed in Writ Petition No. 126 of 2001, wherein respondent No. 3 was also impleaded as respondent, (here is no scope to arrive at any different conclusion than that which has been arrived at in Writ Petition No. 126 of 2001.

7. Respondent No. 3 has placed reliance on the judgment of the Apex Court in the matter of M. Nagaraj and Others Vs. Union of India (UOI) and Others, . It is further contended that in view of the Constitution (Eighty Fifth Amendment) Act, 2001 and introduction of sub-Article (4A) in Article 16, the judgment of the Apex Court in Ajit Singh's case will have no effect. The learned Counsel placed reliance on para No. 89 of the judgment which reads as under:

"89. In the circumstances, clause (4A) of Article 16 was once again amended and the benefit of consequential seniority was given in addition to accelerated promotion to roster point promotees. Suffice it to state that, the Constitution (Eighty Fifth Amendment) Act, 2001 was an extension of clause (4A) of Article 16. Therefore, the Constitution (Seventy-Seventh Amendment) Act, 1995 has to be read with the Constitution (Eighty Fifth Amendment) Act, 2001."

"90. THE CONSTITUTION (EIGHTY-FIFTH AMENDMENT) ACT. 2001- STATEMENT OF OBJECT AND REASONS : The Government servants belonging to the Scheduled Castes and the Scheduled Tribes had been enjoying the benefit of consequential seniority on their promotion on the basis of rule of reservation. The judgments of the Supreme Court in the case of Ajit Singh Januja and others

Vs. State of Punjab and others, , which led to the issue of the O. M. dated 30th January, 1997, have adversely affected the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes category in the matter of seniority on promotion to the next higher grade. This has led to considerable anxiety and representations have also been received from various quarters including members of Parliament to protect the interest of the Government servants belonging to Scheduled Castes and Scheduled Tribes.

2. The Government has reviewed the position in the light of views received from various quarters and in order to protect the interest of the Government servants belonging to the Scheduled Castes and Scheduled Tribes, it has been decided to negate the effect of O.M. dated 30th January, 1997 immediately. Mere withdrawal of the O.M. dated 30th will not meet the desired purpose and review or revision of seniority of the Government servants and grant of consequential benefits to such Government servants will also be necessary. This will require amendment to Article 16(4A) of the Constitution to provide for consequential seniority in the case of promotion by virtue of rule of reservation. It is also necessary to give retrospective effect to the proposed constitutional amendment to Article 16(4A) with effect from the date of coming into force of Article 16(4A) itself, that is, from the 17th day of June, 1995.

3. The Bill seeks to achieve the aforesaid objects. THE CONSTITUTION (EIGHTY FIFTH AMENDMENT) ACT, 2001.

The following Act of Parliament received the assent of the President on the 4th January, 2002 and is published for general information.

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Fifty Second year of the Republic of India, as follows:-

1. Short title and commencement.- (1) This Act may be called the Constitution (Eighty Fifth Amendment) Act, 2001.

(2) It shall be deemed to have come into force on the 17th day of June, 1995.

2. Amendment of Article 16. - In Article 16 of the Constitution, in clause (4A), for the words "in matters of promotion to any class", the words "in matters of promotion" with consequential seniority, to any class, shall be substituted,"

91. Reading the Constitution (Seventy-Seventh Amendment) Act, 1995, with the Constitution (Eighty Fifth Amendment) Act, 2001, clause (4A) of Article 16 now reads as follows:

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State.

In view of the judgment in M. Nagaraj case (supra) and considering amended Article 16(4A) of the Constitution of India, the respondent No. 3 contends that the ratio laid down in Ajit Singh's case cannot be applied in the instant case and respondent No. 3 is entitled to accelerated promotion.

8. Per contra, the learned Counsel appearing on behalf of the petitioner contended that the amended provisions of Article 16(4A) deals with the categories of Scheduled Castes and Scheduled Tribes and has no application to any other reservation. The learned Counsel invited our attention to conclusion listed in M. Nagaraj's case in para No. 122.

"122. The impugned constitutional amendment by which Articles 16(4A) and 16(4B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50 per cent (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBC on one hand and SCs and STs on the other hand as held in Indra Sawhney, the concept of post-based Roster with in-built concept of replacement as held in R. K. Sabharwal."

9. The learned Counsel invited our attention to the observations made in para No. 124 of the judgment:

"As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SC/ST in matter of promotions."

It is thus clear that the amended provisions to the Constitution, namely, Article 16(4A) deals with the matters of promotion in respect of Scheduled Caste and Scheduled Tribe categories. In the instant case, the respondent No. 3 claims to be belonging to NT(A) whereas the petitioner himself belongs to Scheduled Caste category. Obviously, the reliance placed by the petitioner on the judgment reported in M. Nagaraj's case is misplaced. In any case, although the petitioner belongs to Scheduled Caste category, no promotion is claimed on the basis of caste based reservation. The post of Headmaster is not reserved for Scheduled Caste category candidate. So also it is to be noted at this stage that the petitioner No. 2 institution runs two schools, namely, A. B. boys School and A. B. Girls School. In any case, the post of Headmaster cannot be reserved for any reserved category candidate. It is also impermissible in view of the Full Bench judgment reported in New English High School Association and Another Vs. Baldev Ade and Another, wherein the Full Bench has held as under:

"26. If out of two posts, one post is reserved by applying the roster, it would obviously exceed 24 per cent. Besides, the reservation is not 24 per cent in favour of any one particular category. The maximum reservation is in favour of

the Scheduled Castes which is to the extent of 13 per cent, whereas the minimum is 4 per cent in case of Denotified and Nomadic Tribes. As rightly submitted by the learned Advocate Shri A. D. Mohgaonkar, if the reservation in the categories of Denotified and Nomadic Tribes is considered as one unit, it would consist of 4 per cent i.e. 8 out of 100. If there are only two posts, and one of them is specified for reservation in favour of the Denotified Tribes or the Nomadic Tribes, who are entitled for reservation to the extent of only 8 out of 100, it would virtually amount to granting reservation by 42 per cent in excess of the statutory entitlement in favour of the said category, which is not permissible and it would be in excess of the reservation under the statutory provision. Similar is the case in relation to the Scheduled Castes which is entitled for 13 per cent reservation. In other words, 26 out of 100 and even reservation of one post would be in excess of total reservation of 24 per cent.

"27. Undoubtedly, the Constitution mandates implementation of reservation policy. However, at the same time, it assures opportunities to all the open class category candidates. The implementation of the reservation policy should not lead to absurd result. The application of reservation percentage has to be with reference to the number of posts. It is always to be remembered that the reservation percentage is to be applied and the 50 point roster is to be followed taking into consideration the total number of posts in a cadre and at the same time care has to be taken that other category candidates are not prejudiced in the sense that the statutorily recognised reservation percentage does not exceed while implementing the reservation policy. Undisputedly, the relevant rule requires 24 per cent of reservation out of which 13 per cent for the SC, 7 per cent for ST and 4 per cent for the D.T./N.T. Considering the 24 per cent reservation, if one applies the 50 point roster, it would result in reservation in excess of the statutorily specified percentage. In a cadre comprising of three posts with 24 per cent reservation rule, if one applies the 50 point roster, then the reservation even in respect of one post would exceed 24 per cent reservation. One-third cannot be equated to 24 per cent. It is settled law that the reservation cannot be allowed to exceed the percentage prescribed for reservation as it would result in injustice to the candidates falling outside the reservation category. Considering the same, we are in respectful agreement with the view expressed by the Division Bench in Somsing's case that 24 per cent reservation can be applicable only in case where there are minimum of four posts in a cadre and not otherwise."

10. As stated above, in the instant case the post of Headmaster is not earmarked for any reserved category. The respondent No. 3 cannot stake her claim to the post. The petitioner No. 1 himself belongs to Scheduled Caste category, however, the appointment to the post is not being considered on the basis of caste based reservation and as the petitioner No. 1 is claiming the same on the basis of his seniority-cum-merit, he is entitled for being considered to the said post in preference to respondent No. 3 who is junior to petitioner No. 1. Respondent No. 3 has also placed reliance on the provisions of section 5 of the Maharashtra State

Public Services (Reservation for Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jati), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001. The respondent No. 3 contends that there can be reservation in the matters of promotion at all stages.

"5. Reservation in promotion.- (1) The Reservation in promotion shall be at all stages of promotion.

(2) On the date of coming into force of this Act, if any Government order providing for reservation for any posts to be filled by promotion, are in force, the same shall continue to be in force unless modified or revoked, by Government."

The respondent No. 3, therefore, contends that considering her entry in category "B", being earlier in point of time than that of the petitioner and considering the fact that she belongs to reserved category, she ought to be considered for promotional post. As stated above, the post of Headmaster itself is not earmarked for any reserved categories and in view of the decision of Full Bench (supra), the post of Headmaster cannot be filled in by giving preference to reserved category candidate. The respondent No. 3 cannot claim advantage by placing reliance on the provisions of the Act. The issue in respect of promotion to the post of Headmaster is in fact already covered by the decision rendered in Writ Petition No. 126 of 2001 decided by the Division Bench of this Court on 15-9-2006 wherein one of the members of this Bench (R. M. Borde, J.) was a member and there is no reason to take any contrary view in the instant matter.

11. For the reasons enumerated above, we quash and set aside the communication/order dated 17-7-2006, passed by respondent No. 1.

12. Rule is made absolute accordingly.

13. At this stage, the learned Counsel for respondent No. 3 seeks stay to the implementation and operation of this judgment. We do not find any reason to consider the request favourably. Hence prayer for stay of the judgment is rejected.