

(1994) 10 BOM CK 0004

In the Bombay High Court

Case No : Writ Petition No. 3538 of 1993

Sulabha Govind Vidwans

APPELLANT

Vs

Shravan M. Shevale and Others

RESPONDENT

Date of Decision : 07-10-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21

Citation : (1995) 2 BomCR 561 : (1995) 1 MhLj 157

Hon'ble Judges : Vishnu Sahai, J;D.R. Dhanuka, J

Bench : Division Bench

Judgement

D.R. Dhanuka, J.—The subject matter of the controversy raised by this petition stands concluded by ration of decisions of the Supreme Court in the case of Chakradhar Paswan Vs. State of Bihar and Ors, and in the case of Smt. Chetana Dilip Motghare Vs. Bhide Girls Education Society, Nagput and others, . Article 16(1) of the Constitution of India guarantees equality of opportunity for all citizens in all matters relating to employment or appointment to any office under the State, Article 16(2) of the Constitution provides that no citizen shall on grounds only of religion, race, caste, sex, descend, place of birth, residence or any of them be ineligible for or discriminated against in respect of any employment or office under the State. Article 16(4) of the Constitution provides that nothing in Article 16 shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the service under the State. It is the constitutional mandate emanating from the above referred Articles of the Constitution that a single promotional post or the isolated post cannot be reserved for being filled up by the candidates falling within the ambit of Article 16(4) of the Constitution. The isolated post must necessarily by treated as an open post. As far back as 8th March 1988, the Supreme Court decided Dr. Chakradhar Paswan's case. In para 8 of the above referred judgment in Chakradhar Paswan's case the Supreme Court observed that if there was only one post in the cadre, there could be no reservation under

Article 16(4) of the Constitution. In the same para, the Apex Court further observed that the whole concept of reservation or application of the 50 point roster was that there were more than one post and the reservation could be upto 50%. The same view was taken by our High Court in a very detailed and careful judgment in the case of Maharashtra Mandal and another v. University of Poona and others reported in 1994 MLJ. 647. It is however, shocking to discover that the State of Maharashtra and its officers have infringed the constitutional right of the citizens like the petitioner for several years in teeth of the above referred judgments of the Supreme Court and the Education Officer has even issued a letter dated 1st April 1991 to the management of Shiv Samarth Sevak Mandal stating therein that the decisions of the Supreme Court on the subject have been stayed by the Government of Maharashtra. We are now informed by the learned Assistant Government Pleader Smt. More than on 21st February, 1994 a fresh circular has been issued by the Government of Maharashtra in conformity with the view taken by the Supreme Court in the earlier decisions.

2. Let us now turn to the facts and analyse as to what the controversy is.

3. Smt. Sulabha Govind Vidwans, the writ petitioners in this petition, is M : A.B. Ed. On 4th June 1973, the petitioner was appointed an Assistant Teacher in the primary school run by Shiv Samarth Sevak Mandal, Thane. On 13th June 1977, the petitioner was transferred to secondary section of the said school as Assistant Teacher. The respondent No. 1 was appointed as an Assistant Teacher much later i.e. on or about 2nd January 1979. The respondent No. 1 belongs to the scheduled caste. The petitioners is senior to respondent No. 1.

4. On or about 1st August 1983, the petitioner was promoted to the post of Supervisor in view of her seniority and satisfactory record of service. During the period 1st June 1985 to 17th August 1985, the petitioner worked as an Acting head Mistress of the said school as she was the senior-most teacher working at the relevant time.

5. Sometime in April 1985, a vacancy arose in the post of Assistant Head Master of the said school. On 24th April 1985, the petitioner made a representation to the management of the said school stating therein that the petitioner ought to be appointed as Assistant head Master of the said school in view of her seniority and satisfactory record of service. The management of the said School forwarded the said representation to the respondent No. 4, i.e. the Education Officer (Secondary), Zilla Parishad, Thane, along with letter dated 25th May 1985. At no point of time, the management had any objection to recommend or accept the claim of the petitioner for appointment as Assistant Head Master of the said School. The respondent No. 4 however insisted on the said post being treated as a "reserved post". The respondent No. 4 informed the Chairman of Respondent No. 3 society that the alleged policy of reservation in respect of appointment to the post of Assistant Head Master shall have to be implemented. The post of assistant head master in the said school was an isolated post. In this situation, the respondent No. 1 was promoted to the post of assistant head master merely

on the ground that the respondent No. 1 belonged to the scheduled caste category thought the petitioner was seniormost in the said school. Mrs. V. J. Nadkarni, Superintendent, Education Office, Zilla Parishad, Thane, has in terms so stated in para 4 of her affidavit-in-reply to this writ petition. To quote her words in her own language, the deponent of the said affidavit has stated as under :-

"As the Respondent No. 1 belonged to the Scheduled caste Category he was promoted to the post of Assistant Head Master in the year 1985, though the petitioner was seniormost in the said School."

Having regard to the alleged reservation policy and the alleged obligation of the management of the said school to implement the said policy, the management appointed the respondent No. 1 as an Assistant Head Master of the school on 14th June 1985. The petitioner continued to be the supervisor. The respondent No. 1 continued to function as Assistant Head Master of the School in spite of protests and representations made by the petitioner. By letter dated 13th June 1985, the Chairman of the School Committee informed the petitioner that her claim could not be considered as the respondent No. 1 was required to be appointed as Assistant head Master as per the Government Policy. In view of the authoritative interpretation of the constitutional provisions contained in Article 16(1), 16(2) and 16(4) of the Constitution by the Apex Court, it must be held that the alleged government policy of reservation in respect of the isolated post, if any infringed the fundamental rights of the citizens guaranteed under the above provisions. By letter dated 24th December 1985, the respondent No. 4 purported to approve the appointment of respondent No. 1 as an assistant head master with effect from 14th June 1985.

6. Sometime in March 1991, a vacancy arose in the post of head master of the said school. As a matter of fact on 31st July 1991, the then head master of the school one Shri Pathak retired. On the eve of the retirement of Shri Pathak, the petitioner once again made a strong representation to the management of the school stating therein that the petitioner should be promoted to the post of head master of the school having regard to the decisions of the Supreme Court and having regard to her seniority and satisfactory record of service. By this time, at any rate the judgment of the Supreme Court in Dr. Chakradhar Paswan's case delivered on 8th March 1988 was well known to one and all and at any rate to the Government of Maharashtra and to its education officers. Shri Prabhakar Jagannath Hajare has filled two affidavits on behalf of the management of the school. In this affidavit dated 28th October 1993, Shri Prabhakar Jagannath Hajare has in terms stated as under :

"I say that the petitioner was not appointed to the post of Head Master only because the Respondent No. 4 did not permit us to appoint the petitioner. I say that in the matters of promotions we are bound by directions given by the Respondent No. 4 i.e. the Education Officer of the Zilla Parishad from time to time."

The management was always satisfied that the petitioner deserve to be promoted to the post of head master of the said school, she being the seniormost and her record of service being satisfactory. It is shocking to discover that on 1st April 1991, the Education Officer addressed a letter to Samarth Sevak Mandal stating therein that the head master of the school shall have to be appointed on the footing that the post was a reserved post. It was further stated in the said letter that the judgment of the Supreme Court was already stayed by the Government of Maharashtra. It is a sheer matter of common sense that the judgment of the Supreme Court could not be stayed by the Government of Maharashtra. Nevertheless the respondent No. 4 took liberty with the management of the schools and coerced the managements to act contrary to the judgments of the Supreme Court.

7. In this situation, on 4th April 1991, the management of the said school was required and compelled to appoint respondent No. 1 as head master of the said school. The representation made by the petitioner for promotion to the post of head master of the said school was unlawfully rejected.

8. In this situation, the petitioner adopted an alternate line of approach for the time being. On 11th December 1991, the petitioner made a representation to the management to the effect that the petitioners should be promoted to the post of Assistant Head master as the said post had fallen vacant from 1st April 1991. The petitioner sent couple of reminders to the management in this behalf. Ultimately, on 26th August 1992, the petitioner was appointed as Assistant Head master of the said School. The petitioner continued to agitate her claim against supersession. On 9th December 1992, the petitioner made a representation to respondents Nos. 3 and 4 pointing out that the post of assistant head master as well as head master was an isolated post and the petitioner was entitled to be appointed to the post of assistant head master with effect from 14th June 1985 and to the post of head master from 4th April 1991 in view of the decisions of the Supreme Court in Dr. Chakradhar Paswan's case. The respondent No. 4 went on writing letters to the petitioner to the effect that the representation of the petitioner was under consideration. Nothing was required to be considered as respondent No. 4 had already made up his mind to ignore the decisions of the Supreme Court. Ultimately in March 1993 the present petition was filed by the petitioner.

9. By this petition the petitioner seeks a declaration to the effect that he petitioner is entitled to the benefits of the post of Assistant Head Master with effect from August 1985 and promotion and all consequential benefits attached to the post of head master with effect from 1st April 1991. The petitioner has sought issue of a writ of certiorari so as to quash the communications and orders passed by respondents Nos. 3 and 4 on 13th June 1985 and 1st April 1991 and the appointment of respondent No. 1 to the post of Assistant Head Master and to the post of head master, the said promotions being in violation of the ratio of the above referred judgments of the Supreme Court. The petitioner has also sought

issue of a writ of mandamus for grant of all consequential reliefs including payment of differential amounts of salary with interest at the rate of 18% per annum.

10. Rule 3(3) of Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 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 or schools who fulfils the conditions laid down in sub-rule (1) and who has a satisfactory record of service.

11. Shri S. P. Thorat, the learned counsel for respondent No. 1 has made a valiant effort to persuade the Court to dismiss the petition with or without costs. It is time now to consider the submissions made by the learned counsel for respondent No. 1 and adjudicate upon the said submissions.

12. Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 was amended by Act No. 30 of 1987. By the said amending Act it was provided that an employee could file an appeal to the School Tribunal not merely against an order of termination of service or reduction in rank but also against an order of supersession of the appellant by the management. The said section also provides that such an appeal should be filed within 30 days from the accrual of the cause of action. Relying on the said provision the learned counsel for the Respondent No. 1 has submitted that the petitioner should be referred to an alternate remedy of filing an appeal before the Tribunal. The learned counsel for the respondent No. 1 is completely in error. If a clear case is made out by a citizen in respect of his or her violation of fundamental right under the Constitution, the Court need not refer the citizen aggrieved to the School Tribunal or to any other Tribunal. It is the duty of the Constitutional Court to enforce the fundamental rights guaranteed to the citizens. In this case there is no dispute about the material facts. In this case there is no dispute about the applicable provisions of law. It is also not disputed that the controversy arising in this case is more or less covered by the judgment of the Supreme Court and this Court.

13. The learned counsel for respondents No. 1 submits that the petitioner is guilty of laches. The learned counsel for respondent No. 1 submits that the respondent No. 1 was appointed as Assistant Head Master of the school sometime on 14th June 1985 and it would not be fair to allow the petitioner to challenge the said appointment at this stage. Mrs. V. J. Nadkarni, Superintendent in the Education Office, Zilla Parishad, Thane, has clearly stated in her affidavit that the petitioner would have been appointed to the post of Assistant Head Master in the year 1985 being the seniormost but for the fact that the respondent No. 1 belonged to the scheduled caste category and the petitioner did not belong to the said category. The petitioner did make protest against the appointment of respondent No. 1 in the said post. At the time when the alleged cause of action accrued, the petitioner could not have been entitled to file an

appeal before the School Tribunal as it is common ground that section 9 of the Act was amended only in the year 1987. It is a matter of judicial discretion for the Writ Court as to whether the alleged delay, if any, in filing of the writ petition could be condoned or not. Having regard to the gross facts of the case, we hereby condone the delay and decide this petition on merits.

14. The learned counsel for respondent No. 1 further submitted that the law laid down by the Supreme Court in Dr. Chakradhar Paswan's case became operative only from 8th March 1988 when the judgment in the said case was delivered. This argument is just to be stated in order to be rejected. The Supreme Court has not made any new law by delivering the said judgment which is to be enforced from a particular date. The Supreme Court has merely interpreted the constitutional provisions contained in Articles 14 and 16 of the Constitution. It must follow that the law declared by the Supreme Court in the above referred case was always the law from the date when the Constitution came into force. It may be stated in the passing that in the recent judgment of the Supreme Court in the case of Smt. Chetana Dilip Motghare Vs. Bhide Girls Education Society, Nagput and others, , the Supreme Court has in terms discussed the ratio of the above referred judgment of the Supreme Court in the case of Arati Ray Choudhary Vs. Union of India (UOI) and Others, also.

15. The learned counsel for the Respondent No. 1 has submitted that the respondent No. 1 was senior to the petitioner on the date when the vacancy arose in the post of head master. The learned counsel for respondent No. 1 admits that the respondent No. 1 was junior to the petitioner prior to 14th June 1985. The learned counsel for respondent No. 1 submits that once the respondent No. 1 was appointed as Assistant Head Master on 14th June 1985, the respondent No. 1 became senior to the petitioner as the petitioner continued merely to be a supervisor in the school and the respondent No. 1 was promoted to the post of Assistant Head Master. No one is entitled to take advantage of his own wrong. It is rightly pointed out by the petitioner that the post of Assistant Head Master was also an isolated post. The respondent No. 1 was illegally promoted to the post of Assistant Head Master. If so, the respondent No. 1 cannot claim to be senior as from the date of appointment of the petitioner and or respondent No. 1 as Assistant Teacher shall have to be taken into consideration for the purpose of deciding the subject matter of controversy.

16. The learned counsel for the management has fairly argued this petition and has submitted that the respondent No. 3 was always willing to appoint the petitioner to the post of Assistant Head Master and Head Master to which she was entitled to but for the directions given by respondent No. 4 to the contrary which directions could not have been ignored by the management. The respondent No. 3 has in terms admitted the claim of the petitioner in para 9 of the affidavit of Shri Prabhakar Jagannath Hajare being affidavit dated 18th October 1993. The respondent No. 3 has submitted that in case this Honourable Court is pleased to grant all the reliefs claimed in the petition, directions be

issued to respondent No. 4 and State of Maharashtra to sanction additional grant in aid as the fault is of respondent No. 4 and respondent No. 5 only and not of respondent No. 3. We have no hesitation in accepting the submission made by the learned counsel for the petitioner as well as by the learned counsel for the management.

17. Mrs. Mogre, the learned counsel for respondent Nos. 4 and 5, found herself in extreme difficulty in defending the illegality committed by respondents Nos. 4 and 5. The learned Assistant Government Pleader informed the Court that that earlier circulars issued by the Government of Maharashtra as well as earlier letter issued by the Education Officer were withdrawn by the Government of Maharashtra. This morning, the learned Assistant Government Pleader tendered a copy of the recent government circular dated 21st February 1994 whereby it is directed that in case of isolated post there was no reservation policy. On this aspect of the case, we must also refer to the factual statement appearing in the latest judgment of the Supreme Court in the case of Smt. Chetana Dilip Motghare Vs. Bhide Girls Education Society, Nagput and others, . While narrating the facts in that case, the Supreme Court has in terms observed that the Government of Maharashtra had also issued a circular dated 1st March 1989. It was laid down that in view of the law laid down in Dr. Chakradhar Paswan's case if a reservation was made for a single post in the beginning of the year or for the purpose of filling up the same in future by way of promotion, that would be unconstitutional. The Supreme Court has further observed that the Government of Maharashtra had also stated in its circular dated 1st March 1989 that the principle of reservation would not apply in case of an isolated post. The Court has reason to believe that there was a deliberate and conscious violation of the judgments of the Supreme Court by the Education Officer at the lower level and the above referred circular dated 1st March 1989 was deliberately ignored by the Education Officer. The Government of Maharashtra has been taking unconstitutional stand in these matters. In appropriate case, the Court would be justified in adopting contempt proceedings against the Government of Maharashtra as well as its officers and also award substantial compensation to the citizen who is continuously deprived of his or her fundamental rights guaranteed by the Constitution. The Constitutional Court has so done in cases where the violation of Article 21 of the Constitution is proved to the satisfaction of the Court. There is no reason as to why the same principle cannot be followed by the Constitutional Court in a case where the fundamental right guaranteed under Articles 14 and 16(1) and 16(2) of the Constitution is violated. We refrain from doing that in this case as that would mean prolongation of litigation and perhaps the teacher involved in this case can hardly afford to continue with this litigation. We express our displeasure in respect of the circular issued by the Education Officer to the effect that the decision of the Supreme Court was stayed by the Government of Maharashtra and leave it at that.

18. The learned counsel for respondent No. 1 submitted that in any event this Court should not issue a positive direction for appointing the petitioner as Head

Mistress of the School. The learned counsel for respondent No. 1 submitted that the proceedings be remanded to the management of the school for reconsideration of seniority and merits, pertaining to the claim of petitioner and respondent No. 1 and then decide as to who should be appointed as head master or head mistress of the school. We are not inclined to accept this submission of the learned counsel for respondent No. 1. It would be an exercise in futility to direct the management to reconsider the matter. In our opinion, it would not be proper to prolong the agony of a citizen who has been denied his legitimate promotion for all these long nine years particularly when no one disputes the seniority of the petitioner and the fact that the record of service of the petitioner is satisfactory.

19. Shri S. P. Thorat, the learned counsel for respondent No. 1 has made an appeal to this Court relying on the observations made in para 17 of the judgment of the Supreme Court in Dr. Chakradhar Paswan's case. In that case also, the appointment made to the post of Deputy Director (Homoepathic), the post which would not have been treated as reserved post, was quashed by the Court. Having regard to the fact that the appellant in that post had already occupied the said post ever since 30th May, 1979, the Supreme Court directed the State of Bihar to adjust the appellant in that case in some other equivalent post. The learned counsel for respondent No. 1 has submitted that this Court should recommend that the petitioner be adjusted by respondents Nos. 4 and 5 in an equivalent post in some other school. We shall consider this aspect of the case also while passing the final orders in this petition.

20. In the result the petition succeeds. The rule is made absolute as indicated below :-

(a) It is hereby declared that the petitioner was entitled to be appointed as Assistant Head Master of the said school with effect from the date when the respondent No. 1 was appointed to the said post. It is hereby declare that the said post was illegally treated as a "reserved post". It is hereby declared that the appointment of respondent No. 1 as Assistant Head Master of the said school with effect from 14th June 1985 was unconstitutional and in utter violation of Constitutional Guarantee contained in Article 16(1), 16(2) and 16(4) of the Constitution. The petitioner is deemed to have been appointed as Asstt. Head Master of said school from 14th June 1985 with all the benefits attached thereto including payments of all differential amounts as from the said date.

(b) It is hereby declared that the petitioner was entitled to be appointed as the head mistress of the said school with effect from 1st April 1991. It is hereby directed that the respondent No. 1 was unlawfully appointed as the head master of the said school with effect from 4th April 1991. It is hereby declared that the post of the head master was wrongfully and illegally treated as a reserved post even though the above referred judgments of the Supreme Court prohibited the State and its officers from treating the said post as such.

(c) We issue a writ of certiorari in terms of prayer (b) of the petition and quash the appointment of respondent No. 1 as Assistant Head Master with effect from 14th June 1985 and as Head Master with effect from 4th April 1991. We also quash all the impugned communications and resolutions of respondents Nos. 4 and 5 in this behalf.

(d) We direct the respondents Nos. 4 and 5 to grant their approval to the appointment of the petitioner in the post of Assistant Head Master as well as in the post of the Head Master in terms aforesaid, forthwith.

(e) We direct the respondents Nos. 1 and 3 to hand over the charge of the post of Head Master of the School to the petitioner latest by 5.00 p.m. on 12th October 1994 without fail. The respondent No. 1 can be continued in service in some other post whatever feasible as the management deems fit. The respondent No. 1 can be appointed as the head master of some other school by respondents Nos. 4 and 5 without infringing legal rights of others.

(f) We direct the management to pay all the differential amount of salary to which the petitioner would have been entitled to the post of Assistant Head Master as well as to the post of Head Master for the period commencing from 18th August 1985 and 1st April 1991 respectively with interest at the rate of 12% per annum. We direct the respondent No. 5 to reimburse the respondent No. 3 in respect of the additional financial burden arising from the implementation of the above order. The respondent No. 5 is directed to release the above referred amounts to respondents No. 3 as an additional grant in aid within three months from today. The respondent No. 3 shall pay the entire amount referred here above to the petitioner within one month thereafter. The petitioner shall be entitled to fixation of salary according to the pay scale in the grade of Assistant Head Master and Head Master respectively as if the petitioner was appointed in the said post with effect from 18th August, 1985 and 1st April 1991 respectively. All the concerned respondents are directed to take necessary steps in this behalf expeditiously.

(g) It is necessary to clarify that if a blatant breach of constitutional provisions and the judgment of the Supreme Court is brought to the notice of this Court, the Constitutional Court shall be duty bound to award substantial amount of compensation to the party aggrieved in lieu of infringement of fundamental rights of the citizen and direct recovery of amount of compensation from the salary of officers in default.

(h) We recommend that respondents Nos. 4 and 5 as well as respondent No. 1 do sympathetically consider the request of respondent No. 1 for being appointed or adjusted in some suitable post in some other school without infringing the provisions of law contained in Rule 3(3) of Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 and without infringing the ratio of the judgments of the Supreme Court referred to hereinabove. The Court shall be happy if the respondent No. 1 is also accommodated/adjusted in some equivalent

or near equivalent post somewhere in terms of the recommendation of the Court set out hereinabove. Till then the respondent No. 1 can function in the same school in any suitable post other than of a head master of the school.

(i) Having regard to the facts and circumstances of the case, we direct that the respondents Nos. 4 and 5 do pay costs of the petition to the petitioner fixed at Rs. 1000/-.

(j) Issue of the certified copy expedited.

(k) To appear for further consequential directions on Friday, the 14th day of October, 1994 at 11.00 A.M.