

(2008) 04 BOM CK 0161
In the Bombay High Court
Case No : Writ Petition No. 2558 of 2003

Vidya Prasarak Mandal

APPELLANT

Vs

The University of Mumbai

RESPONDENT

Date of Decision : 15-04-2008

Acts Referred:

Bombay University Act, 1974 — Section 77C

Maharashtra Universities Act, 1994 — Section 2, 7, 79, 79(3)

Citation : (2008) 3 ALLMR 705 : (2008) 110 BOMLR 1308 : (2008) 5 MhLj 477

Hon'ble Judges : V.M. Kanade, J;D.K. Deshmukh, J

Bench : Division Bench

Advocate : Nitin Pradhan and Shubhada D. Khot, for the Appellant; Susheel Mahadeshwar and S.S.Bhende, AGP for Respondent nos. 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

D.K. Deshmukh, J.—The petitioner is a public trust registered under the Bombay Public Trust Act. According to the petitioner, it has started Arts, Commerce and Science college which was run as one composite institution which was affiliated to Pune University. On 21.12.1976 the College was bifurcated into two independent colleges and both the colleges were affiliated to the Bombay University because the territory of the Bombay University was extended to Thane. The two colleges were called (i) K.G. Joshi College of Arts and N.G. Bedekar College of Commerce and (ii) B.N. Bandodkar College of Science. Apart from the aforesaid two colleges, the petitioner institution is running three more colleges viz. (i) T.M.C. Law college, (ii) V.P.M.'s polytechnic and (iii) Institute of Management Studies. According to the petitioner, all the five faculties are managed independently, administratively and financially and they are separate and distinct entities. According to the petitioner, one Mr. S.W. Gokhale was appointed as Principal of the Arts and Commerce College in the year 1994. On 1.9.2000 Mr. S.W. Gokhale retired as Principal. A proposal was submitted by the petitioner to reappoint Mr. S.W. Gokhale as Principal after his superannuation. In

response to that proposal which was submitted to the Bombay University, the University informed the Chairman of the petitioner that the post of Principal of the Arts and Commerce College has been identified as post reserved for backward class and that the petitioner should take steps to make appointment of Principal on regular basis obviously from the reserved category. The petitioner, thus, having been informed that the post of Principal of the Arts and Commerce college is reserved, has filed this petition challenging the communication dated 20.8.2001 from the Bombay University stating that the post of Principal of the Arts and Commerce college is reserved. The petitioner in this this petition also challenges the circular dated 15.3.1999 issued by the Government of Maharashtra, Department of Education (Higher Education) to all the zonal Joint Directors stating therein that if any institution runs three to four colleges then whether the Principal of one college is eligible for transfer in the other colleges or not can be decided by scrutinizing the advertisement and the directives given at the appointment of the concerned Principal. In such a case even if the Principals were not transferred from one college to another, they are eligible for transfer if the colleges have common subject. The rule of reservation can be applied by taking into consideration the total number of Principal's posts in this manner but the Principal's pay scales and the educational qualification differ in case of the Principals posts in engineering, architecture colleges and Arts, Commerce and Science colleges. If an institution runs more than one college where common subjects are taught, then the posts for such subject should be filled according to the consolidated reservation policy. Thus, the post is to be clubbed for the purpose of reservation with the posts of Principal of other colleges. In short the post of Principal of college is not to be treated as isolated post and is to be clubbed with the posts of Principal of other colleges run by the same institution if some of the subject taught in different colleges are common. According to the petitioner, the University has communicated to the petitioner that the post of Principal is reserved only because of the circular dated 15.3.1999. According to the petitioner, firstly, the decision contained in the circular dated 15.3.1995 for clubbing of the posts of Principal of various colleges run by the same institution is contrary to law. According to the petitioner, the posts of Principal of each college is independent and separate post and therefore, that post cannot be clubbed with the post of Principal of some other colleges run by the some institute only for the purpose of making reservation. The petition is opposed by the University. The stand of the University is that the qualification prescribed for being eligible for the post of Principal is the same and therefore, if an institution is running more than one college then the posts of Principal can be clubbed together. The University in support of this submission relies on the Circular of the University dated 4.5.2001.

2. The learned Counsel appearing for petitioner submits that because of the provisions of Section 7 of the Maharashtra Universities Act, 1994 an obligation is cast on the Universities to adopt Government policy and orders issued from time to time in regard to the reservation for schedule caste and schedule tribes and

other backward classes for appointment to different posts of teachers and nonteaching officers and employees. It is submitted that so far as the appointment to the post of Principal of affiliated college is concerned, provision is made u/s 79(3) of the Act which lays down that the selection committee and mode of appointment of Principals, teachers and other employees of affiliated colleges shall be such as may be prescribed. It is submitted that the University has framed statute 413 laying down the manner and mode of selection and appointment of Principal in college. The statute does not provide either for reservation of the post of Principal or clubbing of posts of Principal where more than one college is run by one institution. It is submitted that even the circular issued by the University in relation to the reservation of the post for schedule caste and schedule tribe does not provide for reservation of the post of Principal. It is submitted that the circular dated 15.3.1999 on the basis of which the University is seeking to reserve the post of Principal is contrary to the Maharashtra Government Rules of Business and instructions issued thereunder. Reliance is placed on Rule 9 and it is contended that the directions could have been issued by the State Government only after taking approval of Council of Ministers and as the circular is issued by the Director of Education, Higher Education, it is invalid. The learned Counsel appearing for University relied on the Government Resolution dated 23.3.1994 and the 100 point roster as also the circulars issued by the University.

3. Now first the question that is to be considered is whether there is any valid instrument obliging the petitioner to reserve the post of Principal for backward classes. So far as the Bombay University Act, 1974 is concerned, there was a provision made in that Act by inserting Section 77C which was done by the Maharashtra Act No. 32 of 1978 which provided that the University shall make the necessary statutes for reservation of adequate numbers of posts for members of scheduled caste and scheduled tribes in the affiliated colleges. This reservation was to be made in teaching and nonteaching posts consistently with the maintenance of teaching standards and efficiency of administration. Section 77C of the Bombay University Act reads as under:

77C.(1) The University, the affiliated Colleges and the recognised Institutions shall take into consideration, consistently with the maintenance of teaching standards and efficiency of administration, the claims of the members of the Scheduled Castes, Scheduled tribes and other backward classes in making appointments to teaching and non teaching posts under their respective control; and the University shall make the necessary Statutes for reservation of adequate numbers of posts for members of such Castes, Tribes and Classes in the University, affiliated Colleges and recognised Institutions.

(2) Notwithstanding anything contained in this Act, the State Government shall have power to give to the University, from time to time, such directions as it may consider necessary in regard to categories of posts in which reservation of posts shall be made in favour of the members of the Scheduled Castes, Scheduled

tribes and other Backward classes, percentage of the posts to be reserved for them, and any other matters connected with such reservation and the University shall comply with such directions.

It appears that in the year 1981 the Government issued a resolution on the subject of reservation of teaching and non teaching posts in affiliated colleges. That Government resolution was issued by the Government in exercise of its power under Sub section (2) of Section 77C of the Bombay University Act. It may be pointed out here that this resolution was issued by the State Government in exercise of its similar powers under various other Universities Act in force in the State of Maharashtra. That Government resolution provided that the affiliated colleges shall reserve 24% of the total number of posts of teachers and non-teaching posts to be filled in by selection for members of the Scheduled Castes, Scheduled Tribes and Denotified tribes. The Nagpur University issued an employment notice indicating in the notice number of posts cadre-wise viz. Professors, Readers and Lecturers reserved for backward classes. That employment notice was challenged before this Court. The Principal challenge was that the employment notice must show reservation of post subject-wise. A full bench of this Court has decided that issue in the case "Suresh Chandra Verma (Dr.) and Ors. v. Chancellor, Nagpur University and Ors. 1988(Supp.) Bom.C.R. 429". That judgment was challenged before the Supreme Court. The judgment of the Supreme Court is Dr. Suresh Chandra Verma and others Vs. The Chancellor, Nagpur University and others, . The judgment of the full bench of this Court was approved by the Supreme Court. The Supreme Court held that the employment notice was bad-in-law since it is failed to inform reservation of posts subject-wise and it mentions only total number of reserved posts without indicating a particular post so reserved subject-wise. Thus, so far as the teaching posts in the affiliated colleges are concerned, according to the law laid down by the Supreme Court, the reservation has to be subject-wise. The question whether the post of Principal can be reserved or not, was however not decided. The Bombay University Act was repealed by the Maharashtra Universities Act and so far as the Maharashtra Universities Act is concerned, so far as the question of reservation is concerned, it is Section 7 of the Maharashtra Universities Act which is relevant which reads as under:

7(1) No citizen of India shall be excluded from any office of the university or from membership of any of its authorities, bodies or committees, or from appointment to any post, or from admission to any degree, diploma, certificate or other academic distinction or course of study on the ground only of sex, race, creed, class, caste, place of birth, religious belief or profession, or political or other opinion; Provided that, the university may maintain, accredit or recognise any college or institution exclusively for women, or reserved for women.

(2) The university shall adopt Government policy and orders issued, from time to time, in regard to the reservation for Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Backward classes for

appointment to different posts of teachers and non-teaching officers and employees and for the purpose of admission of students in the affiliated or conducted colleges, university departments, university institutions or recognised institutions.

(3) The university shall adopt the general policy of the State Government in regard to the welfare of various categories of weaker sections of the society and minorities as directed by the State Government from time to time.

By sub-section (1) it is declared that no citizen of India is to be excluded from consideration for any post in the University only on the ground of sex, race, creed, class, caste, place of birth. An exception to that rule is made by sub-section(2) and (3) of Section 7 which casts duty on the university to adopt the policy of the Government in relation to the reservation of posts for backward classes. Thus, so far as making of reservation is concerned, it is for the University to enact appropriate statute for giving effect to the policy of the State Government in relation to reservation. So far as the post of Principal is concerned, we have not been pointed out any specific policy decision of the State Government in relation to the reservation of post of Principal in affiliated college. So far as the appointment to the post of Principal of affiliated college is concerned, it is Section 79(3) which incorporates the provision. Sub-section (3) of Section 79 of the Maharashtra Universities Act, 1994 reads as under:

79(3) The selection committee and mode of appointment of Principals, teachers and other employees of affiliated colleges shall be such as may be prescribed.

Thus, the mode of selection and appointment of Principal to the affiliated college is to be prescribed. The term "prescribed" is defined by Sub section (24) of Section 2 of the Act to mean prescribed by Statutes or Ordinance or Regulations made under the Act. Perusal of the provisions of Act shows that power to frame Statutes, Ordinance and Regulations is conferred on the University. Thus, the competence to frame appropriate statute for making reservation in the post of Principal is vested by the Act in the University. In exercise of its power to frame statutes in relation to appointment to the post of Principal, the University has framed the Statute which is Statute No. 413. Perusal of that Statute shows that not only that Statute does not provide for making of reservation in the post of Principal, but on the contrary in unequivocal term it lays down that appointment to the post of Principal shall be made on merit and shall not be made on communal or caste consideration. Thus, it is clear, so far as the post of Principal of affiliated colleges is concerned, under the scheme of Maharashtra Universities Act a provision for reservation in that post could have been made by the University by framing Statute providing for reservation. Not only that the University has not framed any statute providing for reservation for the post of Principal in the affiliated colleges on the contrary in the Statute that is framed by the University on the subject it is provided that appointment shall be made purely on merit and not on any caste consideration. Thus, under the Act reservation in the post of principal of an affiliated college could not have been

made.

4. So far as the circular dated 15.3.1999 issued by the Director of Education is concerned, firstly we have not been pointed out any authority conferred on the Director of Education by any law authorising him to issue such circular. In our opinion, this being a matter of policy either such decision could have been taken by an authority which is authorised by Law to take such a decision or such a decision can be taken by the State Government itself. We have not been pointed out any decision taken up by the State Government in relation to the reservation in the post of Principal of affiliated colleges. In our view, the circular dated 15.3.1999 is clearly without any authority of law. Really speaking the decision of the University to reserve the post of Principal of Arts and Commerce college of the petitioner which is clearly based on the circular dated 15.3.1999 is liable to be set aside only for this reason that the circular dated 15.3.1999 is without any authority of law.

5. It is further pertinent to be noted that we not only find that there is no authority or statutory provision providing for reservation in the post of Principal but we also find that the observations made by the Supreme Court in its judgment in the case of Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., go to show that there cannot be any reservation in the post of Principal. Specially the observations found in paragraph 112 which is a judgment delivered by Hon''ble Mr. Justice B.P. Jeevan Reddy which is a majority view, in our opinion, are pertinent, they read as under:

112. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/ departments/ institutions, in specialities and super-specialities in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable.

As a matter of fact, the impugned Memorandum dated 13th August, 1990 applies the rule of reservation to "civil posts and services under the Government of India" only, which means that defence forces are excluded from the operation of the rule of reservation though it may yet apply to civil posts in defence services. Be that as it may we are of the opinion that in certain services and in respect of certain posts, application of the rule of reservation may not be advisable for the reason indicated hereinbefore. Some of them are:

- (1) Defence Services including all technical posts therein but excluding civil posts.
- (2) All technical posts in establishments engaged in Research and Development

including those connected with atomic energy and space and establishments engaged in production of defence equipment.

(3) Teaching posts of Professors - and above, if any.

(4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects.

(5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. The list given above is merely illustrative and not exhaustive. It is for the Government of India to consider and specify the service and posts to which the Rule of reservation shall not apply but on that account the implementation of the impugned Office Memorandum dated 13th August, 1990, cannot be stayed or withheld.

We may point out that the services/posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, skill and excellence. Some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with "efficiency of administration" contemplated by Article 335.

The Supreme Court has, thus, stated that application of the rule of reservation in relation to certain services and certain posts is not advisable. One of the posts indicated by the Supreme Court is the post of Principal which is above the post of professor. As we find that there is no valid statutory provision providing for reservation in the post of Principal, it is not necessary for us to consider whether for the purpose of reservation of the post of Principal, the post of Principal in different colleges run by the same institution could have been clubbed together. We find that the University was not at all justified in directing the petitioner to fill in the post of Principal of the Arts and Commerce college by reserving it for backward class.

6. In the result therefore, the petition succeeds and is allowed. The communication dated 20.8.2001 and the circular dated 15.3.1999 are struck down. Rule is made absolute accordingly. No order as to costs.