

(2015) 05 BOM CK 0053
In the Bombay High Court
Case No : Writ Petition No. 4723 of 2013

Vikas

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-05-2015

Acts Referred:

Citation : (2015) 05 BOM CK 0053

Hon'ble Judges : B.P. Dharmadhikari, J;S.B. Shukre, J

Bench : Division Bench

Advocate : Naresh Kolhe, for the Appellant; B.P. Maldhure, A.G.P., Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

B.P. Dharmadhikari, J.

1. The matter was looked into by this Court on 12.1.2015 and following order came to be passed :-

"Shri Naresh Kolhe, learned Counsel for petitioner, Shri N. Khubalkar, learned A.G.P. for respondent no.1, Shri N.L. Jaiswal, learned Counsel for respondent nos. 2 and 4 and Shri A.M. Qazi, learned Counsel for respondent no. 6.

Only question is - If for a vacancy for open category, two candidates have secured equal marks and one of them is belonging to a backward category, how their entitlement to the post can be worked out ?

Petitioner as also respondent no. 2 Employer are relying upon Government Resolution dated 27.06.2008 for said purpose.

We direct the respondent no.1 to file appropriate affidavit explaining the position within a period of four weeks from today.

Copy of this order be furnished to learned Counsel for parties to act upon. List the matter for further consideration on 09.02.2015."

2. Accordingly, affidavit has been filed on behalf of respondent no.1 by Secretary, General Administration Department, Government of Maharashtra through Collector, Bhandara.

We have heard Mr. Naresh Kolhe, learned Advocate for petitioner, Mrs. B.P. Maldhure, learned A.G.P. for respondent nos. 1 and 3, Mr. N.L. Jaiswal, learned Advocate for respondent nos. 2 and 4 and Mr. A.M. Qazi, learned Advocate for respondent nos. 5 and 6 finally by making Rule returnable forthwith.

3. The fact that the petitioner and respondent no.5 have secured equal marks in 2013 recruitment process for the post of Junior Assistant (Accounts) undertaken by respondent nos. 3 and 4 is not in dispute. The petitioner belongs to Open Category while the respondent no. 5 belongs to Special Backward Class. In list of candidates for document verification, published on 24.6.2013 name of petitioner as also respondent no.5 are shown in Open-2 category. Both of them have secured 172.5 marks as per list published on 16.6.2013.

4. However, while preparing waiting list petitioner has been placed at serial no.1 therein and appointment has been given to respondent no.5.

5. In the backdrop of question as noted by this Court in its order dated 12.1.2015 reproduced supra, the only question is whether respondent no.5 could have been placed above petitioner merely because he happens to be a S.B.C. candidate ?

6. The learned Counsel for petitioner submits that roster was already applied and reserved candidates have already been selected and appointed. The candidature of respondent no.5 has been considered in open category along with petitioner and as such, there was no question of again looking into his caste while filling in open vacancy. He has invited our attention to Government Resolution dated 27.6.2008 to urge that as the petitioner is more in age, he needs to be appointed.

7. Mrs. B.P. Maldhure, learned A.G.P. for respondent nos. 1 and 3, Mr. N.L. Jaiswal, learned Advocate for respondent nos. 2 and 4 and Mr. A.M. Qazi, learned Advocate for respondent nos. 5 and 6, dispute this. They pointed out that though technically petitioner and respondent no.5 have been accepted as Open category candidates and their entitlement is being considered to fill in open vacancy, as both of them have secured same marks, for the purpose of said open category, the status of respondent no.5 as S.B.C. candidate has been given weightage. They also rely upon the very same Government Resolution dated 27.6.2008.

8. In addition, Mr. A.M. Qazi, learned Advocate points out that copy of reply placed on record by State Government after orders of this Court dated 12.1.2015 is not served upon him. He further adds that if respondent no.5 cannot be selected against open category post, his entitlement to occupy reserved category post needs to be evaluated. He submits that respondent no.5 appears to have secured highest marks and, therefore, is being considered against open category vacancy.

9. In so far as entitlement of respondent no.5 to be considered against reserved post is concerned, material on record is not sufficient to appreciate the alternate argument of Mr. Qazi, Advocate. There is nothing on record to show that a person who has secured less marks than respondent no.5 in reserved category has been selected and appointed against a reserved category post. However, if this be the position, the respondent no.5 can always make that grievance to respondent no.2 Chief Executive Officer (his employer) and respondent no.2 employer can thereafter evaluate it in accordance with law.

10. In so far as Clause No. 6 of Government Resolution dated 27.6.2008 is concerned, it contemplates that when candidates have secured same marks, one who is more qualified educationally needs to be selected. Thereafter, in relation to backward class candidates, it is mentioned that first a Scheduled Tribe candidate and thereafter a Scheduled Caste candidate, followed by S.B.C., V.J. and N.T. can be considered. Thereafter, at serial no.3 preference is given to physically challenged candidate. At serial no. 4 stands ex-military personnel. At serial no. 5 are nominees of freedom fighters and at serial no. 6 it is stipulated that one who is more in age needs to be preferred.

11. Here, as educational qualification of petitioner and respondent no.5 is not in dispute, the employer as also State Government have preferred to fall upon clause (2). Clause (2) does not deal with open category candidate on one hand and reserved category candidate on the other. It only points out how preference is to be accorded if both the candidates who have secured same marks belonging to backward class. Correctness or otherwise of this stipulation is not in challenge before us. Similarly, the norm of physically challenged person or ex-army personnel or freedom fighter are not relevant.

12. The only relevant norm which can be looked into as per the Government Resolution dated 27.6.2008 is clause 6(6), i.e. about age. Candidate who is more in age, therefore, needs to be appointed. The petitioner and also respondent no.5 are open category candidates and as petitioner appears to be more in age, he ought to have been appointed.

13. In this situation, we find that appointment given to respondent no.5 by extending him preference only because of his status as S.B.C. candidate is arbitrary and unsustainable. It is quashed and set aside. The respondent no.2 employer shall verify the age of petitioner as also respondent no.5 and one who is more in age shall be given appointment. Similarly, we grant respondent no.5 liberty to make appropriate representation to respondent no.2 pointing out that as he may be the backward class candidate, who has secured highest marks, he should have been selected and appointed against appropriate backward class post. If such representation is made, the respondent no.2 shall consider it in accordance with law at the earliest.

14 With these observations and directions, Writ Petition is partly allowed. Rule is made absolute in the above terms with no order as to costs.