
(2002) 11 BOM CK 0009
In the Bombay High Court
Case No : Writ Petition No. 914 of 1988

Vinaysingh Rajput

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 26-11-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2003) 105 BOMLR 786

Hon'ble Judges : H.L. Gokhale, J;A.P. Deshpande, J

Bench : Division Bench

Final Decision : Allowed

Judgement

H.L. Gokhale, J.—This Petition was filed in June, 1988 by the petitioner when he had completed First year M.B.B.S. course successfully but, by which date, the respondent No. 1 - State Government, had passed an order on 11th of May, 1988 holding that the petitioner did not belong to the particular Denotified Tribe, under which he had obtained the admission to the medical course. It is this decision of the State Government, dated 11th May, 1988, which is sought to be challenged by filing this Petition. Respondent No. 1 is the State Government through the Secretary, Social Welfare Department. The impugned order is signed by the Deputy Secretary of that Department. The second respondent is the Dean of the Government Medical College at Aurangabad where the petitioner was prosecuting his studies at the relevant time.

2. The Petition came to be admitted on 10th June, 1988 and interim relief came to be granted in terms of prayer Clauses (C) and (D) of the Petition whereby the respondents were restrained from canceling the admission of the petitioner on the basis of the Government order dated 11th of May, 1988 till the disposal of the Petition.

3. The Petition reached for final hearing much later in June, 2001 before another Division Bench. It. was canvassed before that Division Bench, by way of a

preliminary objection, that, the impugned decision of the State Government dated 11th of May, 1988 was in exercise of power assumed under Government Resolution of 16th October, 1985 and which power could not be said to be legally available to the State Government as claimed under the said Government Resolution. A few decisions of other Division Benches of this Court questioning this power of the State Government were cited before that Division Bench. Thus reliance was placed, amongst others, on a decision of a Division Bench in the case of Miss Ranjana Mohanrao Tonpe v. State of Maharashtra Writ Petition No. 1268 of 1987 decided on 12.2.1990 (Unrep. Decision) and that of another Division Bench in Pushpa Thakur v. State of Maharashtra Writ Petition No. 3461 of 1993 decided on 25.8.2000 (Unrep. Decision). These are unreported decisions. However, in spite of the petitioner's submission having been canvassed before the Division Bench, the Division Bench observed in paragraph 5 of its judgment rendered on 19th June, 2001 as follows:

...Even if we accept, the preliminary objection raised by the petitioner regarding the powers of suo motu review, the petitioner was allowed to continue his M.B.B.S. studies by order of this Court and, therefore, it would be necessary for us to examine the merits of his caste claim rather than deciding the petition solely on the ground that the State Government had no powers of review and, therefore, we had called upon the learned A.G.P. to submit before us the service record of petitioner's father who has already retired from the Government service some time in 1990.

Thereafter, the learned Judges went into the merits of the matter and came to conclusion that the impugned decision of the State Government dated 11th May, 1988 was correct on merits and, therefore, the Petition came to be dismissed.

4. Being aggrieved by the dismissal of this Petition, the petitioner herein carried the matter to the Apex Court in Civil Appeal Nos. 5636-5637 of 2001. The impugned decision of the State Government of 11th of May, 1988 and the judgment of the Division Bench dated 19th June, 2001 were sought, to be defended by the respondents herein in the Apex Court by pointing out that, they were correct on merits and there was a material distinction in the position under the decisions which were cited before the Division Bench and the present case. As against that, the petitioner assailed the decision of the High Court primarily on the ground that the High Court was bound to follow its earlier decisions to the effect that the State Government did not have the power to review the Divisional Commissioner's order. Attention of the Apex Court was also drawn to an unreported decision in this connection. The Apex Court accepted the submission on behalf of the petitioner and observed thus:

...We have considered the submissions of the parties. Learned Counsel for the respondents may be correct, that the earlier decisions were, based on a different Resolution and that was a material distinction with the present case. However, it does not appear that the High Court in the impugned Judgment had sought to distinguish its earlier decisions on that ground. Indeed, appears to have

proceeded on the basis that the decisions were correct and applicable. Having come to this conclusion, it was incumbent on the High Court to have allowed the Writ Petition and set aside the order of the State Government on the ground that (the State Government had no jurisdiction to review the Order of the Divisional Commissioner. It was not open to the High Court, on the writ application of the appellant to have itself taken a decision as if it were an Appellate Authority and discharged what in effect was a power of review of the Divisional Commissioner's order.

In the circumstances, the Apex Court, by its judgment and order dated 5.9.2002, set aside the order of the Division Bench and sent down the matter for re-hearing before this Court, while permitting the parties to raise all issues available to them on the jurisdiction of the State Government to review the order of the Divisional Commissioner and also if necessary on the merits of the State Government's decision. That is how the matter has reached before us for final hearing.

5. Miss Rukhsana Shaikh and Mr. S.B. Talekar have appeared for the petitioner whereas Mr. S.K. Kadam, Assistant Government Pleader, has appeared for the respondents. Before we deal with the rival submissions of the parties we will refer to a few of the necessary facts. The petitioner claims to belong to a Denotified Tribe known as "Rajput Bhamta". He got a certificate issued to that effect from an Executive Magistrate on 17th August, 1982 and on the strength thereof he was admitted to a seat reserved for a Denotified Tribe (which is also known as Vimukta Jali). Some of the Denotified Tribes are those tribes which were said to be indulging into criminal activities in the past and that is how they were notified as criminal tribes. Subsequently this kind of stigma has been removed by denotifying them, but considering the fact that they are backward communities certain benefits in matters of education and employment are conferred on them. As stated above, the petitioner took his admission on the strength of the certificate of belonging to this Denotified Tribe. The admission was a provisional one subject to the scrutiny and verification of the Caste Certificate. The Scrutiny Committee constituted by the State Government examined the claim of the petitioner. The Committee by its decision rendered on 1.11.1985 came to the conclusion that the petitioner was not entitled to claim that he belongs to a Denotified Tribe.

6. Being aggrieved by this order of the Scrutiny Committee the petitioner preferred an appeal to the Divisional Revenue Commissioner at Aurangabad. The Divisional Commissioner allowed that appeal by order dated 4th of April, 1986. However, since the Divisional Commissioner was taking a view different from that of the Scrutiny Committee, he was required to forward his decision to the State Government for its confirmation as per the provisions of the Government Resolution dated 16th October, 1985. The State Government thereafter looked into the entire material on its own once again, and came to the conclusion on 11.5.1998 that the petitioner did not belong to this particular community namely

Rajput Bhamta. It is this decision dated 11th of May, 1988 which is challenged in the present Petition.

7. As far as the merits of his claim are concerned, the petitioner contends that he had all the requisite documents in support which include, amongst others, his own School Leaving Certificate issued on 18th June, 1985 and the Birth Certificate issued by the Municipal Corporation of Aurangabad dated 25th June, 1985 which gives his date of birth as 19.11.1968 and his caste as Rajput Bhamta. This entry in the municipal record had been admittedly made on the basis of an affidavit made before a Judicial Magistrate.

8. As against this submission, on behalf of the State Government, it is canvassed that the earliest document in support of the petitioner is the School Leaving Certificate in favour of his father dated 16th September, 1957 which gives his caste as Hindu Pardeshi. It is contended on behalf of the respondents that the reservation was available only to the Vimukta Jatis designated as Rajput Bhamta and its synonyms as per the Government Resolution of 21st November, 1961 were either Pardeshi Bhamta or Pardeshi Bhamti. It was, therefore, submitted that when the earliest document shows the caste of the petitioner's father as Hindu Pardeshi the subsequent entries were a sort of improvements over the contents in the original documents and that the petitioner could not be permitted to benefit therefrom. It was also contended that no connection with any criminal activities by any of his relatives in the past was pointed out by the petitioner during the course of hearing before the Scrutiny Committee. However, as far as this aspect is concerned, it was pointed out on behalf of the petitioner that such a connection is not required to be established and this position is accepted under the Government Resolution of 25th August, 1997. Even as far as the entry in the School Leaving Certificate of the petitioner's father is concerned, it was contended that he was the first person to go for school education and that is how this entry has come to be made, but that does not mean that the petitioner did not belong to Pardeshi Bhamta community. He has relied upon the certificates issued to his brother and other relatives and these certificates were accepted in appeal against the decision of the Scrutiny Committee.

9. Apart from these merits, it was principally contended on behalf of the petitioner that, the power, which is sought to be exercised under the Government Resolution of 16th October, 1985, cannot be said to be legally available to the State Government. Here, for assessing this submission we have to refer to the earlier Government Resolution dated 9th November, 1981 which, in turn, refers to an earlier Resolution of 24th of February, 1981. In the first paragraph of the Government Resolution dated 9th November, 1981 it is stated that a Scrutiny Committee was constituted to examine the Caste Certificates of the candidates who were admitted against the reserved seats. The Committee consisted of the Director, Social Welfare, Pune, the Joint Director of Social Welfare, Pune and the Director, Tribal Research and Training Institute, Pune. Against, the decision of the Committee, an appeal was available to the aggrieved candidates to the State

Government in the Social Welfare and Sports Department and the decision of the Government was final as far as the Caste Certificate was concerned.

10. Paragraph 2 of this Resolution of 9th November, 1981, however, recorded that the procedure of filing of appeal to the State Government was found to be quite expensive by the candidates coming from all over the State. It was also found that there was no machinery at Mantralaya level to verify the validity of the Caste Certificates. Thirdly, it was stated that the Executive Magistrates, who are competent to issue the Caste Certificates, are under the administrative control of the Divisional Commissioners. Having stated this, the Resolution dated 9th February, 1981 laid down as follow:

...It is, therefore, felt expedient that, the Divisional Commissioners should decide the appeals against the decisions of the Committee mentioned in paragraph 1 above. Government is therefore pleased to direct that henceforth the respective Divisional Commissioners should decide the appeals preferred by the aggrieved candidates against the decisions of the above Committee. The Divisional Commissioners should decide the appeals of such candidates who are ordinary residents of their jurisdiction. As Government attaches utmost importance to safeguard the interests of the backward classes, it is further decided that Commissioners should not delegate this power to any other Subordinate Officer.

11. The Government Resolution of 9th November, 1981 was subsequently modified by further Resolution of the State Government dated 16th October, 1985. In the recital of this Resolution, previous Resolutions of 24th February, 1981 and 9th November, 1981 are specifically referred to. This Resolution thereafter makes a reference to the Scrutiny Committee and then to the provision of an appeal against the decision of the Committee. In para 5 of this Resolution a little different mechanism was now introduced and it has been, in fact, pressed into service by the respondents to defend the impugned order of 11th of May, 1988. The original Resolution is in Marathi and this paragraph, if translated into English, will read as follows:

5. If in any appeal filed by a student/candidate against a decision of the Scrutiny Committee to the Divisional Commissioner, the decision of the Divisional Commissioner goes against the decision of the Committee, the Divisional Commissioner shall send a copy of such decision to the State Government. The State Government shall have complete authority to re-examine such cases, if deemed fit, right from the beginning and to arrive at final decision.

12. It is canvassed on behalf of the petitioner that the original position, as it existed prior to the Government Resolution of 9th November, 1981, provided an appeal against the decision of the Scrutiny Committee to the State Government. The Resolution of 9th November, 1981 altered this position and delegated this power of hearing of appeal to the Divisional Commissioner while making it clear that the Commissioner should not delegate this power to any other Subordinate Officer. Once the Commissioner functions as a delegate of the State Government,

the suo motu review under Clause 5 of the Government Resolution dated 16th October, 1985 would be bad in law. In support of this submission, it is firstly submitted that a power to review must be explicitly provided. It must be conferred by law either expressly or by necessary implication and that it is not an inherent power. Reliance is placed for this purpose on the judgment of the Apex Court in the case of Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, . In the same line is another judgment of the Apex Court in the case of Major Chandra Bhan Singh Vs. Latafat Ullah Khan and Others, that, review is a creature of statute and cannot be entertained in the absence of a provision therefor.

13. In the case of R.R. Verma and Others Vs. Union of India (UOI) and Others, the Apex Court has held thus :

The principle that the power to review must be conferred by statute either specifically or by necessary implication is applicable only where the Government exercises quasi-judicial powers vested in it by statute and not to purely administrative decisions. Government must be free to alter its policy or its decision in administrative matters and cannot be hidebound by the rules and restrictions of judicial procedure though of course they are bound to obey all statutory requirements and also observe the principles of natural Justice where rights of parties may be affected

It is, therefore, submitted on behalf of the respondents that, caste scrutiny is a matter of administrative policy of the State Government and what is necessary is that an appropriate mechanism ought to be provided for scrutiny of the caste of a student or a candidate who is claiming a benefit of reservation. What that procedure should be has always to be left to the State Government. In the instant case all that is provided is that where the Divisional Commissioner takes a view contrary to that of the Scrutiny Committee, that contrary decision will not be final until the particular decision is forwarded to the State Government and the State Government confirms it. Thus, where the Commissioner confirms a decision of the Scrutiny Committee there is no role for the State Government to exercise any further, implying thereby that where two authorities take a consistent decision that would remain undisturbed. However, only in the event of there being a diversion of view, the State Government would scrutinise the matter in its entirety. It is submitted that there is nothing wrong in the approval of the Government Resolution dated 16th October, 1985.

14. It was submitted on behalf of the petitioner that what is contemplated under Clause 5 of the Government Resolution of 1985 is a kind of suo motu review by the State Government after the papers of the decision of the Divisional Commissioner are forwarded by him to the State Government. It is submitted that this kind of additional checking and looking into the matter afresh is available only to the State Government and the State Government takes upon itself to follow this mechanism wherever the Divisional Commissioner takes a view contrary to that of the Scrutiny Committee and forwards the papers to the

State Government. This remedy is not available to a student who would be aggrieved by the decision of the Divisional Commissioner. Thus, it is submitted that this is a sort of one sided remedy.

15. Our attention was drawn to the two judgments which were brought, to the notice of the earlier Division Bench. As far as the decision in Writ Petition No. 1268 of 1986 is concerned, the decision is principally on the facts of the controversy before the Court (as held at the end of para 11 of that judgment) and not so much on the power which is available under Clause 5 of the Resolution of 1985. Similarly, the decision in Writ Petition No. 3461 of 1993 is principally on the basis of two earlier decisions holding that, the alleged power of review was not available, which judgments unfortunately could not be made available to this Bench. However, as far as (Coram : R.G. Deshpande & D.S. Zoting, JJ.) the case of Shivaji Kalge v. State of Maharashtra Writ Petition No. 1125 of 1988 dated 23.3.2001 (Unrep. Decision) is concerned, we find a discussion in paragraphs 13 and 14 of that judgment and those two paragraphs are as follows:

13. After having gone through the judgment referred to above and the orders of the Division Benches of this Court, which are made available for our reading during the course of hearing to this Petition, it is amply clear that the so-called powers vested in the Government either of review or of revision cannot be said to be either correctly vested in the Government or it could be said that such powers could not have been permitted to be exercised by the Government, taking into consideration the constitution, setup and the powers of the Scrutiny Committee and also that of the Additional/Divisional Commissioner who exercise appellate powers against the orders of the Scrutiny Committee.

14. We also find that creating such an additional power either of review or revision by simply issuing a Government Resolution would virtually amount to vesting unbridled powers in the Government and that too, to be exercised one-sidedly. We are making these observations taking into consideration the very wording of para 5 of the above referred Government Resolution. A minute reading of the contents of para 5 of the Resolution clearly indicates that it is only in a case where an order of Appellate Authority "Commissioner" in an appeal at the instance of the candidate/student goes against the Government, in that case only the Government, can review or revise that order. Surprisingly, however, the candidate or student is not given such a liberty of approaching the Government if the order of the Appellate Authority is otherwise in its effect. We no doubt see a substantial force in the arguments of the learned Advocate for the petitioner.

16. Miss Rukhsana Shaikh, learned Counsel appearing for the petitioner has drawn our attention to another judgment of the Apex Court in the case of State of Orissa and Others Vs. Commissioner of Land Records and Statement, Cuttack and Others, . After examining the provisions of the relevant statute, in the facts of the case, the Apex Court held that since the Government had delegated the revisional powers of the Board of Revenue to the Commissioner, the delegate,

the Commissioner, when he exercises those powers of the Board and passes orders, those orders will have to be treated as orders of the Board of Revenue. In para 25 the Apex Court has referred to its earlier decision in the case of *Roop Chand Vs. State of Punjab*, wherein it is held that if an order is revisable and in term is sought to be revised it must be an order passed by an officer in his own right and not as delegate of the State Government. In paragraphs 28 and 29 of this judgment the Apex Court has observed that a review application is to be made only to the same Judge or if he is not physically available, to his successor and that a review is a reconsideration of the same subject by the same Judge, as contra distinguished to an appeal which is a hearing before another Tribunal.

17. Having gone through these authorities, which are referred before us and having gone through the two Resolutions of 9th November, 1981 and 16th October, 1985 we are of the view that, by the Resolution of 9th November, 1981 the State Government had delegated its powers of hearing of the appeals against the decision of the Scrutiny Committee to the Divisional Commissioner. This is also clear from the last sentence of the said Resolution to the effect that the Commissioners should not delegate this power to any other Subordinate Officer. Thus the provision of delegation is clearly indicated in this Resolution from the State Government to the Commissioner. What the Resolution dated 16th October, 1985 does is to maintain this system of hearing the appeals before the Commissioner but with a rider that wherever the Commissioner takes a view contrary to that of the Scrutiny Committee he will be required to send his decision to the State Government and then if it is deemed fit the State Government may re-examine the matter on its own right from the beginning.

18. It is true that this power has been taken by the State Government under its own Resolution, but it cannot be lost sight that it is a quasi-judicial determination which is being made initially by the Scrutiny Committee and then in appeal by the Divisional Commissioner. When there is a claim by a student or candidate that he belongs to a particular community and that is to be determined, it is to be determined by permitting him to place all necessary material before the Scrutiny Committee. The questions are put to him about his relatives, practices and traditions in his community and his knowledge about the community. The student or the candidate is permitted to produce documents and affidavits with respect to his community and those concerning his relatives. This is to be done by following a procedure in consonance with natural justice. Therefore, when determination of a caste claim is being made under the Resolution of the State Government, it is in the nature of a quasi-judicial determination and principles of natural justice have to be followed. This being so, as held by the Apex Court in *R.R. Varma's case* (supra) power of review will have to be specifically and legally provided. In the instant case the kind of mechanism which we find in Clause 5 of the Resolution of 1985 cannot be strictly said to be a reference or a revision or a review. That apart, as stated earlier, it is a one sided review available only to the State Government and not to the candidate which cannot be said to be in consonance with rule of fair play. Besides, it is a reconsideration of the decision

of its delegate by the State Government. In this state of affairs we are in agreement with the view expressed by the Division Bench in the case of Shivaji Kalge (supra) and we hold that the kind of authority exercised by the State Government under Clause 5 of the Resolution of 1985 after the decision of the Divisional Commissioner cannot be said to be a valid and legal authority. For these reasons we have no reason to depart from the view taken in the said judgment. We therefore hold that the State Government did not have a valid and legal authority to pass such kind of order that is passed on 11th of May, 1988 upsetting the order passed by the Divisional Commissioner.

19. Before we conclude we may just add that subsequently in the case of Kumari Madhuri Patila and another Vs. Addl. Commissioner, Tribal Development and others, . Tribal Developments the Apex Court has held that, the order passed by the Scrutiny Committee should be treated as final only subject to a remedy under Article 226 of the Constitution of India. Following that judgment the State Government has come out with a Resolution dated 23rd July, 1996 giving finality to the decisions of the Scrutiny Committee. Incidentally, the State Legislature has also passed "Maharashtra Scheduled Castes, Scheduled Tribes, Denotified Tribes, (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000 (Maharashtra Act No. XXIII of 2001)" to the same effect. Thus, as of now, there is no further proceeding available beyond the decision of the Scrutiny Committee except filing of a Writ Petition if one is aggrieved. However, as far as the position which existed earlier after the Resolution of 16th October, 1985 is concerned, it is clear that an appeal was available against the decision of the Scrutiny Committee to the Divisional Commissioner but the further re-checking by the State Government though provided was bad in law.

20. Since we are holding that the State Government did not have a legal authority to pass the impugned order under Clause 5 of the Government Resolution of 16th October, 1985, we will have to set aside the decision of the State Government, dated 11th May, 1988, for want of jurisdiction. As stated earlier, the Apex Court while interfering with the decision of the earlier Division Bench had observed as follows:

...It will be open to the parties to raise all issues not only as to the question of the jurisdiction of the State Government to review the order of the Divisional Commissioner but also if necessary on the merits of the State Government's decision.

(underlining supplied)

This being the position, it is not necessary to go into the merits of the Government's decision since it is held to be lacking in the concerned jurisdiction. Accordingly, we refrain from going into merit of the State Government's decision.

21. For the reasons stated above, we allow this Petition and set aside the decision of the State Government dated 11th of May, 1988. Though rule is made

absolute there will be no order as to costs.