

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.3189 OF 2015

Marathwada Shikshan Prasarak Mandal,
A Public Trust, having its office at
Deogiri College, Aurangabad
Through its Secretary
Satish s/o Bhanudasrao Chavan

PETITIONER

VERSUS

- 1] The State of Maharashtra
Through its Secretary,
Higher & Technical Education Deptt.,
Mantralaya, Mumbai
(Copy to be served on the
Govt. Pleader, High Court of
Judicature of Bombay,
Bench at Aurangabad)
- 2] The Joint Director,
Higher & Technical Education,
Aurangabad Division,
Aurangabad
- 3] Dr. Babasaheb Ambedkar Marathwada
University, Aurangabad,
Through its Registrar
- 4] The Assistant Commissioner,
(B.C. Cell),
Office of the Divisional Commissioner,
Aurangabad

RESPONDENTS

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Mr. N.B.Khandare, Advocate for the Petitioner
Mr. A.V.Deshmukh, AGP for the Respondent / State
Respondent No.3 served.

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**CORAM: S.S.SHINDE &
A.M.BADAR, JJ.**

Reserved on : 28.09.2015
Pronounced on: 09.10.2015

JUDGMENT: [Per S.S.Shinde, J.]:

- 1] Heard.
- 2] Rule. Rule made returnable forthwith, and heard with the consent of the parties.
- 3] This Petition is filed with following prayers:
 - A) By issue of a writ of certiorari or any other appropriate writ, order or direction in the nature of writ of certiorari, call for record and proceedings of the decision of the B.C.Cell, Commissioner Office, Aurangabad and the Joint Director (respondent No.2) and quash and set aside the same holding that the post of Principal being isolated post, reservation does not apply.
 - B) By issuing a writ of mandamus or any other appropriate writ, order or direction in the nature of mandamus, hold and declare that the post of Principal being isolated post, reservation does not apply and the petitioner may be permitted to fill the post of Principal at Majalgaon College, Majalgaon accordingly by publishing the

advertisement to fill up the same from open category.

The background facts for filing the Writ Petition are as under:

4] It is the case of the petitioner that, the petitioner is a registered public trust and an educational institution and a leading prestigious educational institution in the region. The petitioner is running 23 colleges which receive grants from the Government, 2 Law Colleges, 2 Engineering Colleges, 2 Polytechnic and 1 B.Ed. college. Besides this, petitioner also is running various schools at various places in Marathwada region and each college is an independent unit and administered separately and independently.

5] It is further the case of the petitioner that, College at Majalgaon is run by the petitioner Institute having Arts, Commerce and Science Faculties. One Dr. H.D.Misal, working as Principal of the said College, resigned from the post on 23.09.2013. Dr. Misal joined his original post as Principal at Muktanand Mahavidyalaya, Gangapur on 24.09.2013. As a result of it, the post of Principal at Majalgaon College fallen vacant and, therefore, the

petitioner wrote a letter to the University on 14.10.2013 and sought permission for filling up the post of Principal and for permission to advertise the post. The Director, College and Universities Development Board, vide communication dated 18.11.2013, granted permission for advertising the post and it is further clarified that, the post of Principal being isolated post, be filled in, in the light of the Judgment of the Hon'ble Bombay High Court, Bench at Aurangabad. The petitioner has placed on record copy of the letter dated 14.10.2013 addressed by the Administrative Officer of the petitioner to the Director, College and University Board, and letter dated 18.11.2013 addressed by the the Director, College and University Development Board to the Administrative Officer of the petitioner, respectively.

6] It is further the case of the petitioner that, the Administrative Officer of the petitioner, vide communication dated 19.11.2013, informed the respondent No.2 Joint Director and sought permission for filling up the post of Principal at Majalgaon and also informed that, the University has granted permission to fill up the post of Principal from open category. Accordingly, the respondent No.2 was requested to issue No Objection Certificate for

advertising the post. In response to the request of the petitioner, the respondent No.2 informed that, the petitioner should get verified the roaster points from the Backward Class Cell (B.C.Cell), Commissioner Office, Aurangabad. Accordingly, the communication was made to the B.C.Cell, Commissioner Office, Aurangabad for verification of roaster and supply all information as sought by the Cell. Vide letter dated 17.01.2014, the permission was sought for appointment of the post of Principal as the post is vacant and is required to be filled in as per the orders of the High Court and the Hon'ble Supreme Court. As no decision was communicated, a reminder was also forwarded on 29.01.2014. In the meanwhile, vide letter dated 15.01.2014, the Director, College and University Development Board [for short hereinafter will be referred to as 'BCUD'] asked the petitioner to make an appointment of Principal up to 31.03.2014 and submit a report to the University, failing which the affiliation would be cancelled.

7] It is further case of the petitioner that, the roaster was verified by the B.C. Cell and accordingly, it was communicated vide letter dated 13.11.2014 that, the post of Principal would go to the Scheduled Caste Category

candidate, and the same should be filled in by appointing eligible candidate from the said category. In pursuance of the said communication, the Joint Director (respondent No. 2) also issued a communication / No Objection stating that, the petitioner should take appropriate steps for appointment of Principal as per directions of B.C.Cell.

8] It is further the case of the petitioner that, the petitioner again submitted a representation to the respondent No.2 on 04.02.2015, and requested to issue No Objection Certificate for filling up the post of Principal from open category. However, no response is received by the petitioner to the same. It is further the case of the petitioner that, as per the directions of the University, the post of Principal cannot be kept vacant and has to be filled in at the earliest, otherwise, the University may cancel the affiliation, as stated.

9] It is further the case of the petitioner that, the law is well settled that, the post of Principal is a solitary post under the cadre and is not amenable to reservation. The post of Principal in each of the Colleges run by an educational institution would be a single post in the cadre and, therefore, the reservation would not apply. The

respondent No.2 declared the permission to fill up the post of Principal from reserved category is totally contrary to law laid down by the High Court and Hon'ble Supreme Court.

10] It is further the case of the petitioner that, the judgments of the High Court and the Hon'ble Supreme Court were brought to the notice of the respondents, however, the respondents, ignoring the judgments and law laid down therein, issued directions to fill up the post and appoint the Principal from reserved category. The respondent No.2 ought to have given no objection in clear terms as sought by the petitioner to fill up the post and appoint the Principal from open category, the post of Principal being isolated post and no reservation would apply. The decision communicated by the respondent No.2 to act as per the directions of B.C.Cell is totally in contravention of the judgment of the High Court and the Hon'ble Supreme Court.

11] It is further the case of the petitioner that, the law stands today is that, the post of Principal is a cadre post and is an isolated post. Therefore, reservation does not apply to the post of Principal. The petitioner is entitled to fill up the post as per law declared by the Hon'ble Supreme

Court. Therefore, the decision of respondent No.2 and the decision of B.C.Cell is required to be quashed and set aside. Hence, the Petition is filed, challenging the decision of the respondent No.2 communicating that, the post of Principal in Majalgaon College, Majalgaon should be filled in by appointing a person belonging to reserved category, and further sought direction to the respondents to allow the petitioner to fill the post of Principal in Majalgaon College, Majalgaon from open category.

12] In response to the notices issued to the respondents, the respondent No.4 has filed affidavit-in-reply. The learned AGP submits that, the petitioner has submitted the roaster point to the office of the deponent for final scrutiny. After final scrutiny, the deponent has given roaster point to the petitioner on 14.11.2014. In the said roaster, out of 9 posts, 8 posts were filled in and one post was vacant. According to the reservation policy, the said vacant post of the Principal is reserved for SC candidate. It is submitted that, the petitioner educational society has 9 colleges having grant in aid. Out of 9 posts of Principal, 1 post of Principal is vacant and as per the reservation policy, the said post is reserved for SC category candidate.

Accordingly, the roaster points submitted by the petitioner Institution is verified and returned to the petitioner.

13] We have heard the learned counsel appearing for the petitioner, and the learned AGP appearing for the Respondent – State. Though the respondent No.3 is served, none appears for it. In the case of *Marathwada Sarvodaya Shikshan Prasarak Mandal Vs. The State of Maharashtra & others*, in Writ Petition No.7333/2013, decided on 25.03.2014, and in the case of the *Dr. Mohammad Jilanisha Alisaheb Vs. The State of Maharashtra & others* in Writ Petition No.7191/2012 decided on 30th January, 2013, the Bombay High Court Bench at Aurangabad, has ruled that, the post of Principal of a college must be treated as an isolated post and cannot be clubbed together with a post of Principal in another college merely because the colleges are run by the same trust or society.

14] Yet in another Judgment In the matter of “*Shri Sharda Bhavan Education Society V/s State of Maharashtra and Another*”¹, the Division Bench of Bombay High Court has observed in paragraphs No.10 to 13 of the judgment thus;

10. The learned counsel appearing for

¹ 2011 [6] Mh.L.J. 259

respondent No.2 University, has drawn our attention to the judgment of the Constitution Bench of the Supreme Court in the case of *post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others*, 1998 (2) Mh.L.J. (SC) 353 = AIR 1998 SC 1767. He submitted that there are some observations in this judgment which could lead to the inference that when there is plurality of posts in a cadre, reservations are necessary. He drew our attention to the following observations of the Supreme Court.

'35. In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permissible within the constitutional framework. The decisions of this Court to this effect over the decades have been consistent.

36. Hence, until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with device of rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster

in respect of a single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bound to the members of a large segment of the community who do not belong to any reserved class but on some other occasions the post will be available for open competition when in fact on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society'

11. In our opinion, there can be no doubt when there is plurality of posts in a cadre, the reservation policy of the State must be implemented. But in our opinion, it is difficult to accept that the single post cadre of Principal of a college should be clubbed together with the cadre of Principal in another college, merely because it is being run by the same institution. The petitioner-institution is running three colleges in the same Faculty, affiliated to the same University. However, no statutes have been framed under the Maharashtra Universities Act, requiring such reservation for the post of Principal of the college. Each college must be treated as a separate entity and it cannot be clubbed with another college for the purpose of administration. Otherwise, not only the post of Principal, but also the posts of teaching and non teaching staff would have to be clubbed while considering the reservation. Apart from this, there is no provision in the Maharashtra Universities Act for clubbing such posts, as provided under the Maharashtra Employees of Private

Schools (Conditions of Service) Regulation Act, (in short the MEPS Act) for clubbing of total number of posts in a cadre, including the cadre of Head Master and implementing the reservation policy. The Rules framed under the later Act stipulate that reservation must be to the extent of 24 per cent.

12. In the case of *New English High School Association, Nagpur Vs. Baldev s/o Fakira Ade*, 2006 (6) Mh.L.J. 882, the Full Bench of this Court at Nagpur, has held that the applicability of reservation policy would depend upon the number of posts in a cadre and the percentage of reservation. The reservation cannot be allowed to exceed the percentage prescribed in the Rules framed under the MEPS Act, as it would result into injustice to the candidates falling outside the reserved category.

13. As we have noted earlier, the Maharashtra Universities Act does not have a similar provision as is available under the M.E.P.S. Act. Therefore, in our opinion, the contention of the respondents, is unacceptable. Circulars and government resolutions cannot supersede the provisions of a statute. The post of Principal of a college must be treated as an isolated post and cannot be clubbed together with the post of Principal in another college, merely because the colleges are run by the same trust or society. The argument advanced on behalf of the State is fallacious. If an institution runs several colleges affiliated to several universities, can it be said that the colleges should be clubbed together for the purposes of appointing a Principal?

Furthermore, an institution may run a College of Arts, Science and Commerce, as well as three separate colleges for Arts and Sciences, would it mean, therefore, that all such colleges would have to be clubbed together for implementing the reservation policy? In our opinion, the answer is emphatically in the negative."

15] The issue raised in the petition is no more res integra in view of the Judgment cited at bar in case of *Vidya Prasarak Mandal Vs. University of Mumbai*². The Division Bench, while considering the identical issue, placing reliance on the Judgment of the Apex Court in the case of "*Indra Sawhney V/s Union of India*"³, has observed in paragraph No. 5 and 6 as below:

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 Vs. Union of India*" AIR 1993 SC 477 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

2 2008 [5] Mh.L.J. 47

3 AIR 1993 SC 477

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 organizations / 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 of 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 establishments engaged in production of defence equipments (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 1999, 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

reservations 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 20.08.2001 and the circular dated 15.03.1999 are struck down. Rule is made absolute accordingly. No order as to costs."

16] Yet in another unreported Judgment in the case of *Modern Education Society Vs. The University of Pune through Secretary & Ors. in Writ Petition No.444/2014*, decided on 6th January, 2015, the Division Bench of the Bombay High Court at Principal Seat held that, the similar issue raised in that Petition stands answered by the Judgment of the Hon'ble Supreme Court in the case of *Post Graduate Institute of Medical Education & Research Vs.*

Faculty Association ⁴, which is followed by the Bombay High Court in the order dated 30.11.2011 in Writ Petition No.749 of 1997. It is held that, unless there is a plurality of posts in a cadre, the question of reservation would not arise. It is further observed that, the post of Principal in each of the colleges run by an education institution is a solitary post in a cadre and is not amenable to reservation. These observations have been made relying upon the Judgment in the case of *Post Graduate Institute of Medical Education & Research Vs. Faculty Association* [cited *supra*]. In the present case also, the same issue is raised, therefore, we have no hesitation to allow the Petition since the aforementioned expositions of the Supreme Court and the High Court ruled that, the post of Principal in each of the Colleges run by an education institution is a solitary post in a cadre and is not amenable to reservation.

17] In that view of the matter, in the result the communication dated 16.02.2015 issued by the Joint Director, Higher Education, Aurangabad stands quashed and set aside, and the Writ Petition is allowed in terms of prayer clause 'B'.

4 AIR 1998 SC 1767

18] Rule made absolute in above terms, and accordingly same stands disposed of.

Sd/-
[A.M.BADAR]
JUDGE

Sd/-
[S.S.SHINDE]
JUDGE

DDC