

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

Writ Petition No.6505 of 2014

Monali Laxman Nemade.

.. Petitioner.

Versus

The State of Maharashtra
And Others.

.. Respondents.

Smt. Surekha Mahajan, Advocate, for petitioner.

Smt. R.K. Ladda, Assistant Government Pleader, for
respondent Nos.1 to 3.

Shri. S.B. Talekar, Advocate, for respondent Nos.4 and 5.

**CORAM: T.V. NALAWADE &
INDIRA K. JAIN, JJ.**

DATE : 5th MAY 2015.

ORDER:

1) The petition is filed by a Shikshan Sevak to challenge the decision dated 28-6-2014 taken by her employer, a school. It is informed to her that she was appointed on year to year basis on a post reserved for Scheduled Tribe (for short, "S.T.") category and the school had started process to fill the post by making appointment

of S.T. category candidate. Reliefs of direction to the Education Department of the Government to the effect that it should give approval to the appointment of the petitioner on permanent basis and of direction to the school to give her appointment on permanent post of Assistant Teacher are claimed. Both the sides are heard.

2) Respondent No.4 is registered society and it runs a school, respondent No.5. This school gets 100% grant-in-aid from the State Government. This school has 32 sanctioned posts of teachers. 30 posts were filled and two posts of teachers were lying vacant. There was backlog of one post of S.T. and one post of N.T. (D), reserved categories. As there were two vacancies for two different subjects, on any of the two posts a candidate of S.T. or N.T. (D) category could have been appointed.

3) In the local news paper "Deshdoot" dated 19-5-2011 the school published first advertisement and invited applications from candidates of S.T. / N.T. (D) categories for filling two posts of Shikshan Sevak. As the present dispute is in respect of post of full time Shikshan Sevak

for Semi English Medium, in this matter only facts and circumstances in respect of that post are being discussed. The expected qualification for this post was B.Sc. (B. Group) and B.Ed. In the advertisement, it was made clear that candidates were to come with their applications and relevant record directly for interview on 2-6-2011. The second advertisement was published on 3-6-2011 and in this advertisement the candidates were called for interview on 15-6-2011. The third advertisement was published on 16-6-2011 and the candidates were called for interview on 29-6-2011. In all the three advertisements there was similar matter and for the same post the candidates were called for interview.

4) It is the case of the petitioner that the school did not get candidate from reserved category, S.T. category, for the present post and so the school applied to the authority, Education Department of the State Government, for permission to fill the post from candidate of open category. It is contended that the school had given undertaking to fill up the backlog in future. This application was given on 30-6-2011. It is contended that

the Education Officer gave such permission by letter dated 11-7-2011, which was dispatched on 21-7-2011. It is contended that on 21-7-2011 itself another advertisement was published in the same news paper and candidates from open category were invited for interview.

5) It is the case of the petitioner that proper procedure was followed and she came to be appointed on the post of Shikshan Sevak, for the aforesaid post. It is her case that, her appointment was for three years as per the scheme prepared by the State Government and it was on probation. It is her case that after completion of three years probation period satisfactorily, she was entitled to get appointment on permanent post of Assistant Teacher and she was entitled to get the regular salary. It is her case that she has completed the probation period satisfactorily and the school had submitted proposal for giving approval to her appointment on permanent post. It is contended that the Education Officer refused the permission by giving ground that the post was of reserved category. It is her case that she was appointed as against clear vacancy, she has completed satisfactorily the

probation period and so she is entitled to get confirmation on the post of Assistant Teacher.

6) The petitioner has contended that she is from Other Backward Class (OBC), another reserved category. However, in the petition she has contended that she was treated as a candidate from open category. Learned counsel for the petitioner during arguments placed reliance on some reported cases and she submitted that the circumstance that the petitioner is from OBC category needs to be considered and in view of this circumstance, there was no necessity for getting permission of the Government for making her appointment on the post of Shikshan Sevak.

7) In the reply affidavit, office of the Education Department has admitted that initially permission was given to the post from open category candidate. It is contended that in law such permission was not possible from the Education Officer as the post was reserved for S.T. category. It is contended that in Writ Petition No.9683 of 2013 which was filed in this Court, the rejection of

approval was challenged by the petitioner. It is contended that in view of the directions given by this Court in the writ petition, for respective three years approval was granted. It is also contended that it is upto the management of the school to regularize the services.

8) Respondent No.5 - school has contested the proceeding. It has taken objection also to the contents of the affidavit filed by the office of the Education Officer. It is contended that the office of the Education Officer is misleading the Court. It is contended that the proposal of the school was rejected on 12-8-2013 by the Education Officer on the ground that the post was reserved for S.T. category candidate and the appointment of the petitioner was given from open category against this reserved post. It is contended by the school that in Writ Petition No.9683/2013 this Court had given direction to the Education Officer to consider the proposal for approval for one academic year only.

9) It is the case of the school that as per policy of the State Government which can be seen in the

Maharashtra Employees of Private Schools (Conditions of Services) Regulation Act, 1977 (hereinafter referred to as "the Act"), the Maharashtra Employees of Private Schools (Conditions of Services) Rules, 1981, framed thereunder (hereinafter referred to as "the Rules") and also in Government Resolutions dated 5-9-1995 and 5-11-2009 the appointment of candidate from open category on such post can only be on year to year basis and there are restrictions given on interchangeability. It is contended that the school can give such appointment but not in respect of the post like the present one as there is specific policy of the State Government.

10) It is the case of the school that the petitioner is close relative of previous Chairman of the School Committee and also the previous Chairman of the Trust running the school. It is contended that procedure was not followed and the appointment given to the petitioner is illegal. It is also contended that process was started for recruitment from S.T. category of the present post and one candidate is already selected. It is contended that the entire record of the school shows that appointment was

given to the petitioner as against the reserved post. Some mention is made about giving appointment to one more candidate afterwards and it is contended that said appointment was given on compassionate ground and that post cannot be considered for the present purpose.

11) The record in respect of appointment of the present petitioner shows that advertisement dated 21-7-2011 was published in aforesaid news paper and the post was to be filled from open category. It was the post of Shikshan Sevak. Required qualification was mentioned as B.Sc., B.Ed. When in the past the required qualification was mentioned as B.Sc. (B Group) and B.Ed. It was mentioned that candidate from S.T. was to be given priority. Horizontal reservation was to be followed. Candidates were expected to appear for interview in the school on 1-8-2011.

12) Copy of letter of appointment produced on the record shows that on 1-8-2011 itself the appointment letter was given to the petitioner and that was for the post of Shikshan Sevak. This appointment was for period

from 2-8-2011 to 1-8-2014. In the letter it was mentioned that after satisfactory completion of three years service on the post of Shikshan Sevak the pay of the post of the teacher was to be given to the petitioner. The honorarium of Rs.4000/- per month for this period was mentioned and the appointment was subject to the approval of the Education Officer.

13) Copy of letter of Education Officer dated 12-8-2013 shows that it was sent to the school in response to the letter of the school dated 8-12-2011. In this letter the Education Officer informed to the school that permission given in the past to fill the post from the candidates of open category was not in accordance with the rules as the office had no power to grant such permission. It was informed to the school that as the appointment was made from open category but the post was reserved for N.T. category, and so the approval was not possible. It can be said that the category of N.T. was mentioned by mistake as it is S.T. category.

14) In Writ Petition No.9683/2013 filed by the present petitioner this Court had directed the Education Officer to consider the claim of the petitioner for granting approval under rule 9(9) of the Rules for one academic year. The directions and observations are in paragraphs 2 and 3 and they are as under :-

"2. It is not disputed that the appointment of the petitioner is as against the seat earmarked for reserved category. Although no permanent approval can be accorded to the appointment of the petitioner, her claim can be considered for according approval on year to year basis in accordance with Rule 9(9) of the Maharashtra Employees of Private Schools (Conditions of Services) Rules. Although the proposal is tendered by the institution for according approval to the appointment of petitioner for three years, the Education Officer may consider the claim for according approval under Rule 9(9) of the Maharashtra Employees of Private Schools (Conditions of Services) Rules for one academic year if at all other requirements are satisfied.

3. The Education Officer (Secondary), Zilla Parishad, Jalgaon shall reconsider the case in the light of observations as above and pass appropriate orders within eight weeks from today. In the meanwhile, no coercive action be taken against the petitioner on the ground of refusal by Education Officer to accord approval to appointment of petitioner. Writ Petition stands disposed of accordingly."

15) In the aforesaid petition, after considering the rival contentions and the record, this Court held that the

petitioner was appointed from open category and it was against the post reserved for S.T. category and so permanent approval cannot be considered. In view of this order dated 4-12-2013 of this Court the Education Officer issued approval which can be found in letter dated 11-12-2013. This letter was dispatched on 24-1-2014 by the office. This letter shows that for the period from 2-8-2011 to 1-8-2014 for respective years approval was given.

16) In view of the observations made and the directions given by this Court in Writ petition No.9683 of 2013 it is not open to the petitioner to claim in the present proceeding some thing more than what was allowed to her in the previous proceeding. In view of the record and the position of law the case of the petitioner that regular appointment was given to her from the open category is not acceptable.

17) The policy of the State Government with regard to the implementation of reservation can be found in the provisions of the Act, the Rules and also in various Government Resolutions. The initial resolution dated 5-12-

1994 of the General Administration Department is with reference to Government Resolution No.BCC 1091/2551 (C)/16-B dated 27-3-1991. This Government Resolution shows that the Education Officer had no power to de-reserve the post and grant permission to fill the vacant post from open category candidate.

18) There is allegation of the present management of the school that the petitioner is close relative of the previous management and the appointment given to her was illegal as proper procedure was not followed. The record already mentioned shows that the procedure as laid down in the Act and the Rules was not followed. The record shows that attempt was made to give go-bye to the reservation policy and positive attempt was also made to see that only the petitioner gets appointment to the post.

19) The procedure can be found in section 5 of the Act and Rule 9 of the Rules. Relevant provision of rule 9(7), (8) and (9) is as under :-

"9. Appointment of staff -

(7) The Management shall reserve 52 per cent of the total number of posts of the teaching and non-teaching staff for the persons belonging to the Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes as follows, namely :-

(a)	Scheduled Castes	13 per cent
(b)	Scheduled Tribes	7 per cent.
(c)	De-notified Tribes (A)	3 per cent.
(d)	Nomadic Tribes (B)	2.5 per cent.
(e)	Nomadic Tribes (C)	3 per cent.
(f)	Nomadic Tribes (D)	2 per cent.
(g)	Special Backward Category.	2 per cent.
(h)	Other Backward Classes.	19 per cent.
	Total -	52 per cent.

(8) For the purpose of filling up the vacancies reserved under sub-rule (7) the Management shall advertise the vacancies in at least one newspaper having wide circulation in the region and also notify the vacancies to the Employment Exchange of the District and to the District Social Welfare Officer and to the association or organisations of persons belonging to Backward Classes, by whatever names such associations or organizations are called, and which are recognised by Government for the purposes of this sub-rule requisitioning the names of qualified personnel, if any, registered with them. If it is not possible to fill in the reserved post from amongst candidates, if any, who have applied in response to the advertisement whose names are recommended by the Employment Exchange or the District Social Welfare Officer or such associations or organisations as aforesaid or if no such names are recommended by the Employment Exchange or the District Social Welfare Officer or such associations or organisations as aforesaid within a period of one month the Management may proceed to fill up the

reserved post in accordance with the provisions of sub-rule (9).

(9) (a) In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in sub-rule (7) and if no person from any of the categories is available, the post may be filled in temporarily on an year to year basis by a candidate not belonging to the Backward Classes.

(b) In the case of a non-teaching post, if a person from the particular category of Backward Classes is not available, the Management shall make efforts with regular intervals to fill up the post within the period of five years and the post shall not be filled up during that period by appointing any other person who does not belong to the respective category of Backward Class.

20) Rule 9(8) has two parts. In the first part the sources from where the candidates are to be called and collected for consideration are given. The rule shows that the candidates are to be invited by giving advertisement in news paper having wide circulation in the region. Candidates are to be called from the Employment Exchange and from the District Social Welfare Officer, from recognized organizations and associations of reserved classes by informing them the vacancies and by giving requisition to them to collect the list of candidates.

Before filing vacancy as per section 5, it needs to be ascertained as to whether there are surplus teachers.

21) Rule 9(9) shows that if it is not possible to fill reserved post from amongst the aforesaid candidates or if no candidates from the reserved category comes forward and no list is received from the aforesaid organizations and associations within 30 days, then the management can proceed to fill the reserved post in accordance with rule 9(9). This provision shows that period of one month is given and care is to be taken by the management to ascertain as to whether candidates from reserved categories are available in the sources given above. This procedure is mandatory in nature as the procedure is given to see that honest attempt is made to implement the reservation policy.

22) In the present matter, in the first advertisement, time of 15 days was given to the candidates to come to school and face the interview. In all the three advertisements published for inviting candidates from reserved categories time of hardly 15 days was given.

The first advertisement was given on 19-5-2011 but at that time no correspondence was made with the organizations and associations and also with the offices mentioned in rule 9(8). There is one letter of Project Officer of NT Development dated 21-3-2011 and it shows that it was sent by the said office in response to the letter of the school dated 30-6-2011. Thus first time on 30-6-2011 the school had sent a letter to one office mentioned in rule 9(8). There is copy of letter dated 4-7-2011 sent by the Employment Exchange to the school and it also shows that it was in response to the letter dated 30-6-2011 of the school. However, this letter of the Employment Exchange shows that the school had requested to give list of candidates from open category and so list of 16 candidates of open category was supplied by the Employment Exchange. The second and third advertisements were published for reserved category candidates on 3-6-2011 and 16-6-2011. The candidates from reserved categories were expected to appear for interview lastly on 29-6-2011. Thus the school had closed the matter of recruitment from reserved category on 29-6-2011. There is only one letter dated 30-6-2011 sent to the

Officer of NT Development and aforesaid circumstances show that there was no intention to fill the candidates from reserved category for which the post was reserved. This Court has no hesitation to hold that the procedure given in Rule 9(9) was not followed. The record is sufficient to infer that positive attempt was made to see that only the petitioner gets appointment and by-pass was given to the procedure laid down for implementing the reservation policy. Thus, the appointment given to the petitioner was not given after following proper procedure and it was illegal.

23) In rule 9(9) also there are two parts. The first part shows that if candidate from the reserved category is not available, the candidate of other reserved category in the order specified in Rule 9 (7) can be appointed. For using the first part, advertisement needs to be published in accordance with this part of the sub rule. The rival cases and the record show that advertisement was not in accordance with the first part of this sub rule. Advertisement was for open category candidates and it is also case of the petitioner that she was appointed as open

category candidate. The second part of rule 9(9) is in respect of filling of reserved post from open category candidates. It shows that the post can be filled by appointing open category candidate if no candidate from reserved category is available but appointment to the candidate from open category will be of temporary nature and it will be on year to year basis. For giving such temporary appointment also the school needs to follow the procedure laid down in rule 9(8) first and further it is expected to take permission of the Government as mentioned in Government Resolution of the year 1994. Thus, for these reasons also the appointment of the petitioner cannot be called as legal appointment.

24) The learned counsel for the petitioner submitted that in view of Government Resolution No.PRE 2010/CR-441/PE-1 of the School Education and Sports Department dated 14-10-2010 the petitioner is entitled to get the permanent post of Assistant Teacher as she has worked for 3 years as Shikshan Sevak. This Court has no hesitation to observe that this Government Resolution can be used only when the appointment itself is legal, made

after following aforesaid procedure. As the appointment cannot be treated as legal appointment, this Government Resolution is of no use to the petitioner.

25) Learned counsel for the petitioner placed reliance on two reported cases of the Supreme Court like (1) **1994 (1) Mh.L.J. 218 (SC) (Shakuntla v. Industrial Weaving Coop. Society)**; and, (2) **2006 (1) Mh.L.J. 713 (SC) (Kankavali Shikshan Sasntha v. M.R. Gavali)**. In both the cases the Hon'ble Apex Court has considered and discussed the provision of Rule 9 of the Rules. It is laid down that if the post is reserved for any reserved castes mentioned in rule 9(8) but candidate of that caste is not available and then the candidate of another reserved caste mentioned in rule 9(7) is appointed, such candidate is entitled for regular appointment by virtue of Rule 9(9) (a) of the Rules. It is made clear by the Apex Court that if the candidate not belonging to any of the categories from the reserved castes mention in rule 9(7) is appointed, such appointment has to be on year to year basis. In the present case advertisement was for candidate of open category and so the appointment needs to be treated in

accordance with the advertisement. Thus the petitioner falls in the second part of rule 9(9) (a). The facts of the first case of the Supreme Court show that post was filled prior to 1997 by appointing candidate of other caste mentioned in rule 9 (7). The first case (cited supra) was referred to and relied on in the second case (cited supra). Appointment was made in the second case on 18-6-1994.

26) This Court has already quoted the Government Resolution of 1994 and the relevant portion of Rule 9 of the Rules. It is already observed that the procedure laid down in rule 9(8) is mandatory in nature and the precautionary measures given by the Government in the Government Resolution of 1994 also need to be taken. This Government Resolution came in to force on 1-1-1995. Further, the order of preference given in Rule 9 (7) of the Rules also needs to be followed. Thus, the facts of the present case are altogether different from the facts of two cases of the Supreme Court (cited supra).

27) One case of the Division Bench of this Court reported as **2009 (4) Mh.L.J. 788 (Shubhada v. State of**

Maharashtra) was cited by the learned counsel for the petitioner. The facts show that there were posts of reserved category, of category of candidates appointed, available as per the roster given by the State Government though the post was advertised for different reserved caste as per rule 9(7) of the Rules. In view of the facts of that case this Court held that the provisions of rule 9(9) (a) was applicable. This Court has already observed that in any case the order of preference given in rule 9(7) of the Rules needs to be followed when the candidate from reserved caste for which the advertisement is given is not available.

28) Learned counsel for the petitioner has placed reliance on one more case reported as **2009 (3) Mh.L.J. 605 (Bhairavnath Shikshan Mandal v. Raju Thambe)**. This case is on the law laid by the Apex Court in the case cited supra. Another case reported as **2009 (6) Mh.L.J. 146 (Sarode Devram v. Sarawati Vidya Mandir)** of this Court is also on the law laid down by the Apex Court in the case cited supra.

29) Learned counsel for the petitioner placed reliance on observations made by this Court (learned Single Judge) in the case reported as **2007 (6) Mh.L.J. 563 (Hindi Vidya Bhavan, Mumbai v. Presiding Officer, School Tribunal)**. The facts of this reported case were different and the point involved was also different. With regard to the nature of dispute the learned Single Judge observed that approval of the Education Officer is necessary for the purpose of sanction of grants. The point of filling the posts of Class IV employee like Peon, filled without following procedure was under consideration and also the point of jurisdiction of the School Tribunal in the said case was involved. The point involved was altogether different. This Court is avoiding to discuss the ratio laid down by the Hon'ble Single Judge in the reported case. Here only it needs to be made clear that the scheme of Shikshan Sevak (now described as Probationary Assistant Teacher) is applicable only to aided schools and so the procedure discussed above needs to be strictly followed.

30) Learned counsel for the respondent, school, placed reliance on the observation made by the Apex

Court in the case reported as **2006 BCR 402 (SC) (Aasha Patil v. Sadhana Kamble)**. The Apex Court has laid down that if a post was reserved for backward class candidate mentioned in rule 9(7) and as against that post, candidate from open category is appointed, the appointment of such candidate can be only on year to year basis and the authority does not have power to appoint such candidate permanently. The Apex Court has further laid down that circumstance that such candidate was working for number of years is not relevant for deciding his entitlement to get permanent post. As the petitioner has come with the case that she is appointed as a candidate from open category, these observations need to be used against her. The aforesaid discussion shows that the previous management wanted to give appointment to the petitioner and it manipulated the things and gave go-bye to the procedure established by law. The new management wants to appoint candidate from S.T. reserved category as the post is reserved for such category and the submissions made show that a candidate from this category is already selected. As it is a matter of implementation of the reservation policy and giving relief to the petitioner will

amount to defeating the reservation policy, this Court holds that no relief can be granted to the petitioner.

31) In the result, the petition stands dismissed. Interim relief stands vacated.

(INDIRA K. JAIN, J.)

(T.V. NALAWADE, J.)

32) Learned counsel for the respondent institution is present. He submits that learned counsel for the petitioner had a talk with him after the declaration of decision in the matter and she has requested to this Court for continuation of interim relief for four weeks, as here was interim relief till today.

33) Interim relief is continued for four more weeks.

Sd/-
(INDIRA K. JAIN, J.)

Sd/-
(T.V. NALAWADE, J.)

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