

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY****CIVIL APPELLATE JURISDICTION****WRIT PETITION NO.4427 OF 2001**

Abhinav Jnyan Mandir Society ....Petitioner  
V/S  
Shri.Rajaram Sukhram Gaikwad & Ors. ....Respondent

**WITH**  
**WRIT PETITION NO. 1734 OF 2002**

Prabhakar Bhausingh Chavan ....Petitioner  
V/S  
Rajaram Sukhram Gaikwad & Ors. ....Respondent

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Shri.V.K.Bodhare i/by A. M. Joshi For Petitioner in WP No.4427/01.  
Ms.Prachi Khandage with Shri Nitesh Bhutekar i/by M/s.M.P.Vashi, for  
Petitioner in WP No.1734/02.  
Shri.N.V..Bandiwadekar for R.No.1 in WP No.4427/01 & WP No.1734/02.  
Shri S.D.Dighe, for R.No.2 in WP NO.4427/01.  
Shri A.R.Metkari, AGP for R.No.3/State in WP No.4427/2001.

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**CORAM : A.A. SAYED, J.**

**DATED : 16 DECEMBER 2016**

**ORAL JUDGMENT:**

Both these Petitions under Article 227 of the Constitution impugn the judgment and order dated 26 February 2001 passed by the School Tribunal, Pune, in an Appeal filed by the Respondent No.1- Rajaram Sukhram Gaikwad The operative part of the impugned judgment reads as follows:

“ORDER

1. The Appeal is allowed.

The impugned action of the Respondent No.1 thereby promoting the Respondent No.2 to the post of Headmaster w.e.f. 01-04-1995 is hereby set aside. The Respondent No.1 is hereby directed to promote the Appellant to the post of the Headmaster w.e.f. 01-04-1995 with difference in emoluments.

2. No order as to costs.

Respondents to comply with the above directions within a period of two months from the receipt of this order.

It is hereby recommended to the State Government that the backwages directed to be paid to the Appellant may be deducted from the grant due and payable to the Management and be paid to the employee directly.”

2. The Appeal was filed by Respondent No.1-Rajaram Sukhram Gaikwad (hereinafter referred to as Gaikwad) before the School Tribunal under section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act 1977 (hereinafter referred to as 'MEPS Act') challenging the promotion of Prabhakar Bhausingh Chavan (hereinafter referred to as Chavan) as Head Master by superseding him.

Aggrieved by the order of the School Tribunal, the Management-Abhinav Jnyan Mandir as well as Chavan have filed the above Petitions. It may be noted that during the pendency of the Appeal, Gaikwad was promoted as Head master w.e.f. 01-09-1998. Prior thereto, Gaikwad was appointed as Asst.Head Master w.e.f. 16-03-1998. Therefore, the issue in the Appeal was essentially confined to entitlement of difference of emoluments to Gaikwad as Head Master from 01-04-1995 to 01-09-1998.

3 Gaikwad was appointed as an Assistant Teacher on 13 June 1988 in the school run by the Management, which runs four secondary schools at different places. Gaikwad belongs to the Scheduled Tribe (ST) category. Chavan is also B.A., B.P.Ed. and was also appointed as an Assistant Teacher on the same day i.e. 13 June 1988. He belongs to Nomadic Tribe (NT). Chavan being older, his name is shown higher than Gaikwad in the combined seniority list of their four schools. The Respondent No.3 in the Appeal was the Education Officer (Secondary). One Mr.S.V.Karmarkar was serving in the Abhinav Jnyan Mandir School as a Head-Master retired from service on 31 March 1995. The Management transferred one Mr.Shahasane to Abhinav Jnyan Mandir from Goulwadi, Taluka: Karjat. Therefore, one post of Headmaster in the School at Goulwadi fell vacant w.e.f. 31-03-1995. The case of Gaikwad in the Appeal was as follows:

As per the roster maintained by the Respondent-Management, the vacancy of Headmaster was required to be filled by ST category and therefore he should have been appointed to the post of Headmaster. However, the Respondent-Management had wrongly promoted Chavan as the Headmaster, who belongs to NT category. The action on the part of the Management in superseding his claim over the post of Headmaster was arbitrary and malafide. The model roster as per the reservation policy was binding upon the Management.

4. The Management had filed a Reply before the School Tribunal, wherein their case was as under:

In the cadre of Headmaster the backlog was as follows:

Scheduled Tribes 1

D-Notified Tribes 1

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2

The combined seniority list was as follows:-

| Category   | Name             | Date of appointment | General Category |
|------------|------------------|---------------------|------------------|
| a) D.N.T.  | Smt.P.K.Kiswe    | 14/06/1982          | 26               |
| b)D.T.N.T. | Shri P.B.Chavan  | 13/06/1988          | 47               |
| c) S.T.    | Shri R.S.Gaikwad | 13/06/1988          | 48               |

Mrs.P.K.Kiswe belongs to DTNT category and was Dhangar by caste. However members of that caste were not entitled for the benefit of promotion and therefore the next senior person i.e. Chavan who belonged to DTNT category was promoted to the post of Headmaster in view of the Government Resolution (GR) dated 25-08-1981 and fifty point roster. The Education Officer had also approved the promotion of Chavan. Therefore, Gaikwad was not entitled to claim for promotion.

5 Chavan had also filed his Reply opposing the Appeal. His case was as follows:

As per the seniority list he was at serial No.47 and Gaikwad was at serial No.48. While making promotions as per the roster point inter-se seniority of the eligible candidates are required to be considered. Therefore, the Management has rightly promoted him in preference to Gaikwad, as Gaikwad was junior to him and therefore there was no supersession as alleged by Gaikwad.

6. The Education Officer also filed his Reply before the School Tribunal. His case in the Affidavit-in-Reply was as follows:

At the relevant time as per the fifty point roster there was a backlog of one post of S.T. Category and one post of DTNT category. To fill in the

post, the Management had considered the combined list and the Management promoted Chavan to the post in question on the basis of seniority over Gaikwad and as there was backlog of DTNT category. As the backlog vacancy was filled in on the basis of inter-se seniority, the appointment of Chavan was approved by him.

7        Learned Counsel for the Petitioner-Management and the learned Counsel for Petitioner-Chavan, submitted that the Government Resolution dated 25 August 1981 would apply in the present case which provides for inter-se seniority irrespective of the roster points. The said Government Resolution which clarified the Government Resolution dated 17 September 1980, was never challenged by Gaikwad and therefore the same was binding. The School Tribunal had wrongly interpreted sub-rule (10) of Rule 9 of the MEPS Rules. The Government Resolution dated 25 August 1981 is not inconsistent with the provisions of sub-rule (10) of Rule 9 of the MEPS Rules. The Education Officer has approved the promotion of Chavan.

8        The learned Counsel have invited my attention to the relevant portion of G.R. dated 25 August 1981 and in particular clauses (4), (5) and (13) in the table which read as under:

|    |                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 4. | Since the roster is not for determining seniority or for determining order of promotion whether a candidate belonging to Nomadic Tribe category and senior to Schedule Caste or Schedule Tribe candidate should be promoted earlier. | Once the select list is prepared, the persons included in the select list take their places according to inter-se seniority of all persons brought on the select list irrespective of the roster points according to which the Backward Class persons have come up in the list. If the vacancies are accurately calculated, the candidate selected for promotion from open category and those selected against reserved roster points should be put together in an amalgamated list based on their inter-se seniority and promotions should be made in that order only. Please also see clarification at Sr.No.13 below |
| 5. | Whether the promotion should be made according to the seniority in the combined seniority list i.e. whether a candidate belonging to Scheduled Tribes or Nomadic                                                                     | Clarification on point No.4 above covers this point.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |

|     |                                                                                      |                                                                                                                                                                                                                                                                                                                                                 |
|-----|--------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|     | Tribe category if senior should be promoted earlier than a Schedule Caste candidate. |                                                                                                                                                                                                                                                                                                                                                 |
| 13. | It is presumed that select list identify is to be merged into the general list.      | Clarification given against point Nos.1 to 4 covers this point to be more specific the four parts of select list i.e. open category persons, scheduled castes, scheduled tribes and Nomadic Tribes and Denotified Tribes to be amalgamated together on the basis of interse seniority of the persons in four lists in one combined select list. |

It is submitted that the School Tribunal has erred in the construing the provisions of Rule 9 and not applying the Government Resolution dated 25 August 1981 and the impugned order is therefore required to be set aside.

8. Learned Counsel for Respondent-Gaikwad on the other hand invited my attention to Rule 9 of the MEPS Rules (as it then existed), which deals with appointment of staff. He pointed out that sub-rule (10) of Rule 9 which provides for reservation in promotion of posts of Head and Assistant Head Master, which is relevant. It reads as under:

10(a) The Management shall reserve 24 percent of the total number of posts (or vacancies) of Heads and Assistant Heads for the members of Scheduled Castes, Scheduled Castes converts to Buddhism, Scheduled Tribes, Denotified Tribes and Nomadic Tribes as follows, namely :

- |                                                                            |          |
|----------------------------------------------------------------------------|----------|
| (i) Scheduled Castes and Scheduled Castes converts to Buddhism -           | .... 13% |
| (ii) Scheduled Tribes including those living outside the specified areas - | .... 7%  |
| (iii) Denotified Tribes and Nomadic Tribes                                 | .... 4%  |

(b) In case it is not possible to fill in the post of a Head or Assistant Head for which a vacancy is reserved for a person belonging to the Castes and Tribes specified in Clause (a), the post may be filled in by promoting a candidate from the other remaining categories in the order specified in Clause (a), so however that the percentage of filling up such vacancies does not exceed the limit laid down for each such category. If candidates belonging to any of these categories are not available, then the vacancy or vacancies

(i) of the Head may be filled in by promoting any other teacher on the basis of seniority-cum-merit after obtaining previous approval of the Education Officer;

(ii) of the Assistant Head shall be kept unfilled for a period of three years unless such vacancy or vacancies could be filled in by promotion of any teachers belonging to such Castes or Tribes becoming available during that period.

9. It is submitted by the learned Counsel that the School Tribunal has rightly appreciated sub-rule (10) of Rule 9 and though Chavan was shown as senior and his name is reflected at serial No.47 in the seniority list, the School Tribunal has rightly held that preference was required to be given to Gaikwad, whose name is appearing at serial No.48 in the seniority list. The said preference is required to be given in terms of the order of preference contemplated in sub-rule (10) of Rule 9 as Gaikwad belongs to ST category, whereas Chavan belongs to DTNT category. Learned Counsel submitted that once the statute prescribes the mode of promotion amongst backward class candidates, there was no question of following the Government Resolution dated 25 August 1981 as MEPS Rules would override the Government Resolution. Learned Counsel for Gaikwad in support of his submissions has relied upon the following judgments:

(i) R.K.Sabharwal and ors. vs. State of Punjab and ors., (1995) 2 SCC 745, of the Constitution Bench of the Supreme Court;

(ii) Lakhwinder Kaur Gurai Vs. Garison Children Education Society, 2006(5) Mh.L.J. 332, of learned single judge of this Court;

(iii) Pragnya Vasant Acharya Vs. The State of Maharashtra and Ors., (Writ Petition No.767 of 2007) of single Judge of this Court.

10. I have considered the rival contentions and perused the material on record as well as the judgments cited across the bar.

11. The School Tribunal in the impugned order in paragraph Nos. 10 to 14 has observed as follows:

10 The Respondent No. 1 have produced on record a copy of the roster at Exh. 20. The roster indicates, that, as on 31/12/1994 there was backlog of one S.T. vacancy being roster point No. 2 and one D.T.N.T. vacancy being roster point No. 3. The roster then indicates, that, the Respondent No. 2 who belonged to N.T. Category came to be promoted to the post of Headmaster w.e.f. 01/04/1995 by using roster point No. 3 meant for D.T.N.T. The roster then indicates, that there was backlog of one vacancy of S.T. category being roster No. 2. Then its appears that while making promotion to the post of the Headmaster the Respondent No. 1 did not use roster point No. 2 and used roster point no. 3 for giving promotion to the Respondent No. 2.

11. Rule 9 of the Maharashtra Employees of Private Schools (Conditions of service) Regulation Rules, 1981 (in short the Rules) provides for appointment of staff in private schools. Sub Rule (1) of the rule makes provisions for reservation to the extent of 24 percent in the posts for vacancies of Head and Assistant Heads for the particular of backward categories. For the sake of convenience I reproduce Sub Rule (1), which reads as follows:

Rule 9(10(a): The Management shall reserve 24 percent of the total number of posts (or vacancies) of Heads and Assistant Head for the members of Scheduled Caste, Scheduled Castes converts to Buddhism, Scheduled Tribes, Denotified Tribes and Nomadic Tribes as follows:

- (i) Scheduled Castes and Scheduled Castes converts to Buddhism – 13 percent.
- (ii) Scheduled Tribes including those living outside the specified areas – 7 percent.
- (iii) Denotified Tribes and Nomadic Tribes- 4 percent.

(b) In case it is not possible to fill in the post of head or Assistant Head for which a vacancy is reserved for a person belonging to the castes and Tribes specified in Clause (a) the post may be filled in by promoting a candidate from the other remaining categories in the order specified in clause (a), so however, that the percentage filling up such vacancies does not exceed the limit laid down for each such category. If candidates belonging to any of these categories are not available then the vacancy or vacancies-

(i) of the Head may be filled in by promoting any other teacher on the basis of seniority-cum-merit after obtaining previous approval of the Education Officer.

(ii) of the Assistant Head shall be kept unfilled for a period three years unless such vacancies could be filled in by promotion of any teachers belonging to such caste or Tribes become available during the period.

Clause (a) of Sub-Rule (10) indicates, that, the out of 24 percent posts in the cadres of Heads and Assistant Heads are reserved for

S.C. and S.C. converts to Buddhism, 7 percent are reserved for S.T. including those living outside specified areas and 4 percent of the posts are reserved for Denotified Tribes and Nomadic Tribes. Clause (b) of the Sub-Rule (10) indicates, that in case a person belonging to a particular Caste or Tribe as specified clause (a) is not available then the post is required to be filled by promoting a candidate from the other remaining categories in the order specified in clause (a). Thus, it is very clear that clause (a) of Sub Rule (10) gives an order of preference according to which promotion are to be made in the reserved posts. If the order of preference is taken into account it is very clear that whenever vacancy is available for reserved categories as per Rule the same is to be filled in by promoting a candidate belonging to SC in preference over the candidates belonging to S.T. D.T.N.T. and N.T. Then in case any candidate belonging to S.C. is not available then a person belonging to S.T. is required to be promoted in preference to the candidate belonging to D.T.N.T. category. That means no promotion can be given to a candidate belonging to S.T. if a candidate belonging to S.C. is available. It is true that while giving such preference which given, percentage of reservation of a particular cadre is not to be exceeded. Thus, it will be seen, that clause (a) of Sub Rule (10) gives an order of preference according to which posts for reserved categories are to be filled in while making promotions in the cadre of Heads and Assistant Heads. It will be seen, that, it is nowhere stated either in clause (a) or (b) that while making such promotions the posts belonging to reserved categories are to be taken in to account. Clause (b) makes it further clear, that, inter-se-seniority is to be taken into

account only when candidates belonging to any of the reserved categories are not available. Thus it means when candidates belonging to any reserved categories are not available then promotions are to be made from open category candidates on the basis of the inter-se seniority. It appears, that, such order of preference has been provided on the basis of percentage of reservation provided to a particular reserved category.

12 In the present case there was backlog of roster point No. 2 which was meant for S.T. category which category is placed at No. 2 in the order of preference is given in Sub Rule (10). It will be seen, that, the Appellant was very much available for promotion to the post of the Headmaster as the Appellant belonged to S.T. category. However, instead of promoting the Appellant the Respondent No. 1 promoted the Respondent No. 2 a candidate belonging to D.T.N.T. category by utilizing the roster point No. 3. In my view by doing so the Respondent No. 1 did not follow the order of preference is given in Sub Rule (10). Therefore, the promotion given to the Respondent No. 2 cannot be said to be in accordance with the Sub Rule (10) of Rule 9 and therefore, the same cannot be sustained in the eyes of law.

13 The Respondent Nos. 1 and 2 have justified the action of the Respondent No. 1 in promoting the Respondent No. 2 to the post of the Head by utilising the roster point No. 3 in preference to roster point No. 2. on the ground, that, the Respondent No. 2 was senior to the Appellant as per the combined select list. According to the Respondent the combined select list was prepared in

accordance with the provisions of Govt. Resolution, Education and Department dated 25 August 1981. It appears that, the Govt. Resolution was issued in order to clarify certain points regarding the Govt. Resolution dated 17 September 1980 which had issued orders regarding reservation of vacancies for Backward Class at the stage of promotion in the non-government Secondary Schools in the State. A copy of the Govt. Resolution dated 25 August 1981 is produced by the Respondent No. 1 on record. Both the Secretary of the Respondent No. 1 and counsel for the Respondent No. 2 placed reliance on clarification to point Nos. 4 and 5 in the Govt. Resolution. For the sake of convenience I reproduce point Nos. 4 and 5 with clarification thereon.

...

It appears from the clarification given to point Nos. 4 and 5, that, a candidate belonging to N.T. category senior to S.C. or S.T. candidate should be promoted earlier. According to the Respondent No. 1 they promoted the Respondent No. 2 a candidate belonging to N.T. to post of Headmaster as he was senior to the Appellant who belonged to S.T. category though the roster point was meant for S.T. category. However, in my humble view, if promotions are to be made in accordance with the said clarification given to point Nos. 4 and 5 in the above G.R. then the promotions would not be in accordance with the provisions of Sub-Rule (10) of Rule 9 of the Rules. In my view, Sub Rule (10) was provided an order of the reserved categories are to be made. As per the order of preference if a vacancy is meant for S.C. candidate then he is to be promoted to that post in preference to a candidate belonging to any other

category even though that candidate is senior to the candidate belonging to S.C. I have already mentioned, that, there is nothing in the provision in Sub-Rule (10) to indicate that, while following the order of preference element of seniority is to be taken into account. The same is to be taken into account only when any candidate belonging to any of the reserved categories is not available and when the question arises as to person of which category is to be promoted in the vacancy. In my view as the Sub Rule (10) of Rule 9 makes a clear provision for an order of preference while making promotions in the post belonging to reserved categories, there is no reason to make preference promotion as per the clarification given in the said Govt. Resolution. Then it will have to be taken in to account, that, the provisions of the Rules will have to be prevails to over any contrary provisions in any Govt. Resolution passed by the State Govt.

14. Thus, in my view, the Respondent No.1 did not follow the order of preference given in Sub Rule 10 of Rule 9 while making the promotions to the post in question. The Respondent No.1 ought to have promoted the Appellant to the post of the Headmaster which was meant for S.T. In preference to the Respondent No.2. Instead of doing so the Respondent No.1 promoted the Respondent No.2 on the basis of his seniority over the Appellant. It will be seen that, there was no necessity to take into account the seniority of the Respondent No.2 while making promotion as per the roster point. Thus, the promotions given to the Respondent No.2 is not in accordance with the provisions of Sub Rule (10) of Rule 9 and the same will have to be held as illegal and void. For these reasons my answers on the Point Nos.1 & 2 are in the affirmative.”

12. The School Tribunal has thus examined the 50 point roster produced before it and found that there was a backlog one ST vacancy being roster point no. 2 and one DTNT vacancy being roster point no. 3. This position is not disputed by the Respondents. As a matter of first principle once it is seen that as per the roster, there is a roster point which is earmarked for a post reserved for a particular category of backward class and such person belonging to that category is available (and is senior-most person from that backward class category) such person would be entitled for promotion against that roster point irrespective of the fact that there are other persons belonging to either open or other categories of backward class who are senior to him on the seniority list. In **R.K. Sabharwal** (supra) the Constitution Bench of Supreme Court has laid down that in matters of promotion while operating the roster, subsequent vacancies have to be filled from the categories to which the post belonged in the roster. In the present case, as indicated above, after scrutiny of the roster the School Tribunal found that there was a backlog of one ST vacancy being roster point no. 2 and one DTNT vacancy being roster point no. 3. Once there was a backlog of one ST vacancy, and an ST candidate i.e. Gaikwad was available (shown as Sr. No. 48 on the seniority list), he was entitled to be promoted notwithstanding the fact that Chavan who belonged to DTNT category (shown at Sr. No.47 on the seniority list) was senior to him. In my

opinion, the contention on behalf of the Management and Chavan, relying upon the Government Resolution dated 25 August 1981, that while making promotions on the basis of roster in a backward class vacancy, inter-se seniority of candidates is required to be considered, cannot be countenanced and is rejected. It is noticed that the Government Resolution dated 25 August 1981 was issued only to clarify certain points in the Government Resolution dated 17 September 1980. The Government Resolution dated 17 September 1980 was issued much prior to MEPS Rules which came into force on 16 July 1981. In these circumstances, I do not see how reliance can be placed on the Government Resolution dated 25 August 1981 which only clarifies a position in the Government Resolution (dated 17 September 1980) issued prior to the coming into force of the Statutory Rules which hold the field. The Apex Court in **K.P.Sudhakaran and anr. v/s. State of Kerala and ors.** 2006(5) SCC 386, has held that where statutory Rules govern the field, prior executive instructions on the subject cease to apply. The judgment of the learned Single Judge (His Lordship Dr. Justice D.Y. Chandrachud, as he then was) in **Lakhwinder Kaur Gurai** (supra) which holds that when the field is covered by the Rules, the Government Resolution cannot supplant the provisions of the Rules and can only be read where the Rules are silent, also supports the case of Gaikwad.

13. Rule 9 (10) (b) envisages a situation firstly where it is not possible to fill in the post of a Head Master (or Asst. Head Master) for which a vacancy is reserved for a person belonging to the Castes and Tribes specified in clause (a); secondly it lays down that in such event, the post may be filled in by promoting a candidate from the other remaining category; thirdly it provides how the other remaining categories are to be filled i.e. it has to be done in the order of preference specified in Clause (a).

14. In my view, in the present case, since Gaikwad belongs to ST category and in the roster point no. 2 there was a backlog of one ST vacancy, Gaikwad was entitled to be promoted as Head Master and it was not necessary for the School Tribunal even to go into the aspect of order of preference contemplated in Rule 9 (10) (b). It is only when it is not possible to fill up the post of Head Master as laid down in the first part of Rule 9(1)(b) (see paragraph 13 above), the later part of Rule 9(10) (b) comes into play. Even assuming the order of preference was required to be gone into as specified in clause (a) of Rule 9 (10), Gaikwad would still be entitled to the promotion over Chavan as in the order of preference ST candidate is preferred over a candidate belonging to DTNT. It was sought to be suggested on behalf of the Petitioners at the conclusion of the arguments (which is against their own interest/case) that as a matter of fact considering

the percentage of reservation applicable, the appointments of both, Chavan and Gaikwad as Head Masters were illegal. This submission cannot be considered for the first time at this stage.

15. In light of above discussion, no case for interference has been made out with the impugned order. The Petitions shall accordingly stand dismissed. Rule is discharged. No order as to costs.

16. Learned Counsel for the Petitioners seeks stay of operation of this judgment and order. Stay is refused.

Parties to act on an authenticated copy of this order.

**(A.A. SAYED, J.)**