

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.398 OF 2004

Kshatra Kulstapanna Maratha Samaj through
Trustee Subhash Shankar Pathak ... Petitioner
Vs.
Harishchandra Sadashiv Kubal and others ... Respondents

Mr. A. S. Karwande for Petitioners.
Ms Jyoti J. Jadhav, AGP for Respondent No.4-State.

CORAM : R. G. KETKAR, J.
DATE : JUNE 22, 2017

JUDGMENT :

Heard Mr. Karwande, learned Counsel for petitioners and
Ms Jadhav, learned AGP for respondent No.4-State at length.

2. By this Petition under Articles 226 and 227 of the Constitution of India, petitioners, hereinafter referred to as 'Management', have challenged the judgment and order dated 28.11.2003 passed by the learned Presiding Officer, School Tribunal, Kolhapur Region, Kolhapur (for short 'Tribunal') in Appeal No.130 of 1997. By that order, the Tribunal allowed the appeal preferred by the first respondent, hereinafter referred to as 'respondent', and set aside the oral otherwise termination of 10.06.1997. The Tribunal directed the Management to reinstate respondent to his original post by giving him benefits of continuity in service since the date of 02.09.1996 onwards and to pay him regular salary since the date of reinstatement and onwards. The relevant and material facts giving rise to filing of this Petition, briefly stated, are as follows:

3. The Management had issued advertisement on 19.08.1996

inviting applications from qualified candidates. The post in question was earmarked for S.T. Category. The qualification required for the post was S.S.C. D.Ed. and the pay scale admissible was Rs.1200-2400. The respondent belongs to O.B.C. Category. The respondent was issued appointment order dated 27.08.1996. Clause 2 recited that the appointment was purely temporary for a period of 7 months from 02.09.1996 to 30.04.1997 in the leave deputation vacancy. After expiry of the above period, services of the respondent was to stand terminated without any notice. Clause 8 recited that as per 200 point roster, the post is reserved for S.T. Category only. Appointment of the respondent is temporary for the period from 02.09.1996 to 30.04.1997. The Education Officer, Zillha Parishad, Sindhudurg approved appointment of the respondent for the year ending on 30.04.1997.

4. Mr. Karwande submitted that as the appointment of the respondent was on temporary basis i.e. for a definite period from 02.09.1996 to 30.04.1997, the Tribunal committed serious error in allowing the appeal. He invited my attention to Government Resolutions dated 25.02.1980 and 12.07.1981 which lay down that while filling the posts reserved for S.C., S.T., D.T. and N.T., if candidate of that specific category is not available then the candidate from the remaining categories can be appointed by exchange. But it is not allowed to appoint the candidate of O.B.C. Category. As the respondent belongs to O.B.C. category, in view of the Government Resolutions, he could not have been appointed against S.T. Category. He has taken me through the reply filed by the Management opposing the appeal.

5. Mr. Karwande further submitted that after terminating the services of the teacher, Management had issued advertisement on 15.05.1997. In pursuance thereof, one Shri Khadye Pravin was

appointed as Assistant Teacher from O.B. C. Category for the temporary period of 15.07.1997 to 30.04.1998. The said Khadye left the services on 27.12.1997 and on that post, one Ms Kanekar Vidhya was appointed on temporary basis. Ultimately, the Management appointed Shri Suresh L. Konkani belonging to S.T. Category on 01.12.1998. The appointment of Mr. Konkani was approved by the third respondent, Education Officer. He, therefore, submitted that the respondent ought to have impleaded Mr. Konkani as respondent in the appeal. The Tribunal ought to have dismissed the appeal on the ground that necessary party was not impleaded in the appeal.

6. In support of submission of Mr. Karwande that teacher belonging to O.B.C. category cannot be appointed against the post reserved for S.T. Category, he relied upon the decision of this Court in ***Chandrashekhar Vs. Navshakti Vidyalaya, 2010 (5) Mh.L.J. 1***, and in particular paragraph 46 thereof.

7. Despite service, none appears for the respondent. I have considered the submissions advanced by Mr. Karwande. I have also perused the material on record. It is not in dispute and is rather a matter of record that the Management had issued advertisement dated 19.08.1996 inviting applications for filling up the posts of teachers from qualified candidates. One post requiring qualification of S.S.C. D.Ed. and pay-scale of Rs.1200-2400 was reserved for S.T. Category. It is not in dispute and is rather a matter of record that respondent belongs to O.B.C. Category. A perusal of appointment order dated 27.08.1996 shows that it is issued under Rule 9(5) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short 'Rules'), which have been framed by the State of Maharashtra in exercise of the powers conferred by sub-sections (1) and (2) of Section 16 of the

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short 'Act'). The appointment order under Rule 9(5) is required to be issued in the Form in Schedule 'D'. Clauses 2 and 8 of the appointment order dated 27.08.1996 read thus,

“2. Your appointment is purely temporary for a period of 7 months / years from 2/9/96 to 30/4/97 in the leave deputation vacancy. After expiry of the above period, your services shall stand terminated without any notice.

8. As per 200 point roster this post is reserved for S.T. category only. Your appointment is temporary for the period from 2.9.96 to 30.4.97.”

8. A perusal of the above clauses shows that the appointment of the respondent was made purely on temporary basis for a period of 7 months from 02.09.1996 to 30.04.1997 in the leave deputation vacancy. After expiry of the said period, the services were to stand terminated without any notice. As per 200 point roster, the post was reserved for S.T. Category only, and therefore, appointment for temporary period from 02.09.1996 to 30.04.1997 was made. Education Officer, Zilla Parishad, Sindhudurg approved the appointment for the year ended 30.04.1997.

9. The respondent filed appeal against his otherwise oral termination on 10.06.1997. The Management resisted the appeal by filing a detailed reply and relied upon the Government Resolutions dated 25.02.1980 and 12.07.1981. The main contention raised by the Management was that the post was reserved for S.T. Category and the respondent belongs to O.B.C. Category, which is not permissible. It is material to note that the Management did not contend in the reply that in the place of the respondent, some other teacher belonging to S.T. Category was appointed. Even perusal of the impugned order passed on 28.11.2003 does not indicate that Management raised contention about appointing

teacher from S.T. Category in the place of the respondent.

10. The moot question is whether the Management could have appointed teacher belonging to O.B.C. Category on the post, which was reserved for S.T. Category. Mr. Karwande relied upon the decision of this Court in the case of Chandrashekhar (supra). Before dealing with the submission of Mr. Karwande based on this decision, it is necessary to consider the relevant provisions of the Act and the Rules. Section 4(1) reads thus,

“4. Terms and conditions of service of employees of private schools: (1) Subject to the provisions of this section, the State Government may make rules providing for the minimum qualifications for recruitment (including its procedure), duties, pay, allowances, post-retirement and other benefits and other conditions of service of employees of private schools and for reservation of adequate number of posts for members of the backward classes :

Provided that, neither the pay nor the rights in respect of leave of absence, age of retirement and post-retirement benefits and other monetary benefits of an employee in the employment of an existing private school on the appointed date shall be varied to the disadvantage of such employee by any such rules.”

11. In so far as controversy in question is concerned, Sections 5(1) and 5(2) read thus,

“5. (1) The Management shall, as soon as possible, fill in, in the manner described, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy; (2) Every person appointed to fill a permanent vacancy (except shikshan sevak) shall be on probation for a period of two years. Subject to the provisions of sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed.

Provided that, every person appointed as shikshan sevak shall be on probation for a period of three years.”

12. Section 4(1) lays down that the State Government **may make rules providing for the minimum qualifications for recruitment (including its procedure)**, duties, pay, allowances, post-retirement and

other benefits **and other conditions of service of employees of private schools.**

13. A perusal of sub-section (1) of Section 5 shows that the Management has to, as soon as possible, fill in the manner described, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy. Sub-section (2) thereof lays down that the Management has to appoint every person appointed to fill a permanent vacancy (except shikshan sevak) on probation for a period of two years. Subject to the provisions of sub-sections (3) and (4), on completion of the probation period of two years, the person shall be deemed to have been confirmed.

14. Rule 9 reads thus,

9. Appointment of staff.-

(1) The teaching staff of the school shall be adequate having regard to the number of classes in the school and the curriculum including alternative courses provided and the optional subjects taught therein.

(2) Appointments of teaching staff (other than the Head and Assistant Head) and those of non-teaching staff in a school shall be made by the School Committee:

Provided that, appointments in leave vacancies of a short duration not exceeding three months, may be made by the Head, if so authorised by the School Committee.

(3) Unless otherwise provided in these rules for every appointment to be made in a school, for a teaching or a non teaching post, the candidates eligible for appointment and desirous of applying for such post shall make an application in writing giving full details regarding name, address, date of birth, educational and professional qualifications, experience, etc., attaching true copies of the original certificates. It shall not be necessary for candidates other than those belonging to the various sections of backward communities for whom posts are reserved under sub-rule (7) to state their castes in their applications.

(4) The age limit for appointment to any post in a school shall be as follows, namely :

(a) for an appointment to be made to any post in a

primary school, a candidate shall not be less than 18 years of age and more than 28 years of age, and in the case of candidate belonging to Backward Classes he shall not be more than 33 years of age:

Provided that, upper age-limit may be relaxed in case of women, ex-servicemen and persons having previous experience with the previous permission of the Deputy Director.

(b) for an appointment to be made to any post in any school other than primary school, a candidate shall not be below the age of 18 years.

(5) A letter of appointment order in the Form in Schedule "D" shall be issued to a candidate appointed to the post. A receipt in token of having received the appointment order shall be obtained from the candidate appointed.

(6) ...

(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, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes as follows, namely:-

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

		52 percent.

(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 associations or organisations of persons belonging to Backward Classes, by whatever names such associations or organisations are called and which are recognised by Government of 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 or 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.”

15. Rule 9(2) lays down that appointments of teaching staff (other than the Head and Assistant Head) and those of non-teaching staff in a school has to be made by the School Committee. Sub rule (3) thereof lays down that Unless otherwise provided in these rules for every appointment to be made in a school, for a teaching or a non teaching post, the candidates eligible for appointment and desirous of applying for such post shall make an application in writing giving full details regarding name, address, date of birth, educational and professional qualifications, experience, etc., attaching true copies of the original certificates.

16. Rule 9(7) lays down that 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 - (a) Scheduled Castes - 13%, (b) Scheduled Tribes - 7%, (c) De-notified Tribes (A) - 3%, (d) Nomadic Tribes (B) - 2.5%, (e) Nomadic Tribes (C) - 3%, (f) Nomadic Tribes (D) - 2%, (g) Special Backward Category - 2% and (h) Other Backward Classes - 19%.

17. Sub-Rule (8) thereof lays down that 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 associations or organisations of persons belonging to Backward Classes, by whatever names such associations or organisations are called and which are recognised by Government of the purposes of this sub-rule requisitioning the names of qualified personnel, if any, registered with them. It further provides that if it is not possible to fill in the reserved post from amongst candidates, if any, who have applied in response to the advertisement or 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) of Rule 9. It is relevant to note that no material is produced by the Management as regards compliance of sub-rule (8) of Rule 9.

18. A perusal of sub-rule (9)(a) of Rule 9 shows that 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.** In the present case, the Management did not produce any material on record to indicate that the candidate from Scheduled Tribes was not available and candidates from - (1) Scheduled Castes, (2) De-notified Tribes (A), (3) Nomadic Tribes (B), (4) Nomadic

Tribes (C), (5) Nomadic Tribes (D) and (6) Special Backward Category were available. It is not in dispute that the respondent belongs to O.B.C. In my opinion, once a candidate from other reserved categories was not available and a candidate from O.B.C. Category was available, in view of the express language of clause (a) of sub-Rule (9) of Rule 9, the Management could not have issued appointment letter appointing the respondent on temporary basis or a year to year basis. The Management Could have made appointment on temporary basis or a year to year basis if and only if no person from any of the categories under Sub-Rule (7) of Rule 9 was available.

19. Rule 10 of the Rules reads thus,

“10. Categories of Employees.- (1) Employees shall be permanent or non-permanent. Non-permanent employees may be either temporary or on probation.

(2) A temporary employee is one who is appointed to a temporary vacancy for a fixed period.”

20. Rule 10 lays down the categories of employees. Employees shall be permanent or non-permanent. Non-permanent employees may be either temporary or on probation. A temporary employee is one who is appointed to a temporary vacancy for a fixed period. A conjoint reading of Sections 4(1), 5(1) and (2) and Rules 9 and 10 leads to an irresistible conclusion that if there is a temporary vacancy, the management has to appoint employee on a temporary basis for a fixed period. The management has to fill in every permanent vacancy in a private school in terms of Rule 9 of the Rules by the appointment of a duly qualified person. The management has to appoint a person to fill a permanent vacancy (except shikshan sevak) on a probation for a period of two years. Subject to the provisions of sub-sections (3) and (4), the person on completion of his probation period of two years is deemed to have been confirmed.

21. In the case of **Chandrashekhar** (*supra*), the learned Single Judge of this Court referred to the provisions of the Act and Rules and also considered various judgments. In paragraph 11, it was observed that “in the case at hand, it has been stated by the learned Counsel for the respondent that the school had recognition for one year only and so there was no question of availability of a permanent vacancy. The petitioner has not shown that the statement that the school had recognition only for one year at the relevant time is not correct”. In paragraph 48, this Court also noted that the school itself had recognition only for a period of one year and therefore, it could not be said that there was a permanent vacancy, though the vacancy to which the petitioner was appointed was a clear vacancy. In paragraph 13 of that report, judgment of this Court in ***Priyadarshini Education Trust and others v. Ratis (Rafia) Bano d/o Abdul Rasheed and others*, 2007 (6) Mh.L.J. 667** was referred and extracted paragraph 12. Clauses (i), (ii) and (iv) read thus,

(i) "duly appointed, in the manner prescribed" would be an appointment of a person who is eligible (qualified for the post) for appointment, who is selected by due process of selection i.e. by competition amongst all eligible and desirous candidates, and who is appointed on a permanent vacant post. In other words, inviting applications, as also holding of screening tests, enabling all eligible and desirous candidates to compete for selection and appointment, is a must.

(ii) Once an eligible candidate (duly qualified as required) is selected by selection process as above, for filling in a permanent vacancy, there is no option for the management and it is obligatory on it to appoint such person on probation for a period of two years. It is neither open for the management to appoint him for one academic year or any period shorter than two years probation period, nor it is open for Education Officer to grant approval for such shorter period. [in fact, in view of the requirement as in clause (i) above, the process of grant of approval by Education Officer should begin with examination of selection process and its validity.]

(iv) The appointment of a person not belonging to reserved

category, in a post reserved for a particular category, because the candidate of that category is not available, shall be absolutely temporary and on an year to year basis, governed by sub-rule (9) of Rule 9, although in a permanent vacancy."

22. The learned Single Judge thereafter referred to decision of the Apex Court in ***Shakuntala Ganpatsa Shirbhate v. Industrial Weaving Co-operative Society and others***, 1994 Mh.L.J. 218 in paragraph 40 and extracted paragraphs 2, 4 and 5 of that decision. In paragraph 4, the submission advanced on behalf the appellant that the appellant is entitled to regular appointment in view of Rule 9(9)(a) was noted. It was further noted that since the appellant is a member of one of the backward classes referred to in that Rule, she was entitled to a regular appointment in the very first year when no person belonging to a Nomadic Tribe was available. After noting this submission in paragraph 5, the Apex Court held that the arguments appear to be well founded. Admittedly, respondent No.4 was available for appointment only in 1988. On the first occasion when the post was being filled up, there was no member of a Nomadic Tribe available for appointment. In the absence of a candidate belonging to a Nomadic Tribe, the Rule enjoins year to year appointment only if the available candidate does not belong to the backward classes. The question, therefore, was whether the appellant belonged to a backward class. The Apex Court remitted the matter to the High Court for deciding the question as to whether the appellant belongs to backward classes on the basis of affidavits or to call for a finding from the School Tribunal. In the present case, there is no dispute that vacancy was to be filled in from the S.T. Category and that no candidate from S.T. Category was available. Respondent No.1 belongs to O.B.C., which is one of the reserved categories under Rule 9(7).

23. In paragraph 42, the learned Single Judge referred to the decision

of the Division Bench of this Court in ***D. G. Ruparel College Vs. State, 1999(1) Mh.L.J. 291***, which took similar view. In paragraph 43.1, decision of the Apex Court in ***Kankavali Shikshan Sanstha Vs. M. R. Gavali, 2006 (1) Mh.L.J. 713 (SC)***, which followed the decision in ***Shakuntala's*** case (*supra*) is referred and extracted paragraph 14 thereof, which is as under:

"Para 14 : The law laid down by this Court on the interpretation of Rule 9(9)(a) is in our view resolves the controversy in the present case.

The first respondent was appointed in 1994. The vacancy was reserved for an ST candidate. At that stage there was no candidate belonging to ST available. There is no dispute about the fact that the first respondent belongs to the Hindu Mali community which is an OBC. In the circumstances, in terms of the provisions of Rule 9(9)(a) since no other candidate belonging to ST was available, the first respondent was entitled to appointment on a regular basis. This Court, in the above case, held that in the absence of a candidate belonging to the reserved concerned, the rule enjoins year to year appointment only if a available candidate does not belong to a backward class. The respondent belonging as he does to a backward class was entitled to a regular appointment. The subsequent appointment of P.B. Lohar, the 3rd respondent herein again, operates to displace the first respondent because in any event much prior thereto the first respondent had duly crystallised the right. In any event, it has not been demonstrated before this Court that the 3rd respondent was appointed subsequently in the vacancy created by the termination of the first respondent."

24. In paragraph 44.1, decisions in ***Jeles Education Society Vs. R. T. Bhitale, 2006(3) Mh.L.J. 349*** and ***Bhairavnath Shikshan Mandal, Pune Vs. Raju Haribhau Thombe, 2009 (3) Mh.L.J. 605*** were referred. These decisions followed the Apex Court judgment and it was held that a candidate belonging to a backward class was entitled to be appointed against a permanent post meant for another backward class, whose candidate was not available. In ***Jeles Education Society*** (*supra*), this Court considered decision of the Apex Court in ***Hindustan Education***

Society Vs. S. K. Kaleem Gulam Nabi, (1997) 5 SCC 152 and referred to Rule 9(9)(a) of the Rules and observed thus,

“A harmonious reading of the judgments in Hindustan Education Society (*supra*) and Shakuntala G. Shirbhate (*supra*) will indicate that a person belonging to an open category cannot question his appointment made only for a temporary period against a reserved vacancy. However, when a suitable candidate belonging to a particular reserved category is not available and another from the backward classes is appointed, his appointment cannot be considered to be a temporary appointment although the appointment letter stipulates so. In my view, therefore, the judgment of the School Tribunal which has been impugned in Writ Petition No.232 of 1993 must be upheld.”

25. In paragraph 46, the learned Single Judge observed that petitioner did not claim that he was appointed as O.B.C. candidate against the vacancy meant for Scheduled Caste, Scheduled Tribe or Nomadic Tribe candidate and therefore, there was no question of his appointment being considered as permanent in view of the provisions of Rule 9(9)(a) of the Rules.

26. In that case, the learned Single Judge held that the school in question had recognition only for a period of one year and therefore, it could not be said that there was a permanent vacancy. Apart from that, in fact the decision in **Priyadarshini Education Trust** (*supra*) and the decisions referred from paragraph 40 onwards support the respondent.

27. Mr. Karwande relied upon the Government Resolutions dated 25.02.1980 and 12.07.1981. In my opinion, these Resolutions cannot override the statutory Rules and in particular Rule 9(9)(a). These Resolutions do not advance the case of the Management in view of the express provisions contained in Rule 9(9)(a) of the Rules. A perusal of the impugned order shows that the Tribunal considered provisions of

Rule 9 (9)(a). The Tribunal also considered the decision of this Court in ***Ganesh S. Durafe Vs. Maharashtra Bhatkya Vimukti Jati Shikshan Prasarak Mandal, 2002 (4) All M.R. 652.*** The Tribunal, after considering the provisions of Rule 9 (9)(a) of the Rules held that oral otherwise termination on 10.06.1997 is not sustainable. Mr. Karwande was not in a position to show that the findings recorded by the Tribunal are contrary to material on record or that they are not supported by material on record. In other words, Management was not in a position to show that the findings recorded by the Tribunal are perverse. In the light of the aforesaid discussion, I do not find that the Tribunal committed any error in passing the impugned order. Petition being devoid of substance deserves to be dismissed and is accordingly dismissed. Rule is discharged with no order as to costs.

(R. G. KETKAR, J.)

Minal Parab