

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
LETTERS PATENT APPEAL NO. 239 OF 2009
IN
WRIT PETITION NO. 5019 OF 1997

Mrs. Bhagyashri Hanmant Bhagyawant)
Age – Major, Occ: Service,)
Shri Sai Krupa, Kurla Road, A/p. Pusesawali)
Tal. Khatav, Satara.).. Appellant
Vs. (Orig. Respondent No.4)

1. Shri Suresh Pandurang Kumbhar)
Age – Major, Occ. - Service.)
R/o. Navnath Niwas, Umbraj,)
Tal. Karad, Dist. Satara.)
C/o. Respondent No.3)
2. The Shikshan Prasark Mandal)
Bhag Pusesawali, A/p. Pusesawali,)
Tal. Khatav, Dist. Satara.)
3. The Head Master,)
Mahatma Gandhi Vidyalaya and)
Junior College, Pusesawali.)
Tal. Khatav, Dist. satara.)
4. Deputy Director of Education)
Kolhapur Region, Kolhapur.)
(Notice to be served on the A.G.P.)
High Court, Mumbai.)
5. The Presiding Officer,)
School Tribunal, Kolhapur)
Region, Kolhapur.)..Respondents

Mr.D.J.Bhange, for the Appellant.
Mr. D.S.Mhaispurkar for Respondent No.1.
Ms.Nisha M. Mehra,AGP, for Respondent Nos. 4 & 5.

CORAM: RANJIT MORE &
SMT.SADHANA S.JADHAV, JJ.
DATE : 31st AUGUST, 2017.

ORAL JUDGMENT: (Per Ranjit More, J.)

Heard Mr. Bhange, learned counsel for the appellant, Mr. Mhaispurkar learned counsel for respondent No.1 and the learned AGP for respondent Nos.4 and 5.

2. By this Appeal, the appellant takes exception to the Judgment and order dated 16.6.2006 passed by the learned Single Judge of this Court in Writ Petition No.5019 of 1997. By the said Judgment and Order, the learned Single Judge allowed the respondent No.1's appeal and thereby quashed and set aside the order of the School. Tribunal, Kolhapur, in Appeal No.36 of 1996 dated 18.9.1997. The learned Single Judge declared that the respondent No.1's appointment order dated 25.6.1993 as a lecturer in Junior College on probation for a period of two years as legal and proper.

3. Brief facts giving rise to the present Appeal are as follows :-

(a) Respondent No.2 is a Society and Public Trust which runs the Respondent No.3 – Junior College. On 16.5.1993, the School Management issued an advertisement in the local daily newspaper inviting applications for filling in various posts. One of the posts in the said advertisement was for the subject of English and the requisite qualification prescribed was M.A.B.Ed. The said post was reserved for a candidate belonging to Scheduled Tribe category. The advertisement itself mentions that in case

the candidate belonging to a particular category is not available for which the post has been reserved, a candidate from any other backward class would be considered. The respondent No.1 belongs to Hindu Kumbhar which is included in OBC category. The respondent No.1, pursuant to the said advertisement, applied for the said post of lecturer in English. As no Scheduled Tribe candidate was available, the respondent No.1 was considered and appointed as a lecturer in Respondent No.3 Junior College in the English subject vide appointment order dated 25.6.1993 with effect from 1.7.1993 on probation for a period of two years. The appellant's appointment was duly approved by the Deputy Director of Education, Kolhapur – Respondent No.4 for the years 1993-94 and 1994-95. The respondent No.1 completed the probation period and thereafter was made permanent.

(b) The appellant was working as an Assistant Teacher in the Secondary School of respondent No.2. The appellant was admittedly not eligible for the post of lecturer till the date when the said advertisement was issued in the year 1993 as her qualification was B.A.B.Ed and the required qualification for lecturer in Junior College was M.A.B.Ed. The appellant however passed M.A. Examination in October, 1994 and thereafter made an application to the respondent No.1 - management for appointment to the

post of lecturer in the Junior College in the year 1995. The appellant took her claim to the post held by respondent No.1 on the ground that now she is qualified and the appointment of respondent No.1 was not in accordance with law. In the year 1996, the Head Master of the School – respondent No.3 sought guidance from the respondent No.4 – Deputy Director regarding the legality of the appointment of respondent No.1. The Deputy Director came to the conclusion that the appointment of respondent No.1 on probation was wrong. He has further concluded that approval granted to the respondent No.1's appointment was illegal and consequently revoked the same and the respondent No.2 Management thereafter terminated the services of respondent No.1.

4. Respondent No.1 being aggrieved by the termination, filed an appeal before the School Tribunal, being No.36 of 1996. However, the same was also dismissed. He thereafter approached this Court by filing Writ Petition No.5019 of 1997 which came to be allowed by the learned Single Judge of this Court by an order impugned in this Appeal. Therefore, the appellant approached this Court by way of the aforesaid Letters patent Appeal.

5. Admittedly, the respondent No.1 was qualified to be appointed as a lecturer in English in Respondent No.3 – Junior College inasmuch as

he was holding qualification of M.A.B.Ed. So far as the appellant is concerned, there is no dispute that at the time of issuance of the advertisement, she was not qualified to be appointed as a lecturer in Junior College inasmuch as she was B.A.B.Ed. and she passed M.A. Examination in October, 1994 only. There is also no dispute that in the advertisement dated 16.5.1993 issued by the Respondent No.2 Management, the Management clarified that in case a candidate belonging to a particular class is not available for which the post has been reserved a candidate from any other backward class would be considered. Respondent No.1 belongs to Hindu Kumbhar which is included in OBC category of the backward class for which also reservation has been prescribed under Rule 9 sub-rule (7) of Maharashtra Employees of Private School (Conditions of Service) Rules, 1981 (for short, "the said Rules"). The respondent No.1 in response to the advertisement, therefore rightly applied to the post of lecturer in Respondent No.3 – Junior College. The respondent No.1 thereafter was selected and was appointed as a lecturer on probation for a period of two years and after his completion of probation made permanent in the service.

6. The learned Single Judge relied upon a decision of the Apex Court in **Shakuntala Ganpat Shrbhate vs. Industrial Weaving Co-**

operative Society & Ors. AIR 1994 SC 36 and **Kankavali Shikshan Sanstha & Ors. vs. M.R.Gavali & Ors. 2006 (1) ALL MR (SC) 266** and came to conclusion that the respondent No.1 was entitled to the regular appointment and order issued by the Respondent No.2 Management dated 26.6.1993 appointing the respondent No.1 to the post of lecturer in Junior College is valid, legal and proper.

7. We have also gone through the judgment in **Shakuntala Ganpat Shrbhate** (cited supra). The Apex Court held that since the appellant is a member of one of the backward classes, referred to in rule 9 of the said Rules, she was entitled to regular appointment in the very first year when no person belonging to Nomadic Tribe was available. The Apex Court interpreted the provisions of sub-rule (9)(a) of the said Rules so as to mean that if a backward class candidate for which category vacancy is reserved is not available then a candidate belonging to any other category of backward class mentioned in Rule 9 can be appointed on the regular basis. This decision is followed by the Apex Court in **Kankavali Shikshan Sanstha** (supra). Thus, on reconsideration, we find that the appointment of respondent No.1 is as per the provisions of Rule 9 sub-rule (9)(a) of the said Rules as interpreted by the Apex Court in the decision of **Shankunta**

Ganpat Shrbhate (supra).

8. Mr. Bhange, learned counsel for the appellant invited our attention to the provisions of Rule 9(8) of the said Rules and pointed out that the procedure prescribed under this Rule is not followed by the respondent No.2 Management. He also invited attention to the affidavit in rejoinder filed by the appellant and submitted that the respondent No.1's appointment is from open category and the vacancy in the S.C. category was carried forward. Rule 9(8) mandates that while filling up the post 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 organization of persons belonging to the Backward Classes requisitioning the names of the qualified personnel, if any, registered with it. The said Rule also mandates that if it is not possible to fill in the reserved post from amongst the candidates, if any, who have applied in response to the advertisement or whose names are recommended by the Employment Exchange or District Social Welfare or such associations or organizations as aforesaid, or if no such names are recommended by the Employment Exchange or District

Social Welfare Officer within a period of one month, the Management may proceed to fill up the reserved post in accordance with sub-rule 9. Thus, under this Rule, before proceeding under Rule 9(9), the procedure is required to be followed under Rule 9(8).

9. There is nothing on record whether the Respondent No.2 Management followed the procedure contemplated under Rule 9(8) of the said Rules at the time of appointment of respondent No.1 as lecturer in Junior College. This point was neither argued nor considered by the learned Single Judge while passing the order impugned in this Appeal. We are, therefore, unable to accept the appellant's statement in this regard.

10. The appellant's argument that respondent No.1 was appointed from the open category and reservation for S.T. was carried forward is also liable to be rejected on the ground mentioned in the above para. This point is argued and the documents are relied upon for the first time in this Appeal. There is no reference of this point in the impugned order. We are, therefore, unable to accept this submission of the appellant. The only argument advanced before the learned Single Judge was that respondent No.1's appointment was for a period of one year under Rule 9(9)(a).

However, he was appointed for a period of two years on probation. This submission cannot be accepted in the light of the decision of the Apex Court in **Shakunta Ganpat Shrbhate** (supra).

11. The respondent No.1 has been working with the respondent No.3 Junior College since his appointment continuously despite the termination inasmuch as the same was stayed by the School Tribunal, Kolhapur and subsequently by the learned Single Judge of this Court. The appellant has been working as an Assistant Teacher continuously since 1987. A statement was made at the Bar that the respondent No.1 is due to retire in the year 2020 which is supported by an averment made in the affidavit-in-reply. It is also not disputed that after retirement of the respondent No.1, the appellant is eligible to be promoted. It is not disputed by the respondent No.1 that after his retirement, the appellant would be entitled to be appointed in his post.

12. Taking the totality of the facts and circumstances of the case into consideration, we are unable to interfere with the impugned order. The Letters Patent Appeal is dismissed.

[SMT. SADHANA S.JADHAV, J.]

[RANJIT MORE,J]