

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

WRIT PETITION NO. 1384 OF 2015

Basveshwar Vishwanath Swami .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

Shri S. R. Kolhare, Advocate for the Petitioner.

Shri V. S. Badakh, A.G.P. for Respondent Nos. 1 and 2.

Shri S. S. Thombre, Advocate for Respondent Nos. 3 and 4.

**CORAM : S. V. GANGAPURWALA AND
S. M. GAVHANE, JJ.**

Closed for orders on : 03.10.2018

Order pronounced on : 02.11.2018

FINAL ORDER (Per S. V. Gangapurwala, J.) :-

. The petitioner assails the action of the respondent No. 3 treating the petitioner as a candidate from the Scheduled Tribe category.

2. Mr. Kolhare, the learned advocate for the petitioner submits that, the respondent Nos. 3 and 4 published an advertisement on 10th June, 1989 inviting applications for the post of Assistant Teacher (Mathematics) subject. In response to

the advertisement, the petitioner applied. The interviews were held and the petitioner was selected to the post of Assistant Teacher. He was issued with the appointment order on 04th July, 1989 for probation period. The advertisement was for open category candidate. The appointment of the petitioner was approved by the Education Officer under order dated 16th December, 1989 in the open category post. The approval was for the period of one year i. e. for academic year 1989-1990. Again the approval order was issued on 23.09.1990 for the academic year 1990-1991 and subsequently on 21st September, 1991 for continuation. All the approval orders are from open category.

3. The learned counsel further submits that, the petitioner has never taken benefit of reservation and the approval orders are from the open category. His first appointment is as against the post meant for open category. The service book prepared by respondent Nos. 3 and 4 mentions the caste as Hindu. The learned counsel submits that, on 05th June, 2002, the respondent Nos. 3 and 4 have forwarded the proposal of the petitioner before the Caste Scrutiny Committee, Aurangabad. The Caste Scrutiny Committee, refused to accept the proposal on the ground that the appointment of the petitioner is not against a reserved category post. The learned counsel submits that, recently, the respondent Nos. 3 and 4 have prepared a roster in which the post held by the petitioner is shown for the S. C. category as point No. 1.

4. The learned counsel further submits that, the action of respondents is totally illegal. Initially four posts were advertised, first post was for Maths subject from open category, second post was for science subject from reserved category, third post was for Marathi subject from open category and the fourth post was for general subject from open category. At the relevant time the reservation was 34%. At the time of appointment of the petitioner, there were six assistant teachers. Two teachers namely Mr. Kasale and one Mr. Chame were appointed from reserved category. The reservation of 34% was completed. The original application allegedly said to have been given by the petitioner and produced by the management is false and fabricated. There appears overwriting and manipulation in the date of application as well as in writing and signature of the petitioner. One Smt. Kamble R. S. was appointed against the S. C. category in the year 1991. Her post was advertised in the S. C. category. Her caste claim was validated from the S. C. category. There is no backlog from the S. C. category, however, while preparing the roster Smt. Kamble is deliberately shown from open category. Mr. Kasale stood retired in the year 2009 and Shri Chame stood retired in the year 2011. Two vacancies of reserved posts were created. The roster is wrongly prepared by showing the petitioner from the S. C. category. In the seniority list all the teaching and non teaching staff are shown and their

castes are mentioned from reserved category. According to the learned counsel, as the appointment of the petitioner is from open category, the post held by the petitioner cannot be converted into reserved category.

5. Mr. Thombre, the learned advocate for respondent Nos. 3 and 4 submits that, the petitioner was appointed from the reserved category pursuant to the advertisement issued by the management. Two posts were advertised, for reserved category one for B. Sc. B. Ed. (Mathematics) and another for science subject. The petitioner is appointed from the reserved category as the petitioner belongs to Mala Jangam caste. The petitioner is taking undue advantage of appointment order, wherein it is not stated that appointment of the petitioner is from reserved category, but the fact remains that in the advertisement it was stated that two posts are advertised for the reserved category. The petitioner is appointed from reserved category viz S. C. category. The petitioner did not get his caste claim validated from the Caste Scrutiny Committee, but after giving notice, the petitioner himself submitted a proposal to the Caste Scrutiny Committee on 25.03.2009 through the Head Master. Even as per the service book, the caste of the petitioner is mentioned as Mala Jangam Hindu. The respondents have verified the roster from the B. C. Cell. It is specifically stated that, the petitioner is appointed from the S. C. category. The learned counsel submits

that, as the petitioner was avoiding to get his caste claim verified from the Caste Scrutiny Committee, therefore, proposal was submitted to the Education Officer on 16.07.2002 seeking suspension of the petitioner. The learned counsel submits that, the management has placed on record the original application filed by the petitioner pursuant to the advertisement on 26.06.1989, wherein the petitioner specifically states that, he is a S. C. candidate and also submitted caste certificate. The seniority list also shows that the petitioner belongs to the reserved category.

6. The learned Assistant Government Pleader for respondent Nos. 1 and 2 submits that, at the relevant time the petitioner was appointed, as per Sub Rule 7 of Rule 9 of the Maharashtra Employees of Private Schools (Condition of Service Regulation) Rules, 1981 reservation permissible was 34%. Initial approval was granted to the petitioner as a untrained teacher for the academic year 1989-1990 and again for the academic year 1990-1991. In the order of approval it is not mentioned that, the petitioner is appointed as against a reserved post. The petitioner acquired trained graduate qualification in the academic year 1992. The office of the respondent No. 2 granted approval to the petitioner with continuity in service. The approval memo did not mention in which category of reservation the approval was granted. In the recently prepared roster and verified by the B. C.

Cell, the petitioner is shown against the S. C. category. The office of the respondent No. 2 verified the roster of the management. The management maintained that the appointment of the petitioner is on reservation point that is S. C. category.

7. It is not disputed that when the management had issued advertisement in June 1989 inviting applications for four posts, the word reservation is mentioned below the post of science in the advertisement. The appointment order is issued to the petitioner on 08.07.1989. The appointment order nowhere says that the petitioner is appointed from reserved category. The approval orders are also placed on record. Initial approval order dated 16/19.12.1989 for a period of one year does not state that the petitioner is appointed as against reserved post. In the said approval order dated 16/19.12.1989 the petitioner is shown at Sr. No. 7. The said approval order specifies that the persons at Sr. No. 5 and 6 are granted approval on condition that S.T. and N. T. backlog should be filled in and approval at Sr. No. 9 and 11 is granted on condition that the S.C., S.T. and N. T. backlog should be filled in. In the subsequent approval order dated 23/24.09.1990, the petitioner is shown at Sr. No. 7. The approval orders state that, the persons at Sr. No. 5 and 6 are appointed as against N. T. and O.B.C. In the next academic year, they should not be kept in service and appointments should be made of the

persons from N. T. and O.B.C. category. In the approval order dated 21/24.09.1991, the petitioner is shown at Sr. No. 3. Approval orders state that the persons at Sr. Nos. 5 and 6 are appointed as against N. T. and O.B.C. posts. They should not be continued in the next year and the backlog of N.T. and O.B.C. should be filled and on that condition persons at Sr. No. 5 and 6 were granted approval. The petitioner has been granted approval with continuity in service. The approval order nowhere states that the petitioner is appointed as against the reserved post. The copies of orders of approval as placed by the petitioner are also produced by the learned Assistant Government Pleader. The narration is the same as placed by the petitioner.

8. The contention of the petitioner appears to be that Smt. Kamble R. S. is shown as against open post, however, she belongs to S. C. category and she is issued with the validity certificate of S. C. category. The roster for the period 1989-1990 upto the year 2009-2010 is not on record. The relevant period would be the year the petitioner was appointed and thereby granted permanent approval. In the civil list filed by the management caste of Smt. Kamble is shown as Mahar. The civil list appears to be of 16.09.1992. However, in the roster placed on record by the management, she is shown as against open. The caste of the petitioner is shown as Mala Jangam in the said list. In the year 1992 there would be only one post of S.C. The

reservation was only 34%. The petitioner may claim to belong to Mala Jangam caste, but the relevant aspect would be that at the time of appointment whether the petitioner was appointed from open or reserved category. Neither the appointment order, nor the approval order specify that the petitioner was appointed from reserved post. If Smt. Kamble is shown in the year 1992 from the S. C. category, the total reservation which is 34%, then the post from S. C. category would be filled more particularly if she has a validity certificate as is contended by the petitioner. After 2008 the reservation has risen to 52% as per the M. E. P. S. Rules, that may not be relevant for determining the post on which the petitioner was appointed. The Division Bench of this Court in a case of Dilipsing Bhagwat Patil Vs. The Principal Kisan Mahavidyalaya and others reported in 2001(4) All M. R. 809 and relied by the petitioner held that if the mention of reservation in the advertisement is not made, then it is not open for the school authorities to convert reserved post and say that the advertised post is a reserved post.

9. The roster appears to have been verified in the year 2014 considering the reservation as 52%. It appears that, the petitioner in March 2009 submitted the proposal to the scrutiny committee for validation of his caste claim as belonging to Mala Jangam. If the validity is issued in favour of Smt. Kamble, who is appointed prior to 1992, then there is no propriety saying the

post held by her is a open category post. There is no clear record showing that the petitioner was appointed on the reserved post. The appointment order, approval orders granted from time to time including conditions mentioned in the approval did not suggest that the petitioner was appointed as against reserved post in the year 1989. The subsequent acts and conduct may not be relevant. It appears that, for the first time in the year 2001-2002 the dispute was cropped up about the appointment of the petitioner from reserved category or otherwise. The original application given by the petitioner pursuant to the advertisement will also have to be considered.

10. In view of the above, it would be appropriate to relegate the parties before the Deputy Director of Education to consider the appointment of the petitioner as from open/reserved category and the availability of posts for the for S.C. category as in the year 1989-1990 to 1991-1992.

11. In the light of the above, we relegate the parties before the Deputy Director of Education to consider the appointment of the petitioner as from open/reserved category and the availability of posts for the S.C. category as in the year 1989-1990 to 1991-1992. The persons appointed and the validities owned by the persons. The Deputy Director of Education shall also consider the record, approval orders issued from time to time and conditions

mentioned in the approval orders and shall take decision with regard to the appointment of the petitioner as from open and/or reserved category. The same shall be done by the Deputy Director of Education within a period of six (06) months from the date of appearance of the parties. The parties shall appear before the Deputy Director of Education on 21.11.2018. The parties may place on record before the Deputy Director of Education all the relevant record. The party aggrieved may assail the order of the Deputy Director as may be permissible in law. The writ petition accordingly is disposed of. No costs.

12. Till the Deputy Director of Education decides the issue, the respondents shall not take any adverse action against the petitioner on the ground that the petitioner is appointed from the reserved category.

[S. M. GAVHANE, J.]

[S. V. GANGAPURWALA, J.]

bsb/Nov. 18