

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10841 OF 2017

Smt. Swati Ravindra Walawalkar

.. Petitioner

Vs.

The State of Maharashtra & Ors.

.. Respondents

Mr. Prashant Bhavake for the petitioner.

Ms. Vaishali Nimbalkar, AGP, for the respondent nos.1 to 5.

CORAM : A. K. MENON, J.

DATED : 14th FEBRUARY, 2018.

JUDGMENT:-

1. By this writ petition, the petitioner challenges an impugned order dated 9th June, 2017 passed by respondent no.5- The Education Officer (Secondary), Zilla Parishad, Sindhudurg, declining to approve the appointment of the petitioner as Head Mistress at the Shri Devi Sateri High School, Vetore ("the school"). Considering the scope of the challenge, it is appropriate that this petition be disposed of finally. Accordingly I issue Rule. Rule returnable forthwith. By consent of parties Advocates this petition is taken up for final hearing.
2. The facts in brief are as follows:-

The petitioner is a qualified teacher holding B.Sc. and B.Ed. Degrees. She was appointed as an Assistant Teacher at the aforesaid school by the respondent no.6 which manages the school. The school is fully aided secondary school. One Nandkumar Madukar Ogale was working as a headmaster of the school and was due to retire on 31st May, 2017. In the seniority list, the person next in line was one Mrs. Meghna Murari Samant who could have been appointed as headmistress upon superannuation of Shri Ogale. Mrs. Samant not being interested in the post of headmistress she stated to have communicated to her inability to take up the post. The petitioner is stated to be the next in line in order of seniority. On 10th April, 2017 the petitioner submitted an application Exhibit C by which she conveyed her willingness to take up the post of headmistress and requested that she may be promoted as headmistress after the retirement of Shri Ogale. Respondent no.6 is believed to have considered the application and in a meeting dated 14th April, 2017 it was decided to promote the petitioner. An appointment order dated 20th May 2017 was issued which was effective from 1st June, 2017. Accordingly on 24th May, 2017 the management-respondent no.6 sent the proposal to the Education Officer along with the requisite documentation. In the meantime, the petitioner submitted her joining report and commenced her duties as Headmistress.

3. It is stated that vide communication dated 3rd/6th June, 2017, the Education Officer raised certain objections and sought compliance thereof from the respondent no.6. On 7th June, 2017, the respondent sent a compliance report with supporting documents. On 9th June, 2017 the Education Officer passed the impugned order making reference to a Government Resolution dated 29th May, 2017 issued by the General Administration Department. It is this order that has been challenged in the present petition. The Education Officer directed the respondent no.6 to submit a fresh proposal after taking into consideration the procedure provided in the said Government Resolution which contemplated reservations for posts of backward classes in small cadres.
4. Mr. Bhavake the learned Advocate for the petitioner submitted that there was no occasion for the Education Officer to raise these objections calling upon the respondent no.6 to sent a fresh proposal. He submitted that the refusal to grant individual approval to the appointment of the petitioner by relying upon the Government Resolution of 29th May, 2017 was not justified. The Government Resolution provided for guidelines for the recruitment of posts reserved for backward categories. According to Mr. Bhavake, the Government Resolution does not apply to the post of Headmaster and Headmistress in view of the provisions of Rule 9(10) of the Maharashtra Employees of Private Schools (Conditions of Services)

Rules, 1981 (MEPS Rules). It was submitted that when three sanctioned posts are available, one post is required to be filled from the backward category so as to meet the 337 reservation requirement, and therefore, the impugned order rejecting the proposal on the basis of Government Resolution dated 29th May, 2017 was bad in law and liable to be quashed.

5. Mr. Bhavake submitted that the Government Resolution was issued by the General Administration Department and was inapplicable to the post in question and in any event the Resolution cannot override the MEPS Rules. According to Mr. Bhavake, the Education Officer overlooked the fact that only two posts of Headmasters/Headmistresses were available since there were two schools run by the respondent no.6. Furthermore, no show cause notice was issued and no hearing was given to the petitioner. He therefore submitted that the impugned order is liable to be quashed.
6. The learned AGP appearing on behalf of respondent nos.1 to 5 supported the impugned order. According to her, in view of the stand taken by the Deputy Education Officer Shri Sanjay Basappa Mane in his affidavit dated 31st October, 2017, the petitioner is not entitled to receive approval in respect of her post. Ms. Nimbalkar submitted that the

management had appointed the petitioner as Headmistress prior to the retirement of Mr. Ogale and therefore sent a proposal to the Education Officer which was illegal. She relied upon the said Government Resolution dated 29th May, 2017 issued by the General Administration Department (GAD-GR) which stated that under the GAD-GR, small cadre promotional posts had to be filled up and the respondent no.6 was bound to follow the said guidelines since they were running two private aided schools and two posts of Headmasters were sanctioned. It was further submitted that in Gazette Notification dated 15th March, 2017 issued by the School Education and Sports Department, it was clearly mentioned that to fill up the posts by promotion in smaller cadre, the management should follow the roster specified in Schedule D-4. She further submitted that in accordance with clause 6 of the said Government Resolution dated 26th September, 2017 issued by the School Education and Sports Department (SESD-GR) the guidelines required that the roster should be made applicable from the date of publication in the Gazette. According to Ms. Nimbalkar, respondent no.6 had not submitted the proposal in accordance with the said SESD-GR. The management had not followed the due procedure in appointing the petitioner including that of the roster. She therefore submitted that the appointment of the petitioner is invalid and cannot be approved.

7. Having heard both the counsel at length and having perused the relevant documents, it will be necessary to make note of the relevant rule that would apply in the case of respondent no.7 school and the appointment of the headmaster. I may observe here that it is not disputed that the rule pertaining to an appointment of Headmaster/headmistress is Rule 9 of the MEPS Rules. Rule 9 sub-clause(10) reads as follows:-

“10(a) The management shall reserve 33 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(Vimukta Jatis),

Nomadic Tribes and Special Backward Category as follows, namely;

(i) Scheduled Castes and Scheduled

Castes converts to Buddhism 13 percent

(ii) Scheduled Tribes including those

living outside the specified areas 07 percent

(iii) Denotified Tribes (A) 03 percent

(iv) Nomadic Tribes (B) 2.5 percent

(v) Nomadic Tribes (C) 3.5 percent

(vi) Nomadic Tribes (D) 0.2 percent

(vii) Special Backward Categories 0.2 percent

33 percent

(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 or 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.”*

8. The Rule clearly provides that in the case of Heads and Assistant Heads of a school, the management will reserve 33% of the posts or vacancies as applicable for members of schedule castes, schedule castes converts to Buddhism, schedule tribes, denotified tribes (Vimukta Jatis), nomadic tribes and special backward categories in the ratio provided therein. The ratio varies from 13% to 0.2% in all making of 33%. Rule 10(b) as it then existed contemplates a situation where it is not possible to fill a post of Head or Assistant Head for which a vacancy is reserved for persons belonging to the castes and tribes mentioned in sub rule(a), then in such

cases the post may be filled by promoting the candidate. If one considers the submissions made on behalf of respondent no.5 and the reliance placed upon the notification dated 15th March, 2017, forming second amendment of the MEPS Rules, 2017, clause (b) of sub-rule 10 of clause 9 is deleted. The other amendments include the insertion of Rule 10A which provides for filling of the posts specified in sub-clause (a) of sub-rule (10) and in such cases, the amendment mandate following the *Bindunamawali* specified in Schedule D-2. Furthermore, Rule 10B and 10C provide for filling up posts by nomination and by promotion in smaller cadre following the *Bindunamawali* specified in Schedules D-3 and D-4 respectively. It is the case of the respondent-Education Officer that this procedure will have to be followed and therefore approval will have to be sought.

9. In the present case, in my view, the stand of the Education Officer is misconceived in view of the fact that the management is required to reserve 33% of the total number of posts for Headmasters and Headmistresses from the specified backward classes. The respondent no.6 run only two schools and admittedly only two posts of headmasters have been sanctioned. The reservation contemplated by Rule 9 sub-rule (10)(a) is to the extent of 33% by necessary implication this would mean that there would have to be minimum of three posts as otherwise it

would result in 50% reservation. It is material to note that sub-rule (10) (a) continues to be enforced. It is only sub-clause (b) of sub-rule (10) of Rule 9 that has been deleted.

10. Mr. Bhavake has brought to my attention the decision of this Court in Writ Petition no.8472 of 2012 in which reference is made to the decision of this Court in ***New English High School Association and Anr. v/s. Baldev Fakira Ade & Anr. 2007(1) Bom.C.R. 6.*** Applying the ratio of the said judgment and since the Rule 9(10)(a) now provides for 33% reservation, it would not be possible to accept the contentions of learned AGP. The Government Resolution will have no application in the case at hand. The question of filling up of posts of promotion following the *Bindunamawali* would have only arisen in case there were more than three or more posts. In the instant case, admittedly there are only two posts in two schools. The objections raised by the Education Officer therefore cannot be sustained.

11. Furthermore, it is noticed that the impugned communication dated 9th June, 2017 also relies upon the GAD-GR dated 29th May, 2017. In my view, this Government Resolution will also have no application to the instant case since the said GAD-GR provides guidelines for recruitment/promotion of posts reserved for the backward categories in

smaller cadres. It further provides that where there are 2, 3 or 4 posts in smaller cadre, one post should be available in the reserved category. This will obviously not be workable in the present case since the post concerned is not of a smaller cadre but that of the headmaster/headmistress in respect of which 33% reservation is contemplated in Rule 9(10) of the MEPS Rules. Thus the impugned order is required to be aside.

12. It may also be mentioned that the impugned order has been passed without giving an opportunity to the petitioner or respondent no.6 to be heard. It is noted that the Education Officer had sanctioned continuation of the petitioner in the post in view of the likelihood of the working of the school may be effected and therefore extended. In these circumstances, the petition must succeed and I pass the following order:-

(i) Rule in terms of prayer clause (b). The impugned communication dated 9th June, 2017 is hereby quashed and set aside.

(ii) Petition is disposed of in above terms.

(iii) No costs.

(A. K. MENON, J.)