

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3831 OF 2012

Neeta Sanjeev Dighe	]	
Age : 47 years,	]	
R/o H2/408, Asawari, Lokpuram,	]	
Smt. Gladys Alwaris Road,	]	
Off. Pokhran Road No.2.,	]	
Thane (West).	]	Petitioner

Vs.

- | | | | |
|----|--|---|--|
| 1. | State of Maharashtra |] | |
| | Through Secretary, |] | |
| | Department of Higher & Technical |] | |
| | Education, Mantralaya, Annexe |] | |
| | Mumbai – 400 032. |] | |
| 2. | Joint Director of Higher Education, |] | |
| | Mumbai Region, Elphinstone |] | |
| | Technical Institute, 3, Mahapalika Marg, |] | |
| | Mumbai – 400 001. |] | |

3. The Joint Director of Higher Education,]
Konkan Division, Govt. Adhyapak]
Mahavidyalaya Campus,]
Panvel, Dist. Raigad.]
4. Mumbai University,]
Through its Registrar,]
Fort Campus, Fort,]
Mumbai – 400 032.]
5. Padmashri Annasaheb Jadhav]
Bhartiya Samaj Unnati Mandal,]
Bhiwandi, Dist. Thane.]
6. Principal, B.N.N. College of Arts]
Science and Commerce,]
Bhiwandi, Dist.] Respondents

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Mr. Mihir Desai, Senior Advocate a/w Mr. P. Sarnath, for Petitioner.

Ms. S.S. Bhende, A.G.P, for Respondents No.1 to 3 – State.

Mr. Rui A. Rodrigues a/w Jainendra Sheth, for Respondent No.5.

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CORAM : SUNIL B. SHUKRE AND
G.A. SANAP, JJ.

RESERVED ON : 30th MARCH, 2022.

PRONOUNCED ON: 13th APRIL, 2022.

JUDGMENT: [Per G.A. Sanap, J.]:

1. In this petition, the petitioner has prayed for quashing and setting aside the order dated 6th August, 2011 passed by respondent No.1, whereby the proposal for de-reservation of the post to which the petitioner was appointed came to be rejected and for a declaration that service of the petitioner as a “Lecturer” in Botany may be confirmed from the date of her initial appointment. The facts are as follows.

2. The petitioner was initially appointed as a Lecturer by respondent No.5 at respondent No.6-College on a temporary basis for the period from 29th November, 1990 to 20th April, 1991. The post to which the petitioner was appointed was a reserved post. Before appointment of the petitioner as a Lecturer, since 1985 every year the said reserved post was advertised for more than five years by 1990. The reserved category candidate had not responded to the advertisements and, therefore, the same post could not be filled in.

3. The petitioner after initial appointment was continued for academic years 1991-1992 and 1992-1993. Despite advertisements, as respondent No.5 did not get the candidate from the reserved category, appointment of the petitioner was continued every year on temporary basis. It is alleged that on 26th July, 1993, respondent No.5 did not allow the petitioner to joint the duty. The petitioner, therefore, approached the College Tribunal, Mumbai. The College

Tribunal, Mumbai during pendency of the appeal, allowed the petitioner to report on duty. The College Tribunal dismissed the appeal on 30th March, 1995. However, the College Tribunal continued stay till re-opening of the College for the academic session 1995-1996.

4. The petitioner by filing the Writ Petition in this Court challenged the order of the College Tribunal. This Court continued the interim relief granted by the College Tribunal during pendency of the petition. The petition came to be disposed of on 11th January, 2010. This Court issued directions to the respondents to commence and complete the procedure for de-reservation of her post on or before 31st July, 2010. This Court continued interim relief till communication of the decision taken by the respondents pursuant to the order in the writ petition.

5. It is the case of the petitioner that she made an application to the University for de-reservation of the post occupied by her. The University made recommendation to the Joint Director i.e respondent No.2 for de-reservation of the post. The stay was in operation. The petitioner continued to work as a Lecturer. After filing the Contempt Petition by the petitioner on 6th August, 2011, respondent No.2 rejected the proposal for de-reservation of the post occupied by the petitioner. It is the case of the petitioner that the post was advertised every year for a continuous period of five years. The petitioner is, therefore, entitled to get the benefit of the

Government Resolution dated 29th September, 1986 and also the Government Resolution dated 25th January, 1990. The petitioner is entitled to get continuation and all the service benefits from 25th August, 1990.

6. One Dr. Babasaheb Bhimrao Kadam filed affidavit on behalf of respondents No.1 to 3 and opposed the claim. Respondents No.1 to 3 have not denied the qualification, eligibility and appointment of the petitioner. However, it is the case of the respondents No.1 to 3 that the petitioner is not entitled to avail the benefits of the Government Resolutions. Appointment of the petitioner was temporary. Appointment was made on 23rd December, 1990 by a Local Selection Committee. There was no clear vacancy. In order to get the benefit of de-reservation and continuity of the service, the appointment must be on the clear and vacant post. The appointment was temporary and on year to year basis. The case of the petitioner was not accepted by the College Tribunal.

7. It is the case of respondents No.1 to 3 that respondents No.4 and 5 did not make efforts to fill the reserved post by appointing reserved category candidate. Respondents No.4 and 5 in the absence of the candidate from one reserved category ought to have appointed the candidate from other reserved category. The petitioner is not entitled to get the benefit of any of the Government Resolutions relied upon by her. It is further contended that as per

the roster prescribed by Government Resolution dated 29th March, 1997, two posts for open category were available. One post was occupied by Mr. Momin till 30th September, 2002. On his superannuation, said post was available to be filled from open category. Respondents No.4 and 5 were, therefore, instructed to appoint the petitioner to the open post from 1st October, 2002. The University without following rules and regulations applied for de-reservation of the post. The proposal was not tenable and, therefore, the same was rejected.

8. Mrs. S.S. Gosavi - The Deputy Registrar Special Cell University of Bombay has filed an affidavit on behalf of respondent No.4 - University. Respondent No.4 – University has supported the case of the petitioner. It is contended that the University is bound by the directions issued by the State Government in matters pertaining to reservation under section 7 (2) of the Maharashtra Universities Act, 1994. After the decision dated 11th January, 2010 in Writ Petition No.2677 of 1995, the University had informed respondent No.6 – College to submit their proposal. On receipt of the proposal for de-reservation of the post occupied by the petitioner, on 17th February, 2010, respondent No.4 made a recommendation to respondent No.3 – Joint Director vide letter dated 6th April, 2010 for de-reservation of the the post. Along with recommendation, necessary documents were submitted.

9. Mr. Mihir Desai, learned Senior Advocate submitted that the order dated 6th August, 2011 rejecting the proposal for de-reservation of the post reflects non application of mind to the issue involved in the matter. The learned Senior Advocate submitted that the petitioner was not at fault. The petitioner, pursuant to the advertisement, participated in the recruitment process being eligible for the post. The learned Senior Advocate pointed out that despite repeated yearly advertisements to fill the vacant reserved post, the eligible candidate from the reserved category did not participate in the recruitment process and, therefore, the petitioner being eligible in all respect was initially appointed by the committee constituted by the Management and subsequently by the committee deputed by the University. The learned Senior Advocate submitted that on the date of selection of the petitioner on 21st August, 1991 by the University Selection Committee, the post was advertised on seven occasions. But, the reserved category candidate could not be found and, therefore, from the initial appointment of the petitioner, she was continuously appointed every year for the academic session. The learned Senior Advocate by drawing our attention towards the record submitted that the appointment of the petitioner from time to time was approved by the University. In the submission of the learned Senior Advocate, since the post was continuously advertised for five years, it was incumbent upon the State Government to accept the proposal for de-reservation of the said post forwarded through the University, with the recommendation of the University. The learned Senior Advocate submitted that the issue involved in this case has

been considered earlier in number of matters. In order to substantiate the submission, the learned Senior Advocate has relied on the decisions in the cases of **Ruchira S. Manjrekar Vs. The Principal D.G. Ruparel College of Arts, Science and Commerce and others**, (Civil Writ Petition No. 1940 of 2006) and **Ruchira S. Manjrekar Vs. Joint Director of Higher and Technical Education Mumbai Region, Elphinstone Technical School, Dhobi Talao, Mumbai** (O.S. Writ Petition No.2463 of 2012) delivered on 29th August, 2013.

10. Ms. Bhende, learned A.G.P appearing for respondents No.1 to 3 -State submitted that the order dated 6th August, 2011 passed by respondent No.1 is a well reasoned order and, therefore, on the basis of the submission made on behalf of respondent No.1, same cannot be quashed and set aside. The learned A.G.P submitted that at the time of the appointment of the petitioner, required procedure as per law was not followed. The learned A.G.P submitted that one Shri G.N. Deshpande belonging to scheduled caste was working on one post from 8th October, 1992. The learned A.G.P further submitted that in the year 1997, two posts of open category became available. The proposal was given on behalf of respondent No.1 to respondents No.5 and 6 to accommodate the petitioner on the said post, however, it was not accepted. The learned A.G.P submitted that the Government Resolutions relied upon by the petitioner are not applicable to her case. In short, it is submitted that the case of the petitioner would not be covered by the Government Resolutions

relied on by the petitioner.

11. Learned Advocate Mr. Rui Rodrigues made the submissions consistent with the reply of respondent No.4. Learned Advocate submitted that after verifying the proposal submitted by respondent No.5 and 6 for de-reservation of the post in question, respondent No.4 recommended de-reservation of the post by complying the Government Resolutions relied on by the petitioner.

12. In order to appreciate the rival submissions, we have perused the record and proceedings. In order to consider the application of the guidelines from the Government Resolutions and the settled legal position to the facts of this case, it would be necessary to state at the outset the facts having bearing with the controversy. The Principal of respondent No.6-College gave an advertisement for the appointment of Lecturers for academic year 1990-1991. The post of Lecturer for subject of Botany was one of the advertised posts which was shown reserved. The petitioner applied pursuant to the advertisement. She was selected by the selection committee constituted by the College. She was appointed with effect from 29th November, 1990 up to 20th April, 1991 on temporary basis to the post which was reserved. The advertisement is marked as Exhibit A and the appointment order is marked as Exhibit C. It is undisputed that this post meant for reserved category candidate was advertised for five years, commencing from 1985. The first advertisement is dated 18th May, 1985. The second advertisement is dated 19th May,

1986. Third advertisement is dated 5th May, 1987. Fourth advertisement is dated 7th June, 1988. Fifth advertisement is dated 12th September, 1989.

13. Seventh advertisement was published on 14th April, 1991 by the Principal of respondent No.6 for filling in posts of Lecturers in the various subjects mentioned in the advertisement. There were two posts of Full Time Lecturers for Botany subject and both the posts were for reserved category. Pursuant to this advertisement, again the petitioner applied. Selection process was conducted by the Selection Committee duly constituted by the University. The petitioner was again selected and vide order dated 25th August, 1991 was appointed for one year on temporary basis. For the year 1992-1993, the post was again advertised on 9th June, 1992. The petitioner vide order dated 10th August, 1992 was appointed for academic year 1992-1993. The record would show that again on 2nd June, 1993, the post was advertised. The record reveals that no candidate belonging to reserved category was found and, therefore, the petitioner was continued on the said post on year to year basis. It is pertinent to note that appointment of the petitioner was made on year to year basis by following due process. Though the post was advertised for reserved category, the candidate of reserved category could not be found and, therefore, the petitioner was appointed to the said post. In this petition, mandamus has been sought for de-reservation of the said post. In this context, it would be necessary to see the relevant Government Resolutions and the applicability of the

same to the case of the petitioner. The first resolution is dated 29th September, 1986. In order to tackle the situation, similar to the case of the petitioner, this Government resolution was issued. It provided that reserved category teaching post would be advertised for three years and after three advertisements if no reserved category candidate was available, the post would be de-reserved. The said Government Resolution also provided that if reserved category candidate is not available then open category candidate could be appointed temporarily to the said post. Such a temporary appointment from open category teacher would be continued from year to year till the reserved category candidate is found or till the post is de-reserved. The Government Resolution further provided that after process of de-reservation of the post is completed, appointment of the non backward class teacher shall be deemed to be on probation with retrospective effect from the date of his initial appointment, if he has held continuous appointment for two years in the College under the same management and the said appointment shall be confirmed from the date of completion of two years of continuous appointment. It is to be noted that in order to seek implementation of this Government Resolution, on 11th March, 1987, respondent No.4-University issued a circular and thereby informed all the concerned to comply the guidelines provided in the Government Resolution dated 29th September, 1986. It is to be seen that till appointment of the petitioner on 29th November, 1990 by the Local Selection Committee, the said post was not de-reserved.

14. In the year 1990, Government of Maharashtra gave a second thought to the Government Resolution dated 29th September, 1986 and issued a Government Resolution dated 25th January, 1990. The subject covered by this Government Resolution was more or less same, however, by this Government Resolution the period for de-reservation of the reserved category post was extended from three years to five years. Respondent No.4 – University vide a circular dated 7th July, 1990 issued the directions to the Colleges to comply the guidelines of Government Resolution dated 25th January, 1990 and the Circular dated 7th July, 1990.

15. It is to be noted that prior to the appointment of the petitioner, post of Lecturer in the subject of Botany for reserved category was advertised on six occasions from 1986. It is seen that no steps were taken by respondents No.5 and 6 to initiate the process for de-reservation of the post. The said post was advertised up to 1993. A perusal of the Government Resolutions dated 29th September, 1986 and 25th January, 1990 would show that de-reservation is attached to the post and, therefore, if the post is advertised for five years and no reserved category candidate is available then the post is required to be de-reserved after five years. The de-reservation would be required to be made irrespective of the fact that some open category candidate was appointed on this post, during this period of five years or different open category candidates occupied the said post or even if the post remained vacant during this period. In this case, before appointment of the petitioner by the

duly constituted selection committee of the University, post of Lecturer in Botany subject was advertised on seven occasions.

16. Before proceeding to deal with recommendation made by respondent No.4 – University on receipt of the proposal from respondents No.5 and 6, one important fact which led to filing of this petition needs to be stated. The petitioner, as stated above, was appointed as Lecturer in subject of Botany to the post which was advertised for backward class category. For some reason or the other, on 26th July, 1993, the petitioner was not allowed to work. The petitioner, therefore, filed appeal bearing No.31 of 1993 before the College Tribunal, Mumbai and challenged the said action of the College. The appeal was dismissed. The petitioner challenged the order passed by the College Tribunal by filing writ petition bearing No.2677 of 1995. The Single Judge of this Court decided the writ petition on 11th January, 2010. The learned Single Judge confirmed the order passed by the College Tribunal. However, considering the grievance made by the petitioner, the learned Single Judge directed respondents No.5 and 6 to commence and complete the process for de-reservation of the post to which the petitioner was appointed. Liberty was granted to the petitioner to make a representation. Despite this direction, steps were not taken for initiation of the process for de-reservation. The petitioner filed contempt petition. The contempt petition was disposed of in view of the statement made on behalf of respondents No.5 and 6. The petitioner on 25th June, 2010 made a representation to the Registrar University of

Mumbai and the Joint Director Education, Department of Higher and Technical Education, Mantralaya, Mumbai and prayed for de-reservation of the post to which she has been appointed.

17. At this stage, it is pertinent to mention that University of Bombay accorded approval to the appointment of the petitioner from time to time. In this context, reference can be made to the letters dated 13th October, 1993 and 29th April, 1997. Vide letter dated 13th October, 1993, approval was granted to the appointment of the petitioner as a “Full Time Lecturer” in Botany subject from 20th June, 1992 to 20th April, 1993. A perusal of letter dated 29th April, 1997 would show that approval to the appointment of the petitioner as a “Full Time Lecturer” in Botany subject on temporary basis was accorded from 13th August, 1993 to 20th April, 1994, 20th April, 1994 to 20th April, 1995, 22nd August, 1995 to 20th April, 1996 and 20th April, 1996 to 19th April, 1997. It is to be noted that the University is the Regulatory Authority in respect of affiliated colleges in such matters.

18. In the above context, it is necessary to see the stand of the University which can be seen from the letter dated 6th April, 2010. A perusal of this recommendation dated 6th April, 2010 would show that on receipt of the representation from the petitioner, it was duly verified. It has been specifically stated that on receipt of this representation, necessary documents were called for by the University from the College and the same were attached with the

recommendation. It is seen that all the advertisements published by the College, the correspondence made with Employment Exchange Office and the approval orders for each year had been forwarded to respondent No.2. In this recommendation, it was specifically mentioned that appointment of the petitioner was made on the reserved post. The University on the basis of the available material did not find any fault with proposal and accordingly forwarded the recommendation for de-reservation of post to the Government. In our opinion, recommendation of the University dated 6th April, 2010 is self-explanatory. A perusal of this recommendation would show that before making any recommendation all the relevant facts had been verified. The University on being satisfied that the case in question was a fit case for recommending de-reservation of the post, made the recommendation. The University as can be seen from this recommendation was fully satisfied that the Advertisements as stated by the petitioner had been published. The reserved category candidate could not be found and, therefore, the petitioner was appointed to the said reserved post. It is also seen that the University was satisfied that in order to ensure that the reserved category candidates were made available, information to that effect was forwarded to the Employment Exchange Office by respondents No.5 and 6. In our opinion, therefore, stand of the State that one Deshpande was appointed to the post reserved for scheduled caste category candidate in the year 1992 and, therefore, reserved post could not be de-reserved cannot be accepted.

19. In view of the above factual position, it would be necessary to advert to the settled legal position. The learned Advocate for the petitioner has relied on the decision in the case of **Ms. Ruchira S. Manjekar Vs. The Principal, D.G. Ruparel College of Arts, Science and Commerce and others** and **Ms. Ruchira S. Majrekar Vs. Joint Director of Higher and Technical Education, Mumbai Region** (supra). Learned Advocate for the petitioner submitted that in this case the decisions delivered by our Court in more than one similar cases have been considered.

20. A perusal of the judgment would show that the earlier decision of this Court in case of **Kakoli Shyamlal Sircar Vs. Nagpur University and others**, 2002 (2) Mh. L.J, 673, unreported judgment in case of **Ashok Chandrashekar Rao Vs. University of Mumbai in Writ Petition No.3101 of 2004** and the decision of the Apex Court in the case of **Deepa Gourang Murdeshwar Katre Vs. Principal, V.A.V. College of Arts and others**, (2007) 14 Supreme Court Cases, 108 have been considered. It is held that if the reserved category post was advertised continuously for five years and the reserved category candidate could not be found then the open category candidate can be appointed to the said reserved post on temporary basis and after advertising the post for five years, the said post can be de-reserved.

21. In our opinion, the facts of the case in hand are substantially identical. In this case, it has been established that the petitioner was initially appointed on 29th November, 1990 as a Lecturer by a Local

Selection Committee to the reserved post. The said post was again advertised. The petitioner was selected by the University Selection Committee and appointed as a Lecturer in Botany to the reserved post. The post of lecturer had been advertised every year from 1986. 9th Advertisement to fill up the said reserved category post is dated 2nd June, 1993. It is to be noted that there is no serious dispute by respondents No.1 to 4 about publication of the advertisements by respondents No.5 and 6. It is further pertinent to mention that respondent No.4 – University, on being satisfied every year accorded approval to the appointment of the petitioner as a lecturer in Botany subject to the reserved category post. In our view, therefore, case of the petitioner stands fully covered by the Government Resolution dated 25th January, 1990.

22. It is submitted that as per the Government Resolution dated 5th December, 1994, fresh guidelines have been issued and the same provided that the de-reservation would be permissible after six years. It is also submitted that the post meant for the reserved category candidate could not be filled up by appointing open category candidate. The Government Resolution mandated that if the candidate from a particular reserved category is not found then the candidate from the other reserved category should be appointed. In short, the Government Resolution provided for interchangeability of the reservation. In our opinion, this Government Resolution would not be applicable to the case of the petitioner. The same issue was raised in the case of **Ms. Ruchira Manjrekar** (supra). This Court has

held that the Government Resolution dated 5th December, 1994 would not have retrospective effect. It is also held the right accrued in favour of a candidate prior to the Government Resolution dated 5th December, 1994 could not be curtailed or taken away as per the Government Resolution dated 5th December, 1994. In our view, the submissions advanced on this point cannot be accepted. Similarly, the Government Resolution dated 5th December, 1994 would not be applicable to this case inasmuch as the right to claim de-reservation of the post on which the petitioner was appointed accrued in her favour before 5th December, 1994. It is, therefore, apparent that case of the petitioner would be squarely covered by the Government Resolution dated 25th January, 1990.

23. The ground stated by respondent No.2 for rejecting the proposal vide order dated 6th August, 2011, therefore, cannot be sustained. In our opinion, appointment of Mr. Deshpande as a reserved category candidate in 1992 will have no bearing on petitioner's case inasmuch she was working on a different full time post and Mr. Deshpande was appointed on a separate post two years after the petitioner's appointment. Besides, it has been stated by the State that it has no objection for accommodating the petitioner on vacant open post from 1st October, 2002 if she is eligible. In our view, this clearly indicates that the State is also convinced that the denial of the claim of the petitioner would cause injustice. It is to be noted that the petitioner was first appointed in the year 1990 by Local Selection Committee. She was selected by the duly constituted

selection committee of the University in the year 1991. The petitioner has been working as a lecturer in Botany subject since 1991. It is apparent on the face of the record that till date the petitioner has put in 21 years service. In our view, it would be highly unjust to deny the original claim of the petitioner. In our view, therefore, the reasons recorded vide order dated 6th August, 2011 rejecting de-reservation are not at all just, proper and in consonance with the requirements of the Government Resolution dated 25th January, 1990. Therefore, in our view, the petition deserves to be allowed.

24. In view of aforesaid observations, following order is expedient;

: ORDER :

1. The petition is allowed;
2. The impugned order dated 6th August, 2011 passed by respondent No.1 is quashed and set aside;
3. Respondents No.1, 2 and 3 are directed to de-reserve the post occupied by the petitioner and regularize the petitioner's service to the said post with effect from 21st August, 1991 along with all consequential benefits including confirmation with effect from 20th August, 1993.

4. The respondents are directed to pay salary, arrears and other emoluments, if any, due and payable.
5. Rule is made absolute in the above terms;
6. The Petition is disposed of.

[G.A. SANAP, J.]

[SUNIL B. SHUKRE, J.]