



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.5849 OF 2021

- 1) Peoples Education Society,
Mundane, Tq-Shahada,
Dist-Nandurbar,
Through its Chairman,
Shri J.T. Pawar,
Age-52 years, Occu:Business & Agri.,
R/o-Mundane, Tq-Shahada,
Dist-Nandurbar,
- 2) Adarsh Vidyalay Mundane,
Tq-Shahada, Dist-Nandurbar,
Through its Head Master.

...PETITIONERS

VERSUS

- 1) The State of Maharashtra,
Through its Principal Secretary,
School Education Department,
Mantralaya, Mumbai-32,
- 2) Assistant Commissioner,
Backward Class Cell,
Nashik Region, Nashik,
- 3) Deputy Director (Education),
Nashik Region, Nashik,
- 4) Education Officer (Secondary),
Zilla Parishad, Nandurbar.

...RESPONDENTS

...
Mr. Mahesh S. Deshmukh Advocate for Petitioners.
Mr. S.K. Shirse, A.G.P. for Respondent Nos. 1 to 4.
...

**CORAM: SMT. VIBHA KANKANWADI AND
S.G. CHAPALGAONKAR, JJ.**

DATE OF RESERVING JUDGMENT : 6th MARCH 2024

DATE OF PRONOUNCING JUDGMENT : 3rd APRIL 2024

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Rule. Rule made returnable forthwith. Heard learned counsel appearing for the respective parties finally, by consent.

2. By way of present Petition, the petitioners are praying for issuance of directions to quash and set aside the order passed by respondent No.2 approving roster in relation to posts of teaching staff of petitioner No.2 school run by petitioner No.1 dated 27th October 2020, and to hold that the said order is contrary to the percentage prescribed for Scheduled Tribe and Other Backward Class Category under Rule 9(7) of Maharashtra Employees of Private Schools (Conditions of Service) Rules 1981 (for short "MEPS Rules, 1981"). The further relief has been asked to direct respondent No.2 to forthwith inspect and approve Roster of reservation of petitioner No.2 strictly in accordance with

mandate and particularly percentage prescribed under Rule 9(7) of the MEPS Rules, 1981.

3. Learned Advocate Mr. Deshmukh appearing for the petitioners submits that petitioner No.2 school is run by petitioner No.1. The roster in respect of petitioner No.2 school was sent for approval / inspection to respondent No.2, however, by impugned order dated 27th October 2020 it has not been correctly approved by stating that it is not in accordance with the Government Resolutions dated 5th December 2018, 12th February 2019, 16th August 2019 and 21st August 2019. The concerned authority then went on to wrongly prescribe the reservation applicable to the staff of petitioner No.2. Learned Advocate submits that as regards the reservation is concerned, petitioner No.2 school is governed by the provisions of MEPS Rules, 1981. Rule 9(7) of the MEPS Rules 1981 specially prescribes the reservation / percentage in respect of Scheduled Tribe and Other Backward Class category. The State Government has no authority to change the said percentage by way of the Government Resolution. He has also taken help of the decision of this Court in *Nishad Sadashiv Pawar and others vs. Dnyanasadhana College (through Honorary General Secretary)*

and others, 2005 BCI 224. Learned Advocate for the petitioners has also placed reliance on the decision in *Pimpalner Education Society and another vs. the State of Maharashtra and others (Writ Petition No.2557 of 2015, decided by this Court on 16th March 2016)*, wherein, after relying upon the observations in *Nishad Sadashiv Pawar and others vs. Dnyanasadhana College (through Honorary General Secretary) and others*, (supra), it has been specifically observed in Paragraph No.5 as under:-

5. It is to be noted that unless there is prescription in the Rules providing for such higher percentage of reservation in favour of Scheduled Tribes category, it would be impermissible for the authorities to act upon and observe executive instructions issued by the State. The issue raised in the matter is no more *res integra* in view of the Judgment delivered by the Division Bench of this Court in the matter of *Nishad Sadashiv Pawar and others vs. Dnyanasadhana College and others, reported in 2005(4) All MR 101*. The Division Bench has observed in paragraphs No.3 & 4, as below:

"3 It appears that the authority has proceeded on the footing that what has to be applied as Government G.R. in the matter of reservations. The G.R. is nothing but administrative instructions which will be applicable, if there is no primary or secondary legislation in force. In the instant case, under the M.E.P.S. Act, rules have been framed. Rule 9(7) provides that the Management shall reserve 34% of the total number of posts of the teaching as well as non-teaching staff for the members of S.C., S.T. and Backward communities. In other words it is clear that rules in force being subordinate legislation are applicable. The issue is whether the G.R.s will prevail over the rules. G.R.s are issued pursuant to the executive powers of the State as provided by Article 162 of the Constitution of

India. The rules are framed pursuant to delegation of powers by the Legislature on the delegate. The rule making power is subject to Legislative control. Rules are subordinate legislation whereas administrative instructions are not. Administrative instructions cannot contravene the rules. See Nanjundappa R.V. vs. Themmiiah T., (1972) 1 SCC 409. The rules therefore, will prevail over the G.R.

4. The authorities under the M.E.P.S. Act to follow strictly Rule 9(7) of M.E.P.S. Rules in so far as recruitment to the posts governed by the M.E.P.S. Act and rules. The G.R.s as issued by the Government from time to time in the exercise of its administrative powers under Article 162 of the Constitution of India would be inapplicable to appointments in schools and junior colleges.

Consequently if the contentions raised in ground {c} are considered, the Petitioners are right and the Petitioners can be posted against the posts presently held by them. Considering that and as the issue has not been answered, petition will have to be partly allowed."

4. Learned Advocate for the petitioners further points out that there is a reference to the Ordinance issued by the Hon'ble the Governor of Maharashtra on 9th June 2014 in the impugned communication. By way of said Ordinance, the change in the reservation was made in respect of many posts including teacher and it was stated that it would be applicable to various departments including School Education and Sports Department, Tribal Development Department. However, by further Ordinance by the Hon'ble Governor of Maharashtra issued on 31st October 2014 the effect of earlier Ordinance dated 9th June 2014 was restricted to the post of Kotwal and change was effected and

instead of teachers from School Education and Sports Department, it was restricted to the post of teachers from Rural Development Department and Tribal Development Department. Further, by way of Government Resolution dated 27th August 2018, the further percentage of reservation was prescribed in respect of different districts including the District of Nandurbar. But it was restricted in respect of direct recruitment to in all 18 posts out of which, serial No.7 is teacher (Zilla Parishad) and serial No.17 is teacher (Ashram School) (Tribal Development Department). Therefore, taking into consideration these Ordinances also, the impugned order cannot be allowed to sustain as the said Government Resolution is not applicable to the petitioners.

5. The learned AGP relied on the affidavit-in-reply of Rajendra Fula More, the Naib Tahsildar, Backward Class Cell, Nashik Division, Nashik and submitted that the roster of the petitioners' school was inspected by respondent No.2 and remark was given that all vacant posts are to be filled in only from Scheduled Tribe candidates as the locality of Mundane village in which the institute is located falls under ambit of 100% PESA according to Government Resolution dated 5th March 2015. Depending on the

guidelines of Government Resolution dated 5th March 2015 and Notification of the Hon'ble Governor of Maharashtra dated 9th June 2014, the said decision has been taken. There is a certificate on record which shows that village Mandane, Taluka-Shahada is a village having majority of Scheduled Tribe persons. He also produced on record a letter written by Assistant Commissioner (Backward Class Desk), Divisional Commissioner Office, Nashik to Under Secretary, General Administration Department, dated 12th December 2023 seeking guidance as to whether the Government Resolution dated 1st February 2023 is applicable to the teachers working in private schools. Learned AGP submits that the said guidance is still awaited.

6. The point involved is short, i.e. whether the provisions of Enactment would prevail in respect of percentage of reservation or the Government Resolution or the Ordinance would prevail. The said point is no *res integra* in view of the above referred paragraphs from the decision in ***Nishad Sadashiv Pawar and others vs. Dnyanasadhana College and others*** (supra), relied on in the decision in ***Pimpalner Education Society and another vs. the State of Maharashtra and others*** (supra). Therefore, the rules would prevail over the Government Resolution. Here the

percentage of reservation came to be changed by virtue of the Ordinance issued by the Hon'ble Governor of Maharashtra. However, the duration of the said Ordinance would be of six months only, unless it is extended and before the expiry of that or by legal mode the said percentage ought to have been then carried out in the Enactment itself. As observed above, the Government Resolution is administrative instructions and would be of more importance when there is no primary or secondary legislation in force. However, here the legislation is in force. Therefore, unless the legislation is amended, there cannot be change in the percentage of reservation. Both the cases i.e. *Nishad Sadashiv Pawar and others vs. Dnyanasadhana College and others* (supra) and *Pimpalner Education Society and another vs. the State of Maharashtra and others* (supra) were having similar facts and in such situation it was held that the authorities under the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act should strictly follow the rules. In *Pimpalner Education Society and another vs. the State of Maharashtra and others* (supra), this Court had considered the Government Resolution dated 5th March 2015 providing for the higher percentage of reservation in favour of the Scheduled Tribes since the area within which the school was operating,

comprises of majority of population belonging to the Scheduled Tribes category. Taking into consideration the fact that it was contrary to Rule 9(7) of the MEPS Rules, 1981, the impugned order was quashed and set aside.

7. Again in the present matter also, respondent No.2 is relying upon the same Government Resolution dated 5th March 2015. It is very much unfortunate that the Government officers are only harping upon the Government Resolutions and not considering the decisions of this Court. If respondent No.2 – Assistant Commissioner would have taken note of the decision of this Court in *Pimpalner Education Society and another vs. the State of Maharashtra and others* (supra), he would not have passed the impugned order and therefore, it deserves to be quashed and set aside.

8. Writ Petition, therefore, deserves to be allowed and the Writ Petition is accordingly allowed. The impugned order dated 27th October 2020 issued by the Assistant Commissioner, Backward Class Cell, Nashik Region, Nashik is quashed and set aside and the concerned authority is directed to prepare and approve the roster in accordance with the provisions of Rule 9(7)

of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981. The respondent – authority shall consider the proposal for approval forwarded by the petitioners, strictly in accordance with the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 and to take decision within a period of THREE MONTHS from today.

9. Rule is made absolute in above terms.

[S.G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/MAR24