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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Writ Petition No.1188/2024

1. Devi Saraswati Mahila Bahu-Uddeshiya Shikshan Sanstha,
Thana (Petrol Pump), Tahsil & District Bhandara,
through its Authorized Director Shri Vikas Deoram Wanjari,
Aged about 49 years, R/o Ramabai Ward,
behind Patwari House, Bhandara, Tahsil & District Bhandara.
2. Nitin Keshao Lende,
Aged about 36 years, Occ-Service, R/o. Thana (Petrol Pump),
Tahsil & District Bhandara.Petitioners

Versus

1. The State of Maharashtra,
through its Secretary, School Education & Sports Department,
Mantralaya, Mumbai-400032.
2. The Deputy Director of Education, Nagpur Division, Nagpur.
3. The Education Officer (Secondary), Zilla Parishad,
Bhandara
Respondents.

Mr. A.Z. Jibhkate, Advocate for petitioners.
Ms. N.P. Mehta, Additional Government Pleader for respondent nos. 1 to 3.

CORAM : Nitin W. Sambre & Abhay J. Mantri, JJ
DATE : 06-08-2024.

Oral Judgment (Per Nitin W. Sambre, J.)

RULE. Rule is made returnable forthwith. Heard finally with the consent of the learned Counsel for the parties.

- ii. The challenge in the petition is to the order dated 31-10-2023 wherein the respondent no.3- Education Officer

has refused to grant approval to the appointment of the petitioner no.2 on the post of 'Laboratory Attendant'.

iii. The contention of Mr. Jibhkate, learned Counsel appearing for the petitioners, is that the present petition is the second round of litigation. According to him, in the earlier round of litigation, this Court in Writ Petition No.2998/2021 was pleased to direct reconsideration of the issue about the grant of approval to the appointment of the petitioner no.2 by making the following observation in paragraph 3 of the judgment dated 27-09-2023, which read thus :

"3. After hearing the learned counsel for the parties and after perusing the documents on record we find that for the academic session 2008-2009 as well as 2009-2010 one post of Laboratory Attendant is shown to be sanctioned in the Staff Justification. The appointment of the petitioner is pursuant to the advertisement dated 14-10-2009 which would thus indicate prima facie that at that point of time one post of Laboratory Attendant was sanctioned. Insofar as other tow reasons assigned in the impugned order are concerned they pertain to the policy prevailing on account of Covid Pandemic. That policy is now no longer in operation. In these facts, we find that the interest of justice would be served by directing the Education Officer (Secondary) to reconsider the proposal that was initially moved by the Management seeking approval to the appointment of the

petitioner. The said proposal is dated 19-10-2011. To enable reconsideration of the said proposal the order dated 29-06-2021 is set aside. The petitioner as well as the Headmaster of respondent No.4 should appear with all record before the Education Officer (Secondary) on 9.10.2023. Within a period of four weeks from that date the said proposal shall be decided and the decision shall be communicated to the parties. Proposal be decided on its own merits in accordance with law. Rule is made absolute in the above terms. No costs."

iv. Learned Counsel Mr. Jibhkate would claim that the Education Officer, pursuant to the aforesaid directions reconsidered the issue and has travelled beyond the scope of the directions issued by this Court by furnishing five reasons for rejection of approval. He would invite the attention of this Court to ground nos. (i) and (iii), which read thus:

"(i) That, the Respondent No.3 Education Officer (Secondary), Zilla Parishad, Bhandara is not justified in clubbing the post of Laboratory Attendant along with post of Peon sanctioned as per the order of staff justification for the purpose of reservation when particularly three sanctioned posts of Peon are separately shown and post of Laboratory Attendant is independently shown in the order of staff justification of Devi Saraswati Vidyalaya, Shingori, Tahsil & District Bhandara from the academic session 2009-2010 to onward and therefore, very premise i.e. foundation of the impugned order cannot stand at the

scrutiny of law and the same is liable to be quashed and set aside.

(ii) ***

(iii) *The Respondent No.3 is not justified in not granting approval to the appointment of Petitioner No.2 as a Laboratory Attendant making the reference of roster verified by the Assistant Commissioner, Backward Cell, Nagpur Division, Nagpur when particularly the same is not in conformity with the percentage of reservation to backward class category candidates specified under Rule 9(7) of the Rules, 1981. As per said Rule, 7% reservation to S.T. category is provided. Without causing any prejudice to the grounds raised herein above even if it is assumed that post of Laboratory Attendant along with post of Peon, there cannot be reservation amongst 4 posts for S.T. category candidate since it would come below 0.50. It is the settled principle of law that the verified roster by Assistant Commissioner, Backward Cell cannot have overriding effect upon the statutory provisions and if it is not in conformity with the said statutory Rules, same cannot be binding upon the Petitioner Management. Therefore, interference of this Hon'ble Court under writ jurisdiction to quash and set aside the impugned order dated 31/10/2023 is necessary, in the interest of justice."*

- v. Learned Counsel for the petitioner as such would urge that the respondent Education Officer ought not to have filled up the post of Laboratory Attendant with that of the post

of Peon, particularly when the post of Laboratory Attendant is shown to be solitary to which the reservation is not applicable. According to him, the Backward Class Cell has committed an error in clubbing the posts of Peon and Laboratory Attendant. He would claim that such decision of clubbing the three posts of Peon with that of post of Laboratory Attendant goes contrary to the mandate of sub-rule (7) of Rule 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short, "MEPS Rules").

vi. As against above, the learned Additional Government Pleader would urge that the roster point approved on 29-03-2012 in categorical terms speaks of clubbing of all the four posts viz; three Peon and one Laboratory Attendant together. She claimed that this roster point was duly acted upon by the petitioner no.1 to the extent of filling in the post of the Peon.

vii. According to the learned Additional Government Pleader, the employee i.e petitioner no.2 is in blood relation of the Office Bearer and the appointment of petitioner no.2 is

sought to be justified for the reasons which are not germane to the cause. She had urged that in case the contentions of the learned Counsel for the petitioners are accepted, same would amount to modifying the reservation, roster which is statutorily approved by the Backward Class Cell. As such, the prayer is made for dismissal of the petition.

viii. It is the contention of Mr. Jibhkate, learned Counsel appearing for the petitioners that the petitioner no.1 made two appointments on the post of Peons in 2003 and 2004. The appointment of the petitioner no.2 is of the year 2009, whereas the roster point is approved subsequent thereto i.e. in 2012. In such an eventuality, he would claim that the subsequently approved roster point cannot be made applicable retrospectively by claiming that post of Laboratory Attendant has to be filled in from reserved category.

ix. So far as the aforesaid contentions of learned Counsel for the petitioners are concerned, we are required to have regard to the provisions of Article 16 of the Constitution of India which reads thus :-

16. *Equality of opportunity in matters of public employment*

(1) *There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State,*

(2) *No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.*

(3) *Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.*

(4) *Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.*

(4A) *Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of Scheduled Castes and the Scheduled Tribes which in the opinion of State are not adequately represented in the services under the State.[In article 16 of the Constitution after clause 4, the following clauses shall be inserted through Constitution (Seventy-seventh Amendment) Act, 1995]*

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent, reservation on total number of vacancies of that year.[The Constitution (Eighty-first Amendment) Act, 2000, aimed to protect reservations for SCs and STs in the backlog of vacancies. A new clause (4B) was added to Article 16 of the Constitution of India by the 81st Amendment Act of 2000, after clause (4A). This gave the states the authority to treat unfilled reserved vacancies from one year as a separate class of vacancies to be filled in the following year or years. The new provision stated that such vacancies must not be included in the vacancies of the year in which they are filled, in order to calculate the overall vacancy reservation ceiling of 50% for that year. This modification essentially eliminated the 50% cap on reservations for backlog vacancies.]

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category."

x. The constitutional reservation is made applicable to the vacancies in the Government employment which are also available in the Schools governed by the provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977.

xi. It is duty of the petitioner no.1 Management to follow the reservation. In such an eventuality, a further statutory duty is casted upon the petitioner no.1 to get the roster point approved from the competent Authorities. If the roster point was not approved prior to 2012 and the appointments were made by the petitioner no.1 without approving the roster point, the Management, in such an eventuality is exposing itself to an illegality of carrying out the act of selection and appointing the employees without following the constitutional mandate of

following reservation as guaranteed under Article 16 of the Constitution.

xii. The provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 are applicable to all the private schools in the State of Maharashtra whether such schools are admitted for grant-in-aid or not. Section 4 of the said Act empowers the State Government to make rules providing for minimum qualification for recruitment including the procedure to be adopted for the same. In this backdrop, the State has framed the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981. Rule 9 of the said Rules provide for the appointment of the staff. Sub-Rule 7 of Rule 9 of the said Rules provides for reservation of 52 per cent of the total number of posts of teaching and non-teaching staff. Clause IV of Schedule B to the said Rules provides for qualification of non-teaching posts in the Schools under Rules 2(1)(j) and 6.

xiii. The post of Laboratory Attendant and other lower grade employees such as Naik, Peon, Watchman, Chowkidar,

Sweeper, Callwoman, Kamathi, etc. are clubbed together in a single group and the qualification prescribed is literate. This clubbing contemplates that in case of more than one post in the said category, the same shall be brought out of the purview of non-applicability of reservation and provisions of the Maharashtra Act No.VIII of 2004 can be said to be applicable. The said Act which is styled as the Maharashtra State Public Services (Reservation for Scheduled Castes, Scheduled Tribes, De-Notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001, was enacted for the reservation of vacancies in public services and posts in favour of persons belonging to the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes of Citizens and for matters connected therewith or incidental thereto.

xiv. The reservation of 52 per cent as referred to hereinabove as provided under sub-Rule 7 of Rule 9 of the Rules of 1981 is in tune with Section 4 of the Act of 2004 which

provides for reservation and the percentage to all the appointments made in public services and posts except the super-specialised posts in Medical, Technical and Educational field, the posts to be filled in by transfer or deputation, the temporary appointments of less than forty-five days duration and the posts which are single (isolated) in any cadre or grade. The provisions of the Act of 2004 further contemplates not only for carrying forward of reserved vacancies but also the responsibility and powers of compliance of the Act to be vested in an Authority. Section 8 of the Act of 2004 contemplates prosecution for non-compliance and Section 11 of the Act of 2004 provides for irregular appointments, which are made in contravention of the provisions of the Act to be void. Under serial number 8 of Clause 4 of Schedule B to the Rules of 1981, even if there are total four posts including that of Peon and Laboratory Attendant available in the school managed by the petitioner no.1-Society, the same could be clubbed together vide the roster point approved on 29.03.2012.

xv. Of the posts of Peon and Laboratory Attendant, which falls in Class-IV or Group-D, three posts were vacant and one post was filled in and as such one post was earmarked for Scheduled Tribe category and two were to be filled in from Open Category.

xvi. It is not in dispute that the petitioner no.1-Society has filled in three posts from Class-IV category from Open category and as such one post should have been allocated to the reserved category. The petitioner no.2 was admittedly appointed on the post of Laboratory Attendant (Class-IV category) from Open Category. In such an eventuality, it is to be held that once the reservation is approved, which is not questioned in the present writ petition, the selection and appointment of the petitioner no.2 is in contravention of the provisions of the Act of 2004 referred to herein above and such appointment of the petitioner no.2 becomes void pursuant to the provisions of Section 11 of the Act of 2004 being an irregular appointment.

xvii. In this background, the contentions raised by Shri A.Z. Jibhkate, counsel for the petitioners that the appointment

of the petitioner no.2 on the post of Laboratory Attendant should have been approved being an isolated post so as to make the Constitutional reservation inapplicable, cannot be accepted.

xviii. Merely because the appointments are made prior to the point of approval of roster by itself will not give leverage to the petitioner no.1 to claim that the roster point will have a prospective applicability. It is the failure of petitioner no.1 Society/Management to get the approval of the roster point timely and then to proceed in the matter of making appointments by following the same. The contentions of the learned Counsel for the petitioners to the aforesaid extent are liable to be rejected as it has to be inferred that the petitioner no.1 is trying to act contrary to the mandate provided under Article 16 of the Constitution of India. If we accept the claim of petitioners, same will amount to granting premium and permitting petitioners to take advantage of its own failure of not getting the roster point approved within time and carrying appointment without adhering to constitutional reservation.

xix. The admitted facts are, of the total four post in Class-IV category three sanctioned posts of peon and one of Laboratory Attendant are earmarked. All these four posts at the time of approval of the roster point were clubbed together and accordingly the post of Laboratory Attendant is shown to be filled in from the reserved category of which backlog is shown.

xx. It appears that instead of filling up the post of Laboratory Attendant from the reserved category as was approved by the Backward Class Cell, same was filled in by selecting and appointing the petitioner no.2, who is not from the reserved category.

xxi. Such act on the part of the petitioner no.1 goes contrary to the roster approval order dated 29-03-2012. If the contentions of the learned Counsel for the petitioners is considered, that all the four posts ought not to have been clubbed together and the post of Laboratory Attendant ought to be shown as an isolated post in the staffing pattern, same will amount to modifying the approval of roster point approved on 29-03-2012 by the statutory authority. In any case such

arguments which are made at a belated stage, i.e. after a period of almost about twelve years of approval of roster point/reservation cannot be accepted.

xxii. Though learned Counsel appearing for the petitioners submits that the impugned order dated 31-10-2023 has given a cause so as to challenge the roster point dated 29-03-2012, the fact remains that on the very same roster point on earlier occasion the petitioner no.1 has acted by making appointments for the post of the Peon. In this backdrop, the contention that the reservation granted to the post of Laboratory Attendant goes contrary to the provisions of sub-rule (7) of Rule 9 of the MEPS Rules, cannot be said to be justified.

xxiii. That being so, in our opinion, the reasons assigned for refusal to grant approval to the appointment of petitioner no.2 appears to be quite justified.

xxiv. No case is made out for causing interference. The petition stands dismissed. Rule is discharged. No costs.

(Abhay J. Mantri, J.)

(Nitin W. Sambre, J)