

CASE NO.:
Appeal (civil) 2091-2092 of 2008

PETITIONER:
Rajendra

RESPONDENT:
State of Maharashtra & Ors.

DATE OF JUDGMENT: 25/03/2008

BENCH:
S.B. SINHA & V.S. SIRPURKAR

JUDGMENT:
J U D G M E N T
(Arising out of SLP (C) No.1035-1036 of 2004)

V.S. SIRPURKAR, J.

1. Leave granted.

2. The judgment of the Bombay High Court dismissing the writ petition filed by the appellant herein as also the subsequent order dismissing the review petition are challenged in this appeal.

3. Appellant herein came to be appointed by Leva Education Union, Leva Boarding Zilla Peth, Jalgaon, hereinafter called the \021Management\022 in Nandinibai Vamanrao Girls High School, Jalgaon w.e.f. 1.1.2001 vide letter dated 30.12.2000. The appellant belongs to the \021Other Backward Class\022 (OBC) category. He was a science graduate and had worked as a clerk in a private bank. He applied to an advertisement issued by respondent no. 3 dated 23.12.2000 inviting applications for the post of Junior Clerk. Significantly, this post had become vacant since the earlier employee working on this post was promoted. That promotion was given due to the superannuation of a Chief Clerk. With the result, Shri S.S. Gangapurkar was promoted as a Chief Clerk and so also Shri V.B. Patil who was the junior most employee was promoted as a Junior Clerk w.e.f. 1.11.2000. It was, therefore, that the post had fallen vacant. It was thus a clear vacancy. The advertisement clarified that the post was reserved for the OBC category. Also, it was clearly mentioned in the advertisement that the preference was given to the candidates who were registered with the employment exchange, Maharashtra. Accordingly, the interviews were held on 30.12.2000 and the appellant herein on the basis of his experience in the clerical field and qualifications was selected out of approximately 9 candidates who appeared for the interview.

4. The appointment order came to be issued by the respondent no. 4 School on 31.12.2000. The Management then sent the proposal to the Education Officer for approval of the appointment of the appellant along with a resolution to that effect. This was done on 7.2.2001. The respondent no. 2, after considering all the facts, accorded the approval to the appointment of the appellant as a Junior Clerk on 17.3.2001. This approval was granted w.e.f. 1.11.2001. The approval letter also suggests that this vacancy had fallen because of the promotion of Shri Gangapurkar and Shri V.B. Patil. However, the respondent No.2 again issued a letter dated 30.5.2002 stating that the appointment was not in accordance with the rules and hence the approval granted by the department was being cancelled. Very significantly, before this abrupt cancellation, the department did not give any hearing either to the petitioner or to the management.

5. A representation was made against this letter by the appellant to the management. The respondent management also personally approached and requested the department to give details about the reasons for the

abrupt action of cancellation of the approval. The respondent No.4 also wrote a letter dated 22.6.2002 to the Education Officer requesting to give details or reasons for the cancellation of appointment. The respondent no.2, however, chose to keep mum. The appellant, therefore, approached Aurangabad Bench of the Bombay High Court by way of a writ petition.

6. It is for the first time that before the High Court that a reply came to be filed by Respondent Nos. 1 and 2 wherein they justified their order was an outcome of the Government Circular No. V.G.T-1000/PK

13/2000/Finance Bill-19/Dt.26th February, 1999 issued on 1st March, 2000.

7. Relying upon the aforementioned resolution dated 1.3.2000 whereby the Government had imposed ban on the recruitment on the posts which have fallen vacant on account of retirement, voluntary retirement, resignation or death of incumbent, it was justified by the Government that the post on which the petitioner was appointed and become vacant on 31.10.2000 on account of the retirement of one Shri A.P. Mahajan, the then Chief Accountant working in the school and therefore it was contrary to the Government Resolution. It was on this ground alone that the writ petition was dismissed and even the review petition was failed, as has been stated earlier and that is how the appellant is before us.

8. Learned counsel appearing on behalf of the appellant firstly urged that the judgment of the High Court was erroneous inasmuch as the High Court had failed to take into account the true spirit of the Government Resolution dated 1.3.2000 as also the subsequent Government Resolution dated 29.6.2000. It was urged before us that firstly the ban effected by the Government Resolution dated 1.3.2000 did not apply to the posts which were fallen vacant due to promotion. Relying on the language of the said Resolution, the learned counsel contended that the ban related to the posts which had fallen vacant on account of retirement, voluntary retirement, resignation or death of an employee. It is tried to be suggested that the present post had fallen vacant on account of promotion of Shri S.S. Gangapurkar to the post of Chief Clerk and the promotion of Shri V.B. Patil to the post of Junior Clerk and that is how the post of Shri V.B. Patil had fallen vacant. It was pointed out that this situation is clear from the order passed by the Education Officer (Middle), Zilla Parishad, Jalgaon dated 17.3.2001 wherefrom it was clear that Shri Gangapurkar was promoted as a Chief Clerk on 1.11.2000, Shri Patil who was already serving in the Institute was also promoted from that date, while the appointment of appellant was approved with effect from 1.11.2001. Secondly, it was contended that this Resolution was not applicable to the reserved posts. For this the learned counsel relied on the Government Resolution dated 29.6.2000 and more particularly paragraph 7 thereof. Lastly it was contended that the order passed by the Education Officer was behind the back of the appellant or the Management and without giving any opportunity of hearing to them. It was contended that the abrupt withdrawal of the approval could not have been ordered unless an opportunity of hearing was provided to the appellant as also the President of the Managing Committee and the Headmistress thereof through whom the proposal of approval was sent.

9. As against this the learned counsel appearing on behalf of respondents 1 and 2 contended that the High Court had rightly dismissed the writ petition since the initial appointment itself was in total derogation of the ban created by Government Resolution dated 1.3.2000. It was reiterated that by the subsequent Government Resolution dated 29.6.2000, though the Government had relaxed the condition for recruitment of the vacant posts reserved for backward classes as also the posts reserved for the project affected persons and the appointments on compassionate grounds, the appellant was not appointed on a post meant for the backward classes as it was clear from the advertisement that even the persons from open category could have applied for the same. Learned counsel invited our attention to the advertisement issued with regard to the post and pointed out that in the advertisement itself it was clarified that the persons belonging to the OBC or open could have applied for the post. It was then reiterated that there were only two posts sanctioned in the reserved category and one of them was filled in by Pandit Budha Tayade, while the appellant was working on the other post. It was, therefore,

reiterated that since the 50% reservation was already done by appointing Pandit Budha Tayade from SC category, the remaining post was meant only for the open category and it could not be said that it was reserved for the backward classes. Lastly it was contended that the question of natural justice could not have been raised as the approval was erroneously granted by the second respondent and the initial appointment itself was illegal or invalid.

10. We have considered the contentions in the light of the documents produced before us.

11. Taking the last point first, it was obvious that the order impugned in the writ petition withdrawing the approval was passed abruptly and it came as a bolt from the blue to the appellant. The said approval was granted on 17.3.2001 which clearly shows that the approval was granted for three persons, namely, Shri S.S. Gangapurkar, who was promoted to the post of Chief Clerk w.e.f. 1.11.2000, Shri V.B. Patil who was promoted to the post of Junior Clerk w.e.f. 1.11.2000 and the appellant who was appointed on the post of Junior Clerk w.e.f. 1.11.2001. The communication clearly suggests that the approval was granted to all the three w.e.f. 1.11.2001. On this basis it is not clear as to how the second respondent all of a sudden chose to withdraw the approval by its communication dated 30.5.2002. It is really strange that it should have dawned on the second respondent that the approval granted earlier was wrongly given only after 17 months. It was not as if the appointment was made keeping the second respondent in dark about it. The second respondent was informed by the letter dated 7.2.2001 about the advertisement given as also the appointment made. Along with this communication dated 7.2.2001, the Managing Committee had sent the proposal in the proper form and the other papers regarding the whole selection process starting from the advertisement to the list of employees. This also included a copy of the roster which would have given the complete idea to the second respondent about the nature of the post as also the manner in which the appellant came to be selected. In pursuance of the above communication the approval came to be granted by the second respondent by its order dated 17.3.2000. Therefore, the action taken after about 17 months on 30.5.2002 of withdrawing the approval appears to be high handed. The only reason given in the communication dated 30.5.2002 is that the appointment made on 17.3.2001 is unlawful and is completely against the settled position of law and, therefore, it stood cancelled. In our opinion this is a totally incorrect action on the part of the authorities. No reasons have been given in this order. Very strangely even the subsequent letters sent on behalf of the appellant and the Managing Committee of the school were also not replied to nor were the reasons informed. We totally disapprove of this abrupt action and that too without hearing the petitioner and further not giving the reasons for the same.

12. It is, for the first time, in the writ petition when the reply affidavit was filed by one Rawan S/o Shenphadu Shirsath, Deputy Education Officer, Zila Parishad, Jalgaon that the reasons came to be informed. In this counter affidavit the said Deputy Education Officer, Zila Parishad, Jalgaon took the position that the appointment initially made was in breach of the circular dated 1.3.2002 and, therefore, the second respondent to the writ petition had cancelled the said approval.

13. It is further reiterated in this counter affidavit that by the subsequent Resolution dated 29.6.2000, the Government had relaxed the condition for the recruitment of the vacant posts to the extent of the backlog and the posts reserved for project affected persons and the appointment on compassionate grounds. It was stated that the post of the appellant did not fall under any of these categories. For this the reliance was placed on the advertisement in which it was mentioned that the posts were meant for OBC/open.

14. There can be no doubt that by the circular dated 1.3.2000 a ban was created for filling up any vacancy which is created after 1.3.2000 due to retirement, voluntary retirement, resignation or death. It is further provided in this circular that in case of urgency for filling up of the posts, a proposal should be submitted before the Review Committee consisting of as many as five officers for its decision. It is then provided that if the decision of the

Review Committee is not acceptable, then the further proposal should be submitted before the \023Secretary Committee\024 headed by the Chief Secretary. However, the next Government Resolution dated 29.6.2000 which came on the heels of the aforementioned circular dated 1.3.2000 very specifically provides that the said circular dated 1.3.2000 would stand relaxed and would not apply to the posts for reducing the backlog of the backward classes or if they were to be filled up by the project affected persons or the persons whose appointment could be made on compassionate grounds. The relevant paragraph 7 of the circular dated 29.6.2000 is as under:

\023If the posts lie vacant due to the above mentioned reason from 1.3.2000 and if such posts are to be filled up by way of special recruitment campaign undertaken to reduce the backlog of the backward classes or if it is to be filled up on the principle of project affected or compassionate grounds then in such case the order of 1.3.2000 would not be applicable.\024

It further goes on to say that:

\023..even if these posts lie vacant for the period of more than 6 months, still it won\022t get lapsed. Even if these posts are to be filled up for reducing the backlog of the backward classes on the principle of project affected or compassionate ground, then also it won\022t get lapsed.\024

A joint reading of these circulars dated 1.3.2000 and 29.6.2000 leave us in no doubt that if the posts were meant for the backward classes, it would not have been covered by the circular dated 1.3.2000.

15. However, the contention of the respondent appears to be that the present post was not meant for the backward classes as the advertisement itself suggests that the persons belonging to OBC/open could have applied for the said post. Learned counsel appearing for the Government invited our attention to the advertisement. According to the learned counsel the advertisement does suggest that the persons belonging to the other backward classes/open could apply. It is obvious that there was something wrong with the advertisement particularly because there could not have been a situation where both the persons belonging to OBC as well as persons belonging to open category could apply simultaneously. We do not think that is the import of advertisement. The advertisement has been published in the following form:

\023Junior clerks are required for Nandinibai Wamanrao Girls School Jalgaon, middle school, managed by Leva Education Union (Leave Boarding), Zilla Peth Jalgaon for academic year 2000-2001.

S.No.

Post

Education Qualification

Category

1.

Junior Clerk

Graduate, English, Marathi

Typing Essential should be

computer trained

OBC

(Open Category)

Preference will be given to candidates registered in Employment Exchange, Maharashtra Government and with Social Welfare Officer Class-I.

Therefore, willing candidates are to be present at 11.00 hrs. on 30.12.2000 at the following address with original certificates of educational qualification and certificate of experience.\024

We do not think that the plain reading of this advertisement would convey

that both the open category as well as the OBC candidates could have applied. In our opinion it is clearly suggested that the post was meant for OBC category. The words in the bracket under letters \0230BC\024 being \0230Open group\024 appear to be either an error or a printer\022s devil. Be that as it may, the fact remains that the status of the appellant belonging to the OBC is not, however, in challenge.

16. However, when the matter came up before this Court, counter affidavit was filed by respondents 1 and 2. We would choose to reproduce the following portion of the counter affidavit which is from internal page 2 of the counter:

\023It is submitted that at the relevant time when appointment of petitioner was made by the respondent society, there were two posts sanctioned for the respondent school. For these two posts:

1. Pandit Budha Tayade \026 SC
 2. Rajendra Vitthal Nemade \026 OBC (Petitioner)
- were working. This fact clearly shows that 50% reservation was already filled by the respondent no.3 society by appointing Shri Pandit Budha Tayade (from SC category). Hence the remaining post is clearly for open category. As the post is for open category there is total ban for recruitment by Government Resolution dated 1.3.2000 and 29.6.2000. Hence this deponent had not made any false or misleading statement before the Hon\022ble High Court.\024

To say the least, we fail to follow anything relevant in this stand. In the first place this position was not shown before the High Court in the counter affidavit filed on behalf of the Government and the Education Department where the language of the advertisement alone was relied upon. The name of Pandit Budha Tayade is nowhere to be found in the record. We have already pointed out that the three approvals which were given were for Shri S.S. Gangapurkar, Chief Clerk, Shri V.B. Patil, Junior clerk and Shri R.V. Nemade, Junior Clerk. We fail to follow wherefrom this additional name of Pandit Budha Tayade has and can come. When the learned counsel appearing on behalf of the Government was specifically asked this question, no light could be thrown by her over this issue. We have, therefore, no hesitation in rejecting that stand. This is apart from the fact that if the post was not meant for the OBC category there was no necessity on the part of the Managing Committee to advertise the post as meant for OBC category. The respondents 1 and 2 have not filed any document before us suggesting that this post was not meant in the roster for an OBC candidate. The copy of the roster of the school was already submitted by the School Management at the time of seeking of the approval and it was in the wake of that roster that the approval was granted.

17. Again the stand taken is as if two posts were advertised and one post having been given to a SC category, the second post would remain for the open category. This is not the correct position as here only one post was to be filled as per Roster Point. When any post is to be filled up, it is filled up according to the roster which roster is already prepared and approved by the Education Department. Therefore, every such post would go only by the roster and not by the weird calculation shown on behalf of the Government. We have, therefore, no hesitation in rejecting the arguments on the part of the first and second respondent. We also disapprove the action taken by the second respondent in abruptly canceling the approval even without hearing the appellant or, as the case may be, the Managing Committee.

18. We, however, do not accept the arguments that this post had become available because of the promotion and, therefore, was not covered by circular dated 1.3.2000. It cannot be forgotten that the post became available basically on account of retirement of Chief Clerk and, therefore, consequent promotions were effected. Thus the post did not become available only because of the promotions. However, since we have disapproved of the action of abrupt withdrawal, the appeal must succeed.

19. In the result the appeals are allowed. We set aside the order of the

High Court and allow the writ petition. The counsel fee is fixed at Rs.10,000/-

JUDIS