

Shakuntala Ganpatsa Shirbhate

Vs

Industrial Weaving Co-operative Society and others

Civil Appeal No. 931 of 1992

(L. M. Sharma, M. M. Punchhi, B. P. Jeevan Reddy JJ)

17.02.1992

JUDGMENT

1. Heard the learned counsel for the parties. Special leave is granted.
2. The appellant was appointed as a teacher in Biology initially for a period of one year. The appointment was extended from year to year several times. The last order passed in her favour in 1987 mentioned the appointment 'until further orders'. On 1-4-1988 the services of the appellant were terminated which she challenged by filing an appeal before the School Tribunal under S. 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act of 1977 (hereinafter referred to as the 'Act'). In pursuance of a stay order passed by the Tribunal the appellant continued in service during the pendency of the appeal, which was dismissed on 8-11-1990. The appellant, thereafter approached the High Court with a writ petition which was dismissed by the impugned judgment.
3. According to the case of the respondents the vacancy in which the appellant was appointed from year to year was earmarked for a candidate belonging to a Nomadic Tribe. In absence of a candidate belonging to the Nomadic Tribe the appellant was appointed in accordance with the provisions of S. 5(5) of the Act. As soon as the respondent No. 4, who belongs to a Nomadic Tribe, was available, the appointment of the appellant had to be terminated.
4. Several other questions were raised by the parties before the School Tribunal and the High Court, but since they are not being agitated now before us, we are not detailing the facts relevant to those questions. The learned counsel for the appellant before us has contended that assuming the other findings recorded against her by the High Court to be correct, she is still entitled to regular appointment in view of R. 9(a) of the Maharashtra Employees of Private School (Conditions of Service) Rules, 1981, which is quoted below :—

"(9)(a) In case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from the other remaining categories in the order specified in sub-rule (7) and if no person from any of the categories is available, the post may be filled in temporarily on an year to year basis by a candidate not belonging to the Backward Classes".....

Since the appellant is a member of one of the backward classes referred to in the said Rule, she was

entitled to a regular appointment in the very first year when no person belonging to a Nomadic Tribe was available.

5. The argument of the learned counsel appears to be well founded. Admittedly the respondent No. 4 was available for appointment only in 1988. On the first occasion when the post was being filled up, there was no member of a Nomadic Tribe available for appointment. In the absence of a candidate belonging to a Nomadic Tribe, the Rule enjoins year to year appointment only if an available candidate does not belong to the backward classes. The question, therefore, is whether the appellant belongs to a backward class.

6. Mr. A. K. Sanghi, the learned counsel for the respondents replied by saying that this question was not raised in the High Court and, therefore, should not be permitted to be pressed now. We are not impressed by this technical objection, as this question was permitted to be raised by the High Court by allowing an amendment in the writ petition raising this issue. This fact is mentioned in the special leave petition and not denied in the counter-affidavit. The learned counsel for the appellant also produced before us a copy of the writ petition which shows that the petition was amended by insertion of paragraph 3A which mentions the claim of the appellant of belonging to a backward class. The learned counsel for the appellant also relied upon the counter-affidavit of the respondents which attempts to meet the claim of the appellant on the basis of the appellant's belonging to a backward class.

7. Mr. Sanghi next contended that since this question has not been gone into by the High Court and necessary finding of fact has not been recorded in favour of the appellant, the appellant is not entitled to an outright success at this stage. The suggestion is that the matter may be sent back to the High Court for reconsideration. We find force in his argument. We accordingly set aside the impugned judgment and remit the case to the High Court for fresh decision in accordance with the provisions made above. It will be open to the High Court either to decide this issue itself on the basis of affidavits or to call for a finding from the School Tribunal before proceeding to decide the writ petition finally. The appeal is accordingly allowed, but in the circumstances without costs.

8. The learned counsel for the respondents lastly urged that in the circumstances the respondent No. 4 should be permitted to raise any new ground which may be available to him in answer to the appellant's claim as aforesaid. We think there cannot be any objection to that suggestion.

Appeal allowed.

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