

(2009) 10 GUJ CK 0133

In the Gujarat High Court

Case No : Special Civil Application No. 8680 of 2009

Dr. Deepshikha Chandrabhanu Tripathi

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 07-10-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2010) 1 GLH 622

Hon'ble Judges : M. R. Shah, J

Bench : Single Bench

Advocate : Girish Patal Assoc, for the Appellant; Pranav Dave, Asst. Government Pleader for Respondents 1-2, Mr. Manoj N. Popat for Respondent 3 and Mr. D.G. Shukla for Respondent 4, for the Respondent

Judgement

M.R. Shah, J.—RULE. Mr. Pranav Dave, learned Assistant Government Pleader waives the service of notice of rule on behalf of the respondent Nos. 1 and 2, Mr. Manoj Popat, learned Advocate waives the service of notice of rule on behalf of the respondent No. 3 and Mr. D.G. Shukla, learned Advocate waives the service of notice of rule on behalf of the respondent No. 4 - GPSC. With the consent of the learned Advocates appearing on behalf of the respective parties and in the facts and circumstances of the case, present petition is taken up for final hearing today.

2. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for an appropriate writ, order and/or direction directing the respondents Authorities to terminate the services of the respondent No. 3 as ad-hoc professor in Anesthesiology and to operate the waiting list and offer post of Professor in Anesthesiology in Government Medical College, Bhavnagar. It is also further prayed for an appropriate writ, order and/or direction directing the respondents authorities to consider the petitioner for appointment on the vacant post by operating the said waiting list. During the pendency of the petition, as the State Government took a decision to fill up the advertised the post of

Professor of Anesthesiology in Bhavnagar Medical College by promotion instead of operating selection list/waiting list, the petitioner has also prayed for appropriate writ, order and/or direction quashing and setting aside the communication/letter dtd. 15/9/2009 (Annexure-H) by which it has been decided by the Government to fill up the vacant post of Professor in Anesthesiology in Bhavnagar Medical College by promotion and it has been decided to continue the respondent No. 3 on ad-hoc till the person appointed by promotion resumes his duty.

3. It is the case on behalf of the petitioner that he has been working as Advocate Professor duly selected by rat Public Service Commission V2001. The respondent No. 3 (sic)ent working as ad-hoc Professor in Anesthesiology since 28/ 9/2000. That the respondent No. 3 is not selected by the GPSC which is the statutory requirement. That the GPSC issued two advertisements, one in the year 2006-2007 for three posts of Professor in Anesthesiology and another in 2007 for one post of Professor in Anesthesiology. Thus, in all, four posts were advertised. Several candidates including the petitioner and the respondent No. 3 applied for the aforesaid post of Professor in Anesthesiology and also were called for interview by the GPSC. The selection list was published by the GPSC for one post on 16/1/2008 and for three posts on 25/1/2008. In all, four persons were selected/put in select lists, but accidentally or coincidentally. one Dr.Shaileshkumar Shantilal Shah was included in both the selection lists at Sr. No. 1. Along with this, wait lists were published and in both the wait lists, the petitioner was included as one of the wait listed candidates. It is submitted that the respondent No. 3 did not find her place in any of the select lists either as a selected candidate or a wait listed candidate. In other words she failed in both the interviews. Out of four vacant posts which were required to be filled up by direct recruit as one name was common, only three posts were filled up and one post could not be filled up because the name of said candidate was available in both. It is the case on behalf of the petitioner that 4th advertised vacant post was. therefore, required to be offered to a wait listed candidate, however, it was not done so. and instead of that, on the 4th post the respondent No. 3 was continued as an ad-hoc Professor. It is the case on behalf of the petitioner that first her adhoc appointment was discontinued by order dtd.21/7/2009 and . immediately thereafter she was reappointed as an adhoc Professor by order dtd.29/7/2009. The petitioner, therefore, represented to the Government requesting to operate the wait list and to offer the remaining 4th vacant advertised post of Professor in Anesthesiology to wait listed candidate. It is the case on behalf of the petitioner that though she is at Sr. No. 3 in one waiting list, the first two candidates are not willing to join as per the information available to the petitioner and therefore, she is entitled to be considered for appointment. Thus, it is the case on behalf of the petitioner that refusal/failure on the part of the respondents authorities to operate wait list and to offer post to a wait listed candidate and instead to continue the respondent No. 3 as ad-hoc Professor though admittedly she has failed and not selected by GPSC and though her name

does not figure either in the selection list or waiting list is absolutely irrational, unreasonable, unjustified, discriminatory, malafide, and in clear violation of Articles 14 and 16 of the Constitution of India.

4. This Court issued notice vide order dtd.20/8/2009 making it returnable on 2/9/2009. That thereafter, at the request of the learned Assistant Government Pleader it was adjourned to 8/9/2009. Thereafter again at the request of the learned Assistant Government Pleader it was adjourned to 16/9/2009. On 16/9/2009 when the matter was heard, surprisingly the learned Assistant Government Pleader produced on record one communication dtd. 15/9/2009 of Additional Secretary to the Government, Health and Family Welfare Department informing the learned Assistant Government Pleader that now the Government has decided to fill up the post of Professor of Anesthesiology in Bhavnagar Medical College by promotion and it has been decided to continue the respondent No. 3 on ad-hoc till the person appointed by promotion resumes his duty. Hence, by way of amendment the petitioner has also prayed to quash and set aside the communication dtd. 15/9/ 2009 of the State Government by which it has been decided to fill up the post of Professor of Anesthesiology in Bhavnagar Medical College by promotion, as it being illegal, arbitrary, malafide and only with a view to get out the present petition.

5. Mr. Girish Patel, learned Senior Advocate appearing on behalf of the petitioner has vehemently submitted that even after preparation of the select list and wait list for recruitment to vacant post, the Government may decide not to fill up any post and the candidate in both the lists has no vested right to ask for appointment, but if the Government decides to appoint, it must act only according to the select list and waiting list. It is submitted that in the midst of recruitment process after making appointments from the select list and after making appointments by way of direct recruitment, the Government cannot subsequently and in the midst of recruitment process arbitrarily decide to ignore the list and fill up the advertised vacant post by promotion. It is submitted that in such a situation, as in the present case, the petitioner in the list can always challenge the action or decision of the Government on the ground that it is arbitrary, irrational, unreasonable and discriminatory and violative of Articles 14 and 16 of the Constitution of India. It is submitted that in such a situation, the petitioner can pray for direction to the Government to operate the list. It is further submitted that the present petition is not a public interest litigation as sought to be suggested by the learned Advocate appearing on behalf of the respondent No. 3. It is submitted that as per the judgement of the Hon''ble Supreme Court there can be no public interest litigation in service matter. It is submitted that even otherwise this petition is filed by the petitioner who is directly affected by the unconstitutional and illegal action of the Government.

6. It is further submitted by Mr. Girish Patel, learned Senior Advocate appearing on behalf of the petitioner that in the present case the Government advertised four posts of Professors in Anesthesiology by two advertisements, one for three

posts in 2006-2007 and for one post in 2007-2008. Interviews were held on 21/22-1-2008 for three posts and on 10/11-1-2008 for the one post. Select list and wait list for three posts and for one post were declared on 25/1/2008 and on 16/1/2008. It is submitted that one person Dr. Shaileshkumar S. Shah was in both the selection lists and therefore, one post became vacant. Three persons were appointed in June, 2008 but Government continued the ad-hoc appointment of respondent No. 3 who did not find any place in both the lists. and did not operate the wait list, as it was bound to do so. It is submitted that in any case, the respondent No. 3 cannot be continued on ad-hoc basis, by denying that 4th post to the wait listed candidate. It is submitted that such action is malafide, illegal and discriminatory. It is further submitted that as such so far as the respondent No. 3 is concerned, admittedly she has appeared in the examination conducted by the GPSC and has failed and despite the same, she has been continued on adhoc. It is submitted that the Government is bound to offer 4th vacant post to the wait listed candidate. It is submitted that if the Government had offered 4th vacant post to the wait listed candidate and the 4th post had been filled up by operating waiting list, in that case, there was no necessity to continue the respondent No. 3 on adhoc. It is further submitted by Mr. Girish Patel, learned Senior Advocate appearing on behalf of the petitioner that Government's decision now to fill up the 4th vacant post is absolutely illegal, arbitrary, malafide and colourable exercise of powers. It is further submitted that though the recruitment process for the post was relaxed by the Government for promotion in May, 2008 and even as admitted by the Government in the Affidavit in reply that eligible candidates were available for promotion from 12/12/2007 on which DPC was called, the Government continued the direct recruitment in January, 2008 and made appointment for three posts in June, 2008. It is submitted that even after relaxation in May, 2008, the Government did not come out with a stand that the post shall be filled in by promotion, till the present petition is filed by August, 2009. It is submitted that on the contrary, the Government continued the ad-hoc appointment of respondent No. 3 and reappointed her again on ad-hoc basis on 29/7/2009 after eight days after her termination on 21/7/2009. It is submitted that the Government never disclosed its intention or even whisper about it in its correspondence with the petitioner. It is submitted that the Government's decision now to fill up the post by promotion at present is absolutely malafide and arbitrary and with the sole purpose to deprive the petitioner of her right and to accommodate respondent No. 3. It is submitted that the said decision is purely afterthought because its object was to allow the period of validity of the waiting list to expire in January, 2010 and then to continue the respondent No. 3. It is further submitted that absence of ratio or quota for direct recruitment and for promotion in the recruitment rules does not authorise the Government to apply recruitment rules arbitrarily and according to its rhyme and reason. It is submitted that the Government must act in good faith, in accordance with Articles 14 and 16 of the Constitution of India and Government cannot stop the recruitment process after making few appointments to advertised posts and suddenly resort to promotion to the remaining advertised

posts for which wait listed candidates are available. It is submitted that it can not pick and choose any method arbitrarily and according to its fancy. Therefore, it is submitted that in the present case the Government's decision to fill up 4th advertised vacant post by way of promotion at this late stage after operating select list is arbitrary, unreasonable, irrational, deserves to be quashed and set aside. By making above submissions, it-is requested to allow the present Special Civil Application; to quash and set aside the action of the respondents Authorities in deciding now to fill up the 4th Post of Professor in Anesthesiology in Bhavnagar Medical College by way of promotion and direct the respondents authorities to operate the wait list which was prepared and declared by the GPSC.

7. The petition is opposed by Mr. Pranav Dave, learned Assistant Government Pleader. It is submitted that as the petitioner's name appears in the waiting list, merely because candidate is selected and his name is shown in the waiting list, he/she does not acquire any absolute right to appointment and it is open to the State Government to make appointment or not. It is submitted that on this count alone, the writ petition is required to be dismissed. It is submitted that no legal and/or fundamental rights of the petitioner has been abridged by not operating the wait list.

8. It is further submitted by the learned Assistant Government Pleader that the post in question is governed by recruitment rules and as per the said rules the post is required to be filled in by direct appointment as well as by promotion. It is submitted that no ratio has been fixed because if such ratio is laid down in that case vacant post of direct recruitment cannot be filled in by way of promotion and same would be applicable vice versa. Thus, the post of Professors may remain vacant which may ultimately have an adverse effect on the education that is required to be imparted constantly to the students and therefore to maintain flexibility in appointment to the post in question, the State Government has not laid down any specific ratio. In support of communication/decision 15/9/2009 whereby the Government had decided now to fill up the vacant post by way of promotion, Mr. Dave, learned Assistant Government Pleader relying upon Affidavit in reply, more particularly para 8, 9 and 10 has tried to justify the action. Para 8, 9 and 10 of the Affidavit in reply are as under:-

"8. I respectfully say that, the post of professor of Anesthesiology is a Class-I post and therefore the office of the deponent are bound by the criteria laid down by GAD Department vide its Rules namely Gujarat Civil Service Classification and Recruitment (General) (Second Amendment) Rules, 2005. dated 29.10.2005, for promotion to the aforesaid post. It is specified in the said Rules that they would be in force with regard to promotion to ClassI post and that certain minimum bench mark i.e. "Very Good" relating to the promotion to Class-I post is required to be scrupulously followed. On implementing these Rules, in the year 2005, no suitable and eligible candidates were available, who were full-filling required criteria for considering them in zone of consideration for promotion. In the meantime, representation was made by the office of the deponent to the State

Government to reconsider their decision as it was the consistent practice of the office to department to give "Good" to all their employees in their ACRs and thereby the exemption was sought and which was accordingly granted by the GAD Department vide notification dated 03.05.2008. I further respectfully say that the said exemption has been extended upto 31.12.2009. Copies of GAD Notification dated 29.10.2005, 3.5.2009 and 12.2.2009 are annexed hereto and marked as Annexure-R-I (Collectively).

9. I respectfully say that, in the aforesaid facts and circumstances, it can be transpired that no eligible candidates were available for the year 2005-2006, 2006-2007 and 2007-2008 respectively. I further respectfully say that initially the post which were advertised on 15.08.2006 and 18.07.2007 were required to be originally filled in by way of promotion but as no candidate was full-filling the minimum bench mark i.e.-of "Very Good" required for promotion, no list was prepared of candidates who can be appointed by way of promotion and therefore, it was decided to fill in the post by way of the direct recruit and accordingly the below mentioned procedure was followed.

No. of Post

3

1

Requisition to GPSC

15.6.2005

23.1.2007

Date of Advertisement

15.8.2006

18.7.2007

Date of Interview

21/22.1.2008

10/11.1.2008

Date of Result

25.1.2008

16.1.2008

Appointment Order

24.6.2008

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I further respectfully say that as soon as the office of the deponent had got exemption from the criteria laid down by the GAD Department in its Notification dated 29.10.2005, DPC was convened on 12.12.2007 and eligible candidates were given appointment by way of promotion.

9. I respectfully say that other candidates are very much available by DPC dated 12.12.07 who can be appointed at the vacant post in question. I further say that D. P.C. candidates Dr.Rupakar & Dr.Shukla are serving as Associates Professors from 20.02.97 and Wait List candidate Dr.Tripathi is serving as an Associates Professor from 23.08.01. Thus, candidates chosen for appointment are quite senior to the candidates whose names are appearing in the waiting list. I respectfully say that the State Government has given appointment to all the candidates whose names were appearing in the select list and have accordingly exhausted the select list as submitted by the GPSC. I further say that as there may not be any heart burning amongst those eligible candidates who are as on today capable and eligible of being promoted because of the exemption granted by GAD Department and an opportunity is also required to be given to them, therefore, the decision has been taken by the State Government to fill up the post in question by way of promotion eh changed sets of promotion criteria."

9. Therefore, it is requested that the decision dtd. 15/9/2009 to fill up the vacant post by way of promotion may not be disturbed as the decision has been taken after considering the past experience with a chance to those who were eligible and qualified for promotion on the date of the DPC meeting. Therefore, it is requested lo dismiss the present petition.

10. The petition is also opposed by Mr. Popat, learned Advocate appearing on behalf of the respondent No. 3. On the aspect of respondent No. 3 having failed in the examination conducted by the GPSC and her name does not figure even in the waiting list, it is submitted by Mr. Popat that as such the examination conducted by GPSC is only formal one and so far as respondent No. 3 is concerned, she is qualified, and has experience of eight years as a Professor in Anesthesiology. Therefore, it is requested to dismiss the present Special Civil Application.

11. Heard the learned Advocates appearing on behalf of the respective parties.

12. At the outset, it is required to be noted that four posts of Professors in Anesthesiology were advertised by two advertisements, one for three posts in 2006-2007 and another for one post in 2007-2008. Interviews were held on 21/22-1-2008 for three posts and on 10/ 11-1-2008 for the one post. Select list and waiting list for three posts and for one post were declared on 25/1/2008 and on 16/1/2008. On the basis of interview held on 21/22-1-2008 (which was for three posts as per the advertisement No. 132) GPSC declared select list of three persons and wait list of 9 candidates. In the said select list one Dr.Shaileshkumar S. Shah was placed at Sr. No. 1, one Dr.Mahendra Ramkrushna Upadhyay was placed at Sr. No. 2 and one Dr.Arun Harilal Vyas was placed at Sr. No. 3 in the

said list. Similarly on the basis of the interviews conducted on 10/11-1-2008 for the one post of Professor in Anesthesiology pursuant to the advertisement No. 73 dld.2006-2007, GPSC declared select list and in which Dr. Shaileshkumar S. Shah was placed in the select list and waiting list of 10 candidates was prepared/published. Thus, the name of Dr. Shaileshkumar S. Shah was figured in both the select list more particularly at Sr. No. 1 in both the select list. Three persons were appointed in June, 2008 on the basis of the aforesaid select list i.e. by appointing Dr. Shaileshkiirnar S. Shah, Dr. Mahendra Ramkrushna Upadhyay and Dr. Arun Harilal Vyas. 4th advertised post was not filled in by Government by operating waiting list as the person whose name figure in the select list was not available for appointment as he got appointment. As such 4th post was required to be filled up by the Government from and amongst the candidates in the wait list by operating wait list. It is to be noted that if the name of Dr. Shaileshkumar S. Shah would not have figured in both the select list and instead some another candidate's name figure in the select list in that case, the State Government would have filled in all the four posts by operating select list. Accidentally or coincidentally, the name of Dr. Shaileshkumar S. Shah figure in both the select list and therefore, he was appointed by operating only one select list and in the second select list which was prepared on the basis of the interviews held on 10/11-1-2008. his name only figure in the select list, that 4th post was not filled in by the Government. In such a situation as such the Government was required to operate the wait list and to fill up the 4th post which was advertised. It is true and it cannot be disputed that a candidate/person in the wait list does not acquire any absolute right to appointment merely because he is selected and is kept in the wait list. It is also true that even after preparation of select list/wait list for recruitment to the vacant post, Government may on a valid reason take a decision not to fill up any post. However, once the Government decides to appoint by operating the select list, it must act only according to the select list and wait list and in the midst of the recruitment process after making appointments by operating select list, the Government cannot arbitrarily decide to ignore the list and take a "U" turn and decide to fill up the advertised vacant post by promotion. In the present case, the Government first decided to fill up the post by direct recruitment. Four posts were advertised; examinations were conducted by GPSC for four posts of Professor in Anesthesiology; interviews were also conducted by GPSC for four posts; GPSC published two select lists and waiting lists on the basis of the interview conducted on 21/ 22-1-2008 and 10/11-1-2008 for four posts. The State Government also operated select list and filled in posts of Professors in Anesthesiology operating select list and filled up three posts of Professors in Anesthesiology out of four posts advertised. Thus, once the State Government decided to fill up the posts advertised by operating select list, subsequently, it is not open for the Government to take a "U" turn and cannot fill up the 4th advertised vacant post by way of promotion. The subsequent decision to fill up some of the advertised post by way of promotion instead of operating select list/wait list is absolutely illegal and arbitrary and taking away the rights of the candidates in the select list/wait list. A wait list is to

be operated by the Government in case where a candidate in the select list is not available for appointment and under that situation, a candidate in the wait list on merits is to be appointed by operating such a wait list. That is the purpose and object of preparing wait list. Under the circumstances, the subsequent decision to fill up the 4th advertised post by way of promotion is absolutely illegal, arbitrary and malafide.

13. It is to be noted that if the name of Dr. Shaileshkumar S. Shah would not have figured in both the select list and the name of some other candidate would have been figured, in that case, the State Government would have filled in the post by appointing that person. However, in the present case, accidentally or coincidentally the name of Dr. Shaileshkumar S. Shah figure in both the select list and that is why 4th advertised post could not be filled in by operating select list. Therefore, the action of the respondents in not filling up the 4th advertised post by operating wait list. in the facts and circumstances of the case is absolutely illegal, arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution of India, which deserves to be quashed and set aside.

14. Now, so far as challenge to the decision dtd. 15/9/2009 of the Stale Government now to fill up the post of Professor in Anesthesiology in Bhavnagar Medical College (4th advertised post) by way of promotion is concerned, the same is absolutely illegal, arbitrary and malafide. It appears that according to the Government in view of the amendment in Recruitment Rules made by GAD Department dtd. 29/10/2005 it has been decided to fill up the post by way of promotion. However, it is to be noted that even as per the Affidavit in reply, as soon as the office of the respondent authority got exemption from the criteria laid down by GAD Department in its notification dtd. 29/10/2005, DPC was convened on 12/12/2007 and eligible candidates were given appointment by way of promotion. Thus, even thereafter the Government continued direct recruitment in January 2008 and made appointments for three posts in June, 2008 and even after relaxation in May 2008, the Government did not come with a stand that the post shall be filled in by promotion, till the present petition was filed by August, 2009. It is only after when the petition was heard at least 2 to 3 times, all of a sudden during the midst of the hearing of the present Special Civil Application the State Government came out with a communication dtd. 15/9/2009 of Additional Secretary to the Government, Health and Family Welfare Department informing the learned Assistant Government Pleader that now the Government has decided to fill up the post of Anesthesiology in Bhavnagar Medical College by promotion and to continue the respondent No. 3 as ad-hoc Professor till a person appointed by promotion resumes his duty. Thus, the aforesaid communication dtd. 15/9/2009 now to fill up the post of Professor in Anesthesiology in Bhavnagar Medical College, (which was already advertised earlier and for which interviews were held) is nothing but illegal, arbitrary and malafide and afterthought and only with a view to get out of the present petition, such a decision is taken. When DPC met on 12/12/2007 and even at the stage when the relaxation was granted in the month of May, 2008, no such decision

was taken, on the contrary. Government went on to fill up the post by direct recruitment and even filled up three posts out of four advertised posts. Therefore, the impugned decision/communication dtd. 15/9/2009 deserves to be quashed and set aside.

15. Even otherwise, the decision to continue the respondent No. 3 as ad-hoc Professor in Anesthesiology till the person appointed for promotion resumes his duty also cannot be sustained. It is to be noted that the post of Professor in Medical College is required to be filled in only by a candidate selected by GPSC and who has passed the examination conducted by GPSC. That is the statutory requirement. In the present case, not only the respondent No. 3 is not selected by the GPSC but the respondent No. 3 has not even cleared/passed the examination conducted by GPSC, therefore, it can be said that the respondent No. 3 is not fulfilling the statutory requirement or has not passed the GPSC examination. To that extent the respondent No. 3 is not qualified to be appointed and continued as Professor in Anesthesiology. Under the guise of interest of education of the students, the respondent No. 3, who is not statutorily qualified cannot be continued as a Professor of Anesthesiology in Bhavnagar Medical College even till the person appointed by promotion resumes his duty. On the other hand, other candidates like the petitioner and others who are in the waiting list prepared by the GPSC are available and at least it can be said that they are to be given preference than the respondent No. 3, who is not qualified. Under the circumstances, even the decision of the concerned respondents to continue the respondent No. 3 as Professor of Anesthesiology in Bhavnagar Medical College even till the person appointed by promotion resumes his duty, cannot be sustained. In view of the above and for the reasons stated above, the petition succeeds. The impugned decision of the concerned respondent i.e. Additional Secretary to Government, Health & Family Welfare Department dtd. 15/9/2009 deciding now to fill in 4th advertised vacant post of Professor of Anesthesiology in Bhavnagar Medical College by promotion is hereby quashed and set aside and the concerned respondents, more particularly, respondent Nos. 1, 2 and 4 are hereby directed to fill in the post of Professor of Anesthesiology in Bhavnagar Medical College i.e. 4th advertised vacant Post of Anesthesiology by operating wait list which has been prepared on the basis of interviews conducted by GPSC more particularly select list/wait list dtd. 16/1/2008/25/1/2008 declared/published by the GPSC forthwith. Consequently, the impugned communication dtd. 15/9/ 2009 issued by the Additional Secretary to the Government, Health and Family Welfare Department deciding to fill in the vacant post of Anesthesiology in Bhavnagar Medical College by promotion and to continue the respondent No. 3 on the post of Professor of Anesthesiology in Bhavnagar Medical College till the person appointed by promotion resumes his duty is hereby quashed and set aside. Till any appropriate order is passed to appoint a person from the wait list as stated above. It will be open for the concerned respondents to appoint any person on merits even as ad-hoc Professor of Anesthesiology in Bhavnagar Medical College from and amongst wait list

prepared/declared by the GPSC dtd. 16/1/2008/25/1/2008 so that the anxiety on the part of the State Government to protect the interest of students and education can be taken care of. Rule is made absolute accordingly. No costs.

Direct Service is permitted.