
(1991) 04 GUJ CK 0008
In the Gujarat High Court

Dr. R.R. Shah

APPELLANT

Vs

R. Basu, Municipal Commissioner and Others

RESPONDENT

Date of Decision : 03-04-1991

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 53(1), 53(1), 54, 54(3)
Constitution of India, 1950 — Article 14, 14, 16, 16

Citation : (1992) 1 GLR 215

Hon'ble Judges : R.D. Vyas, J;A.P. Ravani, J

Bench : Division Bench

Judgement

A.P. Ravani, J.—The petitioner is challenging the selection and appointment of respondent No. 4 as Additional Medical Officer of Health and also prays that he appointed to the same post. It is inter alia contended and prayed that respondent No. 4 is not qualified to hold the post in question and therefore, a writ of quo warranto be issued directing respondent No. 4 to vacate the post. The petitioner has also challenged the Constitutional validity of Section 53(1) of the Bombay Provincial Municipal Corporations Act, 1949 (for short "the Act") as being violative of Articles 14 and 16 of the Constitution of India and as being inconsistent with the provisions of Section 54(3) of the Act. Section 53 of the Act empowers the Municipal Corporation to make appointment of certain Municipal Officers and Section 54 provides for constitution of staff selection committee in respect of certain posts.

2. The Facts: The petitioner is serving as Deputy Health Officer with respondent No. 3-Ahmedabad Municipal Corporation. Respondent No. 4 was also holding the same post prior to his appointment as Additional Medical Officer of Health. The post of Additional Medical Officer of Health was created some time in June 1978. It was occupied by one Dr. Vyas till June 30, 1982. After the retirement of Dr. Vyas, on July 1, 1982, the petitioner was given additional charge of the post. On October 18, 1982, the post was advertised and applications were invited. On November 19, 1982, the petitioner was provisionally appointed on the post for a period of one year. The Standing Committee of the Municipal Corporation formed

a selection committee consisting of: (1) Superintendent of Civil Hospital, Ahmedabad, (2) Deputy Municipal Commissioner (General), (3) Assistant Municipal Commissioner (Personnel) and (4) Medical Officer (Health). This Selection Committee held interview of the candidates who applied pursuant to the advertisement dated October 18, 1982.

3. There were 9 candidates. Out of them 3 were selected. The petitioner was given rank No. 1. One Dr. Mohanti was given second rank while respondent No. 4 was given third rank. The Standing Committee passed resolution recommending the appointment of petitioner for a period of one year. However, the General Board of the Corporation took decision on September 27, 1983 not to approve the appointment of the petitioner. Consequently, the Municipal Commissioner passed order dated November 29, 1983, reverting the petitioner to his original post. Thereafter the post remained vacant for some time. The Municipal Commissioner again wrote a letter to the Corporation for re-consideration of the proposal for appointment of the petitioner on the post. However, the Corporation did not agree with the recommendation of the Commissioner.

4. On October 3, 1984, the Standing Committee passed a resolution and recommended the appointment of respondent No. 4. Thereafter the General Board of the Corporation passed a resolution on December 4, 1984 and approved the appointment of respondent No. 4. It was decided by the General Board of the Corporation to make appointment out of the employees working with the Corporation. The General Board of the Corporation considered two persons, namely, the petitioner and respondent No. 4. Both of them were considered by the Board and the Board decided to appoint respondent No. 4 on the post. As disclosed in the resolution, the General Board of the Corporation considered that there was no other employee in the senior cadre of the Corporation belonging to Scheduled Caste; that respondent No. 4 belongs to Schedule Caste; that respondent No. 4 was also superior in merits to the petitioner as far as the academic qualifications are concerned. Moreover, respondent No. 4 was also selected earlier by the selection committee constituted by the Standing Committee. On overall consideration, the Board found that respondent No. 4 was more suitable for the post in question. Hence decided to appoint him on the post.

5. As indicated hereinabove, the petitioner has challenged the legality and validity of the aforesaid decision of the Corporation and has also challenged the vires of Section 53(1) of the Act. The constitutional validity of the provisions of Section 53(1) be examined first.

6. Is Section 53(1) and Section 54(3) of the Act constitutionally invalid? There is always a presumption that a validly amended provision of a statute is constitutionally valid unless it is shown otherwise. No argument whatsoever is advanced showing that the provisions of Section 53(1) of the Act which confers power of appointment of certain officers on the Corporation is unreasonable or arbitrary and therefore ultra vires the provisions of Articles 14 and 16 of the Constitution of India. In view of this position, there is no reason to hold that the

provision is constitutionally invalid. As far as Section 54 of the Act is concerned, it relates to the constitution of staff selection committee and certain appointments in the Municipal service. However, Section 54(2) of the Act specifically excludes the appointment of officers of which powers are conferred upon the Corporation under the provisions of Section 53(1) of the Act. In view of this position there is nothing to indicate that the provisions of Section 53(1) and the provisions of Section 54 of the Act are conflicting or inconsistent with each other. For the aforesaid reasons and in view of the fact that no argument whatsoever is advanced in this behalf, the challenge to the constitutionally validity of the provisions of Section 53(1) of the Act and challenge to Section 54(3) of the Act fail. There is no substance in this ground and hence the same is rejected.

7. Has the Corporation no power to make the appointment in question?

Section 53(1) of the Act specifically confers power on the Corporation to make appointment of Municipal officers, whether temporary or permanent, whose minimum monthly salary exclusive of allowances exceeds such amount as may be fixed in this behalf by the State Government by a general or special order, from time to time in the case of each Corporation. It is an undisputed position that the post of Additional Medical Officer of Health carries the salary exceeding the amount fixed in that behalf by the State Government. Nothing is pointed out to show that the post of Additional Medical Officer of Health is not covered by the provisions of Section 53(1) of the Act. Bare reading of the provisions of Section 53(1) of the Act shows that the power to make appointment on the post in question vests in the Corporation. The section specifically mentions that such appointment may be made temporary or permanent. In view of this unambiguous position, it has got to be held that the Corporation has power to make appointment to the post of Additional Medical Officer of Health.

8. Whether the provisions of the Act and the Rules as regards the appointment in question are complied with? The learned Counsel for the petitioner submitted that as provided u/s 453 of the Act, rules in the Schedule A to the Act are deemed to be part of the Act. Rule 2 of the Chapter III of the Rules provides for the procedure for appointment to the post in question. Rule 2 reads as follows:

Before making an appointment to any post referred to in Rule 1 applications shall be invited for such post by advertisement in the local newspapers and the applications received shall be scrutinised by the Commissioner who shall submit to the Corporation, through a committee if so required by the Corporation, a list arranged in order of preference of such persons out of those who have applied as he considers qualified for the post:

Provided that, if the Corporation is of the opinion that any officer in municipal service possessing the qualifications prescribed under Rule 3 is a fit person to be appointed to the post, it may appoint such officer to the post without following the procedure prescribed in this rule.

On the basis of the aforesaid provisions of the rules, it is submitted that the Standing Committee of the Corporation had formed a selection committee. The selection committee had interviewed nine candidates. The petitioner was placed at Sr. No. 1. One Dr. Mohanti was placed at Sr. No. 2 and respondent No. 4 was placed at Sr. No. 3. The Commissioner recommended the appointment of the petitioner. Even so the petitioner has not been appointed. Therefore, it is contended that the appointment of respondent No. 4 is not in accordance with the provisions of the Act and the Rules.

9. In order to examine the aforesaid contention, the factual background narrated in the earlier part of this judgment needs to be kept in mind. It may be noted that when Dr. Vyas retired, proposal for appointment of the petitioner did not emanate from the Corporation. The Corporation never required a committee to be appointed. It was the Standing Committee which formed a selection committee, while the relevant rule requires that the Commissioner may submit a list to the Corporation through a committee if so required by the Corporation. In the instant case, the Standing Committee of its own or the Municipal Commissioner on his own appear to have acted. The initial exercise of selection was not at the instance of the Corporation. Section 53(1) of the Act does not confer any power of appointment on the Standing Committee. Therefore, the entire exercise taken by the Standing Committee and by the Commissioner was without jurisdiction.

10. Again it may be noted that the Commissioner could have submitted a list arranged in order of preference. In the instant case, the list prepared by the selection committee was not in order of preference. It was in order of merits. Merit was not to be decided by the Commissioner or by the committee appointed by the Standing Committee. The decision as regards merit is required to be taken by the Corporation itself. It is the function of the Corporation to evaluate the relative merits of the candidates. To arrange the order of merit was not the function of the committee or that of the Commissioner. Therefore, the exercise taken by the Commissioner and the Standing Committee as well as the selection committee appointed by the Standing Committee was not in accordance with the provisions of the Act and the Rules. Again it may be noted that the preparation of list in order of preference only means that the candidates to be included in the list are eligible and all of them are suitable for the post. However, other things being equal, if question arise of giving preference, the order of preference should be as indicated in the list. When the question of preparing a list in order of merit arises, the list so prepared indicates that the person, whose name is at Sr. No. 1 tops the list and he is superior amongst all. In the same way, Sr. No. 2 stands just below Sr. No. 1 and so on. The list prepared on the basis of merit indicates something more than eligibility. The essential distinction being that in case of preparation of list in order of merit, the element of evaluation enters in the mind of the authority or the person preparing the list while in case of preparation of list in order of preference, this would ordinarily be absent. Such list would prima facie indicate that all equal and eligible. Evaluation of merit is to be done by

some other authority. The list so prepared only indicates that all the candidates included in the list are eligible and suitable for the post. The preference indicated may not be necessarily on the basis of merits after evaluation of relative merits of the candidate concerned.

11. It is contended that the Corporation was bound to accept the recommendation made by the Commissioner pursuant to the selection made by the committee specially appointed in this behalf by the Standing Committee. If the argument is accepted, it would mean that the power to appoint on the post in question is vested in the Standing Committee or in the selection committee appointed by the Standing Committee. Bare reading of Section 53(1) of the Act shows that the power to appoint on the post in question vests in the Corporation. Even as per the provisions of Rule 2, the function of the Commissioner and that of the committee, if any appointed, would be to make a list in order of preference. Be it noted that such list is not to be prepared in order of merit. This is so because the provisions of the Act and the Rules do not provide that the essential function of selecting and appointing the officer on the post in question be decided by any other authority. If such functions are assigned to the Commissioner and the Committee appointed by the Standing Committee it would amount to abdication of its function by the Corporation. The Corporation has no power to delegate such function to the Commissioner or to the Standing Committee. The Act and the Rules do not provide for any such delegation. A committee is to be appointed only if the Corporation so requires. The function of such committee would be to facilitate the procedure. The committee is to prepare a list of candidates in order of preference. The Commissioner is to submit the said list to the Corporation. The recommendation so made by the Commissioner can never be said to be binding to the Corporation. If such recommendation is to be binding, it would amount to re-writing the provisions of Section 53(1) of the Act and also the provisions of Rule 2. The result of such re-writing would be that the powers of appointment would vest in the Municipal Commissioner or in the selection committee appointed by the Standing Committee. Such interpretation which runs counter to the provisions of the Act and the Rules cannot be adopted.

12. The confusion arose on account of the fact that the earlier selection made by the selection committee pursuant to the recommendation made by the Commissioner and the action taken by the Standing Committee is mixed up with the selection made by the Corporation later on. The resume of facts indicated in the earlier part of this judgment clearly indicate that the petitioner was appointed on the post purely on temporary basis for a period of one year. Since the recommendation made by the Commissioner was not accepted by the Corporation, the Commissioner had reverted the petitioner to his original post. Thereafter the post remained vacant for a pretty long time (from December 1, 1983 to October 3, 1984). In the month of October, 1984, the Standing Committee again initiated the proposal for appointment of respondent No. 4 to the post in question. The General Board of the Corporation decided to resort to the proviso to Rule 2 which empowers the Corporation to make appointment of

any officer in the municipal service without following the procedure prescribed in the Rules. The Corporation for the reasons stated in the resolution dated 4-12-1984 did not think it proper to follow the procedure of inviting applications and calling for the list arranged in the order of preference from the Commissioner or for appointing a committee in this behalf. The Corporation has resorted to the proviso to Rule 2 for good reasons. As disclosed in the resolution, there were officers in the municipal service possessing the requisite qualifications. This data was available before it on account of the previous exercise taken by the Standing Committee. The petitioner as well as respondent No. 4 were the persons who were included in the list prepared by the committee appointed by the Standing Committee and whose names were also forwarded by the Commissioner to the Corporation. Therefore, if the Corporation formed opinion that the procedure of inviting applications be dispensed with and appointment to the post in question be made from amongst the officers serving with the Corporation, it cannot be said that the Corporation acted arbitrarily or in unreasonable manner.

12A. For good and valid reasons, the Corporation selected respondent No. 4. As disclosed in the resolution, the Corporation decided to prefer respondent No. 4 to the petitioner for the following reasons:

(i) That there was no other officer belonging to Scheduled Caste in the senior cadre of officers of the Corporation;

(ii) That respondent No. 4 belongs to Scheduled Caste and thus a Scheduled Caste candidate was available;

(iii) That respondent No. 4 was superior in merits to the petitioner as far as academic qualifications of both the candidates are concerned. As disclosed from the record of the petition, respondent No. 4 has secured 62% of marks in the M.B.B.S, examination while the petitioner has secured 57% marks. In the D.P.H. examination, the petitioner passed the same with pass class, while respondent No. 4 has passed it with 65.3% of marks.

(iv) That even the selection committee appointed by the Standing Committee had selected the petitioner as well as respondent No. 4. The names of both the candidates appeared in the list. This indicates that respondent No. 4 was eligible and as a matter of fact, was considered eligible for the post by the Committee also. If this list is treated as list showing preference (and not merits), then on the basis of this list also, the Corporation could have said that on merits, respondent No. 4 was superior to the petitioner.

13. For the aforesaid reasons, if the Corporation considered that respondent No. 4 was more suitable for the post in question, it cannot be said that the decision of the Corporation is in any way arbitrary or unreasonable. On the contrary, such decision would be more in accord with the constitutional provisions contained in Article 16 and in the directive principles of State policy contained in Chapter IV of the Constitution.

In the instant case, the Corporation found that respondent No. 4 was more suitable for the post on account of his superior academic qualifications. Even if it were shown that the petitioner as well as respondent No. 4 were on par, that is to say, they stood on equal footing and if the Corporation were to give preference to respondent No. 4, the action of the Corporation could not have been labelled as unreasonable or arbitrary. On the contrary such a decision would be in accord with the constitutional provisions which mandates that the members belonging to Scheduled Castes and Scheduled Tribes and other Backward Classes be extended necessary protection. In the instant case, no such protective benefit has been conferred. All that is done is superior academic merits of respondent No. 4 have been recognised. He has been appointed on the post for the reasons disclosed in the resolution. Hence the decision cannot be said to be in any way unjust or arbitrary.

14. Some decisions relied upon by the learned Counsel for the petitioner:

The learned Counsel for the petitioner submitted that once a selection is made and name of the petitioner is shown at Sr. No. 1 in order of merits, this order of merit could not have been disregarded by the Corporation. The Corporation ought to have made appointment in accordance with the selection made. This argument is based on some decisions which pertain to constitutional provisions as regards the selection made by the Union Public Service Commission or by the State Public Service Commissions. As indicated hereinabove, this argument is not available in case of appointment made by the Corporation under the provisions of Section 53(1) of the Act and the relevant rules. The scheme of the Act and the Rules as regards the appointment of the officers covered by the provisions of Section 53(1) of the Act is altogether different. As shown hereinabove, the power to appoint on the post in question vests in the Corporation. The Corporation has to make selection. Even in cases where the Committee is appointed, the function of the Committee is to make a list in order of preference and not in order of merits. The decision as regards the suitability or otherwise of a candidate rests with the Corporation. Therefore, the decisions cited by the learned Counsel for the petitioner are of no help to the petitioner. Even so brief reference to the decisions cited may be made

1. *Jatinder Kumar and Others Vs. State of Punjab and Others*, . In that case, a question arose as to whether a candidate selected by the subordinate service selection board for direct appointment to the post of Assistant Sub-Inspectors of Police has got an unfettered right to be appointed on the basis of the recommendation made by the Board. In the course of the judgment, the Supreme Court held that such a candidate has no such unfettered right. However, the Supreme Court observed that if the vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. The Government cannot disturb the order of merit according to its own sweet will except for other good reasons, viz., bad conduct or character. This decision does not apply to the present case

for the reasons already indicated hereinabove. In the instant case, the Act and the Scheme are different from that of the appointment made pursuant to the recommendation made by the Public Service Commission.

2. I.J. Divakar and Others Vs. Government of Andhra Pradesh and Another, . That was also a case of post falling within the purview of State Public Service Commission. For the same reasons, this decision also does not help the petitioner.

3. Gurdayal Singh Fiji Vs. State of Punjab and others, . This was a case pertaining to LA.S. select list to which the provisions with regard to the selections by Public Service Commission and other constitutional provisions apply. For the same reasons, this decision is also of no help to the petitioner.

4. K.I. Shephard and Others Vs. Union of India (UOI) and Others, . It was a case pertaining to a scheme of amalgamation of different banks. In the scheme, there was a provision with regard to exclusion of certain employees. The question arose whether such exclusion could be done at the time of preparation of draft scheme. Having regard to the relevant provisions of the Banking Regulation Act and the provisions of the Scheme, the Supreme Court held that such exclusion cannot be made in the scheme at the draft stage. This decision deals with altogether different factual situation and with different provisions of statute and is of no help to the petitioner.

5. Pandya Jashwantlal M. and Others Vs. District Superintendent of Police and Others, . This is a decision of a learned single Judge of this High Court. It pertains to the selection list for the post of appointment as Armed Constable, which was prepared by the appropriate authority. The persons included in the select list were sought to be denied appointment and in that context the question arose. For the reasons that the factual position and the provisions of law considered by the Court are quite different this decision is also of no help to the petitioner.

6. S.N. Mukherjee Vs. Union of India, . This was a case with regard to an Army Officer and the Supreme Court has considered the question with regard to the requirement of compliance with the principles of natural justice in case of administrative actions and necessary to give reasons. This decision is neither relevant nor of any help to the petitioner.

15. Conclusion: No other contention is raised.

There is no substance in the petition. Hence rejected. Rule discharged.