

**(2006) 09 GUJ CK 0065**

**In the Gujarat High Court**

**Case No : Special Civil Application No. 20744 of 2006**

Ganesh Gajaji Koli Bhil

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

**Date of Decision : 29-09-2006**

**Acts Referred:**

Constitution of India, 1950 — Article 309

**Citation : (2006) 09 GUJ CK 0065**

**Hon'ble Judges : H.K. Rathod, J**

**Bench : Single Bench**

**Advocate : Biren A. Vaishnav, for the Appellant; L.B. Dabhi, AGP for Respondents 1 - 2, for the Respondent**

## **Judgement**

H.K. Rathod, J.—Heard the learned Advocate, Mr. B.A. Vaishnav, appearing on behalf of petitioner and learned AGP, Mr. Dabhi, appearing on behalf of respondent No. 1 and 2.

2. The petitioner has challenged the order dated 27.09.2005, wherein, the respondent has taken the decision that petitioner is not entitled for the compassionate appointment on the ground that petitioner is not having requisite qualification as per the Government Resolution dated 16.3.2005 for the appointment in the post of class IV. The respondent has come to conclusion that petitioner is not possessing SSC educational qualification and, therefore, compassionate appointment cannot be offered to the petitioner.

3. The brief facts of the present petition are that the father of the petitioner was working as Class-IV Painter with the respondent at Ahmedabad. The father of the petitioner died on 18.1.2005 after completing more than 32 years" service. In view of the policy framed by the State of Gujarat to give compassionate appointment to the dependent of such deceased employee, the petitioner had applied on 17.2.2005 for compassionate appointment. His application was forwarded by respondent No. 2 to the Gujarat Subordinate Services Selection Board on 24.3.2005. The case of the petitioner was rejected only on the ground

that the petitioner is not possessing the requisite qualification as per Notification dated 16.3.2005, as the petitioner has not passed Std.X (SSC). That is how, the present petition is filed.

4. Learned Advocate, Mr. Vaishnav, appearing on behalf of petitioner, submitted that policy to give compassionate appointment in the class-III and class-IV has been framed by the State Government by issuing Resolution dated 10.3.2000. According to said Resolution dated 10.3.2000, the qualification for class IV post has been fixed as standard IV to IX and for class-III, SSC or further educational qualification. In the said resolution, it is also further made clear by State Government that for the post in which no educational qualification is fixed like Hamal, Sweeper, Paniwala and Safai Kamdar, in that category, compassionate appointment can be given without considering the educational qualification. In the said resolution, certain relaxations are also available to such person for getting compassionate appointment from the State Government. It is also made clear in the said resolution that appointment on compassionate ground should have to be made against the vacant post and necessary information should have to be supplied by the department as per Government Resolution dated 27.7.1999. Learned Advocate, Mr. Vaishnav, submitted notification dated 16.3.2005, relevant portion of which is quoted as under:

No.GS/4/2005/CRR/102004/1619/G-2:- In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of all existing rules regulating the recruitment to the posts of Class IV with any appellation in Inferior Service in the Secretariat and non-Secretariat offices of the State of Gujarat, the Governor of Gujarat hereby makes the following rules to provide for regulating recruitment to the posts of Class IV with any appellation in Inferior Service in Secretariat and non-Secretariat offices namely.

5. In view of the aforesaid averments made in the Notification, learned Advocate, Mr. Vaishnav, submitted that this being a statutory Rules framed by State Government under Article 309 for the direct recruitment to the post of Class-IV by way of selection / transfer or deputation. Therefore, he submitted that State Government cannot insist the educational qualification from such candidate, who has applied for compassionate appointment as per notification dated 16.3.2005. He also submitted that while issuing this notification, is in supersession of all existing rules regulating the recruitment to the post of Class-IV with any appellation in Inferior service in the Secretariat and non-Secretariat offices of the State of Gujarat. Therefore, he submitted that because of this notification, the Government Resolution dated 10.3.2000, wherein, the policy has been framed to give compassionate appointment to such candidate wherein concerned employee expired during the course of employment has not changed and not adversely affected the legal right of such person. Therefore, learned Advocate, Mr. Vaishnav, submitted that this notification dated 16.3.2005 is not applicable at all being a statutory Service Rules to the appointment of the petitioner on compassionate ground. He also submitted that 10.3.2000 Government policy till

date not cancelled, not modified and new policy has also not come into effect. Therefore, it is a legal obligation of the State Government to consider the policy dated 10.3.2000 for giving compassionate appointment to such candidate. Therefore, the decision which has been taken by respondent relying upon the notification dated 16.3.2005 is contrary to the policy framed by Government dated 10.3.2000. He also submitted that petitioner is satisfying educational qualification which has been fixed in GR dated 10.3.2000. However, appointment has been denied to the petitioner only on the ground that petitioner is not possessing requisite qualification as per notification dated 16.3.2005.

6. Learned Advocate, Mr. Vaishnav, submitted that once the application is submitted by the petitioner on 17.2.2005 for compassionate appointment, the policy dated 10.3.2000 was in existence and it was not changed by State Government. During the pendency of such application, while scrutinizing the application of the petitioner, subsequently if any change came into effect which will not be applicable to the case of the petitioner. He pointed out similar analogy in case of advertisement issued by the department in respect to post in question prescribing the qualification, method and manner of selection and subsequently if any change came into effect after publishing the advertisement, that change will not be applicable to the selection process or advertisement but, it having prospective effect. In short, his submission is that once the advertisement issued by the department and applications invited and received by the department, then, any change which adversely affect their right under the advertisement to any concerned candidate, they cannot have any adverse effect but, it can be applied with prospective effect. He relied upon the following decision:

6.1 In case of Sukhdarshan Singh ect. etc. Vs. State of Rajasthan, , Relevant observations are in Para.5 and 6, which are quoted as under:

5. It is well settled rule of construction that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the Rule must be held to be prospective. If a Rule is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. In the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure. The amending Rule of 1987 does not contain any express provision giving the amendment retrospective effect nor there is anything therein showing the necessary-intendment for enforcing the Rule with retrospective effect. Since the amending Rule was not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force. The amended Rule could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment moreover

construction of amending Rules should be made in a reasonable manner to avoid unnecessary hardship to those who have no control over the subject matter.

6. In *A.A. Calton Vs. Director of Education and Another*, this Court considered the validity of appointment of Principal by the Director of Education made u/s 16F of the U.P. Intermediate Education Act 1921. The High Court quashed the selection of Principal on the ground that the appointment had been made by the Selection Committee and not by the Director of Education as required by Section 16F(4) of the Act. The High Court directed the Director of Education to make selection and appointment. Pursuant to the direction of the High Court, the Director made appointment to the post of Principal by his order dated March 8, 1977, but before that date, Section 16F(4) of the Act was amended on August 18, 1975 taking away the power of the Director to make appointment u/s 16F(4) of the Act. In view of the amendment of Section 16F of the Act, validity of the order of the Director of Education dated March 8, 1977 making appointment to the post of Principal was again questioned. The High Court dismissed the writ petition: thereupon the unsuccessful party preferred appeal. This Court held as under (para 5):

It is no doubt true that the Act was amended by U. P. Act 26 of 1975 which came into force on August 18, 1975 taking away the power of the Director to make an appointment u/s 16F(4) of the Act in the case of minority institutions. The amending Act did not, however, provide expressly that the amendment in question would apply to pending proceedings u/s 16F of the Act. Nor do we find any words in it which by necessary intendment would affect such pending proceedings. The process of selection u/s 16F of the Act commencing from the stage of calling for applications for a post up to the date on which the Director becomes entitled to make a selection u/s 16F(4) (as it stood then) is an integrated one. At every stage in that process certain rights are created in favour of one or the other of the candidates. Section 16F of the Act cannot, therefore, be construed as merely a procedural provision. It is true that the legislature may pass laws with retrospective effect subject to the recognised constitutional limitations. But it is equally well settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect. In the instant case admittedly the proceedings for the selection had commenced in the year 1973 and after the Deputy Director had disapproved the recommendations made by the Selection Committee twice the Director acquired the jurisdiction to make an appointment from amongst the qualified candidates who had applied for the vacancy in question. At the instance of the appellant himself in the earlier writ petition filed by him the High Court had directed the Director to exercise that power. Although the Director in the present case exercised that power subsequent to August 18, 1975 on which date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior

to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned Counsel for the appellant that the law as amended by the U. P. Act 26 of 1975 should have been followed in the present case.

6.2 In case of N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, . Relevant observations are in Para. 11, 12 and 13 which are quoted as under:

11. There is yet another aspect. of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing Rules or Government Orders, and if it further indicates the extent of reservations in favour of "Various categories, the selection of candidates in such a case must be made in accordance with the then existing Rules and Government Orders. Candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however he has no absolute right in the matter. If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication, if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the Rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant Rules and orders. Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right for selection, but if he is eligible and is otherwise qualified in accordance with the relevant Rules and the terms contained in the advertisement, he does acquire a vested right for being considered for selection in accordance with the Rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of Rules during the pendency of selection unless the amended Rules are retrospective in nature.

12. In B.N. Nagarajan and Others Vs. State of Mysore and Others, the dispute related to the validity of appointment of Assistant Engineers. The Public Service Commission invited applications by issuing Notifications for appointment to the post -of Assistant Engineers in October 1953, May 1959 and April 1960. The

Commission made selection, interviewed the candidates and sent the select list to the Government in October/ November 1960. But before the appointments could be made the Mysore Public Works, Engineering Department Services (Recruitment) Rules 1960 came into force which prescribed different provisions than those prescribed in the earlier Notifications in pursuance whereof the Public Service Commission had made the selections. The validity of the appointment made by the Government on the basis of the selection made by the Commission was challenged. The High Court quashed the selection and appointments made in pursuance thereof. On appeal before this Court, validity of the appointments were assailed on the ground that since the appointments had been made after the amendment of the Rules the appointments should have been made in accordance with the amended Rules. A Constitution Bench of this Court rejected the contention holding that since the whole procedure of issuing advertisement, holding interviews and recommending the names having been followed in accordance with the then existing Rules prior to the enforcement of the amended Rules the appointments made on the basis of the recommendation made by the Public service Commission could not be rendered invalid.

13. In *Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others*, similar question arose relating to recruitment by promotion. The question was whether promotion should be made in accordance with the Rules, in force on the date the vacancies occurred or in accordance with the amended Rules. The Court observed as under (para 9 of AIR):

The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub Registrar Grade 11 will be according to the new rules on the zonal basis and not on the Statewise basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.

The same view was taken in *P. Ganeshwar Rao and Others Vs. State of Andhra Pradesh and Others*, Similar view was taken in *A.A. Calton Vs. Director of Education and Another*, (1983)ILLJ502SC . It is a well accepted principle of construction that a statutory rules or Government order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government orders and any amendment of the rules or the Government order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended rules or the amended Government orders issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections. See *P. Mahendran and others Vs.*

State of Karnataka and others,

6.3 In case of Maharashtra State Road Transport Corporation and Ors. v. Rajendra Bhimrao Mandve and Ors. reported in AIR 2002 SC 222, The Apex Court has, in Head Note, has observed as under:

Industrial Disputes Act (14 of 1947), Sch.2, Item 6 - APPOINTMENT - Appointment - Criteria for selection - Alteration in middle of selection process - Not permissible - Post of drivers in State Road Transport Corporation advertised in 1995 - Selection process started and driving test held - Circular Order No. 17 of 1996 D/- 24-6-96 fixing criteria for selection issued by Corporation thereafter - Cannot be applied to the ongoing selection - Circular Order No. 17 of 1996 however, cannot be said to be illegal or arbitrary or against the orders of the State Government or the Resolution of Board of the Transport Corporation - Supreme Court to give quietus to controversies with reference to the selection in question and avoid reopening of selection process, directed that petitioners may be considered for appointment favourably. (Paras 5, 7)

6.4 In case of State of Uttaranchal and Ors. v. Sidharth Srivastava and Ors. reported in (2003) SCC 336, the Apex Court in Para. 24, has observed as under:

24. It was also urged that if there were vacancies and the candidates were selected in accordance with the law by UPPSC and there was urgent need to fill up the said vacancies, it is wholly arbitrary on the part of the appellants not to fill up the vacancies by the candidates recommended by the UPPSC and going in for fresh recruitment. This submission is again without any force in law. When we have already held that the selection made by UPPSC is not binding on the State of Uttaranchal, no direction could be given to appoint the non-official respondents as is done by the High Court in the impugned judgment.

7. Learned Advocate, Mr. Vaishnav, relying upon the aforesaid decisions, submitted that similar case is before this Court in present situation when on 17.2.2005, application was made by the petitioner with a prayer to grant compassionate appointment and department has consumed the time to take decision, meanwhile Services Rules has been changed by notification dated 16.3.2005 which is not applicable, however, respondent is insisting it which required to be fulfilled by the petitioner. Therefore, according to him, that notification dated 16.3.2005 is not applicable. Over and above, if it is applicable it having prospective effect, not applied to the application which was made by the candidate prior in point of time.

8. Learned Advocate, Mr. Vaishnav, submitted that petitioner will make detailed representation to the respondent to reconsider the decision given by respondent in light of the submissions made by him and some suitable directions may be issued to the respondent, so they may examine the issue and pass appropriate reasoned order within some reasonable time.

9. Learned AGP, Mr. Dabhi, appearing on behalf of respondent Nos. 1 and 2

submitted that if the petitioner will make detailed representation, then respondent authority will reconsider the matter in light of representation which will be filed by petitioner within some reasonable time.

10. In view of these submissions made by learned Advocate, Mr. Vaishnav and considering the decisions which have been relied by him and also keeping in mind the fact that notification dated 16.3.2005 is relate to the Service Rules and policy is dated 10.3.2000 remained intact, not modified, not cancelled, then, in light of this factual aspect, the respondent shall have to re-consider the decision, therefore, it is open for the petitioner to make detailed representation to the respondent along with the decisions which have been relied upon which will be supplied by petitioner to the respondent, within a period of 15 days from the date of receiving the copy of this order. As and when respondent receives the copy of representation from the petitioner, it is directed to respondent to re-consider the decision in light of decisions which have been relied upon by petitioner and also consider, whether notification dated 16.3.2005 which has been issued under Article 309 of the Constitution will apply to the policy of compassionate appointment dated 10.3.2000 or whether policy decision dated 10.3.2000 has been in any way has been cancelled, replaced by some other policy or not and to pass appropriate reasoned order in accordance with law within a period of two months from the date of receiving the representation from the petitioner.

11. In view of the above observations and directions, present petition is disposed of, without expressing any opinion on merits. However, it is made clear that in case if ultimate decision is adverse to the petitioner, it is open to the petitioner to challenge the same before appropriate forum in accordance with law. Direct service is permitted.