

(1992) 07 GUJ CK 0006
In the Gujarat High Court

Iqbalhusen Adambhai Patel and Others

APPELLANT

Vs

District Education Officer and Others

RESPONDENT

Date of Decision : 03-07-1992

Acts Referred:

Gujarat Panchayats Act, 1961 — Section 155 , 155(1)(b), 203

Citation : (1993) 2 GLR 1627

Hon'ble Judges : N.J. Pandya, J

Bench : Single Bench

Judgement

N.J. Pandya, J.—In both the matters a common question relating to Government Resolution issued by the State of Gujarat in its Education Department on 30th July. 1977 (hereinafter referred to as the impugned Resolution) is involved. The petitioners were Teachers under the Erstwhile District School Board. That came to be dissolved after application of Gujarat Panchayats Act, 1961 u/s 155 thereof, the effective date being 1-4-1963. I am not much concerned with it except for the provisions contained in Section 155(1)(b) & (e) including two of the provisions of the last mentioned Clause (e) read with it of course, will be the provision of Section 203 of the Panchayat Act and Section 323 whereby general rule making power is provided. Section 203 refers to provisions relating to service, particularly for regulating the services of employees. There are provisions made in that Chapter and there references are made to Sub-section (3) of Section 5.

2. Section 203(2) has a provision whereby different classes of Panchayat Services could be specified as forming different cadres, may be with reference to District or Taluka. So far as the Primary Teachers are concerned, orders under Sub-section (2) of Section 203 have been issued whereby the Primary Teachers have been included in the list of District Cadre of a given District Panchayat and that order is dated 30-7-1977 where there is a mention of earlier order of 1967. This order is reproduced in compilation of Rules. Vol. 10 at page 86 and in the Scheduled at page 89 under the heading Medical, Public Health and Ayurved. At

Serial No. 43 Primary Teachers are shown to be included in the District Cadre which forms part 1 of the said Schedule.

3. The petitioners were Primary Teachers working in Baroda District at the relevant time till they came to be transferred to Bharuch. These orders came to be passed starting with the year 1970 ending with the year 1975. The transfer orders of none of these petitioner-Teachers had a condition attached to it with reference to the seniority in the District to which they were transferred.

4. The petitioners being primary teachers, the governing provision will be the Primary Education Act, 1947, under which rules came to be framed in 1949. The said 1947 Act provides for the powers of Administrative Officers towards School Board Staff which will now be taken to be the staff of the respective Education Committees as per the said Section 155 of the Panchayat Act. There is rule-making power in 1947 enactment;

thereunder the aforesaid Rules of 1949 have been framed and mere in Rule 40 read with Rule 63 the transfer of primary teachers has been taken care of. Rule 40 being directly involved is required to be considered in the instant case, which is reproduced hereunder:

Loan or transfer of services of Staff".- Subject to the provisions of the Act, a District School Board on the recommendation of the Administrative Officer and an authorised Municipality on the recommendation of the School Board may sanction the loan or transfer of the services of any member of the staff maintained by it; u/s 20 of the Act to another District School Board or authorised Municipality or Government or Private Institution on such terms and conditions as may be mutually agreed upon between it and such other Board or Municipality or Government or Private Institution.

As could be seen from the aforesaid rule, the inter-district transfers could be effected on mutual consultation and it could be on such terms and conditions as maybe mutually agreed upon. It is an admitted position that vis-a-vis the seniority no conditions in the case of any of the petitioners have been attached. Therefore, the petitioners did carry with them the respective seniority to the District to which they were transferred.

5. This situation would have prevailed but for the said impugned resolution dated 30th July, 1977. The centre of controversy of the impugned resolution is para 6, which shows that seniority of the teachers who have been transferred after the year 1970 will be fixed at the bottom of the prevalent seniority list and they will be ranking below the teachers who have joined the service in the year in which transfers came to be included in the list of the concerned District. Subsequently, this paragraph 6 came to be amended in the year 1980 by another G.R. dated 23-10-1980 and instead of there being a reference to the year 1970 it came to be specified to 2-1-1990. The reason as to why this date was settled down in neither of these two G.Rs. respectively at pages 23 & 31 of the Petition No. 3713 of 1981 (hereinafter referred to as the main petition) is silent.

6. The controversy is that the Government Resolutions though issued by the appropriate Department, namely, the Education Department, cannot be allowed to operate retrospectively and in the process disturb the settled position vis-a-vis the seniority of the petitioners in the Bharuch District where they were transferred as stated above. Ordinarily one would not have given much importance to the seniority amongst the primary teachers because, if at all there be any promotion hanging on the seniority it could be only one in a given school relating to Head-Master's post, if at all the rule is so framed. This fact is being adverted to only with a view to understand the reason of the controversy that suddenly erupted. The reason is that in the year 1975 new revision of pay scales came to be implemented with effect from 1-1-1973 popularly known as Desai Pay Commission Rules. For the first time, primary teachers were to be given selection grade and that was directly linked with seniority of different aspirants for the benefit of selection grade. Naturally, there would be no difficulty in assigning the respective seniority to the incumbents if they have remained in the District where they started the service right from the beginning all throughout. The difficulty will arise only with regard to teachers who have come from District other than the one that they are now serving. The petitioners are thus, directly affected as a result of the said impugned G.R. because, if it is implemented as sought to be done by the respondents, they will not be entitled to any selection grade.

7. On behalf of the petitioners learned Advocate Mr. Desai in the main petition and learned Advocate Mr. Hathi in the second petition have strongly urged that the petitioners being primary teachers right from the date of their recruitment, transfer and everything is to be governed by the provisions of the said 1947 Act, and the Rules framed thereunder in the year 1949, as may be amended from time to time. The circular, therefore, cannot have any overriding effect over the statutory Rules and when the administrative u/s 24 read with Rule 63 of 1949 Rules can be the only authority to transfer the primary school teachers, and when Rule 40 provides that there could be conditions attached to transfer from one School Board area to another and in the instant case from one Education Committee area to another, the Government Resolution particularly with reference to paragraph 6, cannot have application to the case of the petitioners.

8. On behalf of the respondents, Miss Doshit has strongly supported the case of the State and the authorities working thereunder and for that purpose she has relied on 1968 Rules that were framed under the Panchayat Act, 1968 Rules relied on by Miss Doshit are Gujarat Panchayat Service, Transfer of Servants, Rules 1968. They are framed in exercise of the powers conferred by Section 323 read with Section 203 of the Gujarat Panchayat Act, 1961, These Rules relate to transfer within the District and also the cases of inter-District transfers. So far as the transfer out of the Districts are concerned that being not the controversy here, I leave aside Rule 2. Rule 3 refers to inter-District transfer and Rule 4 refers to transfers subject to certain conditions when they are inter-District transfers. Rule 4, therefore, is nothing else but a provision added to Rule 3

because there is a direct reference to the provisions of Rule 3 and they are Sub-clauses (1) and (2) of Clauses (a) and (b) of Sub-rule (1) of Rule 3. The combined effect of Rules 3 and 4, therefore, is that if the transfer is in order to absorb a member on account of his service becoming surplus or a request transfer, the person so transferred shall lose his seniority and will rank at the bottom of the cadre in the District where he has been transferred to.

With reference to said 1968 Government Resolution, the submission of Miss Doshit is that though the impugned Resolution may have been issued 1968 Rules were very much there in force and the Government Resolution does nothing else but to issue guidelines in conformity with the existing statutory provision which will certainly prevail with reference to the main Act and statutory Rules framed thereunder.

It is her further submission that though the respective transfer orders do not contain any reference to the ranking in seniority and losing the same in the transferred District, this would be the consequence, according to her, because at the time when the transfer orders came to be passed in respect of each of the petitioners in the aforesaid petition, the 1968 Rules were very much in force. Elaborating her argument further Miss Doshit has submitted that in view of the provisions of Section 155 read with Sections 203, 205, 206 and 201, the petitioners are members of the Panchayat Service. She has readily admitted that no allocation orders have been passed but, according to her, this was not necessary as the direct consequence of Section 155 which provides for the dissolution of the School Board and its consequences, will be the same.

9. Taking care of a likely submission about there being conflict between Rule 40 of 1949 and Rule 63 of 1968, she has submitted that firstly 1968 Rules being subsequent, they should prevail over the earlier one and further her submission was that there is no conflict between the two. If 1968 Rules are read as supplementary to the provisions made in Rule 40 of 1949 Rules, according to Miss Doshit, they stand in harmony with each other. What was left initially to be decided by their respective Committee inter se and mutually to be agreed upon, is now prescribed by way of Rules. According to her, therefore, even if the transfer orders are silent about the effect of transfer pertaining to seniority, the 1968 Rules being very much in force, they should be given a free play and its effect will automatically follow whether reference to it has been made in the transfer orders or not. In other words, according to Miss Doshit what was left to be agreed upon between the respective authorities had now been determined by a statutory provision, i.e., the Rules framed under the Panchayat Act in 1968 and its effect automatically will be felt on the transfers made after the promulgation of these Rules and as such, there is no conflict between Rule 40 of 1949 Rules and the 1968 Rules.

10. Promptly, this was countered by the other side, when he submitted that if at all 1968 Rules were holding the field and was to govern the case of the Primary Teachers also, there was no question of issuing the impugned G.R. at all. The

G.R. is no doubt, issued by the State of Gujarat in its Education Department. This is required to be done because if one turns to the provisions of 1947 Act as well as Rules framed thereunder in 1949, the Primary Teachers are governed by these statutory provisions and the authorities provided therein. The very fact that G.R. was required to be issued indicates that neither the Rules nor the orders issued till then as per the provisions of 1947 Act or 1949 Rules had provided for this eventuality. As noted above, the circumstances arose for issuing the orders with regard to fixation of seniority because of the introduction of selection grade. That seems to be the reason why Rule 3 of 1968 Rules also came to be introduced on and from 2-1-1970 as per the foot note to be found from the bottom of the Rule in the aforesaid volume of the local Acts. There are no such rules to be found in that 1949 Rules or no such material has been produced by the State in these proceedings having been initiated under 1947 Act or 1949 Rules. No doubt, the impugned G.R. pertains to the Primary Teachers and therefore, can be taken to be the Resolution governing the case of the Primary Teachers, but in the instant case, what is to be considered is whether the persons who have been transferred prior to the issuance of the G.R. which admittedly, came to be issued on a later date. In other words, it was made applicable retrospectively. That certainly would be the result taking para 6 with the aforesaid amendment, of giving effect to from 2-1-1970.

11. If this G.R. is to be taken as submitted by Miss Doshit, it will have to be also considered that 1968 Rules being there on the way as submitted by the other side, there is no need for issuance of G.R. and on the other hand, the transfer orders of the teacher could have been issued under 1968 Rules itself. Now, this will not be the position because as per Section 24 of the 1947 Act and Rules 40 and 63 of 1949 Rules, the prescribed authorities for the transfer are the Administrative Officer and Director of Education, as the case may be.

12. The State level Officials respectively the Director of Education and the Development Commissioner come into picture only when transfers are to be effected in inter-District. With the State, the transfers are to be effected by the transferring authority, namely. Administrative Officer and District Development Officer. An occasion did arise for This Court to consider the case of primary teachers with regard to transfer as well as imposition of penalty for disobedience of the transfer order. The matter came up before This Court by way of Special Civil Application No. 1921 of 1971 dealt with by Justice B.J. Diwan, as he then was, on 25-2-1972. The petitioner in that case was not a teacher but an employee of the erstwhile District School Board having joined it as a Clerk on 15th July, 1941. Like the present petitioners, by operation of Section 155 of the Panchayat Act, he came within the administrative control of the Education Committee of the District Panchayat. By the time the dispute arose, the petitioner of that case had already become an Assistant Accountant. He came to be transferred from Education Committee area to the Agricultural Branch by the District Development Officer. It was a post of lower cadre, according to the petitioner and was with less beneficial time-scale. Therefore, the petitioner

declined to join the post and did not go to the Agricultural Branch under the District Development Officer. The petitioner did contend that the D.D.O. had no authority and power to transfer him and that the transfer tantamounts to degrading him to a lower post. This resulted in issuance of charge-sheet followed by passing of penal order which came to be challenged in the said petition.

13. After considering various provisions particularly with reference to the Discipline and Appeal Rules framed under the Panchayat Act, particularly with reference to Rule 4 thereof, the learned Judge came to the conclusion that the authority in respect of the transfer of the petitioner of that case will be the Administrative Officer and even for initiating the disciplinary proceedings and imposing punishment, it will be an Officer prescribed as per the Rules framed under the 1947 Act and certainly not D.D.O. With reference to definition clause of Disciplinary and Appeal Rules 1964, the learned Judge in that matter was pleased to carve out a position that as denned in Rule 2, the petitioner would certainly become a member of the Panchayat Service, but as per Rule 4, when his right or privilege is protected, if given under any law applicable to him, he cannot be proceeded against by the District Development Officer under the Disciplinary and Appeal Rules that being the position with reference to the said 1947 Act and 1949 Rules, he cannot, be proceeded against by the District Development Officer under 1968 Rules and it has been held that he could not have been transferred.

14. No doubt, in 1968 Transfer Rules, there is no definition clause at all. We may proceed on an assumption that like the petitioner of the said case before Justice B.J. Diwan, the present petitioners are also members of the Panchayat Service, but as 1968 Rules itself provides, there is no reference to any of the Primary School Teachers or the staff of the Education Committee and no authority whatsoever has been prescribed for the transfer and therefore, the transfer orders could not be said to be under 1968 Rules and in my opinion, there is no question of 1968 Rules governing the case of any of the petitioners when the transfer came to be made during the period 1970 to 1975. The transfers have taken place definitely prior to the aforesaid impugned Government Resolution came to be issued. If the G.R. is permitted to operate in the manner suggested by the Department, it will certainly work to the disadvantage of the petitioners. No such situation can be brought about in the service life of an employee, which was never contemplated when an event occurred in his service life and which was not even contemplated at that time. Taking the concrete case of the petitioners here, when they came to be transferred Rule 40 of Rules 1949 being the governing Rule, unless there be any conditions imposed on their transfers, by a later G.R. the conditions could not be altered to their disadvantage.

15. The reliance sought to be placed in 1968 Rules, therefore, in my opinion, will not be available, firstly, because the transfer orders were never passed under the Rules, the transfer authorities themselves, being different and secondly, if at all these rules were to apply, there was no need to issue any Government

Resolution, let alone the impugned Government Resolution. Taking the 1968 Rules, as they are, when there is no reference to primary teachers or any of the staff members of the Education Committee, the G.R. will have to be read as appended to 1949 Rules Which are framed under 1947 Act. Now, this sort of exercise cannot be done unless there are specific provisions in either of the enactments namely the Primary Education Act, 1947 or the Gujarat Panchayat Act, 1961 or alternatively, even there might be provisions in 1949 Rules or 1968 Rules permitting this exercise.

16. In my opinion, when these two sets of Rules 1949 Rules and 1968 Rules are considered in this light, it is obvious that they are governing in their respective field and 1949 Rules will hold the field when the cases of the employees of the Education Committee including the Primary School Teachers are being dealt with and correspondingly, members of the Panchayat Staff will be governed by 1968 Rules when their case is being dealt with.

17. Incidentally, it may be mentioned that the said decision rendered by Justice B.J. Diwan on 25-4-1972 was taken up by way of Appeal before the Division Bench in Letters Patent Appeal and it came to be disposed of by a reported decision S. Dayal and Another Vs. Ambalal Kuberdas Patel, . The view taken by the learned single Judge has been confirmed by the learned Judges of the Division Bench while disposing of that L.P.A. It is clearly held in para 7 of that decision that the entire machinery under the Bombay Primary Education Act would clearly continue, which would mean that the transferring authority will be the one prescribed by the Act or Rules framed thereunder and therefore, any attempt made to govern the case of the Education Committee Staff Members, including that of the Primary School Teachers, with respect to Rules framed under the Gujarat Panchayats Act will have to fail. No doubt, Miss Doshit was not relying solely on 1968 Rules, she was also supporting the impugned G.R. on its own merits. As recorded above, she had submitted that G.R. is nothing else, but the guidelines issued according to the prevalent Rules. However, if those prevalent Rules are 1968 Rules, they do not apply and hence, the G. R. will have to be taken as it is and when it is considered with reference to its date, namely, 30-7-1977, it can be made use of against the petitioners only if paragraph 6 is permitted to operate in its full force as per the aforesaid amendment as to the date 20-1-1970, it could be permitted to operate retrospectively.

18. In my opinion, Rule 40, which is the governing factor here under 1949 Rules, when it clearly provides that in inter-State (inter-district) transfers conditions as may be mutually agreed between the District Committees may be imposed and no such condition having been imposed, the effect of allowing the operation of para 6 in the full force, in my opinion, will be disastrous.

19. Taking the overall situation in my opinion, the petitions are required to be allowed. The respondents are directed to show the seniority of the respective petitioners from the date of their first joining in service and not from the date of joining in Bharuch District. The consequence thereof is directed to be worked out

within six months from the date of receipt of the writ and the benefits flowing therefrom may be made available to the petitioners within 2 months therefrom. Rule is made absolute.