
(1997) 01 GUJ CK 0044
In the Gujarat High Court

Kusumben E. Borasada

APPELLANT

Vs

Govt. of Gujarat and Others

RESPONDENT

Date of Decision : 18-01-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 226, 39
Gujarat Secondary Education Act, 1972 — Section 2(p)

Citation : (1997) 3 GLR 2159

Hon'ble Judges : S.K. Keshote, J

Bench : Single Bench

Judgement

S.K. Keshote, J.—Challenge is made by the petitioner to the order dated 3rd November, 1981 of respondent No. 1 whereunder it was held that the petitioner could not be treated as a protected teacher. The petitioner was appointed as craft teacher in the Web Memorial Girls High School run by the Education Board of Baroda Methodist Church, Gujarat Conference in Southern Asia, now run by Methodist Church in India, with effect from 1-8-1958. The petitioner was taking periods for Standards V to VII in the subject of craft and other subjects which were assigned to her by the Principal from time to time. The petitioner has come up with the case that she was in service in a secondary school as on 29th March, 1965. Upto 1976 the school was working in three different sections, namely, Standards I to IV, Standards V to VII and Standards VIII to X. The respondent-management is also running a school known as Hill Memorial High School since 1940. The said school had classes from Standard VIII to Standard X. The petitioner was taking the periods for Standards V to VII. It is the school which was the sister concern of Hill Memorial High School. Both the schools were run by common management. The petitioner was treated as a secondary teacher and she was given salary in the scale of Rs. 155-280 with higher start at Rs. 165/-, under the Sarela Pay Commission. Under the Desai Pay Commission she was paid salary in the scale of Rs. 260-500.

2. The petitioner has come up with the case that she has opted for pension. It has further been the case of the petitioner that three other teachers of the said

school were treated as protected teachers, while the petitioner has been denied the said benefit. By Government Circular dated 4-6-1965, the schools which were running Standard V to VII were treated as primary section and Standards VIII to XI (now standards VIII to X) were treated as secondary section. The petitioner was in the service of secondary school as on 29th March, 1965, and as per the Government circular she is entitled to be treated as protected teacher. After 1977 there is watertight compartments of primary and secondary sections in the respondent school. It is the case of the petitioner that she, being a protected teacher, is entitled to the pay-scale of craft teacher, which is prescribed for secondary school. Under the Desai Pay Commission, recommendation was made for pay-scale of Rs. 350-600 for craft teacher. Various representations were made by the petitioner for giving her the pay-scale of craft teacher. Ultimately that request has been turned down by respondent No. 1 under letter dated 3-11-1981 on the ground that as on 29th March, 1965 she was not working in the school having Standard V to XI and therefore, she could not be treated as protected teacher. Hence this Special Civil Application.

3. The respondents filed reply affidavit and they have come up with the case that the claim of the petitioner for being treated as protected teacher is unsustainable, as she does not fall within the definition thereof as given in Section 2(p) of the Gujarat Secondary Education Act, 1972. The respondents have given out detailed reasons for which the petitioner could not have been treated as protected teacher. The petitioner, after filing reply by the respondent, has amended the petition.

4. In the State of Gujarat, pension schemes are extended to the teachers who are retired from non-Government recognized grant-in-aid secondary and higher secondary schools. The pension benefits are also extended to the teachers who retired from non-Government recognized aided colleges. The pensionary benefits have not been extended to the teachers of non-Government recognized grant-in-aid primary schools. The petitioner amended the Special Civil Application and challenged the action of the respondent-State of Gujarat of not extending pensionary benefits to the teachers of non-Government recognised grant-in-aid primary schools, as being violative of Articles 14, 16, 21, 39, 41 and 45 of the Constitution of India. The amendment has been allowed by this Court under order dated 9-7-1996. On 9-7-1996 respondent Nos. 1 and 2 were given time to file reply to the amended Special Civil Application. The matter was listed for hearing on 5-8-1996. On 5-8-1996 the respondents were given last opportunity to file reply to the amended writ petition and the matter was adjourned to 26th August, 1996. Thereafter the matter was adjourned to 18th September, 1996, 10th October, 1996, 12th December, 1996 and 17th January, 1997. On 17th January, 1997 the matter was adjourned to today at the request of the Counsel for the respondents. Though the respondents have had more than five months' time at their disposal, they did not care to file reply to the amended writ petition. The matter pertains to the claim of pension of retired teacher. But the respondents have taken the same very casually.

5. The learned Counsel for the petitioner has not pressed his claim of protected teacher. The learned Counsel for the petitioner contended that denial of pensionary benefits to the teachers of non-Government recognised grant-in-aid primary schools is illegal, arbitrary, unjust and improper and it makes hostile discrimination. The Counsel for the petitioner contended that pensionary schemes are being given so that a teacher, who retires from non-Government recognised grant-in-aid college, higher secondary school, secondary school or primary school, may not have any financial difficulty in his old age. Pensionary scheme has been provided for giving financial aid and assistance to the retired employees in their old age so that at least they may not face any difficulty in meeting their day-to-day expenses. If that is the purpose and object of providing pension scheme, then the Counsel for the petitioner contended how it can be said to be a justified action to deny that benefit to a class of teachers to which the petitioner belongs. Carrying this contention further the Counsel for the petitioner submitted that the teachers who retired from the primary schools have "no Allaudin"s Chirag or Kuber Khajana" wherefrom they will get their money on retirement. The respondents have not given out any explanation or justification whatsoever to make hostile discrimination in the matter of extension of benefits of pension in between teachers who retired from college, higher secondary school, secondary schools on the one hand and teachers of primary schools on the other hand. The respondents further failed to give out any nexus whatsoever with the object sought to be achieved by non-extension of the benefits of pension to the teachers of the category to which the petitioner belongs. It has next been contended by the Counsel for the petitioner that all primary school teachers serving under the District Panchayats or Municipalities are given benefit of pension scheme. The teachers who are working in the Government primary schools are also entitled to the benefit of pension scheme. The Counsel for the petitioner urged that qualification for the post of Assistant Teacher in primary schools run by Government, District Panchayats, Municipalities, Government recognised schools, and non-Government recognized grant-in-aid schools is the same. Not only the qualification is same but the pay-scale of primary school teachers of all the schools aforesaid is the same. The nature of duties performed by the teachers, irrespective of their appointment in a particular school, are the same. So the primary school teachers of non-Government recognized grant-in-aid schools suffer double discrimination. It is a case where the State of Gujarat has acted with impropriety and in highly discriminatory manner in the matter of extension of benefits of pension scheme to the non-Government recognized primary school teachers.

6. On the other hand the Counsel for the respondents made oral submission that the teachers of non-Government recognized grant-in-aid primary schools were not given pension as it is the policy of the Government. When the Court has asked the Counsel for the respondents to produce the policy before this Court, he contended that has not been made available or provided to him by the Government. However, he contended that in the policy matter this Court has very

limited judicial power of review. The Court has again asked the Counsel for the respondent to give out the justification for not extending the benefit of pension scheme to the teachers of schools of the category to which the petitioner belongs, but the learned Counsel very frankly conceded that nothing has been given out by the Department in this regard to him. However, the Counsel for the respondents submitted that the reason may be that the Government was not giving grant-in-aid to non-Government recognized primary schools, but he admitted that for the last 17 or 18 years the Government is giving grant-in-aid to non-Government recognized primary schools.

7. I have given my thoughtful consideration to the submissions made by the learned Counsels for the parties.

8. From the side of the respondent-State of Gujarat no explanation or justification is forthcoming, why the benefit of pension scheme has not been extended to the teachers of non-Government recognized grant-in-aid primary schools. The learned Counsel for the petitioner relying, on the decision of the Hon"ble Supreme Court in the case of Haryana State Adhyapak Sangh and Others Vs. State of Haryana and Others, and the State of Maharashtra Vs. Manubhai Pragaji Vashi and others, , contended that it is a case of hostile discrimination amongst a class and as such the relief as prayed for by the petitioner, by way of amendment of the writ petition, should be allowed.

9. In the case of Haryana State Adhyapak Sangh v. State of Haryana (supra) the appellants therein were teachers employed by various recognized aided private schools in the State of Haryana. The schools were under private management, receiving financial aid from the State Government. The appellants had approached the Court with the grievance that they were entitled to parity with the teachers employed by the Government schools in the matter of pay-scales and other emoluments such as dearness allowance, house rent allowance, city compensatory allowance, medical reimbursement, gratuity, etc. The Court observed that the teachers of the aided schools must be paid same pay-scales and dearness allowance as teachers in the Government schools for the entire period claimed by the appellants and that the expenditure on that count should be apportioned between the State and the Management in the same proportion in which they shared the burden of the existing emoluments of teachers.

9.1. Next is the State of Maharashtra v. Manubhai Pragaji Vashi (supra) which was a case of private law colleges who made grievance that the State has not extended the benefit of grant-in-aid to those institutions though such benefits are extended to other non-Government colleges. The Apex Court has observed that not extending grant-in-aid by State to non-Government law colleges and at the same time extending such benefits to non-Government colleges with faculties, viz., Arts, Science, Commerce, Engineering and Medicine (other professional non-Government colleges) is patently discriminatory. It has further been observed that the State has not discharged the burden of proof cast on it to sustain the differential treatment meted out to one of the Government

recognized professional colleges (private law colleges). It has further been observed that it is patent that likes have been treated unlike; without proper justification or reason and the private law colleges have been singled out for such discriminatory treatment. The disparity in the service conditions in not affording the benefit of pension-cum-gratuity scheme to non-teaching staff in non-Government law colleges and at the same time affording same benefit to non-teaching staff of colleges with faculties in Arts, Science, Commerce, Engineering and Medicine with effect from 1st October 1982 is also discriminatory. The plea of the Government on paucity of funds has been repelled by the Apex Court, observing that the plea of paucity of funds pleaded by the State would not be tenable as the paucity of funds can be no reason for discrimination.

9.2. In the case of *Madhya Pradesh Ration Vikreta Sangh Society and Others Vs. State of Madhya Pradesh and Another*, the Apex Court observed that the wider concept of equality before the law and the equal protection of laws is that there shall be equality among equals. Even among equals there can be unequal treatment based on an intelligible differential having a rational relation to the objects sought to be achieved. However, if the Governmental action discloses arbitrariness, it would be liable to be invalidated as offending against Article 14 of the Constitution.

9.3. In the case of *Punjab Higher Qualified Teachers' Union (Non-Petitioners) and Others Vs. State of Punjab and Others*, the Apex Court held that Article 14 of the Constitution does not permit creation of a class within the class without any rational basis. The burden of proof cast on the State that creates discrimination against the teachers of recognised aided private schools and not extending the benefit of pension to them is based on reasonable classification having nexus with the object sought to be achieved. In the present case, the reasons which are given by the respondent for not extending the benefit of pension scheme to the teachers of aided private primary schools is only that it is the policy of the Government. However, the policy has not been produced on record. In the matter of policy decision, though this Court sitting under Article 226 of the Constitution may have very limited power of judicial review, that policy is also subject to judicial review on the touch-stone of Articles 14 and 16 of the Constitution of India. It is only where the discrimination made is based on reasonable classification having nexus to the object sought to be achieved, the Court may decline to interfere and not otherwise. Another reason given is that earlier the Government was not giving grant-in-aid to the non-Government recognised primary schools is hardly of any justification as admittedly for last 17 to 18 years the Government is giving grant-in-aid to the non-Government recognised primary schools. So, on the basis of facts which have come on record, as discussed above, it is evident that the teachers of private primary schools, though recognised and receiving grant-in-aid have been singled out for hostile discriminatory treatment in the matter of grant of pensionary benefits. In the case of private recognised law colleges, the case was of disparity in the service conditions, in not affording benefit of pension-cum-gratuity scheme to the non-

teaching staff in the non-Government law colleges and at the same time affording the same benefit to the non-teaching staff of colleges with faculties in Arts, Science, Commerce, Engineering and Medicine with effect from particular date was held discriminatory. The teachers in recognised and aided private primary schools are also employees in educational institutions as other teachers who are employed in recognised and aided private secondary and higher secondary schools and colleges. In the case of later employees the Government has given the benefit of pension scheme, but the former has altogether been singled out. This is apparently hostile discrimination for which no justification has been given by the Government.

9.4. The matter is squarely covered by the decision of the Supreme Court in the case of *State of Maharashtra v. Manubhai Pragaji Vashi* (supra). The action of the respondent - State of not extending the benefit of pension scheme to the teachers of recognised, aided private primary schools, though such benefit has been extended to the teachers of private secondary and higher secondary schools and colleges which are recognised and aided, is patently discriminatory and based on no material. The respondent has not discharged the burden of proof cast on it to sustain the differential treatment meted out to teachers of recognised private primary schools receiving grant-in-aid. It is patent that likes have been treated unlike without proper justification or reason, and this class of persons have been singled out for hostile discriminatory treatment. Disparity in the service conditions, in not affording the benefit of pension scheme to the teachers of recognised and aided private primary schools is discriminatory and requires to be set right.

10. In the result this Special Civil Application succeeds. The action of the respondent-State of Gujarat in not giving the benefit of pension to the teachers of recognised, aided private primary schools is declared to be ultra vires Articles 14 and 16 of the Constitution of India. The respondent-State of Gujarat is hereby directed to extend the benefit of pension to the teachers of aided private primary schools in the State of Gujarat. The petitioner's claim shall be worked out within a period of three months from the date of receipt of certified copy of this judgment, and thereafter the petitioner shall be given the benefit of pension, inclusive of arrears, within next three months. However, it is made clear that in case the petitioner was a member of Provident Fund Scheme, then she has to refund to the State the share of contribution of the employer, if any, together with interest thereon. Rule made absolute accordingly, with no order as to costs.