

(1981) 07 GUJ CK 0016
In the Gujarat High Court

Maganbhai Bhikhabhai Mistri

APPELLANT

Vs

Olpad Taluka Azaddin and Others

RESPONDENT

Date of Decision : 15-07-1981

Acts Referred:

Gujarat Secondary Education Act, 1972 — Section 35(5), 35(5)

Citation : (1982) GLH 41 : (1982) 1 GLR 664

Hon'ble Judges : B.K. Mehta, J

Bench : Single Bench

Judgement

B.K. Mehta, J.—By this petition under Article 227 of the Constitution, the petitioner, who is the senior most teacher in the school known as Mahadev Shastri Vidyalaya, run and managed by the respondent No. 1 trust, challenges the order of Gujarat Secondary Education Tribunal, dismissing his application in limine as in the opinion of the Tribunal, it did not disclose any cause of action inasmuch as there was no averment as to the breach of conditions of service which would invest the Tribunal with jurisdiction. The petitioner was required to move the Tribunal since he was not selected for the post of first Head Master of the said school inspite of the fact that he was the senior most teacher amongst eligible and suitable candidates for the said post. The Tribunal could not persuade itself to entertain the petition, since in its opinion, the appointment was to be made purely on merits and the opinion of the Selection Committee about the suitability of the petitioner's claim was not justiciable. It is this order of the Tribunal which is the subject-matter of this petition.

2. At the time of hearing of this petition, Mr. Ajmera, the learned advocate for the petitioner, raised the following two contentions:

1. The Tribunal has failed to exercise jurisdiction on misconstruction of proviso to Section 35(5) of the Gujarat Secondary Education Act, 1972, hereinafter referred to as "the Act", inasmuch as it held that the appointment to the post of the Headmaster was to be made purely on merits; and

2. In any case, the Tribunal could not have rejected the application of the petitioner in limine without notice to the respondent trust on the ground that the question of suitability is not justiciable without any material in that behalf.

These contentions were sought to be repelled by Mr. Sanjanwala, learned advocate for respondent No. 1 Trust by urging that the question involved in this petition is concluded by the judgment of this Court (Per N.H. Bhatt J.) in Special Civil Application No. 843/79 Smt. Shantadevi K. Sharma v. Manager, Navjeevan Girls High School 22 G.L.R. 1116 pronounced on February, 4, 1981, where on the facts, which were on all fours with the facts of the present case, the learned single Judge has rejected the petition of unsuccessful teacher challenging the order of the Tribunal where the Tribunal has rejected his application in limine on the same ground that the application did not disclose any cause of action, in as much as the grievance made in the said application about the suitability was not justiciable.

3. I am of the opinion that this petition should be allowed obviously for the following reasons: The Tribunal in its impugned order has recorded its findings in the following terms:

The condition for entertaining the application by this Tribunal, is that there should be a dispute relating to the conditions of service between the employee and the employer school management. The jurisdiction vested in this Tribunal u/s 38 of the Act, is a very limited jurisdiction. This Tribunal cannot enlarge the jurisdiction because it would amount to encroachment on the jurisdiction of the ordinary civil court which practice is discouraged by the Hon'ble the Supreme Court. Therefore, the applicant should first satisfy this Tribunal that his grievance is based on the breach of any of the condition of his service. The applicant says that his seniority has not been given due consideration by the Selection committee and therefore it amounts to a breach of condition. It is not in dispute that the Selection for the post of Principal is to be made purely on merits. The proviso to Section 35(5) of the Act Provides:

Provided that for the purpose of such selection, preference shall be given to a senior teacher serving in the school, if he is otherwise eligible and suitable". According to the applicant, he is the senior most teacher of the school and he is suitable as well eligible. However, it is nowhere provided in the Section that the senior most teacher, if he is eligible for appointment as a headmaster has to be selected. When if the selection committee does not find him suitable for the post. His say is that he is suitable for the post of the headmaster and it is only because of the prejudice in the mind of the management that he has not been found suitable by the selection committee. It is difficult for me to agree that on this count, he can be said to be basing his case on breach of the condition of his service. The suitability of a candidate for the post for which he has applied, has to be decided by the selection committee constituted under the provisions of the Act and the Regulations under the directions issued by the Gujarat Secondary Education Board from time to time...."suitability" referred to in proviso to

Section 35(5) of the Act is to be decided by the selection committee and not by the court or by this Tribunal." With respect to the Tribunal, I am of opinion that the Tribunal has erred, as rightly contended by the learned advocate of the petitioner, and misconstrued the proviso when it held that it was not disputed that the selection for the post of Principal is to be made purely on merits. In my respectful opinion, the Tribunal has failed to appreciate that the proviso in effect and substance prescribes the criteria of selection for the post of Principal on the basis of merit-cum-seniority. In other words, if everything is equal, on the ground of eligibility and suitability, the preference is to be given to the senior most teacher serving in the school or schools under the same management. The grievance of the petitioner before the Tribunal was that his seniority has not been given due consideration by the Selection Committee and, therefore, it amounted to breach of condition. The Tribunal has recorded this grievance in its order but was not impressed with that grievance since, the selection, in the opinion of the Tribunal, was to be made purely on merits. It should be profitable to set out Sub-sections (4) and (5) of Section 35 in order to appreciate as to what is the criteria prescribed by the Legislature for appointment to the post of Principal.

(4) Subject to the provisions of Sub-section (1) of Section 34, the school staff selection committee or as the case may be, the special school committee shall select persons for appointment as teachers of the school from amongst the persons who are qualified to be appointed as such in accordance with the regulations made in this behalf:

Provided that for the purpose of such selection preference shall be given to a protected teacher, if he is otherwise eligible.

(5) The special school committee shall select persons for appointment to the post of headmaster of the school from amongst persons referred to in Sub-section (4) or from amongst the teachers in the school:

Provided that for the purpose of such selection, preference shall be given to a senior teacher serving in the school or schools under the same management, if he is otherwise eligible and suitable.

The schema for selection for the appointment to the post of teachers and Principal appears to be that appointment as a teacher is to be made from amongst persons who are qualified to be appointed as teachers in accordance with the Regulations made in that behalf; while the selection of persons for appointment to the post of Headmaster of the school is to be made from amongst persons so qualified or from amongst the teachers in the school for which the appointment of Principal is to be made. The proviso, however, enjoins that for purposes of such selection, a senior teacher, serving in the school or schools under the same management, is to be preferred if he is otherwise eligible and suitable. The legislative intent behind this appears to be clearly manifest in this proviso that when the competition is between the teachers employed in the same school and the outsiders, preference is to be given to the senior teacher

serving in the school, provided he is otherwise eligible and suitable. The rationale underlying this proviso appears to be that a senior teacher who has put in services in a school for which the appointment of Principal is to be made, is to be preferred not only qua his junior teachers but qua outsiders, provided everything is equal on merits. If this is the intent and rationale underlying the proviso, I think, with respect to the Tribunal, that it clearly misconstrued the proviso and proceeded to reject the application in limine as if the only criteria for appointment is the suitability. It should be emphasised that it is not merely the suitability which is to be borne in mind while making appointment to the post of a headmaster. The Selection Committee has to bear in mind the eligibility as well as suitability of the candidates applying for the post of Headmaster and if amongst such candidates, if there is already a senior teacher serving in the school or schools under the same management, he is to be preferred. I am, therefore, of the opinion that the Tribunal has failed to exercise the jurisdiction on misconstruction of the proviso. The Tribunal could not have even rejected the application on the ground that the grievance about the suitability of the petitioner was not justiciable without any material prima facie indicating otherwise. It could have done so only after notice to the respondent-Trust.

4. The contention of Mr. Sanjanwala based in decision of this Court in Spl. C.A. 843/79 would not assist the cause which he is representing before me. Two questions arose before Bhatt, J. in the said Special Civil Application. The first question was whether the Tribunal was competent to reject the application in limine and secondly, whether the Tribunal was right in its conclusion that the petition disclosed no cause of action in terms of Section 38 of the Act. The learned Judge answered the first question against the petitioner of that Special Civil Application holding that the Tribunal was competent to reject applications before it in limine. The learned Judge, however, qualified his answer by adding the following qualification:

If the petition discloses that dispute has been brought to the Tribunal by a teacher, a Headmaster or a member of non-teaching staff in connection "with the condition of ten vice of such person," the "application is competent. More often than not, such applications would be referring to some condition of service giving rise to a dispute and when such an averment is there in the petition itself, it will be the duty of the Tribunal to afford an opportunity to the applicant to make good that assertion of the condition of service and the consequential right resting on it. In such cases, it will not be open to the Tribunal to summarily reject the application without affording an opportunity, to the concerned application to adduce requisite evidence.

Now this qualification added by the learned Judge goes against the client of Mr. Sanjanwala. In the present case before me, the grievance has been made by the petitioner that the Selection Committee did not give promotion to him though he was senior most teacher. Mr. Sanjanwala, however, urged that he relies more on the second question where the learned single Judge held that the Tribunal was

right in concluding that application before the Tribunal in that case did not disclose any cause of action. I am afraid, how can this view of the learned single Judge in the facts and circumstances of the case before him can be any matter of precedent. The learned single Judge has in para 6 noted as under:

Nowhere in this application I find that the petitioner had referred to her preferential claim to be considered for appointment as a Principal on the basis of the condition of service.

If there were no proper averments in that application before the Tribunal, the Tribunal would have certainly rejected the application as one without any cause of action. Mr. Sanjanwala, however, relied on the following paragraph which is the ratio of the decision:

I would reiterate that u/s 38(1) of the Act, the jurisdictional fact is that there must be a dispute connected with the conditions of service and if in the application there is nothing to express or suggest by implication that the condition of service was the original cause of application, the Tribunal would be fully justified in rejecting the application summarily on the ground that it discloses no cause of action.

I do not think that there could be any disagreement with this principle. The grievance of the petitioner in the present case before me is that the Selection Committee has not given preference to his seniority and Mr. Sanjanwala fairly conceded that seniority is a condition of service. He, however, invited my attention to the following observations of the learned single Judge on which he relied heavily:

The Tribunal in this connection states that she asserted that she was better qualified than the respondent No. 2 for becoming the Principal of the school. Ex-parte assessment of one's own capacities and capabilities by a litigant cannot furnish any cause of action. It is the subjective satisfaction of the Selection Committee, based on objective facts, that is at the root of the Selection and the allegation otherwise made by the petitioner in that application can hardly constitute the cause of action. It is to be noted that what I have observed above is confined to the peculiar facts and circumstances of this case.

I have not been able to appreciate how this observation which the learned single Judge has made in the peculiar facts and circumstances of the case, can assist or advance the case of the client of Mr. Sanjanwala. Even subjective satisfaction of a statutory authority on objective facts can always be subject to judicial scrutiny by inquiring as to whether the formation of the said satisfaction had any factual basis or whether the executive had acted in good faith or whether the existence of relevant materials upon which the authority for exercise of executive power is protected are the vide *Ishwarlal Girdharlal Joshi v. State of Gujarat* and *Anr.* (1976) 8 G.L.R. 728, *Mrinal Kanti Das Burman and Ors. v. State of West Bengal and Ors.* (Full Bench) 1977 Lab. I.C. 628).

5. The question of exercise of that judicial power is not arising for my determinations since the Tribunal has rejected the application of the petitioner summarily.

6. In that view of matter, therefore, this petition should be allowed and the order of the Tribunal should be quashed and set aside and the matter should be remanded to the Tribunal for deciding the application before the Tribunal afresh according to correct legal principles. Rule is made absolute with no order as to costs.