

(1999) 11 GUJ CK 0028
In the Gujarat High Court

Case No : Special Civil Application No. 6157 of 1987

Managing Trustee

APPELLANT

Vs

Mahanbhai R. Bhangi

RESPONDENT

Date of Decision : 30-11-1999

Acts Referred:

Citation : (2000) 1 GLR 708

Hon'ble Judges : P.B. Majmudar, J

Bench : Single Bench

Advocate : P.C. Master, for the Appellant; Bipin P. Jasani, (absent); R.M. Desai, for Respondent No. 2; A.D. Oza, for the Respondent

Judgement

P.B. Majmudar, J.—This is a petition under Articles 226 and 227 of the Constitution of India. The question which is required to be decided in this Special Civil Application is whether a person who has not been given appointment order in an educational institution can challenge the decision of the institution making a complaint of not giving him appointment order by invoking Section 38(1) of Gujarat Secondary Education Act 1972 (hereinafter referred to as the said Act).

2. The facts giving rise to this Special Civil Application are as under:

That the petitioner no.1 is the Managing Trustee of Shri Jagatguru Shankaracharya Maharaj Kelvani Trust which is registered under the provisions of Bombay Public Trust Act. The petitioner no.2 is the Principal of Shri Jagatguru Shankaracharya Maharaj Utter Buniadi Vidyalay which is being run and managed by the petitioner no.1-Trust. The respondent no.1 herein had filed an application before the Secondary Education Tribunal, Ahmedabad by invoking section 38(1) of the said Act. Aforesaid application is at Annexure-B to the this petition. In the application before the Tribunal, the respondent no.1 has stated that there is a school named Shri Jagatguru Shankaracharya Maharaj Utter Buniadi Vidyalaya, At-post Shankaracharya Nagar, Taluka Matar, District Kheda. That the said school had taken interview for filling in the post of peon and for that purpose the

respondent no.1 herein was called for personal interview on 13.11.85 and accordingly he had remained present in the interview with all the necessary documents. According to him , his name was kept in the select list at Sr.No.2 and even though the candidate at Sr.No.1 in the select list did not resume duties, yet he being second in the select list was not given appointment order by the Institution. The respondent no.1 therefore, had given a notice to the institution requesting them for giving him appointment order for the post of peon. The fact that he was at Sr.No.2 in the select list was not known to him but he was so told by the DEO. That thereafter, he made repeated requests to the management of the institution for giving him appointment order but the same was not given to him. That according to him, the DEO had informed the management that if the appointment order is not given to the petitioner deduction of 5% grant will be made and inspite of the same, no appointment order was given to him. The respondent no.1 further stated that though he was selected, he has not been given appointment order by the management and therefore, it was prayed by the respondent no.1 in his application before the Tribunal that the opponents nos 1 and 2 who are the present petitioners herein should be directed to give appointment order to the respondent no.1. The respondent no.1 has also prayed for interim relief before the Tribunal that the management may be restrained from giving appointment order to any one else except him. While admitting the said application, the Tribunal issued notice to the opponents and granted ex-parte interim injunction restraining the opponent school from appointing any one else other than the applicant on the post of peon. Copy of the interim injunction granted by the Tribunal is at Annexure.C to the petition.

3. Present petitioners who were opponents before the Tribunal gave their reply which is at Annexure.D to the petition. It was pointed out by them in their reply that in the interview which was taken by the school, the respondent no.1 herein stood at Sr.No.3, in the select list while respondent no.3 Raghavbhai Khimabhai Chosla stood second in the interview and accordingly he was placed at Sr.No.2 and therefore, when the candidate at Sr.No.1 did not join duties inspite of appointment order given to him, naturally the candidate at Sr.No.2 in the order of selection in the select list was given appointment order and that since the respondent no.1 original applicant before the Tribunal stood at Sr.No.3 in the select list, naturally the appointment order was given to the respondent no.3 who was at Sr.No.2 in the select list. They also stated that the application was made on absolutely incorrect facts. It was also pointed out in the reply that since no appointment order was given in favour of the respondent no.1-who was the original applicant before the Tribunal, no contract of employment was entered into and therefore, the application before the Tribunal was not maintainable at all.

4. Thereafter, a request was made on behalf of the respondent no.3 herein before the Tribunal that he was not joined as a party opponent in the application before the Tribunal and therefore, he was subsequently added as a party opponent no.4 before the Tribunal and he pointed out that the question of jurisdiction may be decided first.

5. However, the Tribunal at that time passed an order stating that the question of jurisdiction will be decided along with the main matter after recording the evidence, present petitioners, original opponents nos 1 and 2 before the Tribunal filed this SCA challenging the jurisdiction of the Tribunal to proceed further with the matter and it was also prayed by them that during the pendency of this SCA further proceedings before the Tribunal may be stayed.

6. This court while issuing Rule on 8.12.1987 passed the following order:

"Heard the learned advocates. The respondent no.1 who has made an application before the Secondary Education Tribunal is not appointed on the establishment of the school. Section 38(1) of the Act which is reproduced at page 7 of the petition, reads as follows:

"38(1) Where there is any dispute or difference between the Manager of a registered private secondary school and any person in service of such school as head-master, a teacher or a member of non teaching staff, which is connected with the conditions of service, of such person, the Manager or as the case may be, the person may make an application to the Tribunal for the decision of the dispute."

Looking to the above provisions of section 38(1) of the Act, it is crystal clear, on the face of it, that the respondent no.1 had no right to approach the Tribunal assuming that his grievance is justified. No other provision of law is pointed out by the advocate of respondent no.1 under which respondent no.1 could have approached the Tribunal. In view of this, a prima-facie case is made out by the petitioner that Tribunal had no jurisdiction to entertain the application filed by the Respondent no.1. In view of this, Tribunal also had no jurisdiction to grant any interim relief. It is also pertinent to note that Respondent no.3 was appointed in November 85 and was working in the school and application before the Tribunal was filed more than 1 year thereafter. In view of this, the question of appointing somebody else other than the respondent no.3 before the Tribunal on the post in question, did not arise because respondent no.3 was already appointed to that post. In view of this, it is difficult to understand how the interim relief granted by the Tribunal can be operative. But apart from this, prima-facie case is made out that the Tribunal has no jurisdiction to entertain the application in question.

In view of the discussion made above, this petition is required to be admitted and hence Rule is ordered to be issued.

Interim relief to the effect that Tribunal shall not proceed with the application No. 27/87 pending before it and interim relief granted by the Tribunal is hereby suspended till final hearing and disposal of this petition."

7. The matter has now been taken up for final hearing today. At the time of hearing of this petition, Mr. P.C. Master, learned advocate for the petitioner has pointed out that since no appointment order in any manner was given in favour of the respondent no.1, the Tribunal could not have proceeded with the matter

since it has no inherent jurisdiction to decide the aforesaid controversy. It has been also pointed out that no interim relief could have been granted by the Tribunal because before the Tribunal passed the order, the respondent no.3 herein was already working on the post of peon on the basis of his selection to the post in question. It is therefore, prayed that since the Tribunal has no jurisdiction to proceed with the controversy raised in the proceedings before it, the proceedings are required to be quashed and set aside by issuing suitable writ, direction or order under Article 226 of the Constitution of India.

8. Mr. A.D.Oza learned advocate for the respondent no.3 who was already appointed on the post in question has supported the submission of Mr. Master. Mr. Master has also placed on record the extract of select list showing the names of the persons who were selected by the Selection Committee along with the marks given to each of the candidates by the Selection Committee. Aforesaid extract of the select list is taken on record.

9. As per the said list, one Dave Ishwerbhai Vanmalidas was selected at Sr.No.1 and he got 49 marks and therefore, his name has been shown as first in the column of "order of selection" in the select list. At Sr.No. 2 the name of respondent no.1 appears and he is shown to have obtained only 28 marks and at Sr. 3 the name of Chosla Rgahubhai Khimabhai is shown and he has obtained 40 marks and he is shown as second in the column of "order of selection" It is argued that there was only one vacancy which was required to be filled in and since the person at Sr.No.1 who has obtained 49 marks did not join, the respondent no.3 who has obtained 40 marks was given appointment order. Since there was only one post, respondent no.1 herein was not given any appointment order. As per the aforesaid noting of the selection committee, the respondent no.1 herein was not selected. In the said selection committee, representative of the District Education Officer was also present and he also appears to have signed the proceedings of the selection committee.

10. On the basis of the aforesaid interview and selection, ultimately appointment order was given to the respondent no.3 herein on 8.11.1985 which is at Annexure.A. It may be noted that the respondent no.3 was working on the said post since November 1985, respondent no.1 herein filed the application before the Tribunal. The application was moved before the Tribunal on 20.1.1987 for interim relief and interim relief as prayed for was granted by the Tribunal. So, after the appointment order was issued in favour of respondent no.3, the application before the Tribunal was moved after a period of 14 months.

11. It is not in dispute that the interview had taken place in November 1985. It was submitted that on the face of it, u/s 38(1) of the said Act, the Tribunal had no jurisdiction to entertain the application in question since the respondent no.1 was not given any appointment order by the management.

12. I have heard the learned advocates for the parties. Advocate for respondent no.1 is not present at the time of hearing of the matter. Since 1987, the further

proceedings of the Tribunal is stayed by this court. The question which arises for determination of this Court is whether the Secondary Education Tribunal can proceed with the matter and adjudicate the dispute purported to be u/s 38(1) of the said Act even though the applicant concerned may not have been given any appointment order nor given any promise for appointment in the post in question. Section 38(1) of the Act is reproduced in para 6 of this judgment. It makes it clear that whenever there is any dispute or difference between the manager of a registered private secondary school and any person in service of such school can make an application to the Tribunal for the decision of the disputes which may be in connection with the conditions of service. It presupposes that the dispute should be between the person in service of such school against the Institution. Respondent no.1 herein undisputedly was not in service at the relevant time. Not only that he was not even selected for the post in question and simply he was called for interview. He was not given any appointment order or even any offer for appointment. Section 38(1) therefore, naturally would not be applicable in the facts of the case stated above. The respondent no.1 has clearly prayed in his prayer clause of the application that the management should be directed to give him appointment order. That shows that no appointment order was given to him in any manner. So there was no dispute which could have been adjudicated by the Tribunal u/s 38(1) of the Act. Looking to the prayer in the application, the Tribunal could not have proceeded further with the application as on the face of it it was lacking inherent jurisdiction to decide such a dispute. There was no contract of employment between the management and respondent no.1. The Tribunal therefore, seems to have failed to appreciate that looking to the prayer in the application, it could not have proceeded further with the matter. In the interview process, while assessing the merits of the candidates, the Selection Committee had assigned certain marks to the candidates. It was produced before the Tribunal. A list containing the names of selected candidates has also been produced on record and it is clear that the respondent no. 1 was not selected because he had obtained less marks than the candidates already selected. Even assuming that respondent no.1 was selected but his name was kept on the waiting list, yet as long as no appointment order was given to him, he could not have invoked the jurisdiction u/s 38(1) of the said Act. The Tribunal therefore, had no jurisdiction to decide the dispute of this nature as it lacks inherent jurisdiction. In the absence of appointment order in favour of the respondent no.1 or any promise given by the management to appoint him on the post in question, there was no question for the Tribunal to proceed to adjudicate the said dispute. The relationship of master and servant starts only by way of appointment order and thereafter only the concerned person may fight for his right and can invoke jurisdiction of the Tribunal. But here, when there is no dispute between the manager of a registered private secondary school and any person in service, there was no question of giving any relief to the respondent no.1, who was the original applicant before the Tribunal. If the respondent no.1 had any grievance for not giving him any appointment order, the respondent no.1 should have approached other forum to ventilate his

grievances but surely could not have invoked the jurisdiction of the provisions of section 38(1) of the Act. The Tribunal therefore, has assumed jurisdiction which it has not.

13. At this stage Mr. Oza has placed on record the decision given by the said Tribunal while the said Tribunal was sitting as Gujarat Affiliated Colleges Services Tribunal, in Application Nos 59 of 1987 and 77 of 1987. Said Tribunal has observed that where there was no privity of contract between the college and the applicant of that case, there was no employer employee relationship between the applicant and college. The department had not passed any order directing the opponent no.2 Mahila College to absorb the applicant on the post and the application of the applicant was rejected by the Tribunal on the ground of jurisdiction.

14. It has been pointed out by Mr. Oza that the provision in 38(1) of the Act is para materia with the provisions contained in section 8 of the Gujarat Affiliated Colleges Services Act. In that view of the matter also present application of the respondent no.1 should have been rejected by the Tribunal straightaway on the ground of lack of jurisdiction.

15. In view of the aforesaid facts and circumstances, the proceedings before the Tribunal is required to be quashed. Since the matter is pending before this Court since 1987, no useful purpose will be served by remanding the matter back to the Tribunal for deciding the question of jurisdiction. In view of the pleadings and other evidence on record, it is clear beyond doubt that proceedings u/s 38(1) is not maintainable before the Tribunal. However, reference is required to be made to the decision of this court reported in 21 GLR 573 in the case of Vinodkumar Hematram Dave vs. Secondary Education Tribunal & ors. In that case the petitioner was appointed as Head Master of the school by the Institution and order of appointment was issued on 21.2.1979 and as per the order of appointment, the order was to take effect from a future date i.e. April 1979. The petitioner of that petition forwarded his letter of acceptance within the specified time. The contract of service thus came into existence even though the appointment was to be made effective after a lapse of 1-1/2 months. During the intervening period a communication dated March 21, 1979 was addressed to the petitioner intimating that his appointment order has been cancelled for certain reasons. The petitioner had therefore, challenged the said decision u/s 38(1) of the said Act. The Tribunal came to the conclusion that it has no jurisdiction since the petitioner was not in service of said Institution. In the background of the aforesaid facts, this court has held that the contract of service at the level of promise to an employee to be employed can come into existence as soon as the offer is made by the employer and accepted by the teacher. A breach may take place at the second level, the level of performance which contemplates exchange of remuneration for services which happened in that case. Therefore, the jurisdiction is conferred on the Tribunal constituted under the Act to resolve disputes or differences between the management and the person in service of

such school which is connected with the conditions of service of such person. It has been observed that the expression "in service of such school" can but yield to one reasonable construction. It can only be interpreted in such a manner as to apply to any such person who is under a contract of service with such school and if this interpretation is accepted, it cannot be said that the Tribunal had no jurisdiction to entertain the application made by the petitioner. The expression "a person in service" has always been interpreted in such a manner as to apply to a person who was under a contract of service. If the expression were to be interpreted literally and in a narrow manner, a person in service would mean only one who is in "actual" service at the point of time of making an application.

16. In such an event a dismissed teacher can never invoke section 38(1) with the result that the scheme evolved by the Act for the benign purpose of protecting teachers from exploitation would pathetically crumble to the ground. Ultimately, this court, considering the facts and circumstances came to the conclusion that if the appointment order came into effect from a future date, the Tribunal will have the jurisdiction to decide the dispute. However, the facts of the present case is entirely different. In that case the appointment order was already given but it was to come into effect from a future date. In the present case, no appointment order whatsoever has been given to the respondent no.1. Respondent no.1 was never even under a contract of service. Not only that even his prayer in the application is to get appointment order from the management. Therefore, respondent no.1 can never be said to be in service or even having any contract of service with the management. The facts of the present case makes it absolutely clear that the Tribunal had no jurisdiction to decide the dispute in question. Therefore, by no stretch of imagination it can ever be said that even a candidate who appeared for interview and has not been selected or even has been kept in waiting list, can also invoke jurisdiction of the Tribunal u/s 38(1) of the Act. In that view of the matter, present petition is required to be allowed and further proceedings before the Tribunal in connection with the Application No. 27/87 is required to be quashed on the ground that the Tribunal has no jurisdiction to decide such a dispute raised in the said application. It will be open for the respondent no.1 to avail whatever remedy available to him under the law before the other appropriate forum. In the circumstances, proceedings before the Tribunal is quashed. Rule is accordingly made absolute with no order as to costs. Writ be sent to the Tribunal.