

(2019) 01 GUJ CK 0129
In the Gujarat High Court

Case No : R/Special Civil Application No. 3747 Of 2016

Natvarlal Amarshibhai Devani

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 21-01-2019

Acts Referred:

Punjab Municipal Act, 1911 — Section 238

Constitution Of India, 1950 — Article 14, 16, 136, 226, 311(2)

Citation : (2019) 01 GUJ CK 0129

Hon'ble Judges : A.J. Shastri, J

Bench : Single Bench

Advocate : Rv Deshmukh, Premal R Joshi

Final Decision : Allowed

Judgement

1. RULE. Learned AGP Mr. Rohan Yagnik waives service of rule on behalf of respondent no. 1 and learned advocate Mr. Premal Joshi waives service of rule on behalf of respondent no. 2. With the consent of the learned advocate for the respective parties, the matter is heard finally.

2. The present petition under Articles 14, 16, 311(2) and 226 of the Constitution of India has been filed for the purpose of seeking the following reliefs :

"9(A) That this Hon'ble Court may be pleased to admit and allow this petition.

(B) This Hon'ble Court may be pleased to issue a writ of mandamus, certiorari or any other appropriate writ order direction quashing and setting aside the orders/ communications dated 21.11.2015 (Ann. "A"), dated 01.02.2016 (Ann. "B") and dated 04.02.2016 (Ann. "C") directing the respondents to treat the petitioner in the cadre of Superintendent Prohibition and Excise, Class-II.

(C) This Hon'ble Court may be pleased to hold that in the facts of the case the promotion of the petitioner is deemed to have been approved on expiry of six months from the date of promotion.

(D) Pending hearing admission and final disposal of this petition, the Hon'ble Court may be pleased to stay further operation, implementation and execution of the impugned orders annexed at Annexure "A" dated 21.11.2015, Ann. "B" dated 01.02.2016, and Ann."C" dated 04.02.2016.

(E) This Hon'ble Court may be pleased to grant such other and further relief(s) as deemed just and proper in the interest of justice."

3. The petitioner has come out with a case that he has joined the services as Junior Clerk on 06.12.1985 and was then selected and appointed as a Sub Inspector (P&E) by direct recruitment with effect from 02.11.2001 and subsequently, was also promoted to the post of Inspector (P&E) Class-III with effect from 21.01.2009. There were two vacant posts in the promotional cadre of Superintendent of Prohibition and Excise Class-II, having fallen vacant, the department wanted to fill up the post and since in the feeder cadre two employees namely the present petitioner and one Mr. S.R. Vasava were possessing of requisite qualifications as per the recruitment rules, their cases were considered by the Departmental Promotion Committee (DPC). At the relevant time, when the DPC considered the case of both, the petitioner as well as Mr. Vasava since there was nothing adverse to them and they were fulfilling the criteria of merit as well as efficiency, they came to be selected by the DPC in the proceedings dated 22.01.2014. On the basis of said selection/recommendation made by DPC, the Home Department - respondent no.1 herein, issued the order of promotion on 30.01.2014 with respect to the present petitioner to the post of Superintendent of Prohibition and Excise Class-II, in anticipation of the approval from the GPSC. It is the case of the petitioner that the said promotion was adhoc as the approval from the GPSC was awaiting. Nonetheless, was posted and granted promotion against the clear vacancy at Kutch - Bhuj. The petitioner took the charge on the said promotional post on 30.01.2014 and vide order dated 13.02.2014, an order was also issued by the Accounts Officer showing up the fixation of the petitioner on the promotional post.

3.1. It is the case of the petitioner that as per the Government Resolution, the guidelines which have been issued vide Government Resolution dated 02.03.2009 by the General Administration Department of the State of Gujarat requiring the authority to sent a recommendation to the GPSC for its approval on promotion within a period of one month and maximum six months from the date of recommendation of the DPC or promotion. Despite the aforesaid clear guidelines, respondent no. 1 - Home Department, sent a proposal on 12.12.2014 much after a period as mentioned in the Government Resolution and there was a time gap of 11 months and 13 days in sending the proposal and, therefore, it was late by 5 months and 13 days after maximum period. It is the case of the petitioner that this approval of GPSC as a routine manner, since the departmental promotional committee is scanning the employee for the promotional post. Had this proposal been forwarded in time, the eventuality which has taken place later on may not have come in the way of the petitioner. It is submitted that the

proposal which was originally forwarded on 12.12.2014 was not promptly dealt with, as a result of this, respondent no. 1 had also submitted reminder to GPSC on 20.01.2015 and then vide specific communication and the order dated 05.02.2015, approval to the promotion of the petitioner was specifically accorded by the GPSC. This approval was only upon one condition that if in future scheduled caste candidate is available then the petitioner will have to move to his original post and with no other condition, the specific approval had been granted. It is further the case of the petitioner that even this eventuality does not remain in existence as one schedule caste candidate Mr. S.P. Vasava had also been promoted to the post of Superintendent, Prohibition and Excise, Class-II and, therefore, there is no circumstance coming in the way of the approval which has been granted specifically by GPSC.

3.2. It has been asserted in the petition that later on, the petitioner was arraigned in one ACB case, resulted in FIR No. 1 of 2016, which was recorded by ACB Police Station, Bhuj on 21.01.2015 and after the promotion of the petitioner and after DPC cleared and recommended the petitioner's case, and much after the proposal which was forwarded on 12.12.2014, on account of this compliant, the petitioner was detained in the custody for more than period of 48 hours. As a result of this, an order was issued of deemed suspension on 28.01.2015 with effect from 20.01.2015 and later on two specific orders came to be passed on 13.02.2015 and 18.05.2015 placing the petitioner under suspension as Superintendent, Prohibition and Excise, Class-II. Further, it is the case of the petitioner that instead of leaving the matter there, though there is no provision, the Deputy Secretary of the Home Department addressed a letter on 04.06.2015 to the Secretary, GPSC, seeking his advise as to whether the petitioner's promotion can be regularized on the basis of the approval dated 05.02.2015 received from the GPSC, in view of the ACB case and the suspension of the petitioner. On 15.07.2015 the GPSC has asked the Home Department as to whether there was any provision and subsequently, the GPSC again addressed a letter on 21.11.2015 to ACS, Home Department and withdrawn its approval to the promotion which was already granted. The grievance of the petitioner is that there are guidelines issued by the Government to the effect that on the date of the DPC meeting, if any disciplinary proceedings or prosecution is pending against the Government Servant, then there cannot be promotion, but his case is at the best required to be kept in sealed cover which will be opened on his exoneration or acquittal in the case. The said Government Resolution indicating such proposition are Government Resolutions dated 24.08.2007 and 17.08.2015 respectively and despite the aforesaid guidelines being clearly available with the department, and there is no rule which empower to withdraw the approval once having been granted, and the promotion which has been approved came to be withdrawn, pursuant to its approval, this amounts of penal action sticking stigma upon the petitioner having far reaching consequences. As a result of this, since the impugned action has been undertaken in complete violation of the principles of natural justice, without holding any departmental inquiry, the petitioner has

invoked extra ordinary jurisdiction of this Court.

4. Learned advocate Mr. R. V. Deshmukh appearing on behalf of the petitioner has vehemently contended that the action on the part of the respondent authority is absolutely in flagrant violation of the principles of natural justice and in the circumstances indicated above, reversion could not have been affected without granting any opportunity to the petitioner. It has further been submitted that the approval which has been granted in specific terms vide order dated 05.02.2005, was in response to the proposition which has been forwarded at that point of time, but there was no blot of any nature on the career of the petitioner and therefore, what was considered at the time of approval was a clean record which was scanned by the DPC and pursuant to it approval was granted. The GPSC being functus officio after passing an order on 05.02.2005, the action based upon it is impermissible and withdrawal of recommendation/approval amounts to without authority of law. Resultantly, on this count alone, the action is required to be set aside.

4.1. Learned advocate Mr. Deshmukh has further submitted that there is no provision under the rules or guidelines to recall the approval which has already been granted, even Article 311(2) of the Constitution of India also would not permit such action to be taken without complying established procedure of law and, therefore, the action on the part of the respondent authority is nothing but authoritative in the eye of law. It has been submitted by learned advocate Mr. Deshmukh that the promotion which has been effected of the petitioner was against the clear vacant position and the terms of promotion and the approval thereof was quite distinct from what has been utilized for recalling the promotion and, therefore, also there is a clear non application of mind on the part of the authority in initiating action against the petitioner. The word 'ad hoc' is misconstrued by the respondent authority. The ad hoc is in the context of the language in true sense ad hoc, but was granted since in anticipation of the approval, the word ad hoc was used, otherwise the petitioner was fully eligible, falling within the criteria and scanned by DPC to which the approval was granted. As a result of this, the order of promotion was rather misconstrued by the authority. Hence, the action is unjust and arbitrary since tilted with mala fides, there is hardly any justification to substantiate it by the authority. Learned advocate Mr. Deshmukh has further submitted that even the probationer cannot be discontinued if any action entails in other consequence or penal in nature or stigmatized and here is a case in which the petitioner was promoted to a substantive post which was vacant and after examining the eligibility criteria of the petitioner this substantive promotion could not have been withdrawn in the manner in which it has been done. Admittedly, the action is initiated on the basis of the ACB trap and therefore, this is by way of penal consequences without holding any inquiry and without granting any opportunity. Hence, the action initiated is thoroughly unjustified in the eye of law. Learned advocate Mr. Deshmukh has further submitted that later approval is a mere formality at the time when the proposal was forwarded for approval and there was no

circumstance of any nature which would permit the authority to recall the recommendation. What is to be seen is the circumstances which were prevailing at the time when the post was to be filled in and the recommendations were to be considered. Undisputedly, when the recommendation was made there was no adverse circumstance of any nature available with the authority. Hence, on account of principle of *functus officio* also, the action recalling the recommendation is contrary to the well established principles. This being the position, the reliefs prayed for in the petition deserve to be granted. To substantiate the submission, learned advocate Mr. Deshmukh has drawn the attention to the impugned order which has been passed and a bare reading of it reflects that no opportunity of hearing was given to the petitioner at any point of time and, therefore, considering the situation which is prevailing, learned advocate Mr. Deshmukh has insisted for granting of relief as prayed for. Learned advocate Mr. Deshmukh has relied upon the decision of the Apex Court in the case of *State of Maharashtra v. Veerappa R. Saboji* reported in 1979 Law Suit (SC) 372 attached to the petition compilation at page 119 and by referring to para 10 a contention is raised that the action is not sustainable in the eye of law.

5. To meet with the stand taken by the learned advocate for the petitioner, learned advocate Mr. Premal Josh appearing for the respondent authority has contended that the petitioner's promotion was merely adhoc promotion and there was no substantive right available with the petitioner by virtue of which the petitioner can stick to the post and, therefore, in absence of any legal right, the petitioner cannot maintain the petition. Learned advocate Mr. Joshi has further submitted that it is not that without the application of mind any decision is taken by the authority, on the contrary, the relevant material produced before the authority was considered, examined and thereafter, it was thought it fit to recall the approval and according to him, power to grant, power to recall or withdraw is inbuilt in the mechanism of exercise of power. As a result of this, there is no substance in the petition and if that being so, the same deserves to be dismissed. Learned advocate Mr. Joshi has further submitted that the principles of natural justice cannot be stretched to that extent where even if the petitioner is involved in ACB trap, remained in custody for more than 48 hours, by ignoring that, the approval can be continued, and that was the opinion of the authority, such opinion may not be substituted in exercise of extra ordinary jurisdiction. It has been submitted that even the consent/approval which was given on 05.02.2015 was also admittedly, one as is reflecting from page 109 and had the respondent - State authority could have brought this information about ACB trap well within time, possibly this order of 05.02.2015 could not have been passed and it is on account of delayed action on the part of the respondent authority, a situation is created which is tried to be en-cashed by the petitioner. Therefore, no relief be granted in the interest of justice. It has been further submitted that this is not a reviewing power and it is merely a rectification of the error which has been committed. The respondent - State has informed the GPSC on 04.06.2015 and with immediate effect, reconsideration exercise is undertaken and the same

was recalled and, therefore, this does not tantamount to review power being exercised, but a mistake is corrected. According to learned advocate Mr. Joshi the decision which has been tried to be pressed into service is not applicable as the facts are quite distinct and since the petitioner was not having substantive right of holding the promotion and the same was merely adhoc, question of compliance of the principles of natural justice would not arise. Accordingly, the action is not assailable by the petitioner.

6. To support the stand taken by the learned advocate appearing for the GPSC - respondent authority, learned AGP Mr. Rohan Yagnik appearing on behalf of the respondent - State has vehemently opposed the petition. It has been submitted that there were vacancies in the post, as a result of this, the petitioner was merely considered by the DPC and the petitioner was from the beginning knowing that his tenure is merely adhoc and, therefore, now the petitioner cannot be allowed to turn around and to claim as if it was a substantive right. Learned AGP Mr. Yagnik has submitted that there was a serious complaint filed against the petitioner and ACB trap was undertaken and the petitioner had remained for more than 48 hours in judicial custody and, therefore, there was a deemed suspension for which the petitioner has been placed under it. This fact of criminal complaint and the prosecution has been considered at length by the authority while exercising power and, therefore, it is not a case of acting without authority of law, nor the action suffers from vice of non application of mind. The power to correct is always inbuilt in the authority and the principle of functus officio has no role to play in the present proceedings.

7. As a counter to this stand taken by the authorities, in rejoinder, learned advocate Mr. Deshmukh has submitted that there is no power with the authority to recall or withdraw and this is rather administrative power and cannot be recalled or reviewed unless specifically provided conferred and there is nothing on record to suggest that such power of recalling is available with the authority. Learned advocate Mr. Deshmukh has reiterated that at the relevant point of time, when the proposal of December, 2014 was for consideration of the approval, the prevailing circumstance, justifiably considered by the authority while granting specific approval on 05.02.2015 and any subsequent change or event will not authorized the authority to recall once passed on the benefit. Resultantly, the prevailing circumstances since were clear without any adverse material, the approval which has been granted could not have been withdrawn. Hence, the reliefs prayed for be granted in the interest of justice.

8. Having heard the learned advocates for the respective parties and having gone through the material on record, it has been found by the Court that a specific approval which has been granted on 05.02.2015 was in consideration of the proposal which was made by DPC on 12.12.2014. So as on date of the proposal and as on the date of the DPC recommendation for promotion, there was no adverse circumstance available against the petitioner and, therefore, was considered was justifiably considered by the GPSC while granting approval on

05.02.2015. It is also emerging from the record that this ACB trap which has occurred on 20.01.2015 was not informed by the respondent - State till 04.06.2015 and, therefore, after a lapse of more than four months, this fact of criminal prosecution when was informed already the approval was accorded to the earlier proposal. Hence, the subsequent change which has been brought to the notice of the authority cannot be relied upon and referred to behind the back of the petitioner.

9. Yet another circumstance which is quite visible from the record is that the adhoc promotion which has been granted to the petitioner was against the substantive vacant post and again the same was granted after a satisfying eligibility criteria of the petitioner by an independent Departmental Promotion Committee and upon its specific recommendations, the approval was granted and, therefore, since the said promotion which has been granted against a substantive post was in respect of the word adhoc appears to have been utilized and, therefore, in the manner in which the authority wants to interpret the word adhoc is not possible to be accepted by the Court. The petitioner at the relevant point of time was eligible, examined by the DPC independently and at the time of proposal in December, 2014 there was nothing adverse to the petitioner. Hence, any subsequent information which has been brought behind the back of the petitioner cannot be relied upon without granting any opportunity to the petitioner. The well recognized principles of natural justice as held by a series of decisions is applicable in a whole range of decisions whether it is administrative quasi judicial or judicial and therefore, since undisputedly, no opportunity was given to the petitioner still unilaterally withdrawing the approval again is not sustainable in the eye of law in the considered opinion of this Court.

9.1. Further, another departmental communications which are reflecting on the record of the case are also suggestive that there is no provision or specific guidelines on this issue and since after unreasonable delay of approximately four months and more, the fact of ACB trap is brought to the notice, the same ipso facto would not permit the authority to forward unilaterally to withdraw the proposal which has already attained finality the moment it has been passed. The Court has considered the issue of functuous officio and it is well recognized principle that administrative authorities are not entitled to recall on its own any orders which have been passed. This principle of functuous officio is equally applicable to the respondent authority and on this count also unilateral withdrawing of proposal is not sustainable. The record of the case on the contrary is indicating that on 20.06.2015, even an instruction was generated on record to regularize this adhoc promotion which has been granted which is reflecting on page 63-C. When that be so, reversion could not have been affected at least without granting any opportunity to the petitioner even a bare minimum opportunity to explain prior to such action ought to have been granted in the considered opinion of this Court. All the subsequent events after approval are generating different cause even for the authority and that can be ventilated in an appropriate mode in accordance with law. Even the record indicates that with

regard to that episode of ACB trap the charge sheet has been issued only on 22.08.2016. That being the position, this circumstance in the opinion of this Court would not permit the authority to recall the approval unilaterally. Further looking at the record, to page 109 an order of approval dated 05.02.2015, is also clearly suggesting that on the recommendation of the DPC meeting on 22.01.2014, GPSC has accorded approval and the only condition which is visible is that such approval would be removed and withdrawn moment the schedule caste candidate would be available. Except this, there is no other condition reflecting in the said approval order dated 05.02.2015 and as such this circumstance of subsequent event could not have been utilized to revert the petitioner. The fact of this withdrawal is based upon the ACB trap which was not at the relevant point of time available and, therefore, the Court is of the opinion that such action, partakes the character of penal action and the same should have been with due compliance of the well recognized principles of natural justice.

10. The Apex Court in a decision, which has been cited, in the case of State of Maharashtra v. Veerappa R. Saboji reported in 1979 Law Suit (SC) 372 has observed the relevant proposition in para 10 which is reproduced hereinafter :-

"10. The question of violation of Article 311(2) has to be examined in two perspectives. Firstly, if it could be held in agreement with the High Court that he should be deemed to have been confirmed in the post to which he was initially appointed, it is plain that terminating his service by a notice of termination simplicitor like the one given in this case, will be violative of the requirement of Article 311(2). On my finding it is manifest that it is not so. He was continuing in the post in an officiating capacity. His services could be terminated by one month's notice simplicitor according to the terms of the employment. Secondly the question to be examined is whether the termination was by way of punishment. Even in the case of a temporary or officiating Government servant his services cannot be terminated by way of punishment casting a stigma on him in violation of the requirement of Article 311(2). This principle is beyond any dispute but the difficulty come in the application of the said principle from case to case. If a Government servant is compulsorily retired or one who is officiating in a higher post is reverted to his parent cadre, or when the services of an officiating or temporary Government servant are dispensed with by an order of termination simplicitor, then problems arise in finding out whether it is by way of punishment. In different kinds of situation, different views have been expressed. Yet the underlying principle remains the same. One should not forget a practical and reasonable approach to the problem in such cases. Ordinarily and generally, and there may be a few exceptions, any of the three courses indicted above is taken a recourse to only if there are some valid reasons for taking the action against the Government servant. If a probe in the matter is allowed to be made in all such cases, then curious results are likely to follow. In a given case, there may be valid reasons, may be of a serious kind, which led the authorities concerned to adopt one course or the other as the facts of a particular case demanded. If one were to say in all such cases that the action has been taken by

way of punishment then the natural corollary to this would be that such action could be taken if there was no such reason in the background of the action. Then the argument advanced is that the action was wholly arbitrary, mala fide and capricious and, therefore, it was violative of Art. 16 of the Constitution. Where to draw the line in such cases? Ordinarily and generally the rule laid down in most of the cases by this Court is that you have to look to the order on the face of it and find whether it casts any stigma on the Government servant. In such a case there is a presumption that the order is arbitrary or mala fides unless a very strong case is made out and proved by the Government servant who challenges such an order. The Government is on the horns of the dilemma in such a situation. If the reasons are disclosed, then it is said that the order of the Government was passed by way of punishment. If it does not disclose the reasons, then the argument is that it is arbitrary and violative of Art. 16. What the Government is to do in such a situation? In my opinion, therefore, the correct and normal principle which can be culled out from the earlier decisions of this Court is the one which I have indicated above."

10.1. The Court is also keeping in mind one another relevant proposition which has been laid down by the Apex Court in the case of Mohd. Rahid Ahmad etc., v. The State of U.P., and Anr., reported in AIR 1979 SC 592, the relevant observation contained therein, is reproduced hereinafter :-

"40. In A.K. Kraipak v. Union of India, (1970) 1 SCR457: (AIR 1970 SC 150) there was a reiteration of the principles, albeit in a different form, laid down by this Court in Dr. (Miss) Binapani Dei v. State of Orissa, (1967) 2 SCR 625; (AIR 1967 SC 1269) and by the House of Lords in Padfield v. Minister of Agriculture, Fisheries and Food, 1968 AC 997 that the executive should not arbitrarily or capriciously act and that the myth of executive discretion is no longer there. Indeed, in Karipak's case (supra) it was observed (at p.154 of AIR 1970):

"The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated..... Under our Constitution the rule of law pervades over the anti-field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of the rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functioning in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power."

10.2. On the similar line, it has also been propounded by the Apex Court in the case of S.L. Kapoor v. Jagmohan & Ors., reported in AIR 1981 SC 136 that the

violation of the principles of natural justice itself is prejudiced and, therefore, the action is not sustainable. The observations contained in para 16 are reproduced hereinafter :-

"16. Thus on a consideration of the entire material placed before us we do not have any doubt that the New Delhi Municipal Committee was never put on notice of any action proposed to be taken under Section 238 of the Punjab Municipal Act and no opportunity was given to the Municipal Committee to explain any fact or circumstance on the basis (of which) that action was proposed. If there was any correspondence between the New Delhi Municipal Committee and any other authority about the subject matter or any of the allegations, if information was given and gathered it was for entirely different purposed. In our view, the requirements of natural justice are met only if opportunity to represent is given in view of the proposed action. The demands of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based, if it is furnished in a casual way or for some other purpose. We do not suggest that the opportunity need be a 'double opportunity' that is, one opportunity on the factual allegations and another on the proposed penalty. Both may be rolled into one. But the person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. If that is made know the requirements are met. We disagree with the finding of the High Court that the Committee had the opportunity to meet the allegations contained in the order of supersession."

11. From the above discussion, and in view of the peculiarity of this case, the Court deems it proper to allow the petition and quash and set aside the impugned orders/communication dated 21.11.2016 as well as order dated 01.02.2016 and 04.02.2016 at Annexure-A, B and C respectively. This judgment and order shall not be construed to have any interference with respect to the independent proceedings which are going on against the petitioner. As a result of this, the petition stands allowed. Rule is made absolute to the aforesaid extent.