

(2014) 09 GUJ CK 0053

In the Gujarat High Court

Case No : Misc. Civil Application No. 1576 of 2013 in Special Civil Application No. 16647 of 2005

Patel Hetalkumar Dahyabhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 05-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 141
Constitution of India, 1950 — Article 142, 226

Citation : (2014) 09 GUJ CK 0053

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : M.A. Parekh, Advocate for the Appellant; Vandan Baxi, Asstt. Government Pleader and Sunil S. Joshi, Advocate for the Respondent

Judgement

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J.B. Pardiwala, J.—This application is at the instance of the original petitioners of Special Civil Application No. 16647/2005 for review of our order dated 3/7/2013, by which we rejected the Special Civil Application no. 16647/2005 and other allied writ-petitions.

2. Controversy in the main writ-petition:

The main writ-application and the other allied petitions were heard together and were disposed of by a common judgment and order dated 3rd July, 2013.

2.1. The applicants herein had challenged the recruitment to the post of "Vidya Sahayaks" which were filled-in pursuant to the advertisement published by the opponents dated 20/7/2004, mainly on the ground that at the time of making the said recruitment, the State authorities failed to provide for full 15% reservation for the members of the Scheduled Tribes. The recruitment was at the instance of the Dahod District Panchayat and Bhavnagar District Panchayat.

2.2. The applicants had applied for being appointed as "Vidya Sahayaks" pursuant to an advertisement dated 20th July, 2004 published in a daily newspaper for filling-up 1828 posts of Vidya Sahayaks, out of which 1730 posts were to be filled-up from and amongst PTC/Trained Graduates and 86 posts were to be filled-up from and amongst the C.P. Ed. candidates.

2.3. However, when the merit list was prepared, they were not called for interview as the State Authorities had decided to curtail the percentage of reservation so far as the members of the Scheduled Tribes were concerned.

3. The State authorities, for the purpose of the said recruitment had decided to act in terms of the G.R. dated 21st January, 1986 based on the recommendations of the Sadhwani Commission which provided for district-wise reservation. The grievance of the applicants was that the Government Resolution dated 21st January, 1986 which was applied for the purpose of the recruitment brought down the reservation for the Schedule Tribe candidates to 10.5% instead of 15% for the reason that 27% reservation was uniformly applied for the SEBC in the appointments of "Vidya Sahayaks" in each district. As a result the applicants pointed-out that the percentage of reservation exceeded more than 65% to 70% in some of the districts, thereby violating the law laid down by the Supreme Court in the case of Indra Sawhney Vs. Union of India (UOI) and Others, . It was brought to our notice that with a view to meet with such a contingency, the Government had decided to proportionately reduce the reservation prescribed according to the government Resolution dated 21st January, 1986 so far as the Scheduled Tribes, Scheduled Castes and other backward classes were concerned.

4. The stance of the State Government before us was that there was no deviation from the reservation policy and the guidelines laid down by the Supreme Court with respect to the reservation had been strictly followed. It was submitted before us that in what manner reservation should be provided was a matter of policy and ordinarily the same was not open to challenge.

5. After taking into consideration all the relevant aspects of the matter the only question which fell for our consideration was whether the State Government should have been directed to rearrange the Select List of "Vidya Sahayaks" of the year 2004 for the purpose of giving appointments to the members of the Scheduled Tribes, to the extent of 4.5% who were left-out on account of the reduction of the percentage of reservation from 15% to 10.5%.

6. While rejecting all the writ applications we took the view that there was no malafide on the part of the State Government in not strictly adhering to the extent of percentage of reservation of the posts so far as the members of the Scheduled Tribes were concerned. We took the view that the administrative exigencies which had cropped-up were of such a nature that if the Government would have decided to give reservation of 15% then in such circumstances the aggregate reservation would have surely exceeded 50% and that would have

been against the mandate of the Supreme Court as laid down in the case of Indra Sahani (supra.).

7. It appears that the petitioners of Special Civil Application No. 16780/2005 which was one of the allied writ applications thought fit to file a Special Leave Petition (Civil) No. 32849/2013 in the Supreme Court challenging our judgment and order dated 3rd July, 2013.

8. The Supreme Court vide order dated 29th October, 2013 disposed of the SLP by passing the following order.

"This petition is directed against order dated 3.7.2013 passed by the Gujarat High Court in Special Civil Application No. 16780 of 2006 whereby the petitioners" prayer for issue of a mandamus to reserve 15% posts for Scheduled Tribes was rejected.

After arguing the case for some time, learned counsel for the petitioners made a request that his clients may be permitted to withdraw the special leave petition with liberty to seek indulgence of the High Court for issue of a direction to grant age relaxation to them in future recruitment.

The request of the learned counsel is accepted and the special leave petition is dismissed as withdrawn with liberty in terms of the prayer made."

9. Mr. M.A. Parekh, the learned advocate appearing for the applicants herein submitted that this application for review is substantially on the ground that the applicants had not challenged the principle of district-wise break-up of reservation nor they had challenged the quantum of 40% reservation allotted to the Dahod District. On the contrary, the main prayer in the Special Civil Application was for issue of a writ of mandamus to fill-up the post of Vidya Sahayak from amongst the Scheduled Tribe candidates to the extent of 40% and direction upon the State Authorities to fill-up the remaining posts of Vidya Sahayaks from the candidates who had applied for the posts pursuant to the advertisement dated 21st July, 2004.

10. Mr. Parekh submitted that the petition of his client i.e. the applicants herein should not have been heard and decided along with the other writ-applications. The subject matter and the reliefs prayed for in the other writ applications were in direct conflict with the subject matter and the reliefs prayed for by the applicants herein. The petitioners of other writ applications were dissatisfied with the quota allocation of reservation so far as the District of Bhavnagar was concerned, whereas the present applicants had prayed for enforcing the 40% of quota fixed for the candidates of Scheduled Tribes so far as the District of Dahod was concerned.

11. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration in this application is, whether there is any error apparent on the face of the order under review.

12. In a very pronouncement of the Supreme Court in the case of Kamlesh Verma Vs. Mayawati and Others, , the Supreme Court, in paras 15 and 16 of the judgment, has reiterated the well-settled principles as regards the scope and power of the Court to review, which read thus:

"15. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

Summary of the Principles:

16. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

(A) When the review will be maintainable:-

- (i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;
- (ii) Mistake or error apparent on the face of the record;
- (iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in AIR 1922 112 (Privy Council) and approved by this Court in Moran Mar Basselios Catholicos and Another Vs. The Most Rev. Mar Poulose Athanasius and Others, , to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India (UOI) Vs. Sandur Manganese and Iron Ores Ltd. and Others, .

(B) When the review will not be maintainable:-

- (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.
- (ii) Minor mistakes of inconsequential import.
- (iii) Review proceedings cannot be equated with the original hearing of the case.
- (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.
- (v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.
- (vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negated."

13. The question as regards the Court's power of review in proceedings under Article 226 of the Constitution of India came up for consideration before a Full Bench of this High Court in Gujarat University, Ahmedabad and etc. Vs. Sonal P. Shah, . The Full Bench, after taking notice of the amendment made in Section 141 of the Civil Procedure Code to the effect that the word "proceeding" used in that section did not include a writ petition under Article 226 of the Constitution of India, held:

"(1) The provisions of the Civil P.C. of Order 47 are not applicable to the High Court's power of review in proceedings under Article 226 of the Constitution.

(2) The said powers are to be exercised by the High Court only to prevent miscarriage of justice or to correct grave and palpable errors. (The epithet "palpable" means that which can be felt by a simple touch of the order and not which could be dug out after a long drawn out process of argumentation and ratiocination).

(3) The inherent powers through ex facie plenary are not to be treated unlimited or unabridged, but they are to be invoked on the grounds analogous to the grounds mentioned in Order 47 Rule 1, namely: (i) discovery of new and important matter or evidence which the party seeking the review could not produce at the time when the earlier order sought to be reviewed was made, despite exercise of due diligence; (ii) existence of some mistake or error apparent on the face of the record; and (iii) existence of any analogous ground. (These are the very three grounds referred to in Order 47, Rule 1, Civil P.C. and by declaration of law at the hands of the Supreme Court in the above case they are the hedges or limitations of the High Court's power)."

14. Bearing the aforesaid principles in mind, let us consider the claim of the applicants so as to find out whether any case has been made out for interference exercising review jurisdiction.

15. We are not impressed by the submissions of Mr. Parekh. We have substantially answered the issue raised by Mr. Parekh in our judgment and order dated 3rd July, 2013. The issue which has been raised by the applicants in this review application was also well explained by the State Government by way of affidavit-in-reply duly sworn in by the In-charge District Primary Education Officer, District Panchayat, Dahod.

16. We quote below the averments made in Para-7 of the affidavit-in-reply.

"I say and submit that the said govt. resolutions categorically provide that the Districts, where the government has prescribed the percentage of the reserved categories in excess of 50%, than in such Districts, on a given recruitment occasion, the proportion of reservation shall not exceed 50% of the total vacant posts. It is submitted that govt. resolution dated 21-1-1986 provides for different percentage, District-wise, for different reserved categories and in so far as the Dahod District is concerned, as pr the said resolution, the total percentage of reservation comes to 74% which exceeds 50% ceiling as circumscribed in the aforesaid resolutions. It is respectfully submitted that in order to implement the guidelines and explanations with regard to the extent of reservations as reflected in the aforesaid govt. resolutions, the respondent no. 2 had to proportionately reduce the percentage of different reserved categories so as not to exceed 50% and accordingly the percentage of scheduled tribe was brought down to 26% from 40%, the percentage of SEBC was brought down to 18% from 27% and accordingly the other categories. Hence it is not true and not admitted that the reservation of S.T. has been reduced to 14% from 40% as contended in ground (h) of the petition."

17. Thus, we do not find any error apparent on the face of the order which if not corrected, would lead to a serious miscarriage of justice.

18. At this stage, it may not be out of place to state that Mr. Parekh, the learned advocate appearing for the applicants, submitted that he was not seriously pressing the grounds on which this review application has been filed, but he seeks limited indulgence of this court relying on the order passed by the Supreme Court referred to above. Mr. Parekh submits that his clients had not thought fit to challenge the judgment and order of this Court dated 3rd July, 2013, yet the petitioners of one of the allied matters which was heard and disposed of by a common judgment had gone to the Supreme Court and the Supreme Court granted permission while withdrawing the S.L.P. to seek indulgence of the High Court for issue of a direction to grant age relaxation to them in future recruitment. Mr. Parekh submits that in this review application we should observe something or issue appropriate directions to the State Authorities so far as grant of age relaxation to the applicants herein is concerned, if they at all apply in future pursuant to any fresh recruitment.

19. We are afraid, we are unable to accept the prayer made on behalf of the applicants so far as the age relaxation is concerned. The Article- 226 of the Constitution of India does not vest the High Court with the power to interfere when there exists no legal or fundamental right of a person over the subject matter of the dispute alleged. In the case before us, it is not the case of the applicants that although they have the legal right to be considered conferred under any policy or rules for appointment to the posts of Vidya Sahayaks, yet the State Government is denying such right. On their own admission, they have crossed the age limit prescribed for such appointment to the post of Vidya Sahayak. If any advertisement is issued in future for recruitment to the post of

Vidya Sahayak, there would be no scope of accepting their application even at the instance of the Selecting Authority. Such being the position, the High Court in exercise of power under Article- 226 of the Constitution of India, cannot confer a right to the applicants to appear at the future process of selection.

20. At this stage, we may profitably refer to a decision of the Supreme Court in the case of Tirumala Tirupati Devasthanams Vs. K. Jotheeswara Pillai (D) by LR's. and Others, , wherein the Supreme Court made the following observations in para-8 which are worth noting.

8. The learned Single Judge has also issued a writ of mandamus directing the appellant to consider the case of writ petitioner No. 5 as to whether he was entitled for exemption from age qualification. As already mentioned the Rules do not make any provision for granting exemption except to the limited extent as provided in the second para of Rule 11. The principles, on which a writ of mandamus can be issued, are well settled and we will refer to only one decision rendered in The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others, , where this Court observed as under:-

"A writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limits of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance."

There being no statutory provision or rule providing for exemption from eligibility criterion, the learned Single Judge clearly erred in issuing a writ of mandamus against the appellant directing it to consider the case of writ petitioner No. 5 for granting him exemption from the rule providing for upper age limit for fresh appointment."

21. Mr. Parekh, the learned advocate appearing on behalf of the applicants placed strong reliance on a decision of the Supreme Court in the case of Manmohan Sharma Vs. State of Rajasthan and Others, in support of his submissions that this court in exercise of power under Article- 226 of the Constitution can direct the State Authorities to grant the benefit of age relaxation in favour of the applicants if they apply for the post in any future recruitment. In the case before the Supreme Court, it was contended by the learned counsel appearing for the appellants that the appellants were appointed as teachers and had served the school to which they had been posted for nearly a decade. It was also submitted that their appointments had been made on a bonafide error in the interpretation of the order of the Supreme Court, but so long as there was no fraud played by the appellants, there was no reason to deprive them of the

benefit of such a long period of service. Alternatively, it was submitted that since the appellants had crossed the upper age limit for recruitment as teachers, the court could consider issuing a direction for consideration of their cases in future recruitments in relaxation of the age bar. In such circumstances, the Supreme Court in para-27 made the following observations:

"27. The appellants had been appointed and have served for nearly a decade but there are allegations that such appointments were obtained by misrepresentation of facts and fraudulently. We do not consider it necessary to go into that aspect as we are informed that criminal cases have already been registered against appellants. Any observation made by us whether or not the appointments were obtained by misrepresentation or by playing fraud upon the authorities concerned is bound to cause serious prejudice to the appellants. All that we need say is that in the facts and circumstances of the case we do not consider the appellants to be entitled to the relief of regularization of their services as prayed for by them. Having said that we cannot ignore the fact that the appellants will be left without any alternate avenues of employment at this stage of their lives. Subject to any finding that may be recorded by a competent Court, as regards the alleged fraudulent nature of the appointments secured by the appellants, we direct that such of the appellants as were appointed as teachers and as have now been terminated may be given a one-time concession of relaxation of the upper age limit and considered in the next selection process in relaxation of rules regarding such age limit prescribed for appointment as teachers. We make it clear that the above shall be a one-time relaxation for the appellants to try their luck in the next selection process. The appellants or such of them as wish to avail of this concession shall file an undertaking before the appointing authority concerned to the effect that the fresh appointment if any given to them pursuant to the age relaxation shall stand terminated in case they are found guilty and sentenced to imprisonment in the criminal case registered against them for obtaining a fraudulent appointment. Beyond that we do not consider the appellants to be entitled to any relief from this Court. The appeals are with the above directions disposed of leaving the parties to bear their own costs."

22. The aforesaid decision relied upon by Mr. Parekh is of no assistance to his clients for more than one reason. First, the direction which was issued by the Supreme Court to give one time concession of relaxation of the upper age limit and consideration in the next selection process in relaxation of rules regarding such age limit prescribed for the appointment as teachers was in exercise of power under Article- 142 of the Constitution. Secondly, the appellants were already in service as teachers for nearly a decade, but there were allegations that such appointments were obtained by misrepresentation of facts and fraudulently. The Supreme Court declined to go into such aspects of fraud and misrepresentation as criminal cases had already been registered against the appellants. However, the Supreme Court on equities thought fit to take notice of the fact that the appellants would be left without any alternative avenues of the

employment at that stage of their lives. The Supreme Court observed that subject to any finding that may be recorded by a competent court, as regards the alleged fraudulent nature of the appointments secured by the appellants, the appellants whose services had been terminated may be given one time concession of relaxation of the upper age limit and be considered in the next selection process in relaxation of rules regarding such age limit prescribed for appointment as teachers. Thus, the facts before the Supreme Court were altogether different. The appellants before the Supreme Court were already in service for nearly a decade and thereafter their services were discontinued. In the present case none of the applicants were appointed as Vidya Sahayaks. In view of such distinguishing features, it is difficult for us to straightway rely on the decision of the Supreme Court and issue the direction as prayed for by the applicants.

23. In this connection, we may profitably refer to the following observations of the Supreme Court in paragraph 24 in the case of Indian Bank Vs. ABS Marine Products Pvt. Ltd., while distinguishing a precedent from mere directions:

"24. One word before parting. Many a time, after declaring the law, this Court in the operative part of the judgment, gives some directions which may either relax the application of law or exempt the case on hand from the rigour of the law in view of the peculiar facts or in view of the uncertainty of law till then, to do complete justice. While doing so, normally it is not stated that such direction/order is in exercise of power under Article 142. It is not uncommon to find that courts have followed not the law declared, but the exemption/relaxation made while moulding the relief in exercise of power under Article 142. When the High Courts repeatedly follow a direction issued under Article 142, by treating it as the law declared by this Court, incongruously the exemption/relaxation granted under Article 142 becomes the law, though at variance with the law declared by this Court. The courts should, therefore, be careful to ascertain and follow the ratio decidendi, and not the relief given on the special facts, exercising power under Art. 142. One solution to avoid such a situation is for this Court to clarify that a particular direction or portion of the order is in exercise of power under Art. 142. Be that as it may."

24. For the foregoing reasons, we do not find any merit in this review application and the same is accordingly rejected. No costs.