

(2010) 01 GUJ CK 0020
In the Gujarat High Court

Case No : Special Civil Application No. 293, 316, 439 and 498 of 2010

Patel Jignaben Babulal and Others

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 28-01-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 166, 19

Citation : (2010) 01 GUJ CK 0020

Hon'ble Judges : D.H. Waghela, J

Bench : Single Bench

Advocate : K.B. Pujaraa and A.S. Supehia, for the Appellant; Shivang Shukla, Asstt. Government Pleader for Respondents 1-2 and Shalin Mehta, for Respondents 3 to 7, for the Respondent

Final Decision : Dismissed

Judgement

D.H. Waghela, J.—These petitions are directed against decision dated 06.01.2010 and instructions issued by letter dated 15.01.2010 regarding consideration of marks obtained at P.T.C. Examinations (Primary Teachers Training Course) by the candidates applying for recruitment on the posts of Vidyasahayaks. The petitioners are some of the candidates who have passed P.T.C. Examinations in or before the year 2008 and whose mark-sheets reflect the marks obtained by them in the sections of internal evaluation as well as practical training. By virtue of Resolution dated 07.07.2008, the State Government has decided not to show the marks of internal evaluation and most of the papers of practical training, and restricted the mark-sheet to total 1000 marks comprising of eleven papers of written examinations and two subjects of 50 marks each of practical training. Thus, the marks obtained by the candidates in the examination of P.T.C. (Final) in the section of internal evaluation and practical training out of total 500 marks are practically kept out of consideration for deciding relative merit of the candidates. Being aggrieved by such change in the norms brought into effect by the aforesaid impugned decision and instructions, the petitioners have approached

this Court with the contentions that they are patently illegal, arbitrary, discriminatory, bad in law, null and void, irrational, suffering from vice of non-application of mind, without jurisdiction and authority of law, contrary to principles of natural justice, equity, fair play, good conscience, estoppel, contrary to statutory provisions of law and violative of fundamental rights of the petitioners under Articles 14, 16, 19 and 21 of the Constitution.

2. The petitions having raised common legal issues and in view of urgency of the matters, they were heard together for final disposal at the admission stage by consent and upon request of learned Counsel appearing on both sides. Some of the candidates passing their examinations after the year 2008 have joined as respondents and canvassed their case through learned Counsel Mr. Shalin Mehta.

3. The case of the petitioners is mainly based upon Resolution dated 03.09.2004 of the State Government whereby it was decided that the earlier Resolution dated 01.10.2001 resolving to disregard internal evaluation out of total 300 marks should be cancelled and percentage of total marks obtained at the P.T.C. Examination shall be considered in selection for the posts of Vidyasahayaks. The standard and criterion fixed by that Resolution dated 03.09.2004 could not be varied to the disadvantage of the candidates passing P.T.C. Examinations before the year 2008, and that too after advertisements for recruitment on the posts of Vidyasahayaks, according to the petitioners. Elaborating their case, it was submitted on behalf of the petitioners that all recruitments of Vidyasahayaks since the year 2004 have been made on the basis of merit of the candidates calculated on the basis of total 1500 marks at P.T.C. Examinations. Changing that policy, while maintaining the pattern of written examinations, the course of P.T.C. is made non-residential and the pattern of marks is changed to total 1000 marks comprising of total 900 marks for written examinations, 50 marks for education-practical (annual work) and 50 marks for computer, totalling to 100 marks for internal evaluation, to make total 1000 marks which would be reflected in the mark-sheet. Since recruitment of Vidyasahayaks is based on 100% objective criteria and only the marks obtained at H.S.C. Examination and P.T.C. Examination are to be considered with the weightage of 40% and 60% respectively, the marks obtained in internal evaluation by the candidates passing P.T.C. Examinations before the year 2008 have to be considered and their non-consideration could put such candidates to an unfair disadvantage, according to the submission. It was further submitted that the decision dated 06.01.2010 and the instructions based thereon have serious adverse consequences for about 80,000 unemployed P.T.C. qualified candidates, even as advertisements for the posts of Vidyasahayaks were being published since 22.12.2009 for recruitment in various districts and even the last date for receipt of applications was 02.01.2010. Learned Counsel Mr. Pujara and Mr. A.S. Suphia vehemently argued that such administrative decision and instructions amounted to changing the rules of the game after its commencement and discriminated against the petitioners.

4. As against the above contentions, it was submitted for the respondents by learned A.G.P. Mr. Shukla and learned Counsel Mr. Shalin Mehta that no candidate for any post can claim to be considered in a way which is favourable to him. Firstly the policy of the State Government was declared in the shape of Government Resolution (G.R.) dated 11.06.1998, whereunder marks obtained in the internal examinations were not considered for selection and appointment on the posts of Vidyasahayaks. Thereafter, vide G.R. dated 21.6.2000, a decision was taken to exclude 300 marks, inter alia, referable to the internal marks obtained in the subjects mentioned therein. It was only in the year 2004, vide G.R. dated 03.09.2004, that a decision was taken to consider the internal marks while ascertaining merits of the candidates for the posts of Vidyasahayaks. The rationale behind the G.R. dated 03.09.2004 was to ensure equal treatment to the candidates who were possessing qualification of P.T.C. or B.Ed. The qualification of B.Ed. was considered to be a qualification equivalent to P.T.C. for appointment to the posts of Vidyasahayaks. That qualification of B.Ed was subsequently removed with effect from 2007 from the eligibility criteria for appointment to the posts of Vidyasahayaks. Thereafter, in view of certain unfortunate incidents, reconsideration of the scheme of compulsory residence in hostel, internship and marks granted by internal evaluation was required and a special Committee was constituted for that purpose. That Committee having made comparative study of primary teachers course in several other States, visited several P.T.C. Colleges and upon due deliberations made recommendations to the Government. Accepting such recommendations, the rule of evaluation and grant of marks out of total 1000 marks was adopted by G.R. dated 07.07.2008 with the clear stipulation that other marks of internal evaluation or practical examination shall not be considered in recruitment for teachers. That, however, did not alter the pattern of education in the P.T.C. course and the policy decision had reasonable nexus with the objects sought to be achieved. According to the affidavit of Under Secretary, Primary Education, Education Department of the State, the endeavour of the Government in taking the policy decision was to curb immoral and unscrupulous activities in the matter of allocation of internal marks. He has also deposed that the authorities had received complaints about charging of higher amounts for the purpose of allocating higher marks in the internal examination and the Government sought to check such activities by self-financed colleges. It was submitted that G.R. dated 07.07.2008 was already holding the field when the posts of Vidyasahayaks were advertised and the decision dated 06.01.2010 was clarificatory in nature. It was submitted that the matter of appointment of Vidyasahayaks was within the domain of the State which would be competent to alter the rules and resolutions from time to time in terms of its prevalent policy and no one can claim that the rules should forever remain the same.

4.1 Relying upon the judgment in Punjab University Vs. Subash Chander and Another, it was submitted that change in the policy of granting grace-marks was held to be reasonable though it had a retroactive effect. Paluru Ramkrishnaiah and Others Vs. Union of India (UOI) and Another, was relied upon for the

proposition that in absence of legislative rules, it was competent for the State Government to take a decision in the exercise of its executive power under Article 162 of the Constitution. The observations, as under, in decision of the Apex Court in *Union of India v. Pushpa Rani and Ors.* (2008) 9 SCC 242 were also relied:

37. Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. The court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also not open to the court to make comparative evaluation of the merit of the candidates. The court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration.

5. Thus, the issues thrown up for consideration and decision by this Court are:

(a) whether the impugned decision and instructions are arbitrary and discriminatory?, and

(b) whether they are amounting to changing the rules for recruitment after commencement of recruitment process by publication of advertisements to invite applications for the posts?

The contention that the impugned decision and instructions were illegal and ineffective for not having been issued in the name of the Governor as required under Article 166 could not be pressed in view of decisions of the Supreme Court in *State of Punjab and Another Vs. Mohammed Iqbal Bhatti*, and in *Purnendu Nath Tagore Vs. Administrator-General of West Bengal and Others*,

6. The legal proposition laid down in several decisions of the Apex Court, including in *K. Manjusree Vs. State of A.P. and Another*, and *Hemani Malhotra Vs. High Court of Delhi*, that the authority concerned cannot either during the selection process or after it change the criteria for selection, could not be seriously assailed. However, it is also held in *K. Manjusree* (supra) that scaling down of written examination marks so as to maintain the ratio in respect of the marks of written examinations and interview could be upheld if it is in consonance with the criteria decided before commencement of the selection process. There is no dispute about the fact that, even as the *Bombay Primary Education Act, 1947* is amended by the *Amendment Act No. 3 of 2003* on

03.03.2003 so as to provide for selection of Vidyasahayaks and empower the Government to make rules governing qualifications and criteria for selection and appointment of Vidyasahayaks, such rules are not made so far. Therefore, the present controversy has to be resolved on the basis of the relevant resolutions of the Government.

7. Perusing the record, it appears that by the first G.R. dated 11.6.1998, the Government resolved to cancel the scheme of appointing "Balgurus" and decided to fill up 20,000 vacant posts of primary teachers under the new "Vidyasahayak Scheme". The eligibility criteria for Vidyasahayaks under that scheme included qualifications of (1) SSC/PTC. (2) Trained Graduate and (3) SSC/C.P.Ed (5%). For considering the candidates in the first category with educational qualification of SSC/PTC weightage of the marks obtained in SSC was 40% and that of the marks obtained in PTC was 60%. It was, however, stipulated that the marks obtained against three subjects having total 225 marks were not to be taken into account for deriving the percentage of marks at the PTC Examinations. Thereafter, the scheme was modified by G.R. dated 21.6.2000 so as to accommodate advent of 10 + 2 pattern and introduction of Higher Secondary Certificate Examination. Even as trained graduates continued to be eligible, the rule of disregarding the score out of 225 marks at the PTC Examinations after SSC was also maintained. But, for the candidates passing PTC Examination after HSC, marks obtained out of 300 marks of final evaluation were required to be disregarded for arriving at the percentage of marks obtained at the PTC Examination. Overall weightage divided between SSC/HSC and PTC was also maintained. Maintaining those percentages of weightage in the overall assessment, the G.R. dated 03.09.2004 declared that the marks obtained against those total 300 marks in three subjects of internal evaluation shall also be counted for arriving at the total percentage of marks in the PTC for the purpose of selection under the Vidyasahayak scheme. Without reference to these resolutions, the latter G.R. dated 07.07.2008 was issued to disregard the marks obtained at internal evaluation and in practical examinations so as to issue mark-sheet of PTC only reflecting marks obtained against total 1000 marks at the PTC final year examination. It was also stipulated that marks granted by the educational institutions in the course of internal evaluation were not to be mentioned at all in the mark-sheet and only the marks recorded in the mark-sheet would be considered in selection for the posts of Vidyasahayaks. Even as G.R. dated 07.07.2008 was expressly made prospective in its operation, as a necessary concomitant and to place all the candidates at par, only the marks obtained against total 1000 marks in the same subjects by the candidates passing PTC after and before the year 2008, the clarification was required.

8. As recorded in the decision dated 06.01.2010, a Committee of the concerned officers opined that in order to place all the candidates passing PTC Examinations from the year 2001 to 2009 on the same footing and to avoid injustice on account of internal/external evaluation, the marks obtained at the written examinations and out of total 50 marks of practical paper of teaching and 50

marks of practicals in computer should be considered. That opinion was accepted by the Government and the impugned instructions based thereon were issued. Upon that decision being conveyed to this Court during the course of hearing of Special Civil Application No. 13473 of 2009 and allied matters, those petitions by candidates passing PTC Examinations after 2008 were disposed as not surviving.

9. It is clear from the above discussion of evolution of the policy of the Government and rival contentions of the parties that the intention and effect of disregarding the marks obtained against the subjects of internal evaluation and practicals by the candidates passing PTC Examinations before the year 2008 is to remove obvious anomaly and injustice by placing all the candidates at par for fair assessment of their merit on the basis of marks obtained against the same subjects out of the same number of total marks. Therefore, the grievance of discrimination or disadvantage for the petitioners cannot, *prima facie*, survive. The argument that candidates like the petitioners would have put in sustained and extra efforts for securing higher marks in all the subjects comprised in the final examination for total 1500 marks and the candidates appearing in PTC Examinations after the year 2008 would have the benefit of concentrating only on final examinations of 1000 marks, is spacious but calls for factual data and analysis which this Court may not be competent to undertake in the petitions under Article 226 of the Constitution. However, in the nature of things, there cannot be different criterion for the candidates acquiring the requisite qualification in different years on different pattern of internal and external marks. As seen earlier, the Government has consistently co-related and adjusted consideration of the marks of internal evaluation and practical examinations for the purpose of selecting Vidyasahayaks, according to the prevailing policy of education in PTC colleges and the changing qualification criteria for Vidyasahayaks. Therefore, in absence of any apparent irrationality or illegality and in view of the intention and effect of removing, by the impugned G.R. dated 07.07.2008, decision and instructions, the discrimination and injustice, it is held that they are neither discriminatory nor in violation of the letter and spirit of Articles 14 and 16 of the Constitution. The following observations made by Constitution Bench of the Apex Court in *M. Nagaraj and Others Vs. Union of India (UOI) and Others*, may be apposite in the present context:

45. Merit is not a fixed absolute concept. Amartya Sen, in a book *Meritocracy and Economic Inequality*, edited by Kenneth Arrow, points out that merit is a dependent idea and its meaning depends on how a society defines a desirable act. An act of merit in one society may not be the same in another. The difficulty is that there is no natural order of "merit" independent of our value system. The content of merit is context-specific. It derives its meaning from particular conditions and purposes. The impact of any affirmative action policy on "merit" depends on how that policy is designed. Unfortunately, in the present case, the debate before us on this point has taken place in an empirical vacuum. The basic presumption, however, remains that it is the State who is in the best position to define and measure merit in whatever ways it consider it to be relevant to public

employment because ultimately it has to bear the costs arising from errors in defining and measuring merit. Similarly, the concept of "extent of reservation" is not an absolute concept and like merit it is context-specific.

46. The point which we are emphasising is that ultimately the present controversy is regarding the exercise of the power by the State Government depending upon the fact situation in each case. Therefore, "vesting of the power" by an enabling provision may be constitutionally valid and yet "exercise of the power" by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.

10. As for the contention of changing the rules after commencement of selection process, it is noticed that the impugned decision and instructions were clarificatory and consistent with G.R. dated 07.07.2008 which preceded the date of advertisement for recruitment. It would be futile to argue that G.R. dated 03.09.2004 was required to be read in isolation and the policy contained therein could not be modified by subsequent Resolution dated 07.07.2008 which did not refer to the former. Mere absence of reference to G.R. dated 03.09.2004 in G.R. dated 07.07.2008 cannot invalidate either of them; but they have to be read harmoniously so as to give effect to both as far as it is practicable. G.R. dated 07.07.2008 clearly marked a departure in the policy of Government and modified the pattern of marks relevant for the purpose of arriving at proper percentage against 60% weightage for PTC. Such modification was along the policy and decision of the Government after consideration of relevant facts and circumstances, which cannot be subjected to judicial review. Therefore, the argument that the Government had changed the rules by changing the criteria for selection after starting the process of recruitment is negated and rejected.

In the result, in the facts and for the reasons discussed hereinabove, the petitions are dismissed with no order as to costs.