

(1980) 06 GUJ CK 0005
In the Gujarat High Court

Case No : Special Civil Applications No's. 443 and 460 of 1980

Patel Rajesh Motibhai and Another

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 20-06-1980

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 1981 Guj 30 : (1981) 22 GLR 417

Hon'ble Judges : N.H. Bhatt, J

Bench : Single Bench

Advocate : B.P. Tanna, Spl. C.A. No. 443/80 and B.P. Tanna, Spl. C.A. No. 460/80, for the Appellant; C.K. Takwani, Spl. C.A. No. 443/80 and C.K. Takwani, Spl. C.A. No. 460/80, for the Respondent

Judgement

1. These two petitions raising common questions of law and somewhat similar questions of facts are being disposed of by this common judgment with the concurrence of the learned advocates appearing in the matters.

2. There is a sole petitioner in the special civil application No. 443 of 1980 and there are two petitioners in the Special Civil Application No. 460 of 1980. All the three are the students of the M. P. Shah Medical College, Jamnagar, who had passed their first M.B.B.S. examination, the results of which were declared sometime in January 1980. It is common ground that admissions to Government Medical Colleges situated at Ahmedabad, Baroda, Surat and Jamnagar are given by the State of Gujarat strictly according to merits. The Rules for admission to this course are published by the Government and they are dated 10-5-79. The students who have passed the 12th Std. examination with Science subjects including Biology, are eligible for admission. It would be evident that students from all parts of Gujarat will be aspirants for admissions to the medical course. Some may like to be at Ahmedabad, some may prefer to be at Baroda, some may have a special liking for Surat and some may find it convenient to be at Jamnagar. It may happen that a student from Jamnagar area may, for some

reasons like to have admission at Ahmedabad or vice versa. The Government therefore has laid down in the aforesaid rules that "the placement of a candidate to a medical college in the State shall be decided on the basis of merit-cum-preference given by them in their application for admission". So the list of eligible candidates will first be prepared on the basis of merit and then for the purpose of allotting one or the other of the colleges to them, preference will be given to their choice. It may happen that a student hailing from Jamnagar or Surat or round about may prefer Ahmedabad for some reasons but the students above him in the merit list also might have likewise preference for Ahmedabad. If the total seats of Ahmedabad are thus allotted to those students up in the list, the preference of the student, say for Ahmedabad, may not be given any weightage. Such a student, say from Ahmedabad, might be required to go to Jamnagar also. This scheme of admission and allotment of colleges is acknowledged on all hands to be in consonance with the above-mentioned Admission Rules.

3. Ordinarily, a student who gets admission to one college would be expected to complete his course at the same college, but the Government was not oblivious of certain students' desire based on some necessities to have the places of their choice or the circumstances may alter in the course of the 11/2 years of the first M.B.B.S. course which may make it convenient for that student to seek a shift to another college. Viewing these possible situations, which are recurring, the Government had resolved on 30-7-77 to effect such transfers on certain basis. Clause 1 of the said resolution sets out the purpose. It reads:

"Applications for transfer will be considered immediately after passing the 1st M.B.B.S. examination within one month from the beginning of the terms of concerned medical college where the admission is sought, provided there is a clear vacancy". (emphasis by me)

A clear vacancy is defined as one which is caused by transfer of a student or his or her having left the studies or due to death, discharge, etc. More often than not, all the seats recognised by the University, say of 2nd M.B.B.S. in a particular college may not be filled in because of certain failures at the 1st M.B.B.S. level. So some clear vacancies might even otherwise be there. The Government then in the aforesaid resolution provided that a student seeking transfer of entry into 2nd M.B.B.S. course has to make an application for transfer. Then clauses 3 and 4 of the said resolution are reproduced below, because their consideration is the main subject matter of these two petitions:

"3. Merit lists will be prepared on the basis of marks obtained at the last university examination separately in respect of applications for transfer from candidates of Medical Colleges within the State, and in respect of candidates of medical colleges outside the State. The transfer shall be given strictly on merit according to percentage of marks obtained in the last University examination subject to provision in Rule 4 below. The candidates should have passed the last University examination at the first attempt. Application for transfer from candidates outside the State will be considered after first finalising applications of

transfer in respect of candidates from the medical colleges within the State.

4. Notwithstanding anything contained in Rule 3 above, sons/daughters of State Government servants whose parents are transferred/posted in the same town in which the medical college is situated will be given priority for transfer (inter se claim will be determined on merits).

Note:- Applications from candidates claiming preference must be accompanied by certificate from competent authority to that effect that (a) they are Movement servants; (b) are residing in the same town where college is situated without which their claim will not be considered."

4. Even a bare look at the abovementioned clause 3 of the resolution shows that different merit lists are to be prepared on the basis of the marks obtained at the last University examination separately in respect of applications for transfer from candidates of medical colleges within the State. It is the policy decision of the Government that as at the initial stage, admission to medical course was on the basis of merit alone, this sort of change sought to be permitted also should by and large be on the basis of merits, the merits have been determined on the strength of the marks obtained at the 1st M.B.B.S. examination. So far there is no controversy amongst the contending parties before me. The subject matter of dispute, however, is the legality and validity of the abovementioned clause 4, which overrides the normal basis adopted by the Government for permitting transfers as is evident from clause 3 of the resolution. The petitioners in these two petitions contend that the preferential treatment or priority accorded to the sons/daughters of State "Government servants, whose parents were transferred or posted in the same town in which the medical college is situated is obnoxious to the guarantee of equality before law enshrined in Article 14 of the Constitution of India. This is the challenge to clause 4, which is required to be examined in these petitions.

5. Before I go to deal with this cleancut legal question, the factual background of these petitions deserves to be specifically noted. The three petitioners of these two petitions and the respondent No. 2 in the first petition and the respondents Nos. 2 and 3 of the second petition were students of M. P. Shah Medical College, Jamnagar. All these parties were aspirants for admissions to colleges other than Jamnagar, as far as the 2nd M.B. B.S. course is concerned. The sole petitioner of the Special Civil Application No. 443/80, the two petitioners of the Spl. Civil Appln. No. 460/80, the respondent No. 2 of the Petition No. 443/80 and the respondents Nos. 2 and 3 of the Petition No. 460/80 were seeking transfer from Jamnagar to Baroda, Ahmedabad, Baroda, Ahmedabad, Surat and Baroda respectively. As per clause 3 of the Government Resolution of 1977, the Principal of M. P. Shah Medical College, Jamnagar prepared the merit list of these candidates. The petitioner of the Petition No. 443/80 stood at No. 2, the petitioner No. of the Petition No. 460/80 stood at No. 3, the petitioner No. 2 of the Petition No. 460/80 stood at No. 4, the respondent No. 2 of the Petition No. 443/80 stood at No. 9 and the respondent No. 2 of the Petition No. 460/80, stood

at No. 19 whereas the respondent No. 3 of the Petition No. 460/80 was not given any merit number, because she had passed her examination six months earlier, that is, in April 1979. In other words, the respondent No. 3 of the Petition, No. 460/80, Kum. Dipti K. Mehta was given transfer at the end of the first term of the 2nd M.B.B.S. course, because of the special circumstances, namely, she and her parents having suffered considerably in the notorious Morbi disaster. It is no longer in controversy before me that this respondent No. 3 Dipti K. Mehta's case was considered by the Government as a special case and the Medical Council of India is said to have approved of this. It is to be noted with pertinence that Medical Council of India also have their say in the matter of admissions and transfer. The Medical Council has made provision for migration/transfer of students from one medical college to another and these recommendations are admittedly having the force of law. Clause V of the recommendations is reproduced below:-

"V. Migration/Transfer of students from one Medical College to another:

(a) A student studying in a recognised medical college may be allowed to migrate/transfer to another recognised medical college under another/some University.

(b) The migration/transfer can be allowed by the University concerned within three months after passing the 1st professional examination, as a rule,

(c) Migration/transfer of students during the course of their training for the Clinical subjects should be avoided,

(d) The number of students migrating/ transferring from one medical college to another medical college during one year will be kept to the minimum so that the training of the regular students of that college is not adversely affected. The number of students migrating/transferring to/from any one medical college should not exceed the limit of 5% of its intake subject of 5 students in any one medical college in one year.

(e) cases not covered under the above Regulations, may be referred to the Council, for consideration on individual merits,

(f) an intimation about the admission of migrated/transferred students into any medical college should be sent to the Council forthwith."

The Medical Council of India has laid down that the number of students migrating or seeking transfer from one medical college to another should not exceed the limit of 5% of its intake, subject to a maximum of 5 students in any one medical college in one year. Clause (e) quoted above specifically refers to cases not covered under Clause (d) and it clothes the Medical Council with the authority to sympathetically consider the case not falling within that category, on its individual merits. I was shown at the time of hearing of this petition the letter from the Medical Council of India addressed to the Secretary to the Government of Gujarat, Health and F. W. Depart merit approving the transfer of Kum. Dipti K.

Mehta, the respondent No. 3 in Special Civil Application No. 460/80, permitting her transfer from Jamnagar medical college to Baroda medical college, "as a special case in view of the circumstances mentioned".

6. The grievance of the petitioners is that though these three petitioners were ranking very high in the merit list prepared for the purpose of transfer from Jamnagar College to the colleges of their choice, the respondent No. 2 of the Petition No. 443/80 was given precedence or priority over them because her father, a Government servant, was functioning as such at Gandhinagar, place about 30 kilometers away from Ahmedabad and the respondent No. 2 of the Petition No. 460/80 though appearing at No.19 in the merit list prepared by the Principal of M. P. Shah Medical College, Jamnagar was given chance to go to Surat, a place of her choice, because there was no aspirant from Jamnagar who wanted to go to Surat. Similarly, two more students from Jamnagar, one Mr. P. C. Jhala was permitted to join Ahmedabad college because his father at the relevant time was a Government servant posted at Ahmedabad. Similarly, one Mr. R. B. Jaipalli, who was at Sr. No. 22 in the list was given Surat, but he had not accepted transfer,

7. The above analysis will show that the three respondents in these two petitions and Mr. Zala and Mr. Jaypalli having been already selected as the candidates for transfer from Jamnagar, the cases of these petitioners were not considered because only the candidates could be permitted to leave Jamnagar for joining some other colleges in the State. The Government is said to have first proceeded to decide the cases of Government servants while dealing with the applications of the students from Jamnagar, because according to the Government, the sons and daughters of Government servants had an overriding preferential treatment in the matter of transfer by virtue of clause 4 of the resolution already referred to. The petitioners, grievance is that had Rule 4 not been there in the resolution, they would have been the first to get the places of their choice. So their first attack is directed against the validity of clause 4 of the resolution.

8. It is to be incidentally noted that though clause 3 of the transfer resolution speaks of merit list, the State Govt. on its own prepared a combined and common merit list on the basis of inter se merits as determined by the percentage of marks obtained by different students from different universities, i.e. Ahmedabad College governed by Gujarat University, Baroda College by M. S. University, Surat College governed by South Gujarat University and Jamnagar College by Saurashtra University. Whether this could be done or not is a different matter altogether, but clause 3 of the Rules does not envisage any such combined list. The aspirants for transfer are college-wise. The number of students that are permissible to be allowed transfers are also college-wise. The Government's action, therefore, in jumbling the four select lists and prepare one of its own, is an action unwarranted by its policy decision and, as a matter of fact, this action of the Government is challenged by the petitioners in these two petitions, but as the prayers sought for by the petitioners can be essentially met

by striking down clause 4, I refrain from expressing any final opinion in that regard. I say, it is not necessary to decide so because the ratio of 4: 1 between repeaters on one hand and others on the other hand does not arise here in this case. Kum. Dipti K. Mehta, the respondent No. 3 in the Petition No. 460/80 is no doubt a repeater, but she is afforded transfer as a special case under clause (e) of the Medical Council of Indian recommendations. Her case, therefore, stands on a different footing and in my view she is not necessary to be counted for the purpose of considering the "five" transfers from Jamnagar. Her case stands on a different footing and her position remains unaffected despite my upholding the contention of the petitioners.

9. It is to be noted with pertinence that clause 4 of the resolution gives a downright preference and overriding priority to the children of Government servants. The personnel of Indian Civil Service in pre-independence days claimed and enjoyed privileged position, but that is and should be the relic of the past. On the advent of the constitution, what supervenes is the constitutional mandate and not the whims or notions of certain so-called privileged classes. Sons and daughters of Government servants cannot treat themselves as a separate privileged class. Clause 4 as it stands, carves out a special treatment for them, overriding the general policy norm laid down in clause 3 of the above resolution. In other words, out of the class of students seeking transfer, a special class is created, namely, the class of sons and daughters of the Government servants and this classification is made obviously to oblige the sons and daughters of the officers of the Government. Can it be done with impunity? Does it not amount to permitting classification based on no intelligible differentia? It appears so. A son or a daughter of a Government servant by this accident itself claims to steal march over other kindred persons. What has the Government to say in this regard? The affidavit of the Govt. filed by its Under-Secretary, one Mr. D. B. Shah, deserves to be quoted.

"I say that the transfer of sons and daughters of the Government servant inter se has to be determined on merits. I say that there is no preferential treatment being given to sons and daughters of the Government servants, but only a priority is given for transferring a son or daughter of the Government servants to medical college situated in the town where parents of such son or daughter may be serving. I say that this priority is being given to facilitate the children of the Government servants to continue their studies in the town where their parents are serving.....(Para 4)

But it is settled position of law that reasonable classification can always be made for giving preference to any particular class on the basis of the public interest felt by the Government and that such classification can never offend Article 14 say that if the Government has light to reserve certain seats for itself in admissions of students to Government medical college, the Government has certainly a right for giving priority to a particular class so far as transfer from one medical college or the other is concerned. I say that the Government has decided to give priority

to sons and daughters of the Govt. servants who are posted in the same town where medical college is situated for transferring them to the same place on the basis that Government service is of transferable type and, therefore, the Government always has a right to give priority to its servants, I say that this classification is based on reasons and it is not discriminatory. I say that there is complete nexus between, the classification and the object which is sought to be achieved. I say that the classification is of sons and daughters of the Government servants as being one class and the object being to give benefit to such class by the Government in view of the fact that the Government has a right to give such priority In view of the rules.....(para 7)."

10. The law is correctly quoted in the affidavit, but its basis is lacking. To say that preference is not given, but priority is given, is something *ex facie* meaningless. Priority and preference in this context are synonymous. What is the object sought to be achieved by making this class out of a class? There is no public interest that could be conceived and none is stated. The respondent No. 3 of the Petition No. 460/80 tried to fling a benevolent suggestion to the Government by citing the earlier affidavit. She says that "the rules are obviously framed with a view to attract persons to join the Government services and with a view to ensure them economic relief by saving them from spending after their children who without these rules may be required to join colleges outside the place of posting of the concerned government servant and as such, there is a clear policy in enacting the rules in question and giving priority for transfer to the Government servants both in Central and State Government service." This is not what the Government says. All that the Government says is that it has a right to create a class out of the class of students seeking transfers and that it is in the public interest to do so. When Government servants are liable to be transferred at the interval of three to five years, when the medical course itself is stretched over at least 4½ years with one year's compulsory internship to boot, the alleged public interest even if forcibly stretched out, can be little served by such a provision. When the Government itself does not say that in order to attract better talent to Government service and in the interest of the service itself this provision is made, the benign possible conjecture on the part of the respondent No. 3 can have little relevance.

11. Mr. Takwani, the learned Assistant Govt. Pleader, however, put forward before me a bold proposition that as the Government runs the colleges with its own funds, the Government has absolute power to make reservation for certain people. I have called this proposition bold and I call it bewildering also. In a society governed by the rule of law, the Government managing the funds of the people as a trustee, cannot arrogate to itself the powers of a capitalist handling his own funds. Mr. Takwani, however, tried to seek support for his proposition from the judgment of the Supreme Court in the case of *Kumari Chitra Ghosh and Another Vs. Union of India (UOI) and Others*, . In that case, the reservation of the seats in the Maulana Azad Medical College, Delhi was in respect of certain categories mentioned in clauses (c) to (h) contained in the College prospectus

relating to the eligibility for admission to the College. The Supreme Court held that said reservations were not violative of Articles 14, 15 and 29 of the Constitution of India. The reasons are given by the Supreme Court why they were not so. The Supreme Court says:

"The first group of persons for whom seats have been reserved are the sons and daughters of residents of Union Territories other than Delhi. These areas are well known to be comparatively backward and with the exception of Himachal Pradesh they do not have any Medical College of their own. It was necessary that persons desirous of receiving medical education from these areas should be provided some facility for doing so. As regards the sons and daughters of Central Government servants posted in Indian Missions abroad, it is equally well known that due to exigencies of the service these persons are faced with lot of difficulties in the matter of education. Apart from the problems of language, it is not easy or always possible to get admission into institutions imparting medical education in foreign countries....." It is, therefore, evident that even in that authority a reasonable basis for classification or to put it differently an intelligible differentia was clearly found by the Supreme Court and that is why the classification was not found to be Invidious. As far as the case on our hand is concerned, the classification is without any intelligible differentia, without any rational basis, without any nexus between the illusory object of public interest sought to be achieved and the ground of classification. If any authority is needed to re peal Mr. Takwani's broad proposition, we can advert to the case of State of Uttar Pradesh and Others Vs. Pradip Tandon and Others, . In that case, the reservation of seats in medical colleges in Uttar Pradesh for candidates from rural population was held to be unconstitutional.

12. It is, therefore, evident that the State Government that has made Clause 4 of the resolution for transfer has not adopted any rational basis, had not any objective sought to be achieved by giving preferential treatment to the sons and daughters of the Government servants and it seems to have proceeded to make that provision only on the assumed notion about the right of the Government in respect of admission to the medical colleges run at the cost of the public exchequer.

13. I, therefore, declare Clause 4 of the Government Resolution No. MCG 1077/5375/1 dated 30th July, 1917 as ultra vires Article 14 of the Constitution of India.

14. This brings me again to the factual parts of these petitions. Though the petitions were filed soon after the first term of the second M.B.B.S. course started and soon after the merit list prepared by the Dean of the M. P. Shah Medical College, Jamnagar was found to be not acted upon, the matters could not be taken up on hand. The respondents in these two petitions have already joined other colleges and are prosecuting their studies at the places of their new destinations. It would, be too harsh to set at naught their transfers. At the same time, the cases of these three petitioners, who where entitled to their places of

choices given to them deserved to be considered by the Govt. They were high-up in the merit list. As the things stand at present, there were five students, who could be granted transfer. Even if the respondent No.2 of the Petition No. 433 of 1980 is not disturbed and the respondent No.2 of the Petition No. 460/80 is not disturbed, and as held by me above, Kum. Dipti K. Mehta the respondent No.3 of Petition No. 460/80 is a case recognised even by the Indian Medical council as special case all the there petitioners can be and must be accommodated in dated in the matter of their choice, provided there are vacancies in the Colleges to which they seek Admission. So as for as transferees from Jamnagar are concerned, there are only three including Mr. P. C. Jhala. As said by me above, the transfer of the respondent No. 2 in each of these two petitions is not regular. They could not be given placement in the five seats meant for transfer from Jamnagar. It is, therefore, in the fitness of things that all the three petitioners of these two petitions are given transfer from Jamnagar to the places of their choice. The concerned Universities that are parties before me, namely, M. S. University, Gujarat University are hereby directed to accord special permission for transfer of these three students and the State Government is hereby given a writ of mandamus to effect the transfers of these petitioners from Jamnagar to the places of their first preference. I am sure that Indian Medical Council would visualise the difficulties and would grant necessary permission under clause (a) of theft recommendation quoted above. The delay that has been occasioned is due to the proverbial delay of courts and despite the petitioner's persistent efforts to get their matters heard soon in the month of February and March 1980, these matters could not be taken by this High Court because of the heavy pressure of admissional work. It is in this situation that a request is made to the Indian Medical Council to accord their sanction If it is otherwise necessity for the purpose of the transfers of the petitioners, to effect which a writ of mandamus has been given by me in this petition. Though as a natural corollary the respondents Nos. 6 and 7 of the Petition No. 460/80 and the respondent No. 2 of each of these petitions might be required to be relegated to make room for the petitioners, in view of the time-lag, I do not order their repatriation to Jamnagar college, the college of their origin from where they had sought transfers and they shall be allowed to be continued at the colleges where they are at present as special cases. It is obvious that the terms so far completed by the respective petitioner at Jamnagar college will be treated as continuity in study on their transfer to other colleges by the concerned Universities as per the powers vested in them as per Ordinance No. 71 of the Gujarat University and as per other similar Ordinances of the M. S. University.

15. The petitions are accordingly allowed, making rule absolute with no order as to costs.

Liberty to the parties to move this court in case of difficulty.

The implementation of this writ to be effected by the Government within a period of 10 days from today.

16. Petitions allowed.