

(2016) 07 GUJ CK 0079

In the Gujarat High Court

Case No : Special Civil Application No. 10095 of 2016, Special Civil Application No. 10099 of 2016, Special Civil Application No. 10102 of 2016 and Special Civil Application No. 10135 of 2016

Pathak Pratiksha Vishal

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 25-07-2016

Acts Referred:

Constitution of India, 1950 — Article 12, Article 226

Citation : (2017) 1 GLR 401

Hon'ble Judges : Mr. N.V. Anjaria, J.

Bench : Single Bench

Advocate : Mr. R.C. Jani For R.C. Jani & Associate, for the Petitioner No. 1; Mr. Bhargav Pandya, AGP, for the Respondent No. 1; Notices served by D.S, for the Respondent Nos. 1 and 2; Mr. Sudhir Nanavati, Sr. Advocate and Ms. Anuja S. Nanavati, Advocate, for the Re

Final Decision : Dismissed

Judgement

Mr. N.V. Anjaria, J.—Should the Doctrine of Precedent operate on a steady pitch or shaky pitch is the neat question of law ultimately falling for consideration in the captioned group of petitions.

1.1 All the aforesaid petitions are similar in terms of facts and involve identical issue. Therefore, they are heard together and are being decided by this common order.

2. The question arises to be considered by this court as the Division Bench in (Dr.) C. A. Shah v. Gujarat Cancer & Research Institute [1992 (2) GLH 38], the second respondent- the Gujarat Cancer and research Institute not to be "state" within the meaning of Article 12 of the Constitution, now sought to be seriously questioned by the petitioners seeking relief in the present batch of petitions.

2.1 By invoking jurisdiction under Article 226 of the Constitution and by asserting

rights under Articles 14 and 16 of the Constitution, the petitioners in the respective petitions prayed for setting aside of decision reflected in communication dated 21st June, 2016 of the Officiating Director of the third respondent-the Gujarat Cancer and research Institute. Thereby, it was directed to recover amount of Rs.03,500/- per month from the salary alleging that while fixing the pay grade, wrong fixation in high grade was done. It was alleged that it resulted into excess payment.

2.2 In response to Notice, the respondents have appeared. The first and second respondent represented through Assistant Government Pleader Mr.Bhargav Pandya have chosen not to file reply whereas the third respondent also filed affidavit-in-reply. The third respondent also filed application in the first captioned petition under Article 226(3) of the Constitution praying for vacation of the interim stay.

3. Learned senior counsel Mr.Sudhir Nanavati at the threshold submitted that in view of the decision of Division Bench of this court in (Dr.) C. A. Shah (supra), the third respondent is not a "state" nor an "instrumentality of state" within the meaning of Article 12 of the Constitution. It was submitted that therefore the writ petition cannot be maintained against the third respondent and no writ lies.

4. Heard learned advocate Mr.R.C. Jani for the petitioner and learned senior counsel for the second respondent in the main petition as well as in respect of civil application for vacating interim stay, for the respective parties, in view of the aforesaid aspect of maintainability of writ and invocation of writ jurisdiction against the second respondent institute.

4.1 Learned advocate Mr.R.C. Jani for the petitioners submitted that the proposition of law laid down in (Dr.) C. A. Shah (supra) namely that the Gujarat Cancer & Research Institute is not a "state" can not hold good. He contended on the basis of Supreme Court decision in Janet Jeyapaul v. SRM University (AIR 2016 SC 73) that the ratio of (Dr.) C. A. Shah (supra) does not hold good, and that the said decision is not liable to be followed but the Apex Court proposition would hold the field. According to his submission, the third respondent institute discharges a public function. The Supreme Court treating the function of imparting education to be public in nature held in Janet Jeyapaul (supra), the respondent institute which was a deemed university to be falling within the scope of Article 12. It was submitted that the test of public function was an important test not to be overlooked but must prevail and clinch the issue. Thereby, he submitted, (Dr.) C. A. Shah (supra) can not be said to be a good law. Learned advocate for the petitioners lastly submitted that in any case the decision in Janet Jayapaul (supra) would require that the decision in (Dr.) C.A. Shah (supra) about the second respondent not being "state" may be referred for Larger Bench's consideration by following appropriate mechanism.

4.2 Referring to the certain aspects relating to the third respondent institute, he attempted to submit from the material produced as annexures to the affidavit-in-

reply in response to the Civil application for vacation of stay, that as per resolution of the Health and Welfare Department dated 25th July, 2002, the part of the set up in the institute is sanctioned by the State Government (Page Nos. 60 and 61). He invited attention to the details about nursing staff therein. He relied on a kind of certificate given by the Deputy Secretary, Health and Family Welfare Department wherein the third respondent is described as a public funded research institute. It was next submitted that the department of the state government exercises also financial control, the control over the expenditure beyond particular limit of the third respondent. On the basis of those aspects urged, it was submitted that the third respondent has to be held to be falling within Article 12 of the Constitution.

5. Before the Division Bench in (Dr.) C. A. Shah (supra) the issue arose whether the Gujarat Cancer and Research Institute was a "state" in the context of the challenge as to whether termination of services of petitioner of that case working on part time basis as a Head of Gynecology Department in the institute. The issue whether the institute was a "state", was addressed at length by the Division Bench after examining various relevant tests as enumerated by the court, it was held as above.

5.1 In (Dr.) C. A. Shah (supra), it was on the basis of following consideration that the Division Bench of this Court ruled that Gujarat Cancer & Research Institute is not "state" under Article 12 of the Constitution.

"The conspectus of the aforesaid decisions and the facts narrated herein below leave no doubt that the respondent-Institute is not a "State" or "Other Authority" as envisaged by Article 12 of the Constitution of India:

(1) The Institute does not owe its existence to any statute. It is creation of contract between the Gujarat Cancer Society and the State Government, therefore it is not a statutory body.

(2) It is registered under the Societies Registration Act, 1860, and under the Bombay Public Trusts Act, 1950;

(3) Its funds consist of properties belonging to Gujarat Cancer Society, gifts, donations and also grants by the Government. The Institutions owned by the State are normally not funded by gifts and donations. It is an admitted fact that donations to the Cancer Society are substantial. The Institute is entitled to receive contributions of gifts from any indigenous source without Government sanction;

(4) It is administered by the Governing Board consisting of three members nominated by the Gujarat Cancer Society, three members nominated by the Government and by the Director appointed by the Governing Board;

(5) It does not enjoy any monopoly status. Any private individual, any society or any public trust can open or start such type of cancer institution at any moment without any hindrance;

(6) As per the rules framed by the Institute, the State Government has no power to give any general directions or to have supervision over the functioning of the Institute. Therefore, it is not subject to the directions which may be issued by the Government from time to time;

(7) The respondent Institute is not an agency or instrumentality of the Government for carrying out governmental functions.(para-17)

5.2 Noticeably, the aforesaid decision and the ratio laid down therein stands re-affirmed by more than one decisions of the Division Bench of this court decided on the anvil of time.

5.3 The Division Bench in Pravinchandra M. Patel v. Director of Gujarat Cancer and Research Institute being judgment dated 21st September, 2011 in Letters Patent Appeal No.446 of 2003 and allied Appeals relied on decision in (Dr.) C. A. Shah (supra) to follow and confirm the position of law that the third respondent institute is not a "state" within the meaning of Article 12 of the Constitution.

5.4 In another decision of learned single judge in Anita Vinodbhai Hukmani v. Gujarat Cancer and Research Institute being Special Civil Application No.8290 of 2012, the petitioner was dismissed on the ground that respondent institute is not a "state" or "other authority". It was taken in Letters Patent Appeal No. 1318 of 2012. The Division Bench by its order dated 22nd October, 2013 upheld the dismissal of the petition re-affirming the view of (Dr.) C. A. Shah (supra). Review Application being Misc. Civil Application (For Review) No.2880 of 2013 was preferred against the said order dated 22nd October, 2013. The Review application was also dismissed for the reasons stated in the order.

6. Yet another attempt was made by learned advocate for the petitioner by pressing into service Division Bench decision of this Court in Bhavsar Urmiben Kanaiyalal v. State of Gujarat [2015 (3) GLR 2204] from which he pointed out certain test to be applied first to judge whether a body is a "state" or not. In Bhavsar v. Urmiben (supra), the question was whether the Gujarat State Social Welfare Board was a "state" within the meaning of Article 12 of the Constitution. The court held that it was not a state within the meaning of Article 12 notwithstanding the fact that the function of the Mandal was to promote ayurvedic pharmacy in the State which recorded the court, can not be held to be a public function. As far as the decision in Bhasvar v. Urmiben (supra) is concerned, learned counsel for the third respondent would rely on test mentioned in para-9 thereof to submit that there has to be unusual degree of control of the state government in rendering by a body running public services, which element is entirely absent in the case of third respondent. It was then submitted that the third respondent is not an independent corporate body formed by the government performing government function therefore also Gujarat Cancer & Research Institute cannot be brought within the concept of a "state". He submitted that the control of the State in order to make a body "state" has to be deep and pervasive and the functioning discharged by it of

must be of a public character. Both these requirements must, submitted the learned counsel, be present together in order to bring the ropes of state for a body which otherwise a private body.

7. In (Dr.) C. A. Shah (supra), particularly in paragraph No.4 thereof, the Division Bench underlined the statement of law that "running of cancer hospital cannot be said to be discharging a statutory function of public duty". The Division Bench in its judgment dated 21st September, 2011 in Pravinchandra (supra) referring to and to rely on (Dr.) C. A. Shah (supra), while confirming the learned single judge's decision, quoted with approval the aforesaid proposition of law from (Dr.) C. A. Shah (supra). Thus, it is reiteratedly held that the functioning of the third respondent is not a statutory function of public nature or in the nature of public duty.

7.1 It is further relevant to note that a Division Bench decision in Anita Vinodbhai Hukmani (supra) reaffirming the law laid down in (Dr.) C. A. Shah (supra), was subjected to a Review Application. The Review that was asked for in respect of the very view, and in respect of the proposition that Gujarat Research and Cancer Institute was not a "state" within the meaning of Article 12. One of the grounds on which the review prayer was pressed was that the 6th Pay Commission recommendations were applied to the third respondent-institute. The Division Bench repelled the contention and did not entertain the review and maintained the law laid down in (Dr.) C. A. Shah (supra).

8. The law of precedent or the doctrine of stare decisis has invaluableity in justice delivery. The doctrine, observed the Supreme Court in *Union of India v. Raghubir Singh* [(1989) 2 SCC 754] has a merit of promoting a certainty and consistency in judicial decisions. In *State of Uttaranchal v. Balvant Singh Chauhan*, 2010(3) SCC 402, the Apex Court reiterated the need to adhere to precedence unless there are extraordinary circumstances requiring reconsideration. It was held that it is a boundant duty of the Court that issue once settled by an authoritative judgment should not be reopened unless there are extra-ordinary reasons for doing so. In *Manganese Ore (India) Limited v. CST* [(1976) 4 SCC 124], it was opined by the Apex Court that the doctrine of stare decisis is a very very valuable principle and precedent which cannot be departed from unless there are extraordinary or special reasons to do so. Judgments of this court "are decisional between litigants but declaratory for the nation" cautioned the Supreme Court in *Ganga Sugar Corporation v. State of U.P.* [(1980) 1 SCC 223], only to underline the importance of law of precedence. In *Waman Rao v. Union of India* [(1981) 2 SCC 362], the Supreme Court explained the jurisprudence of precedent and observing that it is sufficient for invoking the rule of stare decisis that a certain decision was arrived at on a question which arose or was argued, no matter on what reason the decision rests or what is the basis of the decision; for the purpose of applying the rule of stare decisis, it is unnecessary to enquire or determine as to what was the rationale of the earlier decision which is said to operate as stare decisis.

8.1 In *Krishena Kumar v. Union of India* [(1990) 4 SCC 207] the Supreme Court explained the meaning and importance of the doctrine in the words that "State decisis et non quieta movere. To adhere to precedent and not to unsettle things which are settled. But it applies to litigated facts and necessarily decided questions." Referring and relying on *Waman Rao (supra)*, in *Shanker Raju v. Union of India* [(2011) 2 SCC 132], the Supreme Court reiterated the concept:

"It is a settled principle of law that a judgment, which has held the field for a long time, should not be unsettled. The doctrine of stare decisis is expressed in the maxim stare decisis et non quieta movere, which means "to stand by decisions and not to disturb what is settled". Lord Coke aptly described this in his classic English version as "those things which have been so often adjudged ought to rest in peace". The underlying logic of this doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible."

9. There is no gainsaying that the law declared by Division Bench of this Court in (Dr.) C.A. Shah (*supra*) that Gujarat Cancer & Research Institute is not falling within the ambit of Article 12 and accordingly not "state" or "authority of state" to be amenable to the writ jurisdiction, has stood timetested. The law declared as back as in 1992 was considered by the subsequent Division Benches in *Pravinchandra (supra)* and *Anita Vinodbhai Hukmani (supra)* in the years 2003 and 2012 respectively. These decisions also confirm the view of (Dr.) C.A. Shah (*supra*) that the second respondent is not a "state" or "its instrumentality". In such reiteration, what was specifically held by (Dr.) C.A. Shah (*supra*) that the Institute does not discharge a public function or public duty came to be re-affirmed. In the Review Application against the decision in *Anita Vinodbhai Hukmani (supra)*, the law in (Dr.) C.A. Shah (*supra*) was focused and tested in the context of an additional aspect, namely that 5th Pay Commission recommendations were applied to the Institute. Even after considering that aspect, the Institute was held to be not the "state". This emphatically answers and finally repeals the submission of learned advocate for the petitioners herein who struggled to convince the Court to hold the second respondent to be within Article 12 on financial aspects, rightly in vain.

10. The principle of precedent is of cardinal virtue in the system of justice. It infuses reliability in the justice delivery system. It brings a certainty and solidity to the decisions and thus strengthens the administration of justice. The long standing and time-tested principles laid down by judicial decisions are not to be departed from. Even sundry and miscellaneous changed facts do not provide a ground to upset the settled law. This Court is bound by the law declared by the Division Bench. Hence for the reasons afore-stated, there was no justification in urging on behalf of the petitioners by their learned advocate that in view of decision of the Apex Court in *Janet Jayapaul (supra)*, a different view may be taken and the question may be referred for having a re-look.

11. All these petitions therefore fails to stand test of maintainability. The third respondent against whom prayer is made is not a "state" within the meaning of Article 12 of the Constitution; nor it is "instrumentality of state"; and writ does not lie against it. Without going into factual merits, these petitions are dismissed. Interim relief granted earlier is vacated. Notice stands discharged in each petition.