

(2005) 02 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 17016 of 2004

Rohit J. Gediya

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 25-02-2005

Acts Referred:

Gujarat Civil Services (General Conditions of Services) Rules, 2002 — Rule 27, 37, 49, 9(86)

Gujarat Civil Services (Pay) Rules, 2002 — Rule 23, 23(1)

Citation : (2005) 02 GUJ CK 0001

Hon'ble Judges : Akil Kureshi, J

Bench : Single Bench

Advocate : Paresh Upadhyay, for the Appellant; S.P. Hasurkar, AGP for Respondent No. 1-3, for the Respondent

Judgement

Akil Kureshi, J.—Rule. Learned AGP Mr. S.P. Hasurkar waives service of notice of rule. At the joint request of the learned counsel appearing for the parties, the petition is heard from time to time for final disposal.

2. In the present petition, the petitioner has challenged his transfer order dated 10.12.04 by which the petitioner is ordered to be transferred from the Government Dental College, Jamnagar to Medical College, Vadodara as Tutor in Dentistry.

3. Brief facts needed to appreciate the controversy involved can be noted at this stage.

3.1 The petitioner possesses the educational qualification of Bachelor's Degree in Dental Surgery. For the period between 1.11.96 to 6.4.97, the petitioner was appointed on ad-hoc basis as Tutor in the subject of Prosthetic Dentistry. Thereafter from 7.4.97, the petitioner was appointed as a Tutor in the subject of Operative Dentistry on ad-hoc basis.

3.2 In response to the advertisement issued by the Gujarat Public Service

Commission for the post of Tutor in Operative Dentistry, the petitioner applied and was selected and therefore the Government issued an order on 27.12.01 appointing the petitioner on the said post. Detailed posting order was given to the petitioner on 15.1.02. In the said order, it is indicated that the petitioner is appointed on the post of Tutor in Operative Dentistry Class II.

3.3 It is the case of the petitioner that in the Government Dental Colleges, there are Tutors engaged for several different subjects such as, Prosthetic Dentistry, Oral Dental Pathology, Paedodontia, Operative Dentistry, Oral Surgery, etc. It is the case of the petitioner that each such stream is distinct and separate cadre and that there is no possibility of intermixing of these cadres.

3.4 It is also the case of the petitioner that he is appointed on the post of Tutor in Operative Dentistry in Government Dental College and Hospital and that this appointment is only for the Government Dental Colleges and not for Government Medical Colleges.

3.5 It is also the case of the petitioner that the cadre of Tutor in Operative Dentistry in the Government Dental Colleges is a separate and distinct cadre and that a separate seniority list for the same is being maintained by the respondents. It is the case of the petitioner that from the said post of Tutor in Operative Dentistry, next promotion is to the post of Assistant Professor in Operative Dentistry. It is being pointed out that the Tutors in Operative Dentistry cannot seek or get promotion to the post of Assistant Professor in any other branch and conversely feeder cadre for the post of Assistant Professor in Operative Dentistry is the cadre of Tutor in Operative Dentistry and no other cadre.

3.6 In view of the above averments, the petitioner has stated in the petition that the petitioner is not averse to his transfer as long as the same is in his cadre and in Government Dental College. The petitioner states that he would be willing to be transferred at any place in the said cadre in Government Dental College, but that his transfer cannot be on any other post and outside the Government Dental Colleges. It is further contended that for promotion to the post of Assistant Professor in Operative Dentistry, experience in the relevant field only is to be counted and when the petitioner is being posted in the capacity of Tutor of Dentistry in the Government Medical College, the experience gained by the petitioner in the said capacity will not count for promotion to the next higher post.

3.6 The petitioner has produced on record certain seniority lists to demonstrate the fact that Tutors in different cadres are distinct and separate categories and cadres. Learned counsel for the petitioner has also made available recruitment rules for the post of Lecturer in dental subject at Government Dental Colleges and hospitals. It is not in dispute that the post of Lecturer in Dental subjects now is redesignated as Assistant Professor. The counsel for the petitioner has also referred to the recruitment rules for the post of Junior Lecturers in Dental subjects in Government Dental Colleges and hospital. It is also not in dispute

that the post of Junior Lectures is now redesignated as Tutors.

3.7 On the basis of the above recruitment rules, it is sought to be canvassed that the cadre of Tutor in Operative Dentistry is a distinct and separate cadre and that promotion of the petitioner also can only be in the cadre of Assistant Professor in Operative Dentistry.

4. The respondents have filed affidavit in reply and resisted the petition. In the affidavit in reply, it is stated that there are three posts in Vadodara Medical College in Dentistry Department vacant since long and it was, therefore, necessary to transfer the petitioner. It is contended that lien and seniority of the petitioner is retained in the Jamnagar Medical College. It is contended that the transfer order is in public interest. It is stated that the petitioner is appointed on the post of Tutor in Operative Dentistry. However, it is denied that he could not be directed to teach any other subject. It is contended that the petitioner is qualified to teach the subject of Dentistry in medical colleges.

5. On the basis of the above factual averments made by the parties, the counsel for the parties have made oral submissions at considerable length. Learned counsel for the petitioner submits that the petitioner is ready and willing to undertake transfer at any place as long as the same is in his cadre. He submits that the transfer cannot be outside the cadre so as to mar the chance of promotion and also to destroy the seniority of the petitioner. Even otherwise, it is contended that the petitioner is appointed to the post of Tutor in Operative Dentistry in Government Dental College and he cannot be posted outside of Government Dental Colleges or on any post other than Tutor in Operative Dentistry. From the material produced on record, it is being contended that there is no doubt about the fact that the Tutor in Operative Dentistry is a separate cadre and that the next promotion also is on the specific post of Assistant Professor in Operative Dentistry. He, therefore, submits that when the post of Tutor in Operative Dentistry is a distinct cadre, it is not possible to place the petitioner on any other post outside of his cadre.

6. Learned AGP Shri Hasurkar submits that it is the prerogative of the Government to place a person on a particular post as per the requirement of the administration. He submits that public interest required that the petitioner be sent to Vadodara where there were three vacancies on the post of Tutor in Dentistry in Government Medical College. He submits that as long as the transfer is not vitiated on the ground of malafides or is not shown to be opposed to any statutory rules or wholly impermissible, this Court would not interfere with the exercise of power of transfer by the competent authority. He submits that transfer is the privilege of the employer and the Court would not interfere with the exercise of such powers especially when it is being pointed out that the transfer is in public interest.

7. Having considered the rival submissions, it is necessary to decide whether the transfer of the petitioner is outside of his cadre or not and if so whether such

transfer would be permissible.

7.1 From the material on record, it can be seen that the petitioner was appointed to the post of Tutor in Operative Dentistry. There is no serious dispute about the fact that a separate seniority list for the post of Tutor in Operative Dentistry in Government Dental Colleges is maintained. There is no dispute about the fact that such separate seniority lists are maintained for the purpose of Tutors in Government Dental Colleges in different subjects. There is also no serious dispute about the fact that next promotion from the post of Tutor in Operative Dentistry is in the higher cadre of Assistant Professor in Operative Dentistry. There is no serious dispute about the fact that Tutor in Operative Dentistry cannot seek promotion to the post of Assistant Professor in any other branch. Similarly, Tutor in any other subject cannot seek promotion to the post of Assistant Professor in Operative Dentistry. There is no serious dispute raised about the fact that Government Dental Colleges maintain separate seniority list from that of Government Medical Colleges. The recruitment rules for the post of Lecturer in Dental subjects in the Government Dental Colleges (now redesignated as Assistant Professor) and for the post of Junior Lecturer in Dental subjects at Government Dental Colleges and Hospitals (now redesignated as Tutors) make things absolutely clear. Firstly these cadres are for the Government Dental Colleges and Hospitals and that promotion to the post of Assistant Professor in a particular branch is from the feeder cadre of tutors in the same branch. This aspect has been made clear where for promotion to the post of Assistant Professor what is required is the teaching experience of three years in the subject concerned. The subject concerned has to be understood as the relevant branch in which promotion is sought. Along with the recruitment rules, learned advocate for the petitioner has also produced an advertisement issued by the Gujarat Public Service Commission inviting the qualified candidates to apply for the post of Assistant Professor in Paedodontia which is one of the sub-branches of Dentistry. Thus it can be seen that the post of Assistant Professors also are sub-classified according to the specialty of the subject. An advertisement issued by the Gujarat Public Service Commission inviting application for the post of Tutor in Operative Dentistry, which is on record, makes it clear that a separate selection process is being undertaken for the post in question. The petitioner has also produced the seniority lists for the posts of Tutor in Dentistry in Government Dental Colleges and Hospitals. Likewise, separate seniority list is also produced for the post of Tutor in Dentistry in Government Medical Colleges. Comparing these two lists internally makes it further clear that the post of Tutor in Operative Dentistry in Government Dental Colleges and hospitals is distinct and different from the post of Tutor in Dentistry in Government Medical Colleges.

8. On the basis of the above overwhelming materials, it is abundantly clear that the cadre of Tutor in Operative Dentistry in Government Medical Colleges and Hospitals is distinct and separate cadre and cannot be confused in any manner with the cadre of Tutor in Dentistry in Government Medical Colleges. In fact, this aspect of the matter has not been seriously debated by the learned AGP also.

What is, however, sought to be contended is that the petitioner is being sent to Vadodara on vacant post where he is qualified to teach as a Tutor and when such requirement is demonstrated before the Court, transfer order becomes one in public interest and therefore the Court should not interfere with the same.

9. In view of the above conclusion factually that I have reached, namely, that the cadre of Tutor in Operative Dentistry in Government Dental Colleges and Hospitals is different and distinct from the cadre of Tutor in Dentistry in Government Medical Colleges and that therefore, the transfer of the petitioner is outside of his cadre, it is necessary for me to examine the legality of the transfer order on the basis of the contentions raised by both the sides.

10. As noted earlier, learned counsel for the petitioner has been vehemently urging that such a transfer order would be impermissible and therefore illegal. On the other hand, learned AGP strenuously argued that as long as the transfer order is not mala fide nor shown to be opposed to any statutory provisions of law, the same cannot be interfered with.

11. In support of his contentions, learned AGP Shri Hasurkar has placed reliance on the decision of the Hon'ble Supreme Court in the case of Union of India v. Janardhan Debanath 2004 SCC 631. In the said decision, however, the Hon'ble Supreme Court was considering a situation where for inefficiency and misbehaviour, a Government official was transferred to another post in the same cadre. Such a transfer order was upheld being permissible under FR 15 and 14-B and Rule 37 of the P & T Manual, Vol.IV though it was contended to be a penal transfer order without any inquiry. This decision, however, would not apply to the facts of the present case. One may, however, notice that in the said decision also, the Hon'ble Supreme Court left open the question whether the transfer would result into loss of seniority or promotional prospects.

12. The learned AGP has placed reliance on a decision of the Hon'ble Supreme Court in the case of National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan and others, in support of his contention that unless transfer order is shown to be the outcome of mala fide exercise of power or in violation of any statutory provision, the same cannot be a subject of judicial interference as a matter of routine. For the same purpose, he also placed reliance on the decision of the Hon'ble Supreme Court in the case of State of Rajasthan and Others Vs. Anand Prakash Solanki, and in the case of State Bank of India Vs. Anjan Sanyal and Others,

13. There cannot be any doubt about the fact that a transfer order passed by the Competent Authority in exercise of valid powers cannot be interfered with by the Court lightly. It goes without saying that unless transfer order is shown to be pursuant to mala fide exercise of powers or contrary to the recruitment rules, the Court would not be justified in interfering with the transfer orders since it is for the Government to decide which employee should be posted at which place and at which point of time in public interest. The question, however, that arises in the

present petition is whether it is permissible at all for the Government to transfer the petitioner from his previous place of posting as Tutor in Operative Dentistry in Government Dental Colleges and Hospital to the post of Tutor in Dentistry in Government Medical College. As noted earlier, these two posts being distinct and separate categories of posts, is it permissible for the Government to interchange the incumbent from one position to another.

14.1 In the case of *Om Prakash Rana Vs. Swarup Singh Tomar and Others*, the Hon''ble Supreme Court made the following observations.

"9. As is clear by now the fundamental basis of the contention that the power of transfer under the Education Act and its Regulations continues in force even after the enactment of the Services Commission Act rests on the assumption that the power of appointment does not include the power of transfer. In our opinion, the assumption is unsustainable. The scheme under the Education Act envisages the appointment of a Principal in relation to a specific College. The appointment is in relation to that College and to no other. Moreover, different Colleges may be owned by different bodies or organizations, so that each Principal serves a different employer. Therefore, on filling the office of a Principal to a College, a new contract of employment with a particular employer comes into existence. There is no State level service to which Principals are appointed. Had that been so, it would have been possible to say that when a Principal is transferred from one College to another no fresh appointment is involved. But when a Principal is appointed in respect of a particular College and is thereafter transferred as a Principal of another College it can hardly be doubted that a new appointment comes into existence. Although the process of transfer may be governed by considerations and move through a machinery, different from the considerations governing the appointment of a person ab initio as Principal, the nature of the transaction is the same, namely, that of appointment, and that is so whether the appointment be through direct recruitment, through promotion from the teaching staff of the same institution or by transfer from another institution."

14.2 In the case of *General Officer Commanding-in-Chief and Another Vs. Dr. Subhash Chandra Yadav and Another*, the Hon''ble Supreme Court observed that each of the Cantonment Boards is an autonomous body and the employees of one Cantonment Board cannot be transferred to another Cantonment Board inasmuch as the service under the Cantonment Board is not a centralised service or a service at the State level and therefore any such transfer of an employee will mean termination of services of the employee in the Cantonment Board from which he is transferred and a fresh appointment in the Board where he is so transferred. With the above observations, the Hon''ble Supreme Court was pleased to uphold the decision of the High Court which had struck down the rules in question and also the impugned order of transfer of the employee concerned.

14.3 In the decision of *Hydro-Electric Employees Union, U.P. v. Sudhir Kumar Sharma* AIR 1998 SC 2970, the Hon''ble Supreme Court observed that under the service jurisprudence if a unified cadre is formed by the employer consisting of

different categories of persons then there would be no bar for the employer to make transfer within the cadre and for such transfers a specific order of interchangeability is not required under law. Following observations of the Hon"ble Supreme Court in para 11 of the said decision can be noted:

"It may be stated here that under the service jurisprudence if a unified cadre is formed by the employer consisting of different categories of persons then there would be no bar for the employer to make transfers within the cadre and for such transfers a specific order of interchangeability is not required under law. As we have stated earlier that these three category of officers were constituted into one cadre by the employer - Board in the year 1963, the Board will be within its power to transfer them from one post to the other within the cadre itself. In the aforesaid premises, the impugned judgment of the Division Bench of Allahabad High Court dated 22.8.1995 is wholly unsustainable in law and we accordingly set aside the same and we affirm the judgment of the learned single Judge dated 29.9.94 and writ petitions filed by the Meter Readers stand dismissed."

14.4 In the case of V. Jagannadha Rao and Others Vs. State of A.P. and Others, the Hon"ble Supreme Court observed that transfer in relation to the service means a change of place of employment within an organization though definition may differ and in many cases, transfer is conceived in wider terms as a movement to any other place or branch of the organization, transfer essentially is to a similar post in the same cadre. Following observations made by the Hon"ble Supreme Court in para 10 may be noted:

"10. Transfer in relation to service reduced to simple terms means a change of place of employment within an organization, as stated in New Oxford English Dictionary, 1993 Edition, Vol.2, p.3367. It is an incidence of public service and generally does not require the consent of the employee. In most service rules, there are express provisions relating to transfer. For example, Fundamental Rule 15 provides:

"F.R. 15(a). The President may transfer a Government servant from one post to another, provided that except --

- (1) on account of inefficiency or mis-behaviour, or
- (2) on his written request.

a Government servant shall not be transferred substantively to, or, except in a case covered by Rule 49, appointed to officiate in a post carrying less pay than the pay of the permanent post on which he holds a lien, or would hold a lien had his lien not been suspended under Rule 14.

(b) Nothing contained in clause (a) of this Rule or in clause (13) of Rule 9 shall operate to prevent the re-transfer of a Government servant to the post on which he would hold a lien, had it not been suspended in accordance with the provisions of clause (a) of Rule 14."

Service rules sometimes define transfer. For example, supplementary Rule 2(18) of the Fundamental Rules governing Central Government servants defines transfer in the following terms:

"Rule 2(18) : Transfer means the movement of a Government servant from one headquarter station in which he is employed to another such station, either

(a) to take up the duties of a new post, or

(b) in consequence of his headquarter."

Though, definitions may differ and in many cases transfer is conceived in wider terms as a movement to any other place or branch of the organization, transfer essentially is to a similar post in the same cadre as observed by this Court in *B. Varadha Rao Vs. State of Karnataka and Another*. It is now well settled that a government servant is liable to be transferred to a similar post in the same cadre which is a normal feature and incidence of government service and no government servant can claim to remain in a particular place or in a particular post unless, of course, his appointment itself is to a specified non-transferable post. No transfer is made to a post higher than what a Government servant is holding. In other words, it is generally a lateral and not vertical movement within the employers organization."

15. At this stage one may also note some of the provisions of the Gujarat Civil Services (General Conditions of Service) Rules 2002. Rule 9(86) defines the term "transfer" which reads as follows:

"9 (86) "Transfer" means the movement of a Government employee from one headquarter station in which he is employed to another such station, either -

(a) to take up the duties of a new post; or

(b) in consequence of a change of his headquarters."

Rule 27 of the said Rules provides that a Government employee may be transferred from one place to another under certain circumstances. The said rule reads as follows:

"27. Transfer to a post carrying less pay is permissible: (1) A Government employee may be transferred from one post to another, provided that, except:-

(a) on account of inefficiency or misbehaviour, or

(b) on his written request, or

(c) in anticipation of the abolition of the post on which he holds a lien.

A Government employee shall not be transferred substantively to, or, except in case covered under the Gujarat Civil Services (Pay) Rules, 2002, appointed to officiate in a post carrying less pay than the pay of the permanent post on which he holds a lien, or would hold a lien, had his lien not been suspended under

rule-23.

2) Nothing contained in sub-rule (1) of this rule or in sub-rule (43) of rule 9 shall operate to prevent the re-transfer of a Government employee to the post on which he would hold a lien, had it not been suspended in accordance with the provision of sub-rule (1) of rule-23."

15.1 From the above rule position also, it can be seen that the concept of transfer under the Government service would mean taking up the duties of a new post or in consequence of a change of his headquarters and that a Government employee can be transferred from one place to another, but this cannot be construed to mean that the person can be transferred outside of his cadre.

16. From the above discussion, it can be seen that by virtue of the impugned order of transfer what is sought to be done is to transfer the petitioner from the present post of Tutor in Operative Dentistry in a Government Dental College and Hospital to the post of Tutor in Dentistry in Government Medical College which is wholly impermissible and would result into serious loss to the petitioner. Transfer of the petitioner outside his cadre would not be permissible. I, therefore, find that the respondent had no power to transfer the petitioner from the post of Tutor in Operative Dentistry in Government Dental College to the post of Tutor in Dentistry in Government Medical College. I, therefore, find that the impugned order of transfer has been passed without any authority and the same cannot be sustained.

17. The learned AGP has submitted that currently the petitioner is not qualified for being promoted to the post of Assistant Professor in Operative Dentistry. This, however, would not decide the legality of the transfer order as the question is not of qualification of the petitioner for promotion or his immediate chance or right for being considered for promotion. The question is one of permissibility of the transfer order and the powers of the Government to effect such a transfer. The learned AGP also contended that the appointment order of the petitioner specifically provides that he is appointed on a transferable post. In my view, such a clause in the appointment order would not permit the Government to transfer the petitioner outside of his cadre. I am also unable to agree with the submission of the learned AGP that the Gujarat Civil Services Rules do not prohibit such a transfer and that therefore the same is not illegal. As noted earlier, a combined reading of the relevant provisions of the said Rules with the well known and well established concept of transfer of a Government servant would not permit the Government to transfer the petitioner outside his cadre. For the same reason, I also cannot see how the decision of the Hon"ble Supreme Court in the case of National Hydroelectric Power Corpn. Ltd. v. Shri Bagwan (supra) would help the situation. In the said decision, the Hon"ble Supreme Court was concerned with the transfer of an employee at a new Project and his seniority was therefore not being affected by such a transfer.

18. In the result, as one of the rare cases I find that the transfer order having

been found wholly impermissible and illegal, this is a fit case to interfere with the same. The same is therefore quashed and set aside.

19. Counsel for the petitioner submits that the petitioner has remained without salary since 10th December 2004 and the petitioner has sufficient leave to his credit and would apply for leave to the authorities. It is, therefore, directed that the petitioner shall apply to the Commissioner of Health for leave due to his credit and if he applies for the leave, the same shall be granted as due.

20. With the above directions, the petition is allowed to the above extent. Rule is made absolute accordingly.

21. At the request of the learned AGP, this order is stayed for a period of three weeks.