

(2012) 04 GUJ CK 0036

In the Gujarat High Court

Case No : Special Civil Application No. 3414 of 2009 with Civil Application No. 2871 of 2011

Saurashtra Tantri Sangh and 2

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 23-04-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 162, 19, 19(1)(a), 226

Citation : AIR 2012 Guj 152 : (2012) 3 GLR 2504

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : Pratik Y. Jasani for Petitioners - 3, for the Appellant; Sangita Vishen AGP. for Respondent : 1 and Rule Served for Respondent : 1, for the Respondent

Judgement

S.R. Brahmbhatt, J.—The petitioners by way of this petition have approached this Court under Article 226 of the Constitution of India with the following prayers;

(A) Issue a writ of mandamus or any other appropriate writ, order or direction directing the respondent-State Government to issue classified advertisement to the members of Petitioner No. 1 Association and to provide compensation to the members of Petitioner No. 1 Association for the losses suffered by them for want of advertisements during the last three years.

(B) Pending admission hearing and final disposal of the present petition, this Hon"ble Court be pleased to direct the respondent-State Government to issue classified advertisement to the members of Petitioner No. 1 Association.

(C) This Hon"ble Court be pleased to award cost of the proceedings.

(D) This Hon"ble Court be pleased to grant any other and further reliefs as deemed fit and proper in the interest of justice.

During the course of submission, the challenge in this petition was confined qua the decision of the State in excluding the periodicals and weeklies from the

purview of eligibility for receiving the classified advertisement. Thus, at the inception, it is required to be unequivocally noted that this petition is now confined to one and the only challenge in respect of decision of the State in excluding the periodicals and weeklies from the purview of eligibility for receiving "classified advertisement" from the State and its instrumentalities and agencies.

2. The facts in brief leading to filing this petition, as could be culled out from the memo of petition, deserve to be narrated in order to appreciate the controversy in question.

3. The petitioner no.1 is a registered Association of editors of various newspapers published from Saurashtra region. Prior to the impugned decision, the advertisement namely, display advertisements as well as classified advertisements were released and published in the newspapers, periodicals and magazines at the rate determined by the State in this behalf. The State is forming and formulating norms for releasing advertisement essentially based upon the publications, circulation figures, and there exists absolutely no objection qua fixing those criterion for releasing advertisement to those publications having standard of meeting those criterion.

4. As per the decision of the State, impugned in this petition, i.e. prior to 03.10.2006 and even thereafter it is decided that the regular publication having circulation of 5,000 and more are eligible for receiving advertisement. Thereafter the said criterion was reduced to that of 2,500 only in case of daily, as per the policy of the State dated 28.03.2007. However, an exception is carved out qua the publications which are not daily publications from being eligible to receive the "classified advertisement". This exception where under the publications which are not daily publications have been excluded from being eligible to receive the classified advertisements, as such, the said exclusion was not existing prior to the date of decision i.e. 03.10.2006. But thereafter under the ground of following the Central Government's guideline issued by the Directorate of Advertising and Visual Publicity ("DAVP" for short), the State has adopted similar formula and excluded the periodicals, non daily newspapers and magazines from the purview of eligibility to receive "classified advertisements" and hence this petition.

5. This classification was sought to be justified on the basis of the difference in publication only.

6. Learned advocate for the petitioner has submitted as under:

(i) The government by its policy dated 03.10.2006, banned on giving classified advertisements to all weeklies and fortnightlies. There are no reason mentioned in the policy as to why "classified advertisements" have been discontinued to the weeklies, which were being given to weeklies since 1988. The said policy has been modified by State by issuing a subsequent resolution dated 23.08.2007, wherein the weeklies as well as dailies were given certain relaxation with respect to publication.

(ii) Learned advocate for the petitioners has submitted that the petitioners had earlier challenged the resolution dated 03.10.2006 by way of filing petition being S.C.A. No. 23296 of 2006, which came to be withdrawn by the Association with a liberty to file fresh in case they being discriminated and the concerned advocate of the government made a statement that the government has started scrutinizing the applications of the petitioners" Association for the purpose of empanelment. Since the government had decided not to grant classified advertisements to weeklies, since the members were not empaneled, the present petition has been preferred.

(iii) Learned advocate for the petitioners further submitted that in the reply page no. 66, para 6.12 to the petition, the government has given the reason for not giving classified advertisements to weeklies, wherein it has been stated that since the classified advertisements viz. recruitment, auction notice, tender notice are supposed to be published in time and in view of that, weeklies and fortnightlies do not serve the purpose. The said reason is completely arbitrary inasmuch as the government can certainly provide such "classified advertisements" which are not date specific. The government in its further affidavit has stated that the committee has decided to release "classified advertisements" on a particular day of week. If the government has decided to release classified ads on a particular day and the weeklies if releasing their edition on that particular day, then the "classified advertisements" can be given to weeklies.

(iv) Learned advocate for the petitioners, thereafter contended that the government publishes various classified advertisements in rural areas wherein the weeklies are more popular than dailies. The purpose of government would be better served, if the "classified advertisements" to be published for rural areas be given to weeklies and by providing "classified advertisements" to weeklies would also curtail expenditure of the government, as the price being paid to weeklies is much lesser in comparison to dailies.

(v) Learned advocate for the petitioners further contended that the government in its further affidavit mentioned about the guidelines of DAVP. The said guidelines does not in any way oust weeklies for providing classified advertisement and on perusal of Clause 3 r/w. Clause 11 does mention about providing advertisement to weeklies. Even otherwise the guidelines of DAVP are not binding on government since DAVP is the nodal agency of Government of India and it provides guidelines for providing/regulating advertisements of organizations of Central Government including public sector undertakings and autonomous bodies.

(vi) Learned advocate for the petitioners further contended that the State in its further affidavit has placed the minutes of some meetings wherein the ministers have decided to oust the weeklies as far as providing "classified advertisements" are concerned. The minutes of all the meetings would go to show that there is no subjective satisfaction behind taking such a weeklies so far as providing

"classified advertisements" are concerned, is in breach of Article 14, 19(1)(a) of the Constitution. In support of his submission he placed reliance upon *Siddhu Matriculation Hr. Secondary School Vs. K. Shyam Sunder and Others*, especially para nos.31 to 35 deals with change of policy with the change of government, paras 50 to 53 deals with legislative arbitrariness.

(viii) Learned advocate for the petitioners, therefore, submitted that in view of the aforesaid, the present petition may be allowed.

7. Learned AGP for the State has submitted as under:

(i) When a party seeks writ of mandamus, he has to demonstrate existence of a legal right in his favour as well as a corresponding legal duty cast on the State Government and/or any public authority. Clause 4 of the Government Resolution dated 03.10.2006 deals with release of Display Advertisements to all the newspapers irrespective of their categories viz. Dailies, weeklies, fortnightlies etc. while Clause 5.2 of the said Government Resolution provides that the classified advertisement will be given only to dailies and that empaneled weeklies and monthlies will stand removed from the empanelment. In view of the aforesaid, the prayer of the petitioner Sangh, seeking direction to the State Government to release classified advertisements to weeklies, is misplaced and without any basis inasmuch as no vested or legal much less any fundamental right flows from the Government Resolution dated 03.10.2006 in favour of the members of the petitioner Sangh to claim the classified advertisements.

(ii) Learned AGP further submitted that in the present case, the vowed object of the Government Resolution dated 03.10.2006 is to give display advertisement" to dailies, weeklies and monthlies, and such advertisements are being given to the members of the petitioner Sangh as well. However, no right flows from the aforesaid Resolution in favour of the petitioner Sangh for getting "classified advertisements" and the State Government is not under any legal obligation to issue such advertisements to the petitioner Sangh. The said policy of the State Government holds the field and petitioner Sangh has not challenged the legality and validity of the said policy as such. Thus, the prayer made by the petitioner Sangh in the present petition being against the very object and spirit of the said policy, deserves to be rejected.

(iii) Learned AGP, thereafter submitted that the Government Resolution dated 03.10.2006 followed by the amendment resolution dated 23.08.2007, is based on the opinion obtained from the Expert Committee constituted in this behalf. The said committee, after due deliberation and weighing the pros and cons of the matter and after taking into account several factors viz. the policy framed by the Directorate of Advertising and Visual Publicity ("DAVP" for short), the additional financial burden on the State exchequer, etc., has submitted its recommendations and the State Government, in turn, has, in exercise of its powers under Article 162 of the Constitution of India, framed a comprehensive Advertisement Policy vide Government Resolutions dated 03.10.2006 and

23.08.2007.

(iv) Learned AGP further submitted that specifying the criteria and prescribing the norms and parameters to be fulfilled by the agencies making themselves eligible for the purpose of getting the advertisement, fall within the domain of the executive power of the State Government. Under the circumstances, the decision as to the laying down of the norms and parameters is a policy matter of the State Government and when such a decision is taken remaining within the framework of the provisions of the Constitution, the same is not susceptible for judicial review and hence, as per the settled legal position, may not be interfered with. The State Government has a right to determine the mode and manner in which its advertisements should be released to the newspapers, and that, therefore, no newspaper establishment can demand as a matter of right, that the Government should give any or all of its advertisements to that newspaper establishment.

(v) Learned AGP, thereafter submitted that the said policy decision of the State Government is based on sound and justifiable reasons. Merely because the petitioner does not like the said policy decision and merely because the same is not fair and wise as per its perception, protection under Article 14 of the Constitution cannot be said to be available to the petitioner and that the said decision cannot be alleged to be illegal and arbitrary. Though, freedom of press is a part of freedom of speech and expression covered under Article 19(1)(a) of the Constitution, the same freedom of press should not be allowed to be misused in such a manner and to such an extent that any newspaper establishment under the guise of its fundamental right covered under Article 19(1)(a) of the Constitution in relation to freedom of speech and expression, starts misusing the same for varied purposes.

(vi) Learned AGP further submitted that pertinently the Government advertisements are not intended to provide financial assistance to the newspapers and thus, the petitioner Sangh cannot contend that under the guise of new advertisement policy, the respondent State cannot stop giving advertisements to the members of the petitioner Sangh, affecting the livelihood of about 800 families of its members. It may be noted that to receive an advertisement is not a right in law much less a fundamental right and, therefore, it is not open to the petitioner Sangh to seek enforcement of fundamental right under Articles 14 and 19 of the Constitution of India.

(vii) In support of her submission, learned AGP relied upon the judgment of Apex Court in case of M/s. Ugar Sugar Works Ltd. Vs. Delhi Administration and Others, , while dealing with the challenge to the notification issued relating to the registration of brands and eligibility of brands of IMFL for its sale in the National Capital Territory of Delhi, observed as under:

The challenge, thus in effect is to the executive policy regulating trade in liquor in Delhi. It is well settled that the Courts, in exercise of their power of judicial

review, do not ordinarily interfere with the policy decisions of the executive unless that policy can be faulted on grounds of mala-fide, unreasonableness, arbitrariness or unfairness, etc. Indeed, arbitrariness, irrationality, perversity and mala-fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, the mere fact that it would hurt business interest of a party, does not justify invalidating the policy. In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference to judgment of the executive. The Courts are not expected to express their opinion as to whether at a particular point of time or in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State.

(viii) Learned AGP further submitted that it is nobody's case that despite the newspapers viz. dailies and weeklies are similarly situated, they are discriminated in releasing the advertisements. It is well-settled position of law that burden to prove unequal treatment lies on the person complaining of such treatment. In the present case, the petitioner Sangh has not been able to discharge the burden in support of its members being subjected to any discrimination inasmuch as the members of the petitioner Sangh publishing dailies on one hand and the members publishing weeklies on the other stand totally on a different footing and thus, they cannot be said to be belonging to a similarly situated class.

(ix) Learned AGP, thereafter contended that the concept of equality before law does not involve the idea of absolute equality amongst all, and all that Article 14 guarantees is similarity of treatment and not identical treatment. The Hon'ble Apex Court has time and again held that the State Government has power to make classification on the basis of rational distinction relevant to the particular subject to be dealt with. In the present case, the State Government has effected the classification amongst dailies and weeklies for the purpose of release of classified advertisements. The classified advertisement include tender advertisements, recruitment advertisements etc. which are time-specified and thus, in case of the weeklies being published once in a week, the time schedule could not be adhered to and the whole object of publishing classified advertisements in a weeklies got frustrated as the news about the recruitment, tender, etc. were not reaching the public at large in time and thus, no fruitful purpose was being served by classified advertisements to weeklies. On the other hand, the purpose of timely bringing the matter to the knowledge of the concerned public at large was being effectively served by releasing the advertisements to the dailies and thus, it would not be in the larger public interest to incur additional burden on the public exchequer by paying to the weeklies by releasing the very classified advertisements to them as well.

(x) Learned AGP further submitted that if one reads the provisions contained the Government Resolution dated 03.10.2006 and the guidelines with respect to advertisement policy issued by DAVP in the year 2207, in juxtaposition, it leads

to only one conclusion that the advertisements, which are time specific should be solely allowed to the dailies and that the weeklies should not be given the same, as the object behind issuing classified advertisements to the weeklies is not being served in the right earnest.

(xi) Learned AGP further submitted that in the present case, the petitioner Sangh has not challenged the legality and validity of the policy framed by the Stage Government its Information & Broadcasting Department, and thus, this Court in exercise of its powers under Article 226 of the Constitution of India, may not like to judicially review the said policy. Even otherwise, the Apex Court has, time and again, held that the lone fact that the policy may hurt the business interest of a party would not justify interference by the court with such policy. In support of her submission she relied upon the following judgments viz. Transport and Dock Workers Union and Others Vs. Mumbai Port Trust and Another, especially paragraph nos. 20, 21 22, 24 and 43, 44 and Bajaj Hindustan Ltd. Vs. Sir Shadi Lal Enterprises Ltd. and Another, , especially in para nos.40 and 41.

(xii) Learned AGP submits that in view of the aforesaid submissions petitioner Sangh does not deserve to be granted any of the reliefs and petition deserves to be dismissed.

8. The Court is of the view that before advertizing to the rival submissions few indisputable aspects are required to be mentioned herein below so as to appreciate the real purport and matrix of the controversy namely;

(i) The issue of releasing of advertisement to the newspapers, magazines and periodicals is subject matter exclusively and purely falling within the domain of State alone.

(ii) Prior to the advent of the policy the circulation was the only criterion for giving advertisement to newspapers, magazines and periodicals.

(iii) There existed no separate classification for denying advertisement to periodicals and non daily magazines and weeklies.

(iv) The committee which deliberated upon the issue has not pointed out anything on the record indicating that the time constrain which is sought to be presented, as one of the justification is the reason for excluding the non daily, magazines, periodicals and newspapers from the purview of eligibility of receiving "classified advertisement".

(v) The affidavit-in reply, though contains this aspect but from the deliberation of committee or from the guidelines issued from DAVP this factum is not being ascertained or articulated at all.

(vi) The classification sought to be made prima facie appears to be reasonable so far as discerning and deciding as to whether the advertisement is required to be issued to a publication or not but the classification for indiscriminately excluding of the periodicals, magazines and newspapers and non daily newspapers from

the eligibility criterion of receiving classified does not seem to be based upon intelligible criterion or motive sought to be achieved on account of such classification. The classification, as such cannot be said to be illogical and/or unreasonable, but question arises as to whether the periodical or a weekly or non daily newspapers is having larger circulation than daily newspapers, then also, can it be denied the benefit of getting classified advertisement. The answer would be unequivocally "no", as it would amount to debarring the said magazine and/or non daily from getting benefit of the advertisement.

(vii) In these days of advertisement and the rights of advertisement one cannot deny the importance of receiving advertisement, as the existence of newspaper and/or magazine is heavily dependant upon the advertisement and when the State releases the advertisement, it cannot be permitted to make unintelligible discrimination of excluding periodicals and/or non daily newspapers.

(viii) This would not take away discretion in the releasing authority to withhold the advertisement from being released or given to a periodical and/or magazine, if on account of its publication time or date of publication. It is likely to be futality or not likely to serve the purpose of publication. In other words, in case, where the publication is having sufficient time limit, then the advertisement cannot be denied to such periodicals only on ground of it being not a daily newspaper and/or periodicals.

9. In view of the aforesaid background, this Court is not impressed by the submission of learned Assistant Government Pleader for the State that the decision of excluding periodicals from eligibility for reserving classified advertisements cannot be interfered with on the ground of it being policy decision. The policy decision cannot be permitted to interfered with the fundamental rights. In case if the policy decision has an effect of abridging and or affecting the fundamental rights of the citizen, then, the said policy decision cannot escape the judicial scrutiny and it is being found irrational or unconstitutional or discriminatory or violative of article 14, the same is to be struck down. The principle of administrative law and the constitutional concept of equality enshrined in the constitution would rather makes it incumbent upon the Courts to see to it that in framing of the policy least there is any inadvertence, infringement upon right to be treated as equally reasonable with reasonable approach and equality. Any action though ostensibly appears to be an action within the four corners of reasonableness may loose its character of reasonableness when it is being applied or implemented. Similarly any action which may appear to be not truly conforming to the aspect of reasonableness and/or even answering the broad classification criterion may turn out to be most reasonable, when it is being implemented. Therefore, the ostensibly appearing reasonable classification when it is being implemented may turn out to be most unreasonable classification and that has to be taken into consideration by the Court for analyzing or assessing the policy when it is assailed on the ground of depriving the petitioners of their rights to be treated fairly and reasonably.

10. The Court is not much impressed by the submission canvassed on behalf of the State with regard to the policy of the State to give advertisement not for benefiting the periodicals but for larger circulation and information only. This is correct but any action of the State which has resultant effect upon infringement of any fundamental right, then that action needs to be in conformity with the principle laid down in the Constitution and therefore, in my view, when the periodicals have circulation which is equivalent to daily, then only on account of there being not daily they cannot be denied the benefit of receiving advertisement. But this in itself would not entitle the periodical to receive the advertisement in case if it is found that it is not worthwhile to issue advertisement on account of time constraint. Unfortunately, the State has not evolved any methodology for working out this principle but that is not the realm of the Court nor it would impede the Court in holding that the action of the State in excluding the periodicals and enbloc from the eligibility criterion irrespective of their figure of circulation cannot be justified and therefore, this action is required to be quashed and set aside and it is hereby quashed and set aside. It would be open to the State to come out with appropriate formula bearing the aforesaid principle in mind.

11. The decision of excluding the periodicals from the eligibility criterion of reserving classified advertisements irrespective of their circulation amounts to discriminatory treatment to them and, therefore, on that basis such an exclusion cannot be said to be answering the real test of reasonableness or intelligible classification permitted for achieving the object for making the classification. In the instant case the broad classification of circulation can not further be classified in respect of their nature of publication, namely daily and weekly or periodicals. The object of giving advertisement is for informing people at large. Therefore so far as the criterion for circulation is concerned, it is most appropriate and it cannot be found to be incorrect in any manner. But by the impugned action the State has without obvious reason excluded the periodicals and weeklies from the benefit of getting classified advertisements despite their circulation being equivalent or more than the dailies in a given case. This discrimination in respect of the periodicals, weeklies and fortnightly magazines and publications cannot be permitted in light of the provision of Article 14 of the Constitution of India. The spacious submission with regard to intention of the State for releasing advertisement is to inform the public and not for the benefit of the editors of periodicals and newspapers, is no answer to the nagging question if indiscrimination as the periodicals, weeklies and fortnightlies if have larger circulation than the dailies in the area, then, their exclusion from being eligible to receive the advertisement namely classified advertisement would hit by provision of Article 14 being discriminatory and hence not permissible under the provision of law.

12. In light of the aforesaid discussions, this Court is of the considered view that the action of the State in denying benefit of receiving advertisement, namely classified advertisement to periodicals like weeklies, fortnightlies despite their

being having circulation of more than the dailies in the area is required to be quashed and set aside being discriminatory and violative of Article 14 of the Constitution of India.

13. In the result the petition is required to be allowed so far as the claim of the petitioners qua they are entitled to receive classified advertisements if they fulfill the criterion of circulation as envisaged by the State authorities. The State is at liberty to evolve appropriate policy bearing in mind the aforesaid principle and ensuring that no discrimination is perpetrated to the periodicals and fortnightly weeklies/ publications if they are fulfilling the criterion of circulation.

14. With the aforesaid observations, the petition is disposed of. Rule made absolute. No costs. In view of the order passed in main matter i.e. S.C.A. No. 3414 of 2009, the Civil Application i.e. C.A. No. 2871 of 2011 is not survive and disposed of accordingly.