

(1979) 12 GUJ CK 0014
In the Gujarat High Court

Vinodkumar Hematram Dave

APPELLANT

Vs

Secondary Education Tribunal and Others

RESPONDENT

Date of Decision : 17-12-1979

Acts Referred:

Constitution of India, 1950 — Article 227

Gujarat Secondary Education Act, 1972 — Section 38, 38(1)

Citation : (1980) 21 GLR 573

Hon'ble Judges : M.P. Thakkar, J

Bench : Single Bench

Judgement

M.P. Thakkar, J.—Offer and acceptance notwithstanding, a letter of firm appointment notwithstanding, a contract of service does not come into existence if it is cancelled before the appointee takes charge-such is the proposition canvassed by the Management of a Secondary School. The teacher contends that a contract of service having come into existence the Management cannot wriggle out from the purview of the Tribunal created for the avowed object of redressing such grievances by committing a breach of the contract before the stipulated date for performance. The Tribunal has agreed with the Management and shut its doors against the teacher at the threshold. The controversy has now been brought before this Court by the teacher concerned.

2. The Managing Trustee of a Trust running a High School, respondent No. 2 herein, appointed the petitioner as Headmaster of a school run by the institution by an order of appointment dated February 21, 1979 as per Annexure "A". It was mentioned in the order of appointment that the appointment would be effective from April 2, 1979. It appears that the petitioner forwarded his letter of acceptance as required by Annexure "A" within the specified time. The contract of service thus came into existence though the appointment was to become operative after a lapse of about 1 months with effect from April 2, 1979. Some 10 days before the date on which the appointment was to become effective, respondent No. 2 addressed a communication as per Annexure "C" dated March 21, 1979 informing the petitioner that his appointment had been cancelled for

certain reasons. The petitioner invoked the jurisdiction of the Tribunal constituted under the Gujarat Secondary Education Act, 1972 (Act) for the resolution of disputes or differences between the management of a registered private secondary school and any person in service of such school as head-master, teacher etc. The Tribunal came to the conclusion that it had no jurisdiction in the matter and it was not competent to entertain the dispute between the parties inasmuch as in the opinion of the Tribunal the petitioner could not be said to be a person in the service of the institution. The view taken was that since the appointment was cancelled before the petitioner took charge of his office, it cannot be said that the petitioner had ever been in the service of the institution. In the opinion of the Tribunal it cannot be said that he had become an employee of the institution pursuant to the order of appointment, the appointment having been cancelled before he could assume charge of his office. The Headmaster concerned has approached this Court by way of the present petition under Article 227 of the Constitution of India and has challenged the legality and validity of the impugned order at Annexure "F" dated July 23, 1979 rejecting his application on the ground that it was not maintainable.

3. The controversy centres round the question whether the dispute falls within the ambit of Section 38(1) of the Act which deserves to be quoted for a proper understanding of the point at issue:

38. (1) Whether there is any dispute or difference between the manager of a registered private secondary school and any person in service of such school as headmaster, a teacher or a member of non-teaching staff, which is connected with the conditions of service of such person, the manager or, as the case may be, the person may make an application to the Tribunal for the decision of the dispute.

It may be realised that the dispute arises in the context of cancellation of the appointment of the petitioner to the post of Headmaster. The cancellation of the appointment, according to the petitioner, offends Section 36 of the Act which provides that no person who is appointed as a headmaster, a teacher, or a member of non-teaching staff of a registered private secondary school, shall be dismissed or removed or reduced in rank or his service terminated otherwise by the manager until Clauses (a) & (b) of Section 36(1) are complied with. A person who has been appointed as a head-master or a teacher within the meaning of Section 36 alone can raise a dispute envisaged by Section 38. It is an admitted position that respondent No. 2 had made an offer to appoint the petitioner as a Headmaster and the petitioner had accepted the said offer. A contract of service had, therefore, come into existence. That the petitioner was appointed as a Headmaster cannot therefore be disputed. It is, however, contended that whereas his appointment as a Headmaster was to become operative or come into effect at a future date viz. on April 2, 1979 and whereas before the petitioner could assume charge of the office, his appointment was cancelled as per Annexure "C" dated March 24, 1979 the petitioner had never become an

employee. The view taken by the Tribunal is that since the appointment was cancelled before the petitioner assumed charge of the office, it cannot be said that the petitioner was a person who was in the service of the school. This view has been taken in the context of the provision contained in Section 38(1) which provides that where there is a dispute or difference between the manager of a registered private secondary school and any person in service of the school as head-master, teacher or a member of non-teaching staff, which is connected with the conditions of service of such person, an application to the Tribunal for the decision of the dispute can be made. Stress has been laid on the expression "any person in service of such school". It is in the context of this expression that the Tribunal has taken the view that the petitioner was not a person in the service of the school inasmuch as the relationship of master and servant had never come into existence, his appointment having been cancelled before it became effective. A very interesting question has, thus, arisen in the backdrop of the aforesaid facts in regard to the interpretation of Section 38 and the maintainability of the application which has been made by the petitioner on the premise that there is in existence a dispute or difference between him on one hand and the Manager of the School on the other which requires to be resolved by the Tribunal having regard to the fact that he fulfils the description of "any person in service of such school".

4. The first question which requires to be resolved is as to what is the jurisprudential relationship between an institution which makes the appointment of a teacher to take effect on a future date on the one hand, and such a teacher on the other, in case the appointment is cancelled before the day for taking the charge dawns. That a contract of service would come into existence as soon as an offer is made and accepted cannot be disputed. On first principles as soon as an offer is made and accepted, a contract comes into existence. It may be that the contract contemplates performance by a party at a future date. So what? Surely it does not mean that the contract has not at all come into existence simply because it contemplates performance at a future date. There may be a contract for constructing a building which contemplates the commencement of the building work months after the execution of the contract. If the offer is accepted, then a completed contract comes into existence regardless of the fact that the construction work is to commence later. If breach is committed of such a contract before the commencement of the contract, it cannot be gainsaid that damages can be claimed against the party who commits breach. The position is so obvious that it is not possible to argue to the contrary on the basis of logic, reason or legal principle. By parity of reasoning the conclusion is obvious that a contract of service came into existence as soon as the offer was made by the institution and was accepted by the teacher irrespective of the fact that the time for performance on the part of the teacher was postponed till the specified date. It is equally obvious that if a breach is committed by one of the parties, the injured party can claim redress. For the moment we are not concerned with the question as to what form the redress should take. In the present case the

dispute is between an institution imparting secondary education governed by the Act on the one hand, and a teacher on the other, and it is in that context that the teacher claims redress by invoking Section 38. For the moment we are not concerned even with the question as to whether relief as claimed by him should or should not be granted by the Tribunal. We are seized of the sole question whether the Tribunal has jurisdiction to resolve the dispute. On first principles it is clear that a contract for service had come into existence. It is also manifest that a breach of the contract was committed by respondent No. 2 institution. Merely because the breach was committed "before" or prior to specified date for performance on the part of the teacher, it does not cease to be a breach. Nor can it be said that a contract of service had never come into existence. If one were to scan the horizons for precedent in a matter which is clear on principle, one can turn to *Hochster v. De La Tour*, All England Law Reports, Reprint, 1843-1860 Volume, page 12. That was also a case concerning a contract of service. The defendant had engaged the plaintiff to render certain services beginning on June 1, 1852. On May 11, some 20 days before the specified date the plaintiff was informed by the employer that he would not employ him as agreed and refused him compensation. It was in these circumstances that the plaintiff commenced the action giving rise to the aforesaid decision. More than 125 years back Court of Queen's Bench speaking through Campbell, C.J. has taken the view that where a party to an executory agreement before the time fixed for performance, breaks the agreement either by disabling himself from fulfilling it, or by renouncing it, an action will lie at the instance of the aggrieved party even before the time specified for the fulfilment of the agreement. The said decision is a clear authority for the proposition that (1) a contract of service can come into existence between parties even in respect of a contract which contemplates performance at a future date and (2) that in case of breach the aggrieved party can seek appropriate redress from the competent Court even before the specified date for performance. What is of importance is to realise that a contract of service does come into existence and that redress in respect of breach committed by a party to the contract can be claimed by the aggrieved party notwithstanding the fact that the breach was committed prior to the date on which the performance was to be commenced. The statement of law in Anson's Law of Contract, Twenty-third Edition, at page 486 on the basis of this decision is to the effect that "a contract is a contract from the time it is made, and not from the time that performance is due." The subject has been dealt with in Halsbury's Laws of England, Fourth Edition, Volume 16, in Paragraph 585 at page 376 in the following manner:

Employee's right to damages. Where the employer commits a breach of the contract of employment the employee is entitled to recover damages. If the contract is for service to be rendered at a future date, there is a breach if, before the time fixed for the commencement of the service, the employer informs the employee that he will not be required, or otherwise intimates his intention not to be bound by the contract. In this case the employee is entitled to treat the

breach as final and to institute proceedings at once; he need not wait before doing so until the time fixed for performance arrives. If, however, he thinks fit he may elect to treat the contract as subsisting, and thereby give the employer the opportunity of changing his mind.

The foot-note shows that the aforesaid statement of law is inter alia based on *Hochster v. De La Tour* (supra). It may be mentioned that though Paragraph 585 envisages a claim for damages, we are not concerned with that part of the statement of law inasmuch as so far as the relationship between an institution imparting secondary education and a teacher is concerned, the contract of service can be specifically enforced having regard to the provisions of the Act and the law developed in the context of the said Act. The aforesaid passage has been extracted merely in order to reinforce the proposition that a contract of service does come into existence as soon as the acceptance of the offer is communicated regardless of the fact that the performance of the contract is to commence at a future date. The said passage also buttresses the proposition that in such an event the aggrieved party can seek redress from the appropriate forum.

5. In the treatise on "The Contract of Employment" by M.R. Freedland, 1976 Edition, at page 20 the jurisprudential dimension has been highlighted viz. that a contract of service has a two-tiered structure-(1) at the level where there is an exchange of work and the remuneration and (2) at the level where there is an exchange of mutual obligations for future performance to employ and be employed. One can do no better than quote the relevant passage:

The structural issue, then, is how far the contract protects each party's interest in the due occurrence of the exchange or series of exchanges which form the basis of the contract. In the case of the contract of employment, the exchange is of service against remuneration, but there is more to the contract than this simple exchange, because the employee undertakes an obligation to make himself available to render service, while the employer undertakes to enable the employee to earn his remuneration. Each of these promises, however, is conditional upon the readiness and willingness of the other to perform his counter-promise. Hence the contract has a, two-tiered structure. At the first level there is an exchange of work and remuneration. At the second level there is an exchange of mutual obligations for future performance. The second level the promises to employ and be employed -provides the arrangement with its stability and with its continuity as a contract. The promises to employ and to be employed may be of short duration, or may be terminable at short notice; but they still form an integral and most important part of the structure of the contract. They are the mutual undertakings to maintain the employment relationship in being which are inherent in any contract of employment properly so called.

The formulation of the two-tiered structure clarifies certain crucial aspects of the law of the contract of employment. For instance, one set of rules has developed to regulate the employer's obligation to pay remuneration, and another has

grown up concerning the employer's obligation to employ. Thus, the distinction between entire and divisible obligations relates to the former whilst the law concerning breach of contract and dismissal arises in the latter context.

What emerges from this discussion is that a contract of service at the level of promise to employ and to be employed can come into existence as soon as the offer is made by the employer and accepted by the teacher. A breach may take place at the second level, level of performance, "which contemplates exchange of remuneration for services. And that is precisely what has transpired in the present case. Now jurisdiction is conferred on the Tribunal constituted under the Act to resolve disputes or differences between the management and the person in service of such school which is connected with the conditions of service of such person. The expression "in service of such school" can but yield to one reasonable construction. It can only be interpreted in such a manner as to apply to any such person who is under a contract of service with such school. And if this interpretation is accepted, it cannot be said that the Tribunal had no jurisdiction to entertain the application made by the petitioner. The expression "a person in service" has always been interpreted in such a manner as to apply to a person who was under a contract of service. If the expression were to be interpreted literally and in a narrow manner, a person in service would mean only one who is in "actual" service at the point of time of making an application. In such an event a dismissed teacher can never invoke Section 38 with the result that the scheme evolved by the Act for the benign purpose of protecting teachers from exploitation would pathetically crumble to the ground. Fortunately, however the Courts have, preferred the meaningful Twentieth Century approach to the obscurantist Eighteenth Century approach. Section 38 has been interpreted in such a manner as to confer jurisdiction on the Tribunal to resolve disputes between a school and a teacher irrespective of whether the teacher was actually employed on the date of the making of the application or whether he had been dismissed. The jurisdiction of the Tribunal depends on the circumstance whether the teacher was at one point of time under a contract of service and whether the dispute has a nexus with the relationship arising from the aforesaid contract of service. *Satsangi Shishuvihar Kelawani Trust v. P.N. Patel* 18 G.L.R. 615, is an authority for the proposition that it is only when a dispute is raised after termination that the wide jurisdiction of the Tribunal is attracted to decide whether the termination of service is wrong, unlawful or not justified. The law is now, therefore, well settled that a person who was once under a contract of service will fall within the description of "any person in service" even if he is not in actual service on the date of making recourse to the Tribunal. It is, therefore, irrelevant to pose the question whether or not the teacher concerned is in actual service at the point of time of invoking the jurisdiction of the Tribunal. The relevant question to ask is whether the teacher concerned was under a contract of service and whether the complaint regarding breach or wrongful termination arose in the context of that contract. If this test is applied, and no other test can conceivably be applied, the answer is obvious. The Tribunal has the jurisdiction.

The fact that the contract of service was at a stage when the date of performance specified in the contract had not arrived, and a breach was committed prior to the specified date, will make no difference. Shri Girish Patel who was good enough to appear *amicus curiae* has sought support from *Dharamshi v. Bai Sakar* 18 G.L.R. 888, wherein the question was posed in the context of Hindu Marriage Act. In Section 25 reference was made to the expression "husband". The view was taken that the expression "husband" and "wife" were used as descriptive of the parties and that the same had not been employed in order to convey that the party in whose favour the order was made, must be one who has a subsisting relationship as husband or wife at the relevant date. By analogy the view can be reasonably taken that the expression "any person in service" is not referable merely to a person actually in service at that point of time but also to a person who had entered into a contract of service giving rise to the dispute. Reliance is also placed on *The Cawnpore Tannery Ltd., Kanpur Vs. S. Guha and Others*, . The discussion arose in the context of Section 2(k) and Section 25(h) of the Industrial Disputes Act whether the expression "workmen" would not include dismissed, discharged or retrenched workman. The Supreme Court has declared that he would be covered by the expression. No doubt that decision was rendered in the context of the definition as it was amended in 1956. But even prior to the amendment the expression carried the same meaning so as to include a dismissed, discharged, or a retrenched employee, as has been observed in para 3 of the judgment. Much earlier, the Supreme Court had an occasion to deal with a similar problem in *Central Provinces Transport Services Ltd. Vs. Raghunath Gopal Patwardhan*, . The discussion in paragraph (6) shows that the provision concerned has been so interpreted as to include one who had been dismissed. And it has been observed that the respondent cannot be denied relief only by reason of the fact that he was not in employment on the date of the application. The law laid down in AIR 1949 111 (Federal Court) has been reaffirmed So also in *Bennett Coleman and Co. (P) Ltd. Vs. Punya Priya Das Gupta*, , J.M. Shelat J. speaking for the Court has taken the view that the expression "who is employed" in Section 2 (f) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 is not restricted to a newspaper employee who is "presently" employed in a newspaper establishment but it also relates to an ex-employee whose employment has come to an end. The proposition is now firmly entrenched that a workman can make recourse to the appropriate forum for redress notwithstanding the fact that on the date of invoking the jurisdiction he is not in actual employment by reason of the impugned order of termination of service. Since the position is incapable of being disputed, the petitioner must straightaway succeed for it has been established a that contract of service had come into existence and that a breach thereof was committed by respondent No. 2 institution. That the breach was committed prior to the agreed date for commencement of the performance on the part of the teacher is altogether immaterial. The right to invoke the jurisdiction u/s 38 of the Act can be exercised by all teachers whose services have been terminated regardless of whether the

termination took place "before" or "after" taking charge under the contract of service because the said right springs from the "contract" of service wherein it has its roots and is not dependent on the event of "taking charge".

6. An argument which found favour with the learned Tribunal has next been reiterated in the context of the expression "appointed" employed in Section 36 of the Act. The learned Tribunal has taken the view that since the petitioner never took charge it cannot be said that he was appointed as a teacher at any time. The fallacy in the argument is visible even on the surface. What is the warrant for the proposition that an appointment is any the less an appointment or no appointment in the eyes of law if charge is not taken pursuant to the order of appointment? The expression "appointment as a teacher" without any stretching or straining means and refers to a person (1) who was selected for the post of teacher and (2) with whom a contract of service came into existence. The expression squarely applies to such a person regardless of whether the contract was terminated "before" or "after" taking charge. The Supreme Court has in terms held that the expression "appointed" can be aptly applied to signify the selection of the personnel to exercise some powers (see *The State of Assam Vs. A.N. Kidwai, Commissioner of Hills Division and Appeals, Shillong*, .

7. Almost in desperation it was lastly contended on behalf of respondent No. 2 institution that this Court should not interfere in exercise of its jurisdiction under Article 227 of the Constitution of India having regard to the fact that whether the relation of master and servant exists is a question of fact as has been stated in paragraph 191 of Halsbury's Laws of England, Second Edition, Volume 22 at page 112. In the present case the Tribunal has declined to exercise jurisdiction on the ground that on a true interpretation of Section 38 the petitioner was not entitled to invoke the jurisdiction by reason of the fact that the contract of service had been repudiated by the management "before" the actual arrival of the date on which performance was to commence. The Tribunal has not rested its decision on a factual finding based on evaluation of evidence. The Tribunal has closed its doors because of a misconception of law. It is therefore, futile to contend that this Court cannot interfere in exercise of its jurisdiction under Article 227 of the Constitution.

8. It is now time to place on record high appreciation of the invaluable assistance rendered by Shri Girish Patel at the instance of the Court in his capacity as an amicus curias. It was he who unearthed *Hochster v. De La Tour* 1843 All ELR 12, and it was he who cited the passage from M.R. Freedland's "The Contract of Employment".

9. The petition is, therefore, allowed. Impugned order at Annexure "F" dated July 23, 1979 is quashed and set aside. The matter will now go back to the Tribunal. The learned Tribunal will entertain this application and will proceed to determine it in accordance with law on the basis that it has jurisdiction to decide the dispute raised by the petitioner. Rule is made absolute to this extent. There will be no order regarding costs.