

(2013) 07 GUJ CK 0009

In the Gujarat High Court

Case No : Special Civil Application No. 18213 of 2006

Waghela Bharatkumar Revabhai

APPELLANT

Vs

District Primary Education Officer, Kutch-Bhuj and Others

RESPONDENT

Date of Decision : 17-07-2013

Acts Referred:

Citation : (2014) LabIC 710

Hon'ble Judges : C.L. Soni, J

Bench : Single Bench

Advocate : Jayshree C. Bhatt, for the Appellant; Ronak B. Raval, A.G.P., Premal R. Joshi and R.K. Mishra, for the Respondent

Final Decision : Allowed

Judgement

C.L. Soni, J.—By this petition under Article 226 of the Constitution of India, the petitioner has made following prayer in paragraphs 13(a) to 13(d) of this petition:

13.(a) To admit this petition and to issue Rule returnable/Notice for final disposal on returnable date.

(b) To quash and set aside the illegal action of the respondent No. 1 in denying appointment as Vidya Sahayak in Valmiki Category to the petitioner pursuant to the Advertisement dated 9.7.2004 as per Annexure "A" and in illegally giving appointment to Solanki Urmilaben Rambhai though the petitioner is higher in merit than the said candidate.

(c) To direct the respondent No. 1 to forthwith give appointment to the petitioner as Vidya Sahayak in Valmiki Category pursuant to the advertisement dated 9.7.2004, as the petitioner is second highest meritorious candidate in Valmiki category.

(d) To direct the respondent No. 1 to give appointment to the petitioner as Vidya Sahayak with continuity of service and all other consequential benefits as if he was appointed in December, 2004 along with all other candidates pursuant to the

advertisement dated 9.7.2004 as per Annexure "A";

It is the case of the petitioner that the respondent No. 1 issued advertisement dated 9.7.2004 at Annexure A for recruitment of total 1661 Vidya Sahayaks out of which 1572 vacancies were ear-marked for PTC-Trained Graduates. The petitioner applied in response to the said advertisement. The petitioner was called for personal interview and after interview, the petitioner stood at Sr. No. 2 in the select list for the post reserved for candidates belonging to Valmiki Category. The person at Sr. No. 1 Mr. Vinod Soneri was having merit of 68% and the petitioner was at Sr. No. 2 having merit of 59.004%. The petitioner was, therefore, eagerly waiting for appointment. However, when the petitioner made inquiry on or before 17.8.2006, the petitioner came to know that the appointments were already made in the month of December, 2004. The claim of the petitioner was ignored and the candidates with less merit were given appointment and, therefore, the petitioner made representation dated 21.8.2006 but of no avail and the petitioner has thus approached this Court.

2. The petition is opposed by the affidavit in reply dated 14th September, 2006 filed on behalf of respondent No. 1 as also affidavit in reply dated 14th September, 2006 filed on behalf of respondent No. 6.

3. Heard learned advocates for the parties. Learned Advocate Ms. Jayshree Bhatt appearing for the petitioner submitted that the advertisement at annexure A clearly provides reservation for two posts for candidates belonging to Valmiki-Rukhi community. Learned Advocate Ms. Bhatt submitted that the said advertisement also provided for reservation as per the Government Rules for other categories like Scheduled Caste, Scheduled Tribe, Socially and Educationally Backward Community, Physically Handicapped candidates and for Women. Learned Advocate Ms. Bhatt submitted that the benefit of reservation for each of the above categories as required by the advertisement and according to the Government Policy was independent than the reservation of two posts fixed for candidates belonging to Valmiki community. Learned Advocate Ms. Bhatt submitted that the posts were required to be filled in from amongst the candidates belonging to Valmiki Community on the basis of their merits. She submitted that there could not have been further percentage-wise reservation for women for these two posts as reservation for Valmiki community was purely against the posts and not against any of other categories. Learned Advocate Ms. Bhatt submitted that the other candidates belonging to Valmiki Community were appointed as Vidya Sahayak on the basis of their merits in general category. Learned advocate Ms. Bhatt submitted that total candidates belonging to Valmiki community were in all seven in number as per list at Annexure-III wherein the petitioner is at Sr. No. 5 and where-from first three candidates have got appointment as Vidya Sahayak purely on the basis of merits and not against any reserved category and, therefore, person at Sr. No. 4 above the petitioner as also the petitioner were entitled to be considered for appointment against two posts reserved for Valmiki community. Learned advocate Ms. Bhatt submitted that

ignoring the claim of the petitioner, respondent No. 3 who was at sr. No. 7 in the said annexure III was preferred though respondent No. 3 was having less merit than the petitioner. She thus submitted that such appointment of respondent No. 3 is contrary to reservation provided in the advertisement and, therefore, such appointment of respondent No. 3 is invalid, non est and void in the eye of law and therefore, same is required to be cancelled and the petitioner is required to be appointed as Vidya Sahayak by giving benefit of reservation against post reserved for Valmiki Community.

4. As against the above arguments, learned A.G.P. Mr. Ronak Raval appearing for respondent No. 2 submitted that the respondent had drawn list of seven persons belonging to Valmiki community and the petitioner was at Sr. No. 5 whereas respondent No. 3 was at Sr. No. 7 and being female candidate, she was given appointment as Vidya Sahayak. Learned AGP Mr. Raval submitted that the petitioner has not approached this Court within reasonable period and has allowed respondent No. 3 to resume duty and work for a long period and since respondent No. 3 also belongs to Valmiki community, this court may not interfere with the appointment given to respondent No. 3.

5. Learned Advocate Mr. R.K. Mishra appearing for respondent No. 3 submitted that the respondent No. 3 being female candidate was entitled to have priority in the matter of reservation for appointment as Vidya Sahayak. He submitted that respondent No. 3 also belongs to Valmiki Community. He submitted that respondent No. 3 was also found to be in the list of seven persons for giving appointment as Vidya Sahayaks and, therefore, no illegality could be said to have been committed for giving appointment to her based on merit list prepared for Valmiki community candidates. He submitted that the reservation to the extent of 30% was available in favour of female candidates even from Valmiki category and, therefore, there is no illegality committed in giving appointment to respondent No. 3. Learned advocate Mr. Mishra submitted that in any case, the petitioner is responsible for delay and latches in filing the present petition and allowing respondent No. 3 to work for long time and, therefore, at this stage, this Court may not interfere with such appointment given to respondent No. 3. He, thus, urged to dismiss the petition.

6. Learned Advocate Mr. Premal R. Joshi appearing for respondent No. 1 submitted that the respondent No. 1 followed reservation policy as required by the rules of the Government and as mentioned in the advertisement itself. He submitted that after making reservation for various categories, separate list for candidates of Valmiki community was drawn wherefrom respondent No. 3 being only female candidate was preferred against two posts reserved for Valmiki community and such appointment to respondent No. 3 is on consideration of her merits after the candidate who stood first against the post reserved for Valmiki community. Learned advocate Mr. Joshi submitted that the petitioner consciously allowed such process of giving appointment to respondent No. 3 and has not chosen to challenge the appointment given to respondent No. 3 immediately and

therefore, he could be stated to have acquiesced in such appointment and, therefore, even if any irregularity in giving preference to respondent No. 3 for appointment as Vidya Sahayak is found, same at this stage may not be disturbed by this court in exercise of the powers under Article 226 of the Constitution of India.

7. Having heard the learned advocates for the parties and having perused the advertisement at annexure A with other documents and also the affidavit in reply filed by the respondents, it appears that over and above the reservation provided for categories like Scheduled Caste, Scheduled Tribe, Socially and Educationally Backward Community, Physically Handicapped and Women for appointment as Vidya Sahayak, advertisement at annexure A further and distinctly provided for reservation of two posts for the candidates belonging to Valmiki-Rukhi Community. The reservation of 30% provided for women was available in general category, SC, ST and SEBC and Physically Handicapped persons. However, such reservation for women against two posts reserved for Valmiki community could not be made because it is not possible to have 30% reservation in two such posts. Even otherwise also, the reservation provided in advertisement for candidates belonging to Valmiki Community was against the posts and not percentage-wise in different categories. Therefore, such two posts reserved for candidates belonging to Valmiki Community were required to be filled strictly according to merits from amongst candidates belonging to such community who were not in a position to get appointment by competing in general category.

8. It appears that the list of seven candidates belonging to Valmiki Community was prepared according to their merits as found at annexure III. The petitioner is found to have been placed at Sr. No. 7. Against the name of the petitioner in the last column of merit, 59.004% marks are stated whereas against the name of respondent No. 3 in the column of merit, 55.235% marks are stated. In between these two, there was also another candidate at Sr. No. 6 having 57.336 % marks, higher than respondent No. 3. In the said list, three candidates who could compete in general category were not considered for appointment against two posts reserved for Valmiki Community. Then remains person at Sr. No. 4 in the said list who is stated to have secured 67.790 marks and stood first in merit against two posts reserved for Valmiki community. Leaving him, the petitioner was next person in merit who was eligible to be appointed against remaining post reserved for such category. However, not only the petitioner was bypassed but next candidate who was having higher merit than respondent No. 3 was also bypassed. Thus, while filling up the post reserved for Valmiki Community people, merit is given go by and the respondent No. 3 was given appointment as Vidya Sahayak. Such action on the part of the respondent authority is clearly violative of not only the provisions made in the advertisement but also the constitutional mandate of considering case of candidate according to merits. Though no person or candidate has fundamental right to claim reservation, still such person or candidate has right to be considered according to comparative merits in the matter of public employment for the posts falling within reserved categories.

Such right is denied to the petitioner and respondent No. 3 who was not entitled to get such appointment having lesser merit than the petitioner came to be appointed on one of the posts reserved for Valmiki Community people. Appointment of respondent No. 3 therefore could be said to be invalid, non est and void in the eye of law and respondent No. 3 is not entitled to continue with such illegal and invalid appointment and she has to make way for deserving and rightful candidate who is the petitioner in this case.

9. In the case of *State of Orissa and another v. Mamata Mohanty*, reported in 2011 (3) SCC 436, Hon''ble the Supreme Court has held and observed in para 59 (Para 38 of AIR) as under:

59. The rule of law inhibits arbitrary action and also makes it liable to be invalidated. Every action of the State or its instrumentalities should not only be fair, legitimate and above-board but should be without any affection or aversion. It should neither be suggestive of discrimination nor even give an impression of bias, favouritism and nepotism. Procedural fairness is an implied mandatory requirement to protect against arbitrary action where Statute confers wide power coupled with wide discretion on an authority. If the procedure adopted by an authority offends the fundamental fairness or established ethos or shocks the conscience, the order stands vitiated.

9.1 In the case of *Ashok Kumar Sonkar v. Union of India and others*, reported in (2007) 4 SCC 54, Hon''ble Supreme Court has held and observed in paras 25 to 28, 34 and 35 as under:

25. Submission of Mr. Shekhar that the Visitor committed an error in passing the impugned judgment as "any irregularity in the procedure by any authority shall not render the same invalid, unless the same affects the merits of the case" is stated to be rejected. Appointment of a teacher must conform to the constitutional scheme as adumbrated under Articles 14 and 16 of the Constitution of India and the terms of the Act or the statute or ordinances governing the field. Any violation of the provisions thereof would entitle the Visitor to exercise his jurisdiction under sub-section (7) of Section 6. It is also beyond any cavil that in exercising the said power, the statutory provisions interpreted by this Court must be followed.

26. This bring us to the question as to whether the principles of natural justice were required to be complied with. There cannot be any doubt whatsoever that the audi alteram partem is one of the basic pillar of natural justice which means no one should be condemned unheard. However, whenever possible the principles of natural justice should be followed. Ordinarily in a case of this nature the same should be complied with. Visitor may in a given situation issue notice to the employee who would be effected by the ultimate order that may be passed. He may not be given an oral hearing, but may be allowed to make a representation in writing.

27. It is also, however, well-settled that it cannot be put any straight jacket

formula. It may not be in a given case applied unless a prejudice is shown. It is not necessary where it would be a futile exercise.

28. A court of law does not insist on compliance of useless formality. It will not issue any such direction where the result would remain the same, in view of the fact situation prevailing or in terms of the legal consequences. Furthermore in this case, the selection of the appellant was illegal. He was not qualified on the cut-off date. Being ineligible to be considered for appointment, it would have been a futile exercise to give him an opportunity of being heard.

34. It is not a case where appointment was irregular. If an appointment is irregular, the same can be regularized. The court may not take serious note of an irregularity within the meaning of the provisions of the Act. But if an appointment is illegal, it is non est in the eye of law, which renders the appointment to be a nullity.

35. We have noticed hereinbefore that in making appointment of the appellant, the provisions of Articles 14 and 16 of the Constitution and statutory rules were not complied with. The appointment, therefore, was illegal and in that view of the matter, it would be wholly improper for us to invoke our equity jurisdiction.

10. In light of the above, since the appointment of respondent No. 3 is invalid, non est and void, simply because the petitioner could not approach this court immediately, same would not validate the appointment of respondent No. 3. It is required to be noted that the petitioner has averred in the petition that the petitioner could know about appointment of respondent No. 3 on or about 17.8.2006. It is further averred in the petition that the petitioner then immediately made representation dated 21.8.2006. Thus, moment the petitioner came to know, he made representation and since such representation was of no avail to him, he immediately approached this Court by this petition on 23.8.2006 after waiting for response on his representation and, therefore, it cannot be said that the petitioner is responsible for delay and latches in challenging the action of the respondent authorities in denying appointment to the petitioner to the post of Vidya Sahayak and in giving illegal appointment to respondent No. 3. Petitioner has prayed in this petition that the illegal action of respondent authority in denying such appointment to the petitioner and giving illegal appointment to respondent No. 3 be quashed and set aside. Therefore, since the respondent No. 3 has got such appointment against her entitlement, such appointment of respondent No. 3 is required to be quashed and set aside.

11. Learned advocate Mr. Mishra has how-ever stated that by now since more than eight years have passed after respondent No. 3 got appointment, this court at this stage may not order to cancel appointment of respondent No. 3. Such contention of learned advocate Mr. Mishra cannot be accepted because as stated above, after the petitioner came to know about giving appointment to respondent No. 3, the petitioner immediately made representation and then filed this petition. Period passed after filing of the petition, though long may be,

cannot be a ground to continue illegal and invalid appointment, and to deny rightful claim of the petitioner to get such appointment. Petitioner since was having higher merits than respondent No. 3 was clearly entitled to be appointed as Vidya Sahayak. Since the appointments of Vidya Sahayak are made from the merit list prepared by concerned authorities, petitioner is entitled to be appointed on the basis of his merits. For the reasons stated above, this petition is allowed. Appointment of respondent No. 3 as Vidya Sahayak on one out of two posts reserved for candidates belonging to Valmiki Community is held and declared as invalid, non est and void. The petitioner is held entitled to be appointed in place of respondent No. 3 on the post of Vidya Sahayak reserved for candidates belonging to Valmiki Community. Respondent authorities are directed to cancel appointment of respondent No. 3 and to give appointment to the petitioner on the said post. Such appointment shall be effective from the date of filing of the petition i.e. from 24th September, 2006. However, it is made clear that the petitioner shall not be entitled to any other benefits for the period from the date of filing of the petition till he is given appointment on such post except that such period shall be considered only for the purpose of considering the case of the petitioner for conferring upon him benefit of permanency on the post of Vidya Sahayak on completion of five years" service as per the policy prevalent for such purpose. Respondents are directed to implement this judgment and order within the period of one month from the date of receipt of this order. Rule is made absolute.