

M. D. Shukla & Ors vs State Of Gujarat & Ors on 6 February, 1970

Equivalent citations: 1971 AIR 117, 1970 SCR (3) 515, AIR 1971 SUPREME COURT 117

Author: J.C. Shah

Bench: J.C. Shah, K.S. Hegde

PETITIONER:

M. D. SHUKLA & ORS.

Vs.

RESPONDENT:

STATE OF GUJARAT & ORS.

DATE OF JUDGMENT:

06/02/1970

BENCH:

SHAH, J.C.

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SHAH, J.C.

HEGDE, K.S.

CITATION:

1971 AIR 117 1970 SCR (3) 515

1970 SCC (1) 419

CITATOR INFO :

R 1977 SC 747 (6)

ACT:

States Reorganisation Act 37 of 1956 ss. 115, 116, 117-
Bombay Re-organisation Act 11 of 1960, ss. 81, 82 & 83-
Permanent employees of Saurashtra and Kutch States allotted
to Bombay State after passing of Act 37 of 1956 but posted
in districts of Saurashtra and Kutch-Allotted to Gujarat
State after passing of Act 11 of 1960-Transferred to
Secretariat--Government order regularising their services in
Secretariat and fixing their pay and
seniority--Regularisation whether amounted to 'absorption'
within meaning of Bombay Allocated Government Servants' (Ab-
sorption. Seniority, Pay and Allowances) Rules,, 1957,-R.
138 of Bombay Civil Services Classification and Recruitment
Rules, 1939 as amended' in 1957 whether violated by such
regularisation.

HEADNOTE:

Prior to November 1, 1956 the appellants were holding permanent posts in the ministerial service of the Secretariats of the Part B State of Saurashtra and the Part C State of Kutch. By virtue of s. 8 of the States Reorganisation Act 37 of 1956 the new State of Bombay which included the territories of the States of Saurashtra and Kutch was formed. Under s. 115(1) of the Act the appellants were allotted to serve in connection with the affairs of the new State of Bombay. BY the proviso to, s. 115(7) it was provided that 'conditions of service applicable immediately before the appointed day to the case of any person allotted to another State shall not be varied to his disadvantage except with the previous approval of the Central Government'. Section 116 provided for the continuance of officers in equivalent posts. By s. 117 power was conferred upon the Central Government to give directions to State Governments for the purposes of ss. 114, 115 and 116. The Act authorised the Central Government to establish one or more Advisory Committees to advise the Government on the division and integration of the services in the new States and for ensuring fair and equitable treatment to all persons affected by the provisions of s. 115 and for proper consideration of any representation made by those persons. A large majority of the members of the ministerial branch of the Secretariats of the State of Saurashtra and Kutch were unwilling to be posted in the Secretariat of the new State of Bombay. A large majority out of them including the appellants were accordingly posted in the districts of the former States of Saurashtra and Kutch. Under the Bombay Reorganisation Act 11 of 1960 the States of Gujarat and Maharashtra were carved out of the territory of the new State of Bombay. Sections 81, 82 and 83 of the 1960 Act were substantially the same as Ss. 115, 116 and 117 of the 1956 Act. The services of the appellants were under s. 81 of the Act allotted to the newly constituted State of Gujarat. The State of Gujarat transferred the appellants from the districts to the Secretariat. After consulting the Public Service Commission it issued on August 19, 1966 an order "regularising" the services of the appellants and fixing their pay and seniority. The officers of the Secretariat who before the, passing of the said order constituted the ministerial service filed a petition in the High Court challenging its validity. The High Court allowed the petition mainly on two grounds, namely : (i) that the appellants were not absorbed-in the ministerial services of the Secretariat within the meaning
516
of the Bombay Allocated Servants' (Absorption, Seniority, Pay and Allowances) Rules, 1957; (ii) that r. 138 of the

Bombay Civil Services Classification and Recruitment Rules, 1939 as amended in 1957 allowed recruitment to the Ministerial Staff of the Secretariat by nomination after an examination or by promotion from the Lower Division and it was not open to the Government to adopt any other method. The High Court's decision was challenged in appeal before this Court. The Court noted that no equivalence had been established between the posts in the Secretariats of the States of Saurashtra and Kutch and the posts in the new State of Bombay or later in Gujarat and that there had been no integration of the services by the Central Government. It was conceded before the Court that the State had the authority to transfer, subject to the Constitution and the rules made under Art. 309, any public servant to render service which by his training and aptitude he was competent to do.

HELD : (i) The fact that the expression 'absorption' had not been used in the impugned order would not justify the inference that there was no intention to absorb the former Saurashtra and Kutch State personnel in the Secretariat. [521 F]

In the absence of determination of equivalent posts under the orders of the Central Government, the State of Gujarat was competent, as a matter of provisional arrangement to absorb the former Saurashtra and Kutch States personnel in the ministerial establishment of the Gujarat State Secretariat. In terms the order said that the persons named therein "should be treated to have been regularly appointed in the posts shown against their names in column 4 of the statement" appended to the order. That clearly amounted to absorption. [521 G-H]

(ii) The High Court was wrong in holding that the impugned order was bad because it contravened r. 138 of the Recruitment Rules.

Assuming that r. 138 requires the State to follow a certain method for recruitment to the ministerial service, that rule made under Art. 309 of the Constitution cannot take away the statutory right vested in the personnel of the former Saurashtra and Kutch States which they acquired under s. 115(7) of the States Reorganisation Act, 1956 to hold posts in the new State which were equivalent and on terms which were not, unless previous approval of the Central Government was obtained, disadvantageous. Since the arrangement which was made by the Gujarat Government must be regarded as provisional and to ensure so long as the Central Government did not make a final decision, it was not open to the officers of the Secretariat to challenge the authority of the Government of Gujarat either to transfer officers from the Districts and to post and assign them duties in the Secretariat or to fix their pay and seniority among the officer of the Secretariat performing ministerial duties.' [523 G-524 B]

N. Raghavendra Rao v. Deputy Commissioner, South Kanara,

Mangalore, [1964] 7 S.C.R. 549 and Union of India & Anr.
v. P. K. Roy & Ors. [1968] 2 S.C.R. 186, applied.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 458 of 1969. Appeal from the judgment and order dated July 1, 1968 of the Gujarat, High Court in Special Civil Application No. 1499 of 1966.

M. C. Chagla, S. K. Dholakia, Vineet Kumar and J. R. Nana- vati, for the appellants.

S. T. Desai, B. D. Sharma and S. P. Nayar, for respondent No. 1.

S. S. Shukla, for respondents Nos. 2 to 148. The Judgment of the Court was delivered by Shah, J. Certain officers in the ministerial branch of the Secretariat Service of the State of Gujarat moved a petition in the High Court of Gujarat for an order directing the State Government to treat its order dated August 19, 1966 as "illegal, void and of no effect" and to forbear from enforcing its order treating the persons whose names were specified in the annexure to the order as servants of the "Secretariat cadre". The High Court of Gujarat granted the petition and declared the order dated August 19, 1966, invalid. With certificate granted by the High Court this appeal has been filed.

Prior to November 1, 1956, the appellants were holding permanent posts in the ministerial service of the Secretariats of the Part B State of Saurashtra and the Part C State of Kutch. By virtue of s. 8 of the States Reorganization Act 37 of 1956 the new State of Bombay, which included the territories of the States of Saurashtra and Kutch, was formed. Section 115 of the States Reorganisation Act made provisions relating to services other than All- India Services. By sub-s. (1) of s. 115 it was enacted, inter alia, that every person who immediately before the appointed day was serving in connection, with the affairs of any of the existing States specified therein shall, as from that day, be deemed to have been allotted to serve in connection with the affairs of the successor State to that existing State. By the proviso to sub-s. (7) it was provided that conditions of service applicable immediately before the appointed day to the case of any person allotted to another State shall not be varied to his disadvantage except with the previous approval of the Central Government. Section 116 provided for the continuance of officers in the same posts. By s. 117 power was conferred upon the Central Government to give directions to Any State Government that may appear to be necessary for the purpose of giving effect to -the provisions of ss. 114, 115 and 116 of the Act. Under the States Reorganisation Act, 1956, the appellants were allotted to serve in connection with the affairs of the new State of Bombay. In exercise of the powers under Art. 309 of the Constitution, the Government of Bombay sanctioned certain rules called "The Allocated Government Servants' (Absorption, Seniority, Pay & Allowances) Rules, 1957". Those rules governed the servants who were allotted to the State of Bombay on reorganisa-

tion. A large majority of the members of the ministerial branch of the Secretariat of the States of Saurashtra and Kutch were, it appears, unwilling to be posted in the Secretariat of the new State of Bombay. They were accordingly posted in the districts of the former States of Saurashtra and Kutch.

Under Act 11 of 1960 called "The Bombay Reorganisation Act"

the States of Gujarat and Maharashtra were carved out of the territory of the new State of Bombay. Under s. 81 provisions relating to services other than All-India Services were made and by S. 82 provisions as to the continuance of officers in the same posts was made. By s. 83 power was given to the Central Government to give directions to the States. Those provisions were substantially the same as the provisions of ss. 115, 116 and 117 of the States Reorganisation Act, 1956. The appellants were allotted to serve in connection with the affairs of the State of Gujarat under s. 81 of the Bombay Reorganisation Act.

The newly constituted State of Gujarat finding a dearth of experienced officers in the Secretariat transferred the appellants at diverse times between the years 1961, 1962 and 1963 to the Secretariat of the State of Gujarat and 'assigned them duties in connection with the Secretariat Service. Orders were issued from time to time fixing their scales of pay and seniority. Apparently the Public Service Commission raised some objections about an attempted integration between the officers who were originally serving in the Secretariat Service, and those who were posted from the districts. Ultimately on August 19, 1966, the State Government issued the order to the following effect :

"The question of regularising the appointment to various posts in the Secretariat Department on and after 1st May 1960 of the drafted persons was under the consideration of Government for some time. Government is now pleased to direct, in consultation with the Gujarat Public Service Commission, that the persons shown in the accompanying statement should be treated to have been regularly appointed in the posts shown against their names in column-4 of the statement with effect from the date shown in column-5 in the Departments mentioned in column-3 of the statement.

2. As regards fixation of their pay and seniority orders have already been issued in Government Resolution General Administration Department No. SCT- 1161-F, dated 25th April, 1961 and Government Resolution General Administration Department No. SCT1162-KH, dated 14th March 1964. The Departments are requested to fix their pay and seniority accordingly."

Appended to the order was a list of 90 persons designating the departments in which they were posted, posts to which appointed and the dates from which they were appointed. The officers of the Secretariat who before the date of the order constituted the ministerial service then filed the petition out of which this appeal arises challenging the validity of the order of the Government. The petition was founded on three grounds : (1) that the order violated r. 138 of the Recruitment Rules framed by the Government of Bombay in 1957; (2) that the order violated the proviso to cl. (6) of s. 81 in that it altered the conditions of service of the applicants; and (3) that it violated the provisions of the Allocated Government Servants' (Absorption, Seniority, Pay & Allowances) Rules, 1957. Counsel for

the applicants conceded before the High Court that the transfer of the former Saurashtra and Kutch States Secretariat personnel to the Gujarat Secretariat per se was not open to objection. The High Court did not consider whether the Saurashtra and Kutch States secretariat personnel had "any rights flowing on account of absorption and integration of service under the States Reorganisation Act, 1956 or the Allocated Government Servants' Rules, 1957." But the High Court held that since the impugned order purported to amalgamate the former Saurashtra and Kutch States personnel with the Gujarat Secretariat Service contrary to the terms of r. 138 of the Recruitment Rules, and the Government had no authority to vary the method of recruitment provided by the statutory r. 138 of the Recruitment Rules which was mandatory, the orders of transfer to the Secretariat which was not made in the process of integration could not operate as absorption under the Allocated Government Servants' (Absorption, Seniority, Pay & Allowances) Rules, 1957. The High Court also observed that when the ministerial service employees of the former Saurashtra and Kutch States Secretariats were absorbed in the districts, integration of the services was complete and any transfer thereafter to the Secretariat could not and did not -amount to absorption in equivalent posts. It is necessary first to examine the scheme of ss. 115 & 116 of the States Reorganisation Act, 1956. Section 115 was intended to provide for the conditions of service of employees who immediately before November 1, 1956 were serving in connection with the affairs of a State and were allotted to serve in connection with the affairs of another State. Power to fix the conditions of service was reserved exclusively to the Central Government. For that purpose the Central Government was authorised to establish one or more Advisory Committees to 'advise the Government on the division and integration of the services in the new States and for ensuring fair and equitable treatment to all persons affected by the provisions of S. 115 and for proper consideration of any representation made by those persons. By the proviso to sub-s. (7) S. 115 a guarantee was given to every allotted public servant that his conditions of service shall not be varied to his disadvantage except with the previous approval of the Central Government. Section 116 provided for the continuance of officers in equivalent posts. This Court in *N. Raghavendra Rao v. Deputy Commissioner, South Kanara, -Mangalore*(1) held that the effect of sub-s. (7) of s. 115 is to preserve the power of the State to make rules under Art. 309 of the Constitution, but the proviso imposes -a limitation on the exercise of that power; the limitation is that the State cannot vary the conditions of service applicable immediately before November 1, 1956, to the disadvantage of persons mentioned in sub-ss. (1) & (2) of s. 115. In the view of the Court the broad purpose underlying the proviso to s. 115 (7) of the Act was to ensure that the conditions of service shall not be changed except with the prior approval of the Central Government, that is, before embarking on varying the conditions of service, the State Governments should obtain the concurrence of the Central Government.

In *Union of India & Anr. v. P. K. Roy & Ors.* (2) this Court held that it is the duty of the Central Government to integrate the services, but the State may be asked to prepare a provisional gradation list provided. the Central Government maintains its control over it. It is clear that the conditions of service applicable immediately before the appointed day in the case of any person who is allotted to another State cannot be varied to his disadvantage except with the previous approval of the Central Government. This protection could not be removed by the rules made by the State subsequent to November -1, 1956, unless the previous approval of the Central Government was obtained thereto.

It is true that the ministerial service personnel in the States of Saurashtra and Kutch, after they were allotted to the State of Bombay were posted and assigned duties in various districts in Saurashtra and Kutch. But in the absence of evidence to show that the previous approval of the Central Government was obtained, their right to be absorbed in equivalent posts in the new State of Bombay and later in the State of Gujarat was not thereby affected. It appears that there has not been any equivalence established between the posts in the Secretariats of the States of Saurashtra and Kutch and the posts in the new State of Bombay and: later in the State of Gujarat to which the members of the ministerial service of the Secretariats of former Saurashtra and Kutch States were allotted. The mere fact that they were posted (1) [1964] 7 S.C. R. 549.

(2) [1968] 2 S. C. R. 186.

and continued to render service in the Districts will not, in our judgment, affect the right of the personnel to be absorbed in the equivalent posts in the Secretariat and on terms not disadvantageous to those they were already entitled except with the previous, approval of the Central Government.

It was conceded, and rightly, that the State has the authority to transfer, subject to the Constitution and the rules made under Art. 309 any public servant to render service which by his training and aptitude he was competent to do. Transfer of the personnel from the States of Saurashtra and Kutch to the Secretariat in the State of Gujarat and assignment of duties performable by the ministerial staff in the Secretariat cannot be challenged, and that because they were posted between 1956 and 1960 in the Districts they will not be deprived of their statutory right under s. 115(7) proviso. Posting in the districts was and must remain purely provisional, until final integration is made by the Central Government. It is common ground that no such final integration had been made by the Central Government.

Two grounds appealed to the High Court in deciding the case- against the appellants : (1) that the appellants were transferred to the Secretariat of the State of Gujarat, but they were not absorbed in the ministerial service of the Secretariat of the State of Gujarat. In the view of the High Court there was merely "regularisation" of the appointment of those persons for the purpose of performing service in the Secretariat; and (2) that the order dated August 19, 1966 was contrary to the Recruitment Rules, 1957.

If it be granted that the State was competent 'to transfer and did transfer the appellants to perform service in connection with the affairs of the State in the Secretariat, it is difficult to hold that when the State "regularised" the service of the appellants in the Secretariat with the consent of the Public Service Commission there was no absorption under the Absorption Rules. It is true that the expression "absorption" has not been used in the order, but that will not justify an inference that there was no intention to absorb the former Saurashtra and Kutch States personnel in the Secretariat. In the absence of determination of equivalent posts under the orders of the Central Government, the State of Gujarat was competent, as a matter of provisional arrangement to absorb the former Saurashtra and Kutch States personnel in the ministerial establishment of the Gujarat State Secretariat. In terms the order says that the persons named therein "should be treated to have

been regularly appointed in the posts shown against their names in column-4 of the statement" appended to the order. That, in our judgment, amounted to absorption.

Original r. 138 of the Bombay Civil Services Classification and Recruitment Rules, 1939, was deleted and the following rule was substituted on May 22, 1957. The relevant part of the rule reads "138. The ministerial staff in the Secretariat and attached offices is divided into two Divisions.

(a) Upper; and (b) Lower.

(i) Superintendents : Appointments shall be made by- promotion from among Senior Assistants.

(ii) Senior Assistants : Appointments shall be made by promotion from among Junior Assistants.

(iii) Junior Assistants : Appointments shall be made either : -

(a) by nomination on the results of a competitive examination held by the Bombay Public Service Commission, or

(b) by promotion from among members of the Lower Division.

Provided that ,not more than one out of every four vacancies in the posts of Junior Assistants shall ordinarily be filled by promotion.

(2) To be eligible for appointment by nomination a candidate must

(i) hold a degree in Arts, law, science, Agriculture or commerce of a recognised University or possess an equivalent qualification;

(ii) have attained the age of 18 years; and

(iii) not have -attained the age of 30 years in the case of members of the Lower Division appointed on the recommendation of the commission and who have graduated while in service and in any other case 24 years on the first day of the month immediately following month in which the posts are advertised by the Commission.

B. Lower Division

(b) Clerks, clerk-typists, typists : Appointments shall be made by nomination on the results of a competitive examination held by the Commission.

Provided that suitable members of Class IV services who while in that service, have passed the Secondary School Certificate Examination or an examination recognised by Government as equivalent to that examination, shall be eligible for appointment to the posts of clerks by promotion.

(2) To be eligible for appointment by nomination, a candidate must -.-

(i) have passed the secondary school certificate examination or an examination recognised by Government as equivalent to that examination;

(ii) have attained the age of 18 years; and

(iii) not have attained the age of 23 years on the first day of the month immediately following the month in which the posts are advertised by the Commission. A candidate for the post of clerk-typist or typist must, also be able to type neatly and accurately at a minimum speed of 40 words per minute.

The High Court held that recruitment to the ministerial staff in the Secretariat could only be by nomination or by promotion from among members of the Lower Division, nomination being on the result of a competitive examination held by the Public Service Commission and promotion being from the subordinate staff. In view of this rule, according to the High Court, it was not open to the State Government to adopt any other method of recruitment of the members of the ministerial staff.

Counsel for the appellants contended that r. 138 only dealt with the existing servants and did not prevent any additional members from being amalgamated in the ministerial staff in the Secretariat. He also contended that the recruitment did not amount to admission of an officer for the first time in the service. It is unnecessary for the purpose of this appeal to consider these arguments. Assuming that r. 138 requires the State to follow a certain method for recruitment to the ministerial service, that rule made under Art. 309 of the Constitution cannot take away the statutory right vested in the personnel of the former Saurashtra and Kutch States which they acquired under the States Reorganisation Act, 1956, to hold posts in the 'new State which were equivalent and on terms which were not, unless the previous approval of the Central Government was obtained, disadvantageous. Since the arrangement which is made by the Government of the State of Gujarat must be regarded as provisional and to endure so long as the Central Government does not make a final decision, it is not open to the officers of the Secretariat to challenge the authority of the Government of Gujarat either to transfer officers from the Districts and to post and assign them duties in the Secretariat or to fix their pay and seniority among the officers in the Secretariat performing ministerial duties. The appeal must therefore be allowed and the order passed by the High Court must be set aside. The petition filed by the respondents Nos. 2 to 148 will stand dismissed. There will be no order as to costs throughout.

G.C. Appeal allowed.