Bhartiya Seva Samaj Trust Tr.Pres.& Anr vs Yogeshbhai Ambalal Patel & Anr on 14 September, 2012

Equivalent citations: AIR 2012 SUPREME COURT 3285, 2012 AIR SCW 5125, 2012 LAB. I. C. 3971, (2012) 3 SERVLJ 412, (2012) 5 MPHT 411, (2013) 1 SERVLR 533, 2012 (8) SCALE 698, AIR 2012 SC (CIVIL) 2728, (2012) 4 LAB LN 513, (2012) 3 CURLR 423, (2012) 135 FACLR 554, (2012) 7 MAD LJ 127, (2012) 4 SCT 378, (2012) 8 SCALE 698

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Bench: Fakkir Mohamed Ibrahim Kalifulla, B.S. Chauhan

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6463 OF 2012

Bhartiya Seva Samaj Trust Tr. Pres. & Anr.
..Appellants

Versus

Yogeshbhai Ambalal Patel & Anr. … Respondents

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. This appeal has been preferred against the impugned judgment and order dated 26.7.2012 passed by the High Court of Gujarat, Ahmedabad in Letters Patent Appeal No.1367 of 2008 in Special Civil Application No.6346 of 2006.

2. Facts and circumstances giving rise to this appeal are that:

A. The appellant Trust runs a Primary School wherein a large number of students are getting education and a large number of teachers are imparting education. Respondent No.1 was appointed as an Assistant Teacher on 1.7.1993 alongwith a large number of persons in pursuance of the advertisement inviting application for the posts. B. The appellant Trust issued a show cause notice dated 26.3.1998 to the respondent No.1 as why his services should not be terminated and alongwith the said notice he was also given the cheque towards salary for the month of March 1998. He was asked to submit reply to the said notice within 15 days. The notice was issued on the ground that he did not possess the eligibility for the said post and proper procedure had not been followed for making the appointment. C. The respondent No.1 did not submit any reply to the aforesaid notice. Thus, the appellant Trust passed the order dated 30.4.1998 terminating his services on the ground that his appointment was in contravention of the statutory provisions of Bombay Primary Education (Gujarat Amendment) Act, 1986 (hereinafter referred to as the 'Act') and particularly, in violation of the Schedule attached thereto. Alongwith the order of termination, he was also served a cheque for a sum of Rs.1710/- towards the salary for the month of April 1998 and was directed to hand over the charge to the Principal. D. Aggrieved, the respondent No.1 challenged the aforesaid order by filing Application No.69/98 before the Gujarat Primary Education Tribunal on 11.5.1998 and asked for quashing of the said order and for reinstatement with all back wages. The appellant contested the said application and submitted the written statement etc. Parties were given the liberty by the Tribunal to examine and cross-examine the witnesses examined by the parties. The Tribunal vide judgment and order dated 21.1.2006 allowed the application of the respondent No.1 directing the appellant to reinstate him and also to pay him the back wages.

E. Aggrieved, the appellant filed Special Civil Application No.6346 of 2006 before the High Court of Gujarat challenging the said order of the Tribunal dated 21.1.2006.

F. The learned Single Judge vide order dated 13.11.2008 dismissed the said application filed by the appellant Trust on various grounds, inter-alia, that the termination was in utter disregard of the statutory provisions of Section 40B of the Act which requires to serve a show cause notice to the employee and seeking approval of the statutory authorities before giving effect to the order of termination.

G. Aggrieved, the appellant challenged the said judgment and order by filing Letters Patent Appeal No.1367 of 2008 which has been dismissed by order dated 1.12.2008.

Hence, this appeal.

3. Shri Percy Kavina, learned Senior Advocate appearing on behalf of the appellant, has submitted that the respondent No.1 possesses the qualification of B.Sc.; B.Ed., but the required qualification for a Primary School Teacher is Primary Teachers Certificate (PTC) as provided in Clause (6) of Schedule F to the Act as applicable to all Primary Schools in the State of Gujarat. Thus, the respondent did not possess the qualification making him eligible for the post. Once the order is bad in its inception, it cannot be sanctified by lapse of time. The order of termination ought not to have been interfered with as the order setting aside the same had revived the wrong order of appointment, which is not permissible in law. The courts below must have ensured strict compliance of the statutory provisions of the Act and have swayed with unwarranted sympathy with the respondent No.1. Thus, the appeal deserves to be allowed.

4. On the contrary, the respondent No.1 appeared in person as a Caveator and has submitted that he had applied in pursuance of an advertisement wherein the eligibility i.e. qualification was shown as B.Sc.;B.Ed/B.A.;B.Ed. The vacancies had been advertised in local newspaper having wide circulation. Most of the teachers in the School run by the appellant had been appointed though they possessed the same qualification i.e., B.Sc.;B.Ed./B.A.;B.Ed. A large number of candidates had applied for the post alongwith respondent no.1 possessing the same qualification and they had been selected. None of them has been removed. The respondent No.1 had been given hostile discrimination as the teachers having the same qualification duly appointed alongwith respondent No.1 are still working in the appellant's School. Respondent No.1 had been chosen to be removed for extraneous reasons and had been deprived of his legitimate dues. His selection was made by the Committee consisting of the representatives of the appellant Trust as well as Government officials after being fully satisfied regarding the eligibility of the respondent No.1. The appellant Trust cannot be permitted either to make discrimination amongst employees or to take the benefit of its own mistake and that too at such a belated stage. The appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

Section 40B of the Act reads as under:-

Section 40B: Dismissal removal or reduction in rank of teachers:-

(1)(a) No teacher of a recognized private primary school shall be dismissed or removed or reduced in rank nor service be otherwise terminated until –

i) he has been given by the manager an opportunity of showing cause against the action proposed to be taken in regard to him; and

ii) the action proposed to be taken in regard to him has been approved in writing by the administrative officer of the school board in the jurisdiction of which the private school is situated.

(b) The administrative officer shall communicate to the manager of the school in writing his approval of the action proposed, within a period of forty five days from the date of receipt by the administrative officer of such proposal.

(2) Where the administrative officer fails to communicate either approval or disapproval within a period of forty five days specified in clause (b) of sub-section (1), the proposed action shall be deemed to have been approved by the administrative officer on the expiry of the said period."

6. The Tribunal as well as the High Court, after appreciating the evidence on record, recorded the findings to the effect that there had been two fold violation of Section 40B of the Act, firstly, no notice was issued to the respondent No.1 and secondly, no approval from the competent authority was sought for by the School management.

7. Shri Percy Kavina, learned Senior Advocate appearing on behalf of the appellant, has fairly conceded to the effect that the said statutory provisions of Section 40B of the Act had been violated on both counts.

In view of the above, the facts and circumstances of the case do not warrant review of the orders passed by the High Court as well as by the Tribunal. However, Shri Percy Kavina has insisted that this Court should not permit an illegality to perpetrate as the respondent No.1 had been appointed illegally and he did not possess the eligibility for the post. The Primary School children have to be taught by qualified persons and this Court has consistently held that B.Sc.; B.Ed./B.A.;B.Ed. is not equivalent to PTC which is the required qualification in clause (6) of Schedule F attached to the Act. Clause (6) of Schedule F reads as under:-

"Clause 6. Qualification – The Management shall appoint only trained teacher who have passed the Secondary School Certificate Examination and also the Primary Training Certificate Examination.

For special subjects, teachers shall be recruited in accordance with the qualification laid down by the Government for such teacher under the vacancies in the District Education Committees or Municipal School Boards in the State from time to time." Thus, it has been submitted by Shri Percy Kavina that in order to enforce the statutory requirement, this Court should set aside the impugned judgment and order as it has revived the illegal appointment of the respondent No.1.

8. It is a settled legal proposition that the court should not set aside the order which appears to be illegal, if its effect is to revive another illegal order. It is for the reason that in such an eventuality the illegality would perpetuate and it would put a premium to the undeserving party/person. (Vide:

Gadde Venkateswara Rao v. Government of Andhra Pradesh & Ors., AIR 1966 SC 828; Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar & Ors., AIR 1999 SC 3609; Mallikarjuna Mudhagal Nagappa & Ors. v. State of Karnataka & Ors., AIR 2000 SC 2976; Chandra Singh v. State of Rajasthan, AIR 2003 SC 2889; and State of Uttaranchal & Anr. v. Ajit Singh Bhola & Anr., (2004) 6 SCC 800).

9. In State of Orissa & Anr. v. Mamata Mohanty, (2011) 3 SCC 436, this Court while considering the similar issue where teachers had been appointed without possessing the eligibility has held that if the appointment order itself is bad in its inception, it cannot be rectified and a person lacking eligibility cannot be appointed unless the statutory provision provides for relaxation of eligibility in a particular statute and order of relaxation has been passed in terms of the said order.

10. In Andhra Kesari Education Society v. Director of School Education & Ors., AIR 1989 SC 183, this Court recognised the importance of eligibility fixed by the Legislature in the said case, pointing out that, as those persons have to handle with the tiny tods, therefore, the teacher alone could bring out their skills and intellectual activities. He is the engine of the educational system. He is a superb instrument in awakening the children to cultural values. He must possess potentiality to deliver enlightened service to the society. His quality should be such as could inspire and motivate into action the benefiter. He must keep himself abreast of ever- changing conditions. He is not to perform in wooden and unimaginative way; he must eliminate unwarranted tendencies and attitudes and infuse nobler and national ideas in younger generation; and his involvement in national integration is more important; indeed, indispensable.

11. IN BANDHUA MUKTI MORCHA V. UNION OF INDIA & ORS., 1984 SC 802, THIS COURT HELD THAT ARTICLE 21 READ WITH ARTICLES 39, 41 AND 42 PROVIDES FOR PROTECTION AND PRESERVATION OF HEALTH AND STRENGTH ALSO OF TENDER AGE CHILDREN AGAINST ABUSE OF OPPORTUNITIES AND FURTHER PROVIDES FOR PROVIDING THE EDUCATIONAL FACILITIES.

12. In Miss. Mohini Jain v. State of Karnataka & Ors., AIR 1992 SC 1858, this Court while dealing with this issue held that without making “right to education” under Article 41 of the Constitution a reality, the fundamental rights under Chapter III shall remain beyond the reach of the large majority which are illiterate. The State is under an obligation to make an endeavour to provide educational facilities at all levels to its citizens. The right to education, therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution to provide educational institutions at all levels for the benefit of the citizens. The Educational Institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society.

13. In Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors., AIR 1993 SC 2178, this Court considered a large number of judgments on this issue and came to the conclusion that the right to education is contained in as many as three Articles in Part IV, viz., Articles 41, 45 and 46, which shows the importance attached to it by the founding- fathers. Even some of the Articles in Part III, viz., Articles 29 and 30 speak of education. The Court further held that right to compulsory and free

education up to the age of 14 years is a fundamental right of every child.

14. In view to have greater emphasis, the 86th Amendment in the Constitution of India was made in 2002 introducing the provision of Article 21-A, declaring the right to free and compulsory education of the children between the age of 6 to 14 years as a fundamental right. Correspondingly, the provisions of Article 45 have been amended making it an obligation on the part of the State to impart free education to the children. Amendment in Article 51-A of the Constitution inserting the clause-'k' has also been made making it obligatory on the part of the parents to provide opportunities for education to their children between the age of 6 to 14 years.

15. Thus, in view of the above, it is evident that imparting elementary and basic education is a constitutional obligation on the State as well as societies running educational institutions. When we talk of education, it means not only learning how to write and read alphabets or get mere information but it means to acquire knowledge and wisdom so that he may lead a better life and become a better citizen to serve the nation in a better way.

The policy framework behind education in India is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.

Every generation looks up to the next generation with the hope that they shall build up a nation better than the present. Therefore, education which empowers the future generation should always be the main concern for any nation.

16. Right to education flows directly from Article 21 and is one of the most important fundamental rights. In Ashoka Kumar Thakur v. Union of India (2008) 6 SCC 1, while deciding the issue of reservation, this Court made a reference to the provisions of Articles 15(3) and 21A of the Constitution, observing that without Article 21A the other fundamental rights are rendered meaningless. Therefore, there has to be a need to earnestly on implementing Article 21A.

Without education a citizen may never come to know of his other rights. Since there is no corresponding constitutional right to higher education – the fundamental stress has to be on primary and elementary education, so that a proper foundation for higher education can be effectively laid.

Hence, we see that education is an issue, which has been treated at length in our Constitution. It is a well accepted fact that democracy cannot be flawless; but, we can strive to minimize these flaws with proper education.

Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must

be maintained at all costs.

17. This Court in State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors., (2011) 8 SCC 737 held as under:

> "In the post constitutional era, attempts have been made to create an egalitarian society by removing disparity among individuals and in order to do so, education is the most important and effective means. There has been an earnest effort to bring education out of commercialism/merchantilism.
>
> The right of a child should not be restricted only to free and compulsory education but should be extended to have quality education without any discrimination on economic, social and cultural grounds".

18. In view of the above, education and particularly that of elementary/basic education has to be qualitative and for that the trained teachers are required. The Legislature in its wisdom after consultation with the expert body fixes the eligibility for a particular discipline taught in a school. Thus, the eligibility so fixed require very strict compliance and any appointment made in contravention thereof must be held to be void.

19. In ordinary circumstances, the instant case could be decided in the light of the aforesaid backdrop. However, the Division Bench of the High Court has given full details of the teachers who had been appointed alongwith the respondent No.1 in pursuance of the same advertisement and possessing the same qualification of B.Sc.;B.Ed./B.A.;B.Ed. They are still working with the same management and some of them had been as under:

(i) Mrs. Rekhaben Virabhai Patel

(ii) Mrs. Urmilaben Chandrakantbhai Mistry

iii) Mr. Dilipbhai Naranbhai Patel

iv) Mrs. Ritaben Shaileshbhai Joshi

20. The High Court further recorded a finding that the list of such persons was merely illustrative and not exhaustive.

21. A person alleging his own infamy cannot be heard at any forum, what to talk of a Writ Court, as explained by the legal maxim 'allegans suam turpitudinem non est audiendus'. If a party has committed a wrong, he cannot be permitted to take the benefit of his own wrong. (Vide: G. S. Lamba & Ors. v. Union of India & Ors., AIR 1985 SC 1019; Narender Chadha & Ors. v. Union of India & Ors., AIR 1986 SC 638; Molly Joseph @ Nish v. George Sebastian @ Joy, AIR 1997 SC 109; Jose v. Alice & Anr., (1996) 6 SCC 342; and T. Srinivasan v. T. Varalakshmi (Mrs.), AIR 1999 SC 595).

This concept is also explained by the legal maxims 'Commodum ex injuria sua nemo habere debet'; and 'nullus commodum capere potest de injuria sua propria'. (See also: Eureka Forbes Ltd. v. Allahabad Bank & Ors., (2010) 6 SCC 193; and Inderjit Singh Grewal v. State of Punjab & Anr., (2011) 12 SCC 588).

22. Thus, it is evident that the appellant has acted with malice alongwith respondent and held that it was not merely a case of discrimination rather it is a clear case of victimisation of respondent No.1 by School Management for raising his voice against exploitation.

23. After going through the material on record and considering the submissions made by learned counsel for the appellant and the respondent No.1-in-person, we do not find any cogent reason whatsoever to interfere with the aforesaid findings of fact.

24. The appeal lacks merit and is, accordingly, dismissed.

.....J. (Dr. B.S. CHAUHAN) .....J. (FAKKIR MOHAMED IBRAHIM KALIFULLA) New Delhi, September 14, 2012