Supreme Court of India
Gujarat State Dy. Executive ... vs State Of Gujarat And Ors. on 10 May, 1994
Equivalent citations: JT 1994 (3) SC 559, (1995) ILLJ 1047 SC, 1994 (2) SCALE 866, 1994 Supp (2) SCC 591, 1994 3 SCR 983, 1994 (3) SLJ 5 SC
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Bench: K S Verma, R Sahai
JUDGMENT R.M. Sahai, J.

1. Seniority and quota violation between promotees and direct recruits, that too amongst engineers, keeps on coming to this Court every now and then. But the dispute which has come by way of this appeal, directed against the judgment and order of the Gujarat High Court, is slightly different from the beaten path. Although the issue primarily relates to construction of a circular issued by the State Government on 4th April, 1979 providing for that, 'the waiting lists which are prepared on the basis of the result of the competitive examination by the Commission, such waiting lists shall remain in force till the date of result of the subsequent examinations are declared', the real issue that arises is if such waiting list could remain alive for 10 years and could furnish source of recruitment. Equally important, rather of far reaching consequence, is the issue whether the High Court could issue a direction to appoint candidates from the waiting list to future vacancies as the quota of direct recruits had not been worked out by applying correct principles. To add to this is the claim of those selected after lapse of 10 years, that they too should be granted deemed date of appointment as was done by the High Court in earlier petition filed by some of the candidates who had appeared in the exams held in 1980 and 1982-bat had failed and on having succeeded from the High Court in 1984 were given their placement from 1981 and 1983.

2. Service is the Engineering Service of State of Gujarat. In 1980, examinations were held for selection of Class I and Class II Engineers under Executive Engineers (Civil) Gujarat Service of Engineers Class I Recruitment Rules, 1979 (for short 'the Recruitment Rules') framed under Article 309 of the Constitution of India. Rule 4 of the Recruitment Rules empowered the Gujarat Public Service Commission (for short 'the Commission') tc fix qualifying marks in any or all the subjects. In exercise of this power the Commission decided to hold an examination which consisted of 1100 marks (900 for written and 200 for viva voce). It appears that after the examinations were held the Commission for the first time fixed a minimum qualifying marks of 50%, (that is, 100 marks out of 200 of viva voce) for selection. The results were declared in December 1981. One of such candidates Sri Ashra who had appeared in the examinations, but had not been selected even though he had secured good marks in the written examination and on aggregate had secured higher marks than those who had been selected, approached the High Court by way of Writ Petition No. 3820 of 1981 claiming that the fixing of qualifying marks was arbitrary. Similar Writ Petition No. 5381 of 1983 was filed by one Sri Patel after the result of the next examination held in 1982 was declared in 1983. Both the writ petitions were decided by a common order on 5th November 1984, Their claim was upheld, the fixation of qualifying marks was struck down and the Commission was directed as under:-

to consider the question of inclusion of the petitioners' names in the merit lists on the basis of aggregate marks in the written as well as viva voce tests ignoring the concept of minimum qualifying

marks for viva voce test. If the petitioners are entitled to the inclusion of their names on merits on the basis of aggregate marks, the merit lists shall accordingly be revised and appropriate recommendations shall be made to the State Government. If the petitioners are entitled to appointments to the posts in question on the basis of Gujarat State Dy. Executive Engineers' Assn. v. The State of Gujarat and Ors. [R.M. Sahai, J.] S.C.563 inclusion of their names in the merit lists, such appointments shall be given to them by the State Government. In such an event, they shall also be given appropriate seniority in accordance with their ranking in the merit lists. In other words, the petitioners shall be placed above those who rank below them in the merit lists in the seniority list of the posts in question. If necessary, they may be given deemed date of appointment without any monetary benefit.

This direction became final as the SLP filed against this order was dismissed by this Court. Consequently, it was given effect to and the list was redrawn. The effect of redrawing the list was that those candidates who had filed the writ petition succeeded and were placed in the list of selected candidates and were appointed as such. It further resulted in alteration of the waiting list. For instance, the candidates in the waiting list at serial nos. 1 and 7 were pushed down to nos.4 and 12 and some of the candidates who had earlier been disqualified were placed higher in the revised waiting list. However, those who had been appointed were not disturbed as the High Court while deciding the writ petition had directed that the entire selection was not being quashed as, 'it would be equally improper to disturb selection of those who had been selected and appointed on the basis of such merit list. In our opinion, the ends of justice would be met if the Commission is directed to revise the merit lists in accordance with the directions given hereafter.

3. Thus one phase of litigation, initiated by those candidates who had secured better marks in aggregate but had failed to secure qualifying marks, came to an end. The second phase of litigation, with which this appeal is concerned and the seed for which, too, was sowed in 1982, itself, immediately after declaration of result of 1980 examination was initiated by those candidates who had secured qualifying marks but could not secure sufficient marks to be placed in the select list but had been placed in the waiting list. They filed Writ Petition No. 4411 of 1982 claiming that the vacancies worked out for the examination held in 1980 were not in accordance with quota rules. It was claimed that since under the rule in operation till 1982 the vacancies of direct recruits lapsed if no examinations were held a direction be issued to the Government to work out the vacancies and appoint candidates from waiting list of 1980. Similar relief was claimed by others in writ petitions filed after declaration of result in 1983.

4. Before these petitions could be decided, the appellant, an association of pro-motees, approached the High Court in 1986 that they were apprehensive that the State Government in garb of implementing the order passed in November, 1984 may make fresh appointments of direct recruits from the waiting list prepared in 1981 and 1983 which would be highly prejudicial to their interest, therefore, a direction be issued to the State Government not to appoint any more direct recruits from the waiting list as they were already in excess of their quota. Some individual promotees also approached the High Court. All these petitions were decided by a common order by the High Court in 1989. The operative portion of the order passed by the learned Single Judge, which was affirmed by the Division Bench against which this appeal has been filed, reads as under:-

In the result, Special Civil Applications Nos: 4411 of 1982 and 1522 of 1989 are allowed. The respondents arc directed to operate and implement the revised select list prepared by the Commission on the basis of the result of the examination held in December, 1980, by taking into Account the aggregate marks of written as well as viva voce tests between the period from September 8, 1981 to September 21, 1983 notwithstanding the fact that the result: of the next examination was declared on September 21, 1983. Since in all there were 86 vacancies available for appointment by direct selection and promotion to the posts of Executive Engineers, GSE Class I in 1981-82, 21 appointments were required to be made by direct selection against 15 which have been made in the Irrigation Department and Roads and Building department. Respondents are, therefore, directed to make 6 more appointments by direct selection from the revised list referred to above on merits out of the vacancies available in the year 1981-82. Petitioners who do not get appointments, will be considered for vacancies arising in the year 1982-83 and allocable to direct recruits. For the purpose of applying the quota rule in the year 1982-83, as in the case of the year 1981-82, the vacancies would include newly created posts, vacancies existed on account of retirement, promotion etc. and the vacancies arising on account of the officers sent on deputation. The ratio to be applied for working out vacancies available to the petitioners for appointment by direct selection would be as prescribed by Rule 3. Under Rule 3, this ratio was 1:3 upto May 21, 1982 and 1:4 thereafter. If the vacancies in the year 1982-83 are not sufficient to accommodate all the petitioners, the remaining petitioners will be considered for appointment in the vacancies allocable to direct recruits as aforesaid which arose between April 1, 1983 and September 21, 1983, the date on which the result of the next examination was declared. Respondents are further directed to take into consideration the claim of the petitioners of Special Civil Application No. 1522 of 1989 that they belong to reserved category while giving them appointment as aforesaid in the year 1981 -82 or any subsequent year. In other words, they shall be given appointments as per the existing Reservation Policy. Petitioners shall be given appointments as aforesaid from the date they are entitled to, without giving them any monetary benefit for the period from the date they were entitled to the appointments to the date they are actually appointed and if, necessary, petitioners may be given deemed date of appointment. Petitioners' seniority in the cadre of Executive Engineers (Civil) in GSE Class I shall accordingly be adjusted. Respondents are directed to carry out the aforesaid directions within six weeks from the date of receipt of the writ of this Court.

5. Are these directions well-founded in law? Not one of them. The direction to operate and implement the revised list prepared by the Commission, notwithstanding the declaration of the result of examination of 1982, is based on erroneous understanding Of the earlier decision. The occasion for direction to revise the list in that case arose as the High Court found that the very basis of selection was arbitrary. But that ratio could not be extended to hold that the waiting list, so redrawn, was alive even after 1983. Those petitions were not concerned either with determination of quota or the life of a waiting list. The principle laid down therein could not furnish basis for the claim that the determination of quota was not proper. Nor could the High Court direct the Government to appoint the direct recruits from the waiting list prepared in 1980 in the vacancy which according to the High Court should have been available as that would amount to interfering with discretion of Government which as a matter of policy may decide to fill lesser vacancies.

6. Even then we would examine if the exercise undertaken by the High Court of determining the quota and direction to Government to appoint is well founded in law. Before deciding these issues it may be pointed out that the direction to work out vacancies and appoint candidates from the waiting list, the High Court did not find that the selection held in 1980 was for lesser number of vacancies than was available for direct recruits. Rather it held that vacancies of 79-80 and 81-82 could not be taken into account as even if there were any it had lapsed under proviso to Rule 3. It is not disputed that selections were held, both, irj 1980 and 1982 for certain number of vacancies and the candidates who were found suitable were placed in the select list. And those who had got lesser marks were placed in the waiting list. Therefore, the vacancies advertised for which selection were held had been filled in accordance with the Recruitment Rules on recommendations made by the Commission. No further exercise was necessary. But the High Court proceeded to determine the quota after taking into consideration (a) vacancies in permanent posts (b) vacancies in temporary posts - whether duly created or existing (c) vacancies on account of retirement and (d) vacancies on account of the officers sent on deputation to other Departments and Corporations for reasonably long period for the purpose of applying quota rules. It did not agree with the State Government that apart from (a) and (b) the vacancies arising out of (c) and (d) could not be taken into account for determining the quota. Consequently, it issued directions to the State Government to appoint persons from the waiting list and if the quota of direct recruits in one year exhausted then they were to be accommodated in vacancies thus calculated for the next year. One of the reasons for this direction was the enforcement of the proviso to Rule 3 which provided that if the vacancies of direct recruits were not filled in one year they shall not be carried forward and shall lapse. The High Court held that this rule was likely to cause hardship to the direct recruits as was apparent from the list filed by the State Government which clearly demonstrated that large number of promotees were appointed in excess of their quota.

7. In A.K. Subraman and Ors. v. Union of India and Ors. it was held that quota rule was to be enforced with reference to all posts, permanent and temporary. But it is very doubtful if the quota could be worked out taking into account the number of vacancies arising out of deputations. In this appeal it is not necessary to enter into this wider aspect as even if the principle evolved by the High Court for determining quota is accepted as correct the question still is if it could issue directions to the State Government to appoint candidates from the waiting list of 1980 examination on such vacancies which arose between 1980 and 1983. The view in law does not appear to be sound. Rule 3, and more particularly its proviso, as it existed in 1980 read as under:-

(3). The appointment by Direct Selection and promotion shall be made in the ratio of 1:3 (i.e. one by direct selection and three by promotion).

Provided that if in any year recruitment by direct selection is not made according to the prescribed ratio the shortfall of direct recruits shall lapse and shall not be carried forward in the subsequent year.

The main part of the rule was amended in 1982 and the ratio of 1 to 3 was substituted and it was fixed at 1 to 4. The proviso was deleted. The operation of the proviso was undoubtedly prejudicial to direct recruits. If selections were not held or vacancies were not worked out properly and the quota

lapsed, then it obviously went to promotee. The learned Counsel for direct recruits submitted that if the State Government was left to itself then even for extraneous reasons it may not have held selection resulting in reducing the number of direct recruits in service. No such claim was made before the High Court. However, even assuming that it may happen the question as to how to safeguard against such possible misuse is entirely different from the consideration if the State Government could be directed to work out the vacancies and make appointments from the waiting list. On a literal reading of the proviso the quota lapses if the selection by examination for direct recruits is not held in any year. Since admittedly the next examination for selection of direct recruits was held in 1982 the quota of direct recruits, if any, under the rules for 1981-82 lapsed. But such construction of the proviso would be highly inequitable. It shall be dealt latter However, even if on some reasoning the view of the High Court would have been upheld for 1981-82 it could not be invoked for vacancies arising after the result of 1982 examination were declared for the simple reason that the proviso to Rule 3 had been deleted in 1982 and the vacancies of direct recruits could not lapse and consequently were to be carried forward.

8. Coming to the next issue, the first question is what is a waiting list?; can it be treated as a source of recruitment from which candidates may be drawn as and when necessary?; and lastly how long can it operate? These are some important questions which do arise as a result of direction issued by the High Court. A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How it should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For instance, if an examination is held say for selecting 10 candidates for 1990 and the competent, authority prepares a waiting list then it is in respect of those ten seats only for which selection or competition was held. Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join. But once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. She has no vested right except to the limited extent, indicated above, or when the appointing authority acts arbitrarily and makes appointment from the waiting list by picking and choosing for extraneous reasons.

9. A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since

the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list, in one examination was to operate as an infinite stock for appointments, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service.

10. How a waiting list is to operate in the State is clear from a circular issued by the State Government on 27th December, 1983. The relevant portion of the Circular is extracted below:-

According to the instructions issued by the department often & often, waiting list prepared by the Gujarat Public Service Commission over and above the number of posts requisitioned shall remain in force upto 2 years or under circumstances upto the declaration of the result of next examination. The basic purpose of the preparation of waiting list is when sufficient candidates are not available from the merit list prepared for requisition of particular year, short fall can be met with from waiting list or for making recruitment Curing emergent condition, waiting list cannot be considered as merit list for that year or of next year, similarly waiting list cannot be used as a substitute to the requisition of next year. Further as the requisition statement for the particular year is sent for the post allocable to direct recruitment for that year as per provision in relevant rules, naturally the requirement of subsequent year cannot be incorporated. Considering on the above facts it is not fair to stop the regular procedure of recruitment or not to give new advertisement for the reason that merit list or waiting list prepared as part of merit list of previous year is in force.

Although the Circular was issued in 1983 but it only attempted to clarify what was implied purpose of a waiting list. Even without it, the operation of a waiting list should be confined to the vacancies notified for that examination and not for any vacancy arising in future unless a policy decision is taken by the Government to that effect. Appointment in future vacancies from waiting list prepared by the Commission should be exception rather than the rule. It has many ramifications. In any case, the High Court should not have assumed upon itself the role of appointing authority unless it found that the Government was acting arbitrarily. No rule has been shown that selection of direct recruits was to take place every year. In absence of such rule, the proviso could not apply. However, its validity was not challenged either in the High Court or in this Court. It has, therefore, to be construed so as not to defeat the objective of its enactment. For its working reasonably it has to be understood that once recruitment by direct selection has been made in any year then the quota of direct recruits till then should be deemed to have been exhausted and if any vacancy could not be filled for any reason then it should be deemed to have lapsed and could'not be carried forward. Read in this manner the quota of direct recruits till 1980 exhausted. But it could not affect quota of 1981-82 and 1982-83, therefore, no appointments on the quota of direct recruits for 1981-82 and 1982-83 could be made from the waiting list of 1980. The entire exercise undertaken by the High Court of finding out number of vacancies was thus an exercise in futility. Further, what the High Court has done is that it has not worked out the vacancies only till the examinations were held but it

went further to hold that since the result of the next examination was declared in 1983 the vacancies for direct recruits arising between the date the result of 1980 examination was declared and before the result of 1982 was declared could be filled from the waiting list of 1980. In other words, the waiting list instead of being a list for filling the vacancy in exigencies arising out of non-joining of a candidate for the year for which the examination was held became a source of recruitment for the vacancies which were to arise between 1980 and 1983. And if the vacancies which arose in 1981-82 and 1982-83 are filled by this method then the examination of 1982 was held for which vacancy as normally the Government sends the requisition for the vacancies existing on the date of sending the requisition. We can appreciate the anxiety of the High Court that if examinations are not held regularly as has happened between 1983 to 1993 it may result in depriving fresh candidates from being selected and their post may be filled by promotees. But such concern could not result in nullifying entire procedure. The better course would have been to direct the Government to work out the vacancies and fill them by holding an examination, if necessary, in addition to the examination already held. But the procedure adopted by the High Court, of giving such vacancies to candidates who were in the waiting list does not appear to be correct. There was no contingency nor/the State Government had taken any decision to fill the vacancies from the waiting list as it was not possible for it to hold the examination nor any emergent situation had arisen except the claim of some of the candidates from the waiting list that they should be given appointment for vacancies which arose between 1980 and 1983 and between 1983 and 1993. Such claim of the appellants who had appeared in a particular examination and were placed in the waiting list could not be sustained. In fact, the action of the State Government in not sending the requisition every year or at most every second year to the Commission for holding an examination for vacancies which had arisen or were likely to arise was liable to be commented upon and the State Government should have been directed to take care in future that the examinations are held regularly. But in no case the vacancies arising in future should have been offered to the candidates in the waiting list of the earlier year. The direction of the High Court, therefore, to appoint the candidates from the waiting list in the vacancies which, according to its calculation, arose between the years 1980 to 1983 and between 1983 to 1993 cannot be upheld.

11. The entire appointment of direct recruits, therefore, from the waiting list was not proper. But these persons have been appointed and are working now at least for five years. It would, therefore, be unjust and harsh to quash their selection at this stage. Therefore, while refraining from quashing the appointment made in pursuance of the direction issued by the High Court, we are of the opinion that the waiting list for one year cannot furnish source of recruitment for future years, except in very exceptional cases. It is, however, necessary to add that non-holding of examination at the instance of the Government could not result in reducing the quota of direct recruits to be worked ouj on the principle for determination of such vacancies. Therefore, if vacancies had collected between 1983 and 1993 due to interim orders passed by the courts, and they have not been taken into account when the examination for 1993 was held then it would be expedient to direct the Govern-' ment to work out the same immediately and send the requisition to the Commission for holding selection for if the next examination is going to be held within one year from today. We may clarify that it is nobody's case that the quota rule has broken. Therefore the direction is being issued to protect the quota of direct recruits during 1983 to 1993 in the peculiar facts of the present case.

12. Taking up the application of direct recruits, who have been appointed in pursuance of the decision of the High Court, for deemed date of appointment and grant of seniority at the same place as those appointed in 1980 or in 1983 on the basis of selection held in 1980 and 1982, suffice it to say that even the appointment of these candidates was not in accordance with law yet we have not set it aside on equitable considerations. Further, a candidate appointed in pursuance of a direction issued by the High Court in 1989 in respect of a vacancy which might be deemed to have existed in 1981-82 cannot get seniority over those candidates who were appointed either from the same batch on the basis of better aggregate marks or over those candidates who were selected in the subsequent examination. No parallel could be drawn from Ashra 's case. He was found to have been illegally excluded from the select list as a result of operation of a letter issued by the Commission which was found to be arbitrary. He was, therefore, entitled to be placed in the select list. He was, therefore, entitled to deemed date of appointment. That cannot apply to those who were in the waiting list. A candidate from the waiting list appointed subsequently cannot claim appointment from a back date. Even otherwise appointment of a candidate operates from the date he is appointed and not from the date those from the select list are appointed. Same principle applies even amongst inter-se appointees from the waiting list. For instance, if A, B and C are appointed from the waiting list as and when vacancy arises" say in 1990, 1991 and 1992, respectively, then their seniority shall be counted from the date of their appointment and B cannot claim it from 1990 or 1991 nor C can claim either from 1991 or 1990. The claim of the direct recruits is, therefore, rejected and it is directed that they shall be given seniority from the date of their appointment and not from any back date.

13. In the result this appeal succeeds and is allowed. The order of the High Court is set aside subject to following directions:-

(1) Any candidate who has been appointed in pursuance of the order passed by the High Court shall be deemed to be in service from the date he has joined and his seniority shall be reckoned from that date only.

(2) No fresh appointment shall be made.

(3) if vacancies for direct recruits have accrued between 1983 to 1993 and they have not been taken into account when the examination for 1993 was held then they shall form part of the requisition to be sent by the Government to the Commission either for the next examination if it is going to be held within one year or a fresh examination may be held in the alternative for such vacancies only within a period of one year from today. This direction is being issued in the peculiar facts of this case.

14. The parties shall bear their own costs.