

Parmar Navinkumar Bipinchandra vs State Of Gujarat on 30 April, 2019

Author: N.V.Anjaria

Bench: N.V.Anjaria

C/SCA/21486/2017

CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 21486 of 2017

With

CIVIL APPLICATION (FOR DIRECTION) NO. 1 of 2018

In R/SPECIAL CIVIL APPLICATION NO. 21486 of 2017

With

CIVIL APPLICATION (FOR VACATING STAY) NO. 2 of 2018

In R/SPECIAL CIVIL APPLICATION NO. 21486 of 2017

With

CIVIL APPLICATION (FIXING DATE OF EARLY HEARING) NO. 3 of 2018

In R/SPECIAL CIVIL APPLICATION NO. 21486 of 2017

With

R/SPECIAL CIVIL APPLICATION NO. 21868 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE N.V.ANJARIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? No 2 To be referred to the Reporter or not ? No 3 Whether their Lordships wish to see the fair copy of the judgment ? No 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any No order made thereunder ?

===== PARMAR
NAVINKUMAR BIPINCHANDRA & 22 other(s) Versus STATE OF GUJARAT & 2 other(s)
===== Appearance:

MR YATIN OZA, SR. ADVOCATE WITH MR MR HJ DHOLAKIA(5862) for the
Petitioner(s) No. 1,10,11,12,13,14,15,16,17,18,19,2,20,21,22,23,3,4,5,6,7,8,9 MR MP
PRAJAPATI(677) for the Petitioner(s) No. 18,19,20,21,22,23 MR PRAKASH JANI,
ADDL. ADVOCATE GENERAL WITH MS NIDHI VYAS AND AGP MR KM ANTANI
(1) f o r t h e R e s p o n d e n t (s) N o . 1 , 3

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CORAM: HONOURABLE MR.JUSTICE N.V.ANJARIA Date : 30/04/2019 Since both the captioned petitions were similar involving identical issues of facts and law, they were heard along with the Civil Applications therein, and are treated by the present common judgment.

1.1 Heard learned senior advocate Mr.Yatin Oza with learned advocate Mr.H.J. Dholakiya for the petitioners, learned Additional Advocate General Mr.Prakash Jani assisted by learned Assistant Government Pleader Ms.Nidhi Vyas as well as learned Assistant Government Pleader Mr.K.M. Antani, for the respondents.

2. The 23 petitioners herein who are Teachers, are aggrieved for the reason that they are excluded and denied to compete for the post of Principal in the registered private grant-in-aid secondary and higher secondary schools. The ground for their non-

consideration for the post is that they have been working as Teachers in the non-grant-in-aid schools. The petitioners have prayed to permit them to apply for the post and to participate in the recruitment process which was initiated by issuance of advertisement dated 12th September, 2017.

3. The facts and events in the background are quite relevant. In exercise of powers conferred under Section 35 of the Gujarat Secondary and Higher Secondary Education Act, 1972, the State Government framed the rules called 'Teachers and Head Masters of Registered Private Secondary and Higher Secondary Schools (Procedure for Selection) Rules, 2011'. These Rules were notified vide Notification of the Education Department dated 11th February, 2011.

3.1 While the aforesaid Rules of 2011 were common to provide the procedure for selection for the Teachers as well as of the Head Masters, in the year 2017, the State Government framed separate Rules which were limited to be applied only to the post of Principal in the registered private secondary and higher secondary schools. These Rules notified under Notification dated 25th July, 2017 were 'The principal in the Registered Private Secondary and Higher Secondary Schools (Procedure for Selection) Rules, 2017'. Except that the later Rules were confined to the post of Principal, both were same in respect of other provisions contained therein.

3.2 The aforementioned Rules of 2011 relating to the procedure for selection of the Teachers and Head Masters came to be challenged for their vires. The Division Bench in its decision in Akhil Gujarat Rajya Shala Sanchalak Mandal v. State of Gujarat [2011 (5) GLR 3807] upheld the vires of the said Rules. The Division Bench observed as under.

"50. Admittedly, after framing of the First Regulation by the State Government, namely, the Gujarat Education Regulations, 1974, no separate Regulation has been framed by the Board u/Sec.53 of the Education Act and thereby the Regulations framed by the State Government laying down the conditions of service is still in force even as on today. Such power having been already delegated to the State Government and the relevant Sections 34 and 54 having not been under challenge, it cannot be held that the State Government has been delegated with the arbitrary power u/Sec.35

or the selection committee has been delegated with such arbitrary power.

51. In view of the discussions above, while we uphold Sec.35 as substituted by the as amended by Gujarat Education Laws (Amendment Act) 2010 (Amending Act No.3 of 2010), the Rules framed thereunder, namely, the Teachers and Head Masters of Registered Private Secondary and Higher Secondary Schools (Procedure for Selection) Rules, 2011 as published by Notification dated 11th February 2011 are also upheld for the same reasons. We find no merit in the writ petitions. They are accordingly dismissed, but there shall be no order as to costs."

3.3 Thereafter, in Priteshkumar Thakorbbhai Patel v. State of Gujarat being Special Civil Application No.19369 of 2017 Notification dated 25th July, 2017, namely Rules of 2017, were brought under challenge. That petition stood dismissed by the Division Bench as per order dated 10th November, 2017, in which it was observed by the Division Bench, "2. in the earlier judgment of this Court in Special Civil Application No.2877 of 2011 dated 6.9.2011 reported in 2011(5) G.L.R. Page 3807 in the case of Akhil Gujarat Rajya Shala Sanchalak Mandal Through Trustees and others vs. State of Gujarat Through Chief Secretary and others, the very same rules were under challenge, which were upheld by the Division Bench of this Court. As against the same, Civil Appeal was preferred before the Hon'ble Supreme Court, which was also dismissed. Learned counsel for the petitioners submitted that in the aforesaid judgment, only validity of the very same Rule 3 onwards was discussed, as such, it is now open to the petitioners to agitate the matters before this Court."

3.3.1 It was finally held, "3. As much as the entire set of rules framed in the year 2011 in the very same form was under

challenge and as such the said rules were upheld by the Division Bench of this Court and same were confirmed by the Hon'ble Supreme Court, we are of the view that subject matter of these petitions is covered to be dismissed, in view of the earlier judgment of this Court reported in 2011(5) G.L.R. Page 3807. Following the judgment in Special Civil Application No.2877 of 2011 reported in 2011(5) G.L.R. Page 3807, these writ petitions are dismissed. Notice is discharged."

3.2 The order of the Division Bench in Priteshkumar Thakorbbhai Patel (supra) was carried before the Apex Court, however the SLP was withdrawn.

3.3 It is further relevant to mention that in both Rules of 2011 as well as of the year 2017 upheld by the Court as above, Section 2(b) in the Rules contained the definition of "Registered Private Schools". The verbatim same definition in both reads as under.

"2(b) 'Registered Private Schools' mean the non- government secondary and higher secondary schools receiving grant-in-aid from the Government."

3.4 The eligibility for appointment was the qualifications mentioned in Regulation 20(1) of the Gujarat Secondary Education Regulations, 1974. As the above quoted definition or registered private

schools came to be amended, also amended was the Regulation 20(1) of the Regulations of 1974. The candidates who are otherwise qualified but working in the other private schools which are not receiving the grant, namely the schools which are non-grant-in-aid schools or self-financed schools, came to be kept out of consideration for the purpose of appointment in the grant-in-aid and government schools. As already noted, the Rules containing the aforesaid provisions came to be upheld by the Division Bench of this Court in Akhil Gujarat Rajya Shala Sanchalak Mandal (supra) as well as in Priteshkumar Thakorbhair Patel (supra).

3.5 It is also relevant to mention that as per the Rules of 2011, advertisement was published for the recruitment of Principal in the grant-in-aid schools with the aforesaid conditions of eligibility criteria as per Regulation 20(1) of the Regulations of 1974. In that recruitment process, 423 candidates came to be appointed as Principals in the grant-in-aid schools.

3.6 Now, the present petition has been filed by the petitioners questioning the classification of the Teachers working in the grant-in-aid schools and those working in the non-grant-in-aid schools or the self-financed schools for the purpose of the recruitment to the post of Principal in the registered private schools which are defined as schools receiving grant from the Government as above. Amongst the present petitioners, quite noticeably, petitioner Nos.1, 2, 5, 10, 14, 16 and 17 were also the petitioners who had filed the aforesaid Special Civil Application No.19369 of 2017, which culminated into the decision in Priteshkumar Thakorbhair Patel (supra), in which the Rules regarding the selection of the Principal have been upheld.

4. In order to press the prayers in this petition that the petitioners may be allowed to apply for the Principal in the registered private grant-in-

aid secondary and higher secondary schools, it was vehemently submitted that not permitting the petitioners to compete for the post of Principal only for the reason that they are the Teachers working in the non-grant-in-aid schools, tantamount to an invidious discrimination and it would violate petitioners' rights under Articles 14 and 16 of the Constitution. It was the submission of learned senior counsel in the second place, that the duties discharged by the petitioners as Teachers were same as those performed by the Teachers working in the grant-in-aid schools. It was submitted that looking to the duty-chart of the petitioners, the discrimination meted out to them was evident when they are not permitted to compete for the post of Principal.

4.1 It was next submitted that the petitioners possessed the qualifications prescribed in the advertisement, therefore also they shall be treated as eligible to compete for the post of Principal. In the fourth place it was submitted that the Rules applicable to the Teachers in the grant-in-aid schools are applicable to the petitioners and that the authorities have been deducting the amount towards Employees' Provident Fund from the salary of the petitioners. It was the fifth submission on behalf of the petitioners that during the last 15 years, very low number of Teachers in the grant-in-aid schools have been selected, therefore searching Principal from the Teachers in grant-in-aid schools only could be difficult. It was submitted also that the petitioners are considered eligible to be appointed as District Education Officer and Education Inspector, therefore they should be treated eligible for the post of Principal. It was highlighted in the sixth place that the only aspect of

distinction between the petitioners and those Teachers working in grant-in-aid schools was that the appointment of the petitioners was not done through a governmental agency.

4.2 On the basis of all the above aspects, learned senior counsel for the petitioners contended that the petitioners-Teachers working in the grant- in-aid schools ought to have been treated as a one class for the purpose of the post of Principal. It was submitted that the State Government could not have decided one single class of Teachers into two classes and thereby render the petitioners ineligible for the post of Principal in the registered private grant-in-aid secondary and higher secondary schools. By pressing into service the decision of the Supreme Court in *Shree Bhagwati Steel Rolling Mills v. Commissioner of Central Excise* [(2016) 3 SCC 643, paragraphs 28 and 29], it was submitted by learned senior advocate for the petitioners that Rules or Regulations framed under the delegated powers under the statute cannot cross the limits of the statutory provisions.

4.3 The petition came to be contested by filing affidavits-in-reply. Both respondent No.2 as well as respondent No.3 raised the main contention that the selection rules for the Teachers and Head Masters of the year 2011 were challenged before this Court. The Division Bench upheld the vires of the said Rules in *Akhil Gujarat Rajya Shala Sanchalak Mandal* (supra). It was contended that Rules of 2017 were also challenged by the petitioners whom included the several of the present petitioners also, by filing Special Civil Application No.19369 of 2017, which petition too came to be dismissed by the Division Bench as per judgment and order dated 10.11.2017. On the basis of the above, it was submitted that the challenge in this petition was not maintainable and the prayer was not grantable.

4.4 Learned Additional Advocate General for the respondent - State, submitted that in view of decision in *Akhil Gujarat Rajya Shala Sanchalak Mandal* (supra) and in *Priteshkumar Thakorbhai Patel* (supra), since Rules are upheld, the prayers made in this petition would not sustain in law. He, however, proceeded further to elaborate the aspect that the nature and the modalities of recruitment of Teachers in the grant-in-aid schools would defer in several ways than under the self-financed schools, that is non-grant-in-aid schools. It was submitted that for the grant-in-aid schools, permission would have to be obtained and no-objection from District Education Officer could be required before recruiting Teacher. The recruitment precedes publication of advertisement and the process mentioned therein is required to be undertaken; approval of the District Education Officer for appointment of the selected candidates is required; grant is received from the State Government for payment of salary of the Teachers; roster point are applied.

4.5 Learned Additional Advocate General submitted that all these features may not be present when a non-grant-in-aid or self-financed schools when they recruit and appoint the Teachers. It was thereby sought to be submitted that classification of Teachers belonging to the grant-in-aid schools and those hailing from non-grant-in-aid schools for the purpose of eligibility to the post of Principal was a proper classification.

4.6 Learned Additional Advocate General relied on the decision of the Supreme Court in *State of Madhya Pradesh v. Dharam Bir* [(1998) 6 SCC 165], in particular paragraphs 32, 33 and 34 thereof, to submit that experience is a condition of eligibility and could not be equated with the educational qualifications. When the plea of experience cannot stand against the provisions of the Rule, it must

fail, held the Supreme Court. The next decision, also of the Apex Court, was in State of Jammu & Kashmir v. Shiv Ram Sharma [(1999) 3 SCC 653] wherefrom the principle was asserted that it is permissible for the government to prescribe appropriate qualification in the matter of appointment or promotion to different posts. Again by pressing into service, decision of the Supreme Court, in Rajasthan Public Service Commission v. Kaila Kumar Paliwal [(2007) 10 SCC 260], it was submitted that when the post of Head Master was governed by separate Rules statutory in nature, eligibility has to be determined with reference to such Rules.

5. In the context of above set of facts and contentions, Section 35 of the Gujarat Secondary and Higher Secondary Education Act, 1972 presently in force upon being substituted by the Gujarat Educational Laws (Amendment) Act, 2010 may be referred to. It reads as under.

"35. Selection of teachers and headmasters-The procedure for selection of teachers and headmasters of registered private secondary and higher secondary schools shall be such as may be notified by the State Government by rules from time to time."

5.1 Rules of 2011 and the Rules of 2017 referred to hereinabove were framed in exercise of powers conferred under the aforesaid statutory provision. Rule 2(b) in both the Rules defined the registered private schools identically. The only differentiation in the Rules of 2017 was that they were made confined to the selection for the post of Principal. The rest of the provisions were same. Eligibility for appointment was mentioned in Rule 7 in the Rules of 2011 whereas it was Rule 6 in the Rules of 2017. This prescription of eligibility in both the Rules was similarly worded. Rule 6 of Rules of 2017 is reproduced hereunder.

"6. Eligibility for appointment. - To be eligible for appointment as a Principal, a candidate shall possess-

(1) requisite educational qualifications in accordance with the provisions of the Gujarat Secondary Education Regulations, 1974; and (2) basic knowledge of computer application as prescribed in the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 :

(3) Provided that the age limit shall be relaxed in favour of a candidate belonging to the Scheduled Castes, Scheduled Tribes, Socially and Educationally Backward Classes and women in accordance with the provisions of the Gujarat Civil Services Classification and Recruitment (General) Rules 1967."

5.2 From the memorandum of Special Civil Application No.19369 of 2017 being Priteshkumar Thakorbbhai Patel, which was made available for perusal of the Court, it could be readily discerned that the very contentions raised in this petition were raised as grounds in the said petition. The prayers in Priteshkumar Thakorbbhai Patel (supra) were to hold and declare Rule (b) and Notification dated 11th February, 2011 and 25th July, 2017 as bad in law and contrary to the provisions of the Act. Thus, the definition of registered private schools in the Rules of 2011 and Rules of 2017 was challenged. The second prayer was for setting aside amendment in Regulation 20(1) of the Gujarat Secondary Education Regulations. It was also prayed to hold that the

petitioners and other similarly situated employees/candidates working in the non-granted schools were eligible for the appointment as Principal in the grant-in-aid schools.

6. There would be no gainsaying that having regard to the difference in the process of recruitment by which the Teachers in the grant-in-aid schools are appointed and further in light of the experience they would gain as Teachers in the grant-

in-aid schools, their classification as a class to be eligible to compete for the post of Principal, in exclusion of those Teachers who are appointed and worked in the non-grant-in-aid or self-financed schools, would not be irrational. The submission canvassed by learned Additional Advocate General about the method of selection of Teachers being different in both the cases, could be countenanced to justify the division. Such considerations have to be held to be relevant considerations for the purpose of dividing a class and it would be having the nexus with the object sought to be achieved which is to maintain a particular standard and caliber in manning the post of Principal.

6.1 The clinching would be, however the aforementioned decision of this Court in Akhil Gujarat Rajya Shala Sanchalak Mandal (supra) and the subsequent decision in Priteshkumar Thakorbhai Patel (supra) which have the effect in law of accepting, approving and endorsing to the classification acted upon in the Rules for the purpose of appointment to the post of Principal. Once the Rules are upheld as above, the submission as regard the Rules travel the statute can also not hold good.

6.2 Indeed, in view of upholding of Rules of 2011 and 2017 as above, no contention on part of the petitioners would stand valid. There remain no legal room for canvassing any contention and to assail the classification as wrongful. The entire premise of the petition and the set of contentions raised, stand as misconceived in light of above. The petition and the prayers therein were virtually stillborn.

7. Accordingly, the petition stands dismissed. Notice is discharged. Interim relief is vacated.

ORDER IN SCA NO.21868 OF 2017 For the above reasons recorded in respect of Special Civil Application No.21486 of 2017, since this petition involves identical facts and issues, the same is also dismissed. Notice is discharged. Interim relief stands vacated.

(N.V.ANJARIA, J) ORDER IN CIVIL APPLICATIONS In view of order passed in Special Civil Application No.21486 of 2017 dismissing the petition as meritless, no orders are required to be passed in the Civil Applications.

FURTHER ORDER At this stage, learned advocate Mr.H.J. Dholakia for the petitioners prays for the stay of the aforesaid judgment.

In the facts and circumstances of the case and for the reasons recorded in the judgment, request could hardly be accepted. Therefore, rejected.

(N.V.ANJARIA, J) Anup