HIGH COURT OF GUJARAT

NARANBHAI DAHYABHAI MAKWANA
Versus
GOVERNMENT OF GUJARAT

Date of Decision: 18 June 1997

Citation: 1997 LawSuit(Guj) 244

Hon'ble Judges: S K Keshote

Eq. Citations: **1998 1 GCD 40**

Case Type: Special Civil Application

Case No: 5718 of 1992

Subject: Constitution

Acts Referred:
Constitution of India Art 16, Art 14

Final Decision: Application dismissed

Advocates: Anant Dave, H L Jani, R C Jani

Cases Referred in (+): **4**

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[1] All these petitions are identical and as such the same arc disposed of by this common order. In fact, earlier the petitioners filed a joint petition, being Special Civil Application No. 5718 of 1992 and as ordered by this Court, the other petitioners in the aforesaid Special Civil Application filed one or two pages petition. The arguments have been advanced by the learned counsel for the parties with reference to Special Civil Application No. 5718 of 1992.

[2] The facts of this case, in brief are that the petitioners applied for the post of Gram Sevak (Multi Purpose) pursuant to the advertisement Nos. 38 to 44 of the year 1985. It is not in dispute that for Gandhinagar District, five posts were vacant for unreserved category for the cadre of Gram Sevak (Multi Purpose). The dispute in all these petitions relate to appointment of the aforesaid five posts of Gram Sevak (Multi Purpose) for Gandhinagar District. The petitioners were selected and their names have been placed in the merits list which was of seventeen candidates. The names of the petitioners

were placed in the aforesaid select list at Sr. Nos. 7, 8, 11, 13, 14, 15 & 16. In the year 1985-86, 1986-87 and 1987-89, there was a ban put by the State Government due to prevailing situation of drought and no recruitment or appointment in the Government was given and therefore the petitioners, as per their case, were not appointed though selected on the post of Gram Sevak (Multi Purpose). The recruitment rules were amended by Resolution dated 5.5.1988 and it is case of the petitioners that in view of subsequence clarification issued on 22.12.1988, no appointment was required to be given to the candidates who were selected pursuant to the advertisement issued in the year 1984-85 and who were put in the select list because of amended recruitment rules by the Government Resolution dated 5.5.1988. Making reference to the Resolution dated 29th May, 1982 of the Department of Panchayat and Rural Housing Development. Government of Gujarat, it is averred that for non-gazetted cadres, the select/waiting list prepared by the District Panchayat Selection Committee on the basis of result of the competitive test would remain operative until the result of the next text held by selection committee was declared. So as per the case of the petitioners, the select list was to remain in operation till preparation of the next select list and till no list is prepared after holding competitive test by the authority and therefore the petitioners claim their appointment on the post of Gram Sevak (Multi Purpose) on the basis of aforesaid select list. When nothing has been done, the petitioners approached this Court by filing the Special Civil Application.

[3] The learned counsel for the petitioners contended that once names of the petitioners has been placed in select list, and when that select list is to remain in operation till the next select list is prepared, they have acquired right of appointment to the posts. It has next been contended that the select list so prepared could not have been brought to an end only on the ground that the Rules were amended, as the amended Rules could not have been given retrospective effect. The amended rules are only prospective. In support of this contention the learned counsel for the petitioners placed reliance on the decision of the Hon'ble Supreme Court in the case of P. Mahendran & Ors. vs. State of Karnataka & Ors., reported in AIR 1990 SC 405. Reliance has further been placed on the decision of this Court in LPA No. 209 of 1992 decided on 23rd December, 1993 and decision of the learned Single Judge of this Court in Special Civil Application No. 2614 of 1989 decided on 12th December, 1991.

[4] On the other hand, the learned counsel for the respondent- District Panchayat, Shri R.C. Jani contended that the petitioners have not acquired any indefeasible right of appointment merely on the ground that they have been empaneled. It has next been contended that the appointments could have been restricted against five posts which have been notified and no appointment to the post which has been created in subsequent years could have been filled in from the select list prepared for live posts.

In support of this contention the learned counsel for respondent-District Panchayat placed reliance on the decision of Hon'ble Supreme Court in the case of Sankarsan Dash vs. Union of India, reported in (1991) 3 SCC 47. Shri H.L. Jani, learned counsel appearing for respondent-State has supported the contention made by the learned counsel for the respondent-District Panchayat.

[5] I have given my thoughtful consideration to the submissions made by the learned counsel for the parties. Annexure 'A' is the advertisement under which applications have been invited for five posts of Gram Sevak (Multi Purpose) for Gandhinagar District, which fact is not in dispute. It is also not in dispute that the names of the petitioners were placed at Sr. Nos. 7, 8, 11, 13, 14, 15 and 16. The dispute is also not that four posts have been filled in out of five from the candidates who were there in the select list the fifth post could not be filled in because the Government has put ban and instructions regarding financial crisis. However, the respondent No. 3 very categorically made a statement in reply that the candidate at Sr. No. 5, Prajapati Prahladbhai Maganlal, is entitled to get appointment on the post of Gram Sevak (Multi Purpose) and will be appointed as and when the Government lifts the ban. It is also not in issue that persons from the select list lower in merits than the petitioners have not been given the appointments.

[6] In the case of P. Mahendran vs. Slate of Karnataka (Supra), the issue there was whether the amendments to the Rules meanwhile changing eligibility criteria after the commencement of selection process will be taken to be having retrospective effect and further selection of the candidates already made also shall be affected. While dealing with this issue, the Hon'ble Apex Court held that it is well settled rule of construction that every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the rules showing the intention to affect existing rights the rule must be held to be prospective. If a rule is expressed in a language which is fairly capable of either interpretation it ought to be constructed as prospective only. In the absence of any express provision or necessary intendent, rule cannot be given retrospective effect except in matter of procedure. Dealing with the rules in question, the Court has further held that the amending Rules 1987 in the instant case does not contain any express provision giving the amendment retrospective effect, nor there is any thing therein showing the necessary intendment for enforcing the rule with retrospective effect. Since the amending rule seeking change in the eligiblity criteria for selection and appointment to the post of Motor Vehicles Inspectors was not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover, as the process of selection had already commenced when the amending rules came into force. The

amending rules could not effect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualification prescribed by the rules before the amendment. It has further been held that the construction of amending rules should be made in a reasonable manner to avoid unnecessary hardship to those who have no control over the subject matter. There is no dispute to the ratio laid down by the Hon'ble Supreme Court, but that case is of little help to the petitioners in this case. The Division Bench in the LPA No. 209 of 1992 (decided on 23rd December, 1993) has considered the matter regarding the currency of select list prepared for appointment on the post of Gram Sevak. The LPA was directed against the judgment of learned Single Judge dated 11th September, 1991 in Special Civil Application No. 1191 of 1989 allowing the writ petition of the respondents and directing that the select list, which had been prepared on 20th of November, 1982, and which contained the name of the respondents, should continue to operate for filling up the existing vacancies or till the next select list, when prepared. The respondents therein were the candidates who had applied pursuant to the advertisement of the year 1980 for appointment as Gram Sevak. A select list of about 100 candidates was prepared on 20th November, 1982, out of which, 40 candidates were appointed by July, 1988. Thereafter a ban was imposed and on 22nd December, 1988 a Circular was issued by the administration scrapping the aforesaid select list and directing that no appointment should be made therefrom. The said decision was challenged in the aforesaid writ petition. In the appeal, it was contended that there were only two posts which existed at the time when the advertisement was issued and there was no reason as to why a select list of 100 candidates should have been prepared. The Division Bench, dealing with the aforesaid contention held that though only two vacancies existed at the time when the advertisement was issued, but for the reasons best known to them, the authorities concerned prepared a select list of 100 candidates. It has further been observed that select list was prepared to operate for one year, but it continued to operate till 1988, when the impugned circular was issued. Relying on the earlier decision of Divison Bench in LPA No. 137 of 1993, the Court has confirmed the judgment of the learned Single Judge and the LPA has been dismissed and directions were issued that the respondents will execute and operate the said select list and fill up the vacancies from the select list in question till the next select list is prepared and published. Now I may refer to the decision of this Court in Special Civil Application No. 2614 of the 1989 with SCA No. 3081 of 1989 decided on 12th December, 1991. That was also a case of appointment on the post of Gram Sevak and the notification dated 22nd December, 1988 was declared to be arbitrary and illegal and directions were given that the select list/waiting list in question shall remain operative until fresh select list is made in terms of paragraph 3 of the circular dated 29th May, 1982 and the respondents shall fill up the vacancies to the post in question from these select list/waiting lists until they remain operative. So in two cases of this Court, the point in

issue was that whether the select list prepared should remain in operation until fresh select list is prepared and that contention has been accepted. The Circular dated 22nd December, 1988 which scrapped the select list prepared earlier was held to be arbitrary and illegal later decision. However, in all these decision the point was not raised that if any appointment is made beyond the post advertised it will affect the right of candidate who acquire eligibility subsequently and as such, any direction given to the appointment beyond the post advertised will be violative of Arts. 14 & 16 of the Constitution of India.

[7] It is no more res-integra that the candidate included in the merit list has no indefeasible right to appointment even if vacancy exists. However, the State and its functionaries, while filling up the vacancies have to act bonafide and not arbitrarily. That is what the ratio which has been laid down by the Hon'ble Supreme Court in the case of Shankarsan Dash vs. Union of India (Supra). The admitted facts of the case arc that only live posts of Gram Sevak (Multi Purpose) were notified for selection and appointment, out of which four have been filled in from the candidates whose name stood at Sr. No. 1 to 4 in the select list. This select list had not remained in operation for all the years together as it was the case in the cases before this Court, reference of which has been made above. The respondents have not acted upon the select list for all the year to fill up subsequent vacancies arisen. Even all the five posts were not filled in. Very fairly, the respondents have given out that 5th candidate shall have a right of appointment and he will be given appointment as and when the ban would be withdrawn by the Government. What the petitioners are claiming in the Special Civil Application is appointment on the post more than the number which has been advertisement and secondly against the posts which have been created in subsequent years. The select list prepared could have been and should have been operative only to the extent of the post advertised and the post subsequently created should not have been filled from the condidates by giving appointments to those candidates whose names have been empaneled. The Circular of the Government though contemplates that the merit list shall remain in force till the next select list is prepared, but this matter has to be cansidered with reference to the rights of those persons who acquire eligibility after preparation of select list and with reference to the question whether the select list could have been made operative or given effect to make the appointment on the posts subsequently created or making appointments on the posts exceeding the number that has been advertised.

[8] In the case of Gujarat State Deputy Executive Engineers Association vs. State of Gujarat & Ors., reported in JT 1994 (3) SC 559, the point which came up for consideration before the Apex Court was that can a waiting list be treated as a source of recruitment from which candidates may be drawn as and when necessary, and how

long such a waiting list is operative. Dealing with these questions, the Apex Court held that the waiting list prepared in examination conducted by the Commission does not furnish a source of recruitment and that it is operative only for contingency that if any of the selected candidates does not join then a person from the waiting list may be pushed up and be appointed in the vacancy caused of if there is some extreme exigency, the Government may, as a matter of policy decision, pick up persons in order of merits from the waiting list. The Apex Court, in paras 8 and 9 of the judgment has considered these questions and I cannot do better than to reproduce those paragraphs in the judgment: 8. Coining 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 merits are placed below the last selected candidates. 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 whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of the 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 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 merits has a right to claim that he may be appointed if one or the other selected candidate does not join. Rut 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 arbitrary and makes appointment from the waiting list by picking and choosing for extraneous reasons.

[9] A waiting list prepared in ah 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 none examination was to operate as a 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 perpetuate 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. 9. Reference may have to another decision of Apex Court in the case of Prem Singh & Ors. vs. Haryana State Electricity Board & Ors., reported in JT 1996 (5) SC 219. In this case, two questions have arisen for consideration before the Apex Court, (i) whether it was open to the Board to prepare a list of as many as 212 candidates and appoint as many as 137 out of that list when the number of posts advertised was only 62, and (ii) whether the High Court was justified in quashing selection of all 212 candidates and appointments of 137 ? The facts of that case are to be briefly stated. By an advertisement published on 2.11.1991, applications were invited for 62 vacant posts of JE by the Board. Large number of applications were received and after screening 5955 applicants were found eligible.. 893 candidates appeared for interview in July, 1992. The Selection Committee selected 212 candidates and recommended their names in April, 1993. The Board after considering the latest vacancy position as on 11.2.1993, decided on 2.4.1993 to fill up 147 posts. Following the instructions of the State Government relating to reservation of posts, the Board distributed the vacant posts as under : 1. General : 74 2. S.C. : 29 3. B.C. : 15 4. Ex. Servicemen : 25 5. P.H. : 04 Total : 147

[10] It has further been decided to reduce the share of General category by 24 posts as there was backlog of that many posts reserved for SC. So the appointments were made in different categories as under : 1. General 50 2. S.C. 53 3. B.C. 15 4. Ex. Servicemen 25 5. P.H. 04 Total 147

[11] The Chief Engineer of the Board was able to appoint 138 candidates shortly thereafter. Some of the candidates who were not selected/appointed and one person who became eligible soon after the last date for receiving the application challenged the selection/appointment by filing the aforesaid writ petition in the High Court.

[12] After considering the case law the Hon'ble Apex Court in Para 25 of the judgment has observed : 25. From the above discussion of the case law it becomes clear that the

selection process by way of requisition and advertisement can be started for clear vacancies and also, for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in expectional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the Court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointment and may mould the relief in such a manner as to strick a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case. Considering the question what relief should be granted in the case, the Apex Court has observed in para 26: In the present case, as against the 62 advertised posts the Board made appointment on 138 posts. The selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 2. J 1.1991 and the selection process which followed thereafter. But as the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of retirement etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. However, the appointments which were made against future vacancies - in this case on posts which were newly created - must be regarded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of retirement and 12 because of deaths. The vacancies which were likely to arise as a result of retirement could have been reasonably anticipated by the Board. The Board through oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the appointments made against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be quashed. Therefore, in view of the special facts and circumstances of the case we do not think it proper to invalidate the appointments made on those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid. Though the High Court was right in the view it has taken, we modify its order to the aforesaid extent. These appeals are allowed accordingly.....

[13] So it is no more res-integra that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies, but not for future vacancies and if the requisition and the advertisement are for certain

number of posts only, the appointing authority cannot make more appointments than the number of posts advertised even though it might have prepared a select list of more candidates. The Apex Court has justified the appointment in excess of the requisition and advertised vacancies against anticipated vacancies, i.e. after selection process started. Those were the posts which had become vacant because of retirement and death. So far the vacancy which arose because of death a lenient view has been taken, but the appointments which were made against future vacancies were held to be invalid.

[14] In the case in hand, the requisitioned and advertisement was only for five posts and only four appointments have been made. The petitioners are now claiming appointments in these Special Civil Applications, by virtue of their names standing in the select list against the future vacancies. That is not permissible. This Court cannot direct the respondents to make any appointment in excess of the vacancies requisitioned and advertised by issuing a writ of Mandamus. If the prayer of the petitioners is allowed, then this Court will ask the respondents to fill up the future vacancies from the select list though the select list has been prepared on the basis of requisition and advertisement for five posts only. Yet there is another aspect in the matter which needs to be noticed. A distinction has to be drawn in between a select list and waiting list. When the five posts were requisitioned and advertised, the select list could have been only of five candidates, i.e. list of candidates from Sr. No. 1 to 5, on merits. The waiting list of reasonable number of candidates could have been prepared for meeting the contingency where the selected candidates or any of the selected candidate has not joined the post. In this case, the select list of 17 candidates has been prepared but the list beyond number 5 is at the most a waiting list. The waiting list cannot be kept in force for all the years to come. Though there may be a circular or a provision to continue the select list for a period till next select list is prepared, but that provision cannot be made applicable to waiting list. Otherwise also, a select list could not have been continued and could not have been kept in operation for filling up future vacancies, and on doing so, it would have been a case of violation of provisions of Arts. 14 and 16 of the Constitution of India. In the present case, even the fifth candidate could not be given appointment so far. The petitioners have no legal or fundamental right of appointment on the future posts in excess of the posts requisitioned and advertised. It is a case where the select list would not have been operated to the full extent and the names of the petitioners are far below in the select list. Taking into consideration the matter from this angle, the petitioners have no right whatsoever to get the appointment] on the post of Gram Sevak (Multi Purpose) beyond the number of the posts requisitioned and advertised, in response to which they submitted the application.

[15] In the result, all these Special Civil Applications fail and the same are dismissed. Rule is discharged in each petition with no order as to costs.