

HIGH COURT OF GUJARAT**HIRABHAI M MAKWANA***Versus***PRESIDENT****Date of Decision:** 19 October 2000**Citation:** 2000 LawSuit(Guj) 846**Hon'ble Judges:** [P B Majmudar](#)**Case Type:** Special Civil Application**Case No:** **3285 of 1991****Subject:** Constitution**Acts Referred:**[Constitution of India Art 227](#)[Gujarat Secondary Education Act, 1972 Sec 35, Sec 35\(7\), Sec 36](#)**Advocates:** [Paresh M Dave](#), [R C Jani](#)**Cases Referred in (+): 1**

[1] The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India challenging the order passed by the Gujarat Secondary Education Tribunal at Ahmedabad in Application No.365 of 1990. The petitioner herein was the original applicant before the Tribunal. It was his case before the Tribunal that he is a trained Graduate Teacher and qualified to be appointed as a teacher in Secondary Educational institutions. That he was appointed as a teacher and in-charge Head Master in the first respondent - institution with effect from June 1987 and worked till the end of academic year 1989-90 i.e. till June 1990. In spite of the fact that he was serving the school, he was not paid his regular salary. He was not allowed to perform his duty from June 1990. On the basis of the aforesaid apprehension of termination of his services, he approached the Tribunal by way of filing the said Application No.365 of 1990.

[2] The Tribunal had initially granted interim injunction in favour of the applicant against the termination without following the procedure established under the law. However, according to the applicant in spite of interim order he was not permitted to

discharge his duty. Ultimately, the Tribunal decided the main application and by its order dated 13.3.1991 allowed the said application partly. So far as prayer regarding continuing the petitioner in school on the post of in-charge Headmaster is concerned, the said prayer was rejected by the Tribunal. However, the Tribunal passed an order directing the respondent-school for making the payment of salary together with allowances to the petitioner with effect from 15.6.1987 to 15.6.1990 on the basis of *Quantem Meruit*. The aforesaid order of the Tribunal is impugned at the instance of the original applicant-teacher insofar as his claim regarding continuous service in the school on the post of Asst. Teacher/in-charge Head Master was denied. This petition was admitted by this Court on 27.12.1993 and now it has reached for final hearing.

[3] At the time of hearing of this petition, Mr Dave appearing for the petitioner has submitted that the petitioner having been appointed by the management on the post of Asst. Teacher / in-charge Head Master, his services could not have been terminated except in accordance with the provisions of Section 36 of the Gujarat Secondary Education Act. He submitted that even assuming that his appointment was not in accordance with the provisions of the Act, then also, his services could not have been terminated without following the principles of natural justice. He, however, submitted that in any case, so far as management is concerned, the Committee of the School had appointed the petitioner on the aforesaid post and if there is any defect in procedure in making such appointment u/s 35 of the said Act, then also the school is estopped from removing the petitioner from the aforesaid post. At the most, even if it is held that the appointment is ineffective, it is between the school and the Government and the Government may not sanction the salary of the petitioner but it does not mean that the school can terminate the services of the petitioner relying upon the provisions of Section 35 of the Act.

[4] As against that Mr Jani for the management has submitted that since the appointment of the petitioner on the post of Head Master was not in accordance with Section 35 of the Gujarat Secondary Education Act, the appointment of the said teacher was ineffective and therefore there is no necessity to comply with the provisions of Section 36 of the Act. He further submitted that the petitioner was appointed only for a temporary period by way of stop gap arrangement and since the applicant-teacher was unemployed he was given appointment for some time on humanitarian ground and that the same do not confer any rights in favour of the applicant.

[5] It is not in dispute that the petitioner was appointed by the respondent-school on the post of Asst. Teacher and he was given work of in-charge Head Master. It seems that his substantive appointment was on the post of Asst. Teacher of the school. The Tribunal considering the evidence both oral as well as documentary of the parties came

to the conclusion that the institution had taken the work from the petitioner as a teacher and in-charge head master. The Tribunal had also observed in its judgement that considering the documents on record that the petitioner was working in the opponent-school and was designated as in-charge Head Master. However, the Tribunal was of the opinion that since the procedure prescribed u/s 35 of the Act was not followed by the management before appointing the petitioner on the aforesaid post of teacher, such appointment would be void and that such void appointment cannot create any right in favour of the concerned teacher. The Tribunal had relied upon certain judgements given by the Tribunal on earlier occasion on this point. At this stage, it is relevant to refer to the provisions of Section 35 of the Act. Section 35 reads as under:-

"Registered private secondary schools to have selection Committees. - (1) For every registered private secondary school there shall be following two committees, namely:-

(A) a school staff selection committee for the purpose of recruiting the teaching staff of the school other than the head master;

(B) a special school committee for the purpose of recruiting the head master, and for the purpose of initial recruitment of the headmaster and the teaching staff of a school started after the appointed day.

(2) The school staff selection committee shall consist of the following members, namely:-

(I) Two representatives of the management of the school to be nominated by the management.

(ii) The headmaster of the school;

(iii) In the case of a school the total number of teachers in which is more than six, two teachers to be elected by the teachers of the school from amongst themselves, and in the case of a school the total number of teachers in which is or is less than six, one teacher to be elected by the teachers of the school from amongst themselves; and

(iv) One representative of the Board to be nominated by the Board.

(3) The special school committee shall consist of the following members, namely:-

(I) Two representatives of the management of the school to be nominated by the management.

(Ii) Two representatives of the Board to be nominated by the Board.

(4) Subject to the provisions of sub-section (1) of section 34, the school staff selection committee or, as the case may be, the special school committee shall select persons for appointment as teachers of the school from amongst the persons who are qualified to be appointed as such in accordance with the regulations made in this behalf.

Provided that for the purpose of such selection preference shall be given to a protected teacher, if he is otherwise eligible.

(5) The special school committee shall select persons for appointment to the post of headmaster of the school from amongst persons referred to in sub-section (4) or from amongst the teachers in the school;

Provided that for the purpose of such selection, preference shall be given to a senior teacher serving in the school or schools under the same management, if he is otherwise eligible and suitable.

(6) Whenever the persons from amongst whom a teacher or a headmaster is to be selected includes a person who is related to any member of the governing body or other body in charge of the management of the school or to any member of the school staff selection committee or, as the case may be, the special school committee, the member concerned of such committee, shall disclose the fact of such relationship to the members of the Committee and if any such person is selected by the Committee, his selection shall be subject to approval by an officer of the Board authorised in that behalf. Such approval shall be sought by the Committee within a week from the date of selection of the persons concerned and the authorised officer of the Board shall communicate his decision within fifteen days from the date of receipt of the reference by him.

(7) Any appointment of a headmaster or a teacher made in contravention of the provisions of this section shall be ineffective."

[6] Reliance has been placed by the respondent on Section 35(7) of the Act and it was stated that since the appointment was not made in conformity with the provisions of Section 35 of the Act and as Staff Selection Committee had not selected the candidate, the appointment in question is ineffective. Mr Dave for the petitioner however submits that the Committee of the School had conducted interview though representative of the D.E.O. was not present at such selection. However, the Tribunal relying upon the provisions of the Act that such an appointment is ineffective came to the conclusion that the said appointment is void in law and therefore it does not create any rights in

favour of such teacher on the post. Reference to Section 36 of the Act is required to be made. Section 36 reads as under:-

"36. Dismissal, removal and reduction in rank of certain persons. -- (1) No person who is appointed as a headmaster, a teacher or a member of non-teaching staff of a registered private secondary school shall be dismissed or removed or reduced in rank nor shall his service be otherwise terminated by the manager until--

(A) he has been given by the manager a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, and

(B) the action proposed to be taken in regard to him, has been approved in writing by an officer authorised in this behalf by the Board;

Provided that nothing in this sub-section shall apply to any person who is appointed for a temporary period only.

(2) The officer referred to in clause (b), of sub-section (1) shall communicate his decision within a period of forty-five days, from the date of receipt by him of the proposal under the said clause (b) and if such decision is not communicated to the manager by the said officer within such period the action proposed to be taken under the said clause (b) shall be deemed to have been approved by the said officer.

(3) Where a head master, a teacher or a member of non-teaching staff of a registered private secondary school pending any inquiry proposed to be held against him, the fact of such suspension together with the grounds therefor, shall be immediately communicated by the manager to an officer authorised in this behalf by the Board, and such suspension shall be subject to ratification by the said officer within a period of forty-five days from the date of the receipt of the communication in this behalf by such officer and if such ratification is not communicated to the manager by the said officer within such period, the suspension under reference shall cease to have effect on the expiry of such period.

(4) Where a head master, a teacher or a member of non-teaching staff of a registered private secondary school desires to submit his resignation, the resignation shall be tendered by him in person to the District Education Officer concerned and shall not be accepted by the manager unless it is so tendered and forwarded to him by such officer duly endorsed. The acceptance of any such resignation tendered in contravention of this sub-section shall be ineffective.

(5) Any person aggrieved by an order of the authorised officer under clause (b) of sub-section (1) may make an appeal to the Tribunal within a period of thirty days from the date of the decision of the authorised officer."

[7] The question which arises for the determination of the Court is whether the appointment is ineffective or void appointment or whether in case of ineffective appointment procedure as provided u/s 36 is required to be followed or not. It is not in dispute that the concerned teacher was appointed by the school though the representative of the DEO was not present and therefore it cannot be said that the provisions of Section 35 of the Act were followed by the school. Nonetheless, so far as salary of the teacher is concerned, the same is required to be borne by the Government under the provisions of Grant in Aid Code and therefore as far as the State Government is concerned, when the question of payment of salary of such teacher arises the Government may refuse to pay the salary of such teacher as his appointment is not valid appointment. So far as management is concerned, qua them it can never be said that the appointment of the teacher which was made by them by way of contract or employment vitiates simply because the management has not followed the provisions of Section 35 of the Act. Therefore, it can never be said that so far as management is concerned, the appointment is void. The effect of the same can be said to be that the management itself will have to pay the salary of such teacher. It does not lie in the mouth of the management to say that since they have not constituted proper committee as required u/s 35 of the Act. Ineffective appointment cannot be equated with void appointment and, therefore, it cannot be said that in all cases, the appointment which is ineffective is void. Therefore, even if the appointment in question can be ineffective, it cannot be branded as a void appointment.

[8] Mr Dave has pointed out that even in the year 1985 the school had given advertisement and the petitioner was called for the interview. Therefore, simply because some representative of the Board was not present as required u/s 35 of the Act, the school management cannot take advantage of the aforesaid situation and it was the duty of the management to see that some representative of the DEO remained present at the time of interview. However, in my view, before terminating the services of the petitioner who had served for more than about 3 years the management is required to follow the procedure u/s 36 of the Act. Even if it is presumed that the appointment in question was not valid so far as management is concerned, then also without giving any show-cause notice or any opportunity of being heard on this ground it was not possible to the management to terminate the services of the petitioner orally. All sorts of terminations are covered by Section 36 of the Act and therefore without following the provisions of Section 36 it was not open for the management to terminate the services of the petitioner. In the instant case it is not in dispute that

minimum requirement of following principles of natural justice is not followed. It was open for the management to hear the concerned petitioner and thereafter to pass appropriate order for the purpose of terminating his services. But without observing the rules of natural justice it was not open for them to terminate the services of the petitioner in the aforesaid manner.

[9] Mr Dave has relied upon judgement of this Court reported in 19 GLR 347 in the case of CHHAGANBHAI P. OZA V. THE AHMEDABAD JESUIT SCHOOLS SOCIETY & ANR. In para 6 of this judgement, this Court observed as under:-

"6.The next question is whether it is sufficient for the management to call upon the petitioner to show cause why his services should not be terminated without assigning any reasons for taking the decision to terminate the services. Clause (a) of sub-sec. (1) of Sec. 36 in terms provides that the teacher concerned is entitled to a reasonable opportunity of showing cause against the proposed action before the action can be taken by the management. Can it be said that a teacher has been afforded reasonable opportunity when he is not apprised of the reasons which influenced the management in taking decision to terminate his services?

"... Clause (a) of Sec. 36(1) in terms provides that the teacher concerned is entitled to a reasonable opportunity of showing cause against the proposed action before the action can be taken by the management. Only when the reason which operates on the mind of the management is communicated to the teacher, the teacher can satisfy the management in exercise of the right conferred by Sec.36(1) (a) that the reason is no real reason, that there is some misconception or the reason itself is non-existent or an illusory one. The whole purpose of obliging the management to afford a reasonable opportunity is that the reasons operating on the mind of the management are exposed to the view of the authority and that the teacher has an opportunity to show whether or not reasons are genuine or irrelevant or illusory. Therefore on a true interpretation of Clause (a) of Sec. 36(1), it is incumbent on the management to disclose to the teacher concerned the reason operating on its mind and the factors influencing the management in taking a decision to terminate his services in order to satisfy the requirement of affording reasonable opportunity imposed on it by clause (a) of Sec.36(1)."

[10] He has relied upon the judgement of this Court in the case of HIRABEN JIVANBHAI CHAUDHARI V. R.C. RAVAL reported in 34(1) GLR 66 . This Court has observed in para 7 as under :-

"... When voidable contract is said to be avoided it does not mean that the contract never existed, but it would mean that it ceased to exist from the moment of

avoidance. In the case of suppression of true facts or disclosure of untrue facts or non-disclosure of material facts, it cannot be said that there is no consent at all from the other party acting on such representation, but it can be said that the other party would not have consented if he had the facts before him. Therefore, voidable transaction until it is avoided is valid, and the things done under such contract cannot afterwards be undone. In other words, when a contract is voided by the party affected thereby, avoidance takes effect from the time it is avoided and not from the date of the transaction."

In para 22-A this Court further held as under:-

"22-A. The case like the present one should be decided by resorting to second proposition, namely, of issuing notice to the employee calling upon him to show cause and to tender his explanation for his conduct. The employee should tender his explanation and his documentary evidence. Explanation of the employee along with documentary evidence tendered by him should be considered independently and not in a biased manner by the employer and after consideration, the employer should take a positive decision as to whether it would like to avoid the contract and once such decision is taken the employer can by an order, rescind the contract of employment."

[11] Mr Dave has relied upon unreported judgement of this Court in group of petitions being Special Civil Application No.3141 of 1993 and other allied matters wherein services of the petitioners of those petitions were terminated by cyclostyled orders on the ground that their appointment was not validly made on the post in question. Though this Court has allowed those Special Civil Applications on the ground that without hearing those petitioners no such orders could have been passed and Court had permitted the respondents to hear the petitioners and pass appropriate orders in accordance with law.

[12] Mr Jani has however argued that the management had appointed the petitioner on purely temporary post and the management was subsequently not willing to continue him further. However, it is not open for the management to act on their sweet will ignoring the provisions of law and since they have continued the petitioner as a teacher for a period of 3 years, it was not open for them to terminate the services of the petitioner without hearing him and without giving opportunity to show cause. There is no substance in the aforesaid submission of Mr Jani. It is argued by Mr Jani for the respondent that since the order of appointment do not create any right in favour of teacher concerned, there is no question of hearing him before terminating his services and there is no necessity to follow procedure u/s 36 of the Act, as at the time of appointment of the petitioner no proper procedure was followed. In my view, said

submission is hallow and misconceived. So far as management is concerned, they have thought it fit to appoint the petitioner on the aforesaid post and and it is not open for them to take advantage of their action. But, in any case, there is absolutely no justification for them not to hear the present petitioner before taking the impugned action by observing the principles of natural justice. It was open for the management at least to give notice as to why his services should not be discontinued. Without following the minimum requirement of following the principles of natural justice the aforesaid order cannot stand. Under the aforesaid circumstances and considering the various judgements of this Court as referred to above, the petition is required to be allowed. It is submitted by Mr Jani that the school is closed since 1995 and it is not functioning since then. Mr Dave for the petitioner has also admitted the same. In that view of the matter, it is not possible to pass any order of reinstatement of the petitioner. As stated above, the order of termination is required to be set aside on the ground that the same was passed without following the principles of natural justice and the petitioner is entitled to all the benefits of his pay scale, salary and other incidental benefits as if he has continued in employment till the school was closed in the year 1995.

[13] The respondent-management is directed to pay all the aforesaid benefits to the petitioner up to the date of closure of the institution and whatever benefit is given to other teachers who were continuing in the school up to the closure of the institution should also be given to the petitioner. If the D.E.O. has considered other such teachers as supernumerary teachers and if such benefit is given, the said benefit also should be given to the petitioner. The respondent-management is also directed to pay arrears of salary of the concerned teacher forthwith for the period for which he has served in the institution and for which no salary was given to him. Rule is accordingly made absolute to the aforesaid extent with no order as to costs.