

(2005) 2 GLR 1274

Gujarat High Court

Case No: Special Civil Application No. 1853 of 2003

Vinodkumar Rajabhai
Rathod

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision: Nov. 5, 2004

Acts Referred:

- Constitution of India, 1950 - Article 136, 226, 227
- Urban Land (Ceiling and Regulation) Act, 1976 - Section 33

Citation: (2005) 2 GLR 1274

Hon'ble Judges: M.S. Shah, J

Bench: Single Bench

Advocate: Paresh Upadhyay, for the Appellant; Nagesh Sood, AGP for Respondent Nos. 1-2 and A.D. Oza, for the Respondent

Final Decision: Allowed

Judgement

M.S. Shah, J.

The petition challenges inaction on the part of the respondents in not appointing the petitioner on the post of Lecturer in Physics in Gujarat Education Service Class-II (Collegiate Branch) at Government Arts, Science & Commerce Colleges.

2. The Gujarat Public Service Commission ("the GPSC" for brevity) issued advertisement inviting applications for appointment to the posts of Lecturer in Physics in Gujarat Education Service Class-II (Collegiate Branch) at Government Arts, Science & Commerce Colleges. 38 posts were advertised, out of which 3 posts were reserved for Scheduled Caste candidates. The petitioner is a Scheduled Caste Candidate. By notice dated 9.6.2000, the GPSC published the select list and the waiting list. There is also no dispute about the fact that the petitioner's name was kept at Sr. No. 1 in the waiting list. The candidates in the select list as well as in the waiting list were also individually informed by separate letter dated 22.6.2000. In the said letter addressed to the petitioner,

it was stated that inclusion of the candidate in the waiting list did not confer any right of appointment and that the waiting list would remain in operation for a period of two years or till declaration of the result of the next examination, whichever is earlier.

3. In spite of availability of GPSC selected candidates for the posts of lecturer in Physics and in various other disciplines, the Government was not filling in the advertised posts for which the select lists were already forwarded by the GPSC in June/July 2000 or around that time for Physics and other subjects. Some of the GPSC selected candidates, therefore, filed Special Civil Application No. 2395 of 2001 and cognate petitions. At the hearing of the said petitions, the State Government contended that the ad-hoc lecturers had earlier filed petitions for their regularization and that although their writ petitions were dismissed by the learned Single Judge, the Division Bench of this Court on 29.9.1999 had permitted such ad-hoc lecturers to make a representation to the State Government for their regularization and that, therefore, the matter was under consideration. This Court, therefore, by ad-interim order dated 4.5.2001 directed the Government to decide the representation of ad-hoc lecturers by 10.6.2001 and the hearing of SCA No. 2395 of 2001 and cognate petitions was adjourned to 15.6.2001. Affidavit dated 14.6.2001 came to be filed on behalf of the State Government stating that pursuant to the above interim order, the State Government decided to regularize the services of ad-hoc lecturers subject to certain procedure including reference to the GPSC to obtain its approval. Subsequently, however, another affidavit dated 30.8.2001 came to be filed on behalf of the State Government taking the stand that in view of the recommendations of the high level committee appointed by the Government to consider the issues, the State Government has decided that the candidates duly recommended by the GPSC should be given appointment by the State Government and that after accommodating GPSC selectees, if any vacancies are available, then ad-hoc lecturers can be continued.

4. On account of the aforesaid stand of the State Government, the ad-hoc lecturers continued to enjoy the protection against termination of their services even after availability of GPSC selectees and ultimately that litigation concluded before the learned Single Judge on 15.7.2002 when the learned Single Judge rendered judgment in the said group of petitions being SCA No. 2664 of 2001 and cognate petitions ([Shah Jolly Chandravadan and Others Vs. State of Gujarat and Others](#), The Court held that when GPSC selectees are available, ad-hoc lecturers have no right to continue in service and gave, inter alia, the following directions :-

"(a) Considering the totality of facts and settled legal proposition in this field of service jurisprudence, prayer for continuation of service directly or indirectly made before this Court is not accepted. So, such or similar reliefs prayed by the Lecturers presently on ad hoc basis are hereby rejected. Therefore, interim relief, if granted to any of the ad hoc Lecturers stands vacated.

(b) Respondent-State is entitled to and is under statutory obligations to appoint Lecturers selected and recommended by the GPSC in each subject against the available vacancies

advertized. They shall be replaced vide ad hoc Lecturers in the respective subjects for which they have been selected.

(c) It is stated that GPSC has completed the process of selection and list of selected candidates is prepared and sent to the State Government. If GPSC has not finalized the list, then respondent GPSC is hereby directed to finalize the list and send it to the State Government with recommendations for appointment of selectees at the earliest and preferably within one week from the receipt of writ of this order.

(d) The State Government, obviously is directed to take further appropriate steps in accordance with the recommendations made by the GPSC within two to four weeks from the date of receipt of such final list of candidates recommended by the GPSC.

(e) If such list is already sent to the Government and the same is with the Government, then implementation thereof as per the policy of the Government be made within aforesaid time period from the date of receipt of writ of this order. As per the list of documents supplied by the learned GP Mr AD Oza and referred by learned Advocate General Mr Shelat, GPSC had selected 335 (three hundred and thirty five) candidates and 99 of them have already been appointed. Hence, these observations and directions so far as remaining 236 GPSC selectees shall have to be complied with."

5. In compliance with the aforesaid directions, the State Government operated the entire select list prepared by the GPSC for the posts of Lecturer in Physics by issuing notification dated 9.10.2002 and the Government Resolution of even date and the Commissioner of Higher Education issued consequential appointment and posting orders dated 31.12.2002. It also appears that one Scheduled Caste candidate from the select list did not join. Specific averment is made in this regard by the petitioner in para 3.3 of the petition, which is not controverted by any of the respondent-authorities, which reads as under:-

".... It is respectfully stated that, one Shri Bharkat Kumar Rameshbhai Kataria, a candidate at Sr. No. 25, in the select list, who is also a Scheduled Caste candidate is not willing to join pursuant to the said result because the said candidate was already selected by the GPSC pursuant to the earlier advertisement and the said person is already working as the full time Lecturer in the subject of Physics at Bahauddin Science College, Junagadh, since more than two years and under these circumstances, there was no occasion for the said candidate to opt for the appointment again in the same subject in Government College. The petitioner respectfully states that, in the waiting list, the name of only one candidate i.e. of the petitioner is shown. It is respectfully stated that, under these circumstances, one person from the waiting list belonging to the Schedule Caste i.e. the petitioner ought to have been appointed by the respondent-authorities."

Under these circumstances, the petitioner by his letter dated 23.1.2003 (Annexure "D"), the petitioner requested the respondent-authorities to issue appointment order in favour

of the petitioner stating that the petitioner had learnt that one selected candidate for the posts of Lecturer in Physics has not given willingness and is, therefore, not appointed. The respondents did not give any reply to the petitioner.

6. In the meantime, the judgment dated 15.7.2002 of the learned Single Judge was carried in appeals and by judgment dated 11.12.2002 (reported in [K.D. Vohra Vs. Kamleshbhai Gobarbhai Patel](#)), the Letters Patent Bench dismissed the appeals and confirmed the directions given by the learned Single Judge. The Letters Patent Bench also took serious note of the inaction on the part of the State Government as well as the GPSC of a long period of almost a decade which resulted into continuance of ad-hoc lecturers and contrary to the recruitment rules beyond one year without consultation with the GPSC.

7. It appears that the petitioner learnt on personal inquiries that the reason for not accepting the petitioner's representation was that the petitioner was in the waiting list and the waiting list could only be operated for a period of two years from 20.6.2000. The validity period of the waiting list expired on 20.6.2002 and, therefore, no appointment order could be issued in favour of the petitioner. Hence, the petitioner has moved this Court.

8. Mr Paresh Upadhyay, learned counsel for the petitioner has raised the following contentions :-

8.1 When the select list prepared by the GPSC and forwarded to the Government on 22.6.2000 was not operated till 9.10.2002, and even the posting orders were not issued till 31.12.2002, the question of operating the waiting list did not arise because the waiting list is to be operated when candidates in the select list are appointed and given posting orders, but do not join. The question whether the candidates in the select list joined or did not join, therefore, did not arise till January, 2003 and since the petitioner came to know that one candidate from the select list was not appointed because he was already working on such post, the petitioner had submitted the representations dated 23.1.2003 (Annexure-D). The respondents, therefore, ought to have appointed the petitioner at that time because the question of operating the waiting list arose only in January, 2003 after the actual posting orders were issued.

8.2 It is further submitted that the Government Circular dated 20.2.1998 permitting operation of the waiting list for a period of 2 years from the date of preparation of the waiting list has to be read in the context of the purpose for which the waiting list is prepared and not in isolation or in vacuum. Since the select list published in June 2000 was for the first time operated in October/December 2002, the period of two years should be computed from the date of issuance of appointment/posting orders or in any case the waiting list has to be treated as operative for a reasonable period from the date of issuance of posting orders.

8.3 Ad-hoc lecturers in Physics are still continuing at Government colleges. In the subject of Physics itself, many persons are still working as lecturers on ad-hoc basis, who had either not appeared in the selection in which the petitioner had competed or have appeared and not selected. There is specific averment to this effect in para 3.6 of the petition.

8.4 The issue involved in the present petition is now settled by the judgment of this Court dated 30.10.2004 in Special Civil Application No. 11958 of 2004.

9. On the other hand, Mr Nagesh Sood, learned AGP for the State Government and the Commissioner of Higher Education and Mr A.D. Oza, learned counsel for the GPSC have submitted that the Government Circular dated 20.2.1998 clearly lays down that the waiting list is to remain in operation for a period of two years only and that the period of two years would run from the date of communication of the waiting list to the concerned candidates or till the date of declaration of result of the next examination, whichever is earlier. It is submitted that since the waiting list was communicated on 22.6.2000, the validity period of the waiting list came to an end on 20.6.2002 and, therefore, the waiting list could not have been operated after 20.6.2002. Reliance is placed on certain decisions which shall be dealt with hereinafter.

10. Having heard the learned counsel for the parties, it appears to the Court that there is considerable substance in the submissions made by the learned counsel for the petitioner that the respondents not having operated the select list for more than two years in order to protect the ad-hoc lecturers who were and are being continued without consultation of the GPSC in contravention of the statutory recruitment rules, cannot be permitted to rely on the said fact for denying appointment to the petitioner. Even when a clear vacancy for GPSC candidate was available when a Scheduled Caste candidate at Sr. No. 25 of the select list did not join, the respondents ought to have offered appointment to the person at Sr. No. 1 in the waiting list.

As held by the Apex Court in *Gujarat State Dy. Executive Engineers' Association v. State of Gujarat*, 1994 SCC Su (2) 591 = 1994 (2) SLR 710, a candidate in the waiting list in order of merit has a right to claim that he may be appointed if one or other selected candidate does not join (para 8). The occasion for the petitioner to claim such right did not arise before 31.12.2002 when for the first time posting orders were issued in favour of the GPSC selected candidates. Such candidates were given time to report for duty and, therefore, the fact whether any GPSC selected candidate had not reported for duty and consequent vacancy was available would not be known till January, 2003. It is only in the background of these facts that one has to consider whether the respondent authorities were justified in not accepting the petitioner's representations dated 23.1.2003 by which the petitioner requested the respondents to appoint the petitioner as a lecturer in Physics in the vacancy made available by not joining of a Scheduled Caste candidate from the select list. The submission made on behalf of the respondents that validity of the waiting list was only two years and that the period began to run from 22.9.2000 cannot at all,

therefore, be accepted in the aforesaid peculiar facts and circumstances of the case. The factual situation was such that the waiting list could not have been operated before January, 2003.

11. It appears to the Court that the respondents have denied the petitioner legitimate right to be appointed to the post of lecturer in Physics inspite of the fact that on account of a Scheduled Caste candidate from the select list did not join in January 2003, since he was already working on the said post since more than two years, and inspite of the fact that the petitioner being at Sr. No. 1 of the waiting list and also a Scheduled Caste candidate was, therefore, required to be appointed on that vacancy. A large number of ad-hoc lecturers in Physics who had either not appeared at the GPSC selection or who had appeared, but failed to pass at such selection, were continued in service as ad-hoc lecturers and are continued as such even now. In the aforesaid litigation, the State Government had fairly submitted (para 72 of the judgment of the learned Single Judge at page 1247 of the reports) that after appointing GPSC selected candidates in each subject, if the Government finds that there is a scope to continue ad-hoc appointees or to continue ad-hoc appointees on the available vacancies, then the State is ready to continue such ad-hoc appointees till regularly selected candidates are made available. This Court also held (para 76 Page 1251) that obviously those who have failed and not included in the select list, cannot be permitted to continue on the post. However, such ad-hoc lecturers can be continued if no GPSC selectees are available against their respective posts. Direction (b) given by the learned Single Judge (para 77 page 1252) also required the State Government to appoint the lecturers selected and recommended by the GPSC in each subject against the available vacancies advertised. They were to replace ad-hoc lecturers in the respective subjects for which they have been selected. The Court also directed the State Government to take appropriate steps in consonance with the recommendations of the GPSC within two to four weeks from the date of receipt of the final list of candidates recommended by the GPSC. All these directions were confirmed by the Division Bench in the judgment dated 11.12.2002 in the Letters Patent Appeals with scathing criticism of the tortious inaction on the part of the State Government and GPSC. The State Government did not, however, pay heed to the above directions and the State Government and GPSC have sought to justify the inaction of not operating the waiting list in 2003 and 2004 on the ground that the time limit stipulated by the Government Circular dated 20.2.1998 had expired in June 2002.

12. At this stage, therefore, the true scope and purport of the Government Circular dated 20.2.1998 needs to be examined. The said resolution provides for a two year validity period for the waiting list. Before considering the validity of the waiting list, it would be necessary to refer to the resolutions/circulars providing for operation of the select list. By the Government Circular dated 16.1.1969, when the State Government in the General Administration Department noticed that considerable delay occurs in communicating Government decision to the GPSC on the recommendations made by it, the Government directed that in respect of the Commission's recommendation for appointment to the

posts by direct selection, the required action like verification of character and antecedents and medical examination of the candidates and offer of appointments should be completed within two months from the date of the Commission's recommendations and that the Commission be informed of the action taken to accept its recommendation within this period. Again by Government Circular (GAD) dated 27.5.1982, the Government provided that the aforesaid period for acting upon the recommendations of the GPSC and informing the GPSC about the action taken by the Government should not exceed a period of six months under any circumstances. In case the time is not complied with, such non-compliance alongwith reasons therefore must be intimated to the GPSC. The abovesaid instructions were reiterated by the Government circular dated 26.11.1991. By circular dated 27.8.1997, the State Government directed that when GPSC selected candidates are available, but they are not given appointment, the ad-hoc appointment should not be made and ad-hoc appointments given earlier should be terminated forthwith.

13. Now coming to the Government Circular dated 20.2.1998 providing that the waiting list shall remain in operation for a period of two years, the said instructions have to be read in light of the aforesaid instructions that the State Government must take action to accept the recommendations of the GPSC for offering appointments to the candidates placed in the select list within a period of six months from the date of the Commission's recommendations. The Government policy, therefore, contemplates that the waiting list should remain in operation for another year and a half after operation of the select list so that in case any candidate included in the select list and appointed does not join or leaves the service after joining, the vacancy should be filled in by operating the waiting list.

That is precisely what the petitioner requested in January 2003 when he pointed out to the State Government that one candidate from the select list, a Scheduled Caste candidate is not given posting orders on 31.12.2002 as he is not willing, in the circumstances stated above. There is no dispute about the fact that candidate at Sr. No. 25 of the select list Mr Bharatkumar Rameshbhai Kataria, a Scheduled Caste candidate is not appointed, at least has not joined, as stated hereinabove. Since the petitioner is a Scheduled Caste candidate, the petitioner was, therefore, entitled to claim that the vacancy available on account of non-joining of Mr Bharatkumar Kataria was required to be made available to the petitioner which claim was made within few days from the date of posting orders were issued. Seen in this light, the inaction on the part of the respondents in not considering the petitioner's representation and in not appointing the petitioner as a lecturer in Physics must be held to be illegal and arbitrary.

14. Of course, on behalf of the respondents, reliance has been placed on the following decisions in support of their contention that a candidate in the waiting list has no right to get a mandamus for appointment :-

(i) [Jatinder Kumar and Others Vs. State of Punjab and Others,](#)

(ii) (2004) 2 SCC 681

(iii) [Ashwani Kumar Singh Vs. U.P. Public Service Commission and Others,](#)

(iv) [State of Bihar and others Vs. Md. Kalimuddin and others,](#)

15. In [Jatinder Kumar and Others Vs. State of Punjab and Others,](#) all that the Apex Court laid down was that it is open to the Government to decide how many appointments will be made and the process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus.

In the instant case, apart from availability of vacancy on account of the selected candidate not joining and the petitioner herself having been selected and placed in the waiting list, there are a large number of ad-hoc lecturers who have been continued in service, the details of which are already given in para 8.3 hereinabove are not disputed by or on behalf of the respondents.

16. The decisions in [Ashwani Kumar Singh Vs. U.P. Public Service Commission and Others,](#) and [Bihar State Electricity Board Vs. Suresh Prasad and Others,](#) dealt with the cases where the first examination was followed by the second examination held by the concerned Board/Commission. After the appointments were made from the select list prepared pursuant to the first examination, another select list was prepared pursuant to the second examination and appointments were also made from such second select list. It was thereafter that the candidates whose names were included in the merit list pursuant to the first examination filed petitions claiming that the appointments made from the select list pursuant to the second examination were illegal. The Apex Court held that in the absence of statutory rules to the contrary, the employer is not bound to prepare a waiting list in addition to the panel of selected candidates and to appoint the candidates on the waiting list in case the candidates on the panel did not join.

In the facts of the instant case, there are clear and specific government instructions that the select list has to be acted upon within six months from the date of communication of the recommendations by the GPSC and the waiting list has to be operated within a period of two years. As already pointed out earlier, when the select list itself was not, or could not be, operated for two years and four months, and the posting orders for the candidates in the select list were issued only on 31.12.2002, the question of operating the waiting list did not arise till then. When a Scheduled Caste category candidate included in the select list were offered appointment on 31.12.2002 at that time the respondents were required to consider the petitioner's case who was at Sr. No. 1 in the waiting list and who is also a Scheduled Caste candidate. The illegality or arbitrariness on the part of the respondents in not doing so and in not accepting the petitioner's specific representation to that effect made on 23.1.2003 would be borne out when seen in light of the undisputed fact that ad-hoc lectures who either did not appear at the GPSC selection or who appeared but

have failed to pass continue as ad-hoc lecturers in the same subject i.e. Physics, have been continued in service and continue even now.

17. Similarly, the decision in [State of Bihar and others Vs. Md. Kalimuddin and others](#), has to be read in the context of the facts of that case where the Court gave a direction for appointment of a person after the life of the select list had come to an end. That was a case where the rule in question was a statutory rule framed under Article 309 of the Constitution.

In the instant case, the Government Circular dated 20.2.1998 contains mere executive instructions which have to be read as a part of the entire scheme of Government instructions regarding implementation of the GPSC recommendations including the Government circulars regarding operation of the select list itself.

18. The apprehension urged by the learned counsel for the respondents that the directions proposed to be given in this case would be treated as relaxing the provisions of the Government Circular dated 20.2.1998 is misconceived. This Court does not hold that the provisions of the said Circular are not mandatory or that the provisions thereof are to be relaxed. All that this Court proposes to do is to consider the fact that the select list itself was not operated for a period of more than 2 years and thereafter the occasion for operating the waiting list did not arise till January 2003 and, therefore, the Circular dated 20.2.1998 read in light of the circulars dated 16.1.1969, 27.5.1982, 26.11.1991 and 27.8.1997 did not place any embargo upon the respondent authorities in operating the waiting list within a period of one year and six months from the date of operation of the select list. The decision is, therefore, rendered in the peculiar facts and circumstances of the case where the select list itself was not operated for more than two years on account of Government instructions and various litigations referred to hereinabove.

19. In view of the above discussion, the petition is allowed. Respondent No. 3-Gujarat Public Service Commissioner is directed to forward, within 15 days from the date of receipt of the writ of this Court, the name of the candidate placed at Sr. No. 1 in the waiting list for the post of lecturer in Physics as prepared on 9.6.2000 pursuant to advertisement No. 26/98-99 and thereafter respondent No. 1-State Government, after considering the formalities regarding verification of character, antecedents and medical examination, appoint such candidate on the post of lecturer in Physics in Gujarat Education Service Class-II (Collegiate Branch) at Government Arts, Science & Commerce Colleges within one month.

20. Rule is made absolute to the aforesaid extent.