

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 773 of 1998

in

SPECIAL CIVIL APPLICATION No 760 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT Sd/-

and

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO  
1 & 2 YES; 3 to 5 NO

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P.G. PANCHOLI

Versus

STATE OF GUJARAT  
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Appearance:

1. LETTERS PATENT APPEAL No. 773 of 1998  
MR BB NAIK for Appellant No. 1  
..... for Respondents No. 1-3  
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CORAM : MR.JUSTICE J.N.BHATT

and

MR.JUSTICE D.H.WAGHELA

Date of decision: 30/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.N.BHATT)

1. The appellant-original petitioner- has, by invoking the provisions of Clause 15 of the Letters Patent, questioned the validity and propriety of the order of the learned single Judge dated 19.3.1998, whereby, the petition was dismissed.

2. The learned counsel Mr.Naik for the appellant-original petitioner- has raised the following three contentions in the course of his submissions during the time of hearing of this appeal on two occasions and he has also taken us through the relevant material from the record of the present case. Upon his request, the old record of the writ petition was also requisitioned from the old High Court premises and we have examined all the records threadbare.

- (i) That the original petitioner has specifically averred in the petition that he was regularly appointed being the senior-most person and seniority alone being the criteria for the promotional post of Vice Principal from the post of Assistant Engineering Superintendent and that the said submission has not been controverted by filing any affidavit-in-reply by the other side;
- (ii) That the appointment of the original petitioner again from the post of Vice Principal to the post of Principal by virtue of Notification dated 8.5.1984 would show that he was regularly appointed on the post of Vice President; and
- (iii) That the petitioner has also specifically averred in the petition that the persons junior to the petitioner in the cadre of Assistant Engineering Superintendent in the cadre of Vice Principal are continued as Vice Principal and the petitioner is reverted. It is further averred that one such person Shri S.K.Seraiya, who was promoted to Class II service from the cadre of Assistant Engineering Superintendent by order dated 28.5.1985, was still continuing in Class II service and the petitioner was reverted. It is in this context it has been submitted that the impugned notification of reversion is suffering from the vice of discrimination, arbitrariness

and is offending the provisions of Articles 14 and 16 of the Constitution.

3. Before the aforesaid three contentions are examined, analyzed and evaluated for the purpose of considering the merits of the order, let us have a skeletal projection of a few relevant material facts.

4. The appellant is the original petitioner, who joined the service of the respondent authority as an Assistant Lecturer in the Department of Education under the Director of Technical Education on 26.7.1963. He was, thereafter, transferred with effect from 16.6.1969 to Surat from Bhavnagar as Assistant Lecturer in F.S.Parekh Technical High School. He was, thereafter, promoted on 9.1.1974 by selection to the post of Assistant Engineering Superintendent. He was thereafter transferred to Navsari for some time and again he was placed back at Surat.

5. By virtue of Notification dated 30.10.1982 issued by the respondent authority, it is the case of the petitioner that he came to be promoted to Class II post of Gujarat Education Service and given posting as Vice Principal in F.S.Parekh Technical High School, Surat and in pursuance of the said Notification, he took charge as Vice Principal. He has further alleged that he was mainly in charge of the Engineering Training Institute which was run by F.S.Parekh Technical High School.

6. It is further emerging from the petition that the confidential reports of the petitioner, as per his claim, till the year 1983-84, were "Good" and he has not received any adverse remarks during his long service period of 20 years till 1983-84 came to an end. It is also noticed from paragraph 3 of the petition that no norms are prescribed for the duties to be performed by the Vice Principal and, though he had asked for the duty list of the post of Vice Principal when he was promoted to the said post, he was not given the same. Even the powers of the post of Vice Principal are not defined and the petitioner was not supplied with the same. The petitioner was performing his duties very efficiently, diligently and honestly as per the instructions of the Principal. The petitioner has highlighted the nature of work and duties performed as Vice Principal in the later portion of para 3 of the petition which we need not in greater detail reproduce and articulate.

7. It is also the case of the petitioner that the respondent No.3 Shri S.N.Desai, the then principal of

F.S.Parekh Technical High School, Surat used to give directions to staff contrary to the directions given by the petitioner which some time resulted into conflict between the staff and the Principal. At one occasion, even the respondent No.3 had to tender an apology to the Class III staff. The Inspector of the Department also knew about this. The respondent No.3 wrote adverse confidential reports of the petitioner for the above stated reasons for the years 1984-85 and 1985-86. The petitioner was communicated the said reports and he made representations against the same before higher authority but the same were rejected.

8. By virtue of the notification of the respondent authority dated 24.2.1987, the impugned order of reversion of the petitioner from the post of Vice Principal to the post of Assistant Engineering Superintendent came to be passed which was assailed by the petitioner in the petition before the learned single Judge.

9. The learned single Judge, after consideration of the facts and circumstances, reached to the conclusion that the original petitioner was not entitled to hold the civil post of Vice Principal as his promotion on the post of Vice Principal was purely on temporary and ad-hoc basis and the petitioner was given promotion on the post of Vice Principal not after being found suitable for the same by the Departmental Promotion Committee. It is in this context the learned single Judge has further observed that the impugned order of the petitioner's promotion to the post of Vice Principal was ad-hoc and temporary, and as such when he was ordered to be reverted therefrom, that action could not be said to be illegal or arbitrary. In short, the petition came to be dismissed by the learned single Judge holding that the original petitioner was not entitled to hold the civil post of the office of Vice Principal. Being aggrieved by the order of the learned single Judge, the original petitioner has now come up before this Court by invoking the provisions of Clause 15 of the Letters Patent. We have heard the learned advocate Mr.Naik, as stated hereinabove, elaborately. We have also examined the material on record.

10. In the factual matrix emerging hereinabove and emerging from the petition and other documents submitted by the original petitioner, and as no affidavit-in-reply seems to have been filed, we would like to deal with the three contentious issues raised by the learned counsel Mr.Naik before us:

(i) Prima facie, one would be tempted to accept the submission that in absence of any affidavit-in-reply controverting the pleas raised in the petition, the learned single Judge ought to have accepted the pleas of the petitioner and allowed the petition. This prayer is reiterated before us. There is no dispute about the fact that affidavit-in-reply has not been filed. We would like to place it on record that, in a given case, if the respondent-authority has failed to file affidavit-in-reply and when the Court, while exercising the power of judicial review, that too under Article 226 of the Constitution which are extraordinary, plenary, discretionary and equitable, even finds from the record that the propounder of the claim or right in the petition has not succeeded in showing his right to be protected by extraordinary redressal with the help of Article 226, non-filing of affidavit-in-reply or non-counteracting the pleas and averments made in the petition ipso facto would not be sufficient. The constitutional Court's duty commands that before any such extraordinary remedy is extended to ascertain and satisfy about the legitimate right and if the petitioner fails and if the Court in its duties succeeds to find that there is no such right, it is not necessary for the Court to accept the plea or the contention advanced in the petition at its face value in absence of any affidavit-in-reply; nor any legal provision or any authoritative pronouncement has been submitted contrary to this proposition of law. Therefore, we are of the opinion that the first part of the first submission, howsoever it may appear to be alluring and tempting, is not acceptable and sustainable.

At this stage, it would lead us to appreciation and examination of the second part of the first contention raised by the learned counsel Mr.Naik. Mere averment in the petition that the petitioner was appointed on the post of Vice Principal being the seniormost person and on regular basis does not find any support from the plain tenor and contents of the appointment order. It is in this context the learned single Judge has rightly observed, in our opinion, that the petitioner has not been able to show that he was entitled to protection and he was holding a

civil right to the post of Vice Principal to which he came to be promoted temporarily on ad-hoc basis. We have also, for our satisfaction, gone through the appointment order relied on by the petitioner and we have found that the observations of the learned single Judge on this count are quite justified. It leaves no manner of doubt in our minds that the order of the promotion to the post of Vice President by the respondent authority was purely temporary and ad-hoc. Not only that, there is no other material whatsoever worth the candle to suggest that the case of the petitioner was before the Departmental Promotion Committee and that he was regularly appointed after the necessary prescribed procedure came to be observed. Mere submission is one thing, and the Court of law, and more so under the constitutional powers under Article 226 of the Constitution which are of extraordinary nature, would obviously require the contender or propounder of the right to show that he has been appointed on the post of Vice Principal, or for that purpose any post, as of right and after observance of due procedure and on a regular basis. There is none in the present case. Therefore, the second part of the first contention does not at all appeal to us. We are also feeling that it is our duty to point out that despite our pointed question to place a copy of the Recruitment Rules or relevant rules entitling promotion to the post in question, the learned counsel Mr.Naik expressed his inability to produce the same. No such copy of the Rules had been produced in the petition and obviously therefore the learned single Judge was deprived of examining the contention that a permanent post on a regular basis was given to the original petitioner. We are, therefore, of the clear perception that mere averment, and even in absence of any affidavit-in-reply and that too without any support from the Rules and that too in the teeth of the plain tenor of the order, would run diametrically counter to the contentions advanced before us. We are therefore unable to subscribe to the first contention advanced by the learned counsel Mr.Naik.

- (ii) It would nextly lead us to appreciation of the second contention of the learned counsel Mr.Naik that the factum of further promotion to the post of Principal from the post of Vice Principal ipso

facto would radiate a strong support to the contention that the appointment was regular. It was further therefore submitted that in absence of any regular appointment to the post of Vice Principal, there would not have a reason or the question of appointment of the same person to the higher post of Principal. Undoubtedly, this submission is also quite settled, but not sound and sustainable when one gets into the reality of the contents of the notification dated 8.5.1984 by virtue of which appointment of the petitioner to the post of Principal came to be recorded. We have examined the entire notification. At two places it has been specifically mentioned that even the post offered to the petitioner as Principal and his appointment to that post was subject to regular appointment that may be made by the respondent authorities. Again, in the same notification, the following expressions are employed:

" Shri P.G.Pancholi, Vice Principal of the F.S.Parekh Technical High School (Gujarat Education Service Class II) is hereby transferred and posted as Principal at the Government Technical High School at Surendranagar vice Shri K.N.Patel on ad-hoc/temporary promotion."

It would be further interesting to note that at the end of the Notification, an additional clarification is made insofar as the petitioner's promotion is concerned. It is specifically stated that the promotion in respect of Mr.Pancholi (original petitioner) is ordered on purely temporary and ad-hoc basis for a period of twelve months or till the said post is filled in on regular basis, whichever is earlier.

It could well be visualised in absence of Rules which is not placed before us, as stated hereinabove, that vice Mr.K.N.Patel, who was holding the post of Principal, the original petitioner came to be posted for a temporary ad-hoc period. It is also further circumscribed that such a purely temporary and ad-hoc basis promotion shall be for a period of 12 months or till the said post is filled in on regular basis. It leaves no any manner of doubt in our minds that appointment of the petitioner to the post of Principal was not on regular basis, or was not

after the Departmental Promotion Committee's scrutiny and after observing necessary provisions made under the Rules, which we have not been able to peruse despite our repeated requests as the same were not supplied.

It is, therefore, evident that merely in absence of or in case of vacancy of the office of Principal, as Mr.K.N.Patel had been transferred and posted elsewhere, such type of ad-hoc temporary appointment by no stretch of imagination or by any principle of jurisprudence of service could lead to an inference that the post of Vice Principal was held by the original petitioner on a regular basis or after observance of necessary due process or scrutiny by the Departmental Promotion Committee.

It is also noticed that even the petitioner himself came to be promoted to the post of Assistant Engineering Superintendent on selection. It is, therefore, as clear as broad daylight that the lower post than the post of the Vice Principal, known as Assistant Engineering Superintendent, is a post of selection and that is how the original petitioner got that post upon selection. We do not presume in absence of any relevant or necessary provisions in the Rules that the higher post of Vice Principal would be filled up strictly only on seniority and that too without the principle of seniority-cum-merit. Again, such appointment came to be made on regular basis which was emphatically and vehemently sought to be fortified. We are, therefore, unable to accept the first two contentions advanced by Mr.Naik.

(iii) Obviously, lastly, it would take us to consideration and appreciation of the last and third contention that juniors to the original petitioner were retained in Class II service and one of them is also named in the petition and the reversion of the petitioner to the original post from the office of the Vice Principal would tantamount to discrimination resulting in infringement of the provisions of Articles 14 and 16 of the Constitution. This submission proceeds on the premise that the original petitioner's claim to the post of Vice Principal was as of right as if the appointment was by promotion after observance of necessary due process and in



accordance with the prevalent rules. We need not reiterate what we have said earlier but this supposition, this premise on which assistance of Articles 14 and 16 is involved, is without any basis. Once the entitlement to hold the civil post is not established by the person who propounds it, no further question of examining the merits would arise. Again, the second question will be whether the appointment and continuance of the junior, even if it is accepted at its face value as averred in the petition, could be presumed to be not on merits and bypassing the right of the petitioner. The question of discrimination would arise only when right is established and shown to be violated and thirdly a person junior to the contender or propounder of entitlement is wrongfully given entitlement or continuance and, in the present case, in the category of Class II or in the post of Vice Principal. These are the assumptions and suppositions on which averments are made and arguments are advanced and in order to qualify one to earn the protection of extraordinary constitutional discretionary, plenary powers under Article 226, it is necessary or imperative to show the right or entitlement to the post in question and that such right or entitlement is wrongly violated. We do not propose to go into the issue of adverse remarks and communication of the same for the relevant period of 1984-85 and 1985-86. They are admitted facts. Therefore, one more important aspect which this Court is obliged to consider, even if we find any merits in the last contention, is whether in absence of a person who is likely to be affected and is junior to the petitioner could any effective, enforceable constitutional redressal be given without hearing him? That is one of the aspects. After consideration and thorough and threadbare analytical evaluation of factual profile and relevant proposition of law and the very well elaborated defined parameters of the provisions of article 226 of the Constitution we find that the third submission is also quite meritless. Consequently, we are left with no alternative but to raise our hands helplessly from affording any relief to the original petitioner- appellant before us as no right is established, much less an infraction thereof. In the circumstances, when we broadly agree with the ultimate conclusion recorded by the learned single Judge,

we affirm the conclusion and dismiss the LPA on merits at the admission stage as it is not fit and proper case for the exercise of our powers under Clause 15 of the Letters patent. The appeal is accordingly dismissed.

Sd/-

( J.N.Bhatt, J.)

Sd/-

30.10.2001 ( D.H.Waghela, J.)  
(KMG Thilake)