

HIGH COURT OF GUJARAT

**RAJENDRASINH V CHAUHAN
V/S
STATE OF GUJARAT**

Date of Decision: 26 September 2007

Citation: 2007 LawSuit(Guj) 3208

Hon'ble Judges: [S R Brahmhbhatt](#)

Eq. Citations: 2008 (1) GLR 634, 2008 (17) GHJ 54

Case Type: Special Civil Application

Case No: 4006 of 1987

Subject: Constitution

Head Note:

Gujarat Panchayats Act, 1961 – Sec 294(4), 102 - Constitution of India – Art 14, 16, 226, 227 – Validity of appointment of secretary by nagar panchayat – D.D.O. suspended resolution – Excess amount paid to secretary on his appointment sought to be reversed – Held, As Gujarat Panchayat (Amendment) Ordinance, 1984, nullified Gujarat Panchayat (3rd Amendment) Act, 1978, Nagar Panchayat has no power to appoint secretary, hence, order of D.D.O. suspending resolution proper & recovery of excess amount not valid direction given to state not to order recovery – Rule discharged

Acts Referred:

[Constitution of India Art 16](#), [Art 227](#), [Art 226](#), [Art 14](#)

[Gujarat Panchayats Act, 1961 Sec 102](#), [Sec 294\(4\)](#)

Final Decision: Rule discharged

Important Para: [10](#)

Advocates: [Bipin I Mehta](#), [Hemant Makwana](#), [U M Shastri](#), [B M Mangukiya](#)

Reference Cases:

[Cases Referred in \(+\): 2](#)

Judgement Text:-

S R Brahmhatt, J

[1] The petitioner under Art. 226 of the Constitution of India has challenged inter alia the order of District Development of ficer passed on 2091984 suspending Resolution No. 40 dated 1771984 passed by the then Lunawada Nagar Panchayat (now Lunawada Borough) promoting and appointing the petitioner from the post of Accountant to the post of Secretary w.e.f. 1771984 on retirement of the then Secretary on his attaining the age of superannuation; on the ground that the Resolution No. 40 passed by Lunawada Nagar Panchayat was not in consonance with the instructions of the State contained in communication dated 1931983. The Resolution was suspended under Sec. 294 of the Gujarat Panchayat Act, 1961.

[2] The facts in brief deserve to be set out as under :

The petitioner who was an employee of Lunawada Nagar Panchayat had originally been appointed as Naka Karkoon on 651957. Thereafter, he was promoted as Accountant in 1972. Petitioner was given charge of the post of Secretary on 2111984 as per the prevailing rules and regulations. The qualification for the post of Secretary was Matriculation and passing of Local Self Government Diploma and 2 years experience in Municipality. Petitioner took the examination of Local SelfGovernment Diploma in March, 1984, petitioner was declared successful on 1261984. Petitioner submitted application on 371984 to the Chairman, Lunawada Nagar Panchayat Committee stating that as he possessed qualification and he has passed the Local Self Government Diploma Examination he be considered and promoted to the post of Secretary. The Lunawada Nagar Panchayat

considered the application positively and passed resolution dated 1771984 in its General Meeting being Resolution No. 40 and resolved that as the post of Secretary was vacant due to retirement of the then Secretary Shri P. J. Dave, and as petitioner was possessing requisite qualification for the post of Secretary, and as he was also holding charge of the post of Secretary and had put in 27 years service in Panchayat he was promoted to the post of Secretary in the payscale of Rs. 500900. The respondents State issued necessary administrative instructions vide communication dated 1931983 in view of the decision of the Apex Court in case of State of Gujarat & Anr. v. Ramanlal Keshavlal Soni & Ors., reported in AIR 1984 SC 161 : 1983 (1) GLR 708 (SC), providing moratorium on filling the post by way of direct recruit or promotion. The instruction dated 1931983 were taken into consideration by District Development of ficer and he was of the view that the resolution of Lunawada Nagar Panchayat No. 40 dated 1771984 was not in conformity with the directions of the State Government, and therefore, in exercise of power under Sec. 294(4) of the Gujarat Panchayat Act, 1961 he suspended the same. It appears from the record that the Panchayat challenged this order of District Development of ficer before the Development Commissioner and the Development Commissioner vide order dated 2811985 confirmed the order of District Development of ficer. Petitioner therefore was apprehending his reversion, and as even thereafter, he was permitted to continue as Secretary approached this Court by way of present petition under Art. 226 of the Constitution of India.

[3] This Court on 1381987 (Coram : R. J. Shah, J.) (as he then was) ordered maintaining status quo as on date, and thereafter, the interim relief has been continued. At one point of time on 30121988 this Court [Coram : M. B. Shah, J. (as he then was)] subsequently made an order to District Development of ficer to consider case of the petitioner and as no decision was taken, this Court (Coram : R. A. Mehta, J.) (as he then was) had to make an order for District Development of ficer's presence in the Court for explaining noncompliance with order dated 30121988. Petitioner has retired on attaining the age of superannuation and it is a statement made at the Bar by Shri Mehta learned Counsel for the petitioner that till the age of superannuation petitioner discharged his duty as Secretary to the Panchayat. The petitioner, however is not receiving pensionary benefits/retiral benefits on the post of promotion to the post of Secretary.

[4] Shri Mehta, learned Counsel appearing for the petitioner has submitted that the original rules came to be amended where under the local cadre which is subjectmatter of this petition and in Nagar Panchayats were subsequently excluded, and thereafter, subsequently only on 1851985 after the decision of Apex Court in State v. Ramanlal Keshavlal Soni (supra) they were again included in the purview of the recruitment procedure. Therefore, as the petitioner came to be appointed in the interregnum period by the Panchayat in its General body Meeting by Resolution No. 40 dated 1771987 his appointment was absolutely just and proper and valid and the Panchayat as such had competence to appoint the petitioner as Secretary. The District Development of ficer at the relevant time was not justified in exercise of his power under Sec. 294 of the Panchayat Act on the ground that Resolution No. 40 dated 1771984 was not in consonance with the directives and instructions received by Government vide communication dated 1931983. Shri Mehta submitted that District Development of ficer if he could take into consideration the instruction dated 1931983 as well ought to have taken into consideration subsequent directives issued by way of Resolution dated 27121983 and the directives dated 1331985 in regard to filling up of post on converted Gram/Nagar Panchayats. Shri Mehta has submitted that the petitioner was fulfilling all the requisite qualifications and at the relevant time the Resolution No. 40 dated 1771984 came into being, Nagar Panchayat had power to make appointment to the post of Secretary by way of promotion, and therefore, the petitioner's promotion should have been treated regular promotion and the order of District Development of ficer as well that of the Development Commissioner therefore deserved to be quashed and set aside.

[5] Shri Mehta has further submitted that as the order of suspending the Resolution No. 40 dated 1771984 passed by District Development of ficer had direct impact upon the civil rights of the petitioner as he was likely to be reverted from the post of Secretary, the same could not have been passed without affording an opportunity of being heard to the petitioner.

[6] Shri Makwana, learned A.G.P. appearing for the State submits that, as the appointment of the petitioner by way of promotion to the post of Secretary vide Resolution No. 40 dated 1771984 was in itself without authority of law and with requisite competence the District Development of ficer was well within his power to suspend execution of the same and exercised his power under Sec. 294(4) of the Panchayats Act, 1961. The order of District Development of ficer has also been rightly considered by the Development Commissioner. Shri Makwana has invited this Court's attention to the

observations of the Supreme Court in case of State v. Ramanlal Keshavlal Soni (supra) and submitted that the entire amendment of 1978 to the Panchayats Act, 1961 was found to be repugnant, and therefore, the same was quashed. The State Government therefore was required to issue necessary orders. In fact, the Amendment of 1978 was challenged by the employees of the Panchayat. However it is a case where the amendment itself was sought to be relied upon for effecting appointment of the petitioner to the post of Secretary by way of promotion. Shri Makwana has submitted that right after the decision of the Apex Court in case of State v. Ramanlal Keshavlal Soni (supra) the State Government issued Ordinance on 661984 where under the effect of earlier 1978 Amendment was taken away and Sec. 102 of Panchayat Act was amended. Now, by virtue of this Amendment in regard to Panchayat no one possessed power of making appointment to the post of Secretary, and therefore, the Resolution of the Panchayat No. 40 dated 1771984 was bad in law, and therefore, it has rightly been suspended by District Development of ficer in exercise of his power made under Sec. 294(4) of the Gujarat Panchayats Act, 1961. Shri. Makwana has also placed reliance upon the decision of this Court in case of Ratibhai M. Patel & Ors. v. District Development of ficer, Mehsana, reported in 1999 (1) GLR 109, wherein an identical question arose before this Court and this Court [Coram : S. K. Keshote, J. (as he then was)] was pleased to dismiss the petition. Shri Makwana submitted that when the action of the Panchayat lack inherent power and was without authority of law the same was rightly suspended by District Development of ficer, and therefore, District Development of ficer was not required to afford an opportunity to the petitioner; whereas and in fact it was the Panchayat which was aggrieved and Panchayat was required to take up the matter at appropriate stage. Accordingly, Panchayat had filed revision application before the Development Commissioner who in turn dismissed the same confirming the order of District Development of ficer. Therefore, as it is observed by this Court in case of Ratibhai M. Patel & Ors. (supra) the requirement of hearing is also not warranted in such type of cases.

[7] Shri Mangukiya learned Counsel appearing for the then Nagar Panchayat has submitted that the petition is suffering from the vice of nonjoinder as the Lunawada Panchayat is no more exist and in its place Municipal Borough came into existence, and therefore, without joining Lunawada Borough petitioner cannot maintain and agitate this petition. Shri Mangukiya further submitted that the control of the State was all along there in the matter of recruitment to the post of Secretary, and therefore, though at the relevant time Nagar Panchayat had passed Resolution No. 40 dated 1771984 Panchayat did not have competence at the relevant time to pass such Resolution, and

therefore, the petition deserves to be dismissed.

[8] Shri Shastri, learned Counsel appearing for the District Development officer has also submitted that the order of District Development officer dated 20/9/1984 was proper and justified, and therefore, it has been rightly upheld by the Development Commissioner while rejecting the revision application filed by the Nagar Panchayat. He submitted that the petitioner has belatedly approached this Court under Art. 226 of the Constitution of India, and therefore, this petition is also suffers from the vice of delay and laches.

[9] This Court has heard learned Counsels of respective parties at length and perused the record. It deserves to be noted that the controversy in this petition is in a narrow compass. The question which requires to be addressed is as to whether the Lunawada Nagar Panchayat at the relevant time i.e. 17/7/1984 had competence to pass Resolution No. 40 appointing petitioner by way of promotion to the post of Secretary without any consultation or approval by the State or its authority or delegated officers. In order to appreciate this question it is expedient to set out the Amendment of 1978 which is promulgated as Gujarat Panchayats (3rd Amendment) Act, 1978 wherein under Sec. 102 it has been amended. The same is set out as under :

"In the Principal Act, in Sec. 102 : (1) for subsec. (1), the following subsection shall be substituted, namely :

"(1)(a) Subject to the provisions of this Act and the rules made thereunder there shall be a Secretary for every gram panchayat and nagar panchayat who shall be appointed in accordance with the rules :

Provided that where on account of conversion of a Municipality into a gram panchayat or a nagar panchayat under Sec. 307, an officer of a municipality becomes a Secretary of such panchayat or where any person not being a talati cum panchayat Secretary is appointed as a Secretary to such panchayat, such Secretary shall not be governed by the rules so made and the rules for regulating recruitment, and conditions of service of such Secretary shall be such as the panchayat may, subject to general or specific order of the State Government, by its resolution determine :

Provided further that the State Government having regard to the population of a gram and income of the panchayat thereof may direct in respect of a group of gram panchayats that such group shall have one Secretary, and thereupon, there shall be one Secretary for that group.

(b) A gram panchayat or as the case may be, a nagar panchayat may, subject to general or special order of the State Government, appoint such servants as may be necessary for the proper exercise of its powers, discharge of its duties and performance of its functions under this Act, and the Rules for regulating recruitment and conditions of service of such servants shall be such as the panchayat may subject to like order by its resolution determine."

Now by virtue of this amendment in Sec. 102 the panchayat so far as the local cadres were concerned, become empowered to appoint Secretary and other employees forming part of local cadres. After the decision of the Apex Court in case of State of Gujarat v. Ramanlal Keshavlal Soni (supra) the State issued ordinance on 661984 which was known as the Gujarat Panchayats (Amendment) Ordinance, 1984 and it was provided therein that it shall be deemed to have come into being on 1071978. Thus, the amendment had the effect of nullifying the amendment of 1978. The saving clause No. 17 of this Ordinance read as under :

"17.(l)(a) The Gujarat Panchayats (Third Amendment) Act, 1978 and (b) the Gujarat Panchayats (Amendment) Ordinance, 1984 are hereby repealed.

(2) Notwithstanding the repeal of the Gujarat Panchayats (Amendment) Ordinance, 1984, anything done or any action taken under the Principal Act as amended by the said Ordinance, shall be deemed to have been done or taken under the Principal Act as amended by this Act."

[10] Against this backdrop the submission of Shri Mehta deserves to be examined. The effect of Ordinance dated 661984 deserves to be taken into consideration in its proper perspective. Resolution No. 40 dated 1771984 came into effect only on 1771984.

Admittedly, subsequent to passing of the Ordinance and its effect, and therefore, the nagar panchayat could not have made appointment of the petitioner to the post of Secretary by way of promotion contrary to the rules which prescribed the mode of appointment to the post of Secretary wherein the power of making appointment to the post of Secretary in the local cadre were conferred upon nagar panchayat vide 1978 amendment were taken away. In view of this, it can be said that the decision of District Development of ficer was, though not entirely based upon this reasoning, not unjustified so as to smack of violation of Arts. 14 & 16 of the Constitution of India. The State was required to issue instructions on 1931983 only in order to take care of the situation that was arising after the pronouncement of the Apex Court in case of State v. Ramanlal Keshavlal Soni (supra). Therefore, in order to take care of the situation that may arise after pronouncement of the Supreme Court in case of State of Gujarat v. Ramanlal Keshavlal Soni (supra), the necessary instructions were required to be issued on 1991983. Therefore, the District Development of ficer's reasoning cannot be said to be not germane to the controversy in question. Therefore, it has rightly been upheld by the Development Commissioner.

[11] Shri Mehta in the alternative has submitted that in fact the petitioner has discharged his duty as Secretary, and therefore, in case this Court is not accepting the petition, the respondents may atleast be restrained from effecting recovery. This submission of Shri Mehta is without prejudice to his earlier submission that the petitioner had been rightly appointed by promotion to the post of Secretary by the Panchayat.

[12] Shri Mehta's alternative submission with regard to direction for not recovering the dues of salary deserves positive consideration. As it could be noted from the affidavit in reply, the petitioner at the relevant time had possessed requisite qualification for appointment to the post of Secretary by way of promotion. This Court [Coram : M. B. Shah, J. (as he then was)] vide order dated 30121988 has passed order which reads as under :

"Order :

District Development of ficer, Panchmahals has not verified whether petitioner was duly qualified to be appointed as Secretary of the Nagar Panchayat or not. Hence, D.D.O. Panchmahals, is directed to consider the qualification of the petitioner and decide whether he was duly qualified to be appointed as Secretary of the Nagar Panchayat. The District Development of

ficer also should consider whether he was the seniormost person eligible to be promoted to the post of Secretary, Nagar Panchayat. D.D.O. shall decide the said question on or before 3111989."

As this order was not complied with, this Court [Coram : R. A. Mehta, J. (as he then was)] again had to pass the following order 1321989, which reads as under :

"The Dist. Development of ficer, Panchmahals was directed to decide certain questions by order dated 30121999 and the D.D.O. Was directed to decide on or before 3111989 and the matter was adjourned to 221989. As no instructions were received from the D.D.O. The matter was adjourned to 1321989. The learned Counsel for the Dist. Development of ficer is again without any instructions on the question of compliance with the Court's order dated 30121988. Therefore, the responsible and conversant of ficer of the D.D.O., Panchmahals is directed to remain in personally present in this Court on 2021989 to explain why the Court's order is not complied with. S.o. to 2021989."

Despite this order the respondent did not consider the case of the petitioner for being regularised on the post of Secretary.

[13] In view of the aforesaid observations, it would be improper for this Court to hold otherwise than declaring that the nagar panchayat in fact did not have power of appointing present petitioner to the post of Secretary by way of promotion and the D.D.O. order was not unjustified. However, at the same time in view of the facts and circumstances attending this case the defect in appointment was absolutely curable and it deserved to be cured which has not been cured and the fact remains that the petitioner had been protected by order of this Court, and the petitioner in fact discharged his duties all throughout as Secretary. Because of nonacceptance of this petition the State may not be entitled to order recovery as otherwise petitioner was eligible to discharge his duty as Secretary and in fact he has discharged his duties as such and in fact the State was ordered long back to consider his case by this Court. As observed above, it would not be proper for the respondent to order the recovery. Therefore, this Court while rejecting this petition is of the view that, in the interest of justice, the State

shall be restrained from ordering any recovery from the petitioner. At the same time, it would be open to the petitioner to make an appropriate representation to the State Authorities for treating him to be regularly appointed Secretary and if such representation is made same shall be considered in accordance with law and its own merits, without being influenced by the dismissal of this petition.

[14] With these observations the petition fails and is dismissed accordingly. Rule discharged. Interim relief, if any granted earlier, shall stand vacated. No cost.

Petition dismissed.

