

(2016) 02 GUJ CK 0090

In the Gujarat High Court

Case No : Special Civil Application No. 1255 of 2002

Abdulkadir Sultanmiya Ladman

APPELLANT

Vs

Govt of Gujarat and Others

RESPONDENT

Date of Decision : 11-02-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 227

Citation : (2016) 02 GUJ CK 0090

Hon'ble Judges : V.M. Pancholi, J.

Bench : Single Bench

Advocate : Reema Kamani, Ld. Advocate for P.H. Pathak, Advocate, for the Appellant; Rutvij Oza, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

V.M. Pancholi, J.—1. This petition is filed under Articles 226 and 227 of the Constitution of India, wherein, the petitioner has prayed for the following reliefs:

"A) Be pleased to issue a writ of certiorari, writ of Mandamus or any other appropriate writ, Order of Direction to quash and set aside the actions of respondents in not paying the Pension as per the last drawn Pay-Scale Rs. 425-700 and consequent recovery of Rs. 34,844 as well recovery of penal interest for Home Building Loan for Rs. 9,114 from the Gratuity.

B) Be pleased to direct the respondents to pay Pension and Gratuity to the petitioner on the bases of Pay-scale of Rs. 425-700 subject to further payment of difference amount if become payable as per final result of Application No. 252/99 with arrears and interest at the rate of 14% per annum."

2. Heard learned advocate Ms. Reema Kamani for Mr. P.H. Pathak, learned advocate for the petitioner and learned AGP Mr. Rutvij Oza for the respondents.

3. Learned advocate for the petitioner mainly submitted that the petitioner joined the services of the respondents as Lab Assistant on 06.03.1964. Thereafter, he

was transferred in 1976. Petitioner was given grade and pay scale of Rs. 425-700 with effect from 29.11.1976 as per the office order dated 30.10.1980. Petitioner was accordingly drawing his salary in the said pay scale till his last day in service. In the meantime, Government issued Government Resolution dated 25.06.1992. As per the said resolution, pay scale and grade for Lab Technician was fixed as Rs. 1400-2600/-. As per the case of the petitioner, he was covered by the said resolution and therefore, representations were made before the respondent authorities. The request of the petitioner was not considered. Petitioner therefore filed an Appeal No. 252 of 1999 before the Gujarat State Civil Services Tribunal. The Tribunal by an order dated 16.08.2002, partly allowed the said appeal and the order dated 01.07.1999, passed by the respondent authority was quashed and set aside. The respondent was directed to pass a fresh order in accordance with the standing order of the Government. At this stage, learned advocate for the petitioner submitted that the respondent authority thereafter passed an order on 10.10.2002 and thereby placed the petitioner in the pay scale of Rs. 1640-2900/-. Learned advocate Ms. Kamani thereafter submitted that surprisingly and shockingly, the aforesaid order was modified and corrected by the respondent authorities by an order dated 16.05.2003, whereby, the petitioner was granted pay scale of Rs. 1600-2660/-. So called mistake committed by the department while passing an order of 10.10.2002 was accordingly rectified. However, the said order of May, 2003 was not at all served to the petitioner and when this Court passed an order dated 11.01.2016 in the present petition, on 21.01.2016, the aforesaid order was served to the petitioner.

4. Learned advocate for the petitioner thereafter contended that petitioner has retired in the year 1999. At that time, the respondent No. 3 insisted for recovery of Rs. 34,844/- from the gratuity and also decided to fix the pension at a lower rate of basic i.e. 380-600 instead of Rs. 425-700/-, a scale which the petitioner was drawing at the time of his superannuation i.e. on 31.12.1999. Amount was paid to the petitioner after deduction of the aforesaid amount. Thus, it is contended that the respondent authorities have without issuing notice and without following the principles of natural justice, made the recovery of the aforesaid amount and therefore, the said action of the respondent authorities is required to be quashed and set aside and the respondents be directed to refund the aforesaid amount to the petitioner.

5. Learned advocate for the petitioner thereafter contended that petitioner was drawing Rs. 425-700/- and therefore, the respondent authorities are bound to fix the pension on the basis of the last salary drawn by the petitioner and therefore, the order dated 16.05.2003 is also required to be quashed and set aside.

6. Learned advocate for the petitioner has placed reliance upon the order dated 19.01.2015 passed by the Hon'ble Division Bench of this Court in Special Civil Application No. 13924 of 2005 in support of her contention.

7. On the other hand, learned AGP Mr. Oza mainly contended that there are three divisions in Directorate of Health, Medical Services and Medical Education viz.

Director of Health, Director of Medical and Director of Medical Education and Research.

8. Petitioner was originally appointed by the Medical Education Department as Lab. Assistant and thereafter he was promoted to the post of Lab Technician and was posted to Medical College, Surat. Thereafter, he was transferred to the Referral Hospital, Chhota Udepur. However, that was a stopgap arrangement. The petitioner continued to work at Chhota Udepur under the Health Department till his retirement on superannuation. It is submitted that pay of the petitioner was fixed in the pay scale of Rs. 300-600/- which was subsequently revised and fixed in the pay scale of Rs. 425-700/-. As per the revision of pay scale Rules 1987, the pay scale was fixed at Rs. 1400-2300/- However, the said fixation came to be rejected by the local fund audit on the ground that the petitioner was not holding a degree of B.Sc. and therefore excess amount paid to the petitioner because of the mistake, was ordered to be recovered from the petitioner. Such recovery was made. At this stage, it is contended that petitioner was posted on the post of Lab Technician sanctioned by the Directorate of Health. Qualification for Lab Technician under the said Directorate is B.Sc. or B.Sc. Second Class or B.Sc. with three years experience. He therefore submitted that the reliance placed by the petitioner on the qualification of the Lab Technician under the Directorate of Medical are not applicable in the facts of the present case and therefore when the petitioner has not passed B.Sc., he is not entitled to get the benefit of the pay scale which was wrongly granted to him. Accordingly, the pension of the petitioner is fixed.

9. At this stage, learned AGP further submitted that on 10.10.2002, petitioner was granted higher pay scale of Rs. 1640-2900/- with effect from 01.06.1987. However, in view of the objection taken by the District Local Fund Examiner, said order was revised by an order dated 16.05.2003 and thereby, petitioner was granted higher pay scale of Rs. 1600-2600/-. It is admitted by learned AGP that in view of the affidavit filed on 02.02.2016, the order dated 16.05.2003 was not served to the petitioner and the same was served only on 21.01.2016. However, the said order was placed alongwith the affidavit which was filed on 19.02.2013 before this Court. He therefore submitted that no error was committed by the respondent authorities while recovering the aforesaid amount from the petitioner and while fixing the pension of the petitioner in the pay scale of Rs. 1350-2200/- which is corresponding to Rs. 380-600/-. Thus, petitioner is not entitled to claim any of the reliefs prayed for in this petition and therefore, petition be dismissed.

10. I have considered the submissions canvassed on behalf of learned advocates appearing for the parties. I have also gone through the material produced on record. It emerges from the record that petitioner was appointed on 06.03.1964 with the respondent department. The petitioner was initially posted at Baroda Medical College and thereafter in 1976, he was transferred to Referral Hospital, Chhota Udepur on the post of Lab Technician. At that time he was given grade and pay scale of Rs. 425-700/- with effect from 29.11.1976 as per the

recommendation of the pay commission. By an order dated 30.10.1980, he became eligible to get first higher pay scale on completion of first higher service after completion of 9 years of services on 01.06.1987. When the Tribunal passed an order in Appeal No. 252 of 1999 on 16.08.2002, the respondent authorities passed an order on 10.10.2002, by which he was placed in the pay scale of Rs. 1640-2900/-. The petitioner has retired on 31.12.1999 on attaining the age of superannuation. However, at that time, Rs. 34,844/- deducted from his retiral benefit. The aforesaid amount was deducted without following the principles of natural justice. No notice was issued to the petitioner, nor any opportunity of hearing was afforded to him and therefore in view of the settled legal position, even if it is a mistake on the part of the respondent authorities in giving the particular pay scale to the petitioner, the amount given to the petitioner cannot be recovered without issuing the notice to him. In a recent decision rendered by the Hon''ble Supreme Court in the case of State of Punjab & Ors. v. Rafiq Masih (White Washer), reported in , 2015 (4) SCC 334, the Hon''ble Supreme Court observed and held in paragraph No. 18 as under:

"18. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group "C" and Group "D" service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

Thus, in view of the aforesaid decision, recovery from the retired employees or the employees who are due to retire in one year was impermissible. Thus, such action on the part of the respondent of recovering of amount of Rs. 34,844/- is required to be quashed and set aside and the respondents are hereby required to refund the aforesaid amount to the petitioner.

11. That the Division Bench of this Court vide order dated 19.01.2015, passed in

Special Civil Application No. 13924 of 2005, observed and held as under:

"4.1 Insofar as the stand of the Railway Administration for withdrawal of the order of stepping up of pay is concerned, we have no quarrel whatsoever. The stepping up was granted when it was not due to the petitioner and other employees since the very basis of the higher pay of the juniors was their ad-hoc promotion. Even the petitioner had not questioned the subsequent order of the Railway Administration dated May 28, 1990, withdrawing the benefit of stepping up of pay. The real question before the Tribunal and consequentially before us is, can the Department calculate the pension of the petitioner ignoring two advance increments granted to him during the course of his active service. Whatever be the genesis of the two advance increments released in favour of the petitioner, it appears indisputably that such advance increments were granted to him. It was because of this that his basic salary was fixed at Rs. 3220/- + Rs. 75/- + Rs. 75/- as on February 01, 1992. It was thereafter increased to Rs. 3500/- with additional increment due and released in his favour with effect from September 25, 1993. He retired with effect from June 30, 1994. Though the Tribunal recorded that it is not clear as to whether the petitioner actually received such salary, we have verified the original service book of the employee presented by the Railways, which also carries the entries of pay fixation noted above. There is nothing on record that despite such fixation, his salary was not released on such basis. We, therefore, proceeded on the premise that the petitioner received salary on the basic pay-scale of Rs. 3350/- on February 01, 1992 and Rs. 3500/- with effect from September 25, 1993. The pension of a retired Government servant is to be fixed in terms of his last drawn salary considering his total length of pensionable service. Throughout the active service, the petitioner received salary on certain pay fixations. The Railway Administration could not have drawn his pension on some other basis at a lower level without legally revising his pay fixed. This was never done. In fact, a further order was passed on March 19, 2001, nearly after seven years after his retirement, giving legitimacy to the pay fixed as on February 01, 1992 and September 25, 1993, as noted above. Strangely the Railway Administration once again backtracked its step and recalled its order dated March 19, 2001 vide order dated October 07, 2003. This order cannot be relied upon for withholding the correct pension of the petitioner for several reasons. Firstly, this would run against the actual pay fixed and salary drawn by the employee. Secondly, this order was passed many years after the Government servant retired. Thirdly, it was passed behind the back of the petitioner without any notice. Fourthly, this order was never communicated to the petitioner or even to the Tribunal, which was offspring of the petitioner's grievance about not paying correct pension to the petitioner.

5. Under the circumstances, the impugned judgment of the Tribunal is reversed. The respondents are directed to refix the pension of the petitioner taking into account his last drawn salary on the basis of pay fixation carried out in his service book noted above. Since the petitioner himself had taken considerable time in moving the legal machinery for such purpose, there shall be no burden of

interest till filing of the Original Application. Post the date of filing, the respondent shall pay statutory interest on such unpaid pension. Such benefit shall be released in favour of the legal heirs of the deceased employee."

12. Thus, keeping in mind the aforesaid observations, in the present case, petitioner is entitled to get his pension re-fixed taking into account his last drawn salary.

13. In the present case, the petitioner has lastly drawn the salary in the scale of Rs. 425-700/- and therefore, the respondents are directed to pay pension to the petitioner on the basis of the pay scale of Rs. 425-700/-.

14. Accordingly, the following order is passed:

I. Respondent authorities shall refund the amount of Rs. 34844/- to the petitioner with statutory interest.

II. The respondents are hereby directed to re-fix the pension of the petitioner in the pay scale of Rs. 425-700/-, corresponding Rs. 1400-2300/-. The respondents are also directed to pay the arrears with statutory interest as the petition was immediately filed within a period of 12 weeks from the date of receipt of this order.

15. Petition is accordingly allowed. No order as to costs. Rule is made absolute to the aforesaid extent.