

(2022) 03 GUJ CK 0040

In the Gujarat High Court

Case No : R/Special Civil Application No. 17539 Of 2021

Aneri Amalbhai Shah

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 10-03-2022

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2022) 03 GUJ CK 0040

Hon'ble Judges : Nikhil S. Kariel, J

Bench : Single Bench

Advocate : Mita S Panchal, Utkarsh Sharma

Final Decision : Disposed Of

Judgement

Nikhil S. Kariel, J

1. Heard learned Advocate Ms.Mita Panchal for the petitioners and learned AGP Mr.Utkarsh Sharma on behalf of the respondents.

2. Issue Rule returnable forthwith. Learned AGP waives service of notice of Rule on behalf of the respondent State.

3. With the consent of the parties, the present petition is taken up for final hearing.

4. By way of this petition, the petitioners have prayed for the following reliefs:-

"9(A) Your Lordships may be pleased to admit and allow this application;

(B)Your Lordships may be pleased to issue writ of mandamus and/or any other appropriate writ, order or direction to hold and declare that the petitioners are entitled to the benefit of continuity of services along with all the consequential benefits for the calculation of five years in fixed pay scheme as both have secured appointment as per the first merit list as well as in the revised merit list and both the time, they were appointed on the post of Accountant by the

respondent authority as granted in SCA No.16290/2016 by this Court and further be pleased to quash and set aside the order Dated 12.1.2021 annexed at Annexure-A to this petition;

(C) That pending hearing and final disposal of this petition, the respondents may be pleased to give the benefit of continuity of service along with all the consequential benefits for the calculation of five years in the fixed pay scheme as petitioners had secured their appointment as Accountant in the first merit list as well as in revised list and were appointed on the same post of Accountant both the time by the respondent authority as given benefit to the petitioners of SCA No.16290 of 2016 as ordered by this Hon'ble Court, in the interest of justice."

5. The brief facts leading to filing of this petition are as under:-

5.1. The petitioners had applied for the post of Accountant on the basis of an advertisement published by the Joint Selection Committee of the Finance Department on 12.11.2011. The petitioners having cleared the selection process by the Joint Selection Committee was placed on the select-list for the post of Accountant (Class-III Grade-I). Such appointment was on fixed pay for a period of five years as per the extant Policy of the State Government and whereas the appointment order was issued on 26.9.2012. It is stated that vide an order passed by the respondent No.2 herein dated 11.4.2014, the order of appointment had been cancelled. It appears that the order of cancellation had been necessitated on account of later developments. The selection process had been challenged by some candidate, who had not cleared the selection process and whereas this Court had initially vide an order passed in Special Civil Application No.12500 of 2013 directed the respondent Authority to consider the representation of the aggrieved persons. It appears that later on few other persons had filed petitions and whereas this Court had directed the respondents to complete the process of revising the merit list more particularly in context of error in answer keys. It further appears that the Joint Selection Committee had sought for a report of experts and whereas based upon the same, the Gujarat Technology University (GTU) was requested to prepare a revised merit list as per the correct answer keys furnished by experts. That as per the result prepared by the GTU a fresh merit list and waiting list were prepared by the Committee. It appears that based upon the merit list and waiting list prepared by the GTU, the Joint Selection Committee vide an order dated 11.4.2014 had cancelled the original merit list and instructions were given to the respondent No.2, who vide order dated 11.4.2014 had cancelled the appointments given to selected candidates, including the present petitioners. It further appears that even in the revised merit list, the petitioner Nos.1 and 2 were placed at Sr. Nos.61 & 57 respectively. As per the case of the petitioners, since they were not given reappointment orders, petitioner No.1 had filed Special Civil Application No.7619 of 2014 for appropriate direction, and whereas the Hon'ble Court had issued notice to the respondents and protection was granted vide order dated 3.6.2014. It is submitted that during the pendency of the said petition, both the petitioners

were reappointed on 19.7.2014 and the petitioner nos. 1 and 2 joined the duties on 23.7.2014 and 30.7.2014 respectively. That the petitioners were confirmed on 25.7.2019 and 30.7.2019 respectively on the same post by the respondents. It appears that the orders of appointment of the petitioners were fresh appointment orders and whereas there was no reference to the earlier appointment orders or the period of works rendered by the petitioners on the post in question. The petitioners state that some similarly situated persons had challenged the decision of the respondents in not giving benefits of continuity of service for the purpose of considering the period of five years in the fixed pay scale, more particularly the petitioners therein having secured place in the first merit list as well as in the second merit list and had been appointed on the same post of Accountant by the respondent Authorities. It appears that the Coordinate Bench of this Court vide an order dated 24.1.2017 in Special Civil Application No.16290 of 2016 had inter alia held that the petitioners therein would be entitled to the benefit of continuity of service for the purpose of calculating five years from the date of their original appointments. That the appointment was to relate back to the date when the petitioners therein were originally appointed, with continuity of service for the purpose of seniority without any back-wages or incidental benefits. It is stated that the respondent State had challenged the decision before the Hon'ble Division Bench and vide an order dated 7.9.2017, Hon'ble Division Bench of this Court had been pleased to confirm the decision of the learned Single Judge. It appears that the State had challenged the said decisions before the Hon'ble Apex Court and vide an order dated 30.7.2019 the Hon'ble Apex Court had been pleased to reject the appeals. It appears that the petitioners therein had been granted the benefit of continuity of service for the purpose of counting the period of five years. Since similarly situated persons had been granted the benefit of continuity of service, a representation was made to the respondent Authorities, but the same was rejected vide order dated 12.1.2021. Left with no other alternative remedy, the present petitioners have approached this Court by way of the present petition, praying for grant of the same benefit.

6. Learned Advocate Ms.Mita Panchal on behalf of the petitioners would submit that since similarly situated candidates had been granted continuity of service by this Court, which decision had been confirmed up to the Hon'ble Apex Court, there was no reason whatsoever for the respondents to deny the same benefit to the present petitioners. Learned Advocate Ms.Panchal would also rely upon a Circular by the GAD Department dated 22.8.2014, whereby it was held that as per the State Litigation Policy published vide Notification dated 29.12.2011 and as per the ratio of decisions of various Courts of giving benefits of a judgement to identically situated persons, who were not party to a litigation, the State has framed a policy whereby in case of decisions of the Courts having been accepted and no review applications are pending, or where the decisions attained finality in appeals, it was decided that a report by the Department concerned about the cases where persons are similarly situated to the persons who have been granted

benefit by an order of a Court should be submitted to the Competent Authority of the Department and if they are similarly situated, then the case should be put up before the General Administrative Department and the Finance Department, which would in turn place the same before the Chief Secretary for approval. Learned Advocate would submit that since the cases of the present petitioners and of the petitioners in SCA No.16290 of 2016 were identical, and therefore, as per the policy of the State Government it was incumbent upon the Department to have proceeded in accordance with the policy of the State Government and given the benefit as granted to the petitioners of SCA No.16290 of 2016. Learned Advocate would further submit that as such the entire issue had arisen on account of a mistake committed by the Authorities themselves. It was not a case where there was any allegation or malpractice, etc. The issue was with regard to calculation of marks and whereas in case of the present petitioner in both the original merit list as well as in the revised merit list, the petitioners had found their place in the merit category, and therefore, the petitioners could not have been denied the benefit of continuity of service.

7. On the other hand, learned AGP Mr.Sharma would submit that while the case of the petitioners may or may not be identical to the case of the petitioners in SCA No.16290 of 2016, yet the fact remains that at the relevant point of time, the petitioners had not questioned the decision of the State Government of not granting continuity of service to the petitioners. Learned AGP would submit that it is only after this Court had passed the order in SCA No.16290 of 2016, which came to be confirmed up to the Hon'ble Apex Court, the petitioners had challenged the decision of the State Government of not granting continuity of service. Learned AGP, relying upon the decision of the Hon'ble Apex Court in case of State Of U.P. & Ors. Vs. Arvind Kumar Srivastava & Ors., reported in (2015) 1 SCC 347, would submit that in case of those persons, who did not challenge wrongful action and acquiesced to the same and woke up after a long delay only because their counterparts, who had approached this Court earlier in time, succeeded in their efforts, then such employees could not claim the benefit of the judgement in case of similarly situated persons to be extended to them. Learned AGP would, therefore, submit that the petition being barred by delay and laches, this Court may not entertain the present petition.

8. This Court had an occasion to consider identical set of facts in case of Minalben Banubha Rana Vs. State of Gujarat in Special Civil Application No.8956 of 2020 and after considering the contentions on behalf of the petitioner and the rival contentions and the affidavit-in-reply filed on behalf of the respondent State, the Court passed the following order:-

8. Heard the learned Advocates for the respective parties, who have not submitted anything further. At the outset, it requires to be noted that the petitioners of SCA No.16290 of 2016 and the present petitioners are identically situated. Paragraphs 6, 7, and 8 of the decision of the Coordinate Bench of this Court dated 24. 1.2017 in SCA No.16290 of 2016 confirms the said facts and for

the purpose of better appreciation, the said paragraphs are reproduced herein below:-

"6. Present petitioners are aggrieved by the fact that their names appeared in the first list and thereafter, they continued to serve for nearly 1½ years from the date of receipt of the appointment order. However, due to the decisions in the case of others, who had not cleared the examination or those of them who were wrongly appointed due to the wrong answer keys, the reappointment was given to the petitioners.

7. The petitioners had approached this Court by preferring Special Civil Application No. 4067 of 2016 whereby they had requested for benefit of continuity of service by calculation of five years in fixed payscale on the ground that they had served the place in the first merit list as well as in the revised merit list and they were appointed on the very post of Sub-Accountant by the respondent authorities. This Court directed the authority to consider the case of the petitioners on the basis of the decision of Rajesh Kumar and others (supra) as follows:

"4. Having regard to the relief prayed for keeping in mind the decision of the Supreme Court in case of Rajesh Kumar and Others v. State of Bihar and others, I quote the observation made by this Supreme Court in Paragraph Nos. 18 and 19(3):

18. There is considerable merit in the submission of Mr.Rao. It goes without saying that the appellants were innocent parties who have not, in any manner, contributed to the preparation of the erroneous key or the distorted result. There is no mention of any fraud or malpractice against the appellants who have served the State for nearly seven years now. In the circumstances, while inter se merit position may be relevant for the appellants, the ouster of the latter need not be an inevitable and inexorable consequence of such a reevaluation. The reevaluation process may additionally benefit those who have lost the hope of an appointment on the basis of a wrong key applied for evaluating the answer scripts. Such of those candidates as may be ultimately found to be entitled to issue of appointment letters on the basis of their merit shall benefit by such reevaluation and shall pick up their appointments on that basis according to their inter se position on the merit list.

19(3) In case writ petitioners respondent nos.6 to 18 also figure in the merit list after reevaluation of the answer scripts, their appointments shall relate back to the date when the appellants were first appointed with continuity of service to them for purpose of seniority but without any back wages or other incidental benefits."

5. Let appropriate decision be taken within a period of six weeks from the date of receipt of this order. The decision shall be in writing with reasons and with consideration of the decision of the Supreme Court and the same shall be communicated to the petitioner. With the above, this writ application is disposed

of. Direct service is permitted.”

8. Pursuant to the directions of this Court, the respondent authority denied the grant of seniority to the present petitioners mainly harping on the fact that pursuant to the Court’s directions revised list had been prepared and the appointment given was fresh appointment, and therefore, the petitioners could not have requested for continuity of their services which they did for 1½ years.”

9. In the above referred judgement, the Coordinate Bench has held at paragraphs No.23 to 27 as thus:-

“23. Applying the said ratio to the case of the present petitioners whose names figured in both the lists and who have continued to serve except for the period of 1 month and 25 days, in the opinion of this Court, for the purpose of seniority, their date of appointment must go back to the original date of appointment.

24. Petitioners enjoyed the privilege of being meritorious to figure in the first merit list and also in the subsequently drawn merit list. Therefore, to equate their case with those who either were left out earlier or those whose names erroneously appeared due to wrong answer keys would not be a just approach. Action of the State respondent, therefore, warrants indulgence.

25. Learned advocate Mr.Thakkar at this stage has requested for concession that the period when these petitioners were unable to serve for 1 month and 25 days for no fault of theirs, be treated as an extraordinary leave. The period during which the petitioners served was nearly 1½ years when service came to be ended due to litigation by those who did not succeed and once again reappointment pursuant to the revised merit list has been done and therefore, since the act of the Court should prejudice none and as the petitioners had no role to play in dropping the first merit list and also in redrawing the same nor were they at fault anywhere, such a request for concession that the said period of one month and twenty five days be treated as extraordinary leave, as the petitioners are not desirous to enter into any other dispute with regard to that period, appears to be a reasonable request.

26. Let the authority treat the same accordingly.

27. Petition in wake of the aforesaid discussion stand allowed. Order of the respondent authority dated 3.8.2016 is quashed. The petitioners are held entitled to benefit of continuity of service for the calculation of five years from the date of their original appointment. Their appointment shall relate back to the date when they were first appointed with continuity of service to them for the purpose of seniority without any back wages or other incidental benefits.”

10. The said decision of the learned Single Bench of this Court (Coram: Ms.Sonia Gokani, J.) had been confirmed by the Hon’ble Division Bench (Coram: Mr.R. Subhash Reddy, C.J. and Mr.Vipul Pancholi, J.). That the decision of the learned Single Bench as well as of the Division Bench had not been interfered with by the Hon’ble Apex Court.

11. Thus, the only issue which requires consideration of this Court is whether the petitioners ought to be granted the same benefit as was granted to the petitioners of SCA No.16290 of 2016. The position of law in this regard has been succinctly explained by the Hon'ble Apex Court in case of State Of U.P. & Ors. Vs. Arvind Kumar Srivastava & Ors. (Supra) which was incidentally relied upon by the respondent. Paragraphs 22, 22.1, 22.2 and 22.3 of the decision are reproduced herein below for better appreciation:-

"22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under:

22.1 Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly.

Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.

22.2 However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.

22.3 However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularization and the like (see K.C. Sharma & Ors. v. Union of India (supra)). On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence."

12. Thus, appreciating the findings set out by the Hon'ble Apex Court relying upon the earlier decision of the Hon'ble Apex Court, it could be appreciated that the normal rule in this regard being that in case of relief given by a Court to an employee or group of employees, then in normal circumstances all other identically situated persons should be treated alike by extending the same benefit. That merely because other similarly situated persons have not approached the Court, they are not to be treated differently. The normal rule would be subject to the exception in the form of laches, delay and acquiescence, more particularly when the person claiming similar benefits had waken up after a long delay and because his counterparts, who had approached the Court earlier in time, succeeded in their efforts. Again, the Hon'ble Apex Court has stated that even the exception as above would be subject to another exception in case the judgement pronounced by the Court was in rem with the intent to give benefits to all similarly situated persons.

13. Having regard to the proposition of law laid down by the Hon'ble Apex Court, this Court finds that the petitioner ought not to be denied the benefit as available to the petitioners of SCA No.16290 of 2016 only on the ground of laches. The reason for reaching such conclusion are three-fold; one being the cause which led to the dispute in the first place i.e. the revised merit list could not be attributable to the petitioners or for that matter any other candidate. From perusal of the decision of this Court in SCA No.16290 of 2016, it clearly appears that the revision in merit list was necessitated on account of the mistake committed by the respondent Authorities and not on account of any fault on the part of the present petitioners or any other similarly situated candidates. Under such circumstances, the petitioners ought not to be prejudiced on account of no fault on their part. The second reason is that the petitioners being meritorious candidates inasmuch as even the revision in the merit list did not affect their position in the merit list inasmuch as in both the merit lists the petitioners being selected upon merit; and the third reason being that the Circular of the State Government through the GAD dated

22. 8.2014, which inter alia requires the Department to prepare monthly statements with regard to decisions of the Courts being applicable to other similarly situated employees, who had not approached the Court and the issue is required to be forwarded to the Chief Secretary through the concerned head of the Department and whereas the Chief Secretary to give appropriate recommendation. It appears that though a specific contention has been raised with regard to the Circular dated 22.8.2014, more particularly at paragraph 3 of the petition, yet in the affidavit-in-reply there is no explanation coming forth as to whether such process had been carried out or not. Perusal of the Circular clearly reveals that the onus of taking a decision as to whether similarly situated persons are entitled to the benefit of a judgement in spite of their having not approached the Court was on the respondent Authorities. As per the terms of the Circular dated 22. 8.2014 it was the responsibility of the Nodal Officer or the Administrative Officer of the Department to place the issue of similarly situated

persons before the head of the Department every month, who in turn is required to take approval from the Chief Secretary through GAD and the Finance Department. The respondent authorities having not adhered to their own policy of giving benefit to similarly situated persons, beneficiaries of a litigation, the said aspect would also be a relevant factor in granting prayers as prayed for by the petitioners.

14. As such, in case of Arvind Kumar (supra) before the Apex Court the petitioners were challenging cancellation of their appointments after a period of 9 years and whereas as on the date of the judgement as noted by the Hon'ble Apex Court any direction to give appointment to the respondents therein would be after a period of 27 years when most of the respondents would be almost 50 years of age. In the instant case, the petitioners had joined service vide appointment order dated 26.9.2012 and whereas vide an order dated 11.4.2014 appointment came to be cancelled and whereas the petitioners were reappointed on 19.7.2014. The request of the petitioners for continuity of service from the date of actual appointment appears to be reasonable and just, more particularly since as noted herein above, the termination could not be said to be on account of any fault of the petitioners or for that matter, fault of any candidate.

9. In this view of the matter, in the considered opinion of this Court, the present petition deserves consideration. At this stage, it would be relevant to refer to concession given by the learned Advocate Ms.Mita Panchal, relying upon the concession given by the learned Advocate for the petitioners in SCA No.16290 of 2016 that the period during which the petitioners were unable to serve for no fault of theirs be treated as an extraordinary leave.

10. Having regard to the same, the period from the date of cancellation of appointment till the date of actual joining of the petitioners is directed to be treated as extraordinary leave. The petitioners are directed to be conferred with the benefit of continuity of service for calculation of five years from the date of their original appointment i.e. w.e.f. 26.9.2012. It is clarified that the continuity of service as available to the petitioners in SCA No.16290 of 2016 would be for the purpose of seniority only without any back-wages or any other incidental benefits.

11. The petition stands disposed of accordingly. Rule is made absolute to the aforesaid extent.