
(2016) 10 GUJ CK 0002

In the Gujarat High Court

Case No : Special Civil Application No. 15827 of 2003

Bharatbhai Kanubhai Mevada

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 04-10-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 4 LLJ 727

Hon'ble Judges : Mr. J.B. Pardiwala, J.

Bench : Single Bench

Advocate : Mr. Swapneshwar Goutam, Asst. Government Pleader, for the Respondents Nos. 1 to 2; Ds Aff. Not Filed (R), for the Respondents Nos. 1 to 2; Mr. RK Mishra, Advocate, for the Petitioners Nos. 1 and 2

Final Decision : Disposed Off

Judgement

Mr. J.B. Pardiwala, J. Oral - By this writ application under Article 226 of the Constitution of India, the writ applicants, serving with the State Government, have prayed for the following reliefs;

"(A) Your Lordships may be pleased to restrain the respondent authorities from terminating the services of the petitioners herein and with the order that they shall not interfere in the execution, performance of the petitioners by holding that the proposed order of terminating the services of the petitioners which is ready to be served on the petitioners is illegal, arbitrary, unconstitutional and violative of Articles 14, 16, 21 and Rule 33(1)(A) of the B.,C.S.R.

(AA) Be pleased to quash and set aside the order of termination dated 11.11.2003 at Annexure-"C" to be illegal and arbitrary.

(B) Lordships may be pleased to hold and declare that the petitioners are entitled to permanency in the services after 3 years of their initial appointment on the Class IV post.

(C) Your Lordships may be pleased to direct the respondent authorities to regularise the services of the petitioners from their initial appointment and to place the petitioners in the time scale grade and be further pleased to direct the respondent authorities to pay the differences in arrears of salary of Class IV employee and to extend all the benefits attached to Class IV post to the petitioners as per the rules and regulations.

(CC) Your Lordships may be pleased to hold and declare that the services of the petitioners that came to be regularised vide orders, dated 25.11.2010 which is annexed herewith and marked as Annexure-"D" (Colly), ought to have been considered from the initial date of appointment i.e., from 04.01.1992 as the petitioners are regularly selected employees on their respective posts and further be pleased to direct the respondent authorities to pay the difference of arrears to the petitioners, being given effect from 25.11.2010 by considering their services to be regularised with effect from 04.01.1992, instead of 01.05.2007.

(CCC) Your Lordships may be pleased to hold and declare that the action on the part of the respondent authorities in referring the petitioners as adhoc employees while placing them in regular pay scale of Class IV employees vide orders, dated 05.06.2012 in respect of Petitioner No.1 and 25.05.2012 in respect of petitioner No.2 is illegal, arbitrary and without any application of mind as the petitioners services were already regularised by the respondent authorities on 25.11.2010 as Class IV employees and therefore the respondent authorities may be directed to extend all the benefits attached to Class IV post to the petitioners as per the rules and regulations and also be entitled to pensionary benefits after superannuation and all other consequential benefits.

(D) Your Lordships may be pleased to pass such other and further orders as deemed fit, just and proper in the interest of justice."

2. I need not state the facts as they are sufficiently considered in the order dated 20th October, 2004 passed by this Court while issuing rule and granting the interim protection. The order dated 20th October, 2004, reads thus;

"Rule.

2. Heard Mr. RK Mishra for the petitioners and Ms. Panchal, learned AGP for the respondents on the question of interim relief.

3. The petitioners names were forwarded by the Social Welfare Branch of the District Panchayat, Gandhinagar/Ahmedabad for appointment to the vacant posts of part-time sweeper in Class-IV service. The petitioners appeared before the Selection Committee on 4.12.1991 and as the petitioners came to be selected they were appointed by order dated 4.1.1992 of the Commissioner of Higher Education. The petitioners accordingly continued as part-time sweepers. They were required to render services for six hours at a monthly remuneration of Rs.1350/-p.m.. However, the petitioners services came to be terminated w.e.f. 21.11.2003 as per the impugned order dated 11.11.2003 at Annexure "C" to the

petition. Hence, the petitioners have challenged the said termination and have also prayed for directions to the respondents to regularise the petitioner's services from the date of initial appointment and to grant them regular pay-scale. The petitioners have also relied on the Government Circular dated 26.12.1980 (Annexure-B) regarding conversion of part-time employees for pay into regular posts.

4. The stand of the respondent-authorities in the reply affidavit is that the Government Circular dated 26.12.1980 has been kept in abeyance by State Government (Finance Department) Circular dated 21.8.1995 and, therefore, the petitioners are not entitled to regularisation.

As regards termination of the petitioners' services, the respondents have stated that the part-time employees are being employed on the basis of need, and after completion of work their services are terminated. It is further contended that as per terms and conditions mentioned in the appointment order, the petitioners services have been terminated without any notice or notice pay.

However, as regards the petitioners' specific contention in paragraph 5 of the petition that three persons, namely, NH Chauhan, KM Mesariya and BC Shelot who were appointed in the respondent-department as part-time sweepers in the year 1995, but those juniors are continued in service while terminating the petitioners services and, therefore, the impugned termination is challenged as discriminatory and arbitrary, the stand of the respondents is that, "no seniority has been prescribed for part-time Class-IV employees".

5. The learned AGP submits that grant of any mandatory relief would amount to allowing the petition.

6. In *Deoraj v. State of Maharashtra*, 2004 (4) SCC 697, the Apex Court has held that while the Court would not ordinarily grant mandatory interim relief but it is not that the Court cannot grant such mandatory relief. Where the interests of justice so require and if irreparable damage is being caused to the petitioner by an illegal action of the respondents, the Court can, in an appropriate case, grant such mandatory interim relief.

7. In the facts of the present case it is undisputed that the petitioners were regularly selected for the posts of part-time sweeper in the year 1992 and that the respondents while terminating the petitioners services on the ground of economy measures have continued in service three persons who were subsequently appointed as part-time sweepers in the year 1995, which averment made in paragraph 5 of the petition is not controverted, but the stand of the respondents is that the respondents do not maintain seniority for part-time employees. If in spite of these glaring facts, interim relief is not granted the petitioners will suffer irreparable loss which cannot be compensated in terms of money by giving them back wages as and when the petition is allowed and allowing them to starve in the meantime.

8. Moreover, the Court is not directing the respondents to give the petitioners back wages for the intervening period from the date of termination till the date of reinstatement and the petitioners' prayer for directing the respondents to regularise the petitioners' service and to pay them salary in the regular pay scale is also not being granted by this interim order and, therefore, also there is no question of allowing the petition at this stage.

9. In view of the undisputed facts that the petitioners are serving as part-time sweepers since 1992 and respondents have retained three junior persons in service who were recruited three years after the petitioners' recruitment, there shall be interim relief directing the respondents to take the petitioners back in service as part-time sweepers latest by 1st November 2004 and to pay them remuneration on that basis, which was being paid to them before termination of their services. Direct service is permitted and shall be effected by 28.10.2004.

3. Thus, this Court directed the respondents to take the writ applicants back in service as the part time sweepers and pay them the remuneration on that basis which was being paid to them before the termination of their services.

4. Some developments took place during the pendency of this writ application. The learned counsel appearing for the writ applicants invited my attention to Page-32, which is an order dated 25th November, 2010, Annexure-D passed by the State Government in the case of the writ applicant No.1, regularising his services with effect from 1st May, 2007 in Class-IV. In the same manner, an identical order came to be passed in the case of the writ applicant No.2, which is at Page No.43. Thus, there is no doubt that the State Government thought fit to regularise the services of both the writ applicants, but at the same time, has imposed a very unusual condition in the orders referred to above. Despite regularising the services, it has been stated in the order that their services are treated as the temporary. The writ applicants are much concerned about such condition or the status being conferred by the State Government. According to the writ applicants, even while passing the two orders, regularising the services, their earlier 18 years of part time service was not considered, but they would not like to raise such issue. They are only concerned with their status of being temporary as stated in the regularisation orders. The learned counsel places reliance on a decision of the Supreme Court in the case of G.P. Doval & Ors. v. Chief Secretary, Govt. of U.P. & Ors., AIR 1984 SC 1527, wherein the Supreme Court, in paras-13,14 and 15, observed as under;

"13. The question that can then be posed is: what constitutes substantive appointment in a cadre which is within the purview of the Public Service Commission. Now the cadre of Khandsary Inspectors was formed in 1959. There is no material to show that at that time it was within the purview of the Public Service Commission. A vague statement was made that under the Uttar Pradesh Public Service Commission (Limitation of Functions) Regulations, 1954, any post with a sanctioned scale, the maximum of which exceeds Rs. 200/- would be within the purview of the Public Service Commission. It was therefore, said that

the post of Khandsari Inspector was within the purview of the Public Service Commission. It was then urged that as the "Khandsari Licensing Scheme" was to be urgently implemented, the appointing authority filled-in the posts pending recruitment by the Public Service Commission. This statement is not borne out by the record. On May 4, 1960, 9 persons including petitioners Nos. 1 and 2 were temporarily appointed as Licensing Inspectors. The appointment order does not show that the appointment was pending selection of regular candidates by the Public Service Commission. In fact, some confusion in this behalf crept in because a statement was made at the hearing of these petitions that the post of Khandsari Inspectors came within the purview of the Public Service Commission in 1961. Undoubtedly, the post of Licensing Inspector was created in the first instance upto March, 31, 1960. But it may be mentioned that it has continued uninterruptedly till today and has become a permanent cadre. Identical appointment orders were issued in favour of petitioner No. 3 some of the petitioners including petitioners Nos. 4, 5, 6, 7 and 8 and some of the respondents including respondents Nos. 4, 5, 6, 7 and several others came to be appointed by the Order dated March, 23, 1961. (Annexure "B" to the petition). In this appointment order it was clearly stated that "on the result of the qualifying test and interview held for the posts of Khandsari Inspectors in the months of February, and March, 1961, the candidates as noted in the enclosed list are temporarily appointed as officiating Khandsari Inspectors in the scale of Rs. 120-6-210-EB-10-250 plus usual dearness allowance per month subject to final selection by Public Service Commission at any later date." The recitals in the order do not spell-out that the appointees were to hold stop-gap arrangement till a candidate by the Public Service Commission is made available. On the contrary, the recitals clearly indicate that those appointees will have to face the approval test by the Public Service Commission. Now if petitioner Nos. 1 and 2 came to be appointed in 1960 and respondents 4, 5 and 6 came to be appointed in 1961 and the appointment of each of them had to be approved by the Public Service Commission, once the approval is granted, the same will relate back to the date of first appointment. That is the meaning of the expression in Model No.11; or from the date of the order of the first appointment, if such appointment is followed by confirmation." It is not disputed that all the petitioners except Petitioner 4 were approved by the Public Service Commission on September, 30, 1963 and yet respondent No. 7-J.S. Negi is shown at S. No. 17 while petitioner No. 1 who joined service on March, 4, 1960 and whose appointment was approved on the same day has been assigned S. No. 27 in the seniority list. If the first appointment is made by not following the prescribed procedure but later on the appointee is approved making his appointment regular, it is obvious commonsense that in the absence of a contrary rule, the approval which means confirmation by the authority which had the authority power and jurisdiction to make appointment or recommend for appointment, will relate back to the date on which first appointment is made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation. That had not been done in this case. Therefore, assuming

that the model principle set out in the 1940 Order has a binding effect, the impugned seniority list does not conform to the prescribed guideline and would certainly be invalid.

14. Once it is shown that the 1940 Order did not prescribe any binding rule or seniority, but it was a model prescribed for adoption and the adoption having not been shown, it cannot prescribe a binding rule of seniority. Assuming that it is deemed to have been adopted the seniority list does not conform to the model as interpreted by us.

15. Now if there was no binding rule of seniority it is well-settled that length of continuous officiation prescribes a valid principle of seniority. The question is from what date the service is to be reckoned ? It was urged that any appointment of a stop-gap nature or pending the selection by Public Service Commission cannot be taken into account for reckoning seniority. In other words, it was urged that to be in the cadre and to enjoy place in the seniority list, the service rendered in a substantive capacity can alone be taken into consideration. We find it difficult to accept this bald and wide submission. Each case will depend upon its facts and circumstances. If a stop-gap appointment is made and the appointee appears before the Public Service Commission when the latter proceeds to select the candidates and is selected, we see no justification for ignoring his past service. At any rate, there is no justification for two persons selected in the same manner being differently treated. That becomes crystal clear from the place assigned in the seniority list to petitioner No. 1 in relation to respondent No. 7. In fact if once a person appointed in a stop-gap arrangement is confirmed in his post by proper selection, his past service has to be given credit and he has to be assigned seniority accordingly unless a rule to the contrary is made. That has not been done in the case of all the petitioners. The error is apparent in the case of petitioner 1 and respondent No. 7. These errors can be multiplied but we consider it unnecessary to do so. In fact a fair rule of seniority should ordinarily take into account the past service in the stop-gap arrangement is followed by confirmation. This view which we are taking is borne out by the decision of this Court in *Baleshwar Dass and Ors. etc. v. State of U.P. and Ors. etc.*, wherein this Court observed that the principle which has received the sanction of this Court's pronouncement is that "officiating service in a post for all practical purposes of seniority is as good as service on a regular basis. It may be permissible, within limits for Government to ignore officiating service and count only regular service when claims of seniority come before it, provided the rules in that regard are clear and categorical and do not admit of any ambiguity and cruelly arbitrary cut-off of long years of service does not take place or there is functionally and qualitatively, substantial difference in the service rendered in the two types of posts." It was said that service rules will have to be reasonable, fair and not grossly unjust if they are to survive the test of Articles 14 and 16. It is thus well-settled that where officiating appointment is followed by confirmation unless a contrary rule is shown, the service rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation for determining

the place in the seniority list. Admittedly, that has not been done and the seniority list is drawn up from the date on which the approval/selection was made by the Public Service Commission in respect of each member of the service, which is clearly violative of Article 16, and any seniority list drawn up on this invalid basis must be quashed."

5. Mr. Goutam, the learned AGP appearing for the State submits that this Court may direct the authority concerned to look into the matter so that an appropriate modification or clarification could be effected as regards the status of the two writ applicants in service.

6. Having heard the learned counsel appearing for the parties and having considered the materials on record, I am of the view that the controversy now revolves around in a very narrow compass. Although, in the year 2010, the services of both the writ applicants came to be regularized, yet while passing the order dated 25th May, 2012, which is at Page-54, Annexure-E to this writ application, the authority concerned said that the appointment was purely on temporary basis. Even while fixing the pay scale on regular basis, the State said that the appointments were purely on temporary basis. This Court fails to understand the basis for the same. Having once regularised the service; having put the writ applicants in the regular pay scale, then there should not be any question of saying that the appointments were purely on temporary basis. This may have a far reaching effect in future, if any controversy arises.

7. In such circumstances, the authority concerned is directed to look into the matter and effect the necessary correction by issuing either a corrigendum or a separate order, clarifying this position.

8. Let this exercise be undertaken at the earliest and completed within a period of eight weeks from the date of the receipt of the writ of the order. It is needless to clarify that since the writ applicants have been regularised in service, the initial order of termination dated 11th November, 2003 will not survive and is hereby quashed.

9. With the above, this writ application is disposed of. Rule is made absolute to the aforesaid extent.

10. Direct service is permitted.