

(2016) 03 GUJ CK 0042

In the Gujarat High Court

Case No : Special Civil Application No. 6032 of 2003

Bhaskar S. Vora and Others

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 03-03-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 16, Article 16(1), Article 162, Article 19(1), Article 19(I) (f), Article 19(I)(f), Article 309, Article 31(1), Article 311, Article 32

Citation : (2016) 03 GUJ CK 0042

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

Bench : Single Bench

Advocate : Shivang M. Shah, Advocate, for the Appellant; Udit Mehta, AGP, for the Respondent

Final Decision : Allowed

Judgement

V.M. Pancholi, J.—1. By way of this petition, petitioners have prayed for the following reliefs:

"(A) Your Lordships will be pleased to issue a writ of or in the nature of mandamus or any other appropriate writ, order or direction, quashing and setting aside the decision of the State Government reflected in clarification No. 1 issued in Government Resolution dated 9.6.1999 (produced at Annexure H/I to the present petition) in refusing to grant benefit to the petitioner of revision in pay scale in respect of notional period of qualifying service available under G.R. Dated 8.10.1970 and in not regulating the pension on that basis.

(B) Your Lordships will be pleased to issue a writ of or in the nature of mandamus or any other appropriate writ, order or direction, to command and direct the respondents State Government to grant to the petitioners the benefit of revision of scales of pay applied in accordance with Fifth Pay Commission recommendations under the Gujarat Civil Services (Revision of Pay) Rules, 1998, in respect of their notional qualifying period of service (being the period from the date of their voluntary retirement from the respective posts till the date of his

actual would-have-been retirement on superannuation, as made available under Government Resolution dt. 8.10.1970 read with under Government resolution dt. 8.10.1970 read with Government resolution dated 3.2.1998) for the purpose of determining regulating and calculating the pension."

2. Facts of the present case in nutshell are as under.

2.1 Petitioners joined the services in the respective department during the period between 1964 to 1966. Each of the petitioners opted for voluntary retirement upon completion of 25 or more years of service in accordance with the resolution dated 08.10.1970 passed by the Finance Department, State of Gujarat. The details of the petitioners are produced at Annexure:C with the compilation. The resolution dated 08.10.1970 covers the cases of voluntary retirement of each of the petitioners, provides that in cases of employees who opt for voluntary retirement under the said Government Resolution, benefit of period of 5 years shall be given in calculating the pensionable service for the purpose of retirement, subject to rider by virtue of said notional extension, the total pensionable service does not exceed 33 years or the total period of service had the government servant retired in normal course. The resolution also provides that the pensionable pay which the Government servant would have drawn during the enhanced national qualifying service as stated in the Government Resolution shall be deemed to have been received by him though not actually drawn in the post from which he retired for the purpose of calculating pensionable pay and the pension of the government servant concerned shall be so regulated.

2.2 It is the case of the petitioners that in the orders of voluntary retirement, in respect of the petitioners, it is specifically mentioned that their voluntary retirement is under Government Resolution dated 08.10.1970. The pension orders also indicate the said notional benefit having been granted to them.

2.3 It is further the case of the petitioners that while giving effect to the 3rd Central Pay Commission recommendations, the State Government by resolution passed on 22.12.1976, provided that the benefit of revised pay scales and fixation of pay brought about under Gujarat Civil Services (Revision of Pay) Rules, 1975 gave effect from 01.01.1973 should be allowed notionally in the cases of government employees voluntary retired and covered under the resolution dated 08.10.1970.

2.4 It is further the case of the petitioners that while giving effect to the 4th Central Pay Commission recommendations, the State Government by resolution dated 06.11.1987 extended similar benefit for the notional period of the similarly situated voluntary retired government servants giving benefit to them of the revised pay scales under Gujarat Civil Services (Revision of Pay) Rules of 1987.

2.5 Petitioners have stated that 5th Central Pay Commission was appointed on 09.04.1994 and on 28.11.1997, the State Government appointed a High Power Committee for the purpose of giving effect to the recommendations of the 5th

Central Pay Commission to the State Government employees and thereafter on 20.01.1998, the State Government resolved to accept the recommendations of the said Committee and resolved to implement the 5th pay commission recommendations for its employees. The said Government Resolution dated 20.01.1998 provides that the revision of pay shall be applicable to the Government employees, who retired on or after 01.01.1996. It is also provided that the benefits of the revised pay scales and fixation of pay in the revised scales under Gujarat Civil Services (Revision of Pay) Rules, 1998, should be allowed notionally in the case of voluntary retirement covered under resolution dated 08.10.1970 and notional pay so worked out should be taken into account for regulating the pension.

2.6 The grievance voiced in the present petition is that on 09.06.1999, the State Government issued Government Resolution in which it was provided that the benefit of revised pay scales under Gujarat Civil Services (Revision of Pay) Rules, 1998 shall not be granted to the employees who have voluntarily retired under resolution dated 08.10.1970 and in whose case notional period of 5 years traveled beyond 01.01.1996. In other words, it was provided that the Government servants who have voluntarily retired between 01.01.1991 and 31.12.1995 and covered under Government Resolution dated 08.10.1970, shall not be granted the revision of pay scales under 5th pay commission recommendations in their notionally extended period.

2.7 Petitioners have therefore made several representations to the different government authorities. However, their representations were not decided and therefore, by way of the present petition, petitioners have challenged the Government Resolution dated 09.06.1999, whereby, the benefit of revised pay scales applied under Gujarat Civil Service (Revision of Pay) Rules, 1998, has been denied as per the recommendations of the 5th pay commission to the petitioners in spite of their notional period of qualifying service conferred under Government Resolution dated 08.10.1970.

3. Heard learned advocate Mr. Pranav Dave for the petitioners and learned AGP Mr. Udit Mehta for the respondents.

4. Learned advocate for the petitioners referred to the Government Resolution dated 08.10.1970, which is produced at Annexure:D, page 50 with the compilation. The said Government Resolution provides for the voluntarily retirement by the Government servants. It is pointed out that clause-2 of the said resolution provides as under:

2. Government is further pleased to direct that the Government servants who seek voluntary retirement under these orders may be allowed the retirement benefits calculated in accordance with the rules existing on the date of their retirement after taking into account the additional years of notional service as mentioned below:--

(1) For Government servants governed by Pension Rules.--(i) The service

qualifying for retirement benefits should be enhanced by the addition of 5 years in such a case.

(ii) The resultant length of service after taking into account the said addition of notional service shall in no case be more than 30 qualifying service, or the service which the Government servant concerned could have counted had he retired on attaining the age of superannuation, whichever is less.

(iii) Where the service qualifying for retirement benefits is enhanced under (I) and (ii) above, the pensionable pay as defined under B.C.S.R. 9(41) and 9(41-A) or Rule 46 in the Revised Pension Rules, 1950 which the Government servant would have drawn during the enhanced notional qualifying service shall be deemed to have been received by him (though not actually drawn) in the post from which he retires. For the purpose of calculating pensionable pay. The pension of the government servant concerned shall be determined on the basis of average notional pay earned during the last twenty months or thirty six months preceding the date of retirement whichever may be more beneficial to him."

5. Learned advocate for the petitioners thereafter submitted that Government issued Government Resolution dated 22.12.1976, which is produced at page 52, wherein, it is provided as under:

"After careful consideration, Government is pleased to direct that the benefit of the revised pay scales and fixation of pay in the ROP Rules, 1975 should be allowed notionally in such cases and notional pay so worked out should be taken into account for regulating the pension."

6. Thereafter, learned advocate Mr. Dave appearing for the petitioners referred to the Government Resolution dated 06.11.1987, wherein, Clause-4 provides as under:

7. Learned advocate for the petitioners would thereafter contend that the Government thereafter issued Government Resolution dated 20.01.1998, wherein, in Clause-2(2), it has been provided as under:

"2(2) The benefits of the revised pay scales and fixation of pay in the revised scales as the scheme laid down in the Gujarat Civil Services/(ROP) Rules, 1998 should be allowed notionally in the case of voluntary retirement covered under the Government Resolution, Finance Department No. NVN-1070-3158-J dated the 8th October, 1970 and notional pay so worked out should be taken into account for regulating the pension."

8. At this stage, learned advocate Mr. Dave submitted that petitioners had voluntarily retired as per Government Resolution dated 08.10.1970 during the period between 1991 to December 1995.

9. After referring to the aforesaid resolutions, it is contended that revision in the pay scales on the basis of the 3rd pay commission, 4th pay commission as well

as 5th pay commission, were granted. Revision in the pay scales on the basis of 5th pay commission recommendations made applicable from 01.01.1996 should be allowed notionally in the cases of government servants who had voluntarily retired under the Government Resolution dated 08.10.1970. The notional period so worked out on the basis of revised pay scale shall be taken into account for regulating the pension. It is further submitted that revised pension Rules of 1950 has been amended to give effect to the relevant recommendations of the 5th pay commission and Revision of Pay Rules of 1998, both are statutory rules framed under Article 309 of the Constitution of India. The provisions made in this statutory rules create a vested enforceable rights for the petitioners-pensioners.

10. Learned advocate Mr. Dave thereafter submitted that the recommendations of other pay commissions prior to the 5th pay commission were given effect on the basis of resolution dated 08.10.1970 insofar as its application in revision of scale of pay for the period notionally extended in the cases of voluntary retirees covered under the Government Resolution dated 08.10.1970. Once again, it is submitted that while giving effect to the recommendations of the 3rd central pay commission recommendations for its employees, the State Government by resolution dated 22.12.1976 provided that the benefit of revised pay scales and fixation of pay brought about under the revision of pay Rules of 1975 should be allowed notionally in the cases of Government employees voluntarily retired and covered under Government Resolution dated 08.10.1970. Similar provision was made in Government Resolution dated 06.11.1987 while implementing recommendations of 4th pay commission.

11. It is further contended that in the Government Resolution dated 20.01.1998 also, it has been provided that the benefits of the revised pay scales and fixation of pay in the revised scales as the scheme laid down in Gujarat Civil Services (Revision of Pay) Rules, 1998 should be allowed notionally in the case of voluntary retirement covered under the Government Resolution dated 08.10.1970 and notional pay so worked out should be taken into account for regulating the pension. However, learned advocate submitted that on 09.06.1999, the Government issued the impugned Government Resolution, whereby, certain clarifications were made in Government Resolution dated 20.01.1998. It is contended that resultant effect of the clarification made in Government Resolution dated 09.06.1999 is that certain benefits were denied to the petitioners who have voluntarily retired as per Government Resolution dated 08.10.1970. It is contended that the discriminatory treatment is meted out to the class of the petitioners and similarly situated government employees covered under Government Resolution dated 08.10.1970. Clause 2(iii) of Government Resolution dated 08.10.1970 creates a deeming fiction for qualifying service. Government Resolution dated 08.10.1970 is not canceled by the Government and therefore, the denial of benefit of revision of pay on the basis of the 5th pay commission and the notionally extended period of services of the petitioners as an invariable effect of retrospectively setting at naught to the resolution dated 08.10.1970. The impugned Government Resolution is therefore violative of

Article 14 inasmuch as it artificially divides a homogeneous class of voluntarily retired Government servants covered under Government Resolution dated 08.10.1970 by carving out the group of persons from amongst equal who have voluntarily retired after 01.01.1991 whose notional extension traveled beyond 01.01.1996. Thus, the clarification made in Government Resolution dated 09.06.1999 is irrational, unjust and creating a class within class, which is not permissible and therefore, it is requested that the impugned Government Resolution be quashed and set aside and the respondents be directed to grant benefit to the petitioners as prayed for in this petition.

12. Learned advocate Mr. Dave has placed reliance upon the following decisions in support of his contentions.

"? In case of Punjab Water Supply & Sewerage Board v. Ranjodh Singh and others, reported in , (2007) 2 SCC 491

? In case of District Registrar, Palghat v. M.B. Koyakutty, reported in 1979 (2) SCC 150

? In case of Chairman, Railway Board and others v. C.R. Rangadhamaiah and others, reported in , (1997) 6 SCC 623

? In case of Union of India and others v. Tushar Ranjan Mohanty and others, reported in , (1994) 5 SCC 450"

13. On the other hand, learned AGP Mr. Udit Mehta appearing for the respondents submitted that the Government issued Government Resolution dated 08.10.1970 to give notional benefits of maximum 5 years service, subject to certain conditions in case of voluntary retirement of the Government employee. Such benefit of 5 years service was to be given to such employee notionally for the purpose of calculating his pensionary benefits like pension and gratuity. Such period is calculated notionally and not to be treated with the Government servant who is retiring after 5 years. In the year 1998, revision of pay scale has come into effect with retrospective effect i.e. from 01.01.1996. It is pointed out that the Government has clearly categorized the eventualities of persons who have retired before 01.01.1996 and who have retired after 01.01.1996 by bringing in force two separate resolutions. Said resolutions are produced at Annexure:R-I and R-II respectively. It is contended that though both the resolutions are passed on 20.01.1998, it would be applicable to the employees who have retired prior to 01.01.1996 and after 01.01.1996, it is contended that confusion had arisen in the case of those employees who have actually voluntarily retired on or before 31.12.1995 and pursuant to which, Finance Department vide resolution dated 09.06.1999, made certain clarifications. The State Government is empowered to issue such clarifications by way of resolution and therefore, the respondents have not committed any illegality as alleged by the petitioners. By way of said clarification, it is clarified that the benefits of pay fixation would not be applicable to those who retired before 01.01.1996 and the same would be applicable to Government employees

who had taken voluntary retirement before 01.01.1996. Thus, no distinction has been kept between persons who have actually retired on 01.01.1996 on account of superannuation and on account of voluntarily retirement. He therefore requested that the present petition is misconceived and therefore, the same be dismissed.

14. Learned AGP has placed reliance upon the decision of this Court in case of Bhagwandas Bulchand Asnani v. Director of Pension & PF, rendered on 15.01.2003, passed in Special Civil Application No. 10177 of 1999 and allied matters. Learned AGP has also placed reliance upon the decision rendered by this Court on 18.08.2004 in Special Civil Application No. 5853 of 2001 and allied matter.

15. I have considered the submissions canvassed on behalf of learned advocates for the parties. I have also gone through the material produced on record and the decisions relied upon by the learned advocates for the parties.

16. It would emerge from the record that petitioners were appointed in different departments during the period between 1964 to 1966. They opted for voluntary retirement during the period between 1990 to 1995. The voluntary retirement was under Government Resolution dated 08.10.1970. Thus, after completing 25 years of service, the petitioners opted for voluntary retirement and as per the resolution, benefit of period of 5 years service shall be given in calculating pensionable services for the purpose of retiral benefits, subject to rider that by virtue of said notional extension, total pensionable service does not exceed 30 years or the total period of 30 years had the Government served retired in normal course on his reaching the age of superannuation. It is further revealed that by resolutions dated 22.12.1976 and 06.11.1987, the Government provided the benefit of revised pay scales and recommendations of 3rd Central Pay Commission and the 4th Central Pay Commission respectively, and it was given to the government servants who have opted voluntary retirement under Government Resolution dated 08.10.1970 and notional pay so calculated was taken into account for regulating the pension. Similarly, by Government Resolution dated 20.01.1998, benefit of 5th Pay Commission recommendations were extended to the Government servants. Clause 2(2) of the said Government Resolution provides that benefit of revised pay scales and fixation of pay in the revised scales as the scheme laid down in Gujarat Civil Services (Revision of Pay) Rules, 1998, should be allowed notionally in the case of voluntary retirement covered under Government Resolution dated 08.10.1970 and notional pay so worked out should be taken into account for regulating the pension. In spite of such provision contained in the Government Resolution dated 20.01.1998, the impugned Government Resolution dated 09.06.1999 was issued by the Government and aforesaid clause was clarified, thereby such benefit was denied to the Government servants who have opted for voluntary retirement under Government Resolution dated 08.10.1970, who have retired during the period between 01.01.1991 to 31.12.1995. Thus, it is clear that the Rules which were

framed under Article 309 of the Constitution of India were modified by Government Resolution by way of administrative instructions while issuing clarification dated 09.06.1999, the concerned Governmental authority has not at all considered and read earlier Government Resolutions except Government Resolution dated 20.01.1998. Thus, it is clear that the benefits which were given to the Government servants, who have voluntarily retired under Government Resolution dated 08.10.1970, such as recommendations of 3rd and 4th pay commissions were denied to the Government servants who have retired voluntarily during period between 01.01.1991 to 31.12.1995. Thus, the Government has created a class within class, which is not permissible.

17. The Hon''ble Supreme Court in the case of Union of India and others (supra), observed and held in paragraphs No. 9, 10 and 12 as under:

"9. We take up the first and the second contentions together for consideration. It is obvious from the plain language of Rule 8(1)(b)(i) that all Grade-IV officers who have completed four years of service on regular basis are entitled to be considered for promotion to Grade-III on the basis of their seniority provided they are not found unfit by the Controlling Authority. The rule gives a statutory right to Grade-IV officers to be considered for promotion in the order of their seniority. The said right is further strengthened by the proviso to Rule 8(1)(b) (i). The proviso makes it obligatory that when a junior officer in Grade-IV is eligible and is considered for promotion all officers senior to him in that grade shall also be considered for promotion. Even otherwise, "to be considered for promotion" is a guaranteed right under Article 16(1) of the Constitution of India. It is, therefore, clear that Mohanty and other senior general category Grade-IV officers had a vested right under the Rules as also under Article 16(1) of the Constitution to be considered for promotion when persons junior to them were being considered and in fact promoted. Respondents 2 to 9 were admittedly junior to Mohanty and as such they could not be promoted, without considering the case of Mohanty. Rule 13 of the Rules before its amendment did not permit any reservation in respect of appointments to be made by way of promotion. There can, therefore, be no dispute that on 24-11-1987 when Respondents 2 to 9 were promoted to Grade-III, Mohanty and other general category candidates, senior to him had a vested right to be considered for promotion. Whether such a right can be rendered nugatory by retrospective legislation? The question is not res integra. There are several pronouncements of this Court on the subject.

10. In State of Gujarat v. Raman Lal Keshav Lal Soni this Court had an occasion to deal with the question as to whether the status as civil servant conferred on the Panchayat employees could be taken away by retrospective 1 , (1983) 2 SCC 33 : 1983 SCC (L & S) 231 455 operation of amended law. The Gujarat Panchayats Act, 1961 aimed at democratic decentralization of important governmental functions by vesting such functions in Gram, Nagar, Taluqa and District Panchayats and by enabling the State Government to transfer other powers, functions and duties to the Panchayat institutions. The dispute having

arisen regarding the status of the Panchayat employees, some of them filed a writ petition before the Gujarat High Court seeking various reliefs. The High Court allowed the writ petition holding that the members of the Panchayat service belonging to the local cadre were government servants and issued consequential directions for equation of posts, revision of pay scales and payment of salaries. The State Government filed appeal against the judgment of the High Court before this Court, but during the pendency of the appeal, the Gujarat Panchayats (Third Amendment) Act, 1978 was enforced with a view to nullify the basis of the decision of the High Court. The employees filed writ petitions under Article 32 of the Constitution of India before this Court challenging the constitutional validity of the Amending Act. The State appeal and the writ petitions were heard together by a Constitution Bench of this Court. This Court held that the Gujarat Panchayats (Third Amendment) Act, 1978 was arbitrary, unreasonable and unconstitutional on the following reasoning:(SCC p. 62, para 52)

"The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights not yesterday's. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years. That would be most arbitrary, unreasonable and a negation of history. It was pointed out by a Constitution Bench of this Court in *B.S. Yadav v. State of Haryana*. Chandrachud, C.J., speaking for the Court held: (SCC headnote)

"Since the Governor exercises the legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case."

Today's equal cannot be made unequal by saying that they were unequal 20 years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tampered with that way. A law which if made today would be plainly invalid as 2 , 1980 Supp SCC 524: 1981 SCC (L & S) 343: (1981) 1 SCR 1024 456 offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective laws. We are, therefore, firmly of the view that the Gujarat Panchayats (Third Amendment) Act, 1978 is unconstitutional, as it offends Articles 311 and 14 and is arbitrary and unreasonable.

...

"12. In T.R. Kapur v. State of Haryana three petitioners T.R. Kapur, Mahinder Singh and V.D. Grover, who were diploma holders, were working 3 , (1984) 3 SCC 281 : 1984 SCC (L & S) 520: (1984) 3 SCR 623 4 1986 Supp SCC 584 : (1987) 2 ATC 595 :(1987) 1 SCR 584 457 as Sub-Divisional Officers on regular basis under the unamended Rule 6(b) of the Punjab Service of Engineers, Class 1, Public Works Department (Irrigation Branch) Rules, 1964. They were eligible for promotion as Executive Engineers in Class I service despite the fact that they did not possess a degree in engineering. By the notification dated 22-6-1984, Rule 6(b) was amended and it was provided that a degree in engineering was an essential qualification for promotion of Assistant Engineers (Irrigation Branch) to Class I service and thereby the petitioners were rendered ineligible for promotion to the post of Executive Engineer in Class I service. The amendment was challenged in this Court by way of a petition under Article 32 of the Constitution of India. This Court came to the conclusion that the retrospective effect given to the amendment was violative of Articles 14 and 16 of the Constitution of India on the following reasoning: (SCC p. 595, para 16)

"It is well settled that the power to frame rules to regulate the conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect: B.S. Vadera v. Union of India, Raj Kumar v. Union of India, K. Nagaraj v. State of A. P. and State of J & K v. Triloki Nath Khosa. It is equally well-settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. It may further be stated that an authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights."

18. The Hon"ble Supreme Court in the case of Punjab Water Supply & Sewerage Board (supra), observed and held in paragraph No. 19 as under:

"19. In the instant case, the High Court did not issue a writ of mandamus on arriving at a finding that the respondents had a legal right in relation to their claim for regularisation, which it was obligated to do. It proceeded to issue the directions only on the basis of the purported policy decision adopted by the State. It failed to notice that a policy decision cannot be adopted by means of a circular letter and, as noticed hereinbefore, even a policy decision adopted in terms of Article 162 of the Constitution of India in that behalf would be void. Any departmental letter or executive instruction cannot prevail over statutory rule and constitutional provisions. Any appointment, thus, made without following the procedure would be ultra vires."

19. The Hon"ble Supreme Court in the case of Chairman, Railway Board and others (supra), observed and held in paragraphs No. 19, 20, 24 to 26, 32 and 33 as under:

"19. In Triloki Nath Khosa and Ors. (supra) rules had been framed altering the criterion of eligibility for promotion from the post of Assistant Engineer to the post of Executive Engineer and the same were challenged on the ground of retrospectivity by the Assistant Engineers who were in service on the date of making of these rules. Rejecting the said contention, this Court said:

"16. It is wrong to characterise the operation of a service rule as retrospective for the reason that it applies to existing employees. A rule which classifies such employees for promotional purposes, undoubtedly operates on those who entered service before the framing of the rule but it operates in futuro, in the sense that it governs the future right of promotion of those who are already in service. The judgment rules do not recall a promotion already made or reduce a pay scale already granted. They provide for a classification by prescribing a qualitative standard, the measure of that standard being educational attainment. Whether a classification founded on such a consideration suffers from a discriminatory vice is another matter which we will presently consider but surely, the rule cannot first be assumed to be retrospective and then be struck down for the reason that it violates the guarantee of equal opportunity by extending its arms over the past. If rules governing conditions of service cannot ever operate to the prejudice of those who are already in service, the age of superannuation should have remained immutable and schemes of compulsory retirement in public interest ought to have foundered on the rock of retrospectivity. But such is not the implication of service rules nor is it their true description to say that because they affect existing employees they are retrospective." (p. 779).

20. It can, therefore, be said that a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retrospectivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively.

...

...

24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has

been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (supra), B.S. Yadav (supra) and Raman Lal Keshav Lal Soni & Ors., (supra).

25. In these cases we are concerned with the pension payable to the employees after their retirement. The respondents were no longer in service on the date of issuance of the impugned notifications. The amendments in the rules are not restricted in their application in futuro. The amendments apply to employees who had already retired and were no longer in service on the date the impugned notifications were issued.

26. In *Deokinandan Prasad v. State of Bihar & Ors.*, , [1971] Supp.) SCR 634, decided by a Constitution Bench it has been laid down:

"31. Pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant." (p. 152)

(emphasis supplied)"

In that case the right to receive pension was treated as property under Articles 31(1) and 19(1)(f) of the Constitution.

...

32. It is no doubt true that on December 5, 1988 when the impugned notifications were issued, the rights guaranteed under Articles 31(1) and 19(1)(f) were not available since the said provisions in the Constitution (Forty-fourth Amendment) Act, 1978. But the notifications G.S.R. 1143 (E) and G.S.R. 1144 (E) have been made operative with effect from January 1, 1973 and April 1, 1979 respectively on which dates the rights guaranteed under Articles 31(1) and 19(1)(f) were available. Both the notifications in so far as they have been given retrospective operation are, therefore, violative of the rights then guaranteed under Articles 19(1) and 31(1) of the Constitution.

33. Apart from being violative of the rights then available under Articles 31(1) and 19(1) (f), the impugned amendments, in so far as they have been given retrospective operation, are also violative of the rights guaranteed under Articles 14 and 16 of the Constitution on the ground that they are unreasonable and arbitrary since the said amendments in Rule 2544 have the effect of reducing the amount of pension that had become payable to employees who had already retired from service on the date of issuance of the impugned notifications, as per the provisions contained in Rule 2544 that were in force at the time of their retirement."

20. The Hon"ble Supreme Court in the case of District Registrar, Palghat (supra), observed and held in paragraphs No. 21, 22 and 30 as under:

"21. As against this, Mr. Nambiar, appearing for the respondents, submits that once the bar of minimum educational qualification was removed for appointment as Lower Division Clerk, further promotion of the respondent was governed by Rule 28(b)(ii), Part I of the Kerala Rules of 1958. After their appointment, the respondent or others like him who had been exempted from possessing the minimum educational qualification, had become integral members of the same cadre. They could not be singled out for hostile treatment. Counsel has submitted that the rule enunciated by this Court in Triloki Nath 250 Khosa's case (ibid), is not applicable because the facts of that case were entirely different. Counsel further stated that any executive order issued by the Government, cannot supplant the statutory rules framed by the Governor under Article 309. Executive instructions can operate only in areas not covered by the rules. But here the area was fully occupied by the statutory rule 28(b)(ii).

22. There can be no quarrel with the proposition that if the statutory rules framed by the Governor or any law enacted by the State Legislature under Article 309 is silent on any particular point, the Government can fill up that gap and supplement the rule by issuing administrative instructions not inconsistent with the statutory provisions already framed or enacted. The Executive instructions in order to be valid must run subservient to the statutory provisions. In the instant case, however, it could not be said that there was a gap or a void in the statutory provisions in the matter of promotion from the cadre of Lower Division Clerks to that of Upper Division Clerks.

...

30. The last point for consideration is, whether it was proper for the High Court to issue a positive direction requiring the appellant to 253 promote the respondent to the Upper Division and thereafter to determine his rank in the cadre of Upper Division Clerks. Ordinarily, the court does not issue a direction in such positive terms, but the peculiar feature of this case is that it has not been disputed that Koyakutty respondent satisfies the two-fold criterion for promotion laid down in the statutory rule 28(b)(ii). Indeed, the District Registrar, Palghat, who was impleaded as respondent 3 in the writ petition, expressly admitted in paragraph 8 of his counter-affidavit filed before the High Court, "that the seniority of service is the basis of promotion from the ranks of Lower Division Clerks to the ranks of Upper Division Clerks provided they are fully qualified bypassing the departmental tests for the purpose". It was never the case of the Registrar that Koyakutty was not otherwise fit for promotion. Indeed, even in the grounds of appeal to this Court, incorporated in the Special Leave Petition, it is not alleged that Koyakutty did not satisfy the criterion of seniority-cum-fitness prescribed by Rule 28(b)(ii). The position taken by the appellant, throughout, was that this rule should be deemed to have been" supplemented" by the impugned Government Notification. It is not correct that the impugned

Notification merely "supplements" or fills up a gap in the statutory rules. It tends to super-add or super impose by an Executive fiat on the statutory rules something inconsistent with the same. Since the existence of both the criteria viz., seniority and fitness for promotion to the Upper Division prescribed by the statutory Rule 28(b)(ii), in the case of Koyakutty was not disputed, the High Court was justified in issuing the direction, it did."

21. The orders upon which learned AGP has placed reliance, have no application in the facts and circumstances of the present case. In the case decided by this Court in Special Civil Application No. 10177 of 1999 and allied matters, the issue was not with regard to the Government servants who have opted for voluntary retirement under Government Resolution dated 08.10.1970. The issue involved in the said petition is narrated in paragraph No. 2, which reads as under:

"2. The short facts of the case are that the petitioners have retired from service on 31-12-1995 afternoon. The Government revised the pay-scale of the employees w.e.f. 1-1-1996. It is the case of the petitioners that the Government initially issued a Resolution No. PGR/1098/6/M dated 20-1-1998 for the revision of the pension of the employees, who were drawing pension on or before 31-12-1995 and the petitioners were not drawing pension on 31-12-1995 and, therefore, the petitioners would not be included in the said resolution. It is further the case of the petitioners that the Government simultaneously on the same day issued another resolution bearing No. PGR/1098/7/M dated 20-1-1998 for revision of the pension and as per the said resolution since the benefits are to be given for revision of the pension of the employees, who retired from 1-1-1996 onwards, the pension of the petitioners is required to be fixed accordingly. The contention of the petitioners is that the respondents have fixed the pension of the petitioners as if they have retired on 31-12-1995 and as a consequence thereof, the benefits of the recommendations of Fifth Central Pay Commission to be given to its employees w.e.f. 1-1-1996 is not given for the purpose of fixation of pension and, therefore, these petitions. Thus, the facts of the present case are different and therefore, the said decision would not be applicable."

22. In the case decided by this Court in Special Civil Application No. 5853 of 2001 and allied matters, the question was with regard to statutory rules and Government Resolution whether the Government employee is entitled for pensionable service beyond 33 years or not. This Court in paragraph No. 3.2 therefore has held as under:

"3.2. In my view, the calculation which has been made by the respondents more particularly, from the documents which have been produced by the petitioners clearly establish that the State Government has calculated 33 years of pensionable service which is maximum and, which is permissible under the Rules. Therefore, the petitioners cannot be given notional increment for 5 years beyond permissible limit. In that view of the matter, the petition is misconceived."

23. The issue involved in the present petition is different and therefore, learned

AGP has wrongly placed reliance upon the aforesaid two decisions.

24. In view of the aforesaid discussion and in view of the aforesaid decisions rendered by the Hon'ble Supreme Court, it can be said that the clarification issued by the respondent by Government Resolution dated 09.06.1999, clarifying the Clause 2(2) of Government Resolution dated 20.01.1998 is illegal. The Government cannot clarify by way of administrative instructions any rules which are framed under Article 309 of the Constitution of India. Thus, clarification No. 1 issued in Government Resolution dated 09.06.1999, refusing to grant benefits to the petitioners of revision in pay scale in respect of notional period of qualifying service available under Government Resolution dated 08.10.1970 is quashed and set aside. The respondents are directed to grant the benefit of revision of pay scale of pay applied in accordance with recommendations of 5th Pay Commission under Gujarat Civil Services (Revision of Pay) Rules, 1998 in respect of their notional qualifying period of service (being the period from the date of their voluntary retirement from the respective post till the date of their actual would have been retirement on superannuation), as made available under Government Resolution dated 08.10.1970 for the purpose of determining, regulating and calculating the pension. The respondents shall carry out the aforesaid exercise within a period of eight weeks from the date of receipt of this order and thereafter pay the actual benefit to the petitioners within a period of four weeks thereafter.

25. At this stage, learned advocate Mr. Pranav Dave appearing for the petitioners submitted that some of the petitioners have expired and therefore, legal heirs of some of the petitioners who have expired are brought on record. However, the details with regard to the legal heirs of some of the petitioners who have expired are not available with him. It is therefore clarified that as and when the legal heirs of the concerned deceased petitioners approach to the Government authority with the copy of this order and the necessary details, respondents shall also consider their case as per this order and give the benefits accordingly.

26. With this observations and directions, petition is allowed and disposed of. Rule is made absolute to the aforesaid extent. No order as to costs.