

(2011) 01 GUJ CK 0071
In the Gujarat High Court

Case No : Letters Patent Appeal No. 2276 of 2010 in Spl. C.A. No. 7990 of 2010

Chandulal Nagji Joshi

APPELLANT

Vs

District Primary Education Officer and Others

RESPONDENT

Date of Decision : 20-01-2011

Acts Referred:

Citation : (2011) 52 GLR 660

Hon'ble Judges : Jayant Patel, J; J.C. Upadhyaya, J

Bench : Division Bench

Advocate : A.S. Asthavadi, for the Appellant; R.A. Mishra, for Respondent Nos. 1 and 4 and N.J. Shah, A.G.P. for Respondent Nos. 2, 3 and 5, for the Respondent

Judgement

Jayant Patel, J.—Admit. Notice of admission is waived by Mr. R.A. Mishra learned Counsel for Respondent Nos. 1 and 4 and Mr. N.J. Shah, learned A.G.P. for the Respondent Nos. 2, 3 and 5.

2. The present appeal arises against the order dated 27-8-2010 passed by the learned Single Judge of this Court in Special Civil Application No. 7990 of 2010, whereby the learned Single Judge has dismissed the petition on the ground of delay, since it was filed after a period of three years from the date of alleged cause of action.

3. Heard Mr. Asthavadi, learned Counsel for the Appellant, Mr. Mishra, learned Counsel for Respondent Nos. 1 and 4 and Mr. N.J. Shah, learned A.G.P. for Respondent Nos. 2, 3 and 5 for final disposal of the L.P.A.

4. The relevant facts are that the original Petitioner was serving as a teacher, who was granted selection grade vide order dated 27-9-2002, copy whereof is produced at page 11, however, the said order was not implemented. To say in other words, monetary benefits pursuant to the said order were not disbursed in favour of the Petitioner-Appellant herein, which were otherwise to follow w.e.f. 1-1-1973 as per the said order and since no action was taken for disbursement, the Petitioner preferred petition before this Court. The learned Single Judge

dismissed the petition, and hence, the present Appellant is before us.

5. We may first consider the decision of the Apex Court rendered in case of Shiv Dass Vs. Union of India (UOI) and Others, upon which the learned Single Judge has placed reliance. Paras 10 and 11 of the said decision, in our view, are relevant and the same read as under:

10. In the case of pension, the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally, the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine whether on merit Appellant had a case. If on merits it would have found that there was no scope for interference, it would have dismissed the writ petition on that score alone.

11. In the peculiar circumstances, we remit the matter to the High Court to hear the writ petition on merits. If it is found that the claim for disability pension is sustainable in law, then it would mould the relief, but in no event, grant any relief for a period exceeding three years from the date of presentation of the writ petition. We make it clear that we have not expressed any opinion on the merits as to whether Appellant's claim for disability pension is maintainable or not. If it is sans merit, the High Court naturally would dismiss the writ petition.

(Emphasis supplied)

6. The aforesaid shows that the Apex Court in Para 10 did observe that if the petition is filed beyond reasonable period say three years, normally, the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. In the very Paragraph, it has been observed by the Apex Court that if on merits it would have found that there was no scope for interference, the High Court would have dismissed the petition on that score alone. After making the aforesaid observation in Para 11, the Apex Court has remitted the matter back to the High Court to hear the writ petition on merits with further observation and direction that if it is found that the claim for disability pension is sustainable in law, then the High Court would mould the relief, but in no event, grant any relief for a period exceeding three years from the date of presentation of the petition. Therefore, if the judgment is read in its totality, the view taken is that the High Court, while exercising the power to dismiss the petition on the ground of delay, would take into consideration the merits of the matter too, but if the case is found as not strongly meritorious, the petition could have been rejected on the ground of delay. However, if the case is found to be strongly meritorious, the High Court would mould the relief not exceeding for period of three years. It appears that the learned Single Judge was more guided by the observations of the Apex Court. "If the petition is filed beyond reasonable period say three years, normally, the Court would reject the same." But while considering the aforesaid, the later portion of the observation

made by the Apex Court including the directions issued therein, have not been considered. Hence, it can be said that the real effect of the decision of the Apex Court has not been properly considered.

7. The aforesaid leads us to examine the question as to whether there is a strong case on merits to be considered by the Court or not. It is undisputed position that the pay of the Petitioner was fixed and it is only on account of audit objection raised, the complication had arisen, which has resulted into non-implementation of order for fixation of pay-scale as back as in the year 2002. The affidavit-in-reply filed on behalf of the contesting Respondent, relevant of which is at Paras 6 and 7 of the affidavit-in-reply filed by Shri A.K. Rathod, District Primary Education Officer, Junagadh, reads as under:

6. I submit and say that after the order for payment of selection grade from 1-1-1973 to the Petitioner, the approval of the same was sought vide letter dated 1-9-2004 from the Respondent No. 2. Accordingly, vide letter dated 16-9-2006, the Respondent No. 2 has granted the approval and/or direction to the Respondent No. 1, it is within the power and authority of the Respondent No. 1 to grant the same. Accordingly, the proposal was sent to the Respondent No. 5 through the Respondent No. 3.

7. That the Respondent No. 5 has raised objection as to the authority of the Respondent No. 1 and also raised the further objection to the effect that the selection is to be given to 20% of the total strength of the teacher. In case if the Petitioner is given the benefit of selection grade, one person who is given the selection grade at that time requires to be withdrawn and the amount is required to be recovered, for that necessary action is to be taken by this Respondent. In this respect, it is respectfully submitted that once the amount is paid by way of salary to the employee in excess, the same cannot be recovered. Further, all these teachers are already retired and at this stage any such action would be beyond any legal purview. As such, it seems that because of some communication gap and/or some other delay in submission of details, the Petitioner is genuinely left out from grant of selection grade.

8. The aforesaid makes it clear that it is not the matter where the authority, who had exercised the power for grant of selection of the pay-scale, had fixed the pay-scale without any jurisdiction or authority. Further, the audit objection raised to confer the benefit upon the Petitioner and after recovery of the salary already paid pursuant to the earlier order to the other employee, in our view, is non-sustainable inasmuch as the salary already paid to the other employee on account of his pay fixation, may be by mistake or otherwise for which he cannot be attributed any fault, cannot be recovered as per the settled legal position.

9. The second aspect is that in so many cases, it happens that if a junior is granted the benefit of the selection grade, the case of the senior if considered and found proper at the later stage, he would be placed at par for grant of selection grade and it will have relevance to the monetary benefit or notional

benefit and it cannot be on condition that there must be recovery of the salary from the junior concerned. Therefore, we find that the inaction on the part of the Respondent authority of not implementing the order for fixation of the pay-scale which was made as back as in the year 2002 on the ground of so-called wrong audit objection, is ex-facie arbitrary and cannot be sustained in law.

10. In view of the aforesaid finding, the Petitioner has a strong case on merits to get the benefits flowing from the fixation of the pay-scale as per order dated 27-9-2002. But the fact remains that he has preferred petition after long period and as per the above-referred decision of the Apex Court in case of Shiv Dass (supra), the relief would be required to be moulded for the period not exceeding three years. It appears that the petition has been filed in the month of March, 2010, therefore, the monetary benefit shall be disbursed by the Respondents authority to the Petitioner from as it may have become due from 1st April, 2007 onwards till today since the time consumed in the disposal of the petition as well as of the present L.P.A. would not operate as a bar to decline the relief to the original Petitioner.

11. In view of the aforesaid, the order of the learned Single Judge is set aside with the directions to the Respondents to grant to the original Petitioner the monetary benefit as may be available in law, pursuant to the order dated 27-9-2002 for his pay fixation, which in effect would be for re-fixation of his pension for the period from 1-4-2007 onwards. The arrears shall be calculated and paid within period of three months from the date of receipt of this order and for future it will continue in accordance with law after implementation of the order dated 27-9-2002.

12. Appeal is allowed to the aforesaid extent. No order as to costs. D.S. permitted.