

(2005) 03 GUJ CK 0016

In the Gujarat High Court

Case No : Special Civil Application No. 568 of 1997

Commissioner

APPELLANT

Vs

Raginaben K. Pijkar

RESPONDENT

Date of Decision : 03-03-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227

Citation : (2005) 03 GUJ CK 0016

Hon'ble Judges : Anant S. Dave, J

Bench : Single Bench

Advocate : A.Y. Kogje, AGP, for the Appellant; Dipak C. Raval and Anand Advocates, for the Respondent

Final Decision : Allowed

Judgement

Anant S. Dave, J.—The petitioner - State has challenged the order of Civil Services Tribunal, Gandhinagar, dated 7.8.1995 Civil Services Tribunal, Gandhinagar, dated 7.8.1995 the ground that the learned Civil Service Tribunal has wrongly given the benefit of higher pay scale to the respondent inspite of the fact that she had refused the promotion which was offered to her at the relevant point of time, and also that grant of higher pay scale to the respondent herein is contrary to the Government Resolution dated 16.8.1994 issued by the Finance Department of State of Gujarat.

2. The short facts of the petition are that by an order dated 30.3.1993 the respondent, who was working as staff nurse in the pay scale of Rs. 1350-2200, was promoted on purely ad-hoc and temporary basis as a head nurse in the pay scale of Rs. 1400-2600 and was transferred from Civil Hospital, Ahmedabad to General Hospital at Patan. That alongwith the petitioner about 62 other staff nurses were also promoted and transferred by the said general order dated 30.3.1993 issued by the Additional Director, Gandhinagar.

3. It is pertinent to note that in the said order of ad hoc and temporary

promotion it was clearly mentioned that the employee, who is transferred is to report at the place of transfer on or before 15.4.1993 and in case if employee refuses to accept the promotion the authority was to be intimated about the acceptance or refusal, as the case may be. It was further made clear that if refusal or acceptance is not submitted to the authority within the specified time limit then it would be presumed by the authority that such employee is not willing to accept the promotion and the order of promotion will be cancelled and the person who comes next in the serial number will be given promotion and no representation thereafter will be entertained.

4. Respondent herein addressed a communication dated 5.4.1993 at Annexure-B to the petition whereby it is stated that by an order dated 30.3.1993 she is transferred as a head nurse at Patan but due to her family and social circumstances she was unwilling to join at Patan as head nurse. In the said communication she has also stated that her husband has heart ailment and he was referred to Department of Cardiology in the Civil Hospital from 4.3.1993 to 9.3.1993 and he is under treatment, and if necessary, he was required to be operated and required permanent care and caution. Besides this she submitted that she has child aged five years old and no one else except the husband and wife was there to take care of the said child. It was also submitted that her husband is also serving in the Civil Defence Department and his duty hours are not fixed and, therefore, also her request can be considered. The respondent herself was patient of high blood pressure and Thyroid and, therefore, it was very difficult for her to join at the place of transfer and alternatively she had suggested that according to her information vacancies at nine other places for head nurse are available and accordingly her case can be considered.

5. It seems that thereafter also the respondent herein submitted a detailed representation in line with her earlier representation and requested the authority on 1.6.1993 that if she is not accommodated at Ahmedabad she can be posted at Visnagar and whenever vacancy is available at Ahmedabad she can be transferred.

By and large request of the respondent to the authority was on the ground of her family circumstances and, therefore, three representations were submitted to the authority.

6. That in view of the fact that the respondent herein refused to join her duties at Patan on the post of head nurse, the promotional post at Patan, like other such staff nurses, who had refused to join at the place of transfer pursuant to the order dated 30.3.1993, the appellant herein cancelled the order of ad hoc and temporary promotion of about 37 nurses including the respondent (original appellant) and subsequently by letter dated 9.9.1993 the respondent herein however expressed her willingness that she was ready and willing to join at Patan.

7. However, as her representations were not acceded to nor reply given by the

authority, the respondent herein filed Appeal No. 223/1994 for grant of higher pay scale as per the provision of Government Resolution of dated 16.8.1994 and also filed another Appeal No. 345/1994 on the ground that she deserves promotion in view of the fact that according to her she never refused to accept the promotion. The representations were made to accommodate her at different places where according to her she could have been accommodated and it was also submitted that refusal to accept promotion on the ground of family circumstances was a case of genuine hardship of respondent herein (original appellant) and, therefore, appeal filed by her deserves to be allowed.

8. That the Gujarat Civil Service Tribunal, Gandhinagar, rejected the claim of the respondent (original appellant) qua Appeal No. 345/1994 for promotion on the ground that the appellant did not report for duty at her place of posting by 15.4.1993, the time limit fixed by the office order dated 30.3.1993 issued by the Commissioner of Health Service. It was only after the cancellation of promotion by order dated 27.8.1993 that the appellant expressed her willingness to join at the place of posting. As per the original order dated 30.3.1993 that the subsequent order of promotion issued by the respondent dated 1.10.1993 related to staff nurses, who were already senior to the appellant and, thereafter, the appellant was promoted in the next set of order of promotion issued by the authority on 31.5.1995 and she joined the duty as a head nurse, a promotional post at Rajula. Therefore, the claim of the appellant qua promotion was not accepted by the Civil Service Tribunal and it is to be noted that the rejection of her claim by the Civil Service Tribunal in Appeal No. 345/1994 is not challenged by the appellant and the respondent herein and she has acquiesced accordingly qua her claim of promotion.

9. However, claim of the appellant in Appeal No. 223/1994 for the benefit of the higher pay scale, which was denied by the authority was allowed by the Civil Service Tribunal on the ground that the appellant had never refused to accept the promotion from the post of staff nurse to head nurse vide order dated 30.3.1993. That the reasons given by the Tribunal are that the representation submitted by the appellant cannot be equated to the refusal of the promotion in view of the fact that the appellant had narrated her genuine difficulty by narrating certain family circumstances which included heart ailment of her husband, a child aged about five years and nobody to look after him except the father and mother, that even the appellant was also suffering from high blood pressure and Thyroid and the request made by the appellant was to consider her case at different place where according to the appellant vacancies were available.

Looking to the above facts and after referring the Government Resolution of Finance Department dated 16.8.1994, the Tribunal came to the conclusion that the appellant was entitled for higher pay scale as per the provision of the aforesaid Government Resolution.

10. Shri A.Y. Kogje, learned AGP, appearing for the State has contended that the Civil Services Tribunal while passing the order dated 7.8.1995 has committed

material irregularity in not taking into consideration the provision of Government Resolution of Finance Department dated 16.8.1994 which clearly prohibits grant of benefit of higher pay scale to an employee, who refuses to accept the promotion on any ground and if such refusal to accept the promotion by an employee on any ground is communicated to the authority, the benefit of higher pay scale also cannot be given. In support of his contention Mr. Kogje, learned AGP, relied on Clause-3 Sub Clause-20 of Government Resolution dated 16.8.1994 which provides that any employee who refuses to accept the promotion on any ground even if personal or due to heart ailment or administrative on or after 5.7.1991, such employee is not to be given benefit of higher pay scale. According to Shri Kogje, when the claim of the respondent (Original appellant) for promotion is refused by the Tribunal on the same reasoning and ground, the benefit of higher pay scale could not have been given. The interpretation of communication addressed by the appellant to the respondent initially on 5.4.1993 and to other representations subsequently on 1.6.1993 and onwards clearly states that the appellant had refused to accept the promotion and only after the respondent authority had cancelled the order of promotion of about 37 staff nurses by an order dated 27.8.1993, the appellant had expressed her willingness to accept the promotion and to resume the duty at Patan as head nurse. Therefore, according to Shri Kogje, learned AGP, order of the Tribunal is contrary to the provisions of Government Resolution dated 16.8.1994 and appreciation of the evidence on the basis of facts available on the record is also not proper.

11. Shri Kogje, learned AGP, has also invited the attention of this Court to para-13 on the finding of the Tribunal while rejecting the claim of the appellant for promotion and has submitted that the benefit of higher pay scale is only available when the employee is fulfilling the provision of Government Resolution dated 16.8.1994 and even the Tribunal has referred Government Resolution dated 16.8.1994 and no reasonings have been assigned for grant of higher pay scale that as to how the benefit of such Government Resolution can be given to the appellant even though clear embargo is put in Clause-3 of Sub Clause-20 in Government Resolution in case of employee who refuses to accept the promotion on or after 5.7.199. He further submitted that cancelation of promotion of the appellant pursuant to the fact that she refused to accept the order of promotion and it was duly communicated to the authority, according to Shri Kogje, the appellant had accepted finding and verdict of the Tribunal qua her claim to promotion, and therefore the same is not the subject matter of this appeal and once the appellant has accepted the said verdict, no benefit of higher pay scale can be given and, therefore, the order of Civil Service Tribunal suffers from vice of non application of mind and contrary to the finding of facts and law as held and requires to be interfered in exercise of jurisdiction under Article 226 and 227 of the Constitution of India.

12. Shri Dipak C. Raval, learned advocate appearing for the respondent has vehemently contended that by letter dated 5.4.1993, respondent (original

appellant) has never refused to accept the promotion but she has narrated the family circumstances and other difficulties faced by her and requested the authority to consider her case at alternative places where according to her vacancies were available. Not only that but according to Shri Raval, it was submitted that the cancellation of promotion of the appellant without affording any opportunity of hearing was in violation of principles of natural justice and even not replying or answering the representation submitted by the appellant by the authority is a case of arbitrary exercise of power and, therefore, also the finding of the Tribunal insofar as the benefit is given to the appellant for higher pay scale needs not to be disturbed in exercise of powers under Article 226 and 227 of the Constitution of India.

13. It was further submitted by Mr. Raval that the action of the respondent authority discriminatory and violative of Article 14 of the Constitution inasmuch as that when similarly situated persons like the appellant respondent herein, were accommodated on the request for transfer to other place, why such treatment is not given to the appellant and, therefore, on this ground also the stand of the State authority is not justified and benefits given by the Tribunal after appreciating the facts on the record need not require to be disturbed or reversed in exercise of power under Article 226 of the Constitution of India. Shri Raval, learned advocate for the respondent has relied on para-9 of the judgment of the Tribunal with regard to the reasoning given for grant of higher pay scale to the respondent herein and, therefore, according to Shri Raval the Tribunal has rightly interpreted the provision of Government Resolution dated 16.8.1994 and, therefore, no interference of this Court is required at this stage.

14. Having heard the learned advocate for the parties this Court is inclined to accept the submissions made by learned AGP Shri Kogje that the Tribunal has erred in granting benefit of higher pay scale to the respondent herein (original appellant). It is true that the claim of the respondent herein in Appeal No. 345/1994 which was filed before the Civil Services Tribunal for grant of promotion was declined on the ground that the respondent herein had refused to accept the promotion and did not resume the duty at the place of transfer as a head nurse on ad hoc promotion within specified time limit on or before 15.4.1993. It may be a case of real hardship of the respondent herein and certain family circumstances for which the respondent herein may have requested the authority to consider her case at some nearby place to Ahmedabad where he was residing with her family. At the same time, employee of the State authority is duty bound to comply with the order of promotion or transfer as the case may be and for any grievance with regard to a place of transfer or any other hardship including family circumstances or any other administrative difficulty can be agitated before the authority only after resuming the duty and in such circumstances the authority can very well consider such case in accordance with law and simply because the representations submitted by the respondent herein were not answered, same cannot be made a ground of getting benefit of Clause-3 of Sub Clause-20 of the Government Resolution dated

16.8.1993. In the present case it is borne out from the record that by letter dated 5.4.1990 the respondent herein has clearly shown her unwillingness to accept the offer of the promotion and also denied to join as a head nurse on promotional post at Patan General Hospital and, therefore, there could not have been a different conclusion other than the fact that she never wanted to join at the place of transfer as stated and discussed in earlier paragraph, the difficulties could have been represented before the authority only after joining at the place of transfer and on that ground she could not have refused to accept the offer of promotion.

It is only when the State authority has cancelled the order of promotion by order dated 27.8.1993 of about 37 staff nurses which included respondent herein that she had shown her willingness on 9.9.1993 to accept the offer of promotion and to join the duties as head nurse at General Hospital, Patan. This very attempt could have been made immediately after the order of promotion dated 3.3.1993, which was received by the respondent. So far as the findings of the Tribunal is concerned with regard to the fact that the respondent herein have never refused to accept the promotion but a representation was made to consider her case on line with other such cases and also considering the hardship of the petitioner as one more ground to grant the benefit to the respondent herein is not the real approach in the facts of this case to which the Tribunal could have addressed. When there was clear statement of non acceptance of promotion in a letter dt.5.4.1993 by the respondent herein rejecting or refusing to accept the promotion, while deciding the claim of the the respondent, the appellant in Appeal No. 345/1994 there could not have been other finding for grant of benefit of higher pay scale by treating the letter of refusal of promotion as a representation to consider the case of respondent herein for alternative places. It is also true that Tribunal has failed to discuss the relevant provision of Government Resolution dated 16.8.1994 by which it can be said that the respondent is entitled to get the benefit of such provision. On the contrary Clause-3 of Sub Clause-20 clearly bars benefit of higher pay scale to an employee who refuses to accept the promotion on or after 5.7.1991.

15. That Shri Kogje, learned AGP, in his submission stated that on the reasonings and grounds given by the Civil Service Tribunal, case of respondent herein in Appeal No. 345/1994 was not accepted and it was dismissed and as such no other ground or reasonings could have been given for grant of benefit for higher pay scale and that on this aspect it is held that the Tribunal has failed materially in exercising the jurisdiction and, therefore, such finding required to be reversed by this Court in exercise of powers under Article 226 and 227 of the Constitution of India.

16. It may be very relevant to note that preamble of G.R. dated 14.8.1994 clearly states that as in certain cadres for employees, chances of promotion are meagre and salary of the employee is not stagnated at particular grade and therefore the Scheme is framed by the Government. In the present case, though

offered, the petitioner declined to accept promotion and thereafter claiming higher pay scale cannot be said to be a just and legal claim. That Tribunal findings and interpretation of G.R. dated 14.8.1994 granting higher pay scale on different considerations by allowing Appeal No. 223 of 1994 is erroneous, illegal and therefore, order dated 7.8.1995 of the Tribunal by which Appeal No. 223 of 1994, which is partly allowed, is set aside and the conclusion and the judgment qua Appeal No. 345 of 1994 are not disturbed.

17. So far as submission of Shri Raval with regard to opportunity to be given to the respondent herein before canceling her order of grant of temporary promotion is concerned, it has no force of law, simply because the said promotion was purely temporary and ad hoc and that too, even as per the condition laid down in the said order dated 30.3.1993, where the transferred and promoted employee was to accept such transfer and promotion on or before 15.4.1993, and, therefore, also the respondent is not entitled for any benefit of principles of natural justice. That the grant of request of two other employees by the authority also cannot be considered to be in any manner discriminatory and in such facts Article 14 cannot be placed into service to compel the authority to commit the same mistake or an irregularity in exercise of its administrative powers and such benefit cannot be confirmed by this Court in exercise of power under Article 226 of the Constitution of India.

18. On conjoint findings of facts and looking to the provision of Government Resolution dated 16.8.1994 and rejection of claim of the respondent herein qua promotion by the Civil Service Tribunal in Appeal No. 345/1994 it is held that the extension of benefit and higher pay scale to the respondent herein by an order dated 7.8.1995 by Gujarat Civil Service Tribunal by partly allowing Appeal No. 223/1994 is contrary to law and facts and is quashed and set aside and it is declared that the respondent herein is not entitled to the benefit of higher pay scale as directed by the Tribunal. Rule is made absolute. No order as to costs.