
(1994) 12 BOM CK 0055
In the Bombay High Court
Case No : Writ Petition No. 392 of 1994

Dattatraya Laxman Kamat

APPELLANT

Vs

State of Goa and Another

RESPONDENT

Date of Decision : 06-12-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 142, 226, 227

Goa, Daman Diu (Absorbed Employees Conditions of Service) Act, 1965 — Section 3

Citation : (1996) 3 BomCR 51

Hon'ble Judges : E.S. Da Silva, J;A.P. Shah, J

Bench : Division Bench

Advocate : S. Naik, for the Appellant; G.U. Bhohe, G.A., for the Respondent

Final Decision : Allowed

Judgement

E.S. Da Silva, J.—Rule, by consent, returnable forthwith.

2. The petitioner who is a retired Nazir of the Civil Judge, Senior Division and Chief Judicial Magistrate, Panaji, is challenging under Article 226 of the Constitution of India the Order of the Government dated 27th December, 1990 purporting to revoke the earlier order of the Government dated 20th September, 1989. Therefore a prayer for a writ of certiorari or any appropriate writ, order or direction to quash and set aside the said order is made along with an additional prayer for a writ of mandamus commanding the respondents to restore the Order dated 20th September, 1989.

3. It is the case of the petitioner that he was appointed to the post of "Ajudante do Escrivao" after the liberation of Goa in the Court of Civil Judge, Senior Division, Margao, by Order dated 28th February, 1963 against the pre-liberation post. The said post was a post which was existing under the former Portuguese regime immediately before 20th December, 1961. During the Portuguese regime the conditions of service including the designation of the posts and pay scales were regulated by the law known as "Estatuto do Funcionalismo Ultramarino".

According to this all the posts along with scales carried by the said posts were classified under various alphabets from "A" to "Z" and each alphabet had corresponding pay assigned to the corresponding post. According to the category assigned to the post of "Ajudante do Escrivao" the petitioner was appointed and grouped under alphabet "O" and the pay assigned to the said alphabet was 220000 Escudos equivalent to Rs. 366.66. After liberation of Goa there was no specific law regulating the conditions of service and the existing laws were not saved nor other laws extended. During the said period the administration of Goa, Daman and Diu was run by the Administrator under Article 239 of the Constitution. In exercise of his administrative powers the Administrator issued instructions fixing same pay scale for the same posts which were notified on 15th September, 1962 which covered the cases of persons who had joined Government services from 10th May, 1962. Though the petitioner was entitled to receive the pay which was assigned to his post equivalent to Rs. 366.66 the petitioner was however sanctioned only a pay of Rs. 290/- in the scale of Rs. 290-320 as ad-hoc salary. Thereupon a law was enacted by Parliament known as the Goa, Daman and Diu (Absorbed Employees) Act, 1965, (hereinafter called "the Absorbed Employees Act") which was brought into force from 1st February, 1966. Under the said Act absorbed post was defined as Civil Service of the post which existed under the former Portuguese administration in Goa, Daman and Diu immediately before 30th December, 1961. Section 3 of the Act enabled the Central Government to make rules for regulation of recruitment to the absorbed posts and the conditions of service of the absorbed employees. In exercise of those powers the Central Government made rules known as Goa, Daman and Diu (Absorbed Employees) Rules, 1965 (hereinafter called "the Rules"). The petitioner stated that the post of "Ajudante do Escrivao" in which the petitioner was initially appointed by Order dated 28th February, 1963 is an absorbed post as it satisfies the requirements specified in section 2 of the Absorbed Employees Act and the post was equated to the post of U.D.C. and was brought on the revised Central Government scale of pay of Rs. 130-300 with effect from 1st February, 1966. By the reason that the Constitution of India was applicable to the territory of Goa, Daman and Diu with effect from the 5th March, 1962 and the territory was declared to be a Union Territory, the Goa, Daman and Diu Administration Act, 1962 was also deemed to have come into force from 5th March, 1962. As per section 5 of the said Act all the laws in force before the appointed day in the territory of Goa, Daman and Diu continued to be in force until amended by the competent registering or other competent authority. The petitioner stated that the "Estatuto do Funcionalismo Ultramarino" (E.F.U.) was one of such laws which was in force immediately before the appointed day relating to the recruitment and conditions of service of the Government Servants including the salaries payable to the respective posts. Thus any amendment or revision in the salaries of the absorbed employees in the absorbed posts could only be effected either by a Competent registration or by a Competent Authority. Thus and since the territory of Goa, Daman and Diu was declared as Union Territory conditions of service of the employees could only be regulated either by

law made by the Parliament or under the rules made by the President of India in exercise of powers vested in him under the proviso to Article 309 of the Constitution. These powers were delegated by the President to the Administrator of Goa, Daman and Diu under letter dated 25th July, 1963 of the Government of India, Ministry of External Affairs. Prior to this date of 25th July, 1963 neither the Administrator nor the Government of Goa, Daman and Diu had legal authority to exercise powers under the proviso to Article 309 of the Constitution including the powers to amend or revise any pay scale assigned to any post including the absorbed post. It was therefore stated that the revised pay scales fixed by order dated 23rd August, 1962 are without any legal authority and as such null and void. In the meantime, several persons serving in the administration of the Union Territory and similarly placed as the petitioner who had been appointed after the liberation of Goa represented to the Government regarding the fixation of pay scale under the provisions of the E.F.U. By Order dated 20th September, 1989 the Government in its wisdom and consequent upon these representations chose to protect the pre-liberation pay of the absorbed posts and as such sanctioned the protection of pay of the absorbed posts held by the petitioner from the date of appointment. As a result the petitioner was given the pay corresponding to his post of "Ajudante do Escrivao" which was fixed at Rs. 366.66 with effect from 28th February, 1963. However, by a subsequent order dated 27th December, 1990, the Government revoked the said Order and revised the scale of the petitioner based on the provisional scale of pay. At that time several petitions were filed and by judgment dated 30th August, 1993 in Writ Petitions No. 77/91 and 79/91 Government was directed to refix the payment of the petitioners according to the order dated 20th December, 1961. It was therefore contended that the pay of the petitioner ought to have been also the same as per the said pre-liberation post to which the petitioner was appointed irrespective of the date.

4. On behalf of the respondents no return or affidavits were filed by the Government. Mr. Bhobe, learned Government Advocate, however, at the time of the hearing has advanced during the course of his arguments four sets of submissions. It was firstly contended that the petitioner is guilty of delay and laches inasmuch as the impugned order having been passed on 27th December, 1990 the petitioner chose to challenge this order only on 8th September, 1994. It was further submitted that even after the said order was successfully challenged by other petitioners in Writ Petitions No. 77/91 and 79/91 on 30th August, 1993, the petitioner still took his own time to approach this Court to seek relief against the impugned order.

We are not inclined to agree with the respondents that the right of the petitioner sought to be enforced in this case is to be held as defeated in view of any delay or laches. In matters of service dealing with pensionary and other benefits delay and laches does not assume, in our view, special relevance. In the instant case it is to be noted that the petitioner's pay has been protected by the earlier order which for no reasons appears to have been revoked or restrained. Further the impugned order having been successfully challenged in Writ Petitions No. 77/91

and 79/91 before a Division Bench of this Court the principle laid down in those decisions should have been applied by the Government in all cases situated in similar circumstances. Thus, the question of any delay or laches on the part of the petitioner to approach this Court for redress in order to get this principle implemented in his case does not seem to arise.

5. The next submission of the learned Counsel is that the judgement of the Division Bench of this Court in the aforesaid Writ Petitions No. 77/91 and 79/91 was restricted to the petitioners in those case only and therefore it was not open to the petitioner to try to take any cover or benefit from that decision. We are unable to accede to the contention of the learned Counsel in this regard. It is a fact that the decision passed in those writ petitions makes reference to the relief to be granted to the petitioner only. However, this does not mean that the petitioner would not be entitled to claim that since his case is situated on the same footing as the petitioners in those cases the same relief or benefit should be extended to him also. As we said above it is a question of a principle laid down by the decision of the Division Bench which was sought to be implemented. This being the position the Government is not to be heard as contending that the same principle should not apply in the instant case once it is not disputed that the facts of this case are not different from the ones which were pleaded by the petitioners in Writ Petitions No. 77/91 and 79/91.

6. It was further urged by the learned Counsel that having regard to the ratio of the judgment in the case of Ramakant Shripad Sinai Advalpalkar Vs. Union of India and others, the claim of the petitioner is bound to be dismissed. It was submitted that the Division Bench in Writ Petitions No. 77/91 and 79/91 did not consider the implication of the ratio and the observations made in the aforesaid judgement by holding the petitioners entitled to the benefits conferred on him by Order dated 20th September, 1989.

It is difficult to accept the contention of the Government Advocate that no due consideration was given by the Division Bench of this Court to the aforesaid decision and therefore the ruling passed by this Court can be said as having been passed per incuriam. We have inquired from Mr. Bhobe whether this decision was relied upon by him before the Division Bench. Mr. Bhobe in all fairness has stated that he was not in a position to definitely say whether such reliance was placed by him before the Division Bench. In the circumstances we are not required to adjudicate as to whether the non-consideration of the aforesaid decision by the Division Bench would have resulted in the said Writ Petitions No. 77/91 and 79/91 being dismissed by the Division Bench. However, even on its merits in our view the aforesaid decision cited by Mr. Bhobe does not appear to be attracted in the instant case. Indeed that was a case dealing with the question of the purported promotion of an officer holding a lower post and who was asked to discharge the duties of a higher post. The Court while examining the provisions of section 2 of the Act and the meaning of the expressions "absorbed post" and "absorbed employee" held that asking an officer who was substantively holding a

lower post merely to discharge the duties of a higher post cannot be treated as a promotion. The Court observed that in such a case he was not getting the salary of the higher post but was getting only that in service parlance is called a "charge allowance". Such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority could not enter into it. It was noted that the person in this regard continues to hold his substantive lower post and only discharges the duties of the higher post essentially as stop-gap arrangement. On facts the Court held that the provisions u/s 2(a) and (b) merely indicate that an absorbed employee should have held the absorbed post immediately before 20th December, 1961 and that he did not detract from that position if subsequently he was serving in any other post in connection with the administration of the Union Territory of Goa. It was thus erroneous to construe that in such circumstances the "other" post would also become an "absorbed post" in relation to such person. In this respect he would continue to be an "absorbed employee" only in relation to the post he held immediately prior to 20th December, 1961.

7. The factual position in that case was that the petitioner was holding a substantive post of Upper Division Clerk although he was acting in the higher post of Grade III Officer. Subsequently on the post of Treasurer having fallen vacant upon the death of its incumbent, he was asked to perform the duties of Treasurer on the stipulation that he would draw, besides the monthly salary of his own post as acting Grade III Officer which he then was, an allowance of Rs. 100/- per month. This clearly means that the post the petitioner was holding was a post of Upper Division Clerk acting as Grade III Officer and at the time he was asked to hold charge of the post of Treasurer there was no question of his having been promoted to the said charge. There is therefore a vast difference between holding a charge of a post on officiating basis and holding the post as such on substantive basis. The former does not certainly amount to a promotion but only signifies that a person who is occupying the substantive post is requested to look after the duties of the higher post. In the instant case the petitioner was admittedly holding a substantive post as "Ajudante do Escrivao" which is to be held as "absorbed post" and as such was entitled to be deemed to be an absorbed employee. In the circumstances we are of the view that the ruling cited by Mr. Bhobe is not at all relevant in this case.

8. The last submission of Mr. Bhobe is that if the Court is to accept the petitioner's contention at this stage several other employees would follow in order to claim related benefits which in correct interpretation of the judgement in the Ramakant Shripad Sinai Advalpalkar Vs. Union of India and others, , are not due to them. We are not in the least impressed by this kind of submission. Once the judgement of the Division Bench has upheld the grievance of the petitioners in that case it was the bounden duty of the Government to satisfy the grievances of all others who are placed in similar situation. Therefore the argument advanced by Mr. Bhobe in that behalf is totally untenable and we have to reject as it is devoid of any substance. In our view the case of the petitioner is entirely

covered on facts and in law by the earlier judgment of the Division Bench in Writ Petitions No. 77/91 and 79/91.

9. In the result the petition is bound to succeed and is hereby allowed in terms of prayers (a) and (b). Rule accordingly made absolute with costs.