(2014) 09 GUJ CK 0126

In the Gujarat High Court

Case No : Special Civil Application No. 10928 of 2014

Jayeshkumar Mahendrabhai Parmar APPELLANT

Vs

State of Gujarat and Others RESPONDENT

Date of Decision : 29-09-2014

Acts Referred:
Constitution of India, 1950 — Article 14, 16

Citation : (2015) LabIC 252

Hon'ble Judges : J.B. Pardiwala, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Gunvant R. Thakar, Advocates for the Appellant; Vandan Baxi, Asstt. Government Pleader, Advocates for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.—Looking to the nature of urgency and the issue involved, we have heard the learned advocates for the parties for final disposal of the petition. The petitioner has challenged the action of the State authorities in offering him appointment to the post of Accountant under office order dated 28th May, 2014, on a fixed pay of Rs. 10,000/- per month. The petitioner has also challenged the Government Resolution dated 16th February, 2006, issued by the Finance Department, providing for appointments on various posts under the Government in Group III and IV cadres on fixed salary basis, being opposed to Rule 23 of the Gujarat Civil Service (Pay) Rules, 2002 (hereinafter referred to as "the Pay Rules"), and Government Resolution dated 17th June, 1994 and Circular dated 27th September, 2001. The petitioner has also prayed for quashing a communication dated 5th August, 2014, issued by the respondent No. 3, under which his representation for pay protection was rejected and he was directed to report for duty within seven days, failing which it would be presumed that he would not be interested to be appointed on the post of Accountant.

2. The brief facts are as under:--

2.1 The petitioner applied for the post of sub-Accountant, in response to the selection process initiated by the Gujarat Subordinate Service Selection Board.

He was selected and appointed on the said post on 27th April, 2007, on a fixed salary of Rs. 2,500/- per month, which was revised from time to time by the Government. We may notice that pursuant to the implementation of the Sixth Pay Commission Recommendations, the said post carries the pay-scale of Rs. 5,200-20,200/- with a grade pay of Rs. 2,400/-.

2.2 As per the Government Policy, like in other similar cases, the petitioner''s appointment to the post of sub-Accountant was on a fixed salary for initial period of five years, and upon completion of the period of five years and his suitability to continue on the post, the petitioner would be brought on the regular pay-scale. In his case, upon completion of the said period, the petitioner was appointed on the regular pay-scale with effect from 28th June, 2012, by an order dated 11th July, 2012. The petitioner is currently discharging his duties on the said post.

2.3 From the post of Sub-Accountant, the next promotional avenue is that to the promotional post of Deputy Accountant. However, the petitioner would also be eligible for applying for direct selection, not only to the post of Deputy Accountant, but also to the next higher post of Accountant. Therefore, when the respondents invited eligible candidates from public to apply for the post of Deputy Accountant and Accountant by way of direct recruitment, the petitioner also applied. He was selected for both the posts. He was offered appointment on the post of Accountant as well as Deputy Accountant. He indicated his preference for the post of Accountant, foregoing his selection to the post of Deputy Accountant. Accordingly, he was offered appointment to the post of Accountant by an order dated 28th May, 2014 as at Annexure "A" to the petition.

2.4 The order provided that in terms of the Government Resolutions, the appointee would have to discharge his duties as an Accountant for a fixed monthly salary of Rs. 10,000/- and he would have to give an undertaking as per the prescribed format. It was mentioned that during this period of five years, he would have to pass the Accountants Examination Part I and n, and the service rendered by him on the post will not be counted towards pension, bonus, LTC, extension of leave or any other financial benefits from the Government. After completion of five years of satisfactory service, permanent appointment order would be issued, after which he would get the benefit of the new pension scheme of the Government. The prescribed format for giving undertaking contained all these terms and conditions, and further specified that after completion of five years, the question of appointment on regular pay-scale of Rs. 9,300 - 34,800/- with grade pay of Rs. 4,400/- would be considered.

2.5 The petitioner, thereupon, made a representation dated 7th June, 2014, pointing out to the authorities that he is already appointed to the post of Sub Accountant in the regular pay-scale with effect from 28th June, 2012. He is aged about 34 years. In normal course it would take about 20-25 years to get promotion to the post of Accountant and since he has already worked for five years on fixed salary basis, his new appointment may be made in the regular pay-scale.

2.6 The representation of the petitioner was not accepted by the Government, and under a communication dated 5th August, 2014, he was given seven days to report for duty, failing which in was informed that the offer of appointment would stand cancelled.

2.7 The petitioner, in the meantime, filed this petition challenging his appointment on fixed salary basis. He has prayed for a direction that his appointment be made to the post of Accountant on regular pay-scale and to quash communication dated 5th August, 2014 issued by the respondent No. 2.

3. When the petition came up for hearing on 19th August, 2014, we issued notice and directed the respondents not to fill up one post of Accountant, to which the petitioner was selected.

4. The respondents have appeared and also filed the reply. They mainly rely on the Government policy of making appointment to Group III and IV posts initially for a period of five years on fixed salary basis.

5. Learned counsel Shri G.R. Thakar for the petitioner raised following contentions:--

(i) Initial appointment of the petitioner to the post of sub-Accountant was on fixed salary basis. After completion of five years he was already brought to the regular pay scale , and now he cannot be made to serve for another five years on fixed salary. The petitioner is currently drawing gross salary of Rs. 19,000/- per month, and therefore, he cannot be asked to work on the post of Accountant on a fixed salary of Rs. 10,000/- per month.

(ii) The erstwhile Rule 41 of the Bombay Civil Services Rules (the provision now incorporated in Rule 23 of the Gujarat Civil Service Rules, 2002) recognizes the principle of pay protection when a Government servant is recruited and selected through direct selection to any higher post.

(iii) Counsel also urged that the entire fixed salary appointment scheme is invalid and unconstitutional, and so held by this Court in the judgment delivered on 20 January, 2012, in the case of Shree Yogkshem Foundation for Human Dignity v. State of Gujarat (Writ Petition (PIL) No. 49 of 2011).

6. On the other hand, the learned Assistant Government Pleader Shri Baxi opposed the petition. He relied on the Government Resolution dated 16th February, 2006, issued by the Government of Gujarat, under which the scheme for appointment on fixed salary is framed. He submitted that the petitioner is appointed in terms of such scheme and therefore, he cannot seek pay protection of his earlier post. The learned counsel strongly urged that as the offer of appointment presently given to the petitioner is not a regular appointment, the question of pay protection does not arise. He submitted that the petitioner has promotional avenues in his cadre, if however, he desires to avail of the

opportunity of direct recruitment to the post of Accountant, he must submit to the provisions contained in the Government Resolution dated 16th December, 2006.

7. Having heard the learned counsel appearing for the parties and having perused the documents on record, few facts are not seriously in dispute, which are as under:--

(a) The petitioner was initially appointed on fixed salary basis, and he was drawing monthly salary of Rs. 2,500/- on the post of sub-Accountant with effect from 27th April, 2007.

(b) After completion of five years of satisfactory service, he was brought on the regular pay-scale with effect from 26th August, 2012, by order dated 11th July, 2012, in the pay-scale of Rs. 5,200-20,200/-, with grade pay of Rs. 2,400/-.

(c) He applied for and was selected by a direct recruitment selection process undertaken by the Government to the post of Accountant, which carries the pay-scale of Rs. 9,300-34,800/- with a grade pay of Rs. 4,400/-.

(d) He was offered appointment on such post under order dated 28th May, 2014 on a fixed salary of Rs. 10,000/- per month, and was asked to give an undertaking in the prescribed format.

8. Rule 41 of the Bombay Civil Service Rules pertained to regulating the pay fixation of a Government servant, who is appointed substantively to a post of time-scale of pay. The relevant portion of such rule reads as under:--

"41. Save as provided in Rule 42, the initial substantive pay of a Government servant who is appointed substantively to a post on a time-scale of pay is regulated as follows:--

(a) If he holds a lien on a permanent post, other than a tenure post, or would hold a lien on such a post had his lien not been suspended under Rule-19.

(i) when appointment to the new post involves assumption of duties or responsibilities of greater importance (as interpreted for the purposes of Rule 56) than those attaching to such permanent post, he will draw as initial pay the stage of the time-scale next above his substantive pay in respect of the permanent post;"

9. Note 8 below Rule 41 of the BCSR pertains to the cases of a Government servant working in an office or Department if selected for appointment either in the same office or any other office under the Government through direct selection. The relevant portion of Note 8 reads as under:--

"Note 8. Save as otherwise provided in the Bombay Civil Services Rules, 1959 and the Revised Leave Rules, 1936, if a Government servant working in an office or department is selected for appointment either in the same office or any other office to a service/cadre/post under the Government through the Gujarat Public

Service Commission, Centralised recruitment scheme or any other method approved by Government and if the service rendered prior to and after such selection is continuous without any physical break, the previous service shall count for the purpose of fixation of pay and leave."

10. It can thus be seen that in the case of a Government servant, who was selected through direct selection process, his pay fixation would be governed under Rule 41 of the BCSR, read with Note 8 thereof. The provision contained in Rule 41 and Note 8 have been substantially retained in the Pay Rules of 2002. Rule 23 of the said Rules pertains to the pay on new appointment, relevant portion of which reads as under:--

"23. Pay on new appointment:--(1) Where the Government employee is selected for appointment to a service or cadre or post under the Government through the Gujarat Public Service Commission, Centralised Recruitment Scheme, or any other method approved by the Government and if the service rendered prior to and after such selection is continuous and the appointment is on a higher post as compared to the pay scale of the post on which the employee was working prior to his appointment before selection; his pay shall be fixed as per Rule-13.

11. In turn, Rule 13 of the Pay Rules, which pertains to fixation of pay on appointment to another post not involving assumption of duties or responsibilities of greater importance, reads as under:--

"Where a Government employee holding a post in a substantive, temporary or officiating capacity, is appointed in a substantive, temporary or officiating capacity to another post including an ex-cadre post and the appointment to the new post does not involve assumption of duties or responsibilities of greater importance than those attached to the old post, his initial pay shall be fixed as under:--

(a) if there is a stage in the time-scale of the new post which is equal to his pay in the pay scale of the old post, he shall draw pay at that stage;

(b) if there is no such stage, he shall draw pay at the stage next below his pay in the pay scale of the old post plus personal pay equal to the amount of difference;

(c) in either of these two cases, he shall continue to draw that pay until such time as he would have received an increment in the time-scale of the old post or till he would earn an increment in the time scale of the new post, whichever is earlier;

(d) if the minimum of the time-scale of the new post is higher than his pay in the old post, he shall draw that minimum as initial pay."

12. Rule 23 of the Pay Rules, as is apparent, covers cases where a Government employee selected for appointment to a service or cadre or post under the Government through the selection process undertaken either by the GPSC, Centralized Recruitment Scheme or any other method approved by the

Government. If the service rendered after such selection is continuous, and the appointment is on a higher post, as compared to the post on which the employee was working prior to the appointment on his selection, in such a case his pay would be fixed as provided in Rule 13.

13. Rule 13 per-se applies to cases of fixation of pay of a Government employee holding a post in substantive official capacity to another post, and the appointment to the new post does not involve assumption of duties or responsibilities of greater importance than those attached to the old post. Rule 13 prescribes the mode and method of fixing salary in such cases. By incorporation the same formula would also apply in cases where Rule 23 would apply.

14. In the present case, for apparent and obvious reasons, Rule 23 is applicable. The petitioner is a Government employee. He is selected for appointment to a service under the Government through the selection process undertaken by the Government by an approved method. He had rendered continuous service in his original post before and after his selection and is now being appointed on a post higher to the one which he was holding. The respondents, therefore, cannot avoid their responsibility to protect his present pay in the cadre of sub-Accountant.

15. The learned Assistant Government Pleader, however, as noted above, contended that the current offer of employment is not on a regular basis and that therefore, the petitioner cannot be said to have been appointed to a higher post. According to him, in such a scenario, Rule 23 would not apply. We, however, beg to differ. If the fresh order of appointment is not on a post under the Government of Gujarat, perhaps the debate whether Rule 23 would apply or not, would be germane.

16. In the present case, for the reasons discussed hereafter, we are inclined to hold that the offer of appointment dated 28th May, 2014 to the petitioner is on a higher post of Accountant, but on fixed salary basis.

17. The Government Resolution dated 16th February, 2006, under which the fixed salary regime is set up, itself envisages that there would be appointment after regular selection to the post under the Government, but without offering regular salary. The preamble to the Resolution itself discusses reasons for formulation of the scheme. It provides that the appointment of the staff on contractual basis has not worked out satisfactorily, and it did not result in any substantial saving of Government fund. On the other hand, it led to demoralization of the employees. If instead, appointments are made for five years on fixed salary basis, it would result into considerable savings for the Government, and the appointees would receive salary in the regular scale after five years, which would maintain their dedication to the work and spirit. The Resolution therefore, provides that the appointments under the Government in Class III and IV posts made through direct selection would be for a period of five

years on fixed salary on probation. The terms of the GR further provides that all such appointments would be made only after following the procedure laid down under the Recruitment Rules. There shall be no relaxation in educational or any other qualifications, nor shall there be any relaxation in the recruitment process. All persons being appointed under the scheme would be appointed on a fixed salary for a period of five years. Even the appointment on compassionate basis would be governed and regulated according to this scheme. The period of five years shall not count towards any service benefits. Significantly, the last Clause 22 of the said scheme provides that the person being appointed under this scheme for a period of five years on fixed salary, having been already discharged his duties, at the time of consideration of his appointment on regular pay-scale, there would be no need for a fresh appointment on probation.

18. In our opinion, the entire scheme and in particular the last noted clause which is of great significance leaves no manner of doubt about the nature of appointment under the scheme. The scheme itself envisages appointment after full regular selection process without slightest deviation in the qualifications required or in the procedure for selection to be followed. The initial appointment would be for a period of five years on fixed salary basis, and upon completion of five years, the person would be brought to regular pay-scale, of course, subject to his suitability. At that time, there would be no need for issuance of fresh appointment on probation. To put it differently, the petitioner''s performance would already be judged and his suitability for confirmation in service would be examined before he is brought on regular scale.

19. The scheme thus, envisages appointment on a post, with a fixed salary. It is not the case of a contractual appointment on a fixed salary basis. The entire scheme envisages a regular selection process meant for direct recruitment, scrupulous and strict adherence to the educational and other qualifications. It is aimed only at saving Government funds for an initial period of five years, as suggested in the preamble to the scheme. The scheme therefore, cannot be seen as one making appointments on contractual basis subject to permanency after five years. The scheme refers to fixed salary, though appointment is already made but the event of being brought to regular pay-scale, is differed for a period of five years.

20. In that context, the appointment order dated 8th May, 2014, when it refers to a contractual employment, is wholly dehors the scheme itself. In our opinion, such contractual appointment is not envisaged in the Government Resolution. It is not part of the scheme framed by the Government and could not have been slipped into the appointment order, which is not backed by any Government decision. The Government decision was to make appointment against a regular post, after regular selection and recruitment process being followed, but only the salary on the regular pay was differed for a period of five years, subject to the appointee proving his suitability. Thus seen, the scheme itself envisages appointment to a post. The case of the petitioner is thus covered under Rule 23

of the Pay Rules, and his pay fixation therefore, should be made in terms of Rule 13 of the said Rules.

21. The situation can be looked from a slightly different angle as well. It is undisputed that the respondent examined all qualifications and other criteria as on the date when the selection process was undertaken. For example, for direct recruitment to the post of Accountant, a candidate must be below 30 years of age, which would be relaxed for a candidate belonging to Scheduled Castes/ Scheduled Tribes by five years. This criteria would be judged at the time of the selection process and not at the time when the candidate, after five years of service on fixed salary basis, is brought within the regular pay-scale. If we accept the contention of the learned AGP that appointment to the post takes place after five years, it would amount to appointing a person to a post under the Government well after he has crossed the maximum age limit prescribed for such a post.

22. The petitioner, as a Government servant, also had a right to apply for the post in question for direct recruitment as long as he fulfills the educational and other qualifications, including the age criteria. The petitioner, admittedly, fulfilled all such criteria and was therefore, considered for the post in question. If he is now asked to surrender all his past service benefits, and is also directed to accept appointment on fixed salary for another period of five years, it would virtually be taking away his avenue of direct selection to the post. Surely, Articles 14 and 16 of the Constitution strike at arbitrariness of the Government agencies. No interpretation of the Government scheme, which brings about such an incongruent situation, would be permissible. As a Government servant, the petitioner would be virtually deprived of a direct selection opportunity. Surely, a Government servant, who was already brought to regular pay-scale after five years of working on a fixed salary basis, and has spent several years in his post, as has happened in the present case, cannot be asked to go back to the fixed salary employment, merely because he proves himself worthy of a direct selection competing with thousands of other eligible candidates to the higher post. Any Government policy requires the candidate to surrender all his past service benefits for direct selection to higher post would be entirely unreasonable, arbitrary and therefore violative of Articles 14 and 16 of the Constitution. It would also be discriminatory. We may recall, the fix salary scheme applies only to Class III and Class IV services. Only in cases of such services this "double jeopardy" of being placed again on fixed salary upon direct recruitment of a candidate who is already holding a Government post would apply. In other words, the policy of pay protection upon a Government servant being directly selected on a higher post will apply to Class-II and Class-I posts but not to the rest. Insofar as this distinction is concerned, there is no reasonable basis for different treatment. Even if this argument of ours is not to be accepted, it would amount to the Government policy being in conflict with the statutory Rules. Rule 23 of the Pay Rules, 2002 speaks of pay protection in such cases. The Government policy to the extent it is against the said Rules, must

yield to the statutory provisions. If Rule 23 applies, the Government policy cannot be pressed in service to deny benefit of pay protection to the Government employee.

23. We are quite alive to the fact that the entire fixed salary regime of the Government envisaged under the said Government Resolution dated 16th February, 2006, has been declared as unconstitutional by this Court in the judgment in the case of Shree Yogkshem Foundation for Human Dignity (supra). Only on the basis of this judgment, the Government stance would be rendered invalid, however, we are conscious that the Government has challenged this judgment before the Supreme Court, and the judgment has been stayed. We are, therefore, given our reasons quite apart from the question of the validity of the Government Resolution dated 16th February, 2006 itself.

24. In the result, the Government''s decision to offer appointment to the petitioner under order dated 28th May, 2014, on the post of Accountant on fixed salary basis is quashed. It is further directed that the petitioner shall be appointed on the said post of Accountant by protecting his current pay in the cadre of Sub Accountant, as provided under Rule 23, read with Rule 13 of the Pay Rules, 2002. The respondents shall not insist on the petitioner giving an undertaking as provided in the prescribed proforma, appended to the order dated 28th May, 2014.

It is however, clarified that the petitioner shall not claim any seniority in the post of Accountant for such period of five years, and this period would be treated as appointment on probation, and ultimately, if he successfully completes the period of probation, after five years, his seniority will be judged on the basis of his rank in the select list.

The petition is disposed of with the above direction. Direct service permitted.

Learned AGP requests for a stay of this order for a period of four weeks. The prayer is rejected.