

(2020) 08 GUJ CK 0282

In the Gujarat High Court

Case No : R/Special Civil Application No. 8640 Of 1992

M J THAKER

APPELLANT

Vs

Director Stock Holding Centralmedical Stores Organisation &
3 Other(s)

RESPONDENT

Date of Decision : 31-08-2020

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 226

Citation : (2020) 08 GUJ CK 0282

Hon'ble Judges : Dr. A. P. Thaker, J

Bench : Single Bench

Advocate : KB Pujara, Utkarsh R Sharma, RC Jani

Final Decision : Disposed Of

Judgement

Dr. A. P. Thaker, J

1. By filing this petition under Articles 14, 16 and 226 of the Constitution of India, the petitioner has prayed to quash and set aside order dated 3.8.1991 passed by respondent no.2 and also to quash and set aside impugned Government Resolution dated 11.8.1992 passed by respondent no.2. The petitioner has also prayed to quash and set aside order dated 30.11.1992 passed by respondent no.1 and direct respondent no.1 to grant promotion to the petitioner on the post of Junior Clerk on the vacancy caused by promotion of Mr.A.B.Chavada to the post of Senior Clerk with effect from 30.11.1992.

2. It is the case of the petitioner that he has passed SSC examination and he was appointed as Peon in the office of respondent no.2 by appointment order dated 23.11.1982. After joining the services, the petitioner went through training and passed post-training examination prescribed for Clerks and he was issued certificated in this regard dated 30.8.1990. Thus, the petitioner was qualified to be appointed as Clerk by promotion under Rule of the Gujarat Non-Secretariate Clerks and Clerks- cum-Typists (Gujarati/English) Recruitment Rules, 1990.

2.1 It is further the case of the petitioner that respondent no.3 herein, Mr.Vipul D. Pandya, was appointed illegally and irregularly in the office of respondent no.1, therefore, by order dated 14.5.1991, his services were directed to be terminated with a further direction to fill up that post by way of promotion. Accordingly, on 18.5.1991, services of Mr.Pandya came to be terminated and simultaneously granted promotion to one Mr.R.L.Vasava by order dated 18.5.1991.

2.2 Thereafter, Mr.Pandya-respondent no.3 herein approached higher-up in the Government and by influence, respondent no.2 passed an order dated 3.8.1992 directing respondent no.1 to immediately reinstate respondent no.3 in service. Following this, Mr.R.L.Vasava apprehended that he would be reverted back to the post of Peon, he preferred Special Civil Application No.5231 of 1991 and obtained injunction against his reversion.

2.3 Thereafter, respondent no.2 passed an order dated 16.8.1992 directing the Commissioner of Health and Medical Services and Medical Education to appoint respondent no.3 and accordingly an order was passed on 20.8.1992. On 2.9.1992, petition filed by Mr.R.L.Vasava was allowed on the basis of the statement made at the Bar that Mr.Pandya was appointed as Jr.Clerk, as aforesaid. Therefore, there was no question of reverting Mr.R.L.Vasava.

2.4 By another order dated 11.8.1992, respondent no.2 treated the break in service of Mr.Pandya from 19.5.1991 to 20.8.1991 as continuous and his seniority was ordered to be considered in the original department and he was granted exemption from pre- service training, requisite for the post of Jr.Clerk.

2.5 One Mr.I.A.Frooqui, Senior Clerk on deputation in the office of respondent no.1 has retired on reaching the age of superannuation by order dated 30.11.1992. Following this order, Mr.A.B.Chavda, Junior Clerk in the office of respondent no.1 has been granted promotion to the post of Senior Clerk by order dated 30.11.1992. Therefore, a vacancy arose in the post of Junior Clerk and the petitioner herein being qualified and eligible for promotion to the said post made a representation dated 30.11.1992. Surprisingly, by an order on the same day i.e. 30.11.1992, respondent no.3 is sought to be reinstated in the office of respondent no.1 in place of Mr.A.B.Chavda w.e.f. his joining the office of respondent no.1, and the petitioner is sought to be deprived of promotion to which he is entitled. Therefore, the petitioner has filed present petition with the prayers as aforesaid.

3. An affidavit in reply is filed on behalf of respondent nos.1 and 4 by one Mr.RajShekhar Mehta, page 39, inter alia, stating that respondent no.1 organization is now functioning as respondent no.4-Corporation since 20th July 2007 and entire establishment as well as record of employees of respondent no.1 office is transferred to respondent no.4 office. He has denied the submission of the petitioner that his fundamental legal right has been violated because of any action or inaction on the part of the respondent. He has admitted the fact of

appointment of the petitioner on 20.11.1982 as well as his passing examination for promotion to the post of Clerk and that respondent no.3, Mr.Vipul Pandya was appointed directly as Junior Clerk for 29 days in respondent no.1 organization from 11.10.1983 and continued till his termination vide order dated 15.7.1985. He has stated that thereafter Mr.Pandya has filed Special Civil Application No.124 of 1986, wherein this Court has ordered to reinstate Mr.Vipul Pandya with full backwages and, therefore, respondent no.1 had preferred Letters Patent Appeal No.280 of 1983, wherein also Letters Patent Appeal was dismissed by this Court. He has also stated that thereafter respondent no.2 sent a communication to respondent no.1 on 14th May 1991 to terminate the service of Mr.Vipul Pandya by paying one month's notice pay and fill up that post immediately by promotion and, accordingly, an order was passed by respondent no.1 on 18th May 1991 terminating the services of Mr.Vipul Pandya by paying one month notice pay and promoting Mr.R.L. Vasava on the vacant post of Mr.Vipul Pandya. According to him, Mr.Vasava promoted due to roster benefit in place of present petitioner. He has also stated that respondent no.2 has reconsidered the case of Mr.Vipul Pandya and he was reinstated in service and as there was no vacant post of Junior Clerk in respondent no.1-office at that point of time and due to interim order of this Court in Special Civil Application No.5231 of 1991, it was not possible to revert Mr.Vasava to the post of Peon again. Therefore, respondent no.2-office sent a communication on 16.8.1991 to another office of Commissioner, Health, Medical Service and Medical Education to appoint Shri Vipul Pandya on vacant post of Junior Clerk and, accordingly, he was reinstated in Commissioner Office vide order dated 20.9.1991. He has also narrated the facts that service break in the service of Mr.Vipul Pandya between 19th May 1991 to 20th August 1991 was also regularized, his seniority was maintained and he was given exemption from passing pre-service examination.

3.1 He has also stated that pursuant to the order of respondent no.2 dated 11.8.1992, respondent no.1 had passed an office order dated 9.10.1992 reinstating Mr.Vipul Pandya on the post of Junior Clerk and in view of promotion of Mr.A.B.Vasava on the vacant post of Senior Clerk, Mr.Vipul Pandya was sent back to respondent no.1 office on the post of Junior Clerk. He has also stated that prayer of present petitioner claiming promotion to the post of Junior Clerk is not acceptable as the post of Junior Clerk has already been filled up by direct recruitment. According to him, the petitioner was not entitled to promotion till 2001, as on 9.7.2000, petitioner was second in seniority list. He has also stated that in Circular dated 9.7.1991 seniority of Mr.K.L.Patni was declared and Mr.Gajjar was granted promotion in the year 1999. He has also submitted that both these employees were transferred to other government department as the government ordered to reduce the posts of Class-III employees in all government departments. Along with this affidavit, he has filed various documentary evidence, which includes seniority list.

4. The petitioner herein has also filed affidavit in rejoinder, wherein he has reiterated the contentions raised in the petition. He has admitted and stated that

the stand taken by respondents regarding order dated 20.11.1992 is challenged in this petition itself and this Court has granted interim relief against implementation and execution of said order. He has stated that it is clear that the respondents have tried to over-reach the orders of this Court and the respondents cannot take advantage of illegalities committed by them. He has also stated that no record of seniority list of the cadre of Peon is produced by the respondents.

5. Additional affidavit of respondent no.4 has been filed by Shri Raj Shekhar Mehta, page 59, wherein he has placed on record relevant facts pertaining to appointment of Mr.Vipul Pandya and the seniority list dated 22.2.1991 and 1.7.1992. He has stated that the petitioner was at serial no.02, whereas Mr.Patni was ahead of the petitioner and Mr.Patni was granted promotion on 7.3.2000 and was appointed as Junior Clerk. He has also stated that Mr.Gajjar was appointed on the post of Junior Clerk cum Typist on 29th May 1991, which is a completely different post.

6. Thereafter, the petitioner has also filed an additional affidavit. In such affidavit, while dealing with all the contentions, he has stated that the respondents have clearly committed the contempt of Court. He has also stated that so far as case of Mr.Gajjar is concerned, he was a "Packer-cum-Hamal" and was far junior to the petitioner in Class-IV cadre, has also been given promotion on 29th May 1999 in disregard of petitioner's seniority. According to him, he is entitled to promotion from 29th May 1999 from which date his junior Mr.Gajjar was promoted.

7. Further affidavit has filed by respondent no.3, Shri Vipul Pandya, stating that the petitioner was appointed on the post of Peon on 23.11.1982, which suggests that the cadre and nature of work of the petitioner and respondent no.3 are different. He also stated that the petition is filed after 9 years delay, therefore, it is required to be dismissed. He also stated that the respondents have implemented the orders as per the direction of Honourable Court and Government Resolutions. He also stated that petitioner was at serial no.2 in the seniority list, therefore, he is not entitled to any relief.

8. Another additional affidavit was filed on behalf of respondent no.4 stating that HR Committee was constituted to consider entire aspect of the matter and after due consideration the petitioner is held not entitled to get any promotion as Junior Clerk. However, it appears that contention raised in this affidavit is not brought on record earlier at the stage of filing of first affidavit-in-reply and other additional affidavits.

9. This Court has heard learned advocates appearing for the parties and perused the material placed on record.

10. Mr.K.B.Pujara, learned counsel appearing for the petitioner submitted that this is a clear case of abuse of power by the respondent-authorities. He submitted that respondent no.3, who was terminated from service made a come

back by getting order of reinstatement in service, by illegal means, and by order dated 30.11.1992, he is put in the same position where he was prior to his termination. He submitted that respondent no.2 has arbitrarily and illegally exercised powers to extend such undue favour to respondent no.3. He submitted that by order dated 14.5.1991, respondent no.3 was terminated and Mr.R.L.Vasava was granted promotion on said vacancy, however, due to political influence respondent no.3 came to be reinstated by order dated 3.8.1991. He further submitted that it does not come on record as to for what reasons, respondent no.3 was ordered to be reinstated in service. Following this, Mr.R.L.Vasava apprehended that he would be reverted back to the post of Peon, he preferred Special Civil Application No.5231 of 1991 and obtained injunction against his reversion.

10.1 Thereafter, respondent no.2 passed an order dated 16.8.1992 directing the Commissioner of Health and Medical Services and Medical Education to appoint respondent no.3 and accordingly an order was passed on 20.8.1991. On 2.9.1992, petition filed by Mr.R.L.Vasava was allowed on the basis of the statement made at the Bar that Mr.Pandya was appointed as Jr.Clerk, as aforesaid. Therefore, there was no question of reverting Mr.R.L.Vasava.

10.2 It is contended by Mr.Pujara that by another order dated 11.8.1992, respondent no.2 treated the break in service of Mr.Pandya from 19.5.1991 to 20.8.1991 as continuous and his seniority was ordered to be considered in the original department and he was granted exemption from pre-service training, requisite for the post of Jr.Clerk. He submitted that all these orders are passed only with a view to extend illegal and undue favour to respondent no.3 at the instance of a Minister.

10.3 Mr.Pujara further submitted that under the Rules, an appointee to the post of Junior Clerk has to undergo pre-service training and the post-training examination before such appointment and respondent no.3 has neither undergone training nor he has passed any such examination and, therefore, he was terminated from service and he cannot be reinstated in the office of respondent no.1 as Junior Clerk as he is not qualified for the post. He submitted that on the other hand, petitioner is eligible and entitled to be given promotion but he is not given promotion by the respondents.

10.4 Mr.Pujara submitted that action of respondent no.1 and 2 in reinstating the respondent no.3 with the benefits of continuity of service, seniority and exemption from pre-service training and not granting promotion to the petitioner are illegal and unjustified. Therefore, present petition is required to be allowed.

11. It is submitted by learned advocate for respondent no.3 that respondent no.3-Mr.Vipul Pandya was appointed as a Junior Clerk in respondent no.1 on 11.10.1983, while the petitioner was appointed as Peon, which suggests that cadre and nature of work of both of them were different. He also submitted that present petition is filed after delay of nine years and, on this ground alone it may

be dismissed. He further submitted that respondent no.3 was appointed as Junior Clerk by virtue of orders dated 4.7.1989 and 28.12.1989 and, there was no disadvantage or loss to the petitioner. He has submitted that since the petitioner and respondent no.3 have retired from service, the present petition has become infructuous. He, therefore, prayed to dismiss present petition.

12. Mr.Utkarsh Sharma, learned advocate for respondent no.4 submitted that respondent no.1 is now known as respondent no.4 from 20.7.2007 and entire establishment as well as record of employees of respondent no.1 office are transferred to respondent no.4. He submitted that service of Mr.Vipul Pandya, respondent no.3 came to be terminated by order dated 15.7.1985 against which he filed Special Civil Application No.124 of 1986 which was allowed by order dated 4.7.1989 and he was ordered to be reinstated with full backwages. Against this respondent no.2 had preferred Letters Patent Appeal No.282 of 1989, which came to be dismissed by this Court by order dated 28.12.1989. Thereafter, on 14.5.1991, respondent no.2 sent a communication to respondent no.1 to terminate the services of Shri Pandya and fill up the post by promotion and accordingly, on 18.5.1991 services of Mr.Pandya were terminated and Mr.R.L.Vasava was promoted on the vacant post. He further submitted that respondent no.2 reconsidered the case of Shri Pandya taking into consideration judgment of this Court in Letters Patent Appeal No.282 of 1989 and intimated respondent no.1 to reinstate Shri Pandya in service, however, as there was no vacant post of Junior Clerk in respondent no.1 office due to interim order of this Court in Special Civil Application No.5231 of 1991, it was not possible to revert Shri Vasava. Therefore, respondent no.2 sent a communication to the office of Commissioner, Health, Medical Services and Medical Education to appoint Shri Pandya on the vacant post of Junior Clerk and accordingly, he was reinstated vide order dated 20.9.1991. He further submitted that respondent no.2 issued a GR on 11.8.1992 to treat the service of Shri Pandya as continuous from 19.5.1991 to 20.8.1991 and to retain his seniority in his original office and to exempt him from passing pre-service examination, pursuant to which office order dated 9.10.1992 came to be issued reinstating Mr.Pandya on the post of Junior Clerk but due to non-availability of post of Junior Clerk in office of respondent no.1, it was mentioned in said order that as and when post of Junior Clerk is vacant Mr.Pandya will be taken back. Thereafter, on 30.11.1992 due to promotion of Shri A.B.Chavda to the post of Senior Clerk, post of Junior Clerk fell vacant and, accordingly, Mr.Pandya was called back to the office of respondent no.1 on the post of Junior Clerk. He, therefore, submitted that appointment, regularization and calling back of Mr.Pandya to the post of Junior Clerk is legal, just and proper. He further submitted that since the post of Junior Clerk had already been filled up by direct recruitment, prayer of petitioner for promotion to the post of Junior Clerk is not acceptable.

12.1 He further submitted that ratio of Direct Appointment and Appointment by way of Promotion was prescribed as 9:1 till the year 1998. Therefore, in the year 1991 and 1992, when the issue of appointment of Mr.R.L.Vasava and

appointment of Mr.Vipul Pandya had come up, out of 15 posts only two posts were filled by way of promotion. As can be seen from record, Mr.R.L.Vasava was granted promotion to fill the back log, which exceeds the limit of promotion prescribed in the policy. Therefore, inclusion of another promotee at the relevant time was out of question. This ratio was amended in the year 1998 and it is prescribed as 8:2, thereafter, promotion was granted to Mr.D.L.Patni on 3.3.2000. Thus, it is clear that till the year 2000, the petitioner was not senior-most and was not entitled for promotion. He further submitted that from 2000 till date, no post has become available to be filled by way of promotion, therefore, the case of the petitioner may not be considered.

12.2 He further submitted that the petitioner has made baseless allegations of political influence. He also submitted that decision of reinstatement of Mr.Pandya was taken by the government after careful consideration of whole issue and it cannot be called favourable, arbitrary and illegal. He further submitted that appointment and regularization of respondent no.3 is after considering the order of Letters patent Appeal No.282 of 1989 and, therefore, the prayers cannot be granted. He further submitted that even as on 9.7.2001, the petitioner was second in seniority list and was not entitled for promotion to the post of Junior Clerk.

13. In reply to this, Mr.Pujara, learned advocate for the petitioner submitted that petitioner was appointed as Peon in respondent no.1 office vide order dated 23.11.1982 while respondent no.3-Mr.Vipul Pandya was appointed as junior clerk for 29 days on 11.10.1983 and was continued in service from time to time and his services were terminated vide order dated 15.7.1985 leading to filing of Special Civil Application No.124 of 1986 and Letters Patent Appeal No.282 of 1989. He also submitted that the respondents cannot take advantage of their own wrong to defeat the legal and legitimate rights of the present petitioner. He further submitted that when this Court granted interim relief, whereby order dated 30.11.1992 was stayed, respondent no.3-Mr.Vipul Pandya could not have been brought in the office of respondent no.1. He also submitted that Mr.R.L.Vasava was junior to the petitioner as he had joined the service as Peon on 1.5.1985, while the petitioner had joined the service on 11.11.1982, yet Mr.Vasava was given promotion by order dated 18.5.1991. It is said that this promotion was given as per roster, however, roster was not applicable in the matter of promotions from Class-4 to Class-3 at the relevant time. He further submitted that it may be true, as stated by respondent no.2 in additional affidavit dated 18.12.2017 that "Assuming that, if Mr.D.L.Patni was not appointed against the said post, Mr.D.L.Patni would have been appointed." Therefore, Mr.D.L.Patni should have been promoted on 30.11.1992 and consequently, the petitioner should have been promoted on 3.3.2000, on which dated Mr.D.L.Patni was granted promotion. He further submitted that Mr.J.A.Gajjar, Packer-cum-Hamal who was junior to the petitioner was granted promotion on 29.5.1999, therefore, the petitioner is entitled to promotion from 29.5.1999, on which date his junior was promoted.

14. Heard learned advocate appearing for the parties and perused the material placed on record.

15. It is well settled principle of law that the basic principles governing the judicial review of administrative action are:- (i) illegality, (ii) irrationality and (iii) procedural impropriety.

15.1 It is also well settled that normally while exercising power of judicial review, Courts would only examine the decision making process of the administrative authorities but not the decision itself. This principle has been repeatedly stated by the Honourable Supreme Court on number of occasions. Few of them are (i) Chairman, All India Railway Recruitment Board v. K.Shyam Kumar reported in (2010) 6 SCC 614, (ii) Sterling Computers Limited v. M.N.Publications Limited reported in (1993) 1 SCC 445, (iii) State of A.P. v. P.V.Harmantha Rao, reported in (2003) 10 SCC 121.

15.2 So far as term "illegality" is concerned, it means that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of dispute, by those persons, the Judges, by whom the judicial power of the State is exercisable.

15.3 So far as term "irrationality" is concerned, it means what can now be succinctly referred to as "Wednesbury unreasonableness". It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

15.4 So far as term "procedural impropriety" is concerned, it means rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative authority to observe procedural rules that are expressly laid down in the legislative instrument by which jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

15.5 In our country where administrative action is challenged under Article 14 as being discriminatory, equals are treated as unequals or unequals are treated equally, the question is for the Constitutional Courts as primary revisionary courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Here the Court deals with the merits of the balancing action of the administrator and is, in essence, applying "proportionality" and is a primary reviewing authority.

15.6 But, where an administrative action is challenged as arbitrary under Article 14, the question will be whether the administrative order is "rationale" or "reasonable" and the test then is the Wednesbury's test. The Court would then

be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or whether his view is one which no reasonable person could have taken. Thus, when administrative action is attacked as discriminatory under Article 14, the principles of primary review is for the Courts by applying the proportionality. However, where administrative action is questioned as "arbitrary" under Article 14, the principle of secondary review based on Wednesbury principle applied.

16. On consideration of the submissions made by learned advocates for the parties as well as the material placed on record, certain admitted facts emerge, which are as under:-

- i) The petitioner was appointed as a 'Peon' on 23.11.1982.
- ii) The petitioner has cleared training for pre-service and also passed necessary examination for being considered for the post of Junior Clerk.
- iii) Thereafter, on 30th August 1990, he became eligible for promotion as Clerk as he has already undergone the training as well as examination.
- iv) Mr.Pandya-respondent no.3 was appointed as junior clerk for 29 days on 11.10.1983.
- v) Service of Mr.Pandya was terminated on 14th May 1991.
- vi) Mr.Pandya filed petition before this Court wherein the order of termination was set aside on the ground that due process was not followed. Thereupon, he was taken in service and after making payment of notice period his service was terminated.
- vii) Later on, he challenged the same before this Court and he was directed to be reinstated and, therefore, he was appointed as Clerk and Letters Patent Appeal filed by the State was also dismissed.
- viii) One Mr.Vasava was promoted on 18th May 1991. He has also filed Special Civil Application No.5231 of 1991 for necessary relief, which was allowed by this Court on 2nd September 1992.
- ix) The break in service of Mr.Pandya was considered by the Government from 19th May 1991 to 20th August 1991 as continue service and he was also granted exemption from passing post- training examination treating it as a special case.
- x) On retirement of one Mr.I.A.Faruki, Senior Clerk, on 30.11.1992, Mr.A.B.Chavda, Junior Clerk, was promoted by order dated 30.11.1992.
- xi) As per government circular dated 19.11.1992, there is no reservation policy for promotion.
- xii) The case of the petitioner is not considered by the authority.

xiii) This Court has passed interim order not to implement the order dated 30.11.1992 yet the authority has not followed the order of this Court.

17. Considering the submissions made by both the sides coupled with the material placed on record, it transpires that the respondent has passed an order on 30.11.1992 transferring Mr.Vipul Pandya, Junior Clerk, on the post which fell vacant due to promotion of one Mr.A.B.Chavda from Junior Clerk to Senior Clerk. It also appears from record that this very order has been stayed by this Court and it was also served to the respondents. However, from the material placed on record, it appears that instead of obeying that order, the respondent-authority has ignored the same and executed order dated 30.11.1992 and passed further order of continuity of service of Mr.Vipul Pandya and granting him exemption from passing pre-service examination. This led the petitioner to raise a grievance that Mr.Vipul Pandya was given special treatment, which is believable on the touchstone of the preponderance of probability.

18. Further on perusal of the seniority list, Page 37, which is relating to cadre of Junior Clerk as on 1.1.2012, name of Mr.Vipul Pandya appears at serial no.12, and his date of entry in service is 21.8.1991 and the mode of recruitment is direct recruitment. In the remarks column, it is narrated that he has reported his duty on 1.5.2012 in the Madhyastha Aushadh Bhandar. At the same time, there is another seniority list dated 1.1.2001 pertaining to Class-III service, i.e. Clerk Post etc., wherein at serial no.16, name of Mr.R.L.Vasava is shown and his date of entry in service is 11.5.2019 and the mode of recruitment is promotion. Further name of Mr.Gajjar is shown at serial no.17 and date of entry in service is 29.5.1999 and the source of appointment is also promotion. Name of Mr.B.L.Patni is at serial no.18, whose date of entry in service is 3.3.2000 and mode of recruitment is also promotion.

19. At this juncture, it is pertinent to note that there is list prepared by the authority for the purpose of giving promotion from Class-IV to Class-III, which is at page no.33, wherein present petitioner's name is at serial no.2 and his date of entry in service is 10.11.1982, whereas name of Mr.Patni is at serial no.1, whose date of entry is 9.11.1982. It also appears from the same list that name of Mr.Gajjar is at serial no.7 and he was working as Packer cum Halal and date of entry in service as Class-IV is 28.5.1984. Likewise name of Mr.Vasava is appearing at serial no.8 and whose date of entry in service i.e. on 1.5.1985. Thus, it emerges from record that in the cadre of Class-IV i.e. Peon, name of present petitioner appears at serial no.2, whereas Mr.Gajjar and Mr.Vasava are appearing thereafter and they are junior to the present petitioner. It also appears from seniority list of the post of Peon and Hamal etc. dated 1.1.2001, that name of Mr.Gajjar is shown at Sr.No.7 and in column of remarks, it has been mentioned that he has been given promotion from 29.5.1999. All these material clearly suggest that though the petitioner is senior to Mr.Gajjar and Mr.Vasava, the respondent- authority has not considered the case of the petitioner and instead granted promotion to his junior Mr.Gajjar and Mr.Vasava.

20. At this stage, it is pertinent to note that as per the Circular dated 19.11.1992 of the Government of Gujarat, Health and Family Welfare Department bearing No.PRCH/1092/112/roster cell, which is at page 82 in the compilation, clearly reveals that there is no applicability of roster points for granting promotion from Class-IV to Class-III. Thus, the stand of the respondents that Mr.Vasava and others were promoted on the roster point is clearly devoid of merits and it is against their own circular.

21. On consideration of material on record, it clearly appears that respondents have selectively placed the seniority list and has not produced all the seniority lists of every year in the matter. Not only that but also it appears that though there was stay granted by this Court against operation of order dated 30.11.1992, the authority granted further benefits to Mr.Vipul Pandya. The action on the part of the respondent-authority has created an impression that they have favoured Mr.Vipul Pandya for whatsoever reasons. Be that as it may be, but one thing is clear that the respondent-authority has suppressed material documents and has not placed all the seniority lists of Class-IV from beginning till the last date of hearing. However, as referred to herein above, the seniority list of Class-IV clearly depicts that junior to the petitioner have been granted promotion though there was no applicability of the roster system and though the petitioner was entitled to get promotion as Junior Clerk prior to Mr.Gajjar and Mr.Vasava.

22. It is also pertinent to note that Mr.Vasava has approached this Court for redressal that he may not be reverted back from the post of Senior Clerk to Junior Clerk and this Court has granted protection to him and, therefore, so far as case of Mr.Vasava is concerned, he has umbrella over his head and, therefore, his service cannot be affected at all. Likewise Mr.Vipul Pandya has already retired and, therefore, though there is action of the respondents favouring Mr.Pandya, no prejudicial order against Mr.Pandya could be passed. However, at the same time, when the authority has shown bias against present petitioner and has not granted him the promotion as Junior Clerk, though he was having all the qualifications and was entitled to get promotion prior to Mr.Gajjar, at least from the date of promotion of Mr.Gajjar, the petitioner has to be given deemed promotion on the line of Mr.Gajjar and he is to be given all other ancillary and consequential benefits, which may include pay as well as higher grade pay as well as the fixation of pension on the post of Class- III.

23. Having considered the legal aspect as well as the material placed on record, it is quite clear that the authority has treated the equals unequally. Action of the authority in not granting promotion to the petitioner though he was entitled to get same treatment as is given to Mr.Gajjar, who was also a "Packer cum Hamal", is arbitrary in nature. Considering the material placed on record, this Court is of the considered opinion that the petitioner is entitled get deemed promotion from the date of promotion given to his junior Mr.Gajjar i.e. from 29.5.1999 with all consequential benefits till his retirement and his retiral benefits are required to be calculated on the basis that the petitioner was working as Class-III employee

till his date of retirement.

24. During the course of proceedings and at the fag end of hearing of this matter, the authority concerned has constituted one committee, which has decided the case against the petitioner. However, it is pertinent to note that from the facts in the affidavit in reply, it appears that the report is prepared only with an intention to save the skin of the officers from the clutches of the order of this Court.

25. As there was no reservation policy in existence for promotion in view of circular dated 19.11.1992, promotion granted on the basis of reservation policy to one Mr.Vasava is not justifiable. At the same time, when this Court has passed interim order, the authority should have followed it and no further proceeding or promotion should have been given to anybody else. Even on consideration of the seniority list, it is found that the petitioner was at serial no.2 and Mr.Vasava and Mr.Patni were below him and, therefore, on the basis of policy of granting promotion to Peon, who has passed necessary pre- training examination and qualified for such post, the petitioner ought to have been given promotion at least from the date the promotion is given to Mr.Gajjar. In view of this, it is held that the petitioner is entitled to get promotion of Junior Clerk.

26. It is pertinent to note that the stand taken by the authority is that due to change of policy of giving promotion to the departmental candidate is nothing but denial of right of the petitioner. It is also submitted by learned advocate for the authority that while preparing report everything has been considered and the petitioner is not entitled to get any benefit of promotion as there was no post vacant in the past and also in present. This stand of the authority is devoid of merits as they have not followed the order of this Court and considering overall factual aspects of the case, even the petitioner's case is required to be considered and he has to be given due promotion from the date of promotion of Mr.Gajjar with all consequential benefits, which may include granting of higher pay-scale as well as pensionary benefits in the cadre of Junior Clerk, on which he might have retired.

27. It is also pertinent to note that the petitioner was not granted promotion as Class-III employee, he had continued to serve as a Peon i.e. Class-IV till the age of 60 years, whereas as per Rules, Class-III employee is to retire on attaining the age of 58 years. Therefore, the petitioner has served for two more years, however, in view of the judgment relied upon by Mr.Pujara, no recovery could be made for the service of these two years, as the petitioner has served on the post of "peon". However, at the time of giving retirement benefits, calculation is required to be made on the basis of his retiring upon attaining the age of 58 years.

28. Accordingly, the petitioner is hereby ordered to be given deemed promotion from the date of promotion given to his junior Mr.Gajjar i.e. from 29.5.1999 with all consequential benefits till his retirement, which may include granting of higher

pay-scale etc. It is further directed that the retiral benefits of the petitioner be calculated on the basis of his having worked as Class-III employee till his date of retirement at the age of 58 years. Further, no recovery be made for the service of two years as the petitioner has worked upto 60 years of age as a "Peon". The concerned respondents are directed to calculate the benefits as per above direction and make the payment thereof with arrears to the petitioner within a period of three months from today. Registry is directed to communicate this order to the concerned respondents through e-mail/fax or any other electronic mode.

29. With these directions, present petition is disposed of. Rule is made absolute accordingly with no order as to costs.