

(2022) 10 GUJ CK 0104
In the Gujarat High Court

Case No : R/Special Civil Application No. 8514, 8519 Of 2019

Madhuben Umedbhai Patel

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 19-10-2022

Acts Referred:

Citation : (2022) 10 GUJ CK 0104

Hon'ble Judges : Biren Vaishnav, J

Bench : Single Bench

Advocate : Himanshi R Balodi, Hemal A Dave, Nirali Sharda

Final Decision : Disposed Of

Judgement

Biren Vaishnav, J

1. Ms. Balodi, learned counsel for the petitioners would rely on Common Oral Judgment passed in similar matter by this Court namely; Special Civil Application No.5526 of 2021 and allied matters dated 03.08.2022 so far as second higher pay scale. Moreover, in such judgment, reference of Special Civil Application No.5170 of 2019 dated 15.07.2022 which covers the issue of first higher pay scale. She further requested this Court to pass a similar order in this matter too. The order dated 03.08.2022 reads as under:

"1. Rule returnable forthwith. Mr. Utkarsh Sharma, learned AGP waives service of notice of rule on behalf of respondent State.

2. With the consent of learned advocates appearing for the respective parties, matter is taken up for final hearing today.

3. These petitions pray for the benefit of second higher pay scale on completion of 24 years of service. It is not in dispute that the petitioners have been granted the benefit of the first higher pay scale of Rs.2000-3500/-. The entitlement of the similarly situated petitioners who had not been granted the benefit of Rs.2000-3500/- as the first higher pay scale, has been decided by this Court by

order dated 15.07.2022 passed in Special Civil Application No.5170 of 2019 which order reads as under:

"1. Rule returnable forthwith. Mr. Utkarsh Sharma, learned AGP waives service of notice of rule on behalf of respondent State.

2. With the consent of learned advocates appearing for the respective parties, matter is taken up for final hearing today.

3. By way of the present petition, the petitioners have prayed for the following prayer:

"(A) Directing the Respondents to grant higher pay scale of Rs.2000-3500 to the petitioners from the date of completion of nine years service and be pleased to direct the respondents to revise their pay and retiral benefits accordingly and grant the same with interest at the rate of 9% per annum.

(B) Be further pleased to direct the respondent authorities to consequently grant second higher grade pay scale to the petitioners, having completed requisite length of service under Government Resolution dated 02-07-2007 with interest at 9% per annum, from the date of grant of first higher grade and not from the date of regular promotion to the post of Child Development Programme Officer.

(C) Be pleased to direct the respondents to re-fix the pay and consequential benefits including the retiral benefits of the petitioners corresponding to 7th Pay Commission Report upon granting of aforesaid prayers."

4. Facts of the petition indicate that the petitioners were serving as Child Development Project Officers who were granted the pay-scale of Rs.2000-3500 from the date of passing of their departmental examination. The grievance on the part of the petitioners is that rather than granting such pay-scale from the date of passing the departmental examination, such higher pay scale of Rs.2000-3500 was to be granted from the date of completion of 9 years of service.

5. Ms. Himanshi Balodhi, learned advocate appearing for the petitioners would submit that not paying of higher pay-scale of Rs.2000-3500 from the respective dates of their entitlement i.e. from the date of completion of 9 years of service is bad. As far as the case of granting benefits from the date of passing of departmental examination is concerned, she submitted that the said issue is decided by this court by way of Special Civil Application No. 8181 of 1998. She would submit that the stand of the State to deny the benefit of the pay-scale of Rs.2000-3500 based on the schedule of the Government Resolution dated 16.08.1994 on the ground that the next higher pay-scale after Rs.1400-2600 was Rs.1640-2900 and not Rs.2000-3500 is misconceived. She would submit that while deciding the question of entitlement of higher pay-scale of Rs.2000-3500 although in context of it being recovered as it was so granted by mistake, a Division Bench of this court in Letters Patent Appeal No. 211 of 2017 had considered the issue in light of clause 3(3) of the Government Resolution

dated 16.08.1994.

6. Mr. Utkarsh Sharma, learned AGP appearing for the respondent State relying on the affidavit-in-reply filed by the State would submit that the petitioners would be entitled to the grant of higher pay-scale as per the policy of the State Government as set out in the resolution dated 16.08.1994. He would submit that as per the Child Development Project Officer Recruitment Rules dated 06.10.1983 (for short 'the recruitment rules'), there are four posts of different pay-scales available under the supplementary post of Child Development Project Officer. The recruitment rules would indicate that the pay-scale of Mukhya Sevika was Rs.1400-2300. Even if it is believed that there was only one feeder post on the basis of recruitment rules dated 15.12.1989 on the promotional pay-scale of Rs.2000-3500 is granted then the cases prior to the publication of the recruitment rules, the scale would be of Rs.1640- 2900. In support of his submission, he would rely on the clarificatory resolution dated 16.10.1993 of the State which clarifies in the explanation no. 18 that in cases in which the higher pay-scale as per the schedule was due as on 01.06.1987 in those cases even if the promotional post is operational after 01.06.1987 then also the higher pay-scale under the schedule is receivable. The relevant submission of Mr. Sharma, learned AGP as set out in the affidavit-in-reply reads as under:

"i. That the petitioners have sought higher pay scale which are not statutory benefits, it arises on account of a beneficial policy measures, which cannot be availed as a matter of right, much or less an enforceable/fundamental constitutional rights. Thus, there are no vested enforceable rights to seek for a higher pay scales and no cause of action arises for the petitioners, to invoke writ jurisdiction.

ii. The denial to revise the higher pay scale to the petitioners cannot be viewed as an ifraction of their fundamental rights. In absence of such infractions, the writ jurisdiction cannot be invoked.

iii. Notwithstanding the aforesaid preliminary objections, the present petition on merit does not also deserve to consider by this Hon'ble Court without prejudice to the aforesaid submission, the following grounds deserve to considering while at hence on merit.

iv. The petitioners would be entitled for grant of higher pay scale as per the policy of a state, being Government Resolution dated 16.08.1994, more particularly, as per the clause - 3 (3). The copy of the said Government Resolution dated 16.08.1994 is annexed herewith and marked as ANNEXURE-II.

v. It is submitted that, as per the Child Development Project Officer Recruitment Rules dated 06.10.1983, there are four posts of different pay scale available under the supplementary posts of the Child Development Project Officer. It includes Social Worker (pay scale Rs.1640-2900), Block/District Extension Educator (pay scale Rs. 1640-2900), Public Health Nurse (pay scale Rs. 1400-2300) and MukhyaSevika (pay scale Rs. 1400-2300). The copy of the

Recruitment Rules dated 06.10.1983 disclosing multiple feeder-cadres is annexed herewith and marked as ANNEXURE-III.

vi. The Department has published the recruitment rules dated 15/12/1989 for Child Development Project Officer, Class-II; as per the provisions of these rules the cadre of MukhyaSevika (pay scale Rs.1400-2300) was retained as a Feeder post.

vii. Even if it is believed that there is only one Feeder post on the basis of the said Recruitment Rules, 1989 and the promotional pay scale of Rs. 2000-3500 is granted, then the cases prior to the publication of the said Recruitment Rules wherein, the higher pay scale of Rs. 1640-2900 is sanctioned or to be sanctioned under Schedule-1 of G.R dated 16.08.1994, the Finance Department has released explanations vide Resolution dated 16.10.1993. It is clarified in the explanation No. 18 that, the cases in which the higher pay scale as per the schedule was due on 01.06.1987, in that cases even if the promotional post is operational after 01.06.1987, then also the higher pay scale under the schedule is receivable. The copy of the clarification dated 16.10.1993 is annexed herewith and marked as ANNEXURE-IV."

6.1 As far as the issue pertaining to the judgment in the Letters Patent Appeal is concerned, he would submit that at no point the issue with reference to the actual entitlement of the pay-scale of Rs.2000-3500 was adjudicated on merits and therefore as per the schedule to the Government Resolution dated 16.08.1994, the pay-scale that the petitioners were entitled to as a higher pay-scale was of Rs.1640-2900.

6.2 Paras 8 and 9 of the affidavit-in-reply read as under:

"viii.As far as the issue pertaining to the government resolution dated 12/3/2018, the beneficiaries, were extended the first higher pay scale of 2000-3500 instead of 1640-2900. However, it was subjected to the proceedings of SCA 2902/2015 and LPA 211/2017 and therefore, an exclusive order dated 12.03.2018 was passed in compliance of the said proceedings and judicial pronouncements, however, at no point of time, the issue with reference to the actual entitlement of the 2000-3500 scale was adjudicated on the merits.

9. It is submitted that, the entitled higher pay scale of the petitioners is shown at ANNEXURE-I, higher pay scale applicable to the same as per the schedule to Government Resolution dated 16.08.1994 is 1640-2900. Hence, pay scale of Rs. 1640-2900 is entitled to the petitioners as per the higher pay scale."

7. The issue need not detain the court longer. The policy of granting higher pay-scale especially clause 3(3) of the Government Resolution dated 16. 08.1994 in context of the rules of promotion to the post of Chief Development Project Officer were considered by the Division Bench in Letters Patent Appeal No. 211 of 2017. Mr. Utkarsh Sharma, learned AGP may be right in his perception that the issue of the entitlement was not considered, however, indirectly when the court was

considering the legality of the recovery of the pay-scale of Rs.2000-3500, the Division Bench had considered clause 3(3), clause 3(7) of the Government Resolution dated 16.08.1994 and the rules known as the Gujarat Public Health Recruitment Rules, 1989. The contention of the State therefore before the Division Bench was that in light of the rules when there were four posts in the feeder cadres, it was contended by the Assistant Government Pleader that there is no promotional post of Mukhya Sevika. The Schedule 1 therefore of the Government Resolution dated 16.08.1994 would be applicable to the case of the petitioners. It will be relevant to note the contention of the State then, as it is set out in the judgement of the Division Bench in paras 6 to 8 thereof which read as under:

"6. Learned Assistant Government Pleader submitted that the State Government issued Government Resolution dated 16.8.1994 for grant of higher grade scale to the government employees on terms and conditions stipulated in the said resolution. It is contended that the government has decided to give such benefit on account of various factors such as non-availability of promotional avenues because of less number of posts and the person who is working since years on one post may not be stagnated. However, such benefit is to be extended after considering the various aspects like feeder cadre, next promotional post, recruitment rules, passing of departmental examination and various other factors stipulated in Government Resolutions dated 16.8.1994 as well as 2.7.2007.

7. It is contended that before the Gujarat Public Health Recruitment Rules of 1989 were framed, Rules of 1983 were in force and there were four feeder cadre to the post of Child Development Project Officer Class II. Such feeder cadres were (1) Public Health Nurse, (2) Social Worker (Family Welfare), (3) Block Extension Educator/District Extension Educator and (4) Mukhya Sevika. However, in view of the introduction of new recruitment rules, the only feeder cadre for the promotional post of Child Development Officer Class II is that of Mukhya Sevika. The said rules were introduced in the year 1989. It is submitted that as per Clause 3(3) read with Clause 3(8) of Government Resolution dated 16. 8.1994 along with schedule appended to the said resolution, the higher grade scale which was available to the original petitioners as per their prevalent scale would be of Rs.1640-2900 and not Rs.2000-3500.

8. Learned Assistant Government Pleader submitted that as there is no promotional post of Mukhya Sevika, pay scale prescribed in Schedule I of Government Resolution dated 16.8.1994 would be applicable to the case of the petitioners and therefore when it was noticed that the present appellants have wrongly granted the benefit of pay scale of Rs.2000-3500, such benefit was decided to be withdrawn."

8. It is in light of these submissions made by the State opposing the entitlement of pay-scale that the Division Bench in para 13 onwards interpreted clause 3(3) of the resolution and the rules of 1993 considering the decision of the learned Single Judge in Special Civil Application No. 324 of 2010 and observed that

initially there were four feeder cadre posts to the post of Child Development Officer and after the recruitment rules of 1989 were framed there is only one feeder cadre posts i.e. Mukhya Sevika. The court in unequivocal terms observed that it is not in dispute that the post of Child Development Officer is a promotional post and the feeder cadre is Mukhya Sevika. Interpreting clause 3(3) of the Government Resolution dated 16.08.1994, the court held that in its view the original petitioners were eligible to get the higher grade scale of the promotional post which was rightly granted to them. Paragraphs no. 13 to

19 of the Division Bench in the Letters Patent Appeal would read as under:

"13. Having considered the submissions advanced on behalf of learned advocates and having gone through the material produced on record, it has emerged from the record that the concerned original petitioners were appointed as Mukhya Sevika who have completed nine years of service before the Rules of 1993 came into force on 14.1.1993. At this stage, it is required to be noted that as per the recruitment rules, for the appointment to the post of Child Development Officer which is made by promotion of a person of proved merit and efficiency from amongst the persons who have worked for not less than seven years as Mukhya Sevika in the integrated Child Development Service Block and Nutrition Programme sponsored by the Government of India or the State Government or by direct selection or by temporary transfer on deputation basis from a suitable officer working in the cadre of Gujarat Development Service Class II of the Panchayat and Rural Housing development or District Social Defence Officer Class II of the Social Defence Department. Thus, post of Child Development Officer is a promotional post of Mukhya Sevika.

14. At this stage, we would like to refer to Clause 3(3) of the Government Resolution dated 16. 8.1994 which provides as under:

3(3) Higher Grade Scale means the scale of pay of the post of next promotion, provided that for the employees on posts having more than one promotional post in different scales of payt heir pay of Higher Grade Scale shall be considered the pay of the pay scale of the lowest of the promotional posts.

Provided further that in the case where there is no promotional scale, the H.G.S.shall be the Higher Grade Scale corresponding to his existing scale of pay as specified in Schedule (1) annexed to this Government Resolution.

Provided further that in case of posts with feeder cadres in different pay scales, instead of promotional scale, the Higher Grade Scales of such posts shall be higher grade scale corresponding to his existing scale of pay as specified in Schedule(1) annexed to this Government Resolution.

15. Clause 3(7) of Government Resolution dated 2.7.2007 provides as under:

In case of interrupted promotion, if the period of such promotion is taken into account for the purpose of increment, it will be considered for the service of lower cadre for eligibility of Higher Grade Scale provided that such service in

higher cadre (on the post of promotion) shall not be considered.

16. At this stage, it is also required to be noted that the Rules of 1993 have come into force after the date on which the petitioners have completed nine years in the feeder cadre and therefore the respondents could not have insisted on passing of examination to make themselves eligible for the benefits of the higher grade scale. In similar matter decided by learned Single Judge of this Court in Special Civil Application No.324 of 2010 and allied matters, it has been observed by the learned Single Judge in paragraphs 6 and 7 as under:

6. It is clear that the controversy has arisen from requirement of passing the departmental examination meant for the promotion to the post of Child Development Project (Female) Officer. It is undisputed that passing of the departmental examination is sine qua non for grant of higher grade scale. It is also not disputed that such departmental examination was held for the first time in the year 1993 and all the petitioners had become eligible for the first higher grade scale prior to holding of such examination. The respondents at the relevant time had also granted the benefit of the first higher grade scale counting their nine years service from the date of appointment. Thus, the petitioners were not at fault, but the lapse on the part of respondents in not holding the examinations in time pursuant to the relevant rules caused the problem. The petitioners were rightly granted benefit of the higher grade scale after completion of nine years of service at the relevant time and they cannot be deprived of that benefit for voluntary act of the respondents in not holding the examination before the petitioners became eligible. No opportunity of hearing was given to the petitioner before retrospectively withdrawing the benefit of higher pay scale given to them.

7. For the above reasons, the petitions are allowed, the impugned orders modifying the higher grade scale to the petitioners and for effecting recovery are set aside and the earlier orders by which the petitioners were granted the first higher grade scales after completion of 9 years in service are restored with direction to grant them the consequent benefits. Monetary benefits due to the petitioner under this order shall be paid to the petitioners within three months from today.

17. It is not in dispute that the appellants have granted the benefit of higher grade scale as per the order passed by this Court in the aforesaid matter.

18. Thus, we are of the view that the original petitioners were not required to pass the departmental examination in pursuance to the Rules of 1993 as they have completed nine years of service before such rules came into force.

19. As observed hereinabove, initially there were four feeder cadre posts to the promotional posts of Child Development Officer and after the recruitment rules of 1989 were framed there is only one feeder cadre post i.e. Mukhya Sevika. Thus, it is not in dispute that post of Child Development Officer is a promotional post and feeder cadre is Mukhya Sevika. Thus, in view of clause 3(3) of Government Resolution dated 16. 8.1994, the original petitioners were eligible to get the

higher grade scale of the promotional post which was rightly granted to them. Thus, we are of the view that no mistake was committed by the original respondent-present appellants while granting the benefit of higher grade scale to the petitioners and therefore withdrawal of the same after a period of 13 years is not permissible. It is reported that some of the original petitioners who were appointed during the period between 1976 to 1982 have already retired in the year 2009 and some of the petitioners are getting such benefit since the year 2002."

8.1 Therefore, to deny the pay -scale of Rs.2000-3500 on the basis of the the petitioners having completed 9 years of service from the date of departmental examination appears to be unjust.

9. The petition is accordingly allowed. The respondents are directed to grant the petitioners higher pay-scale of Rs.2000-3500 from the date of their respective completion of 9 years of service and the consequential benefits such as second higher grade scale etc be revised accordingly. On refixation of pay based on such benefits and on revision of pension to the retired employees, the terminal benefits and the consequential benefits together with arrears shall be paid to the petitioners within 14 weeks from the date of receipt of the writ of the order of this court. Rule is made absolute accordingly. Direct service is permitted."

4. So far as Special Civil Application No.6818 of 2018 is concerned, the petitioner of this petition had preferred Special Civil Application No.2001 of 2014 before this Court. This Court vide order dated 26.11.2015, on the statement made by Administrative Officer viz. Mr.R.D.Parmar who was present before the Court, that the concerned respondent will give the benefits of 2nd higher pay scale to the petitioner within a period of four weeks and will thus implement the order of this Court. However, the said order was not complied with and the benefits of 2nd higher pay scale on completion of 24 years of service i.e. 01.09.2006 were not given and therefore the petitioner approached this Court second time. The petitioner is entitled to the second higher pay scale as per the circulars dated 02.07.2007 and 16.08.1994 and order passed on 02.05.2015, but the effect of such circulars and order was not given. Pursuant to the order dated 26.11.2015, order dated 05.04.2016 had been passed in her favour which has not been implemented till date.

5. The petitions are accordingly allowed. The respondents are directed to grant the petitioners second higher pay-scale of Rs.15,600-39,100/- (grade pay 5400/-) from the date of their respective completion of 24 years of service and the consequential benefits be revised accordingly. On refixation of pay based on such benefits and on revision of pension to the retired employees, the terminal benefits and the consequential benefits together with arrears shall be paid to the petitioners within 14 weeks from the date of receipt of the writ of the order of this court. Rule is made absolute accordingly. Direct service is permitted."

2. Accordingly, in view of the above, the present petitions shall also be governed

by the both the Judgments of this Court dated 15.07.2022 passed in Special Civil Application No.5170 of 2019 and dated 03.08.2022 passed in Special Civil Application No.5526 of 2021 and allied matters referred hereinabove and is disposed of in the same terms. On re-fixation of pay based on such benefits and on revision of pension to the retired employees, the terminal benefits and the consequential benefits together with arrears shall be paid to the petitioners within 12 weeks from the date of receipt of the writ of the order of this court.

3. Rule is made absolute to that extent. No order as to costs. Direct Service is permitted.