

(1999) 10 GUJ CK 0025

In the Gujarat High Court

Case No : Special Civil Application No. 6373 of 1999

M.M. Bhavsar - Peon

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-10-1999

Acts Referred:

Citation : (2000) 1 GLR 822

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Advocate : I.S. Supehia, for the Appellant; N.D. Gohil, AGP for Respondent No. 1 and S.P. Hasurkar, for the Respondent

Final Decision : Allowed

Judgement

1. Rule. Service of rule is waived by learned counsel for the respondents. As pleadings are complete, the petition is heard finally at the request of parties.

2. The petitioner was appointed as Packer in 1978 in the Printing Press who was working under the Fisheries Department. Thereafter, he was appointed as a Distributor as a direct recruit which under the recruitment rules of the fisheries department was a Class IV post. By order dated 26th July 1990, the Government directed to close the printing press and absorb its employees in fisheries department in the same pay scale. Pursuant to this order, the petitioner became an employee of the fisheries department with effect from 26/7/90. Order of appointment by absorption was issued on 25/7/91 as peon on ad hoc basis in Class IV service in the pay scale of Rs.750/- - Rs.940/-, however his pay as on 25/2/91 as distributor at Rs.1130/- was protected, when he joined as peon. By order dated 27/7/95, in pursuance of Government Resolutions of 5/7/1991 as substituted by resolution dated 18/2/95 was protected, the petitioner was given benefit of next higher grade of the pay scale on completion of 9 years service as distributor w.e.f. 18/3/90. The higher pay scale referred to in the order is Rs.1200 - Rs.1800. Thereafter, by order dated 19th September 1997, the petitioner was ordered to be confirmed as peon in the pay scale of Rs.775 - Rs.

1025 w.e.f. 25/2/91. The petitioner protested against this by pointing out that he has already been placed in a higher pay scale w.e.f. 18/3/90, before the date of his absorption and therefore, his higher status / pay scale is protected in view of the order dated 26/7/90. By confirming the petitioner w.e.f. 25/2/91 in pay scale of Rs.775 - 940, when the petitioner was already placed in higher pay scale w.e.f. 18/3/90 on pay scale of Rs.1200 - 1800, the order was not justified inasmuch as by order dated 26/7/90, the pay scale to which the petitioner was entitled as on that date was protected. This representation of the petitioner did not find favour with the respondents and by order dated 21/7/99, he was informed that since his services in the printing press came to an end under order dated 26/7/90, his placement in higher grade is not protected on absorption. It is this order which results in denying protection of pay to which the petitioner became entitled to before his absorption and withdrawal of higher pay scale given to the petitioner with effect from date of absorption is under challenge.

3. The respondents have filed a reply affidavit in which it was pointed out that the petitioner on being absorbed was initially offered posting as cleaner in the pay scale of Rs.775 - 1025 because at that time, there was no equivalent post of Class IV equivalent pay scale of Rs.800 - 1150 was available and with the stipulation that he would be placed at the bottom of the seniority. His option was asked if he is prepared to accept the offer or his case may be considered for retrenchment for want of requisite post. This option was given to the petitioner by order dated 3rd August 1990. The petitioner respondent by letter dated 4/8/90 pointing out his difficulties and stated that he is prepared to be absorbed on any post at Ahmedabad or Gandhinagar, which is equivalent or even if it is lower to the post that is available for his absorption. The same offer was repeated by the petitioner on 18th December 1990. Relying on this option, the petitioner was absorbed as peon instead of cleaner in the pay scale of Rs.750 - 940 which was also a Class IV post though the pay scale was lower than which the petitioner was drawing as a distributor namely Rs.800 - 1150. Therefore, the petitioner is not entitled to pay scale of higher grade. However, in reply affidavit, there is no denial of the orders dated 27/7/95 by which the petitioner was granted higher grade and placed in pay scale of Rs.1200 - Rs.1800 w.e.f. 18/3/90 on completion of 9 years of service in one and the same grade under career advancement scheme of the State to ameliorate the conditions of service of persons as a relief against stagnancy. The only justification which appears from the reply and contentions of the learned counsel for the respondents is that, because the petitioner has given option on 4/8/90 to be absorbed on a lower post and he has been so absorbed, he cannot now claim benefit of protection of his pay scale to which he became entitled to prior to date of absorption.

4. Having considered the rival contentions of the parties, I am of the opinion that the petition merits acceptance. The facts which speak for themselves are that, by order dated 26/7/90, it was envisaged that those persons who are absorbed as a result of closure of printing press shall be offered same pay scale. The petitioner

was already serving at that time only Class IV servant with the designation of "Distributor" in the pay scale of Rs.800 - 1150. The petitioner was absorbed in Class IV post only, with protection of pay. However, as per the petitioner's option to remain at Ahmedabad or Gandhinagar, he was absorbed as peon in Class IV service in pay scale of Rs.750 - 940 for being accommodated at Gandhinagar / Ahmedabad w.e.f. the date of joining viz. 25/2/91. However, it is to be noticed that offer was made for absorption as cleaner in pay scale of Rs.775 1025, another post of Class IV also with different and lower pay scale than that was applicable to post of Distributor in the printing press. While absorbing in Class IV service having different pay scale, the pay drawn by the petitioner at press was protected. Thus, inspite of Government resolution dated 26/7/90, the offer of absorption itself was in lower pay scale with pay protection and not on any post in the same pay scale. By opting any post in Class IV, the lower category of post under state with pay protection which was available at Ahmedabad or Gandhinagar cannot be read as waiver of protection of pay to which the petitioner was entitled to as on the date of absorption or to which he became entitled to as a result of subsequent resolutions of Government, applicable to employees of press as well and which were in fact extended to the petitioner. The option to be absorbed even on a post in lower pay scale at Gandhinagar or Ahmedabad, in response to offer to absorb on a post with lower pay scale as cleaner can only be read in the context as willingness to accept absorption in lower pay scale with protection of pay only if he is to be absorbed at Gandhinagar or Ahmedabad, but it cannot be by any stretch of imagination be read as option to forgo any benefit State were to confer on its employees as relief against stagnancy vide resolution dated 5/7/91 and 18/2/95 referred to above. When the order of absorption was made for giving benefit of promotion to next higher grade on completion of 9 years service in one and the same cadre were not even in existence and its effect was not envisaged by any one. However, when those resolutions came and by order dated 27/7/95, the petitioner was given benefit of the higher pay scale on completion of 9 years service in the cadre of distributor w.e.f. 18/3/90 and he was placed in the pay scale of Rs.1200 - 1800 on 18/3/90, his status as on the date of order dated 26/7/90 and on actual absorption became that of an incumbent in the pay scale of Rs.1200 1800 with pay fixed in that scale with effect, from the date of absorption he became entitled to be continued in that pay scale. The order dated 27/7/95 has never been withdrawn nor has been held to be illegal or contrary to law. What has now been sought to be communicated is that because of the order of confirmation on the post of peon dated 25/2/91 in the pay scale of Rs.750 - 940, he loses the benefit of government resolutions giving next higher grade to each of one of its employee by way of promotional opportunity on completion of 9 years of service in one and the same cadre, as relief against stagnancy, because of his option given to be absorbed in lower pay scale with pay protection with effect from a later date. This is reading option on a wholly out of context of the facts existing as on the date the order has been made. At any rate, pay to which petitioner was entitled to as on the date of absorption still remain

protected.

5. The chain of events reveals that the petitioner was absorbed as a peon in Class IV service in the pay scale of Rs.750 - 940 w.e.f. 25/2/91. Much before the order dated 26/7/90, he was given the higher pay scale vide order dated 27/7/95. This date of placing the petitioner in higher pay scale is even prior to date of order dated 26/7/90 when decision to close the printing press and absorption of employees of the printing press in Fisheries Department with protection of pay scale was taken. This order has come into existence after the petitioner has been absorbed on the other post in the fisheries department. This benefit has been granted with effect from retrospective date after absorption as a result of resolution which has come into existence after absorption. The benefit of government resolution giving relief against stagnancy was an independent exercise and has nothing to do with absorption of surplus employees or option given at the time of absorption about place of posting. It was given to employees of all departments of government those who were continuing in one and same cadre for 9 years without obtaining even first promotion. The petitioner became entitled to such benefit is apparent from the fact that order dated 25/7/95 was made. The impugned order also says that the petitioner is entitled to such benefit at least upto 25/7/90 when government decided to close the printing press and to absorb its employees. The benefit of higher pay scale given to an employee after absorption, on the basis of policy decision taken after such absorption to all its employees at one point of service has nothing to do with exercise of option of an employee in Class IV to be absorbed as a result of being rendered surplus on any post in Class IV at Gandhinagar or Ahmedabad in the pay scale attached to it with protection of pay. He has never opted not to be absorbed if not absorbed at Ahmedabad or Gandhinagar. It was only a request made for favourable posting, on being offered to be absorbed in lower pay scale with posting at distant place, which was granted. Moreover, the option was never to forgo the benefit of future scheme which applied to all the government employees without any discrimination. To permit denial of a benefit of pay in higher grade on the basis of an option which was not founded on the knowledge of future event will result in obvious hostile discrimination inasmuch as it will tantamount to deny relief of higher pay scale which has been extended to one and all employees of State on the basis of an option for absorption at Gandhinagar / Ahmedabad which have no relation to operation of scheme. The benefit granted to petitioner operated w.e.f. 18/3/90, to which he is entitled admittedly until 26/7/90, could not be withdrawn inasmuch as there never was exercise of option by the petitioner to forgo the benefit which accrued to him as a result of resolution of 1991 as modified by resolution of 1994. The option for absorption to lower post can never be read as an option to forgo benefits flowing from a scheme which has come into existence retrospectively as a result of subsequent policy decision by the government.

6. In view of the aforesaid, I am of the opinion that the respondent's plea that the petitioner is not entitled to draw the benefit of relief against stagnancy after

absorption, is not well founded and cannot be accepted.

7. The petition therefore succeeds and is hereby allowed. The impugned order dated 21st July 1999 denying the protection the benefit of granting of higher grade as a result of absorption is quashed and it is directed that, absorption of the petitioner as a peon on account of closure of printing press cannot result in withdrawal of entitlement to higher pay scale granted to the petitioner by order dated 27/7/95 with effect from 18/3/90. The said benefit remains unaffected and the petitioner is entitled to continue to get the benefit of order dated 27/7/95. It is further made clear that order dated 19/7/97 , Annexure `F' is only an order of confirmation on the post of peon w.e.f. 25/2/91, the date with effect from which initial order of absorption was made on ad hoc basis. However, as a result of petitioner's placing in higher grade with effect from 18/3/90 on completion of 9 years service necessitated absorption of petitioner in the higher pay scale as was clearly envisaged under order dated 25/7/90. The respondents are bound to make necessary consequential orders of placing the petitioner in such pay scale as a necessary consequence with effect from the date of absorption. That is only the logical conclusion of benefit extended to the petitioner under the Government resolution referred to above and to the entitlement of which there is no dispute.

In the facts and circumstances of the case, there shall be no orders as to costs.