

(2008) 02 GUJ CK 0005

In the Gujarat High Court

Case No : Special Civil Application No. 7127 of 1993

M.S. Goswami Deleted As Withdrawn and Others	APPELLANT
Vs	
State of Gujarat and Others	RESPONDENT

Date of Decision : 21-02-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
Gujarat Panchayat Service (Transfer of Servants) Rules, 1968 — Rule 3, 4
Gujarat Panchayats Act, 1961 — Section 203

Citation : (2008) 02 GUJ CK 0005

Hon'ble Judges : Anant S. Dave, J

Bench : Single Bench

Advocate : Alpesh Rajpuriya, for Petitioners 2-3, A.S. Asthavadi, for Petitioners 5.2.1, 5.2.2, 5.2.3, 5.2.4, 5.2.5, 5.2.6 and 5.2.7 and Prashant G. Desai, for Petitioner 6, for the Appellant; Asmita Patel, AGP for Respondents 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

Anant S. Dave, J.—This petition under Article 226 of the Constitution of India is filed by the petitioners with the following main prayers:

(A) Your Lordships be pleased to quash and set aside the decision of the respondents to withdraw the benefit of higher pay scale and the future decision of the respondents to recover the amount paid to the petitioners under the scheme of higher grade pay scale per order at Annexure D colly. As being bad in law, illegal, arbitrary, suffers from non-application of mind and violative of Articles 14 and 16 of the Constitution of India, by issuing a writ of mandamus, or any other appropriate writ, order or direction of this Honourable High Court in the interest of justice.

(B) Your Lordships be pleased to declare that the respondents have no power in the eyes of law to withdraw/withheld the benefit of higher pay scale to the petitioners on the basis of Clause 10 of the Government resolution at Annexure C

to the petition and be further pleased to declare that the respondents are duty bound to give the benefit of higher pay scale to the petitioners by issuing a writ of mandamus or any other appropriate writ, order or direction of this Honourable High Court.

(C) Your lordships be pleased to stay the further operation, implementation and execution of the impugned orders at Annexure D colly. To the petition and be further pleased to direct the respondents to give the benefit of higher pay scale to the petitioners, pending the final disposal of this petition.

2. By an order dated 21.7.1993, Rule was issued and the matter was ordered to be heard with Special Civil Application No. 2204 of 1993 and allied matters. Interim relief was also granted in terms of para 22(C) by which operation, implementation and execution of the impugned orders at Annexure-D collectively, came to be stayed, which ordered for cancellation of higher pay scale and recovery of the pay initiated against the petitioners.

3. Subsequently, vide order dated 27.11.2007, this Special Civil Application qua petitioner No. 1-M.S.Goswami and petitioner No. 4-N.J.Maheriya were permitted to be withdrawn since cause of action qua those petitioners did not survive. The cause of action qua petitioner No. 2-J.V. Khokhariya and petitioner No. 3-R.G.Parmar does not survive since the petitioner Nos. 2 and 3 were repatriated to their original department. Therefore, this Special Civil Application survives qua petitioners Nos. 5 and 6 only.

4. Thereafter, matter was listed for final hearing pursuant to the order passed by Hon"ble the Chief Justice, upon submissions made by the Office on 8.2.2008.

5. According to petitioner No. 5-N.S.Jadav, he joined the service as Assistant Machineman, Government Photo Litho Press, Bhavnagar on 3.8.1983. Thereafter, upon request made by the him, he was transferred to Government Photo Litho Press, Ahmedabad by order dated 27.3.1985 with effect from 13.4.1985. The petitioner No. 6-R.K.Parekh joined the services as a Tracer, Land Survey Department, on 12.12.1978. Thereafter, upon the request made by him, he was transferred to Government Photo Litho Press, Ahmedabad by order dated 5.3.1987 with effect from 5.3.1987 on the same cadre and pay scale.

6. The above transfers were on certain conditions that; (i) seniority of petitioners in their respective cadres to be considered from the date of resuming their duties at Government Photo Litho Press, Ahmedabad; (ii) services rendered by the petitioners in erstwhile Departments will not be counted for the purpose of seniority; and (iii) rules and regulations of the employees of Government Press will be applicable to the petitioners. It was also mentioned that the transfers were as per their requests, therefore, they were not entitled for transfer allowance and joining period.

7. That by order dated 3.8.1992 petitioner No. 5 was given higher pay scale with effect from 3.8.1992 in the pay scale of Rs. 1200-1800 for higher post of

Machineman and by order dated 22.10.1991 petitioner No. 6 was given higher pay scale with effect from 1.12.1987 in the pay scale of Rs. 1400-2600 which was for the higher post of Draftsman.

8. The grant of higher pay scales was pursuant to the policy decision taken by the State Government which provides for incentives to the employees, who do not have further avenues of promotions and to avoid stagnation in a particular cadre, keeping in mind the efficiency of employees the higher pay scales were granted. Undertakings were also obtained from the petitioners Nos. 5 and 6 that in case if it is found that higher pay scale is given erroneously, concerned authority will be entitled to fix the correct pay scale and can recover the amount granted pursuant to such orders.

9. Later on, by order dated 9.7.1993 passed by the Competent Authority, earlier order dated 3.8.1992 of granting higher pay scale to petitioner No. 5 in the scale of Rs. 1200-1800 came to be cancelled and by order dated 6.7.1993 passed by the Competent Authority, earlier order dated 22.10.1991 of granting higher pay scale to petitioner No. 6 in the scale of Rs. 1400-2600 came to be cancelled. Recovery was also ordered to be initiated for the excess amount paid to the petitioners Nos. 5 and 6 pursuant to the audit objection raised by the Audit Department on the ground that the petitioners had foregone their seniority in their erstwhile departments.

10. The above orders are challenged in this petition on the ground that the orders impugned suffer from vice of principles of natural justice inasmuch as no opportunity of hearing was afforded to the petitioners before reducing the pay scale and initiating the recovery as per the orders dated 9.7.1993 and 6.7.1993 respectively. It is further contended that before passing the impugned orders, the respondent authorities have not taken into consideration various Government Resolutions issued from time to time, more particularly Government Resolution dated 5.7.1991, in proper perspective. According to learned Counsel for the petitioners, forgoing and surrendering seniority of erstwhile services rendered by the petitioner Nos. 5 and 6 cannot be considered for denying benefit of first higher pay scale inasmuch as the benefit of the promotion in the Government Photo Press in the Government Press were also not available to the petitioners and stagnation remained in the same cadre and in the same pay scale. It is further submitted that the resolution of 5.7.1991 provide for certain terms and conditions on which the employees are entitled to get the benefit of higher pay scale on completion of 9-18-27 years of service and as per Clause (ii) of the said resolution, the petitioners fulfill all the relevant criteria as no promotion was received by the petitioners in the past and therefore, the services rendered by the petitioners are to be treated as service rendered by the petitioners on their respective posts. In that view of the matter also, withdrawal or cancellation of the higher pay scales is unjust, illegal, arbitrary, unreasonable and violative of Article 14 of the Constitution of India and the impugned orders deserve to be quashed and set aside.

11. Learned Counsels for the petitioners placed reliance on Clause 10 of the clarificatory resolution dated 11.10.1991 issued by the Finance Department of the Government of Gujarat and submits that it nowhere indicates that erstwhile services of the petitioners, upon joining another department on request can be taken away or not to be considered for completion of 9 years of service for grant of higher pay scales. According to learned Counsels for the petitioners, what is provided in Clause 10 is that in normal circumstances, services, which are counted for grant of increment are to be considered for counting 9 years and exceptions are twofold; where cadre is changed or erstwhile irregular service is regularized, which is not counted for the purpose of seniority, such service is not to be considered for counting 9 years service for grant of first higher pay scale.

12. Learned Counsels for the petitioners has placed reliance on a decision of this Court in the case of *Ajitsinh Chaturji Rathod v. State of Gujarat* reported in 2004 (4) GLR 3181, which in an unreported decision of Division Bench of this Court in Letters Patent Appeal No. 779 of 2000 was confirmed and appeal preferred by the State Government came to be dismissed.

In another case being Letters Patent Appeal No. 229 of 2003 and allied matters, the Division Bench of this Court reversed the orders of a learned Single Judge and the Authority was directed to give higher grade pay scale to the appellants-original petitioners. Thus, according to learned Counsels for the petitioners, the instant case is identical and covered by the aforesaid decisions of this Court, therefore, this petition also deserves to be allowed.

13. Ms. Asmita Patel, learned AGP, for the respondent Authority, vehemently contended that transfer of the petitioners from erstwhile departments of the petitioners were conditional and seniority of the erstwhile departments were foregone and surrendered by the petitioners and it was made specifically clear that the seniority will be counted from the date of joining duty in Government Press, orders passed by the Authority based upon audit objection are just and proper and cannot be said to be illegal in any manner. Besides, according to her, undertakings were given before the Authority by the petitioners that in case in future if it is found that first higher pay scale was granted to the petitioners by mistake or erroneously, the same shall be recovered from the petitioners. Therefore, now the petitioners cannot backtrack and contend that principles of natural justice are violated in passing the impugned orders. Learned AGP has further contended that Clauses 5 and 10 of the clarificatory resolution issued by the Finance Department of State of Gujarat are to the effect that if interpreted in correct perspective, no right is created in favour of the petitioners for grant of first higher pay scale. According to her, if erstwhile services of the petitioners are counted for grant of first higher pay scale on the basis of completion of 9 years, seniors to the petitioners, who are otherwise in lower pay scales may also claim the stepping up which may create anomaly. It is further submitted that having accepted the conditions imposed by the authority at the time of transfer, now it is not open for the petitioners to challenge the orders of the authority. Therefore,

also no interference is called for by this Court.

14. Learned Counsels for the petitioners, relying on the affidavit in rejoinder, submit that except the petitioners Nos. 5 and 6 all other co-petitioners have been given the benefit of first higher pay scale and since the present petitioners have retired voluntarily and not joined the parent departments from where they were transferred, the cases of the petitioners need to be looked into from that angle also. However, learned AGP has submitted that the case of other co-petitioners was on a different footing inasmuch as they had joined their original and parent departments, while the petitioners had voluntarily retired, therefore, parity cannot be claimed on that ground.

15. Having heard learned Counsel for the parties and perusing the record of the case, according to this Court, the issue is no more *res integra* in view of the decision of the Division Bench of this Court in Letters Patent Appeal No. 229 of 2003 and allied matters and Letters Patent Appeal No. 779 of 2000, where an employee who was transferred from one district to another district on his own request was denied higher pay scale on the ground that service of such an employee rendered in erstwhile district cannot be considered and counted for grant of higher pay scale was directed to be paid higher pay scale by the Division Bench of this Court. So far as decision of Letters Patent Appeal No. 779 of 2000 and allied matters, the Division bench of this Court confirmed the decision of learned Single Judge by directing the Authority to grant higher pay scale, while in another Letters Patent Appeal No. 229 of 2003 decision of the learned Single Judge came to be reversed and benefit of higher pay scale was ordered to be granted to those appellants.

16. The learned Single Judge in case of Ajitsinh Chaturji Rathod (*supra*) in paras 4, 5 and 6 held as under:

4. Having considered the carefully the rival contentions, I am of the opinion that there is no warrant to draw this inference that the petitioner has lost his services from 1964 for the purpose of reckoning seniority in the present cadre. At the relevant time, when the petitioner was recruited, the Gujarat Panchayat Act, 1961 was in force. Chapter XI of the Act of 1961 contains the provisions relating to services of Panchayat. Section 203 envisages that for the purposes of bringing about the discharge of functions and duties of Panchayats, a Panchayat services shall be constituted in connection with the affairs of the Panchayat in pursuance thereof, the panchayat service was constituted. The provisions further envisage that the panchayat service was constituted of such classes, cadres, and posts and initial strength of officers and servants in each such class and cadre as the State Government may from time to time determine and such cadres may consists of District Cadres, Taluka Cadres and Local Cadres. It also envisages that that, subject to the provisions of the Act, the State Government may make Rules regulating the mode of recruitment and providing conditions of services, appointing to the panchayat services also for providing inter district transfer of service belonging to panchayat service and the circumstances on which and the

conditions on which such transfers shall be made. Gujarat Panchayat Service [Transfer of Service] Rules 1968 governs the inter district transfers. The Rule 3 provide the conditions under which mode, the transfers can be made, [i] in the public interest; [ii] in order to absorb the members becoming surplus in one District or [iii] an application is made to the District Development Officer in that behalf by the incumbent. As a condition of such transfer, Rule 4 provides, that in the case of transfer, by way of absorption of a surplus employee of another district or at one's own request, such incumbent shall not claim seniority over the person who ranks last in the post having clear vacancy in the cadre to which such member may be appointed. As a result of such transfer, he takes seniority at the bottom amongst the regularly employed persons in the cadre at the place of transfer on the date of transfer. However, this does not envisage that the period of service for the purpose of seniority in all circumstances to be reckoned with effect from the date of transfer. That is to say, the period of past services in the parent district, he carries with him for the purpose of reckoning the seniority vis-a-vis a person appointed to the services of the district who comes after him. Therefore, it is not possible to accept the contention of the learned Counsel for the respondents that, because of the operation of condition of inter district transfer on request, the petitioner is not entitled to compute the period of services rendered at District Panchayat, Surat for the purpose of counting seniority. The limited operation to which the rules provide affecting the seniority is vis-a-vis persons already in the employment at the time of transfer on request or at the time of absorption on being declared surplus in the parent district. He loses seniority not because of not reckoning the period of past services rendered in parent district, but because of securing transfer on request as a condition for acceptance of such request.

5. It is next contended by learned Counsel for the respondents that the petitioner is entitled to count only such services who are in the same cadre and grade. If the services are rendered in different cadres though in the same grade, the same may not be considered by clubbing the same unless it falls within the other provisions of the scheme where services rendered into different cadres can be clubbed together for the purpose of availing the benefit under the scheme. There is some force in this contention. As noticed above, Section 203 of the Act of 1961 envisages constitution of the Panchayat Services having different cadres levels namely, District Cadres, Taluka Cadres and Local Cadres. Thus, Statute envisages separate District Cadres within the services constituted for the State. While the Statute itself provides that a servant belonging to a Taluka cadre shall be liable to be posted, whether by promotion or transfer in any Gram or Nagar in the same Taluka and the servant belonging to the Local Cadre shall be liable to be posted whether by promotion or transfer to the same gram or Nagar as the case may be. For the inter district transfer of employees of District Cadres, it left the matters to be provided under the Rules. The Rules of 1968 provided for inter district transfer of a member of panchayat services belonging to a district cadre to another district cadre. Scheme in this regard remains unaltered even under

Panchayat Act, 1993. Therefore, the petitioner who was a member of panchayat services of Surat District Panchayat was member of District Cadre Surat till he served within Surat District and when he was transferred to the panchayat services of Mehsana district, he became member of Mehsana District Cadre. Therefore, it cannot be said that he rendered service in same cadre through out. This position is further clear from the fact that where the situation like the present arises, the scheme has envisaged that where a government has made a transfer from one cadre to other cadre in public interest and pay scales of these posts are equal, the services rendered in both the cadres shall be taken into account for the scheme of higher grade scale subject to other conditions. As the scheme has made specific provisions for inter cadre transfer in the public interest, it has made no such provisions for such inter cadre transfers on its own request. In those circumstances, a question of clubbing of period must depend upon the provision governing such situation. Therefore, the two periods cannot be clubbed together for the purpose of claiming benefits under the Scheme.

6. However, the question does not rest here. It is not envisaged anywhere that any part of the services is not to be treated for the purpose of conferring benefit of the higher grade scale, if the person is otherwise entitled to it without clubbing of the periods. The Scheme does not express its applicability only to same cadre and grade, but applies to "one and same cadre and grade". The use of expression "one and same cadre" must be interpreted in the context of object of scheme viz. to provide time bound promotion at least once on completion of a period of service, since regular appointment. If that period is completed in any one cadre, without aid of clubbing, there is nothing in the Scheme which can inhibit the incumbent from availing such benefit with effect from that date. If the incumbent has completed continuous regular service of requisite period, to be accounted for in that cadre, in more than two cadres of same grade, the benefit must go to the incumbent on the earlier of the two dates. Scheme has clear object of giving one promotional chance, in case actual promotion has not come one's way, on completion of nine years service in one and the same cadre after regular appointment. The question of continuous service for seniority is inextricably woven with the thread of granting promotion to incumbent at least once on completion of nine years of regular service in one cadre to combat stagnancy. The question of taking into account aggregated period as to any two cadres will arise only in case where the services in one cadre does not satisfy the condition of requisite period of service in that cadre. However, if a person qualifies for that benefit, remaining in one and the same cadre at particular point of time, merely because of the exigencies of service later in time the incumbent has been placed in different cadre, he cannot be deprived of that benefit by confining the question of extending benefit only to the computation of period to his present cadre. What is requisite condition is that he should have spent 9 years of regular service which is accountable for the purpose of seniority in one and the same cadre and grade, not necessarily in the present cadre. If a man has served in one district cadre for 4 years and has been transferred to another

district cadre at his own request and he has served there for six years, in that event in either of the cadre, he has not completed 9 years service and he cannot take advantage unless the both are clubbed together. In the other case, a person may have served in one cadre for more than 20 years and has been transferred to another cadre by loss of seniority. In such case, he is not deprived of the benefit of the scheme which has to operate from the date of entry in the service at different points when the conditions can be said to be fulfilled. In that event if a person has fulfilled the conditions for availing the benefit at any point, be it before his services are transferred in the present cadre affecting his seniority, there is no provision in the scheme which takes away that benefit because of the subsequent events. This is also in consonance with the object with which the scheme has been introduced.

17. Therefore, what is necessary for an employee to get higher grade pay scale is that he must have spent the required 9 years of regular service which is countable for the purpose of seniority in one and the same cadre and grade, not necessarily in the present cadre, and rest of the things are not material. I am in complete agreement with the decision of the Division Bench of this Court as well as the decision rendered by the learned Single Judge in the case of Ajitsinh Chaturji Rathod (*supra*).

18. In another decision rendered by Division Bench of this Court in Letters Patent Appeal No. 229 of 2003 and allied matters while interfering with the order of learned Single Judge in upholding the contention of the Authority that service rendered in erstwhile departments where seniority is foregone, benefit of higher pay scale cannot be given, the Division Bench after placing reliance on the decision of Dwijen Chandra Sarkar and Another Vs. Union of India and Another, in paras 7 and 8 held as under:

7. After having heard the learned advocates appearing for the parties and after examining and evaluating the factual profile of the entire matter and also after having considered the authorities cited before us, we are of the view that the order, passed by the learned Single Judge, requires an interference by us while exercising appellate jurisdiction under Clause 15 of Letters Patent. The Hon"ble Supreme Court has, in the case of Dwijen Chandra Sarkar (*Supra*), specifically held "that the past service of the appellants is to be reckoned for the limited purpose of eligibility computing the number of years of qualifying service, to enable them to claim the higher grade under the scheme of time bound promotions. The Hon"ble Supreme Court has further held that the appellants will be entitled to the higher grade from the date on which they have completed 16 years computing the same by taking into account their past service in the Rehabilitation Department also along with the service in the P & T Department. They will be so entitled as long as they remained in the post of Assistant and till their normal promotion to a higher post according to Rules." Even the Division Bench of this Court in the case of State of Gujarat v. Ajitsinh Chaturji Rathod LPA No. 779 of 2000, decided on 4.12.2000, has taken the view that "mere transfer

from Surat to Mehsana on the condition to be at the bottom, at the new station, upon request, would not, in any way, adversely affect the right to claim benefit of higher grade under the relevant G.R." In our view, the learned Single Judge is, therefore, not right in holding that for conferring of benefit of higher grade scale on completion of 9 years" service, the service rendered in Mehsana District Panchayat alone can be considered. This view is contrary to the view taken by the Hon"ble Supreme Court, in the case of Dwijen Chandra Sarkar (Supra), and the Division Bench judgment of this Court in the case of State of Gujarat v. Ajitsinh Chaturji Rathod (Supra).

8. In the result, all these three Letters Patent Appeals are allowed. The order passed by the learned Single Judge, in all the three petitions, is hereby quashed and set aside. and the earlier order of the respondent-authorities, granting higher grade scale to the appellants - original-petitioners, is hereby restored. However, looking to the facts and circumstances of the case, there shall be no order as to costs.

19. Therefore, in the case in hand also, regular services rendered by the petitioners in other departments on the same posts are required to be counted for granting benefits of the Scheme. Both the petitioners herein were regularly employed after undergoing valid selection procedure and in accordance with recruitment rules and continued on the pay scales commensurate with the posts, which on being transferred to Government Press where also avenues of promotion were not available and the petitioners were stagnated in their respective cadres. Therefore also, the petitioners are entitled for the higher grade as per the Government Resolution dated 5.7.1991.

20. So far as grant of higher pay scale and undertakings given by the petitioners are concerned, the above undertakings were given in case of any mistake or error in the grant of pay scales. However, as discussed hereinabove, there is no such mistake or error in granting the first higher pay scales to the petitioners and therefore the impugned decisions of the Authority cannot be accepted and the undertakings given by the employees have no bearing in view of the above decisions.

21. Even clarificatory Clauses Nos. 5 and 10 cannot take away any benefit accrued to the petitioners on the basis of resolution dated 5.7.1991 which clearly mentions the method of computation of 9 years of service and type of service to be considered which refers to all the services that counts for increment in the scale, i.e. the scale received by the petitioner on a particular post and cadre. So far as Clause 10 of clarificatory resolution is concerned, the denial of first higher pay scale is permitted only when there is a change of cadre and pay-scale and irregular service of the past is subsequently regularized which is not to be counted for the purpose of seniority. However, in the present case, services were rendered by the petitioners in their erstwhile departments where the petitioners were appointed in accordance with the relevant rules and after undergoing valid selection procedure, which cannot be said to be irregular services and therefore

also the above contention fails. Any claim that may be made by the senior employee/s of the Department can be decided on the basis of the facts and circumstances of each case, and on that ground the petitioners cannot be denied the first higher pay scale, particularly when they were eligible as per Clause (ii) of the Government Resolution dated 5.7.1991. It is also to be noted that subsequent Government Resolution dated 15.7.2004, which also reiterates that seniority is an important yardstick for grant of higher pay scale to Government employees do not affect the claim of the petitioners as interpreted by this Court in the decisions referred hereinabove. Therefore, also the above fact do not require any further deliberation.

22. So far as similarly situated co-petitioners have been conferred benefits accruing out of the Government Resolution dated 5.7.1991 on the ground that they were sent back to their original departments and since the petitioners herein have taken voluntary retirement they are not entitled, is also unreasonable, arbitrary, discriminatory and violative of Article 14 of the Constitution of India. Once law is laid down by this Court in the aforesaid two decisions rendered in (i) Letters Patent Appeal Nos. 779 of 2000 (ii) Letters Patent Appeal Nos. 229 of 2003 and allied matters, the authority cannot deny similar benefit accrued to similarly situated persons and the petitioners ought to have been conferred the benefits of higher pay scales as laid down in the Government Resolution dated 5.7.1991.

23. Thus, a case is made out to grant higher pay scale to the petitioners Nos. 5 and 6. Accordingly, this Special Civil Application succeeds qua petitioners Nos. 5 and 6 and the same is allowed.

The impugned orders dated 9.7.1993 and 6.7.1993 respectively are hereby quashed and set aside. The respondents are hereby directed to fix the pay scale of the petitioners Nos. 5 and 6 as per the Government Resolution dated 5.7.1991 prior to passing the impugned orders dated 9.7.1993 and 6.7.1993 respectively. Accordingly, this Special Civil Application is allowed. Rule is made absolute to the aforesaid extent. However, there shall be no order as to costs. Direct Service is permitted.