
(1996) 05 GUJ CK 0014
In the Gujarat High Court

M.U. Shaikh

APPELLANT

Vs

The Director of Employment and Training

RESPONDENT

Date of Decision : 02-05-1996

Acts Referred:

Recruitment Procedure Rules, 1970 — Rule 23

Citation : (1996) 3 GLR 71

Hon'ble Judges : R.K. Abichandani, J

Bench : Single Bench

Judgement

R.K. Abichandani, J.—The petitioner challenges the decisions of the Service Tribunal in Appeal No. 372 of 1979 dated 17-12-1979, Appeal No. 388 of 1988 dated 2-11-1989 and Review Application No. 3 of 1990 dated 28-8-1990. The grievance of the petitioner has been that the Competent Authority has illegally prevented the petitioner from crossing the Efficiency Bar with effect from 1-1-1978.

2. The petitioner was serving as a Junior Clerk in the District Employment Exchange, Surendranagar and has retired from service on attaining the age of superannuation on 31st January, 1995. At the relevant time, the petitioner was working under the Directorate of Employment and Training in the office of the Deputy Chief, University Employment Information and Guidance Bureau, Rajkot, as a Junior Clerk in the pay scale of Rs. 350-12-410-EB-12-470-15-500. On 17th January, 1978, the Deputy Chief, UEIG Bureau, made an order, by which he allowed the petitioner to cross the Efficiency Bar at Rs. 410/- in the pay scale, permitting him to draw pay at Rs. 422/- per month with effect from 1-1-1978. However, on the next day, i.e., on 18-1-1978, the Deputy Chief cancelled his order dated 17-1-1978, when his attention was drawn to the Circular dated 15-10-1976, under which directions were issued by the Director that proposal for crossing the Efficiency Bar in respect of members of Class III staff of all subordinate offices under the control of the Directorate should be sent to that office. The petitioner challenged the order of the Deputy Chief dated 18-1-1978

before the Gujarat Civil Services Tribunal, Gandhinagar in Appeal No. 372 of 1979. The Tribunal negated the petitioner's contention that as Head of Office, the Deputy Chief was empowered to allow the petitioner to cross the Efficiency Bar and, therefore, he could pass the order dated 17-1-1978. The Tribunal held that the petitioner was unable to point out any authority to establish his contention that the Head of Office under the Directorate was competent to make such orders. The Tribunal, therefore, held that the order passed by the Deputy Chief on 17-1-1978, allowing the petitioner to cross the Efficiency Bar was clearly without authority and against the express instructions of the Director, contained in his Circulars dated 17-4-1976 and 15-10-1976. In that judgment, in paragraph 13, the Tribunal observed as under:

...So far as the question of crossing the Efficiency Bar is concerned, the concerned competent authority has not yet passed any order one way or the other and the appellant can have a cause of action only when he is not permitted to cross the Efficiency Bar by orders of the competent authority....

It is, therefore, clear that the question as to whether the petitioner should be allowed to cross the Efficiency Bar or not with effect from 1-1-1978 was kept open, for the competent authority to decide, by the Tribunal. The Tribunal had dismissed Appeal No. 372 of 1979, upholding the cancellation done by the Deputy Chief of his earlier order dated 17-1-1978, by which the petitioner was allowed to cross the Efficiency Bar. The petitioner, who has appeared as Party-in-person, challenges the said decision of the Tribunal dated 17-12-1979 on the ground that the Deputy Chief was authorised as the appointing authority in view of the G.A.D. Circular dated 17th April, 1970 bearing No. GS-19/1107/K, under which the Recruitment Procedure Rules, 1970 for the post of Clerk, etc., were published. It was provided by Rule 23 that the Competent Authority to appoint the candidates as Clerks was the Head of Office to which such candidates were allotted from the list by the Collector. In a petition filed in the year 1991, the petitioner cannot be allowed to challenge the decision dated 17-12-1979 rendered by the Tribunal in Appeal No. 372 of 1979. Therefore, the petitioner's challenge against the Tribunal's judgment dated 17-12-1979 cannot be entertained.

2.1 However, the matter does not rest there. As noted above in paragraph 13 of the Tribunal's judgment, the question regarding the Efficiency Bar of the petitioner was required to be decided by the Competent Authority. The petitioner was, later on, by order dated 15-5-1985, allowed to cross the Efficiency Bar with effect from 1-1-1985. While issuing that order, it was observed that the petitioner had challenged the order of the Deputy Chief in Appeal No. 372 of 1979 and that the said appeal was dismissed on merits by the Tribunal's order dated 17-12-1979 and the Competent Authority had decided that he was not fit to cross the E. B., which decision was communicated on 15-6-1983. The petitioner challenged the impugned order dated 15-5-1985 to the extent to which it was against the petitioner is Appeal No. 388 of 1988, contending that he

should have been allowed to cross the Efficiency Bar from 1-1-1978. In the judgment and order dated 2nd November, 1989, the Tribunal, while dismissing the appeal, observed that it had gone through the judgment of the Tribunal dated 17-12-1979 in Appeal No. 372 of 1979 and that the said appeal was heard and decided by the Tribunal on merits and further that the petitioner had again tried to agitate the same points before the Tribunal and was trying to get the same advantage in the matter of release of increments which was denied to him on merits. This observation of the Tribunal clearly indicates that the Tribunal had overlooked paragraph 13 of the earlier decision dated 17-12-1979 in Appeal No. 372 of 1979. As noted above, the question of the petitioner's Efficiency Bar was left open to be decided by the Competent Authority and the Tribunal had never decided the issue regarding Efficiency Bar of the petitioner on merits. Therefore, the decision of the Tribunal dated 2-11-1989 proceeds on totally an erroneous assumption that the petitioner's case for being allowed to cross Efficiency Bar from 1 -1-1978 was rejected on merits by the Tribunal in Appeal No. 372 of 1979. For this reason, the decision of the Tribunal in Appeal No. 388 of 1988 cannot be sustained.

3. The petitioner was at pains to point out to the Tribunal in his Review Application No. 3 of 1990 that its reading of the earlier decision in Appeal No. 372 of 1979 was not correct. Unfortunately, even in its judgment and order dated 28th August, 1990 in the Review Application also, the Tribunal has betrayed non-application of mind to the relevant record. In paragraph 4 of its judgment in the Review Application, the Tribunal reiterated the remark that Appeal No. 372 of 1979 was heard and decided on merits and referred to its observations in Appeal No. 388 of 1988, that the petitioner had again tried to agitate the same points and to get same advantage in the matter of release of increments, which was denied to him, on merits. Though the Tribunal had noted that in Appeal No. 388 of 1988 the question involved was of releasing increments after the Efficiency Bar with effect from 1-1-1978. it did not notice that, that question was never decided by the Tribunal on merits earlier in Appeal No. 372 of 1979 or even in its order in Appeal No. 388 of 1988. The Tribunal observed that the order dated 20-11-1986 was never challenged by the petitioner. This was factually incorrect as can be seen from the appeal memo of Appeal No. 388 of 1988. The petitioner had, in paragraph XI clearly challenged the order dated 20-11-1986, which was at Annexure E/6 of that appeal as "misconceived in law" though the petitioner pointedly challenged the order dated 2-11-1986. the Tribunal made an observation that it was never challenged before it. The Tribunal, therefore, did not notice that there were good grounds made out by the petitioner even in the Review Application, on the basis of which the Tribunal could have corrected itself. The order dated 28-8-1990 rejecting the Review Application also, therefore, cannot be sustained.

4. On 12-11-1981, the petitioner was given a show cause notice to show cause as to why having regard to the adverse entries in his confidential reports, namely, communicated on 20-10-1975, 6-9-1976, 20-3-1978, and 19-4-1979,

for the relevant period mentioned therein his increments should not be stopped and he should not be allowed to cross Efficiency Bar with effect from 1-1-1978. By order dated 20-11-1986, the petitioner was allowed to cross the Efficiency Bar from 1-1-1986, stating that he was not permitted to cross the Efficiency Bar with effect from 1-1-1978. It is, therefore, clear that the petitioner was not allowed to cross the Efficiency Bar on the basis of the four adverse entries mentioned in the show cause notice dated 12-11-1981. The first adverse entry communicated on 20-10-1975 was for the year 1974-75. The next communication on 6-9-1976 was for the year 1975-76. The petitioner was, admittedly, given Selection Grade with effect from 27-9-1976. The criteria for grant of Selection Grade for non-gazetted grades as reflected from the Government Resolution G.A.D. No. CDR 1074-G, dated 10th February, 1976 is:

...the test applied for promoting a Government servant, whether gazetted or non-gazetted, to selection grade should be the same as that for promotion to a higher cadre or service, so far as standard of Confidential Reports, passing of Departmental examinations, etc. are concerned....

Therefore, when the petitioner was given the Selection Grade on 27-9-1976, the adverse remarks communicated on 20-10-1975 and 6-9-1976 for the years 1974-75 and 1975-76 respectively did not come in his way and the Competent Authority found the petitioner fit for the Selection Grade notwithstanding these remarks. When these adverse entries are not used against the employee while considering the question of grant of Selection Grade to him, the criteria for which was the same as that for grant of promotion, they cannot be relied upon for the purpose of withholding his increments at the stage of Efficiency Bar. Therefore, the adverse entries for the period prior to the grant of Selection Grade to the petitioner stood washed off and could not have been taken into consideration for the purpose of deciding whether the petitioner should be allowed to cross the Efficiency Bar with effect from 1-1-1978.

5. The adverse entry for the year 1976-77 was communicated to the petitioner on 20th March, 1978, i.e., nearly after 47 weeks, instead of six weeks, from the completion of the confidential reports for the relevant period. The adverse remarks for the period 9-6-1977 to 16-1-1978 were communicated to him on 19-4-1979, i.e., nearly 50 weeks after the completion of the confidential reports for the said period. According to the petitioner, he had not received the communication dated 19-4-1979 and, therefore, the adverse remarks were communicated to him on 17-3-1982 and if that date is to be reckoned, then, the remarks were communicated 184 weeks after the completion of the confidential reports for the relevant period. There is no dispute about the fact that the adverse remarks were required to be communicated within six weeks after the completion of the confidential reports for the relevant period for which they are written. It has been held by the Supreme Court in *State of Haryana Vs. P.C. Wadhwa, IPS, Inspector General of Police and Another*, that the whole object of making and communicating adverse remarks would be lost if they are

communicated to the officer concerned after an inordinate delay. The provisions relating to communication of adverse entries, although directory in nature, is required to be complied with substantially. A directory provision cannot altogether be ignored. In P.C. Wadhwa's case (supra), the Supreme Court held that if the circular provided a total period of seven months as the maximum period, within which adverse remarks, if any, had to be communicated to the officer concerned, and if they were actually communicated after 27 months, i.e., after about four times the period prescribed under the Rules, there was unreasonable delay in communicating the remarks and, therefore, there was no substantial compliance with the provisions of the Rules, which require remarks to be communicated. In C.N. Chavda v. D.G.P. reported in 1992(1) GLH 209, relying upon the decision in P.C. Wadhwa's case, this High Court held that the adverse remarks communicated more than 13 months after the relevant period was over, was grossly delayed. Delay of four times was held to be unreasonable in P.C. Wadhwa's case. Therefore, so far as the adverse remarks for the year 1976-77 and for the period 9-6-1977 to 15-1-1978 are concerned, the communications having been unduly delayed, they could not have been relied upon by the concerned authority in the instant case for the purpose of withholding the petitioner's increments at the stage of crossing of the Efficiency Bar with effect from 1st January, 1978.

6. Thus, the basis on which the petitioner's increments have been stopped at the Efficiency Bar with effect from 1-1-1978 is, therefore, wholly, erroneous and the Tribunal failed to notice this important aspect of the matter while proceeding on a erroneous basis that the question regarding Efficiency Bar of the petitioner was decided by the Tribunal on merits in Appeal No. 372 of 1979. Under these circumstances, the Tribunal's decisions in Appeal No. 388 of 1988 and Review Application No. 3 of 1990 cannot be sustained and are hereby set aside. The respondent is directed to consider the question of release of Efficiency Bar to the petitioner with effect from 1-1-1978 afresh and in the light of the observations made in this judgment, ignoring the adverse entries, which were mentioned in the show cause notice dated 12-11-1981, on the basis of which the petitioner was denied the benefit of further increments beyond the Efficiency Bar. The decision shall be taken by the respondent within four weeks from the date of the receipt of the writ of this order and all the consequential benefits, in the event of the petitioner's Efficiency Bar being released from 1-1-1978, will be given to him within four weeks of the making of the order, releasing the Efficiency Bar from 1-1-1978. Rule is made absolute accordingly, with no order as to costs.