

(2016) 03 GUJ CK 0011

In the Gujarat High Court

Case No : Special Civil Application No. 8260 of 2012

Radheshyam R. Shah

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 01-03-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 03 GUJ CK 0011

Hon'ble Judges : J.B. Pardiwala, J.

Bench : Single Bench

Advocate : Mihir H. Pathak, Advocate, for the Appellant; Vacha Desai, AGP, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J.—1. By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

"23(A)Your Lordship may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or a writ of mandamus or a writ in the nature of the mandamus and any other appropriate writ, order and direction to quash and set aside the impugned order/letter dated 10.4.2012 by the respondent No. 2 and the Hon"ble Court may further be pleased to direct the respondent No. 3 to release all the consequential benefit of the stepping up as per the orders issued by the respondent No. 2 in 2007 (Annexure-B colly) to the petitioner forthwith;

(B) That any other suitable and appropriate relief or relief/s be awarded as deemed fit to be just and proper under the circumstances.

(C) The appropriate cost of the petition be awarded."

2. The facts of this case may be summarized as under:

2.1 The writ applicant was serving as a Assistant Director of Information, Class-II post. He retired from service on attaining the age of superannuation with effect

from 31st July, 1999.

2.2 Initially, the appointment of the writ applicant was on the post of Clerk-cum-Typist dated 11th June, 1964. He passed the pre-service examination in 1965.

2.3 Thereafter, the writ applicant came to be promoted as the Senior Clerk, Assistant Superintendent, Superintendent, and lastly, the Assistant Director of Information. It is the case of the writ applicant that he is entitled to the deemed date of promotion in all the cadres in view of the Gujarat Non-Secretariat Clerks, Clerk-Typists (Training & Examination) (Amendment) (Amending) Rules, 1994. It is the case of the writ applicant that according to the rules, the seniority of the Clerks/Typists should be counted from the date of joining the service.

2.4 According to the writ applicant, he was senior to one Shri Goswami, but as he was posted at the District level and Shri Goswami was posted at the Head Office and was also, at the same time, performing the duty of the Senior Clerk, the salary of Shri Goswami was higher than that of the writ applicant. By different orders, the writ applicant was granted the deemed date of promotion on the post of Senior Clerk, Assistant Superintendent, Superintendent and the Assistant Director respectively between 1970 and 1992.

2.5 The petitioner was, thereafter, put to the post of Senior Clerk, Assistant Superintendent, Superintendent and the Assistant Director of Information by stepping up, and therefore, the earlier orders were cancelled.

2.6 The writ applicant was also granted the benefits of stepping up of his pay with that of Shri Goswami. But, according to him, the benefits have not been extended so far.

2.7 By letter dated 16th April, 2008, the writ applicant was informed by the respondent No. 3 that, he was not entitled to the stepping up under Rule 21(5) of the Gujarat Civil Service (Pay) Rules, 2002.

2.8 It is the case of the writ applicant that he is entitled to the stepping up according to the resolution of the Finance Department dated 8th May, 1970, and the same was rightly granted. He was further informed thereafter by letter dated 6th December, 2008 that, as he was not fulfilling the conditions of the Rule 21(5), the benefits of stepping up could not be given.

2.9 It appears that in the past, he had filed a Special Civil Application No. 1443 of 2009 which came to be disposed of by this Court vide order dated 18th April, 2009 in the following terms:

"1. By way of this petition under Article 226 of the Constitution of India, petitioner has prayed for an appropriate writ, direction and order quashing and setting aside the letter dated 16.4.2008 (Annexure H) by further directing the respondent to pay the arrears become due and payable on account of granting of deemed date of promotion from time to time as also granting of stepping up to the petitioner by adjusting the amount of Rs. 5995/- and to pay the remaining

amount.

2. It appears that relying upon Rule 21(5) of the GCSR (Pay) Rules, 2002, the respondent No. 3 has raised audit objection that petitioner was not entitled to the stepping up. It is the case on behalf of the petitioner that Rules 21(5) of the GCSR (Pay) Rules, 2002 would not be applicable as earlier order has already passed granting deemed promotion to the petitioner. It is required to be noted that the impugned communication at Annexure H dated 16.4.2008 is by the respondent No. 3 by way of audit objection. Ultimately, concerned department has to consider audit objection and take an appropriate decision. It will be open for the petitioner to submit representation to the concerned respondent within a period of two weeks from today by contending that Rule 21(5) relied upon by the respondent No. 3 is not applicable. Thereafter taking into account said representation, concerned respondent to take an appropriate decision in accordance with law and merits inclusive of applicability of Rule 21(5) for which this Court has not expressed any opinion. The said decision to be taken within a period of 2 months from the receipt of the present order and communicate the same to the petitioner."

2.10 Pursuant to the order referred to above, the respondents once again looked into the matter and rejected the claim of the writ applicant for the benefits of stepping up.

2.11 Hence this petition.

3. This writ application has been opposed by the respondents. On behalf of the State Government, an affidavit-in-reply has been filed duly affirmed by the Under Secretary, Information and Broadcasting Department inter alia stating as under:

"5. It is submitted that vide Finance Department Government Resolution No. PAY/1264/1367/CH dated 3rd December 1965 and Finance Department Government Resolution Np.PGR-2470/490/CH dated 08th May, 1970, the Finance Department has issued certain directions and guidelines for granting stepping up. A copy of the aforesaid Government Resolutions are annexed herewith and marked as Annexure-A and Annexure-B.

6. It is submitted that a perusal of the aforesaid Government Resolutions, makes it clear that for getting benefit of stepping up, the employee is required to fulfill certain conditions enumerated in the aforesaid Government Resolutions. It is submitted that in the present case, the petitioner is not fulfilling the required conditions as laid down in aforesaid Government Resolutions in the light of the following facts. Hence the petitioner is not entitled to get the benefit of "stepping up" of his pay as much as of Shri Goswami.

(A) Shri Goswami was recruited as a Junior Clerk on 11-11-1964 in the office of the Commissioner of Information (the than named as the office of the Director of Information) based on the selection by the Gujarat Public Service Commission. Whereas the petitioner was recruited as a Clerk-cum-Typist on 11-6-1964 in the

office of the District Information Office, Banaskantha based on the selection by the committee constituted under the Central Recruitment Scheme. Thus Shri Goswami and the petitioner were recruited from two different sources in two different offices.

(B) While Shri Goswami was holding a post of Junior Clerk in the office of the Director of Information, he had been temporarily given promotion of Senior Clerk as a stop gap arrangement on different occasions totaling 881 days as per the details given below before his regular promotion in the rank of Senior Clerk.

(C) Considering the duty of more than 730 days performed as a stop gap arrangement on the post of Senior Clerk in the past, the initial pay of Shri Goswami on the post of Senior Clerk was fixed at Rs. 220/- adding two increments as per the provisions of Rule 41(b) of Bombay Civil Services Rules 1959. Since the petitioner had not worked on the post of Senior Clerk as a stop gap arrangement before his regular promotion in the rank of Senior Clerk just like Shir Goswami, he was not entitled to get the benefit of any additional increments, hence his (petitioner's) initial pay was fixed at Rs. 200/- on the post of Senior Clerk. The relevant part of Rule 41(b) of Bombay Civil Service Rules 1959 is reproduced herein below.

Rule 41(b)

(b) If the conditions prescribed in clause (a) are not fulfilled he will draw as initial pay the minimum of time-scale:

Provided both in cases covered by clause (a) and in the those covered by clause (b) that,

I.(1) If he has previously held substantively-

(i) the same post, or

(ii) a permanent post which was at that time on the same time-scale, or

(iii) a permanent post, other than a tenure post, which was at that time on as identical time-scale, or

(2) If he is appointed substantively to a tenure post which was at that time on a time-scale identical with that of another tenure post which he has previously held substantively.

then, save as provided in Rule 43, the initial pay shall not be less than the pay, other than special pay, personal pay, or emoluments classed as pay by Government under Rule 9(39)(a)(iii), which he drew on the last such occasion, and he shall count the period during which he drew that pay on such last any previous occasion for increments in the stage of the time-scale equivalent to that pay.

(D) That in this case the difference in pay (anomaly) is not aroused on account of pay fixation under Finance Department Government Resolution No.

PAT-1264-463/CH, dated the 5th January, 1965 as enumerated in the condition No. 3(d) of Finance Department Government Resolution No. PGR-2470/490/CH, dated the 08th May, 1970. The pay of Shri Goswami was higher than that of the petitioner only because Shri Goswami had got the benefit of two additional increments on account of his duty performed as a stop gap arrangement on the post of Senior Clerk for more than 730 days before getting regular promotion to the post of Senior Clerk. Hence the conditions for getting the benefit of stepping up under Finance Department Government Resolution dated 08th May, 1970 do not satisfy in this case.

7. It is also respectfully submitted that the petitioner had earlier filed a Special Civil Application No. 1443 of 2009 before this Hon. High Court for the same issues. In that petition Hon. High Court had given certain directions by oral order dated 18/04/2009 of which operative part is reproduced herein below.

"Ultimately, concerned department has to consider audit objection and take an appropriate decision. It will be open for the petitioner to submit representation to the concerned respondent within a period of two weeks from today by contending that Rule 21(5) relied upon by the respondent No. 3 is not applicable. Thereafter taking into account said representation, concerned respondent to take an appropriate decision in accordance with law and merits inclusive of applicability of Rule 21(5) for which this Court has not expressed any opinion. The said decision to be taken within a period of 2 months from the receipt of the present order and communicate the same to the petitioner."

A copy of the oral order dated 18/04/2009 of Hon. High Court is annexed herein and marked as Annexure-C.

8. It is submitted that the petitioner had made his representation vide letter dated 13-10-2009 with reference to the oral order dated 18/04/2009 of Hon. High Court in SCA No. 1443 of 2009. A copy of the letter dated 13-10-2009 is annexed herein and marked as Annexure-D.

9. It is submitted that with reference to the representation dated 13-10-2009 made by the petitioner, the Government through the Information and Broadcasting Department, Sachivalaya, Gandhinagar vide letter dated 16-11-2009 had conveyed its decision to the petitioner that the petitioner is not entitled to the benefit of stepping up either under the provisions of Finance Department Government Resolution No. PGR-2470/490/CH dated 08th May, 1970 or under the provisions of Rule 21(5) of the Gujarat Civil Services Rules, 2002. A copy of the letter dated 16-11-2009 of the Information and Broadcasting Department is annexed herein and marked as Annexure-E.

10. Further it is submitted that by perusing the order of Hon. High Court dated 22.04.2014 in SCA No. 8260 of 2012 it seems that the petitioner has addressed a letter dated 20.03.2014 to the Registrar of the Hon. High Court stating that he has not received pension amount. In this regard it is respectfully submitted that the petitioner has been already paid the following retirement benefits.

Looking to the above details, it seems that the plea of the petitioner in SCA No. 8260 of 2012 is not correct."

4. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the writ applicant is entitled to the relief prayed for in this writ application.

5. The principle argument of the learned counsel appearing for the petitioner is that although his client was senior to one Shri Goswami, yet Shri Goswami was paid higher salary, and therefore, stepping up. The Government has offered an explanation that the salary of Shri Goswami was higher because he got the benefits of the two additional increments as he performed the duty as a stop gap arrangement on the post of Senior Clerk for more than 730 days before he came to be promoted on regular basis to the post of Senior Clerk. According to the Government, the necessary requirements, as provided in the Government Resolution dated 8th May 1970, are not fulfilling by the writ applicant.

6. As there is a reference of the Government Resolution dated 8th May 1970, I must look into the same:

"Pay Fixation - Removal of anomaly.

Finance Department Resolution No. PGR-2470/490/CH Dated 8th May, 1970.

RESOLUTION

Under the provisions of the Government Resolution, Finance Department No. PAY-1264/463-CH dated the 5th January, 1965 anomalous situation may arise in which a Government servant on promotion to a higher post may become entitled to get more pay than what his senior colleagues promoted earlier to such posts in the same line of promotion and in the same way may be receiving on the crucial date (date of promotion of the Junior Government Servant), and in many cases, once such an anomaly arises, it perpetuates, thereby causing considerable heartburning and dissatisfaction to the persons concerned.

2. After carefully reviewing the provisions of the aforesaid Government Resolution, Government has decided that the anomaly should be rectified by stepping up the pay of the Senior Person affected, to the level of the pay admissible to the Junior Government servant on his promotion to the higher post irrespective of the fact whether the senior Government servant has been confirmed in the higher post prior to the date of promotion of the Junior person.

3. The method of "stepping up" shall be employed subject to the following conditions, all of which must be satisfied:

(a) the Government servants concerned should belong to the same cadre and the posts in which they have been promoted should be identical and in the same cadres;

(b) The time-scale of the pay of the lower and higher posts in which they are entitled to draw should be identical.

(c) But for his promotion to post earlier the Government servant concerned would have been eligible to draw pay in the lower post, at a stage not lower than that admissible to the Junior person immediately to the latter's promotion to higher post;

(d) The anomaly is directly attributable to the provision of the Government Resolution, Finance Department No. Pay-1264/463, dated the 5th January, 1965.

4. The orders regarding the stepping up to the senior Officer's pay to the level of that of the Junior in accordance with these should be issued the B.C.S.R.51.

The next increment of the senior officer will be drawn on the date on which it would have fallen due but for the re-fixation of pay.

5. The pay of the senior person so stopped up shall not be reduced on reversion of the Junior officer nor will it be stepped up again with reference to the pay of the same officer on repromotion.

6. Government is also pleased to direct that past cases where as a result of fixation of pay under the G.S. Finance Department No. GCS-2761/1545-F dated the 28th February, 1961, as amended a Government servant happens to get less pay than what person junior to him may be getting may be referred to Government for decision under B.C.S.R. 51 on the merits of the individual cases.

7. These orders take effect from the 1st April, 1970. The pay of the Government servant, concerned should be refixed retrospectively on the basis of those orders, but if should be drawn with effect from the 1st April, 1970 without payment of arrears. The cases of Government servants who have quit service on account of retirement etc prior to the date of issue of these orders as also those of persons on leave preparatory to retirement as on the 1st April, 1970 shall not be reopened.

By order and in the name of the Governor of Gujarat,

Deputy Secretary to Government, Finance Department."

7. In *Union of India and another v. R. Swaminathan* [AIR 1997 SC 3554], the Supreme Court observed that ".....The difference in the pay of a junior and a senior in the cases before us is not a result of the application of Fundamental Rule 22(I)(a)(1). The higher pay received by a junior is on account of his earlier officiation in the higher post because of local officiating promotions which he got in the past. Because of the proviso to Rule 22 he may have earned increments in the higher pay scale of the post to which he is promoted on account of his past service and also his previous pay in the promotional post has been taken into account in fixing his pay on promotion. It is these two factors which have increased the pay of the juniors. This cannot be considered as an anomaly requiring the stepping of the pay of the seniors".

8. The very same view referred to above has been expressed by the Supreme Court in *Union of India and others v. M. Suryanarayana Rao* [, AIR 1998 SC 2992].

9. In *Union of India v. Sushilkumar Paul* [, (1998) 5 SCC 268], the Supreme Court on facts noticed that the concerned junior government servant (one Shri Mishra) had been given some ad hoc promotion. At the time of regular promotion, he was getting higher pay because of his earlier ad hoc promotion. It was for that reason that although he was a junior, yet he was receiving more pay than his senior. In view of the said facts, the Supreme Court observed that "...the anomaly for granting benefit of stepping up of pay should be directly as a result of the application of Fundamental Rule 22-C and that if a junior officer draws a higher pay in the lower post either because of advance increments or on any other account then the provision of stepping up would not apply in such a case".

10. Thus, the Government seems to be right in submitting that the difference in pay (anomaly) was not account of the pay fixation under the Finance Department's Government Resolution dated 5th January, 1965, as enumerated in the condition No. 3(d) to the Finance Department's Government Resolution dated 8th May, 1970.

11. It is the two additional increments received by Shri Goswami, which made the difference.

12. At this stage, I may also look into the decision of the Supreme Court in the case of *Gurcharan Singh Grewal v. State of Punjab Electricity Board* [, (2009) 3 SCC 94] relied upon by the learned counsel appearing for the writ applicant. The learned counsel has placed reliance on the observations made in para 17, which reads as under:

"Something may be said with regard to Mr. Chhabra's submissions about the difference in increment in the scales which the appellant 1 and Shri Shori are placed, but the same is still contrary to the settled principle of law that a senior cannot be paid lesser salary than his junior. In such circumstances, even if, there was a difference in the incremental benefits in the scale given to the appellant 1 and the scale given to Shri Shori, such anomaly should not have been allowed to continue and ought to have been rectified so that the pay of the appellant 1 was also stepped up to that of Shri Shori, as appears to have been done in the case of the appellant 2."

13. It appears that the above referred decision has been relied upon by the learned counsel to make good his case that mere difference in the incremental benefit in the scale is not the reason to justify the payment of higher salary to a junior compared to his senior. It appears that none of the judgments referred to above were considered in the case of *Gurcharan Singh Grewal* (supra), and besides the same, the factual position in the said case is also quite different compared to the case in hand.

14. Similar to Rule 22 of the Fundamental Rules, Rule 41A of the Bombay Civil Service also provides that the anomaly in pay requiring stepping up of pay should be directly as a result of pay fixation made under the said Rule. As discussed hereinabove, the writ applicant has failed to establish that the anomaly in question arose on account of the fixation of pay. On the contrary, it is established that such anomaly arose on account of Shri Goswami who performed his duty as a stop gap arrangement on the post of Senior Clerk for more than 730 days before getting regular promotion on the post of Senior Clerk.

15. In view of the aforesaid discussion and observations, this petition fails, and is hereby rejected. Rule is discharged.