

(2014) 04 GUJ CK 0118
In the Gujarat High Court

Case No : Special Civil Application No. 14521 of 2012

R.G. Bhatt

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 09-04-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2014) 3 GLH 234

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : K.M. Patel, Senior Advocate and Vaibhav A. Vyas, Advocate for the Appellant; D.M. Devnani, Asstt. Government Pleader, Advocate for the Respondent

Judgement

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Abhilasha Kumari, J.—Rule. Mr. D.M. Devnani, learned Assistant Government Pleader, waives service of notice of Rule on behalf of the respondents. The challenge in this petition preferred under Article 226 of the Constitution of India, is to the communications dated 31.05.2012 and 16.03.2011, issued by the State Government, whereby the request of the petitioner for counting the services rendered by him with effect from 03.07.1986 to 05.11.1997, with the Gujarat Water Supply and Sewerage Board ("the Board" for short), for the purpose of continuity of service, has been rejected.

2. Briefly stated, the facts of the case, as garnered from the averments made in the petition are that, the petitioner initially joined service as an Assistant Engineer in the Board, on 03.07.1986. The petitioner worked as such upto 05.11.1997. Pursuant to an advertisement issued by the Gujarat Public Service Commission, the petitioner applied and was appointed as an Executive Engineer, Class I, under the State Government after the due process of selection. He commenced working as such from 06.11.1997. The petitioner made a representation to respondent No. 2, to grant him continuity of service by

considering the period of service rendered by him under the Board, with effect from 03.07.1986 to 05.11.1997. The said representation was not accepted and the decision in this regard was communicated to the petitioner, by a communication dated 16.03.2011. According to the petitioner, the said decision is not only illegal but is arbitrary and discriminatory as well, as a similarly situated person, by the name of Shri A.D. Patel, who was also working for the Board and who joined service under the State Government, was granted the benefit of continuous service for all purposes, including leave, pension, etc.

3. Prior to the filing of the present petition, the petitioner had approached this Court by filing a petition, being Special Civil Application No. 9926 of 2011, which was disposed of, by an order dated 02.08.2011, whereby respondent No. 1 was directed to consider the factual aspects of the case and tally the case of the petitioner with that of Mr. A.D. Patel and also to consider whether there was any break in the service of the petitioner when he served under the Board and the State Government. If it was found that there was no break, the respondents were directed to explain why similar treatment was not given to the petitioner. Pursuant to the above order, the case of the petitioner was reconsidered and reexamined by respondent No. 1. However, once again, the request of the petitioner for continuity of his earlier service under the Board with the service of the State Government, came to be rejected by the impugned order dated 31.05.2012.

4. According to the petitioner, the impugned orders are illegal, arbitrary and discriminatory, as there is no reason for not according the same treatment to the petitioner as was accorded to Mr. A.D. Patel. Aggrieved by the impugned orders, the petitioner has approached this Court by filing the present petition.

5. The State Government has filed four affidavits. In the first affidavit-in-reply, affirmed on 28.02.2013, by respondent No. 2, it is stated in Paragraph 7, that the case of Mr. A.D. Patel, with whom the petitioner is claiming parity, was considered as a special case. After considering it as such, Mr. A.D. Patel was granted the benefit of continuous service, by including the services rendered by him under the Board with that under the State Government.

6. In the second affidavit, a surrejoinder affirmed on 26.06.2013 filed by respondent No. 2, it is stated that the petitioner is not entitled to the benefit of continuity of service from 03.07.1986 to 05.11.1997, as per the Government Resolution dated 24.02.1993. It is further stated in Paragraph 4, that the case of Mr. A.D. Patel cannot be treated as a precedent and the petitioner cannot claim negative equality for the relief to which he is not otherwise entitled.

7. The third affidavit, is the affidavit-in-reply, affirmed on 26.11.2013 on behalf of respondent No. 1. It is stated in Paragraph 6 that Mr. A.D. Patel was given the benefit for the service rendered by him with the Board, which was treated as continuous service for the purpose of leave and pension. While taking this decision, it was directed that this benefit be granted to Mr. A.D. Patel and rules

be framed for the future. It is further stated that all throughout, the Finance Department (respondent No. 1) has submitted that Mr. A.D. Patel was not entitled to the benefit of continuity of service. However, it was granted to him pursuant to the approval granted by the State Government, in that case. It is reiterated in Paragraph 8 of the said affidavit, that to extend the same benefit to the petitioner as was extended to Mr. A.D. Patel as a special case, would give rise to several such requests dehors the policy.

8. The last affidavit is the affidavit-in-reply filed by respondent No. 1, affirmed on 31.03.2014. It is stated in Paragraph 4 thereof, that the petitioner and another employee had represented to the State Government to the effect that they are identically situated as Mr. A.D. Patel, therefore, their services ought to be counted as continuous. The Revenue Department, being the parent Department, submitted the necessary details, with notings, to the Finance Department and the General Administration Department. Ultimately, as per the record, this proposal was forwarded to the highest Authority of the Finance Department together with all the notings and a decision was taken by the said Authority that the past services of the petitioner and the other employee cannot be counted as continuous with that rendered by them under the State Government, for the purpose of pension. It is, therefore, clear that contrary stands have been taken by the same Authority in the Finance Department in the case of the petitioner and that of Mr. A.D. Patel.

9. Mr. K.M. Patel, learned Senior Advocate with Mr. Vaibhav A. Vyas, learned Advocate for the petitioner has vehemently submitted that, as per the Government Resolution dated 24.02.1993, the services of the petitioner can be treated as continuous, as it is stated in the said Resolution that on the basis of experience, the services rendered with Boards and Corporations, prior to joining Government service, can be treated as such. According to the learned Senior Advocate, this Government Resolution did not require any clarification. However, the State Government came out with a clarification, vide Government Resolution dated 25.04.2006, wherein it is stated that the services rendered under Boards and Corporations cannot be counted as continuous with the services rendered under the State Government. It is contended that the Resolution dated 24.02.1993, governs the service conditions of the petitioner, and has to be treated as an implied condition of service as it was operating when the petitioner joined Government service. Therefore, by issuing a subsequent Resolution dated 25.04.2006, the service conditions of the petitioner cannot be altered retrospectively, and this benefit cannot be taken away.

10. In support of the above submission, learned Senior Counsel has placed reliance upon the judgment of the Supreme Court in Ex-Major N.C. Singhal Vs. Director General Armed Forces Medical Services, New Delhi and Another, .

11. It is further submitted that the petitioner joined service under the State Government in the year 1997. Prior to that, with effect from 03.07.1986 to 05.11.1997, he had worked under the Board, which is a 100% Government

funded organization, under the control of the very same Department of the State Government in which the petitioner is now serving. The State Government has, in the case of Mr. A.D. Patel, who is similarly situated as the petitioner, granted continuity of service by counting the service rendered by him under the Board, for the purpose of leave encashment, pension, etc. There is no reason why the petitioner cannot be given similar treatment and why he is singled out for discrimination.

12. On the above grounds, it is prayed that the petition be allowed.

13. The petition has been strongly opposed by Mr. D.M. Devnani, learned Assistant Government Pleader, by submitting that the Government Resolution dated 24.02.1993, itself contains a clause wherein it is clearly stipulated that the services rendered under Boards and Corporations shall not be counted for continuity of service with the services rendered under the State Government. Further, the concerned employee shall have no lien in the State Government. It is submitted that it is not correct to state that this Resolution confers continuity of service, as has been submitted by the learned Senior Advocate for the petitioner, as that is an incorrect reading of the Resolution. It is pointed out by the learned Assistant Government Pleader that Clause 5 of the said Resolution makes it very clear that there shall be no continuity of service with the service rendered under Boards and Corporations, insofar as State Government services are concerned. It was found that even though the Government Resolution dated 24.02.1993 is very clear in this regard, it was not being implemented in its true sense; therefore, it became necessary to issue a clarificatory Government Resolution dated 25.04.2006, reiterating that the services rendered under Boards and Corporations shall not be counted for continuity of service with services rendered under the State Government and such employees will have no lien in the State Government.

14. It is further submitted by the learned Assistant Government Pleader that the Government Resolution dated 25.04.2006, is merely clarificatory in nature and it cannot be said that it takes away a benefit that was conferred by the Government Resolution dated 24.02.1993, retrospectively, as argued on behalf of the petitioner. In fact, no such benefit, as claimed by the petitioner, has been conferred by the Government Resolution dated 24.02.1993, therefore, none has been taken away by the Government Resolution dated 25.04.2006.

15. Lastly, it is submitted by the learned Assistant Government Pleader that in view of the affidavits filed on behalf of the respondents, and as the case of the petitioner is not covered under the Policy of the State Government, as stipulated in the Government Resolution dated 24.02.1993, and clarified by the Government Resolution dated 25.04.2006, the petitioner cannot claim parity with Mr. A.D. Patel, whose case is also not covered by the said policy. However, Mr. A.D. Patel has been granted the benefit of continuous service by a decision taken on the file by the highest Authority in the Finance Department.

16. It is prayed by the learned Assistant Government Pleader that in view of the above, the petition deserves to be rejected.

17. In support of the submission that the petitioner cannot claim negative equality, the learned Assistant Government Pleader has placed reliance upon the following judgments:--

(a) Fuljit Kaur Vs. State of Punjab and Others, .

(b) Vishal Properties Pvt. Ltd. Vs. State of U.P. and Others, .

(c) Kastha Niwarak Grahnirman Sahakari Sanstha Maryadit, Indore Vs. President, Indore Development Authority, .

18. In the above factual background, this Court has heard learned Counsel for the respective parties, at length and considered the rival submissions.

19. By an order dated 24.03.2014, this Court had directed the respondents to clarify whether the policy, as contained in Government Resolution dated 24.02.1993, is applicable only to the petitioner and not to Mr. A.D. Patel and to indicate, why the case of Mr. A.D. Patel is so "special" that it necessitated a deviation from the prevalent policy. Pursuant to the above order, the respondents have filed a further affidavit-in-reply, affirmed on 31.03.2014, that has been referred to hereinabove. In this affidavit-in-reply, there is no explanation why the case of Mr. A.D. Patel has been considered as a "special" case. However, as directed by the Court, the learned Assistant Government Pleader has kept the original record ready for the perusal of the Court.

20. This Court has perused the original files wherein a decision regarding Mr. A.D. Patel has been taken by the highest Authority in the Finance Department, which will be referred to at an appropriate stage.

21. The primary issue for determination before this Court is, whether the petitioner is eligible for continuity of the services rendered under the Board with the services rendered under the State Government for the purpose of leave encashment, pensionary benefits under the policy formulated by the State Government vide Government Resolution dated 24.02.1993, and as clarified by Government Resolution dated 25.04.2006? The ancillary issue that arises is whether the case of the petitioner is similar to that of Mr. A.D. Patel with whom he claims parity and whether he ought to be granted similar treatment?

22. Considering the primary issue whether the petitioner is entitled for continuity of service as per the policy of the State Government, it is seen from the Government Resolution dated 24.02.1993, especially, Paragraph 5 thereof, that the petitioner is not eligible for the benefit claimed by him. It is clearly stated in the said Resolution that services rendered under Boards or Corporations would not be counted for continuity of service with the service rendered under the State Government and that such employees would have no lien in the State Government.

23. Learned Senior Advocate has submitted that this Resolution does confer continuity of service and can be taken to be an implied condition of service of the petitioner. Having perused the Government Resolution dated 24.02.1993 as a whole, from start to finish, this Court is unable to agree with the submissions advanced by the learned Senior Advocate. The said Resolution is very clear in this regard, but has been further clarified by the Government Resolution dated 25.04.2006, which reiterates the same position; namely, that persons working in Boards and Corporations cannot get the benefit of continuity of services rendered by them under such Boards and Corporations with the service rendered under the State Government. The submission that the service conditions of the petitioner have been altered by a subsequent Government dated 25.04.2006, as advanced by the learned Senior Advocate for the petitioner, cannot be accepted as the Government Resolution dated 24.02.1993, lays down the policy of the State Government and not the service conditions of the petitioner. Considering this aspect, the judgment of the Supreme Court in *Ex Major N.C. Singhal v. Director General, Armed Forces Medical Services, New Delhi and another* (supra), would not be applicable to the facts and circumstances of the present case. In the present petition, the policy of the State Government, as encapsulated in Government Resolutions dated 24.02.1993 and 25.04.2006, has not been challenged. It would, therefore, be applicable to the case of the petitioner.

24. Insofar as the ancillary issue is concerned, it is not denied by the respondents that the case of the petitioner is similar to that of Mr. A.D. Patel, who has been conferred the benefit of continuity of service rendered by him under the Board with the service rendered under the State Government. Learned Assistant Government Pleader was unable to satisfy the query of the Court, why the case of Mr. A.D. Patel was considered as a "special" case, necessitating a deviation from the prevailing policy.

25. This Court has had the benefit of perusing the original files that were made available by the learned Assistant Government Pleader. A very startling situation has emerged from the perusal of the original files. It is found that in the case of Mr. A.D. Patel, the Finance Department has very clearly opined that the benefit of continuous service cannot be conferred upon him. In spite of the same, the highest Authority in the Finance Department has passed an order dated 17.04.2003, to the effect that the service of Mr. A.D. Patel, rendered with the Board, be counted as continuous and Rules be formulated in future.

26. It may be clarified that the case of Mr. A.D. Patel is not under the scrutiny of this Court. It is only being referred to as the petitioner has claimed parity with the case of Mr. A.D. Patel. The benefit granted to Mr. A.D. Patel whether rightly or wrongly, is also not under challenge. Apart from referring to the factual position, as emerges from the original record, this Court would refrain from making any observations, save and except that, it is apparent that in the case of Mr. A.D. Patel, the benefit of continuity of service rendered under the Board has been granted dehors the prevailing policy of the State Government. The reason for this

is not known and neither is this Court inclined to enter into this arena. Suffice it to say that though, the respondents have tried to term the case of Mr. A.D. Patel as a "special case", there is nothing in the original file to substantiate this claim. The said case has not been treated as a special case, but appears to be an aberration, and not a precedent.

27. The question that now arises is whether the petitioner can legally claim parity with the case of Mr. A.D. Patel? In the considered view of this Court, the answer is in the negative. When the case of the petitioner is not covered by the policy formulated by the State Government, this Court cannot issue a direction to the respondents to confer a benefit upon him, to which he is not entitled. If a benefit has been wrongly conferred upon another, in this case upon Mr. A.D. Patel, in direct contravention of the policy of the State Government, the petitioner cannot claim similar treatment, or cry foul that he is discriminated against. The mandate of Article 14 of the Constitution of India does not extend to cases of negative equality, as per the settled position of law. Simply put, two wrongs cannot make a right and an illegality cannot be perpetuated. This view is fortified by several judgments of the Supreme Court, referred to hereinbelow.

28. In *State of Punjab & Ors. v. Col. Kuldeep Singh* (supra), relied upon by the learned Assistant Government Pleader, the Supreme Court has held as below:--

"13. The respondent cannot claim parity with *D.S. Laungia* (supra) in view of the settled legal proposition that Article 14 of the Constitution of India does not envisage for negative equality. Article 14 is not meant to perpetuate illegality or fraud. Article 14 of the Constitution has a positive concept. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or Court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a Judicial Forum, others cannot invoke the jurisdiction of the higher or superior Court for repeating or multiplying the same irregularity or illegality or for passing wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim the benefits on the basis of the wrong decision. Even otherwise Art. 14 cannot be stretched too far otherwise it would make function of the administration impossible, [vide *Coromandel Fertilizers Ltd. Vs. Union of India (UOI) and Others*, ; *Panchi Devi Vs. State of Rajasthan and Others*, ; and *Shanti Sports Club and Another Vs. Union of India (UOI) and Others*, ."

(emphasis supplied)

29. In *M/s. Vishal Properties Pvt. Ltd. v. State of U.P. & Ors.* (supra), cited by the learned Assistant Government Pleader, the Supreme Court has, after discussing several other judgments of the same Court, held that illegalities cannot be perpetuated and the appellant therein cannot claim that the benefit extended to others, though illegally, should also be extended to him, as Article 14 provides for positive equality and not negative equality.

30. In *Kastha Niwarak G.S.S. Maryadit, Indore v. President, Indore Development Authority (supra)*, relied upon by the learned Assistant Government Pleader, the Supreme Court has held that:-

"8..... The concept of equal treatment on the logic of Article 14 of the Constitution cannot be pressed into service in such cases. What the concept of equal treatment presupposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. Even if hypothetically it is accepted that a wrong has been committed in some other cases by introducing a concept of negative equality the appellant cannot strengthen its case. It has to establish strength of its case on some other basis and not by claiming negative equality. (See : *Union of India (UOI) and Another Vs. International Trading Co. and Another, .*"

(emphasis supplied)

31. In *National Institute of Technology, Jamshedpur and Others Vs. Chandra Shekhar Chaudhary, ,* the Supreme Court has held that a wrong decision by the Government would not give a right to enforce a wrong order and claim parity or equality. The relevant portion of the judgment is reproduced hereinbelow:-

"10. In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right". [See: *State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, , Vikrama Shama Shetty Vs. State of Maharashtra and Others, , South Eastern Coalfields Ltd. Vs. Prem Kumar Sharma and Others, , Ekta Shakti Foundation Vs. Govt. of NCT of Delhi, , and South Eastern Coalfields Ltd. Vs. Prem Kumar Sharma and Others,]*.

11. Merely because in some cases the norms may not have been followed that cannot be a ground to hold that departure from norms should be continued...."

(emphasis supplied)

32. The principles of law enunciated by the Supreme Court in the abovequoted judgments are squarely applicable to the factual matrix of the present case. It is a settled position of law, reiterated several times, that Article 14 of the Constitution has a positive concept and nobody can claim equality in an illegality.

33. In the present case, it clearly appears that there has been a deviation from the policy of the State Government in the case of Mr. A.D. Patel, for whatever reason, despite the contrary opinion of the Finance Department. The petitioner cannot claim parity on the ground that he should be given the benefit of a wrong decision, as that would offend the basic concept and foundation of equality and fair play. Viewed from every angle, this Court is unable to accept the case of the petitioner for reasons discussed hereinabove.

34. Before parting with the judgment, this Court is constrained to observe that from a perusal of the original file notings, it is clear that the policy of the State Government has been deviated from in the case of Mr. A.D. Patel, for reasons best known to the highest Authority in the Finance Department, who has taken a decision to confer benefits upon Mr. Patel that are in contravention of the prevalent: Government policy. It is not for this Court to question the wisdom of the said Authority who has passed the order in the case of Mr. A.D. Patel as it is not under challenge. It has been strenuously argued on behalf of the petitioner that he has been discriminated against and the treatment meted out to him is not similar to that meted out to Mr. A.D. Patel. In this context, the Court cannot ignore the fact that conferring a benefit upon Mr. A.D. Patel, dehors the policy of the State Government, has resulted in discrimination against similarly placed employees at large, who are bound to follow the prevalent policy; whereas one lone "special" employee, continues to enjoy the benefit of continuity of service, in contravention of the policy of the State Government. Such favour, wrongly shown to one employee would naturally lead to a great deal of heartburning and dissatisfaction, insofar as other employees, including the petitioner, are concerned. While it is the prerogative of the State Government to formulate policies, it is also incumbent upon it to ensure the just and fair implementation of such policies evenhandedly, in cases of all categories of employees who are governed by them. Policy and law must be implemented equally and similarly situated persons must be given the same treatment as mandated by law. No single person ought to be chosen for favourable treatment dehors the policy. This situation deserves to be brought to the notice of the State Government. To this end, the present judgment be brought to the notice of the Chief Secretary, Government of Gujarat, who may ensure that such aberrations in implementing the policy of the State Government do not recur. The Chief Secretary may consider this aspect and, if thought fit, issue necessary instructions to ensure that policies of the State Government are implemented fairly and equally, in all cases. Subject to the above observations, the petition fails and is rejected. Rule is discharged. There shall be no orders as to costs.