
(2016) 02 GUJ CK 0064

In the Gujarat High Court

Case No : Special Civil Application Nos. 833 of 2000 and 2 of 2004

R.J. Patel and Others

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 08-02-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 16, Article 16(1), Article 32

Citation : (2016) 02 GUJ CK 0064

Hon'ble Judges : Akil Abdul Hamid Kureshi, J.

Bench : Single Bench

Advocate : B.M. Mangukiya, Advocate, for the Appellant; Rakesh Patel, AGP, for the Respondent

Final Decision : Dismissed

Judgement

Akil Abdul Hamid Kureshi, J.—1. These two petitions arise in common background. They concern the question of seniority between promotees and direct recruits in Gujarat Administrative Service. For convenience, we may record facts as arising in Special Civil Application No. 833 of 2000.

2. The petitioners were recruited as Mamlatdars in the year 1977. Petitioners No. 1, 2 and 4 were promoted to the Gujarat Administrative Services, Class-I in April 1983. Likewise, petitioner Nos. 3 and 5 were promoted to the said cadre in May 1983. The private respondents were directly recruited to Gujarat Administrative Service in the year 1986. The constitution of the Gujarat Administrative Service is done under the Gujarat Administrative Services Rules, 1974 (hereinafter to be referred to as "the said Rules"). Rule 5 thereof provides for recruitment of service and envisage constitution of the cadre through promotion as well as direct recruitment. At the relevant time, rule envisaged 50% quota for promotion and 50% for direct recruitment.

3. The seniority list for the cadre was published for the first time in the year 1994. The petitioners were placed below the 12 private respondents, who were

directly recruited and posted as Deputy Collectors after the petitioners were so promoted to the said post in Gujarat Administrative Service. The seniority between the petitioners-promotees and the directly recruited private respondents came up for consideration before the High Court in a pending Special Civil Application No. 12096 of 1994. The High Court, by a common judgment dated 25.11.1997 in the said petition and other connected proceedings, directed the Government to form a High Power committee consisting of Chairmanship of the Chief Secretary. All the petitioners were allowed to lodge their claims for seniority and raise other related grievances before said Committee.

4. Pursuant to such direction of the High Court, the Committee decided the objections of rival parties under a speaking order dated 27.09.1999. Before the Committee, three sets of employees had raised their grievances. One was by the direct recruits. The other was by the promotees and, the third group comprised of the persons, who were placed in the waiting list prepared for direct recruitment. The promotees mainly argued that they were already promoted to Gujarat Administrative Service long before the direct recruits were selected and appointed in the said cadre. The decision of the Government to show them senior to the promotees was wholly unjustified and not permissible. The committee considered all these representations and disposed of the same by giving brief reasons. The request of the petitioners to grant them seniority over to the direct recruits was rejected. The petitioners, thereupon, filed the present petition, in which, they have prayed for setting aside the seniority list published by the Government on 29.11.1994. They have prayed that their names be shown senior to respondent No. 2 to 13. They have also prayed for being granted deemed date of promotion to the cadre of Additional Collector on the basis of such revised seniority.

5. Under substantially similar circumstances, other set of promotees in Gujarat Administrative Service have filed Special Civil Application No. 2 of 2004 and have, likewise, questioned their seniority position in the Gujarat Administrative Service, Class-I, being shown junior to the direct recruits.

6. Case of the petitioners is simple. They contend that they were all promoted to the post of Deputy Collector in Gujarat Administrative Service, Class-I, in the year 1983. The private respondents were directly recruited to the same cadre in the year 1986. Under no circumstances the direct recruits, therefore, can claim seniority over the petitioners-promotees. They contend that for years together, the Government of Gujarat did not undertake regular direct selection process. For a long period of time, thus, no appointments were made. They, therefore, argued that the quota rule had broken down. They would, therefore, contend that the seniority of the promotees should be reckoned from the date of their initial entry in the cadre, even if they occupied vacancies in excess of the promotee quota.

7. The Government has filed a detailed reply. In addition to relying on the Office Order dated 27.11.1999 passed by the High Power committee, it is further

highlighted that the petitioners were appointed by way of direct recruitment in cadre of Mamlatdar in Class II services. They were, thereafter, temporarily on ad-hoc basis posted as Deputy Collector in Gujarat Administrative Class-I in the year 1983 against the quota of direct recruits. On the other hand, respondent Nos. 2 to 13 were directly recruited and appointed as Deputy Collectors in Class-I post in the year 1986. The petitioners were promoted against the vacancies meant for the direct recruits. They were, therefore, not entitled for seniority from the year 1983 on the strength of continuous officiation. They had to be pushed down within the respective quota meant for promotees. It is contended that the period of fortuitous promotion cannot be considered for seniority.

Regarding the direct recruitment it is stated as under:

"4.6 It is humbly submitted that After the formation of the cadre of Gujarat Administrative Service (G.A.S.) Class I in 1974 (w.e.f. 7.11.1974) direct recruitment could not be undertaken upto first four years i.e. upto 1978 due to litigations filed by Revenue Officers who had challenged the very Constitution (formation) of Gujarat Administrative Service Cadre.

4.7 It is submitted that under the circumstances, Government could send the requisition for direct recruitment, to Gujarat Public Service Commission only in 1978. And pursuant to this requisition, the direct recruits could be appointed in 1981 after following due process of selection.

4.8 It is submitted that thereafter, in 1983 a requisition was sent to the Gujarat Public Service Commission and pursuant to that, in February 1986 direct recruitment was made. Prior to that, because of the administrative requirement, some promotions were given from the cadre of Mamlatdar Class II to the cadre of Gujarat Administrative Service Class I, in which the petitioners were also included. As mentioned in the earlier paras, petitioners were promoted against the quota of direct recruits. Thereafter, a provisional seniority list of the officers appointed to the Gujarat Administrative Service during the period from 1/1/1985 to 31/3/1989 was prepared and issued under Govt. Circular Memorandum No. GAS/1489/226/G.1 dated the 10th August, 1992. Moreover, the concerned officers were requested to send their objections. Representations against the said provisional Seniority list."

With respect to the principle applied for considering inter se seniority between promotees and direct recruits, it is stated as under:

"4.10 It is submitted that the Government had carefully and objectively examined the various points including the factual service data raised in the representations with reference to the guidelines/observations made in different judgments and the relevant rules and orders of Government. Accordingly, Government had decided to adhere to the principles/aspects which were adopted while finalising the final seniority list of officers appointed to the Gujarat Administrative Service during the period 7/11/1974 to 31/12/1984 published under Government Resolution dated 29/3/1988 except the unit year i.e. a

financial year has been taken a unit instead of a calendar year in view of the Government Resolution, General Administration Department No. SNR-1183-1222-G.2 dated 4th December, 1986. These principles/aspects are as under:

- (i) Actual number of appointments made in the Gujarat Administrative Service in a year has been taken as the number of vacancies in that year.
- (ii) Distribution of the same amongst the direct recruits and the promotees according to the ratio of recruitment rules applicable from time to time.
- (iii) Regularization of the appointments in each year as per the quota (i.e. carry forward/push down theory as per N.K. Chauhan's case)"

It is further pointed out that for the direct recruitment, for which, requisition was sent to the GPSC in the year 1978, actual recruitment was made in the year 1981 and total of 33 officers were appointed. For the requisition sent to GPSC in the year 1983, 15 persons were appointed in the year 1986. This was, for the purpose of recruitment for the direct recruitment quota which arose during 1981-1982 and 1982-83. Yet another requisition was sent to the GPSC in the year 1985 for filling up direct recruitment for the year between 1983-84 and 1985-86. Actual appointments were made in December 1989 when 78 direct recruits were appointed. On the basis of such materials, it is contended that, it cannot be stated that the quota rule had broken down.

8. On the basis of such pleadings, learned counsel Mr. Mangukia for the petitioners contended that, the petitioners were admittedly promoted to Gujarat Administrative Service Class-I in the year 1983 whereas, the private respondents were directly recruited in the year 1986. Thus, the petitioners had rendered continuous uninterrupted service for nearly 3 years before the private recruits were directly recruited and appointed. The Government could not fill up the direct recruit quota for years together thus indicating that the quota rule had broken down. In that view of the matter, benefit of continuous officiation must be given to the petitioners for the purpose of the seniority. The Government erred in showing the direct recruits senior to the petitioners.

9. On the other hand, learned AGP and learned advocate Mr. Tanna for the State as well as private respondents respectively opposed the petitions contending that the quota rule had not broken down. Selection and recruitment process had been undertaken at periodical intervals. Mere delay for sometime would not indicate breaking down of the quota rule. They point out that none of the direct recruits had been given seniority from the date anterior to his entry in the service. All the petitioners were promoted against the quota for direct recruits. To the extent, the quota in their stream was not available, their seniority had to be adjusted. This principle flows from series of decisions of Supreme Court.

10. Having heard learned counsel for the parties and having perused the materials on record, following aspects emerge:

"(I) The Gujarat Administrative Service cadre is constituted under the said Rules.

Rule 3 thereof pertains to Constitution of Gujarat Administrative Service. Sub-rule (2) thereof provides that the service would comprise of the posts belonging to the cadre of Deputy Collectors, those belonging to the cadre of Gujarat Development Service, Class-I and subject to such other posts as the State Government, from time to time, created and allowed to the service."

11. Rule 4 pertains to composition of the service and envisages those, who are already holding the post and those who may be recruited in accordance with the Rule 5. Sub rule (1) of Rule 5 envisages appointment to the service by way of promotion as well as direct recruitment in the ratio of 2:1. Rule 6 of the Rules pertains to fixation of seniority and provides that the seniority of officers of the service shall be fixed in accordance with total length of continuous service at the time of fixation of seniority subject to the maintenance of inter se seniority amongst themselves.

12. All the petitioners are promotee officers to the Gujarat Administrative Service. Their initial promotion was only ad-hoc and by way of officiation. This was so because, at the time, when they were so promoted in the year 1983 and other respective dates, the quota for promotion was not available. Thus, they were occupying the direct recruitment quota at the time of their officiating promotion.

13. All the direct recruits were selected and directly recruited to Gujarat Administrative Service, Class-I in the year 1986 against their quota. They were regularly selected and appointed after following regular selection process through GPSC.

14. When the seniority list for the Gujarat Administrative Service, Class-I, was to be prepared, the question of inter se seniority between promotees and direct recruits cropped up. The Government reckoned the date of initial appointment of the direct recruits as a relevant date for their seniority. As against that, the Government ignored the initial period of ad hoc officiation promotion of the promotees, which was during the time when they were occupying quota belonging to the direct recruits. They were pushed down in the seniority list to the extent the quota in their stream was available. It was because of this reason that the petitioners were shown as junior to the private respondents though the private respondents entered the services later than the date of ad hoc promotions of the petitioners.

15. Question is, would this breach any of the seniority principles? In this context, one may refer to the leading decisions of the Supreme Court. In case of N.K. Chauhan and ors. vs. State of Gujarat and ors. reported in , (1977) 1 SCC 309, the Supreme Court held that, later, direct recruits cannot claim "deemed" dates of appointment for seniority in service with effect from the time, according to the rota or turn, the direct recruits vacancy arose. Seniority will depend on the length of continuous officiating service and cannot be upset by later arrivals from the open market save to the extent of which any excess promotees may have to

be pushed down. It was however observed that:

"40. (e) Promotees who have been fitted into vacancies beyond their quota during the period B--the year being regarded as the unit--must suffer survival as invalid appointees acquiring new life when vacancies in their quota fall to be filled up. To that extent they will step down, rather be pushed down as against direct recruits who were later but regularly appointed within their quota."

16. In case of *A. Janardhana vs. Union of India and ors* reported in , (1983) 3 SCC 601, it was reiterated that the direct recruits, who comes into service after the promotee was already unconditionally and without reservation promoted and whose promotion is not shown to be invalid or illegal according to the relevant statutory or non-statutory rules should not be permitted by a principle of seniority to score the march over a promotee because that itself being arbitrary would be violative of Articles 14 and 16.

17. These issues once again came up before the Constitution Bench of the Supreme Court in case of *The Direct Recruit Class II Engineering Officers' Association and ors vs. State of Maharashtra and ors.* reported in , AIR 1990 SC page 1607 in which it was held and observed that, when rules are silent on the prescription of quota the same may also be prescribed by executive instructions. However, if quota is not followed for number of years inference would be that such instructions have ceased to remain operative. It was observed that:

"44. To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from

one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position."

With respect to Writ Petition No. 1327 of 1982, we further hold:

(K) That a dispute raised by an application under article 32 of the Constitution must be held to be barred by principles of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by a judgment which became final."

18. The decision of Constitution Bench in case of *The Direct Recruit Class II Engineering Officers' Association and ors vs. State of Maharashtra and ors.* (supra) was considered by the Supreme Court in case of *Keshav Chandra Joshi and ors vs. Union of India and ors* reported in , 1992 Supp (1) SCC 272. Referring to proposition (B), it was observed that, where relaxation is subject to prior fulfillment of certain conditions, which are not satisfied, the said proposition cannot be invoked. It was further observed that in order to become the member of service, officer must hold the post in substantive capacity, appointment to this post must be according to the rules and within the quota. It was further observed that the Government had to make promotions in excess of quota but that itself would not give right to the petitioners to be included in the seniority list of the Assistant Conservator of Forest. It was held that seniority has to be reckoned from the date of the initial appointment and not from confirmation but this holds good only if initial appointment is ad hoc or fortuitous. When the promotion is outside the quota, seniority has to be reckoned from the date of the vacancy within the quota rendering the previous service fortuitous. It was observed as under:

"24. It is notorious that confirmation of an employee in a substantive post would take place long years after the retirement. An employee is entitled to be considered for promotion on regular basis to a higher post if he/she is an approved probationer in the substantive lower post. An officer appointed by promotion in accordance with Rules and within quota and on declaration of probation is entitled to reckon his seniority from the date of promotion and the entire length of service, though initially temporary shall be counted for seniority. Ad hoc or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority, even if the appointee was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Article 14 read with Article 16(1) of the Constitution as unequals would be treated as equals. When promotion is outside the quota, the seniority would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota may work out hardship but it is unavoidable and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend Articles 14 and 16(1). Therefore, rule must be carefully applied in such a manner as not to violate the rules of equality assured under Article 14 of the Constitution. This Court interrupted that equity is an integral part of Article 14. So every attempt would be made to minimize, as far as possible, inequity. Disparity is inherent in the system of working out of integration of the employees drawn from different sources who have legitimate aspiration to reach higher echelons of service. A feeling of hardship to one, or heartburning to either would be avoided. At the same time, equality is accorded to all the employees."

19. These decisions were considered by a reference before the larger Bench of Supreme Court. In case of P. Sudhakar Rao and ors vs. U. Govinda Rao and ors. reported in , (2013) 8 SCC 693, it was held that to oppose the scrutiny of Article 14 of the Constitution, the seniority to the Supervisors could be reckoned only from the date, on which, they satisfied all the real and objective procedural requirements of the Andhra Pradesh Engineering Service Rules and the law laid down by the Supreme Court.

20. It can thus be seen that through series of decisions, the Supreme Court has frowned upon a direct recruits claiming seniority from the date anterior to his entry in the service on the strength of the vacancy having arisen earlier. At the same time, it is also well settled that a promotee to a service cannot reckon his seniority merely on the strength of continuous officiation if such promotion is in

excess of his quota. In other words, if, on account of interest of administration, the Government has resorted to ad hoc promotion on account of non-availability of direct selection candidates, the promotee officers cannot claim seniority for the period during which he was occupying the vacancy belonging to the quota of direct recruits. This is precisely what has happened in the present case. The case put forth by the Government is clear on factual aspects. It is pointed out that the direct recruits have been granted seniority only from the date they entered the service. The promotees, though promoted earlier, were occupying the quota of direct recruits. To the extent the quota in their promotion stream was not available, their seniority was ignored. In my opinion, the principles applied by the Government in fixation of inter se seniority of promotees and direct recruit is legal and, is supported by long line of judgments, particularly, in case of N.K. Chauhan and ors. vs. State of Gujarat and ors.(supra), The Direct Recruit Class II Engineering Officers" Association and ors vs. State of Maharashtra and ors. (supra) as explained by Keshav Chandra Joshi and ors vs. Union of India and ors (supra).

21. Only escape from such a conclusion would be, if the petitioners were to demonstrate that the quota rule had broken down, in that situation, the proposition laid down by the Supreme Court in case of The Direct Recruit Class II Engineering Officers" Association and ors vs. State of Maharashtra and ors. (supra) would apply. Here also the facts are plain. The respondents pointed out that, in three lots, direct selection process had been undertaken and actual recruitment made. We have noted such dates emerging from the affidavit-in-reply of the State Government. It shows that, such recruitment had been undertaken through the GPSC and officers in three different batches were directly recruited. This is not a case where, for years together, no direct selection could take place for whatever reason. In the public employment, particularly, where lengthy procedure is to be followed, some delay, though not desirable, is quite inevitable. Merely because for a couple of years between the three direct selection attempts, no recruitment could take place, would not be sufficient to come to a conclusion that the quota rule had hopelessly broken down. If, in the meantime, the promotee officers were promoted in excess of the promotion quota and thus occupied the quota reserved for direct recruits, surely they cannot claim benefits of such service for the purpose of seniority.

22. In the result, both the petitions are dismissed.