

(2016) 02 GUJ CK 0214

In the Gujarat High Court

Case No : Special Civil Application No. 12052 of 2000

R.P. Chaturvedi and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 26-02-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 16, Article 16 (1), Article 16(1), Article 226

Citation : (2016) 02 GUJ CK 0214

Hon'ble Judges : V.M. Pancholi, J.

Bench : Single Bench

Advocate : A.K. Clerk, Advocate, for the Appellant; Udit Mehta, AGP, for the Respondent

Final Decision : Allowed

Judgement

V.M. Pancholi, J.—1. By way of this petition, the petitioners have prayed for the following reliefs:

"25(a) declaring that the omission of the State Govt. to promote the petitioners to the post of Medical Officer Class II on completion of 5 years service as Medical Officer Class III is illegal and null and void.

(b) Directing the respondent to give a deemed date of promotion to the petitioners in the post of Medical Officer Class III and to grant to the petitioners all consequential benefits like arrears of salary, seniority etc. on that basis.

(c) xxxx

(d) xxxx"

2. The facts in nutshell are as under:

"2.1 The petitioners joined the services of the respondent-State as Medical Officer Class III pursuant to their selection by Gujarat Panchayat Services Selection Board. Petitioner Nos. 1 to 4 joined the services in the year 1978. The

petitioner No. 5 joined the services in the year 1980. It is the case of the petitioner that at the time of recruitment, recruitment rules for the post of Medical Officer Class II namely Medical Officer, Gujarat Medical Services Class II Recruitment Rules, 1977 issued vide notification dated 27.12.1977 were in force. As per the said rules, the persons who have rendered ten years services as Medical Officer Class III were eligible for promotion of Medical Officer, Class II. However, by notification dated 10.5.1981, the State Government amended the notification dated 27.12.1977 and substituted the words "five years" for the words "ten years" in the notification dated 27.12.1977. Thus, it is the case of the petitioners that as per the amended recruitment rules prevailing at the relevant time, the petitioners were eligible for promotion to the post of Medical Officer Class II on expiry of five years service in the post of Medical Officer Class III on 18.2.1982, the respondent State promoted 110 Medical Officers Class III as Medical Officer Class II on completion of five years service. The petitioners completed five years of service in the year 1983 and in the year 1985 respectively. However, they were not promoted on the post of Medical Officer Class II. The petitioner, therefore, made representations. However, promotion was not given to the petitioners. Thereafter, by an order dated 27.10.1994, the petitioners have been promoted on temporary basis on the post of Medical Officer Class II. Thus, though the petitioners were eligible for promotion in the year 1983-85, the respondents have been in fact promoted in the year 1994. The present petition is therefore filed for grant of deemed date promotion and other consequential benefits."

3. Heard learned advocate Mr. A.K. Clerk appearing for the petitioners and learned advocate Mr. Udit Mehta for the respondents.

3.1 Learned advocate Mr. Clerk mainly contended that the petitioners Nos. 1 to 4 were appointed in the year 1978 and petitioner No. 5 is appointed in the year 1980 and therefore as per the amended notification of the recruitment rules, the petitioners were eligible for promotion after completion of their five years service on the post of Medical Officer, Class III. Similarly situated persons i.e. more than 110 Medical Officers of Class III were promoted by order dated 18.2.1982 to the post of Medical Officer, Class II on completion of five years service. Even thereafter, 400 persons who are recruited were appointed on the post of Medical Officer Class II during the period between 1983-93. Thus, the posts of Medical Officer Class II were available during the aforesaid period, in spite of that the respondents have not promoted the petitioner though they were eligible and only in the year 1994, promotion was granted to the petitioner. During the aforesaid period of ten years, only 9 persons were promoted on the post of Medical Officer, Class II.

3.2 Learned advocate Mr. Clerk thereafter submitted that as per note put up by Dy. Secretary, Health and Family Welfare Department, the ratio of 1:1 between direct recruits and promotees was in operation under the rules which were notified vide notification dated 27.12.1977. Thus, the State Government was

under an obligation to promote equal number of promotees to Medical Officer, Class II during the period between 1983 and 1993. However, 400 direct recruits were appointed on the said post whereas only nine persons were promoted and therefore the decision taken by the respondents is arbitrary, irrational and unreasonable. Lastly, it has been contended that action of the respondents-authorities in directly recruiting a large number of persons and promoting only nine persons amounts to denying promotion to the petitioners which is violative of fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India and therefore this petition be allowed.

3.3 In support of the aforesaid contention, learned advocate Mr. Clerk has placed reliance upon the following decisions:

"1. Ajit Singh and others v. The State of Punjab and others, reported in , AIR 1999 SC 3471.

2. State of Mysore v. M.H. Krishna Murthy and others, reported in , (1973) 3 SCC 559.

3. Raghunath Prasad Singh v. Secretary, Home (Police) Department, Government of Bihar and others reported in , 1988(Supp)SCC 519.

4. Dr. Ms. O.Z. Hussain v. Union of India reported in , 1990(Supp) SCC 688.

5. Anvarhusen Abdulkarim Kureshi v. Registrar, High Court of Gujarat at Ahmedabad, reported in , 1994(2) GLH 504."

4. On the other hand, learned AGP Mr. Mehta has mainly contended that on upgradation of dispensaries from Class III to Class II, the petitioners did not stand automatically promoted. No ratio of promotion and direct recruitment has been prescribed in the recruitment rules for Medical Officer, Class II and, therefore, it is the sole discretion of the State Government to fill in the post of Medical Officer, Class II either by direct recruitment or by promotion. Learned AGP has fairly admitted that the petitioners become eligible on completion of five years continuous service as Medical Officer, Class III to be promoted on the post of Medical Officer Class II. However, though they were eligible, they were not entitled for such promotion and it was the discretion of the State Government to promote the petitioners. Forty persons were promoted on the post of Medical Officer Class II as per the direction given by the Tribunal on 10.4.1989. It is further contended that no person junior to the petitioners was promoted prior to the petitioners and therefore the petitioners are not entitled for deemed date of promotion on completion of their five years service on the post of Medical Officer Class III. He, therefore, submitted that the present petition be dismissed.

5. I have considered the submissions canvassed on behalf of learned advocates for the parties and also gone through the material produced on record as well as the decisions relied upon by learned advocate for the petitioners.

6. It emerges from the record that petitioners completed five years of service on

the post of Medical Officer Class III in the year 1983 and 1985 respectively. Thus, on completion of five years of service, the petitioners are having right to be considered for promotion. Right to be considered for promotion is a fundamental right as held by the Hon"ble Supreme Court in various cases. As per the Medical Officer (Gujarat Health Services) Class II Recruitment Rules of 1977, appointment to the post of Medical Officer in Gujarat Medical Services Class II shall be made either by promotion of a Medical Officer Class III who possess certain qualification prescribed in Rule II and also by direct selection. Rule II of the said rules provide as under:

"2. Appointment to the post of Medical Officer in Gujarat Medical Services Class II shall be made either.

(a) by promotion of a Medical Officer's Class III who possess.

(I) the M.B.B.S. Degree of a University recognised by the Government of Gujarat or any other qualification specified the first or second schedule to the Indian Medical Council Act 1956 or

(II) registerable qualification under schedule III of the Indian Medical Council Act 1965 or

(III) Qualifications as specified in part C and D of the schedule of Gujarat Medical Practitioners Act 1963 and has rendered meritorious services of ten years as Medical Officer either in Gujarat Medical Services Class III or under panchayats or

(b) by direct selection."

7. The word "ten years" mentioned in clause 2(a)(III) was substituted with the word "five" years by notification issued in the year 1981. The said notification is produced at page 12 of the compilation. Thus, it is not disputed that the petitioners Nos. 1 to 4 have completed five years continuous service on Class III post in December, 1983 whereas petitioner No. 5 has completed five years in the year 1985. Thus, on completion of five years of service, it was their fundamental right to be considered for promotion. It is contended on behalf of learned AGP that the person can be appointed on the post of Medical Officer, Class III by promotion or by direct selection and no ratio is prescribed for such appointment. It is true that no ratio is prescribed in the said rule for appointment by direct selection or by promotion. However, from the facts produced on record, it is clear that 400 persons were appointed by direct selection during the period 1983-93 whereas as per the affidavit of the respondent, it is admitted that only 40 persons were appointed during the said period by way of promotion, no explanation is given by the respondent for not promoting the employees who were working on the post of Medical Officer Class III. The only contention is that it was the discretion of the respondent to appoint person on the post of Medical Officer Class II by direct recruitment or by promotion. However, this Court is of the opinion that if the discretion is with the State Government, such discretion is required to be exercised in a reasonable manner and if the discretion is exercised

arbitrarily, said discretion is required to be interfered with while exercising powers under Article 226 of the Constitution of India. The respondents have specifically admitted in paragraph 10 of the affidavit which is filed on 14.6.2006 that "though the petitioners become eligible for promotion they were not considered for promotion to Medical Officer Class II." Thus, even the respondents have not considered the case of the petitioners for the promotion though admittedly they became eligible on completion of five years service.

8. The Hon"ble Supreme Court in the case of Ajit Singh (supra), held in paragraphs 22 and 27 as under:

"22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws." Article 16(1) issues a positive command that "there shall be equality of opportunity for all citizens in the matters relating to employment or appointment to any office under the State." It has been held repeatedly by this Court that sub-clause(1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said sub-clause particularizes the generality in Article 14 and identifies, in a constitutional sense "equality opportunity" in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

27. In our opinion, the above view expressed in Ashok Kumar Gupta and followed in Jagdish Lal and others cases, if it is intended to lay down that the right guaranteed to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta right from 1950."

9. The Hon"ble Supreme Court in the case of M.H. Krishna Murthy and others (supra), observed and held in paragraphs 7 and 11 as under:

"7. The question which remains for consideration by us is the one relating to the validity of a division into two classes of, members of the same service, belonging to the same cadres, for 579 purposes of a difference to be made in their

promotional chances. Learned Counsel for the State has sought to justify this difference in promotional chances by a reference to differences in the historical backgrounds and to the practice of making the distinction in promotional chances. The Mysore High Court had very rightly observed that neither a fortuitous artificial division in the past nor the unconstitutional practice of making an unjustifiable discrimination in promotional chances of Government servants belonging to what was really a single category, without any reference either to merit or seniority, or educational qualifications, could justify the differences in promotional chances. We think that it had rightly declared the purported amendments in the rules of 1959, which sought to disintegrate a service which had been integrated, to be ultra vires. Such amendments made for the purpose of justifying the illegal promotions made, in the teeth of the protection conferred by Articles 14 and 16(1) of the Constitution of India upon Indian citizens in Government service, could not be upheld.

11. The cases mentioned by the Mysore High Court i.e. *State of Punjab v. Joginder Singh* and *K.M. Bakshi v. Union of India* also show that inequality of opportunity of promotion, though not unconstitutional per se, must be justified on the strength of rational criteria co-related to the object for which the difference is made. In the case of Government servants, the object of such a difference must be presumed to be a selection of the most competent from amongst those possessing qualifications and backgrounds entitling them to be considered as members of one class. In some cases, quotas may have to be fixed "between what are different classes or sources for promotion on grounds of public policy. If, on the facts of a particular case, the classes to be considered are reality different, inequality of opportunity in promotional chances may be justifiable. On the contrary, if the facts of a particular case disclose no such rational distinction between members of what is found to be really a single class no class distinctions can be made in selecting the best. Articles 14 and 16 (1) of the Constitution must be held to be violated when members of one class are not even considered for promotion. The case before us falls, in our opinion, in the latter type of cases where the difference in promotional opportunities of those who were wrongly divided into two classes for this purpose only could not be justified on any rational grounds. Learned Counsel for the State was unable to indicate any such ground to us. We, therefore, think that the Mysore High Court rightly held that the impugned notifications were unconstitutional."

10. The Hon^{ble} Supreme Court in the case of *Raghunath Prasad Singh* (supra), observed and held in paragraph 4 as under:

"4. Before we part with the appeal, we would like to take notice of another aspect. In course of hearing of the appeal, to a query made by us, learned counsel for the appellant indicated the reason as to why the appellant was anxious to switch over to the general cadre. He relied upon two or three communications which are a part of the record where it has been indicated that there is no promotional opportunity available in the wireless organisation.

Reasonable promotional opportunities should be available in every wing of public service. That generates efficiency in service and fosters the appropriate attitude to grow for achieving excellence in service. In the absence of promotional prospects, the service is bound to degenerate and stagnation kills the desire to serve properly. We would, therefore, direct the State of Bihar to provide at least two promotional opportunities to the officers of the State Police in the wireless organisation within six months from today by appropriate amendments of Rules. In case the State of Bihar fails to comply with this direction, it should, within two months thereafter, give a fresh opportunity to personnel in the police wireless organisation to exercise option to revert to the general cadre and that benefit should be extended to everyone in the wireless organisation."

11. The Hon"ble Supreme Court in the case of Dr. Ms. O.Z. Hussain (supra), observed and held in paragraph 7 as under:

"7. This Court, has on more than one occasion, pointed out that provision for promotion increases efficiency of the public service while stagnation reduces efficiency and makes the service ineffective. Promotion is thus a normal incidence of service. There too is no justification why while similarly placed officers in other ministries would have the benefit of promotion, the non-medical "A" Group scientists in the establishment of Director General of Health Services would be deprived of such advantage. In a welfare State, it is necessary that there should be an efficient public service and, therefore, it should have been the obligation of the Ministry of Health to attend to the representations of the Council and its members and provide promotional avenue for this category of officers. It is, therefore, necessary that on the model of rules framed by the Ministry of Science and Technology with such alterations as may be necessary, appropriate rules should be framed within four months from now providing promotional avenue for the "A" category scientists in the non-medical wing of the Directorate."

12. This Court in the case of Anvarhusen Abdulkarim Kureshi (supra), observed and held in paragraphs 38 as under:

"38. However, for the reasons stated in paras 27 and 30, this Court is of the opinion that petitioner is required to be absorbed in the mainstream or in the cadre of Jr.Clerks at least from 3rd of July 1987 as from that date his post as per High Court's notification came to be included in the cadre of Jr.Clerk. In my opinion, though Notification is issued and published on 27th of November 1991, entry is substituted in the Notification dated 3rd of July 1987. Petitioner was working on the post of Telephone Operator continuously since his appointment on such post till that date, i.e. 3rd of July 1987. Therefore, directions to the respondent to absorb the petitioner in the cadre of Junior Clerk from the date post of Telephone Operator was re-designated and was merged in the common cadre of Junior Clerk if issued no injustice will be caused to any other class of employees as petitioner is even otherwise required to be absorbed in the cadre of Junior Clerk because of such re-designation. In fact, consistent with the

reasons recorded by this Court in para 27 read with para 30 of the judgment, in the opinion of this Court, a situation like the one with which the Court is faced, cannot be tolerated. A situation where an employee is asked to face the status quo for entire career to come reminds one of feudal days of serfdom when a person born as a serf or slave was to die as a slave. To say that petitioner was employed in an isolated post and therefore shall have to continue for his whole career as such is to negate the very principle underlying equality of opportunity in the matter of employment guaranteed by Article 16 of the Constitution of India. The concept of equality of opportunity is not referable only to a right to job or opportunity of getting oneself engaged in a job. But, it necessarily refers to opportunity to develop or to advance. Even denial of such opportunity to develop and advance so as to render the whole career of an employee static and lifeless would in my opinion tantamount to denying of opportunity in the matter of employment. Denial of such opportunity is denial of an incentive for personal development. Denial of realistic opportunity to move upward brings about frustration, inefficiency and ineffectual performances. Therefore, in my opinion, some relief is required to be granted to the petitioner. This Court would have considered the case of the petitioner for appropriate relief after expiry of about ten years in service but unfortunately because of the conduct of the petitioner, such relief cannot be granted to the petitioner as early as 1982-'83. In fact, the conditional offer was made to the petitioner in the year 1982 which he accepted and unfortunately failed to fulfil the condition. He was appointed as Section Writer on purely temporary and ad hoc basis with effect from 7th of July 1982 vide order dated 6th of July 1982. Such appointment was conditional. The petitioner failed to acquire the requisite speed of typing 30 words per minute within one month. He, therefore, applied vide application dated 12th of October 1982, that he should be sent back to his parent post of Telephone Operator. Thus, by his conduct, he has forgone the opportunity which was provided to him to get himself regularised. Therefore, after lapse of reasonable time from October 1982, some directions is required to be issued. In the opinion of this Court, in the facts and circumstances of this case, such direction can be issued so as to be effective from 3rd of July 1987, i.e. the date on which the post of Telephone Operator is re-designated in the cadre of Junior Clerk. Accordingly, my answer to the first question is that holder of an isolated post not belonging to any cadre is not liable to stagnate as the same post for the whole career and that consistent with the opportunity to develop and advance, promotional avenue shall have to be provided and it is expected of an employer to provide for such opportunity. As stated hereinabove, such obligations shall have to be read on the employer as flowing from Article 16 of the Constitution of India. An ideal model employer is expected to see that it is not simply hiring a hand but it is hiring or employing a whole man. A person is appointed for a whole career a career with no opportunity to advancement and development, is no career at all. Such a situation is worse than serfdom. Article 16 of the Constitution of India does not encourage serfdom or state of slavery, where an employee is simply exploited with no realistic positive promise or opportunity to move forward. This Court is,

therefore, of the opinion that consistent with the underlying spirit of Article 16 of the Constitution of India, a Court of law can direct the employer of an employee recruited on an isolated post to provide opportunity to develop and advance to holder of such post so that equality of opportunity in the matter of employment is not denied to such an employee. Consistent with this principle, I would direct the respondent to absorb regularly the petitioner in the cadre of Junior Clerk with effect from 3-7-1987 and to count his seniority in the said cadre with that date and to provide other benefits in the same cadre flowing from his absorption in the said cadre."

13. Keeping in mind the aforesaid decision rendered by the Hon"ble Supreme Court as well as this Court, if the facts of the present case are considered, it is clear that though the petitioners were eligible and entitled to get promotion in the year 1983 and 1985 respectively as observed hereinabove, on completion of five years of service on the post of Medical Officer Class III, such promotion was denied to the petitioner and even their case for promotion was not at all considered by the respondents. Only in the year 1994, such promotion was granted to the petitioners and in the meantime, admittedly only 400 persons were appointed during the period between 1983-1993 whereas more than 400 persons were appointed directly on the post of Medical Officer Class II. Thus, fundamental right of the petitioner to be considered for the promotion has been violated. The respondents have arbitrarily appointed 400 direct recruits whereas only 40 persons were promoted during the period of 10 years, there is no explanation given by the respondents for the same. As observed hereinabove, only contention is that it was the discretion of the State Government to give promotion. However, when discretion is exercised arbitrarily as observed hereinabove, the same is required to be deprecated by this Court.

14. In view of the aforesaid discussion, the petition is allowed. The respondents are hereby directed to consider the case of the petitioners for deemed date of promotion from the date on which they completed five years of service on the post of Medical Officer Class III to the post of Medical Officer Class II as per the recruitment rules, if otherwise, they are found fit for such promotion with all consequential benefits. However, it is clarified that the deemed date of promotion shall be considered only for the purpose of pay fixation, seniority and pension and the petitioners are not entitled to get the arrears for the said period. Petition is accordingly allowed and disposed of. Rule is made absolute to the aforesaid extent.