
(2013) 12 GUJ CK 0217
In the Gujarat High Court
Case No : Letters Patent Appeal No. 279 of 2013

R.R. Tiwari

APPELLANT

Vs

Director of Social Defence and Another

RESPONDENT

Date of Decision : 21-12-2013

Acts Referred:

Citation : (2014) LabIC 779

Hon'ble Judges : Bhaskar Bhattacharya, C.J.;J.B. Pardiwala, J

Bench : Division Bench

Advocate : Balkrishna Acharya, for the Appellant; Vacha Desai, Asst. Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, C.J.—This Letters Patent Appeal is at the instance of an unsuccessful writ-petitioner and is directed against order dated 6th February, 2013 (Reported in 2013 Lab IC (NOC) 412) passed by a learned single Judge of this Court in Special Civil Application No. 3285 of 1985 thereby disposing of the same by holding that the petitioner should not be entitled to claim any retiral benefit from the Government except the amount like his contribution, if any, towards General Provident Fund and Group Insurance Scheme. Being dissatisfied, the writ-petitioner has come up with the present Letters Patent Appeal.

2. In the Special Civil Application out of which the present Letters Patent Appeal arises; the petitioner had made the following prayers in paragraph 21 of the writ-application:

21. The petitioner, therefore, prays that:

(A) YOUR LORDSHIPS be pleased to is"-sue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction quashing and setting aside the decision of the respondents to terminate the services of the petitioner at annexures-C and D to the petition.

(B) YOUR LORDSHIPS be pleased to direct the respondents, their agents and servants, to give permission to the petitioner to appear in the examination to exhaust his third chance and in case of non-passing in the examination, direct them to permit the petitioner to appear in the examination on making payment of examination fees of Rs. 15/- till the petitioner passes the departmental examination and further direct the respondents to grant the petitioner all the consequential benefits with effect from the date of the petitioner passes the, departmental examination.

(C) YOUR LORDSHIPS be pleased to stay the operation and implementation of the impugned orders dated 4th June, 1985 and 6th June, 1985 at annexures-C and D respectively, to the petition and further be pleased to direct the respondents to permit the petitioner to discharge his duties as probation officer at the Government certified school Baroda as if the termination order is not passed and to permit the petitioner to draw his salary and to grant all consequential benefits accordingly pending admission, hearing and final disposal of this petition.

3. The following facts are not in dispute:--

(a) The petitioner was selected for the post of Probation Officer in the pay-scale of Rs. 425-700 by the respondents.

(b) The initial appointment of the petitioner was made by an order dated 7th December 1981 and the said appointment was initially on probation for a period of one year.

(c) Under the terms of the appointment, the petitioner was required to undergo training for a period of six weeks at the Head Office, and he was entitled to get posting if found fit in the training.

(d) The petitioner had undergone the prescribed training and on successful completion of the training, he was posted in the establishment of the respondent No. 1.

(e) Thereafter, from time to time, the petitioner was transferred from one place to another.

(f) The appointment of the petitioner as Probation Officer was made in accordance with the Recruitment Rules for Probation Officers and the Recruitment Rules for Probation Officers have been framed by the Government of Gujarat by the Department General Resolution No. Cde/1061/83584/CH dated 22nd October, 1966.

(g) According to Rule 5, a selected candidate will be required to pass the departmental examination and the examination in Gujarati and Hindi in terms of the rules prescribed by Government.

(h) According to Rule 6, a candidate appointed either by promotion or by direct selection shall have to undergo training as may be prescribed by Government.

(i) The petitioner completed one year of probation period as required under Rule 4 and he had also completed the training for six weeks, and on completion of training, since he was found fit, he was assigned work and was posted in the establishment of the respondent No. 1.

(j) As the petitioner did not satisfy the remaining condition of passing departmental examination as required under Rule 5, the petitioner was served with an order of the respondent No. 1 dated 4th June, 1985 by which the services of the petitioner were terminated on account of non-passing of the departmental examination.

(k) In compliance with the order of the respondent No. 1, the respondent No. 2 had also passed the order dated 6th June, 1985 by which the petitioner was informed that as per the order dated 4th June, 1985 passed by the first respondent, the petitioner was relieved from the service.

4. The aforesaid orders of termination are the subject-matter of the Special Civil Application out of which the present appeal arises.

5. It appears that a learned single Judge of this Court, after entertaining the above Special Civil Application, granted interim order staying the operation of the order of termination, as a result, the petitioner continued in service till he attained the age of superannuation. The respondents did not apply to the higher forum for vacation/variation of the interim order passed by the learned single Judge. Ultimately, when the Special Civil Application came up for final hearing before the learned single Judge, it was found that the petitioner had already attained the age of superannuation and in such circumstances, the learned advocate for the petitioner prayed for a direction upon the State-respondent to pay pensionary benefits to the petitioner.

6. As indicated earlier, the learned single Judge has turned down such prayer on the ground that by virtue of interim order the petitioner having completed his service-tenure before being made permanent after the probation period, he cannot get the benefit of interim order. According to the learned single Judge, the benefit of interim order is always subject to the final decision of the proceedings.

7. The questions, therefore, that arise for determination in this Letters Patent Appeal are, first, whether the learned single Judge, in the facts of the present case, was justified in disposing of the Special Civil Application by refusing the retiral benefits, and, secondly, without deciding the question whether the order of termination was legal and valid, the Special Civil Application could at all be disposed of.

8. Thus, the first question that arises for determination in this Letters Patent Appeal is whether the respondents were justified in passing the termination order on the sole ground that the petitioner could not clear the departmental examination within the period fixed by the Rules framed by the respondent No. 1.

9. In order to appreciate the aforesaid question, it will be profitable to refer to

Rules 3, 5, 11 and 13 and also Appendix "B" of the Gujarat Social Defence Departmental (Conditions of service relating to sub-service Departmental and Higher Standard Departmental Examinations) Rules, 1972 (the Rules hereafter) which are quoted below:--

3. Subject to the provision of rule 5 --

(1) Every person who is appointed prior to the appointed date to any post specified in Appendix A and to whom these rules apply shall be required to pass the Sub-service Departmental Examination within a period of 3 years from the date of his regular appointment.

(2) Every person who is appointed on or after the appointed date to any post specified in Appendix A and to whom these rules apply shall be required to pass the Sub-Service Departmental Examination within a period of one year from the date of his regular appointment.

(3) Every person who is appointed prior to the appointed date other than by promotion to any post specified in Appendix B and to whom these rules apply shall be required to pass the Higher Standard Departmental Examination within a period of 3 years from the date of his regular appointment.

(4) Every person who is appointed on or after the appointed date otherwise than by promotion to any post specified in Appendix B and to whom these rules apply shall be required to pass the Higher Standard Departmental Examination within a period of probation:

Provided that in the case of person who is appointed as a Clerk or a Senior Clerk otherwise than by promotion and who has a last chance if the period for a passing the examination as provided in sub-rule (1) or (2) as the case may be expires before the date of the holding of the relevant examination, the said period shall be deemed to have been extended until the date of the declaration of the result of the examination so held.

Provided further that if a direct recruit referred to in sub-rule (2)(4), fails to pass the examination within the period specified as aforesaid, such period shall, if his service be otherwise satisfactory, be extended to such period not exceeding three years (four years in the case of a Scheduled Caste and Scheduled Tribe candidate) in the aggregate, as may, be necessary to enable him to pass the examination in not more than three chances (four-chances in the case of a Scheduled Caste and, Scheduled Tribe candidate) in all.

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5.(1) The relevant examination required to-be passed under Rule 3 or Rule 4 shall have to be passed in not more than two or three chances, as the case may be, during the specified period:

Provided that the chances already availed of or which should have been availed of before the appointed date under the old rules shall be counted as having been

availed of under these rules:

Provided further that persons belonging to Scheduled castes and Scheduled tribes may be given one more chance which shall have" to be availed of within a period of one year from the date of the expiry of the period mentioned in sub-rule (1), (2) (3) or (4) of Rule 3 or" Rule 4.

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11. Every year Director of Social Defence shall hold twice in the year the Sub-Service Departmental Examination and the Higher. Standard Departmental Examination. The examinations shall ordinarily be held in the" months of June and December.

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13. A Government servant specified in Appendix A or B who intends to appear at any examination under these rules shall send his application for enlisting his name as a, candidate for such examination to the Director of Social Defence, Gujarat State, in the Form in Appendix "E" at least sixty days before the date of the commencement of the examination. If the applicant subsequently decides not to appear at the examination, he shall give intimation-tion thereof to the Director of Social Defence, Gujarat State, at least 30 days before the date of the commencement of the examination. In the event of any person failing to appear at the examination after having enlisted his name" as a candidate for appearing thereat but without intimating as aforesaid, he shall be deemed to have lost one chance to pass the examination:

Provided that the State Government may condone the failure on the part of the person to give intimation as aforesaid and the consequences arising there from if it is satisfied that the person had failed to give intimation within the time for reasons beyond his control.

APPENDIX "B"

(See Rule 1(3), 3, 4)

1. Superintendents of all the certified schools and institutions.
2. Chief Officers/Inspectors of C.S. and C.I./Chief Organizer/Psychiatric Social worker/Women Inspector.
3. Head Masters and Principals.
4. Probation Officers, District Probation Officers, Case Workers, Dy. Superintendents, Assistant Superintendents, Assistant Superintendent-cum-Matron, Community Organiser, Assistant Inspectors, Play room Worker.
5. Statistical Assistant, Research Assistant-cum-Statistical Assistant.
6. Sr. Clerks/Sr. Clerk-cum-Accountants/House Mother-cum-Accountant

7. Office Superintendent

8. Head Clerk

9. Sub-Auditors/Sub-Accountants 10. Record Keeper

(Emphasis supplied by us).

10. After hearing the learned counsel for the parties and after going through the provisions contained in the Rules quoted above, we find that for the post in question, the period of probation is one year and he is required to pass a departmental examination and examinations in Gujarati and Hindi according to the rules prescribed by the Government. According to the provisions contained in the prescribed rule being Rule 3(4), every person who is appointed on or after the appointed date otherwise than by promotion to any post specified in Appendix "B" and to whom the rules would apply, (the petitioner comes within the above expressions) should be required to pass higher standard departmental examination within the period of probation. The second proviso of the said rule, however, prescribes that if a direct recruit referred to in sub-rules (2), (4) fails to pass the examination within the period specified as aforesaid, such period shall, if his service be otherwise satisfactory, be extended to such period not exceeding three years (four years in the case of a Scheduled Caste and Scheduled Tribe candidate) in the aggregate, as may be necessary, to enable him to pass the examination in not more than three chances in all (four chances in all in the case of a Scheduled Caste and Scheduled Tribe candidate).

11. We find that in the case before us, after the completion of the probationary period which expired on 6th December, 1982, the petitioner's service was not terminated because his service was otherwise satisfactory as it appears from his annual confidential report which has been placed before us and he was given time of further two years till December, 1984 by extending the probation to three years in aggregate (the departmental examination is held twice a year in the months of June and December as provided in Rule 11) but he could not pass the examination and thus, his service was terminated in the month of June, 1985 after the publication of the result of the last examination held in December 1984.

12. We, thus, find that in the case before us, the employer gave the appellant the opportunity to appear at the departmental examinations by extending the period of probation to even more than three years in aggregate but the appellant could not avail of those extended period of three years probation in aggregate. We do not find any substance in the contention of the learned Advocate for the appellant that in addition to three years of probation, further chance should be given to the appellant as he could not avail of three chances. It was the appellant who did not sit in the examinations although those were held. It is not his case that in course of three years period of extended probation, even three examinations were not held. We are also not impressed by the submission of the learned Advocate for the appellant that the extended period of probation should be one year plus three additional years because the phrase "such period"

referred to in the Rule means the period of probation and according to the Rules mentioned, above, the said period should be extended to three years in aggregate and not to be extended by three years in addition to the initial one year of probation.

13. Lastly, Mr. Acharya strongly relied upon the decision of the Joint District Judge, Rajkot dated 11th January, 1989 in Civil Appeal No. 88 of 1986 in the case of Sureshkumar Laxmibshankar Bhatt v. State of Gujarat and others whereby the said appellate court allowed the appeal and decreed the suit filed by an employee being Civil Suit No. 1233 of 1984 who prayed for a declaration that the order of termination passed against him was illegal inasmuch as the order of termination was issued before the declaration of the result of passing departmental examination. It was further held therein that if the appellant therein was unable to pass the departmental examination, his further increment might be stopped but his service could not be terminated. Mr. Acharya pointed out that against the said decision, the State of Gujarat preferred a Second Appeal before this Court, being Second Appeal No. 52 of 1989, but the said Second Appeal was summarily dismissed by this High Court on 16th March, 1989 at the stage of admission under Order 41 Rule 11 of the Code of Civil Procedure. By relying upon the said decision, Mr. Acharya contends that in the case before us, at the most, the increment of the appellant could be stopped but he could not have been terminated from service.

14. After going through the order passed by this Court in the Second Appeal, we find that this Court held that no substantial question of law was involved, and hence, the appeal was summarily dismissed. It is now settled law that summary dismissal of an appeal does not mean that the judgment delivered by the first appellate court should be treated to be a precedent as if the High Court has delivered the judgment. In the facts of the said case, as no substantial question of law was involved, the High Court did not entertain the second appeal and the said decision will be binding upon the parties to the proceedings; but the said decision cannot be said to be a precedent as if a law is laid down by this Court that if a person fails to pass in the departmental examination within the period of probation as required under the concerned service rule, the period of probation would be extended beyond the extended period prescribed under the Rules.

15. On consideration of the relevant Rules, we are of the view that in a case like the present one, when passing of departmental examination is mandatory within the period of probation, and for that purpose the period of probation can be extended at the most by further two years, it necessarily follows that the period of probation should not be extended any further for the failure of the employee to pass the examination within the extended period. We, thus, find that the said decision of this Court dismissing the appeal summarily at the stage of admission hearing under Order 41, Rule 11 of the CPC cannot help Mr. Acharya's client.

16. Similarly, even the other case of The State of Gujarat v. Kokila Dinkarra Trivedi in Civil Appeal No. 52 of 1980 relied upon by Mr. Acharya is of no avail to

the appellant as in that case also the second appeal was summarily dismissed at the stage of admission.

17. We have already pointed out that by virtue of the interim order of the learned single Judge, the appellant has completed his entire service-tenure after attaining the age of superannuation. However, we find substance in the contention of Ms. Desai, the learned AGP, that the appellant being liable to be terminated in accordance with law but having remained in service by virtue of the interim order cannot get the benefit of pension as he was not even been confirmed in service. Any interim order passed in a proceeding is, it is needless to mention, subject to the final decision in the proceedings.

18. We therefore, hold that the termination of the appellant was justified and the learned single Judge in the facts of the present case rightly refused the modified prayer of grant of pension. The appeal is, thus, devoid of any substance and is consequently dismissed. No costs.