(2011) 03 GUJ CK 0038

In the Gujarat High Court

Case No : Special Civil Application No''s. 2274 to 2283 of 2008 and Spl. C.A. No. 8059 of 2009

S.A. Jafai and Others APPELLANT

Vs

State of Gujarat and Others RESPONDENT

Date of Decision : 10-03-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Gujarat Municipalities Act, 1963 — Section 104, 256, 260, 47A(2)(3)

Citation : (2011) 52 GLR 1223 : (2011) 2 GLR 1223

Hon'ble Judges : S.J. Mukhopadhaya, C.J;Anant S. Dave, J

Bench : Division Bench

Advocate : G.M. Joshi, in Spl. C.A. Nos. 2274 to 2283 of 2008 and Bipin I. Mehta, in Spl. C.A. No. 8059 of 2009, for the Appellant; Trusha K. Patel, A.G.P. for Respondent Nos. 1 and 2 and M.B. Parikh, for the Respondent

Final Decision : Allowed

Judgement

S.J. Mukhopadhaya, C.J.—In all these cases, as a common question of law is involved and similar prayer has been made, they were heard together and are disposed of by this common judgment.

2. The Regional Director of Municipalities, State of Gujarat, Rajkot, by order dated 9-10-2003 cancelled the pay and allowances as was granted to the employees of the Bagasara Municipality at par with the recommendations of the 5th Pay Commission, and thereby, the order of approval granted by order dated 9-11-1998 was set aside. Such order was passed in exercise of powers conferred u/s 260 of the Gujarat Municipalities Act, 1963. The order aforesaid having affirmed by the State of Gujarat, the employees of the Bagasara Municipality preferred these writ petitions challenging the aforesaid orders.

3. The brief facts of the case are as follows:

The State of Gujarat by its notification No. GN-2/PGR-1098-2-M dated 20-1-1998 issued the Gujarat State Service (Pay Revision) Rules, 1998 revising the scales of pay of the State employees as per the recommendations of the 5th Pay Commission.

Subsequently by Resolution dated 2-6-1998, the State Government ordered to grant pay-scales as per the recommendations of the 5th Pay Commission to the employees of the Municipalities at par with the employees of the State Government. At Clause 4 therein, the condition was imposed, English version of which is quoted hereunder:

(4) New pay-scales shall be approved only in respect of such Nagarpalikas which do not spend more than 45% of their revenue income towards establishment expenses. Further, only those Nagarpalikas which restrict their establishment expenses within the limit of 45%, shall be eligible for grant as prescribed.

The Regional Director of Municipalities, Rajkot, thereafter, issued the order dated 9-11-1998 allowing the scales of pay as recommended by the 5th Pay Commission to the employees of the Bagasara Municipality, at par with the employees of the State Government with the following conditions:

(i) The Municipality will have to obtain option from the employees of the sanctioned establishment.

(ii) The amount due on account of revision is to be made as under:

(a) 25 % of the difference and payable amount in cash without prior audit.

(b) 50% of the difference and payable amount in cash after proper verification.

(c) Balance 25% of the difference and total amount are to be deposited in the Provident Fund Account.

(iii) There will be 10% deduction in the sanctioned posts as per the policy of the State Government.

(iv) The pay-scales or the posts which have been created by the Municipality without permission of the competent authority, will not be entitled to get such benefits.

(v) The dearness allowance on the new revised pay-scales will have to be paid as per the orders of the State Government.

(vi) The sanctioned pay-scales will remain in consonance with the provisions of the Gujarat State Service (Pay Revision) Rules, 1998 and the orders as may be passed by the Government from time to time.

The employees were provided with the arrears of pay and pay in terms with the recommendations of the 5th Pay Commission, at par with the scales of pay as granted to the employees of the State.

4. From the record, it appears that a number of persons were appointed against

no post with or without the approval of the Director of Municipalities. A large number of daily-rated workmen were also engaged without following any procedure contrary to the decisions of the High Court and the Supreme Court. Therefore, the expenditure towards establishment exceeded more than 45% of the revenue generated for the Municipality. The Regional Director of Municipalities, Rajkot, therefore, by order dated 25-7-2002 withdrew the revised scale of pay as was granted as per the recommendations of the 5th Pay Commission from prospective effect.

5. At that stage, on behalf of the employees of the Bagasara Municipality, the Gujarat Pradesh Municipality Karmachari Maha Sangh filed a writ petition in Special Civil Application No. 8434 of 2002 (Gujarat Pradesh Municipality Karmachari Maha Sangh v. State of Gujarat), challenging the instructions issued by the Director of Municipalities, Gujarat State dated 23-7-2002. The learned Single Judge by order dated 3-10-2002 while held that the Director of Municipalities is vested with the powers to instruct the Municipalities to reduce the remuneration to the persons who are employed by the Municipalities as officers and servants, further held that whether the expenditure can be controlled by reduction of the staff or by reduction of the salary or by both is a matter which is to be looked into by the Director of Municipalities. In any case, the permanent employees are also being given an opportunity to make appropriate representation to the Director of Municipalities.

6. As regards the contention that there are other employees like daily wager employees whose salary bill takes the establishment cost beyond 45%, and therefore, the permanent employees should not suffer, the learned Single Judge observed that, "it is to be noted that the instructions are issued by the Director of Municipalities with the wholesome purpose that the substantial income of the Municipality should not be spent on salary of the employees, otherwise very little amount will be left for providing services to the residents in the town for whose benefit the Municipality is constituted. If the Director of Municipalities, who has been vested with the statutory powers u/s 260 of the Act, has taken the policy decision that 45% is the reasonable percentage beyond which the Municipality should not spend for the salaries and wages of its employees, no fault can be found with such decision and the said percentage, would therefore, include the salaries and wages payable to all the employees irrespective of their status whether they are permanent or temporary or daily wagers". The learned Single Judge further held that, "if the Municipality wants to make appointment of employees in excess of the sanctioned set-up or even on the sanctioned setup, the Municipality will have to obtain the permission of the Director u/s 260 of the Act regarding their appointment/remuneration and while considering such proposal, the Director of Municipalities will have to consider whether the proposal of the Municipality is reasonable or not and to what extent it is required to be accepted". So far as the illegal recruitment of daily wagers and other employees is concerned, the learned Single Judge by the aforesaid order dated 3-10-2002 in Special Civil Application No. 8434 of 2002 held as follows:

9... In case, the Municipality itself does not make such a proposal, but the permanent employees are of the view that on account of excessive and illegal recruitment of the daily wagers, the Municipality has to spend more than the required amount of salaries and wages to the daily wagers and other illegally recruited persons, it would be open to such permanent employees to submit a joint representation to the Director of Municipalities and in such a case also, the Director of Municipalities shall consider such representation after giving an opportunity of hearing to the Municipality as expeditiously as possible and preferably within six months, but the Municipality is not required to continue to pay salary as per the 5th Pay Commission pay-scales until such exercise is undertaken and final decision is taken by the Director of Municipalities.

The case was disposed of with the following observations and directions:

10. While considering the question whether the expenditure incurred by the Municipality on its staff is excessive (for which the Director has presently fixed the limit at 45% of the income of the Municipality), the Director shall consider, inter alia, the following aspects:

(i) While computing the income of the Municipality, its revenue income, octroi grant and salary grant being received by the Municipality from the Government/ Municipal Finance Board shall be taken into consideration.

(ii) While computing the salary bill of the Municipality, the salary and allowances paid/payable to the employees on the sanctioned set-up as well as other set-up and to daily wager employees shall also be taken into consideration, with the break-up of regularly appointed employees on the sanctioned set-up, those not on the sanctioned set-up but appointed with the sanction of the Director of Municipalities, and thirdly daily wagers appointed or regularized without the sanction of the Director of Municipalities.

(iii) The Director of Municipalities shall also consider the suggestion being made on behalf of the Petitioners that when the Municipality is required to pay the salary to the Chief Officer in the 5th Pay Commission pay-scales, it would be discriminatory to direct the Municipality not to pay such pay-scales to other employees. It will be open to the Director to consider the above and suggest to the Government to reimburse to the Municipality difference between the salary payable to the Chief Officer as per the 5th Pay Commission pay-scales and the salary payable to the Chief Officer as per the 4th Pay Commission pay-scales.

(iv) The directions dated 23-7-2002 of the Director for withdrawing the 5th Pay Commission pay-scales are with prospective effect and not with retrospective effect. Hence, the directions are issued only for the limited purpose of stopping the payment of salaries in the 5th Pay Commission with future effect. Hence, dismissal of the petition by this Court shall not be construed as requiring the Municipality to recover the amounts already paid to the employees in the past on the basis of 5th Pay Commission pay-scales.

(v) Even where the present income of the Municipality may not be sufficient to pay its employees salaries in the 5th Pay Commission pay-scales, the Director shall not merely stop at giving such findings, but shall take steps; at an appropriate time and stage, and after consultation with the appropriate authorities and bodies, for suggesting ways and means of increasing the income of the Municipality/ies including recommendations to the State Government for introducing and/or amending the relevant statutory rules for fixing the minimum rates of taxation u/s 104 of the Gujarat Municipalities Act, 1963.

(vi) The Director shall reserve liberty to the Municipality that after an adequate increase in the revenue income of the Municipality, it will be open to the Municipality to reconsider the matter and to submit a fresh proposal to the Director of Municipalities with full justification for enhancing the pay-scales for its employees.

7. The Regional Director of Municipalities, Rajkot, has thereafter, issued the impugned order dated 9-10-2003 setting aside the order granting scales of pay in terms with the recommendations of the 5th Pay Commission as was allowed to the employees of the Municipality, at par with the permanent employees of the State. This was affirmed by the State.

8. The Bagasara Municipality at that stage preferred a writ petition before this Court in Special Civil Application No. 23552 of 2007 (Bagasara Nagarpalika v. State of Gujarat) with a prayer to quash and set aside the decision of the Director of Municipalities and confirmation thereof by the State Government, whereby the benefits conferred of the 5th Pay Commission were withdrawn. The said case was heard by the learned Single Judge, who by order dated 29-11-2007, observed that the Government has taken the policy decision for enabling powers of the Municipality to confer the benefits in the cases where in comparison to the revenue of the Municipality, the expenses are not exceeding 45%, and in case where the expenses are exceeding 45%, such benefits are to be discontinued. Such policy of the State Government is with the object to achieve and maintain expenses of a particular limit in comparison to revenue of the Municipality and it may also add to the improvement of the efficiency amongst the staff for increasing the revenue of the Municipality so as to maintain particular level of expenses in the Municipality. The learned Single Judge by order dated 29-11-2007 refused to interfere with the order passed by the Director of Municipalities and as affirmed by the State.

9. When the present case was taken up, the learned Single Judge having noticed the aforesaid order dated 29-11-2007 passed by another learned Single Judge in Special Civil Application No. 23552 of 2007, as also the order dated 3-10-2002 passed by another learned Single Judge in Special Civil Application No. 8434 of 2002, was of the following opinion, and therefore, referred the matter to the Larger Bench on 2-7-2008:

Therefore, the impugned order is contrary to the directions of this Court contained in Para 10 of the decision dated 3-10-2002 in Special Civil Application No. 8434 of 2002 and deserves consideration by this Court.

6. In my opinion, the case of the regularly appointed employees of the Municipality on sanctioned set-up and employees appointed by the Municipality, but subsequently sanction is granted by the Director of Municipality, stand on a different footing and simply on the ground of policy decision of the State, the Petitioners cannot be deprived benefits of 5th Pay Commission, which they deserve but for the salary expenses of the employees appointed regularly by the Municipality. Therefore, considering the above facts and circumstances, this petition deserves consideration by this Court. However, the fact remains that order impugned in this petition is upheld by the learned Single Judge of this Court in a challenge made by the Respondent-Municipality, and therefore, the matter is referred to the Larger Bench.

10. The learned Counsel for the Petitioners have taken a similar stand in the present case, as was raised before the learned Single Judge that the permanent employees who are the employees in the regular establishments receiving the scales of pay cannot be made to suffer on the basis of the expenditure if incurred towards daily wagers or fixed wagers or part-time employees or other employees, who have not been appointed against regular posts or are not appointed on the approval of the Director of Municipalities. The learned Counsel would contend that the aforesaid aspect has not been considered by the Regional Director of Municipalities nor the State Government which affirmed the aforesaid order by the impugned order dated 24-7-2007.

11. On behalf of the Director of Municipalities and the State, similar stand has been taken as shown in the impugned order dated 9-10-2003 of the Regional Director of Municipalities, Rajkot. According to them, substantial income of the Municipality cannot be spent on salary of the employees. As per the policy decision of the State, it should be limited to 45% of the total income. The expenditure towards establishment being much more than 45%, the impugned decision was taken.

12. We have heard the Counsel for the parties and perused the record.

13. For determination of the issue, it is not only pertinent to notice the relevant provisions of law relating to the officers, employees and other staff of the Municipalities, but also the actual expenditure as being made by the Bagasara Municipality, as discussed hereunder.

Officers and Servants, Under the Act and Working Under the Municipality

14. u/s 47 of the Gujarat Municipalities Act, 1963, there shall be a Chief Officer appointed by the State Government and the Municipality, with the previous sanction of the Director, if so required by the State Government, can create posts of --

(i) a Municipal Engineer,

(ii) a Water Works Engineer,

(iii) a Municipal Health Officer,

(iv) a Municipal Auditor,

(v) a Municipal Education Officer, and

(vi) any other officers as may be designated by the State Government.

Under Sub-section (3) of Section 47, subject to the provisions of Section 47A, the recruitment and conditions of service of the officers referred to in Sub-sections (1) and (2) are to be filled up by the Municipalities.

Under Section 47A, the State Government can constitute Municipal Services in respect of all Municipalities comprising Chief Officers of such Municipalities and all or any other officers referred in Sub-section (2) of Section 47, and such classes, cadres and posts, (including grades and posts) and specify the initial strength of officers in each such class or cadre. The State Government may make Rules for regulating the mode of recruitment, can provide terminal benefits, compensation, pension, gratuity, etc. and the conditions of service of persons appointed to, or absorbed to, such Municipal Services.

Under Section 256 of the Municipalities Act, for the purpose of enabling the Municipalities to discharge their functions and duties, the State Government can depute the officers of All India Service and the officers of the State Service, except Class IV employees. The pay and allowances of such officers of the State posted in the Municipalities are to be paid by the Municipalities from their fund.

Under Section 260 of the Municipalities Act, the Director is empowered to prevent extravagance in the employment of establishment of the Municipality by reducing the number of persons and remuneration of such persons or person. This provision being the relevant for the present case is quoted hereunder:

260. Power of Director to prevent extravagance in the employment of establishment: If in the opinion of the Director the number of persons who are employed by a Municipality as officers or servants, or whom a Municipality proposed to employ or the remuneration assigned by the Municipality to those persons or to any particular person is excessive the Municipality shall, on the requirement of the Director reduce the number of the said persons or the remuneration of the said person or persons:

Provided that the Municipality may appeal against any such requirement to the State Government whose decision shall be conclusive.

15. From the aforesaid provisions, it will be evident that except for the following officers and servants, no other officers can be employed by any of the Municipalities:

(i) a Municipal Engineer,

(ii) a Water Works Engineer,

(iii) a Municipal Health Officer,

(iv) a Municipal Auditor,

(v) a Municipal Education Officer, and

(vi) any other officers as may be designated by the State Government.

The power of appointment to the posts aforesaid, except the posts of the Chief Officer of the Municipality, is vested with the Municipality. Their conditions of service u/s 47A shall be fixed by the State Government.

16. In view of the aforesaid provisions of law, it will be evident that except the State Government, no other officer including the Director of Municipalities is empowered to decide the conditions of service of a person appointed to, or absorbed to, the Municipal services. Therefore, the scales of pay of such Municipal employees, one of the conditions of service, can be fixed only by the State Government and not by the Regional Director of Municipalities.

Expenses as Incurred by Bagasara Municipality and Noticed by the Regional Director

17. From the impugned order dated 9-10-2003, the following facts relating to income and expenditure appear:

Rupees

(i)

Annual income of the Municipality

1,43,64,065/-

(ii)

Outstanding dues

Rs. 1,79,24,592/-

+ Rs. 32,66,400/-

(iii)

There are arrears of GEB bills on which the Municipality has to pay interest @ 14%.

2,11,90,992/-

(iv)

Demand of taxes of the Municipality during the year 2002-2003

28,67,965/-

(v)

Against the aforesaid amount, recovery is Rs. 6,57,177/- and there is only 22.91% recovery against 100%

6,57,177/-

Expenditure of the Municipality towards pay and allowances during the year 2002-2003

(i)

Pay and allowances of the employees on approved set-up

41,29,978/-

(ii)

Pay and allowances of those who are not working on approved set-up, but appointed by approval of the Director.

58,107/-

(iii)

Pay and allowances of those who are not working on approved set-up and also not appointed by approval of the Director.

29,01,293/-

(iv)

Pay and remuneration to all daily wagers

30,14,184/-

(v)

Expenditure of the fixed pay employees

Nil

(vi)

Expenses towards the contract employees

3,13,539/-

Total establishment expenses

1,04,17,100/-

Therefore, the pay and salary expenditure on the establishment for the year 2002-2003 is Rs. 72.52%.

The aforesaid facts have been noticed by the Regional Director of Municipalities, Rajkot, who exercised powers u/s 260 of the Municipalities Act and cancelled the notification by which the pay and allowances were granted to the regular employees on the establishment of the Bagasara Municipality on the basis of the recommendations of the 5th Pay Commission at par with the State Government employees.

18. The State is empowered to determine the conditions of service of Municipal employees u/s 47A. Revision of pay as per the recommendations of the 5th Pay Commission was decided by the Resolution dated 2-6-1998. Therein, the only condition imposed was restriction of expenditure of the establishment of employees within 45 % of the total income of the Municipality. Thus, it will be evident that the said restriction is limited to the salary to the employees of the Municipalities i.e. those appointed against the posts in accordance with law.

From the aforesaid Resolution dated 2-6-1998 if read with Sections 47 and 47A of the Municipalities Act, 1963, it will be clear that the same do not relate to any workman engaged on daily wage or fixed wage basis for any specific Scheme. It does not relate to any person who has not been engaged against a post as created under the Act or the persons who have been engaged on contract basis.

19. The Director has not been vested with the power to appoint or approve the appointment made under the Municipalities Act, 1963. Such power is vested with the Municipality u/s 47(2)(3) of the Act.

20. We, therefore, hold that any person engaged on daily wage or fixed wage or contract basis, for any one or other nature of job of the Municipality, do not fall within the meaning of "employees in the establishment of the Municipality". The direction of the learned Single Judge as given by earlier order dated 3-10-2002 in Special Civil Application No. 8434 of 2002, at Para 10(ii), directing the Director to consider, inter alia, the salary and allowances paid to the daily wage employees and that those not on the sanctioned posts, but appointed with the sanction of the Director of Municipalities, is contrary to the provisions of law.

21. The establishment of the Municipality has a sanctioned strength of posts created under the Act or in accordance with the Act. The appointment against non-existent posts is not only illegal being violative of Article 14 of the Constitution, but also ab-initio void. Therefore, the question of approval of the employees working against non-existent posts does not arise. Those who have appointed without following any procedure, their appointments were also illegal being violative of Articles 14 and 16 of the Constitution of India.

Therefore, in case if a persons is found to have been appointed without following the procedure against a non-existing vacancy, such appointment cannot be taken into consideration as also engagement of daily wage, fixed wage or contract worker for computing the expenditure of establishment of the employees to determine whether it is within the limit of 45% of the total income of the Municipality.

22. Section 260 of the Municipalities Act, 1963 empowers the Director of

Municipalities to reduce the number of persons or remuneration of any person or persons in the employment of the establishment. No prescription has been made there under to decide the same taking into consideration the total income of the Municipality and the expenditure incurred towards the salary of employees of the establishment of the Municipality. It is only by Resolution dated 2-6-1998, while granting the revised scale as per the recommendations of the 5th Pay Commission to the regular employees, the limitation of 45 % of total income of the Municipality has been prescribed to be determined on the basis of the expenditure of salary of regular employees of the establishment. Such power u/s 260 is subject to the following conditions:

(i) In case the number of regular employees against the post is excessive;

(ii) If the Municipality proposes to appointment excessive employee;

(iii) If the remuneration assigned by the Municipality is excessive to a group of persons or any individual.

If any of the aforesaid contingencies arises, the Director u/s 260 may pass the following orders:

(i) reduce the number of employees;

(ii) reduce the remuneration of an individual;

(iii) reduce the remuneration of a group of employees.

From the aforesaid provisions, it is clear that depending on the exigencies and circumstances, the Director is empowered u/s 260 to take recourse of one or other measures, as discussed hereinabove.

23. In the present case, the question arises whether the Director of Municipalities has applied mind while exercising power u/s 260 and before passing the impugned order.

24. The order dated 9-11-1998 issued by the Regional Director of Municipalities, Rajkot allowing benefits of revision of pay as per the recommendations of the 5th Pay Commission, as per Government Resolution dated 2-6-1998 shows that the administrative exigency towards employees'' salary was within the limit of 45% of the income of the Municipality.

25. There is nothing on record to suggest that the income of the Municipality subsequently gone down, and therefore, the administrative expenditure of salary of the establishment of the Municipality has gone beyond the limit of 45% of the total income of the Municipality. On the contrary, from the impugned order dated 9-10-2003, it will be evident that while computing the expenditure of the Municipality towards pay and allowance to the employees, not only the pay and allowances of the employees on the sanctioned set-up has been taken, which has not been correctly taken, but the Director also took into consideration the pay and allowances and wages paid to the employees of the other groups for the

financial year 2002-2003 as shown hereunder:

(i) Pay and allowances of those who are not working on approved set-up, but appointed by approval of the Director

Rs. 58,107/-

(ii) Pay and allowances of those who are not working on approved set-up and not appointed by the approval of the Director

Rs. 29,01,292/-

(iii) Pay and remuneration of daily wagers

Rs. 30,14,184/-

Total

Rs. 59,73,583/-

Therefore, it will be evident that the salary expenditure has been shown as 72.52% for the financial year 2002-2003 as wrongly inflated by adding the salary and wages of employees paid to the posts which are not in the establishment of the Municipality, and who have been appointed without any post, with approval of the Director or without approval of the Director. The wages of daily wage and contract employees who may have been engaged in terms with one or other scheme has also been reflected as expenditure of the establishment though such engagement under a scheme is not in the establishment having fixed number of posts.

26. The actual pay and allowances of the employees on the approved set-up for the financial year 2002-2003 is Rs. 41,29,978/-, which if calculated, comes to much less than 45% of the total income of the Municipality, as shown in the expenses incurred by the Municipality and the details as quoted at Para 17 hereinabove.

27. Non-application of mind on the part of the Director of the Municipalities is evident who has failed to notice the aforesaid fact, and thereby, instead of taking recourse of reducing the number of persons, who have been illegally appointed without any post or engaged in absence of any scheme, which is one of the measures which could have been taken u/s 260 of the Act, and have reduced the scale of pay of regular employees who have been appointed against sanctioned posts, and in accordance with law. Thus, without application of mind, scales of pay of regular employees have been reduced, who were rightly provided with the revised scale of pay, and thereby, given advantage to the illegal appointees in violation of Article 14 of the Constitution. Such illegal action on the part of the Director being passed without application of mind and being violative of Article 14 of the Constitution cannot be upheld, and thereby, we set aside the impugned decision dated 9-10-2003 passed by the Regional Director of Municipalities, Rajkot and the orders passed by the State approving such illegal order.

The Respondents are directed to pay the employees of regular establishment, who have been appointed against sanctioned posts, revised scale of pay as per the recommendations of the 5th Pay Commission, granted by resolution dated 2-6-1998 and given effect vide letter dated 9-11-1998 and the arrears of salary in the said scale within two months from the date of receipt/ production of a copy of this judgment. They be also provided such revised scale of pay with immediate effect. But this order shall not stand in the way of the Director of Municipalities to pass appropriate order u/s 260 with respect to those, appointed against no post or unsanctioned posts and/or not appointed by the approval of the Director. If there is any scheme specifically framed by the State Government for the Municipalities or by the Municipalities and for giving effect to the same, if daily wage or contract employees are required, they may be paid wages under the Scheme, but their salary and wages cannot be clubbed together with the salary to which the employees of regular establishment.

28. All the writ petitions are allowed with the aforesaid observations and directions, but there shall be no order as to costs.

Direct Service is permitted.

