
(1998) 01 GUJ CK 0015

In the Gujarat High Court

Case No : Special Civil Application No. 3003 of 1979

Shankerbhai G. Chaudhary

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 13-01-1998

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (1998) 1 GLR 668

Hon'ble Judges : M.R. Calla, J

Bench : Single Bench

Advocate : Haroobhai Mehta and Vasavadatta Bhatt, for the Appellant; V.B. Garania, for the Respondent

Judgement

M.R. Calla, J.—The petitioner herein was appointed as Junior Geologist, Class III on 5-11-1976 and in the seniority list of Junior Geologists, Class III, which was issued, as a tentative seniority list as on 30-6-1979, on 5-7-1979, the petitioner's name was shown at Sr. No. 6. The petitioner has raised a grievance in the matter of promotion to the Class II Post. So far as the five persons, above whom the grievance has been raised in Para 6 of the petition is concerned, it is found that all these 5 persons are at Sr. Nos. 1 to 5 in the aforesaid seniority list and the petitioner is at Sr. No. 6 and, therefore, all these five persons are senior to the petitioner. All these five persons have been appointed during the period from 21-9-1972 to 12-8-1976 whereas the petitioner has been appointed 5-11-1976. Thus, the petitioner cannot have any legal cause or grievance against the promotion of the five persons senior to him as per this list. It is not the case of the petitioner that he had challenged or seeks to challenge this seniority list on any ground whatsoever. Later on, during the pendency of this petition, a Civil Application No. 670 of 1980 was moved seeking an amendment in the petition. This Special Civil Application was filed on 20-10-1979 and during the pendency of this petition two developments took place :

(1) By an order dated 15-5-1980 the petitioner's representations against certain

adverse remarks in the petitioner's A.C.R. for the period 5-11-1976 to 31-3-1977, 1-4-1977 to 31-3-1978 and 1-4-1978 to 31-3-1979, which were conveyed vide communication dated 5-12-1979, were decided and his representation against the remarks mentioned at Item Nos. 4 to 7 for the period from 5-11-1976 to 31-3-1977 was rejected and the adverse remarks for the period from 1-4-1977 to 31-3-1978 and 1-4-1978 to 31-3-1979 were expunged.

(2) By an order dated 1-1-1980 one Shri M. M. Parikh was promoted as Geologist, Class II with the specific mention in this order dated 1-1-1980 that his promotion of Shri M. M. Parikh was till any other order is passed subject to the final decision which may be rendered in Special Civil Application No. 3003 of 1979 filed by the present petitioner Shri S. G. Chaudhary.

2. Because of the subsequent developments, as aforesaid, the amendment was sought seeking to challenge the promotion of Mr. M. M. Parikh and Mr. M. M. Parikh was also sought to be impleaded as respondent No. 3 through the amendment application, i.e., Civil Application No. 670 of 1980. The amendment, as prayed for by the petitioner, was allowed on 27-3-1980 but the learned Counsel has failed to show that this amendment was carried out so as to array Mr. M. M. Parikh as respondent No. 3 and it appears that Mr. M. M. Parikh has no notice of this Special Civil Application and with regard to the challenge to his promotion by the petitioner. Nevertheless the fact remains that as per seniority list, to which the reference has been made hereinabove, Mr. Parikh is certainly junior to the petitioner at Sr. No. 8 while the petitioner being at Sr. No. 6 is senior to Shri M. M. Parikh. It has also come on record through Para 11A that the petitioner was promoted as Geologist, Class II on 11-8-1980 vide order dated 8-8-1980 and, therefore, the petitioner's grievance is only for the purpose of antedating his promotion as Geologist, Class II to that of 1-1-1980 from that of 8/11-8-1980 and the petitioner seeks his date of promotion as 1-1-1980 because Mr. Parikh being junior to him has been promoted from 1-1-1980 and the petitioner's contention is that the adverse remarks, which were in existence against him at the time when this order dated 1-1-1980 was passed In favour of Mr. Parikh, have been later on expunged by order dated 15-5-1980. Therefore, it has been argued that had these adverse remarks, which have now become nonexistent on account of their expunction vide order dated 15-5-1980, would not have been considered against him at the time when the order dated 1-1-1980 was passed in favour of Mr. Parikh, the petitioner being senior to Mr. Parikh he would have been promoted as Geologist, Class II from 1-1-1980 instead of Mr. Parikh. It has also been pointed out on behalf of the petitioner that in fact all the adverse remarks against the petitioner have been expunged. The order dated 15-5-1980 categorically mentions about the expunction of the remarks for the period 1-4-1977 to 31-3-1978 and 1-4-1978 to 31-3-1979 and the learned Counsel has submitted with regard to the period from 5-11-1976 to 31-3-1977 i.e., the remarks at Item Nos. 4 to 7, that these remarks cannot be taken to be adverse. I have perused the communication dated 5-12-1979 at Annexure "K" page 34 with the petition and find that against Item Nos. 4 to 7

the remarks are as under :

"4. "Samanya" 6. "Samanya" 5. "Samanya" 7. "Theck"" "Samanya" would mean average or ordinary and "theck" would mean fair and, therefore, the contention of the learned Counsel for the petitioner is not without force when he says that these remarks cannot be treated or taken as adverse remarks. The remark of average or ordinary or fair cannot be treated as adverse remarks and, therefore, it is obvious that remarks at item Nos. 4 to 7 for the period 5-11-1976 to 31-3-1977, would at the most mean that his representation for overrating him has been rejected, but it can never mean that there are any adverse remarks against him or that as such remarks could be treated as adverse to him and the petitioner being senior to Mr. Parikh is certainly entitled to be considered on the basis as if there were no adverse remarks against him.

3. In the backdrop of the facts and circumstances stated hereinabove, the Court would have felt inclined to direct the respondent Nos. 1 and 2 to consider petitioner's candidature for antedating his promotion as Geologist, Class II from 1-1-1980 instead of August, 1980, but the record shows that this amendment was carried out only in part, and was not carried out so as to implead Mr. M. M. Parikh as a party respondent No. 3 and Mr. M. M. Parikh, in whose place the petition seeks to be promoted, was not given any notice and thus I find that though the Court had allowed the amendment, so as to implead Mr. Parikh as a respondent to this petition i.e. respondent No. 3, the same was not served and the amendment granted by the Court was not carried out in toto although the petition itself is pending since 1979 and the amendment was allowed by the Court way back in March 1980, i.e. more than 17 years ago. The Court's order passed on 27-3-1980 allowing the amendment was not taken to its logical end by the petitioner who himself had obtained the order. In such circumstances the Court does not find it appropriate to issue any direction straightaway without giving notice to Mr. M. M. Parikh and at this stage after the pendency of this matter for a period of nearly 20 years in this Court, the Court also does not find it expedient now to issue a notice to Mr. M. M. Parikh and keep the matter pending even now so as to lead the fate of this petition at the door steps of twenty-first century.

4. In any case, the petitioner's right to receive a fair consideration under Art. 16 of the Constitution of India in the matter of promotion cannot be thwarted and he has to be considered for promotion as on 1-1-1980 as if there were no adverse remarks against him. The petitioner is, therefore, found to be entitled for reconsideration of his candidature for promotion to the post of Geologist, Class II with effect from 1-1-1980 instead of August 1980 based on the fact of the expunction of his remarks for the period indicated in the earlier part of this order. During the course of dictation of this order the Court made a query as to whether Mr. M. M. Parikh was still in service and thereupon the learned Counsel Ms. Vasavdatta Bhatt under instructions from the petitioner present in Court informed the Court that Mr. M. M. Parikh had left the job way back in 1988 and

he is abroad. The dictation of order is, therefore, deferred for tomorrow and the learned A.G.P. Mr. Garania is directed to verify the factual position.

5. Mr. Garania, learned A.G.P. under instructions from Mr. Vanraj Vanjara, Section Officer of Narmada and Water Resources Department, Government of Gujarat, has stated that Mr. M. M. Parikh had already sought voluntary retirement from the Government service in the year 1988 while it is stated by the learned Counsel on behalf of the petitioner, under instructions from the petitioner, that Mr. Parikh is abroad and is not available in India for last many years. In any case, it is clear that Mr. M. M. Parikh is no more in the Government service since 1988. It would, therefore, now be futile to give notice to Mr. M. M. Parikh or to direct the State Government to hear Mr. Parikh (who is no more in service since 1988 and who may be abroad) before considering the petitioner's case for antedating his promotion from 1-1-1980 instead of August, 1980.

6. Now so far as the question of considering the petitioner's case for antedating the promotion to 1-1-1980 is concerned, it is very clear that the adverse remarks, which were recorded against the petitioner for the period 1-4-1977 to 31-3-1978 and 1-4-1978 to 31-3-1979, had been expunged and so far as the remarks for the period 5-11-1976 to 31-3-1977 are concerned, they cannot be treated to be adverse and, therefore, in case the petitioner's candidature for promotion to the post of Geologist, Class II is considered by the respondents by ignoring the remarks, his date of promotion as Geologist, Class II may be antedated to 1-1-1980 instead of August, 1980.

7. Accordingly, this Special Civil Application partly succeeds and the respondent Nos. 1 and 2 are directed to consider the petitioner's candidature for promotion to the post of Geologist, Class II from 1-1-1980 instead of August 1980 by ignoring the adverse materials, which had earlier been taken into consideration against him at the time when the order with regard to Mr. M. M. Parikh was passed and in case the petitioner is granted promotion from 1-1-1980 the appropriate orders may be issued in his favour and he shall be entitled to all consequential benefits. Rule is made absolute in the terms as aforesaid with no order as to costs. Direct service is permitted.

8. Petition partly allowed.