

(2017) 01 GUJ CK 0067
In the Gujarat High Court
Case No : 8859 of 2010

SHARDABEN ASHIVNKUMAR BRAHMBHATT

APPELLANT

Vs

STATE OF GUJARAT & ORS.

RESPONDENT

Date of Decision : 13-01-2017

Acts Referred:

[Bombay Primary Education Rules, 1949](#), [Rule 37](#)

Citation : (2017) 01 GUJ CK 0067

Hon'ble Judges : S.G. Shah

Bench : Single Bench

Advocate : KB PUJARA, AMITA SHAH

Final Decision : Allowed

Judgement

1. Heard learned advocate Mr. K. B. Pujara for

the petitioner and learned AGP Ms. Amita Shah for respondent - State.

2. Perused the record. Petitioner has challenged the order dated 27.07.2010 by the respondent. By such impugned order respondents have conveyed the petitioner that since she is untrained teacher, benefits of higher grade pay scales granted in her favour firstly on 21.07.1979 and on 21.07.2000 cannot be given to her and respondent has to recover the amount from the petitioner. Irrespective of any other details, petitioner was appointed on 01.07.1980 and retired on superannuation on 31.07.2005 and, therefore, at least disclosure of date of granting first higher grade pay pay scale on 21.07.1979 is improper, in as much as, the first pay grade would have been granted with effect from 21.07.1989, when petitioner has completed 9 years service.

3. Thereby, it is undisputed fact that petitioner has served with the respondents from 21.7.1980 till 31.10.2005 and during her service tenure, she has been granted higher pay scale on two occasions i.e. first on 21.7.1989 and secondly on 21.7.2000 i.e. atleast five years before her retirement and therefore, any

action on the part of the

respondents to recover any amount after retirement can certainly be assailed pursuant to the decision of the Hon"ble Supreme Court of India in the case of State of Punjab & Ors. Vs. Rafiq Massi reported in (2015)4 SCC 334; wherein the Hon"ble Supreme Court of India has in categorical terms held that recoveries by the employer would be impermissible, when

"(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

In addition to the above grounds, the two additional grounds are not relevant at present.

4. Therefore, at present, though pleading runs into number of pages, it would be appropriate to cut-short the issue before us inasmuch as now, it is undisputed fact that first order

of recovery is only on 27.7.2010 i.e. after five years of retirement of the petitioner and though respondents have taken five years for deciding such recovery and thereby, though they have paid only provisional pension to the petitioner, the fact remains that even if process of recovery might have been started in the year 2009, respondents could not complete the process by the year 2010, may be because of the fact that practically respondents are trying to find out a reason in some cases that how to recover some amount from some employees, though factually and legally, there is no reason for them to recover any such amount.

5. Thereby, even if we verify the merits of the case, instead of discussing the entire details pleaded by the petitioner, it would be appropriate to consider the defence first so as to answer that there is no substance in any such defence and thereby to allow the petition. The respondents have filed affidavit-in-reply on 14.12.2010 contending that since petitioner was appointed as Assistant Teacher in Primary School on compassionate basis, though she was not having minimum educational qualification for appointment as such at the relevant time i.e. Std.10th Pass, as the petitioner has passed

only Std.7th, she was therefore paid scale of Rs.260 - Rs.350/- fixed for

untrained teachers. Therefore, prima facie one fact is very much clear that here is the employer who has identified the petitioner as untrained teacher and all their documents reflect such identification and thereby such post and for their benefit, they have appointed her as Assistant Teacher in Primary School considering the requirement at particular time and thereby, took work or duties from her as Assistant Teacher though she was named or termed as untrained teacher. It is undisputed fact that respondents had never compromised with their service structure, since there is regular post of untrained teacher. Therefore, in any case, when the cadre of the untrained teachers are there in Government service with the respondents and thereby, prima facie they are entitled to all the benefits which are otherwise available to all other Government servants irrespective of their eligibility or qualification at the time of joining services. In simple words, it is made clear that when such teachers are appointed as untrained teachers, now, respondents cannot come forward stating that because they are untrained teachers, they are not entitled to benefits, more particularly,

when such benefits like higher pay grade is extended to all kind of employees irrespective of their post and qualification at the time of their actual appointment. The basic concept of higher pay scale is now known to all that higher pay scale is granted to a particular employee, who could not get promotion in the same scale for an number of years, which was 9 - 20 - 31 years for teachers at relevant time, whereas for the Government servants it was 9 - 18 - 27 years; which is now revised 12 - 24 years for all Government servants without any classification like teachers and others. Therefore, basically, the benefit of higher pay scale is to be extended to any Government servant or employee irrespective of his/her qualification at the time of joining services because it is to be extended as and when such employee completes 9 years at the relevant time or 12 years at present. Therefore, the entire exercise by the respondents in passing order of recovering some amount already paid to the petitioner before decades, is absolutely arbitrary, illegal, unjust and needs to be quashed and set-aside.

6.However, though the facts are quite simple and clear as aforesaid, when there is lengthy pleading on record to show that why

petitioner is not entitled to higher pay scale, at the cost of making this judgment lengthy for no valid reason, I have no option but to discuss and determine those issues, which are otherwise in favour of the petitioner only.

7.For the purpose, it is further contended in affidavit in reply by the respondent that benefit of condition No.3(32) of the Government Resolution dated 16.8.1994 is not proper or it is erroneous inasmuch as pursuant to resolution dated 29.4.1992 of the Education Department, the teachers who were not having requisite qualification at the time of their initial appointment i.e. those who were untrained teachers, the higher pay scale can be granted only if they acquire requisite qualifications subsequent to joining the service and that too

by considering 60% of their length of service. Therefore, if we consider such resolution as proper and legal, then, such untrained teachers who acquire requisite qualification, would be entitled to higher pay scale only after serving 40% period more than teachers. Even in that case, such classification certainly amounts to discrimination and therefore, it is not valid.

8. Unfortunately, though the basic scheme of higher pay scale is only total length of service and non-promotion, it seems that now respondents are relying on one another resolution dated 17.5.1976 so also 16.8.1994 when they have contended that the teachers would be eligible to get promotion on the basis of overall performance, qualification and where requisite qualification is acquired even during service tenure. Such contention is also misconceived inasmuch as though there may be a different criteria for promotion, the basic scheme of higher pay scale, as discussed herein above, is quite simple, whereby, on the contrary, the benefit is to be granted to the person, who is otherwise not promoted for couple of years and mainly because of no vacancy on promotional post.

9. Whereas, learned advocate Mr. Pujara for the petitioner has rightly pointed out that above-referred Government Resolutions are in fact contrary to the statutory provision being Rule 37 of the Bombay Primary Education Rules, 1949, wherein Sub-Rule (4)(a) provides that it shall be duty of every District School Board or authorised municipality to depute every year for training such number of untrained primary school teachers employed by or under it as the Director may require and

to make adequate provision for the purpose of its job. Therefore, it is the primary duty of the employer to extend training to such untrained teachers and thereby, if respondents have not selected or deputed the petitioner for any such training, now, they cannot take a stand that since the petitioner has not completed the training, she is not entitled to the benefit of higher pay scale. Petitioner has rightly pleaded and placed on record a list of 31 similarly situated untrained teachers, who were granted benefit of 1st and 2nd higher pay scale though they were untrained teachers. For certain information, the petitioner had to apply under the Right to Information Act and in response, she received a communication dated 28.2.2008 from the office of the District Primary Education Officer of Gandhinagar District. Such communication confirms the averment of the petitioner, which is recorded herein above regarding similarly situated 31 untrained teachers of different districts and more particularly, when the petitioner was serving in Gandhinagar District, the communication specifically confirms in item No.6 that there was no provision for the department at the relevant time to send any such untrained teachers for training.

Therefore, now, it is clear on record that it was respondents who have never sent the petitioner for training, which is to be conducted by them only and therefore, now, they cannot say that since the petitioner has not completed the training, she is not entitled to higher pay scale, which is ordered to be

withdrawn after more than 5 years of retirement by passing an order of recovery.

10. In view of above facts and circumstances, though I have perused the entire record, its discussion is not much material at this stage when the facts are very much clear on record and when there is no other contention.

11. In view of above facts and circumstances, the petition is allowed as prayed for. Thereby, the impugned order dated 27.7.2010 is hereby quashed and set-aside. Therefore, now, respondents are restrained from recovering any amount from the petitioner based upon such decision that she is not entitled to first or second higher pay scale. Therefore, it is made clear that petitioner was rightly granted first and second higher pay scale at relevant time i.e. 21.7.1989 and 21.7.2000 and thereby, now,

respondents cannot recover any amount from her. Pursuant to such decision, now, the respondents are supposed to and therefore, directed to release all consequential benefits, if any, not paid to the petitioner based upon their such exercise and activity so also the impugned order of recovery. Such difference of amount should be paid within three months from the date of receipt of writ of this order. The respondents shall also now fix the final pension within three months without fail.

12. Rule is made absolute. Direct service is permitted.