

(2008) 02 GUJ CK 0043
In the Gujarat High Court

Case No : Letters Patent Appeal No. 130 of 2002 in Special Civil Application No. 8526 of 2000 and Letters Patent Appeal No. 133 of 2002 in in Special Civil Application No. 8526 of 2000

State of Gujarat and Another

APPELLANT

Vs

Smita Paul Shastri and Others

RESPONDENT

Date of Decision : 20-02-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 — Rule 11B

Citation : (2008) 02 GUJ CK 0043

Hon'ble Judges : R.M. Doshit, J;K.M. Thaker, J

Bench : Division Bench

Advocate : M.L. Shah, Asst. Government Pleader Letters Patent Appeal No. 130 of 2002 and B.M. Mangukiya, Letters Patent Appeal No. 133 of 2002, for the Appellant; Sonal R. Shah, for Respondent Nos. 1 and 2, B.M. Mangukiya, for Respondent No. 3, M.L. Shah, AGP for Respondents Nos. 2 - 3 and N.M. Kapadia, for the Respondent

Final Decision : Allowed

Judgement

R.M. Doshit, J.—These two appeals, preferred under Clause 15 of the Letters Patent, arise from the judgment and order dated 30th August, 2001 passed by the learned Single Judge in Special Civil Application No. 8526 of 2000. The appellants in the Letters Patent Appeal No. 130 of 2002 are the State Government and the Director, Forensic Science Laboratories, the respondents No. 1 and 2 in the writ petition. The appellant in the Letters Patent Appeal No. 133 of 2002 is one Shri KM Mehta, the respondent No. 4 in the writ petition.

2. The facts leading to the present appeals, as are relevant, are as under:

The respondent No. 1 [hereinafter referred to as "the petitioner"] has been employed by the State Government. At the relevant time, she was serving as a Head Clerk in the office of appellant No. 2, the Director of Forensic Science

Laboratories, Ahmedabad (hereinafter referred to as the Director). On her being found suitable for promotion to the higher post of Office Superintendent, by Government Notification dated 21st December, 1995 she was promoted as Office Superintendent in Class-II service. By order dated 21st December, 1995 made by the Director she was posted at Forensic Science Laboratory, Surat. On 27th December, 1995 by a written application she expressed her unwillingness to accept the said promotion. The reasons she stated for her non-acceptance of promotion were personal inconvenience. Pursuant to her refusal to accept the promotion, by Government Notification dated 1st February, 1996 her promotion as Office Superintendent was cancelled. Since her refusal to accept promotion and one another Head Clerk, Mr. Joshi having refused to accept promotion, the respondent No. 4, appellant in Letters Patent Appeal No. 133 of 2002, was offered promotion as Office Superintendent. The said Shri Mehta accepted the said promotion and was promoted as Office Superintendent in June, 1996. The petitioner was once again offered promotion as Office Superintendent by Government Notification dated 29th October, 1997 and she was posted at Surat. We are informed that the said promotion was accepted by the petitioner. A provisional seniority list of Office Superintendents in the Forensic Science Laboratories as on 1st January, 2000 was published on 28th June, 2000. In the said seniority list, the respondents Nos. 3 and 4, Shri NV Mehta and Shri KM Mehta were placed above the petitioner. The petitioner lodged her objection. By order dated 26th July, 2000 her objection was rejected. The provisional seniority list was made final.

3. Feeling aggrieved, the petitioner preferred Special Civil Application No. 8526 of 2000 under Article 226 of the Constitution. The petitioner prayed, that in the final seniority list of Office Superintendents the petitioner be placed above the respondents Nos. 3 and 4. We are informed that by amendment made to the writ petition, the petitioner also challenged the promotion of the respondent No. 3 as Office Superintendent made on 10th June 1999, the date of deemed promotion as on 13th June, 1996 given to the respondent No. 3, and the promotion of the respondent No. 3 to the higher post of Administrative officer. She also claimed right to be considered and promoted as Administrative Officer and not to promote the respondent No. 4 as Administrative Officer until the petitioner was so promoted.

4. The appellants contested the petition. According to the appellants, the petitioner by refusing promotion to the post of Office Superintendent offered to her in the year 1995 forfeited her right to promotion. In view of the prevalent Government policy she was once again considered for promotion after the expiry of period of one year, and was offered promotion in the year 1997. In the meanwhile, the respondent No. 4 had been promoted as Office Superintendent in the month of June 1996. Thus, on the principle of continuous officiation, the respondent No. 4 became senior to the petitioner in the cadre of Office Superintendent. The respondent No. 3, in view of the revised seniority list in the lower cadre, was entitled to seniority over the respondent No. 4. Though he was

promoted later he was required to be placed above the respondent No. 4 and be given deemed promotion to the post of Office Superintendent as of June, 1996.

5. The learned Single Judge has considered the rival contentions, and has relied upon Rule 11-B of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967. The said Rule 11-B has been inserted in the said Rules by amendment made on 15th September, 1997. The said Rule 11-B provides for consequences of refusal to accept promotion by Government servant. It reads as under:

11-B. Refusal to accept promotion by Government Servant.

(1) Where a Government Servant refuses to accept the promotion, he shall make an application to that effect to the appointing authority showing the reasons for refusing the promotion. The appointing authority, thereafter, may promote the next eligible person and such Government servant shall lose his seniority vis-a-vis his juniors who have been promoted after his refusal.

(2) Where the Government Servant has refused to accept the promotion, his case shall not be considered for promotion for a period of one year from the date of refusal of promotion or till next vacancy arises, whichever is later. Provided that the provisions of Sub-rules (1) and (2) shall not apply where ad-hoc promotion against short term vacancy is refused by the Government Servant.

Explanation xx xx xx xx xx

xx xx xx xx xx

The learned Single Judge has held that the promotion offered to the petitioner in the year 1995 was ad-hoc and conditional. By refusing such promotion she did not lose seniority or right to promotion in accordance with Sub-rules (1) (2) of the said Rule 11-B. The learned Single Judge has held that, in view of the order dated 20.12.1995 when the promotion was given completely on ad-hoc basis, the petitioner was justified in refusing the promotion and rules provide also accordingly. The learned Single Judge further observed that It may also be stated that when the authorities consider the seniority of the petitioner they will consider the fact that originally the petitioner was offered promotion on ad-hoc basis and also on the post which is meant for Scheduled Caste and Scheduled Tribe candidates and therefore the petitioner has refused the promotion. In view of the said observation, the learned Single Judge held that It may also be stated that the petitioner has not lost her seniority by mere refusal of ad-hoc promotion. In view of the aforesaid finding, the learned Single Judge issued direction as under;

7. The respondent authorities are, therefore, directed to consider the case of the petitioner for giving promotion as she has earlier refused promotion on a ground that it was purely ad hoc promotion. However, she is already in the seniority list from 1994, the authorities will give deemed promotion to the petitioner in the light of the principles stated in this behalf. It may also be stated that respondent

No. 4 is not given promotion till today. Therefore, I am not considering case of respondent No. 4 at this stage. He will be given promotion in due course in accordance with law.

Therefore, the present Appeals.

6. The learned AGP Mrs. Shah has appeared for the State Government. She has assailed the judgment of the learned Single Judge. She has submitted that the petitioner had refused to accept promotion in the month of November, 1995 for her personal reasons. The learned Single Judge is not right in holding that the petitioner had refused to accept promotion because it was ad-hoc or because it was conditional. She has submitted that according to the above referred Rule 11-B, by refusing to accept promotion the petitioner forfeited her right to promotion for one year and also the seniority vis-a-vis persons promoted before she was promoted. The respondent No. 4 having been promoted earlier has rightly been given seniority over the petitioner. As to the respondent No. 3, in view of the revised seniority list he was required to be given seniority over the respondent No. 4 and deemed date of promotion as on the date the respondent No. 4 was so promoted. The placement of the respondents Nos. 3 and 4 in the seniority list of Office Superintendents as on 1st January, 2000 above the petitioner was in consonance with the rules made in that behalf. The petition, therefore, ought to have been dismissed in toto.

7. The Appeal is contested by Ms. Sonal Shah, the learned advocate appearing for the petitioner. She has supported the judgment of the learned Single Judge. She has submitted that the promotion offered to the petitioner in the month of December, 1995 was not only ad-hoc but was also conditional. Further, the petitioner had not refused to accept the promotion, she had only requested to keep the order of promotion in abeyance for some time. The petitioner, therefore, did not forfeit her right to promotion nor would she lose seniority on account of her later promotion. The claim for seniority made by the petitioner is fortified by the proviso to aforesaid Rule 11-B.

8. The facts, recorded hereinabove, are not disputed. It is also not in dispute that in the cadre of Head Clerk the petitioner was senior to the respondents Nos. 3 and 4. The questions that arise for consideration are whether the petitioner had refused to accept promotion offered to her in the month of December, 1995, and whether by her not accepting the said promotion she had forfeited her right of being considered for promotion for one year and the right to seniority over the persons who were promoted before she was actually promoted.

9. The Government Notification dated 20th December, 1995, the order of promotion/posting made by the Director and letter dated 27th December, 1995 of the petitioner expressing her inability to accept the promotion are on record. By its Notification dated 20th December, 1995, the State Government made ad-hoc promotion on the post of Office Superintendent, Class-II on condition that the petitioner would be reverted as and when the reserved category candidate

was made available, and if at that time other vacant post was not available. Pursuant to the said Notification, the order of promotion/posting at Surat was made by the Director. On 27th December, 1995 the petitioner expressed her inability to accept the promotion for the reasons stated in the said letter. As stated in the said letter, it was her family circumstances, the school-going children etc., which deterred the petitioner from accepting promotion. She did mention that she could not accept the promotion for the time being and that the promotion be kept in abeyance for the time being. We are, however, of the opinion that, it was her family circumstances which deterred the petitioner from accepting promotion. She did not refuse promotion because it was ad-hoc or because it was conditional. According to us, the learned Single Judge has erred in invoking the proviso to the above referred Rule 11-B. The said proviso would be attracted only in case of promotion made on a temporary vacancy. Besides, the said Rule 11-B was inserted in September, 1997, long after the petitioner refused to accept promotion in December, 1995. The same was not made retrospective in operation. The learned Single Judge has erred in invoking the said Rule 11-B and the proviso thereto.

10. In the present case, though the promotion was ad-hoc and conditional, it cannot be said that the vacancy was temporary. On the contrary as pointed out in the counter-affidavit, the vacancy had arisen on superannuation of the existing employee. In other words, the vacancy was of permanent nature. The learned Single Judge has also erred in holding that the petitioner had refused promotion because it was ad-hoc or because it was conditional. The letter dated 27th December, 1995 is explicit. There is nothing in the said letter to even remotely suggest that the petitioner had refused to accept the promotion because it was ad-hoc or conditional. The averment made in the petition to that effect is clearly an afterthought. As observed by us the petitioner had refused to accept promotion for her personal reasons. She necessarily forfeited her right to promotion for one year. As pointed out in the counter-affidavit, the petitioner had not accepted the promotion and that the post could not be kept vacant. In the circumstances, the said post was filled-in by promotion of the respondent No. 4 who was junior to the petitioner in the cadre of Head Clerk. Promotion of the respondent No. 4 as Office Superintendent made in the month of June 1996 was in accordance with the Government policy and the seniority amongst the head clerks. We are of the view that, the petitioner having refused to accept the promotion, she had no locus standi to challenge the promotion of the respondent No. 4. Further, the challenge to the promotion of the respondent No. 4 made in the month of June, 1996 in the present petition filed in the year 2000, long after the petitioner was promoted as Office Superintendent in the year 1997, requires to be rejected on the grounds of delay and laches also. As to the seniority, in absence of a specific rule to the contrary, ordinary rule of continuous officiation shall prevail. The respondent No. 4 having been promoted as Office Superintendent prior to the petitioner, the respondent No. 4 has rightly been given seniority over the petitioner. As to the respondent No. 3, it should be noted

that he was promoted as Office Superintendent on 18th June, 1999, i.e., after the respondent No. 4 and the petitioner were so promoted. As explained in the counter-affidavit, in view of the revised seniority list in lower cadres, the respondent No. 3 was entitled to seniority over the respondent No. 4. Keeping in view the date of promotion of the respondent No. 4, the respondent No. 3 has been given deemed promotion as on 13th June, 1996 and has been placed above the respondent No. 4. In absence of challenge to the revised seniority list in the lower cadre, challenge to the deemed promotion granted to the respondent No. 3 is not maintainable.

11. In absence of specific relief prayed for by the petitioner, the learned Single Judge has erred in issuing direction to the appellants to grant deemed promotion to the petitioner as Office Superintendent. We hold that the petitioner has rightly been given seniority in the cadre of Office Superintendent below the respondents No. 3 and 4. The said seniority shall govern the future promotion of the petitioner.

12. In above view of the matter, we allow both these Appeals. The impugned judgment and order dated 30th August, 2001 passed by the learned Single Judge in Special Civil Application No. 8526 of 2000 is quashed and set aside. The Special Civil Application No. 8526 of 2000 is rejected. The parties will bear their own cost.

13. The registry will maintain copy of this judgment in each Appeal.