
(1991) 10 GUJ CK 0014
In the Gujarat High Court

State of Gujarat and Others

APPELLANT

Vs

H.C. Vora and Others

RESPONDENT

Date of Decision : 04-10-1991

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226

Citation : (1992) 1 GLR 282

Hon'ble Judges : Gajendra Naraayan Ray, C.J;C.K.Thakker, J

Bench : Division Bench

Judgement

G.N. Thakker, J.—This appeal is filed by the State of Gujarat against the order passed by the learned single Judge (Coram: N.H. Bhatt, J.) dated October 4, 1978 by which the learned single Judge allowed the writ petition, i.e., Special Civil Application No. 1374 of 1973 holding that the petitioner was entitled to be considered alongwith other persons on the basis of seniority from the date when he was initially appointed as a Commuter in the office of the District Superintending Engineer, East Saurashtra, Irrigation Circle, as per order dated August 30, 1961 and the respondents (present appellants) were directed to extend all lawful benefits to the petitioner on the basis of the said date.

2. It is the case of the original petitioner in the petition that he was appointed as a temporary Commuter by the Superintending Engineer, East Saurashtra, Irrigation Circle, by an order dated August 30, 1961. The said office came to be closed from December 15, 1967 and therefore, he was declared surplus. By the order Annexure "A" to the petition, the petitioner was, therefore, appointed as a Clerk in the office of the Sales Tax Officer, Investigation Branch, Rajkot with effect from that date. The said order contains certain conditions, some of them, which are relevant for the purpose of the present controversy, read as under:

He is informed that his seniority will be counted from the date of his appointment in this Department.

He is further informed that he will have no claim of seniority on the basis of the

service rendered by him in his parent department over the persons already appointed before him in this department.

Except pay and leave, for all other matters his appointment will be treated as fresh and he will be governed by all the Rules applicable to persons who resume on this day.

3. Thus, at the time of the appointment in December 1967, the petitioner was clearly and unequivocally informed that his seniority will be counted from the date of his appointment in Sales Tax Department. He was also informed that he would have no claim of seniority on the basis of the services rendered by him in his parent department and that "except pay and allowance" all other matters of his appointment would be treated as fresh. As the learned single Judge observed "the petitioner quietly accepted the new appointment and resumed duties". It, however, appears that after a substantial period of about six years, the petitioner filed a writ petition being Special Civil Application No. 1374 of 1973 in this Court for an appropriate writ, directions and/or orders directing the respondent-State to consider the seniority of the petitioner on the basis of the total length of the service in the Government and directing them to consider his case for promotion on the basis of the said seniority and to extend all other benefits. Reliance was placed by the petitioner on a circular issued by the Government of Gujarat, G.A.D. dt. July 16, 1962 Annexure "B" to the petition. The petition was admitted and since it was found by the Court at the relevant point of time that a "wider question" had been raised in the petition some employees in the representative capacity were ordered to be joined as respondents by an order of the Court and that is how the respondent Nos. 4 to 10 were impleaded as party respondents in the main petition.

4. An Affidavit-in-reply was filed by one Shri B.K. Dalai, Deputy Commissioner of Sales Tax, Rajkot Division opposing the petition. It was contended that the petitioner was appointed as a temporary commuter with effect from September 6, 1961 in the pay scale of Rs. 46-3-85-EB-4-105. On account of the closure of the said unit, the petitioner was declared as surplus and instead of terminating his services and sending him home the Collector, Rajkot vide his order dated December 11, 1967 placed the services of the petitioner at the disposal of the Sales Tax Department for appointment as Clerk and in those circumstances the petitioner came to be appointed as a Clerk with effect from December 15, 1967 with clear and distinct condition that his previous services would not be counted for seniority in the new Department, except for the pay and leave. It was also stated that the cadre of the commuter was quite different from that of the cadre of the Clerk, that pay scales of two posts were also different and duties were also different. Therefore, services rendered in the previous Department as a commuter could not be considered while fixing the seniority as a Clerk in the Sales Tax Department. It was also contended that the petitioner was estopped from raising any such claim in view of the condition laid down in the order of appointment and in view of the acceptance of the same by the petitioner. The

State also contended that the Government Circular dt. July 16, 1962 was not applicable to the petitioner. With regard to the fixation of the seniority it was the case of the petitioner that a number of persons who were appointed after 1961 and, therefore, they should have been treated as Junior to the petitioner and yet were placed above the petitioner treating them as Senior to him which was illegal. The State, however, attempted to justify the said action on the ground that the seniority of those employees who were appointed as Clerks in the Sales Tax Department was in accordance with the principles accepted by the State Government. It was stated that the seniority list which was prepared in 1972 showing the position as on January 1, 1971 was prepared on the basis of two principles:

(1) Government has adopted pre-service Training and Examination vide No. GS/43-1167-K, dated 18-10-1967. The Scheme of pre-service examination came into force from 21-1-1963. Hence the seniority assigned to persons who have joined this Department before 21-1-1963 and not covered under the Scheme is according to the date of joining this Department.

(2) From 21-1-1963 and onwards, the seniority assigned to persons according to the passing of pre service examination.

According to the State, therefore, if any person is appointed prior to January 21, 1963, his seniority was required to be fixed on the basis of the date of the appointment and accordingly the seniority list was prepared showing the date of the appointment of those clerks and obviously in these circumstances they were shown as seniors to the petitioner who was appointed in Sales Tax Department in 1967. With regard to the second type of employees who came to be appointed from and after January 21, 1963 they were assigned seniority according to the passing of the pre-service examination. Therefore, even if they have entered the Sales Tax Department alongwith or subsequent to the petitioner in view of the Centralised Recruitment Scheme (CRS) they were required to be granted date of passing of the examination and that is how those employees were treated as senior to the petitioner. In these circumstances, according to the respondent-State the claim made by the petitioner was ill-founded and the petition was required to be dismissed.

5. The learned single Judge after considering the evidence on record came to the conclusion that the action of the respondent-authority in not considering the past service rendered by the petitioner as commuter was illegal, arbitrary and violative of his fundamental rights and, therefore, allowed the petition as stated by us hereinabove. It is against this order of the learned single Judge that the present Letters Patent Appeal is filed by the appellant-State.

6. Miss Rekha Doshit, the learned Counsel for the appellants-State has raised the following contentions :s(1) The learned single Judge was not right in invoking and pressing into service the circular Annexure "B" to the petition dated July 16, 1967 as the same is not applicable to the case of the petitioner since the

petitioner was not transferred from one Department to another Department to equivalent post or cadre.

(2) As early as in 1967 when fresh appointment order was given to the petitioner he was specifically informed that the said appointment was to be treated as fresh appointment and except pay and leave for all other matters of appointment including the seniority the past services would not be taken account and he would not claim any such seniority on the basis of the service rendered by him in his parent department, the petitioner accepted the said order and then after considerable period of about six years it was not open to the petitioner to raise a dispute of seniority and he would be estopped from doing so.

(3) The learned single Judge was not right in holding that the petitioner was required to be treated as senior to the persons appointed after September 1961 or even December 1967 in view of the principles laid down by the State Government in Centralised Recruitment Scheme and the seniority of the petitioner was accordingly fixed in accordance with those principles.

7. Miss V.P. Shah, the learned Counsel for the respondent No. 1 original petitioner on the other hand supported the order passed by the learned single Judge inter alia contending that the past services of the petitioner could not have been ignored by the Government and even if the petitioner had not raised any such objection for some time since it was his fundamental right there was no question of invoking doctrine of estoppel. According to her, the Government circular Annexure "B" was a policy decision taken by the Government and the Government cannot say that it will not implement in the case of the petitioner alone. Such an action would be arbitrary, unreasonable and violative of fundamental rights guaranteed under Articles 14 and 19 of the Constitution of India. She also submitted that in fact when the case of the petitioner was not considered for the purpose of promotion the petitioner made a number of representations and, therefore, there was no question of delay and laches. It is only when the Government did not pay any heed to the various representations made by the petitioner, that he was constrained to approach this Court by filing the petition. Miss Shah also submitted that at the instance of this Court, the petitioner even joined the employees likely to be affected as party-respondents. Even though they were served, they did not appear before the Court since they were satisfied that the claim put forward by the petitioner was well founded, none of them had also filed an appeal and therefore the findings recorded by the single Judge operate as res judicata. She has also submitted that in any case the employees appointed after December 1967 could not have been placed above the petitioner in the seniority list. Therefore, to that extent the action of the respondent is clearly arbitrary and unlawful. Finally, she submitted that the judgment of the learned single Judge is of October 1978 and considerable period of about 13 years has lapsed. Affected persons have not filed any appeal against the said judgment. The said Judgment is implemented also and in these circumstances even if this Court comes to the conclusion that the judgment

requires to be quashed and set aside, a declaration may be granted to that effect for future guidance of the Government without in any manner affecting the rights of the petitioner. She submitted that pursuant to the judgment, the petitioner has been granted selection grade and has also received certain monetary benefits and it would be very difficult if any recovery is sought to be made after such a long period.

8. We have heard both the learned Counsels at a considerable length. We are of the opinion that the appeal filed by the State Government requires to be allowed and the judgment delivered by the learned single Judge requires to be set aside.

9. The learned single Judge has allowed the petition primarily on the basis of the circular dated July 16, 1962 Annexure "B" to the petition. It is, therefore, necessary to refer to the said circular which reads as under:

Instances have come to the notice of Government in which Government servants are accepted or transferred for employment from one Department to another either at their own requests or otherwise, in such cases the question that arises for consideration is whether or not such Government servants should be allowed to count the service rendered by them in the previous Department for the purpose of seniority in the new Department. Government has examined this question and it has been decided that service rendered in one Department should count for the purpose of seniority, if they are appointed to equivalent posts or cadre in other departments irrespective of the fact whether the transfer from one Department to another was made at their own requests or otherwise.

(Emphasis supplied)

Interpreting the above resolution, the learned single Judge states as under:

It very clearly and cogently lays down that when for any reason a Government servant from one department is transferred to another department or is accepted in another department and if his fresh appointment is to an equivalent post or cadre in the other department, the services rendered by that Government servant in the earlier department should count for the purpose of seniority.

(Emphasis supplied)

Then, by interpreting the term "otherwise" liberally, the learned single Judge came to the conclusion that it was sufficiently wide to cover all cases of acceptance of an employee of one Department in another Department even on the occasion of the earlier Department being closed. In our opinion, on that interpretation and the understanding of the above resolution, the learned single Judge granted relief to the petitioner.

10. Looking to the circular extracted above, however, it clearly appears that it is in two parts. The first part can be said to be preamble or the matter which was under consideration of the Government and there both the expressions, namely, "acceptance" as well as "transfer" have been used. The Government examined

the said question but then so far as the decision of the Government is concerned, it is in the later part of the circular. In our opinion, the question which was decided was only with regard to the transferred employees and none else. The last sentence makes it abundantly clear that the seniority was to be counted of transferred employees. The said transfer may be at the request of the employee or "otherwise". In our opinion, therefore, the above circular applies only to the transferred employees and not to any other class of employees. Only thing is that such transfer may be voluntary or otherwise. It is not disputed fact that the Department wherein the petitioner was originally appointed and serving came to be closed and, therefore, he was declared as surplus. Ordinarily, his services could have been terminated and he would have been sent home. Instead, fresh appointment was given to him. Apart from the fact that he was specifically informed that the said appointment would be treated as fresh appointment and his seniority in the parent service would not be taken into account, even otherwise also this circular cannot help the petitioner. Admittedly, this cannot be said to be a transfer. When it is so, the learned single Judge has obviously committed an error of law in applying the said circular and extending the benefits thereof to the petitioner. Therefore, on this ground alone the appeal requires to be allowed and the judgment of the learned single Judge requires to be set aside.

11. Miss V.P. Shah, the learned Counsel for the petitioner submitted that this was not even the ground put forward by the State Government before the learned single Judge that the above circular is not applicable to the present petitioner in view of the fact that it was not the case of transfer. This argument, however, does not detain us. If the petitioner wants to place reliance on the circular Annexure "B" to the petition he has to satisfy the Court that it is applicable to his case. In our opinion, on the true interpretation of the circular, it does not apply to the surplus employees. The petitioner cannot take advantage of the said circular if the learned single Judge has committed an error of law, which requires to be corrected in Letters Patent Appeal.

12. Miss Doshit, the learned Counsel for the appellants submitted that even if it is assumed for the sake of argument that the said circular is applicable to the case of the petitioner, in the instant case the petitioner is not entitled to the benefits thereof inasmuch as he was not appointed to the equivalent Post or cadre For the said purpose, she drew our attention to the affidavit-in-reply filed by the Deputy Commissioner of Sales Tax, stating therein that the cadre of the commuter and the cadre of clerk are different and the pay scales as well as duties are also different. It is no doubt true that in the affidavit-in-rejoinder filed by the petitioner, it was stated that both the cadres are equivalent, pay scales are same and the common seniority of commuter and clerks is maintained. But this statement appeared for the first time in the affidavit-in-rejoinder only. Again no source of information has been disclosed and no documentary evidence has been produced by the petitioner in support of the said statement. Since, it is a question of fact, we do not want to enter into the said factual controversy in the exercise of the powers under Article 226 of the Constitution of India. Therefore,

even on that ground the petition requires to be dismissed.

13. We are also not impressed by the argument of Miss Shah that other employees who would have been treated as Junior to the petitioner were treated as Seniors. We are inclined to accept the submission of Miss Doshit that virtually the petitioner can be said to be appointed for the first time in December 1967 and with effect from that date only, his services can be taken into account. If this is the position, the employees who were appointed prior to December 15, 1967 would be treated as Senior to the petitioner and the petitioner cannot make any grievance against any of them. With regard to the persons who have been appointed in Sales Tax Department after the petitioner would ordinarily be treated as Junior to the petitioner but if they were appointed in the Government service after the Centralised Recruitment Scheme came into force and if in accordance with the provisions of the said Scheme, they are entitled to get their seniority with effect from the passing of the pre-service training examination, the petitioner cannot make any grievance. Therefore, even those persons also must be treated as Senior to the petitioner.

14. Then remains only one person, and that is one Mr. C.H. Shukla. He was appointed in Sales Tax Department alongwith the petitioner in December, 1967 and he passed pre-service training examination on October 24, 1968. In spite of that he was shown in the seniority list as on January 1, 1971 at Sr. No. 323, while the petitioner was shown at Sr. No. 368. This was clearly illegal. Miss Doshit, however, placed on record the provisional seniority list prepared by the Department on June 7, 1982 as on 1-1-1981 and pointed out that the said mistake was corrected by the Department and in the said seniority list the petitioner is shown at Sr. No. 161 while Mr. Shukla is shown at Sr. No. 205. Therefore, now even that grievance of the petitioner does not survive.

15. With regard to the submission of *res judicata* we fail to appreciate how the said doctrine could be invoked in the facts of the case. Reliance on the case of *Vora Salehbhai Giilambhai and Anr. v. State of Gujarat*, reported in (1968) IX GLR 340 is, in our opinion, not well founded. In the said case, the plaintiff filed a suit for declaration of the right to cut trees in certain survey numbers which was partly decreed, and partly dismissed with regard to the other survey numbers. The State did not file appeal against the decree passed against it. But original plaintiff filed an appeal against the decree passed against him. In the said appeal the State Government attempted to dislodge the claim of the plaintiff-appellant even in respect of the decree passed against it by the trial Court. Relying upon a number of decisions, this Court rightly held that in view of the fact that the State Government had not preferred any appeal against the decree passed by the trial Court, to that extent it would operate as *res judicata*. We are afraid the said reasoning cannot be applicable in the instant case. Here the petition filed by the petitioner is allowed by the learned single Judge and the State has filed Letters Patent Appeal against the said decision. In our opinion, therefore, the State Government can contend that the order passed by the learned single Judge is

contrary to law. For that it is not necessary that other persons also should come and file the appeal and if they do not file the appeal the decision rendered by the learned single Judge would operate *res judicata* even against the State. Therefore, even that contention has no force and we hereby reject it,

16. With regard to the last contention Miss Shah submitted that certain mandatory benefits have been granted to the petitioner consequent upon the judgment of the learned single Judge including the grant of selection grade. Miss Doshit, on the other hand, stated that the selection grade has been granted to the petitioner in due course and it has nothing to do with the judgment of the learned single Judge. In these circumstances, there is no question of any recovery to be made from the petitioner if this Letters Patent Appeal is allowed. In all probability in these circumstances, even if this appeal will be allowed, the State will not recover any amount from the petitioner. Still however, we make it clear that if pursuant to the judgment of the learned single Judge any amount is to be recovered, the same shall not be recovered from the petitioner. In the result, we pass the following order.

17. This appeal is allowed.

18. The order passed by the learned single Judge directing the State Government to consider the past services of the respondent No. 1-original petitioner from the date of his original appointment in the State Government, is hereby quashed and set aside and the seniority of the respondent No. 1-petitioner is ordered to be considered only with effect from the date of his appointment in Sales Tax Department with effect from December 15, 1967 except leave and pay as mentioned in the original order Annexure "A". In view of this order the petitioner is also not entitled to the consequential benefits as per the direction of the learned single Judge. We, however, direct that no recovery should be made from the respondent No. 1-original petitioner. The appeal is accordingly allowed with no order as to costs.