
(2017) 01 GUJ CK 0132
In the Gujarat High Court
Case No : 1161 of 2016, 20132 of 2015

UNION OF INDIA & ORS

APPELLANT

Vs

ABDUL HAMID HASANBHAI JAMADAR

RESPONDENT

Date of Decision : 17-01-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court

Citation : (2017) 01 GUJ CK 0132

Hon'ble Judges : Anant S Dave, A Y Kogje

Bench : Division Bench

Advocate : Niral R Mehta, Nikunt K Raval, M O Avira

Final Decision : Dismissed

Judgement

1. These two petitions under Articles 226/ 227 of the Constitution of India are filed by the petitioners being aggrieved by the judgment of the Central Administrative Tribunal, Ahmedabad, (for short, "CAT") in their respective petitions pertaining to grant of financial upgradation under the Assured Career Progression Scheme (for short, "ACP scheme").

2. The facts in both the petitions being similar in nature, with the consent of the parties, both the matters are taken up for hearing together.

3. In view of the similarity in the facts of the case and the questions of law in each of the petitions being identical, the facts are gathered from Special Civil Application No.1161 of 2016.

4. The facts, in brief, necessary for the purpose of decision in these petitions, are as under: 4.1 The respondent was appointed as the "Driver Engine Statistics" (DES) on 8th February 1984 and the post was re-designated as the "Fitter General Mechanic" (FGM) on 6th July 1994, but in the same scale.

4.2 The Assured Career Progression (ACP) Scheme for financial upgradation,

after 12 /24 years of regular service without any promotion, was introduced on 09.08.1999. The clarification dated 04.01.2002 was issued to cover such cases, whether the employees, who qualified in the Trade Test in first attempt after the scheme was introduced i.e. 09.08.1999, would be allowed to get the benefit of ACP from 09.08.1999 and not from the date of passing of the Trade Test, and the employees, who qualified in the Trade Test subsequent to their respective first attempt, will be allowed financial upgradation from the date of passing of the Trade Test. In the clarification, an exception was carved that such benefit will not be available to the employees who had failed or not appeared in the Trade Tests which were conducted prior to 09.08.1999.

4.3 The respondent was given first financial upgradation with effect from 05.08.2002, which according to the respondent, was the date on which the respondent had passed the Trade Test. Being aggrieved by the grant of first financial upgradation with effect from 05.08.2002, instead of granting first financial upgradation with effect from 09.08.1999 and second financial upgradation with effect from 08.01.2008, the respondent filed an Original Application No.38 of 2013 before the CAT, Ahmedabad.

4.4 The application was resisted by the department contending inter alia that the case of the respondent would be covered in the exception carved under the clarification, as prior to 09.08.1999 when the Trade Test was conducted by the department, the respondent had not at all appeared for such test, and therefore, first financial upgradation was available to the respondent only with effect from the date on which he cleared the Trade Test i.e. 05.08.2002.

4.5 The CAT, Ahmedabad, by its order dated 26.06.2015, allowed the application and directed the department to grant first and second financial upgradation under the ACP Scheme with effect from 09.08.1999 and 18.03.2007 respectively to the respondents.

5. It is this order which is the subject-matter of challenge in the present petitions filed by the Union of India.

6. Heard learned advocates Mr.Niral Mehta and Mr. Nikunt Raval, for the petitioners in Special Civil Applications Nos.1161 of 2016 and 20132 of 2015 respectively and learned advocate Mr.M.O.Avira for the respondents in both the petitions.

7. Learned advocates for the petitioners have contended that the benefit under the ACP Scheme is meant for financial upgradation to the employees who are deprived of promotion on account of lack of promotional avenue, however, grant of benefit under the Scheme is not automatic upon completion of the required period of service, but would be subjected to screening by the Departmental Screening Committee constituted under the Scheme. The Scheme envisages the composition of Screening Committee on the same line as all the Departmental Promotion Committee (DPC) prescribed under the relevant recruitment / service rules. Referring to the conditions for grant of benefit under the ACP Scheme, the

learned advocate drew attention to relevant Clauses of the scheme.

8. The learned advocate for the petitioners, thereafter, drew attention to the clarification issued by the Ministry of Defence, which reads as under: "Sub:Clarification regarding grant of ACP after passing the Trade Test. A reference was sent to DPO&T for one time relaxation from passing of Trade Test for granting ACP from 9.8.1999 i.e. date of implementation of ACP Scheme if the employees are otherwise eligible. 2. DOP&T has clarified that as a special case the employees who qualify the trade test in first attempt after 9.8.1999 may be allowed benefit of ACP from 9.8.1999 only and not from the date of passing of trade test. However, employees who qualify in the trade test in subsequent attempt will be allowed financial upgradation only from the date of passing of trade test. In no case, the benefit could be given to an individual w.e.f. 9.8.1999, who had earlier appeared in the Trade Test before

9. 8.1999 but failed or has not appeared in trade test at all or has not otherwise passed the trade test. 3. In future, the required trade test should be held well in time as per planned calendar so that it is held before an employee complete 12/24 years of service for grant of financial upgradation under ACPS. (Based on DOP&T ID No.3683/Estt.(D)/01 dated 6.12.2001)." 9. Based on the clarification, more particularly para-2 hereinabove, learned Advocate for the petitioners submitted that the respondent having not taken and cleared the trade test prior to 09.08.1999, he would not be entitled to benefits with effect from 09.08.1999, but with effect from the date on which the respondent would clear the trade test and that is 05.08.2002.

10. As against this, learned Advocate for the respondent has submitted that the CAT is perfectly justified in granting benefits of ACP scheme from the date as prescribed under the scheme regardless of the date on which the respondent cleared the trade test conducted first after coming into existence of the scheme. He submitted that once ACP scheme came into effect, the respondent became entitled to the benefits of the scheme and the clarification issued subsequently cannot take away the right of the respondent under the scheme. He submitted that an artificial distinction is created by issuance of the clarification which is unwarranted. He further submitted that the CAT has already taken a view in similar set of circumstances while deciding OA No.101 of 2010 and the decision rendered is not challenged and is accepted by the very same department and therefore, the case of the respondent also should not be viewed differently.

11. Having heard learned Advocates for the rival parties, the provisions of the ACP relevant for the purpose of appreciating the benefits available under Clause-4 of the scheme are as under:- "The first financial up gradation under the ACP Scheme shall be allowed after 12 years of regular service and the second up gradation after 12 years of regular service from the date of the first financial up gradation subject to fulfillment of prescribed conditions. In other words, if the first up gradation gets postponed on account of the employee not found fit or due to departmental proceedings, etc. this would have consequential effect on

the second up gradation which would also get deferred accordingly;"

12. The other relevant clauses of the Scheme read as under: "Clause 6: Fulfillment of normal promotion norms (bench-mark, department examination, seniority-cum-fitness in the case of Group "D" employees, etc.) for grant of financial up gradations, performance of such duties as are entrusted to the employees together with retention of old designation, financial up gradations as personal to the incumbent for the stated purposes and restriction of the ACP Scheme for financial and certain other benefits (House building Advance, allotment of Government accommodation, advances, etc.) only without conferring any privileges related to higher status (e.g. invitation to ceremonial functions deputation to higher posts, etc.) shall be ensured for grant of benefits under the ACP scheme."

"Clause 10: Grant of higher pay-scale under the ACP Scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular for regular promotion on occurrence of vacancy subsequently. In case he refuses to accept the higher post on regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribed in the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second up gradation under the ACP Scheme only after he completes the required eligibility service/period under the ACP Scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial up gradation after rendering 12 years of regular service and after 2 years there from if he refuses regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+2+1) of regular service, he shall be eligible for consideration for the second up gradation under the ACP Scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial up gradation (2+10) in that higher grade i.e. after 25 years (12+2+1) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade;"

"Clause 11: In the matter of disciplinary / penalty proceedings, grant of benefits under the ACP scheme shall be subject to rules governing normal promotion. Such cases shall, therefore, be regulated under the provisions of relevant CCS (CCA) Rules, 1965 and instructions there under;"

13. The scheme was introduced in the year 1999 and the financial upgradation was provided for after 12 /24 years of regular service without any promotion. The respondent, therefore, on the basis of the scheme became entitled to the benefits of upgradation after completing respective period of 12 /24 years of regular service without any promotion.

14. In the year 1999, when the scheme was floated, it cannot be said that the respondent envisaged that the respondent's non-appearing in any examination conducted prior to the scheme coming into force would earn disqualification from the entitlement for a particular period. This right for the higher scale which crystallized on the date of the scheme being made operational cannot be taken away by issuing subsequent clarification.

15. In any case, after the scheme came into force, had the trade test been conducted forthwith then also the respondents' entitlement for the higher scale would have crystallized then. The findings, therefore, given in OA No.101 of 2010 have been correctly applied by the Tribunal to the facts of the present case.

16. The situation would have been quite different had the respondents not passed the trade test in the first attempt when the trade test was conducted for the first time after the scheme coming into operation. The fact that the respondents have cleared their trade test in the first attempt in the examination conducted for the first time after the scheme, would entitle the respondents to get the effect of financial upgradation with effect from 09.08.1999 instead of 05.08.2002.

17. In view of the aforesaid, this Court has no hesitation in holding that the respondents were entitled to the financial upgradation as made applicable to others with effect from 09.08.1999 as against the decision of the department to confer such benefits with effect from 05.08.2002. Therefore, no fault can be found in the judgment of the CAT dated 26.01.2015 in the respective OAs filed by respondent.

18. In view of the aforesaid, the petitions stand dismissed. Notice is discharged. No order as to costs.