

(2010) 01 GUJ CK 0006

In the Gujarat High Court

Case No : Letters Patent Appeal No. 639 of 2002 in Special Civil Application No. 3656 of 1986 and Letters Patent Appeal No. 86 of 2003 in Special Civil Application No. 6684 of 1989

Vadodara Municipal Corp.

APPELLANT

Vs

Shital Prakash Harlikar

RESPONDENT

Date of Decision : 29-01-2010

Acts Referred:

Companies (Court) Rules, 1959 — Rule 139
Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10(4)

Citation : (2010) 01 GUJ CK 0006

Hon'ble Judges : Bhagwati Prasad, J; Bankim N. Mehta, J

Bench : Division Bench

Advocate : Pranav G. Desai, for the Appellant; J.T. Trivedi, for Respondent Nos. 1/1 and 1/2 in L.P.A. No. 639 of 2002 and R.D. Shah in L.P.A. No. 86 of 2003, for the Respondent

Final Decision : Dismissed

Judgement

Bhagwati Prasad, J.—These appeals are filed by the appellant against the Judgment and order dated 19.4.2001 passed by learned Single Judge of this Court in Special Civil Application Nos. 3656 of 1986 and 6684 of 1989.

2. The dispute before learned Single Judge giving rise to this appeal was that the respondent was appointed by the appellant Corporation as Junior Clerk on 1.10.1962. Thereafter, he was promoted to the post of Senior Clerk by order dated 25.10.1974. It was contended by the petitioner that next promotional post is that of Head Clerk which carries the pay scale of Rs. 425-800 and his case is covered by an award of the Industrial Tribunal, Gujarat State, Ahmedabad, dated 25.2.1983 in Reference No. IT/144/77 and IT/314/77 and therefore he is entitled to be appointed. The appellant replied before learned Single Judge that the Head Clerk is next senior post to the Senior Clerk but before an employee is promoted to the position of Head Clerk he must have passed L.S.G.D. Examination and the

petitioner has not passed the said examination. Therefore, he could not be considered for promotion to the post of Head Clerk. All the promotions then made in the Corporation are on the basis of seniority from the Senior Clerks but those who have been promoted was required to pass L.S.G.D. Examination. The requirement of promotion to the post of Head Clerk is not seniority alone but the qualifying examination is also a required condition.

3. Learned Single Judge while passing the order impugned has placed reliance on a Judgment of this Court rendered in Special Civil Application No. 2955 of 1983 dated 24.2.1984 and has held that since in the I.T. Reference No. 144 of 1977 decided on 25.2.1983 it has been held by the Tribunal that the promotion is not restricted to a particular post but it is for all the employees who are in the pay scale of Rs. 550-900 and that being the position the question of passing the required qualification was not germane. Relying on those observations of learned Single Judge and that of the observations of the Tribunal, learned Single Judge has allowed the Special Civil Applications.

4. Learned Counsel for the appellant arguing the appeal that I.T. Reference No. 144 of 1977 decided on 25.2.1983 was in relation to the questions referred to the Tribunal in following terms:

2(A) As employee who is holding charge over such temporary or permanent vacancy in violation of the above-referred principle of seniority-cum-merit, should not be considered as his having experience of the said post and his such service should not be taken into account for deciding his seniority for the post.

(B) All cases of holding charges of temporary or permanent vacancies in violation of principle of seniority-cum-merit mentioned above, should be reviewed and such appointments should be regularised by appointing employees from same Dept. on seniority-cum-merit basis.

In relation to these questions of reference the following order was made by the Tribunal.

(i) For all posts carrying pay scale upto 550-900 promotions should be given on the basis of seniority only;

(ii) For posts carrying pay scale higher than 550-900, the present practice of filling up the posts by selection on the basis of merits, should continue.

(iii) In no case, temporary charge of a post should be given to an employee for more than six months. The post should be filled in, in a regular way, within six months.

5. Learned Counsel for the appellant submitted that the Reference as made was not that how the promotion should be made on a particular post carrying a pay scale. Thus, the Tribunal has exceeded its powers in deciding the Reference and the term as defined u/s 10(4) of the Industrial Disputes Act which is reproduced as under:

Section 10(4) Where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this Section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto.

6. He has placed reliance on a decision in the matter of Pottery Mazdoor Panchayat v. Perfect Pottery Co. reported in 1979 LAB I.C. 827 wherein at paragraph No. 11 the Hon''ble Supreme Court has observed as under:

Having heard a closely thought out argument made by Mr. Gupta on behalf of the appellant, we are of the opinion that the High court is right in its view on the first question. The very terms of the references show that the point of dispute between the parties was not the fact of the closure of its business by the respondent but the propriety and justification of the respondent's decision to close down the business. That is why the references were expressed to say whether the proposed closure of the business was proper and justified. In other words, by the references the Tribunals were not called upon by the Government to adjudicate upon the question as to whether there was in fact a closure of business or whether under the pretence of closing the business the workers were locked out by the management. The references being limited to the narrow question as to whether the closure was proper and justified, the Tribunals by the very terms of the references, had no jurisdiction to go behind the fact of closure and inquire into the question whether the business was in fact closed down by the management.

7. He has placed reliance on another decision of the Hon''ble Supreme Court in the matter of Hasham Abbas Sayyad v. Usman Abbas Sayyad reported in AIR 2007 SC 1077 at paragraph No. 22 which reads as under:

This aspect of the matter has recently been considered by this Court in Harshad Chiman Lal Modi Vs. DLF Universal and Another, in the following terms:

We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (I) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity.

8. For the same purpose he placed reliance on a Division Bench decision of this Court in the matter of Manubhai M. Desai Vs. State of Gujarat, particularly at

paragraph No. 8 which reads as under:

Needless to mention that once an order is void ab initio or a nullity it remains a nullity even if it is confirmed or modified or annulled by higher forum. It is settled proposition of law that once an order or a decision of an inferior Court or Tribunal is rendered void, it should a fortiori have the the same nullifying consequence in case of an order or decision of the superior Court as well. This proposition is very well settled in a decision of this Court in the case of East India Co. v. Official Liquidator, Raj Ratna Mills reported in (1970) 11 GLR 457.

9. He has also placed reliance on another decision of this Court in the matter of East India Co. v. Official Liquidator of Rajratna Naranbhai Mills Pvt. Ltd. (In Liquidation) and Anr. reported in 11 GLR 457 wherein it is observed as under:

Compliance with these requirements of Rule 139 of the Companies (Courts) Rules is a condition of exercise of the power to give directions in regard to sale of the property of the company by the Official Liquidator. If the condition is not satisfied the Court cannot exercise the power or, in other words, the Court would lack power and the purported exercise of the power would be no exercise at all: it would be void and of no effect.

10. Thus learned Counsel submitted that since the Tribunal has exceeded its power to decide the Reference or in limit its jurisdiction to answer the Reference in question as made to it and had laid down the Rules for promotion ignoring the qualification required as was delineated in law governing the Corporation, it was not open to the Tribunal to have laid down the Rules for promotion and thus the order of the Tribunal is without jurisdiction and requires to be ignored being against the very canon of law and should not have been acted upon by learned Single Judge.

11. Per contra, learned advocate Mr. J.T. Trivedi, relying on a decision of the Hon"ble Supreme Court in the case of Union of India v. Prafulla Kumar, (1983) 1 LLJ 304 submitted that the terms of Reference should be liberally construed. In that view of the matter if the Tribunal has exceeded its jurisdiction that should be ignored. He has further relied on a decision of the Hon"ble Supreme Court in the case of Tayabbhai M. Bagasarwalla and another Vs. Hind Rubber Industries Pvt. Ltd. etc., wherein the Hon"ble Supreme Court has held that even if the order was without jurisdiction the respondents can be punished for contempt of Court. Therefore, he supported the order of learned Single Judge.

12. We have given our thoughtful consideration and perused the record. This is undeniable that employer has absolute right to fix the qualification for recruitment and promotion. Having fixed the qualification for promotion that the employees are required to pass L.S.G.D. Examination it had a right to insist upon passing of that qualification before any employee could ask for promotion. This is admitted by the Corporation that it had not violated the rule of seniority in promotion and as an when there was an employee who possessed a requisite qualification his seniority is maintained and he is promoted. This is in consonance

with the prevailing service jurisprudence in the country. The Tribunal's award laying down the qualifications for promotion is in the nature of laying down new rules for promotion. We are afraid that laying down of this kind of rules was not within the competence of the Tribunal and apart from that, questions which were available to be answered as referred to it did not cover this subject and thus the award is beyond the scope of Section 10(4) of the Industrial Disputes Act. In that view of the matter, it can safely be said that the award though, not challenged by the Corporation, was not enforceable under Article 226 of the Constitution of India being an illegality and the jurisdiction under Article 226 of the Constitution cannot be used to perpetuate illegality. The award being beyond the terms of Reference required to be ignored. In that view of the matter, if the order of learned Single Judge is examined then the same being based only on the basis of the award cannot be sustained. The order of learned Single Judge of this Court in earlier proceedings does not make any mention regarding the required qualification. Therefore, that too also cannot be pressed into service because qualifications can always be prescribed by the employer to maintain the standards of its employees.

13. In view of the aforesaid discussion, the Judgment and order of learned Single Judge dated 19.4.2001 is not liable to be sustained. The same is, therefore, quashed and set aside. The appeals are allowed and the Special Civil Applications are dismissed.