

(2017) 02 GUJ CK 0173
In the Gujarat High Court
Case No : 16068 of 2011

VINAYKANT G KARGASTHALA

APPELLANT

Vs

STATE OF GUJARAT & ORS.

RESPONDENT

Date of Decision : 03-02-2017

Acts Referred:

Constitution of India, Article 14, Article 21, Article 226, Article 16 -
Bombay Civil Services Rules, 1959, Rule 41(a)(1)

Citation : (2017) 02 GUJ CK 0173

Hon'ble Judges : S G Shah

Bench : Single Bench

Advocate : Vidhi J Bhatt, Swapneshwar Gautam

Final Decision : Allowed

Judgement

1. Heard learned advocate Ms. Vidhi J. Bhatt for the petitioner and learned AGP Mr. Swapneshwar Gautam for the respondents.
2. Perused the record. The petitioner herein is seeking indulgence of this Court under Articles read with the resolution of Finance Department, Government of Gujarat dated 5.7.1991 and 16.8.1994 relating to grant of higher pay-scale relating to Scheme of Higher Grade Scale, to deal with the payment of installments of D.A., with interim relief in absence of restricted chances of promotion to the Government employee.
3. The petitioner has prayed to declare the communication dated 28.12.2004 by the Director of Forensic Science Laboratory, Gujarat State, copy of which is produced at Annexure-P, as illegal, arbitrary and contrary to the Government resolutions under reference submitting that such action is violative of Articles 14, 16 and 21 of the Constitution of India and thereby, such communication needs to be quashed and set-aside. By such communication, respondents have refused to extend the benefit of above-referred Scheme to the petitioner, even after specific

observation and direction by this Court in its order dated 15.9.2006 in Special Civil Application No.19691 of 2006. The petitioner has also prayed to issue a writ of mandamus, commanding the respondent authorities to grant the petitioner the benefit of higher pay-scale on completion of 9 years on the post of Scientific Officer on 2.3.2003 with all consequential benefits flowing from such grant, such as re-fixation of his pay w.e.f. 3.3.2003 and re-fixation of his pension and other retirement benefits on his retirement on superannuation on 31.10.2009. The petitioner has also prayed for arrears of pay and allowances from 3.3.2003 till filing of the petition and requested to grant urgent relief till the date of payment with arrears of pension and other retirement benefit from 1992 till 1994 with 18% interest thereon.

4. The undisputed fact between the parties is to the effect that initially, the petitioner was appointed as Laboratory Technician on 20.02.1979. He was promoted as Scientific Assistant w.e.f. 23.11.1983.

5. Thereafter, he could not get promotion for pretty long time and pursuant to recommendations by the third Pay Commission, which was constituted in the year 1982, so also in view of representations of employees regarding stagnation and few chances of promotion, the Government has constituted a High Level Committee, somewhere in the month of May, 1990 under the Chairmanship of the then Finance Minister. Pursuant to recommendation by such Committee, initially the Government has passed one resolution on 20.2.1991 confirming that employees who did not get promotion shall be given higher grade scale at the end of 12 and 24 years at the end of their continuous service in the same cadre. However, since such scheme did not extend any benefit to the employees and thereby, when it became a scheme on paper only, it was abolished by resolution dated 5.7.1991 i.e. in couple of months only and there was representation that higher grade scale should be given at the end of 9, 18 and 27 years instead of 12 and 24 years and such scheme is to be made effective from 1.6.1987. It is also submitted to concerned Committee that further pay may be fixed in such a manner as if employee was actually promoted because of such scheme. Therefore, Government has issued an order dated 11.10.1991 clarifying that as to how such scheme should be implemented. According to such clarification, in cases where the service of 9 years or more than 9 years in same cadre is completed as on 1.6.1987 or thereafter, first higher grade scale shall be admissible on the basis of eligibility. It is further clarified that when services of other 9 years is completed in higher grade scale, second higher grade scale shall be admissible. Similarly, third higher grade scale shall be admissible after another 9 years. All such facts are categorically disclosed in G.R. dated 16.8.1994, English version of which is produced by the respondent for the perusal of the Court, copy of which is to be taken on record.

6. Thus, pursuant to several other representations and demands for concessions of different unions were made and therefore, after discussing detailed history and details of such representations and demands by the unions regarding more

concession in such scheme, ultimately, the Government has formulated a scheme of higher grade scale to deal with the problem of installments of D.A., interim relief and absence or restricted chances of promotion to the Government employees by its resolution dated 16.8.1994. So far as the present petitioner is concerned, his entire claim is based upon such G.R. because he is seeking benefit of conditions of such G.R. for the period between 1992 till the year 2003. Till then, there was no other G.R. or clarification in existence except the G.R. dated 16.8.1994.

7. However, as usual, respondents are now relying upon one G.R. dated 2.7.2007 because this petition is filed in the year 2011 and this petition is taken up for final hearing in the year 2017, but the law is well settled that the issues raised in the petition are required to be dealt with as per the concerned G.R., which was in force at the relevant time. It is also well settled legal position that subsequent G.R.s, cannot be applied retrospectively. Whereas, in the present case, the fact remains that the petitioner is entitled to certain benefits as per the G.R. dated 16.8.1994, initially in the year 1983 and 1994 itself and therefore, if benefit of such G.R. was properly released and extended in accordance with law and Rules in favour of the employees, then, he would have got all the requisite benefit at the relevant time and therefore, only because for one or another reason, if respondents have not released the requisite benefits at the relevant time, may be because of administrative lacuna at their end or as alleged by the petitioner may be because of arbitrariness and discrimination against the petitioner, then, now, the respondents cannot say, submit and press that now when G.R. of 2.7.2007 is available, they will apply the condition of such G.R. only though they have failed to extend the benefit of G.R. dated 16.8.1994 at the relevant time for no fault of the petitioner and as it would be discussed herein after, may be because of some selectiveness and arbitrariness on the part of the respondents.

8. Thereby, initially, if we verify the conditions of G.R. dated 16.8.1994, now, it becomes clear that pursuant to condition No.3(2), the first higher grade scale shall be granted to the employee, who has completed 9 years of service in the respective cadre and pay-scale provided that said employee should not have got more than two promotions prior to this. The relevant criteria in such condition is with respect to completion of 9 years of service in the "respective cadre" and that the employee should not have got more than 2 promotions prior to getting such benefit. Therefore, the only restriction is to the effect that a person is not entitled to benefit of such scheme if before completing 9 years in the same cadre, he has got two promotions i.e. one promotion after another in previous cadre and thereby, he reached to the third highest cadre at the time of consideration of an application of such scheme. The same condition further clarifies that in individual case, if the Government has made transfer from one cadre to other for public interest, and payscale of this post are equal, the service rendered in both cadres, shall be taken into account in the scheme of higher grade scale, subject to other conditions. Rest of the conditions are not material at present and therefore, avoided to be discussed herein, except condition

No.3(20) whereby an undertaking in writing is to be taken from every such employee who avails the benefit of such scheme that if he is promoted after getting such benefit, he would not refuse to accept promotion otherwise he shall have to forgo the benefit of the scheme and he shall be reverted to his original lower grade and shall draw the pay which he could have drawn in the original lower grade. However, due to reversion in the original grade, the recovery for the period for which pay and allowances in higher grade are drawn by employee shall not be made. Thereby, though such condition is there in one of the Government Resolution, unfortunately, on daily basis we have to decide several petitions by different petitioners where for some different reasons recovery is being sought for.

9. The condition though imposes restriction upon the employees, again in the next paragraph of the condition, relaxation was given that if any employee has refused the promotion granted to him for whatsoever reason but before 5.7.1991 and if other conditions of Resolutions are fulfilled then he may be given the benefit of higher grade pay, however, with some further conditions. But, at present, we are not concerned with those conditions except recording that in fact the entire scheme is made for the benefit of the employees who could not get promotion for couple of years and, therefore, whenever there is an issue regarding interpretation or consideration of such scheme, though it must be strictly with reference to the conditions laid down in such Government Resolution, it should be for achieving the goal of such Government Resolution regarding extending the same benefit to the employees rather than achieving the goal of the respondent/s to deny such benefit to several such employees on different interpretation on same Government Resolution at different point of time.

10. Whereas condition No.3(33) makes it clear that if an employee gets promotion after getting higher grade pay, he shall not get the benefit of pay fixation under Rule 41(A)(1) of Bombay Civil Services Rules provided that the pay scale of promotional post is higher than the higher pay grade, then, fixing of pay scale can be done in accordance with the said rules.

11. Condition No.3(24), therefore, confirms that the previous scheme of granting senior scale after 17 years, all orders shall stand discontinued.

12. Now, therefore, if we come back to the factual details of the petitioner, even at the cost of repetition, let us record the fact as under: - * 20.1.1979 ? First time appointed as lab technician. * 23.11.1983 ? promoted as Scientific Assistant * 24.11.1992 ? on completion of 9 years, when he was not promoted, he becomes entitle to get benefit of the scheme of first higher grade. However, implementation of such scheme is though effective on that day, probably because of absence of Government Resolution dated 16.8.1994 on that date, the respondents have certainly not extended such benefit to the petitioner on 24.11.1992. Otherwise, pursuant to Government Resolution dated 16.8.1994, when petitioner has not been promoted for more than 9 years after 23.11.1983, he is entitled to benefit of first higher grade pay w.e.f. 24.11.1992. Therefore, by

office order dated 27.1.1994, respondents have confirmed the higher pay grade to as many as 14 employees and confirmed that petitioner is entitled to higher pay grade w.e.f. 25.11.1992, relying upon G.R. dated 5.7.1991. However, the fact remains that benefit of such office order was never extended to the petitioner till October, 2011 when only Rs.2,400/- has been paid to him for the period between 25.11.1992 till 2.3.1994. Such office order dated 27.1.1994 specifically confirms that petitioner has completed 9 years on 24.11.1992 and therefore, he is entitled to higher pay grade w.e.f. 25.11.1992. Similar respective dates were disclosed for remaining 13 employees of the same department. However, it is submitted by the petitioner that instead of extending the benefit of aforesaid w.e.f. 25.11.1992, which was confirmed by office order dated 21.3.1994 by the Director of Forensic Science Laboratory, all of a sudden just within couple of days from approval by the Government and surprisingly, before the order dated 21.3.1994 by the Director of Forensic Science Laboratory, both the Government i.e. Home Department and Director, Forensic Science Laboratory have by their office order dated 14.2.1994 and 20.2.1994 respectively, promoted the petitioner to the post of Scientific Officer, Class-II. However, such office order is quite interesting and surprising when it states that petitioner is promoted to the post of Scientific Officer purely on adhoc basis and such promotion is conditional without disclosing the specific condition for such promotion, but disclosing that he is promoted adhoc only till eligible reserved candidate is available for the post. Irrespective of such orders of promotion, it becomes clear that pursuant to G.R. dated 5.7.1991, read with G.R. dated 16.8.1994, petitioner is entitled to the benefit of first higher pay grade w.e.f 24.11.1992 and though it was approved and granted by order dated 27.1.1994 and 21.3.1994, its benefit was not released till October, 2011.

13. Thereafter, petitioner continued to serve as Scientific Officer and, therefore, in the year 2003 when he completed 9 years of services in the same cadre without any promotion, according to petitioner, he is entitled to benefit of Government Resolution dated 16.8.1994 w.e.f. 2.3.2003 for 2nd higher pay grade. However, when respondents have refused to extend such higher pay grade, petitioner has continued to make representation before the respondent for releasing the higher pay grade, but ultimately, by impugned order dated 28.12.2004, respondents have refused to extend such benefit contending that since petitioner has been promoted as Scientific Officer, now, he is not entitled to benefit of higher grade pay.

14. Therefore, petitioner has approached Alternative Dispute Resolution Mechanism held in the High Court of Gujarat at pre-litigation stage wherein on 5.8.2011 in pre-litigation case No.79 of 2011, the mediators have recorded that ? the applicant relies on the judgment of the High Court (Coram: H.K. Rathod, J.) delivered on

15. 9.2006 in Special Civil Appln. No.19691 of 2006. We have applied our mind to the facts of the case stated therein and the principle involved and we are of

the opinion that the said judgment does not apply to the facts of the present case. If the benefit of Govt.Resolution (FD) dated 2nd July 2007 is available to the applicant, the Department may obtain a suitable undertaking from him and give the benefit of higher pay scale to him. If the applicant is not satisfied with the aforesaid order, then he would be at liberty to approach as higher forum. The matter stands disposed of." 15. Therefore, petitioner has no option but to file present petition seeking reliefs which are disclosed here inabove.

16. In support of his petition, petitioner has produced on record relevant communication so also office orders and relevant Government Resolution dated 16.8.1994.

17. The respondents have, however resisted the petition by filing their affidavit in reply on 13.12.2011 inter alia contending that the petitioner was granted first higher grade pay on completion of 9 years in the cadre of Scientific Assistant Class II w.e.f. 25.11.1992. However, despite the order of granting such benefit, the effect of the same was not given till 10- 11/10/2011 when a cheque of only Rs.2,400/- was sent to the petitioner by the respondent for the arrears of salary pursuant to such benefit for the period between 25.11.1992 till 2.3.1994 considering the fact that from 3.3.1994 petitioner was promoted.

18. Therefore, prima facie, there is reason to believe that the Government is simply making a show that they have released the benefit of higher grade pay to the petitioner only by paying Rs.2,400/- which was otherwise due for the period during 25.11.1992 and 2.3.1994 only in the month of October, 2011 and that too after filing of present petition, since petition was filed on 2.9.2011 and respondents are very much aware about the dispute pursuant to pre litigation proceeding before the Alternative Dispute Resolution Mechanism before this High Court. Therefore, irrespective of all other facts and circumstances or issues and applicable conditions of Government Resolution or Rules, basic fact which emerges from the record is certainly disturbing and to the effect that though the government is aware that benefit of higher grade pay is to be released from the period between 25.11.1992 to 2.3.1994 and though order to that effect was passed somewhere on 27.11.1994 (Page 32), the Government has never bothered to release the actual benefit in favour of the petitioner for the reasons best known to them until October, 2011 and, therefore, this act on the part of the Government can certainly be considered as discriminatory, arbitrary and disturbing the rights of the litigant for no valid reason whatsoever.

19. It is further submitted in affidavit in reply that meanwhile Government Resolution dated 2.7.2007 came into existence whereby promotional benefits on completion of 9-18-27 years has been modified and made applicable only on completion of 12 and 24 years and, therefore, case of the petitioner falls under Government Resolution dated 2.7.2007 and, thereby, when petitioner has already taken the benefit of first higher pay grade on completion of 9 years, now, he is entitled to 2nd higher pay scale only on completion of 24 years from 25.11.2007. However, the year 2007 may be a typographical error. The date

25.11.1992 certainly relates to the year 1992 and, therefore, we would consider the submission to the effect that petitioner is entitled to 2nd higher grade pay only after completing 24 years from 25.11.1992. Thereby, he would be entitled to 2nd higher grade pay only in the year 2016. If it is so, considering the age of superannuation of the petitioner which falls in the year 2009, there is no reason for the respondents to call for relevant documents from the petitioner. However, it is contended that they have communicated the petitioner to submit the relevant documents if he wants to get 2nd higher pay grade w.e.f. 25.11.2007. Here, again there is error in disclosing the date 25.11.2007 for the reasons best known to respondents that which date they want to disclose i.e. from which date petitioner is eligible for 2nd higher pay grade.

20. Thereafter, there is disclosure regarding decision by the Alternative Dispute Resolution Mechanism before the High Court in the name of Permanent Lok Adalat (Visama). However, the fact remains that respondents is very much aware about the contention of the petitioner that petitioner is claiming equal benefit which were granted by this Court vide its judgment and order dated 15.9.2006 in Special Civil Application No.1961 of 2006. But with that reference, it is contended in such reply that such judgment cannot be complied in the case of the petitioner.

21. Surprisingly, in para 10 of the reply, now Government has come forward with altogether a different story that when 1st higher pay grade has already been granted to the petitioner, as per the Government Resolution dated 2.7.2007, the 2nd higher pay grade can only be granted on completion of 15 years of service from the date of granting 1st higher pay grade i.e. on 25.11.1992 and, therefore, when petitioner is claiming higher pay grade w.e.f. 3.3.2003, it is contended that such demand is absolutely contrary to the Government Resolution dated 2.7.2007.

22. It is undisputed fact that considering his Date of Birth, petitioner has retired w.e.f. 31.10.2009 on superannuation and, therefore, it is certain that after his last promotion on 3.3.1994, he has never been promoted or had never been granted any other benefit as per prevailing scheme as per Government Resolution dated 16.8.1994 till his date of retirement, even after his repeated representations at relevant time during his services and, therefore, petitioner is certainly entitled to benefit of 2nd higher pay grade because of restriction and absence of chance of promotion for 9 years after his last promotion.

23. In view of above facts and circumstances, now, only issue which requires to be considered is to the effect that whether such benefit is to be considered pursuant to Government Resolution dated 16.8.1994 or pursuant to Government Resolution dated 2.7.2007. It is well settled that the benefit was accrued in favour of the petitioner on or about 2.3.2003 that is well before the Government Resolution dated 2.7.2007 and, therefore, if respondents would have acted as a prudent and moral employer and if they would have released all relevant benefits if not immediately when it is due, then, at-least thereafter, petitioner would have certainly got the benefit of 2nd higher pay grade somewhere in the year 2003

itself that is well before the Government Resolution dated 2.7.2007. Therefore, considering the settled legal position that effect of Government Resolution cannot be given retrospectively, more particularly, if it is restraining some benefits which are otherwise accrued well in advance before such Government Resolution, by all means, Government Resolution dated 2.7.2007 would not be applicable to the case of the present petitioner and Government Resolution dated 16.8.1994 would only be applicable in the present case.

24. Therefore, learned Assistant Government Pleader Mr. Swapneshwar Gautam appearing for the State has submitted, relying upon the Government Resolution dated 2.7.2007, that now the benefit of higher pay grade is to be released not at the end of 9 years and 18 years but after 15 years as per such Government Resolution. As discussed hereinabove, it becomes clear that when said Government Resolution is not applicable at the relevant time in the year 2003, there is no reason to deny the benefit claimed by the petitioner. However, if we peruse the Government Resolution dated 2.7.2007, it becomes clear that in para 4(A) of such Government Resolution, it has been categorically disclosed that if any employee has completed the services of 9 years, before the date of such Government Resolution, then, he is entitled to the benefit of Government Resolution No. PAY-1194(44)-M dated 16.8.1994 of the Finance Department. Though, in para 4(B) it is stated that if any employee has received the benefit of 1st higher pay grade pursuant to above referred Government Resolution dated 16.8.1994 read with Government Resolution dated 1.4.2004, then, he would be entitled to get 2nd higher pay grade pursuant to such Government Resolution only on completion of 15 years. But the material condition in such paragraph is with reference to accruing all benefit from particular Government Resolution i.e. if benefit is accrued only under this new Government Resolution dated 2.7.2007 then and then it is to be released after fifteen years. Whereas, as aforesaid when benefit of 2nd higher grade pay has been accrued in favour of petitioner as back as on 2.3.2003 i.e. prior to Government Resolution dated 2.7.2007 and, thereby, when such benefit was already accrued in favour of the petitioner pursuant to Government Resolution dated 16.8.1994 such conditions would not apply to the case of the present petitioner.

25. In support of his submission, learned AGP is relying upon the decision of the co-ordinate bench of this High Court in case of M.D. Parmar vs. Pay and Account Officer & others reported in (2014) 3 GLR 2090. In such cited case with reference to the higher pay scale though it is disclosed in the Head-Note that employee who has got benefit of first higher grade pay scale in earlier cadre, is not entitled to such benefit again after promotion on completion of services on promotional post. It is further stated in the Head-Note that such benefit on promotional post foregoing benefit in earlier cadre and, therefore, benefit is not available to promotees. Therefore, prima facie it seems that the Head- Note is misconceived in as much as, there cannot be a restriction in extending such benefit on different ground beyond the restriction confirmed in the concerned Government Resolution dated 16.08.1994 or any other Government Resolutions

which was in force and applicable to the case of concerned employee at the relevant time. Learned AGP is relying upon para 10 of such judgment but with due respect again it is to be noted that if we peruse the text of the Government Resolution, relevant provisions of which are discussed herein above, then it nowhere confirms that Government has decided to confer benefit of only first higher grade pay scale to the employees on their completing 9 years or 18 years and 27 years as on 01.06.1987. it would be appropriate to reproduce the paragraph as it is rather than to comment on it, which reads as under; "From the above provisions made in the Government Resolution dated 16.8.1994, it appears that the Government clearly intended to confer benefit of only 1st higher grade pay scale to an employee on his completing nine years of service or more including 18 years and 27 years as on 1st June, 1987 whereas second and third higher grade pay scale are intended to be given either on completion of 18 years and 27 years of service after 1.6.1987 in the pay scale of concerned cadre or after one year of his reaching to the maximum of higher pay scale or the pay scale of promotional post and stagnated whichever is later. Therefore, if an employee has got benefit of 1st higher grade pay scale on completion of nine years of service as on 1st June, 1987, case of such employee would be considered only for 2nd and 3rd higher grade pay scale on his completing 18 and 27 years of service after 1st June, 1987 in the pay scale of concerned cadre or after one year of his reaching to the maximum level of higher pay scale whichever is later. Thus, an employee who has got first higher grade pay scale on completion of nine years or more years service on 1st June, 1987 are to be conferred benefit of 2nd and 3rd higher grade pay scale only in which ever cadre he is if he is complying with the conditions for such 2nd and 3rd higher grade pay scale. Therefore, the employee completing nine years service on his promotional post does not become entitled to first higher grade scale but could be conferred benefit of 2nd and 3rd higher grade pay scale only if he is complying with the conditions for such benefits." Bare reading of above para makes it clear that the negative impact either considered by the co-ordinate bench or as submitted by the petitioner, with reference to the Resolution dated 16.08.1994 is not only unwarranted but misconceived, if it is to be believed as submitted by learned AGP. It is quite clear and obvious that the Government Resolution dated 16.08.1994 categorically confirms that government employees are entitled to 3 higher grade pay scale on completion of 9 years, 18 years and 27 years in absence of restricted chance of promotion and it is no where stated that if first higher pay grade is released then employee is not entitled to second or 3rd higher pay grade. Whatever is described with reference to second and third higher grade pay scale was differently interpreted by the employer at different time. When co ? ordinate bench and respondents are relying upon few lines from para 3 of the Government Resolution they have also to rely upon the entire para 3 also, which reads as under; "In view of the facts stated in the preamble above, it will be found that the present scheme is brought into effect with the intent to see that the-pay of the Government employees is not stagnated at the maximum stage in their grade if there is no chance or limited

chances of promotion during their service. It is found from the experience that though there are chances of promotion or the regular promotion is secured at interval of time under present orders and employee is not stagnated at maximum stage in his pay scale, he becomes eligible to have the benefit of First, Second and Third Higher Grade Scale of completion of 9-18-27 years of service. Actually this was not the intension of the Government. With reference to this background and after full consideration in the matter, Government instead of provisions of resolution mentioned as read, after revising into scheme ab-initio, is hereby pleased to direct that the employees who have completed 9 years of service in the respective cadre and the grade on 1st June 1987 or whenever they complete 9 years of service in the grade or the respective cadre after this date shall be eligible for First Higher Grade Scale. Even though they have completed more than 9 years of service that means 18-27 years of services in the same cadre on 1-687, they shall be eligible only for First Higher Grade Scale. Where the Second and Third Higher Grade Scale shall be admissible to the employee at 18 and 27 years in the grade of respective cadre after 1st June 1987 or if the employee has completed one year after reaching the maximum stage in the respective higher/promotional grade and has strangulated, whichever is later provided he should not have got more than two promotions./higher grade prior to that. After getting the higher grade if the employee promoted on` the promotional posts, it will be considered that he has got only one Higher Grade Promotion. With reference to existing orders, the orders sanctioning the second and third higher grade scale to the respective employees shall be considered null and void. Thereupon, due to availing of second and third higher grade scale according to the previous orders the amount of difference which is credited to G.P.F. account of the respective employees is required to be transferred to the Government accounts. Orders in this respect are being issued separately." Therefore though bare reading of such provision may give a negative sense, reading of entire Government Resolution makes it clear that it is for extending three higher grade scales. Thereby, different consideration relying upon different judgment and clumsy and improper government resolution would give two options; (1) granting second higher grade pay scale on completion of 18 years from the effecting date i.e. 01.06.1987 with condition that in between there should not be two promotions, as submitted by learned AGP and as disclosed by the coordinate bench and (2) considering the absence or restricted chance of promotion in different cadre irrespective of benefit of higher pay grade in previous cadre and thereby if any employee does not get higher pay grade in promoted cadre for more than 9 years then he is again entitled to benefit of higher pay grade with respect to that cadre. Thereby higher pay grade is related to the cadre wherein employee get stagnant without promotion for 9 years. So far as 2nd and 3rd higher pay grade is concerned, it is to be granted when employee could not get promotion continuous for more than 9 years and again further 9 years i.e. till 18 years and then after further 9 years i.e. completing 27 years.

26. As against that petitioner is relying upon the decision in the case of Dipak

Babaria Vs. State of Gujarat reported in AIR 2014 SC 1792. Considering the fact, respondents are changing their stand repeatedly and filing different affidavits. In such cited case, the Hon'ble Supreme Court of India has held that Government cannot improve its stand by filing subsequent affidavits as laid down long back in the case of Commissioner of Police, Bombay Vs. Gordhandas Bhanji reported in AIR 1952 SC 16 and some other cases. It is evident from record that respondents have changed their submissions frequently though there is no such pleading in their original affidavit-in-reply. It is settled legal position that even facts, which is not to be relied upon are required to be pleaded and then, atleast, prima facie evidence about its proof is to be disclosed on record with the pleading itself so as to enable the other side to verify and scrutinize such facts and evidence and to rebut it in accordance with law. Similarly, any point or issue except law point needs to be pleaded before final hearing and therefore, altogether new fact or issue cannot be permitted to be raised at the time of final hearing without affording opportunity to the other side to have a chance to rebut such fact or issue in accordance with law. Therefore, basically respondents are supposed to come forward with all relevant facts and issues in their pleading at the earliest so as to enable the other side to answer such issues. Though a principle applies to the petitioner also, in the present case, it is evident that respondents have tried their level best to change their plea in different manner so as to arrive at a conclusion only in their favour, irrespective of overall facts, circumstances and applicable law. In view of such situation, the Hon'ble Supreme Court of India has in reported case held that it was not permissible.

27. Therefore, even if we are strict to the text and interpretation of G.R. as done in the case of M.D. Parmar (supra), it becomes clear that though petitioner was entitled to certain benefits w.e.f. 25.11.1992, it was not released in favour of the petitioner till the year 2011 i.e. almost for 20 years and when it was realised that now petitioner is entitled to higher pay grade only w.e.f. 2003 and thereby, when he would get the benefit of higher pay grade from 2003 till 2009 i.e. till his retirement i.e. for 6 years, respondents have all of a sudden, after 20 years of actual accrual of benefit for couple of years, release the benefit of first higher pay grade only for the limited period from 25.11.1992 and till 2.3.1994 and only Rs.2,400/- was paid to the petitioner and that too in the year 2011. Therefore, such action of the respondents needs to be deprecated by all means.

28. Based upon such facts, circumstances and discussion, there is no option, but to hold that, considering the benevolent nature of the G.R. in favour of the employees, petitioner is certainly entitled to benefit of higher pay grade on completion of 9 years without promotion from 3.3.1994 i.e. w.e.f. 3.3.2003 till his retirement on superannuation on 31.10.2009. It is also evident that though higher pay grade was confirmed by order dated 9.2.2005, it was not made effective and no salary was increased till October, 2011.

29. Petitioner is also relying upon the judgment and order dated 15.09.2006 in Special Civil Application No.19691 of 2006 between State of Gujarat Vs. Haribhai

Shankarlal Raval. It is evident that this judgment was not referred to the concerned Court in the case of M.D. Parmar (supra) and it is also obvious that such judgment has never been overruled or set-aside by any higher authority and therefore, it certainly remains in force till date and therefore, when there is a prior judgment on the issue confirming that similarly situated employees are entitled to benefit of G.R. dated 16.08.1994 and that too after relying upon the judgment of Hon^{ble} the Supreme Court of India in case of Union of India & Ors. Vs. V.M. Mathivanan reported in (2006)6 SCC 57, there is no reason to deviate from such decision, which is supported by the judgment of the Hon^{ble} Supreme Court of India rather than the decision in the case of M.D. Parmar (supra) wherein neither the judgment of Hon^{ble} Supreme Court of India nor the case of Haribhai Shankarlal Raval (supra) was considered.

30. Lastly, the petitioner is also relying upon the decision of this Court in the case of Kandoi Chimanlal Brijlal & Ors. Vs. State of Gujarat & Ors. reported in 2013(1) GLH 766 wherein this Court has held as under:- "i) In spite of more than one judgments of this Court against the respondent authorities, the denial of benefit of higher grade scale to the petitioners as claimed by them and similarly situated persons, is held to be illegal, arbitrary and lacking bonafide on the part of respondent authorities, more particularly, Director of Primary Education, Gujarat State.

ii) The petitioners shall be paid all the three higher grade scales as per Government Resolution dated 5.7.1991, over and above selection grade availed by them which was prior to 26.12.1985, as held by this Court in Letters Patent Appeal No. 1073/2004 and cognate matters vide judgment dated 14.10.2004.

iii) The retirement dues of the petitioners shall also be recalculated accordingly.

iv) Arrears of difference of pay as well as retirement dues shall be calculated and paid within a period of four months from today.

v) The petitioners shall also be entitled to interest from 1.1.1995 till 31.1.2013 on the above amount, at the rate of 10% per annum, which shall also be paid along with arrears, as directed above.

vi) While implementing these directions, it shall also be kept in view that the petitioners of Special Civil Applications No.10878 of 2008, 11380 of 2008 and 11160 of 2008, had availed one promotion on the post of Education Inspector and therefore, they will be entitled to only remaining two higher grade scales and qua them, the directions shall be implemented accordingly.

vii) For the reasons recorded in paras-8.5, 9.2, 9.3 and 10 to 14, more particularly para 12 of this judgment, each petitioners shall be paid cost of Rs. 5000/- by the Director of Primary Education, Gujarat State, which shall be paid within a period of three months from today. It would be open to the State authorities to recover this amount from erring officer(s), in accordance with law.

viii) The Principal Secretary, Education Department is further directed to carry

out the directions contained in para 13 of this judgment within a period of three months from today."

31. There is no further submission than what is discussed herein above.

32. In view of above facts and circumstances, this petition succeeds. Thereby, the petition needs to be allowed as prayed for. Thereby, respondents are directed to release the higher pay scale to the petitioner when he has completed 9 years on the post of Scientific Officer on 2.3.2003 i.e. w.e.f. 3.3.2003 till his retirement on superannuation on 31.10.2009 and to pay arrears of pay and allowances for the period between 3.3.2003 to 31.10.2009 and to recalculate the retirement benefit and pension and to pay arrears within four months from the date of receipt of writ of this judgment. If respondents fail to pay arrears within four months, then, they shall be liable to pay 6% interest on such amount from due date till the actual payment.

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