

**SUPREME COURT OF INDIA**

K.K.Gohil

Vs.

State of Gujarat & Ors.

C.A.No.5821 of 2011

(M.Y.Eqbal and Arun Mishra,JJ.,)

12.05.2015

**JUDGMENT**

**M.Y.Eqbal,J.,**

1. This appeal by special leave is directed against the judgment and order dated 11th December, 2009 passed by the High Court of Gujarat at Ahmedabad in Letters Patent Appeal No.2392 of 2009, whereby the High Court has dismissed the Letters Patent Appeal of the Appellant.

2. The factual matrix of the case is that the appellant had joined the service on 16.11.1989 as a peon in the Social Welfare Department and, thereafter, the appellant was promoted as Junior Clerk in the pay-scale of Rs. 950-1500 vide order dated 30.6.1997 and posted under the Commissioner of Tribunal Development, Gujarat State and the said scale of Rs.950-1500 which came to be revised as Rs.3050-1590 in view of the Revision of Pay Rules, 1998 made effective from 1.1.1996.

3. The appellant had completed nine years of service on 30.6.2006 and was granted the first higher grade scale of Rs.4000-6000 by the Competent Authority i.e. Commissioner of Tribunal Development, Gujarat State w.e.f. 1.7.2006 by order dated 22.6.2007, according to the policy of the Government of Higher Grade Scale introduced vide Government Resolution dated 16.8.1994.

4 The appellant was meeting with all the requirements to get the higher grade scale as provided under the said scheme except passing of the departmental examination, which the appellant had not been able to clear because such examination was not conducted at all by the department and this fact was taken into consideration by the Departmental Promotion Committee and considering the policy of the Government in this regard, the first higher grade scale of Rs.4000-6000 was granted to the appellant.

5. The order of granting first higher grade scale to the appellant was not given effect to because of objection raised by the audit authorities and the matter was referred to the

Government and the Government in Social Justice and Empowerment Department (Tribunal Development) had referred the matter to the General Administration Department. The authorities of the General Administration Department held that even if the department has not conducted the examination, it is the disqualification of the employee concerned to be eligible to get the higher grade scale and the specific attention to the Judgment of the High Court was drawn to the officers of the General Administration Department and when they did not find any distinguishing features in both the cases, the stand was taken that the same cannot be made applicable to the appellant as he was not party to the said judgment.

6. Based on the above, higher grade scale that was granted to the appellant came to be withdrawn by the order dated 14.2.2008 and it is pleaded that no opportunity of hearing was given to the appellant. The order dated 14.2.2008 was challenged by the appellant by way of a by way of Special Civil Application No. 9683 of 2008 which was allowed on 5.2.2009 by the High Court quashing and setting aside the order dated 14.2.2008 and liberty was granted to the respondent Authority to pass appropriate order in accordance with law and on merits after giving an opportunity of hearing to the appellant.

7. The Commissioner of Tribal Development, Gujarat State issued a show cause notice to the appellant on 17.7.2009 calling upon the appellant to show cause as to why the order dated 14.2.2008 withdrawing the higher grade scale granted to him should not be confirmed as the appellant failed to pass the examination held in December, 2008. Pursuant to the said notice the appellant gave an oral as well as written representation on 27.7.2009 explaining in detail that during the period of eligibility to get the higher grade scale, no examination was conducted by the Department and the same was conducted only in the year 2009 after long span of 12 years. It was also pointed out to the authorities that still three more chances were available with the appellant to pass the examination and that higher grade scale cannot be denied only on the ground of non-passing of the departmental examination in view of the policy of the Government as also the settled position of law and based this, the appellant was rightly granted the first higher grade scale vide order dated 22.6.2007.

8. It has been pleaded on behalf of the appellant that the Commissioner of Tribal Development passed an order dated 26.8.2009 in view of the decision taken by the Government and cancelled the higher pay scale given to the appellant.

9. Aggrieved by the said order of the Department, the appellant approached the High Court of Gujarat at Ahmedabad under Article 226 of the Constitution of India by filing SCA No.11767 of 2009. The learned Single Judge of the High Court vide order dated 16.11.2009 dismissed the above-said petition by observing as follows:-

“Therefore, it appears to the Court that if within the requisite period, the departmental examination is not held, the employee concerned may be entitled for the benefit of higher pay scale and the benefit may also be conferred but in a case where, before the benefit is conferred upon the employee concerned, the employee who appeared at the departmental examination, has failed at the first attempt, such benefit if not conferred will have to be kept in abeyance until he passed the examination at the second and/or

third attempt. If out of three attempts, the employee has failed to clear the examination, he would not be entitled to the benefit of higher pay scale but if he passed examination, may be at second or third attempt, the benefit may be conferred effecting from the date on which he was entitled i.e. date of the earlier period upon completion of nine years of service. This appears to be with a view to maintain the requisite merit for grant of benefit to the government servant upon completion of nine years service.”

10. Appellant then moved an appeal against the order of the learned Single Judge being LPA No.2392 of 2009. The Division Bench of the High Court upheld the decision of the Single Judge and held that:-

“We have heard learned counsel for the appellant and given our thoughtful consideration. The law is very clear and we are in agreement with the proposition of law that at the completion of nine years an employee becomes entitled to higher pay scale. If the departmental examination was prescribed before higher pay scale was granted, and in the departmental examination he failed, his entitlement to promotion came under cloud. Therefore, the learned Single Judge was right in saying that as and when he passes the examination, he will be entitled to higher pay scale. The candidate has to pass the departmental examination in three chances. The appellant having failed once, there are two chances available to him. Therefore, as and when he passes the examination in two chances, he will be entitled to get higher pay scale. For the foregoing reasons, we do not see any reason to interfere with the order passed by the learned single judge. The appeal fails and the same is rejected.”

11. As per the Government Resolution dated 16.8.1994, upon completion of 9 years service the concerned government servant is entitled for the benefit of higher grade scale if he has not been promoted or that the requisite departmental examination for entitlement of higher post or for maintenance of the very post, are not cleared. The purpose of the policy was to see that no stagnancy was created in service on account of the fact that no higher posts are available. But at the same time when such benefits were conferred, two conditions were provided. One was that, as and when the promotion is offered to him, he will have to accept the same and the second was that he will have to pass the requisite departmental examination. Failure to comply with either of the two conditions would result in withdrawal of the benefits and also the refund of the amount of higher pay scale which was already granted, if any, prior thereto. It was not by way of compromising the merit that the benefit was to be given, just because the requisite length of service was completed but also dependent upon the merit and acceptance of the promotion.

12. From perusal of the Government Resolution dated 16 th August, 1994, it is manifest that the grant of a higher grade scale to the eligible employees who have completed nine years of service is permissible, provided that the employee is eligible to get the promotion on the basis of his overall performance, qualifications and passing the examination if prescribed. It is also material that if the employee gets higher grade scale without passing any competitive

examination, he will have to clear the departmental examination otherwise the grant of higher grade scale is to be withdrawn.

13. However, by circular dated 24.11.2004, the Government of Gujarat modified the earlier Resolution taking note of the High Court's order and directed that in cases where for getting higher pay scales a departmental examination is necessary then in such cases it is equally necessary that the departmental examination should be organised in time. Further by Government Order dated 22.06.2006, it was specifically brought to the notice of the Department that if the higher departmental examination is not organised during the eligibility period for getting the higher pay scales then in such case the higher pay scale benefit cannot be stalled on such ground. In the instant case, admittedly, the higher pay scale was ordered to be granted to the appellant after completion of nine years but the same was withdrawn on the basis of earlier circular of 1994. The High Court has not considered the subsequent circular of 2004 and based on the circular of 1994, the order withdrawing the benefit was upheld. The impugned order passed by the High Court on this account cannot be sustained in law.

14. Considering the entire facts of the case, vis-a-vis the Government Resolution time to time issued relating to the condition for giving benefit of promotion, we are of the view that the reasons assigned by the learned Single Judge and the Division Bench of the High Court cannot be sustained in law. Hence, this appeal is allowed and the impugned order passed by the High Court is set aside. Consequently, it is held that the appellant is entitled to the higher pay scale on completion of nine years of service.