

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2738 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO
1 to 5 - No

RAJENDRABHAI RATILAL SONI

Versus

S B TRIVEDI

Appearance:

MR BD KARIA, for Petitioner

MR VM PANCHOLI, AGP for Respondents

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 30/07/1999

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution, the petitioner who is working as a Physiotherapist at the Bapunagar General Hospital under the Employees State Insurance Scheme (ESIS) has prayed for a writ of mandamus to direct the respondents to promote the petitioner and put him in the grade of Rs.1640-2900 with effect from 1.1.1986.

2. The petitioner was recruited as a massagist under the Superintendent of the Bapunagar General Hospital under the ESIS on 8.11.1971. Pursuant to the interviews held on 30.7.1973, the petitioner was appointed as a Physiotherapist at the same hospital in the scale of Rs.175-275. Upon coming into force of the Gujarat Civil Services (Revision of Pay) Rules, 1975, with effect from 1.1.1973, the pay-scale of Physiotherapists was revised from Rs.175-275 to Rs.350-560. Thereafter, with effect from 1.1.1986 the scale was revised to Rs.1200-2040. During pendency of the petition, with effect from 1.1.1996 the scale has been revised to Rs.4000-6000.

The petitioner is a blind person and he has no vision in either eye. The petitioner started making representations before the authorities from 1989 to place the petitioner on the higher scale which was Rs.1640-2900 with effect from 1.1.1986 (which is now further revised to Rs.5500-9000 with effect from 1.1.1996). The representation was rejected by respondent No.1-Director of Medical Services (ESIS) as per his reply dated 29.1.1990 (Annexure "B"). The petitioner has, therefore, filed the present petition for challenging the aforesaid decision.

Another circumstance which prompted the petitioner to approach this Court was the appointment of Vibhutiben as a direct recruit on the post of Physiotherapist at the Bapunagar General Hospital (ESIS) on 15.4.1991. According to the petitioner, the said appointment was made without issuing any advertisement or holding interviews.

The petitioner has stated in the petition that there are atleast 10 similarly situate Physiotherapists who are getting the pay-scale of Rs.1640-2900. The Physiotherapist at the General Hospital, Rajkot and the Physiotherapist at the General Hospital, Palanpur are both blind persons, but both of them are getting salary in the pay scale of Rs.1640-2900 with effect from October, 1989. Their names are also given as D.M. Shah and B.A. Rohit respectively.

3. In response to the notice issued by this Court, affidavit is filed by Dr. N.S. Vora, Deputy Director, ESIS stating that there is no provision for filling up the post of Physiotherapist by promotion in the Recruitment Rules for the post of Physiotherapist in the higher scale called "the Physiotherapists Class III Employees State Insurance Scheme Recruitment Rules, 1978" (Annexure "E"). The only mode of appointment to the post

is by direct selection and that the qualification prescribed for the said post is a degree in Physiotherapy from a recognized institute. The petitioner does not possess such a degree as the petitioner has only undergone a training course conducted by the Victoria Memorial High School for the Blind, Bombay which, according to the deponent, is not recognized by the Government.

It is further stated that earlier there was an advertisement inviting applications for the posts of Physiotherapists Class-III in the higher pay-scale at the General Hospital, Bapunagar. The petitioner had applied in response to the same on 10.3.1977, but the petitioner was not selected. It is also stated that the Physiotherapists at the General Hospitals at Rajkot and Palanpur are not governed by the Rules relied upon by the petitioner which Rules (contained in the Government Notification dated 24.8.1984) are at Annexure "D". It is also stated in the reply affidavit that various kinds of electrical equipments and electronic instruments in Physiotherapy Department are required to be operated by the Physiotherapists, but a blind person would find it difficult or would require special attention for operating such instruments and, therefore, the Superintendent of the General Hospital, Bapunagar, Ahmedabad-respondent No. 3 has certified that the petitioner would not be able to handle all such instruments, equipments and for this reason also the petitioner was not selected for the post in the higher scale.

It is stated that Miss Vibhutiben S Bhavsar, was a bonded candidate under the Commissioner, Health Services (Medical Department) and, therefore, she is governed by different Rules at Annexure "D" whereas the petitioner is governed by the Rules at Annexure "E". It is contended that apart from his physical disability, the petitioner was suffering from the disability of non-possession of a degree in Physiotherapy.

4. The petitioner has filed rejoinder affidavit contending that 1978 Rules at Annexure "E" cannot be invoked by the respondents as the petitioner was appointed in the year 1974. It is also submitted that since the petitioner is rendering the same services and in the same manner as the other blind Physiotherapists at Government Hospitals, the petitioner is entitled to equal pay for equal work.

Lastly, it is also submitted that in any view of

the matter, the petitioner is entitled to get the benefit of higher scale after completion of 9 years service as the said resolution was issued for the benefit of the Government employees who were stagnating in the post for more than 9 years.

5. It appears that during pendency of this petition, this Court also directed the petitioner to make representation to the respondents. That representation was made by the petitioner, but was rejected by the respondents on the same grounds as mentioned in the reply affidavit, particularly stating that the diploma certificate produced by the petitioner was valid for working as a teacher in any school for blind, but not for the post of Physiotherapist.

6. The learned counsel for the petitioner has raised the same contentions which are raised in the aforesaid pleadings. The learned counsel for the petitioner further stated that in order to see that the employees who have worked in the cadre for more than 9 years do not suffer for lack of promotional avenues, the State Government also passed a resolution on 5.7.1991 for giving higher scale to employees who completed 9 years service and further higher scale to the employees who completed 18 years service.

7. The submission on behalf of the respondents is that since the petitioner is not eligible to be promoted to the post of Physiotherapist in the higher scale, the petitioner is not eligible to get the benefits of the aforesaid Government Resolution.

8. Having heard the learned counsel for the parties, it appears to the Court that since the General Hospital at Bapunagar, though under the administrative control of the Director of Medical Services (ESIS), is very much a Government Hospital as contemplated by the Recruitment Rules dated 24.8.1984 at Annexure "D" to the petition, the petitioner is entitled to rely upon the same. The relevant part of the said rules reads as under :-

"2. Appointment to the post of
Physiotherapist at the Government
Hospital shall be made either :-

(a) By promotion of a person of
proved merit and efficiency from
amongst the persons working as
massure/assistant massure/trained
assistant Assistant

Physiotherapist in Physiotherapy Department in lower grade and who has put in five years of continuous service as such in the lower grade.

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(b) By direct selection

3. To be eligible for appointment by direct selection to the post mentioned in rule 2, a candidate shall

(a) not be more than 30 years of age.

(b) possess -

(i) a degree in Physiotherapy of a recognized institution;

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(ii) a diploma in Physiotherapy of a recognized institution, with two years working experience in physiotherapy department.

It is submitted on behalf of the respondents that since the petitioner has undergone only a training course conducted by the Victoria Memorial High School for the Blind, Bombay, the same cannot be considered to be equivalent to a degree or a diploma in Physiotherapy.

Now, as far as the equivalence of the aforesaid course is concerned, in Special Civil application No. 2292 of 1974 decided on 29.3.1978, this court has already observed that the persons who have undergone the three years elementary and two years advanced course in Messeur and Physiotherapy at Victoria memorial School for the Blinds, such qualification has to be considered as equivalent to a diploma in Physiotherapy. It is the case of the petitioner that the petitioner has also undergone three years elementary course and two years advanced course in Physiotherapy at the aforesaid institution. It must, therefore, be held that the petitioner thus possesses the qualification for appointment to the post of Physiotherapist in the higher scale. Thus, once it is held so, there could not be any difficult about giving the petitioner higher scale in view of the fact that the petitioner has been stagnating on the post of Physiotherapist in the lower scale which post is

admittedly held by the petitioner since 1974. The averments made in the petition that the petitioner is discharging the same duties in the same manner as other blind Physiotherapists at the Government General Hospital at Rajkot and the Government General Hospital at Palanpur are discharging are not controverted in the reply affidavit. The said Physiotherapists were paid salary in the higher scale i.e. Rs.1640-2800 with effect from October, 1989. The petitioner's representation to give the petitioner the said pay-scale was rejected by the impugned communication dated 29.1.1990 (Annexure "B"). Hence, there is no need to give any direction to the respondents to consider the petitioner's case for promotion to the post of Physiotherapist in the higher grade on the basis of the Recruitment Rules dated 24.8.1984 but on the ground that the petitioner had already completed 9 years service on the post of Physiotherapist in the lower scale, the petitioner is entitled to get the benefit of higher scale of Rs.1640-2900 with effect from 5.7.1991.

9. In the result, the petition is partly allowed. The respondents are directed to place the petitioner in the scale of Rs.1640-2800 with effect from 5.7.1991 till 31.12.1995 and to pay the petitioner the benefit of the corresponding pay-scale of Rs.5500-9000 with effect from 1.1.1996.

The respondents shall accordingly fix the petitioner's pay within two months from the date of receipt of the writ of this Court or a certified copy of this judgement, whichever is earlier and thereafter pay the petitioner arrears of difference of salary on that basis within a period of two months from the date of such fixation. If the entire exercise as aforesaid is not carried out within four months from the date of receipt of a copy of this judgment, the amount of arrears of difference of salary shall be paid to the petitioner with interest at the rate of 12% per annum.

Rule is made absolute in the aforesaid extent with no order as to costs.

Sd/-

July 30, 1999 (M.S. Shah, J.)

sundar/-