

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 18190 of 2011

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.THAKER

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to civil judge ?

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KIRANBEN P CHAUDHARY - Petitioner(s)

Versus

STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :

MR AS SUPEHIA for Petitioner(s) : 1,
MR JANAK RAVAL AGP for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1 - 2.
MR HS MUNSHAW for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE K.M.THAKER

Date : 30/04/2012

ORAL JUDGMENT

Heard Mr. Supehia, learned advocate for the
petitioner, and Mr. Raval, learned AGP, for the
respondent – State.

1.1 Rule.

1.2 In the facts and circumstances of present case and in view of the fact that the petitioner relies on the order dated 31.3.2009 passed in Special Civil Application No.2146 of 2009 and order dated 18.2.2010 passed in Special Civil Application No.324 of 2010 and allied matters and having regard to the submissions made by the contesting parties, the petition is taken up for hearing and final disposal today in view of the request made by learned counsel for the contesting parties.

2. The petitioner has approached this Court seeking below mentioned relief/direction:-

"10A Directing the Respondents to modify the orders dt. 2.9.2011 and grant the first higher grade scale to the petitioner with effect from 22.3.1997 instead of 23.11.2007 and further revise her pay accordingly and pay the arrears with interest.

2.1 The petitioner has placed reliance, to justify the above mentioned relief, on notification dated 16.8.1994 issued by the respondent – State (Health & Family Welfare Department).

2.2 The case of the petitioner is that in view of the said notification, the petitioner is entitled for first higher grade w.e.f. 22.3.1997, however, the said benefit has been granted to the petitioner w.e.f. 23.11.2007, which is erroneous and contrary to the GR dated 16.8.1994.

3. So far as the relevant facts involved in present petition are concerned, it emerges from the record

that the petitioner came to be appointed as Mukhya Sevika by virtue of order dated 18.3.1988 and she resumed duties on 22.3.1988. It is claimed that as of now, the petitioner is working as such at Jhagadiya, district Bharuch, under the authority and control of respondent No.2.

3.1 It is claimed that in view of the GR dated 16.8.1994 granting benefit of first higher grade upon completion of service of 9 years, the petitioner became entitled for the said benefit w.e.f. 21.3.1997. It is claimed that the said GR postulates that the person claiming benefit of the said GR should have completed service of 9 years and should also pass the qualifying examination. What is relevant for considering the claim for such benefit is the Rules notified by the Government, i.e. The Child Development Project Officer (Female) in the Gujarat Public Health Service Examination Rules, 1993 [hereinafter referred to as "the Rules of 1993"]. It is claimed that the said benefit is available to persons like petitioner under the said Rules of 1993 read with GR dated 16.8.1994. The provision which requires the respondent – State to hold examination is found under Rule8, which read thus:-

"RULE 8 : Holding of the Examination

The Health and Family Welfare Department shall hold the examination twice in a year ordinarily in the months of June and December."

3.2 So far as the petitioner is concerned, the grievance is that in the department where the

petitioner is working, the examination has not been held by the respondent authorities for long duration and it was conducted only in November-2007. The petitioner has also claimed that when, after long duration, the examination came to be conducted for the first time in November-2007, the petitioner appeared in the said examination and has cleared the said test in first attempt. It is claimed that the on 23.11.2007 the petitioner was declared successful in the said test.

3.3 Relying on the order dated 31.3.2009 passed in Special Civil Application No.2146 of 2009 and order dated 18.2.2010 passed in Special Civil Application No.324 of 2010 and allied matters, the petitioner has claimed that it was the respondent authorities who did not conduct the examination for so many years and that therefore, for the inaction on the part of the respondent authorities, the petitioner should not be penalized. It is claimed that as per the Rules, the petitioner became entitled for the benefit w.e.f. 22.3.1997 and that therefore, the benefit should be allowed to the petitioner from the said date.

4. The relief, prayed for by the petitioner, is disputed and resisted by the respondents. In the affidavit in reply filed by the respondents, it is claimed that:-

"10. I say and submit that the present petitioner has joined in to the service on 22.03.1988 and had completed 9 years of service on 21.03.1997. So, as per the Government Resolution dated 14.01.1993, she is entitled 1st higher grade after passing the departmental exam i.e. dated

28.11.2007.

11. I say and submit that the petitioner has been appointed on 22.03.1988 as a Mukya Sevika and she has completed nine years of continuous service on 21.03.1997. As per the Health and Family Welfare Department's notification dated 14.01.1993 wherein the departmental examination Rule are framed. Accordingly, as per guide line of the Finance Department's order dated 16/8/1994 the Government employee can be entitle first higher pay scale after departmental examination. The copy of the notification dated 14.01.1993 is annexed hereto and marked as ANNEXURE-R-II to this affidavit in reply.

12. I say and submit that, as per the Government Resolution dated 16.08.1994, the higher pay scale is required to be sanction from the passing of departmental examination. The petitioner has passed the departmental examination on 28.11.2007, therefore, in the case of the present petition, the first higher pay scale is required to be sanctioned from 28.11.2007 according to Rules. The copy of the Government Resolution dated 16.08.1994 is annexed hereto and marked as ANNEXURE-R-III to this affidavit in reply."

5. The relevant factual aspects are not in dispute inasmuch as it is not in dispute that the petitioner came to be appointed vide appointment letter dated 18.3.1988 and she resumed her duties on 22.3.1988. It is also not in dispute that the Government has declared the policy, which is reflected from the above mentioned Rules of 1993 read with GR dated 16.8.1994, which provides for benefit of first higher grade to the employees, who completes service of 9 years.

5.1 It is also not in dispute that the examination which the employees are required to clear for becoming eligible for the said benefit, have not been conducted since many years. The said aspects have been taken note of by the Court in the above mentioned two orders, i.e. order dated 31.3.2009 passed in Special Civil Application No.2146 of 2009 and order dated

18.2.2010 passed in Special Civil Application No.324 of 2010 and allied matters.

5.2 It is also not in dispute that after many years, the examination, as contemplated under the Rules, was conducted in November-2007 and the petitioner cleared the said examination in the first attempt on 23.11.2007.

5.3 It is also not in dispute that the respondents have considered petitioner eligible and entitled for the said benefit w.e.f. 23.11.2007. However, the petitioner claims that she should be granted benefit on and from the date on which she became entitled for the said benefit, i.e. 21.3.1997 and merely because the respondent failed to conduct the examination, the petitioner should not be deprived of such benefit.

6. At this stage, it is relevant to take note of the observations made by the Court in order dated 31.3.2009 passed in Special Civil Application No.2126 of 2009. In the said order, the Court has observed in para 13 to 15 that:-

"13. Identical question came to be considered by the learned Single Judge in its judgment dated 29.7.2003 in Special Civil Application No.10772 of 2003 thereby, the learned Single Judge has confirmed the judgment and order passed by the Gujarat Civil Services Tribunal by which the Tribunal directed the State-Authorities to grant higher grade scale from the date on which the employee became eligible for completion of 9 (nine) years service which was denied on the ground that the employee had not passed the departmental promotional examination. It appears that the said decision has not been further carried in an appeal and the State Government has accepted said judgment and order.

14. Even otherwise, considering the fact that when since 1991, the departmental promotional examination has not been

conducted by the respondent-State and when the petitioner was always ready and willing to appear in the examination and had twice filled up the form, petitioner cannot be denied the benefit of higher grade scale on completion of 9 (nine) years service solely on the ground that petitioner has not passed departmental promotional examination, which is not conducted by the State since 1991. To deny the benefit of higher grade scale to the petitioner on the ground that petitioner has not passed departmental promotional examination would be penalizing the petitioner/employee for their no fault. It is also required to be noted that even in the present Special Civil Application also, in paragraph 13 of petition, petitioner undertakes to appear and pass the examination within the prescribed trials whenever it is held. Under the circumstances, petitioner can be extended the benefit of first higher grade scale subject to petitioner appearing and passing the examination within the prescribed trials whenever it is held.

15. For the reasons stated above, petition succeeds. Respondents are directed to grant the actual benefit of first higher grade scale as per the order dated 10.12.2004 from the date of completion of 9 (nine) years as Head Constable, Driver Mechanic Grade-I subject to the petitioner appearing and passing the examination for the post of Police Sub Inspector- Motor Transport within the prescribed trial(s) whenever it is held. Petitioner shall be paid the arrears within a period of 2 (two) months from today and is continued to pay the benefit of first higher grade pay scale."

6.1 Thereafter, the issue again came up for consideration before the Court in Special Civil Application No.324 of 2010 and allied matters. The Court, while considering the said issue, made below mentioned observations vide order dated 18.2.2010:-

"6. It is clear that the controversy has arisen from requirement of passing the departmental examination meant for the promotion to the post of Child Development Project (Female) Officer. It is undisputed that passing of the departmental examination is *sine qua non* for grant of higher grade scale. It is also not disputed that such departmental examination was held for the first time in the year 1993 and all the petitioners had become eligible for the first higher grade scale prior to holding of such examination. The respondents at the relevant time had also granted the benefit of the first higher grade scale counting their nine years service from the date of appointment. Thus, the petitioners were not at fault, but the lapse on the part of respondents in not holding the

examinations in time pursuant to the relevant rules caused the problem. The petitioners were rightly granted benefit of the higher grade scale after completion of nine years of service at the relevant time and they cannot be deprived of that benefit for voluntary act of the respondents in not holding the examination before the petitioners became eligible. No opportunity of hearing was given to the petitioner before retrospectively withdrawing the benefit of higher pay scale given to them.

7. For the above reasons, the petitions are allowed, the impugned orders modifying the higher grade scale to the petitioners and for effecting recovery are set aside and the earlier orders by which the petitioners were granted the first higher grade scales after completion of 9 years in service are restored with direction to grant them the consequent benefits. Monetary benefits due to the petitioner under this order shall be paid to the petitioners within three months from today."

7. The facts narrated in the petition, which are not disputed by the respondents, give out that the petitioner cannot be held responsible for not fulfilling the requirement of passing the examination. When the respondent consistently failed to conduct the examination despite the obligation cast on it by virtue of the above mentioned provision, i.e. Rule 8 of the 1993 Rules, the petitioner cannot be made to suffer for the lapse on the part of the respondent authorities. The Rules contemplate and provide that the employee would be entitled for the benefit on completion of 9 year's service. The Rules oblige the department to hold examination twice in a year, i.e. in June and December, so that any practical anomaly, such as in present petition, may not arise. When despite such clear provision, the respondents failed and neglected to conduct the examination, the petitioner cannot be said to be at fault. If the relief, as prayed for by the petitioner, is not granted, then, it would amount to penalizing the

petitioner for no fault on her part rather for the default on the part of the respondents.

8. It is not the case of the respondents that though the examinations, as contemplated under Rule 8 read with GR dated 16.8.1994, were held from time to time, the petitioner did not attend/appear in the said test and/or the petitioner did not succeed in the said test and it was only in November-2007, the petitioner for the first time cleared the said examination. Had that been the case, then, the matter would stand on different footing. However, in present case, it is not in dispute that on the date on which the petitioner became entitled for the said benefit or immediately thereafter and until November-2007, any examination was held. Under the circumstances, the entire interregnum, passed without examination being held, and for that lapse, the petitioner, by any stretch of imagination, cannot be held responsible. The fault for the said delay or lapse lies at the door-step of the respondents for which the petitioner cannot be made to suffer.

9. For the foregoing reasons and in view of the orders passed by this Court in the above mentioned petitions, the impugned order dated 2.9.2011 is set aside and the respondents are directed to grant the benefit of first higher pay scale/ grade to the petitioner in accordance with the above mentioned Rules of 1993 and the GR dated 16.8.1994. For the said

purpose, the respondent authorities shall pass fresh order, within 2 weeks, from receipt of certified copy of present order.

The said fresh order shall be passed after taking into account the order dated 31.3.2009 passed in Special Civil Application No.2146 of 2009 and order dated 18.2.2010 passed in Special Civil Application No.324 of 2010 and allied matters.

With the aforesaid observations, clarification and direction, present petition is partly allowed. Rule is made absolute to the extent above.

(K.M.Thaker, J.)

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