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Court : Gujarat

Decided On : Dec-04-1980

Reported in : (1980)2GLR581

Judge : N.H. Bhatt, J.

Appellant : K.A. Contractor and ors.

Respondent : State of Gujarat and ors.

Judgement :

N.H. Bhatt, J.

1. This is a petition by five Government employees in the Gujarat State Accounts Service. In the year 1976 or thereabout, all these five petitioners were in the group I service, which was the highest non-gazetted post in Class III service. In this Accounts Service, there are Group II service, Group I service; Class II service and Class I service. The persons in the Group I service, as the petition paragraph 5 states without any controversy being raised in that regard, were eligible for promotion to Gujarat Accounts Service Class II on the basis of (a) seniority in Group I post; (b) at least three years working on the supervisory pests; (c) passing of the departmental examination prescribed by the Government; and (d) proved merit and efficiency to be adjudged from confidential reports. The examination prescribed by the Government is styled as the Gujarat Accounts and Treasuries Department (Gujarat Accounts Service) Examination Rules, 1975, which are the

Rules made by the Governor by virtue of the powers conferred on him by the proviso to Article 309 of the Constitution of India. Those Rules were made by the Governor in supersession of the existing Rules on the subject. The petitioners admittedly were senior to the respondents nos. 9 to 12, as far as Group 1 service is concerned. The respondents nos. 9 to 12 passed the qualifying departmental examination prescribed by the above-mentioned Rules in April 1966. The petitioners nos. 1 and 5 had appeared at that examination along with the respondents nos. 9 to 12, but they had failed while the respondents nos. 9 to 12 had passed. The petitioners nos. 2, 3 and 4 had not passed the examination till April 1976. All the five petitioners however, had appeared at the examination held in October 1976 and were declared successful in the results announced, curiously enough after about 10 months, that is, in the month of August 1977. It so happened that in the month of November 1976, certain Class II posts were to be filled in. The petitioners, though senior to the contesting respondents in the Group I cadre, were not eligible because they had not passed the examination at the time the avenue for promotions opened. The respondents nos. 9 to 12, therefore, had come to be promoted, but the Government called their promotion ad hoc or provisional. In becoming eligible, the petitioners claimed their eligibility and consequential right to promotion, but the Government did not pay any heed. Therefore, in September 1978, they filed the present petition and prayed for the following reliefs:

(c) Be pleased to direct the respondent nos. 1 and 2 to consider and promote the petitioners to class II posts in the vacancies which were available in November 1976 according to seniority-cum-merit criteria and give all consequential benefits attached to Class II posts retrospectively from November 1976 in the matter of pay-scale, seniority, etc.

(d) Be also pleased to direct respondent nos. 1 and 2 to implement Rule 7 of 1975 Rules both in letter and spirit and readjust the promotions of respondents nos. 9 to 12 and others similarly situated in accordance with law by reverting respondents nos. 9 to 12.

2. In the petition, there were impleaded the respondents nos. 3 to 8, but they are now deleted from the contest. So we have to examine the petition vis-a-vis the petitioners and the respondents nos. 9 to 12, with the State and the Director of Accounts and Treasuries also arraigned on the other side. It is also to be noted pertinently that during the pendency of this petition, the petitioners also came to be promoted to the Class II post and Mr. A.J. Patel, the learned Assistant Government Pleader appealing for the respondents nos. 1 and 2, declared that the Rule 7 of 1975 Rules, which is hereafter quoted, will be given full effect and the petitioners will be accorded seniority pursuant thereto. Thus, to some extent, the petitioners' grievance is redressed. However, certain things do remain and that is why the petition had been prosecuted.

3. Mr. Girish Patel, the learned advocate appearing for the petitioners, raised two questions before me. He first prayed that in view of the Manual of Departmental and Language Examination Rules of the erstwhile State of Bombay, the petitioners, who had appeared at the examination held in October 1976, should be deemed to have passed the examination on the date following the date on which the examination ended. Clause (3) of Rule 2 of the alleged Rules, which was relied upon by Mr. Girish Patel, reads as follows:

3. Unless otherwise specifically provided, the date of passing the examination shall mean the date following the date on which the examination ends.

As the examination ended somewhere in the month of October 1976, Mr. Girish Patel urged that October 31, 1976 should be deemed to be the date on which all these petitioners fictionally passed the examination, because it was none of the fault of these petitioners but due to depreciable lethargy of the persons in-charge of the examinations, the results could be declared as late as in August 1977. Placing reliance on the above-quoted Clause (3) of Rule 2 of the Departmental and Language Examination Rules (Bombay), 1953, Mr. Girish Patel urged that all the five petitioners should be deemed to have passed the examination latest on 31-10-76 and so they were entitled to be considered for the promotional posts, which came to be filled in the month of November 1976, As the factual promotion was not given, Mr. Patel wanted that the petitioners be awarded a deemed date of

promotion and all other available benefits should be directed to be worked out on that basis.

4. The second contention of Mr. Girish Patel is resting on the interpretation of Rule 7 of the Examination Rules, 1975. I quote below the Rules 4, 5, 6, 7 and 8, because they are necessary to be understood in order to comprehend the point raised by Mr. Girish Patel:

5. Consequences in the event of failure to pass the examination for the direct recruits:

(1) Where a direct recruit fails to pass the examination as required under Rule 3, his service shall be terminated;

Provided that if in the case of any such direct recruit, the Government is satisfied that he could not pass the examination at which he had the last chance for reasons beyond his control or that he failed to pass the examination by a very narrow margin of marks, the Government may after recording reasons in writing, give him one more chance to pass the examination.

(2) Where a person holding Group-I post fails to pass the departmental examination as required under Rule 4, he shall not be eligible for promotion to the class II and Class I post, except as provided in Rule 5.

6. Additional chances:

Where a person holding ground-I post fails to pass the departmental examination within the period specified in Rule 4 and according to chances available to him under Rule 4, he shall notwithstanding such failure be eligible to appear at any time in such examination, on payment of an examination fee of rupees thirty and if he passes the examination, he shall be eligible for promotion to the posts of Class II. Provide that he shall not be entitled to claim seniority over those persons who have passed the examination earlier than he.

7. Seniority:

A person who passes the examination within specified period and in specified chances shall retain his seniority for the purpose of promotion to the class II post and Class I post, even if a person junior to him has passed the examination earlier and shall, on his promotion to the Class II post, be assigned seniority over the person, if any, who although being junior to him, has been promoted to the Class II post earlier by reason of his having passed the departmental examination earlier.

8. Provisional promotion:

Where a qualified person of Group-I post is not available for promotion to the Class II post, an unqualified person of Group-I post, whose specified chances to pass the examination are not exhausted under Rule 4, may be promoted provisionally to Class 11 post, subject to the condition that he shall be reverted on availability of a qualified person for promotion or on his failure to pass the examination within the prescribed period and according to the chances specified in Rule 4, whichever event occurs earlier.

5. It cannot be gainsaid that passing of the examination is one of the four eligibility criteria. It is equally clear from the above-mentioned Rules that a candidate is at liberty to clear this examination within three years and by trying his luck at three attempts. The examinations are held twice in a year. In other words, a candidate is at liberty to clear this examination with the prescribed time limit of three years and within prescribed chances. Because of this span, available to a candidate, he may avail himself of this optional treatment, but the man who clears the examination earlier might steal some march over the other. In order to make provision against the outcome of this situation, Rule 7 has been made. It provides that a person who passes the examination within specified period and in specified chances, shall retain his seniority (that is he will not lose his seniority) for the purpose of promotion to the Class II post, even if a person junior to him has passed the examination earlier. Secondly, it is provided that as and when he is promoted to that Class II post, he will be entitled to seniority over the persons junior to him, who was promoted to that Class II post earlier by reason of his having passed the Departmental examination earlier. In other words, the effect of not passing the examination earlier than his junior is not to have any adverse effect on his future

prospects, the rule-making authority itself having given him the range of period and chances. It is, therefore, in the fitness of things that he who avails himself of this latitude or liberal chances spread before him shall not be put to any disadvantage in the matter of seniority in the Grade I post in so far as it was relevant for the purpose of promotion and in the matter of his seniority in the promotional posts despite his being factually promoted later than the person junior to him. Mr. Girish Patel urged that retention of seniority for the purpose of promotion to Class II post necessarily meant that while considering the case of promotion, he will be deemed to be senior as per the seniority in the Group I post and other things being equal in the lower matter of three other criteria of eligibility, he would have an earlier chance of promotion. On the other hand, Mr. Hathi appearing for the contesting respondents and Mr. A.J. Patel, the learned Asstt. Government Pleader for the respondents nos. 1 and 2, urged that what Rule 7 confined itself to was the subject matter of seniority in the higher cadre and the reference to seniority in the Group I post was only clarificatory in character.

6. As far as the first point canvassed by Mr. Girish Patel is concerned, it is not shown as to whether the rules mentioned at Annexure 2 as extracted from the Manual of Departmental and Language Examinations Rules (Bombay) were statutory Rules. Ordinarily, a man can be said to have passed the examination only when he is declared to have cleared that examination successfully. It will be, therefore, in consonance with common sense to hold that a man can be said to have passed examination only when the authority holding the examination declares himself to have passed that examination, but not earlier. The power of the law-giving authority to invoke any fiction in that regard cannot be disputed. However, when statutory Rules, like the 1975 Rules, are made in supersession of the existing Rules on the subject of examination, Clause (3) of Rule 2 quoted above from the Manual of Departmental and Language Examination Rules (Bombay) cannot be allowed to have any sway in the matter. In my view, therefore, the first point canvassed by Mr. Girish Patel fails.

7. It is to be recalled at this stage that the respondents Nos. 9 to 12 were promoted on provisional basis. This method of ad hoc or provisional appointment has been resorted to by the Government in a variety of circumstances. Firstly, the

posts might be there, but duly qualified people may not be available to fill in those posts and so certain people are promoted to that post on adhoc or provisional basis, making it clear that they will hold that post till the duly qualified and competent candidates are available. This is the meaning attributed to the term 'provisional promotion' in the above quoted Rule 8 of the Examination Rules. Secondly, the posts may be temporary or not likely to continue ad infinium. In service law, the permanent posts are known as substantive posts whereas the posts which are for a fixed duration or for unascertainable duration, but which are not permanent at that point of time and are not expected to last fairly longer, are also filled in and those who are promoted to the said posts are said to be officiating in that posts or some times they are designed as persons holding those posts provisionally. The promotion of the respondents nos. 9 to 12 on provisional basis cannot be said to be of the first category, because they were not the un-qualified people promoted for want of any qualified hands being available. It is, therefore, reasonable to hold that there were regular vacancies, though not substantive ones, which arose for being filled in, in November 1976 and as they were the duly qualified persons eligible for promotion, they were given the appointments, but their appointments were stated to be provisional. The orders of promotion of the respondents nos. 9 to 12, also called their appointments as provisional. It is, therefore, clear that when the respondents nos. 9 to 12 were promoted, the Government did not promote them on the ground that some people, like the petitioners not eligible at that point of time but likely to be eligible, in future would come forth and would be required to be accommodated even by replacing the respondents nos. 9 to 12. From the facts and circumstances of the case, as they are set out in the pleadings of the parties, this sort of intention is difficult to be attributed to the State Government and the Director, the respondents nos. 1 and 2 herein.

8. Mr. Girish Patel, however, urged that in August 1977. when the petitioners became eligible, they were entitled to be considered for promotion to fill in those posts, which were temporarily held by the respondents nos. 9 to 12 and, therefore, these petitioners were entitled to replace them, because they were senior in the Group 1 post and they were also senior to the respondents nos. 9 to 12 even in that promotional post by dint of the fiction provided for in the above-mentioned

Rule 7. The seniority claimed by Mr. Girish Patel for the petitioners in both these spheres is indisputable. The question is whether the petitioners at least in August 1977, because of their having passed the qualifying examination and because of their being senior in Group I post, were as a matter of necessity and inevitability entitled to promotion. It is to be recalled here again that as many as four factors conjointly come to have their sway when the question of promotion comes up. One of them, as stated in the petition paragraph 5 itself, is proved merit and efficiency to be adjudged from the confidential reports. It is a matter of assessment, analysis and conclusion. It is, therefore, difficult to say that in August 1977, the petitioners because of their seniority in Group-I post on passing of examination, were entitled to be promoted automatically. It, however, cannot be denied that they were entitled to be considered at that time. What Mr. Girish Patel wants is that their case should be viewed, as if the posts were vacant at that particular point of time by replacing the provisional occupation of those posts by the respondents nos. 9 to 12 and then if they were found to be fit for promotion (as they were found fit during the pendency of this petition), they should be promoted or should be deemed to have been promoted by giving them a deemed date of promotion of August 1977 for all benefits flowing from that promotion effective from August 1977. The affirmation or negation of this prayer would depand on the existance or absence of vacancies at that particular point of time. If Mr. Girish Patel's submission is accepted, and if the respondents nos. 9 to 12, who were legitimately and because of their eligibility promoted, albeit provisionally, were liable to be thrust back, there would certainly arise vacancies and the petitioners would be entitled to that promotion if they, were found to be persons of proved merit and efficiency. So everything would depend on whether there were vacant posts in August 1977 or not. Is it the impact of Rule 7 quoted above that the junior persons, who became eligible earlier and who occupied the positions earlier because of that eligibility, should vacate in favour of the petitioners because of the fiction of Rule 7 quoted above? In other words, the interpretation of Rule 7 one way or the other would answer the question either way. Mr. Girish Patel was fair enough to concede that if Rule 7 was only in the form of the latter part of it, the question of the respondents nos. 9 to 12 having been called upon to vacate the places would not have arisen. If Rule 7 had been as follows, namely, 'a person who passes the examination within specified period

and in specified chances shall on his promotion to the Class II post be assigned seniority over the person, if any, who although being junior to him, has been promoted to the class II post earlier by reason of his having passed the departmental examination earlier', the replacement would hot follow and the person clearing eligibility later on will be required to wait till the new vacancies occur. This concession was made by Mr. Girish Patel because of the judgments of this Court on two earlier occasions, in the Special Civil Application no. 398 of 1973 decided on 15-11-73 by my Brother S.H. Sheth J. and in the Special Civil Application no. 2055 of 1971 decided on 1/3-12-76 by my Brother M.P. Thakkar J. These two cases were the cases arising under the Sales Tax Officers (Sales Tax Department) Recruitment Rules, 1969 and the Gujarat Sales Tax Department (Conditions of Service relating to Sales Tax Officers Examination) Rules, 1967. There Rule 8 was analogous to Rule 7 here, except for the first part of the present Rule 7, relating to retention of seniority for the purpose of promotion to the higher post. Mr. Girish Patel urged with appreciable vehemence that retention of seniority by the employee despite passing the examination later than his junior, which is provided for in the first part of Rule 7, can have any conceivable meaning if and only if the said retention of seniority assumes any earthly benefit. Mr. Girish Patel urged that a senior man in Group I post would remain senior irrespective of passing or not passing the examination, which is provided for earning eligibility for higher post and, therefore, first part of the above-quoted Rule 7 cannot be understood to have reference to that retention. That retention is there despite not passing the examination at all. The retention is provided for 'for the purposes of promotion to Class II post'. Mr. Patel, therefore, urged that in order to have any tangible benefit of retention of that seniority, it must be projected in the matter of promotion to Class II post and, in his submission, this projection can have meaning if and only if it earns him benefit of promotion on that day, the other criteria of eligibility remaining the same in respect of all. In other words, his submission is that this particular earlier clause of Rule 1, which is an additional provision as compared to the similar Rules of the Sales Tax Department, should be interpreted to mean that even if a junior was promoted earlier, because of his having earned eligibility for promotion earlier, he cannot be permitted to retain that earlier post on his senior in Group I post retaining his earlier seniority for the

purpose of promotion. The argument is really very ingenious, but as it militates against the normal rules or notions of service law, is found to be difficult to be accepted by me, particularly because the law-making authority, namely, the Governor of Gujarat, making those 1975 Rules if at all intended to have the result claimed by Mr. Girish Patel, could have in terms stated so. Ordinarily, a man, who is given promotion on the basis of eligibility, cannot be robed of that benefit except for the mandate of some binding law. It is, therefore, reasonable to infer that the retention of seniority in the first part of Rule 7 is not meant to divest an earlier junior promotee of his promotion, in order to make room for the senior would-be-promotee. Mr. Girish Patel's grievance that in that case the earlier clause of Rule 7 would be redundant also is difficult to be accepted. An illustration would make the point clear. Mr. X, a junior in Group I post, say passes the examination in April 1976. He is eligible for promotion, but for want of posts, he does not get the promotion factually. Thereafter Mr. Y, a person senior to him in Group I post, say passes the examination in October 1976. When both X and Y become eligible, a post happens to fall vacant or falls to be created. Who will get that promotional post? Both X and Y will be the claimants for it. X will say that he had become eligible earlier and, therefore, he should get that post. Earlier clause of Rule 7 at that stage would step in and would tell him that for the purpose of promotion, that is, future promotional avenue that opens at that time, the seniority of Y in the matter of that promotion will be respected, of course other three criteria being equal or common in the case of both X and Y. I, therefore, do not agree with Mr. Girish Patel, though I appreciate the view-point of his to some extent, that the earlier clause of Rule 7 quoted above, will be denuded of any sensible meaning, if the interpretation sought for by him was not accepted. It is in this circumstance that I find that the petitioners are not entitled to succeed. As far as the seniority for the purpose of future chances is concerned, Mr. A.J. Patel under instructions of the respondents nos. 1 and 2, has stated before me very categorically that the petitioners will be accorded seniority over the respondents nos. 9 to 12 in Class II post, because the Rules are too clear to call for any mincing of matters.

With the above observation and concession made by Mr. A.J. Patel recorded, the Rule in this petition is discharged with no order as to costs.

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