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K.K.GOHIL

v.

STATE OF GUJARAT AND OTHERS

(Civil Appeal No.5821 of 2011)

B

AUGUST 12, 2015

**[M.Y. EQBAL AND ARUN MISHRA, JJ.]**

C *Service law – Higher grade scale – Entitlement to – Employee granted higher grade scale on completion of nine years – Withdrawal of, on the ground of non-passing of the departmental examination – Said order upheld by High Court – Sustainability of – Held: By Government Resolution dated 16.08.1994, if employee gets higher grade scale without passing any competitive examination, he will have to*  
D *clear the departmental examination otherwise the grant of higher grade scale is to be withdrawn – However, by Circular dated 24.11.2004, State Government modified the earlier Resolution directing that in cases where for getting higher*  
E *pay scales a departmental examination is necessary then in such cases it is equally necessary that the departmental examination should be organised in time – High Court did not considered the subsequent circular of 2004 and based on the circular of 1994, upheld the order of withdrawal of*  
F *benefit – In view of the facts of the case vis-a-vis Government Resolution issued time to time, order passed by the High Court set aside.*

**Allowing the appeal, the Court**

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**HELD: From perusal of the Government Resolution dated 16th August, 1994, it is manifest that the grant of a higher grade scale to the eligible employees who have**

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completed nine years of service is permissible, provided A  
 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 B  
 passing any competitive examination, he will have to  
 clear the departmental examination otherwise the grant  
 of higher grade scale is to be withdrawn. However, by  
 circular dated 24.11.2004, the Government of Gujarat  
 modified the earlier Resolution taking note of the High C  
 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 D  
 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 E  
 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 did not consider the  
 subsequent circular of 2004 and based on the circular F  
 of 1994, the order withdrawing the benefit was upheld.  
 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, the reasons  
 assigned by the Single Judge and the Division Bench G  
 of the High Court cannot be sustained in law, and the  
 order passed by the High Court is set aside. [Paras 12-  
 14] [794-F-H; 795-A-F]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. H

A 5821 of 2011.

From the Judgment and Order dated 11.12.2009 of the High Court of Gujarat at Ahmedabad in Letters Patent Appeal No. 2392 of 2009.

B Manoj K. Mishra, Sandeep Kr. Dwivedi, Bheem Pratap Singh for the Appellant.

Jesal Wahi, Hemantika Wahi for the Respondents.

C The Judgment of the Court was delivered by

**M. Y. EQBAL, J.** 1. This appeal by special leave is directed against the judgment and order dated 11<sup>th</sup> December, 2009 passed by the High Court of Gujarat at Ahmedabad in  
D 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  
E 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  
F 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  
G 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.

H 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 appellatant 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 appellatant. A B

5. The order of granting first higher grade scale to the appellatant 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 appellatant as he was not party to the said judgment. C D E

6. Based on the above, higher grade scale that was granted to the appellatant came to be withdrawn by the order dated 14.2.2008 and it is pleaded that no opportunity of hearing was given to the appellatant. The order dated 14.2.2008 was challenged by the appellatant 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 appellatant. F G H

A 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  
B 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  
C 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  
D 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.

E 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.

F 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  
G petition by observing as follows:-

H “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

A 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<sup>th</sup> 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.

H 13. However, by circular dated 24.11.2004, the

Government of Gujarat modified the earlier Resolution taking A  
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 B  
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 C  
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 D  
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 E  
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 F  
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.

Nidhi Jain

Appeal allowed.