

# Bahadur Hoshi Kotwal vs State Of Gujarat on 7 May, 2019

**Author: N.V.Anjaria**

**Bench: N.V.Anjaria**

C/SCA/19042/2017

CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 19042 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE N.V.ANJARIA

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|---|---|-----|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ?  | Yes |
| 2 | To be referred to the Reporter or not ?   | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ?   | No  |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | No  |

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BAHADUR HOSHI KOTWAL

Versus

STATE OF GUJARAT & 4 other(s)

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Appearance:

MR SHALIN MEHTA, SR. ADVOCATE WITH MR HEMANG M SHAH(5399)

for the Petitioner(s) No. 1

MR KM ANTANI, AGP (1) for the Respondent(s) No. 1

NOTICE SERVED BY DS(5) for the Respondent(s) No. 2,3,4,5

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CORAM: HONOURABLE MR.JUSTICE N.V.ANJARIA

Date : 07/05/2019

CAV JUDGMENT

Heard learned Senior Advocate Mr. Shalin Mehta assisted by learned advocate Mr. Hemang Shah for the petitioner and learned Assistant Government Pleader Mr. K.M. Antani for the respondents.

2. By filing the present petition under Article 226 of the Constitution, the petitioner has prayed to set aside order dated 06 May, 2017, passed by the Joint Director of Commissionerate of Technical Education. The decision conveyed by the said order is that since the petitioner - as Assistant Lecturer Class-III - was appointed on ad-hoc basis and since his services were not regularized, the petitioner was not eligible to get pension and was not entitled to receive any retirement benefits.

3. The petitioner came to be appointed as an Assistant Lecturer in Computer Engineering Class-III on 09th May, 1993 in the pay-scale of Rs.450-1040 under respondent No.3 Government Polytechnic for Girls. The Principal of respondent No.3 addressed a letter dated 01st September, 1987 to the Commissionerate of Technical Education to appoint the petitioner on long term basis since the petitioner had been working since four years. It appears that the petitioner requested the authorities for upgradation to his post as Lecturer and further requested also for regularization of his service. The petitioner has given the details of correspondence that ensued between him and the authorities.

3.1 It appears that the petitioner had at one stage filed writ petition before this Court seeking regularization based on the directions and observations in the decision of the Supreme Court in Secretary, State of Karnataka vs. Uma Devi (3) [2006 (5) SCC .1] The petitioner could not get relief. By order dated 14th February, 2011, abruptly, service of the petitioner was terminated on the ground that he was ad-hoc Lecturer and further on the ground that the decision of the petition was against the petitioner.

4. The petition was contested by respondent No.2 by filing affidavit-in-reply mainly on the ground that since the petitioner was appointed on ad-hoc and temporary basis, he would not be entitled to pension. It was stated that Special Civil Application No.16795 of 2004 and others were filed for regularization which were dismissed, therefore, the claim of the petitioner for pension was indirectly rejected.

5. At the outset, it has to be stated that rejection of claim of regularisation would have no adverse bearing on the claim to pension. The entitlement for receiving pension for the petitioner would arise from the relevant rules. There cannot be either prefacing conclusion or final decision based on the premise that a petition with a prayer for regularisation was not entertained.

5.1 Rule 25 of the Gujarat Civil Services (Pension) Rules, 2002, deals with the qualifying service for the purpose of pension. This rule extracted in its relevant part, reads as under, "Rule-25. Qualifying Service : Subject to the provisions of these rules, qualifying service of a Government employee, means and includes, -

(i) all service including service on probation rendered on a regular establishment in any capacity whether, temporary or permanent, interrupted or continuous but it shall not include -

- (a) service in non-pensionable establishment,
- (b) service paid from contingencies,
- (c) service rendered in daily rated establishment,
- (d) actual periods of break in service if any, between spell of service,
- (e) service prior to resignation, removal or dismissal,
- (f) service as an apprentice,
- (g) service on fixed pay basis, and
- (h) service on contract basis.
- (ii) all service rendered in work charged establishment provided that the total service put in, as such is five years or more,
- (iii) ... ..
- (iv) ... ..
- (v) ... ..
- (vi) ... ..
- (vii) ... ..
- (viii) ... ..
- (viii) ... ..
- (ix) ... ..

5.2 Thus, Rule 25(i) of the Rules provides that qualifying service shall include all services including services rendered on probation. It also

includes services rendered in any capacity whether temporary or permanent, whether interrupted or continuous. The qualifying service, but, would not include the service rendered in the non-pensionable establishment or service rendered in contingencies or service rendered in daily-rated establishment.

Learned senior counsel for the petitioner could rightly emphasise the group of words "whether temporary or permanent, interrupted or continuous"

from the language of the Rules to submit that the petitioner's services would be included as per the Rules, within the purview of qualifying service for pension.

5.3 There is no gainsaying that in the present case, the appointment of the petitioner was never converted into contractual, nor the appointment was on a fixed salary. The Respondent where the petitioner was serving was grant-in-aid institute and the salary was paid to the petitioner under the grant-in-aid code. The petitioner also received Fourth, Fifth and Sixth Pay Commissions benefits from time-to-time.

5.4 Further, Rule 26 of the Rules reads to state about the Conditions subject to which service qualifies. It says in its sub-rule (1) that the service of a Government employee shall not qualify unless his duties, pay and allowance are regulated by the Government or under conditions determined by the Government. As per sub-section (2), it is provided that for the purpose of sub-rule (1) the expression 'service' means service under Government and paid by Government from the Consolidated Fund of State. As noted above, the salary to the petitioner was paid out of grant, therefore non-qualification contemplated under above Rule 26 would not arise for the petitioner.

5.5 Rule 39 prescribes for non-pensionable services, on which provision, learned Assistant Government Pleader wanted to bank upon, but meritlessly. This Rule provides that for those government employees who are paid for services rendered for the government but who are not retained for whole time, the services shall not qualify. Those who are receiving honorarium would also not qualify for their services to be pensionable. Also working on the tenure posts would not be pensionable service. None of these debility arise for the petitioner as the petitioner was on full time duty. He was never part time. The petitioner's case as an Ad hoc Lecturer stood directly covered under Rule 25 of the Rules to treat his service as pensionable.

5.6 An argument was sought to be canvassed by learned Assistant Government Pleader also that there was no sanction to the post held by the petitioner all throughout in ad-hoc capacity. This Court in Vinodbhai Shivrambhai Rathod v. State of Gujarat and others being Special Civil Application No.7462 of 2012 and batch of 21 December, petitions decided as per judgment dated 21 2018, inter alia observed that, "if the State Government fails to create posts, the employees working for years on such post without sanctioning cannot be made to suffer for the inaction of the government. The sanction would have to be presumed in such cases so that the employees do not suffer for the wrong of the government". It was further observed that, the "State Government cannot be allowed to argue that there was no sanction at all for the part-timers who are working in the various departments of the government for ten or more years." It was held therein that the petitioners in the said group of petitions were eligible for one time regularization.

5.7 The Court in Vinodbhai Shivrambhai Rathod (supra) for his above principle laid down, referred to the decision of the Supreme Court in Nihal Singh v.

State of Punjab [2013 (14) SCC 65] . A contention was answered in that decision by the Supreme Court that in absence of sanctioned post, the State cannot be compelled to absorb the persons like the petitioner before the Court. The Supreme Court observed that the posts are to be created by State depending upon the need to employ people having regard to various functions of the State undertakes to discharge. It was further observed that every sovereign government has within its own jurisdiction right and power to create whatever public offices it may regard as necessary to its proper functioning and its own internal administration.

5.8 Keeping in view the above observations and principles when the petitioner was continued in work, though as ad-hoc, on the post of Lecturer, it necessarily implied that the petitioner's post was pursuant to the need of the respondents and the petitioner discharged the duties in the permanent establishment. When the petitioner has put-forth his claim for pension and when the said claim falls within the purview of Rule 25 of the applicable rules and further that the petitioner possessed the qualifying service, the contention that his post was not sanctioned, could hardly be countenanced to impede an enforcement of right of the petitioner to get the pension. Sanction to the post of the petitioner has to be necessarily presumed when the petitioner was continued to thirty three years.

5.9 The petitioner completed thirty three years of service. All the time he was treated as ad-hoc Lecturer. That the time of thirty three years is too long not to be adequate to treat it as permanent service. Apart this, Rule 25 describes the qualifying service as one which may even be temporary, interrupted or continuous. The petitioner was serving in a pensionable establishment. His services could not have been treated as rendered as not qualified to be pensionable.

6. As a result of above discussion, it is declared that the ground for denial to the petitioner the pension and retirement benefits, that the petitioner was ad hoc employee, is not sustainable. The fact that the petitioner served on ad hoc basis would not disentitle him to receive the pension and the pensionary benefits. The decision reflected in communication-cum-order dated 06 May, 2017 of the Joint Director, Commissioner of Technical Education, Gandhinagar, treating the petitioner as ineligible for pension and retirement benefits, is hereby set aside.

6.1 The respondents are directed to calculate the pension with effect from 01 October 2016 and start paying pension regularly to the petitioner. The other retirement benefits including gratuity would also be paid to the petitioner. The payment of pension shall be commenced immediately from the next month, that is June, 2019.

6.2 While the regular pension shall be paid every month from June, 2019, arrears of pension and the arrears for other benefits shall be paid to the petitioner within a period of eight weeks from the date of receipt of writ of this order.

6.3 If the arrears are not paid within the above stipulated time, it is provided that the same shall carry interest at the rate of 6% per annum from the 06 October, date of filing of the petition, that is

11 2017 till the actual payment.

7. Petition is allowed accordingly. Rule is made absolute.

Direct service is permitted.

(N.V.ANJARIA, J) Anup