IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 9530 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

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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 or any order made thereunder ?	

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RAMESHBHAI DALSANGBHAI KUNIYA
Versus
STATE OF GUJARAT

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Appearance:
MR. GAUTAM JOSHI, SENIOR ADVOCATE WITH MR. VYOM H SHAH(9387) for the Petitioner(s) No. 1,2
MS. SURBHI BHATI, AGP, for the Respondent(s) No. 1,2,3

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CORAM:**HONOURABLE MR. JUSTICE BIREN VAISHNAV**

Date : 02/05/2022

ORAL JUDGMENT

1 Rule returnable forthwith. Ms.Surbhi Bhati, learned Assistant Government Pleader, waives service of rule on behalf of the State – respondents.

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2 Mr.Vyom Shah, learned advocate for the petitioners, relies on a decision rendered by this Court in Special Civil Application No. 16299 of 2018 and allied matters dated 08.03.2022.

3 By way of this petitions under Article 226 of the Constitution of India, the petitioners who were initially appointed as Forest Guards on fixed wage basis and got the benefit of inter district transfer post their period of regular service after five years, seek to challenge the resolutions dated 18.01.2017 and 20.01.2018.

4 The petitioners were appointed as Van Rakshaks in the years 2008 on a fixed pay for a period of five years. For the purpose of considering the issue, chronology of dates of service of petitioner no.1 are considered. He was appointed on 18.03.2008 for a period of five years. On completion of five years of service, the petitioner was regularized in service vide an order dated 21.03.2013. A request of transfer was made on he being regularized and by an order dated 15.01.2014, the petitioner was transferred from Valsad to range Deesa. The order of transfer would indicate that on his transfer, the incumbent would lose his seniority and an undertaking was given by the petitioner that he had no objection of losing such seniority. In other words, for the purposes of reckoning his seniority since at the relevant time there was no policy of the State for

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considering the past period of five years of initial appointment for regular benefits, the petitioner in effect lost one year of his service on a regular basis for the purposes of seniority.

5 Subsequent to the orders on which the petitioner accepted the transfer, the State came up with a resolution dated 18.01.2017 through the Finance Department. The resolution provided for a policy of considering the period of five years of the incumbents who were appointed on a fixed pay for the purposes of seniority, promotion, higher pay scale and terminal benefits from their initial date of engagement and not from the date of their regularization as in the case of the petitioner.

6 Mr.Gautam Joshi learned Senior Advocate would emphasize on the language of the resolution to indicate that the resolution was prospective and should therefore be read as such. The General Administration Department by a resolution dated 20.01.2018 has laid down the yardstick for computing seniority in case of such fixed pay employees who were granted the benefit of seniority etc. as per the resolution dated 18.01.2017. The resolution stipulated that those fixed pay employees who were engaged after 18.01.2017 would get the benefits of that initial date of appointment for all purposes whereas the present petitioners who were appointed prior to the resolution would in effect by virtue of his

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transfer not only lose the two years of their seniority but there will be no regard and the benefit for other purposes even of the past five years. The policy therefore is under challenge.

7 Alternatively, Mr.Joshi would rely on the decision of the Supreme Court in case of ***State of Maharashtra v. Uttam Powar*** reported in ***(2008) 2 SCC 646*** and submit that the Supreme Court while considering the decision in the case of ***Scientific Advisor to Raksha Mantri and Another v. V.M.Joseph*** reported in ***(1998) 5 SCC 305*** opined that when person is transferred on his own request his past service has to be counted for the benefits while promotion on higher pay scale.

8 Reliance is also placed on the decision of this Court in the case of ***M.U.Shah v. State of Gujarat*** reported in ***2016 SCC Online Guj 9932***, wherein the Court relying on the decision in case of ***Uttam Vishnu Pawar (supra)*** held as under:

> *"5. Having considered the rival contentions and the judicial pronouncements as above it is more than clear that while on request transfer ex-cadre one may lose seniority, the right to higher grade pay scale is required to be considered on altogether a different criteria laid down in the relevant scheme. It is not the case of the respondents that the Government scheme specifically provides the loss or forfeiture of right to claim higher grade pay scale on forfeiture of seniority. Considering the legal position as settled in paragraph No. 13 in the case of Uttam Vishnu Pawar (supra) and in paragraph No. 9 of V.A. Parekh*

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(supra) both of which are quoted for ready reference hereunder, in the opinion of this court, there was no reason with the respondents to withdraw the first higher grade pay scale granted to the petitioner by virtue of order dated 9.11.1992.

> *"13. Therefore, in view of the consistent approach of this court, it is no more res integra that the incumbent on transfer to the new department may not get the seniority but his experience of the past service rendered will be counted for the purpose of other benefits like promotion or for the higher pay scale as per the Scheme of the Government."*

>> *"9. At the outset, it is required to be noted that the objection raised by the respondent No. 3 that while granting the benefit of higher pay scale on completion of 9 years service/seniority prior to the request transfer is not required to be counted is not sustainable in view of the many decisions of the Division Bench as well as learned Single Judges of this Court. Even, the controversy in question is now not res integra in view of the the decision of the Hon'ble Supreme Court in the case of Uttam Vishun Pawar (supra). All the decisions have been considered by this Court in the recent decision of this Court in the case of Naynaben Manubhai Vyas (supra) dated 12.3.2009 in Special Civil Application No. 1446 of 1994 and other allied matters. In spite of the above decisions of this Court, since long the office of the respondent No. 3 is raising same and similar objection driving the employee to the Court and to obtain the similar order. If, on a particular point there is a decision of this Court every authority of the State Government is bound to follow the same unless it is upset by the higher forum. The authority has to apply its mind before raising objection and grant the benefit accordingly and shall not compel the employee to obtain similar order from the Court. To raise the objections again and again which are overruled by the*

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Court by decision would not only compelling the employee to incur the expenditure towards the legal proceedings but it will also increase the litigation and burden to the Courts, which are otherwise today heavy burdened due to backlog of cases and Courts are trying their best to get out of the backlog. In the case of (Smt) Dhanlakshmiben Liladhar Suchak (supra) the learned Single Judge of this Court as far as back in the year 1992 has observed that the Government should be model employer. The model employer is one who would not deny just claim of his employee and employees on any technical ground. Such model employer would not wait for any direction to be given to accept just claim of the employee/employees. It is further observed that once it is found that an employee is similarly situated the benefits flowing from a judgment in a case of other similarly situated employee, it should be given to other similarly situated employee and employee should not be driven to the Court for addressing just grievances. Even in the case of Secretary, Labour, Social Welfare & Tribunal Development Department (Supra), the Full Bench of this Court in para 9 and 10 has observed and held as under:

"9. The legal position regarding the binding nature of judgments delivered by High Courts was clearly explained as far back as 1962 by the Supreme Court. In East India Commercial Co. Ltd. v. Collector of Customs, Calcutta, A.I.R. 1962 S.C. 1893, Subba Rao. J. (as he then was) speaking for himself and Mudholkar J., has explained though A.K. Sarkar J. who was the legal position, the legal position in paragraph 29 of the report as follows:

This raises the question whether an administrative tribunal can ignore the law declared by the highest court in the State and initiate proceedings in direct violation of the law so declared. Under Art. 215, every High Court shall be a court of record and shall

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have all the powers of such a court including the power to punish for contempt of itself. Under Art: 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to_any person or authority, including in appropriate cases any Government, within its territorial jurisdiction. Under Art. 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer, We, therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. If that be so, the notice issued by the authority, signifying the launching of proceedings contrary to the law laid down by the High Court would be invalid and the proceedings themselves would be without jurisdiction."

The position was reiterated in Makhan Lal v. State of Jammu and Kashmir, (1971) 1 SCC 749 : A.I.R. 1971 S.C. 2206. It was the context of the law declared by the Supreme Court that the decision laid down to that effect so far as Article 141 of the Constitution was concerned, but what has been observed in paragraph 5 at page 2209 by Grover J. speaking for the Supreme Court has equal application so far as pronouncements

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by the High Courts are concerned. Grover J. observed at page 2209:

"The Judgment which was delivered did not merely declare the promotions granted to the respondents in the writ petition filed at the previous stage as unconstitutional but also laid down in clear and unequivocal terms that the distribution of appointments, posts or promotions made in implementation of the communal policy was contrary to the constitutional guarantee of Article 16. The law so declared by this court was binding on the respondent State and its officers and they were bound to follow it whether a majority of the present respondents were parties or not to the previous petition."

It cannot, therefore, be contended by anyone, that since Acharya, the petitioner in Special Civil Application No. 2215 of 1979, was not a party to Special Civil Application No. 806 of 1975, that the law laid down by D.A. Desai, J. in his judgment in that case on August 7, 1975 was not applicable to the case of Acharya. Whether the law is declared by the Supreme Court or whether the law is declared by the High Court, the legal position as regards authorities and tribunals subordinate to the Supreme Court and High Courts respectively is the same as pointed out by Subba Rao J. in East India Commercial Co.s case (supra).

10. In Shri Baradakanta Mishtra v. Shri Bhimsen Dixit, (1973) 1 SCC 446 :A.I.R. 1972 S.C. 2466, the legal position regarding binding nature of the High Court's decision was once again reiterated by the Supreme Court and after quoting the above passage which we have extracted from the judgment of Subba Rao J. in East India Commercial Co.'s case (supra) in paragraphs 15 and 16 of the judgment, Dwivedi J. speaking for the Supreme Court observed at page 2169: "The conduct of the appellant in following the previous decision of the High Court is calculated to create confusion in the administration of law. It will

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undermine respect for law laid down by the High Court and impair the constitutional authority of the High Court. His conduct is therefore comprehended by the principles underlying the law of contempt. The analogy of the inferior court's disobedience to the specific order of a superior court also suggests that his conduct falls within the purview of the law of contempt. Just as the disobedience to a specific order of the Court undermines the authority and dignity of the court in a particular case, similarly any deliberate and mala fide conduct of not following the law laid down in the previous decision undermines the constitutional authority and respect of the High Court. Indeed, while the former conduct has repercussions on an individual case and on a limited number of persons, the latter conduct has a much wider and more disastrous impact. It is calculated not only to undermine the constitutional authority and respect of the High Court generally, but is also likely to subvert the Rule of law and engender harassing uncertainty and confusion in the administration of law."

In Hashmukhlal C. Shah v. State of Gujarat, 19 G.L.R. 378, a Division Bench of this High Court consisting of J.B. Mehta and P.D. Desai JJ. after examining several decisions on the point, observed: "… in a Government which is ruled by laws, there must be complete awareness to carry out faithfully and honestly lawful orders passed by a Court of law after impartial adjudication. Then only will private individuals, organizations and institutions learn to respect the decisions of Court. In absence of such attitude on the part of all concerned, chaotic conditions might arise and the function assigned to the Courts of law under the Constitution might be rendered a futile exercise." From these four decisions, the following propositions emerges:

(1). It is immaterial that in a previous litigation the particular petitioner before the Court was or was not a party, but if law on a particular point has been laid down by the High Court, it must be followed by all

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authorities and tribunals in the State.

(2). The law laid down by the High Court must be followed by all authorities and subordinate tribunals when it has been declared by the highest Court in the State and they cannot ignore it either in initiating proceeding of deciding on the rights involved in such a proceeding.

(3). If in spite of the earlier exposition of law by the High Court having been pointed out and attention being pointedly drawn to that legal position in utter disregard of that position proceedings are initiated, it must be held to be a wilful disregard of the law laid down by the High Court and would amount to civil contempt as defined in section 2(b) of the Contempt Courts Act, 1971."

Thus, even the Division Bench has held that not following the law laid down by the High Court and disregarding the same would amount to Civil Contempt as defined in Section 2(b) of the of the Contempt of Courts Act, 1971. However, in view of the unconditional apology tendered by the concerned officer, which is accepted, no further order is passed."

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9. In the case before the Supreme Court and of the Division Bench of this Court, the Court held that if the petitioners were transferred to a new department, they may not get seniority but the past experience would count for the purposes of promotion and higher pay scale etc. In the case on hand where the petitioners are concerned, in fact, they have a better case inasmuch as they were within the same department appointed on a fixed pay.

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10. Merely because by resolutions post their appointment i.e. on 18.01.2017 and 20.01.2018, the benefit of the entire period of five years of fixed pay services is being given to the petitioners, the loss of seniority of one year will cumulatively damage the case of the petitioners in the matters of promotion etc., inasmuch as, by virtue of the resolutions and the appointees post these two resolutions of 2017 and 2018, the petitioners will continue to stagnate because the appointees post these resolutions will steal a march over the petitioners. That could not have been the intention of the undertaking when the petitioners filed such undertakings in the year 2014 when they opted for transfer.

11. The case of ***Uttam Pawar*** (supra) relies on the decision in case of ***Raksha Mantri*** (supra). Considering the decision of the Supreme Court, the Supreme Court held as under:

> *"7. The respondent herein was working as a Telephone Operator in Irrigation Department of the State of Maharashtra. Thereafter he made a request for his transfer from Mumbai Zone to Kolhapur Zone. The request of the respondent was acceded to and he was transferred on his own request from Mumbai Zone to Kolhapur Zone and he lost his seniority in Mumbai Zone and he joined in Kolhapur Zone on 14.6.1990 as a Junior Clerk at zero seniority. Thereafter, the State Government passed a Resolution dated 8.6.1995 giving a Time Bound Promotion to the persons who are stagnated in the Group C and D cadres for a long period. As per the said Resolution those persons who have put in 12 years of service and who fulfill other conditions laid down in the said Resolution were eligible for the next higher scale of pay. We are not concerned with the other*

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conditions laid down in the Resolution dated 8.6.1995. We are only concerned with the limited question that whether the respondent is entitled to count his service rendered in the Mumbai Zone when he was transferred to Kolhapur Zone for purposes of computing 12 years of service so as to enable him to get the benefit of this Resolution. The Tribunal granted the benefit of past service to the respondent and the same was affirmed by the Division Bench of the High Court."

12. Accordingly, the petition being Special Civil Application No. 9530 of 2019 is allowed. The petitioners' undertaking shall not count to their detriment for the purposes of their seniority. The undertaking shall not operate and their seniority shall be counted from the date of their initial appointment post the period of five years in view of the resolutions dated 18.01.2017 and 20.01.2018. Rule is made absolute to the above extent.

(BIREN VAISHNAV, J)

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