

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 3813 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.Y. KOGJE

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
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

SHARDA CHIMANBHAI LALBHAI

Versus

DINESH MOHANBHAI PRAJAPATI

Appearance:

MR HS MUNSHAW(495) for the Petitioner(s) No. 1

MR.PRASHANT B SHARMA(7028) for the Respondent(s) No. 1

CORAM: HONOURABLE MR. JUSTICE A.Y. KOGJE

Date : 23/08/2022

ORAL JUDGMENT

1. **RULE.** Learned Advocate Mr.Prashant B.Sharma waives service of Rule on behalf of the respondent.

2. This petition under Article 226/227 of the Constitution of India is filed against award dated 09.03.2017 passed by the Industrial Tribunal, Ahmedabad in Reference (IT) No.70 of 2009.

By the impugned award, the Tribunal has directed the petitioner to grant the respondent-workman differential amount in salary by treating the respondent-workman to have worked as a Telephone Operator in place of Ward-boy. The petitioner before this Court is a Municipal General Hospital through its President.

3. Learned Advocate for the petitioner submitted that the respondent was appointed as a Ward-boy, which is a Class-IV post and has continued to work as a Ward-boy in Class-IV post. However, in due course of administration and as interest was expressed by the respondent, in time of necessity, the respondent was given work of Telephone Operator, which was on certain occasions, when either post was vacant or the appointed Telephone Operators were on leave or unavailable.

3.1 It is submitted that only because additional work is taken from the respondent, the respondent cannot claim salary altogether different Class-III post. It is further submitted that the Municipal Hospital has its own Rules for appointing employees and in case of Telephone Operator, certain requirements are prescribed and individuals who are fulfilling such requirements are selected for appointment. The respondent-workman, who was already working as a Ward-boy, has never undergone any selection procedure.

3.2 It is submitted that for the purpose of doing additional work of a Telephone Operator, at best, the respondent can claim charge allowance. However, such aspect is also not required to be considered in view of circular of the Municipal Corporation dated 04.12.2003, wherein such charge allowance for doing work of contingency was not recommended and accepted.

4. As against this, learned Advocate for the respondent-workman, opposing the petition, submitted that the Industrial Tribunal has taken into consideration all relevant aspects, particularly the fact that the respondent-workman has discharged duty as a Telephone Operator and therefore, he has to be paid the same amount as is paid to Telephone Operator. It is submitted that the respondent-workman has been specifically allotted duties as is evident from the evidence on record in the form of duty-list and specific period has been given to the respondent-workman to attend duty as a Telephone Operator. In such situation, the respondent-workman is entitled to claim salary equivalent to any other Telephone Operator.

4.1 It is submitted that the petitioner-Hospital has subsequently also issued internal advertisement for appointment to the post of Telephone Operator from amongst those employees who are already working with the Corporation and therefore, case of the petitioner could also be treated as such.

5. In rejoinder, learned Advocate for the petitioner-Hospital submitted that the document, on which reliance is placed by learned Advocate for the respondent-workman to contend internal advertisement by which existing employees are appointed to the post of Telephone Operator, is a subsequent development of the year 2011 and the same was not a question before the Industrial Tribunal. It is also submitted that work of Telephone Operator is less physical as compared to a Ward-boy and apparently, the respondent was more comfortable to work as a Telephone Operator than a Ward-boy and therefore, had voluntarily come forward for doing such work. Thereafter, having taken advantage of the situation, cannot now claim higher pay scale.

6. Having heard learned Advocates for the parties and having perused documents on record, it appears that the petitioner-Hospital filed reply to the statement of claim of the Association vide Exh-15 and facts of statement of claim of the Association have been denied and stated that the respondent-workman was first introduced in institute on the post of the Ward-boy by stop gap arrangement. The respondent-workman was given acting appointment on the post of a Ward-boy from 05.03.1999. Accordingly, he was performing the duty in the pay scale admissible to him. As the workman was knowing work of telephone operator to some extent and as the work of telephone operator is

an essential service in the institute, sometimes during the leave vacancy of telephone operator, the workman was assigned work of telephone operator as per requirement, on completely temporary basis by stop gap arrangement. The workman has never performed a constant and continuous duty as a telephone operator. The workman has been performing duty as a ward boy since 1999 and has received pay scale and benefits accordingly. It is misleading that the workman has performed duty as telephone operator on permanent vacant post and has been appointed from 25.09.1998. No such entry has been made in the service book of the respondent-workman that he has undergone training of telephone operator and is holding qualification for the same. Designation of a ward boy has been mentioned in the service book of the workman. Telephone operator's post is a post of Class-III which is filled on the basis of merit through selection procedure i.e. after giving advertisement followed by written-oral interview. Ward boy Class-4 to Telephone Operator Class-III is not or cannot be legally appointed in any manner. The reference of the respondent-workman is barred by time limit.

7. It is apparent that the claim of the respondent-workman has worked as a Telephone Operator since 25.09.1998, but has raised industrial dispute in the year 2009. There is no explanation as to why the petitioner has waited for almost a period

of 11 years. As and when such work was offered, there is nothing on record to indicate that the respondent-workman has resisted work of a Telephone Operator. It was open for the respondent to resist the work assigned of a Telephone Operator and only restricting his work of a Ward-boy. In the opinion of the Court, the Industrial Tribunal has failed to consider the aspect of the respondent-workman taking up work of a Telephone Operator in place of a Ward-boy. This is particularly relevant as it is a matter of common knowledge that work of a Ward-boy being more physical than the work of a Telephone Operator and therefore, apparently, the respondent-workman would be getting advantage of his own choice to work as a Telephone Operator in place of a Ward-boy, which cannot be accepted.

8. The Industrial Tribunal has failed to take into consideration the differential aspect of appointment in Class-IV and Class-III. The requirement of the Recruitment Rules specifies that a Ward-boy only to be literate and there is no specification with regard to selection process whereas in the Recruitment Rules prescribed for office staff under Chapter-3 of the Rules, post of Telephone Operator being Class-III, the post had prescribed qualification of SSC pass and experience of Telephone Exchange and such person would be eligible for selection process. This being the most important aspect, the Industrial Tribunal ought not to

have granted the pay scale of Class-III post to the respondent, who was admittedly appointed on the post of a Ward-boy.

9. It would be necessary to observe that even from the record in the form of office order placed before the Industrial Tribunal, against the name of the respondent-workman, post of Ward-boy is mentioned and insofar as performance of duty is concerned, for particular period, duty was assigned as a Telephone Operator, but the same is also done with regard to other Ward-boys, who have not raised any claim.

10. From the submissions made, it appears that the respondent, who has been granted difference in salary between the salary of a Telephone Operator and a Ward-boy to be paid, according to calculation made, an amount of Rs.5,42,000/-, which is a difference in salary, will have to be paid.

11. Considering the aforesaid fact situation and in fact, as the respondent-workman has worked as a Telephone Operator, which is an admitted position, the Court is inclined to set aside the award of the Industrial Tribunal. The same is accordingly set aside. However, considering the fact that the respondent has actually worked as a Telephone Operator, in order to do complete justice, the Court directs the petitioner-Hospital to pay an amount of Rs.2,00,000/- (Rupees Two Lakhs Only) instead of amount of

difference in salary.

12. The petition stands allowed in the aforesaid terms.
Rule is made absolute to the aforesaid extent. No order as to costs.

SHITOLE

Sd/-
(A.Y. KOGJE, J)

