

(2011) 07 GUJ CK 0054

In the Gujarat High Court

Case No : Letters Patent Appeal No. 136 of 2011 in Special Civil Application No. 8783 of 2009 and Civil Application No. 3275 of 2011

K. S. Kewlani

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 15-07-2011

Acts Referred:

Citation : (2011) 07 GUJ CK 0054

Hon'ble Judges : S.J. Mukhopadhaya, C.J;J.B. Pardiwala, J

Bench : Division Bench

Advocate : N.V. Anjaria, for the Appellant; Krina Calla, Asstt. Government Pleader for Respondents 1 - 2 and Dhaval D. Vyas, for Respondent 3, for the Respondent

Judgement

J.B. Pardiwala, J.—In this appeal, the Appellant ? original writ Petitioner challenges judgment and order dated 10th September, 2009, passed by the learned Single Judge in SCA No. 8783 of 2009, whereby learned Judge dismissed the writ petition.

2. The brief facts relevant for the purpose of deciding this appeal can be summarized as under:

2.1 The Appellant ? original Petitioner herein, is a retired Government employee. Appellant has retired from service with effect from 31st October, 1996, on attaining the age of superannuation. The Appellant has been paid the pension for the service, which he has rendered between 10th June, 1975 to 31st October, 1996. The grievance of the Appellant is that his past services for the period between 19th October, 1964 to 9th June, 1975 with Kandla Port Trust is not considered for the purpose of pension and therefore, the Appellant preferred a writ petition seeking appropriate writ, order or directions that the services rendered by the Appellant original Petitioner with Kandla Port Trust between 19th October, 1964 to 9th June, 1975 also should be considered for the purpose of fixation of pension, and the pension should be revised accordingly.

3. Learned Single Judge while rejecting the writ petition, took into consideration following two aspects, namely -

(a) That the resolution which has been relied upon by the Appellant original Petitioner would be applicable with respect to those employees who were employees of the State autonomous bodies and came to be absorbed in the State Government. Learned Single Judge took the view that so far as the Appellant Petitioner is concerned, the Appellant Petitioner resigned from the Kandla Port Trust and was appointed by the State Government afresh, and

(b) Secondly, Appellant original Petitioner cannot be said to have been absorbed in the services of the State Government and therefore, the Government Resolution dated 13th August, 1990 would not be applicable to the Appellant original Petitioner.

4. We have heard learned Advocate Mr. N.V. Anjaria, appearing for the Appellant and learned Assistant Government Pleader Ms. Krina Calla for the State.

5. Assailing the judgment of the learned Single Judge, the learned Counsel for the Appellant Petitioner has put forward the following contentions:

5.1 Learned Single Judge has failed to appreciate that the Resolution dated 13th August, 1990 provided for giving benefit of earlier services for the purpose of pensionable service. It has been submitted that having regard to the said Resolution, the period of service by the Petitioner from 19th October, 1964 to 9th June, 1975 rendered in the Kandla Port Trust is liable to be counted as part of pensionable service and the pension was required to be revised and fixed accordingly.

5.2 The second contention is that the order of the learned Single Judge is erroneous to the extent of taking view that the Resolution would not be applicable to the Appellant Petitioner. It is submitted that it amounts to misreading of the Resolution dated 13th August, 1990. It is submitted that the learned Single Judge has erred in taking the view that the benefit thereof is to be accorded only to the employees who were employees of the State autonomous bodies and came to be absorbed in the State Government.

5.3 It is further submitted that the benefit of Resolution dated 13th August, 1990 is available to two classes of employees. Those who are absorbed from the Central Government to the State Government service and also to those from Central Government to State Government. It is submitted that the language of the Resolution uses the words 'vice-versa' which clearly takes within its compass both category of employees.

5.4 It is further contended that the appointment of the Appellant Petitioner as Lecturer under the Directorate of Technical Education was through proper channel and he was entitled to be given the benefit of Resolution. It is submitted that it cannot be said that the Appellant Petitioner had resigned to be dis-entitled for counting of period of service.

6. Per contra, learned Assistant Government Pleader Ms. Krina Calla submitted that No. error can be said to have been committed by the learned Single Judge in rejecting the writ petition warranting any interference in this appeal. She would submit that the Appellant had worked in Kandla Port Trust from 19th October, 1964 to 9th June, 1975 and had resigned on 9th June, 1975, which was also accepted by the Kandla Port Trust. According to her, the services of the Appellant with Kandla Port Trust came to an end on 9th June, 1975. Thereafter, a fresh appointment was given in the Government sector i.e. in the office of Directorate of Technical Education, Gujarat State, on 10th June, 1975 and the Appellant attained superannuation on 31st October, 1996.

7. Learned AGP has further submitted that the Appellant retired way back in 1996, whereas the petition came to be preferred in the year 2011 i.e almost after a period of 12 years. She submitted that even on the count of delay, the Appellant was not entitled to any relief before the learned Single Judge though learned Single Judge has not dismissed or rejected the petition on the ground of delay.

8. We have given our anxious thoughts and considerations to the contentions of the rival parties and we are of the view that Appellant Petitioner is not entitled to any relief as prayed for, for the reasons which we may record herein-below.

i) The entire claim of the Appellant Petitioner is based on the Government Resolution issued by the Finance Department dated 13th August, 1990. It would be expedient for better adjudication of the entire issue to quote the Resolution, which is as under:

GOVERNMENT of GUJARAT FINANCE DEPARTMENT Resolution No. NVN-1084-GOI-37-P Sachivalaya, Gandhinagar, 13th August, 1990.

PREAMBLE

The Government of India vide their letter No. 28/10/84-PU, dated the 11th October, 1984 had sent a proposal to this State Government regarding counting of service for the purpose of pension of employees of Central Government and Central Autonomous Bodies seeking absorption in the Public Sector Undertakings and Autonomous bodies under the State Government and vice a versa subject to the conditions laid down in the Office Memo GOI No. 28/10/84-Pension Unit dated the 29th August, 1984, the State Government considered the proposal and conveyed its consent to the Government of India.

On the basis of the consent given by the State Government, the Government of India issued orders vide their letter No. 28/10/84-P & PW Vol II dated the 7th February, 1986 and suggested that the State Government to issue similar order vide para 4 in the matter.

RESOLUTION

The Government is pleased to direct that the State Government employees and

employees of the State autonomous bodies seeking absorption in Central Government/Central Autonomous bodies or vice-versa should be allowed the retiral benefits as per G.L GOI No. 28(10)/84-P & PW-Vol.II dated the 7th February, 1986 (Appendix-I) read with office Memo No. 28/10/84-Pension Unit dated 29th August, 1984 (Appendix-II).

The GR dated 14th December, 1989 of even number shall remain inoperative.

By order and in the name of Governor of Gujarat

N.N. Mehta Under Secretary to Government of Finance Department

It is evident on plain reading of the Resolution that the State Government employees and employees of the State autonomous bodies seeking absorption in Central Government/Central autonomous bodies or vice-versa should be allowed to avail of the retiral benefits as per G.L GOI No. 28(10)/84-P and PW Vol.II dated 7th February, 1986. Therefore, we are of the view that the Appellant Petitioner while working in Kandla Port Trust if would have been absorbed by the State Government in any State service, then probably the Appellant Petitioner would have been entitled to claim the relief as he has prayed for to consider his service with Kandla Port Trust also for the purpose of pension. To this limited extent, probably the learned Single Judge has erred in taking the view that the Resolution would be applicable with respect to those employees who were employees of the State autonomous bodies and came to be absorbed in the State Government. We also directed the Respondent to file a reply and state as to whether Kandla Port Trust is a Central autonomous body and if it is a Central autonomous body, as to why the benefit arising out of Government Resolution dated 13th August, 1990 be not allowed in favour of the Appellant and the State be not directed to count the period of service rendered by the Appellant in Kandla Port Trust for the purpose of calculation of retiral benefits from the State of Gujarat to which the Appellant is entitled from the State of Gujarat.

(ii) An affidavit-in-reply has been filed on behalf of Respondent No. 3 Kandla Port Trust, stating that considering the purpose of enactment of the Major Port Trusts Act, 1963 and the constitution of Kandla Port, Kandla Port Trust would be a Central autonomous body.

9. Now, the only question which remains to be considered is as to whether the Appellant original Petitioner can be said to have been absorbed by the State Government in State service so as to claim the benefit of the Resolution for the purposes of clubbing of the two services.

10. At this stage, it would be useful to explain herein the words "absorb" and "absorption".

According to the meaning found in Chamber's 20th Century Dictionary, the word "absorption" means the act of absorbing and "absorb" means, to suck in: to swallow up: to imbibe: to take in: to incorporate ? to take up and transform (energy) instead of transmitting or reflecting: to engage wholly. According to

Black's Law Dictionary, 5th Edition, the word "absorption" is explained as a term used in collective bargaining agreements, to provide seniority for union members, if employer's business is merged with another. *Humphrey v. Moore* 375 US 335, 84 S.Ct. 363, 369. According to the Dictionary of English Law by Sweet & Maxwell the word "absorption" is equal to the word "amalgamation". "Amalgamation" has been explained to say that this takes place where two incorporated companies or societies become united by one of them being merged in the other.

Absorption thus has the effect of sucking and imbibing in to what is originally existing. On absorption thus an employee becomes part and parcel of the department absorbing him and partakes the same colour and character of the existing employees of the department, clarified as promotees, direct appointees or transferees on the loss of his identity.

As against this, the word "resignation" denotes an act by which the employee voluntarily gives up his job. An act of voluntary retrenchment as such would fall within the expression "resign".

11. Ordinarily, a Government servant claiming the benefit of combined service are likely to fall into one of the following categories.

a) Those who having been retrenched from the service of Central/State Governments/Autonomous Bodies secured on their own employment under State/Central Government/Autonomous Bodies either with or without interruption between the date of retrenchment and date of new appointment;

b) Those who while holding temporary posts under Central/State Governments/Autonomous Bodies apply for posts under State/Central Government/Autonomous Bodies through proper channel with proper permission of the Administrative Authority concerned, and

c) Those who while holding temporary posts under Central/State Governments apply for posts under State/Central Government/Autonomous Bodies direct without the permission of the Administrative authority concerned and resign their previous posts to join the new appointment under State/Central Government/Autonomous Bodies.

12. The benefit can be allowed to the Government servants in categories (a) and (b) above. Where an employee in category (b) is required, for Administrative reason, for satisfying a technical requirement to tender resignation from the temporary post held by him before joining the new appointment, a certificate to the effect that such resignation has been tendered for Administrative reasons and/or to satisfy a technical requirement, to join, with proper permission, the new post, may be issued by the authority accepting resignation. A record of such a certificate can also be made in his service book under proper attestation to enable him to get the benefit at the time of retirement.

13. It is not the case of the Appellant Petitioner herein, nor there is anything on

record to even suggest that to satisfy a technical requirement the Appellant tendered his resignation so that he can join the services of the State Government. We are of the view that this is not a case of absorption so that the benefit of the Resolution can be extended in favour of the Appellant Petitioner. Appellant Petitioner No. doubt was serving with the Central Autonomous Body i.e Kandla Port Trust and he tendered his resignation from Kandla Port Trust as he wanted to take up a new appointment as Lecturer in English in Tolani Foundation, Gandhidham Poly-technic, Adipur, under the Directorate of Technical Education, State of Gujarat. Appellant has tried to rely upon some correspondence between the office of the Kandla Port Trust and Directorate of Technical Education, State of Gujarat, but nothing is forthcoming on record that there was any understanding between the two Departments that the Appellant's earlier service with Kandla Port Trust will be clubbed with the State service and with that understanding the Appellant Petitioner resigned from Kandla Port Trust and joined the State service. In any view of the matter, if the Appellant is claiming the benefit of the Government Resolution dated 13th August, 1990, then in that case the Appellant has to make out a case that from Central Autonomous Body i.e. Kandla Port Trust with whom he was serving, he came to be absorbed by the State Government in Government service. As explained earlier, the present one is not a case of absorption. Absorption would have the effect of seeking and imbibing what is originally existing. This is not so far as the present case is concerned.

14. In the above view of the matter, we are of the opinion that the Appellant original Petitioner is not entitled to the relief as prayed for and we are also of the view that No. error much less any error of law is said to have been committed by the learned Single Judge in rejecting the writ petition. There being No. merit in the appeal, the same is hereby ordered to be dismissed with No. order as to costs.

15. Civil Application stands disposed of.