

(2016) 08 GUJ CK 0081

In the Gujarat High Court

Case No : Special Civil Application No. 2536 of 2008

Manglaben Yuvraj Patil

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 23-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 1 GLR 561

Hon'ble Judges : Mr. G.R. Udhwani, J.

Bench : Single Bench

Advocate : Mr. Hemang M. Shah, Advocate, for the Petitioner No. 1; Mr. Tirthraj Pandya, Assistant Government Pleader, for the Respondent Nos. 1 to 4

Final Decision : Allowed

Judgement

Mr. G.R. Udhwani, J.—The petitioner is the wife of deceased Yuvraj Sukhdev Patil who was employed as a daily wager helper with the Deputy Executive Engineer, Damanganga Mechanical Sub- Division No. 3, Machchu-II Dam, Morvi, in the year 1979. The petitioner questions the order dated 16.7.2007 rejecting her representation against fixation of pay of deceased husband of the petitioner in the pay scale of Rs. 950-1400 in substitution of the pay scale of Rs. 1200-1800. The petitioner seeks a further declaration that the pay of her deceased husband was rightly fixed in the pay scale of Rs. 4500-7000 and that the respondents should take into consideration the pre-revised pay scale of Rs. 1200-1800 for the purpose of retiral dues and not Rs. 950-1400. An injunction against recovery of retiral dues as a consequence of correction of the pay scale as above is also sought.

2. The husband of the petitioner was appointed as daily wager helper in the year 1979 and was continued as such until 1988 and with effect from 1.3.1989 he was designated as a Shovel Operator in the pay scale of Rs. 1200-1800. From 1.1.1996 his pay scale was revised to Rs. 4500-7000. 2.1 The husband of the petitioner was called for refixing of the pay scale on 3.2.2005. His pre-revised

pay scale was revised to Rs. 950-1400 on 27.10.2005, pay scale of Rs. 1200-1800 with effect from 1.3.1989. Thereafter, he expired on 4.12.2005 while in service. On the basis of such revision, recovery is sought to be made by the respondents. Retiral benefits of the deceased husband of the petitioner are also withheld. Gratuity amount, however, is deposited as directed by order dated 24.10.2008.

3. The petitioner filed Special Civil Application No. 1739 of 2007 wherein on 18.1.2007 an order directing the petitioner to make a representation was passed. Accordingly, the petitioner made a representation and by the impugned order dated 16.7.2007 the same was rejected. This petition is, therefore, filed praying for the relief as afore stated.

4. The respondents have filed affidavit-in-reply opposing the petition.

5. Having considered the rival contentions of the learned counsel for the parties, it is noticed that the bone of contention of the learned counsel for the petitioner is that the pay scale of Rs. 1200-1800 was rightly granted to the husband of the petitioner and until 3.2.2005 no grievance was made by the respondents against the grant of such pay scale. That the pay scale was revised with effect from 1.1.1996 to Rs. 4500- 7000 without any demur and objection by the respondents. It was contended that it is not the case of the respondents that the pre-revised pay scale of Rs. 1200-1800 was wrongly granted on account of misrepresentation or fraud exercised by the husband of the petitioner. It was argued that if the pay scale was mistakenly granted, no fault can be found with the husband of the petitioner and it should not have been corrected after a long span of 16 years. It is contended that no recovery of so-called excess pay was permissible. The learned counsel for the petitioner, in support of the above contention, relied on the following decisions:

1. Lilaben Digambar Navre v. State of Gujarat thro. The Secretary - SCA No. 15690 of 2011 with SCA No. 117 of 2012 - decided on 13.6.2013.

2. Bharat Sanchar Nigam Ltd. & Anr. v. BPL Mobile Cellular Ltd. & Ors. (2008 (8) Scale 106).

3. State of Punjab and others etc. v. Rafiq Masih (White Washer) etc. (2014(14) Scale 300).

4. Paras Nath Singh v. State of Bihar & Ors. (Civil Appeal No. 2671 of 2009 decided on 21.4.2009 (Supreme Court)).

6. The learned counsel for the petitioner invited the attention of this court to paragraph No. 9 of the affidavit in reply of the respondents and contended that even according to the respondents the pay scale granted to the husband of the petitioner on 1.3.1989 was approved and on the basis of that, pay scale of Rs. 4500-7000 was granted with effect from 1.1.1996.

7. Learned Assistant Government Pleader Mr. Pandya invited the attention of this

court to the contents of the affidavit-in-reply and mainly contended that though the pay scale of Rs. 1200-1800 and pay scale of Rs. 4500-7000 were granted to the petitioner, it was on account of a clarificatory Government Resolution dated 18.8.1999 wherein two pay scales being Rs. 2550-3200 against pay scale of Rs. 750-12- 870-940 and Rs. 3050-4590 against pay scale of Rs. 950-20- 1150-EB-25-1400 came to be approved with a clarification that the daily wagers were not government servants and that the benefit of the pay scale was being extended to them only out of sympathy that the pay scale of Rs. 1200-1800 was revised to Rs. 950-1400 and consequential recovery is sought to be made. It was argued that thus the pay scale initially fixed or granted to the husband of the petitioner in the year 1989 was not, in fact, approved. Reliance was also placed upon the Circular dated 1.3.2001 which answered the query raised with respect to the pay scales other than the above referred two pay scales.

8. It was argued that the husband of the petitioner was given full opportunity before taking the impugned action. It was pointed out that by a letter dated 3.2.2005, he was called upon to make a representation. He remained present on 15.2.2005 and requested to stay the action of reducing the pay scale which request was acceded to and ultimately, by an order dated 27.10.2005 the pay scale of the husband of the petitioner was revised and that before passing the order, all the circumstances were explained to the husband of the petitioner and other affected employees.

9. It is contended that as a consequence of re-fixation of the pay scale of the husband of the petitioner, a sum of Rs. 2,60,000/- is required to be recovered from the petitioner and it is only with a view to avoid the recovery that Special Civil Application No. 1739 of 2007 was filed which was disposed of on 18.1.2007. It was argued that the petitioner has given an undertaking dated 10.1.2008 allowing the respondents to recover the amount, if any due, from the pension of the petitioner and that such undertaking was filed not under misconception, threat or coercion. That the undertaking was voluntarily given.

10. It is contended that the pay scale was revised not on account of mistake committed by the respondents but it is only on account of the change in the policy of the Government as reflected in the Government Resolution dated 18.8.1999. It was argued that since the husband of the petitioner did not fall under any of the two scales prescribed in the Government Resolution dated 18.8.1999, he was not entitled to the pay scale fixed in the year 1989 and his pay scale was deemed to have been reduced with effect from 1.1.1996 (learned AGP states that date of 1.1.1996 is inadvertently mentioned, the said date may be read as 1.3.1989).

11. From the above arguments, it is noticed that on one hand the petitioner pleads that by correcting the pay scale, a mistake is sought to be corrected in the grant of the pay scale to the husband of the petitioner on 1.3.1989 while on the other hand it is a specific case of the respondents that, in fact, no mistake was committed while fixing the pay of the husband of the petitioner on 1.3.1989

but the said pay scale was revised on account of the Government Resolution dated 18.8.1999. The respondents also contend that in absence of prescription of the pay scale in question in the Government Resolution dated 18.8.1999, the pay scale fixed on 1.3.1989 for the petitioner 's husband cannot be said to have been approved by the Government.

12. This court, therefore, would like to examine as to whether by virtue of the Government Resolution dated 18.8.1999 could have revised the pay scale from Rs. 1200- 1800 to Rs. 950-1400. The Government Resolution dated 18.8.1999 refers to four Resolutions mentioned at item Nos. 1, 2, 3 and 4 in the preamble. The Resolution goes on to clarify that the daily wagers are not government servants but on account of representation made to the Government, it has been decided to extend certain benefits also to the daily wagers. Consequently, it provides for two pay scales as referred to herein above for daily wagers. It appears that the Government Resolution dated 18.8.1999 was passed when the new pay scales recommended by the Fifth Pay Commission were sought to be implemented for the government servants. The Resolution nowhere whispers the withdrawal or revision of the pay scales already granted to daily wagers preceding the date of Resolution i.e. 18.8.1999. In fact, it merely revises two pay scales for daily wagers as referred to herein above. It does not say that the other pay scales granted to the daily wagers preceding the date of Resolution would be ineffective. In fact, when a question was posed with regard to other pay scales, another Resolution dated 1.3.2001 came to be passed and in so far as the pay scale of Rs. 1200-1800 with which the petitioner is concerned, question in Appendix-A to the Resolution dated 1.3.2001 was answered by stating that the Resolution dated 18.8.1999 only speaks about two pay scales and it was advised that for the queries in relation to the other pay scales, the Government may be approached. This makes the fact more than clear that apart from two pay scales referred to in the Resolution dated 18.8.1999, there existed other pay scales for daily wagers prior to 18.8.1999. As noticed above, the Resolution is silent and does not intend to correct the pay scale granted to the petitioner or other daily wagers as on 1.3.1989. It appears that the respondents have misconceived the tenor of the Resolution dated 18.8.1999 as if pay scales other than those prescribed in the said Resolution would automatically get obliterated and that is why in para 17 of the affidavit in reply it is stated that the husband of the petitioner was not falling in any of the two categories of the scales approved by the Government and therefore he was not entitled to the scale which he received. This court is of the opinion that the Resolution dated 18.8.1999 does not affect the right of the husband of the petitioner in respect of the pay scale fixed on 1.3.1989. This court is further of the opinion that the said Resolution cannot be retrospectively applied so as to withdraw the pay scales already granted to the daily wagers preceding the date of the Resolution.

13. This takes the court to the next question as to whether a mistake can be corrected belatedly and on that basis recovery of the salary already paid to the employee can be made.

14. Though the learned counsel for the petitioner has referred to various decisions, it would be apt to refer to few of them for the purpose of this petition. In *Lilaben Digambar Navre (supra)*, this court was almost confronted with similar facts as is evident from paragraph No. 3 of the decision. In paragraph No. 11, the court made the following observations:- "Though it is open to the State to correct its mistake of wrong pay scale and no employee as a matter of right can claim to continue with the wrong pay scale, however, every State action must pass through the test of reasonableness as envisaged by Article 14 of the Constitution of India. If the State when faced with any action initiated by its employee or any citizen expects him to be vigilant enough to take action within reasonable time, the State is also expected to take action against its employees or the citizens within the reasonable span of time which may not be as expected from a citizen or an employee....."

15. The learned Assistant Government Pleader urged that this decision is distinguishable on the ground that the petitioners were not granted an opportunity of being heard and it was under these circumstances that the above observations came to be made. In the opinion of this court, the observations quoted above has nothing to do with the issue of principle of natural justice. The observations are general proposition of law and would squarely apply to the facts of the present case.

16. In *Bharat Sanchar Nigam Ltd. (supra)*, the jurisdiction of the authority to correct the mistake was recognised by the Supreme Court in the following terms in paragraph No. 32:

"Indisputably, mistakes can be rectified. Mistake may occur in entering into a contract. In the latter case, the mistake must be made known. If by reason of a rectification of mistake, except in some exceptional cases, as for example, where it is apparent on the face of the record, mistake cannot be rectified unilaterally. The parties who that would suffer civil consequences by reason of such act of rectification of mistake must be given due notice. Principles of natural justice are required to be complied with. The fact that there was no mistake apparent on the face of the records is borne out by the fact that even the officers wanted clarification from higher officers. The mistake, if any, was sought to be rectified after a long period; at least after a period of three years. When a mistake is not rectified for a long period, the same, in law, may not be treated to be one. "

(emphasis supplied)

16.1 The emphasis made above would show that if a mistake is not corrected for a considerable long time, it ceases to be a mistake.

17. A reference may also be made to *Rafiq Masih (White Washer) (supra)*, particularly, paragraph No. 12, which reads as under:

"It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been

made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(I) Recovery from employees belonging to Class- III and Class-IV service (or Group `C" and Group `D" service)

(ii) Recovery from retired employees or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

17.1 Thus no recovery is permissible in the circumstances indicated by the Supreme Court in paragraph No. 12 above.

18. In *Paras Nath Singh v. State of Bihar & Ors.* (Civil Appeal No. 2671 of 2009) decided on 21.4.2009 by the Supreme Court, the following observations were made in paragraph Nos. 6 and 7:

"6. Having considered the fact that the appellant was only a Class IV employee in the State of Bihar and almost an illiterate person and did not know the implications of giving such undertaking and in the absence of any fraud and misrepresentation attributed to the appellant and the amount being not so excessive, in particular Rs. 1,01,529.50, out of which certain amount has already been recovered from the salary of the appellant by the State Authorities, we are of the view that a lenient view should be taken and the amount already paid by the State Authorities to the appellant shall not be recovered.

7. However, whatever amount that has already been recovered, shall not be paid back to the appellant."

19. The learned counsel for the petitioner has relied on the said observations to contend that if a person does not know the implications of the undertaking and in absence of any fraud or misrepresentation, the undertaking would not be binding and the recovery cannot be effected. On the other hand the learned Assistant Government Pleader would distinguish the judgement with the submission that the language used in paragraph Nos. 6 and 7 indicates that only lenient view was taken by the Supreme Court and the observations made in paragraph No. 6 is not a law declared by the Supreme Court, neither it constitutes any direction and

in fact, the observation made in paragraph No. 7 that the recovery already effected shall not be paid back to the appellant therein, would show that the recovery was permissible. In the opinion of this court, the factors like illiteracy of the person who files an undertaking and absence of fraud and misrepresentation are the relevant consideration for the purpose of examining as to whether the undertaking given by such person is binding upon him or not. In the instant case, the husband of the petitioner was a daily wager as good as Class IV employee. The petitioner was all throughout denied the terminal benefits on the ground that huge amount of Rs. 2,60,000/- was outstanding against her. It is presumed that she being the wife of a daily wager virtually doing the work of Class -IV employee would not be that literate to understand the implications of the undertakings and therefore, in the facts and circumstances as indicated by the Supreme Court in paragraph No. 6 above, a lenient view deserves to be taken in the case of the petitioner as well.

20. In view of the above discussion, this court is of the opinion that the Government Resolution dated 18.8.1999 was misconceived by the respondents and withdrawal of the pay scales already fixed for the husband of the petitioner on 1.3.1989 was unwarranted and unreasonable and such action could not have been taken retrospectively, almost after a period of 16 years and effect to such action was given after the death of the employee on the date afore stated. Even if the fixation of pay scale as on 1.3.1989 is treated as a mistake, it should have been corrected within a reasonable time and as observed by the Supreme Court in the case of Bharat Sanchar Nigam Ltd. (supra), a period beyond three years cannot be considered to be a reasonable period in the facts of the present case.

21. In the result, the petition is allowed. The order dated 16.7.2007 rejecting the petitioner's representation is quashed and set aside. It is directed that the respondents shall not effect any recovery from the petitioner on the basis of the said order. The pay scales of Rs. 1200-1800 and Rs. 4500-7000 respectively fixed with effect from 1.3.1989 and 1.1.1996 shall not be disturbed and the benefits, if any, available to the petitioner on the basis of the said pay scales shall be paid to her in accordance with law. It is further directed that all the payments due in accordance with law shall be paid to the petitioner within a period of five weeks from today. Rule is made absolute accordingly with no order as to costs.

22. It is borne out from the record that Rs. 2,60,000/- is deposited by the respondents in this court in pursuance of the order dated 24.10.2008. The said amount has been invested by the Registry in a fixed deposit on long term basis and periodical interest accrued thereon was ordered to be paid to the petitioner. Since the petition is allowed, the Registry would encash the amount already deposited and pay the same to the petitioner by account payee cheque drawn in the name of the petitioner only.