

(2014) 02 GUJ CK 0098

In the Gujarat High Court

Case No : Special Civil Application No. 328 of 2010

Mukesh Ramlal Kukadia

APPELLANT

Vs

Bhavnagar Municipal Corporation

RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 145 FLR 132 : (2014) LabIC 2427 : (2014) 3 LLN 694

Hon'ble Judges : C.L. Soni, J

Bench : Single Bench

Advocate : Vatsal S. Parikh and D.G. Shukla, Advocate for the Appellant; H.S. Munshaw, Advocate for the Respondent

Judgement

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C.L. Soni, J.—In this petition filed under Article 226 of the Constitution of India, the petitioner has prayed for following relief in para No. 9 of the petition.

"(A) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing the respondents herein to reinstate the petitioner in services on his original post with continuity and full backwages alongwith consequential benefits quashing and setting aside the impugned communication dated 01.01.2010 at Annexure " A" herein as it being illegal, improper, unjust and without authority in law.

(B) During the pendency of this petition, Your Lordships may be further pleased to direct the respondents herein to reinstate the petitioner in services on his original post with continuity forthwith.

(C) An ex parte ad interim relief in terms of paragraph 9(B) above may kindly be granted."

The case of the petitioner is that he was working with the respondents as Executive Engineer, Drainage Department. That he was Vice President of Officers

Association of the respondent-corporation and the employees/officers had gone on strike in the month of June/July, 2009 for not implementing the recommendations of 6th Pay Commission. That keeping such thing in mind, he was being pressurized for giving the application for voluntary retirement. That he since feared that he would be trapped in the corruption charges and being under mental tension, applied on 29.09.2009 for voluntary retirement with effect from 01.01.2010. It is further case of the petitioner that the respondent No. 2 Commissioner since wanted the petitioner to leave the services, accepted the application for such voluntary retirement on the very same day giving effect to voluntary retirement of the petitioner from 01.01.2010. The petitioner has averred that after the marriage of his daughter was over and when he felt that he was forced to make application for voluntary retirement, he gave an application dated 31.12.2009 for withdrawal of his request for voluntary retirement. However, such request was turned down vide communication dated 01.01.2010 at Annexure: A, by the respondent No. 2 on the ground that since, the application for voluntary retirement was already accepted, nothing was required to be done as regards the request for withdrawal of the application for voluntary retirement. The petitioner has thus challenged the above said action of the respondents in not permitting him to withdraw his application for voluntary retirement and prayed to direct the respondents to reinstate him on his original post with continuity in service and with backwages and other consequential benefits.

2. The petition is opposed by affidavit in reply dated 04.02.2010 filed by the respondent No. 2, wherein, it is stated that the application dated 29.09.2010 for voluntary retirement made by the petitioner was accepted on the same day by specific order and therefore, the voluntary retirement of the petitioner has come into effect from 01.01.2010 as per the order passed on the application of the petitioner and no change could be made in such order on the basis of the subsequent application made by the petitioner dated 31.12.2009.

3. It is also stated in the affidavit in reply that the petitioner was looking after "Nirmal Gujarat Shauchalaya Yojna" of the State Government and several complaints were received against the petitioner about implementation and execution of the scheme and Municipal Commissioner had called, for preliminary report in the said subject matter, which was received on 29.09.2009, the day on which the petitioner made application for voluntary retirement. It is stated that the petitioner on his own tendered the application for voluntary retirement and requested Municipal Commissioner to accept the same. It is further stated that after the new Municipal Commissioner took charge, as an afterthought, application dated 31.12.2009 was given to withdraw the application for voluntary resignation.

4. I have heard learned advocates for the parties.

5. Learned advocate Mr. Shukla for the petitioner submitted that the petitioner has narrated the circumstances in his petition under which he had given

application dated 29.09.2009 for voluntary retirement. Mr. Shukla submitted that said application was though, accepted by the respondent No. 2 Commissioner to have been granted voluntary retirement, however, before 01.01.2010, since, the petitioner requested to withdraw his application for voluntary retirement, the respondents were required to accept said request. Mr. Shukla submitted that what is stated in the affidavit in reply is just bald allegations against the petitioner, whereas, the petitioner has also made some allegations against the Commissioner. However, if the petitioner was otherwise entitled to withdraw his request of voluntary retirement before effective date given by the petitioner in his application for voluntary retirement, the respondents could not have refused such request of the petitioner. Mr. Shukla has relied on the judgments of Hon'ble Supreme Court in the case of J.N. Srivastava Vs. Union of India (UOI) and Another, and in the case of Shambhu Murari Sinha Vs. Project and Development India and Another, to press his point that an employee is entitled to withdraw his application for voluntary retirement before the effective date and he is to be treated in service for all purposes.

6. As against the above arguments, learned advocate Mr. Munshaw for the respondents submitted that the petitioner with clear intention to escape from action being taken against him for alleged irregularities in the implementation of "Nirmal Gujarat Shuchalaya Yojana" had voluntarily given application dated 29.09.2009. Mr. Munshaw submitted that the petitioner wanted to accept his application and accordingly, the same was accepted and therefore, it was not permissible for the petitioner to withdraw his application for voluntary retirement. Learned advocate Mr. Munshaw submitted that subsequently on the change of Municipal Commissioner, when new Municipal Commissioner took charge, the petitioner came out with the application seeking withdrawal of his application for voluntary retirement. Mr. Munshaw submitted that such conduct of the petitioner would make him disentitle to withdraw his request for voluntary retirement and therefore this Court may not exercise its discretionary jurisdiction under Article 226 of the Constitution of India in favour of such petitioner. Mr. Munshaw thus urged to dismiss the petition.

7. Having heard learned advocates for the parties and having gone through the record of the petition, it appears that, there is no dispute about the fact that request of the petitioner to withdraw his application for voluntary retirement reached to the respondents just on the day prior to the effective date of the voluntary retirement.

8. The application made by the petitioner for voluntary retirement was dated 29.09.2009. The respondent No. 2-Commissioner of Bhavnagar Municipal Corporation passed order on the same day, accepting the request of the petitioner for voluntary retirement to come into effect from 01.01.2010.

9. The petitioner then sent application dated 31.12.2009 at Annexure: D to respondent No. 2 stating that he was withdrawing his request for voluntary retirement and his application for voluntary retirement be treated as cancelled.

The respondent No. 2 Commissioner, however, turned down such request vide impugned order dated 01.01.2010 on the ground that since, the decision on the application of the petitioner for voluntary retirement was already taken on 29.09.2009, nothing further was required to be done. Accordingly, the application of the petitioner for withdrawal of his request for voluntary retirement was not accepted.

10. From the above facts what clearly emerges is that the application of the petitioner for withdrawal of his request for voluntary retirement was before his voluntary retirement actually came into effect. The effective date given by the petitioner in his application for voluntary retirement and accepted by the respondent No. 2 was 01.01.2010. The application made by the petitioner for withdrawal of his request for voluntary retirement was 31.12.2009. In context of this very application dated 31.12.2009, the respondent No. 2 made order dated 01.01.2010. Thus, the respondent No. 2 had already received the application dated 31.12.2009 before the effective date of 01.01.2010 for voluntary retirement of the petitioner.

11. In case of J.N. Srivastava Vs. Union of India (UOI) and Another, Hon''ble Supreme Court has held and observed in para No. 3 as under:

"3. The short question is whether the appellant was entitled to withdraw his voluntary retirement notice of three months submitted by him on 03.10.1989 which was to come into effect from 31.01.1990. It is true that this proposal was accepted by the authorities on 02.11.1989. But thereafter before 31.01.1990 was reached, the appellant wrote a letter to withdraw his voluntary retirement proposal. This letter is dated 11.12.1989. The said request permitting him to withdraw the voluntary retirement proposal was not accepted by the respondents by communication dated 26.12.1989. The appellant, therefore, went to the Tribunal but the Tribunal gave him no relief and took the view that the voluntary retirement had come into force on 31-1-1990 and the appellant had given up the charge of the post as per his memo relinquishing the charge and consequently, he was estopped from withdrawing his voluntary retirement notice. In our view the said reasoning of the Tribunal cannot be sustained on the facts of the case. It is now well settled that even if the voluntary retirement notice is moved by an employee and gets accepted by the authority within the time fixed, before the date of retirement is reached, the employee has locus penitential to withdraw the proposal for voluntary retirement. The said view has been taken by a Bench of this Court in the case of Balram Gupta Vs. Union of India (UOI) and Anr, . In view of the aforesaid decision of this Court it cannot be said that the appellant had no locus standi to withdraw his proposal for voluntary retirement before 31-1-1990. It is to be noted that once the request for cancellation of voluntary retirement was rejected by the authority concerned on 26-12-1989 and when the retirement came into effect on 31-1-1990 the appellant had no choice but to give up the charge of the post to avoid unnecessary complications. He however, approached the Tribunal with the main grievance centering round the rejection of his request

for withdrawal of the voluntary retirement proposal. The Tribunal, therefore, following the decision of this Court ought to have granted him the relief. We accordingly, allow these appeals and set aside the orders of the Tribunal as well as the order of the authorities dated 26-12-1989 and directed the respondents to treat the appellant to have validly withdrawn his proposal for voluntary retirement with effect from 31-1-1990. The net result of this order is that the appellant will have to be treated to be in service till the date of his superannuation which is said to be somewhere in 1994 when he completed 58 years of age. The respondent authorities will have to make good to the appellant all monetary benefits by treating him to have continuously worked till the date of his actual superannuation in 1994. This entitles him to get all arrears of salary and other emoluments including increments and to get his pensionary benefits re-fixed accordingly. However, this will have to be subject to adjustment of any pension amount and other retirement benefits already paid to the appellant in the meantime up to the date of his actual superannuation. It was submitted by learned Senior Counsel for the respondent-authorities that no back salary should be allowed to the appellant as the appellant did not work and therefore, on the principle of "no work, no pay", this amount should not be given to the appellant. This submission of learned Senior Counsel does not bear scrutiny as the appellant was always ready and willing to work but the respondents did not allow him to work after 31-1-1990. The respondents are directed to make available all the requisite monetary benefits to the appellant as per the present order within a period of 8 weeks on the receipt of copy of this order at their end. Office shall send the same to the respondents at the earliest."

12. In case of Shambhu Murari Sinha Vs. Project and Development India and Another, , Hon"ble Supreme Court has observed in para No. 5 as under:

"5. From the facts stated above, it would be seen that though the option of voluntary retirement exercised by the appellant by his letter dated 18.10.1995 was accepted by the respondent-management by their letter dated 30.7.1997, the appellant was not relieved from service and he was allowed to continue in service till 26.9.1997, which, for all practical purposes, would be the "effective date" as it was on this date that he was relieved from service. In the meantime, as pointed out above, the appellant had already withdrawn the offer of voluntary retirement vide his letter dated 7.8.1997. The question which, therefore, arises in this appeal is whether it is open to a person having exercised option of voluntary retirement to withdraw the said offer after its acceptance but before it is made effective. The, question is squarely answered by the three decisions, namely, Balram Gupta Vs. Union of India (UOI) and Anr, ; J.N. Srivastava Vs. Union of India (UOI) and Another, and Power Finance Corporation Ltd. Vs. Pramod Kumar Bhatia, , in which it was held that the resignation, in spite of its acceptance, can be withdrawn before the "effective date". That being so, the appeal is allowed. The impugned judgment of the High Court is set aside with the direction that the appellant shall be allowed to continue in service with all consequential benefits. There will, however, be no order as to costs."

13. In light of the above principles and for reasons recorded above, the impugned order dated 01.01.2010, passed by the respondent No. 2 Commissioner at Annexure: A is required to be quashed and aside.

14. However, on the question of back wages/salary for the interregnum period, learned advocate Mr. Munshaw appearing for the respondents submitted that in the affidavit in reply it is pointed out that just to avoid taking of action for irregularities committed by the petitioner, he had tendered application for voluntary retirement and successfully avoided action against him at the relevant point of time. Mr. Munshaw submitted that in the facts of the case when the petitioner requested the then Municipal Commissioner to accept his application for voluntary retirement, this Court may not grant benefit of back wages/salary for the interregnum period as the same would be a burden on public exchequer.

15. Learned advocate Mr. Shukla, under the instructions of the petitioner, had already agreed at the last hearing to accept 50% of backwages if the corporation was to agree to take the petitioner back in service. Mr. Shukla has now on instruction of the petitioner, who is present in the Court, fairly stated that the petitioner is agreeable to accept amount of backwages even lesser than 50%, and left it to the Court to decide in the facts of the case.

16. In above view of the matter and considering the facts and circumstances of the case, the Court finds that awarding of 25% of the backwages would serve the ends of justice.

17. In the result, the petition is allowed. Impugned order dated 01.01.2010 at Annexure-A passed by the respondent No. 2 is quashed and set aside. The petitioner is held to be in continuous service of the respondent No. 1 corporation with all consequential benefits, except that instead of full backwages, the petitioner shall be entitled to 25% of the backwages. The respondents are directed to reinstate the petitioner in service on his original post within a period of 1 month from the date of production of this order before the respondents. The respondents are also directed to; workout and pay 25% of the backwages/salary for the period from the date of the impugned order till he is taken back in service within a period of 2 months thereafter. Rule made absolute to the extend stated above.