

(2009) 04 GUJ CK 0043
In the Gujarat High Court

Case No : Special Civil Application No's. 21286 and 21363 of 2006, 4089 of 2007 and 9513 of 2008

Patel Rambhai Ganeshbhai	Vs	APPELLANT
State of Gujarat and Others		RESPONDENT

Date of Decision : 01-04-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 2 GLH 211 : (2009) 2 GLR 1102

Hon'ble Judges : K.S. Radhakrishnan, C.J.; K.M. Thaker, J; Akil Kureshi, J

Bench : Full Bench

Advocate : K.N. Patel and D.N. Pandya, for the Appellant; Sunit Shah, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, C.J.—Justice Anant S. Dave has referred all these matters to a Larger Bench after expressing doubts about the correctness or otherwise of the judgment of the Division Bench in Letters Patent Appeal No. 181 of 2005, since it omitted to notice the applicability of Clause 2.3(i)(ii) and Clause 5 of Circular dated 2-11-1998 dealing with the acceptability of secondary evidence in entertaining a claim for freedom fighters pension under Swatantra Sainik Sanman Pension Scheme, 1980. Learned single Judge opined as follows:

In view of the above, modified Clauses 2.3 and 5 and decisions of the Apex Court and various High Courts, which never fell for consideration of the learned single Judge and the Division Bench, it is imperative that all these matters can be examined and considered by the Larger Bench of this Court....

We may at the outset indicate that the issues referred to us for consideration have already been dealt with by the Apex Court in various decisions, and therefore, it is unnecessary to again consider the scope and ambit of various provisions of the Freedom Fighters Pension Scheme, 1972, modified by

Swatantra Sainik Sanman Pension Scheme, 1980.

2. Petitioner in Special Civil Application No. 21286 of 2006, widow of one Gijubhai Vidyaram Acharya has approached this Court seeking a direction to the Central Government as well as the State Government to grant Freedom Fighters Pension to her as a nominee of her husband, who died on 5-2-1984. According to the petitioner, her husband had taken active part in the Freedom Fighters Movement under the leadership of Ramajibhai Dharamsinh Soneji, who had remained underground for more than six months during the period between 15th August, 1942 to 31st August, 1943, stating that he was a proclaimed offender. In support of her contention, a Personal Knowledge Certificate (P.K.C.) dated 1-9-1988 issued by one Nirubhai B. Desai, who himself was in jail during the period from 9th August, 1942 to 1st January, 1945 has been produced. Further, it was also pointed out that said Nirubhai B. Desai was a recipient of freedom fighters pension.

3. Special Civil Application No. 21363 of 2006 is preferred by one Sakariben Ramanlal Patel, widow of Ramanlal Somnath Patel, who expired on 2-5-2000. According to the petitioner, her husband had remained underground for more than six months from 10th August, 1942 to 1st August, 1943, during freedom fighters movement. In support of the contention, a Personal Knowledge Certificate (P.K.C.) issued by Nirubhai B. Desai has been produced.

4. Special Civil Application No. 4089 of 1997 was preferred by one Patel Rambhai Ganeshbhai, who is now a U.S. citizen, claiming that he is entitled to get freedom fighters pension since he had remained underground for more than six months from 9th August, 1942 to July, 1943, during freedom fighters movement. In support of the claim, a Personal Knowledge Certificate (P.K.C.) issued by Nirubhai B. Desai has been produced.

5. Special Civil Application No. 9513 of 2008 is being prosecuted by son of Amichandbhai Soneji, claiming freedom fighters pension, stating that his father had gone underground from 10th August, 1942 to April, 1943 during freedom fighters movement. A Personal Knowledge Certificate issued by Nirubhai B. Desai to this effect has been produced in support of his claim.

6. We have noticed in all these cases, petitioners claim freedom fighters pension mainly relying upon the Personal Knowledge Certificate issued by one Nirubhai B. Desai, who had undergone jail sentence from 9-8-1942 to 1-1-1945 during freedom fighters movement, who himself was a recipient of freedom fighters pension from State Government as well as Central Government. As per the provisions of Swatantra Sainik Sanman Pension Scheme, 1980, any applicant who claims underground suffering for more than six months on account of his participation in the freedom struggle movement, is eligible for Swatantra Sainik Sanman Pension, provided that he was a proclaimed offender or a person on whom an award for arrest/on head was announced, or a person for whose detention, order was issued, but not served. The scheme provides that voluntary

underground suffering or self-exile suffering for party work under the command of the party leaders are not covered as eligible suffering for pension under the Scheme. Further claim of underground suffering is considered subject to furnishing documentary evidence by way of Court's/Government's orders proclaiming the applicant as an absconder, announcing an award on his head or for his arrest or ordering his detention. As per the Swatantra Sainik Sanman Pension Scheme, absconding on issue of warrant of arrest, is not an eligible suffering for grant of pension, unless the same is followed by order of proclaimed offender, or award for arrest/on head or detention order. Of course, in the absence of primary record - based evidence, a Non-Availability of Records Certificate (N.A.R.C.) from the concerned State/Union Territory Administration along with Personal Knowledge Certificate (P.K.C.) from a prominent freedom fighter who has proven jail suffering of a minimum of two years and who happened to be from the same administrative district, can be submitted as supporting evidence to the claim. Where records of the relevant period are non-available, a Non-Availability of Records Certificate (N.A.R.C.) from the concerned authority is a mandatory pre-requisite for secondary evidence, and such a Certificate should not be general or vague, but should conform to the instructions issued by Government of India, Ministry of Home Affairs. The instructions issued by the Government of India requires the State Government to issue Non-Availability of Record Certificate only after due verification from all sources, and such certificate is treated as valid only when it is furnished by State Government clearly indicating that all concerned authorities of the State Governments who could have relevant records in respect of the claim of the applicant have been consulted and it is confirmed that the official records of the relevant time are not available. Verification and recommendation report of the State Government is mandatory in view of the fact that the documents and other evidence of the claims are in the possession of the State Government/Union Territory Administrations concerned and not with the Central Government. Further, the recommendation of the State Government is not binding on Central Government, if the claim does not satisfy the eligibility criteria and evidenciary requirements prescribed under the Central Scheme.

7. Referring to the Personal Knowledge Certificate issued by Nirubhai B. Desai, it has been stated in the counter-affidavit filed in Special Civil Application No. 9513 of 2008 as follows:

...Personal Knowledge Certificate issued by Shri Nirubhai B. Desai, who himself was in jail during the period from 9-8-1942 to 1-1-1945, as is evident from the Certificate, did not specify the reason as to why Shri Amichandbhai went underground. Thus, certificate issued by Nirubhai B. Desai is contradicted by the claim of Chanchalben, who had stated in her application that her husband was underground from 10th August, 1942 to April, 1943.

Further, it is stated that Personal Knowledge Certificate can be taken into consideration only when it is accompanied with valid Non-Availability of Records

Certificate (N.A.R.C.) and in absence of N.A.R.C. from the State Government, P.K.C. issued by Nirubhai B. Desai suffers from infirmity and it cannot be considered as secondary evidence. It is also stated that petitioner's case cannot be compared with the case of Nirubhai Desai or of Lalitkumar Mehta, which stood on a different footing. Lalitkumar Mehta was granted pension on the basis of the recommendation of the then Minister of State for Home, who had personal knowledge of jail suffering of more than 5 years of said Lalitkumar Mehta.

8. Mr. K. N. Patel, learned Advocate appearing for the petitioners submitted that there is no reason to discard Personal Knowledge Certificate issued by Nirubhai B. Desai, who was a well-known freedom fighter. Learned Counsel submitted that there is no reason for Nirubhai Desai to give a wrong certificate in support of a wrong claim, and due weightage should have been given to the certificate issued by Nirubhai Desai. According to him, the reason assigned for rejecting the claim of the petitioners or for not entertaining the claim of the petitioners is illegal and contrary to various decisions rendered by the Apex Court as well as this Court. Learned Counsel placed considerable reliance on the following decisions:

- (1) Mukund Lal Bhandari and others Vs. Union of India and others,
- (2) Mahendra Ashabhai Patel Vs. Union of India (UOI) and Others,
- (3) Gurdial Singh Vs. Union of India and Others,

Learned Counsel submitted that while considering the case of freedom fighters for pension, a liberal and not a technical approach is to be followed and further standard of proof in support of a claim by a freedom fighter is to be lenient and Union of India is not justified in not accepting the claim of the petitioners for pension.

9. Learned Counsel appearing for Union of India placed heavy reliance on the affidavit-in-reply filed by the Under Secretary in the F.F.R. Division of Ministry of Home Affairs, and submitted that in absence of Non-Availability of Records Certificate (N.A.R.C.) duly issued by State Government, Personal Knowledge Certificate (P.K.C.) issued by an other veteran freedom fighter Nirubhai B. Desai cannot be considered by the Union of India, in view of modifications and clarifications issued as per Clauses 2.3(ii) pertaining to "underground" and Clause 5 of "Acceptability of Secondary Evidence" as per Ministry of Home Affairs" instructions dated 2-11-1998. Learned Counsel for Union of India also placed reliance on the decisions of the Apex Court in Union of India Vs. R.V. Swamy alias R. Vellaichamy, - Union of India v. R.V. Swamy @ Vellaichamy; AIR 2006 SCW 3803 - Union of India (UOI) Vs. K. Indrasena Reddy and Another, - Union of India v. K. Indrasena Reddy.

10. The Apex Court in R.V. Swamy's case (supra) reversed the decision of the Madras High Court, and held that High Court was not justified in directing grant of freedom fighters pension in a case where Union of India had rejected certificate issued by a prominent freedom fighter, in the absence of any primary

evidence. By holding so, the Apex Court held as follows:

Of late, large number of cases have been coming up quite frequently for grant of Freedom Fighters Pension on the basis of the certificates issued by some person with status of freedom fighters, and are by and large not found to be acceptable to the Government of India. Since, several matters are coming up to this Court, it is for the Government of India to reconsider the matter and to lay down appropriate clear guidelines for the so-called freedom fighters who issue certificates to persons who come forward for Freedom Fighters Pension. Learned Counsel for the respondent has stated that since the State Government has recommended the case of the deceased - respondent for grant of Freedom Fighters Pension, the respondent-widow may be given liberty to approach the State Government in that behalf. Liberty is given to her to approach the State Government. It is for the State Government to consider the application according to their guidelines and dispose of it on merits.

11. We may indicate on the basis of the opinion expressed by the Apex Court a Circular was issued by the Union of India on 2-11-1998 laying down guidelines in the matter of acceptability of secondary evidence. Applying guidelines as well as the previous decision on the point, the Apex Court in *Union of India v. Avtar Singh* AIR 2006 SCW 3803 reversed the decision of the Panjab and Haryana High Court directing grant of pension based on a certificate issued by co-prisoner. The Apex Court held that a Court sitting in Article 226 of the Constitution of India shall not substitute the opinion expressed by an Expert Committee rejecting a certificate issued by a prominent freedom fighter. The Court held that unless the decision of the Committee is said to be perverse or one which no reasonable person could arrive at, the Court shall accept that finding. The same is the view taken by the Apex Court in *State of Maharashtra and Others Vs. Raghunath Gajanan Waingankar*, The Apex Court held that the High Court exercising writ jurisdiction does not sit in judgment over the decision of the State Government like an appellate authority. The Court held that ordinarily, High Court exercising writ jurisdiction cannot enter into re-appreciation of evidence and reverse the findings arrived at by the State Government, unless they be perverse or be such as no reasonable man acting reasonably could have arrived at.

12. Central Government in all these cases, as stated in the counter-affidavit as well as by various orders issued, did not accept certificate issued by Nirubhai B. Desai, stating that said Nirubhai B. Desai himself was in jail from 9th August, 1942 to 1st January, 1945 in Sabarmati and Nasik jail, and when he was himself in jail, how he could know that petitioners were underground for more than six months. Under these circumstances, he cannot have any personal knowledge of going underground for more than six months from various period coinciding with his sentence. Further, Central Government has also expressed the opinion that non-availability of record certificate should not be general and vague, but it should conform to the instructions issued by the Government of India, Ministry of Home Affairs. The instructions inter-alia required the State Government to issue

Non-Availability of Record Certificate only after verifying from all sources, and such certificate is treated as valid only when it is furnished by State Government indicating that all concerned authorities of the State Governments who could have relevant records in respect of the claim of the applicant have been consulted and it is confirmed that the official records of the relevant time are not available. As the same was not done in all these cases, Union of India has taken up a clear stand that certificate issued by Nirubhai B. Desai cannot be accepted as such. The secondary evidence, in our view, can be permitted to be adduced only after non-production of primary evidence has been satisfactorily accounted for. Before a party is permitted to adduce secondary evidence, it is sine-qua-non for him to show that the document is in existence and despite notice it has not been produced by the party in whose custody the document is kept. The mere assertion that claimants had undergone jail sentence or was underground, is not sufficient to accept the secondary evidence. Further, the production of secondary evidence in this case, is conditional that is production of non-availability certificate by the State Government after undergoing the formalities, which has not been satisfied in all these cases. Sitting this writ jurisdiction, we are not prepared to say that opinion expressed by the Committee in not accepting the certificate is perverse or arbitrary so as to be interfered with by this Court under Article 226 of the Constitution of India. The decision rendered by the learned single Judge (Coram : K. S. Jhaveri, J.) in Special Civil Application Nos. 6176, 6177 and 6192 of 2003, which was affirmed by the Division Bench in L.P.A. (Stamp) No. 181 of 2005, confines to facts of that case, which cannot be applied to the facts of the present case and the principle laid down cannot have any universal application in view of various decisions rendered by the Apex Court.

13. We may also point out that petitioner in Special Civil Application No. 9513 of 2007 is son of Amichandbhai Soneji. Contention was raised on behalf of Union of India that son is not entitled to get freedom fighters pension on the same reason as stated in the other cases as well. Learned Counsel for Union of India submitted that assuming that his father is entitled to receive pension, even then son is not eligible to claim pension on behalf of his father and/or even for the arrears, as he does not fall within the criteria of eligible dependent. In the counter-affidavit filed by Union of India, it is stated that Bhupendra Amichandbhai Soneji being son of Amichandbhai, he is not entitled to get any benefit even in any case without admitting if it is proved that his father was eligible under the Central Scheme. Reference was made to Circular No. 16 of 1977 issued by the Union of India on 29th September, 1977, which deals with payment of arrears to the legal heirs of deceased freedom fighter. Clause 2 of the said Circular reads as follows:

2. In cases where the freedom fighters expired after submission of their application without pension being sanctioned in their favour leaving behind successors who are eligible for grant of family pension under the provisions of the Freedom Fighters Pension Scheme, family pension can be sanctioned in favour of the eligible dependents from the date following the date of death of the

Freedom Fighters and the beneficiary can also draw the life-time arrears of pension which the freedom fighters would have drawn, had the sanction been issued before his death. But no posthumous sanction for payment of life-time arrears could be issued in such cases in favour of legal heirs who are not eligible for grant of pension under the Freedom Fighters Pension Scheme.

14. We have noted that under the Swatantra Sanman Pension Scheme, 1980, eligible dependents are mother, father, widower, widow (if she has not since remarried) or unmarried daughters. In any case, son is not an eligible dependent for the grant of Swatantra Sanman Pension. Over and above this, no posthumous sanction for payment of life-time arrears would be issued in favour of legal heirs who are not eligible for grant of pension under the Freedom Fighters Pension Scheme.

15. For the above mentioned reasons petitioners have not succeeded in establishing their case to get freedom fighters pension under the Swatantra Sanman Pension Scheme. Petitions stand dismissed.