

(2017) 01 GUJ CK 0184
In the Gujarat High Court
Case No : 3628 of 2011

**RAJENDRAKUAMR CHIMANLAL SEVAK SINCE DECEASED THROUGH?
LEAGAL HEIR AND SUCCESSOR Vs STATE OF GUJARAT THROUGH
SECRETARY & ORS.**

Date of Decision : 24-01-2017

Acts Referred:

Citation : (2017) 01 GUJ CK 0184

Hon'ble Judges : S.G. Shah

Bench : Single Bench

Advocate : NIRAV R MISHRA, AMITA SHAH, NISARG SHAH, MURALI N DEVNANI

Judgement

1. Heard learned advocate Mr.Nirav R. Mishra for the petitioner, learned advocate Mr.Nisarg Shah for Mr.Murali N. Devnani, learned counsel for respondent No.4 and learned Assistant Government Pleader Ms.Amita Shah for respondent Nos.1, 2, 3 and 5. Perused the record.

2. Though total pleadings runs into almost 300 pages and though scrutiny of entire record would result into a decision for taking some action against some officers of all the respondents either Municipality or the State, considering the fact that original petitioner has already expired long back and that at present, his widow is waiting for pension, I am restraining myself from observing anything against any such officer because in that case, as it is settled legal position, I have to issue show cause notice to some of them and till then if widow of the original petitioner has to wait for pension, it would result into further injustice to her, more particularly, now, when such issue is well settled pursuant to the judgment by Hon''ble the Supreme Court in the case of Harijan Paniben Dudabhai vs. State of Gujarat & Ors., Civil Appeal No.5441 of 2016, decided on 1st July, 2016 wherein while allowing all the appeals, the Hon''ble Supreme Court has categorically observed that if there is no evidence on record indicating that any prevalent procedure was allegedly infracted or any reason as to why appointment of the employee could be termed as illegal or invalid and, more particularly, when all through his services till the employee retired he was paid all

the benefits and salary like any other employee, such employee could not be denied the pensionary benefits and gratuity. Thereby, Hon''ble Supreme Court has confirmed the view expressed by Division Bench of this High Court in the case of Chief Officer vs. Mohmad Irshad Husenbhai Baloch & Ors. 2011 (I) GCD 569 wherein Division Bench has observed that if at any point of time, neither the Municipality nor the Government has ever refunded the amount of contribution by the employee or they have intimated to the employees concerned about their mistake or otherwise regarding appointment or services of the employee; after completion of his service, if a plea of absence of approval of posting is entertained or accepted, it would result into allowing the atrocious treatment to be applied by the Municipality or the Government or itself officers, which would be invalid under Article 14 of the Constitution of India.

3. Therefore, after hearing learned advocates, now, it becomes clear that pursuant to judgment in the case of Mohmad Irshad Husenbhai Baloch (Supra), which is approved by the Hon''ble Supreme Court in the case of Harijan Paniben Dudabhai (Supra) so also the recent judgment relying upon above two judgments being judgment and order dated 11.4.2016 in Special Civil Application No.13333 of 2014 between Bhagwanji Vashrambhai Javia v. State of Gujarat and judgment and order dated 5.8.2016 in Special Civil Application No.7684 of 2002 between Chandubhai Chhotabhai Patel, now the issue is well settled, whereby it becomes clear that though in some other cases, matter has been referred to the Director of Municipalities to take necessary steps for all such cases, the fact remains that only because of absence or non availability of proper sanction of selecting or posting an employee like present petitioner, after completion of his services qualifying pensionary benefits, the authority like respondent cannot deny the pensionary benefits in absence of their disclosure about any irregularity or illegality at the relevant time and more particularly in absence of any evidence whatsoever to prove and confirm that the appointment of the employee like present petitioner was illegal or irregular.

4. Irrespective of above referred judgment, the respondent - state authorities are relying upon a judgment of Division Bench of this Court reported in 2010(1) GCD 675 between Chorvad Gram Panchayat v. Ramniklal D. Shah. However, as discussed hereinabove when such judgment is considered thereafter by another bench in case of Mohmad Irshad Husenbhai Baloch (Supra) distinguishing the observations in such judgment and when Hon''ble Supreme Court has approved the decision of Mohmad Irshad Husenbhai Baloch (Supra) in the case of Harijan Paniben Dudabhai (Supra), now, in the case of Chorvad Gram Panchayat (Supra) is not a good law and, therefore, the submission by the respondent - State based upon such is nothing but misconceived and needs to be discarded at the outset.

5. In view of above legal position, the petition needs to be allowed. However, before passing final order it would be appropriate to recollect the factual details.

6. It is undisputed fact that petitioner was working as Pumpman in Dakor Nagar Palika from 1.12.1982 and original petitioner retired from 31.5.2007 i.e. after

completing almost 25 years of continuous services. Since petitioner was not paid retiral dues and pension by the Nagar Palika, he has approached the Chief Officer of Nagar Palika by addressing a letter dated 5.6.2008 requesting to grant him pension and other retiral benefits. He continued to represent before the Nagar Palika almost for two years. Meanwhile there was some communication between Nagar Palika and State but ultimately Nagar Palika has, by its letter dated 21.1.2010 conveyed the Collector of Kheda @ Nadiad that appointment of the petitioner was in accordance with procedure followed by such Nagar Palika for such appointment and in para 6 of such letter; copy of which is produced at Annexure H, the concerned Officer has, as back as on 21.1.2010; specifically disclosed to the Collector that post of the petitioner was approved as per Government Resolution dated 22.1.2004 and copy of such Government Resolution was forwarded to the Collector with such communication. It is further contended by Chief Officer in the same letter that the benefit of 4th and 5th pay commission has been approved and granted in favour of the original petitioner at the relevant time and it is further conveyed that if at all there was any negligence on the part of the Nagar Palika in getting any particular order, it was only because of lack of adequate knowledge of the officers Incharge at the relevant time but ultimately when original petitioner was granted all other services benefit including benefit of 4th and 5th pay commission and when he has worked for 25 years and when his appointment was regular and regularized, both by the Nagar Palika and the State, now, he is entitled to pensionary benefit as claimed and, therefore, Chief Officer has requested the Government, forwarding all relevant record, for retiral benefits and pension in favour of the original petitioner.

7. Unfortunately, even, thereafter matter has been tossed between different Officers of the Government and there are different communications for the purpose. During such exercise, at one point of time, Director of Nagar Palika was of the view that papers are to be submitted through Collector whereas Collector has conveyed that the decision is to be taken by Nagar Palika and, therefore, papers may be forwarded to him. However, because of such interse tossing of issue between different Officers, the fact remains that neither of the respondents have ever bothered to look into the correct position and to see that retirement and pensionary benefits are released in favour of the original petitioner though all relevant documents are already provided.

8. At this stage, it cannot be ignored that so far as similarly situated employees are concerned, though they were working on different posts like peon etc. but joined services of Nagar Palika and retired from it like present original petitioner, they all had been granted retirement benefits and pensionary benefits. Papers of such employees are produced on record from page Nos.110 to 116 which are in favour of Vankar Ramalbhai Ramabhai, Poonambhai Bababhai Harijan, Dabhiben Babubhai Harijan, Bhupatbhai Mahijibhai Harijan and Manilal Bijalbhai Harijan. All such employees retired between 2003 and 2006 whereas present petitioner has retired on 31.5.2007. Therefore, when pensionary and retirement benefits are

released in favour of above listed employees, there is no reason or scope to deny the same benefits to the original petitioner except for specific reason for which there must be some evidence to deny such benefit to him.

9. However, the entire record and the submissions by respondents is only to the effect that since there is no approval order regarding appointment of the petitioner, on their record, they are unable to release the pensionary benefits. Whereas, as discussed hereinabove when Municipality has specifically conveyed to the State that appointment was regular and thereafter when there was no complaint or there was no intimation to the original petitioner that his appointment was not illegal or irregular and, thereafter, when all the respondents have allowed him to work for 25 years during which period when they have already released service benefits to him including deduction of Provident Fund and extending benefits of 4th and 5th pay commission, now, in absence of evidence to prove their stand, respondents have no option but to grant pensionary and retiral benefits to the petitioner, in view of legal position discussed hereinabove.

10. Though I have already conveyed that I am not going to take action against the officers who have tried to disclose some improper facts on record, it would be appropriate to consider the defence version and to point out that whether they have committed blunder in such judicial proceedings, more particularly, in the name of Court's direction in same impugned order, whereby, practically, Court has called upon the concerned respondent/s to disclose the correct material and documentary evidence on record rather than opining on such documents.

11. On 17.6.2011, one Jayeshkumar B. Soni being Chief Officer of Nagar Palika has filed affidavit in reply wherein, surprisingly, it is contended by the Chief Officer of the Nagar Palika that though the petitioner has contended in the petition that petitioner was appointed by the Committee as per the Resolution passed by the Nagar Palika, the Chief Officer has audacity to state on oath that petitioner has failed to establish that his appointment was after following due process of law. Practically, due process of law is to be followed by Nagar Palika and once Chief Officer of Nagar Palika has, by his letter dated 22.1.2010 specifically conveyed to the Collector that appointment of the original petitioner was in order, there is no reason for the next Chief Officer to deviate from facts on record that too on oath. Surprisingly, the same deponent Chief Officer is aware about letter dated 22.1.2010 when he referred such letter in para 11 of the same affidavit. However, the ultimate submission by the deponent in such affidavit is to the effect that Nagar Palika had forwarded all the explanation to the Collector but further explanations were sought for by the Collector from Nagar Palika and hence Nagar Palika could not have done anything in the pension case of the petitioner.

12. The deponent has also produced several other communications with his affidavit in reply. But now when law is well settled and there is no other evidence to substantiate the plea of respondent, I do not see any reason to discuss

correspondence produced on record, which simply confirms that practically respondents have tossed the matter amongst different officers without any valid reason.

13. However, reference to letter dated 01.12.2009 is material whereby even government has agreed that for pension and other relevant benefits, papers are already forwarded by the Nagarpalika. But it cannot be ignored that petitioner is retired in the year 2007 and, therefore, when it is not negative or against the petitioner, it is irrelevant, except to confirm that papers are forwarded to the Government.

14. One another affidavit dated 05.09.2011 by in charge Chief Officer of respondent - Nagarpalika namely Yogesh Jaysinh Ganatra is submitted by learned advocate Mr. Shah for the Nagarpalika. This affidavit was pursuant to direction in the order dated 16.08.2011 and, therefore, when the Court has asked to disclose certain facts, the in charge Chief Officer has disclosed some irrelevant facts. Therefore, such facts are not material, at this stage.

15. But it is certain that till 05.09.2011 other respondents have never bothered to file affidavit in reply and, therefore, petitioner has filed affidavit in rejoinder on 15.11.2011 against reply filed by the Nagarpalika. Now petitioner has come with specific disclosure that petitioner had to seek several information under the Right To Information Act and the Chief Officer of the concerned Nagarpalika provided several information by his letter dated 03.11.2011 regarding similarly situated employees to whom pensionary and retirement benefits were granted. Details of which are discussed herein above.

16. Though one affidavit in reply has already been filed by the Nagarpalika, now one Dushyant U. Upadhyay, Mamlatdar, Nagarpalika, Kheda and Nadiad has on behalf of respondent No.3 on 27.12.2012, i.e. after filing affidavit in rejoinder by the petitioner has filed affidavit in reply. The sum and substance of the affidavit in reply is only to the effect that the petitioner was not appointed after following due process of law and that pension case papers were not completed and not in accordance with law and, therefore, petitioner is not entitled to pensionary benefits. He has also produced several communications and government resolutions but now because of production of such Annexure R2 being government resolution dated 31.03.1972, 28.11.1994 so also 26.01.2004, on the contrary, it becomes clear that, in fact, there is a sanctioned post of pumpman / operator and, therefore, by letter dated 30.06.2003, produced at Annexure R3, in fact the government has approved the benefit of recommendation of 4th pay commission in favour of several employees of the Nagarpalika including employees of respondent Nagarpalika, which is shown at Sr. No. 139.

17. Unfortunately, though facts are very much clear as discussed herein above and that original petitioner has retired on 31.05.2007; respondents have relied upon the government resolution dated 01.06.2010 whereby probably now the post of pumpman was not sanctioned. But even if post of pumpman is not

sanctioned pursuant to government resolution dated 01.06.2010 when this post is already sanctioned in government resolutions of 1972, 1994 and 2004 and all the benefits are given to the deceased petitioner from time to time including the benefit of 4th and 5th pay commission now it is not permissible to the respondents to plead that since now there is no sanctioned post of pumpman with effect from 01.06.2016, the original petitioner is not entitled to the retirement benefit and pension.

18. It is undisputed fact that otherwise the total expenditure of the municipality is less than 48% and, therefore, there is no ban upon them to appoint any such person. It is also undisputed fact that out of total sanctioned post being 131, municipality has filled up 61 posts and thereby 70 posts were kept vacant. Such fact is disclosed in a statement produced by the Nagarpalika to the State government in the month of April 2002, copy of which is produced at page 151 and there is also reference of posts of pump operator disclosing that post was approved on 25.09.1951. Therefore, in any case, when there is sanctioned posts and when there is appointment and thereafter when person has worked for 25 years during which all other service benefits are extended by all the respondents and when such fact is known to all of them, now after the completion of qualifying service which is almost 25 years in the present case, respondent cannot take plea that appointment was not legal.

19. Petitioner has filed affidavit in rejoinder to the affidavit in reply by the respondent No.3 on 30.03.2012. He has produced photocopy of all the relevant pages of his service book at page 164 and 165 at Annexure P8 and order of the respondents regarding extending benefits of recommendation of 5th pay commission so also resolution of the Nagarpalika regarding their set up at Annexure P7 and P6 respectively. Perusal of such documents now again makes it clear that the Nagarpalika has relied upon the government resolution dated 22.01.2004 and prepared a list of its employee which is disclosed in their circular dated 21.01.2007 i.e. before retirement of present petitioner of 31.05.2007 disclosing the name of the petitioner as one of the five pump operators and when such resolution has been forwarded to the government and government has approved such set up, then now government has no reason to state that appointment and posting was irregular. Such confirmation at R4 with affidavit which dated 16.05.2007, is before the date of retirement of present petitioner wherein there is reference of a resolution dated 22.01.2004. Whereas perusal of Annexure P7 dated 16.05.2007 shown that benefit of 5th pay commission was also extended to the present petitioner. In service book of the petitioner, there is endorsement that benefit of new pay scale has been released with effect from 21.09.1992. Therefore, the plea of the respondents are baseless and without any merits.

20. Respondent No.4 has filed one another affidavit in reply on 25.08.2016 may be because of the Court's observations in order dated 07.07.2016 that respondent may file affidavit in reply in respect of the amendment of the petition

considering the fact that pending the petition the original petitioner has expired and thereby his legal heirs have prayed to amend the petition with certain prayers, which was allowed. Now, by such fresh affidavit instead of saying anything with reference to the amended portion of the petition, the respondent has come forward with the statement that the submission of the petitioner regarding similarly situated person is misconceived since some of them have died during their service career and pension was sanctioned by the competent authority considering the fact that such other employee was working against sanctioned post. Suffice to say that respondents have failed to realize the difference between sanction posts and appointment but in any case, now respondents have also produced relevant documents that they have provided pensionary benefits to Bhupatbhai and Gopalbhai.

21. It seems that on 31.08.2016 respondent No.3 has filed another affidavit may be to answer the amend petition but there is no new pleadings or submission except reiterating the previous story that in absence of the approved the original petitioner he is not entitled to any benefits. Thereby it is again stated that petitioner was appointed on the post of pumpman without following due process of law. However, as disclosed herein above, if at all it was the position then there is no clarity to that effect and original petitioner was never at fault and as disclosed herein above when he was granted all other service benefits during tenure of his services of almost 25 years, respondents are precluded from taking such plea.

22. Respondent No.4 has also filed further affidavit in reply dated 25.08.2016 pursuant to amendment in petition but there is nothing in such affidavit in reply. Again annexing same documents letter dated 30.06.2003 regarding extending benefits of recommendations of 4th pay commission and statement dated 30.06.2003 confirming that Mr. R. C. Sevak was serving as such, though there is disclosure in such column that set up is not approved. So also Resolution dated 21.01.2007 and circular dated 16.05.2007 confirming that petitioner was serving as such and extending service benefits to him. However, if we peruse the para 9 in such affidavit, then it becomes clear that now Nagarpalika is trying to shift the burden upon the original petitioner to prove that his appointment was not illegal and that too after completing his service of 25 years.

23. However, as disclosed herein above it is a dispute between Nagarpalika and the government that whether he was appointed on an approved post or not. But once original petitioner was appointed and thereafter when he was continued on such post for 25 years with all service benefits which were approved by all the respondents, now respondents have precluded from taking plea that appointment of the original petitioner was irregular and, therefore, pursuant to government resolution dated 28.11.1994 he is not entitled to pensionary benefits.

24. Even if we refer such government resolution, which is produced at Annexure RII (page 129) clause 14 of such government resolution confirms that benefit of pension will be given to the employees who is on permanent post and his post is

created after prior approval of competent authority and who has worked on such such post permanently. It is also confirmed in such clause that the Collector has to verify the approval of post. But considering the communication dated 21.01.2010 when Nagarpalika has conveyed all the facts to the Collector, now it is for the Collector to verify all such facts. However, overall record categorically confirms that throughout the tenure of 25 years of the service of the original petitioner, Collector has never bothered to verify that whether appointment is regular or not and all the benefits were confirmed in favour of the original petitioner and in total set up of the respondent Nagarpalika when Collector has approved the post of petitioner, respondent cannot take a stand that because there is no evidence regarding prior approval, petitioner is not entitled to the pensionary benefits. Such issue is well decided by the division bench of this Court so also the Honourable Supreme Court of India.

25. In view of above facts and circumstances there is no substance in the different version so as to refuse the benefits as prayed for by the petitioner in such petition wherein petitioner has sought indulgence of this Court under Article 14, 16 and 226 of the Constitution of India. Thereby while passing the final order it would be appropriate to recollect observations by the division bench in the case of Mohmad (supra) though if the difference and plea as taken by the respondents are entertained or accepted, then it would result into allowing the atrocious treatment and violation of Article 14 of the Constitution of India. Therefore, it would be appropriate to allow the petition as prayed for in 25(a), (b), (c), (cc), (d), (dd), (ddd). All such retirement benefits shall carry simple 6% interest from the due date till actual payment if payment is made within 4 months otherwise respondent shall pay 9% interest on entire amount. Respondent shall also pay all the pensionary benefits from due date till its payment with 6% interest. Respondent shall complete the exercise within 4 months without fail. If the same is not paid within 4 months, respondents have to pay 9% interest from the due date till actual date of payment.

26. This Petition is allowed with cost. Rule is made absolute to that extent. Direct service is permitted.