

(2013) 05 GUJ CK 0022

In the Gujarat High Court

Case No : Special Civil Application No. 5108 of 2008

Somlubhai Sonjibhai Ganvit

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 09-05-2013

Acts Referred:

Citation : (2013) LabIC 3417

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

Bench : Single Bench

Advocate : Rutvij M. Bhatt, for the Appellant; Ronak B. Raval and Pranav V. Shah, for the Respondent

Final Decision : Allowed

Judgement

C.L. Soni, J.—The petitioner has moved this petition under Article 226 of the Constitution of India challenging the decision of the respondents in not accepting the application of the petitioner for voluntary retirement with effect from 31.5.2007 and prayed to direct the respondent authorities to process his application for voluntary retirement and to pay the benefits of retiral benefits to the petitioner. Case of the petitioner is that the petitioner was appointed on 1st March, 1983 as Talati-cum-Mantri under the Respondent No. 1 in Surat District. He opted for District Transfer and was posted in Valsad District on 11th April, 1994. On account of bifurcation of Valsad District, the petitioner then came within the Navsari District.

2. It is the further case of the petitioner that on account of his ill-health, he was required to go on leave but then, he decided to opt for voluntary retirement and made an application dated 2.3.2007 for voluntary retirement with effect from 31.5.2007. Pending such application, the petitioner requested to grant leave on health ground from 2.3.2007 to 29.5.2007. Such leave was granted by the Respondent No. 3 Taluka Development Officer. The petitioner has further averred that on completion of the notice period of ninety days, the petitioner since did not receive any reply, made representation to the respondent authorities to

process his case for voluntary retirement. However, instead of considering his case for voluntary retirement, Respondent No. 3 issued show-cause notice dated 26.6.2007 stating that the petitioner has proceeded on unauthorized leave and has shown negligence towards his duties. Thereafter, treating the petitioner on service, the respondents served the petitioner with order of transfer intimating the petitioner to resume duties at the place of transfer. It is also the case of the petitioner that the petitioner was intimated by respondents by letter dated 10.8.2007 stating reasons for not processing application of the petitioner for voluntary retirement from 30.5.2007. The respondents then rejected the application of the petitioner for voluntary retirement and asked the petitioner to resume duties and further stated that if the petitioner issues fresh notice for voluntary retirement, same could be considered. The petitioner has stated that the petitioner was still served with further letter dated 14.2.2008 asking the petitioner to resume at the place of transfer within seven days. The petitioner replied the said letter and requested to process his original application for voluntary retirement. However, being tired with the attitude of the respondents, the petitioner has filed this petition praying for the above said reliefs.

3. The petition is opposed by Respondent Nos. 2 and 3 by filing reply affidavit dated 25.6.2008. It is stated therein that after the petitioner submitted an application dated 2.3.2007 to the Deputy District Development Officer seeking voluntary retirement with effect from 31.5.2007, the petitioner on one hand wanted to treat 90 days as notice period and on the other hand, applied for leave from 1.3.2007 to 29.5.2007 and then resumed duties on 30.5.2007, it is further stated that thereafter from 1.6.2007, the petitioner absented from duty and applied for commuted leave of 23 days. It is also stated that the petitioner then made application dated 23.6.2007 to the Taluka Development Officer, Jalalpore for leave of 15 days on medical ground. Deponent who is the Deputy District Development Officer has then stated in the reply that to verify the bona fides of the petitioner, the Taluka Development Officer addressed letter dated 26.6.2007 to the Civil Surgeon, Navsari to ascertain genuineness of the medical certificate and also requested the Civil Surgeon, Navsari to medically examine the petitioner and to render his opinion. The petitioner did not appear before the Civil Surgeon for his medical check up and disobeyed the orders of his superior officer which led reasonable inference to be drawn that the petitioner was not suffering from any ailment. The Taluka Development Officer submitted report dated 27.6.2007 that the petitioner was applying for leave on one or the another pretext and recommended for holding inquiry against the petitioner. The Taluka Development Officer then served notice dated 26.6.2007 calling upon the petitioner to show-cause as to why the proceedings for imposing minor penalty should not be initiated against the petitioner. However, in the mean time, since the petitioner made representation dated 26.6.2007 to do needful for his voluntary retirement, the petitioner was informed that his application for voluntary retirement could not be granted and he should give fresh notice for voluntary retirement in accordance with the relevant rules.

4. The petitioner also filed rejoinder stating that after completing blotless qualifying service of more than 24 years, he preferred to voluntarily retire. The respondents did not give any intimation to the petitioner either of accepting his application for voluntary retirement or of rejecting the application and, therefore, voluntary retirement of the petitioner deemed to have come into effect from 31.5.2007. The petitioner has also stated that his leave was sanctioned by Respondent No. 4 and as per the rules, he remained present on the last working day i.e. 30.5.2007 and attended the office up to 31.5.2007.

5. I have heard the learned Advocates for the parties.

6. Learned Advocate Shri Rutvij M. Bhatt for the petitioner submitted that the petitioner having completed qualifying service of more than 24 years and having given three months notice for voluntary retirement as required by the relevant rules, in absence of any decision of the competent authority either rejecting or refusing to accept the application during the notice period, the petitioner became entitled to voluntary retirement from the effective date. Mr. Bhatt submitted that even if the petitioner had gone on leave during the notice period, same would not make any difference as the requirement under the Rules was to give three months notice which the petitioner complied with, and therefore, the respondents were not justified in subsequently asking the petitioner to make fresh application. Mr. Bhatt submitted that even otherwise, since the competent authority has sanctioned the leave of the petitioner, and since no decision till the last date of notice period was communicated to the petitioner, the petitioner's application for leave after the effective date of voluntary retirement cannot take away the effect of the deeming provisions of the Rules as per which the voluntary retirement of the petitioner had already come into effect from 31.5.2007. Mr. Bhatt submitted that sub-rule (5) of Rule 48 of the Gujarat Civil Services (Pension) Rules, 2002 (hereinafter referred to as "the Rules") provides that a Government employee, who elects to retire under this rule and gives notice under these rules to the appointing authority, he shall not be allowed to withdraw such notice except with the approval of the appointing authority, provided that the request for withdrawal of notice shall be made before the intended date of his retirement. Mr. Bhatt submitted that the legislature clearly intended to give effect to the request of voluntary retirement as per the provisions of sub-rules (1) and (2) of Rule 48 unless the competent authority refuses to grant permission for voluntary retirement before the expiry of the period of notice. He, thus, submitted that the intimation given by the competent authority for not accepting the request of the petitioner being subsequent to the expiry of notice period, cannot operate against the intention of the legislature and, therefore, the decision taken by the competent authority not to accept the request of the petitioner for voluntary retirement cannot stand scrutiny of law. He, thus, urged to allow the petition and direct the respondents to accept the request of the petitioner for voluntary retirement with effect from 31.5.2007 and also direct the respondents to confer all retiral benefits including pension to the petitioner.

7. As against the above arguments, learned A.G.P. Mr. Ronak Raval appearing for the Respondent No. 1 State submitted that the petitioner having gone on leave after applying for voluntary retirement cannot be given benefit of the provisions of the Rules for retirement. Mr. Raval submitted that even after the effective date of 31.5.2007, the petitioner had continued to work under the Taluka Development Officer and, therefore, the petitioner could be said to have waived his right to voluntary retirement. Mr. Raval submitted that the petitioner had gone on leave for no reason and the competent authority subsequently found that the petitioner had wrongly applied for leave on medical ground and, therefore, the petitioner was subjected to show-cause notice by the Taluka Development Officer and in such circumstances, the petitioner could not be made entitled to voluntary retirement. He submitted that in the facts of the case, the competent authority has not committed any illegality in asking the petitioner to apply for voluntary retirement afresh. He, thus, urged to dismiss the petition.

8. Learned Advocate Mr. Pranav Shah appearing for Respondent Nos. 2 to 5 submitted that the petitioner made application dated 30.5.2007 to the Taluka Development Officer stating that from 1.3.2007 to 29.5.2007, he was on medical leave and on 30.5.2007, he resumed duty. Mr. Shah submitted that the above communication by the petitioner clearly reveals that the petitioner had not complied with the requirement of the Rules for voluntary retirement. He submitted that the ground for medical leave was not genuine. Mr. Shah submitted that subsequently also by letter dated 6.6.2007, the petitioner informed the Taluka Development Officer that because of his ill health, he was not in a position to serve from 1.6.2007 to 23.6.2007 and requested to sanction leave for 23 days as medical (commuted) leave. Mr. Shah submitted that since the petitioner after resuming duty again applied for leave for long period, it was found necessary to get verified from the medical officer as to whether the request of the petitioner for medical leave was genuine or not and the petitioner deliberately did not report to the medical officer for getting him medically examined and thus, the competent authority noticed that the petitioner was trying to make out false ground for his leave. Under these circumstances, the competent authority found that the petitioner even after applying for voluntary retirement, continued in service and enjoyed unauthorized leave, therefore, the petitioner was not entitled to voluntary retirement on the basis of his notice. Mr. Shah submitted that the competent authority, in the facts and circumstances of the case, decided not to accept the application of the petitioner and asked the petitioner to make fresh application. Mr. Shah submitted that there is no illegality in such decision taken by the competent authority and, therefore, the petitioner is not entitled to voluntary retirement with effect from 31.5.2007. He, thus, urged to dismiss the petition.

9. Having heard the learned advocates for the parties and having perused the record of the case, it appears that there is no dispute about the fact that the petitioner after completing the qualifying service of more than 24 years applied for voluntary retirement vide application dated 2.3.2007 to be effective from

31.5.2007. As stated above, the competent authority has stated in the reply that the petitioner had submitted such application dated 2.3.2007, however, such application was not accepted as the petitioner had proceeded on leave. At this stage, it is required to be noted that the petitioner stated in his rejoinder that his leave was duly sanctioned by Respondent No. 4.

10. The petitioner has completed less than 25 years of qualifying service, therefore, Rule 48 of the Rules would apply in the case of the petitioner. Rule 48 reads as under:

48. Retirement on completion of twenty years" qualifying service : (1) A Government employee on completion of twenty years" qualifying service, may, by giving notice of not less than three months in writing to the appointing authority, retire from service.

(2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority;

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

(3) The qualifying service as on the date of intended retirement of the Government employee retiring under this rule shall be increased by a period not exceeding five years, subject to the condition that the total qualifying service rendered by the Government employee does not in any case exceed thirty years; Provided that the total qualifying service after allowing the increase under this sub-rule shall not exceed the qualifying service which the Government employee would have had, if he had retired voluntarily at the lowest age limit for voluntary retirement prescribed under sub-rule (5) of Rule 10.

(4)(a) A Government employee referred to in sub-rule (1) may make a request in writing to the appointing authority to accept notice of voluntary retirement of less than three months giving reasons thereof;

(b) On receipt of a request under Clause (a), the Head of Department in case of Class-IV employee and the Head of Administrative concerned in case of other employees, subject to the provisions of sub-rule (2) may consider such request for the curtailment of the period of notice of three months on merits and if it is satisfied that there is no departmental inquiry pending or contemplated against the Government employee, may relax the requirement of notice of three months on the condition that the Government employee shall not apply for commutation of a part of his pension before the expiry of the period of three months notice.

(5) A Government employee, who has elected to retire under this rule and has given the notice to that effect as required under these rules to the appointing authority, shall not be allowed to withdraw such notice except with the approval of the appointing authority:

Provided that the request for withdrawal of notice shall be made before the intended date of his retirement.

(6) The pension and death-cum-retirement gratuity of the Government employee retiring under this rule shall be based on the pay as defined under Rule 9 (53) read with Rule 43 and the increase not exceeding five years in his qualifying service shall not entitle him to any notional fixation or addition of pay for the purpose of calculating pension and gratuity.

(7) This rule shall not apply to a Government employee who retires from Government service for being absorbed permanently in an autonomous body or a public sector undertaking to which he is on deputation at the time of seeking voluntary retirement.

Explanation-1: For the purpose of this rule the expression "appointing authority" shall mean the authority which is competent to make substantive appointment to the service or post from which the Government employee seeks voluntary retirement.

Explanation-2: Qualifying service of twenty years referred in sub-rule (1) means qualifying service excluding the notional service added under sub-rule (3) and also extra ordinary leave sanctioned in the entire service of an employee.

11. Though sub-rule (2) of Rule 48 requires acceptance of notice for voluntary retirement by the appointing authority, but proviso to said sub-rule provides that if the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period. There is no dispute about the fact that till the last date of expiry of three months notice, competent authority has not refused to grant permission for voluntary retirement of the petitioner.

12. The vigor of the provisions about the retirement becoming effective from the date of expiry of three months period in absence of refusal to grant permission could be seen from sub-rule (5) which provides that a Government employee, who has elected to retire under this rule and has given notice to that effect as required under these rules to the appointing authority shall not be allowed to withdraw such notice except with the approval of the appointing authority. Legislature therefore intended that the notice for voluntary retirement is to be given effect to on expiry of three months notice period unless acceptance thereof is refused within the notice period by the appointing authority.

13. In the case on hand, there was no intimation to the petitioner either of not accepting his notice or of refusing his request for voluntary retirement. Thus, on expiry of notice period on 31.5.2007, the voluntary retirement of the petitioner became effective. Therefore, even if the petitioner had subsequently remained present in the office and applied for leave, such could not take away the effect of voluntary retirement which had taken place by virtue of the provisions of Rule 48

of the Rules. Respondent authorities were thus not justified in refusing to accept the request of the petitioner for voluntary retirement and asking the petitioner to make fresh application for voluntary retirement after the voluntary retirement of the petitioner became effective.

14. So far as the leave enjoyed by the petitioner during the notice period is concerned, as stated above, the leave was sanctioned. Even if such leave was not sanctioned, then also, in the facts of the case, the petitioner was entitled to voluntary retirement from the effective date. On the date of making application by the petitioner, the petitioner had completed more than 24 years qualifying service and, therefore, even if the leave period is taken out from total qualifying service, the petitioner was still left with qualifying service of more than 23 years for voluntary retirement against the minimum requirement of 20 years of qualifying service. Under the Rules, giving of three month's notice is required if the Government employee is otherwise completing 20 years of qualifying service. The petitioner has complied with the provisions of such requirement of giving three months notice. The petitioner was not communicated during the notice period that his application was either rejected, not processed or not accepted on account of he having applied for leave during the notice period.

15. Under these circumstances, action on the part of the respondent authority in not accepting the petitioner's application for voluntary retirement and asking the petitioner to make fresh application cannot be sustained.

16. In the case of Tek Chand Vs. Dile Ram, Hon'ble the Supreme Court has held and observed in paras 31 to 35 as under:

31. It is not disputed that the appointing authority did not refuse to grant the permission for retirement before expiry of the period specified in the said application dated 5-12-1994 given by Nikka Ram. Further, no communication whatsoever was made to him within the said period. During the course of the argument before the High Court, the learned counsel for the parties referred to Rule 48-A of the Rules, of course, placing their own interpretation. Since the said Rule is material and has bearing on the question to be determined, it is extracted below:--

48-A. Retirement on completion of 20 years qualifying service.--(1) At any time after a Government servant has completed twenty years" qualifying service, he may, by giving notice of not less than three months in writing to the appointing authority, retire from service.

Provided that this sub-rule shall not apply to a Government servant, including scientist or technical expert who is -

(i) On assignments under the Indian Technical and Economic Co-operation (ITEC) Programme of the Ministry of External Affairs and other aid programmes.

(ii) Posted abroad in foreign based offices of the Ministries/Departments.

(iii) On a specific contract assignment to a foreign Government, unless, after having been transferred to India, he has resumed the charge of the post in India and served for a period of not less than one year.

(2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority;

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

32. Under sub-rule (1) of the said Rule, at any time after completion of 20 years" qualifying service, a Government servant could give notice of not less than three months" in writing to the appointing authority for retirement from service. Under sub-rule (2), voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority. In the proviso to sub-rule (2) of Rule 48-A, it is clearly stated that in case the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.

33. It is clear from sub-rule (2) of the Rule that the appointing authority is required to accept the notice of voluntary retirement given under sub-rule(1). It is open to the appointing authority to refuse also on whatever grounds available to it but such refusal has to be before the expiry of the period specified in the notice. The proviso to sub-rule (2) is clear and certain in its terms. If the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement sought for become effective from the date of expiry of the said period. In this case, admittedly, the appointing authority did not refuse to grant the permission for retirement to Nikka Ram before the expiry of the period specified in the notice dated 5-12-1994. The learned senior counsel for the respondent argued that the acceptance of voluntary retirement by appointing authority in all cases is mandatory. In the absence of such express acceptance the Government servant continues to be in service. In support of this submission, he drew our attention to Rule 56(k) of Fundamental Rules. He also submitted that acceptance may be on a later date, that is, even after the expiry of the period specified in the notice and the retirement could be effective from the date specified in the notice. Since the proviso to sub-rule (2) of Rule 48-A is clear in itself and the said Rule 48-A is self-contained, in our opinion, it is unnecessary to look to other provisions, more so in the light of law laid down by this Court. An argument that acceptance can be even long after the date of the expiry of the period specified in the notice and that the voluntary retirement may become effective from the date specified in the notice, will lead to anomalous situation. Take a case, if an application for voluntary retirement is accepted few years" later from the date specified in the notice and voluntary retirement becomes operative from the date of expiry of the

notice period itself, what would be the position or status of such a Government Servant during the period from the date of expiry of the notice period up to the date of acceptance of the voluntary retirement by the appointing authority? One either continues in service or does not continue in service. It cannot be both that the voluntary retirement could be effective from the date of expiry of the period mentioned in the notice and still a Government servant could continue in service till the voluntary retirement is accepted. The proviso to sub-rule (2) of Rule 48-A of the Rules does not admit such situation.

34. This Court in a recent judgment in the case of State of Haryana and Others Vs. S.K. Singhal, after referring the few earlier decisions of this Court touching the very point in controversy in para 13 of the judgment has held thus:--

13. Thus, from the aforesaid three decisions it is clear that if the right to voluntarily retire is conferred in absolute terms as in Dinesh Chandra Sangma Vs. State of Assam and Others, by the relevant rules and there is no provision in the rules to withhold permission in certain contingencies the voluntary retirement comes into effect automatically on the expiry of the period specified in the notice. If, however, as in B.J. Shelat Vs. State of Gujarat and Others, and as in Union of India and others Vs. Sayed Muzaffar Mir, the authority concerned is empowered to withhold permission to retire if certain conditions exist, viz. in case the employee is under suspension or in case a departmental enquiry is pending or is contemplated, the mere pendency of the suspension or departmental enquiry or its contemplation does not result in the notice for voluntary retirement not coming into effect on the expiry of the period specified. What is further needed is that the authority concerned must pass a posting order withholding permission to retire and must also communicate the same to the employee as stated in B.J. Shelat case and in Sayed Muzaffar Mir case before the expiry of the notice period. Consequently, there is no requirement of an order of acceptance of the notice to be communicated to the employee nor can it be said that non-communication of acceptance should be treated as amounting to withholding of permission.

35. In our view, this judgment fully supports the contention urged on behalf of the appellant in this regard. In this judgment, it is observed that there are three categories of rules relating to seeking of voluntary retirement after notice. In first category, voluntary retirement automatically comes into force on expiry of notice period. In second category also, retirement comes into force unless an order is passed during notice period withholding permission to retire and in third category voluntary retirement does not come into force unless permission to this effect is granted by the competent authority. In such a case, refusal of permission can be communicated even after the expiry of the notice period. It all depends upon the relevant rules. In the case decided, the relevant rule required acceptance of notice by appointing authority and the proviso to the rule further laid down that retirement shall come into force automatically if appointing authority did not refuse permission during the notice period. Refusal was not

communicated to the respondent during the notice period and the Court held that voluntary retirement came into force on expiry of the notice period and subsequent order conveyed to him that he could not be deemed to have voluntarily retired had no effect. The present case is almost identical to the one decided by this Court in the aforesaid decision.

17. In light of the above all subsequent events about rendering service and of going on leave by the petitioner after the effective date of voluntary retirement will have no relevance and on such subsequent events, the petitioner could not be denied voluntary retirement with effect from 31.5.2007. Therefore, decision of the respondent authorities for not accepting the application of the petitioner for voluntary retirement with effect from 31.5.2007 is required to be quashed and set aside, and the respondents are required to be directed to confer all retirement benefits including pension to the petitioner by treating the petitioner to have retired voluntarily with effect from 31.5.2007. In the result, the petition is allowed. Decision of the respondent authorities of not accepting and/or rejecting the application of the petitioner for voluntary retirement with effect from 31.5.2007 is quashed and set aside. Petitioner is held entitled to voluntary retirement with effect from 31.5.2007. Respondents are directed to accept the application of the petitioner dated 2.3.2007 for voluntary retirement with effect from 31.5.2007 and are further directed to confer all consequential benefits including pension to the petitioner by treating the petitioner voluntarily retired with effect from 31.5.2007. Respondents shall calculate and pay all retiral benefits including pension to the petitioner within three months from the date of receipt of this order. Rule is made absolute.