

(2004) 02 GUJ CK 0031

In the Gujarat High Court

Case No : Misc. Civil Application No. 2239 of 2003 in Special Civil Application No. 7703 of 2002

State of Gujarat

APPELLANT

Vs

PWD Employees" Union

RESPONDENT

Date of Decision : 25-02-2004

Acts Referred:

Citation : (2004) 3 GLR 2073

Hon'ble Judges : Jayant Patel, J

Bench : Single Bench

Advocate : Government Pleader for Petitioner No. 1-2, for the Appellant; Shalin N. Mehta, for Respondent No. 1-10, for the Respondent

Final Decision : Allowed

Judgement

Jayant Patel, J.—Rule. Mr. Mehta appearing for respondent waives service of rule. With the consent of learned advocates for parties matter is taken up for final hearing today.

2. The present petition is preferred by the applicant-State Govt. for modification of the order, dated 7.2.2003 passed by this court in SCA No.7703/02.

3. Heard Mr. A.D. Oza, Ld.GP for the applicant and Mr. Shalin Mehta for the opponent. For the sake of convenience, the applicants herein who were original respondents in the main Special C.A. shall be referred as respondents-original respondents and the opponents herein who were original petitioners in the main SCA shall be referred as original petitioners.

4. It has been submitted by Mr. A.D. Oza, Ltd. GP on behalf of original respondents that when this court passed the order on 7.2.2003 in Special Civil Application No.7703/02 by mistake the calculation was made of Rs.2,11,86,300/- which included encashment of leave in lieu of work on public holidays. Mr. Oza submitted that as per Govt. Resolution, dated 31.3.1982 if any employee has worked on public holidays he would be entitled to additional leave in lieu thereof

and said aspect is coupled with further condition that the leave is to be utilized in the same year or otherwise it would lapse. Mr. Oza submitted that therefore in view of Govt. Resolution dated 31.3.1982 such inclusion for encashment of leave in lieu of work on public holidays could not have been made and by mistake same came to be incorporated and therefore he submitted that the order dated 7.2.2003 passed by this court requires to be modified by substituting the figure Rs.1,36,29.094/- in place of Rs.2,11,86,306/- since as per the Govt. Resolution the only entitlement of the original petitioners shall be of Rs.1,36,29.094/-. Mr. Oza also submitted that as per the decision of this court (Coram: H.L. Gokhale, J.) dated 30.1.1996 in Special C.A.No.3607/82 which has been confirmed upto Supreme Court the only direction given at para 8 was to treat the petitioners at par with other employees and for making representation for such purpose and in the event of the Government not considering the same the petitioners were to resort to remedy under law and he therefore submitted that as per the decision the benefits of public holidays are to be given as permissible under the rules and resolutions and in the contention of Mr. Oza since the above referred Govt. Resolution did not permit for encashment of leave in lieu of work on public holidays the inclusion of the same ought not to have been made and since by mistake same was done, the present application.

5. Mr. Mehta for the original petitioners-opponents herein contended, inter alia, that as such in the contempt proceedings being Misc.C.A.No.1615/03 the Division Bench of this court did not allow the Government to raise such contentions and therefore he submitted that the present application for review is not maintainable. Mr. Mehta also submitted that the benefits were already calculated and it was the calculation of the officers of the State Government itself which has resulted into total amount of Rs.2,11,86,300/- including the encashment of leave in lieu of work on public holidays and he submitted that now the Government can not back out from its own declaration made before the court. Mr. Mehta also relied on the decision of the Apex Court in the matter of M/s. M.K. Shah Engineers and Contractors Vs. State of Madhya Pradesh, and he submitted that even otherwise also on the principles of restitution since the matters were pending before the Division Bench of this Court as well as before the Apex Court and since the stay order was in operation, the original petitioners had no option but to continue to work and once the decision of this court in SCA No.3607/82 is confirmed by the Apex Court, the benefits which otherwise have accrued to the original petitioners must be restored. He also submitted that as such the Govt. Resolution would not be applicable. But, even if it is considered for the sake of argument that the Govt. Resolution applies then also the respective period of the year is over and therefore the petitioners are unable to utilize the leave during the said period. He also submitted that in any event that the Govt. Resolution does not prohibit any encashment of leave in lieu of work on public holidays and in the absence of such prohibition and when the calculation is made by the Officers of the Government themselves such contention on the part of the Govt. to back out from the same should not be accepted and he submitted

that the present application deserves to be dismissed.

6. The first aspect which is required to be considered is as to whether the present application can be said to be not maintainable in view of the order, dated 16.9.2003 passed by the Division Bench of this court in Misc.C.A.No.1615/03 in SCA No.7703/82. If the said contention is examined it appears that the Division Bench of this court in exercise of its contempt jurisdiction in the proceedings of Misc.C.A.No.1615/03 was approached in view of the order, dated 7.2.2003 passed by this court in SCA No.7703/02. It is well settled that the court exercising contempt jurisdiction would not normally entertain the contentions which results into going beyond the order which is pressed in service for implementation or obeying. Since this court in SCA No.7703/92 as per order dated 7.2.03 had passed the order taking the basis as Rs.2,11,86,300/- at the relevant point of time the Division Bench in its order dated 16.9.03 observed that "it is too late to put up the defence that the amount calculated is wrong." Therefore, if such observations are made by the Division Bench while exercising contempt jurisdiction, it can not be said that the original parties to the proceedings are precluded from moving this application for modification, if otherwise permissible under law. The observations of the Division Bench, in my view, can not be pressed in service to take away the right of the parties to move for modification and/or to review of the order, if there is any mistake and therefore I can not accept the contention of Mr. Mehta that the present application for modification of the order, dated 7.2.03 is not maintainable.

7. It further appears that as per the State Govt., in view of Govt. Resolution, dated 31.3.82 the concerned workman or the employee would be entitled to leave in lieu of work on public holidays and as per the said resolution the said leave is to be utilized during the said year only. In the order passed by this court in SCA No.3607/82 it was observed at paras 8 & 9 as under:

"8. Prayer (b) of this petition is regarding weekly off and public holidays and payment in lieu thereof if any work is taken on those days. Mr. Master states that these facilities are already extended to all the employees right from Ist April, 1982 which is even prior to the present petition. He states that some of the employees have claimed these benefits for the period prior thereto. If there is any such claim, the employees may present to the Government in that behalf and the Govt. will consider it properly failing which they may resort to the remedies provided under the law.

9. The petition is filed on the footing that in view of rendering long service to the respondents the petitioners are entitled to treatment on par with other regular Government employees and on that basis the aforesaid prayers are also claimed for other benefits if any are made para 3 of the additional affidavit of Shri B.B. Chaudhary dated 12th December, 1995 clarifies the other claim by making reference to the benefits of (i) LTC, (ii) leave encashment, (iii) public holidays (iv) travel allowance, (v) Group Insurance, (vi) Medical Allowance and (vii) Provident Fund. The claim for leave encashment, public holidays and provident

fund as permissible under the relevant and resolution has already been dealt with. Mr. Master states that the remaining other benefits , namely, LTC, Travel allowance, group insurance and medical allowance are being made available to the earlier mentioned group of 108 employees. He states that the remaining employees will be satisfied if these benefits are made available to them from Ist January, 1995 onwards. This submission is reasonable enough and since there is no reason to discriminate between the two group of employees the respondents will take necessary steps to give these benefits to the second group of employees from Ist January, 1995 as may be permissible under the relevant rules and resolutions."

The conjoint reading of paras 8 and 9 of the aforesaid order, shows that this court directed for giving benefit of encashment of leave in lieu of work on public holidays as permissible under relevant rules and resolutions and for giving similar treatment with other employees of the Government. The court further ordered that if there is any such claim the employees could submit representation to the Government in that behalf and the Government will consider it properly failing which they may resort to the remedies provided under law. However it is the case of the State Govt. that as per the Govt. Resolution, dated 31.3.82 the employee shall not be entitled to encashment of leave which accrued in lieu of work on public holidays. Merely because at the time when the claim was made before this court in Special C.A.No.7703/03 on the basis of which the order dated 7.2.2003 came to be passed it can not be said that the Govt. can not approach this court for modification of the order even if the mistake was committed while undergoing the calculation in the total amount of Rs.2,11,86,300/-. It is always open to any party to the proceedings to approach the court if any genuine mistake occurred and on the basis of such genuine mistake by the party the order has been passed. If the order dated 7.2.03 passed in SCA 7703/02 is read it was the calculation submitted by the Government Pleader on behalf of the State Govt. and the court did not read or adjudicate upon the entitlement or otherwise on the question of encashment of leave in lieu of work on public holidays. Even otherwise also when a mistake is brought to the notice of this court the court has inherent power to modify and/or to recall the order if it is demonstrated before the court that such mistake was genuine.

8. The aforesaid takes me to examine the question as to whether such mistake was genuine or not. As observed earlier, the rights of the petitioners in SCA No.3607/82 did not crystallized on the question of encashment of leave in lieu of work on public holidays. What was ordered by the court was for giving benefits including the benefit of leave encashment in lieu of work on public holidays in accordance with the rules and Govt. resolutions. If the Govt. Resolution, dated 31.3.82 which is pressed in service is perused the same does not provide for encashment of leave in lieu of work on public holidays and therefore while calculating the monetary benefits the said amount could not have been included. Still, however, the same was included and therefore it appears that there was a genuine mistake on the part of the Government in including the monetary benefit

of encashment of leave in lieu of work on public holidays and if such is the situation the modification of the order, dated 7.2.03 passed by this court in SCA No.7703/02 is called for. The reliance placed upon the decision of the Apex Court in the matter of M.K. Shah Engineers & Contractors(supra)) by Mr. Mehta for the original petitioner is of no help to the petitioners herein because in the case before the Supreme Court it was by contractual agreement the arbitration clause was accepted whereas in the present case the statement was made on the basis of which the order came to be passed. The said statement was based on the basis of figure and calculation which was submitted and it is the case of the State Govt. that the said figure came to be arrived at by mistake. Therefore, said decision of the Supreme Court would not apply to the facts of the present case.

9. In view of above, it was put to Mr. Mehta appearing for the original petitioners-opponents herein as to whether the petitioners would like to resort to substantive proceedings for asserting their right to claim encashment of leave in lieu of work on public holidays by separate proceedings or the petitioners want adjudication in the present proceedings since application for modification in the SCA No.7703/02 which was essentially for implementation of the order, dated 30.1.1996 in SCA No.3607/82. In response to the same, Mr. Mehta under instructions from his clients declared before the court that the petitioners would like to have adjudication in these proceedings and they are not desirous to resort to separate and independent proceedings.

10. Under the above circumstances, If the matter is further examined it appears that the order dated 30.1.1996 passed in SCA No.3607/82 if read in the light of language used by the court at paras 8 & 9 of the said decision shows that encashment of leave in lieu of work on public holidays was to be given in accordance with Govt. Resolution and further for giving equal treatment at par with other Govt. employees the petitioners had to make representation to the State Govt. for such purpose and if it is not properly considered the petitioners had to resort to remedies provided under law. It has not come on record nor it is the case of the petitioners that the State Govt. has granted leave encashment benefit in lieu of work on public holidays to other employees. However, the contention which was sought to be canvassed by Mr. Mehta was that the Govt. resolution could not have been said to be within the knowledge of the employee concerned and he alternatively submitted that the said resolution would not apply. In furtherance to his submission, Mr. Mehta contended that in any case even if the resolution applies, the period is over and therefore only option left with the Govt. is to give benefit of encashment of leave in lieu of work on public holidays. I find that ignorance of Govt. Resolution or the failure of the Govt. for giving credit to the leave in lieu of work on public holidays can hardly be said as valid ground for asserting the benefit of encashment of leave in lieu of work on public holidays. It was for the petitioner concerned to request at the relevant point of time to the Govt. to credit the leave in lieu of work on public holidays as per Govt. resolution dated 31.3.82. However, such request was not made by the petitioners at the relevant point of time as per Mr. Mehta since there was no

knowledge about said resolution and Mr. Mehta in the alternative contended that even if such request had been made the same would not have been granted because of stay operating in the pending proceedings before the Apex Court.

11. The question of consideration of leave and giving credit would be a subsequent aspect but the fact remains that at the relevant point of time the petitioners have not requested for giving credit of such leave. I find substance in the contention of Mr. Mehta that in view of the stay order granted by the Apex Court so long as the petitioners are not treated at par with the Govt. employees the said benefit could not have been conferred to the petitioners even for additional leave lieu of work on public holidays. Further there is also considerable force in the contention of Mr. Mehta that in view of dismissal of Spl. Leave Petition by the Apex Court and in view of confirmation of judgment of this court in SCA No.3067/82 the petitioners would be in any case entitled to restitution of rights which otherwise accrued to the petitioners and the same should be restored on account of final decision by the Apex court. The principles of restitution are well known that any party who has enjoyed the benefit on account of pendency of proceedings has to make good such benefit if ultimately such party loses in the litigation. In the present case original petitioners have succeeded throughout upto the Apex Court and as a consequence thereof the petitioners would be entitled to assert those benefits which accrued to them as per the judgment of this court in SCA No.3607/82. Therefore, as a consequence of confirmation of decision of this court by the Apex Court all the benefits which otherwise had accrued to the petitioners are required to be restored and to that extent the contention of Mr. Mehta deserves to be accepted. Therefore, as a consequence thereof, it will have to be examined as to whether such benefits really accrued to the petitioners or not even as per the judgment of this court. If the claim is read as it is the benefit which accrued to the petitioners would be to the extent of credit of leave and its utilization thereof during the said period. On account of litigation from 1982 onwards until the decision was confirmed by the Apex Court and since the interim stay was granted by higher forum the judgment was not given effect. Had there been no interim stay granted by the Apex Court possibly the petitioners would have claimed for crediting of leave and would have utilized the said leave during the said period. But, merely because the time has expired of the concerned year it can not be validly asserted by the petitioners that now said leave must be allowed to be encashed only and there is no way out or there is no option but to pay leave encashment benefit. It will be for the State Govt. to consider the modalities for making good to the loss of leave suffered by the petitioners pending the proceedings before the Apex Court. The Government may in a given case take appropriate decision in accordance with law to give credit of leave to concerned employee with liberty to utilize the same during a particular period or in the alternative the Govt. may also consider the matter for encashment of such leave if the circumstances so demand. The decision for such purpose at large is to be considered by the Government upon relevant considerations and such grant of leave, giving credit of leave in lieu of work on

public holidays and encashment thereof are essentially policy decisions of the Govt. with which this court would not normally substitute its wisdom. Therefore, it will be for the petitioners to make appropriate representation to the Govt. for giving credit of such leave and its utilization thereof and/or its encashment. If such representation is made by the petitioners, the Govt. shall consider all the relevant aspects including the benefit of leave as accrued to the petitioners, whether the leave should be credited and its utilization within the stipulated time limit or its encashment can be permitted etc shall be the questions which will be required to be decided by the State Govt. if such representation is made.

11. Since in pursuance of the order passed by this court in SCA No.7703/02 read with the order passed by the Division Bench of this court in contempt proceedings the amount of leave encashment of Rs.75,57,212/- is already deposited I find that till the Govt. finally decide the question of giving credit of such leave to the concerned employee for the purpose of utilization within a particular period and/or for its encashment the said amount should continue as deposit and the State Govt. should be directed to decide such question within stipulated time limit.

12. In view of the aforesaid discussion, I find that the following directions shall meet with the ends of justice:

(i) Order, dated 7.2.2003 passed by this court in SCA No.7703/02 shall stand modified to the extent that in place of amount of Rs.2,11,86,306/- the amount which is required to be disbursed at this stage would be Rs.1,36,29,094/-.

(ii) However, the aforesaid modification shall be with further direction that:

(A) the petitioners are relegated to make representation to the State Govt. for conferment of utilization or encashment of leave in lieu of work on public holidays which are not utilized by the petitioners on account of pendency of proceedings before the Apex Court and petitioners shall make such representation within a period of four weeks from the date of receipt of this judgment;

(B) if such representation is made to the State Govt. the State Govt. shall consider the same in the light of observations made hereinabove and in view of such other relevant circumstances known to law and shall render the decision within a period of two months from the date of receipt of such representation;

(C) until such decision is rendered and is communicated to the petitioners by the State Govt. the amount of Rs.75,57,212/- with interest shall continue to remain as deposit with this court;

(D) it will be open to the State Govt. to request this court in the proceedings of MCA No.1615/03 for its further investment for a period of about 3 months.

(iii) It will be open to either side to move for withdrawal of amount in the light of decision of the State Govt. by filing appropriate application in appropriate

proceedings.

13. Application is allowed accordingly. Rule is made absolute to the aforesaid extent. Considering the facts and circumstances of the case, there shall be no order as to costs.