

(2016) 08 GUJ CK 0041

In the Gujarat High Court

Case No : Special Civil Application No. 2593 of 2012

Subhashchandra Chimanlal Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 19-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 3 GCD 2286 : (2017) 1 GLR 723 : (2017) LIC 1045

Hon'ble Judges : Smt. Abhilasha Kumari, J.

Bench : Single Bench

Advocate : Mr. D.P. Kinariwala for Mr. Nikunj D. Balar, Advocates, for the Petitioner; Mr. Niraj Ashar, Assistant Government Pleader, for the Respondent No. 1; Rule Served, for the Respondent No. 1-5

Final Decision : Allowed

Judgement

Smt. Abhilasha Kumari, J.(Oral)—This petition under Article 226 of the Constitution of India has been preferred with a prayer to issue a writ of mandamus or an appropriate writ or direction to the respondents to process the pension papers of the petitioner and fix the amount of pension.

2. Briefly stated, the facts of the case are that initially, the petitioner was appointed as a Librarian in Sheth C.N. Polytechnic Institute, which was a grant-in-aid institution, by an order dated 01.10.1977. Thereafter, the petitioner was appointed as a Commerce Teacher in Sheth V.R. Bharatiya Vidyalaya, Vamaj, by an order dated 06.10.1988. The petitioner came to be declared as surplus and, therefore, the Principal of Sheth V.R. Bharatiya Vidyalaya, issued a Discharge Certificate in respect of the petitioner on 07.08.1997. It was stated in the said Certificate that the petitioner has been discharged from the school since he was declared surplus by District Education Officer, Mehsana, respondent No.3 herein, vide his order dated 04.08.1997. After that, the petitioner was appointed in Sheth H.L. Janta Vidyalaya and Shri. R.K. Patel Higher Secondary School, Kadi, respondent No.5 herein, on 08.08.1997. The petitioner had written a letter to

respondent No.5 School on 12.10.2002, with a request to sanction leave from 26.12.2002 to 25.12.2003, as he intended to go abroad. On 16.06.2004, the petitioner wrote a letter to the Competent Authority, requesting him to permit him to retire voluntarily. There was no response to the said letter, therefore, the petitioner continued to serve. In between, the petitioner had availed of leave for certain periods and had entered into correspondence with the concerned respondents, for the sanction of such leave. On 19.04.2008, the petitioner once again made a request for voluntary retirement by a letter of the same date, addressed to the Principal of respondent No.5 School. This letter was forwarded by respondent No.5 to respondent No.3 who, by his letter dated 22.04.2008, accepted the request of the petitioner by terming it as a "resignation". The services of the petitioner, therefore, came to an end on 23.07.2008. However, his pension papers were not processed, on the ground that the petitioner had tendered his resignation, therefore, he would not be entitled to any amount of pension. Aggrieved with the above action of the respondents, the petitioner is before this Court.

3. Mr. D.P. Kinariwala, learned advocate for Mr. Nikunj D. Balar, learned advocate for the petitioner has submitted that, in the letter of voluntary retirement dated 22.04.2008, submitted by the petitioner, it is clearly stated that he intends to retire voluntarily. The words used in the vernacular are "Swaichhik Nivrutti" which means voluntary retirement. However, in the last line, the petitioner has stated that his "resignation" for voluntary retirement be accepted, therefore, respondent No.3 has conveniently twisted the meaning of the letter and converted voluntary retirement into resignation, thus depriving the petitioner of his pensionary dues.

4. It is submitted that the case of the petitioner is covered by a recent judgment of the Supreme Court in the case of Shashikala Devi v. Central Bank of India and Ors., AIR 2015 SC 2434, wherein it has been held that if an employee has put in sufficient service entitling him to opt for voluntary retirement, then the intention to waive his right to pension by putting in his resignation cannot be attributed to such employee. The letter sent by such employee has to be treated as voluntary retirement and not resignation.

5. Learned counsel for the petitioner has further submitted that the period of leave availed of by the petitioner with effect from 26.12.2002 to 09.04.2012 has been sanctioned by respondent No.5 on 04.12.2003, as is evident from the document annexed at running Page-47 to the petition. The other period of leave with effect from 14.06.2004 to 20.04.2008, has also been sanctioned by respondent No.5, as can be seen from the extract of the Service Book of the petitioner, annexed at running Page-50 of the petition. It is submitted that the contention raised in the affidavit-in-reply that the petitioner is deemed to have resigned as he has been on leave for more than a period of one year as provided for in Rule 16 of the Gujarat Civil Services (Leave) Rules, 2002 ("Leave Rules" for short) is, therefore, without any basis or foundation.

6. It is further submitted that the petitioner has put in a total of twenty-five years five months and two days of service, therefore, he is entitled to opt for voluntarily retirement and avail of all pensionary benefits.

7. On the above grounds, it is prayed that the prayers made in the petition be granted.

8. Mr. Niraj Ashar, learned Assistant Government Pleader, has opposed the petition by relying upon the contentions raised in the affidavit-in-reply filed by respondent No.1. The main ground taken in the said affidavit is that the petitioner went on unauthorized leave from 26.12.2002 to 25.12.2003 and from 14.06.2004 to 20.04.2008, for a total period of 1877 days. According to the said respondent, this period of leave has not been sanctioned, therefore, the petitioner is deemed to have resigned, in view of Rule 16 of the Leave Rules. Having thus resigned, the petitioner would not be entitled to any pensionary benefits.

9. No other submissions have been advanced by either side.

10. This Court has heard learned counsel for the respective parties at length, perused the averments made in the petition, the contents of the affidavit-in-reply and other documents on record.

11. It would be in order to first take a look at the letter dated 22.04.2008, addressed by the petitioner to respondent No.5 school, requesting for voluntary retirement. From a perusal of the said letter, which is written in the vernacular, it is evident that the intention of the petitioner is to avail of voluntary retirement. It is mentioned in the letter that the petitioner intends to settle permanently in a foreign country, therefore, he is requesting for voluntary retirement. The words used in the vernacular Gujarati language are "Swaichhik Nivrutti" which, when translated, mean voluntary retirement. It is true that in the reference at the top and in the last part of the said letter the petitioner has used the term "Rajinamu", which means resignation, however, the intention of the petitioner is clearly evident from the use of the words "voluntary retirement" in the body of the letter. The use of the word "resignation" is also in the context of the intention of the petitioner to avail of voluntary retirement, as is evident from the letter. In response, respondent No.3, by his letter dated 22.04.2008, has converted the voluntary retirement into resignation and has accepted the "resignation" of the petitioner by ignoring the words "voluntary retirement" which clearly express the intention of the petitioner. In short, the letter of the petitioner for voluntary retirement has been construed as one of resignation by respondent No.3, who has accepted it as such.

12. The contentions raised in the affidavit-in-reply filed by respondent No.1 regarding the unauthorized leave periods of the petitioner, appear to have been made without going through the material on record. It is evident from the document at running Page-47 of the paper-book that the leave period of the petitioner from 26.12.2002 to 25.12.2012, has been sanctioned by respondent

No.5 on 04.12.2003. Further, the period of leave with effect from 14.06.2004 to 20.04.2008 has also been sanctioned by respondent No.5, as is depicted in the extract of the Service Book of the petitioner, annexed at running Page-50 of the petition. The veracity of these documents has not been denied in the affidavit-in-reply filed by the respondent. Hence, the contention raised by respondent No.1 in the affidavit-in-reply that the leave period is not sanctioned and the petitioner is deemed to have resigned, is without any foundation or basis. Such averments are contrary to the record and ought not to have been raised in the first place, as it amounts to misleading the Court. The case of the petitioner, therefore, does not fall within the ambit and scope of Rule 16 of the Leave Rules, in view of the fact that the periods of leave mentioned herein above have been sanctioned.

13. Undisputably, as the petitioner has put in twenty-five years five months and two days of service, he is entitled to opt for voluntary retirement. Further, the petitioner has put in sufficient number of years of qualifying service to be entitled to all pensionary benefits.

14. In the above view of the matter, the case of the petitioner is squarely covered by the judgment of the Supreme Court in *Shashikala Devi v. Central Bank of India and Ors.* (supra). The relevant extract of the said judgment is reproduced herein below:

"14. When viewed in the backdrop of the above facts, it is difficult to reject the contention urged on behalf of the appellant that what the deceased-employee intended to do by his letter dated 8th October, 2007 was to seek voluntary retirement and not resignation from his employment. We say so in the light of several attendant circumstances. In the first place, the employee at the time of his writing the letter dated 8th October, 2007 was left with just about one and a half years of service. It will be too imprudent for anyone to suggest that a bank employee who has worked with such commitment as earned him the appreciation of the management would have so thoughtlessly given up the retiral benefits in the form of pension etc. which he had earned on account of his continued dedication to his job. If pension is not a bounty, but a right which the employee acquires on account of long years of sincere and good work done by him, the Court will be slow in presuming that the employee intended to waive or abandon such a valuable right without any cogent reason. At any rate there ought to be some compelling circumstance to suggest that the employee had consciously given up the right and benefit, which he had acquired so assiduously. Far from the material on record suggesting any such conscious surrender, abandonment or waiver of the right to retiral benefit including pension, we find that the material placed on record clearly suggests that the employee had no source of income or sustenance except the benefit that he had earned for long years of service. This is evident from a reading of the letter dated 8th October, 2007 in which the employee seeks release of his retiral benefits at the earliest to enable him to undergo medical treatment that he requires. The letter, as seen earlier, lays emphasis on the fact that for his sustenance the employee is dependent entirely

on such benefits. It is in that view difficult for us to attribute to the employee the intention to give up what was rightfully his in terms of retiral benefits, when such benefits were the only source not only for his survival but for his medical treatment that he so urgently required. For a waiver of a legally enforceable right earned by an employee, it is necessary that the same is clear and unequivocal, conscious and with full knowledge of the consequences. No such intention can be gathered from the facts and circumstances of the instant case. The employee's subsequent letters and communication which are placed on record cannot be said to be an afterthought. Being proximate in point of time letter dated 8th October, 2007 must be treated to be a part of the subsequent communication making the employee's intentions clear, at least for purposes of determining the true intention underlying the act of the employee.

15. It is, in our opinion, abundantly clear that the beneficial provisions of a Pension Scheme or Pension Regulations have been interpreted rather liberally so as to promote the object underlying the same rather than denying benefits due to beneficiaries under such provisions. In cases where an employee has the requisite years of qualifying service for grant of pension, and where he could under the service conditions applicable seek voluntary retirement, the benefit of pension has been allowed by treating the purported resignation to be a request for voluntary retirement. We see no compelling reasons for doing so even in the present case, which in our opinion is in essence a case of the deceased employee seeking voluntary retirement rather than resigning."

15. Later in the judgment, it is stated that:

"18. In *Sheel Kumar Jain v. New India Assurance Company Limited and Ors.* (2011) 12 SCC 197, the facts were somewhat similar to the case at hand. The appellant in that case was an employee of an Insurance Company governed by a Pension Scheme which provided as in the case at hand, forfeiture of the entire service of an employee should he resign from his employment. The appellant submitted a letter of resignation which resulted in denial of his service benefits under the scheme aforementioned. This Court, however, held that since the employee had completed the qualifying service and was entitled to seek voluntary retirement under the scheme he could not be said to have resigned so as to lose his pension. This Court said :

"25. Para 22 of the 1995 Pension Scheme states that the resignation of an employee from the service of the corporation or a company shall entail forfeiture of his entire past service and consequently he shall not qualify for pensionary benefits, but does not define the term "resignation." Under sub-para (1) of Para 30 of the 1995 Pension Scheme, an employee, who has completed 20 years of qualifying service, may by giving notice of not less than 90 days in writing to the appointing authority retire from service and under sub-para (2) of Para 30 of the 1995 Pension Scheme, the notice of voluntary retirement shall require acceptance by the appointing authority. Since "voluntary retirement" unlike "resignation" does not entail forfeiture of past services and instead qualifies for

pension, an employee to whom Para 30 of the 1995 Pension Scheme applies cannot be said to have "resigned" from service.

26. In the facts of the present case, we find that the appellant had completed 20 years of qualifying service and had given notice of not less than 90 days in writing to the appointing authority of his intention to leave the service and the appointing authority had accepted notice of the appellant and relieved him from service. Hence, Para 30 of the 1995 Pension Scheme applied to the appellant even though in his letter dated 16-9-1991 to the General Manager of respondent 1-Company he had used the word "resign".

16. The case of the present petitioner is on an even better footing than the case before the Supreme Court. In that case, the appellant had used the word "resignation" in his letter, whereas, in the present case, the petitioner has clearly expressed his intention to opt for voluntary retirement, which has been misconstrued by the respondents to mean "resignation" by reading it out of context.

17. There is nothing on record to indicate that in tendering his application for voluntary retirement, the petitioner intended to forfeit his pensionary benefits. As held by the Supreme Court in the case of D.S. Nakara and Others v. Union of India, (1983) 1 SCC 305, pension is a right and not a bounty. After long years of service, pension is a right due to the employee, as a means to sustain him in the evening of his life. The fact that the petitioner put in his papers for pension shows that he never intended to forgo this hard-earned right. He, therefore, cannot be deprived of his pensionary dues just because respondent No.3 construes his application for voluntary retirement as a "resignation". Even if it had been a case of resignation, as held by the Supreme Court in the case of Shashikala Devi v. Central Bank of India and Ors. (supra), the intention to waive his pension cannot be attributed to the employee.

18. In view of the factual position and the principles of law enunciated by the Supreme Court in the above-quoted judgment, which is applicable to the case in hand, the petition deserves to succeed. It is, hereby, allowed.

19. The respondents are directed to release the pensionary benefits of the petitioner within a period of three months from the date of the receipt of a copy of this judgment. The respondents shall also pay interest at the rate of nine per cent per annum to the petitioner on the said pensionary benefits, from the date on which the voluntary resignation took effect upto the date of actual payment.

20. The petition is allowed, in the above terms. Rule is made absolute, accordingly. There shall be no orders as to costs.