(2022) 10 GUJ CK 0116

In the Gujarat High Court

Case No : R/Special Civil Application No. 4529 Of 2022

Sureshchandra Ochchhavlal Desai APPELLANT

Vs

State Of Gujarat RESPONDENT

Date of Decision : 20-10-2022

Acts Referred:
Constitution Of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 25B

Citation : (2022) 10 GUJ CK 0116

Hon'ble Judges : Biren Vaishnav, J

Bench : Single Bench

Advocate : VK Joshi, Soaham Joshi

Final Decision : Allowed

Judgement

Biren Vaishnav, J

1. RULE returnable forthwith. Learned AGP waives service of notice of Rule on behalf of the respondent State.

2. With the consent of learned advocates for the respective parties, the petition is taken up for final hearing.

3. By way of this petition under Article 226 of the Constitution of India, the petitioners have prayed for an appropriate writ to hold and declare that the action on the part of the respondents in not making full payment of pensionary benefits to the petitioners by counting their entire length of service from the date of joining till the date of retirement as illegal and a further direction to fix the pension of the petitioners by counting their services from the date of joining till the date of retirement.

4. Facts in brief would indicate that the petitioners were serving as Rojamdars. They were serving uninterruptedly till the date of their superannuation. The petitioners were extended the benefits of the Government Resolution dated

17.10.1988 and given such benefits on the regular pay scale on completion of 10 years of service. While counting the terminal benefits, the order of service prior to the date of their regularization were not counted.

5. Mr.V.K.Joshi learned counsel for the petitioners would submit that in light of the decision in case of EXECUTIVE ENGINEER PANCHAYAT (MAA & M) DEPARTMENT and Another Versus SAMUDABHAI JYOTIBHAI BHEDI & other reported in 2017 (4) GLR 2952, even initial service prior to the benefit of regularisation has to be counted for the purposes of pension. Accordingly, he would rely on an order passed by this Court in Special Civil Application No.19659 of 2019 dated 28.03.2022.

6. Having heard learned counsel Mr.Joshi for the petitioners and learned AGP for the State, the order passed in Special Civil Application No.19659 of 2019 dated 28.03.2022 reads as under:

1. Heard Mr. V.K. Joshi, learned counsel for the petitioners, Mr. Meet Thakkar, learned AGP for the respondent Nos.1 and 4 as well as Mr. H.S. Munshaw, learned advocate for respondent No.2.

2. By way of this petition, under Article 226 of the Constitution of India, the petitioners have challenged the action of the respondents in not making full payment of pensionary benefits to them by counting their entire length of service from the date of joining till the date of retirement as illegal. They also have prayed for benefits of leave encashment.

3. The case of the petitioners is that while granting pensionary benefits to the petitioners, their date for the purposes of counting service is taken from the date when they completed ten years of service for the purposes of the entitlement as per GR dated 17.10.1988. Service details of each of the petitioners are placed on record which indicate that for the purposes of granting pension, their initial date of appointment is not considered.

4. Mr. Joshi, learned counsel for the petitioners would rely on an order passed in similar matter by the coordinate Bench of this Court in SCA No.11086 of 2019 dated 21.8.2019. He further requested this Court to pass a similar order in this matter too. The order dated 21.8.2019 reads as under:

"Heard learned advocate Mr. Dipak Dave for the petitioner and learned Assistant Government Pleader Ms. Krina Calla for the respondent state.

2. The following are the prayers made in this petition.

"(i) to hold and declare that action on part of the respondents in not making full payment of pensionary benefits to the petitioner by counting their entire length of service from date of joining till date of retirement as illegal, unjustified, arbitrary and further be pleased to direct the respondents to fix the pension of the petitioner by counting his service from date of joining until the date of retirement and fix the pension accordingly;

(ii) to hold and declare that petitioner is entitled to all other retiral benefits including benefit of leave encashment and be pleased to further direct the respondents to pay amount of leave encashment of leave standing in the account of the petitioner;

(iii) to direct the respondents to pay difference of pensionary benefits, gratuity amount and leave encashment with 18% interest from the date when it felt due;"

3. The petitioner served as Rojamdar under the office of Respondent no.2 Executive Engineer, Ahmedabad from 21.4.1985 continuously and uninterruptedly as provided under section 25B of the Industrial Disputes Act. The petitioner was extended the benefits of state government Resolution dated 17.10.1988.

3.1 The grievance of the petitioner is that while counting the pensionary benefits for him, his services has been continued from the date he was made permanent under the Resolution dated 17.10.1988, however, in the process, the initial years of service for 10 years were excluded and not counted. It is the grievance that gratuity amount was also paid on the basis of such erroneous calculation. It is the further grievance that though the petitioner was entitled, he was not to avail 300 days leaves nor at the time of retirement, the respondents paid leave encashment.

3.2 Learned advocate for the petitioner could successfully relied on the decision of this court in Sardarbhai Panabhai Chauhan vs. State of Gujarat being Special Civil Application No. 14504 of 2016 decided on 5.9.2018, which was filed by the similarly situated petitioner and the relief prayed for were also identical. The decision in Sardarbhai Panabhai Chauhan (supra) was carried in Letters Patent Appeal No. 764 of 2019 which was dismissed on 2.4.2019 and the decision was confirmed.

3.3 Learned Assistant Government Pleader could not dispute the applicability of proposition of law emanating from the aforesaid decision as confirmed by the Division Bench.

4. The entire relevant discussion in Sardarbhai Panabhai Chauhan (supra) is relevant to be reproduced hereinbelow to be part of reasoning of this order as well to apply to the petitioner.

5. In Executive Engineer, Panchayat v. Samudabhai Jyotibhai Phedi [2017 (4) GLR 2952], the Division Bench has laid down, upholding the decision of the learned Single Judge, that the past services of the daily-wagers where they have completed 240 days of continuous service as per Section 25B of the Industrial Disputes Act, would qualify for pension.

5.1 The Division Bench in Samudabhai Jyotibhai Phedi (supra) noticed the provisions of the Resolution dated 17th October, 1988 with reference to the nature of benefits flowing therefrom, in paragraph 6 of the judgment stating as under.

“6. As is well known, under Government Resolution dated 17.10.1988, the Government decided to grant benefits of regularization and permanency to daily rated workers who had completed more than 10 years of actual service prior to such date, of course subject to certain conditions. One of the clauses in the said Government Resolution was that the benefit of regularization would be available to those workmen who had completed more than 10 years of service considering the provisions of section 25B of the Industrial Disputes Act. They would get benefits of regular pay scale and other allowances, pension, gratuity, regular leaves etc. They would retire on crossing age of 60 years. That the period of regular service shall be pensionable.”

5.1.1 It was stated that the Government verified and cleared the ambiguity in the Resolution, observing as under.

“7. This Government Resolution led to several doubts. The Government itself therefore came up with a clarificatory circular dated 30.05.1989, in which, several queries which were likely to arise were clarified and answered. Clause-6 of this circular is crucial for our purpose. The question raised was that an employee who had put in more than 10 years of service as on 01.10.1988, would be granted the benefit of Government Resolution dated 17.10.1988. In that context, the doubt was whether for the purpose of pension, the past service of completed years prior to regularization would be considered or whether the pensionable service would be confined to the service put in by the employee after he is actually regularized. The answer to this query was that those employees who had put in more than 10 years of service as per Government Resolution dated 17.10.1988 would get the benefit of pension. For such purpose, those years during which the employee had fulfilled the provisions of section 25B of Industrial Disputes Act, such years would qualify for pensionary benefit.”

5.1.2 The Court thereafter held, “Two things immediately emerge from this clarification. First is that the query raised was precisely what is the dispute before us and second is that the clarification of the Government was unambiguous and provided that every year during which the employee even prior to his regularization had put in continuous service by fulfilling the requirement of having worked for not less than 240 days as provided under section 25B of the Industrial Disputes Act, would count towards qualifying service for pension. In view of the clarification by the government itself, there is no scope for any further debate. The petitioner was correct in contending that having put in more than 10 years of continuous service as a labourer in the past, he had a right to receive pension upon superannuation. This is precisely what the learned Single Judge has directed, further enabling the employer to verify as to in how many years he had put in such service and then to compute his pension.”

5.2 Thus it is a clear position of law emerging from decision in Samudabhai Jyotibhai Phedi (supra) that entire past services of daily-wager which was continuous is liable to be reckoned for the purpose of pensionary benefits and for the purpose of granting pension. In the facts of the case of the petitioner, the factum is not controverted and it is undisputed that the petitioner has throughout worked since his joining, to make his services continuous.

5.3 The only reason put-forth by the authorities to deny the petitioner the pension is that after he was made permanent, he has not completed 10 years of qualifying service, however if the date of joining of the petitioner which is 12th December, 1986 is considered, the petitioner has evidently completed the qualifying period to be entitled to pension as per the law laid down in Samudabhai (supra).

6. While confirming the aforesaid decision, the Letters Patent bench held thus,

“4. Learned Single Judge rightly addressed the issue that only reason which weighed with the authority to deny pension to the petitioner was that after being made permanent, he had not completed ten years of qualifying service, however, if the date of joining of the petitioner, which was 12.12.1986 is considered, the petitioner would complete the qualifying service as per law laid down in the case of Executive Engineer, Panchayat v. Samudabhai Jyotibhai Phedi [2017(4) GLR 2952]. 5. Therefore, following declaration of learned Single Judge in Paragraphs 7 and 8 of the impugned order, reproduced hereinbelow, no interference is warranted: “7. For the foregoing reasons and discussion, it is hereby declared that the action on part of the respondents in not making payment of pensionary benefits to the petitioner and in not counting the entire length of services of the petitioner from 12th December, 1986 till 30th April, 2012 is arbitrary and illegal. The respondents are directed to fix the pension of the petitioner counting his entire service period from 12th December, 1986 till the date of retirement. The petitioner is also held entitled to all other retirement benefits including leave encashment and difference of gratuity, as may be payable. The total amount payable towards pension to be calculated as above, the arrears arising thereby and the other retirement benefits including those mentioned hereinabove, shall be paid to the petitioner within a period of six weeks from the date of receipt of this order.

8. It is provided and directed that if the amount is not paid within stipulated period of six weeks, it shall carry interest at the rate of 6.5% from the date of filing of this petition. The respondents are further directed to continue to pay the pension to the petitioner duly calculated as above.”

6. As noted above, the subject-matter of this appeal and the issues involved therein are no more res-integra and are covered by a decision of this Court in Letters Patent Appeal No.2152/2017 in Special Civil Application No.12350/2016, which attained finality by an order dated 04.01.2019, passed by the Apex Court dismissing Special Leave Petition (Civil) Diary No.45860/2018 preferred by the State of Gujarat and another.”

7. As a result of the above discussion, the prayers made in the petition deserves to be granted. It is held and declared that the action on part of the respondents in not making payment of pensionary benefits to the petitioner by reckoning the

entire length of service from the date of initial joining of the petitioner, is illegal. The respondents are directed to fix the pension of the petitioner by counting his services from the date of his initial joining until the date of retirement. All other retirement benefits shall be paid including the leave encashment benefit. The amounts payable by virtue of this order, shall be paid to the petitioner within a period of six weeks from the date of receipt of this order. If the amounts are not paid within the stipulated time, it is directed that the due amount shall carry interest at the rate of 6% from the date of filling of the petition, that is from 26th June, 2019.

The petition stands allowed accordingly. Direct service is permitted.”

5. Mr. Munshaw, learned advocate appearing for respondent No.2 as well as Mr. Meet Thakkar, learned AGP appearing for the respondent Nos.1 and 4 would the draw the attention to the affidavit-in-reply and submit that on completion of total service of ten years as Daily Wagers, the petitioners were placed in the running scale and that date is taken for counting for purposes of pensionary benefits.

6. Since the issue is squarely covered by the decision rendered by the coordinate bench of this Court in SCA No.11086 of 2019 dated 21.8.2019, the petition is allowed. The respondents are directed to fix the pension of the petitioners by counting their services from the date of their initial joining until the date of retirement. All other retirement benefits shall be paid except leave encashment. The amounts payable by virtue of this order, shall be paid to the petitioners within a period of twelve weeks from the date of receipt of copy of this judgment.

7. Mr. Joshi, learned advocate for the petitioners would concede that the issue regarding leave encashment can be dealt with at a later point of time depending on the outcome of the SLP, if occasion arises and liberty to file fresh petition with regard to leave encashment if need arises pursuant to the final decision of the Apex Court in the pending SLP be granted. Liberty to file fresh petition with regard to leave encashment if need arises pursuant to the final decision of the Apex Court in the pending SLP.

8. Rule is made absolute to the aforesaid extent. Direct Service is permitted. No order as to costs.

7. In view of the above, the petition is allowed. The respondents are directed to fix the pension of the petitioners by counting their services from the date of their initial date of appointment until the date of their retirement. All terminal benefits shall be paid including the benefits of leave encashment on the basis of re-fixation of pension counting their initial date of appointment is the date for such purposes revised pensionary benefits including arrears shall be paid within fifteen weeks from the date of receipt of copy of this judgment.

8. Rule is made absolute to the aforesaid extent. Direct service is permitted. No costs.

