

(2001) 02 GUJ CK 0055

In the Gujarat High Court

Case No : Special Civil Application No. 5627 of 1991

V.I. Gosai

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 23-02-2001

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 102, 22

Citation : (2001) 2 GLR 1767

Hon'ble Judges : M.R. Calla, J

Bench : Single Bench

Advocate : R.J. Goswami, for S.V. Raju, for the Appellant; Hansa Punani, A.G.P. and Patel, for the Respondent

Final Decision : Allowed

Judgement

M.R. Calla, J.—The petitioner was working as a Mamlatdar and was posted as Public Relations Officer in the office of the Collector, Palanpur. He sought his voluntary transfer as Administrator at Mehsana District on the ground that his wife is suffering from cancer. However, this request was not acceded to and the petitioner was transferred on deputation in the Gujarat Slum Clearance Board vide order dated 27-9-1988. The petitioner's grievance is that this transfer order against deputation post had been made without his consent and this transfer order posting him by way of deputation was illegal. However, the fact remains that the petitioner was relieved on 8-11-1988. After 8-11-1988 the petitioner did not join his duties at any place where the posting was given to him and he joined the service only on 29-5-1989 when he was given a posting as Public Relations Officer in the office of the Collector, Ahrnedabad in terms of the order dated 10-5-1989.

2. In substance, therefore, the petitioner's grievance in this S.C.A., is against the order dated 6-7-1990 which is at Annexure-P to the petition whereby the petitioner's case for the period from 8-11-1988 to 29-5-1989 has been treated as a case of unauthorised absence for the period of 203 days under Rule 102 of

B.C.S.R., and this period has been treated as leave without pay. The petitioner's representation/appeal against this order dated 6-7-1990 failed and ultimately the Chief Secretary has also rejected his application vide his letter dated 22-1-1991 and hence the present petition has been filed.

3. In this petition, notice was issued on 7-2-1992, and thereafter, Rule was issued on 8-9-1992. Thus, this S.C.A., has remained pending in this Court for all these years. The respondents have not filed any affidavit-in-reply to this petition even till this date.

4. Mr. Goswami learned Advocate appearing for the petitioner has submitted that even at the time when the earlier order at Annexure-P was passed on 6-7-1990 and even on 19-6-1989 when the petitioner's request for leave had been declined, the petitioner had to his credit earned leave for a period of 101 days and his request for commuted leave had been declined vide letter 19-6-1989 as is clear from the contents of letter dated 19-6-1989 sent by the Section Officer of the Revenue Department, a copy of which is annexed at Annexure-I to the petition. Learned Advocate appearing for the petitioner contended that the order for leave without pay can be passed only when no other type of leave whatsoever is due. In the present case, the leave was due to his credit and the entire period of 203 days for which leave without pay has been granted could be adjusted against the leave due to his credit as per the service record of the petitioner. The fact alleged by the petitioner has not been disputed before this Court by way of filing reply or otherwise or even orally at the time when the matter was heard. The respondents may be right in saying that under Rule 102 of the B.C.S.R., a Government servant who did not join his post within his joining time is entitled to no pay or leave salary after the end of the joining time and wilful absence from duty after the expiry of joining time may be treated as misbehavior for the purpose of Rule 22, but the question which arises for consideration is that, in case there is certain amount of leave due to the credit of an employee who was given a posting on deputation without his consent and such order becomes a cause for his absence, the period of absence is to be regularised or not by granting due leave. In the instant case, the petitioner's request for commutation had already been rejected and ultimately order at Annexure-P has been passed on 6-7-1990 declaring 203 days leave as without pay by treating it as a case of unauthorised absence. In the facts of the present case when the person was admittedly given posting by way of deputation without his consent which is contrary to the settled norms and when the petitioner was constantly asking for leave including commutation of the leave the respondents ought to have decided the petitioner's case on that basis by examining the petitioner's leave title as per the balance of the leave record. The petitioner says that he had 106 days earned leave to his credit besides other type of leave which he could have availed for and yet the order was passed on 6-7-1990 declaring the entire period of 203 days as leave without pay. In such a fact, situation the order dated 6-7-1990 cannot be sustained in the eye of law.

5. In the factual matrix as aforesaid, this Court finds that the respondents have to decide the petitioner's case for the period from 8-11-1988 to 29-5-1989 i.e., for 203 days afresh by taking into consideration all types of leave which is found to be due to his credit and only such period is to be treated as leave without pay, which is beyond the leave due after exhausting the entire due leave and the petitioner has to be paid accordingly. It is also given out by the learned Advocate for the petitioner that by this time the petitioner might have retired from Government service. Even if it is found that the petitioner has retired, the leave case can be decided for the period from 8-11-1988 to 29-5-1989 afresh in the light of the observations made hereinabove and after examining the record of the petitioner's leave title as to how much leave remained to his credit, such period of leave which is found to his credit may be adjusted for the period from 8-11-1988 to 25-5-1989 as leave admissible with pay as admissible and only such period is to be treated as leave without pay for which no leave is found to be due to his credit. In taking up this exercise, the authority shall not be influenced in any manner by the contents of the order dated 6-7-1990 which is hereby set aside. The petitioner shall be entitled to all consequential benefits including retiral benefits, if any, in terms of the order which may be passed afresh now by the concerned authorities with regard to the regularisation of the period from 8-11-1988 to 29-5-1989 i.e., 203 days. Such an order declaring the period of 203 days as unauthorised absence may lead to civil consequences including its own impact on the retiral benefits etc. and therefore, such an order entailing consequences of pecuniary loss could not be passed without following the proper procedure according to rules and the petitioner could not be deprived of any pecuniary benefits including the period of earned leave. The respondents are also directed to decide the case of the petitioner afresh as early as possible after affording reasonable opportunity to the petitioner but in no case later than 30 days from the date the certified copy of this order is produced before the concerned authority. This S.C.A., succeeds and is hereby allowed as above. Rule is made absolute accordingly. No order as to costs.

6. Application allowed.