IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 18746 of 2011

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE S.G. SHAH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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SAVLINGA BALSHANKAR JOSHIPURA....Petitioner(s)
Versus
STATE OF GUJARAT & 3....Respondent(s)

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Appearance:
MR NM KAPADIA, ADVOCATE for the Petitioner(s) No. 1
MS AMITA SHAH, AGP for the Respondent(s) No. 1 - 2
MR AJ YAGNIK, ADVOCATE for the Respondent(s) No. 4
RULE SERVED for the Respondent(s) No. 3 - 4

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CORAM: **HONOURABLE MR.JUSTICE S.G. SHAH**
Date : 01/12/2016
ORAL JUDGMENT

1. Heard learned advocate Mr.N.M. Kapadia and learned AGP Ms.Amita Shah for the respondents No.1 and 2.

2. Petitioner has prayed for direction to the respondents to grant her salary for the period between the months of January, 2011 to May, 2011 and to grant pensionary benefits like gratuity,

provident fund, commuted pension and regular pension with 9% interest. The petitioner has also prayed that pending final hearing of this petition, the respondents should complete the process of pension papers and grant entire pensionary benefit and not to pass any order of recovery.

3. The undisputed fact is to the effect that petitioner was appointed as Assistant Teacher in Grant-in-Aid High School run by respondent No.4 Trust w.e.f. 1.7.1985. However, at the time of joining her service since school leaving certificate was disclosing her date of birth as 23.12.1951 instead of 23.12.1952, the date of birth recorded with the respondent No.4 was 23.12.1951. Therefore, petitioner has immediately submitted an application to respondent No.2 on 31.7.1985 i.e. immediately in the month of her appointment for necessary correction in her service record by annexing birth date certificate showing her date of birth as 23.12.1952. Unfortunately, respondent No.2 has without correcting the date of birth, probably committed mistake and mentioned wrong date of birth as 23.12.1953 in an order to regularise the petitioner in her services. This fact was not noticed by either side and therefore, ultimately, petitioner was retired on superannuation on 31.12.2010, as if her date of birth is 23.12.1952. However, considering the resolution dated 9.9.1992, copy of which is produced at

Annexure-H1 on page 45, whereby State Government has considered that retirement date of such Teacher is to be extended till the end of the academic session since for couple of months, it would be difficult for the school or institution to appoint another Teacher and the retired Teachers have ample experience and control over the academic activities. In view of such circular, petitioner was allowed to work from January, 2011 to 31st May, 2011.

4. However, when pension papers were prepared by respondent No.4 and sent to respondent No.3 on 6.12.2001, the respondents No.1 to 3 could not finalise the case of payment of pension to the petitioner till 24.1.2011 and she was not paid the salary for the month from January, 2011 to May, 2011. Therefore, though petitioner has made several representations, instead of releasing salary for the above-referred period and to finalise the amount of pension, surprisingly, respondents have on the contrary failed to release the amount of gratuity and other pensionary benefits, including PF, without assigning any valid reason. Ultimately, respondents have replied to different representations of the petitioner by their letter dated 20.8.2011 i.e. almost after 8 months, now disclosing the reasons for non-payment of salary and retirement benefits that since date of birth was not corrected within six months of appointment and that such correction was not made

in the service-book, petitioner is not entitled to salary and pension as well as retirement benefits as claimed by her. For the purpose, respondents No.1 to 3 have relied upon their resolution dated 11.8.1989.

5. However, it is clear that restriction by such resolution to correct the date of birth is applicable to the employee and not to the employer and therefore, if at all there is mistake on the part of employer in recording any date of birth and if such date of birth is subsequently corrected by the employer itself, then, it cannot be said that the employee has sought correction after five years so as to attract provision of G.R. dated 11.8.1989.

6. Thereby, though the facts are quite clear that practically, it is an error on the part of the employer in not recording the correct date and not conveying it to the concerned authority in time, and more particularly, when petitioner has approached the employer just within a month of her appointment to correct her date of birth and thereafter, practically, employer has not only corrected, but committed a mistake in such correction also, it cannot be said that petitioner was at fault so as to deny her legitimate benefits for the work done by her i.e. in all for 17 months from January, 2010 to May, 2011. It is also necessary to recollect here that, practically, department has endorsed the

correct date of birth as 23.12.1953 instead of correct date of birth being 22.12.1952, whereby practically, petitioner is entitled to serve for one more year i.e. upto December, 2012. However, it is undisputed fact that neither the petitioner has prayed for extension of one year because of such mistake nor employer has asked her to retire in December, 2009 as if her date of birth is 23.12.1951. Thereby, practically, petitioner has not taken disadvantage of such mistake in recording the date of birth by the respondents and therefore, she can never be punished by refusing to release the salary of the period for which she has worked in the department or by denying her retirement benefit considering the period for which she has rendered her services for the department.

7. In support of her claim, in addition to the basic facts and pleadings as aforesaid, petitioner has produced her appointment letter dated 12.8.1985 wherein her date of birth is disclosed as 23.12.1952 though it was disclosed as 23.12.1951 in her service-book, which makes it clear that she is not at fault in making any disclosure in the service-book, but it was bonafide mistake on the part of the department in recording wrong date of birth as 23.12.1951 instead of 23.12.1952. Such appointment letter dated 12.8.1985 is at Annexure-A. At Annexure-B, petitioner has produced copy of her letter dated 31.7.1985, which was immediately after her

appointment wherein she has simply conveyed to correct the date of birth from 23.12.1952 to 22.12.1952 i.e. change is only of one day which would in any case not affect the tenure of the services and date of retirement because irrespective of date of birth being 22.12.1952 or 23.12.1952 petitioner has to retire on 31st December of a particular year. Therefore, when petitioner was asked to retire on 31.12.2010 on completion of 58 years, it is now clear that year of her date of birth is considered as 1952 and not as 1951 as shown in the service-book. It is also undisputed fact that pursuant to resolution referred herein above, she was allotted the work till 31.5.2011 i.e. till the end of academic session.

8. The controversy arose because of office order dated 6.3.1986 at Annexure-C, whereby, now, department has again committed a mistake in disclosing the date of birth of the petitioner as 23.12.1953. If such date is considered, then, petitioner is entitled to serve upto 31.12.2011. However, Annexure-D dated 6.12.2010, makes it clear that petitioner has retired w.e.f. 31.12.2010, though she has been allowed to serve till the end of academic year. However, because of such mistakes and error, may be bonafide by the department, the petitioner has to suffer huge loss since she has not been paid retirement benefits and salary for five months only on the ground that her service-book is showing the date

of birth as 22.12.1951 though it was corrected by the department so as to consider it as 22.12.1952, as back as in the year 1985 and that too within a month of appointment. It is also clear from the record that such correction was sought for by the petitioner which is within a month of her appointment and therefore, condition of G.R. dated 11.8.1989 would not come in way of such correction.

9. Thereafter, even after several representations by the petitioner, when respondents could not resolve the issue by granting the retirement benefit, pension and failed to pay salary for five months, petitioner has no option, but to file present petition. It is also evident from the record that petitioner could not get the copy of service-book in time, which she had to ask for under the Right to Information Act, and it is only after that, the respondents have provided a photocopy of service-book to her. The perusal of service-book confirms that there is no fault on the part of the petitioner in any manner whatsoever even if her date of birth is recorded as 22.12.1951 in such service-book. However, the respondents have failed to realise that in fact such service-book though discloses the date of birth as 22.12.1951 at initial date of starting such service-book, practically, that column has been corrected by disclosing the correct date of birth being 22.12.1952. However, while making such

correction, respondent No.4 has not endorsed the date of such correction and therefore, respondents No.1 and 3 are trying to take disadvantage of such clerical lacuna, but considering the discussion herein above, when it is quite clear that petitioner has already applied for correction within 30 days from her date of appointment, there is no reason to believe that such correction was made beyond the period of five years as provided in Circular dated 11.8.1989. The remaining correspondence and its reply are now not much material to be discussed herein since, now, it is evident from the record that there is no fault of the petitioner so far as the non-disclosure of her correct date of birth in service-book is concerned, though in my view service-book is perfectly disclosing the date of birth as 22.12.1952, even if such correction is made at belated stage, but it is done by the department and not by the petitioner.

10. Though the facts and circumstances are very much clear and in favour of the petitioner, the respondents have resisted the petition by filing an affidavit-in-reply only on 3.9.2016, disclosing that pursuant to order dated 26.6.2012 by this Court, while admitting the petition, the provisional pension has been granted in favour of the petitioner and she has been paid the same. However, for confirming the final pension, they are relying upon the G.R. dated 11.8.1989 again

contending that since the correction is not made within five years of appointment or confirmation, such correction is now not permissible. However, as discussed herein above, there is no delay on the part of the petitioner in seeking correction of date and therefore, even if proper date is not disclosed on record, because of the mistake or error on the part of the department, then, petitioner cannot be asked to suffer. To that extent, detailed judgment on the point in Special Civil Application No.11423 of 2009 dated 22.11.2016 is necessary to be recollect, which makes it clear that such restriction is on the part of the employee and not the employer and therefore, employer is free to get the date corrected even after the period of five years. However, as discussed herein above, it is made clear that even in service-book the corrected date is very well mentioned and therefore, there is no evidence whatsoever to show that date of birth was not corrected within five years and therefore, reference of G.R. dated 11.8.1989 is baseless.

11. It is also clear that the factual details and documents regarding date of birth of the petitioner, which are disclosed on record, are not in dispute. Whereas, so far as salary for the period between January, 2011 to May, 2011 is concerned, unfortunately, the respondents are relying upon a letter dated 24.6.2011, wherein the respondent No.4 has conveyed to respondent

No.3 that petitioner has served the institution voluntarily as disclosed by her in her farewell. However, such fact has been negatived by the petitioner by filing an affidavit-in-rejoinder dated 13.11.2016, making it clear that she has never volunteered to work without salary confirming that she cannot afford to work without salary at the fag end of her services and thereby, she categorically stated on oath that statement made in her name in communication dated 24.6.2011 is not admitted. It is also stated that she has worked as per the instructions by the authorities pursuant to Circular dated 9.9.1992 to continue the service of academic staff till the end of academic year. Therefore, there is no substance in such defence by the respondents.

12. The overall facts, circumstances and discussion herein above makes it clear that there is clear arbitrariness and selectiveness on the part of respondents No.1 to 3 in not releasing the salary of the petitioner for the period between January, 2011 to May, 2011 though she has rendered her services as per the G.R. dated 9.9.1992 and therefore, petitioner is certainly entitled to full salary for all these five months. The G.R. only makes it clear that such period of services should not be counted for calculation of pension and other benefits. Similarly, when there is no fault on the part of the petitioner so far as disclosure of her date of birth in service record is concerned, the act

of the respondents to withhold all her retirement benefits with pension, even though she has worked till 31.12.2010, is also arbitrary, selective and improper so also irregular and illegal. Therefore, in view of above facts and circumstances, the petition needs to be allowed.

13. The petitioner is relying upon the decision in the case of **Vijay L.Mehrotra Vs. State of U.P. reported in AIR 2000 SC 3513(2)**, wherein, Hon'ble Supreme Court has awarded 18% interest. The petitioner is also relying upon **S.K. Dua v. State of Haryana reported in AIR 2008 SC 1077**, wherein, Hon'ble Supreme Court has remanded the matter back to the High Court for considering issue of interest to be paid for such delayed payment because the High Court has dismissed such petition even without issuing notice to the respondent authorities.

14. It would be appropriate to recollect the decision in the following cases:

(1) AIR SC 3966 between KSRTC v. K.O. Varghese
(2) AIR 2001 SC 2433 between Gorakhpur University v. Shitla Prasad Nagendra
(3) AIR 2000 SC 1918 between R.Veerabhadram v. Government of AP
(4) State of Kerala v. M.Padmanabhan Nair between 1985(1) SCC 429

Wherein Hon'ble Supreme Court of India has reiterated its earlier view holding that the pension and gratuity are no longer any bounty to

be distributed by the Government to its employees on their retirement, but, have become, as per the decisions of the Hon'ble the Supreme Court of India, valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be dealt with the penalty of payment of interest at the current market rate till actual payment to the employees. The said legal principle laid down by Hon'ble Supreme Court of India still holds good in so far as awarding the interest on the delayed payments to the appellant is concerned.

15. Reference to the decision in Letters Patent Appeal No.1429 of 2015 between **State of Gujarat v. Gujarat State Pensioners Federation** dated 4.1.2016 is also relevant wherein the Division Bench of this High Court has confirmed the reasoned judgment dated 16.6.2015 of learned Single Judge in Special Civil Application no.8251 of 2015. Since the Division Bench has endorsed the reasoning of the learned Single Judge, I am not reproducing all those reasoning because they are available in public domain but pursuant to such reasoning, now, it is clear that in case of delayed payment of retired benefit, employees are certainly entitled to interest thereon. It cannot be ignored that there is reference of Government Resolution dated 8.10.2014 in such unreported cases but unfortunately government did not come forward to disclose their own circulars on the

subject.

16. It is needless to mention that if the respondents have erroneously withheld payment to which the petitioner herein is entitled in law for payment of penal amount on the delayed payment.

17. Therefore, the petition is allowed. Thereby, now, the respondents are directed to pay the salary for the period between January, 2011 to May, 2011 to the petitioner and to fix her final pension as if she retired on 31.12.2010 without any issue i.e. as if her date of birth 22.12.1952 is corrected in her service record at the relevant point of time by the department i.e. by considering that she has not applied for such change in violation of G.R. dated 11.8.1989. Thereby, the respondents have to pay all consequential retirement benefits and pension to the petitioner after adjusting the provisional pension that may be paid pursuant to interim order dated 26.6.2012 with 6% interest from the due date till the actual payment within four months from the date of receipt of writ of this order. However, it is made clear that if such payment is not made within four months, then the respondents shall pay the interest @ 9%.

18. Rule is made absolute. Direct service is permitted.

(S.G. SHAH, J.)

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