

(2012) 07 GUJ CK 0042

In the Gujarat High Court

Case No : Special Civil Application No. 8334 of 1999

Akshar Box Factory

APPELLANT

Vs

Nigam Sardar Malek and Others

RESPONDENT

Date of Decision : 31-07-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Industrial Disputes Act, 1947 — Section 25F, 25FFF, 25H

Citation : (2012) 135 FLR 373

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : S.V. Raju, for the Appellant; Subramaniam Iyer for the Respondents
No. 1 - 6, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Brahmbhatt, J.—The petitioner, a partnership firm and No. 1 first party in Reference (LCV) No. 990/86 has approached this Court by way of this petition under Article 226/227 of the Constitution of India, challenging the award and order dated 10.6.1999 passed by the Labour Court Vadodara, partly allowing the reference of the respondents workmen hereinabove and directing it to the workers named in the award, i.e. six workers be reinstated w.e.f. 11.1.1985 and heirs of one workman Shri Udesing Desai Solanki who died during pendency of the reference be treated to be in service from 11.1.1985 to his demise i.e. 5.7.1996 and be paid 50% of wages and other benefits to his heirs and Rs. 1000/-cost to each of the workmen. This award dated 10.6.1999 was passed in Reference (LCV) 990/86.

It is pertinent to note at this state that in this reference there is one more party employer No. 2 First Party employer named as "Yogi Package Industries" who has filed Special Civil Application No. 8335 of 1999 challenging similar order passed, in Reference (LCV) 988 of 86 dated 10.6.1999.

The Labour Court has heard the matters together as it could be seen from both

the awards and as the facts were similar and or intertwined, this Court is required to deal with them by referring the facts & narration in both these awards, though the judgment & award in the petition are passed separately.

2. The facts in brief narrated in this petition is set out as under:

The petitioner, a partnership firm was engaged in manufacturing of corrugated boxes. The petitioner firm had four partners and it was engaging 13 workers in its factory premises. On 30.10.1984 the factory was closed down. Certain workers approached the office of Assistant Labour Commissioner, challenging the closure and on 25.3.1985 before the Conciliation Officer settlement was arrived at whereunder the petitioner partnership firm was required to pay 1-1/2 month's wages which is termed as ex-gratia wages by the petitioner to 6 workmen with a condition that as and when the factory re-starts the workers of the closed factory will be given preference in employment. It was further submitted that the partnership was dissolved, two partners walked out who were signatories to said compromise of settlement and new partnership firm was formed on 13.11.1985. In the petition petitioner alleged that six workmen of earlier partnership firm approached concerned authorities raising dispute that the settlement dated 25.3.1985 was not being enforced, the competent authority referred the same to the competent Court wherein, it was registered as Reference No. (LCV) 990/86. Workmen filed their statement of Claim vide Exhibit-3. They contended that their services terminated on 30.10.1984 was illegal, the terms of compromise was arrived at and said terms of compromise was not enforced. The work commenced on 11.12.1985 but they were not offered and employed as per the terms of settlement, hence the dispute.

3. Written statement was filed vide Exhibit-6 inter alia contending that factory was closed on 31.10.1984. The employer and employee relationship came to an end, the workmen were paid their wages/salary and dues upto October 1984 and 50 % salary by way of allowance, by way of notice pay and compensation etc. u/s 25FFF of I.D. Act. These averments are made by petitioner in memo of petition at para No. 2.11. The Labour Court after recording elaborate submissions vide its order dated 10.6.1999 partly allowed reference in favour of workmen and ordering reinstatement with cost and back wages is ordered from 11.12.1985 and in respect of one workman as stated hereinabove, his heirs were ordered to be paid 25% of backwages as workman had passed away during pendency of reference.

4. Learned advocate Mr. Chetan Pandya for the petitioner contended that the Labour Court failed in appreciating the fact that Akshar Box Factory i.e. petitioner had been closed and license under the Factory Act was surrendered, the license had not been renewed thereafter. It was further contended that in the year 1984 while striking the settlement/compromise the workmen agreed to receive 50% of wages by way of allowance, bonus and other dues and this was by way of ex-gratia payment, bear-in-mind the fact by all the concerned that the factory was closed since 31.10.1984. In light of this unequivocal understanding between the

parties, the Labour Court did not have any room of holding differently than what has been pleaded at the Bar.

5. Learned advocate for the petitioner further contended that as the workmen accepted aforesaid payment they were stopped from raising any dispute much less industrial dispute. On acceptance of amount so decided to be given as an exgratia payment, the relationship of employer and employee stood terminated and after the date of compromise of settlement the workmen are not justified in raising industrial dispute much less the Court is not justified in partly allowing the same.

6. Learned advocate for the petitioner contended that the Labour Court ought to have appreciated the fact that the undertaking called Akshar Box Factory and Yogi Packaging Industries were independent legal entities. When the factum of these two firms being independent undertaking was established before the Labour Court, the Labour Court ought not to have committed serious mistake treating the same to be one undertaking. The Labour Court ought to have appreciated the fact that the petitioner had given away machinery of the factory on rent to one Yogi Packaging Industries as the petitioner was not able to compete in open market and was incapable of undertaking any production activities. Labour Court erred in accepting management of Yogi Packaging Industries and that of petitioner having common relatives and therefore transfer of machinery from petitioner to Yogi Packaging Industries should be treated as a smart device conceived or to avoid legal responsibilities. The Labour Court ought to have understood that in normal business activities such thing takes place in day & day out, though nothing was found which could have given any ground to Labour Court for arriving at such an inference and therefore the order which is passed on the presumption and assumption may not be sustained by this Court in exercise of jurisdiction under Article 226/227 of the Constitution of India.

7. The Labour Court did not have any material before it to hold that the production activities were undertaken by Akshar Box Factory and on that basis could not have passed any order of reinstatement as there existed no evidence whatsoever indicating that Akshar Box Factory were engaged in manufacturing activities. The work of trading activities is distinct from production activity after the said date could have been properly appreciated by the Labour Court. Unfortunately Labour Court without making any distinction between two activities brushed aside the theory and grounds propounded by the respondents. The order therefore passed in favour of the workmen is required to be quashed and set aside.

8. The Labour Court was not justified in arriving at a conclusion that the factory was not closed on 31.10.1984 as three months notice which was required to be given was not given. In fact the deponent on the side of management deposed that there was no requirement of issuing any notice as envisaged. Labour Court ought to have appreciated the fact that the workmen could not have been ordered to be reinstated as it would have permitted to them double benefits

which is undue in eye of law as the workmen were given wages and ex gratia amount earlier which they pocketed and thereafter filed the dispute. Therefore the workmen should not have been ordered to be reinstated as it put the employer to the loss.

9. Learned advocate for the petitioner emphatically submitted that the definition of "factory" and its connotation in common parlance should have persuaded the Court not to hold in favour of the workmen. What was promised in the settlement was restarting the factory where as there exists no evidence on record to indicate that the factory had been restarted. On the contrary the evidence in form of surrendering of license of manufacturing would go to show the factory had never been started. Despite of these facts on record the Court granted reinstatement which was illegal and required to be quashed and set aside. Learned advocate for the petitioner relied upon following decisions in case of:--

(1) Nagpur Electric Lights and Power Co. Ltd. Vs. Regional Director Employees State Insurance Corporation, etc., .

(2) Workmen of Delhi Electric Supply Undertaking Vs. The Management of Delhi Electric Supply Undertaking, .

(3) The Regional Provident Fund Commissioner, Bombay Vs. Shree Krishna Metal Manufacturing Co., Bhandara, .

and contended that the Labour Court missed the fine distinction between two phenomenon, namely reopening and/or re-starting the factory and trading activity. The trading activity in an undertaking cannot be construed as restarting of factory and to reemployment of workers as promised in the settlement. The evidences adduced on part of the employer would amply indicate that in absence of starting or re-starting of factory premises carrying out manufacturing activity it was not open to the workmen to claim their right of being reinstated or re-employed as the term of settlement are clearly indicating that term factory and its restarting only.

10. Learned advocate for the petitioner contended that the Court may know that so far as the Yogi Packaging Industries is concerned which was party in the reference in which the award is passed and which is challenged in this petition has not preferred to challenge the findings recorded in this award in any manner, atleast qua the directions contained in this award.

11. Learned advocate for the workmen invited this Court's attention to the findings recorded by the Court qua the testimony of the witnesses and the conclusion arrived therefrom and submitted mat in view of the testimony of the witnesses and the partner of the undertaking it can well be said that there was a fine device adopted by which the claims of the workmen could be rejected which were otherwise admissible and justified. The attempt is made to show that the factory was never started but there is no attempt to indicate that the workmen

were not required to be engaged on re-starting of the establishment. The heavy reliance of employing word "factory" is sought to be taken advantage by the employer by indicating that the factory i.e. production did not commence qua Akshar Box Factory, that is petitioner in the present petition. If the Court looks at the award in another matter which is in respect of Yogi Packaging Industries the entire device would become clear. Yogi Packaging Industries is relied upon to show that there was no re-starting of the manufacturing activities but it was a trading activities only. Akshar Box Factory did not produce anything to show that Akshar Box Factory as a unit or as an undertaking or as an employer ceased to exist. On the contrary Akshar Box Factory retained its name and under its name carried out its commercial activity. Therefore even if "production activities had not commenced" is removed for the sake of argument then also, the settlement which envisages re-employment of the workman could not have been ignored on account of the fact that the settlement cannot be said to be a settlement merely confined to "factory" only, as it was not a question of factory which is a nonentity in the eye of law, it was question of undertaking of its employer as such. Therefore, the employer when indulging in a device of defeating the right of the workmen, same could not have been countenanced and it has been rightly ignored as could be seen from the impugned order of the Labour Court. Otherwise also this petition under Article 227 of the Constitution of India though it is termed as petition under Article 226 of the Constitution of India, the Court would not go into realm of appreciating evidence and Court may not disturb the findings which have been recorded by the Labour Court after examining the witnesses and evidences adduced on record.

12. The reasoning adopted by the Labour Court as could be seen from the award, which is common in two petitions, being SCA No. 8334 of 1999 (present petition) and SCA No. 8335 of 1999, would indicate that the Court would have decided the same by the common judgment as the facts of both the cases for time & again been referred to in the controversy frequently. Therefore the reasoning portion will have to be dealt with bear-in-mind the said factors which would indicate that the controversy is required to be decided by referring to the testimony of witnesses in both the cases and the findings recorded therein.

13. So far as the workmen in both these petitions are concerned they are claiming to be examined, or atleast it would emerge that the workmen were in fact urging to enforce their claim qua their right to be reinstated flowing from the settlement extracted and reproduced at page-45A in the compilation of this petition. In both these petitions this document is heavily relied upon and it is not disputed that this settlement is signed by all the concerned, namely one representative of Yogi Packaging Industries Mr. Kanubhai Shah and for Akshar Box Factory represented by Mr. Rasikbhai Shah and union representatives. In that settlement, in para-4 it is unequivocally agreed by all that on re-starting of the factory, the preference would be given to the workmen and they would be given increment also, which is not disputed.

14. The fact remains to be noted that both these undertakings were closed on the same day i.e. 11.12.1985. Admittedly, while closing the undertakings the requisite procedure was not followed, though it is claimed by the employer time & again in the written statement that provision of section 25FFF have been followed and complied with. In fact this assertion is though made in the written statement, it the testimony of the witness of the employer, the witness has said that there is no requirement of issuing notice and the witness has rested at there only without further saying anything which would even remotely suggests that section 25FFF was not invocable. The Court hasten to add here that the entire proceedings and conducting thereof does leave room for further concern as it cannot be culled out therefrom as to whether there was specific plea in respect of applicability of section 25FFF or non applicability thereof. It seems that the real issue was missed by both the sides. Though the employer did make averment in the reply in written statement that section 25FFF is complied with. Unfortunately, by saying this, it cannot be said that section 25F is complied with as in the testimony when the employer's witness was confronted with, he made a statement that the notice is not required to be issued as envisaged, but unfortunately there is no averment or claim that section 25F applicability was not warranted in view of the fact mat the strength of the workmen on a given day did not cover the present industrial undertaking at all. However fact remains to be noted that in case if there was a pleading to this effect and then there was requirement of finding which is conspicuously absent in present case. Thus the Court is of the view that the Court need not go into that aspect at this stage. But the Court need not lose sight of the fact that the statement of claim and written statement do not suggest any where that at any given point of time employer engaged the workmen which would have been sufficient to bring the employer undertaking within the purview of section 25FFF. Therefore, this Court can safely conclude mat so far as section 25FFF is concerned same would not require to be invoked against the employer as mere exists conspicuous lacking in evidence to justify invoking section 25FFF.

15. This leaves this Court to consider as to whether can it be said that the workmen had a right to be reemployed as a right flowing from the settlement which has not been disputed by any one. The answer is that the right did flow in favour of the workmen to be offered employment and proximity of closing of factory was on 31.10.1984 and the commencement of work was on 11.12.1985 which is an year and 2 months, coupled with the fact that there was settlement on 25.3.1985, which cast duty upon the employer to call the employees to offer them employment. Therefore, claimants were required to be examined from the point of workmen's entitlement to seek reemployment, even if they are retrenched, though the retrenchment factor is not pleaded at large nor has it been established on account of its being illegal. But if one looks at the claim, it is claim for reemployment on restarting of industry as such. Therefore, the Court rightly has not gone into various factors qua illegality of retrenchment, but Court has elaborately discussed the evidence and has come to the conclusion that the

closure or restarting of the factory is merely a device to defeat rightful claim of the workmen to be reemployed on restarting of the unit, and which is enforceable in eye of law as the settlement was before conciliatory authority. Said settlement if required to be disown, then, proper evidence could have been led qua its non applicability. But in the instant case there exists no evidence is established, except the pleading that this settlement not being P2 settlement would be having no applicability or enforceability. This, in my view was partly incorrect pleading which could not have been accepted and it has rightly not been accepted by the concerned Court. The settlement and independent of settlement, the organization if found to have restarted its activity, then, it is bounden duty cast upon the employer to follow provision of law and offer employment as it is envisaged u/s 25H. In the instant case workmen have heavily relied upon settlement which itself proves that workmen on restarting of factory would be offered employment and would also be informed of starting the factory. Merely stating manufacturing activities have not been started and only trading activities have been started itself would not absolve the employer from its responsibility, as the word "factory" is to be understood in its true meaning in absence of any pleading qua it being not an undertaking as such. Therefore, in my view the petition is required to be dismissed being bereft of merits and is accordingly dismissed. The observations are qua the prayers made in the award and it shall not in any way come in the way of employer to take recourse of law for doing needful, if the workmen are not needed in the employment, and if otherwise required to be paid. Rule discharged. Interim relief, if any, earlier granted shall stand vacated. However, there shall be no order as to costs.