

(2016) 03 GUJ CK 0060

In the Gujarat High Court

Case No : Special Civil Application No. 16492 of 2007

Chief Executive and Vice Chairman and Others

APPELLANT

Vs

Rameshkumar Pratapray Yogi

RESPONDENT

Date of Decision : 08-03-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(oo), Section 2(oo) (bb), Section 2(oo)(bb),
Section 25F, Section 25G, Section 25H

Citation : (2016) 150 FLR 1042 : (2016) LabLR 1227 : (2016) 3 LLJ 6

Hon'ble Judges : K.M. Thaker, J.

Bench : Single Bench

Advocate : Sejal K. Mandavia, Advocate, for the Appellant; T.R. Mishra and U.T. Mishra, Advocates, for the Respondent

Final Decision : Partly Allowed

Judgement

K.M. Thaker, J.—1. In present petition, the petitioner has challenged award dated 4.4.2006 passed by the learned Labour Court at Bhavnagar in Reference (LCB) No. 673 of 1993 whereby the learned Labour Court has directed the petitioner - Gujarat Maritime Board (hereinafter referred to as "the petitioner") to reinstate the respondent workman (hereinafter referred to as "the respondent" or "the claimant) on his original post with continuity of service and 50% backwages. The petitioner is aggrieved by the said direction. Hence present petition.

2. Before proceeding further, it is relevant and necessary to mention at the outset that while the Court considered the petition at admission stage, below quoted order came to be passed on 4.7.2007:

"1. Heard learned advocate Ms. S.K. Mandavia appearing on behalf of petitioner and learned advocate Mr. U.T. Mishra appearing on behalf of respondent on caveat.

2. Issue notice to the respondents returnable on 25th July 2007.

3. Meanwhile, it is directed to the petitioner to reinstate the respondent workman

in service on or before 25th July 2007.

4. Direct service is permitted."

3. Subsequently, on 30.8.2007, the Court passed below quoted order:

"1. Heard learned advocate Ms. S.K. Mandavia for the petitioners and learned advocate Mr. T.R. Mishra for respondent.

2. I have considered the submissions made by both the learned advocates. The Labour Court has granted reinstatement with 50% back-wages of interim period.

3. Learned advocate Ms. Mandavia submitted that respondent workman is already reinstated by the petitioner in the post of work-charge clerk in the pay scale of junior clerk of Rs. 3050-4590/-. Therefore, the contention raised by learned advocate Ms. Mandavia requires detailed examination. Hence, Rule.

4. Interim relief in terms of Para.14(B) qua back-wages only.

5. Learned advocate Mr. T.R. Mishra waives the service of rule on behalf of respondent workman."

4. Accordingly, the petition came to be admitted vide order dated 30.8.2007 after recording the statement of learned advocate for the petitioner that the respondent is already reinstated the Court granted interim relief and stayed operation of the award only qua the direction to pay 50% backwages. The order directing the petitioner to reinstate the respondent has not been stayed by the Court. Actually, even at the stage of considering the petition for admission, the Court had clarified, vide order dated 4.7.2007, that the concerned workman should be reinstated.

5. It is not in dispute that since 2007, the concerned workman is reinstated and is working with the petitioner.

6. So far as the factual background is concerned, it has emerged from the record and submissions by learned advocate for the petitioner and the respondent that the claimant raised an industrial dispute against alleged termination of his service with effect from 26.2.1993. The dispute raised by the claimant came to be referred for adjudication vide order of reference dated 14.10.1993 which came to be registered as Reference (LCB) No. 673 of 1993.

7. In his statement of claim filed before the learned Labour Court, the claimant asserted that he was engaged by the petitioner with effect from June 1991 at salary of Rs. 950/- on work charge basis and that he worked as such continuously from June 1991 to February 1993 when the respondent terminated his service by oral order with effect from 26.2.1993 without any notice or without payment of retrenchment compensation. The claimant alleged that his service came to be terminated without following procedure prescribed by law.

8. The reference was opposed by the petitioner to file written statement at Exh. 8, wherein the petitioner claimed that the claimant was engaged from time to

time on "29 days basis", under which different orders engaging the workman for 29 days with one or two days break were issued from time to time during period from June 1991 to February 1993. In the light of the said arrangement under which the claimant was engaged, the petitioner claimed that the workman was engaged intermittently and that he did not work continuously with the petitioner. The petitioner invoked the provisions under Section 2(oo)(bb) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and submitted that the claim of the claimant be rejected.

9. During the proceeding before the learned Labour Court, the petitioner examined one Mr. B.K. Jain and placed on record a statement reflecting the details of the total number of days, for which the claimant worked with the petitioner from 1991 to 1993.

10. The claimant examined himself and placed on record the notices served by him/union from time to time, wherein he requested that he should be reinstated with consequential benefits.

11. After considering the evidence on record and rival submissions by the contesting parties, the learned Labour Court reached to the conclusion that the contention raised on strength of Section 2(oo)(bb) of the Act is not sustainable. Accordingly, the learned Labour Court rejected the said contention. The learned Labour Court also reached to the conclusion that the petitioner committed breach of Section 25F of the Act when the petitioner discontinued the claimant and thereby terminated his service with effect from 26.2.1993. The learned Labour Court also reached to the conclusion that the petitioner had committed breach of statutory provision while terminating the service of the claimant and that, therefore, the direction to reinstate the claimant would be just and proper. The learned Labour Court also recorded that the petitioner had failed to establish that in the interregnum, the claimant was gainfully employed. However, having regard to the fact that for such long time during which the proceedings were pending before the learned Labour Court, the claimant could not have stayed unemployed, the learned Labour Court allowed 50% backwages and passed the award with above-mentioned directions.

12. During the hearing of the petition, Ms. Mandavia, learned advocate for the petitioner raised only two contentions. By way of first contention, learned advocate for the petitioner submitted that the claimant was engaged on fixed term basis, i.e. on 29 days basis and that, therefore, the Act is not applicable to the termination of the claimant's service. By way of second contention, learned advocate for the petitioner submitted that if the Court does not accept the first contention, then at least the direction to pay backwages may be set aside since the direction to pay 50% backwages in respect of a person who had worked for about one and half years, is unjustified.

13. Per contra, learned advocate for the respondent submitted that actually, the respondent was continuously engaged from 1991 to 1993 and his service was

illegally and arbitrarily and abruptly terminated with effect from 26.2.1993 when the petitioner stopped engaging the workman. He submitted that at the time when the petitioner discontinued the respondent, retrenchment compensation was not paid nor any salary in lieu of notice was paid. He also submitted that the respondent's service was not terminated on account of any misconduct. He also claimed that the respondent's service was terminated without granting opportunity of hearing. According to learned advocate for the respondent, termination of respondent's service being illegal, the direction for reinstatement and full backwages ought to have been passed. Learned advocate for the respondent submitted that the petition may not be entertained and the award may not be interfered with. Learned advocate for the respondent accepted that the petitioner has reinstated the respondent and he is working with the petitioner since 2007.

14. I have heard submissions by learned advocate for the petitioner and I have also considered the impugned award and the material on record.

15. From the submissions by learned advocate for the petitioner, it has clearly emerged that the petitioner, who is statutory board, resorted to unjust and arbitrary manner of engaging the claimant, i.e. engaging the workman by giving artificial breaks by issuing appointment orders for 29 days. Such practice/arrangement amounts to unfair labour practice.

16. Actually, such practice of engaging workman by giving artificial breaks between two phase of appointments has been repeatedly deprecated by Courts. By adopting such practice, the employer actually engages the workman continuously but with a view to establishing that the person was engaged intermittently and was not engaged continuously, artificial breaks are given by issuing appointment letters for 29 days, then break of one or two days is given and the same workman is again appointed after a break of one or two days. In this view of the matter, such artificial breaks cannot be approved. Besides this in such arrangement the appointment which is, in reality continuous, is artificially interjected by such facade or smoke screen of one or two days' breaks, despite the fact that the work, for which the person is engaged, continues and the need for engaging the workman also continues. Such action of engaging the workman with such artificial breaks and then abruptly discontinuing the person would not fall within the purview of clause (bb) of Section 2(oo) and such practice cannot get protection of the principle of fixed term appointment recognised by clause (bb) of Section 2(oo)(bb). The fact that repeated and consecutive orders appointing the claimant on 29 days basis are passed from time to time, go to show that the such arrangement is a conscious decision and attempt of the respondent to give artificial breaks in the service of the claimant so as to circumvent or frustrate the statutory provisions, more particularly section 25F of the Act and to misuse, rather abuse, the provisions under clause (bb) of section 2(oo) of the Act with a view to depriving the claimant of his legal rights conferred by various provisions under different Labour Laws. In view of this Court, such

arrangement cannot be acknowledged and countenanced by the Court. If the petitioner's defence or explanation or so-called justification with regard to its action and the said arrangement is accepted and the award is interfered with on such premise then it would amount to acknowledging and upholding such artificial, unjust and illegal arrangement and it would also amount to putting seal of approval of the Court in respect of such illegal, artificial and unjust practice and arrangement. Such arrangement and practice also amount to unfair labour practice. For all these reasons the arrangement cannot be acknowledged and accepted and the award cannot be interfered with on this ground i.e. by holding that in view of the arrangement under which the workman was engaged, the action is not hit by breach of statutory provision viz. section 25F and/or section 25G and/or section 25H of the Act. The contention is misconceived and not sustainable.

17. In present case, not only by way of evidence of the respondent but also from the evidence of the petitioner it has emerged that the respondent worked with the petitioner with effect from 10.6.1991 to 26.2.1993 and that during the said tenure, he was engaged continuously except the artificial breaks effected by issuing different but successive appointment letters for 29 days.

18. The arrangement adopted by the petitioner in engaging the claimant in the aforesaid manner itself establishes that it was a design and intentional and deliberate attempt on the part of the petitioner to deprive the workman not only of his legal right but the statutory protection as well. In this view of the matter, this Court is convinced to hold that the respondent was actually continuously engaged by the petitioner from 10.6.1991 to 26.2.1993 and the artificial breaks which were resorted to by the petitioner, cannot be taken into account. The petitioner thereby abused the provision under Section 2(o) (bb) of the Act. In this context, reference may be had to the decision dated 8.7.2010 in Letters Patent Appeal No. 850 of 2001.

19. For the aforesaid reason, the first contention by learned advocate for the petitioner that the engagement of the respondent on 29 days basis amounts to employment on fixed term basis and/or that since he was engaged on 29 days basis provision of the Industrial Disputes Act - more particularly section 25F of the Act - is not applicable to his termination, is not accepted and the said contention is rejected.

20. The material on record, more particularly the petitioner's admission that with such artificial break, the claimant was engaged from June 1991 to February 1993, establishes that the claimant was continuously employed by the petitioner during the said period. In this view of the matter, the conclusion recorded by the learned Labour Court that the condition required to be fulfilled by the claimant for attracting the provision under Section 25F is established, cannot be faulted.

21. It is an undisputed fact that at the time when the petitioner discontinued the respondent, condition prescribed by Section 25F viz. of giving one month's

notice in lieu of salary and to pay retrenchment compensation in accordance with the provision under Section 25F, was not paid.

22. Thus, the termination of respondent of service was in breach of Section 25F of the Act. The said conclusion by the learned Labour Court cannot be faulted.

23. Besides this, it is not the case even of the petitioner that it had followed the procedure prescribed under sub-clause (c) of Section 25F. Since the said requirement was also not complied and since compensation and salary in lieu of notice were not paid, the termination is undoubtedly in violation of Section 25F.

24. In this view of the matter, the findings and conclusions by the learned Labour Court do not warrant any interference.

25. When it is established that the respondent's termination was in violation of statutory provisions, as a corollary, direction to reinstate the workman should follow. On this count, the learned Labour Court has not committed any error while directing the petitioner to reinstate the respondent. The said direction does not warrant any interference.

26. Now, so far as the direction to pay 50% backwages is concerned, it is noticed from the award that the petitioner did not place any evidence on record to establish that the respondent was gainfully employed during the interregnum. The learned Labour Court has not proceeded on the presumption that for the period from 1993 till 2006, the workman would have remained unemployed.

27. Besides this, it is relevant to note that before termination from service in February 1993, the respondent had worked for about 20 months with the petitioner. In light of said facts, this Court is of the view that the direction to pay 50% backwages is not justified.

28. Mr. Mishra, learned advocate for the respondent relied on the decision dated 31.3.2014 passed by this Court in Special Civil Application No. 25336 of 2006 which was filed by the present petitioner. Learned advocate for the respondent also relied upon the decision in the case of State of Rajasthan & Others v. Rameshwar Lal Gahlot [, (1996) 1 SCC 595]. According to learned advocate for the petitioner, the facts and the said decision are similar to the facts in present case and in the cited decision, this Court modified the direction qua backwages and reduced quantum of backwages from 50% to 20% after taking into account the decision in case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & Ors. [, (2013) 10 SCC 324].

29. In present case, the Court has taken note of the fact that immediately after the award came to be passed, the respondent has been reinstated by the petitioner, of course in view of the direction passed by the Court. Thus, as a matter of fact, the respondent is in service with the petitioner since 2007, i.e. immediately after the learned Labour Court passed the award.

30. Having regard to the facts of the case, the Court is of the view that the

interest of justice would be served if the direction regarding backwages is modified and the quantum of backwages is reduced to 20% from 50% (awarded by the learned Labour Court). Therefore, following order is passed.

31. The order directing the petitioner to reinstate the respondent is not disturbed and its hereby confirmed. The petitioner has already reinstated the respondent, therefore, any other direction or order is not passed on that count.

32. The direction with regard to backwages is modified and the direction to pay 50% backwages is reduced to 20% and the petitioner is directed to pay 20% backwages to the respondent. Accordingly, the petition is partly allowed. Rule is made absolute to the aforesaid extent.