

(2012) 09 GUJ CK 0121
In the Gujarat High Court

Case No : Special Civil Application No. 92 of 2004

Executive Engineer

APPELLANT

Vs

Pravinsinh Natwarsinh Solanki and 2

RESPONDENT

Date of Decision : 17-09-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2(oo)(bb), 25F

Citation : (2013) 137 FLR 678

Hon'ble Judges : Jayant M. Patel, J

Bench : Single Bench

Advocate : Sejal K. Mandavia for Petitioner 1, for the Appellant; Subramaniam Iyer for Respondents 1-3, for the Respondent

Judgement

Honourable Mr. Justice Jayant Patel

1. The short facts of the case are that the deceased workman - Natwarsinh Pravinsinh Solanki was appointed as clerk from 1971 in the pay-scale of Rs. 260/400 and his services came to be terminated without any notice or without any payment of compensation. Therefore, he raised dispute under I.D. Act. Such dispute came to be referred to Labour Court for adjudication being No. 773 of 1987 and subsequently, it was renumbered as Reference (LCB) No. 210/1990. The Labour Court, at the conclusion of the Reference, found that by way of artificial break, appointments were given for 29 days on continuous basis, but the workman had completed, in one year, services exceeding 240 days and, therefore, there was breach of the provisions of Section 25F of the I.D. Act and without giving notice, he was discontinued. The Labour Court also recorded that the workman, pending the petition, has expired and, therefore, the reinstatement was not ordered, but the back wages were ordered from 29.4.1987 i.e. the date on which he was terminated till his death i.e. 4.6.2001 and he directed the payment of salary of the aforesaid period to the legal heirs of the deceased and the award was passed with the cost of Rs. 250/-. The said

award is challenged by the petitioners in the present petition. Heard Ms. Mandavia, learned Counsel for the petitioner and Mr. Iyer, learned Counsel for the respondent.

2. The learned Counsel for the petitioner, during the course of the hearing, had made available the record of various appointment orders issued by the petitioner in favour of the workmen. The same is also considered, since such record was part of the proceedings before the lower Court.

3. The learned Counsel for the petitioner raised the contention that if the appointment was for a limited period of 29 days and upon expiry of the period, if the workman was not continued in service, it will not be retrenchment within the meaning of Section 2(OO)(bb) of I.D. Act and, therefore, the Labour Court has committed error in treating the workman as in continuous employment and the award deserves to be set aside.

4. Whereas, Mr. Iyer, learned Counsel for the respondent submitted that it was a case of artificial break given by the petitioner to the respondent workman's service in order to deprive him from his legitimate right of continuous service. It is submitted that the Labour Court has also found for such purpose. Under these circumstances, if the artificial break is given, the Labour Court can consider the said aspect and treat the workman as in continuous service and if the continuous service is taken into consideration, the termination cannot be made without payment of retrenchment compensation and if any termination is made without payment of retrenchment, it will be breach of provisions of Section 25F of I.D. Act. The Labour Court has rightly found that the termination was illegal. He submitted that as the workman had expired pending the litigation before the Labour Court, Labour Court has not ordered for reinstatement, but had directed for the payment of backwages from the date of termination until the date of death of the workman to the legal heirs of the deceased workman. He submitted that, therefore, the petition deserves to be dismissed.

5. It is not a case where the workman was appointed for a short period and that too, for a limited days and upon expiry of the said period, his service came to an end and he was not engaged further, but it is rather a case where the workman was engaged since 1977 and he was continued till 1987 during the different periods. The Labour Court has found that the artificial break was given in service and, therefore, the appointment orders were issued for 29 days. Otherwise, the service was continuous for the period exceeding 240 days.

6. The learned Counsel for the petitioner, during the course of the hearing, has made available the details of the appointment order issued in favour of the respondent and the perusal thereof also shows that it is only just for giving a break in continuous service, the appointment orders were issued for 29 days. Otherwise, it was not a case where the appointment was really required for 29 days at each point of time.

7. One might gather an impression that when the appointment was for 29 days

and upon expiry of the period, the engagement would automatically come to an end, but had it been a genuine case where at the end of service or end of engagement, on the last day the appointment, order would not be issued to begin the appointment after three days or the end of the month or after two or three days. This shows that the petitioner wanted to continue the respondent in service, but the practice adopted was of offering appointment for 29 days and thereafter, to give an artificial break for one or two days and thereafter to offer appointment once again. It is required to be recorded that it is not a case where the appointment order was issued for once or twice or thrice, but it was a case where the practice continued for a long time and the learned Judge, therefore, has rightly found that for a period of five years, such practice has continued for payment of daily wages. Under these circumstances, when it was an artificial break even by the employer in service of the workman, such could be termed as unfair labour practice and the Labour Court was justified in examining the said aspect and to ignore such artificial break in service and to treat the service as continuous.

8. At this stage, reference may be made to the decision of the Division Bench of this Court in the case of Surat Mahila Nagrik Sahakari Bank, reported in 2001 (2) GLH 447, wherein the Division Bench had an occasion to examine the case where the artificial break in service was given by the employer so as to deprive the legitimate right of the workman for continuous service. At paragraph 27, it was observed, inter alia, as under:-

27. Considering the various case law and considering the facts of the case, especially when we have gone through the evidence, which was led by the parties, we are of the opinion that the respondent employee was given tenure appointment orders from time to time for a long period, which extended beyond 240 days. It is no doubt true that the respondent has not specifically pleaded that the power exercised by the Management was nothing but a colourable exercise of power. However, the facts of the case as well as the evidence on the record clearly establish that such temporary orders were given from time to time and, thereafter, the services of the respondent were terminated even though the work in question was still in existence. There is nothing on record to show that such work was not in existence at the relevant time when her services were terminated. In fact, at the time of argument, Mr. Patel himself has stated that if her work were found to have been satisfactory, she would have been given permanent appointment. Therefore, it is not possible to believe that since the work, for which she was appointed, was not in existence, her services were not continued further. In so far as the unsatisfactory work is concerned, there is absolutely no reliable material for coming to the conclusion that her work was not satisfactory. Few orders on which reliance was placed by Mr. Patel do not inspire confidence to reach the conclusion that really, the work of the concerned employee was not satisfactory. In our opinion, it is not open for the Management to take the benefit of the nature of appointment order, i.e. tenure order, with a view to depriving the employee the benefit available under the Industrial Law.

This is not a case, wherein only for a fixed type of work, like a Project, etc., an appointment is given and on completion of such work or project, the services of such employee is not required any further. On the contrary, the respondent-employee could have been continued in service even as per the say of Mr. Patel, if her services were found to be satisfactory. That shows that the work in question is still available and other similarly situated employees, who were appointed with the respondent, have been continued in service by the Management.

In fact, to continue a person for a very long time under temporary orders may amount to Unfair Labour Practice within the meaning of the Fifth Schedule of the Industrial Disputes Act, 1947. Clause 10 of the Fifth Schedule lays down that employment of workmen as "badlis", casuals or temporaries and continuing them as such for years, with the object of depriving them of the status and privileges of permanent workmen, may amount to Unfair Labour Practices. The Industrial Court, Surat, in appeal, has considered in paragraph 14 of its order, various appointment orders, which are 16 in number. The appellate court has observed that with a break of one or two days, fresh orders were used to be given to the respondent. The Court has also considered the evidence of the Management, wherein the Bank Manager has said that she cannot state whether any other employees have been continued in service after the termination of service of the respondent. The Industrial Court has not believed the evidence of this Bank Manager on the ground that it is difficult to believe that she is not aware about the aforesaid facts even after serving since 20 years. The Industrial Court has also found in the said paragraph that one Ashaben Pachhigar, who was also given temporary appointment from 8.1.1991 to 7.2.1991, was the sister-in-law of the Manager of the Bank and the said Ashaben was made permanent. Mention is made by the Industrial Court in paragraph 14 of the judgment about similar types of appointments given to others. Considering the aforesaid benefit given to other similarly situated employees as well as considering the fact that the work in question was of a permanent nature, and the employees similarly appointed with the present respondent and even subsequently appointed, have also been made permanent, the Industrial Court has found that the action of the Management was deliberate and intentional not to give status of permanency to the present respondent with an object of depriving her the benefit of law. Under these circumstances, the appellate court has given a finding of fact that the action of Management is not bona fide and by keeping prejudice, she has not been given appointment in order to provide employment to others and that the work in question has continued even after the termination of service of the respondent. Considering the totality of the evidence, therefore, the Industrial Court has given detailed reasons starting from paragraph 14 onwards. It is no doubt true that the applicant, in her application or even in her approach letter before filing the application to the Court or in her evidence, has not clearly stated that the action in question is by way of colourable exercise of power. Still, the appellate court has considered the benefit given by the Bank to others and has

also come to the conclusion that this is a case of victimisation, as observed in the concluding part of paragraph 14 of the order. Therefore, it is not possible for us to believe that the learned single Judge has given the said finding even though there is absolutely no evidence on the record, because, ultimately, the reasoning of the Industrial Court also is on the same line. Therefore, once it is found by the fact finding court, i.e. the Industrial Court, that the order in question is not bona fide and that it is passed by way of victimisation and the said reasoning is based on appreciation of evidence and when attention of the parties is focused on this question, it cannot be said that the said finding of fact is based on no evidence or that the point is wrongly decided even though it was not in issue before the Court. In that case, even if there is no specific issue and if the evidence is already available on the record, such finding cannot be said to be vitiated. While exercising extraordinary powers under Article 226 of the Constitution of India, therefore, it is not possible for this Court to set aside the aforesaid finding of fact, and it cannot be said that the same is without any foundation worth the name. Though it is, no doubt, true that in case of a fixed term appointment, in view of Section 2(oo)(bb), the provisions of Section 25F may not have any application, the Court, exercising powers under the Industrial Disputes Act, can very well go into the questions whether the powers are exercised bona fide, whether it is by way of victimisation or whether it is passed solely with the object of depriving the employee the benefit available under the Industrial Disputes Act. It cannot be said that even if the order is passed by way of victimisation or in an arbitrary manner, or even if it is an unfair labour practice, then also simply because the appointment is for a fixed term, provisions of Section 25F are not to be looked into at all. In our view, therefore, the said provision cannot be brushed aside if it is brought to the notice of the Court that the order in question was passed by way of victimisation or has not been passed with a bona fide intention. When the appellate court has specifically come to the conclusion, on appreciation of the evidence, it would hardly make any difference whether the concerned employee has pleaded that case in her application or not.

As stated earlier, certain facts are not in dispute that various appointment orders of temporary nature were issued from time to time to the respondent and similar orders were issued to other employees and, thereafter, even persons junior to the respondent were made permanent, coupled with the fact that there is no material except some few lines written in some of the temporary orders that the employee may increase her speed of work, and from the same, ipso facto, it cannot be said that her work was not satisfactory during the temporary period and, therefore, the action of not continuing her in service was not a bona fide and genuine action. Therefore, in our view, it is not open for the appellant to take benefit of tenure appointment unless such action is found to be reasonable, bona fide and genuine. The material on the record do not satisfy our conscience that the non-continuance of the respondent in service was bona fide. In view of the positive finding given by the appellate court, we are not in a position to accept the say of Mr. Patel, and as stated earlier, said provision of Section 2(oo)

(bb) cannot be made applicable in all cases, where, based on evidence, it is found that the action of the employer is by way of victimisation or, in any case, is not bona fide.

9. Therefore, if the employer has made a show not in bona fide, but with a mala fide purpose of adopting unfair labour practice and thereby has given artificial break in service, the Labour Court was justified in treating the service of the workman as continuous. Once the service was found to be continuous, the requirement of Section 25F was to be followed, if the termination was to be affected in service. It is an admitted position that no retrenchment compensation was paid at the time when the service of the workman was terminated. Therefore, such termination would be rendered illegal.

10. On the aspects of reinstatement and backwages, the Labour Court has found that the workman had expired and, therefore, the question of reinstatement may not arise and the Labour Court has directed for payment of backwages to the legal heirs of the deceased workman. It appears that the termination was as back as in the year 1987 and the dispute remained pending with the Labour Court for about 14 years, since the award has been passed in the year 2002. Even the workman had expired in the year 2001 and, therefore, considering the facts and circumstances, it appears that the order of 100% of backwages was not called for, since substantial time was taken in deciding the litigation and, therefore, it would be just and proper to order 50% backwages from the date of termination until the death of the workman. Under these circumstances, the award passed by the Labour Court deserves to be modified only to that extent.

11. In view of the aforesaid observations and discussions, the judgement and order of the Labour Court is confirmed with the modification that the petitioner would be required to pay backwages to the legal heirs of the deceased workman at 50% for the period from 29.4.1987 to 4.6.2001. The petition is partly allowed to the aforesaid extent. Rule is made absolute accordingly. Considering the facts and circumstances, there shall be no order as to costs.