
(1981) 04 GUJ CK 0030
In the Gujarat High Court
Case No : Spl. C.A. No. 59 of 1981

F.M. Kolia

APPELLANT

Vs

G.S. Barot and Others

RESPONDENT

Date of Decision : 20-04-1981

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (1982) GLH 526 : (1981) 22 GLR 700 : (1981) 2 LLJ 269

Hon'ble Judges : R.C. Mankad, J;M.P. Thakkar, J

Bench : Division Bench

Judgement

Thakkar, J.—The last straw which might break the back of camel may or may not exist, but if it exists, can one say that it will not break the back of the camel if it proceeds for a hundred miles but it will break its back if it proceeds 10 miles more ? Can one say so without examining the question closely and carefully and without applying one's mind to this dimension of the matter ? Similar is the question which arises in this petition instituted by the Chalthan Kamdar Mandal under Art. 227 of the Constitution arising from an award rendered by the Industrial Court in Reference (IC) No. 144 of 1980, on October 28, 1980. The award is challenged to a limited extent. The grievance is that while the award upholds the claim of the workers to a pay-scale adopted by the industry in the whole region as recommended by the Second Wage Board eleven years back in 1969 now in 1980, a rider is added. The rider is to the effect that it will be enforced only with effect from a subsequent date (November 1, 1980) and not with effect from the date of reference (April 24, 1980) as the Industrial Court would be ordinarily expected to do even if it was disinclined to make it effective retrospectively from the date of making of demand. So far as employers are concerned, they have accepted the award in toto in the sense that they have not challenged any part of the award by way of a petition under Art. 227 of the Constitution of India, and it has become final and binding in so far as they are concerned and to the extent it is adverse to them.

2. The main grievance of the workers is that the direction as regards implementation of the pay-scales recommended by the Second Wage Board should have been made effective from the date on which the demand was made. There was no good ground for making it effective from a date later than the date of making of the reference in any case. The resultant position is that the workers would be deprived of the benefit of the pay-scales as recommended by the Second Wage Board for a period of about seven months after the date on which the reference came to be made. The Industrial Court has the discretion to give retrospective effects to its direction. It can also give prospective effect. That depends upon the facts and circumstances of each case. The Industrial Court, however, cannot do so without taking into consideration all the relevant aspects of the matter. It cannot be a matter of the pleasure of the Industrial Court. It must be built on some principle. It cannot be the ipse dixit of the Industrial Court. The petitioner contends that there is no good reason for not directing the employers to implement the pay-scales as recommended by the Second Wage Board with effect from the date of the making of the reference if not from an earlier date. The Industrial Court has considered the question as regards the financial capacity of the employers and the question as regards the justification for the demand for pay-scales as recommended by the Second Wage Board in paragraph 6 onwards of its award. The Industrial Court has conceded that the Second Wage Board has made its recommendations in the context of the situation obtaining in 1969. The Industrial Court has also conceded that the cost of living has risen sharply since 1969 and the wages as recommended by the Second Wage Board were not given to worker even till 1980 [more than 10 years]. The Industrial Court recorded a clear finding to the effect that the employers were giving wages which were comparatively low in the present circumstances. The Industrial Court also recorded a finding to the effect that recommendations, though they were merely in the form of recommendation, assumed importance inasmuch as the cost of living had gone very high since 1969 which was the year in which the recommendations were made. And that in that limited sense, it could be said that whatever was recommended at the relevant point of time in 1969 could be considered to be the minimum which would be required to be paid to the workers at present. It is not in dispute that the pay-scales which were recommended by the Second Wage Board have been given effect to by the others sugar factories in the region, viz., Chalthan, Gandevo, Bardoli and Maroli. It should be mentioned that the respondents employers had commenced production only two year prior to 1980. The employers had made a net loss of Rs. 1,41,000 and odd in 1978-79. According to the respondents, the estimated loss for the year 1979-80 was in the neighborhood of about a crore of rupees. Another circumstance which impressed the Industrial Court was that the employer was a Co-operative Society which had engaged itself in the production of sugar. It was a Society formed by the farmers from a backward area. The Industrial Court took in account the fact that the society had not been able to declare any dividend so far. All the same, the Industrial Court upheld the contention of the workers that they were entitled to

the pay-scales as recommended by the Second Wage Board in 1969 The view taken by the Industrial Court is expressed in the following words :

"The factory has not been able to declare any dividend so far, It strives to struggle and, therefore, it has not been able to pay higher wages to its workers. On the one hand, it appears that it would not be possible for factory to pay higher wages till it earns something. But it is not certain as to when it would start earning and would pay such wages which can meet the minimum needs of the workers. Today the wages range from Rs. 160 to 200 as far as the unskilled workers are concerned. Though it is true that the wage board recommendations are only the recommendations, those recommendations are meant for implementation one day. It has also to be noted that the wage board made its recommendations in the year 1969 and the period ended in the year 1974. Thus, the said recommendations have also become outdated. It has also to be noted that we are in the year 1980 which means further 6 years have also passed. During this period, the cost of living has gone very high and it would not be justified if the workers of the factory are allowed to be paid low wages in the present-day circumstances. Therefore, though I do not agree with Shri Kolia that that the recommendations of fair wages made by the Second Wage Board are now minimum wages, in the strict sense of the term "wages" under the Minimum Wages Act, it would earnestly desire that at least wages directed to be paid in the Sugar Industry, by the Second Wage Board, should be paid to these workers after these many years. I am aware that before some 4 months or so in the case of Maroli Sugar Factory, I have directed the said factory to implement the recommendations of the Second Wage Board in a phased manner. Therefore, the financial position was far more deteriorating and, therefore, keeping in view the very bad financial position, I had directed phasing of the recommendation to be implemented by the said factory. In the present case, the financial position of the sugar factory is not as bad as that of the Maroli Factory. At the same time, it is not in a happy financial position. But the workers have to be paid such wages as would keep them fit for their work. It is also in the interest of the factory that they keep fit and work. I am, therefore, of the view that at least the wages fixed by way of recommendations of the Second Wage Board should be granted to all the categories of workers in the factory".

Thus, while upholding the contention of the workers that they were entitled to pay-scales as recommended by the Second Wage Board, which were the pay-scales prevailing in several sugar factories in that area, the Industrial Court directed that the pay-scales should be made effective only from a date about seven months subsequent to the date on which the reference was made. It is this part of the award which is being challenged seriously by the union. It was argued that if the mere fact that the society was making losses was not a good ground for refusing to award pay-scales as recommended by the Second Wage Board, it was not a good ground for refusing enforcement of the said pay-scales with effect from the date of the reference. From a perusal of the award it is evident that the Industrial Court has not considered the question as to what

would be the additional burden which would be imposed on the employer if the pay-scales were made effective from the date of the reference instead of a date which is subsequent to the date of the reference, i.e., with effect from November 1, 1980 which results in the workers losing the benefit of the pay-scales as per the Second Wages Board for the seven months. Notwithstanding the losses the employers have been directed to enforce the new pay-scales prospectively which direction has been accepted by the employers. With regard to the date from which the award should be made applicable, the Industrial Court as the "discretion" to give appropriate direction. A matter of discretion as it is, it has to be done by addressing oneself to the relevant question in the context of the relevant considerations. In the present case it appears that one relevant consideration was whether or not the additional burden which would fall on the shoulders of the employers for further seven months was of such an order that the employers could carry. The mere fact that the employers were incurring losses was not considered to be a good ground for denying to the workers the pay-scales recommended by the Second Wage Board way back in 1969, eleven years prior to the making of the reference. If it was not considered to be a relevant factor for granting pay-scales with effect from November 1, 1980, why was it considered to be a relevant factor for denying the benefit of the pay-scales to the workers with effect from the date of the making of the reference ? There must be some good, valid and rational ground for doing so. It may be mentioned that it is not a question of giving retrospective effect at all in the sense that at present it is not the contention of the workers that they should be awarded the pay-scales as recommended by the Second Wage Board with effect from the date of demand. Of course, it was urged initially that they must be awarded the pay-scales as recommended by the Second Wage Board with effect from the date of the making of the demand. Ultimately, however, the contention of the petitioner-union is that workers are at least entitled to be paid on the basis of pay-scales in conformity with the pay-scales recommended by the Second Wage Board at least with effect from the date of the reference. And the Industrial Court has altogether failed to consider this question from the standpoint of the capacity or otherwise of the employers to carry the burden for seven more months in order to make the new pay-scales effective at least from the date of reference. The petitioner-union has buttressed its plea by an observation made by the Supreme Court in *Hindustan Antibiotics Ltd. Vs. The Workmen and Others*, , to the effect that "ordinarily" effect must be given to an award from the date of reference to the Industrial Tribunal of Industrial Court. Reliance is placed on the following passage :

"The learned counsel took objection to that part of the award where the Tribunal gave retrospective operation to it from 1st January, 1962. The reference of the dispute to the Tribunal was made on 11th August, 1962. The first award was made on 8th October, 1963. A Tribunal ordinarily makes its award operative from the date of reference, but in exceptional circumstances it gives retroactive operation to some of its proposals. It will be seen from the record that the

original demand enacted as early as 6th February, 1957 but because of some technical difficulties, namely, whether the Central Government Authorities or the State Governments Authorities were the appropriate authorities for entertaining the dispute in conciliation proceedings, the said proceedings took a long time for reaching the stage of reference. Having regard to that fact and also to the fact that the totality of the emoluments particularly, in the case of lower categories of manual, technical and clerical staff were on the lower side in the company, the Tribunal in its discretion came to the conclusion that the revised scales should come into effect from 1st January, 1962. We do not see any reason to interfere with its discretion.

Of course, the question as regards the date from which the award should be made effective is within the discretion of the Industrial Court. But as per the law declared by the Supreme Court in Hindustan Antibiotics case "ordinarily" it should be made effective "from the date of the reference". There is logic and reason at the back of the proposition that if it is not given retrospective operation with effect from the date of the demand or earlier depending on the considerations obtaining in the context of the dispute, it must ordinarily be made operative with effect from the date of making of reference. "Ordinarily" means unless there are special reasons pertaining either (1) to the dispute concerned or (2) to the case concerned which warrant a departure on rational grounds or ground of expediency. And the proposition that it should be enforced "ordinarily" with effect at least from the date of reference is buttressed by extremely valid, cogent, convincing and rational grounds which cannot be brushed aside. The legal theory on first principles is this. The Industrial Court makes its pronouncement in favour of the workers only when the Court is satisfied about the legitimacy and justness of the demand and considers it expedient in the interest of industrial peace. And for the sake of doing justice to the workers it directs the employer to implement the award on that ground. In an ideal state of affairs the Court would be expected to make its pronouncement on the very day the reference is received. But in reality some time is bound to elapse before the award can be rendered. Statements have to be filed, evidence has to be recorded, arguments have to be heard and the award can be rendered only thereafter. But why should the inevitable timelag in disposing of the reference occasion injustice to the workers ? If the Industrial Court had reached the same conclusion on the date on which the reference was made assuming that it was able to dispose of the reference on the material placed before it by the respective parties on that very day the justness of the demand of the workers would have become manifest in that very day. Merely because some delay cannot be avoided in any event and formal decision can be taken only after a time-lag of a couple of months or a couple of years, it does not mean that the demand was not a just demand on the date of reference. The injustice which was always there could be ascertained only at a later date because of limitations of time and procedure. Injustice which was inherent and latent was discovered and became manifest later. Would it not then be just and proper to make the award in so far as the

demand of the workers is considered to be just, effective at least from the date of reference ? If the demand was just, it was just from the date on which reference was made, not from the date of discovery that it was just or the date of pronouncement of the award. That is the basis for the proposition-that the award must ("ordinarily") be made effective from the date of reference, that is to say, unless there are special reasons for not doing so. In the present case, it is not the say of the respondents that the pay-scales as recommended by the Second Wage Board should be made enforceable from a subsequent date by reason of that fact that on merits the workers are not entitled to the pay-scales comparable with the pay scales obtaining in similar factories of the region. They cannot say so since on their part the award has been accepted. On principle it is difficult to comprehend how a worker working in a sugar factory in the same region or area can be denied the pay-scales on the same basis if the workload be the same, the nature of the work be the same, and the working conditions also be the same. If the circumstance that the respondents are incurring losses is not taken into consideration for denying the demand made by the workers and if it is not considered to be a relevant factor for refusing the contention of the workers that they are entitled to be awarded pay-scales which are in parity with the pay-scales applicable to similar factories in the area, it is difficult to comprehend how the demand of the workers for enforcement of the pay-scales with effect from the date of the reference can be turned down merely on the ground that the factory is incurring losses. No doubt, if the Court had made an assessment of the additional burden and had recorded a finding of fact to the effect that the additional burden was of such magnitude that it could not be borne by the employers, it would have been a different matter.

3. Is it correct to say that in respect of every demand for wage fixation, the factor as regards the losses incurred by the employer is a good and valid answer to deny the demand of the workers ? The question will bear examination on principle. In a way, labour is a commodity or an input which the employer needs to purchase from the open market like other raw materials, commodities, or inputs required to be purchased from the open market in order to manufacture its products or carry on its business. Let us visualize the case of an employer who is working at a loss. When he goes to the market in order to purchase the essential inputs say coal, or oil, or cotton, or jute, or machinery or spare parts, will the supplier countenance his request for supply of goods at a lesser or concessional rate, at a rate lower than the market rate ? Would the supplier not refuse to hear the argument that he is incurring losses and show him the door ? An employer will not be able to secure from the market the raw materials, coal, oil electricity and the other materials required for the running of the factory or business at lesser rate, merely because he is incurring losses. If the employer has a fleet of trucks, it cannot obtain oil or diesel from a petrol pump at a rate lower than the rate at which it is supplied to all other purchasers. If the producer of a commodity or supplier of goods will not sell to the respondents the commodity at a lesser price than the price obtainable in the open market, with

what face can the employers contend that they are entitled to purchase the commodity in question, namely, labour (which may be treated as a commodity for the purposes of the present discussion) at a rate lower than the rate at which it is made available to their counterparts and rivals ? What the other factory owners have to pay for the labour, the respondents will also have to pay to their workers for they cannot claim any privileged treatment merely on account of the fact that they are incurring losses. Returning now to the facts of the present case, there is another factor which cannot be ignored. It may be realised that the respondent-Co-operative Society is a society formed by the farmers growing sugarcane. If the respondent-society pays to its members prices higher than the prevailing prices for the sugarcane supplied by its own members it would be incurring losses. There is no manner of finding out whether the respondent-society has paid to its farmer-members the same price as is being paid by the other factory owners or the price at which it could be sold in the open market. It might well have paid a price higher the price at which sugarcane could have been obtained in the open market. It would not be possible to say positively that the respondent-society has in fact done so. But there is the inherent possibility of this having happened when the factory in question is being run by a Co-operative Society formed by the farmer-producers themselves and the farmers have to pay to themselves through the agency of the collective society formed by themselves. One paying to oneself does not have to consider the cost because it is like putting something from one's own left side pocket one's own right side pocket. They may well pay to themselves higher price and create a situation where they can show that they are incurring huge losses. This aspect cannot be ignored. Be that as it may, so far as the present petition is concerned, the question is whether the Industrial Court has at all applied its mind to the relevant aspect as to whether the employers could or could not bear the additional burden for the seven months (intervening between the date of the reference and the date from which the direction has been given effect to) in the light of the aforesaid circumstances. The Industrial Court has altogether failed to do so. And that is where the error apparent on the face of the record has crept in. Counsel for the employers has pressed into service the following decisions rendered by the Supreme Court in support of his contention that it is a matter of discretion and this court in exercise of its power under Art. 227 of the Constitution of India should not interfere with the discretion exercised by the Industrial Court : viz., *Rajkamal Kalamandir v. Indian Motion Pictures Employees Union*, (23) *Bengal Chemical and Pharmaceutical Works Ltd. Vs. Its Workmen*, . The two propositions enunciated by the Supreme Court in the aforesaid decisions are (i) that under Art. 227 the High Court cannot exercise powers akin to the powers of an Appellate Court and substitute its own discretion or decision in place of that of the Tribunal, and (2) that the question as regards the date from which the award should be made effective is of discretion (albeit discretion has to be exercised on some rational principle.) A reference to *Bengal Chemical and Pharmaceutical Works Ltd. Vs. Its Workmen*, , would so that the Supreme Court has accorded its approval to the proposition that an award can be made effective retrospectively

from the date of the demand, i.e., even a date prior to the date of the making of the reference. It is a matter of discretion to be exercised by the Tribunal. Reliance has been placed on two earlier decisions of the Supreme Court in this connection as is evident from the following passage :

"In Kamani Metals and Alloys Ltd. Vs. Their Workmen, the workmen had made demands on 1st July, 1961 The conciliation board was moved on 8th September, 1962 and, when conciliation failed, a reference was made on 14th December, 1962. The Tribunal made an award, retrospective from 1st October, 1962, a date between the reference to conciliation and the reference to the Tribunal. That decision of the Tribunal was accepted by this Court.

Recently, in Hydro (Engineers) Pvt. Ltd. Vs. The Workmen, this Court declined to interfere with the direction given by Tribunal that its award should take effect from the date of demand made by the workmen. It has also been pointed out, in the said decision, that it is a matter of discretion for the Tribunal to decide, from the circumstances of each case from which date its award should come into operation, and no general rule can be laid down as to the date from which a Tribunal should bring its award into force. Therefore, it will be seen that when a Tribunal gives a direction regarding the date from which it has to become effective, no question of principle, as such, is involved".

It is no doubt true that it is a matter as discretion. The Supreme Court has in terms says so. But on what principles has the Industrial Court exercised its discretion in the present matter ? The only ground on which effect is being given from November 1, 1980 is that the society is incurring losses. But then this factor has been considered to be irrelevant from the point of view of awarding pay scales as recommended by the Second Wage Board. It may also be mentioned that it is not in dispute that the respondent-society has paid bonus as demanded by the workers through a different union notwithstanding the fact that it is incurring losses. Therefore, the mere fact that it is incurring losses, was not a relevant circumstances on the basis of which the usual and the normal formula of directing that the award being made effective from the date of the reference should be made a departure from. If there was any special consideration, the Court might well have made it operative either retrospectively or prospectively. But so far as making it effective from the date of the reference is concerned, there is no valid ground made out by the Court in its Award. It is not for this High Court in exercise of powers under Art. 227 of the Constitution to direct that the respondent-employer should pay-scales as recommended by the Second Wage Board with effect from a particular date. It is also not the function of this High Court in exercise of the powers under Art. 227 to direct the Court to make it effective from a particular date. But what we are inclined to do is in no way countermanded by the decisions cited earlier. No doubt the matter is one of discretion. But it is not a matter of ipse dixit or arbitrary pronouncement of the Court either. And we do not propose to set aside the order of the Industrial Court and modify the award by directing payment with effect from the date of

reference as if we were exercising appellate powers. All we propose to do is to remit the matter to the Court which has altogether failed to apply its mind to the relevant aspect. It is on account of non-application of mind and failure to consider the question "whether" and "why" the award must be made effective from a particular date other than the date of reference that an error apparent on the face of the record calls for our intervention in exercise of jurisdiction under Art. 227 of the Constitution of India. It is certainly within the purview of the jurisdiction of this Court under Art. 227 of the Constitution of India to ascertain whether the workmen have been denied the claim for enforcement of the award with effect the date of the reference on any legal, rational or understandable grounds. It cannot be denied only on the basis of ipse dixit. We are, therefore, of the opinion that in so far as the Court has failed to make a principled approach to the question as regards the date from which the direction regarding payment of pay-scales as recommended by the Second Wage Board be made effective, the Court has committed an error apparent on the face of the record. No exception can be taken to any other aspect of the award. The respondent-employers have accepted the award in toto. So far as the workers are concerned, They have taken exception to several parts of the award but ultimately the petitioner-union has restricted its grievance to the question as regards the date from which the award has been made effective. In so far as demand No. 2 in regard to pay-scales recommended by the Second Wage Board is concerned, we are of the opinion that the Industrial Court has committed an error apparent on the face of the record in failing to take into consideration the following circumstances, namely :

(1) The pay-scales are recommended by the Second Wage Board were being applied by the other factories in the region since years. There was no good ground made out for refusing to make the direction effective with effect from the date of the reference instead of making it effective with effect from a date six months later than the date of reference.

(2) The Court has not taken into consideration the additional burden which would have been imposed by making the direction applicable with effect from the date of the reference instead of from November 1, 1980.

(3) The Court has shown unawareness of the fact that the respondent-society is a society formed by the farmers members who are themselves producers of the sugar-cane crushed at the factory. There is an inherent possibility of their paying to themselves a higher price so that the accounts will show that there was a loss. The loss could not necessarily be attributable to either any factor peculiar to the Society in question or to the circumstance that it has been recently started. If it was recently started, its possibility of having acquired more modern machinery which would result in its being able to manufacture sugar at a lesser cost than the cost incurred by the other factories having out dated and out-moded machinery.

(4) The Court has failed to take into consideration the circumstance that there

was no reason, no valid reason for making available to the respondent-society a commodity at a lower price than the price which other factories similarly situated in the same region would have to pay for the commodity purchased by them. For the purposes of this argument, labour should be treated as a commodity and the price of the labour required to be paid should be considered to be the price which the other factories in the region would be required to pay.

(5) The Court has also failed to take into consideration the circumstance that the respondent-society had paid bonus to its workmen when claim in this behalf was made by a different union notwithstanding the fact that it had incurred losses. The Court has failed to take into consideration the circumstance urged on behalf of the petitioner-union that it was being denied redress in respect of legitimate grievance of the workers merely because it has resorted to constitutional means instead of resorting to agitational methods for bringing pressure on the society. The Court also ought to have considered as to whether there was any special circumstance which justified making departure from the normal rule of making the direction applicable with effect from the date of the reference instead of making it applicable with effect from a subsequent date.

4. We, therefore, allow the petition partly to the aforesaid extent, namely, to the limited extent that the Industrial Court has directed that the pay-scales as recommended by the Second Wage Board be made effective from November 1, 1980 instead of making them effective from the date of the reference. To this limited extent only we quash the award (the rest of the award is confirmed and remains unaffected by this decision) and remand the matter to the Court with a direction to dispose it of in accordance with law in the light of this decision after affording reasonable opportunity to the parties to make submissions in this behalf. It will be open to the Court to take into consideration such further material, if any, as may be produced with its permission by any party provided opportunity is afforded to the other side to produce additional material to meet with or counter the effect of the material that may be produced with the leave of the Court. The Industrial Court will dispose of the matter to the extent it is remandee, in accordance with law, preferably within ninety days of the receipt of a copy of this judgment along with the record. The office is directed to despatch the record along with a copy of this judgment without delay as soon as the judgment is received in the office.