

(2008) 05 GUJ CK 0026

In the Gujarat High Court

Case No : Letters Patent Appeal No. 2320 of 2007 in Special Civil Application No. 21828 of 2006 and Civil Application No. 15803 of 2007 in Letters Patent Appeal No. 2320 of 2007

Garden Silk Mills Ltd.

APPELLANT

Vs

Ashok K. Jha and Others

RESPONDENT

Date of Decision : 14-05-2008

Acts Referred:

Bombay Industrial Relations (Gujarat) Rules, 1961 — Rule 53, 53(2)
Bombay Industrial Relations Act, 1946 — Section 3, 3(14), 42, 42(1), 42(4)
Constitution of India, 1950 — Article 226, 227

Citation : (2008) 117 FLR 526 : (2008) 3 LLJ 1027

Hon'ble Judges : R.M. Doshit, J;K.M. Thaker, J

Bench : Division Bench

Advocate : V.B. Patel and D.G. Chauhan, No. 1, for the Appellant; K.M. Patel and Dipak R. Dave for Respondent Nos. 1 and 3 - 4, for the Respondent

Judgement

R.M. Doshit, J.—This Appeal was heard by us in the month of February. We had the benefit of the able assistance of learned Counsel Mr. V.B. Patel. Before we could deliver this judgment, unfortunately the learned Counsel has passed away.

2. The Appeal is heard extensively. With the consent of the learned advocates, the Appeal is finally decided by this judgment.

3. This Appeal preferred under Clause 15 of the Letters Patent arises from the judgment and order dated 1st October, 2007 passed by the learned Single Judge in above Special Civil Application No. 21828/2006. The appellant, Garden Silk Mills Limited (hereinafter referred to as, "the Mills"), is an employer within the meaning of Section 3(14) of the Bombay Industrial Relations Act, 1946 (hereinafter referred to as, "the Act"). The respondents are the employees of the Mills. The matter at dispute is the orders of transfer dated 4th May, 1996. By the said orders the Mills transferred its employees then working in its Crimping department and called upon them to report for duty in the Twisting department.

4. At first, on 3rd May, 1996 the concerned employees were orally instructed to report for duty in the Twisting department within the establishment. As the employees did not accept the said orders, the written orders were made on 4th May, 1996. By the said orders, the concerned employees were specifically informed that their transfer was made within the establishment. By the said transfer, there was no change in the nature of work they were performing. Their work as Twisting Operator was similar to that of Crimping Operator and that they were qualified to work as Twisting Operator. The conditions of service, salary, legal entitlements and other service benefits would not be adversely affected. The said orders were objected to by the employees. According to the employees, the said orders of transfer from Crimping department to Twisting department amounted to the change in conditions of service that required certain procedure to be followed by the Mills as envisaged by Section 42 of the Act. In absence of such procedure followed by the Mills, the employees were under no obligation to carry out the orders issued by the Mills. The said orders resulted into abstinence from work by the employees. In ensuing litigation, by order dated 16th November, 2006 made by the Labour Court, Surat in O.T. Application No. 29/1996, the said action of the employees was held to be illegal strike. The said order has not been carried further and has become final.

5. Feeling aggrieved by the aforesaid orders of transfer, the employees approached the Labour Court, Surat in O.T. Application No. 22/1996 made under Sections 77 and 78 of the Act. The Surat Silk Mills Labour Union, the representative labour union (hereinafter referred to as, "the Union") also approached the Labour Court to challenge the aforesaid orders of transfer dated 4th May, 1996 in O.T. Application No. 26/1996. According to the employees and the Union, the disputed transfer was made with malafide intention and were vindictive; that the concerned employees were working as Crimping Operators for a long time and that they were not qualified to work as Twisting Operators; that the said transfer adversely affected their emoluments and other conditions of service. The said transfer made without giving the notice of change as envisaged by Section 42 of the Act was illegal. The applications were contested by the Mills. After a round of litigation upto this Court in Special Civil Application No. 9139/1999, by a common judgment and order dated 6th September, 2001 passed by the Labour Court, Surat, both the said Applications Nos.22/1996 and 26/1996 were rejected. The Labour Court observed that both the parties had led documentary evidence but had not led oral evidence. The wages of the workmen in Silk Textiles Industry was determined in accordance with the award made in Wage Board Reference (IC) No. 5 and 6 of 1994. According to the said award, the Crimpers and the Twisters were placed in the same category. The same rate of wages was prescribed for them. The employees and the Union had failed to establish that by the impugned transfer their service conditions were adversely affected, in any manner. They also failed to establish that the concerned employees were working in the Crimping department for a long time. The Labour Court was also of the opinion that the strength in any department is a relative

term. In absence of a previous settlement or award fixing a specific strength in a particular department, the question of reduction or increase in the strength in such department did not arise.

6. Feeling aggrieved, the employees approached the Industrial Court, Surat in Appeal I.C. No. 18/2001 preferred u/s 84 of the Act. The appeal was contested by the Mills. The Industrial Court, Surat was, by its judgment and order dated 9th March, 2006, pleased to allow the said appeal. The Mills was directed to withdraw the orders dated 4th May, 1996 and to restore the employees in their original post. The Industrial Court was of the opinion that the transfer of workmen from one department without corresponding transfer to that department would necessarily result into reduction in the strength in that department. Similarly, transfer to one department without corresponding transfer from that department would necessarily result into increase in the strength in such department. The "transfer", therefore, is an industrial matter referred to in Item 1 of Schedule II to the Act. Such transfer did require a previous notice of change as envisaged by Section 42(1) of the Act. Admittedly, the impugned transfer was made without giving such notice of change. The same was, therefore, illegal.

7. Feeling aggrieved, the Mills preferred above Special Civil Application No. 21828/2006 under Articles 226 and 227 of the Constitution of India. The said petition came to be dismissed by the learned Single Judge by impugned order dated 1st October, 2007. The learned Single Judge was pleased to observe that.... "This Court is having very limited jurisdiction and this Court cannot act as an appellate authority. The finding given by the Industrial Court is based on evidence and finding on the legal aspect is also correctly examined and decided by the Industrial Court within the legal aspect of the Industrial Court has not committed any error which requires interference while exercising the power under Article 227 of the Constitution of India. Even in case when two views are possible then also this Court cannot interfere while exercising the power under Article 227 of the Constitution of India. Therefore, according to my opinion, when there is no error committed by Industrial Court, Surat in order dated 9-3-2006 which requires any interference while exercising the power under Article 227 of the Constitution of India".

8. Mr. V.B. Patel has assailed the judgment of the learned Single Judge. He has submitted that the writ petition preferred by the Mills was essentially one under Articles 226 and 227 of the Constitution of India. The averments made in the petition and the prayers both invoked the jurisdiction of the High Court to issue writ of certiorari under Article 226 of the Constitution of India. The learned Single Judge has manifestly erred in treating the writ petition as one under Article 227 of the Constitution of India and in deciding the same as such. Mr. Patel has submitted that the approach of the learned Single Judge is pernicious in as much as by such observation made by the learned Single Judge the right of the Mills to prefer appeal before the Division Bench under Clause 15 of the Letters Patent is

seriously prejudiced. He has submitted that irrespective of the observation made by the learned Single Judge, the present Appeal preferred under Clause 15 of the Letters Patent is maintainable. In support thereof, he has relied upon the judgments of the Hon''ble Supreme Court in the matters of Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram, ; of Shri M.L. Sethi Vs. Shri R.P. Kapur, of Sushilabai Laxminarayan Mudliyar and others Vs. Nihalchand Waghajibhai Shah and others, of Kishorilal v. Sales Officer, District Land Development Bank and Ors. (2006)7 SCC 496 ; of Kanhaiyalal Agrawal and Others Vs. The Factory Manager and others, and of State Bank of Bikaner and Jaipur Vs. Om Prakash Sharma, He has also relied upon the judgment of this Court in the matter of Gujarat State Road Transport Corporation v. Chaudhary Popatbhai Revabhai 2005(4) GLR 3395 and of the Bombay High Court in the matter of Sarva Shramik Sangh Vs. Janprabha Offset Works and Another,

9. Mr. Patel has also submitted that the Mills had preferred the writ petition under Article 226 of the Constitution of India for issuance of writ of certiorari. He has submitted that Article 226 of the Constitution of India empowers the High Courts to issue a writ of certiorari when tribunal or court below has committed an error apparent on the face of the record. In the present case, the Court below failed to appreciate that the "transfer within the establishment" is the industrial matter covered by Item 2 of Schedule III to the Act. Such action, therefore, did not require a notice of change as envisaged by Section 42(1) of the Act. Further, the Court below also failed to appreciate that Application No. 22/1996 was taken out by individual workmen. Under the scheme of the Act the individual workmen do not have right to take out such proceeding. The same was rightly rejected by the Labour Court as not maintainable. The Application No. 26/1996 was taken out by the representative union, but the matter was not carried further by the union. Further, such an action could not have been initiated unless an approach letter was given and the Mills had been given 15 days" time to settle the matter, if possible. The Application No. 26/1996 filed by the union was, therefore, premature and not maintainable. The Court below failed to appreciate the legal questions and proceeded on the premise that the matter at dispute was covered by Item 1 of Schedule II to the Act. It was a fit case for the learned Single Judge to issue a writ of certiorari to set-aside the order made by the Industrial Court and to restore the order made by the Labour Court. In support of these submissions, Mr. Patel has relied upon the judgments in the matters of Municipal Council, Sujanpur Vs. Surinder Kumar, ; of Chhotobhai Jethabhai Patel and Co. Vs. The Industrial Court, Maharashtra Nagpur Bench, Nagpur and Others, of State of West Bengal Vs. Atul Krishna Shaw and Another, of Karnal Improvement Trust, Karnal Vs. Parkash Wanti (Smt) (Dead) and Another, of Shri Ambica Mills Co. Ltd. Vs. S.B. Bhatt and Another, ; of A.R. Antulay Vs. R.S. Nayak and Another, and of Narsinggirji Manufacturing Company, Ltd. v. Gokhale (M.P.) 1957 II LLJ 148.

10. Learned advocate Mr. K.M. Patel has appeared for the respondents and has supported the judgment of the learned Single Judge. He has submitted that any

transfer, in absence of a corresponding transfer, would necessarily result into decrease in the strength of manpower in one department and increase in the strength of manpower in another department. The matter of transfer, therefore, should necessarily fall under Item 1 of Schedule II to the Act. This necessitates a notice of change as envisaged by Section 42(1) of the Act. In absence of notice of change given by the Mills the action of the Mills in transferring the concerned employees from Crimping department to Twisting department was wholly illegal. The said action has rightly been set-aside by the Court below. In support of his submissions, Mr. K.M. Patel has relied upon the judgments in the matters of Co-operative Bank Employees Union v. Yeshwant Sahakari Bank Ltd and Ors. 1993 I LLJ 741 and of Chhotobhai Jethabhai Patel and Co. Vs. The Industrial Court, Maharashtra Nagpur Bench, Nagpur and Others,

11. Though long drawn arguments were advanced on the question of maintainability of this Appeal, there really was not a serious contest on the question of maintainability of the Appeal. Moreover, we have heard the Appeal on merits extensively. We, therefore, do not delve into the question of maintainability of the Appeal. We proceed to decide the Appeal on merits.

12. The matter at dispute is the above referred transfer made on 4th May, 1996. The question raised for our consideration is, whether the said transfer was a change referred to in Section 42 of the Act. Whether such transfer necessitated a previous notice of change as envisaged by Section 42(1) of the Act.

13. Though the employees and the Union had raised a specific plea that the impugned transfers were vindictive in nature and that the said transfers prejudicially affected conditions of their service, they did not lead any evidence in support of the said allegations. They did not lead evidence to prove that the said employees were working as Crimping Operators for a long time; that the work of a Twisting Operator was different from that of Crimping Operator; that they were not qualified to work as Twisting Operator; that their wages or allowances was adversely affected in any manner or; that their service conditions stood altered to their detriment.

14. Section 42(1) of the Act, inter alia, enjoins an employer intending to effect any change in respect of an industrial matter specified in Schedule II to give notice of such intention in the form and in the manner specified in the said section. "Industrial matter" is defined in Clause (18) of Section 3 of the Act, inter alia, to mean Sany matter relating to employment, work, wages, hours of work, privileges, rights or duties of employers or employees or the mode, terms and conditions of employment.

15. Item (1) of Schedule II to the Act refers to S. Reduction intended to be of permanent or semi-permanent character in the number of posts or persons employed or to be employed in any occupation or process or department or departments or in a shift not due to force majeure. "Item (2) of Schedule III to the Act refers to...." Assignment of work and transfer of workers within the

establishment".

16. Rule 53 of the Bombay Industrial Relations (Gujarat) Rules, 1961 provides, inter alia, that Any employee or a Representative Union desiring a change in respect of an industrial matter specified in Schedule III shall make an application in writing to the employer. Sub-rule (2) thereof provides for a period of fifteen days from the date of the receipt of the application by the employer, for the employer and the employee to arrive at an agreement.

17. We do appreciate that transfer of the employees from one department to another, in absence of corresponding transfer, would necessarily result into reduction in manpower in one department and corresponding increase in the manpower in the other department. But, we are unable to agree that Item 1 of Schedule II to the Act is intended to cover the cases like the one before us. Had that been the legislative intent the "assignment of work and the transfer of workers within the establishment" would not have been included in Schedule III to the Act. If the reasoning of the Industrial Court were accepted, the above referred Item 2 in Schedule III to the Act would become nugatory. The cardinal principle of interpretation of statutes requires that the interpretation which would render a part of the legislation nugatory or otiose should be avoided. What is required is harmonization or conciliation amongst the two seemingly contradictory or repugnant provisions in an enactment. As the matter "assignment of work and transfer of workers within the establishment" has been specifically included in Schedule III to the Act, it cannot be artificially brought under Item 1 of Schedule II by reference to the presumable consequences of such transfer or assignment of work. If the transfers were governed by Schedule III to the Act, evidently no notice of change as envisaged by Section 42(1) of the Act was required. The action of the Mills in transferring the employees from Crimping department to Twisting department was not hit by the alleged infirmity of not giving prior notice of change as envisaged by Section 42(1) of the Act. As recorded hereinabove, the orders of transfer were specific that the said transfer did not prejudicially affect the employees. The allegations to the contrary made by the employees and the Union were not proved by leading evidence.

18. Further, no action against the Mills in respect of the said transfer orders could have been brought about unless an approach letter as envisaged by proviso to Section 42(4) of the Act read with Rule 53 of the Bombay Industrial Relations (Gujarat) Rules, 1961 (hereinafter referred to as, "the Rules") was given. In the present case, in answer to the transfer orders dated 4th May, 1996 the concerned workmen submitted their objections on 6th May, 1996 and also conveyed that it was an approach letter within the meaning of Section 42(4) of the Act. Immediately, within two days i.e. on 9th May, 1996 the above-referred Application No. 22/1996 was made to the Labour Court, Surat. Sub-rule (2) of Rule 53 of the Rules provides for a period of 15 days for arriving at an agreement. In our opinion, evidently, the purpose of this buffer time provided under Sub-rule (2) of Rule 53 of the Rules is to enable the parties, the employer

and the representative of the employees, to settle the matter amongst themselves. A proceeding lodged before the expiry of the said period of 15 days would necessarily be premature. If such a proceeding were entertained, it would defeat the legislative intent to enable the parties to conciliate amongst themselves. In the present case, the Application No. 22/1996 filed by the employees and the Application No. 26/1996 filed by the representative union both were premature and were not maintainable.

19. In our opinion, the Industrial Court below had committed a manifest error apparent on the face of the record. The learned Single Judge has erred in not considering the legal issues involved and in dismissing the writ petition treating it as a petition filed under Article 227 of the Constitution of India. In other words, the learned Single Judge has failed to exercise the jurisdiction vested in him.

20. For the aforesaid reasons, the Appeal is allowed. The impugned judgment and order dated 1st October, 2007 passed by the learned Single Judge in above Special Civil Application No. 21828/2006 is quashed and set-aside. The Special Civil Application No. 21828/2006 is allowed. The judgment and order dated 9th March, 2006 passed by the Industrial Court, Surat in Appeal (IC) No. 18/2001 is set-aside. The judgment and order dated 6th September, 2001 passed by the Labour Court, Surat in O.T. Application No. 22/1996 is restored.

21. In view of this judgment, the Civil Application stands disposed of. The parties will bear their own cost.