
(2007) 10 GUJ CK 0016

In the Gujarat High Court

Case No : Special Civil Application No. 21828 of 2006

Garden Silk Mills Ltd.

APPELLANT

Vs

Ashok K. Jha and Others

RESPONDENT

Date of Decision : 01-10-2007

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 106(1), 3(32), 30, 42, 42(1)
Constitution of India, 1950 — Article 227
Industrial Disputes Act, 1947 — Section 9A

Citation : (2008) 1 GLH 164 : (2008) 1 GLR 245 : (2008) 2 LLJ 339

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Mihir Thakore, for Nilesh A. Pandya, for the Appellant; K.M. Patel for Dipak R. Dave for Respondent Nos. 1 and 3 and Dipak D. Joshi, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned Senior Advocate Mr. Mihir Thakore with learned Advocate Mr. N.A. Pandya on behalf the petitioner and learned Advocate Mr. K.M. Patel with learned Advocate Mr. Dipak R. Dave on behalf of respondent Nos. 1 and 3.

2. In the present petition, the petitioner has challenged the order passed by the Industrial Court in Appeal (IC) No. 18 of 2001 dated 9-3-2006 whereby the Industrial Court has allowed the appeal filed by the respondents and declared that by notice dated 4-5-1996, the change is considered to be illegal which requires to be withdrawn and re-transferred the respondents workmen to the original place and post.

3. According to petitioner, on 4-5-1996, the respondent workmen were working in the Crimping Department of the petitioner company transferred to the Twisting Department as the Twisting Operator by a written order. The respondents have challenged the said order by way of Original Application No. 40 of 1996 before

the Labour Court, Surat. The Surat Silk Mills Union also filed Application No. 26 of 1996 regarding the same dispute. On 6-1-1997, the said application came to be decided. Thereafter, the respondents had filed Revision Application Nos. 2 of 1987 and 4 of 1987 against the order passed by Labour Court, Surat which were admitted partly and the main application was remanded back to the Labour Court, Surat. Thereafter, the petitioner filed a writ petition being Spl.C.A. No. 9139 of 1999 before this Court and matter was remanded back to the Labour Court with a direction for fresh hearing. The Labour Court, after giving equal opportunity to the parties to produce the evidence, passed the order dismissing the Original Application Nos. 22 of 1996 and 26 of 1996. The respondents then filed Appeal (1C) No. 18 of 2001 before the Industrial Court, Surat against the order of the Labour Court. The Industrial Court, Surat by its judgment and order dated 9-3-2006 has held that the transfer of the respondents from Crimping Department to Twisting Department was illegal on the ground that the transfer was not a mutual transfer in both the departments and that the petitioner company had failed to comply with the requirements under Item Nos. 1 and 2 of Schedule II of the Bombay Industrial Relations Act, 1946 and that the respondents should be shifted to their original posts.

4. This Court has issued notice to the respondents and the respondents are appearing and the matter is at admission stage.

5. Learned Senior Advocate Mr. Mihir Thakore submitted that this being an industrial matter covered by Schedule III, Item No. 2, and therefore, assignment of work and transfer of workers within the establishment read with Section 42 of the Act. He submitted that u/s 42 of the Act, notice of change is necessary by the employer intending to effect any change in respect of an industrial matter specified in Schedule II shall give notice of such intention in the prescribed form to the representative employees. Therefore, intention of the employer in respect to Item No. 2 is very important and material. However, he submitted that the decision taken by the employer is not covered by Item Nos. 1 and 2 of Schedule II, but it covered by Item No. 2 of Schedule III. According to him, the decision of transferring in all 31 workmen from one department to another department may have an adverse consequences such as reduction or increase in the departments. But for that, the employer is not duty bound to follow the procedure as required u/s 42(1) of the Act. He also submitted that because of the transfer, the service condition is not changed and same is not having any adverse impact or effect to the respondents workmen, and therefore, when there is no adverse consequences because of the decision taken by the employer in transferring certain workers from one department to another, then certainly, the industrial matter is covered by Item No. 2 of Schedule III of the Act and for that, no notice of change is necessary to be given by the employer. Therefore, the finding given by Industrial Court is contrary to law and decision given by the Labour Court is correct. He also submitted that Industrial Court has committed gross error in setting aside the order passed by Labour Court, Surat. He relied upon the decision of the Bombay High Court in case *Jilajit Ramnandan Chaudhary and Ors.*

v. Dawn Mills Ltd. and Ors. reported in 2003 (99) FLR 184 and submitted that there is neither any monetary loss to the petitioners nor there is change in service conditions of the petitioner on account of transfer from one department to another and the findings arrived at in the regard without being clearly borne out from the record, do no warrant interference in writ jurisdiction. Therefore, he submitted that identical facts were examined by the Bombay High Court wherein it has been held that there is no change in service condition, there is no unfair labour practice adopted by the employer on account of transfer of employees, then there is no need to comply with the provisions of Section 42(1) of the Act by the employer because otherwise Schedule III, Item No. 2 permits to the employer to transfer the employee from one department to another department.

6. He also emphasized that there is no strength of employees is decided by any agreement either in crimping department or twisting department. He relied upon certain observations about not having any evidence, about number of persons or post in particular department which ultimately reduced or increased because of the transfer of the employees. He read over Para 8 of decision of Industrial Court and submitted that Industrial Court has committed gross error considering it illegal change and also come to the conclusion that industrial matter is covered by Item No. 1, Schedule II. In short, his submission is that Industrial Court has committed gross error in allowing the appeal filed by the respondents.

7. He also submitted that in respect to appellant Nos. 4, 6, 12, 14, 23 and 21 have settled the matter with the petitioner and appellant No. 13 has retired, and therefore, those employees are not entitled the benefit of the order passed by Industrial Court as that aspect is already made clear by the Industrial Court, Surat.

8. Learned Advocate Mr. K.M. Patel appearing on behalf of respondents submitted that it is not merely a transfer due to administrative reasons but in this case, first management has decided or is having intention to effect the change in respect to Item Nos. 1 and 2 of Schedule II. The intention of the employer to transfer the employees in respect to industrial matter is covered by Item Nos. 1 and 2, and thereafter, an order of transfer has been issued by the petitioner on 4-5-1996. Therefore, he submitted that Industrial Court has rightly appreciated the legal aspect of the matter and considered Section 42 read with Schedule II Item Nos. 1 and 2 and transferred the consequences of the intention which has been materialized by issuing individual transfer order in respect to each employee from crimping department to twisting department by transferring 31 employees which is having the effect, but reduction will be of permanent or semi-permanent character and the number of posts or persons employed in one department and in other department to increase permanent or semi-permanent number of employees employed which covered both Item Nos. 1 and 2 of Schedule II of Section 42 of the Act. In short, his submission is that petitioner first decided or intended the reduction in crimping department in the strength of employees working and increase in the twisting department from the strength in

which the employees were working. Therefore, the decision of employer to reduce the strength of permanent employee from crimping department and to increase the strength of permanent employee in twisting department when normally from crimping department to twisting department, the transfer is not permissible because in both the department, nature of job and work are altogether different, and therefore, this being not merely a transfer, but it is a decision of the employer intending to reduce strength from one department to increase the strength to another department. So, learned Advocate Mr. Patel submitted that industrial matter covered by Item Nos. 1 and 2 of Schedule II and for which, notice of change is necessary which is not given by the petitioner. Therefore, the Industrial Court has rightly examined the issue after considering the relevant provisions of law on the subject and for that, according to him, no interference is required by this Court.

9. Further, he relied upon the decision of Division Bench of the Bombay High Court in case of Co-operative Bank Employees Union v. Yeshwant Sahakari Bank Ltd. and Ors. reported in 1993 (I) LLJ 741. He submitted that the Division Bench's judgment is 1-10-1992 and the decision which has been relied by learned Senior Advocate Mr. Thakore of learned single Judge of the Bombay High Court wherein Division Bench's decision of the Bombay High Court has not been taken into account or not considered and that decision is based only on factual aspect. Relying upon the decision of Division Bench of the Bombay High Court, learned Advocate Mr. K.M. Patel submitted that Sub-section (1) of Section 42 of the Act casts three obligations on the employer, if he intends to effect any change in any industrial matter enumerated in Schedule II. Learned Advocate Mr. Patel relied upon Paras 17, 18, 20 and 24 are quoted as under:

17. The objects of the two statutes under consideration, viz., the B.I.R. Act and the Industrial Disputes Act, are dissimilar, the former is preventive, the latter curative. As indicated in the preamble of the B.I.R. Act, the Act is intended "to regulate the relations of employer and employees, to make provision for settlement of industrial disputes and to provide for certain other purposes". The Industrial Disputes Act, 1947 is intended "to make provision for the investigation and settlement of industrial disputes, and for certain other purposes". While the B.I.R. Act makes elaborate provisions for regulating industrial relations, greater emphasis is laid on dispute resolution under the scheme of the Industrial Disputes Act. Though, there are also provisions with regard to dispute resolution in the B.I.R. Act, the emphasis is not on them. The B.I.R. Act being concerned with the larger issue of industrial relations, there is the concept of a "representative of employees" under this Act and a special status has been given to the representative of employees. This paramount status even includes the right to act to the exclusion of or against the wishes of an individual, affected employee in the larger interests of the employees in the industry (See, in this connection, the decision of the Supreme Court in Girja Shankar Kashi Ram Vs. The Gujarat Spinning and Weaving Co. Ltd., followed by Santuram Khudai Vs. Kimatrai Printers and Processors Pvt. Ltd. and Others, Concepts of industry-wise

representation and "representative of employees" are conspicuously absent in the scheme of the Industrial Disputes Act. It is for this reason that Section 9A of the Industrial Disputes Act requires a notice of change to be given, in advance, to the workmen, who are "likely to be affected" by a change in the conditions of service applicable to them in respect of any matter specified in the Fourth Schedule, before such change can be brought about.

18. When one turns to Section 42(1) of the B.I.R. Act, one discerns a triple obligation on the employer who intends to effect a change with regard to any industrial matter enumerated in Schedule II. The first and primary obligation is to give a notice of the intended change to the "representative of employees". The second obligation is that a copy of such notice be sent to the statutory authorities, and the third, that a copy of such notice is to be displayed at the conspicuous place where "the employees affected" by the change are required to work. The thrust in Sub-section (1) of Section 42 is on the "representative of employees" and not on the employees themselves. This is designedly so as to be in consonance with the general scheme and legislative policy of the Act. The expression "representative of employees" has been defined in Section 3(32) to mean a representative of employees entitled to appear or act as such u/s 30. Section 30 of the B.I.R. Act gives the hierarchy of such representatives of employees, the representative Union for industry being given the primary and paramount status. A conspectus of the provisions of the B.I.R. Act, would therefore, fortify the conclusion that the notice of change required to be given under Sub-section (1) of Section 42 is primarily intended for consideration of the representative of employees. We are therefore, unable to accept the line of thinking reflected in Bombay Suburban Electric Supply's case (*supra*) that the construction of Sub-section (1) of Section 42 must run parallel to or draw inspiration from the construction of Section 9A of the Industrial Disputes Act.

20. There is another aspect of the matter, which appears to us to be clinching. Having cast the obligation upon the employer under Sub-section (1) of Section 42 to give a notice of change, the Act also provides remedies in case of failure. u/s 79(1), not only is an employee "directly affected" entitled to move an application before the Labour Court for seeking the relief of declaration of an illegal change, but the right of moving such an application has been specifically conferred upon the Labour Officer and the representative Union. Apart from and irrespective of the right conferred upon the employee directly affected", which we may take to mean prejudicially affected, the Labour Officer and the representative union - neither of whom, obviously, could ever be prejudicially or adversely affected by any illegal change made by the employer-have been independently conferred with the right of moving the statutory forum for appropriate relief. In respect of the offence u/s 106(1), the Labour Court is entitled to take cognizance of any offence, upon a complaint of fact constituting such offence made by the person affected thereby or a representative Union or on a report in writing by the Labour Officer. Here again, we find that, apart from the person "affected" by the illegal change, the representative Union and the

Labour Officer, neither of whom, obviously, can be directly affected by the illegal change, have been specifically conferred with the power of launching the prosecution into motion. These remedial provisions u/s 79 and 82 also lead us to the conclusion that the right granted to the representative employee is independent of the right granted to the employees prejudicially or adversely affected thereby. Correspondingly, therefore, the right of the representative of employees to receive a notice of change under Sub-section (1) of Section 42 and the obligation of employer to give such a notice of change is spelt out, independent of any adverse effect upon employees by the intended change, as long as it is a change with regard to an industrial matter specified in Schedule II of the B.I.R. Act.

24. To sum up, we are of the view that Sub-section (1) of Section 42 of the B.I.R. Act casts three obligations upon the employer, if he intends to effect any change in any industrial matter enumerated in Schedule II. The first, to issue a notice of change in the prescribed form on the representative of employees. The second, to forward a copy of such notice of change to the statutory authorities specified therein. The third, to affix a copy of such notice at a conspicuous place, where the employees, affected by the intended change, are at work. Perhaps, the employer may be relieved of the last obligation, in case the employees are not prejudicially or adversely affected by the proposed change. We are, however, unable to accept the view that the employer can be relieved of the other two obligations also if not employee is likely to be prejudicially or adversely affected.

9.1 Learned Advocate Mr. Patel emphasizes that because of the transfer, the nature of job and work is changed. Therefore, it has caused prejudice to the concerned employees and adverse effect in service.

10. I have considered the submissions made by both the learned Advocates and have also perused the order passed by Industrial Court, Surat as well as the Labour Court, Surat. I have also considered the decision of the Division Bench of the Bombay High Court and decision of the learned single Judge of the Bombay High Court as referred and relied by both the learned Advocates. The Industrial Court has considered in Para 8 and discussed the issue that Item Nos. 1 and 2 of Schedule II are covered in such transfer of employees from crimping department to twisting department. No doubt, the Industrial Court has examined the finding given by Labour Court that there was no strength decided by agreement in respect to both crimping department and twisting department but that finding is considered to be contrary to record and is incorrect. There is no dispute between the parties that from crimping department to twisting department, the transfer was made, but the question is that it has been rightly examined by Industrial Court that because of this transfer, in one department strength is increased and in another department, strength is decreased, meaning thereby, that in permanent strength of the employee from crimping department are to be reduced and in twisting department, that strength will be increased and there is no corresponding transfer between two departments because nature of duty and

job are totally different. The Industrial Court has also considered that what is the meaning of illegal change and decision of Division Bench of the Bombay High Court which has been relied by learned Advocate Mr. K. M. Patel before this Court. The Industrial Court has also considered other decisions on the subject. But the Industrial Court has also considered that it may not be having any adverse effect to the service condition or cause prejudice to the concerned employees. However the obligation cast upon the employer if they intended to change, either to reduce the strength of the department or to increase the strength of the department, in both the occasions, the notice of change is must and it should be given by employer u/s 42(1) of the Act. The Industrial Court has also considered the relevant provisions of Section 46(4) which amounts to an offence in case when illegal change has been made by the employer. Ultimately, the Industrial Court has come to conclusion that petitioner-employer has effected illegal change by reducing the strength in crimping department by transferring 31 permanent employees to the twisting department by increasing the strength of permanent employees without giving notice of change to the representative Union as required u/s 42(1) of the Act, and therefore, the Industrial Court has set aside the order passed by Labour Court, Surat which is having contrary finding and come to the conclusion that transfer of 31 employees by order dated 4-5-1996 amounts to illegal change pertaining to Item Nos. 1 and 2 of Schedule II, and therefore, directed to the petitioner to restore the respondent employees to original place and post and give them work accordingly from twisting department to crimping department. According to my opinion, the Industrial Court has rightly examined the issue and rightly allowed the appeal filed by the respondents. The decision given by the Industrial Court is after considering the legal aspect of Section 42(1) read with Schedules II and III of the Act. The Industrial Court has rightly considered the difference between Schedules II and III, Item Nos. 1 and 2 of Schedule II and Item No. 2 of Schedule III and find out the real intention of the employer and come to the conclusion that it is not merely a transfer of 31 employees, but an intention of the employer to reduce the strength from crimping department and increase the strength in twisting department which fall within Item Nos. 1 and 2 of Schedule II of the Act which requires notice of change, which is not given, and therefore, it amounts to illegal change. Therefore, it has been rightly set aside by the Industrial Court.

11. Therefore, according to my opinion, the Industrial Court has not committed any error which requires interference by this Court. 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.

12. Hence, there is no substance in the present petition. Present petition is dismissed accordingly.