

**(2011) 05 GUJ CK 0132**

**In the Gujarat High Court**

**Case No :** Letters Patent Appeal No. 1932 of 2004 in Special Civil Application No. 2276 of 2004 and Civil Application No. 8526 of 2004 in Letters Patent Appeal No. 1932 of 2004 and Civil Application No. 434 of 2011 in Letters Patent Appeal No. 1932 of 2004

Gujarat Electricity Board

APPELLANT

Vs

Kodarji Babarji Dabhai

RESPONDENT

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**Date of Decision :** 06-05-2011

**Acts Referred:**

Gujarat Electricity Board Regulations — Regulation 113  
Industrial Disputes Act, 1947 — Section 17B

**Citation :** (2011) 05 GUJ CK 0132

**Hon'ble Judges :** V.M. Sahai, J;G.B.Shah, J

**Bench :** Division Bench

**Advocate :** Lilu K. Bhaya, for the Appellant; P.H. Pathak, for the Respondent

**Final Decision :** Dismissed

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**Judgement**

V.M. Sahai, J.—This Letters Patent Appeal under Clause 15 of the Letters Patent has been filed by the Appellant challenging the order of the learned Single Judge dated 22.6.2004 passed in Special Civil Application No. 2276 of 2004 by which the Award of the Labour Court dated 30.6.2003 passed in Reference (LCK) No. 228 of 1988 has been affirmed. The Labour Court has directed to reinstate the Respondent workman on his original post with 50% back wages.

2. Brief facts of the case are that the Respondent was appointed as a temporary Helper in the year 1970 in Gujarat Electricity Board, Kadi. He was regularly appointed on 10.2.1972. According to the Appellant, in the past, various notices had been issued to the Respondent for unauthorised absence from duty. Since the Respondent was absent from duty unauthorisedly, therefore, his services came to be terminated by order dated 4.7.1987 by the Appellant exercising powers under Regulation 113 of the Board, as inspite of notices served on the Respondent, he did not join his duty.

In para-3 of the memo of Appeal, it has been stated that the Respondent was continuously absent from 28.1.1987 to 4.7.1987. A notice was issued to the Appellant on 5.2.1987 informing him that he was absent from duty without leave from headquarters and he was called to give his explanation. Another notice was sent to him on 10.4.1987. It was informed by this notice that by merely writing a post card and seeking permission of leave, was not sufficient as the Respondent remained absent and he did not produce any medical certificate nor he reported for duty. The explanation of Respondent was called and he was directed to be present on duty. Another notice was issued on 6.6.1987 informing the Respondent that his continuous absence from duty means that he is not interested in continuing with service. He was given last warning and called upon to remain present on duty. Since the Respondent, inspite of last notice did not join his duty, therefore, he was terminated from service by order dated 4.7.1987.

3. The learned Single Judge dismissed the writ petition filed by the Appellant on the ground that the controversy involved in the writ petition was covered by the Division Bench decision of this Court in Gujarat Electricity Board v. Girishbhai Valjibhai Chudgar decided on 2.7.2003 in LPA No. 652 of 2002 and this fact was conceded by the learned Counsel for the Appellant appearing for the Board before the writ Court, that the facts of the case before the Division Bench and in the instant case were similar, therefore, the learned Single Judge dismissed the writ petition filed by the Appellant. In Appeal, Gujarat Electricity Board has engage another Counsel on its panel who had filed this Appeal.

4. We have heard Ms. L.K. Bhaya, learned Counsel appearing for the Appellant and Mr. P.H. Pathak, learned Counsel appearing for the Respondent. Though the matter was listed for consideration of Civil Application u/s 17B of the Industrial Disputes Act, 1947, with the consent of the Counsel for the parties, we have taken the main Appeal for final disposal.

5. The learned Counsel for the Appellant has urged that the learned Single Judge has dismissed the writ petition as the learned Counsel appearing for the Board before the writ Court had conceded that the facts before the Division Bench in the case of Gujarat Electricity Board v. Girishbhai Valjibhai Chudgar were identical to the instant case and on that ground, the writ petition has been dismissed. She urged that merely because learned Counsel who was appearing before the writ Court on behalf of the Appellant, had conceded, on that basis, the learned Single Judge could not dismiss the writ petition and the learned Single Judge was required to decide the matter on merits. She urged that under service Regulation 113, the Respondent has rightly been dismissed from service and it was not necessary for holding any departmental inquiry proceedings.

6. On the other hand, learned Counsel for the Respondent has urged that merely because the Appellant was absent from duty without any leave, he could not be summarily dismissed without following due procedure of law as prescribed under Gujarat Electricity Employees Conduct, Discipline and Appeal Procedure, wherein, in Clause 6, the procedure has been prescribed for holding a departmental

inquiry and this procedure was required to be followed for taking action against the Respondent, but he could not be terminated from service under Regulation 113.

7. On the arguments of the learned Counsel for the parties, the first question that arises for consideration is whether on the basis of concession given by the learned Counsel, the learned Single Judge could dismiss the writ petition and if he had dismissed the writ petition on the basis of the concession given by the Counsel of the Appellant, is it open to the Appellant to challenge the order of the learned Single Judge in this Appeal? The concession given by the learned Counsel for the Appellant who appeared before the writ Court is not binding on the Appellant. Normally, wrong concession given by the learned Counsel on pure question of law is not binding upon the parties. The Apex Court in *B.S. Bajwa and Anr. v. State of Punjab and Ors.* (1998) 2 SCC 525, in para-6 has held as under:

6. ...However, the Division Bench, after reaching the above conclusion, proceeded to grant the benefit of a much earlier date, namely, 6.4.1964 as the date of appointment on the basis of a concession of the Additional Advocate General made therein without considering the effect of same or of taking into account the inconsistency with its earlier finding. We have no doubt that the concession on this point, being one of law, it cannot bind the State and, therefore, it was open to the State to withdraw as it has been done by filing a review petition in the High Court itself. That apart that concession made on behalf of the State cannot bind D.P. Bajaj and Jagir Singh or anyone else who would be adversely affected thereby....

8. In *Union of India and Ors. v. Mohanlal Likumal Punjabi and Ors.* (2004) 32 SCC 628, in paras-8 and 9, the Apex Court has held as under:

8. We shall first deal with the effect of concession, if any, made by leaned Counsel appearing for the present Appellants before the High Court. Closer reading of the High Court's order shows that the High Court took the view that in view of the revocation of the order on 19.12.1994 and the order passed by the High Court on 11.1.1995, no further order could have been passed u/s 7 of SAFEMA. After having expressed this view, the so-called concession is recorded...

8. In *Uptron India Ltd. v. Shammi Bhan* it was held that a case decided on the basis of wrong concession of a Counsel has no precedent value. That apart, the applicability of the statute or otherwise to a given situation or the question of statutory liability of a person/institution under any provision of law would invariably depend upon the scope and meaning of the provisions concerned and has got to be adjudged not on any concession made. Any such concessions would have no acceptability or relevance while determining rights and liabilities incurred or acquired in view of the axiomatic principle, without exception, that there can be no estoppel against statute.

9. In *Union of India (UOI) and Another Vs. S.C. Parashar*, in para-13, the Apex Court has held as under:

13. ...The concession of the learned Counsel appearing for the Appellant before the High Court was apparently erroneous. It is now well settled that wrong concession made by a Counsel before the Court cannot bind the parties when statutory provisions clearly provide otherwise....

10. The Apex Court in U.P. Power Corporation Ltd. Vs. Ayodhya Prasad Mishra and Another, in para-14 has held as under:

14. The learned Counsel for the Appellant Corporation contended that the Counsel appearing for the Corporation had no power or authority to make any concession on behalf of the Corporation and no order could have been made on the "so-called" concession by the advocate for the Corporation. It was urged that even otherwise, it is well settled that there can be no concession on a question of law and, hence, even if such concession was made, it was of no avail. Since the writ petition had no right to get promotion, notwithstanding concession or statement by the Counsel for the Corporation, neither could mandamus have been issued by the High Court nor could direction have been given to the Corporation to offer first vacancy of Superintending Engineer to the writ Petitioner.

From the aforesaid discussion of the Apex Court, it is clear that the concession given by the Counsel or conceding a point by a Counsel would not have any binding effect if the concession has been made on the question of law. Therefore, the argument of the learned Counsel for the Respondent that the concession would bind the Appellant and the appeal deserves to be dismissed on the ground that before the learned Single Judge, the Appellant had conceded that the Division Bench decision applied to the facts of the case and the appeal against such an order of the learned Single Judge is not maintainable, is liable to be rejected. The appeal filed by the Appellant is maintainable as it is necessary to find out as to whether the concession given by the learned Counsel for the Appellant, who appeared before the writ Court was on the question of law.

11. We have proceeded to hear learned Counsel for the parties keeping aside the concession given by the Counsel for the Appellant who appeared before the writ Court on merits of the case. It is necessary to extract Service Regulation 113 as under:

113. The continued absence from duty or overstay, in spite of warning, to return to duty shall render the employee liable to summarily discharge from service without the necessity or proceedings under the Gujarat Electricity Board, Conduct, Discipline and Appeal Procedure.

The main thrust of the learned Counsel for the Appellant is based on the decision of the Apex Court in Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani, wherein the Apex Court, in absence of any challenge to the validity of Regulation 113 considered the scope of Regulation 113 and held as under:

5. ...Regulation 113 confers wide powers on the authorities to summarily discharge an employee from service, if he continues to be absent from duty in an unauthorised manner and refuses to join his duty even after warning. Under the disciplinary rules detailed procedure is required to be followed for removing an employee from service but Regulation 113 provides for summary discharge from service. Before this power is exercised, two conditions must be satisfied; Firstly, the employee must be found to be absent from duty without leave or overstaying the period of sanctioned leave, and, secondly, he failed to join his duty even after a warning. The object and purpose of giving warning is to remind the delinquent employee that if he continues to be absent from duty he would be liable to action under Regulation 113 and to afford him an opportunity to make amends by joining his duty. If even thereafter he fails to join duty, his services are liable to be terminated by an order of discharge....

From the law laid down by the Apex Court, it is clear that it is open to the Appellant to terminate the service of an employee if he continuously remains absent from duty or overstays the period of sanctioned leave and in spite of warning, he fails to return on duty, in such situation, he could be discharged suddenly from service, without complying with the procedure prescribed for taking disciplinary action under Gujarat Electricity Board Conduct, Discipline and Appeal Procedure. The Apex Court has further held that a warning need not be in a particular form, the object and purpose of warning as contemplated by Regulation 113 is to remind the delinquent employee that his continued unauthorised absence from duty was liable to result in discharge of his service. But before the power under Regulation 113 could be exercised, three conditions must be satisfied:

- (i) The employee must be found to be absent from duty without leave or overstaying the period of sanctioned leave;
- (ii) He failed to join his duty even after the warning;
- (iii) An opportunity should be afforded under Regulation 113 to the employee to make amends by joining his duty and even if thereafter, he fails to join the duty, then his service is liable to be terminated.

12. The facts of the instant case are that a notice was issued to the Respondent by the Appellant on 5.2.1987, but this notice has not been brought on record either of the writ petition or of this Appeal. Alongwith the writ petition, notices dated 13.5.1987 and 26.5.1987 had been filed which were issued to the Respondent mentioning therein that last warning was issued to him to join his duty as the Respondent was a permanent helper, but was very irregular in service and no improvement was found in his conduct. Alongwith the appeal, notice dated 6.6.1987 also mentions that last warning is issued to the Respondent that he should join his duty within seven days from the receipt of the letter. It was also mentioned in the notice that the Respondent was absent from duty from 4.7.85 to 19.8.85; 1.12.85 to 27.1.86; 20.2.86 to 19.4.86; 22.6.86 to

7.7.86; 21.7.86 to 14.9.86; 28.1.87 to 5.2.87; 5.3.87 to 31.3.87 and 1.4.87 to 30.4.87. The Appellant has terminated the services of the Respondent under Regulation 113 treating that he was continuously absent from duty from 1.5.87 and the Respondent was also black-listed from future employment under the Board or its associate office. From ground No. 3 of the memo of appeal, it appears that the Respondent has sent a post card seeking sanction of leave, but it did not accompany any medical certificate, but whether leave was sanctioned by the Appellant or not had not been stated. Assuming that the Appellant was absent from duty with effect from 1.5.87 to the date of the impugned order dated 4.7.87, and he was continuously absent from the earlier dates, in our opinion, for taking action under Service Regulation 113, the Appellant was required to be issued a warning. The notice sent to the Respondent by registered post mentioned that last warning was given to the Respondent. Though these letters were sent by registered post had been returned to the Appellant by endorsement of the postal department "refused", but the presumption in law would be that the refusal would amount of service of these notices and it would be deemed in law that the warning notice was served on the Respondent by the Appellant.

13. Another important aspect of the matter which arises for consideration is for taking action against an employee under Service Regulation 113, the notice must mention that the Respondent is proposing to take action against the employee under Regulation 113 and if he does not join his duty, inspite of last warning, then his service is liable to be terminated summarily without holding any departmental proceedings under Gujarat Electricity Board Conduct, Discipline and Appeal Procedure. Absence of any mention of Regulation 113 in the notice, would render the notices issued to the Respondent on 13.5.87, 26.5.87 and 6.6.87 to be bad in law and invalid as the employee cannot be taken by surprise. An employee may be under a bonafide belief that as the notice issued to him mentioned that the action will be taken against the Respondent under Rules and Regulations of the Board. The Respondent remained under an impression that the action would be taken against him for unauthorised absence from duty by holding a regular departmental disciplinary proceedings under Gujarat Electricity Board Conduct, Discipline and Appeal Procedure. The Respondent was not in a position to understand that he would be discharged from service by adopting summary procedure as provided by Regulation 113. In absence of any mention of Regulation 113 in any of the notices issued by the Appellant to the Respondent, the entire proceedings initiated by the Appellant stands vitiated. Therefore, the Apex Court decision in Gujarat Electricity Board (Supra) would not help the Appellant inasmuch as in the case before the Apex Court, show cause notice was issued to the employee on 18.4.1974 clearly mentioned therein that why action may not be taken against him under Service Regulation 113.

14. For the aforesaid reasons, we do not find that various notices issued by the Appellant to the Respondent without mentioning that action would be taken under Regulation 113 can be held to be valid notices on the basis of which,

action could be taken against the Respondent by the Appellant. Therefore, the termination of service of the Respondent by the Appellant Board was not in conformity with service Regulation 113. We are of the considered opinion that in absence of any valid notice under Regulation 113 issued by the Appellant, if the Respondent has failed to join duty, his service was not liable to be terminated by the Appellant by adopting summary discharge of service procedure as provided by Regulation 113.

15. For the reasons aforesaid, we do not find any illegality in the order passed by the learned Single Judge or by the Labour Court. This Appeal fails and is accordingly dismissed.

As the Appeal is dismissed, Civil Applications do not survive and are accordingly disposed of.