

**(2017) 02 GUJ CK 0005**

**In the Gujarat High Court**

**Case No :** Special Civil Application No. 4387 of 2008

Gujarat Labour Welfare Board

APPELLANT

Vs

Hiteshbhai M Bhatt

RESPONDENT

**Date of Decision :** 08-02-2017

**Acts Referred:**

Industrial Disputes Act, 1947 — Section 2(j), Section 25-F

**Citation :** (2017) 2 LLJ 205

**Hon'ble Judges :** Mr. K.M. Thaker, J.

**Bench :** Single Bench

**Advocate :** Ms. Khyati P Hathi, Advocate, for the Petitioner No. 1; Mr. Ph Pathak, Advocate and Notice Served, for the Respondent No. 1

**Final Decision :** Partly Allowed

## Judgement

Mr. K.M. Thaker, J.(Oral)&mdash;The petitioner ? Gujarat Labour Welfare Board ("the Board" for short) has challenged award dated 21.9.2007 passed by the learned Labour Court at Rajkot in Reference (LCR) No.26 of 1994 whereby the learned Labour Court directed the Board to reinstate original claimant and to pay 100 days" wages for every year from the date of termination until the date of award within 30 days and the Court further directed that if the amount is not paid within 30 days, then the Board should pay the amount to the workman with interest @ 12% for the period of delay. The learned Labour Court also directed the Board to pay Rs.8,000/- towards costs to the claimant. Feeling aggrieved by the said directions the Board has taken out present petition and challenged the award.

2. So far as the factual background is concerned, the respondent herein (original claimant) raised industrial dispute with the allegation that the Board terminated his service illegally and without following procedure prescribed by law. Appropriate Government referred the dispute for adjudication to learned Labour Court. The dispute came to be registered as Reference (LCR) No.26 of 1994.

2.1 In his statement of claim, the claimant alleged that he was working as Peon with the Board since May 1990 and that he was permanent employee and that he had worked for more than 240 days in each year. He also alleged that the Board did not pay bonus and was not granting benefit of earned leave or weekly off. He also alleged that when his service came to be discontinued, the Board did not pay retrenchment compensation, notice pay and also did not grant opportunity of hearing. He also alleged that after he was terminated, the Board engaged other employees. According to the claimant, his service came to be terminated in May 1993 and thereafter he had served demand notice on 2.7.1993, however, the Board did not reinstate him. With the said allegation, the claimant demanded that he should be reinstated in service with all benefits.

2.2 The Board opposed the reference and resisted the demand. The Board contended that its activities do not fall within purview of Section 2(j) of the Industrial Disputes Act, 1947 ("the Act" for short) and that it is not an industry and that, therefore, the reference is not maintainable. On merits, the Board contended that the claimant was working on daily wage basis and that he was not permanent employee and he had never worked for 240 days in any year. The Board denied other allegation by the claimant. The Board also contended that the claimant was engaged on need basis and since work was not available, the Board did not engage him and that, therefore, it cannot be said that the Board terminated the claimant in service. In its reply, the Board mentioned the details of attendance of the claimant to support the contention that the claimant had not worked for 240 days in any year and that he was not engaged continuously or regularly. With such details, the Board submitted that the reference may be rejected.

2.3 Upon completion of the pleadings of both sides, the learned Labour Court received and recorded evidence from the claimant and the Board. After the parties concluded their evidence, the learned Labour Court heard rival submissions from the contesting parties and then the learned Labour Court passed impugned award with above mentioned directions.

3. Ms. Hathi, learned advocate for the Board contended that the learned Labour Court failed to appreciate that the Board cannot be termed "industry". She submitted that the activities of the Board are not carried on with motive of profit and any manufacturing or commercial activity are also not undertaken by the Board and therefore, there is no justification in considering the Board as industry within the purview of Section 2(j) of the Act. She submitted that the conclusion that the Board falls within the purview of Section 2(j) of the Act, is incorrect. She further submitted that the reference should not have been entertained and ought to have been rejected in light of such preliminary objection. She assailed the impugned award on the ground that the claimant did not establish that he had worked for 240 days and that, therefore, the learned Labour Court could not have held that the provisions under Section 25F or Section 25G were attracted and/or that the Board committed breach of the said provisions. She submitted

that the claimant was engaged only on daily wage and temporary basis and he was not permanent employee and that, therefore also there was no justification in directing the Board to reinstate the claimant. She also submitted that the provisions under the Gujarat Rural Employment Scheme, 2006 framed under Section 4 of the National Rural Employment Guarantees Act, 2005 are not applicable to the Board and that, therefore, the direction to pay 100 days wages for each year from the date of termination till the date of award is arbitrary, without jurisdiction and unjustified. She also submitted that the direction to pay 12% interest if the amount is not paid on or before 1.11.2007, is also arbitrary and unjustified and that, therefore, the directions passed by the learned Labour Court deserve to be set aside. She also submitted that the learned Labour Court has committed error in holding that the Board committed breach of Section 25F and/or Section 25G. She also submitted that even the learned Labour Court accepted that the claimant had not completed attendance of 240 days, but the learned Labour Court took into consideration public holidays, weekly off and other holidays to hold that the claimant had worked for 240 days. With such submissions, she submitted that the award may be set aside and the petition may be allowed.

4. Mr. Pathak and Ms. Kamani, learned advocates opposed the petition. Learned advocates for the claimant submitted that the learned Labour Court has not committed any error in holding that the Board falls within the purview of Section 2(j). Learned advocates also submitted that the claimant was engaged regularly and continuously from May 1990 to April 1993 and that the claimant had worked for 240 days in each year and that the findings recorded by the learned Labour Court are not incorrect or unjustified. Learned advocate for the claimant also contended that the claimant had mentioned names of the persons who were engaged after his service was terminated and that the Board had undisputedly not paid retrenchment compensation and had not complied the conditions prescribed under Section 25F and that, therefore, there are no error in the findings recorded by the learned Labour Court and the Board committed breach of Section 25F and Section 25G. Learned advocate for the claimant also submitted that there is no error in the direction to pay 100 days wages for each year for the period of termination and/or the direction to pay Rs.8,000/towards costs. He submitted that the direction to pay interest in the event of delay in payment of the amount as directed by the learned Labour Court does not warrant interference. According to learned advocate for the claimant, there is no error in the award or final directions.

5. I have considered rival submissions as well as material available on record and the impugned award.

6. According to the Board, its activities are not commercial activity and the Board is also not engaged in manufacturing activity and that, therefore, the activities of the Board cannot be termed "industry" and the Board would not fall within purview of Section 2(j) of the Act. Any debate on this ground virtually does not

survive after the decision in case of Bangalore Water Supply and Sewerage Board v. R. Rajappa [(1978) 2 SCC 213] and subsequent decisions. The Board had raised preliminary objection against maintainability of the reference on the ground that the Board would not fall within purview of Section 2(j) and therefore, the reference is not maintainable. The main plank of the contention was that the Board undertakes activities mentioned under Section 7 of the Bombay Labour Welfare Funds Act, 1953 and the said activities are neither industrial activity nor commercial activity and that, therefore, the Board cannot be considered as industry within the meaning of Section 2(j) of the Act. Therefore, it would be appropriate to take into account provisions of the Labour Welfare Fund Act. Section 2(1) provides that the Board means "Board constituted under Section 4 of the Act and the term "fund" is defined as the labour welfare fund contributed under Section 3 of the Act. The said Sections 3 and 4 of the Act read thus:

### "3. Welfare Fund. ?

[a] [(1) The State Government shall constitute a fund called the Labour Welfare Fund, and notwithstanding anything contained in any other law for the time being in force or in any contract or instrument, all unpaid accumulations shall be paid [b] [at such intervals as may be prescribed] to the Board, which shall keep a separate account therefor until claims thereto have been decided in the manner provided in section 6A, and the other sums specified in subsection (2) shall be paid into the fund.

(2) The Fund shall consist of

(a) all fines realised from the employees;

(b) [c] [unpaid accumulations transferred to the Fund under section 6A];

[d] [(bb) any penal interest paid under section 6B;]

[e] [(bbb) any contribution paid under section 6BB;]

(c) any voluntary donations;

(d) any fund transferred under subsection

(5) of section 7;

[f]

(e) any sum borrowed under section 8.

[g] [(f) any loan, grantinaid or subsidy paid by the State Government.]

(3) The sums specified in subsection (2) [h] [shall be paid, or collected by such agencies, at such intervals] and in such manner and the accounts of the Fund shall be maintained and audited in such manner as may be prescribed.

### 4. Board. ?

(1) [a] [The State Government shall, by notification in the Official Gazette constitute the Board for the whole of the State of Maharashtra for the purpose of administering the Fund, and to carry on such other functions assigned to the Board by or under this Act.] The Board shall consist of the [b] [following members, not exceeding twenty six in number], namely:?

????

(5) [f] [The Board shall be a body corporate by the name of the Maharashtra Labour Welfare Board] having perpetual succession and a common seal, with power to acquire property both moveable and immovable, and shall by the said name sue and be sued."

7. Section 7 of the Act prescribes that the fund shall vest in the Board and the fund amount shall be applied by the Board for the purpose of the activities mentioned under subsection (2) of Section 7. Section 12 of the Act empowers the Board to appoint Inspector so as to carry out regular or periodical inspection of the records of the factories and establishments to which the Act would be applicable. The said Section 12 reads thus:

"12. Appointment of Inspectors

(1) The State Government may appoint Inspectors to inspect records in connection with the sums payable into the Fund. [a] [Inspectors appointed, whether by a local authority or the State Government under the Bombay Shops and Establishment Act, 1948 (Bom. LXXIX of 1948), in relation to any area, shall be deemed to be also Inspectors for the purposes of this Act, in respect of establishments to which this Act applies, and the local limits within which such Inspector shall exercise his functions under this Act shall be the area for which he is appointed under the said Act.]

(2) Any Inspector may-

a) with such assistance, if any, as he thinks fit, enter at any reasonable time any premises for carrying out the purposes of this Act;

(b) exercise such other powers as may be prescribed."

8. The Government is authorised, by virtue of Section 15, to remove any person or staff of the Board.

9. Upon considering the provisions under Section 7 of the Act, this Court inquired with the learned advocate for the Board about the number of employees engaged by the Board and whether the Board has any branch offices spread over the State or not.

10. In reply, learned advocate for the Board informed this Court that the Board runs about 30 centres spread over the State in different towns, villages and cities of the State. She also informed this Court that at present 80 persons are employed by the Board and that the Board undertakes activities of running bal

mandir, undertaking, sports activities, education, etc. and to conduct various activities as contemplated under the Act, the Board engages employees in different categories, such as Senior Clerk, Junior Clerk, Bal Sevika, Peon, Cleaner, Shikshika (Teacher) and the said employees are usually appointed through Employment Exchange. Learned advocate for the Board also clarified that the service conditions of the employees are governed by provisions under the Gujarat Civil Services Rules.

11. When the said profile of the Board and the spectrum of the Board's activities are taken into account in light of the observation by Hon"ble Apex Court:

"(a) The consequences are (i) professions, (ii) clubs (iii) educational institutions (iv) cooperatives, (v) research institutes (vi) charitable projects and (vii) other kindred adventures, if they fulfil the triple tests listed in (supra), cannot be exempted from the scope of Section 2(j).

"(c) If, in a pious or altruistic mission, many employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre on asramites working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then the institution is not an industry even if stray servants, manual or technical, are hired. Such eleemosynary or like undertakings alone are exempt not other generosity, compassion, developmental passion or project."

[See: (1978) 2 SCC 213]

coupled with the fact that the Board runs and manages about 30 centres and engages about 80 employees whose service conditions are governed by the Civil Service Rules and since the Board, by virtue of Section 15 of the Act, is conferred with the authority to terminate the service of the staff / employees, it cannot be said that the activities of the Board do not fall within purview of the criteria mentioned by Hon"ble Apex Court in Part I (a) and/or (c) of paragraph No.140 in the decision in case of Bangalore Water Supply and Sewerage Board v. R. Rajappa [(1978) 2 SCC 213] the Board's contention viz that it cannot be termed "industry" cannot be accepted. In paragraph No.140 of the said decision, Hon"ble Apex Court has observed, inter alia, that:

"I.

140. "Industry as defined "in Section 2(j) and explained in Banerji's case has a wide import.

(a) Where (i) systematic activity, (ii) organized by cooperation between employer and employee (the direct and substantial element is chimerical); (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious, but inclusive of material things or

services geared to celestial bliss e.g. making, on a large scale prasad or food), prima facie there is an "industry" in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer employee relations.

(d) If the Organisation is a trade or business it does not cease to be one because of philanthropy animating the undertaking.

## II.

141. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.

(a) "Undertaking" must suffer a contextual and associational shrinkage as explained in Banerji and in this judgment; so also, service, calling and the like. This yields the inference that all organized activity possessing the triple elements in I (supra), although not trade or business, may still be "industry" provided the nature of the activity, viz. the employeremployee basis. Bears resemblance to what we find in trade or business. This takes into the fold of "industry" undertakings, callings and services, adventures" analogous to the carrying on of trade or business". All features, other than the methodology of carrying on the activity viz. in organizing the cooperation between employer and employee, may be dissimilar. It does not, matter, if on the employment terms there is analogy.

## III

142. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

(a) The consequences are (i) professions, (ii) clubs (iii) educational institutions (iv) cooperatives, (v) research institutes (vi) charitable projects and (vii) other kindred adventures, if they fulfil the triple tests listed in (supra), cannot be exempted from the scope of Section 2(j).

(b) a restricted category of, professions, clubs, cooperatives and even gurukulas and little research labs, may qualify for exemption if, in simple ventures, substantially and going by the dominant nature criterion, substantively no employees are entertained but in minimal matters, marginal employees are hired. without destroying the nonemployee character of the unit.

(c) If, in a pious or altruistic mission, many employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause, such

as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre on asramites working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then the institution is not an industry even if stray servants, manual or technical, are hired. Such eleemosynary or like undertakings alone are exempt not other generosity, compassion, developmental passion or project.

#### IV. The dominant nature test :

(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom Are not "workmen" as in the University of Delhi case or some departments are not "productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur, will be the true test. The whole undertaking will be "industry" although those who are not "workmen" by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone), qualify for exemption, not the welfare activities of economic adventures undertaken by Government or statutory bodies.

(c) Even in departments discharging sovereign functions if there are units which are industries and they are substantially severable, then they can be considered to come within section 2(j).

(d) Constitutionally and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby."

12. When the activity and event of the Board are considered in light of the above quoted observations by Hon"ble Apex Court, it becomes clear that thee is no scope or any room to entertain objection raised by the Board and to hold that the Board would not fall under Section 2(j) of the Act.

13. Since the activities of the Board cannot be covered under any of the exceptions carved out by Hon"ble Apex Court in above mentioned case and since the activities of the Board fall under and that, therefore, it has to be held that the Board is "industry" within purview of Section 2(j) of the Act.

14. In this view of the matter, the contention by the Board against the maintainability of the reference and the award on the ground that the reference should not have been entertained and ought to have been rejected and the award should be set aside, cannot be accepted and said contention deserves to be rejected.

15. So far as the findings of fact recorded by the learned Labour Court with

regard to the case of the claimant that he worked regularly and continuously with the Board from May 1990 to April 1993 and during each year he had worked for 240 days is concerned, it comes out from the written statement filed by the Board in response to the statement of claim of the claimant that he claimant was continuously engaged from May 1990 to April 1993. There is no break during the period from May 1990 to April 1993.

16. On this count, learned advocate for the claimant would, however, contend that though the claimant was engaged every month during the said period however actually the claimant was not engaged for all working days, i.e. for the entire month and every month during the period from May 1990 to April 1993. Learned advocate, so as to support her submissions, sought to rely upon the details of the claimant's attendance mentioned in the written statement and the reply by the claimant during cross-examination that he was engaged whenever work was available.

17. At this stage, it is necessary to take into account the case of the claimant viz. that he worked with the Board as Peon. The Board, on the other hand, asserted that the claimant was engaged as Cleaner. Neither side placed on record the appointment letter where under the claimant was engaged. The claimant, during his deposition before the learned Labour Court, also asserted that he was engaged as Peon. During the cross Page examination also, the claimant asserted that he was working as Peon. The Board had examined witness Mr. B.S. Patel and the Board's witness also stated that the claimant was engaged as Peon. When the witness of the Board stated that the claimant was engaged as and was working as Peon at Vankaner Centre of the Board he did not mention name of any other regular and permanent employee engaged as and working as Peon. Therefore, it would emerge that the claimant was the only Peon who was working at Vankaner Centre of the Board. From the deposition by the Board, it also emerges that after the claimant was discontinued, the Board had awarded the work (which the claimant was performing) to a contractor. Thus, the claim that the claimant was discontinued for nonavailability of work, is falsified by the statement by the Board's witness who stated during his deposition that the work which the claimant was performing, was subsequently outsourced and outside agency. Meaning thereby the work existed and the Board got the work carried out through outside agency.

18. In these circumstances, the Board's case that the claimant's service was discontinued for want of work, cannot be sustained. The Board's witness accepted that when the work was assigned to outside agency and when said agency engaged other persons, work was not offered to the claimant by recalling him. In this background, when the case of the Board that the claimant was engaged intermittently, is examined, then it emerges that the said defence and case of the Board do not inspire confidence and are not palatable. When the claimant was the only Peon working with Vankaner Centre of the Board, then it cannot be easily accepted that the claimant was not engaged on all working

days, more particularly when the Board did not even plead, much less establish that at Vankaner Centre regular permanent employee was working in category of Peon and it was only when the said regular or permanent employee was not available, then the claimant was engaged intermittently.

19. When the Court proceeds in the matter by accepting the Board's contention that for determining as to whether the claimant completed attendance for 240 days in preceding 12 months, public holidays and weekly off cannot be or should not be included in case of the persons who are engaged on daily wage then also it emerges that there is no scope to accept the Board's case that the claimant was engaged only intermittently.

20. Under the circumstances, there is no basis or justification to interfere with the findings of fact recorded by the learned Labour Court that the claimant had worked continuously, regularly and for more than 240 days in preceding 12 months. This discussion and these facts also establish that the claimant fulfilled both conditions (service for minimum then 1 year / 12 months and attendance for 240 days in preceding 12 months) for attracting Section 25F of the Act.

21. Once the said fact is established and the conclusion by the learned Labour Court, which is supported by evidence on record, is accepted, the question which would arise for consideration is as to whether the employer complied the condition prescribed under Section 25F of the Act or not.

22. In present case, it is undisputed fact that the Board had not paid retrenchment compensation at the time when the service of the respondent was discontinued. It is also undisputed fact that at the relevant time the procedure prescribed under Rule 81 was not followed and neither one month's notice was served nor notice pay was paid before or at the time when the respondent's service came to be discontinued. Therefore, there is no dispute with regard to the respondent's failure to comply conditions prescribed under Section 25F and Rule 81. Consequently, breach of the said provisions is established and the findings by the learned Labour Court on that count cannot be disturbed.

23. Above discussion leaves behind only one issue, i.e. with regard to appropriate relief.

24. When breach of statutory provision is established, ordinarily, direction to reinstate the workman would follow, unless exceptional circumstances are made out. In present case, the Board has neither pleaded nor established any exceptional circumstances.

25. However, it has emerged that for determining and granting relief the learned Labour Court imported and applied the provisions under the Gujarat Rural Development Guarantees Scheme, 2006 framed under the National Rural Employment Guarantee Act, 2005. The Board's contention, and objection to that extent, is justified. Learned advocate for the Board relied on the notification and submitted that the said provisions are neither applicable to the area nor to the

Board. Learned advocate for the respondent would submit that the learned Labour Court has merely drawn an analogy or help to quantify back wages.

26. Even if that be so, the fact remains that the learned Labour Court has not considered relevant factors for determining the issue with regard to back wages.

27. On this count, when the facts and circumstances obtaining on record of present petition are considered, it emerges that the direction to pay back wages is unwarranted and unjustified.

28. When the nature of appointment of present respondent and the nature of his employment and the duties performed by him and total tenure of his service with the Board are taken into account, then it comes out that the direction to pay back wages is unjustified.

29. During hearing of present petition, it is given out that as of now, the respondent would be about 55 years old.

30. In the interregnum, more than 25 years have passed. In that view of the matter, obviously the respondent would not have remained unemployed. However, on assumption and for want of any evidence that the claimant was gainfully employed during interregnum, the Board paid last drawn wages to the claimant from 2008 until now. According to the learned advocate for the Board, the Labour Welfare Board has already paid Rs.1.15 lakh towards last drawn wages (in accordance with Section 17B of the Act) during pendency of this petition.

31. On overall consideration of all facts and circumstances, this Court is of the view that the direction to pay back wages at rate of 100 days per year (by taking into account per day wages at Rs.25 per day, i.e. Rs.2,500/per month) does not deserve to be sustained. Therefore, the said direction is set aside.

32. Learned advocate for the Board vehemently assailed the order directing the Board to pay interest @ 12% from 1.11.2007 in event of delay beyond 30 days. The objection of learned advocate for the board against the said direction is justified. In light of the terms of reference and the stage when the learned Labour Court was adjudicating the dispute (which was referred to the learned Labour Court), it had no authority or jurisdiction to pass any direction for period beyond the date of award and/or direction for payment of interest for future period, i.e. from 1.11.2007 onwards. The learned Labour Court is not competent to pass such direction in view of the provisions under the Act and more particularly in absence of terms of reference. Therefore, the said direction cannot be sustained. Consequently, the direction is set aside.

33. On reading the said direction coupled with the further direction, i.e. the direction to the Board to pay Rs.8,000/- towards cost to the claimant, it appears that the learned Labour Court was too generous while passing the impugned award. The direction pay Rs.8,000/- towards cost is unjustified. Therefore, the said direction is also set aside.

34. In the result and for the reasons mentioned above and in light of the foregoing discussion, the impugned award is partly set aside and modified.

35. The direction to reinstate the claimant is not disturbed.

36. Other directions passed by the learned Labour Court in the impugned award dated 21.9.2007 including the direction for payment are quashed and set aside.

37. The petition is partly allowed and Rule is made absolute to the aforesaid extent.