
(2010) 04 GUJ CK 0038

In the Gujarat High Court

Case No : Special Civil Application No. 11125 of 2009

Gujarat Maritime Board

APPELLANT

Vs

Kantilal Hiralal Kharva

RESPONDENT

Date of Decision : 27-04-2010

Acts Referred:

Constitution of India, 1950 — Article 227
Industrial Disputes (Gujarat) Rules, 1966 — Rule 25H, 78, 81, 82(1)
Industrial Disputes Act, 1947 — Section 25F, 25G , 25H

Citation : (2010) 126 FLR 1068 : (2010) 3 GLR 2121 : (2011) 2 LLJ 856

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

Bench : Single Bench

Advocate : Sejal K. Mandavia, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned Advocate Ms. Sejal K. Mandavia for petitioner Gujarat Maritime Board through its Port Officer, Mandvi (Kutch).

2. Petitioner Board has challenged award passed by Labour Court, Kachchh at Bhuj in Reference (LCB) No. 45 of 2000 Exh. 43 dated 27.3.2009. Labour Court has partly allowed reference and set aside termination of respondent workman by holding it as illegal, improper, unjust, ultra vires, against principles of natural justice and directed petitioner to reinstate respondent workman in service, with continuity of service with 50 per cent back wages for interim period.

3. Ms. Mandavia, learned Advocate appearing for petitioner has raised contention before this Court that according to respondent, he was serving with petitioner board since 25 years as seaman and on 18.1.2000, he was illegally retrenched by petitioner without following Section 25F of ID Act, 1947. It was also pointed out that petitioner has not followed principles of last come first go and other juniors were continued in service and, thereby he has prayed that he should be reinstated with full back wages for interim period. She further submitted that detailed written statement was filed by petitioner contending that it is absolutely

wrong fact that respondent was working since 25 years and for that, he should produce necessary evidence on record. It was also contended by petitioner before labour court, Bhuj that respondent has not completed 240 days" continuous service and he was employed as and when work was required and, therefore, she submitted that labour court has committed gross error in granting relief in favour of present respondent workman. She also submitted that it is duty of workman to produce evidence before court and he should establish that he has completed 240 days continuous service but in facts of this case, respondent has not produced anything, however, labour court has believed that he has completed 240 days continuous service which is not proper. She also submitted that labour court ought to have considered deposition of witness Shri Chaturbhai Mohanbhai Rathod Exh. 27 in which he has categorically mentioned that respondent was given work for one year or two years and respondent workman has not passed selection process. It is also deposed that respondent was given work as and when it was available and from 1975 to 2000, he has not served with petitioner board. She also submitted that labour court has wrongly believed that respondent was working since 1995 with petitioner. Statement which was produced at Exh. 18/1 is wrongly interpreted by labour court. In short, respondent has not completed 240 days continuous service and, therefore, question of compliance of Section 25F of ID Act, 1947 does not arise. Labour Court has wrongly relied upon decisions cited by respondent which were not applicable to facts of present case. She also submitted that labour court has wrongly believed that other persons who are junior to respondent were continued in service. She submitted that it is important to note that respondent has not given names of such juniors. She submitted that it is duty of respondent workman to give names of the persons, date of joining of such persons and post of said persons. She further submitted that only after said three facts are established, labour court can say that there is violation of Section 25G and H of ID Act, 1947. She submitted that respondent workman has not established breach of Section 25G and H of ID Act, 1947. In short, her submission is that labour court has committed error in granting relief of reinstatement and 50 per cent back wages for interim period and, therefore, interference of this Court is necessary. Except that, no other submission is made by learned Advocate Ms. Mandavia before this Court and no decision has been cited by her before this Court in support of submissions recorded herein above.

4. I have considered submissions made by learned Advocate Ms. Mandavia. I have also perused impugned award passed by labour court, Bhuj. Award is running from page 1 to 52 Exh. 43. Statement of claim was filed by workman at Exh.3 against which reply was filed by petitioner at Exh.13 and thereafter, documentary evidence was produced by employee as referred to in para 6. No further documentary evidence is produced from employee side. Opponent petitioner has not produced any documentary evidence in support of their case before labour court. Before labour court, respondent workman was examined at Exh. 15 and on behalf of petitioner, witness Chaturbhai Mohanbhai Rathod was

examined at Exh. 27. Thereafter, submissions were made by both learned advocates before labour court. After considering submissions made by learned advocates for respective parties, issues have been framed by labour court in paragraph 14. Labour Court has discussed evidence of workman in paragraph 18 which is quoted as under:

18. On the above submission, the employee has examined himself at Exh.15. The employee has deposed, on oath that he was appointed by the opponent on dated 01.10.1975 as a seaman labourer and worked as such till dated 18.01.2000 and opponent have retrenched him on dated 18.01.2010. The employee further deposed, on oath, that from the date of his joining the service till his retrenchment he has completed more than 240 days in each and every calendar year. The employee was cross examined by the learned advocate Shri Desai for the opponent. During the cross examination the employee has denied the suggestion that he was being paid salary for the period for which he used to work and he was being called as and when need arises. The employee has admitted that the first appointment order was given to him and he has not produced the said appointment order before this Court and for this, he has not explained by deposing that as the appointment order is destroyed in the earthquake he has not produced the same. He has deposed during the cross examination that he has produced the entry permit in the port area for showing that he was the seaman labourer of the opponent. The employee has denied the suggestion that he has never worked as rojamdard or permanent workman with the opponent. Except this nothing fruitful has come out from the cross examination of the employee by the learned advocate for the opponent.

5. Then, labour court also considered oral evidence of witness for petitioner, namely Chaturbhai M. Rathod Exh. 27 in para 19 of award which is quoted as under:

19. On the other hand, the opponent has examined his witness Shri Chaturbhai Mohanbhai Rathod at Exh.27. The witness deposed, on oath, that the employee was not permanent employee of the opponent. He further deposed on oath that the employee was being called as and when work was available. The witness has deposed that the employee was entrusted the petty work on hand pavti and upon completion of the said petty work, the workman was automatically relieved from service. He deposed that this work remains in existence for 5 day, 10 days, one year or for two years. He further deposed that the workman was being taken through the employment exchange and the workmen were being appointed on temporary basis. He further deposed that his Institution runs as per BCSR Rules. He further deposed that the seniority list is not prepared of the workmen like the employee. During cross examination by the learned Advocate Shri SD Rathod, for the employee, the witness has admitted that employee used to work as labourer and the Pass Exh.6 was issued by his Institution. The witness further admitted that in the said pass the designation of the employee is shown as "SEAMAN" The witness deposed that in the year 1975, the employee may have worked on hand

pavti but then he has deposed that the employee has not produced that he worked in the year 1975 and onwards. He further deposed that the hand pavti is not in their possession. He deposed that the seamen are 2 to 3 but he deposed that on completion of the work the employee was automatically relieved. The witness deposed that the work done on handpavti with effect from 1975 to 2000 is not being counted as service. He deposed that the seniority list is prepared of permanent employees but not of pavtiwala. The witness deposed that the employee has not worked for 240 days in any of the calendar years and there is no proof about the same. From the cross examination of the witness of the opponent by the learned advocate Shri SD Rathod, it has come out that the employee was serving as seaman with the opponent and to that effect the Port Pass Exh. 6 was issued by the Institution. The Port Pass was issued on 30.12.1995. Thus, from the cross examination of the opponent witness it is sufficiently proved that since 1995 the employee was working as Seaman of the opponent. In support of this there is statement of attendance produced at Exh. 18/1. Now, as it has come on record by way of evidence of the witness of the opponent that this statement was given by the opponent to the employee. On going through the said statement it appears that in the year 1995, the employee had worked for 250 days. In the year 1996, the employee had worked for 327 days. He has also worked for 332 days in the year 1997. He has also worked for 307 days in the year 1998 and that in the year 1999 he has worked for 345 days. At the last in the year 2000 upto he was retrenched, he has worked 17 days only. Thus, from this statement, it is sufficient proved that right from 1995 upto 2000 the employee had worked for more than 240 days. This statement is supported by the attendance registers produced at Exh.42 by the learned advocate Shri SD Rathod. However, as it has come out from the deposition of the witness of the opponent that prior to 1995 the employee may have worked on handpavti and the period of work done on hand pavti is not being counted. The witness has not denied that the employee has not worked from 1975 upto 1995. Thus, when the opponent is in possession of those hand pavtis and when they have shown their inability to produce the said handpavtis, this Court is inclined to observe that had the opponent produced the said handpavti then from the said handpavti it would have been proved that the employee had worked for more than 240 days in each and every calendar year. Therefore, without any hesitation this Court raises a presumption that the employee had worked for more than 240 days in each calendar year right from 1975 upto 2000 the date of retrenchment of the employee.

6. Aforesaid paragraph is very much relevant and on that basis, labour court has come to conclusion that concerned workman has worked for more than 240 days in each calendar year right from 1975 upto 2000, till date of retrenchment of employee. Before labour court, Port Pass issued by institution dated 30.12.1995 was produced at Exh. 6. In cross examination of opponent's witness, it is sufficiently proved that since 1995, employee was working as seaman of opponents. In support of this, there is statement of attendance produced at Exh.

18/1 which has come on record by way of evidence of witness for opponent means present petitioner that this statement was given by petitioner to employee concerned. Going through the said statement which was given by petitioner to concerned employee, it appears, as considered by labour court, that in the year 1995, the employee had worked for 250 days, in the year 1996, the employee had worked for 327 days. He has also worked for 332 days in the year 1997. He has also worked for 307 days in the year 1998 and that in the year 1999 he has worked for 345 days. At the last in the year 2000 upto he was retrenched, he has worked 17 days only. Therefore, on the basis of aforesaid statement which was given by petitioner to workman, completion of 240 days has been established by way of documentary evidence before labour court, therefore, in light of these facts, according to my opinion, labour court has rightly come to conclusion that 240 days continuous service has been completed by respondent workman and at the time of retrenchment or termination of service of workman, Section 25F of ID Act, 1947 has not been complied with by petitioner and, therefore, labour court has rightly held that the order of termination/retrenchment is void ab initio.

7. In respect to contention about 25G and 25H of ID Act, 1947, labour court has given reasoning in para 24 and 25 of impugned award. Therefore, para 24 and 25 of impugned award are quoted as under:

24. The learned advocate Shri SD Rathod has vehemently submitted that when the junior to the employee are continued in service and the work which the employee was doing before his retrenchment is continued the employee cannot be retrenched therefore the retrenchment is illegal and the employee should be reinstated in service with retrenchment compensation and other benefits also. It is further submitted that before retrenchment the provisions of Section 25F of ID Act are mandatory and non compliance with said provisions is illegal. The learned advocate Shri Rathod has submitted that the opponent has not given any chance to the employee but has kept new workmen, which is illegal, therefore, the order of retrenchment should be set aside and the employee should be reinstated with full back wages. The learned advocate has also argued that the opponent has not followed the principle of Last come First Go and has retrenched the employee without any default. In support of his case the employee has deposed in his deposition Exh. 15 that he was illegally retrenched. This fact is not rebutted by the opponent. The opponent has examined one witness at Exh. 27 but from the evidence of the said witness particularly from the cross examination, nothing fruitful has come out. Therefore, the say of the employee in his deposition coupled with cross examination is required to be believed. Thus, from the record of the case, it has come out that the opponent has illegally retrenched the employee because the work which the employee was doing, is still going on. It is also the case of the employee that after his retrenchment also, persons are taken in service and the employee is not called for the same, therefore, his retrenchment is illegal. In views of the above circumstances, when the opponent has not rebutted the say of the employee on oath, in that case, it can be said

that the opponent has not followed the provisions of the principle 'Last Come First Go'. In view of the above circumstances, the opponent has violating the mandatory provisions of Section 25-G of ID Act by retrenching the employee because in the ordinary course the opponent should have retrenched the workman who was the last person employed in that category and if the employer has retrenched the employee instead of last person employed in that category, in that case the employer should have given reasons for doing so. When the employer has not given notice recording reasons for retrenching the employee instead of the employee last employed nor the employer has given notice pay to the employee because employee has completed 25 years continuous service with the opponent. It has also come on record that the employer has also not paid compensation for retrenchment for every completed year of continuous service or any part thereof, therefore the employer has not followed the mandatory provisions of Section 25-F of I.D. Act but has violated the provisions of the said section. The employer has also violated the mandatory provisions of Section 25H of ID Act because he has employed other employees after retrenchment of the employee and the work on which the employee was working was still continued even after retrenchment of the employee. Not only this, the employer has not given any opportunity in the manner prescribed in Section 25-H to offer himself for reemployment because as per provisions the employee shall have preference over other persons. Meaning thereby, before taking into his employ any persons, the employer should have first given opportunity to the employee on the said post and thereafter he may have employed other persons. As the employer has employed other persons without taking the employee as his workman, the employer has violated the mandatory provisions of the ID Act. In view of the above circumstances, the employee is entitled for reinstatement on his original post with continuity of service along with back wages.

25. The learned Advocate for the employee has vehemently submitted that the employee has not published the seniority list on the notice board in conspicuous place in the premises of the industrial establishment at least seven days before the actual date of retrenchment but has directly retrenched the employee from service and thereby the employer has violated the mandatory provisions of Section 81 of the Industrial Disputes (Gujarat) Rules, 1966 nor the employer has shown the seniority list to the employee before his retrenchment. This Court has gone through the record of the case and there is substance in the submission of the learned advocate for the employee, therefore, this Court holds that the employer has violated the mandatory provisions of Section 81 of the ID Rules, 1966. Not only this, the employer has not included the employee in the seniority list and to explain this the employer has examined his witness at Exh. 27 who deposed that as the employee has not completed 240 days in any of the years of his service his name is not included in the seniority. As held above, while deciding point No. 1, the employee has completed 240 days in each and every year. Moreover, when the employee has been in continuous service for 25 years under the opponent, he cannot be retrenched from service without giving notice

in writing assigning the reasons because the opponent has not followed the Principle of Last Come First Go Therefore this explanation given by the witness of the opponent cannot be accepted. The employer has also violated the provisions by not including the employee in seniority list when the juniors to him are included in the said seniority list. In view of the above detailed discussion the retrenchment of employee is illegal. Therefore, the opponent has violated the mandatory provisions of Section 25F, 25G, 25H of ID Act and Rule 81 of ID Rules. The employer has also violated the provisions of Section 82 of ID Rules because as per said section the employer has not given the notice in writing by registered post to the retrenched workman employee at his last known address for filling the vacancies. The employee has also not informed, under Sub-rule (1) of Rule 82 of ID Rules, the trade union or unions of workmen connected with the industrial establishment for the vacancies to be filled in, giving details, therefore, the employer has also violated the mandatory provisions of the said rules. In this respect reference may be made to the decision of Division Bench of Hon"ble Gujarat High Court reported in 2001(3) GLR Page 2734. In the said case the employee was governed by Industrial Disputes (Central) Rules, 1957. Juniors to the employee were reemployed and no intimation was given to the employee about vacancy by Registered Post at the address given by him. Therefore, the Hon"ble High Court of Gujarat has held that there was violation of Section 25H and Rule 78. In the present case also, the employer has not given intimation to the employee about filling of the vacancy. Therefore, the said decision is applicable to the facts of the present case.

8. Labour Court has considered various decisions in respect to subject. For that, labour court has rightly considered relevant facts which are on record and also relevant decisions which are applicable to facts of present case and for that, labour court has not committed any error which would require interference of this Court. Labour Court has also considered question of back wages in paragraph which is quoted as under:

33. From the above detailed discussion, this Court comes to the final conclusion that the employee has sufficiently proved that he has completed 240 days in each and every calendar year during the course of his service and that he was illegally retrenched by the opponent from service, without giving him notice, notice pay or retrenchment compensation. When such is the situation, this Court thinks it just and proper, in the interest of justice to hold that the employee is entitled to be reinstated on his original post along with 50 per cent back wages. In view of the above detailed discussion, the following final order is passed.

9. It is necessary to note that the date of termination is 18th January, 2000 and dispute raised by workman was referred for adjudication on 9th March, 2000 and reference came to be decided on 27th March, 2009. Duration in deciding reference is exactly about 9 years. Pendency is not because of lethargic approach of concerned workman. While considering question of back wages, labour court has considered relevant aspect and mere long pendency of litigation in Court is

not a ground to deny relief of back wages to concerned employee, otherwise, employee would suffer double jeopardy of losing back wages and also delay in getting reinstatement. As per recent decision of apex court in case of PVK Distillery Ltd. v. Mahendra Ram 2009 AIR SCW 2904, question of relief of back wages has been considered while considering long pendency of litigation in Courts and it was held that it is not ground to deny relief, otherwise, employee would suffer double jeopardy of losing back wages and also delay in getting reinstatement. Relevant paragraph 20, 21, 22 and 23 are reproduced as under:

20. In the instant case, the notice had been issued limiting the question to the payment of 50% of the total back wages. This does not mean that the respondent is not entitled to further relief. The point that his services were terminated in the year 1985 and since then the case is pending for the last two decades in different courts also has no relevance, since he had approached the court within a reasonable time. It is not his fault that the case is still pending before the court. These grounds could not be held against him for denying the relief of back wages otherwise he would suffer double jeopardy of losing back wages and delay in getting the reinstatement for no fault of his. Therefore, it would have been more enlightening, had the High Court reasoned out as to why the appellant should reinstate the respondent with full employment benefits and should pay full back wages to him for nothing in return from him in terms of work, production etc.

21. Giving a realistic approach to the matter and in spite of all these circumstances we are restricting ourselves to the question of 50% of the total back wages. Although services of the respondent have been terminated unjustifiably and illegally, it itself does not create a right of reinstatement with full employment benefits and full back wages. The notice was issued with a view that the appellant's factory has been taken over by a new management altogether and by asking the appellant to pay full back wages for the long interregnum would be unfair and unjust. The workman has not entered appearance to justify the award passed by the Labour Court. Therefore, in our view, it would be unreasonable to put a huge burden on the appellant by directing them to reinstate respondent with continuity of service and with full back wages, because the appellant's factory had been declared sick and remained closed for many years and has been assigned to a new management led by its Chief Executive Director, Sri M.K. Pania in order to rehabilitate/reconstruct it.

22. In view of the above discussion, we are of the opinion that it would be fair and reasonable to direct the employer to deposit 50% of back wages by way of arrears of back wages, instead of full wages awarded by the Labour Court.

23. Accordingly, the judgment and order of the Labour Court and the High Court are set aside and it is declared that the respondent herein shall be entitled to 50% of the total back wages payable during the aforesaid period in terms of Section 6N of the U.P. Industrial Disputes Act.

10. It is necessary to note that in aforesaid reported decision, apex court has also considered 50 per cent back wages for interim period being reasonable amount because termination is found to be unjustified and illegal. Looking to facts which are on record in present case also squarely covers reasoning given by apex court in aforesaid paragraph, therefore, according to my opinion, labour court has not committed any error which would require interference in granting 50 per cent back wages for interim period because order of termination is found to be void ab initio because of violation of mandatory provisions of Section 25F of ID Act, 1947 and, therefore, contentions raised by learned Advocate Ms. Mandavia in this regard cannot be accepted. Same are, therefore, rejected.

11. Entire findings given by labour court are based on appreciation of evidence on record and labour court has appreciated oral as well as documentary evidence and has recorded finding of fact. Such findings of fact recorded by court below normally cannot be disturbed by this Court while exercising powers under Article 227 of Constitution of India as per recent decision of apex court in case of State of Haryana v. Manoj Kumar reported in 2010 AIR SCW 1990 decided on 9th March 2010. The relevant Para 22 to 29 are quoted as under:

22. The appellants urged that the jurisdiction of the High Court under Article 227 is very limited and the High Court, while exercising the jurisdiction under Article 227, has to ensure that the courts below work within the bounds of their authority.

23. More than half a century ago, the Constitution Bench of this Court in Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, settled that power under Article 227 is limited to seeing that the courts below function within the limit of its authority or jurisdiction.

24. This Court placed reliance on Nagendra Nath's case in a subsequent judgment in Nibaran Chandra Bag etc. Vs. Mahendra Nath Ghughu, The court observed that jurisdiction conferred under Article 227 is not by any means appellate in its nature for correcting errors in the decisions of subordinate courts or tribunals but is merely a power of superintendence to be used to keep them within the bounds of their authority.

25. This Court had an occasion to examine this aspect of the matter in the case of Mohd. Yunus Vs. Mohd. Mustaqim and Others, The court observed as under:

The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority," and not to correct an error apparent on the face of the record, much less an error of law. for this case there was, in our opinion, no error of law much less an error apparent on the face of the record. There was no failure on the part of the learned Subordinate Judge to exercise jurisdiction nor did he act in disregard of principles of natural justice. Nor was the procedure adopted by him not in consonance with the procedure established by law. In

exercising the supervisory power under Article 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or reweigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decision.

26. This Court again clearly reiterated the legal position in *Laxmikant Revchand Bhojwani and Another Vs. Pratapsing Mohansingh Pardeshi Deceased through his Heirs and Legal Representatives*, The court again cautioned that the High Court under Article 227 of the Constitution cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes.

27. A three-Judge Bench of this Court in *Mrs. Rena Drego Vs. Lalchand Soni, Etc.*, again abundantly made it clear that the High Court cannot interfere with the findings of fact recorded by the subordinate court or the tribunal while exercising its jurisdiction under Article 227. Its function is limited to seeing that the subordinate court or the tribunal functions within the limits of its authority. It cannot correct mere errors of fact by examining the evidence and re-appreciating it.

28. In *Virendra Kashinath Ravat and Another Vs. Vinayak N. Joshi and Others*, this Court held that the limited power under Article 227 cannot be invoked except for ensuring that the subordinate courts function within its limits.

29. This Court over 50 years has been consistently observing that limited jurisdiction of the High Court under Article 227 cannot be exercised by interfering with the findings of fact and set aside the judgments of the courts below on merit.

12. Therefore, in view of above discussion and decision of apex court as referred above, there is no substance in this petition and same is required to be dismissed.

13. Therefore, in result, this petition is dismissed accordingly.