

(2016) 02 GUJ CK 0227

In the Gujarat High Court

Case No : Special Civil Application No. 6316 of 2011

Gujarat Public School

APPELLANT

Vs

Naya Gujarat Kamdar Union

RESPONDENT

Date of Decision : 25-02-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 33, Section 33A, Section 33-A

Citation : (2016) 02 GUJ CK 0227

Hon'ble Judges : Kaushal Jayendra Thaker, J.

Bench : Single Bench

Advocate : Kabir A. Hathi, Advocate, for the Appellant; Subramaniam Iyer, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Kaushal Jayendra Thaker, J.—1. The captioned petition was earlier decided vide order dated 10.8.2011. By the said order dated 10.8.2011, the Court dismissed the captioned petition, i.e. Special Civil Application No. 6316 of 2011. The said order was carried in appeal before Hon"ble Division Bench by way of appeal, i.e. Letters Patent Appeal No. 1407 of 2011. Alongwith the appeal, certain Civil Applications were also filed. The appeal came to be disposed of by Hon"ble Division Bench vide order dated 12.8.2013. The relevant part of the order reads thus:-

"Thus, in view of our decision in the case of Revaben Wd/o. Ambalal Motibhai, and Others v. Vinubhai Purshottambhai Patel and Others reported in , 2013 (1) GLH 440, this Appeal is not maintainable. We, accordingly, dismiss the Appeal as such. We make it clear that we have not gone into the merits and dismissal of this Appeal will not stand in the way of the appellant in seeking appropriate remedy before appropriate forum in accordance with law.

It appears that at the time of admission a Division Bench of this Court stayed the operation of the order impugned which also included imposition of costs. Since

we have found that this Appeal is not maintainable, it is needless to mention that interim order granted earlier stands vacated.

In view of dismissal of the Appeal itself, the connected Civil Application becomes infructuous and the same is disposed of accordingly."

2. The said order dated 12.8.2013 passed by Hon"ble Division Bench in Letters Patent Appeal No. 1407 of 2011 was carried before Hon"ble Apex Court. The Hon"ble Apex Court decided the Special Leave Petition by order dated 8.7.2014. The relevant part of the order dated 8.7.2014 passed by Hon"ble Apex Court reads thus:-

"4. We have perused the order of the learned Single Judge. We find that there is absolutely no consideration as regards the correctness of the Award dated 27th January, 2009 passed in Complaint No. 6 of 2006. Therefore, we are of the considered view that the appellant is entitled to urge all submissions as regards the merits of the Award passed in Complaint No. 6 of 2006 dated 27th January, 2009. Since there was no consideration, we are not inclined to examine the correctness of the Award of the Labour Court in these proceedings.

5. It is, therefore, appropriate for the learned Single Judge to examine the correctness of the Award to pass orders on merits in the Special Civil Application No. 6316 of 2011. We also wish to make it clear that the conclusion of the learned Single Judge as regards the correctness of the order dated 13th January, 2011 in Miscellaneous Application No. 35 of 2009 is not interfered with. Even while directing the learned Single Judge to consider the Special Civil Application on merits as regards the validity of the Award passed in Complaint No. 6 of 2006 dated 27th January, 2009, we are convinced that the respondent - workmen numbering 16 who are fighting for their rights right from 2005 should be duly compensated by directing the appellant-School to make some monetary payment pending consideration of the main Award by the learned Single Judge.

(emphasis supplied)

6. With that view, while setting aside the order of the learned Single Judge dated 10th August, 2011 in Special Civil Application No. 6316 of 2011 and remitting the matters back to the learned Single Judge for deciding the said writ petition on merits as regards the correctness of the Award dated 27th January, 2009 in Complaint No. 6 of 2006, the appellant is directed to pay a sum of Rs. 30,000/- (Rupees Thirty thousand only) to each of the 16 workmen within a period of one month from today. The learned Single Judge is requested to dispose of the appeal expeditiously, preferably within a period of four months from the date of production of a copy of this order."

3. On perusal of the order passed by Hon"ble Apex Court, it emerges that Hon"ble Apex Court did not interfere with the order dated 13.1.2011 in Misc. Application No. 35 of 2009, but directed that the Special Civil Application No. 6316 of 2011 be heard and decided on merits.

As regards the validity of the award dated 27.1.2009 passed in Complaint No. 6 of 2006, Hon''ble Apex Court also directed that the petition may be heard expeditiously and preferably within four months.

Thereafter, the petition is not heard further.

4. On 8.1.2015, the Court passed below quoted order:-

"It was noticed from the record that the Hon''ble Supreme Court has directed to decide the matter expeditiously, preferably within a period of four months. However, learned advocate Mr. Kabir Hathi for the petitioner has filed a leave note upto 12.01.2015. In that view, to be listed on 13th January, 2015."

4.1. Thereafter, on 13.1.2015, the Court passed below quoted order:-

"On behalf of learned advocate Mr. Kabir Hathi, learned advocate Mr. Bhargav Hasurkar prayed for time stating that he may be required to conduct the matter as learned advocate Mr. Hathi has shifted his practice. There is a direction from the Apex Court to dispose of the petitions preferably within four months.

Given this context, as a last chance, the matter is stand over to 21st January, 2015."

4.2. On 21.1.2015, below quoted order was passed:-

"Learned advocate Mr. Subramaniam Iyer for the workmen wants to produce a copy of application under section 33A. He shall also produce reply to the said application filed by the employer. For the said purpose, the matter to be listed on 2.2.2015.

The Registry shall in the meantime call for the record and proceedings from the Labour Court, Vadodara, in respect of Complaint No. 6 of 2006 decided by the Labour Court No. 2, Vadodara on 27th January, 2009, so as to reach this court well before the next date of posting of these petitions."

4.3. On 26.10.2015, the Court passed below quoted order:-

"In view of sick note of learned advocate for the respondent Union, stand over to 07.12.2015."

4.4. Thereafter, the matter was listed before this Court on 23.2.2016 when learned advocate for the petitioner had filed leave note. In that view of the matter, this Court passed below quoted order on 23.2.2016:-

"1. When the petitions are called out, learned advocate for the petitioner is not present. It is informed that learned advocate for the petitioner has filed leave note and learned advocate of the respondent has filed sick-note.

2. These petitions are pending since 2011. These petitions are adjourned for more than 20 times and have been rotating on admission cause list without further hearing and progress. Therefore, following order is passed:-

The petitions will be heard peremptorily on 25.02.2016. Any leave note or sick note will not be considered. If the learned advocates are not present, appropriate order will be passed in first call."

4.5. In pursuance of the said order, the petition is listed for hearing today at serial No. 2 in the cause list.

5. Today, when the petition was called out and taken up for hearing in the first session, no one was present from the side of the petitioner. The Court Master informed the Court that learned advocate for the petitioner has filed leave note.

The Court's attention is drawn to the order dated 13.1.2015 wherein it is recorded that learned advocate for the petitioner has shifted his practice.

Despite such fact, any alternative arrangement does not appear to have been made.

The hearing of the petition was deferred to second session in the hope that some request or submission would be made on behalf of the petitioner, however, any request or submission is not made and on behalf of the petitioner, hearing is not attended.

5.1. Mr. Iyer, learned advocate for the respondent, is present.

6. So far as subject matter of the petition is concerned, it is noticed that the petitioner has prayed, inter alia, that the order dated 13.1.2011 passed below Exh. 24 in Misc. Application No. 35 of 2009 and the award dated 27.1.2009 passed below Exh. 49 in Complaint No. 6 of 2006 may be set aside.

7. The relief prayed for in paragraph No. 10(B) of the petition reads thus:-

"10(B) Your Lordship may be pleased to issue a writ of mandamus or a writ of certiorari or any other appropriate writ, order or direction, quashing and setting aside the impugned Order dated 13.1.2011 passed below Exhibit-24 in Misc. Application No. 35 of 2009 as well as the impugned judgment and award dated 27.1.2009 passed below Exhibit-49 in Complaint No. 6 of 2006 (Ref. (Demand) No. 6 of 2005) and further be pleased to direct the learned Presiding Officer of the Labour Court to allow the Misc. Application No. 35 of 2009 and allow the present petitioner to defend them from the stage where the matter was conducted ex parte i.e. to lead further evidence and argue the main complaint being Complaint No. 6 of 2006 and to decide the same in accordance with law, in the interest of justice;"

8. So far as the order dated 13.1.2011 passed below Exh. 24 in Misc. Application No. 35 of 2009 is concerned, the learned Labour Court passed the said order in Misc. Application No. 35 of 2009 whereby the learned Labour Court rejected the application seeking rehearing of the Complaint No. 6 of 2006.

9. From the order dated 8.7.2014 passed by Hon''ble Apex Court it is noticed that Hon''ble Apex Court has clarified that the correctness of the order by learned

Single Judge as regards the correctness of the order dated 13.1.2011 in Misc. Application No. 35 of 2009 is not interfered with.

9.1. In the said order dated 8.7.2014 passed by Hon"ble Apex Court, it is observed that:-

"...We also wish to make it clear that the conclusion of the learned Single Judge as regards the correctness of the order dated 13th January, 2011 in Miscellaneous Application No. 35 of 2009 is not interfered with...."

9.2. Thus, so far as the petitioner's challenge "by virtue of para 10(B) of present petition" against the order dated 13.1.2011 in Misc. Application No. 35 of 2009 is concerned, the said challenge does not survive, inasmuch as the said order dated 13.1.2011 has attained finality in view of the order passed by this Court in earlier proceedings and in light of the order dated 8.7.2014 passed by Hon"ble Apex Court.

10. Now, so far as the petitioner's challenge against the award dated 27.1.2009 in Complaint No. 6 of 2006 is concerned, it has emerged from perusal of the said award that the concerned workmen invoked provision under Section 33-A of the Industrial Disputes Act, 1947 [hereinafter referred to as "the Act"] and filed a complaint alleging that their services have been terminated by an oral order in violation of principles of natural justice as well as in breach of the condition prescribed under Section 33 of the Act.

11. So as to support the said allegation, the concerned workmen claimed that at the time when their services came to be terminated by oral order on 9.5.2005 a dispute by way of and in form of Reference (Demand) No. 6 of 2005 was pending and that they are concerned workmen in the said reference wherein they have claimed relief/direction for regularization in service and revision in their wages and service conditions.

11.1. It was also claimed by the concerned workman before the learned Labour Court during the hearing of the complaint that despite pendency of said dispute, their service came to be terminated by oral order without filing application as contemplated under Section 33 i.e. without seeking approval and that therefore, the termination is bad in law and unsustainable.

11.2. The learned Labour Court examined the said contention and after considering the material on record, the learned Court recorded finding of fact that on 9.5.2005 the service of the concerned workmen were terminated by oral order and at that stage (i.e. when the service were terminated by oral order) a dispute/proceeding was pending and that therefore, the provision under Section 33 of the Act was attracted, however, any application as contemplated under Section 33 was not filed.

11.3. The said finding of fact is recorded by learned Labour Court in the award dated 27.1.2009. The said finding of fact recorded by the learned Court is based on the material which was available on record.

11.4. Thereafter, the learned Labour Court considered the demand of the concerned workmen (viz. that in view of breach of Section 33, direction to reinstate them may be passed) in light of the finding of fact reached to and recorded by it.

11.5. Having reached to the conclusion that the employer has committed breach of Section 33 of the Act, the learned Labour Court passed the award dated 27.1.2009 declaring that the employer's action of orally terminating services of the concerned workmen on 9.5.2005 is illegal and the employer should reinstate the workmen whose names are mentioned at serial Nos. 1 to 9, 11 to 15, 17 to 19 and 21 to 24 with consequential benefits.

12. As mentioned earlier, the employer, thereafter, filed Misc. Application No. 35 of 2009 which came to be rejected vide order dated 13.1.2011 which has attained finality in light of Hon''ble Apex Court's order dated 8.7.2014.

13. In this background, above quoted relief is prayed for by the petitioner in paragraph No. 10(B) of this petition.

14. On examination of the memo of the petition, it comes out that the petitioner has not raised any contention against the award dated 27.1.2009 passed below Exh. 49 in Complaint No. 6 of 2006.

In this context, it would be appropriate to take into account the contentions raised by the petitioner in paragraph Nos. 4(a) to 4(g), which read thus:-

"(a) The impugned order passed by the Labour Court is bad in law and in facts and the same came to be passed without considering the facts and circumstances of the case, pleadings of the parties and contrary to the settled legal position.

(b) The Labour Court ought to have held that since the main complaint No. 6 of 2006 was pending and transferred from one court to another during the hearing and from the record of the Complaint No. 6 of 2006 it is apparent that the Advocate of the petitioner has not remained present before the court and to lead further evidence of the present petitioner was closed on the application given by the respondent union. Thereafter from the record, it appears that the Advocate has not argued the matter and in absence of argument of the petitioner, the ex-parte Award came to be passed by the Presiding Officer, Labour Court in Complaint No. 6 of 2006 and therefore, the Presiding Officer ought to have held that the Misc. Application which was filed in time and ought to have allowed the same so as to give an opportunity to the petitioner to defend its case and lead further evidence, in the interest of justice and principle of natural justice.

(c) The learned Labour Court has failed to appreciate the fact that the present petitioner has unable to contest the main complaint due to the negligence and uninformative by the Advocate, which caused 100% back wages to the petitioner. It is submitted that even as per principle of natural justice, the present petitioner ought to have been offered to lead further evidence and to argue the main

matter instead of rejecting the application.

(d) The learned Labour Court has further failed to appreciate the fact that during the hearing and pendency of the application, vide Exhibit-22, the present petitioner has filed one pursis, stating that they are ready and willing to take back all the employees in the employment, so that as per the principle of natural justice they can defend their case in the main complaint before the learned Court in a proper manner. However, without considering this aspect, the learned Court has rejected the Misc. Application which is illegal, erroneous and contrary to the settled principle of law.

(e) The learned Labour Court has wrongly gone into the facts of the case and failed to appreciate that petitioner has shown their bona fides that during the pendency of the main complaint they are ready and willing to take them in the employment subject to the final outcome of the complaint without prejudice to the rights and contentions of the parties. It is submitted that the learned Court without mentioning the said fact in the order, has rejected the Misc. Application by its impugned order and thereby committed a grave error in passing the impugned order which deserves to be quashed and set aside in the interest of justice.

(f) The learned Labour Court has failed to appreciate the facts in its true perspective and did not given an opportunity to the present petitioner to argue the matter and lead further evidence. It is submitted that as per the provisions of the Industrial Disputes Act, to lead further evidence and argue the matter is required to be given. It is pertinent to note here that, even during the pendency of the Misc. Application, the present petitioner has offered them to resume for duties but that very bonafide action of the present petitioner was not at all considered by the Presiding Officer of the Labour Court while rejected the Misc. Application. It is submitted that if the said offer of the petitioner is considered by the learned Court, then, the concerned workman would not suffer on account of unemployment or any financial loss during the pendency of the complaint, which should be heard and decide from the stage where it was heard ex parte.

(g) Even other wise also, the impugned order is bad in law and in facts, erroneous, contrary to the evidence on record and settled legal position."

15. Any contention against the observations, findings of facts and conclusions recorded by the learned Labour Court in the award dated 27.1.2009 is not raised by the petitioner in present petition.

15.1. Further, any material is not available on record which would establish and which could convince this Court that the findings of fact and conclusions recorded by the learned Labour Court are incorrect and/or contrary to evidence on record and/or perverse.

15.2. There is nothing on record to establish that the service of the workmen were not orally terminated on 9.5.2005 (i.e. before almost 11 years) and/or that

on 9.5.2005 i.e. when the workmen were terminated by oral order the dispute raised by and on behalf of the concerned workmen (seeking regularization in the service) was not pending in form of Reference (Demand) No. 6 of 2005.

15.3. There is nothing on record to establish that breach of Section 33 of the Act was not committed when the services of the workmen came to be terminated on and from 9.5.2005.

15.4. On the contrary, in paragraph No. 4(d) of the petition memo, the petitioner has stated that during pendency of the application before the learned Labour Court, the employer had filed pursis stating that it was ready and willing to take back all employees in the employment.

15.5. The said statement of the petitioner employer in paragraph No. 4(d) of the petition goes to show that the respondent workmen were relieved from the service (on 9.5.2005) and having regard to said fact (viz. the services of the workmen were discontinued) the employer had filed the purshis declaring that it was ready to take back all concerned employees.

16. In this view of the matter, below mentioned findings of fact and conclusions have been recorded by the learned Labour Court in the award dated 27.1.2009 viz.

(a) a dispute by way of Reference (Demand) No. 6 of 2005 was pending before the learned Labour Court,

(b) the service of the present respondents came to be terminated on 9.5.2005 during pendency of said dispute - which was pending at relevant time - by way of reference,

(c) the service of the workmen were terminated by the employer by order,

(d) there is no evidence to prove, and it is not proved, that the workmen had voluntarily abandoned their service,

(e) present respondents are concerned workmen in the said reference, and

(f) though the dispute was pending at the time when the services of present respondents were terminated, application as contemplated under Section 33 of the Act was not filed.

17. There is nothing on record of the petition in light of which or on strength of which it can be held that the findings of fact recorded by learned Labour Court are perverse and/or incorrect.

17.1. Any material to establish that the said conclusions are erroneous and contrary to evidence on record is not available on record of present petition.

17.2. In paragraph Nos. 4(a) to 4(g) any contention against the conclusions/ findings of fact recorded by learned Labour Court is not raised by the petitioner in present petition and, in any case, same is raised at the time of hearing of the

petition.

17.3. Actually, even after the order by Hon''ble Apex Court, the petitioner has not cared to attend the hearing and prosecute the petition.

17.4. Despite such position this Court has considered and examined entire material on record to decide the petition on merits however any material to establish, and satisfy this Court, that the learned Labour Court has committed error or acted arbitrarily and passed unjustified direction is not placed/available on record of the petition.

17.5. In this view of the matter, the findings and conclusions recorded by the learned Labour Court in the award dated 27.1.2009 cannot be faulted.

18. As mentioned earlier, the petitioner was put to the notice by this Court vide order dated 23.2.2016 that the petition will be peremptorily heard on 25.2.2016.

18.1. The said clarificatory order was made in view of the direction by Hon''ble Apex Court in the order dated 8.7.2014 that the petition should be preferably heard within 4 months.

18.2. Despite the said order dated 23.2.2016, no one conducted the petition on merits. Under the circumstances, the Court is constrained to decide the matter in absence of learned advocate for the petitioner.

19. On examination of the memo of the petition, the material available on record of present petition and the impugned award and submissions by learned counsel for the concerned workmen and in light of the foregoing discussion, it has emerged that the award dated 27.1.2009 passed by the learned Labour Court does not suffer from any infirmity.

19.1. From the material on record and from the submissions, it has also emerged that the service of the concerned workmen were terminated in May 2005.

19.2. Almost 10 years have passed since the concerned workmen are out of employment.

19.3. The Court passed the order in complaint No. 6 of 2006 on 27.1.2009.

19.4. Thus, almost 6 years have passed after the order in said complaint No. 6 of 2006 came to be passed.

19.5. The petitioner herein, thereafter, moved an application i.e. Misc. Application No. 35 of 2009 before the learned Court which came to be decided vide order dated 13.1.2011.

19.6. In this petition, the petitioner has also placed under challenge the award dated 27.1.2003 passed in complaint No. 6 of 2006.

Thus, about 2 years after the award was passed, it is placed under challenge in this petition.

19.7. The fact that the service of the concerned workmen are discontinued w.e.f. 9.5.2005 is not in dispute, though the ground for discontinuation or the mode of discontinuation is disputed. The concerned workmen claimed before the learned Court that their service came to be orally terminated w.e.f. 9.5.2005, whereas the petitioner claimed that the concerned workmen voluntarily abandoned the service.

19.8. There was no evidence on the record of the complaint No. 6 of 2006, and there is none even on the record of this petition, which would establish, or support the petitioner's claim, that the workmen had voluntarily abandoned their service. The petitioner failed to support and prove its said allegation and during prosecution of this petition also petitioner has not shown any evidence to support its claim that workmen had abandoned their service.

19.9. By the award dated 27.1.2009, the learned Court has, for want of cogent and satisfactory evidence, not believed the petitioner's claim that the concerned workmen voluntarily abandoned the service. In absence of any evidence which would establish and prove the petitioner's claim and allegation or support and justify the contention that the learned Court's conclusion is erroneous, the findings and conclusions by learned Court cannot be faulted.

19.10. Further, the fact that at the time when the service of the concerned workmen came to be discontinued (i.e. on 9.5.2005) a dispute/reference namely Reference (Demand) No. 6 of 2006 was pending and in the said reference, present respondents were the "concerned workmen" (i.e. subject matter of the said reference was related to present respondents) is not in dispute and it is also not in dispute that inspite of the said fact situation the petitioner did not file any application under Section 33 of the Act.

19.11. Since the service of the concerned workmen were discontinued without preferring application contemplated under Section 33, the complaint No. 6 of 2006 was filed.

19.12. When the learned Labour Court reached to the conclusion that the discontinuation of service of the concerned workmen was on account of the petitioner's action and not on account of voluntary abandonment of service and when any cogent and satisfactory evidence to successfully assail the said conclusion is not brought to the notice of this Court and when from the material on record before the learned Labour Court or from the record of the petition any cogent material - evidence to establish voluntary abandonment is not established, then in that event, there is nothing to persuade and convince this Court to hold that the complaint was not maintainable and/or in view of the facts involved in the complaint, Section 33 of the Act was not attracted and applicable and/or the findings recorded by learned Labour Court are incorrect or perverse.

20. In this background, when above discussed factual aspects are collectively considered, then, it becomes clear that it is not possible to hold that the impugned order suffers from any error.

20.1. The learned Labour Court has not committed any error of law or jurisdiction and the findings of fact and conclusions recorded by the learned Labour Court cannot be said to be perverse.

21. Therefore, any interference by this Court against the said award dated 27.1.2009 is not warranted in exercise of discretionary jurisdiction.

Consequently, the petition fails and deserves to be rejected and is, accordingly, rejected.