

(2016) 02 GUJ CK 0019

In the Gujarat High Court

Case No : Special Civil Application No. 2674 of 2006

Gujarat Water Supply and Sewerage Board

APPELLANT

Vs

Madhugar Dolatgar Goswami

RESPONDENT

Date of Decision : 03-02-2016

Acts Referred:

Citation : (2016) 02 GUJ CK 0019

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

Bench : Single Bench

Advocate : H.S. Munshaw, Advocate, for the Appellant; T.R. Mishra, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

K.M. Thaker, J.—1. Heard Mr. Munshaw, learned advocate for the petitioner board and Mr. Mishra, learned advocate for the respondent.

2. The petitioner is aggrieved by the award dated 1.4.2004 passed by the learned Labour Court, Bhavnagar in Reference (LCB) No. 324 of 1991 as well as by the order dated 8.12.2005 passed by the learned Labour Court, Bhavnagar in Misc. Application No. 30 of 2004 in Reference (LCB) No. 324 of 1991.

3. The impugned award dated 1.4.2004 came to be passed ex parte, in absence of and without hearing present petitioner. By the said ex parte award dated 1.4.2004, the learned Labour Court directed the petitioner to reinstate the respondent with continuity of service and full backwages.

4. Since the award was passed ex parte, the petitioner herein filed miscellaneous application under Rule 26A of the Industrial Disputes Gujarat Rules, 1961 and requested the learned Labour Court to recall the award dated 1.4.2004 and restore the proceedings of reference of Reference (LCB) No. 324 of 1991 and grant opportunity of hearing and pass fresh award after hearing the petitioner. The learned Labour Court, after hearing the petitioner and the respondent, rejected the said miscellaneous application vide order dated 8.12.2005, for the

reasons recorded in the said order.

5. In this background, the petitioner has challenged the said awards in present petition.

6. Before proceeding further, it is relevant and necessary to mention that learned advocate for the respondent and learned advocate for the petitioner have jointly submitted that the respondent has been reinstated w.e.f. 26.4.2006.

7. In this context, it is relevant to mention that against the above-referred two orders, the petitioner filed present petition somewhere in February 2006. After hearing the petitioner, the Court admitted the petition vide order dated 21.2.2006 and granted interim relief qua the direction to pay full backwages and direction to grant continuity of service. This Court did not grant stay against the direction to reinstate the respondent, however, the Court clarified that the reinstatement will be subject to the result of the petition. Thereafter, the Court passed another order dated 20.4.2006. In view of the fact that until then the respondent was not actually reinstated, the Court directed the petitioner to reinstate the respondent in service on or before 4.5.2006 and to also pay regular and current salary w.e.f. 1.4.2004, i.e. the date when the learned Labour Court passed ex parte award.

8. In view of the said order and direction, Mr. Munshaw, learned advocate for the petitioner submitted that after the said order dated 20.4.2006, the petitioner reinstated the respondent w.e.f. 26.4.2006 and the petitioner has also paid wages to the respondent w.e.f. 1.4.2004.

9. Meaning thereby, in effect and in substance, the respondent is reinstated w.e.f. 1.4.2004 itself inasmuch as the respondent has been paid regular and current wages (in view of the order dated 20.4.2006) with effect from the date of the ex parte award dated 1.4.2004.

10. In this background, Mr. Munshaw, learned advocate for the petitioner assailed the aforesaid orders and submitted that the learned Labour Court has committed error in directing the petitioner to reinstate the respondent with continuity of service and also in granting full backwages.

11. Learned advocate for the petitioner submitted that the award dated 1.4.2004 came to be passed ex parte.

12. He also submitted that for the reasons mentioned in Misc. Application No. 30 of 2004, the petitioner could not attend the proceeding of the reference and also could not lead any evidence and therefore, the correct and complete facts were not placed on record before the learned Labour Court when the Court passed the ex parte award dated 1.4.2004.

13. He further submitted that when the fact about the ex parte award came to the knowledge of the petitioner, the application to restore the proceeding was filed, however, the learned Labour Court rejected the application.

14. He submitted that the order dated 8.12.2005 is erroneous and arbitrary and the learned Labour Court has failed to consider the facts and circumstances on account of which the proceeding of the reference could not be attended earlier.

15. He also submitted that on appropriate condition, e.g. direction to pay compensatory cost to the respondent, the reference ought to have been restored and the petitioner ought to have been granted opportunity to contest the reference on merits.

16. He also submitted that the directions passed in ex parte award are passed without taking into account relevant and material facts and therefore, the award as well as the order in miscellaneous application deserve to be set aside.

17. On the other hand, learned advocate for the respondent submitted that in the first place, the petitioner did not attend the reference proceeding and therefore, the Court was constrained to pass ex parte award. Then, belatedly the miscellaneous application came to be filed and the petitioner failed to make out sufficient cause in support of the request to restore the proceeding. He submitted that the petitioner failed to satisfy the learned Labour Court as regard the reason for not attending the proceeding and that, therefore, in absence of satisfactory explanation and sufficient cause, the miscellaneous application is rejected and the said order is neither erroneous nor arbitrary.

18. He also submitted that the service of the respondent was terminated arbitrarily and without following procedure prescribed by law inasmuch as the petitioner had not paid retrenchment compensation nor principles of natural justice were followed and therefore, the direction in the impugned award is neither illegal nor erroneous nor arbitrary. He further submitted that the respondent is in service with the petitioner from 2006 and effectively he is in service w.e.f. April 2004 which means that the respondent is in continuous service with the petitioner since last 10 years and therefore, at this stage, it would neither be just nor proper to re-start the entire proceeding before the learned Labour Court as claimed by the petitioner.

19. I have considered the submissions by learned advocates for the petitioner and the respondent and also the material on record and I have considered the merits of the case in light of the above-mentioned factual background including the fact that the respondent has been reinstated and is working with the petitioner since 2006.

20. It is true that while passing the order dated 21.2.2006, the Court clarified that the reinstatement will be subject to the result of the petition, however, the fact remains that the respondent has been working with the petitioner since last 9 years.

21. It is not in dispute that the respondent was employed by the petitioner.

22. According to the case of the petitioner, the respondent was employed on temporary and ad hoc basis. His appointment was on daily wage basis and he

was engaged with the petitioner w.e.f. August 1989. According to the facts mentioned by the petitioner, the respondent worked upto December 1989 and during the said period, he had worked for 125 days. According to the petitioner, the respondent worked on Rampar Group Water Supply Scheme and he was engaged depending on availability of work.

23. On the other hand, the respondent claimed in his statement of claim that he worked with the petitioner for one year before his service came to be terminated w.e.f. 11.12.1989.

24. When the allegation made by the respondent in his statement of claim is taken into account, then it becomes clear that the point/date of termination of service is not in dispute.

25. The petitioner claims that the respondent worked upto December 1989 and the respondent himself claimed in his statement of claim that his service was terminated w.e.f. 11.12.1989.

26. The respondent claimed that he worked for one year before 11.12.1989 whereas, according to the petitioner, he was engaged only in August 1989. Thus, the total length of service of the respondent with the petitioner was of 5 months, according to the petitioner.

27. It is an undisputed fact that the petitioner did not establish its case before the learned Labour Court at the time when the reference was heard.

28. In view of the above factual aspects and more particularly the discrepancy between rival claims with regard to the total length of service prior to termination in December 1989, learned advocate for the petitioner would submit that the proceeding may be remanded for re-consideration by directing the learned Labour Court to restore the reference proceeding.

29. Therefore, the question which arises, is as to whether after period of almost 25 years reference proceeding should be remanded to the learned Labour Court, more particularly when the respondent is working with the petitioner since last about 10 years.

30. When overall view of the facts and circumstances is taken into account, more particularly when the fact that the service of the respondent was terminated in December 1989 and since then almost 25 years have passed, it will be an exercise in futility to remand the reference proceeding for fresh hearing and fresh decision inasmuch as neither the original record related to the service of the respondent would be available with the petitioner after 25 years nor any witness competent to depose on behalf of the petitioner with regard to respondent's employment would be available.

31. Learned advocate for the petitioner could not say with certainty as to whether the petitioner would be in a position to lead oral and/or documentary evidence by witness competent to depose before the learned Labour Court either

on the basis of personal knowledge or even with aid of documents pertaining to relevant period.

32. Moreover, it was because of the lapse on the part of the petitioner that the reference proceedings were not attended by the petitioner for almost 13 years inasmuch as the order of reference was passed in January 1991 and the award came to be passed in 2004.

33. Meaning thereby for almost 13 years, the petitioner did not attend the proceeding before the learned Labour Court.

34. The respondent cannot be made to suffer for the said lapse of the petitioner.

35. In view of this Court, for the aforesaid and such other reason, the petitioner's request to remand reference proceeding for fresh hearing and fresh decision is not sustainable and does not deserve to be granted.

36. Having regard to the above-mentioned facts and also having regard to the fact that since last about 10 years, the respondent is working continuously with the petitioner, there is no justification, after lapse of almost 25 years since the dispute arose and/or after about 10 years since the respondent came to be reinstated, the Court is not inclined to interfere with the direction so far as the reinstatement is concerned.

37. This brings in picture two aspects against which the petitioner has grievance, viz. direction to pay backwages and direction to grant continuity of service.

38. So far as the issue related to backwages is concerned, it is appropriate to note that the respondent claimed that his service was terminated w.e.f. 11.12.1989.

39. When the allegation is taken into account, it emerges that though the service of the respondent was allegedly terminated in December 1989, the respondent raised industrial dispute for the first time by serving demand notice in July 1991. Thus, for the period of almost two years, he did not take any steps to raise an industrial dispute.

40. Furthermore, when the order of reference was passed on 30.1.1991 and the learned Labour Court had forwarded intimation in October 1991 asking the respondent to file statement of claim (since until then statement of claim was not filed), the respondent filed the statement of claim on or around 3.2.1992. Thus, initially for the period of about two years, the respondent did not take any steps to raise industrial dispute and then for almost one year after the order of reference, the respondent did not file statement of claim.

41. Other relevant fact, rather more important fact which emerges from the record, is that after the respondent filed his statement of claim in February 1992, he came forward to get his evidence recorded, after more than 11 years, i.e. on 5.10.2003.

42. It is necessary to note that the deposition of the respondent is recorded by the learned Labour Court on 5.10.2003.

43. Meaning thereby after having filed the written statement in 1992 (i.e. after delay of one year from the date of order of reference), the respondent got his evidence recorded after delay of 11 years.

44. In these circumstances, it would not be just and proper to impose obligation of backwages for the said period, i.e. at least until October 2003 on the petitioner.

45. The claim of the respondent's backwages from the alleged date of termination at least until 5.10.2003, is not justified and cannot be sustained or granted.

46. Therefore, the question about the respondent's claim for backwages will arise for the period from 5.10.2003 to 1.4.2004 inasmuch as the respondent has been undisputedly paid regular and current wages w.e.f. 1.4.2004.

47. Thus, the period in question with regard to claim for backwages would be of about 6 months.

48. In this context, it is appropriate to note that after the learned Labour Court passed ex parte award on 1.4.2004, the said ex parte award (according to the details recorded in the order dated 8.12.2005 passed in Misc. Application No. 30 of 2004) was published on 13.4.2004.

49. The petitioner claimed that the ex parte award came to the knowledge and notice of the petitioner on 16.4.2004 and the miscellaneous application came to be filed on 18.5.2004.

50. On examination of the record, the learned Labour Court found that the application was actually filed on 18.5.2004 and there was delay of about 3 days in filing the application.

51. The learned Labour Court rejected the said application in December 2005 and then present petition came to be filed.

52. In the ex parte award dated 1.4.2004, the learned Labour Court has not recorded any observation or conclusion with regard to the issue as to whether the workman was gainfully employed during the intervening period of 13 years.

53. In this view of the matter, it appears that the respondent may be granted 50% backwages for the period from 5.10.2003 to 31.3.2004.

54. In this view of the matter, the petitioner is directed to pay 50% backwages to the respondent for the period from 5.10.2003 to 31.3.2004.

55. This leaves behind the issue with regard to the respondent's claim for continuity of service. In view of this Court when the total length of respondent's employment with the petitioner is only 5 months and even if the respondent's own claim is taken into account, then the total length of his service with the

petitioner would be hardly of 1 year and when the fact that the dispute was raised after 2 years and for about 11 years after the order of reference was passed, the respondent did not take any steps to prosecute the reference on merits the direction to continuity of service from the date when the respondent was first engaged by the petitioner, is not justified and unsustainable.

56. On this count, the Court is of the view that if the petitioner is directed to grant continuity of service to the respondent w.e.f. 1.4.2004, i.e. the date from which the petitioner has treated the respondent as reinstated and the date which also happens to be the date of the ex parte award, then the interest of justice would be served.

57. Therefore, the petitioner is directed to treat the respondent in continuous service w.e.f. 1.4.2004.

58. With the aforesaid directions, the petition is partly allowed and the impugned award dated 1.4.2004 is partly modified. For the aforesaid purpose, the order dated 8.12.2005 in Misc. Application No. 30 of 2004 is set aside. Orders accordingly. Rule is made absolute to the aforesaid extent.