
(2013) 08 GUJ CK 0024

In the Gujarat High Court

Case No : Special Civil Application No. 15449 of 2008

Hitendra Vrajlal Ashara (I)

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 30-08-2013

Acts Referred:

Citation : (2014) 1 GLR 635

Hon'ble Judges : R.R. Tripathi, J;R.D. Kothari, J

Bench : Division Bench

Final Decision : Allowed

Judgement

R.D. Kothari, J.—The petitioner, a Labour Judge, allowed employer's application being Misc. Application No. 37 of 1997 wherein prayer was to set aside order passed in Reference (L.C.B.) Case No. 490 of 1990. In the opinion of employer/applicant, Labour Court had passed "ex-parte" order in Reference (L.C.B.) Case No. 490 of 1990 in favour of workman. Earlier, the predecessor of the petitioner has rejected the employer's application seeking the same relief i.e. Misc. Application No. 92 of 1993. Allowing the employer's 2nd application i.e. Misc. Application No. 37 of 1997 by the present petitioner has led the workman to file the complaint against the petitioner. The complaint, in the end, culminated into dismissal of the petitioner. Hence, the present petition. Following chronology of event would help us to appreciate the case of parties properly:

2. The findings of Inquiry Officer are as under:

(I) That the delinquent cannot review the order passed by his predecessor of dismissing the application of the employer.

(II) There is no "discussion and finding" in the order passed by the delinquent as to on what ground the delay is condoned under Sec. 26A(ii).

(III) In Misc. Application No. 37 of 1997, the employer does not allege that his application is beyond time. In view of absence of such averments by the

employer, question of condoning the delay by the delinquent does not arise.

(IV) The employer does not say at all in his application i.e. Misc. Application No. 37 of 1997 that earlier he has filed Misc. Application No. 92 of 1993 for similar relief. This fact is suppressed by the employer.

(V) The delinquent cannot be allowed to justify his action of passing illegal order relying on order passed in L.P.A. because High Court in L.P.A. had no occasion to deal with merits of the order passed by the delinquent in Misc. Application No. 37 of 1997.

(VI) The settlement between the parties is a subsequent development.

(VII) The delinquent had allowed Misc. Application No. 37 of 1997 on extraneous ground, viz., order passed in Misc. Application No. 92 of 1993 is not a speaking order.

2.1. Referring and relying on principles that are to be followed when Departmental Inquiry is to be initiated, as laid down in Union of India and Others Vs. K.K. Dhawan, , the Inquiry Officer has concluded that reading the entire order of the delinquent, there remains no doubt that delinquent had allowed the Misc. Application No. 37 of 1997 going out of way to help the applicant/employer and to favour the employer brushing aside all legal contentions and objections raised by the workman.

3. Learned Advocate Shri D.P. Kinariwala for the petitioner referred the relevant part of Inquiry Officer's report and other relevant material. It was submitted that in view of the orders passed by this Court, finding of the Inquiry Officer is erroneous and unsustainable. Learned Advocate also submitted written submissions.

4. On the other hand, learned Senior Advocate Shri Shalin Mehta for respondent No. 2 submitted that the High Court on its administrative side has rightly passed the order dismissing the petitioner. It was submitted that elaborate Inquiry Officer's report does not call for any interference as the Inquiry Officer has considered all the relevant aspects. Shri Mehta has also drawn attention to more than half-a-dozen complaints filed against the present petitioner. We may refer to those complaints in brief at the end.

5. Learned Advocate Shri Kinariwala has submitted as under:

(i) The order in question was passed by the petitioner in pursuance to order passed by the High Court in Spl. C.A. Nos. 446 and 520 of 1998. So, it cannot be said that petitioner has passed the same with any ulterior motive.

(ii) The orders passed by the petitioner were challenged before the High Court and the same were confirmed.

(iii) There is no evidence on record to hold that petitioner has passed the order on any other consideration than judicial one. That being so, Inquiry Officer has

seriously erred in recording finding in this behalf and Disciplinary Authority has erred in accepting the finding of the Inquiry Officer.

(iv) In the inquiry, the original complainant Mr. Neve has not appeared to depose. One Shri Chhaganbhai had deposed on behalf of the Disciplinary Authority.

(v) If the complaint like the present one is entertained on such type of allegations, then it would not be possible for any judicial officer to discharge his duties without fear.

6. The last referred finding of Inquiry Officer is, "petitioner has gone out of way to help and favour "the employer"." That the petitioner has passed the order "brushing aside all legal contentions and objections" raised by the workman. This proposition, if read in abstract, sounds good. But, in fact, the record of the case does not support this conclusion. If this ground falls to the ground, then none of the remaining findings would survive. First about brushing aside "all legal contentions and objections". What are they? They are:

(I) Suppression of material facts by the employer;

(II) Entertaining time barred application of the employer and condoning delay; and

(III) Not properly appreciating the objections raised by the workman that, "earlier Court has rejected the same relief".

7. Point Nos. 1 and 3 may be considered together. The "charge" against the employer is that he has not disclosed filing of earlier application (Misc. Application No. 92 of 1993) wherein same relief was claimed by him. It is also the say of the workman that the employer has also not disclosed about rejection of earlier application by the predecessor of the petitioner. Non-disclosure of this fact in later petition is not in dispute. This fact has come on record as the workman has disclosed the same in his reply. The workman has also produced copies of the earlier proceeding as evidence. For two reasons, giving of undue importance to this ground is uncalled for; (i) Disclosure of it by the workman before any effective order is passed on application reduces the rigour of this submission to considerable extent. Further, the Hon'ble Supreme Court in *Continental Foundation Joint Venture Sholding, Nathpa H.P. Vs. Commissioner of Central Excise, Chandigarh-I*, , in context of excise, has held that ".....Mere omission to give correct information is not suppression of facts unless it was deliberate to evade the payment of duty. When the facts are known to both the parties, omission by one party to do what might have been done would not render it "suppression"....." and (ii) It is important to mention that the employer had though filed interim injunction application along with Misc. Application No. 37 of 1997, he had not obtained any order on that application. It is an admitted fact that employer has not obtained any interim order by taking aid of "suppression of facts".

8. The Inquiry Officer has found that, "petitioner has sought to review the earlier order". This view is also erroneous as it is nobody's case that order passed by the petitioner was in exercise of review jurisdiction nor the petitioner has passed an order treating the application as a review application. Probably, the Inquiry Officer intended to say that allowing the application by the petitioner amounts to review of the earlier order. It is alleged that earlier order was a non-speaking order. The parties had, in fact, not sought for review of a non-speaking order. Therefore, in the circumstances of the case, this approach is erroneous.

9. Reference to earlier order by the petitioner as a non-speaking order (Misc. Application No. 92 of 1993) is commented upon by the Inquiry Officer as taking extraneous matter into consideration. This also is not possible to accept. How at all saying so by the petitioner can be said to be taking extraneous matter into consideration is difficult to appreciate. In both the applications, relief claimed was same and parties were same.

9.1. In view of above discussion, objection based on - "suppression of material fact" and "not properly appreciating that earlier Court had rejected the same relief - cannot be accepted.

10. The principal defect found in the petitioner's order is about limitation and condonation of delay. It appears from the record that employer in his application (Misc. Application No. 37 of 1997) alleges that his application is, "within time limit". Rule 26A(ii) of the Industrial Disputes Rules confers power upon the Labour Judge to extend the period of setting aside ex-parte order. It is the say of the petitioner that he has exercised the power and has condoned the delay under Rule 26A(ii). However, it is the say of the Inquiry Officer that it is not so stated by the petitioner in his order. The Inquiry Officer found that there is no "discussion and finding" on what ground this belated application was allowed. The discussion by Inquiry Officer in this behalf in a sense can be said to be good. However, the Inquiry Officer has missed to take into consideration couple of relevant aspects. The order of the petitioner was carried before the higher Court by the workman by filing Special Civil Application No. 4460 of 1998. The said petition was summarily dismissed. The Inquiry Officer distinguished the order passed by the High Court in Special Civil Application saying that the High Court had no occasion to examine the order in question on merits. In a sense the say of the Inquiry Officer is right as the petition was summarily dismissed. But it would be proper to say that High Court did not find it necessary or worth to examine it on merits. That declining to interfere with the order/discretion exercised by the Court does not - in a sense - stand on lesser footing than confirming the order. In Special Civil Application No. 4460 of 1998, this Court (Coram: Ms. Justice R.M. Doshit), after hearing the parties and dismissing summarily the petition, has observed, thus:

The petitioner has vehemently argued that a false affidavit has been made by the respondent and in fact notices were duly served upon the respondent. Be that as it may, since the learned Labour Judge, in exercise of his discretion, allowed the

application and has thought it fit to offer one more opportunity to the respondent, I do not consider it expedient to interfere with the same. Mr. Mangukia, the learned Advocate appearing for the respondent has offered to pay a sum of Rs. 1,00,000/- to the workman in full and final settlement of the entire dispute. The offer appears to be just and proper. However, the petitioner workman does not agree to accept the said offer. The demand made by him appears to be too tall. However, the interest of justice demands that the petitioner-workman should be paid some amount towards the back wages awarded to him. It is, therefore, directed that the respondent shall, within a period of three weeks from today, deposit a sum of Rs. 80,000/- with the Court below. Upon deposit of the aforesaid amount, the same shall be invested with the Nationalised Bank for a term of two years. The petitioner-workman shall be entitled to withdraw the periodical interest earned on the said deposit. It is clarified that in the event the petitioner loses in the Reference, the aforesaid sum of Rs. 80,000/- shall not be refundable. However, in the event the petitioner succeeds in the Reference, the aforesaid amount shall be adjusted against the amount that may be found due and payable to the petitioner.

(Emphasis supplied)

11. The above order of the learned Single Judge was carried in appeal by both the parties. Before this Hon''ble Court, parties had arrived at settlement and both the Letters Patent Appeals were dismissed by a short common order.

12. Condoning the delay is a "discretionary order". It is true that in the present case, material irregularity has crept in while condoning the delay. In view of dismissal of workman's petition against the order passed in Misc. Application No. 37 of 1997 and later on, arrival of settlement between the parties - much prior to the report of the Inquiry Officer - renders the issue of limitation and condonation of delay more or less academic. Further, the workman/complainant, after lodging the complaint before the Industrial Tribunal, has disappeared. He has not appeared before the Inquiry Officer to depose. It is the say of the Disciplinary Authority that they have tried to serve the summons at Dhuliya (Maharashtra) and at Bhavnagar twice and one attempt was made to serve at Baroda. All attempts have failed. After settling the dispute with the employer, the workman/complainant had disappeared. The authority could not trace him. Thus, the circumstances, viz., parties arriving at settlement and complainant not turning up after lodging of the complaint deserved weightage in appreciating the strength of objection based on limitation and condonation of delay.

13. It would appear from the record that, "all those legal contentions and objections" of workman which petitioner had said to have brushed aside, suffered summary dismissal by this Court before the learned Single Judge. Perusal of this Court's order of learned Single Judge gives impression that those legal contentions and objections may not have been raised by the petitioner. The order, on the other hand, gives impression that talk of settlement may have been taken place at the time of hearing. Employer had offered Rs. 1 lac. The Court

observed that, "... petitioner - workman does not agree to accept the said offer. Demand made by him appears too tall....." The direction given by the Court to deposit the amount in Nationalized Bank in F.D.R. with liberty to the workman to withdraw the interest periodically - as an interim arrangement during the pendency of the reference - gives an impression that taking extremely serious view of the order passed by the petitioner by the Inquiry Officer was uncalled for in these circumstances and development.

14. As to the conclusion that order is passed to, ".....help the applicant" and "to go out of way to unduly favour him", it may be born in mind that Inquiry Officer draws conclusion solely on the basis of order passed by the petitioner. The evidence of one Chhaganbhai is more or less formal, the Inquiry Officer does not derive any support from his evidence. It may be noted that order passed by the petitioner spreads in 9 typed pages. The petitioner discusses facts and contentions raised by the workman. The documentary evidence produced by the workman are also taken note of. The petitioner also refers 1985 SC - but then Page Number and Name of Journal is not stated - in support of his view. Further, he also gave direction to dispose of Reference (L.C.B.) No. 490 of 1990 within six months from passing of the order by him and he awards cost of Rs. 1,500/- to the workman. Prima facie, giving impression that petitioner did try to be judicious. That much, in our opinion, is sufficient to absolve the petitioner from charge of undue favour/help to the employer. The conclusion reached by the petitioner may be erroneous. Line of reasoning adopted by him may even be erroneous. But in order to succeed on this plea, it should be shown that conclusion and erroneous line of reasoning is of such nature that - it has crossed the boundaries of "difference of opinion/perception".

15. The test of "difference of opinion/perception" is laid down by this Court in recent decision of Division Bench in Ramesh P. Vaghela Vs. State of Gujarat and Another, . After considering the law laid down in many cases, it has laid down, "when a misconduct can be said to have been committed". It was held in Paras 6.8 and 18 as under:

6.8. This Court is unable to subscribe to the conclusion on Paragraph 4 and 35 of the inquiry report holding that since there was transgression of some established and definite rule of action then such transgression would amount to misconduct and was in nature of dereliction of duty amounting to misconduct on part of the delinquent. In Re: Mehar Singh Saini, Chairman, HPSC and Others, , the Supreme Court observed that the term "misconduct" implies a wrongful intention and not a mere error of judgment. A misconduct is malfeasance and the improper conduct. Therefore, a mere wrong judicial order inadvertently passed or passed even after application of mind but not appreciating a settled principle, cannot per se tantamount to misconduct. The connotation misconduct has to be construed with reference to the nature of subject matter, the kind and capacity of a person against whom it is levelled.

18.An error of judgment, interpretational diversions, a different in perception

or difference of opinion, as well as individualistic approach on part of a judicial officer can hardly be equated, in their any amount of degree, with misconduct. These characteristic are not one with the help of which the "misconduct" can be alleged, when they have not intake of extraneous considerations or corrupt practice.

16. Applying the above test, it would appear that petitioner has not travelled beyond parameters of "difference of opinion" or "difference in perception". In the writ petition filed by the workman against the order passed by the petitioner, this Court would not have desisted from interfering if the conclusion reached by the petitioner had been ex-facie unacceptable.

17. Reference may be made to other relevant circumstances etc. of the case. Misc. Application No. 37 of 1997 was filed by the employer prior to the passing of the order on the Recovery Application No. 297 of 1997 filed by the workman. As referred above, in Misc. Application No. 37 of 1997, employer has also applied for interim relief by filing separate application. This application was pending at the time of passing of the order on Recovery Application of the workman. Then, upon passing of the order on Recovery Application, the employer had filed two writ petitions before this Court being Special Civil Application Nos. 466 and 520 of 1998, praying for setting aside order passed in Reference (C.L.B.) No. 490 of 1990 and order passed against him in Recovery Application. Therein, this Hon"ble Court, while dismissing both the writ petitions by common order dated 4-2-1998 (Coram: S.K. Keshote, J.) (as he then was), has observed in Paras 3, 4 and 5 as under:

3. Admittedly, the application of the petitioner for bipartite hearing is pending before the Labour Court at Bhavnagar. The application of the petitioners for interim relief is also pending. It is true that the Labour Court has proceeded in the proceedings initiated by the respondent-workman under Sec. 33C(2) of the Industrial Disputes Act, 1947 and final order has also been passed but nevertheless still the Labour Court has not become functus-officio to pass an appropriate order on the application filed by the petitioners for grant of interim relief. Instead of pressing for early hearing of the applications for interim relief as well as for bipartite hearing, the petitioners have approached this Court and challenge has been made to the original award as well as to the order of the Labour Court which has been passed under Sec. 33C(2) of the Industrial Disputes Act, 1947. When the petitioners' applications for bipartite hearing as well as for the grant of interim relief are pending before the Labour Court, this petition against the original award as well as the order passed by the Labour Court on the application of the petitioners for setting aside of the said award is not maintainable. The petitioners should have waited for the decision of the Labour Court on the application filed by them for bipartite hearing.

4. So far as the second writ petition is concerned, the petitioners have not participated in the proceedings. The petitioners have allowed those proceedings to go ex-parte and when the ex-parte orders have been passed, they have

challenged those orders before this Court. The petitioners were served with the notice of those proceedings but they have chosen not to contest those proceedings. This conduct of the petitioners itself would have been sufficient for dismissal of Special Civil Application No. 520 of 1998 but still that course is not adopted for the reason that the petitioners should be given an opportunity to approach to the Labour Court in the proceedings which have been initiated by the respondent-workman under Sec. 33C(2) of the I.D. Act, 1947.

5. In the result, both these special civil applications are dismissed. So far as the Special Civil Application No. 446 of 1998 is concerned, it is expected of the Labour Court, Bhavnagar that it shall expeditiously decide the applications of the petitioners filed for bipartite hearing as well as for grant of interim relief. So far as the Special Civil Application No. 520 of 1998 is concerned, it is open to the petitioners to approach to the Labour Court at Bhavnagar for setting aside of the said order or for modification of the said order on merits and if such an application is filed, the said Court shall decide the same on merits in accordance with law.

18. One of the submissions of learned Advocate Shri D.P. Kinariwala for the petitioner is that the petitioner had passed the order in pursuance to above order passed by this Court in two Spl. C. As. An erroneous reading of above order of the High Court by the petitioner is not unlikely. Though, the High Court has only asked to decide pending application of the petitioner/employer, the order of the High Court may have weighed with the petitioner in deciding the application. In this behalf, it may also be noted that Chhaganbhai, who is examined by the Authority/Inquiry Officer, in his cross-examination, says that workman has insisted to decide the application on that day. What may have weighed with the petitioner for deciding the application - is not possible to guess but, these circumstances may perhaps have weighed with the petitioner.

19. As observed above, complainant did not turn up before inquiry proceeding to depose. The workman/complainant's allegation of corruption in his complaint makes his presence more preferable.

20. In view of the above discussion, in the circumstances of the present case, the conclusion drawn by the Inquiry Officer that petitioner has, "brushed aside all legal contentions and objections of the workman" and "petitioner had passed order to give undue favour and help the employer" is erroneous.

21. A tentative decision arrived at by the Disciplinary Authority based on report of Inquiry Officer as well as final decision which is also based on report of Inquiry Officer are also vitiated.

22. In the end, reference needs to be made to submission of the petitioner, viz., ".....It would not be possible for any Judicial Officer to perform his judicial function without fear." and expressing anguish that, ".....if this Hon"ble Court passed an order setting aside the order of dismissal, even then it would not restore the image and impression of the present petitioner of dishonest Judicial

Officer. When order of dismissal is passed against an employee, not only the concerned Judicial Officer but his family members are also affected". Reliance was placed on observation made in *Ishwar Chand Jain Vs. High Court of Punjab and Haryana and Another*, . The bold submission as made was uncalled for in the present case and it deserves criticism. If the employer had not filed two Spl. C. As. before this Court prior to passing of the order by the petitioner and if the workman had not challenged the said order before this Court after the passing of the order by petitioner/delinquent, it is difficult to say what would have been the fate of this petition. It is somewhat by accident that petitioner's order in question stands insulated by the two (prior/after) orders of the High Court. Otherwise, the record of the petitioner is quite disturbing. Learned Senior Advocate Shri Shalin Mehta has drawn attention of the Court that High Court has received as many as 8 complaints in span of less than 4 years' period (1998-2001) against the petitioner, which includes complaint of corruption. It is almost absurd to complain about "image" in these circumstances. We are also not prepared to believe that petitioner was at all worried or concerned about his family members being affected by his conduct. None else but petitioner himself is to be blamed for alleged adverse effect on "image" and "impression". While we allow the present petition, no consequential order is passed in typical circumstances of the present case. Along with the present petition, today, we have decided another Spl. C.A. No. 14011 of 2008 of the present petitioner. In that petition also, the petitioner had challenged the dismissal order passed in pursuant to departmental inquiry held in connection with another incident wherein the petitioner was found guilty for misconduct and ultimately dismissed from service. We have dismissed said Spl. C.A. No. 14011 of 2008 today. Therefore, while we formally allow the present petition and quash and set aside the report of the Inquiry Officer and order of dismissal, but in view of the above, no consequential order is passed. Rule is made absolute to the aforesaid extent.