

(2013) 08 GUJ CK 0025

In the Gujarat High Court

Case No : Special Civil Application No. 14011 of 2008

Hitendra Vrajlal Ashara (II)

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 30-08-2013

Acts Referred:

Citation : (2014) 1 GLR 646

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

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.D. Kothari, J.—The petitioner, at the relevant time, was a Labour Judge at Amreli. He had decided one application which was re-numbered as Transfer Application (B.I.R.) No. 9 of 1998. In that application, "workman" had challenged his termination order and had prayed all consequential benefits. The employer, in that application, in reply, inter alia had challenged jurisdiction of the Labour Court by advancing the contention that employer was working as "Group Mantri" at the relevant time, and therefore, Labour Court would not have jurisdiction. The workman has disputed this. The controversy in this petition centred around one question, that is, "is it practice in the Labour Court that whenever plea of want of jurisdiction is raised, the said plea is to be decided first"? In other words, "is it the practice to decide the issue of jurisdiction as a preliminary issue"? The question of jurisdiction herein is also referred to as a question of legality and validity of the inquiry. It is the case of the workman that he had argued only preliminary point, however, the petitioner did not decide the preliminary issue and instead of that, he, by order dated 23-4-1999, decided the main matter on merits, and has dismissed the petition. Shri Patil, an Advocate for the workman before the Labour Court, had filed a complaint before the Industrial Tribunal on 31-5-1999. It ultimately resulted in dismissal of the petitioner from service by order dated 19-11-2007. The charge against the petitioner is "manner and mode" in which he had disposed of the Transfer Application (B.I.R.) No. 9 of

1998. To be specific, charge against the petitioner is as under:

Though Mr. V.M. Jhala had filed Transfer Application (B.I.R.) No. 9 of 1998 only on limited ground and had claimed a relief of declaration that action of the Bank terminating the services of the petitioner by order dated 20-10-1993 is illegal, unjust, mala fide and against the principle of natural justice as well against the rules of Administration and Mr. Patil, the learned Advocate for the petitioner argued the matter on limited point i.e. about the legality of the proceeding and not about the charges of misconduct and also cited decisions of the High Court. Mr. H.V. Ashra with an oblique motive ignoring the settled principles, instead of deciding only preliminary issue rejected the main petition by judgment dated 23-4-1999 holding that Mr. Jhala was not a workman and charges of misappropriation is established and thus manner and mode in which Mr. Ashra disposed of the whole petition shows that he decided this petition for a consideration other than judicial one.

2. The petitioner had filed detailed reply to the charge-sheet by his written submissions dated 26-2-2001 (Annexure-E). To this, we may refer after referring the finding of the Inquiry Officer.

3. Before the Inquiry Officer, the workman (Exh. 14) and the complainant/ Advocate of workman (Exh. 17) were examined by the Department as their witnesses. On behalf of the petitioner, detailed written submissions were filed. The Inquiry Officer gave her report on 20-3-2002.

4. Main findings of Inquiry Officer are as under:

(i) Failure to record finding in favour of the workman on payment of subsistence allowance, despite the fact that law in this regard was brought to the notice of the petitioner by relying on a decision of the Hon'ble the Supreme Court which squarely covered up the point amounts to acting in dereliction of his duty by the Judicial Officer. The Inquiry Officer disapproved distinguishing of binding Supreme Court's decision on this point by the petitioner.

(ii) There is not even iota of evidence on record to show that workman was serving as a Supervisor or serving in managerial or administrative capacity and drawing of salary more than Rs. 3,000/- per month. It was for the employer to prove that the workman was serving as a Supervisor or in like cadre and drawing the salary over Rs. 1,000/- (excluding of allowances). The employer has not proved this plea.

(iii) The Inquiry Officer records: ".....from the notes of submissions recorded in the hand-writing of the delinquent which is a part of the record also, it appears that Mr. Parikh had made arguments on the issue of legality of Departmental Inquiry only.It is also significant to note that in the written submissions made by the learned Advocate for the opponent - The Kodinar Co-operative Bank Union (Exh. 23), it was specifically mentioned in the last paragraph to permit the opponent to lead the evidence with regard to the misconduct of the applicant if

the Court.....found inquiry to be defective.

5. Learned Advocate Shri D.P. Kinariwala for the petitioner has submitted that findings of Inquiry Officer are erroneous and unsustainable in law. It was submitted that in absence of any allegation of mala fide practice or corruption - attention was drawn to conclusion arrived at in this regard in preliminary inquiry report and in absence of any allegation that petitioner has taken into consideration any extraneous consideration, the Inquiry Officer and Disciplinary Authority ought not to have taken such a harsh view. Shri Kinariwala has also submitted written submissions. Learned Advocate for the petitioner has raised following points:

(I) There is nothing on record to show that it was obligatory on the part of petitioner to decide validity of departmental inquiry as a preliminary issue. Admittedly, the B.I.R. does not provide for preliminary hearing of an issue.

(II) The Advocate for the workman has filed a complaint against the present petitioner only to save himself. The complaint is in nature of afterthought.

(III) The finding that the petitioner has passed order with oblique motive has no basis. Admittedly, there is no charge of corruption against the petitioner.

(IV) There is no provision in standing order to pay subsistence allowance.

(V) In reply filed by the employer in proceeding before the petitioner, a specific plea was raised that workman was working in a supervisory cadre, and hence, is not a workman. Accepting this plea of the employer, the petitioner had allowed the application pending before him. In doing so, no error of law committed by the petitioner.

6. Learned Senior Advocate Shri Shalin Mehta for respondent No. 2 submitted that Inquiry Officer's report does not call for any interference. Referring the above-referred finding of the Inquiry Officer, it was submitted that no error is committed by the Inquiry Officer in appreciating the material before him and finding of misconduct recorded is just, legal and proper. It was submitted that power of judicial review ought not to have been exercised in such a like cases.

7. At the time of hearing, the arguments mainly centred around the issue whether it is a practice in the Labour Court to decide the issue of jurisdiction as a preliminary issue or not. During the course of hearing, attention was drawn to The Cooper Engineering Limited Vs. Shri P.P. Mundhe, wherein identical question had arisen for consideration of the Hon"ble the Apex Court. The question was, "whether when a domestic inquiry held by an employer is found by Labour Court as a violative of principles of natural justice, there is any duty cast upon that Court to give an opportunity to the employer to adduce the evidences afresh before it and whether failure to do so, would vitiate its award" (Para. 1). The Court considered earlier decision on the point and opined in favour of holding preliminary inquiry. In the conclusion, it is held in paras 21 and 22 as under:

21. Propositions (4), (6) and (7) set out above are well-recognised. Is it, however, fair and in accordance with the principles of natural justice for the Labour Court to withhold its decision on a jurisdictional point at the appropriate stage and visit a party with evil consequences of a default on its part in not asking the Court to give an opportunity to adduce additional evidence at the commencement of the proceedings or, at any rate in advance of the pronouncement of the order in that behalf? In our considered opinion it will be most unnatural and unpractical to expect a party to take a definite stand when a decision of a jurisdictional fact has first to be reached by the Labour Court prior to embarking upon an enquiry to decide the dispute on its merits. The reference involves determination of the larger issue of discharge or dismissal and not merely whether a correct procedure had been followed by the management before passing the order of dismissal. Besides, even if the order of dismissal is set aside on the ground of defect of enquiry a second enquiry after reinstatement is not ruled out nor in all probability a second reference. Where will this lead to? This is neither going to achieve the paramount object of the Act, namely, industrial peace, since the award in that case will not lead to a settlement of the dispute. The dispute, being eclipsed, pro tempore, as a result of such an award, will be revived and industrial peace will again be ruptured. Again another object of expeditious disposal of an industrial dispute (See Sec. 15) will be clearly defeated resulting in duplication of proceedings. This position has to be avoided in the interest of labour as well as of the employer and in furtherance of the ultimate aim of the Act to foster industrial peace.

22. We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication the Labour Court should first decide as a preliminary issue whether the domestic Inquiry has violated. The principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer there will be no difficulty. But when the matter is in controversy between the parties that question must be decided as a preliminary issue. On that decision being pronounced it will be for the management to decide whether it will adduce any evidence before the Labour Court. If it chooses not to adduce any evidence. It will not be thereafter permissible in any proceeding to raise line issue. We should also make it clear that there will be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award. It will be also legitimate for the High Court to refuse to intervene at this stage. We are making these observations in our anxiety that there is no undue delay in industrial adjudication.

7.1. The law laid down in Cooper Engineering Ltd. case (supra) supports the say of the workman.

8. It is clear and specific assertion of the workman that, "Transfer Application (B.I.R.) No. 9 of 1998 was argued only on preliminary point". In the complaint

and in evidence before the Inquiry Officer, it is specific assertion made in this behalf. In this context, it is material and important to consider what the petitioner has to say. Let us ask to the petitioner, whether preliminary point alone was argued or application was argued on merits? For this purpose, the petitioner's reply to the charge-sheet which is earliest in point of time can throw some light. In order to consider what exactly happened in hearing and conducting of Transfer Application (B.I.R.) No. 9 of 1998, we would like to give weightage to say of petitioner. The issue certainly need not be blown out of proportion if the petitioner acting in bona fide belief and out of innocence, has decided the main matter instead of preliminary issue. Inflicting penalty for bona fide error is to commit another error. In the detailed reply to the charge-sheet, say of the petitioner is thus: (i) The charge-sheet is bad. That the appointing authority of the petitioner is a Government and in the present case, the Government has not issued the charge-sheet. (ii) bona fide error of fact or law committed in passing the order cannot be a foundation for any departmental inquiry. (iii) Since whole inquiry proceeding was admitted and exhibited in case before the petitioner and as there was no specific prayer or demand to decide legality and validity of inquiry, the petitioner has decided the matter in good faith. (iv) No specific prayer or demand made to decide legality and validity of inquiry as a preliminary issue. (v) The reason for lodging the complaint may be known to the complainant himself. That the Advocate has lodged the complaint after long time. (vi) In conducting the trial, fullest and sufficient opportunity was given to both the sides. (vii) That the finding of the preliminary report is not binding to me as it is in violation of principles of natural justice.

8.1. In the end, the petitioner claims that he may be given an opportunity of hearing and permission be given to engage the Advocate of his choice because several important questions of law and facts are involved. The petitioner also reserves right to declare the name of defence witnesses. Maintaining that he is innocent the petitioner prayed to drop the proceedings.

9. The above-referred detail reply filed by the petitioner in response to the charge-sheet gives picture of petitioner's mind. It provides us a clue to examine the petitioner's case and weigh the petitioner's assertion versus the Inquiry Officer's finding.

10. In view of law laid down in Cooper Engineering Ltd.'s case (supra), it can be said that in case of controversy, Labour Court should decide issue of jurisdiction or issue of legality and validity of proceedings as preliminary issue. In the present case, question of jurisdiction and question of legality of proceeding was raised. Beside that, in the present case there is sufficient material (Exhs. 11, 12 and 23 etc.) to hold that parties have proceeded with understanding that the petitioner would decide only preliminary issue. The petitioner has not shown how this material to draw such inference is unreliable or that reality is otherwise. The plea that there is no specific provision to decide the validity of departmental inquiry as a preliminary issue and that no party has given such application is

misconceived. Even in absence of specific provision in this behalf, it can be said that in any judicial or quasi-judicial proceeding, if it so appears from the record that deciding an issue as preliminary issue would serve ends of justice, then such issue has to be decided as a preliminary issue, more particularly when issue pertains to jurisdiction of authority or a Court. Nor the petitioner can avoid reality by urging that either of the party had not given application to decide validity of departmental inquiry proceeding as a preliminary issue. Giving of application by either party takes back seat when in fact proceeding proceeded with understanding that the Court would decide the "preliminary issue". What matters is a substance i.e. knowledge of party that what is being heard -and giving of an application is a formality or a procedure which is not material. The finding of the Inquiry Officer in this regard, as recorded above, is clear and specific. How this finding is erroneous was not pointed out at the time of hearing. In fact, at the time of hearing, more than couple of times this finding of Inquiry Officer (Page 149) was referred to and learned Advocate for the petitioner has no satisfactory answer to this finding. Further, the say of the petitioner himself, if gathered from his reply to the charge-sheet, gives impression that it was not by unintended or bona fide mistake only the application came to be disposed of on merits. The complaint does not transform into final order overnight.

10.1. The submission of learned Advocate for the petitioner that complaint lodged by the Advocate of the workman is an afterthought and to save himself (the Advocate) and further say of the petitioner that Advocate has filed a complaint for "other reasons" and after very long time, are the desperate arguments. The say that complaint is after a long time is factually incorrect. The petitioner has passed the order on 23-4-1999 and complaint is lodged on 31-5-1999.

11. The finding of the Inquiry Officer is clear, specific and convincing. It is based on material on record. Two witnesses examined before the Inquiry Officer by the Department have deposed against the petitioner. Nothing material is brought out in cross-examination of these witnesses. The finding of the Inquiry Officer is just and proper.

12. The tentative decision reached by the High Court in its order dated 19-7-2002/3-8-2002 is balanced one and does not call for any interference. We have considered fairly detailed reply of the petitioner in response to tentative decision of the High Court.

13. The petitioner, in his reply to the tentative decision, takes following main points:

(i) The Inquiry Officer has taken only one-sided view. The report is perverse and it is not based on principle of law.

(ii) It has considered the factual and legal aspect as if the Inquiry Officer is deciding the appeal against the petitioner's order.

(iii) The Inquiry Officer has treated the defence of petitioner as if the petitioner is guilty and he has to prove his innocence. It is against the well-known principle that, "there cannot be any presumption of guilt".

(iv) "Some" of the authorities relied on are ignored by the Inquiry Officer and the authorities which were cited by other party or not cited by either party, without giving any opportunity to explain, were relied on by the Inquiry Officer. The petitioner does not say which authority is not considered by Inquiry Officer, however, in later part of his submission, the petitioner refers following three authorities as not considered by the Inquiry Officer:

(1) AIR SCW 2924

(2) Union of India and Others Vs. K.K. Dhawan,

(3) Union of India and others Vs. A.N. Saxena,

(v) When legality and validity of the departmental proceeding is not challenged and workman admits the inquiry proceeding that were produced before the petitioner as an evidence, then there was no necessity to raise any preliminary issue.

(vi) That there was no application or prayer to decide the legality and validity of the inquiry as a preliminary issue.

(vii) That there is no allegation of corruption or nepotism or illegal gratification in challenging the judgment of the petitioner.

(viii) If there is no allegation of corruption then while the proceedings are pending before the appellate forum, "legality, propriety and perversity" of the order passed by the petitioner cannot be subject-matter of the departmental inquiry.Unless the order is set aside by the higher forum/appellate Court, the department and the Government is bound to accept the judgment and order passed by the petitioner.

14. Of all the above points taken by the petitioner, barring couple of points none requires comments or consideration. As to the non-consideration of authority cited by the petitioner, the petitioner mentions three authorities in this behalf. In first one, the citation is not proper as the year is not mentioned. Then, Union of India and Others Vs. K.K. Dhawan, is, in fact, laying down the principle how to consider "misconduct" qua the Judicial Officer and the same is relied on by the Inquiry Officer. It is Union of India and others Vs. A.N. Saxena, . A brief reference to Head Note itself would show that it helps to the department than to the delinquent. The Head Note reads, thus: "Disciplinary proceedings - serious charge against the delinquent indicating culpability in the course of judicial proceeding - order of Administrative Tribunal granting stay of judicial proceedings without giving reasons or any inquiry, is liable to be set aside". Thus, it appears that there is no substance in grievance of the petitioner that authority relied on by him is not considered by the Inquiry Officer. The only point that has some

merit is, consent given by the workman in admitting the inquiry proceeding papers produced before the Labour Court. It may be that the petitioner may have misunderstood the consent given on behalf of the workman for placing on record the inquiry proceeding papers, as acceptance of legality and validity of inquiry proceeding. If it is the say of the petitioner that by giving of consent by the workman he has understood that workman may not have any grievance in respect of inquiry, then such view, though erroneous, may be in given case considered as pardonable. But the circumstances of the case do not support such belief of the petitioner. Beside admitting the inquiry proceeding papers, there are also other facts which deprive the petitioner from shelter of saying that he was under belief that workman may not have grievance against legality and validity of the inquiry proceeding. What is answer to the fact that the parties - including employer who had reserved his right in written submission, to make submission on merits - had argued only preliminary issue. Secondly, the Inquiry Officer after considering and verifying the record has come to the clear conclusion that only preliminary point was argued before the petitioner. That being so, say of petitioner that in view of consent given by the workman for taking on record inquiry proceeding had led the petitioner to believe that whole matter to be decided finally - is not possible to accept. The other points taken by the petitioner do not merit any consideration.

15. The findings of the Inquiry Officer are not in any way shaken in detailed reply to tentative decision by the petitioner. The detailed reply has no substance. The final order passed by the respondent No. 2 on 9-10-2007 is also proper, legal and does not call for any interference. In pursuance to tentative decision and final order passed by the respondent No. 2, the State has dismissed the petitioner from service by order dated 19-11-2007. The said order does not call for any interference. Hence, we do not see any reason to interfere. The petition, is therefore, dismissed. Rule is discharged.

FURTHER ORDER:

R.D. Kothari, J.

After the judgment is pronounced, learned Advocate Shri D.P. Kinariwala for the petitioner prays for stay of this dismissal order for a reasonable time so as to enable the petitioner to approach the higher forum.

Learned Advocate Shri Hemang Shah appearing for respondent No. 2 - High Court, opposes the request.

The fact that the Court has dismissed the petition, there is no question of staying the order of dismissal of petition.