

(2010) 11 GUJ CK 0094
In the Gujarat High Court
Case No : S.C.A. No. 10346 of 2002

Jayawant K. Durve

APPELLANT

Vs

Alembic Chemicals Works Company Ltd.

RESPONDENT

Date of Decision : 24-11-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Industrial Disputes Act, 1947 — Section 10, 33

Citation : (2011) 3 LLJ 95

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : Kayur Gandhi and Nirav Joshi for Nanavati Associates, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The Petitioner-Jayawant K. Durve has filed this petition under Articles 226 and 227 of the Constitution of India praying for quashing and setting aside the order passed by the Labour Court, Vadodara in Recovery Application No. 1098/2000 on July 22, 2002.

2. This petition was initially dismissed by this Court on October 11, 2002 by holding that no case was made out for interference either under Article 226 or 227 of the Constitution of India and hence the petition was dismissed.

3. Being aggrieved by the said order the Petitioner has filed Letters Patent Appeal No. 146/2003 before this Court. The said Appeal came to be disposed of on February 8, 2006. The Appeal was allowed by the Division Bench and order of the learned single Judge was set aside on the ground that no reasons were assigned while dismissing the petition. The petition was, thereafter, revived and rule was issued on April 17, 2006. This Court has passed detailed order on August 4, 2008 wherein it is observed that it is needless to state that the payment of subsistence allowance is statutory right and therefore the Court was, prima facie, not justified in rejecting the application on the ground that there was no existing

right. On January 25, 2010, this Court has passed further order for placing the matter before the Mediation Center. However, the matter could not be settled and hence it is placed for final hearing before this Court.

4. The Petitioner is a senior citizen and he has filed several written submissions before the Court. The last submission was filed by him on October 26, 2010 and on the date of last hearing the Petitioner has made clear that because of his old age it is not possible for him to make any oral submission and he places reliance on his written submissions filed before the Court from time-to-time.

5. On behalf of the Respondent Mr. Kayur Gandhi, learned advocate with Mr. Nirav Joshi, for Nanavati Associates appeared and made their submissions. On behalf of the Respondent two affidavits are filed before the Court. The first one is filed on August 1, 2008 and, thereafter, another affidavit is filed on January 7, 2010.

6. It is the case of the Petitioner that he joined the services of the Respondent on January 4, 1956 and on attaining the age of superannuation he retired on October 31, 1995. The Petitioner was suspended on July 5, 1985 and after the departmental inquiry the Respondent Company decided to dismiss the Petitioner. The Petitioner being protected workman could not be dismissed without the permission of the Industrial Tribunal, Vadodara. The Respondent Company, therefore, filed an Application No. 8/1992 in the Industrial Tribunal in the Reference Case No. 40/1985 seeking permission for the dismissal of the Petitioner. During the Pendency of the said permission application before the Industrial Tribunal the Petitioner retired on October 31, 1995 on attaining the age of superannuation. The permission application filed by the Respondent Company came to be dismissed by an order dated February 17, 2000 on the ground that the application have become infructuous. The Respondent Company did not challenge the said order of the Industrial Tribunal and hence he was deemed to have continued in the service of the Respondent.

7. It is also the case of the Petitioner that from the date of the suspension of the Petitioner i.e. from July 5, 1985 to the date of his retirement on superannuation i.e. October 31, 1995 the Respondent Company was paying 75% of his salary as subsistence allowance to the Petitioner. It is also the case of the Petitioner that he was entitled to get the remaining 25% of his salary for the period of his suspension as he was not finally dismissed. The Respondent Company has also not paid to the Petitioner his bonus, medical allowances, leave encashment and educational assistance and consecutive increments.

8. The Petitioner, therefore, filed Recovery Application No. 1098/2000 before the Labour Court for recovery of dues from the Respondent Company. In that Recovery Application the Petitioner has claimed the amount of (Rs.) 7,86,000/- due to be paid by the Respondent Company. The Petitioner, thereafter, filed amendment application. The Respondent Company herein have not filed reply to the said application. On the contrary application was filed before the Labour

Court requesting to frame preliminary issue that the Labour Court has no jurisdiction to entertain the said application. The Labour Court, after hearing both the parties without framing preliminary issue or without rejecting the application Exhibit 14 straightway rejected the Recovery Application vide its order dated July 22, 2002.

9. It is this order which is under challenge in the present petition.

10. In the petition several grounds are raised by the Petitioner challenging the order of the Labour Court. The Petitioner has contended that the Labour Court could not have rejected the Recovery Application on the ground that it had no jurisdiction to entertain the said application especially when an application was made by the Respondent Company for framing preliminary issue. It is further contended that the findings of the Labour Court are based on presumption and assumption which are not supported by any point of law. It is further contended that the Labour Court has wrongly interpreted Section 33(c)(2) of the Industrial Disputes Act and wrongly held that it has no jurisdiction to decide the application of the Petitioner. It is further contended that the issue of subsistence allowance be certainly gone into by the Labour Court while deciding the Recovery Application u/s 33(c)(2) of the Act. The Petitioner has also relied on the order passed by this Court in Special Civil Application No. 2458/2002 filed by the Respondent Company. In the said petition the Respondent Company has challenged the order passed by the controlling authority in favour of the Petitioner in Gratuity Application No. 199/2000. The Court in that petition has held that the Petitioner would be deemed to have continued in service and entitled to all the benefits available. It is further contended that the Recovery Application filed by the Petitioner is very specific and for a specified period. The details of the amount dues were submitted with the Recovery Application and hence the same can certainly be claimed in the application filed u/s 33(c)(2) of the Act. The Petitioner has also contended that he has not made any prayer with regard to the amount of gratuity or the date of superannuation and hence the question of deciding those issues by the Labour Court in the Recovery Application would not arise.

11. In several written submissions filed by the Petitioner the claim was increased. Even before the Mediator the Petitioner has raised the claim to the tune of more than (Rs.) 1 crore. In all these written submissions filed by the Petitioner, the Petitioner has reiterated that although in his recovery application with its amendment he has made the claim with reference to Section 33(c) of the Act, in fact, he is entitled to the more amount due from an employer. It is his case that where any money is due to employer under a statement or award or under the provisions of Chapter-VA or Chapter-VB the workman himself or any other person authorised by him in writing in his behalf or in the case of the death of the workman, his assignee or heirs may, without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him and if the appropriate Government is satisfied that any

money is so due, it shall issue a Certificate for that amount through the Collector, who shall proceed to recover the same in the same manner as an arrears of land revenue. He, therefore, claimed superannuation salary of (Rs.) 30,000/-p.m. from the date of his superannuation. Since he was protected employee he has also claimed the benefits to which he was entitled.

12. The Petitioner has also claimed the full wages upto the date of his retirement i.e. October 31, 1995 and all other retirement benefits. He has also given calculation of medical allowance and other allowances. Lastly the prayer was made by him to grant relief as prayed for in the petition as well as the submissions made by him.

13. This petition was opposed by the Respondent Company. Mr. Kayur Gandhi, learned advocate appearing for the Respondent Company has reiterated the contentions raised and submissions made in the two affidavits filed before this Court. He has submitted that the Petitioner has no pre-existing right to claim the amount of (Rs.) 7,86,060/- as the same has not been adjudicated by the competent authority and the Petitioner should have raised industrial dispute by way of reference under Section-10 of the Industrial Disputes Act for the adjudication of the same. He has further submitted that pursuant to the termination of the Petitioner on July 5, 1985 the Respondent Company filed an Application No. 8/1992 in Industrial Tribunal, Vadodara for permission to dismiss the Petitioner as the Petitioner was a protected workman. The Petitioner had been paid subsistence allowance at 50% for the first three months and thereafter, 75% for the subsequent months till October 31, 1995 i.e. the date on which the Petitioner reached the age of superannuation. The Respondent Company paid total amount of (Rs.) 2,89,718.91 towards subsistence allowance during the said period. He has further submitted that the Respondent Company paid total amount of (Rs.) 4,81,522.91 to the Petitioner towards suspension allowance, gratuity, interest on gratuity, provident-fund, administrative charges etc., which has been explained in detail by the Respondent Company.

The total payment made by the Respondent Company to the Petitioner till date is as under:

Particulars

Amount

Suspension allowance (July 5, 1985 to October 31, 1995)

(Rs.) 2,89,718.91

Gratuity (upto July 5, 1985)

(Rs.) 28,366.00

Gratuity (as per order in case No. 199/2000)

(Rs.) 70,293.00

Additional P.F. paid.

(Rs.) 44,914.00

Edli, Admn. Charges, Pension contribution

(Rs.) 7, 856.00

Interest on gratuity

(Rs.) 37,875.00

Cost for delay payment of gratuity

(Rs.) 2,500.00

Total

(Rs.). 4,81,522.91

14. Mr. Gandhi further submitted that in the recovery application filed by the Petitioner, claim was made for an amount of Rs. 7,86,060/-with 18% interest thereon. The demands made by the Petitioner in his recovery application were as under:

(i) The Respondent Company did not pay the correct amount towards suspension allowance.

(ii) Increments had not been added to the subsistence allowance paid to the Petitioner by the Respondent company.

(iii) The Petitioner was not given the effects of the settlement as well as Shree Sheth's Award.

(iv) The Petitioner was entitled to get 25% salary from 1984 to October 31, 1995 with 18% interest.

(v) The Respondent company did not compute the basic salary of the Petitioner correctly.

(vi) The Respondent company did not include medical allowance in the suspension allowance paid to the Petitioner.

(vii) The Respondent company did not pay bonus to the Petitioner for the suspension period.

(viii) The Respondent company failed to pay to the Petitioner leave encashment and educational assistance.

(ix) The Respondent Company was required to pay 18% interest on the aforesaid total amount from October 31, 1995 to September 30, 2000.

15. Mr. Gandhi further submitted that in the catena of judgments, the Apex Court has held that there must be pre-existing right in favour of the claimant to file

application u/s 33(c)(2) of the I.D. Act. He has further submitted that the application filed by the Petitioner for the period from November, 1984 to October 31, 1995 is clearly barred by limitation as Section 33(c)(1) of the I.D. Act clearly states that every such application shall be made within one year from the date on which the money becomes due to the workman. In the present case, the Petitioner demanded alleged dues for the period starting from November, 1984 to October 31, 1995 by way of a recovery application filed in October, 2000 and that too without explaining the delay in filing the recovery application. He has further submitted that the Petitioner also demanded in his application the payment of bonus. As per the third schedule of the Industrial Disputes Act only Industrial Tribunal has jurisdiction to decide the dispute regarding bonus and hence the Labour Court has rightly rejected the application of the Petitioner at the Labour Court did not have jurisdiction to decide the dispute of Payment of bonus raised by the Petitioner. He has further submitted that some of the demands raised by the Petitioner in his recovery application fall under the third schedule and hence the Labour Court did not have jurisdiction to decide the same.

16. In support of his submissions, Mr. Gandhi relied on the decision of the Apex Court in the case of H.P. State Electricity Board and Another Vs. Ranjeet Singh and Others, wherein it is held that bonus is not covered by second schedule as it appears at Item No. 5 of the third schedule and thus, question of entitlement of bonus would not have been decided by the Labour Court. The Apex Court has further held that in case of pre-existing rights, there must be agreements by both sides about the existence of such rights and if there is any disagreement, this has to be decided by the competent authority.

17. Mr. Gandhi further relied on the decision of the Apex Court in the case of A.P.S.R.T.C. and Another Vs. B.S. David Paul, wherein it is held that when a question arises as to the adjudication of claim for back wages, all relevant circumstances will have to be gone into and are to be considered in a judicious manner. Therefore, the appropriate forum, wherein such question of back wages, could be decided, is only in a proceedings before the Labour Court or Industrial Tribunal before whom a reference u/s 10 of the Act is made. He has, therefore, submitted that the Labour Court has rightly rejected the application filed by the Petitioner holding that the Petitioner did not have pre-existing right.

18. Mr. Gandhi further relied on the decision of the Apex Court in the case of State of Uttar Pradesh and Another Vs. Brijpal Singh, , wherein the Apex Court has held that the workman can proceed u/s 33(c)(2) only after Tribunal has adjudicated on a complaint u/s 33(a) or on a reference u/s 10 that the order of discharge or dismissal was not justified and has set aside the order and reinstated the workman. A proceeding u/s 33(c)(2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from the employer or if the workman is entitled to any benefit, which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. The right to the money, which is sought

to be calculated or to the benefit which is sought to be computed must be an existing one that is to say already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the industrial workman and his employer. It is not competent to the (Labour Court exercising jurisdiction u/s 33(c)(2) to arrogate to itself the function of an Industrial Tribunal and entertain a claim which is not based on an existing right, but which may appropriately be made the subject matter of an industrial dispute in a reference u/s 10 of the Act. The Labour Court has no jurisdiction to first decide the workman's entitlement and then proceed to compute the benefit so adjudicated on that basis in exercise of its power u/s 33(c)(2) of the Act. It is only when the entitlement has been earlier adjudicated or recognized by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is treated as incidental to Labour Court's power u/s 33(c)(2) like that of the executing Court's power to interpret a decree for the purpose of its execution. The difference between a pre-existing right or benefit on one hand and the right or benefit which is considered just and fair on the other hand is vital. The former falls within the jurisdiction of Labour Court exercising power u/s 33(c) of the Act while the latter does not. The Apex Court has further held that appropriate forum, where question of back wages could be decided is only in proceeding before a forum to whom a reference u/s 10 of the Act is made. Therefore, the Labour Court has no jurisdiction to adjudicate the claim made by the Respondent u/s 33(c) of the Act in an undetermined claim and until such adjudication is made by the appropriate forum, the Respondent workman cannot ask the Labour Court in an application u/s 33(c) of the I.D. Act to discharge his dismissal as wrongful and on that basis to compute his wages. He has, therefore, submitted that the impugned order passed by the Labour Court is just and proper and it does not call for any interference by this Court while exercising its writ jurisdiction under Articles 226 and 277 of the Constitution of India.

19. Having considered the averments and submissions made in the memo of petition as well as the written submissions filed by the Petitioner from time to time and having heard the learned Counsel appearing for the Respondent Company in light of statutory provisions and the nature of claim made by the Petitioner in his recovery application filed u/s 33(c)(2) of the Act, the Court is of the view that the Labour Court is justified in rejecting the said application filed by the Petitioner especially in light of the fact that the Respondent Company has already paid an amount of (Rs.) 4,81,522.91 to the Petitioner. In any case the claim enhanced by the Petitioner from time to time subsequent to filing of the Recovery Application does not require any consideration by this Court as what is under challenge is recovery application filed by the Petitioner and the order passed by the Labour Court on that recovery application. As against the claimed amount of (Rs.) 7,86,060/- the Petitioner has already got the amount of (Rs.) 4,81,522.91. The rest of the claim made by the Petitioner requires adjudication which can be done only in the reference filed u/s 10 of the Industrial Disputes

Act. As per the settled legal position the same cannot be adjudicated in an application filed u/s 33(c)(2) of the I.D. Act. Considering the case law cited before the Court and the reliance placed by the learned Counsel appearing for the Respondent Company on the cases referred to hereinabove, the Court is of the view that the Labour Court has rightly decided the application filed by the Petitioner u/s 33(c)(2) of the Act and there is no infirmity or illegality in the order passed by the Labour Court. There is no ban under the law that the Labour Court cannot straightway reject the application on the ground that it has no jurisdiction despite the fact that an application to frame preliminary issue is filed by the Respondent Company. No sooner the application is rejected such application for raising preliminary issue also stands disposed off. It is very clear that dismissal of this petition would not affect the right of the Petitioner to get his claim adjudicated before the proper forum. It is always open for the Petitioner to take appropriate action for his claim.

20. Taking any view of the matter and more particularly considering the fact that an amount to which the Petitioner is entitled i.e. (Rs.) 4,81,522.91 has already been paid by the Respondent Company to the Petitioner. The petition does not have any merit or substance and it is accordingly dismissed. Rule is discharged without any order as to costs.