

(2016) 09 GUJ CK 0019

In the Gujarat High Court

Case No : Special Civil Application No. 14152 of 2016, [On note for speaking to minutes of order dated 02/09/2016 in C/SCA/14152/2016]

Mother Dairy

APPELLANT

Vs

Deputy Commissioner of Labour

RESPONDENT

Date of Decision : 02-09-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10(1)

Citation : (2017) 1 CLR 728 : (2017) 153 FLR 701 : (2017) 1 GLR 798

Hon'ble Judges : Mr. C.L. Soni, J.

Bench : Single Bench

Advocate : Mr. P.C. Chaudhari, Caveator, for the Respondent No. 3; Nanavati Associates and Keyur D. Gandhi, Advocates, for the Petitioners No. 1

Final Decision : Dismissed

Judgement

Mr. C.L. Soni, J.(Oral) - Following are the prayers made in para 7 of the present petition filed under Article 226/227 of the Constitution of India:

"7. For the reasons stated herein above and such other as may be advanced at the time of hearing of this petition, the petitioner above named most respectfully prays that;

(A) Your Lordships be pleased to issue a writ of mandamus and/or writ of certiorari and/or any other appropriate writ, order or directions in the like nature to quash and set aside the original order of reference dated 01.09.2001 issued by the respondent no.1 ? Deputy Commissioner of Labour as illegal without authority of law and ultravires the powers;

(B) Your Lordships may be pleased to issue a writ of certiorari or any other appropriate writ order or direction to quash and set aside the order dated 16.07.2016 passed by the Presiding Officer, Industrial Tribunal No.5, Ahmedabad below Exh. 177 and Exh. 178 in Reference (IT) No. 128 of 2001, in the interest

of justice;

(C) Pending admission, hearing and final disposal of this petition, the execution, implementation and operation of the impugned order dated 16.7.2016 passed by Presiding Officer, Industrial Tribunal No.5, Ahmedabad below Exh. 177 and Exh. 178 in Reference (IT) No.128 of 2001, may kindly be stayed in the interest of justice and equity;

(D) Pending admission, hearing and final disposal of this petition, the further proceedings of the Reference (IT) No. 128 of 2001 may kindly be stayed and

(E) Grant such other and further relief(s) as are deemed fit in the interest of justice and equity."

2. As regards second prayer, learned Advocate Mr. Gandhi appearing for Nanavati Associates, Advocate for the petitioner fairly stated that since similar prayer was not pressed in the petition being Special Civil Application No.13055 of 2016, the present petition for the second prayer is not pressed.

3. It appears from the facts stated in the petition that by order dated 1.9.2001 passed by the Deputy Commissioner of Labour, Ahmedabad, dispute is referred to the Industrial Tribunal ("the Tribunal") for its adjudication on the terms of reference mentioned therein. Based on such order the reference is registered as Reference (IT) No.12 of 2001 before the Tribunal. As averred in the petition, the union filed statement of claim and the petitioner filed its written statement in response to the statement of claim and the evidence is adduced by both the sides. The proceedings are now at the stage of arguments where the petitioner is to submit its written arguments. It is at this stage the petitioner filed the application Exh. 177 and 178 raising preliminary issue regarding jurisdiction of the Tribunal on the ground that the Deputy Commissioner of Labour did not have power to refer the matter in connection with the matter mentioned in item no.3 of the Second Schedule of the Act. Such applications are rejected by the Tribunal against which, above referred petition was filed by the petitioner which was disposed of as not pressed by observing at the instance of the petitioner that whatever observations made by the Tribunal while deciding the applications Exh.177 and 178, the same shall not come in the way of the petitioner when challenge is made to the order made by the Deputy Commissioner of Labour to refer the dispute to the Tribunal for adjudication. The present petition is now filed to challenge the order made by the Deputy Commissioner of Labour to refer the dispute to the Tribunal on the ground that the Deputy Commissioner of Labour had no competence to refer the dispute under the notification dated 21st April, 1982.

4. Learned Advocate Mr. Gandhi appearing for the petitioner submitted that the reference clearly falls within item ? 3 of the Second Schedule of the Act and as per the notification dated 21st April, 1982, copy whereof is placed at page 47, the Deputy Commissioner of Labour had no power or competence to refer the dispute for the terms of reference to the Tribunal. Mr. Gandhi submitted that as

on the date when the Deputy Commissioner of Labour passed the order, the notification dated 18.8.2001 was in force whereunder the Commissioner of Labour was given power to refer the dispute for the matters covered under Item -3 of the Second Schedule. Mr. Gandhi submitted that it is a pure question about the power and jurisdiction of the Deputy Commissioner of Labour to refer the dispute for adjudication to the Tribunal and such issue about the jurisdiction is pure question of law which could be raised at any point of time. He has placed reliance on the decision in the case of Greater Mohali Area Development Authority and Others v. Manju Jain and Others reported in (2010) 9 SCC 157, Ariane Orgachem Private Limited v. Wheth Employees Union and Others, reported in (2015) 7 SCC 561, Gurucharan Singh v. Kamla Singh and Others reported in (1976) (2) SCC 152.

5. Learned Advocate Mr. Chaudhari appearing for the caveator ? respondent No.3 submitted that the challenge to the order of the Deputy Commissioner of Labour is made by the petitioner after long period of 15 years. Mr. Chaudhari submitted that the petitioner after participating in the proceedings of the reference upto the stage of giving evidence has come with the present petition under Article 226/227 of the Constitution of India. Mr. Chaudhari submitted that considering the long delay and the conduct of the petitioner of not challenging the order of the Deputy Commissioner of Labour till the evidence of both the sides was over would amount waiver and therefore the order making reference by the Deputy Commissioner of Labour may not be permitted to be challenged by the petitioner by invoking extra-ordinary jurisdiction of this Court under Article 226/227 of the Constitution of India. Mr. Chaudhari submitted that in any case, it is not correct to say that the Deputy Commissioner of Labour has no competence to refer the dispute to the Tribunal for adjudication. He submitted that the notification of the year 1982 giving power to the Deputy Commissioner of Labour to refer the dispute for the matters contained in the terms of reference are not either disturbed or taken away by subsequent notification issued in the year 2001 and, therefore also, it cannot be said that the Deputy Commissioner of Labour has no power or jurisdiction to refer the dispute to the Tribunal.

6. The Court having heard the learned advocates for both the sides finds that the competence of the Deputy Commissioner of Labour to refer the dispute to the Tribunal for the matters contained in the terms of reference is questioned by the present petitioner after long period of about 15 years. As stated by the petitioner itself, reference before the Tribunal proceeded upto the stage of recording of evidence of both the sides and it is now at the stage of filing of written arguments by the petitioner. During this period of 15 years, the petitioner participated in the proceedings of reference not only by giving written statement against the statement of claim submitted by respondent no.1 but also by adducing evidence. Now when the proceedings of the reference has almost reached to its final stage, the first attempt was made to challenge the jurisdiction of the Tribunal by preferring applications Exh. 177 and 178 which as stated above, the Tribunal rejected and before this Court also the petition was not

pressed against the said challenge. However, under the belief that the issue as regards competence or jurisdiction of the Deputy Commissioner of Labour is pure question of law which could be raised at any stage of the proceedings irrespective of the facts of the case, the order of the Deputy Commissioner of Labour referring the dispute for adjudication is challenged by the petitioner by invoking the jurisdiction of this Court under Article 226/227 of the Constitution of India.

7. In the case of Greater Mohali Area Development Authority (supra), relied on by Mr. Gandhi, Hon"ble the Supreme Court has observed in para 26 as under:

"26. The respondent No. 1 raised the plea of non-receipt of the letter of allotment first time before the High Court. Even if it is assumed that it is correct, the question does arise as to whether such a new plea on facts could be agitated before the Writ Court. It is settled legal proposition that pure question of law can be raised at any time of the proceedings but a question of fact which requires investigation and inquiry, and for which no factual foundation has been laid by a party before the Court or Tribunal below, cannot be allowed to be agitated in the Writ Petition. If the Writ Court for some compelling circumstances desires to entertain a new factual plea the court must give due opportunity to the opposite party to controvert the same and adduce the evidence to substantiate its pleadings. Thus, it is not permissible for the High Court to consider a new case on facts or mixed question of fact and law which was not the case of the parties before the Court or Tribunal below. [Vide State of U.P. v. Dr. Anupam Gupta, Ram Kumar Agrawal and Anr. v. Thawar Das ; Vasantha Viswanathan and Ors. v. V.K. Elayalwar and Ors. Anup Kumar Kundu v. Sudip Charan Chakraborty; Tirupati Jute Industries (P) Ltd. v. State of West Bengal and Sanghvi Reconditioners (P) Ltd. v. Union of India.] "

The Court finds that the above observations in no way will be of any help to the petitioner.

8. In the facts of the case. As regards the the matter in the case of Ariane Orgachem Pvt. Ltd. (supra) relied on by Mr. Gandhi, the Court finds the challenge to the order of the Deputy Commissioner of Labour of not referring the dispute where unlike the facts of the present case, proceedings of reference had not taken place. In the said case, after failure report was submitted by the conciliation officer, the Deputy Commissioner of Labour declined to make order of reference on the ground that there was no industrial dispute in existence between the parties. The High Court in exercise of its powers, quashed order of the Deputy Commissioner of Labour and ordered the Deputy Commissioner of Labour to make order of reference to the Industrial Tribunal for its adjudication. The Hon"ble Supreme Court did not set aside the order of the High Court by observing in para 37 of the above said judgment as under:

"The conclusion arrived at by the High Court that the order of refusal to make an order of reference of the existing industrial dispute to the Industrial Tribunal by

the Deputy Commissioner of Labour is bad in law, and it has rightly issued the writ of mandamus to the State Government and the Deputy Commissioner of Labour for the reason that the employer has been litigating the matter before the High Court for several years and the High Court, based on the pleadings and evidence on record, must have felt that the disputed questions of fact pleaded by the parties warrant the adjudication of the dispute effectively by the Industrial Tribunal. Therefore, we do not find any reason to set aside the order of mandamus issued by the High Court to the State Government represented by the Deputy Labour Commissioner."

However, in para 41 and 42, the Hon"ble Supreme Court provided certain modification in the operative portion of the order of the High Court as under:

"41. Hence, in our considered view the impugned judgment and order passed by the High Court is perfectly legal and valid and the same does not call for interference by this Court except with certain modification in the operative portion of the order of the High Court, namely, with regard to the direction given to the State Government represented by the Deputy Labour Commissioner which is not in accordance with the notification referred to supra. The said direction has to be given to the Additional Labour Commissioner (in accordance with the Notification dated 09.08.2003) to make an order of reference to the Industrial Tribunal within six weeks from the date of receipt of the copy of this order as the matter has been pending at the reference making stage itself for several years at the instance of the appellant-Company and the respondent no.3 herein.

42. We therefore, issue the direction to the State Government represented by its delegatee, the Additional Commissioner of Labour, to make an order of reference to the competent Industrial Tribunal within six weeks from the date of receipt of the copy of this judgment. We further direct the Industrial Tribunal to decide the case within six months from the date of receipt of such order of reference after affording an opportunity to both the parties and to pass appropriate award."

9. It needs to be recorded that in the said case, the notification of the Deputy Commissioner of Labour was challenged before High Court without much delay. Therefore, judgment of the Hon"ble Supreme Court in the said case shall have no applicability to the facts of the present case.

10. Then, Mr. Gandhi relied on the judgment of the Hon"ble Supreme Court in the case of Gurucharan Singh (supra) to press his point that the pure question of law going to the root of the case and based on undisputed or proven facts could be raised even before the court of last resort, provided the opposite side was not taken by surprise or otherwise unfairly prejudiced. This judgment nowhere lays down that the aspect of delay and conduct of the party is to be ignored. A point of law based on undisputed fact, could be raised before the court of last resort. However, if a party by its conduct has allowed the proceedings before the original authority to go on for very long time and having participated in such proceedings for long time, if virtually at the end of proceedings suddenly wakes up to

challenge the competence of the authority based on whose order the proceedings have continued for long time, his objection at such belated stage cannot be entertained as he could be said to have acquiesced in the making of the order and waived his right to challenge the order. In the case of U.P. Jal Nigam and another v. Jaswant Singh and another reported in (2006) 11 SCC 464, Hon"ble the Supreme Court has held and observed in para 6,12 and 13 as under:

"6. The question of delay and laches has been examined by this Court in a series of decisions and laches and delay has been considered to be an important factor in exercise of the discretionary relief under Article 226 of the Constitution. When a person who is not vigilant of his rights and acquiesces with the situation, can his writ petition be heard after a couple of years on the ground that same relief should be granted to him as was granted to person similarly situated who was vigilant about his rights and challenged his retirement which was said to be made on attaining the age of 58 years. A chart has been supplied to us in which it has been pointed out that about 9 writ petitions were filed by the employees of the Nigam before their retirement wherein their retirement was somewhere between 30.6.2005 and 31.7.2005. Two writ petitions were filed wherein no relief of interim order was passed. They were granted interim order. Thereafter a spate of writ petitions followed in which employees who retired in the years 2001, 2002, 2003, 2004 and 2005, woke up to file writ petitions in 2005 & 2006 much after their retirement. Whether such persons should be granted the same relief or not ?

12. The statement of law has also been summarized in Halsbury's Laws of England, Para 911, pg. 395 as follows :

"In determining whether there has been such delay as to amount to laches, the chief points to be considered are :

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches.

13. In view of the statement of law as summarized above, the respondents are guilty since the respondents has acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or while away and did not rise to the

occasion in time for filing the writ petitions, then in such cases, the Court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussion on the financial management of the Nigam. Why the Court should come to the rescue of such persons when they themselves are guilty of waiver and acquiescence?"

11. In the case of *Krishnadevi Malchand Kamathia and others v. Bombay Environmental Action Group and others* reported in (2011)3 SCC 363, Hon'ble the Supreme Court held and observed in para 16 to 19 as under:

"16. It is settled legal proposition that even if an order is void, it requires to be so declared by a competent forum and it is not permissible for any person to ignore the same merely because in his opinion the order is void. In *State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth Naduvil (dead) & Ors.*; *Tayabbhai M. Bagasarwalla & Anr. v. Hind Rubber Industries Pvt. Ltd. Etc.*; *M. Meenakshi & Ors. v. Metadin Agarwal (dead) by L.Rs. & Ors.*; and *Sneh Gupta v. Devi Sarup & Ors.*, this Court held that whether an order is valid or void, cannot be determined by the parties. For setting aside such an order, even if void, the party has to approach the appropriate forum.

17. In *State of Punjab & Ors. v. Gurdev Singh, Ashok Kumar*, this Court held that a party aggrieved by the invalidity of an order has to approach the court for relief of declaration that the order against him is inoperative and therefore, not binding upon him. While deciding the said case, this Court placed reliance upon the judgment in *Smith v. East Ellore Rural District Council*, wherein Lord Radcliffe observed: (AC pp 769-79)

"An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

18. In *Sultan Sadik v. Sanjay Raj Subba & Ors.*, this Court took a similar view observing that once an order is declared non-est by the Court only then the judgment of nullity would operate erga omnes i.e. for and against everyone concerned. Such a declaration is permissible if the court comes to the conclusion that the author of the order lacks inherent jurisdiction/competence and therefore, it comes to the conclusion that the order suffers from patent and

latent invalidity.

19. Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person."

12. Mr. Chaudhari submitted that considering the terms of reference, it clearly appears that the Deputy Commissioner of Labour had competence by virtue of the notification dated 21st April, 1982 and the power of the Deputy Commissioner of Labour are not taken away by subsequent notification dated 18.8.2001 issued by the State Government but by such notification, the Labour Commissioner is also empowered to exercise such power available to the Deputy Commissioner of Labour under the notification of the year 1982, therefore, the original notification giving power to the Deputy Commissioner of Labour stands. The Court however is not required to go into such aspects of the matter when the Court is not accepting challenge to the impugned notification based on the aspect of delay and conduct of the petitioner.

13. In light of the above and considering the time lapse of 15 years during which the proceedings of reference reached to the stage of giving arguments by the petitioner and considering the conduct of the petitioner of participating in the proceedings of reference amounting to acquiescing in the order of the Deputy Commissioner of Labour to refer the dispute for adjudication to the tribunal and also amounting to waiver of its right to challenge the notification of making reference, the Court finds that the challenge by the petitioner to the impugned order of the Deputy Commissioner of Labour cannot be entertained in exercise of the power under Article 226/227 of the Constitution of India.

14. For the reasons stated above, the petition is rejected.