
(1956) 12 BOM CK 0003

In the Bombay High Court

Case No : Special Civil Appeal No's. 1679, 1680 and 1681 of 1956

New Gujarat Cotton Mills Limited

APPELLANT

Vs

Labour Appellate Tribunal

RESPONDENT

Date of Decision : 11-12-1956

Acts Referred:

Companies Act, 1956 — Section 172
Constitution of India, 1950 — Article 226, 227

Citation : (1957) 27 CompCas 500 : (1957) 2 LLJ 194

Hon'ble Judges : Palnitkar, J; J.C. Shah, J

Bench : Division Bench

Advocate : N.A. Palkhivala and V.B. Patel, for the Appellant; H.R. Gokhale, M.C. Bhandare, V.M. Tarkunde and M.A. Rane, for the Respondent

Judgement

Shah, J.—This is an application for a writ under articles 226 and 227 of the Constitution quashing an order passed by the Labour Appellate Tribunal in five appeals Nos. 41 and 147 of 1954, 50, 51 and 148 of 1955. The orders passed by the Labour Court in appeals Nos. 50, 51 and 148 of 1955 were set aside by the Tribunal and the cases were remanded to the Labour Court at Ahmedabad and were directed to be tried on the merits in the light of the observations made in the judgment. Against the order of the Labour Appellate Tribunal this application has been filed. The facts which give rise to this application may be briefly stated.

2. Respondents Nos. 5 to 13 were employees of the Gujarat Cotton Mills Co. Ltd., which will hereafter be referred to as the old company. The old company had a factory at Ahmedabad for manufacture of cotton textiles. The old company closed its factory in October 1952 after putting up a notice understanding order No. 9. In February 1953, this court on a creditor's application ordered that the old company be wound up and appointed the official liquidator to liquidate its affairs. The liquidator obtained an order from this court for selling as a going concern the assets and the goodwill of the company including the leasehold rights to the land on which the factory stood. The new Gujarat Cotton Mills Ltd., which will

hereafter be referred to as the new company, through its agent agreed to purchase the assets, the goodwill and the leasehold rights of the old company together with the buildings, plant and machinery from the liquidator. The new company commenced working the factory in November 1953. The liquidator executed a sale deed in favour of the new company on March 4, 1954. By the sale deed the new company acquired the business assets together with the goodwill, the leasehold interest, building and the plant and machinery. The sale deed recited that the old company continued to be responsible for all debts and liabilities, and bonus and other emoluments due and payable to its employees. The new company declined to continue in its employment certain employees of the old company. These employees then approached the new company for reinstatement or re-employment and the new company having refused to grant their request, applications were filed before the Labour Court at Ahmedabad for an order against the new company reinstatement or re-employment. The Judge of the Labour Court held that the applicants were not employees and the application filed by them was not maintainable. He observed that the old company having been ordered to be wound up by the operation of section 172 of the Indian Companies Act, 1913, the employees of the old company were in law discharged from employment. He also held that the old company had terminated the services of its employees before it was ordered to be wound up. In the view of the Judge, an industrial dispute could not arise between a workman and a prospective employer, and inasmuch as the new company had started substantially as a new undertaking, it could not be regarded as a successor of the old company and was under no obligation to employ the workmen of the old company. In coming to that conclusion the Judge held that there was no connecting link between the business carried on by the old company and the new company, and there was in substance no transfer of the business of a going concern. Against the order of the Labour Court rejecting the application the applicants preferred an appeal to the Industrial Court. In appeal, the Industrial Court agreed with the view of the Labour Court. The Industrial Court held that the services of the applicants stood determined by virtue of section 172 of the Companies Act, and as the liquidator did not continue the business of the old company, they ceased to be employees from the date of commencement of the winding up. The Industrial Court also observed that from the circumstance that the old company as well as the new company were carrying on the same business, the applicants could not be regarded as employees of the new company under the definition of "employee" in the Bombay Industrial Relations Act, and as the applicants had ceased to be employees of the old company, they were not employees within the meaning of the Bombay Industrial Relations Act. In the view of the Industrial Court, sub-section (4) of section 42 of the Act contemplated "approach by an employee to his employer and not to any other employer." The Industrial Court negatived the contention of the applicants that the new company was successor of the old company within the meaning of section 114(1) of the Act. The court held that though the liquidator obtained permission to sell the assets of the old company as a going concern, what was

sold by him was "a mill and all its property to the new company not as a going concern because the old company had closed down and stopped its business." Having regard to the fact that the sale deed recited that the new company acquired the assets of the old company being registered as a separate undertaking under the Industrial Relations Act, the court held that there was a "complete hiatus" between the old undertaking and the new undertaking and the new company could not be regarded as a successor of the old company.

3. Against the order passed by the Industrial Court, appeals were filed to the Labour Appellate Tribunal. The Labour Appellate Tribunal disagreed with the view of the Labour Court and the Industrial Court on the interpretation of the sale deed. The Appellate Tribunal held that the sale deed conveyed not only tangible assets of the old company but also the goodwill which was expressly separately valued and the business of the company was purchased as a running concern, and the new company must be regarded as a successor of the old company. The Labour Appellate Tribunal observed :

"Where a person merely buys the whole or any part of the tangible assets of any person who has been using the same in his business, the purchaser cannot be said to acquire any interest of any sort in the old business of the vendor and if the purchaser starts a similar business of his own with the help of such assets, he cannot be regarded in any sense as a successor of the old business nor is he entitled to any of the intangible privileges belonging to the old business like the right to use the same or a similar name for his business or to canvass the old custom as against the vendor."

4. But, the Tribunal observed, the new company having purchased "the goodwill of the old business it was futile to suggest that the right to run the business of the old company has lost all significance by the mere lapse of time." The Tribunal then observed :

"Ordinarily under the civil law, a person who is a successor to a business is not bound merely because of such succession by the debts or liabilities of the old business and even if he has agreed with his transferor to be so liable, third parties, in the absence of a tripartite arrangement, cannot enforce such debt or liability against the transferor who alone continues to remain liable for such debts and liabilities to third parties Unlike the civil law, under the industrial law the duties of a successor in business who has decided to run the same and the case of employees of the old concern qua the employees of the new concern are different. Under the industrial law the rights and obligations of the old concern are regarded as continuing and enforceable against the new management and not to be affected by the substitution of the new management for the old, whenever justice of the case would require such enforcement."

5. In support of that view, the Tribunal referred to the provisions of section 18(c) of the Industrial Disputes Act and sections 114(1)(a) and 115 of the Bombay Industrial Relations Act. Holding that the new company was the successor of the

old company, the Appellate Tribunal remanded the case to the Labour Court for a decision on the question whether the applicants were entitled to claim relief from the successor in business. The Tribunal observed that in such a case the court must carefully consider whether the refusal to give re-employment is capricious and industrially unjustified on the part of the successor in business, or whether the successor can show cause for such refusal founded on reasonable and bona fide grounds such as want of work, inability of the applicant to carry out the available work efficiently, late receipt of the application for re-employment in view of the prior commitments or any other cause which in the opinion of the court makes it unreasonable to force a successor in business to give re-employment to all or any of the employees of the old concern. Against that order of remand this application has been filed under articles 226 and 227 of the Constitution.

6. Section 42 of the Bombay Industrial Relations Act by sub-section (4) provides, in so far as it is material, as follows :

"Any employee or a representative union desiring a change in respect of

(i)

(ii)

(iii) an industrial matter specified in Schedule III, shall make an application to the Labour Court :

Provided that no such application shall lie unless the employee has in the prescribed manner approached the employer with a request for the change and no agreement has been arrived at in respect of the change within the prescribed period."

Schedule III to the Act sets out several industrial matters and item 6 thereof is : "employment" and includes "reinstatement", "recruitment" as also "unemployment of persons previously employed in the industrial concern."

7. The employees in this case applied to the new company for re-employment or reinstatement, but the new company declined to accede to that request. The requirements of the proviso to sub-section (4) are, therefore, fulfilled. A claim for reinstatement or re-employment must be deemed to fall within item (6) to Schedule III to the Act. The dispute raised by the employees expressly fell within item No. 6 in Schedule III and it was competent to the employees to make an application to the Labour Court desiring change in respect thereof. An employee is defined in section 3(13) meaning :

"any person employed to do any skilled or unskilled work for hire or reward in any industry, and includes -

(a)

(b) a person who has been dismissed or discharged from employment on account

of any dispute relating to a change in respect of which a notice is given or an application made u/s 42 whether before or after his dismissal or discharge."

8. That definition is followed by a proviso which excludes certain categories of employees but it is conceded in this case that the applicants do not fall within the excepted classes. It is clear from the definition that a person who is dismissed or discharged from employment on account of any dispute relating to a change in respect of which an application u/s 42 is made, whether before or after his dismissal or discharge, is regarded as an employee within the meaning of that expression. "An industrial matter" in clause (8) is defined as meaning :

"Any matter relating to employment, work, wages, hours of work, privileges, rights or duties of employers or employees or the mode, terms and conditions of employment, and includes -" certain matters specified therein.

9. At first sight it may appear that there is no contract of employment between the applicants and the new company. The applicants were employees of the old company and it appears that there was termination of employment either by notice served upon them or by virtue of section 172 of the Indian Companies Act. The new company also appears to be a new undertaking : it has been so registered under the Bombay Industrial Relations Act and it has been registered as a new company under the Companies Act. The new company is admittedly a purchaser of the assets, goodwill and the Immovable property which belonged to the old company including the leasehold rights. Under the ordinary law of contracts, the applicants may have no right to claim against the purchaser of the assets of the old company, a right to continue in employment, but the questions arising out of industrial disputes cannot be decided merely on considerations of contractual obligations under the civil law. The object sought to be achieved by the industrial law is promotion of harmonious relations between labour and capital, between the employer and the employee, and substantially by what is called "Labour Legislation" it is intended to provide a machinery for settlement of disputes by adjudication or arbitration on considerations of justice, equity and good conscience. As has been observed by the Federal Court in the Western India Automobile Association Vs. The Industrial Tribunal, :

"..... when a dispute arises about the employment of a person at the instance of a trade union, or a trade union objects to the employment of a certain person, the definition of industrial dispute would cover both those cases. In each of those cases, although the employer may be unwilling to do so, there will be jurisdiction in the Tribunal to direct the employment or non-employment of the person by the employer. This is the same thing as making a contract of employment when the employer is unwilling to enter into such a contract of employment when the employer is unwilling to enter into such a contract with a particular person. Conversely, if a workman is unwilling to work under a particular employer, a trade union may insist on his doing so, and the dispute will be about the employment of the workman by the employer and thus become an industrial dispute subject to the award of the Tribunal."

10. In our view, in industrial matters, the court is entitled and is indeed bound to modify contractual rights and obligations on considerations of equity and in the larger interests of the community, such as promotion of industrial peace and security of employment of workmen. Merely because under the law of contracts, a claim may not lie at the instance of the applicants to be re-employed or reinstated by the new company, the claim made by the applicants cannot be regarded as inadmissible. It appears to have been settled by a large number of decisions of the Industrial and Labour Court that the industrial law takes a different view about the duties and obligations of a successor in business, and if a successor decides to run the same business which was carried on by his predecessor, the employees of the old concern are entitled to submit a dispute before the Industrial Tribunal regarding their rights and obligations in the business of the old concern are entitled to submit a dispute before the Industrial Tribunal regarding their rights and obligations in the business of the old concern, and those rights and obligations must be regarded as continuing and enforceable against the new management and not affected by the substitution of the new management for the old. In *The Management of Odeon Cinema Vs. The Workers of Sagar Talkies and Others*, it was observed by the Madras High Court : "where there is a transfer of a business of one management to another, the rights and obligations which existed as between the old management and their workers continue to exist vis-a-vis the new management, after the date of transfer." It is also implicit in sections 114 and 115 of the Bombay Industrial Relations Act that the rights and obligations of a management of an industrial undertaking are enforceable in proper cases against its successor. It appears from the terms of section 18(c) of the Industrial Disputes Act that a successor to an old undertaking is liable to meet certain obligations of its predecessors. In our view, therefore, the absence of a direct contractual relation between the applicants and the new company is by itself not a ground for rejecting the claim made by the applicants.

11. The Labour Appellate Tribunal has held on the interpretation of the sale deed that the new company are the successors of the business of the old company. In coming to that conclusion they have relied upon the recitals relating to the order made by this court on 16th May, 1953, sanctioning the sale of the mill as a going concern and the invitation of tenders by the liquidator and the sale thereof as a going concern together with the goodwill thereof, the leasehold interest of the company in the said lands, hereditaments and premises and all the plant and machinery and fixtures lying on or about the said mill premises. They have also relied upon the fact that the tender was submitted on behalf of the new company and ultimately it was accepted by the liquidator. They have also observed that a sum of Rs. 3,00,000 (three lacs) out of the total consideration of Rs. 22,51,000 represented the price of the goodwill and the leasehold interest of the company in lands and buildings and the fixtures in the nature of Immovable property agreed to be sold to the purchaser, and that the old company having conveyed to the new company in consideration of Rs. 3,00,000, the goodwill together with the

leasehold interest, it must be held that the new company were the successors of the business of the old company.

12. Mr. Palkhivala who appears on behalf of the new company has contended that this finding of the Labour Appellate Tribunal was incorrect. Counsel contended that there was in substance no sale of a going concern and he has invited our attention to the fact that there is no reference in the habendum clause to the transfer of either a continuing business or of a going concern. Counsel says that in reciting the history of the transactions the sale deed refers to the order passed by the court and also to a invitation for tenders for sale of a going concern, but the clause which conveys the property to the purchaser has reference only to the sale of the plant and machinery, the leasehold interest and the goodwill, and does not purport to convey the business or the goodwill of a going concern. Counsel urged that if there was any obscurity in what was conveyed by the sale deed, permission to produce a copy of the tender submitted on behalf of the new company to the liquidator may be granted in this application. Counsel also urged that the work of the factory of the company had stopped for more than one year prior to the date on which the sale deed was executed and it was almost a legal impossibility that there could be anything in the nature of a succession to a business which was completely stopped. We are unable to accept there submissions. It is true that there is no express reference in the habendum clause to a sale of the business of a going concern, but on a reasonable reading of the sale deed, we have no doubt that there was conveyance of the property ordered to be sold by the court and in respect of which tenders were invited. All the three items of property which were recited as properties in respect of which tenders were invited are the properties which ultimately have been sold and conveyed. We do not think that in this application we will be justified in allowing fresh evidence to be produced at this late stage. Even if the factories of the company had stopped working it is difficult from that circumstance to arrive at a conclusion that the business of the old company had ceased. There is necessarily no direct connection between the stoppage of the factory and the stoppage of a business of the concern. For diverse reasons the factory may have been closed but that does not lead to the conclusion that the business comes to an end. Again the goodwill of a business is inclusive of positive advantages such as carrying on the commercial undertaking at a particular place and in a particular name, and also its business connections, its business prestige, and several other intangible advantages which a business may have acquired. Unless there is clear evidence to show that this goodwill which was intended to be sold and in fact sold by the liquidator to the new company, was nothing but a name, we will not be justified in holding that no real and substantial goodwill of the old company was conveyed. In coming to that conclusion we are impressed by the circumstance that the goodwill has been separately mentioned and has been valued in the sale deed.

13. Even if it be possible to take a view different from the one which has appealed to the Labour Appellate Tribunal on the interpretation of the sale deed,

we do not think that in exercising jurisdiction under articles 226 and 227 of the Constitution we have any powers to interfere with the conclusions of that Tribunal. Their Lordships of the Supreme court in Waryam Singh and Another Vs. Amarnath and Another, have observed :

"This power of superintendence conferred by article 227 of the Constitution should be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors."

14. Therefore, assuming that there is some error committed by the Tribunal, we do not think that the Tribunal has gone outside the bounds of its authority in interpreting the sale deed and in coming to a conclusion that what was conveyed was the business of a going concern and not merely the assets of a business which had closed altogether.

15. Mr. Palkhivala urged that even if we have no jurisdiction under article 227 of the Constitution to interfere with the conclusion arrived at by the Labour Appellate Tribunal, by this application our jurisdiction under article 226 of the Constitution is also invoked, and we may be justified in issuing a writ of certiorari against that Tribunal. But, in our judgment, having regard to the findings of the Tribunal, we are unable to issue a writ of certiorari. The limitations which inhere the exercise of jurisdiction under article 227 apply with greater force when this court's powers under article 226 of the Constitution are invoked. If the Tribunal acts within the limits of its authority, this court will have no power to interfere with the conclusions recorded by it. Counsel urged that the question whether the new company was successor of the old company must be regarded as a jurisdictional question, and being a jurisdictional question, if by a wrong decision the Tribunal has wrongly assumed authority to decide that which it has no power to decide, this court is competent to rectify the error and set aside the order. But we do not think that the question whether the new company is a successor of the old company is a jurisdictional question. The distinction between a collateral fact upon the proof of which the jurisdiction of a Tribunal depends and upon a fact which forms part of the issue to be decided by the Tribunal may be stated as follows :

If the fact be collateral to the actual matter which the lower court has to try, that court cannot, by a wrong decision with regard to it, give itself jurisdiction which it would not otherwise possess. The lower court must, indeed, decide as to the collateral fact, in the first instance, but the superior court may upon certiorari inquire into the correctness of the decision, and may quash the proceedings in the lower court if such decision is erroneous or at any rate if there is no evidence to support it. On the other hand, if the fact in question be not collateral but a part of the very issue which the lower court has to inquire into, certiorari will not be granted, although the lower court may have arrived at an erroneous conclusion with regard to it. (Vide Halsbury's Laws of England Vol. XI, article 270, p. 142).

16. We have no doubt that the question whether the new company are successor of the old company is a part of the issue which the Industrial Tribunal had to inquire into and decide, and certiorari cannot be granted merely to correct an error committed by that Tribunal.

17. It was also urged that there is an error apparent on the face of the record and this court in exercise of its jurisdiction to issue a writ of certiorari is entitled to correct an error apparent on the face of the record. That this court has power to issue a certiorari against a Tribunal to correct an error apparent on the face of the record is undisputed, but, in our view, the error must be so blatant, so obvious, so manifest or so palpable that when attention is invited to it, no elaborate argument is needed to support the contention that the conclusion is erroneous. Where, however, by elaborate argument and detailed reference to evidence a particular conclusion may be demonstrated to be erroneous, we do not think that the conclusion can be regarded as disclosing an error apparent on the face of the record.

18. Mr. Palkhivala urged that the error apparent on the face of the record is an error which can be demonstrated without fresh evidence; but if that be the test, it would in effect be converting this court exercising jurisdiction to grant high prerogative writs into a court exercising appellate jurisdiction against decisions of Tribunals from which no appeals lie thereto. The test suggested by counsel is in our judgment a fallacious test and we are unable to accept the same. Normally, this court does not entertain applications for issue of high prerogative writs, when the decision depends upon proof or disproof of disputed questions of fact. In considering applications for a writ of certiorari, not only does the court not allow fresh evidence to be led to challenge the conclusions of an inferior Tribunal but it normally accepts the conclusions of the Tribunal as binding. It is difficult then to appreciate how the test suggested by Mr. Palkhivala can be applied in ascertaining whether in the decision impugned there is an error apparent on the face of the record. In our view the conclusion of the Labour Appellate Tribunal on the question whether the new company may be regarded as a successor of the old company must be accepted in this application.

19. It was then urged by Mr. Palkhivala that assuming that the new company is the successor of the old company, an application u/s 42(4) at the instance of the employees of the old company cannot lie unless the successor has chosen to re-employ the employees of the original company. This argument we have incidentally referred to in considering the nature of the jurisdiction which the Industrial Court exercised. We have pointed out that the scheme of the Bombay Industrial Relations Act renders a successor liable even in the absence of a contract between the employees of the old undertaking and its successor. We have also observed that the *raison d'être* of a Labour Tribunal is to be found in the desire of the State to provide a forum which may, unhindered by legalistic considerations, attempt to secure harmonious relations between the employer and the employee, with the ultimate object of securing an efficient working of

industry by resolving disputes through the medium of arbitration and adjudication. That being the real object of legislation like the Bombay Industrial Relations Act, jurisdiction to adjudicate upon a claim made by an employee of a transferor undertaking as against the transferee undertaking must be implicit. We, therefore, think that the second contention raised by Mr. Palkhivala cannot be entertained, It was then urged by Mr. Palkhivala that in this case even if it be held that the employees of the old company can file an application u/s 42(4), the services of the applicants having been determined before the date on which the sale deed was executed by the liquidator the applicants have no right to proceed against the new company. It was urged that the right to file an application u/s 42(4) against a successor postulates the existence of a subsisting contract between the old employer and the employee at the date of the transfer of the undertaking. But, if regard be had to the definition of the word "employee" as inclusive of an employee whose employment has been terminated, we are unable to see why the subsistence of an effective contract between the transferor undertaking and the employees is a pre-requisite to a claim against the transferee undertaking u/s 42(4).

20. It may be pointed out that this plea was not urged in any of the three courts below and was sought to be raised before us for the first time. In our view there is no substance in this plea and it must be rejected.

21. Mr. Palkhivala also invited our attention to section 42(4) before it was amended by the Bombay Act XXXIII of 1948. Counsel pointed out that originally the Legislature had used the expression "his employer" in section 42(4) and, relying upon that form of enactment, it was contended that the Legislature had intended that before an employee can make an application, he had to establish that he was an employee of the employer against whom the application was made or intended to be made. It was urged that the Legislature intended by the use of the pronoun "his" that if there was no contract between the employee and the employer, against whom an application was sought to be made under sub-section (4) of section 42, the Labour Court was incompetent to entertain the application.

22. It is unnecessary for us to consider whether section 42(4) before it was amended, by substitution of the definite article "the" for the pronoun "his", supports the contention of the new company. According to Mr. Palkhivala, this amendment was made with a view to bring into line the provisions of the Act in view of another amendment made by incorporating the word "representative union" and by harmonising the use of the word "employer" in the context in which it stood. It is true that by the same amendment the words "or representative union" were added so as to confer a right to make an application upon a representative union. But from that circumstance we are not justified in holding that the expression "the employer" has the same meaning and connotation as the expression "his employer" as originally used.

23. It was finally urged that an application for reinstatement cannot lie at the

instance of employees whose employment has been terminated. It is now too late in the day to raise that contention. The question has been finally adjudicated upon by the Federal Court in *Western India Automobile Association v. Industrial Tribunal, Bombay* [1949] 1 F.J.R. 97 : (1949) 59 Bom. L.R. 894, that the Labour Court or the Industrial Court is competent to reinstate, dismiss or discharge employees; and that appears clear from the definition of the expression "employee" in section 3(13) of the Bombay Industrial Relations Act. In our view the order passed by the Labour Appellate Tribunal directing remand of the proceedings to the Labour Appellate Tribunal directing remand of the proceedings to the Labour Court on the finding recorded by it must be upheld. The rule is, therefore, discharged with costs. Cost quantified at Rs. 150.

24. Civil Applications 1680 and 1681 are also dismissed for reasons mentioned in our judgment in principal case, and the rule is discharged with costs in both the cases. Costs Rs. 150 in each of the applications.

25. Rule discharged.