

(2016) 06 GUJ CK 0066

In the Gujarat High Court

Case No : Special Civil Application No. 5383 of 2001

Office Superintendent

APPELLANT

Vs

P.D. Barot

RESPONDENT

Date of Decision : 10-06-2016

Acts Referred:

Citation : (2017) 1 LLN 137

Hon'ble Judges : Mr. K.M. Thaker, J.

Bench : Single Bench

Advocate : Mr. B.S. Patel, Advocate, for the Petitioner No. 1; Deceased Litigant, Advocate, for the Respondent No. 1; Ms. K.J. Brahmbhatt, Advocate, for the Respondent No. 1.1 - 1.3; Ms. Varsha Brahmbhatt, Advocate, For The Respondent No. 1.1 - 1.3; Pooja H. Bhardwa

Final Decision : Disposed off

Judgement

Mr . K.M. Thaker, J.(Oral)—Heard Mr. Patel, learned advocate for the petitioner-employer, and Ms. Brahmbhatt, learned advocate for the respondent-workman.

2. In Special Civil Application No. 5383 of 2001, the petitioner employer has challenged the award dated 9.5.2001 passed by the learned Labour Court, Surat in Reference (LCS) No. 689 of 1982 whereby the learned Labour Court directed present petitioner employer to reinstate the respondent workman with continuity of service and with 25% back wages.

3. Feeling aggrieved by the said award, the employer filed present writ petition. It appears that even the workman felt aggrieved by the same award. He felt dissatisfied because the learned Labour Court did not award 100% back wages. Therefore, the workman has also filed writ petition, i.e. Special Civil Application No.6331 of 2002. In the petition which is filed by the workman (Special Civil Application No.6331 of 2002) the workman has claimed that the award to the extent by which it denies 100% back wages may be set aside and the employer

may be directed to pay 100% back wages.

3.1 In view of the fact that these two petitions arise from the same award and also having regard to the fact that the learned advocates for the employer and the workman have put forward common submissions for both the petitions, these two petitions are decided by this common judgment. For the sake of convenience, the employer is referred to as the petitioner and the workman (and his heirs and legal representatives) are referred to as the respondents.

3.2 Before proceeding further, it is necessary and appropriate to mention that the learned advocates for the petitioner and the respondent have jointly submitted that the concerned workman died on 24.3.2004, i.e. during the pendency of the petition, and that the heirs / legal representatives of the workman are party to the proceedings.

3.3 It is also relevant and appropriate to mention at this stage that, on earlier occasion, these petitions were disposed of by the Court on joint submissions by the learned counsel for the petitioner and the respondents, who submitted that a settlement is arrived at between the parties whereby the employer agreed to pay Rs.73,000/- to the heirs of the deceased workman. In view of the said submission, the Court passed the order dated 15.9.2012 and disposed of the petitions. The said order dated 15.9.2012 reads thus:-

"Learned counsels appearing for both the sides submitted that looking to peculiar facts and circumstances and the fact that workman has passed away, in the fitness of thing, the employer will pay Rs.73,000/- to its full and final settlement to the heirs of workman on which, the workman's heir will have no further claim whatsoever arising out of the litigation.

Shri Rana, learned advocate appearing for heirs of workman in both the matters submitted that this would satisfy heirs of workman. However, while disposing of matters, the court may grant liberty to file appropriate application in case if there is non-agreement of either party as this talks had taken place on earlier occasion.

In view of this, the court is disposing of the matters by modifying the award in light of consensus arrived at between the counsels and now instead of reinstatement direction, the award is modified where under the employer shall pay Rs.73,000/- towards full and final settlement of the claim. The said payment should be made within 15 days from the date of receipt of order. Liberty to both the sides to approach the court in case of difficulties. Rule made absolute in both the matters to aforesaid extent. No costs. Direct service permitted."

3.4 It, however, appears that subsequently, the heirs of the deceased workman decided to contest the petition and to claim 100% back wages instead of accepting the amount offered under settlement. It is pertinent to mention that the said amount (i.e. Rs.73,000/-) which was offered by the employer by way of settlement is equivalent to the back wages award by the learned Labour Court (i.e. 25% of back wages). However, the heirs of the deceased workman refused

to accept it and decided to contest the petition so as to claim 100% Back wages.

4. So far as factual background is concerned, it has emerged from the record and from the submissions by learned counsel for the petitioner and the respondents that the concerned workman was appointed as Inspector vide appointment order dated 28.7.1981. It is common case of the petitioner and the respondents that the workman was appointed and he took the charge on 12.8.1981. The workman was appointed on probation for one year which commenced from 12.8.1981 (i.e. the date on which he resumed the duty/charge). Clause No.2 of the appointment letter dated 28.7.1981 specifically prescribed probation for one year and it also provided that the service of the workman can be terminated at any time without notice during the period of probation.

4.1 It appears that the performance of the workman was not satisfactory and that therefore, on various occasions, oral instructions to improve the performance was given by the superior officers. According to the petitioner employer, the performance of the workman did not rise to satisfactory level and for the deficiency in performance the workman was granted opportunity to offer explanation/hearing vide notice dated 27.6.1982. The workman responded the said notice dated 27.6.1982 vide his reply dated 23.6.1982. The sub-committee of the petitioner considered the reply of the concerned workman and having found the reply unsatisfactory, it resolved to discontinue the workman's employment. In pursuance of the resolution, order dated 2.7.1982 came to be passed whereby the service of the workman came to be terminated. The termination order dated 2.7.1982 spells out that since the performance was not found satisfactory, the service is terminated.

4.2 Feeling aggrieved by the said order dated 2.7.1982, the workman raised industrial dispute. The appropriate government referred the dispute for adjudication to the learned Labour Court and it was registered as Reference (LCS) No.689 of 1982. During the proceedings before the learned Labour Court, the workman filed his statement of claim and alleged that his service was terminated illegally and arbitrarily. He also claimed in the statement of claim that he had given reply to the notice dated 27.6.1982, however, the subcommittee of the Market Committee passed resolution and terminated his service without considering his reply or explanation and before passing the order dated 2.7.1982, opportunity of hearing was not granted. Thus, the workman alleged that termination of his service is vitiated by violation of principles of natural justice and claimed reinstatement with full back wages.

4.3 The petitioner employer opposed the reference and the allegations made by the respondent workman. In the written statement, the petitioner employer narrated the details about the performance of the respondent workman and claimed that before terminating his service, notice dated 17.6.1982 was issued and also the fact that the reply received from the respondent workman was considered and thereafter, the sub-committee had decided to discontinue the claimant's service and that therefore, a resolution was passed to discontinue his

service and in pursuance of the resolution the order dated 2.7.1982 came to be passed.

4.4 The parties led evidence before the learned Labour Court and after conclusion of the stage of evidence, learned counsel for the claimant and the employer made their respective submissions.

4.5 After considering the submissions by the learned advocates for the contesting parties and the material on record, the learned Labour Court passed the award with above mentioned directions. The said award is challenged by the employer as well as the workman.

5. Mr. Patel, learned advocate for the petitioner employer, submitted that the respondent's service was terminated in accordance with terms and conditions of the appointment. He further submitted that there is specific condition in the appointment letter which prescribed that the probation period will be of 1 year from the date on which the petitioner assumes the charge and during the period of probation his service can be terminated at any time without notice. He submitted that the deceased workman had assumed the charge on 12.8.1981 and his service came to be terminated vide order dated 2.7.1982 i.e. during probation period and that therefore there is no illegality in the action of the petitioner. He submitted that in view of the fact that the respondent's service was terminated during probation and on account of unsatisfactory performance, question of conducting inquiry did not arise and so far as opportunity of defence is concerned notice was issued and respondent's reply / explanation was called for and he was granted opportunity to put forward his case. He also submitted that the respondent's explanation / reply was considered and thereafter his service was terminated and therefore learned Labour Court's decision which is based on the premise that the petitioner violated principles of natural justice, is not justified and deserves to be set aside. Mr. Patel, learned advocate for the petitioner relied on the decisions in case of *Kamal Nayan Mishra v. State of Madhya Pradesh* (2010) 2 SCC 169.

6. Ms. Brahmbhatt, learned advocate for the heirs of the deceased workman supported the award to the extent the award directs reinstatement of the workman but she assailed the order and decision whereby learned Labour Court denied 75% back wages and instead awarded 25% back wages. She submitted that the conclusion of the learned Labour Court that the workman's service was terminated illegally is correct and justified and does not warrant any interference. She further submitted that the conclusion by the learned Labour Court that the workman should be paid back wages is also correct and justified. However, the decision of the learned Labour Court to award 25% back wages and to deny balance amount is unjustified. She also submitted that the workman had not asked any adjournment and had not prolonged the proceedings and therefore denial of 75% back wages is unjustified. Ms. Brahmbhatt, learned advocate for the respondent relied on the decision in case of *V.P. Ahuja v. State of Punjab* (2000 LLR) 473 and *Rajinder Kumar Kindra v. Delhi Administration* through

Secretary (Labour) (AIR 1984 SC 1805).

7. I have considered the submissions by learned advocate for the petitioner and respondent and I have also considered the material on record.

8. So far as the factual backdrop is concerned there is no dispute between the parties. It is not in dispute that

(a) the petitioner was appointed as Inspector w.e.f. 12.8.1981;

(b) he was appointed on probation and the period of probation, as prescribed by appointment letter, was 1 year from the date on which the workman assumed the charge;

(c) the workman had assumed the charge w.e.f. 12.8.1981 and his period of probation would commence from the said date;

(d) the petitioner had issued notice dated 17.6.1982 (i.e. during period of probation) with regard to the performance of the workman and had called for the workman's explanation;

(e) the workman had submitted his explanation vide reply dated 23.6.1982;

(f) after considering the reply / explanation by the workman the sub-committee of the petitioner did not find it satisfactory and decided to discontinue the service of the workman and passed the resolution to that effect on 30.6.1982 and in pursuance of the said resolution the termination order dated 2.7.1982 was passed (the said order was passed during period of probation and before expiry of the period of probation);

(g) the appointment letter contains specific condition about probation and period of probation and that during the probation period service can be terminated without notice.

9. In this background learned Labour Court has passed impugned award. The learned labour Court has proceeded on the premise that before terminating the service of the workman it was necessary for the employer to conduct domestic inquiry and to grant opportunity of hearing and defence to the workman and since opportunity was not granted and inquiry was not conducted the termination order should be set aside. On the said solitary ground the learned Labour Court passed the impugned award.

9.1 What is pertinent to note is the fact that in the impugned award learned Labour Court has not reached to any conclusion and has not recorded specific conclusion that the order of termination was punitive and/or stigmatic.

When service of a probationer is terminated, then; unless the order terminating the service of the probationer is found to be stigmatic such termination would not stand vitiated on the ground that principles of natural justice were not followed.

9.2 As mentioned above, in present case learned Labour Court has not reached to and has not recorded finding of fact and conclusion that the termination was stigmatic.

10. In both the decisions on which learned advocate for the respondent was relied, the Court found that the termination order was stigmatic. Specific conclusion about the nature of the termination order is recorded and it is expressly held that the termination order was stigmatic. It is in view of such conclusion that the Court has held that such stigmatic order could not have been passed without complying principles of natural justice.

10.1 In present case, it is necessary to note on this count that the employer had issued notice and called for the workman's explanation. The workman had even offered his explanation vide communication dated 23.6.1982. The said explanation / reply by the respondent was considered by the sub-committee of the petitioner market committee and then resolution to discontinue the service of the workman was passed. Under the circumstances, in first instance, this is not a case wherein opportunity was not granted to the workman before the decision to discontinue his service was taken.

Second, the learned trial Court did not find and the learned trial Court has not recorded specific finding that the termination order is stigmatic.

Third, the respondent has not challenged the learned trial Court's decision on the ground that the termination order is stigmatic and learned trial Court has committed error in not holding that the termination order is stigmatic. Even during hearing of this petition such contention is not raised. Therefore, the final conclusion by learned labour Court, which rests on only one premise viz. violation of principles of natural justice, cannot be sustained.

10.2 In cases when service of the probationer is sought to be terminated, ordinarily, the employer hands on the horns of dilemma inasmuch as if he proceeds on the ground of deficit in performance and after mentioning in the order that service is not found satisfactory then it may be alleged that the order is punitive and stigmatic and if the termination order is passed without mentioning any reason then the termination would be branded as without application of mind and without any bases or justification.

10.3 In cases where the employer mentions, in the termination order, that the service is discontinued on ground of unsatisfactory performance, the Court would lift the veil and would endeavour to find out whether the order is stigmatic or not. For the said purpose the Court would take into account not only the termination order but other previous and contemporaneous communication / letter or other relevant material to ascertain whether the order is punitive or not and whether the allegation formed foundation or the motive. If the allegations forms foundation of termination order and are not merely motive then the order may be termed as stigmatic.

10.4 In present case the learned Labour Court has not recorded any finding of fact on this count. Without recording the finding and conclusion that the termination order was stigmatic, learned Labour Court has set aside the order on the ground that it was not preceded by domestic inquiry. It is necessary to recall at this stage that the opportunity to tender explanation was granted to the concerned workman. The principles of natural justice cannot be bound in a straitjacket formula and they are not, as observed by the Apex Court "unruly horse" and merely because personal hearing is not granted the action may not be vitiated if, in a given case it is demonstrated that sufficient and reasonable opportunity to tender written explanation was granted and after considering the explanation final decision was taken.

10.5 In this background ordinarily it would be for this Court to record a finding and conclusion as to whether the order dated 2.7.1982 can be termed as stigmatic order or not. In present case, neither the learned Labour Court has recorded such findings nor the workman has challenged the award on that ground and the workman did not even challenge the termination order on the ground that it is punitive and stigmatic and the award is erroneous and defective for not recording such conclusion. Even during hearing of the petition such contention is not raised by the workman. In this view of the matter, the observation and reasons recorded by the learned Labour Court cannot be sustained and the reasons recorded by learned Tribunal viz. the termination order is defective for breach of violation of principles of natural justice, cannot be sustained. For this reason, the employer's petition should succeed.

10.6 However, in view of the fact that the workman died on 24.3.2004 the Court is of view that it is not necessary and / or appropriate in the facts of the case to travel into such territory and to find out as to whether order can be considered as stigmatic and / or punitive or not. Assuming that the order can be termed stigmatic, then also the facts brought out from the record indicate that the employer had granted opportunity to tender explanation to the workman, though a formal domestic inquiry was not conducted. Even if the facts of the case established that the termination order deserves to be interfered with and that therefore, the award directing the employer to reinstate the workman does not warrant interference, then also, the question of actual reinstatement of the workman now does not survive.

11. This position leaves behind the issue related to back wages. So far as the said issue is concerned, learned Labour Court has recorded specific finding that the proceedings were prolonged or delayed on account of the workman.

11.1 So as to assail said finding of fact and the said observation, the workman/ the heirs of the workman have not placed on record of the petition/s the Rozkam of the learned Labour Court, or any other evidence, which would demonstrate the reason behind the adjournment and/or which would establish that the said observation by learned Labour Court is contrary to record. It is pertinent that the proceedings before the learned Labour Court continued from 1982 to 2001.

11.2 As mentioned above, learned Labour Court has expressly recorded specific observation that the proceedings were delayed and prolonged on account of the workman.

On the other hand, a relevant aspect which deserves to be taken into account is that before service of the workman came to be terminated, the workman had worked with the petitioner only for 11 months.

Thus, the total tenure of the service of the workman with the petitioner was not even of one year as against the long period of proceedings before the learned Labour Court.

11.3 In this background when the learned Labour Court, after having found that the proceedings were delayed and prolonged on account of the workman, awarded 25% back wages, the claim of the respondents i.e. heirs of the workman for 100% back wages cannot be sustained.

Even otherwise, in view of the facts and circumstances of the case i.e. that the total tenure of service of the workman with the petitioner was only 11 months and also the fact that when the service of the workman was terminated the concerned workman was on probation and his service was terminated during probation period and the fact that the learned Labour Court has recorded specific observation that the proceedings were delayed on account of the workman, there is no justification to accept the respondents' claim for 100% back wages.

11.4 As mentioned at the outset, the employer had agreed to pay Rs.73,000/- p as lumpsum compensation to the respondents. The respondents i.e. heirs of the deceased workman had, at one point of time agreed to accept the said amount however, they subsequently decided to contest the award for claiming 100% back wages.

Learned advocate for the petitioner has shown calculation of back wages to the learned counsel for the workman and from said calculation, it emerges that 25% back wages would come to Rs.72,225/-.

11.5 As mentioned above, the Court had on earlier occasion disposed of the petition vide order dated 15.9.2012 by directing the petitioner to pay Rs. 73,000/- towards full and final settlement of the dispute/claim.

11.6 In this background and having regard to the fact that the workman died on 24.3.2004 and now the heirs are claiming 100% back wages, the Court is of the view that in light of the observation by the learned Labour Court in the award the demand for 100% back wages is not justified.

11.7 In the facts and circumstances of the case the amount offered by the employer for full and final settlement of entire dispute and the claim is just and reasonable, more particularly in view of the fact that the said amount is equivalent to 25% back wages awarded by the learned Labour Court. In the facts and circumstances of the case this Court is of the view that interest of justice

would be served if the employer is directed to pay Rs.75,000/- to the legal heirs of the respondents and the said payment shall be full and final settlement of all claims and the award.

12. Before concluding it is necessary to note that in Civil Application No. 11402 of 2001 this Court passed order dated 26.12.2001 and directed the petitioner to pay last drawn wages to the respondent in accordance with Section 17B of the Act. From the record it appears that the petitioner failed to comply the said direction. From the record it also appears that the workman had taken out Civil Application No. 4387 of 2002 with the allegation that the direction to pay last drawn wages was not complied. At the relevant time learned Counsel for the petitioner had informed that the direction would be complied.

12.1 Today at the time of hearing it is given out that after the Court passed the order dated 26.12.2001 the concerned workman was not paid the last drawn wages in accordance with Section 17B of the Act. Therefore, the petitioner is under obligation to comply the said direction.

12.2 Under the circumstances it is directed that the petitioner shall pay last drawn wages for the period from the date of civil application (along with affidavit declaring that the workman was not gainfully employed) No.11402 of 2001 to the date of death of the workman i.e. 24.3.2004.

12.3 In this background and in the facts and circumstances of the case, more particularly in view of the fact that the workman died on 24.3.2004, the impugned award is modified and instead of the direction contained in the award the petitioner is directed to pay Rs.75,000/- to the respondents. Such payment shall be in compliance of the total and entire award and in settlement of all claims, demands and dispute of the concerned workman.

12.4 In addition to the said amount of Rs. 75,000/- the petitioner employer shall also pay last drawn wages from date when the civil application No. 11402 of 2001 was filed, to 24.3.2004 (i.e. date of sad demise of the workman). Such amount shall be paid to the respondents within 4 weeks from the date of certified copy of this order.

With the aforesaid clarifications the petitions are disposed of. Orders accordingly.