

(2013) 03 GUJ CK 0080
In the Gujarat High Court
Case No : S.C.A. No. 964 of 2004

Saini and Company

APPELLANT

Vs

Gujarat Engineering and General Kamdar Union and 8 Others

RESPONDENT

Date of Decision : 05-03-2013

Acts Referred:

Industrial Disputes Act, 1947 — Section 18(3)(b), 9, 9

Citation : (2013) 2 LLJ 748

Hon'ble Judges : K. S. Jhaveri, J

Bench : Single Bench

Advocate : M.K. Vakharia, for the Appellant; Bharat Jani, Premal R. Joshi, T.R. Mishra, U.T. Mishra and Utkarsh B. Jani, for the Respondent

Judgement

K.S. Jhaveri, J.—Heard learned advocates for the respective parties and perused the papers on record. Being aggrieved by the award dated 13.11.2003 passed by the Industrial Tribunal, Vadodara in Reference (IT) No. 83 of 1987, present petition has been preferred whereby the Tribunal had directed the petitioner to reinstate six workmen with full back wages and to pay full backwages to the other three workmen who had expired.

2. The facts in brief, as per the present petition, are set out as under:

2.1. The respondent no. 1 had raised a dispute before the Labour Commissioner, Vadodara whereby respondent no. 2 along with their partners were joined as parties. After hearing both the sides, the dispute was adjudicated to the Industrial Tribunal, Vadodara as Reference No. 83 of 1987. After issuance of notice, the Tribunal passed an ex-parte award on 23.1.1990 against respondent no. 2. On coming to know about the same, respondent no. 2 filed application for setting aside the award dated 23.11.1990 which was allowed.

2.2. Thereafter respondent no. 1 filed an application before the Tribunal praying to join the petitioner firm and respondents no. 8 and 9 as party to the said reference. The Tribunal vide award dated 14.9.2001 allowed the said application

against which respondent no. 1 filed an application for setting aside the same. Vide order dated 20.1.2003, the application was allowed and the matter was restored to file.

2.3. As per the application of the respondent no. 1, the petitioner and others were joined as parties to the proceedings and thereafter the impugned award dated 13.11.2003. Being aggrieved by the said award, the present petition is preferred.

3. Mr. Mehul Vakharia, learned advocate appearing for the petitioner submitted that the Tribunal failed to appreciate that it was stated on behalf of Economic Engineering Corporation that the said company had been closed long back and that the workers in question were working with the said Economic Engineering Corporation and not with the petitioner. He submitted that when such a fact is on record, the Tribunal erred in fastening the liability upon the petitioner firm.

3.1. Mr. Vakharia, learned advocate appearing for the petitioner submitted that the Tribunal has failed to appreciate that initially the workers had filed reference only against Economic Engineering Corporation, however, later on when they found that the business of said Corporation has been closed down and another company is working in the said premises, they have joined the petitioners in the reference.

3.2. Mr. Vakharia further submitted that the Tribunal has committed an error in holding the petitioner responsible for the act of the M/s. Economic Engineering Corporation where one of the partners of the petitioner firm was having shares to the extent of 24% in the partnership firm. He submitted that the liability of another firm cannot be thrust upon another partnership firm which was constituted in 1992.

3.3. Mr. Vakharia also submitted that another application at Exhibit 27 was opposed by filing reply at Exhibit 28 before the Tribunal and the partnership deed was also placed on record of this petitioner. He submitted that therefore the liability of earlier partnership firm cannot be enforced upon the petitioner and in doing so the Tribunal has travelled beyond the scope of its jurisdiction.

3.4. Mr. Vakharia has further submitted that the petitioner is a partnership firm and it has a separate legal identity in the eyes of law and that merely because the petitioner firm is carrying on its business on the same plot on rental basis which is under the ownership of respondent no. 2 firm, the liability of respondent no. 2 cannot be fastened upon the petitioner as the petitioner firm has no nexus whatsoever with respondent no. 2.

3.5. Mr. Vakharia submitted that the Tribunal has travelled beyond the terms of reference and that unilaterally the workers cannot be transferred from one partnership firm to another without any agreement between the parties. He submitted that the reference qua the petitioner cannot be maintainable inasmuch as they were never the employers of the workers in question.

3.6. In support of his submissions, Mr. Vakharia has relied upon the following decisions of the Apex Court:

- (i) Kundan Sugar Mills Vs. Ziyauddin and Others, ;
- (ii) Hochtief Gammon Vs. Industrial Tribunal, Bhubaneswar, Orissa and Others, ;
- (iii) Manager, Pyarchand Kesarimal Porwal Bidi Factory Vs. Onkar Laxman Thenge, .

4. Mr. Premal Joshi, learned advocate appearing for respondents no. 6 and 7 supported the award passed by the Tribunal and submitted that the respondents no. 6 and 7 were only sleeping partners and that the petitioner was an active partner and therefore the petitioner firm has rightly been held liable for the backwages and reinstatement.

5. Mohini Bhavsar, learned advocate appearing for Mr. Jani for respondents no. 4, 5, 8 and 9 contended that from the evidence on record it is clearly established that the management was taken over by the petitioner and the petitioner firm was running the business in the same premises as respondent no. 2 firm. She submitted that respondent no. 8 and 9 firms have no concern whatsoever with the business of the respondent no. 2 company which had closed in the year 1985 by making payment of all dues to the concerned workmen who are the members of respondent no. 1 Union.

6. Mr. T.R. Mishra, learned advocate appearing for the respondent no. 1 Union supported the impugned award passed by the Tribunal and submitted that the petitioner and respondents no. 2 to 9 had shown utter disregard to the Tribunal's orders and therefore the Tribunal was forced to pass an exparte award. He submitted that in fact some of the workmen have already expired and that the petitioner being a successor in interest is also liable to reinstate the workmen and implement the award of backwages.

7. At the outset it may be mentioned that Economic Engineering Corporation was incorporated as Partnership firm mainly by three families namely Saini, Bujhar and Shah which held 43%, 34% and 23% share in the firm respectively. Mr. Saini was the Executive partner of the Economic Engineering Corporation and was managing the affairs of the firm as can be seen from the records.

8. As a result of hearing and perusal of records, it is clear that the petitioner was ordered to be joined as party respondent in the Reference 83/87 before the concerned Court/Tribunal in the year 1999. It is not in dispute that present respondent union has sponsored reference challenging the termination of members by Economic Engineering Corporation, respondent no. 2 herein. It is also not in dispute that since respondent no. 2 failed to appear before the Tribunal, an exparte order came to be passed on 23.1.1990 against the said Economic Engineering Corporation and thereafter the Tribunal restored the matter on an application filed by Economic Engineering Corporation. However, in the year 1999, order for joining present petitioner and respondents no. 2 to 9

was passed which was not challenged by either the petitioner or respondents no. 2 to 9 and therefore the same has attained finality and is binding to the parties.

8.1. The Tribunal while deciding the reference has categorically stated that the petitioner was partner of the Economic Engineering Corporation and in fact he was running the business and was successor in interest and therefore the action of joining him as party respondent was just and proper. From the records, it appears that the employer-petitioner has tried to overreach the process of law by one of the partners taking over business of the earlier partnership firm. This is nothing but fraud by the partner in delegating powers to another partnership firm and for the said act of the partnership firm, the workers cannot be left to suffer. This court is not inclined to be a party to such fraud. The business of the petitioner firm is being carried out in the same premises as the earlier partnership firm.

8.2. Moreover, Exhibit 27 application was allowed and thereafter the petitioner has not appeared before the Tribunal. Even Exhibit 27 application is not challenged by the petitioner. It is required to be noted that the petitioner was a partner in the original firm and according to the provisions of the Partnership Act, one partner is liable for the act of the other partners and merely change of partnership firm shall not absolve the liability of the partner.

8.3. It also cannot be said that the Tribunal has travelled beyond the scope of its jurisdiction as the Tribunal has passed a reasoned order after going through the evidence on record and after considering the reply filed in joining application which is not challenged. The original partnership firm has been divided into three other firms and all the partners were joined as party to the proceedings. In view of the facts and circumstances of the present case, this Court is of the opinion that the award passed by the Tribunal qua reinstatement is just and proper.

9. In the case of *Manager, Pyarchand Kesarimal Porwal Bidi Factory v. Onkar Laxman Thenge* (supra) the Apex Court has held that a contract of service being incapable of transfer unilaterally a transfer of service from one employer to another can only be effected by a tripartite agreement between the employer, the employee and the third party, the effect of which would be to terminate the original contract of service and to make a new contract between the employee and the third party.

9.1. Considering the aforesaid decision, this Court is of the opinion that the same shall not be applicable in the present case in view of the fact that the respondents workmen herein were illegally terminated from the first partnership firm being respondent no. 2 firm. One of the partners therein was engaged in a business under a new name in the same premises. If such a practice is allowed, every employer shall deprive the workmen of their legitimate right. In fact in the aforesaid decision, the ratio held is that when an employer lends services of his employee to third person, the employee still continues to be in the employment of his employer and hence the third person cannot terminate the service of the

employee which is not the case here.

10. In the case of *Kundan Sugar Mills v. Ziyauddin and Others* (supra), the Apex Court in para 7 of the judgment has held as under:

7. We have referred to the decisions only to distinguish them from the present case, and not to express our opinion as to the correctness of the decisions therein. It would be enough to point out that in all the said decisions the workers had been employed in a business or a concern and the question that arose was whether in the circumstances of each case the transfer from one branch to another was valid or amounted to victimization. None of these decisions deals with a case similar to that presented in this appeal, namely, whether a person employed in a factory can be transferred to some other independent concern started by the same employer at a stage subsequent to the date of his employment. None of these cases holds, as it is suggested by the learned counsel for the appellant, that every employer has the inherent right to transfer his employee to another, place where he chooses to start a business subsequent to the date of the employment. We, therefore, hold that it was not a condition of service of employment of the respondents either express or implied that the employer has the right to transfer them to a new concern stated by him subsequent to the date of their employment.

10.1. The aforesaid decision is in respect to protecting the service conditions of the employees who were compelled to join another partnership firm and therefore keeping in mind Section 9 of the I.D. Act the Apex Court directed that the right of the employer to transfer the employee to a new concern cannot be implied as a condition of service of the employment.

11. In the case of *Hochtief Gammon v. Industrial Tribunal, Bhubaneswar, Orissa and Others* (supra), the Apex Court has held that it is not open to the Tribunal to travel materially beyond the term of reference for it is well settled that the terms of reference determine the scope of its power and jurisdiction from case to case.

11.1. The Apex Court in the very said decision has held that where certain points of dispute have been referred to the Industrial Tribunal for adjudication it may, while dealing with the said points deal with matters incidental thereto and that means that if the Tribunal feels that some persons who are not joined to the reference should be brought before it, it may be able to make an order in that behalf u/s 18(3)(b).

12. Therefore, this Court does not find any infirmity in the impugned award passed by the Tribunal. However, considering the fact that the workers have attained or are about to attain the age of superannuation, instead of directing reinstatement, ends of justice shall be met by directing the petitioner to pay lumpsum compensation to each of the respondent workmen. The said view is also supported by a decision of the Apex Court in the case of *Asst. Engineer, Rajasthan Dev. Corporation and Another Vs. Gitam Singh*, .

13. In the premises aforesaid, the following order is passed:

(i) The respondent-workmen shall be paid Rs. 50,000/- each as compensation in lieu of their claim.

(ii) In case where the respondent workman has expired, the legal heir/s shall be paid the said amount of compensation.

(iii) The said payment shall be made within a period of one month from today.

(iv) The amount of Rs. 1 lakh deposited by the petitioner before this Court and invested in Fixed Deposit along with proportionate interest shall be adjusted against the said payment and the remaining amount shall be paid by the petitioner.

With the above directions, petition is partly allowed. Rule is made absolute to the aforesaid extent.