

(2016) 03 GUJ CK 0144
In the Gujarat High Court

Case No : Special Civil Application Nos. 6544 and 6545 of 2008 and 482 of 2009

State of Gujarat and Others

APPELLANT

Vs

Lakhmanbhai

RESPONDENT

Date of Decision : 18-03-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 17B, Section 25F, Section 25G, Section 25H

Citation : (2016) 03 GUJ CK 0144

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

Bench : Single Bench

Advocate : Amit Barot, AGP, for the Appellant; Gunvant R. Thakar, Advocate, for the Respondent

Final Decision : Disposed off

Judgement

K.M. Thaker, J.—1. This group of three petitions arise from same and common award. The two persons had raised industrial dispute, which was referred for adjudication to the learned Labour Court at Rajkot. The dispute raised by two persons came to be registered as Reference (L.C.R) No. 79/94 and 80/94. The learned Labour Court adjudicated the said two reference process and decided the same by common award dated 03.10.2007. The said common award is challenged by the employer (Petitioner-State in Special Civil Application Nos. 6544 of 2008 and 6545 of 2008).

2. Even the concerned two persons have challenged the same common award dated 03.10.2007 in Reference (L.C.R) No. 79/94 and 80/94. The said two persons have filed common/single petition challenging the said common award (i.e. Special Civil Application No. 482 of 2009). Since the Employer-State and two persons have raised common contentions, the petitions are decided by this common judgment.

3. The two petitions i.e. Special Civil Application No. 6544 of 2008 and 6545 of 2008 are filed by the State against the common award dated 03.10.2007 in

Reference (L.C.R) No. 79/94 and 80/94. It is claimed that the learned Labour Court has committed error in presuming that the workmen had worked for 240 days in preceding 12 months and that the Court has also committed error in holding that the workmen were relieved in violation of Section 25F, Section 25G and Section 25H of the Industrial Disputes Act, 1947 (hereinafter referred to as the "I.D. Act").

4. The workmen have essentially challenged the said common award to the limited extent i.e. so far as award denies full backwages.

5. So far as the factual background is concerned it has emerged from the record and submissions by learned AGP and learned advocate for the workmen that the respondents claimed that they were engaged by the Executive Engineer Irrigation Division, Rajkot on daily wage basis and they were paid wages @ 27 per day. The respondents also alleged that their service was illegally terminated w.e.f. 1.6.1993 and though they served Noticed dated 10.9.1993 demanding that they may be reinstated the petitioner did not give any reply and therefore they were compelled to raise industrial dispute. The workmen also alleged that at the time when their service was terminated any notice was not issued and their service was terminated without payment of compensation. With such allegations the workmen filed their statement of claim.

6. The reference was opposed by the petitioner i.e. original opponent before the learned Labour Court.

6.1 It was claimed that the claimants were not appointed after following procedure of selection and recruitment. It was also claimed that they were not appointed against any vacancy on permanent post and that they were engaged without issuing any order of appointment by competent authority and they were engaged only when need basis and they were not regular employees. It was also claimed that the persons were engaged only on daily wage basis and need basis and that after the work was completed on 17.6.1990 the claimants were relieved and the allegation that the service of the claimants were terminated w.e.f. 1.6.1993 is incorrect.

6.2 After the pleadings were completed, the evidence was recorded. Upon conclusion of the stage of evidence learned Labour Court heard the submissions by learned advocate for the claimants and learned advocate for the opponent and passed common award which is impugned in present petitions.

6.3 At this stage it is relevant and necessary to mention that while directing the original opponent to reinstate the claimants, learned Labour Court, without any evidence with regard to the employment or unemployment of the claimants, took into account the provisions under Rural Employment Guarantee Act, 2005 and on the premise of the provision under the said Act directed the original opponent to pay 100 days wages for every year from the date of termination until the date of award i.e. for almost 14 years. The said award is brought under challenge by the Executive Engineer as well as the claimants.

7. Learned AGP submitted that the direction by learned Labour Court to reinstate the claimants and the direction to pay back wages at the rate of 100 days every year from the date of termination until the date of award is unjustified and arbitrary. He also submitted that the claimants failed to prove that their service was terminated in 1993 and that they had worked for 240 days in preceding 12 months. Learned AGP submitted that in view of the fact that the persons were engaged only for temporary period and on ad hoc and daily wage basis, such direction ought not have been passed.

8. Mr. Thakar, learned advocate for the claimants vehemently opposed the submissions by learned AGP and submitted that the opponent before the learned Labour Court had not placed on record complete set of muster roll or pay roll for the relevant period and that therefore learned Labour Court has rightly presumed that the claimants had worked for 240 days. He also submitted that it was established before the learned Labour Court that when the service of the claimants was terminated since persons junior to the claimants were retained in service and even after termination of service of the claimants fresh appointments were given and thereby opponent had committed breach of Section 25G as well as 25H. Mr. Thakar, learned advocate for the claimants submitted that learned Labour Court also accepted the fact that the service of claimants were terminated in violation of Section 25G, Section 25H and Section 25F as well and that therefore direction passed by the learned Labour Court requiring the opponent to reinstate the claimants is justified. He also submitted that in view of the fact that learned Labour Court reached to the conclusion that the service of the claimants were terminated in breach of statutory provision, full back wages ought to have been granted.

9. I have considered the material on record. I have also considered the submissions by learned AGP and learned advocate for the claimants and also considered the observations and findings recorded by the learned Labour Court in the award.

9.1 It is not in dispute that the concerned claimants were not appointed after following procedure prescribed for selection and recruitment.

9.2 It is also not in dispute that the any appointment letter was not issued in respect either of the two claimants.

9.3 It is also not in dispute that the concerned claimants were not appointed against any clear vacancy on sanctioned post on permanent establishment.

9.4 It is also not in dispute that the claimants were engaged for temporary period and on ad hoc basis.

9.5 Besides this, it has emerged from the record that on one hand the petitioner State claimed that the claimants were discontinued w.e.f. 17.6.1990 when the work was completed whereas the claimants claimed that they were terminated w.e.f. 1.6.1993.

9.6 Neither appointment orders are placed on record nor termination orders are placed on record.

9.7 The claimants did not mention any exact date from which they started working with the original opponent and did not place any material on record to demonstrate that they were continued in service until 31.5.1992.

9.8 It has emerged from the record that the workmen had demanded production of the attendance register or pay register to establish that they had worked for 240 days. It is not in dispute that the petitioner State had placed on record the muster roll and a statement reflecting details of the number of days for which claimants had worked.

9.9 It is relevant to mention that learned Labour Court has recorded that the muster roll for the entire duration was not placed on record. On the premise that though opponent placed on record muster roll, it was not for the entire period in question, the learned Labour Court proceeded to draw inference that the workmen had worked for 240 days.

9.10 At this stage it is relevant to note that in law and according to relevant provision viz. Section 25F what should have been actually considered and determined is that whether the concerned claimants had worked for 240 days in 12 months preceding the date on which they were alleged terminated and not merely during any years. The learned Labour Court does not appear to have appreciated the requirement prescribed by Section 25F and the Court failed to address and examine the said issue and factual aspect from the proper perspective and appear to have misapplied the provision inasmuch as the Court seems to have proceeded on the broad premise viz. whether during entire tenure for which the claimants were engaged, they had worked for 240 days or not. Section 25F contemplates two conditions viz. that the concerned workman must have worked for 12 months and during period of preceding 12 months the workman must have worked for 240 days. The requirement is to have worked for 240 days in "preceding" 12 months and not in "any slot of 12 months". If the said two conditions are complied then only the obligation for payment of compensation at the time of retrenchment would arise. In present case the learned Court missed to appreciate importance and relevance of the expression "preceding".

9.11 In present case learned Labour Court has not recorded specific conclusion that the claimants had worked for 240 days in preceding 12 months. Instead Court has merely recorded general observation, and that too by drawing presumption, that the claimants had worked for 240 days is recorded but it is not held and not recorded that "they had worked for 240 days during "preceding 12 months". Such specific finding is not recorded. On such general and broad observation it could not have been concluded that the alleged termination of the service of the claimants was in violation of Section 25F.

9.12 The learned Labour Court has also recorded that the termination of the

service of the claimants is also in breach of Section 25G and 25H.

9.13 From the discussion in the award it appears that the learned Labour Court took into account the admission by the witness of the petitioner i.e. Mr. Savjibhai whose deposition was recorded at exh. 53.

9.14 It appears that the said witness of the petitioner State admitted in his deposition that after claimants were relieved when need arose other persons were engaged.

9.15 On the basis of the said admission learned Labour Court reached to the conclusion that the petitioner State had committed breach of Section 25H.

9.16 Learned Labour Court also took into account the deposition of one of the claimants i.e. Mr. Laxmanbhai who, in his deposition mentioned names of Mr. Dipak and Jivan and claimed that the said two persons were junior to the claimants and that when the service of the claimants was terminated the said two persons were continued in service.

9.17 It also appears that the said claimant in his deposition claimed that he was engaged w.e.f. 15.6.1998 however he did not place any material on record to support the said claim.

9.18 In view of the fact that the claimants asserted that juniors were retained and their service was terminated, learned Labour Court held that the petitioner State also committed breach of Section 25G of the Act.

9.19 The petitioner State has not placed any material on record from which it can be concluded that the said conclusion by the learned Labour Court is incorrect and contrary to the evidence available on record.

9.20 In this view of the matter though, learned Labour Court's conclusion that the opponent had terminated service of the claimants in violation of Section 25F is not sustainable, the conclusion that the termination was in violation of Section 25G and 25H cannot be faulted.

9.21 When it is established that the petitioner State discontinued the services of the respondents in breach of Section 25G and 25H then the learned Labour Court's decision and direction to reinstate the concerned workmen cannot be faulted.

10. This leaves behind the issue regarding back wages.

11. On this count it is noticed that except in the statement of claim the claimants have nowhere mentioned that during the interregnum i.e. for 14 years they remained unemployed.

11.1 Out of the 2 claimants only one claimant appeared before the Court and came forward to get his deposition recorded. Thus, deposition of only one claimant was recorded by the learned Labour Court.

11.2 The deposition of other claimant viz. Ms. Rajiben was not recorded since she did not come forward to give statement. The claimants did not depose before the learned Labour Court that they remained unemployed from the date of termination and during the proceedings before learned Labour Court. There is no evidence about their unemployed or employment.

11.3 At the same time it is also matter of fact and record that the petitioner State also did not place any material on record before learned Labour Court that the claimants were gainfully employed in the interregnum.

12. Besides this, unfortunately learned Labour Court has not addressed the said aspect and there is no discussion with regard to the issue of employment or unemployment of claimants during period preceding before learned Labour Court. The award is silent on this count. The learned Labour Court has not recorded conclusion that the concerned persons were not gainfully employed during interregnum and therefore they are entitled for back wages.

12.1 In absence of any discussion or without recording such conclusion the direction to pay back wages at the rate of 100 days every year from the date of termination until date of award could not have been passed. The said direction is unjustified.

12.2 Not only this, though any dispute or any claim or any issue with regard to benefit arising from the Government Resolution dated 17.10.1988 was not at all referred to the learned Labour Court and was not even subject matter of the reference, the learned Labour Court on its own proceeded to take into account the said Government Resolution and proceeded further to direct the petitioner State to grant benefit of said Government Resolution dated 17.10.1988.

12.3 The learned Court could not have decided any issue or claim or dispute which was not referred to the Court by appropriate government by virtue of Order of Reference.

12.4 The said direction by the learned Labour Court is, therefore, without jurisdiction and outside the scope of reference.

12.5 In light of the foregoing discussion, and in light of above quoted observations, the direction passed by the learned Labour Court with regard to the back wages does not deserve to be sustained.

12.6 It is appropriate to note that from the date of award i.e. 2007 until now the claimants - workmen have been paid last drawn wages in accordance with Section 17B in view of the order passed by the Court.

13. On this count it is also relevant to note that the total tenure for which the claimants allegedly worked with the petitioner under office of Executive Engineer is hardly two years (if the case of the employee is to be accepted) or if the case of the claimant is accepted then also total tenure during which the claimants worked with the petitioner under office of Executive Engineer would come to 5

years i.e. from 1988 to 1993.

13.1 In this view of the matter also the direction granting back wages for entire period from 1993 to 2007 i.e. for 14 years at the rate of 100 days per year is not justified, more particularly in respect of the daily wagers who were engaged on ad hoc and daily wage basis for temporary period. Besides this, the order directing the petitioner to pay back wages at the rate of 100 days per year in view of the provision under Rural Employment Guarantee Act, 2005 is unjustified. The direction to pay wages for 100 days for every year from the date of termination until date of award on the ground that the provision under the said Act provides for 100 days of employment has no basis or justification, more particularly in case of the person who was in employment and in respect of whom the direction of reinstatement is granted and the provision or scheme of that Act is not applicable in facts of this case. Further the said direction does not take into account actual status of the claimant during the long interregnum of 14 years. Therefore, also the said direction deserves to be set aside.

14. In this context it would be appropriate at this stage to take into account the observations by Hon"ble Apex Court in case of U.P. State Brassware Corporation Ltd. vs. Uday Narain Pandey , (2006) 1 SCC 479 wherein Hon"ble Apex Court observed, inter alia, that:-

"41. Industrial Courts while adjudicating on disputes between the management and the workmen, therefore, must take such decisions which would be in consonance with the purpose the law seeks to achieve. When justice is the buzzword in the matter of adjudication under the Industrial Disputes Act, it would be wholly improper on the part of the superior courts to make them apply the cold letter of the statutes to act mechanically. Rendition of justice would bring within its purview giving a person what is due to him and not what can be given to him in law.

42. A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an industrial court shall lose much of its significance.

43. The changes brought about by the subsequent decisions of this Court probably having regard to the changes in the policy decisions of the government in the wake of prevailing market economy, globalization, privatization and outsourcing is evident.

44. In Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya and Another [, (2002) 6 SCC 41], this Court noticed Raj Kumar (supra) and Hindustan Tin Works (supra) but held:

"16. As already noted, there was no application of mind to the question of back wages by the Labour Court. There was no pleading or evidence whatsoever on the aspect whether the respondent was employed elsewhere during this long interregnum. Instead of remitting the matter to the Labour Court or the High

Court for fresh consideration at this distance of time, we feel that the issue relating to payment of back wages should be settled finally. On consideration of the entire matter in the light of the observations referred to supra in the matter of awarding back wages, we are of the view that in the context of the facts of this particular case including the vicissitudes of long-drawn litigation, it will serve the ends of justice if the respondent is paid 50% of the back wages till the date of reinstatement..."

45. The Court, therefore, emphasized that while granting relief application of mind on the part of the industrial court is imperative. Payment of full back wages, therefore, cannot be the natural consequence.

50. In *Ruby General Insurance Co. Ltd. v. Chopra (P.P.)* [, (1969) 3 SCC 653] and *Hindustan Steels Ltd. v. A.K. Roy* [, (1969) 3 SCC 513], this Court held that before granting reinstatement, the court must weigh all the facts and exercise discretion whether to grant reinstatement or to award compensation.

51. The said decisions were, however, distinguished in *Mohan Lal v. Management of M/s. Bharat Electronics Ltd.* [, (1981) 3 SCC 225]. Desai, J. was of the opinion:

"17. But there is a catena of decisions which rule that where the termination is illegal especially where there is an ineffective order of retrenchment, there is neither termination nor cessation of service and a declaration follows that the workman concerned continues to be in service with all consequential benefits. No case is made out for departure from this normally accepted approach of the courts in the field of social justice and we do not propose to depart in this case."

52. In *Allahabad Jal Sansthan v. Daya Shankar Rai and Another* [, (2005) 5 SCC 124], in which one of us was a party, this Court had taken into consideration most of the decisions relied upon by Mr. Sangal and observed:

"6. A law in absolute terms cannot be laid down as to in which cases, and under what circumstances, full back wages can be granted or denied. The Labour Court and/or Industrial Tribunal before which industrial dispute has been raised, would be entitled to grant the relief having regard to the facts and circumstances of each case. For the said purpose, several factors are required to be taken into consideration. It is not in dispute that Respondent 1 herein was appointed on an ad hoc basis; his services were terminated on the ground of a policy decision, as far back as on 24-1-1987. Respondent 1 had filed a written statement wherein he had not raised any plea that he had been sitting idle or had not obtained any other employment in the interregnum. The learned counsel for the appellant, in our opinion, is correct in submitting that a pleading to that effect in the written statement by the workman was necessary. Not only no such pleading was raised, even in his evidence, the workman did not say that he continued to remain unemployed. In the instant case, the respondent herein had been reinstated from 27-2-2001."

53. It was further stated:

"16. We have referred to certain decisions of this Court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full back wages was the usual result. But now with the passage of time, it has come to be realised that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at."

54. Yet again in *General Manager, Haryana Roadways v. Rudhan Singh* [, JT 2005 (6) SC 137 : (2005) 5 SCC 591], a 3-Judge Bench of this Court in a case where the workman had worked for a short period which was less than a year and having regard to his educational qualification, etc. denied back wages although the termination of service was held to have been made in violation of Section 25F of the Industrial Disputes Act, 1947 stating:

"A host of factors like the manner and method of selection and appointment i.e. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year."

56. A Division Bench of this Court In *M.L. Binjolkar v. State of Madhya Pradesh* [, JT 2005 (6) SC 461 : (2005) 6 SCC 224], referring to a large number of decisions, held:

"6(7) The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view"

62. In Kendriya Vidyalaya Sangathan (supra), this Court held:

"When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

(emphasis supplied)

14.1 It emerges from the observations quoted above that direction to pay back wages - full or partial - is not to be passed mechanically and/or only because termination is set aside and reinstatement of the employee is directed. Several factors must be considered before passing any direction.

15. Having regard to the facts of present case as well as aspects discussed hereinabove and above quoted observations by Hon"ble Apex Court, this Court is of the view that the order directing the payment of back wages is required to be set aside and is accordingly hereby set aside.

16. Likewise the direction requiring the petitioner State to extend benefit of Government Resolution dated 17.10.1988 is beyond the scope of reference and without any basis or justification. It is pertinent that the applicability of the said Government Resolution dated 17.10.1988 was neither claimed nor established.

16.1 Even in the statement of claim the concerned workmen had not prayed for the benefit in terms of Government Resolution dated 17.10.1988.

16.2 The said claim was not referred to the Court by Order of Reference passed by appropriate government.

16.3 Under the circumstances there was no justification for the learned Labour Court to grant such benefit.

16.4 The said direction is beyond the scope of the reference and therefore not sustainable.

17. Under the circumstances, the direction granting back wages and the benefit of Government Resolution dated 17.10.1988 is set aside. The direction obliging petitioner to reinstate the workmen - claimants is not disturbed.

With the aforesaid clarifications the petitions are disposed of.

Special Civil Application No. 6544 of 2008 and Special Civil Application No. 6545 of 2008 filed by the petitioner State is partly allowed. Rule is made absolute to the aforesaid extent.

The petition being Special Civil Application No. 482 of 2009 filed by the claimants seeking full back wages is not accepted and accordingly the said petition stands rejected.

Rule is discharged qua Special Civil Application No. 482 of 2009. Ad-interim relief, if any, qua Special Civil Application No. 482 of 2009 stands vacated forthwith.

Orders accordingly.