

(2016) 03 GUJ CK 0133

In the Gujarat High Court

Case No : Special Civil Application Nos. 30545, 30406, 30543 of 2007 and 6 to 22 of 2008

State of Gujarat

APPELLANT

Vs

Mahadevbhai Vershi and Others

RESPONDENT

Date of Decision : 17-03-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 17(B), Section 2(j), Section 25(j), Section 25F, Section 25F(c), Section 25G

Citation : (2016) 03 GUJ CK 0133

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

Bench : Single Bench

Advocate : Amit Barot, A.G.P., for the Appellant; Mamta R. Vyas, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Thaker, J.—1. Heard learned AGP for the petitioner State and Ms. Vyas, learned advocate for the concerned 18 workmen ("the respondents" for short).

2. In this group of petitions, common facts and common issues are involved and common contentions are raised. The respondents are different, however, the facts related to their respective case are almost similar and identical and in that view of the matter, learned advocate for the respondents have made common submissions in respect of the applications. The learned AGP has also urged similar and common submissions for all cases, and it is also jointly submitted that all petitions may be heard and decided together. Therefore, the group of petitions is decided by this common judgment.

3. In present group of petitions, the petitioner State has challenged an award dated 29.6.2006 passed by the learned Labour Court at Surendranagar in Reference (LCS) No. 160 of 2005 (Old No. 159 of 1992), whereby the learned Labour Court directed the petitioner State to reinstate the respondents on their original post and to pay last drawn wages till the date on which the respondents

are reinstated on their original post.

4. At the outset, it is necessary to mention and note that any direction with regard to backwages for the intervening period is not passed by the learned Labour Court i.e. backwages are not awarded by the learned Court.

4.1 Even when previous award dated 17.5.2000 was passed by the learned Labour Court, at that stage also the direction for backwages was not granted and the Court had granted reinstatement but without backwages.

5. So far as the facts involved in and relevant for the purpose of deciding this group of petitions are concerned, it has emerged that the respondents herein raised an industrial dispute against present petitioner State on the allegation that their services have been illegally terminated. The said industrial dispute was referred for adjudication to the learned Labour Court. The order of reference came to be registered as Reference (LCS) No. 159 of 1992.

5.1 The said reference was adjudicated by the learned Labour Court vide award dated 17.5.2000 whereby the learned Labour Court declared that the petitioner's action terminating the services of the respondents with effect from 8.3.1992 is illegal. Having reached to such conclusion, the learned Labour Court directed the petitioner State to reinstate the respondents on their original post, however, without backwages.

5.2 The said award dated 17.5.2000 in Reference (LCS) No. 159 of 1992 was challenged by the petitioner in Special Civil Application No. 12148 and 2000 and other connected matters. The said petitions came to be decided and disposed of by the Court vide oral judgment dated 4.7.2005 in Special Civil Application No. 12148 of 2000 and other connected matters. The said decision dated 4.7.2005 reads thus:

"1.0 The petitioner State has challenged the order dated 17.05.2000 passed by the Labour Court, Surendranagar, in Reference (LCS) No. 159 of 1992, whereby the said reference was allowed.

2.0 The brief facts of the case are that the respondents herein were working with the petitioner State as Gardeners on daily wages. On 08.03.1992, the services of the respondents were terminated by the petitioner State. Feeling aggrieved by the said order, the respondents raised industrial dispute, which ultimately, came to be referred to the Labour Court by way of a reference being Reference (LCS) No. 159 of 1992. The Labour Court, Surendranagar, by impugned order dated 17.05.2000, allowed the said reference. Hence, these petitions.

3.0 I have heard learned counsel for the parties and perused the documents placed on record. In view of the decision in the case of Gujarat Forest Producers, Gatherers & Forest Workers Union v. State of Gujarat, reported in , 2004 (2) G.L.R. pg. 1488, wherein it has been held that having regard to the subjects allotted to it under the Rules of Business, the entire Forest and Environment Department of the State Government cannot be termed as 'Industry'.

However, an activity or undertaking of the said Department can be categorized as "industry", if it satisfies the triple test formulated in Bangalore Water Supply case and does not fall within the exceptions culled out therein. Hence, the Labour Court is required to consider the matters afresh.

4.0 In above view of the matter, the impugned order dated 17.05.2000 passed by the Labour Court, Surendranagar, in Reference (LCS) No. 159 of 1992, is quashed and set aside. The matters are remanded for adjudication afresh in view of the aforesaid decision. The Labour Court, Surendranagar is directed to dispose of the proceedings within a period of six months from the receipt of writ of this order. It is clarified that if the directions issued by this Court vide order dated 21.10.2004 passed in Civil Application No. 7355 of 2004 in Special Civil Application No. 12148 and group have not been implemented so far, then the petitioner State is directed to grant the said benefits to the respondents till the same is realized. It shall be open to the parties to raise all contentions and to pray for all reliefs, including the contention regarding continuity of service. The petitions stand disposed of accordingly. Rule is made absolute to the aforesaid extent with no order as to costs."

5.3 Accordingly, the reference proceedings were remanded to the learned Labour Court to decide the issue as to whether the activities carried on by the petitioner State through the respondents would come within the purview of the term "industry" as defined under section 2(j) of the Industrial Disputes Act, 1947 ("the Act" for short). For the said purpose, the award dated 17.5.2000 was set aside.

5.4 Consequently, the reference proceedings recommenced before the learned Labour Court. At that time, the reference was renumbered as Reference (LCS) No. 160 of 2005.

5.5 The parties placed relevant evidence before the learned Labour Court. After considering the evidence and other material on record, the learned Labour Court decided the issue and passed the award dated 29.6.2006 with the aforesaid directions. The said award is placed under challenge of this group of petitions.

5.6 By the impugned award dated 29.6.2006, the learned Labour Court has, after examining the evidence on record, reached to the conclusion that in light of triple test explained by Hon"ble Apex Court in the judgment in the case of Bangalore Water Supply and Sewerage Board vs. A. Rajappa [, (1978) 2 SCC 213] as well as in light of the decision by Full Bench in the case of Gujarat Forest Producers, Gatherers & Forest Workers Union vs. State of Gujarat [, 2004 (2) GLR 1488], the learned Labour Court reached to the conclusion that undertaking/ occupation where the respondents were engaged by the petitioner State and the activities undertaken by the petitioner State through the respondents come within the purview of the term "industry" as defined under section 2(j) of the Act.

5.7 Before the learned Labour Court, the petitioner State had not only opposed the reference on the ground that the activities where the respondents were

employed, cannot be said to be industry but the petitioner challenged the proceedings on other grounds including the contention that the respondents had not worked for 240 days. The petitioner State also contended that since the petitioners were engaged only intermittently i.e. as and when need arose and they since were engaged as a part of project there was no obligation to comply provisions under section 25F of the Act.

5.8 The learned Labour Court considered the material and evidence on record and also the contention raised by the petitioner State and in light of the evidence on record, the learned Labour Court considered it appropriate to draw inference against the petitioner State with reference to the petitioner's contention that the respondents had not worked for 240 days. The learned Labour Court also reached to the conclusion that the respondents were discontinued and relieved without following procedure prescribed under sections 25F and 25G. Having reached to the said conclusion, the learned Labour Court passed the award which is impugned in present petition.

6. While assailing the impugned award and the findings recorded by the learned Labour Court, learned AGP submitted that the petitioner State had placed the details of total number of days for which the respondents were engaged from time to time and the said details established that the respondents had not worked for 240 days in any year. According to learned AGP, in view of the said material, the learned Labour Court ought to have held that the respondents had not worked for 240 days. Learned AGP also submitted that in light of such facts and evidence, it was also established that the petitioner State did not commit breach of section 25F or any other provisions. Learned AGP also made lame attempt to contend that the activity of the petitioner State cannot be said to be an industry. He also submitted that the learned Labour Court ought not have directed the petitioner State to reinstate the respondents and that the said direction is passed by disregarding the fact that the respondents were engaged only intermittently for a particular project and that, therefore, the direction to reinstate the respondents is not justified.

7. Ms. Vyas, learned advocate for the respondents submitted that the respondents led the evidence to establish the nature of duties performed by them and the said evidence established that the activity undertaken by the petitioner State comes within purview of section 2(j) of the Act. She also submitted that the respondents had submitted separate application calling upon the petitioner State to place on record the Muster Roll and Pay Register for the relevant period in respect of the respondents, however, despite the application, the petitioner did not place relevant material and that, therefore, the decision by the learned Labour Court to draw inference against the petitioner State is justified and the learned Labour Court has not committed any error in concluding that the respondents (who have been working with the Department of the petitioner State) had worked for more than 240 days. She submitted that the petitioner State discontinued/relieved the respondents without following

procedure prescribed by law and that, therefore, the learned Labour Court's conclusion that the action of the petitioner State discontinuing the respondents is in violation of section 25F, is correct and justified and does not warrant any interference.

8. I have heard learned AGP and learned advocate for the respondents and also considered the material on record and I have also examined the impugned award.

9. At the outset, it is relevant to mention that subject-reference, i.e. Reference (LCS) No. 159 of 1992 was initially adjudicated and decided by the learned Labour Court vide award dated 17.5.2000. By the said award, the learned Labour Court had set aside the petitioner's action of discontinuing the respondents and the learned Court had directed the petitioner State to reinstate the respondents without backwages. The said award came to be set aside on the ground that the issue as to whether the activities performed by the respondents and undertaken by the petitioner State would come within the purview of section 2(j) or not was not decided and the reference was remanded to the learned Labour Court for decision on the said issue.

10. As mentioned earlier, the learned Labour Court conducted reference proceedings afresh and decided the issue as to whether the activity undertaken by the petitioner State and performed by the respondents would come within the purview of section 25(j) of the Act and after examining the evidence, the learned Labour Court has reached to the conclusion that the said activity would come within the purview of section 2(j).

11. During the hearing of present petition, learned AGP has not successfully assailed the said contention.

11.1 Learned AGP could not establish that the conclusion recorded by the learned Labour Court is contrary to the evidence on record or that the said conclusion by the learned Labour Court is perverse and without support of any evidence.

11.2 The learned Labour Court has noticed from the evidence on record that, though at nominal rates, the petitioner State has been selling the produce (plants etc.) which are looked after and attended to by the respondents and similarly the other workmen. In light of the said evidence and other material placed on record by the respondents to establish the nature - type of activities and the duties performed by them, the learned Labour Court found that the said activity fulfilled the criteria - triple test explained by Hon"ble Apex Court as well as the Full Bench for determining as to whether the activities undertaken by the State and duties which the respondents were required to perform would come within the purview of the term "industry" under section 2(j) or not.

11.3 Under the circumstances, there is nothing on record which would convince the Court to take view different from the view taken by the learned Labour Court with regard to the issue as to whether the activity undertaken by the petitioner State and performed by the respondents come within the purview of section 2(j)

of the Act.

12. It is not in dispute that the respondents were discontinued by the petitioner State. Of course, the petitioner State has claimed that the respondents were engaged intermittently and that they were employed in respect of a particular project.

12.1 However, any specific appointment letters clarifying that the respondents were engaged for particular project or for any particular period are not on record.

12.2 In absence of such evidence, it was just and legal for the learned Labour Court to hold that the petitioner's claim that the respondents were engaged only intermittently and only for a project work for fixed tenure is not established by the opponent i.e. the petitioner herein and cannot be sustained.

13. It is also not in dispute that the respondents had submitted an application calling upon the petitioner to place on record the documents viz. attendance and pay registers so as to establish total number of which they had worked with the petitioner State.

14. It is not in dispute that the petitioner State had not placed on record the Attendance or Salary Registers or any other original material on record of the Court which would establish, in accordance with the law, the fact as regards total number of days worked by each respondent.

14.1 It is true that a statement, supposedly containing summary from the original record (as regards total number of days for which the respondents were engaged) was placed before the learned Labour Court.

14.2 Undisputedly, the said statement was summary/extract which was prepared by some employee of the concerned department, allegedly on the basis of certain Muster Roll or Pay Register.

14.3 Neither the said primary evidence nor even the copy of the said Registers was placed before the learned Labour Court and the employee who prepared the said statement was also not examined. Differently put, the statement and/or its contents were not proved and established in accordance with law, by the petitioner State before the learned Labour Court.

14.4 In this view of the matter, the learned Labour Court proceeded to draw adverse inference against the petitioner State and believed the case of the respondents that they had worked for 240 days. Under the circumstances, the decision of the learned Labour Court to draw inference, as aforesaid, cannot be faulted.

15. It is an undisputed fact that the petitioner State had discontinued the respondents.

15.1 Whatever might have been the reason for discontinuing the respondents, the fact that before discontinuing the respondents the petitioner State had not

served any notice to the respondents intimating them that they would be relieved for the reasons mentioned in the notice or any salary in lieu of notice was not paid stares in the face of the petitioner State.

15.2 It is also undisputed fact that before the respondents came to be discontinued, the petitioner State had not given any notice to the office of the Labour Commissioner as contemplated under section 25F(c).

15.3 It is also not in dispute that the seniority list as contemplated under section 25G read with Rule 81 was not notified and it was not established that the "last-come-first-go" principle was followed.

15.4 In this background and in light of such undisputed facts, the learned Labour Court reached to the conclusion that the action of the petitioner State of discontinuing the respondents is illegal and in violation of mandatory provisions, i.e. sections 25F and 25G of the Act.

15.5 Learned AGP has failed to establish that the said conclusion by the learned Labour Court is contrary to the evidence on record or that the said findings are perverse.

15.6 Any material from the record is not shown to this Court to establish that the notice as contemplated under section 25F was served to the respondents or the notice as contemplated under section 25F(c) was served to the competent authority or that the seniority list as contemplated under Rule 81 read with section 25G was notified. In this view of the matter, the conclusion (i.e. the termination of the respondents is in breach of mandatory provisions) by the learned Labour Court cannot be faulted.

16. Once it is found that the above-mentioned conclusions and findings of fact recorded by the learned Labour Court cannot be faulted, there would not be any reason or justification for this Court to interfere with the direction by the learned Labour Court obliging the petitioner State to reinstate the respondents, more so when the learned Labour Court has not imposed any obligation to the petitioner State to pay backwages.

17. On this count, it is pertinent to note that the respondents have not challenged the decision of the learned Labour Court of not granting backwages. Under the circumstances, the said decision by the learned Labour Court is not required to be examined and any direction with regard to the said issue (i.e. with regard to backwages) is not required to be passed.

18. In the light of the above discussion and the material available on record, it has emerged that the learned Labour Court has not committed any error in holding that the petitioner's action of relieving the respondents is illegal. The conclusions recorded by the learned Labour Court are supported by cogent and satisfactory reasons which, in turn, are based on evidence which was available on record before the learned Labour Court. The petitioner State has failed to make out any case to convince this Court that the conclusions recorded by the

learned Labour Court are perverse or that the award suffers from any apparent and material error of law or jurisdiction.

19. At this stage, it is will not be out of place to note that the Court has passed order dated 9.12.2014 in Special Civil Application No. 14148 of 2014. In the said petition the petitioners had prayed that:

"1. The petitioners, in this petition have taken-out this petition with the following prayers;

[a] Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order of direction quashing and setting aside the order dated 3.9.2014 and further be pleased to restrain the respondents from terminating the services of the petitioners as per the order of the Labour Court and to pay them the minimum wages as per the rules;

[b] Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents to give the work to the petitioners on their original posts at the local place only;

[c] Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction for taking appropriate strict action against the respondent officers who are deliberately passing the order of termination every now and then though specific affidavit is filed before this Hon"ble Court not to terminate the services of the petitioners;

[d] Pending admission, hearing and final disposal of this Writ petition, Your Lordships may be pleased to direct the respondents to immediately call the petitioners and allow them to work on their original post and to pay them the minimum wages as per the rules;

[e] Be pleased to pass such other and further relief as may be deemed just and proper by Your Lordships in the facts and circumstances of the case."

19.1 In the said order dated 9.12.2014, the Court observed and directed that:

"3. The earlier direction have been issued and this arrangement is said to have transpired during the hearing of aforesaid petitions. The petitioners having been aggrieved by the action of Officers of the present respondents, original petitioner in the Government petitions, have been acting contrary to the spirit of the order and have adopted a practice of leaving the workmen without any work and wages under the guise of non-availability of work, sometimes workmen"s unwillingness to accept their status as a piece workmen and the insistence for treating the workmen as a piece workmen.

4. Ms. Reeta Chandarana, learned Assistant Government Pleader contended that the contention of the workmen is not correct as today"s scene is different from the affidavit in reply. The nature of work, which workmen uses to perform indicates that the workmen could have been kept at one place which is being insisted upon by the workmen, and therefore, the grievance made by the

workmen in several application and special civil applications are not justified. Ms. Chandarana, learned Assistant Government Pleader has further submitted that instead of passing of any order in this petition or Civil Application, this Court may fix the main matter for final hearing.

5. This Court is of the considered view that Civil Application filed by the workmen i.e. Civil Application No. 1839 of 2014 and this petition are required to be disposed of with appropriate directions as this Court has come to the conclusion that when there is a dispute qua the facts with regard to the availability of work, the offer of piece rate work instead of regular wages and exigencies of keeping workmen on a place where the benefit of engagement would be nullified. It would not be appropriate at this stage and therefore, these questions need to be thrashed-out at the stage, when the State filed petitions challenging the award of reinstatement where-from this interim arrangement has sprung up, the employer is required to be directed appropriately. Hence, in the interest of justice, the following directions are required to be issued which will put an end of controversy and take care of the necessity on the part of workmen as well as on the employer.

a) The matters filed by the State challenging the order and award of reinstatement having pending, therefore, when there is no stay order against the implementation of the award, it would have been ideal for the State petitioner to offer employment to the workmen. However, the statutory provision of Section 17(B) of the I.D. Act, 1947 shall have to be applied wherein the employer petitioner has challenged the order of reinstatement and the employer is under an obligation to pay the last drawn wages to the workmen till the final disposal of those matters in which the order of reinstatement is challenged. Therefore, the respondent employer in this petition who also happened to be the petitioner in those petitions mentioned hereinabove is hereby directed to comply with Section 17(B) of the I.D. Act and pay to all these 18 petitioners, the last drawn wages in accordance with Section 17(B) of I.D. Act. The last drawn wages shall be paid on or before seventh of every month and be continued to be paid till final disposal of these petitions, which are pending challenging the order and award of reinstatement.

b) It would be now not open to the respondent employer, who happened to be the petitioners challenging in their petitions the award of reinstatement, to seek any further direction for modification of those direction on the substantial plea that may be urged that the workmen may now be offered employment, in view of their past conduct. Unfortunately workmen is deprived even minimum wages which is admissible to the workmen when the order of reinstatement is challenged.

c) This direction will of-course not be binding upon the employer. In case if the employer come forward and establishes before this Court by way of appropriate application with the copy of communication that any of the workmen is currently employed elsewhere and he has been receiving last drawn wage under Section

17(B) of the I.D. Act. This direction shall be applicable till the final disposal of all the above petitions which have been filed by the State challenging the order of reinstatement passed by the Court below in favour of the workmen.

6. This petition, is therefore disposed of with the aforesaid directions. Notice is discharged. No order in Civil Application in view of the order passed in main matter.

7. It would be open to the State and learned Assistant Government Pleader to make appropriate request for fixing early date of hearing of all the above stated petitions filed by the Government.

8. It would be open to the present petitioners to bring-out any appropriate claim admissible under law for seeking wages under Section 17(B) of the I.D. Act from the employer for the period prior to filing of these petitions."

19.2 At the time of hearing of present petition, learned advocate for the respondents alleged that despite the said direction, the petitioner State has, except for some period, not complied the direction passed by the Court (viz. the direction to pay last drawn wages in accordance with section 17(B).

19.3 This Court would not enter into the said dispute and would not examine the allegation by learned advocate for the respondents inasmuch as in present petition which is filed by the petitioner State, it would not be just and proper for this Court to pass any direction against the petitioner, more particularly in respect of the issue or dispute which is not part of or does not arise from the award impugned in present petition. If the respondents have any claim on the strength of the said order dated 9.12.2014 passed in Special Civil Application No. 14148 of 2014, then it would be for the respondents to take out appropriate proceeding in accordance with the law. However, in this group of petitions, which are filed by the petitioner State against the award, any direction for alleged non-compliance of the said direction cannot be passed.

20. From the foregoing discussion, it comes out that the petitioner State has failed to successfully assail the impugned award. Any ground to take view different from the view taken by the learned Labour Court, is not made out. The petitions fail and deserve to be rejected and are accordingly hereby rejected. Rule is discharged.