
(2016) 03 GUJ CK 0110

In the Gujarat High Court

Case No : Special Civil Application No. 18083 of 2006

Testeels Employees Committee

APPELLANT

Vs

Testeels Limited

RESPONDENT

Date of Decision : 14-03-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 25-F, Section 25-FF(a), Section 25-N, Section 25-O, Section 25-O(6)

Citation : (2016) 03 GUJ CK 0110

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

Bench : Single Bench

Advocate : K.R. Koshti and Maheshb Bariya, Advocates, for the Appellant;

Final Decision : Partly Allowed

Judgement

K.M. Thaker, J.—1. Mr. Koshti, learned advocate for the petitioner is present. Mr. Bariya, learned advocate for the respondent is not present. The Court is informed that Mr. Bariya, learned advocate has not filed leave note or sick note. No one is present on behalf of the respondent. Official Liquidator is also not present for the respondent. In this view of the matter, the petition is decided after considering the contentions raised in the petition and the material available on record.

2. The petitioner has described itself as committee formed by the workmen of the respondent company. In paragraph No. 1, the petitioner has described itself in following terms:

"1. The petitioner herein is a Trade Union registered under the provisions of the Trade Union Act, 1926. All the workmen working under the respondent company are the members of the petitioner Union. Therefore, the petitioner Union is legally entitled to voice the grievance of its members before any authority or Court of law."

3. The petition raises claim and dispute on behalf of the workmen of the respondent company.

4. The petition is filed against award dated 21.7.2006 passed by the learned Industrial Tribunal at Ahmedabad in Reference (IT) No. 65 of 2003 whereby the learned Tribunal partly allowed the reference by directing the respondent to pay 30% wages to the concerned workmen of the respondent for the period from 16.12.1989 to 27.4.2004 and denied balance wages and other benefits.

5. So far as the factual background is concerned, it has emerged from the record that the respondent company came to be constituted as a limited company incorporated and registered under the Companies Act, 1956.

5.1 It appears that the respondent company discontinued its operation with effect from 16.12.1989 and stopped engaging the workmen who were in its employment on its roll (as its employees) as on 16.12.1989.

5.2 The record reflects that at the relevant time, i.e. in December 1989, there were about 700 employees on the roll of the company.

5.3 Even if it is assumed that the said figure of 700 workmen is not correct or accurate, it is safe to conclude that the respondent company employed, as its employees, more than 100 workmen as on 16.12.1989 which would attract application of section 25-O of the Industrial Disputes Act, 1947 ("the Act" for short).

5.4 It has also emerged from the record that after having discontinued the operation with effect from 16.12.1989, the respondent company stopped paying salary to its workmen.

5.5 According to the claim of the concerned workmen, at the time when it discontinued its operations with effect from 16.12.1989, the respondent company had not followed any procedure for closing down the undertaking.

5.6 The concerned workmen would claim that in view of the fact that at the relevant time, more than 100 workmen were employed by the respondent company, it was obligatory for the company to follow the procedure prescribed under section 25-O or section 25-N of the Act before discontinuing the concerned workmen. However, the procedure prescribed under section 25-O or section 25-N was not followed by the company and the respondent company illegally and arbitrarily discontinued the operation with effect from 16.12.1989 and discontinued the services of the workmen who were on its roll on 16.12.1989 without following any procedure and without payment of compensation, salary in lieu of notice or any other amount. According to the workmen, even the salary for the period during which the operation continued i.e. 16.12.1989 also remained unpaid.

5.7 It has also emerged from the record that after the company discontinued its operation in December 1989, certain litigation commenced against the company. Even certain creditors instituted proceedings against the company and the company petition came to be filed before the learned Company Court, wherein the creditors prayed for order of liquidation/winding-up of the company.

5.8 Before proceeding further, it is relevant to mention that either before the proceedings under the Companies Act were instituted and company petition seeking order of liquidation was filed, the company had instituted proceedings under the Sick Industries (Companies) Act before the Board.

5.9 It appears that after considering the application and the submissions by the contesting parties, the Board passed an order recommending that the company be wound up. It appears that the order passed by the BIFR was unsuccessfully challenged before the Appellate Board, i.e. before AIFR. Ultimately, the matter was carried before the Company Court and the learned Company Court considered the company petition filed by the creditors and also considered the report of the BIFR and after considering the recommendation of the Board and the company petition filed by the creditors, the learned Company Court passed order appointing Official Liquidator. From the record, it appears that the order appointing Official Liquidator and initiating winding up process was passed by the learned Company Court on 27.4.2004.

5.10 It appears that while the said proceedings before the BIFR, AIFR and before the Company Court were pending, the concerned workmen raised industrial dispute against the company's action of discontinuing the workmen and discontinuing the operation with effect from 16.12.1989.

5.11 The dispute raised by the concerned workmen, through present petitioner, was referred for adjudication to the learned Tribunal at Ahmedabad. The appropriate Government, vide order of reference dated 24.2.2003, passed order of reference and referred the dispute (viz. whether the action of the company discontinuing its operation with effect from 16.12.1989 is illegal and whether the concerned workmen are entitled for wages and other benefits with effect from 16.12.1989) for adjudication. The said reference was registered as Reference (IT) No. 65 of 2003.

5.12 The claimants/workmen filed statement of claims before the learned Tribunal and claimed that the action of the company of discontinuing the operation and discontinuing/relieving the workmen without following procedure prescribed by law is illegal and the workmen are entitled for wages for entire period.

5.13 While the proceedings were pending before the learned Industrial Tribunal, above-mentioned order/report came to be passed by the BIFR and the order dated 27.4.2004 came to be passed in respect of the company petition by the learned Company Court.

5.14 The said details and facts were placed on record before the learned Tribunal.

5.15 In that view of the matter, the learned Tribunal issued notice to the Official Liquidator and impleaded the Official Liquidator as party to the said proceedings of the Reference No. 65 of 2003. The Official Liquidator appeared before the learned Tribunal.

5.16 The learned Tribunal took into consideration above discussed facts, more particularly the fact that the Company Court had passed order for winding up and appointed Official Liquidator.

5.17 After considering the said facts, the learned Labour Court reached to the conclusion that the action of closure of undertaking was illegal and in violation of section 25-O of the Act.

6. It is pertinent to mention that any material to establish that the procedure prescribed by the law, i.e. under section 25-O or section 25-N was not followed before discontinuing the operations and before discontinuing/relieving the workmen.

6.1 Any orders passed in accordance with the law terminating the services of the workmen were also not placed on record before the learned Labour Court.

6.2 Any material worth its name to establish that the operation of the company was discontinued after following procedure of law and/or after following procedure of law and that the relationship of employer-employee had come to an end in accordance with the law were not placed on record before the learned Labour Court.

6.3 It was in this background that the learned Tribunal reached to the conclusion that the action of the company was in flagrant violation of section 25-O of the Act.

7. It is given out during the hearing of the petition that the said order, i.e. order dated 29.7.2006 passed by the learned Tribunal in Reference (IT) No. 65 of 2003 (which is challenged by the workmen in present petition) has not been challenged by the company/Official Liquidator and so far as the company/Official Liquidator is concerned, the award has attained finality.

8. In view of the fact that the order appointing the Official Liquidator is already passed and winding up proceedings have commenced, the concerned workmen have to raise their claim before the Official Liquidator.

8.1 However, at that stage, i.e. when the workmen raise claim before the Official Liquidator question about their entitlement for wages and the period for which the workmen would be entitled for wages and other benefits may arise before the Official Liquidator.

9. The Official Liquidator would consider the claim of the workmen on the strength of and in the light of the direction passed by the learned Tribunal vide order dated 21.7.2006.

9.1 By virtue of the said order, the workmen would be entitled for 30% wages for the period from 16.1.1989 to 27.4.2004.

9.2 Therefore, the workmen felt aggrieved and have taken out present petition and claimed that the learned Tribunal has committed error in allowing 30%

wages for the said period instead of granting full wages for the period in question.

9.3 In present petition, the said claim of the workmen is required to be considered.

10. In this context, it would be appropriate to refer to the decision in case of Textile Labour Association v. Official Liquidator & Jubilee Mills Ltd. & Ors. [2000 (4) GLR 2923].

10.1 In the said decision, the Court considered the effect of the company's action of discontinuing the operation and discontinuing the workmen without following procedure prescribed for closure or retrenchment. The Court considered the effect of company's action in violation of section 25-O of the Act.

11. Before advertng to the observations by the Court in the said decision, it is necessary and appropriate to mention that so far as the facts of present case are concerned, now it is not in dispute that before discontinuing the operation with effect from 16.12.1989 or at any point after 16.12.1989 or before that the company had not taken any steps to comply the conditions either under section 25-F or section 25-N of the Act, muchless section 25-O of the Act and the prescribed procedure was not followed.

11.1 The action of discontinuing the operation and/or closure of the undertaking was effected without following procedure prescribed by law. The said factual aspect is undisputed so far as the present case is concerned.

12. The action of discontinuing the operations and/or the action of discontinuing/relieving the workmen upon discontinuing the operations without following prescribed procedure by law, more particularly under Section 25-F and/or Section 25-FF(a) and/or Section 25-N and/or Section 25-N of the Act amounts to illegal retrenchment and/or illegal closure.

12.1 In the event of illegal retrenchment and/or illegal closure, the workmen would be entitled for full wages inasmuch as the services of the workmen, during the period when such illegal retrenchment or illegal closure subsists, cannot be held to have been severed in accordance with law.

13. On this count, the Court observed in the above referred decision in case of Textile Labour Association v. Official Liquidator of Jubilee Mills Ltd. & Ors. [2000 (4) GLR 2923] thus:--

"11.4 Hence, the question is what was the purpose for which the legislature enacted Section 25-O of the Industrial Disputes Act and particularly sub-section (6) thereof and whether Sections 529 and 529A of the Companies Act fall within the field covered by Section 25-O(6) of the Industrial Disputes Act. Under sub-section (2) of Section 25-O of the Industrial Disputes Act, the Government may grant or refuse to grant the employer permission to close down an undertaking of an industrial establishment, after giving an opportunity of hearing to the employer, workmen and persons interested in such closure, having regard to the

genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors. Absence of any such application of the employer under sub-section (1) or refusal of such permission by the Government under sub-section (2) would clearly indicate an absence of genuine and adequate reasons for closure and will also indicate the interests of the general public in having the activities of the undertaking continued. In other words, whatever may be the reasons for closure, if they are not found by an independent statutory authority to be genuine and adequate, the employer is bound to continue all activities of the undertaking and even if the employer cannot in fact continue the activities of the undertaking, the employer is bound to pay wages to the workmen and to give the workmen all the benefits available to them under any law in force. The legislature thus creates a fiction that the actual closure of the undertaking has to be ignored and the undertaking is to be treated as continuing its activities. The logical conclusion would be that the workmen continued to render services. The logical consequence would be that the workmen would be entitled to be paid wages which are given priority under Section 529(3)(b)(i) of the Companies Act. Sub-section (6) of Section 25-O of the Industrial Disputes Act is a part of the legislative scheme for giving protection to workmen who would otherwise be deprived of wages inspite of absence of genuine and adequate reasons for closure of the undertaking. The fiction is created through the Industrial Disputes Act, 1947 which has been specifically enacted to make provisions for settlement of industrial disputes and for certain other purposes for conferring considerable benefits to workmen. It is also pertinent to note that even when an undertaking is permitted to be closed down under sub-section (2) or sub-section (3) of Section 25-O, its workmen are entitled to receive retrenchment compensation. This also indicates the legislative intent that where the closure is without permission, there would be no question of retrenchment and the workmen would continue to be entitled to be paid wages for the entire period of illegal closure. The Court would also like to take judicial notice of the fact that most of the Companies are ordered to be wound up on the ground of their inability to pay their debts. In almost all such cases there is a period of actual closure without permission under sub-sections (2) or (3) of Section 25-O of the Industrial Disputes Act, when the workmen are ready and willing to offer their services, but the employer has no work to offer. Wages is what the employer is bound to give the workmen when they offer their services. There is nothing in the provisions of Section 25-O of the Industrial Disputes Act or Section 529(3)(b) of the Companies Act which can indicate even the slightest intention that Legislature did not intend the legal fiction to be carried to its logical conclusion.

11.9 The inescapable conclusion is that the expression "all wages or salary...in respect of serviced rendered to the Company" in Section 529(3)(b) (i) of the Companies Act includes all wages or salary payable by the Company to the workmen for the period of illegal closure.

21 C. Relevant Date for computing Workmen's Dues and Calculation of Interest.

The relevant date for computation of the workmen's dues as well as the dues of the secured creditors for the purpose of determining the ratio of the respective dues under sections 529 and 529A of the Companies Act is the date of first appointment of provisional liquidator and if no such appointment is made the date of winding up order as contemplated in Section 530(8)(c)(i) of the Act. Hence, in the first instance the Official Liquidator shall compute the dues of the workmen as covered by the claim for priority u/s. 529 and 529A of the Companies Act and the dues of the secured creditors as on the aforesaid relevant date."

14. As mentioned earlier, in present case, it is an undisputed position that the closure of the company/undertaking and/or retrenchment of the workmen and/or termination of the service of the workmen on closure of the company was effected without following prescribed procedure by law.

14.1 In the award impugned in present petition even the Tribunal has accepted and acknowledged said position and passed the award on that premise (however granted only part of full wages).

14.2 Consequently, such ex facie illegal closure of the undertaking and/or retrenchment of the workmen would entail the consequences as observed and held by the Court in the above referred decision in case of Jubilee Mills Ltd. (supra).

14.3 The workmen who were on the roll of the respondent company on 16.12.1989 would be, therefore, entitled for full wages and other benefits as per the decision by the Court in case of Jubilee Mills Ltd. (supra) till the order passed by the Company Court for winding-up (i.e. till 27.4.2004).

14.4 In this view of the matter, the order passed by the learned Tribunal in Reference (IT) No. 65 of 2003 whereby the learned Tribunal has allowed only 30% backwages for the period from 16.12.1989 to 27.4.2004 is unjustified, erroneous and unsustainable and deserves to be set aside.

14.5 Consequently, the said decision and direction is hereby set aside.

15. It is, however, clarified that so far as the direction which is set aside by the Court is the decision to grant only 30% backwages i.e. the direction restricting the backwages to 30% and disallowing balance 70% backwages.

16. However, so far as the decision holding that the workmen are entitled for wages for the period from 16.12.1989 to 27.4.2004 is concerned, the said direction is not disturbed and it is hereby confirmed.

16.1 The workmen, therefore, would be entitled to full wages for the period from 16.12.1989 to 27.4.2004 and the wages and other benefits will be calculated as per the decision in case of Jubilee Mills Ltd. (supra).

With the aforesaid clarifications and directions, the impugned award is partly modified and present petition is partly allowed. Rule is made absolute to the

aforesaid extent.