

**(1997) 04 GUJ CK 0006**  
**In the Gujarat High Court**

Udaipur Phosphates and Fertilizers Ltd.

APPELLANT

Vs

Gujarat Mazdoor Kranti Union and Another

RESPONDENT

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**Date of Decision :** 03-04-1997

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10  
Industrial Disputes Act, 1947 — Section 10, 10(1), 11, 11(3), 18

**Citation :** (1997) 3 GLR 2132

**Hon'ble Judges :** Rajesh Balia, J

**Bench :** Single Bench

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**Judgement**

R. Balia, J.—The petitioner is a Public Limited Company incorporated and registered in 1982 under the Companies Act, 1956. In this petition it challenges the award of the Industrial Tribunal, Baroda dated 6-1-1995 (Reference I.T. 111 of 1992) by which the petitioner was ordered to be added as party in the said Reference which has arisen between the workmen of Kosan Industries Pvt. Ltd., respondent No. 2 represented by respondent No. 1 Union and M/s. Kosan Industries Pvt. Ltd., their employer respondent No. 2.

2. The facts leading to this petition are : that K.I.P.L. (hereinafter referred to as the employer) was having one of its undertakings/establishments at S-623 Padara Road, Atladra, Baroda, manufacturing chemicals. All the workmen in question numbering 73 were employed in that undertaking. Their services were terminated through notice dated 30-6-1990 by the employer. Retrenchment compensation accompanying the same was also accepted by the workmen. In respect of these terminations, dispute was raised for the first time raising demand vide notice dated 6-2-1992 by respondent No. 1. On the failure of conciliation proceedings, appropriate Government by its order dated 26-6-1992 referred the dispute to the Industrial Tribunal, Vadodara, for adjudication. The dispute referred to the Industrial Tribunal was whether notice given by the undertaking dated 30-6-1993 (terminating services of workmen) was in accordance with law and whether all the 73 workmen are entitled to be reinstated. As it will appear from the narration to follow, the present petitioners

under a Memorandum of Understanding dated 20-9-1991 between the petitioners and the employer decided to take the undertaking as a going concern, with stipulation that the purchaser shall continue to employ the existing employees, workmen, and staff of the vendor (K.I.P.L.) in the undertaking and if their services are continuous services, it shall not be deemed to have been interrupted as a result of purchase of the undertaking as a going concern etc. In pursuance of the said Memorandum of Understanding, the undertaking was taken by the petitioner on 29-2-1992.

3. On 28-6-1993 respondent No. 1 moved an application before the Tribunal that the employer had, by replacing the name of the Company at the gate of undertaking, restarted the production and employed 50 more persons. It was urged in the application that this has been done by the employer to affect the rights of the workmen by carrying on the business of the same undertaking in the changed name. It was urged that the Directors of the employer and the Company whose name appears in the undertaking are the same and the undertaking is engaged in manufacture of the same goods as before. The application was replied to by affidavit dated 16-7-1993 in which the petitioner averred that it had agreed to take the undertaking as a going concern with specific undertaking to continue with the existing employees, workmen, labourers and staff of the vendor (K.I.P.L.) under Clause 14 of the Agreement. The application of the respondent Union was in the first instance allowed by the Tribunal on 9-9-1993 which order was challenged by the petitioner in Special Civil Application No. 13811 of 1993. That Special Civil Application was allowed by the Court on 31-3-1994. The Court was of the opinion that the question of adding all parties in the circumstances require consideration of many questions of facts and law which have not been considered by the Tribunal and the order of the Tribunal was not supported by reasons for its conclusion. It, therefore, set aside the order dated 9-9-1993 and directed the Tribunal to hear the application afresh in accordance with law. Thereafter, the impugned order dated 6-1-1995 was made by the tribunal once against allowing the application of the workmen to implead the petitioner as a party in the reference.

4. It was urged by the learned Counsel for the petitioner that the Tribunal has seriously erred in deciding against the petitioner-Company that the transfer in its favour by the employer was clandestine and that there is a clear case of violation of Section 25H of the Industrial Disputes Act and, therefore, there is every possibility of the liability to take back the retrenched workmen being fastened on the new employer. It is on this premises the application of the workmen to implead the petitioner has been allowed. Whether the petitioner is new employer and whether the relief u/s 25H should be granted to the workmen against the petitioner, apart from the fact that the same could have been decided at that stage to the prejudice to the petitioner, are not germane consideration for deciding the question about joining the petitioners as a party in the pending Reference. It was urged that the two findings were beyond the scope of Reference made to the Tribunal and cannot be said to be in any way incidental or

ancillary to the dispute referred to it and the Tribunal had no jurisdiction to add any person as a party to enlarge the ambit and scope of enquiry about the dispute referred to it. By recording these findings in fact Tribunal has prejudged the merits of contentions against the petitioner even before it was impleaded as party and had an opportunity to defend.

5. Mr. Mishra, learned Counsel appearing for the workmen vehemently urges that on the facts, it was required that behind Corporate veil identity lurk the face of Mr. M.D. Gokuldas who is the real employer of the workmen donning the business in the name of various companies as and when it suits him. If the corporate veil is removed, which the learned Counsel requires to be removed in the present case, the workmen are entitled to relief in the present Reference against the petitioner-Company and, therefore the Tribunal was justified in ordering it to be impleaded as a party.

6. Having carefully considered the rival submissions, I am of the opinion that so far as the reason advanced by the Tribunal in support of its conclusion is concerned, the criticism made by the learned Counsel for the petitioner has force.

7. While considering the question about joining a person as a party in pending litigation it is not for the adjudicatory body to decide the merit of rival contention on which ultimate relief is claimed by or against the person sought to be joined as a party. What is required to be considered is that if claim of the applicant seeking joining of any other person as a party to the lis is accepted, can the relief in pending litigation within the compass of inquiry required to be held, be granted in favour or against the party sought to be joined and its presence is necessary or proper for final adjudication of the lis before the Tribunal to that extent? Inherently, this would include that if the presence of the party is necessary or proper for deciding the issues substantial to the dispute referred to the Tribunal or which are inherently incidental or ancillary thereto then such a person ordinarily ought to be joined as a party. However, if dispute between the parties sought to be joined and the contesting parties are beyond the scope of pending inquiry before the Tribunal or other adjudicatory forum then notwithstanding that such dispute exists between the parties and may appear to be relevant as distinct from incidental and ancillary thereto and may require adjudication, that may be made subject-matter of an independent proceedings but the scope of pending inquiry cannot be enlarged by the process of joining such persons as party to that lis.

With reference to Tribunal like Industrial Tribunal constituted under special Statute for specific purpose, ambit and scope of its power depend upon the Statute under which such Tribunal is constituted. Section 11 of the I.D. Act makes certain provisions of CPC applicable to proceedings before the Tribunal which include power to enforcing the attendance of any person and examining him on oath. Provisions of Order 1 Rule 10 have not been made as such applicable to such proceedings. However, Section 18 states person on whom settlement and awards are binding. Sub-section 3(b) of Section 18 envisages all

other parties summoned to appear in the proceedings as parties to dispute to be bound by the award that may be made unless the Labour Court, Tribunal or National Tribunal as the case may be records the opinion that they were so summoned without proper cause. The provision implies that the Labour Court, Tribunal or National Tribunal established under the Act have necessary power to summon any person other than named in Reference u/s 10 as parties before it. However, this power does not travel beyond the limits of and ambit of power of the Tribunal to adjudicate dispute before it. The Tribunal has no power to enlarge the scope of enquiry in respect of dispute referred to it. It has power only to adjudicate upon the dispute referred to it and matters incidental thereto, but has no power to decide other issues, which may appear to it to be connected or related to dispute referred to it, but are neither referred to it nor incidental thereto, unless the same are referred to it by appropriate Government for adjudication. Necessary implication of this limitation is that Tribunal can summon any other person as party to dispute before it, so as to make the award to be made binding on him only if presence of such person can be said to be necessary or proper for deciding the dispute before it or question incidental thereto to see that it can make a legally effective and enforceable award.

8. Gajendragadkar, C.J.I. in *Hochtief Gammon Vs. Industrial Tribunal, Bhubaneshwar, Orissa and Others*, said :

The result of relevant provision [(Secs. 18(b). 11(3) and 10(1)] is that the Industrial Tribunal while dealing with an industrial dispute came to the conclusion that person other than those mentioned as parties to the industrial dispute were necessary for valid determination of the said dispute, it had the power to summon them; and if such persons were summoned to appear in the proceedings the award that the Industrial Tribunal may ultimately pronounce would be binding on them.

9. Referring to the question about the extent of power, he said, after taking into consideration the limited nature of the Tribunal's jurisdiction that :

It is clear that this power cannot be exercised by the Tribunal so as to enlarge materially the scope of the reference itself because basically the jurisdiction of the Tribunal to deal with the industrial dispute is derived solely from the order of reference passed by the appropriate Government u/s 10(1). What the Tribunal can consider in addition to the disputes specified in the order of reference, are only matters incidental to the said disputes; and that naturally suggests certain obvious limitations on the implied power of the Tribunal to add parties to the reference before it, purporting to exercise its implied power u/s 18(3)(b)...The test always must be is the addition of the party necessary to make adjudication itself effective and enforceable. In other words, the test may well be, would the non-joinder of the party make the arbitration proceedings ineffective and unenforceable. It is in light of this test that the implied power of the Tribunal to add parties must be held to be limited.

10. Both the learned Counsels for parties have placed reliance on the aforesaid decision in support of their respective contentions about the merits of the order in directing the petitioners to be joined as party. The question then arises for consideration in this case is whether joining the petitioners as party to the dispute pending before the Tribunal is necessary to make adjudication effective and enforceable or non-joinder of the parties would result in proceedings ineffective and unenforceable or joining the petitioners as party would result in enlarging the scope of dispute referred to the Tribunal which arose between the respondent Nos. 1 and 2.

11. While considering the application for summoning the petitioner as party before it the Tribunal has found that after the establishment was taken over by the petitioner some of workmen from K.I.P.L. have been taken and some new hands might have been taken as per statement of Shri Zaveri. This shows that there is clear violation of Section 25H of the Act. Therefore, there is every possibility that liability to take back the retrenched workmen being fastened on the new employer, namely U.P.F. Ltd. It is for this reason that the petitioner has been ordered to be added as a party. Incidentally, the Tribunal has also found that the transfer of undertaking by the employer to the petitioner is clandestine on the ground that workmen in question were kept in dark about such transfer.

12. As has been noticed above retrenchment had taken place through notice dated 30-6-1990 and demand against retrenchment was raised on 6-2-1992 much after M.O.U. for the transfer of undertaking from employer to the petitioner was signed on 20-9-1991 and few days before the transfer was actually executed on 29-2-1992. During the course of conciliation proceedings there was no dispute about the genuineness of this transfer. On this premise, it was contended by the learned Counsel for the petitioners that the reasons adopted by the Tribunal show that the issues which would be required to be decided in considering the prayer of the workmen against the petitioners results in enlarging the scope of pending dispute which concern the validity of retrenchment brought about by the K.I.P.L. which is no more owner of the undertaking. The relationship between the employer and employee did not exist between the petitioner and the workmen and the retrenched workmen of K.I.P.L. whose retrenchment has taken place prior to acquisition of undertaking by it. Firstly, in view of provision of Section 25FF which envisages retrenchment of workmen on transfer of establishment, applicability of Section 25H against transferee is not envisaged under scheme of Section 25FF and 25H read together. Thus, according to the learned Counsel for the petitioners, the dispute whether the petitioner as successor-in-interest of K.I.P.L. qua the establishment is required to offer employment to workmen in question on preference before recruiting new hands in terms of Section 25H, and if so, whether new appointments have taken place after the petitioners were retrenched at the establishment to invoke Section 25H and whether the transfer in question is colourable transaction are all questions falling beyond the scope of dispute referred to the Tribunal and even assuming that retrenchment by K.I.P.L. to be valid, which is the condition precedent for applicability of Section 25H for

offering re-employment, cannot be said to be incidental and ancillary to the dispute referred to the Tribunal apart from the fact that as per the authoritative pronouncement of Supreme Court in *Anakapalla Co-operative Agricultural and Industrial Society Limited Vs. Workmen*, Section 25H does not apply to successor-in-interest in the establishment.

13. Learned Counsel for the respondent strenuously urged that it is essential that the petitioners are joined as a party to make effective and enforceable order and therefore, the order of the Tribunal does not call for interference, even if some of the reasons given by the Tribunal are not sustainable. It was urged that the foundation of workmen's application for impleading the petitioner as a party, real employer, notwithstanding the transfer remains the same, namely, Mr. M.V. Gokuldas and therefore, the petitioners are entitled to relief whether against K.I.P.L. or U.P.F. as a cloak for Mr. M.V. Gokuldas.

14. Having carefully considered the rival contentions there appears to be some force in the contention of the learned Counsel for the petitioners that reasoning adopted by the Tribunal in support of its order to implead the petitioner as party is not well founded in law, nor the contention of the learned Counsel for the respondent as to the identity of the employer there is no real addition of party but it is necessary that the petitioners are joined so that corporate veil will be lifted and appropriate orders may be passed vis-a-vis the real employer of the workmen can be sustained as a dispute incidental to the dispute referred to the Tribunal.

15. It is true that Section 25FF envisages ordinarily on transfer of establishment existing employees suffer retrenchment and cannot by that fact alone be subjected to employment under new employer. That being the position, law envisages end of services at the establishment on transfer of establishment. Section 25H cannot be read in a manner to nullify the effect of that provision by envisaging termination of service, payment of compensation for such termination simultaneously with securing continuity of job with the successor owner of the establishment. It results in double benefit which is neither justified nor envisaged. That is the view expressed by the Supreme Court in *A.C.A. & I. Society's case* (supra) The Court said:

Section 25H does not apply to the case of a genuine transfer of industrial concern. Nor can the general principle underlying the provisions of the said section be invoked in dealing with the claim made by the workmen of the transferor-Company against the transferee -society that they should be re-employed. For as soon as transfer is effected u/s 25FF, all employees are entitled to claim compensation, unless of course, the case of transfer falls under the proviso and if these workmen who have been paid compensation are entitled to claim re-employment from the transferee, it will not be fair that vendor should pay compensation to his employees on the ground that the transfer brings about the termination of their services and the vendee should be asked to take them back on the ground that the principles of social justice require him to do so. This

double benefit in the form of payment or compensation and immediate re-employment cannot be said to be based on any considerations of fair-play or justice. Fair-play and justice obviously mean fair-play and social justice to both the parties.

16. It may be noticed that in the aforesaid case the Court observed that if transfer is fictitious or benami, Section 25FF has no application at all. In such a case there has been no change of ownership or management and despite an apparent transfer, the transferor-employer continues to be the real employer and there has to be continuity of service under the same terms and conditions of service as before and there can be no question of compensation.

17. From this it is clear that the plea of transfer being assumed is really directed against the existing employer. If it is directed against the third party then it can only be said to be a new dispute not forming part of dispute about retrenchment which has taken place prior to such transfer. It cannot be said to be incidental to the dispute relating to retrenchment affected by the existing employer as it does not impinge the validity of retrenchment. The dispute as to fictitious nature of transfer really relates to the dispute as to who is employer. In the present case, neither the genuineness of the existing company K.I.P.L. or U.P.F. have been ever put to issue nor at any time within the existing dispute it was the case of the petitioner that Mr. M.V. Gokuldas is the employer of the petitioners and not the K.I.P.L. Company. Therefore, the dispute which the workmen now want to raise concerning the identity of real employer is neither part of the dispute referred to the Tribunal nor is incidental for determining the validity of retrenchment.

18. Learned Counsel for the respondents has fairly stated that to the extent the Tribunal has reached the finding about clandestine nature of the transaction and liability of the petitioner to re-employ the workmen u/s 25H are concerned, they have been reached prematurely as at the stage of deciding the application for impleading parties, the issue could not have been decided on merit.

19. In this regard one cannot fail to notice that the reasoning adopted by the Tribunal about clandestine nature of transaction, on the admitted facts is founded more on imagination than on reason. On the date M.O.U. was signed, the workmen concerned in dispute were not the employees of the transferor-Company for more than one year, they had all accepted the compensation and no demand about reemployment or dispute about retrenchment had been raised. In fact, demands about which this dispute had arisen were made only a few days before execution of transfer documents after obtaining necessary clearances from various statutory authorities for such transfer including that of I.T. Department after M.O.U. had been signed. Therefore, there was no justification and basis for drawing inference of transaction being clandestine by keeping the workmen in dark.

20. However, the question does not rest there. The real question which emerges for determination in this petition is whether the Tribunal was right in joining the

petitioner as a party, if the test is applied whether any effective and enforceable order can be passed in the pending dispute in the absence of petitioner.

21. It is not in dispute and cannot be disputed that on validity of retrenchment having been determined the question that arises for consideration as to what relief the workmen are entitled to if retrenchment is found to be invalid. The question as to what relief can be granted is always incidental to the dispute which is being adjudicated and cannot be said to be a subject-matter of fresh dispute or not inherently concerned with the matter which is pending before the Tribunal. Implicit questions which affects determination of this question also falls in the same category, viz., incidental to main dispute. Obviously, in the present case, if retrenchment is held to be invalid the question would arise whether the workmen are entitled to be reinstated and if their reinstatement has to be granted, how it is to be enforced. Ordinarily, rule in the cases of invalid retrenchment is reinstatement on the principle that invalid order should be deemed to have never come into existence. It is only in the exceptional circumstances that reinstatement cannot be granted. One circumstance as noticed above is that in the case of transfer of an establishment the transferee ordinarily does not get the obligation to employ the workmen employed by the previous owner and their services are liable to come to end. Therefore, ordinary consequence of a transfer of an establishment as a going concern after retrenchment had taken place is that no relief of reinstatement can be granted against previous owner of establishment for whom establishment does not exist. However, as is borne out from the proviso to Section 25FF as noticed by the Supreme Court that in case the services of the workmen have not been interrupted by such transfer, the terms and conditions of service applicable to the workmen after such transfer are not in any way less favourable to the workmen than those applicable to him immediately before the transfer and the new employer in terms of such transfer, would be legally liable to pay to the workmen, in the event of his retrenchment by transferee, compensation on the basis that service is continuous and has not been interrupted by transfer, deemed retrenchment on transfer, envisaged under the provisions of Section 25FF does not take place. In such case the question became germane for consideration, whether on reinstatement being granted, the reinstated workmen can be deemed to be workmen of the transferred establishment to be covered by proviso, before any effective order could be made in that regard.

22. As I have noticed above, the admitted position is that under the agreement of transfer the petitioner is to continue to employ the existing workmen and staff of the vendor from the date of taking over possession of the said undertaking as if their services are continuous and shall not be deemed to have been interrupted in the case of purchaser taking over this undertaking as a going concern with fulfilment of other conditions stipulated u/s 25FF. Thus it is clearly a case governed by the proviso of Section 25FF. In this connection while it has been pointed out by the learned Counsel for the petitioners that notwithstanding this condition in the transfer agreement the same applies only to actually existing

workmen and not to the workmen who can be deemed to exist on that date as a result of their termination being held invalid and, therefore, even accepting the plea of the workmen no relief can be granted of reinstatement in the present case for which reliance was placed on a Bench decision of Andhra Pradesh High Court in the case of Hyderabad Construction Co. v. Labour Court, Hyderabad and Ors. reported in 1980 (1) LLN 65. In the said case though the Court refused reinstatement under transferee held that the workmen must be deemed to be in service of the plant as a result of setting aside the termination by holding retrenchment to be invalid but preferred to deny relief of reinstatement on the ground that relevant Clause of the agreement enjoins an obligation on the company to absorb in service of the plant only those personnel that were actually then working.

23. On the other hand, a Bench of the Kerala High Court in the case of Thomas Paul v. Industrial Tribunal, Kozhikode reported in 1978 LIC 267 has taken the view that in case of retrenchment of a personnel prior to transfer is held to be invalid on the ground of being mala fide which is liable to be quashed then such a person must be deemed to be existing in service on the date of transfer falling within the proviso enjoining upon the transferee to continue him in the service and relief of reinstatement can be granted.

24. Without expressing any opinion on the merits of this issue at this stage it must be held that opinion was concurring in the two cases that as a matter of law termination through retrenchment having been held invalid and if reinstatement is granted they must be deemed of be existing employees on the date of transfer of establishment. The difference lay only if the consequences of such deemed continuous service as a result of removing an invalid order enures for the benefit of continuity of service under proviso to Section 25FF in case of a genuine transfer falling in that category. Issue requires determination before deciding upon relief that may be granted. It is the determination of this issue which in the present case will be determinative of the fact whether in case retrenchment is held to be invalid relief of reinstatement can be granted at all.

Making out a case to what relief a suitor is entitled to in my opinion cannot be said to be a matter which is not incidental or ancillary to the dispute which the Tribunal is adjudicating. If determination of the said issue, namely, to what relief the workmen are entitled to against the ex-employer is a question incidental to the main dispute, and this question requires consideration of the issue whether on a transfer of establishment after retrenchment which falls under proviso to Section 25FF results in continuity of such reinstated workmen or not to see that effective and enforceable award is made then the issue cannot but be taken as incidental and ancillary to the main dispute. Consequence follows that the parties who are necessary or have interest in determination of this incidental issue may be summoned and joined as a party both as a matter of law and justice before this issue is determined.

25. In view thereof I am of the opinion that no interference is called for in

Tribunal's order in directing the petitioners to be joined as a party in the pending dispute though for different reasons emanating from the admitted facts. The petition, therefore, fails and is rejected. Rule is discharged. No order as to costs.

26. Prayer for continuing the interim order passed for staying further proceedings before the Tribunal until a reasonable period is made by the learned Counsel for the petitioners. Keeping in view the facts and circumstances of the case that proceedings of the main dispute have been kept pending for long time and merely proceedings that the case is not likely to affect adversely any of the parties, I am not inclined to entertain this request at this stage.