

(2016) 08 GUJ CK 0091
In the Gujarat High Court

Case No : Special Civil Application Nos. 18627 to 18635 of 2013

Vijanand Naaran Kesur

APPELLANT

Vs

Rajkot Irrigation Department

RESPONDENT

Date of Decision : 29-08-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 10(1), Section 25F, Section 25G

Citation : (2017) 1 CLR 490 : (2017) 153 FLR 472

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

Bench : Single Bench

Advocate : Mr. Taranjit Singh, AGP, for the Respondent Nos. 1-2; Rule Served, for the Respondent No. 3; Mr. Kalrav R. Patel, Advocate, for the Petitioner No. 1

Final Decision : Allowed

Judgement

Mr. K.M. Thaker, J.(Oral) - Heard Mr. Patel, learned advocate for the petitioners (except in Special Civil Application No. 18628 of 2013) and Mr. Taranjit Singh learned AGP.

2. No one has entered appearance for the petitioner in Special Civil Application No. 18628 of 2013 after sad demise of learned advocate who originally represented the concerned claimant.

3. In this group of 9 petitions the petitioners have challenged separate but identical awards dated 29.6.2013 passed by learned Labour Court at Jamnagar in Reference (LCJ) Case No. 134 of 2005, 135 of 2005, 136 of 2005, 137 of 2005, 139 of 2005, 140 of 2005, 141 of 2005, 142 of 2005 and 143 of 2005 whereby learned Labour Court directed the respondent employer to pay lumpsum compensation at the rate mentioned in respective awards and learned Labour Court declined to grant relief of reinstatement and consequential benefits which were prayed for by the claimants.

4. Feeling aggrieved by the awards the claimants have preferred present group of petitions.

5. The respondent employer has not filed any petition against the said awards, more particularly against various observations and findings recorded by the learned Labour Court.

5.1 Thus, so far as respondent employer is concerned, the observations and conclusions/findings of fact recorded by the learned Labour Court in the awards have attained finality.

6. So far as factual background is concerned it has emerged from the record that the concerned claimants had raised industrial dispute against termination from their service. Appropriate government had referred dispute for adjudication to the learned Labour Court at Jamnagar.

6.1 The claimants filed their respective statements of claim with almost similar allegations. The claimants claimed that they were appointed by the opponent employer in 1996 and thereafter they worked continuously with the opponent employer until 1999 when their services came to be illegally and arbitrarily terminated. The claimants alleged breach of Section 25F, Section 25G and Section 25H of the Industrial Disputes Act, 1947 (hereinafter referred to as the "I.D. Act"). It was claimed that in each year they had worked for 240 days however at the time when opponent employer terminated their service the employer did not pay retrenchment compensation. It was also alleged that the persons junior to them were continued in service and after their service was terminated the opponent employer had engaged other persons. With such allegations the claimants prayed for reinstatement with consequential benefits.

7. The reference was opposed by the employer who claimed that the claimants had not worked for 240 days. It was also claimed that they were not engaged after following prescribed procedure for recruitment. It was also claimed that they were engaged on adhoc and casual basis and they were worked as daily wagers. The employer opposed the reference cases also on the ground that dispute was raised after six years and therefore the reference should not be entertained.

7.1 During the proceedings before learned Labour Court the claimants had submitted an application with the request that while they were in service employer did not give any documents like Identity Card, Pay Slip, Attendance Card or any other documents whereby it can be demonstrated that they had worked for 240 days and that therefore the opponent employer may be directed to place on record relevant document such as Attendance Register, Wage Register etc. It was also claimed that after their service was terminated other persons were engaged and that therefore employer may be directed to place on record the details of the persons employed/engaged during last 7-9 years. It appears that after hearing both the sides learned Labour Court had passed order directing opponent employer to place such documents on record.

8. On reading awards it appears that the opponent employer failed to place on record the document demanded by the claimants in respect of which learned

Labour Court passed specific direction.

8.1 During the proceeding before learned Labour Court both the sides led evidence, oral and documentary. Subsequently, learned Labour Court heard the submissions by learned advocates for the contesting parties and after considering material on record and rival submissions learned Labour Court passed awards which are impugned in this group of petitions.

8.2 The learned Labour Court reached to the conclusion that in view of breach of statutory provision the claimants are entitled for appropriate relief however since the employer does not need service of the claimants/daily wagers it would not be appropriate to direct the employer to reinstate the claimants. On such premise the learned Labour Court declined to pass direction to the opponent employer to reinstate the claimants and instead learned Labour Court awarded lump-sum compensation in respect of each claimant.

9. Mr. Patel, learned advocate for the petitioners submitted that though the learned Labour Court has reached to the conclusion that the respondent employer had committed breach of statutory provision at the time when the respondent terminated service of the claimants, learned Labour Court ought to have granted consequential relief viz. reinstatement and back-wages instead of awarding lump-sum compensation. Mr. Patel, learned advocate for the claimants submitted that along with present claimants other 10 persons were also terminated. The said other 10 persons had also raised industrial dispute. He submitted that the reference cases in respect of the said other workers were set aside earlier by way of awards passed in March 2010 in Reference Nos. 144, 145, 147, 148, 149 of 2005 and 89 of 2006 whereby the learned Labour Court directed the opponent employer to reinstate the claimants and except in case of two persons the learned Labour Court denied continuity of service and directed the employer to reinstate other claimants by way of fresh appointment. He further submitted that the said awards were challenged by the claimants in High Court in Special Civil Application No. 4431 to 4436 of 2010. Mr. Patel, learned advocate for the claimants further submitted that the said petitions came to be decided vide order dated 13.4.2010 wherein this Court directed that:-

"Therefore, only direction granting reinstatement as a fresh employee in respect of petitioner is hereby quashed and set aside with a direction while modifying the award in question in respect of present petitioners that all the petitioners are entitled the relief of reinstatement with continuity of service to original post as Labour Court has not applied its mind while giving direction in respect of present petitioners.

Accordingly, award passed by Labour Court in respect of present petitioners in each reference dated 10th March 2010 is hereby modified and accordingly, directed to the respondent to reinstate each petitioner in service with continuity of service on their original post similarly as granted in favour of Chhagan Pola Garsar and Gordhan Velji Mendapara by Labour Court.

Accordingly, rule is made absolute to the aforesaid extent in each petition and award passed by Labour Court dated 10th March 2010 in respect of each petition is accordingly, modified to the aforesaid extent. No order as to costs."

10. Learned advocate for the claimants submitted that though said judgment was placed before learned Labour Court, the Labour Court did not follow similar direction and instead awarded lumpsum compensation and refused to grant relief of reinstatement.

10.1 In this background learned advocate for the claimants submitted that the award may be appropriately modified and employer may be directed to reinstate the claimants.

11. Per contra Mr. Taranjit Singh, learned AGP submitted that the learned Labour Court has taken into account evidence on record and also considered the judgment passed by the Court in SCA No. 4431 of 2010 and connected matters and after taking into account the said decision as well as evidence on record and having found that there is no need for the workmen and if they are reinstated then other 11 workmen may have to be terminated, learned Labour Court has rightly refused to grant relief of reinstatement and that therefore award may not be interfered with.

12. I have considered the submissions by learned advocate for the petitioners and learned AGP for the respondent. I have also considered the material on record and also examined the awards.

13. On reading impugned awards it has emerged that after taking into account the evidence available on record including the deposition of the witnesses examined by the respondent employer learned Labour Court reached to the conclusion that:-

(a) the claimants had worked for more than 12 months i.e. from 1996 to 1999

(b) the claimants had worked for 240 days in preceding 12 months

(c) after the claimants were terminated the respondent had engaged other workmen

(d) at the time when the claimants were terminated the respondent had continued persons junior to the claimants and thereby committed breach of Section 25G of the I.D. Act

(e) learned labour Court also recorded that at the time when the services of the claimants were terminated the opponent employer had not complied conditions and requirements prescribed under Section 25F of the I.D. Act i.e. retrenchment compensation was not paid at the time when the service of the claimants were terminated

(f) with regard to the employer's objection against reference on the ground that the claimants had raised dispute after six years learned Labour Court examined

the justification offered by the claimants and reached to the conclusion that the reference cases did not deserve to be rejected merely on ground of delay

(g) learned labour Court also took into account the deposition of employer's witness who, as recorded by learned Labour Court in the award, admitted that at the time when the service of the claimants were terminated seniority list was not displayed and that the establishment does not maintain seniority list of daily wagers. In view of the said admission by employer's witness learned labour Court reached to the conclusion that opponent employer also committed breach of Rule 81.

(h) learned Labour Court also took into account admission by the employer's witness that in the establishment 11 daily wagers are working.

14. From the said evidence by the employer's witness coupled with the fact that the said witness did not even claim much less, prove that said 11 persons were in service even before the claimants were employed i.e. they were senior to the claimants and/or that they were not employed after the claimants were terminated the learned Labour Court also reached to the conclusion, in view of the admission by employer's witness, that the work existed/the work is available.

14.1 As mentioned earlier findings and conclusions recorded by the learned labour Court are not challenged by the respondent employer. Even the observation and decision by the learned Labour Court that reference cases do not deserve to be rejected on ground of delay is not challenged by the employer. Thus, when the said decision is not under challenge the said observation and conclusion by the learned Labour Court have attained finality. This Court, even otherwise, does not find any justification to interfere with the said conclusion and decision of the learned Labour Court and that too in the petitions filed by the claimants.

14.2 Likewise, employer has also not challenged the observations and findings of fact recorded by the learned labour Court that:

(i) the claimants had worked for more than 12 months

(ii) the claimants had worked for more than 240 days

(iii) at the time of termination the employer did not pay retrenchment compensation

(iv) the opponent employer also did not follow principle of seniority i.e. last come first go and retained service of juniors while the employer terminated claimants

(v) employer also committed breach of Rule 21 and Section 25G of the Act and that the employer also committed breach of Section 25F of the I.D. Act.

14.3 When the learned Labour Court reached to such findings of fact there was no justification to deny the relief by way of reinstatement the order dated 13.4.2010 passed by this Court in Special Civil Application No. 4431 of 2010 and

allied matters in respect of the claimants whose services were terminated along with present claimants. However learned Labour Court did not consider the said decision.

14.4 In absence of any evidence, the bald submissions by the employer ought not have been accepted by the learned Labour Court. It is pertinent to note that the learned Court recorded findings of fact that the employer employed 11 daily wagers and said findings of fact would demonstrate that there was need of employees and work for 11 persons was available with the employer and despite such fact the services of the claimants were terminated. The said findings of fact recorded by learned Labour Court are coupled with the fact that even when the award came to be passed the said 11 persons continued in service establishes that the work existed and continued. Further the ground that 11 persons may have to be terminated is not good justification for refusing appropriate relief when breach of statutory conditions - requirements is accepted by the Court.

15. In recent decision in case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) (2013) 10 SCC 324 Hon"ble Apex Court has observed, inter alia, that:-

38.1 In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2 The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3 Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4 The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the

punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/ Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5 The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6 In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in *Hindustan Tin Works Private Limited v. Employees.*"

16. In this view of the matter the award passed by the learned Labour Court does not deserve to be sustained and the award deserves to be set aside and modified having regard to the facts and circumstances of the case and specific findings of fact recorded by the learned Labour Court. This Court is of the view that following direction should be passed in the interest of justice and the said direction would balance the equity and meet ends of justice.

17. Therefore the petitions are disposed of with following directions:-

(a) The impugned awards dated 29.6.2013 passed by learned Labour Court at Jamnagar in Reference (LCJ) Case No. 134 of 2005, 135 of 2005, 136 of 2005,

137 of 2005, 139 of 2005, 140 of 2005, 141 of 2005, 142 of 2005 and 143 of 2005 are set aside and modified.

(b) The decision by the learned labour Court to refuse relief of reinstatement and instead awarding compensation at the rate specified in the award is set aside.

(c) The respondent employer is directed to reinstate the concerned claimants without back wages.

It is clarified that if the said 11 persons were engaged after the claimants were discontinued then the claimants shall be reinstated in service from the date when 11 persons referred to in the award were engaged by the employer however the claimants shall not be entitled for back wages. If the said other 11 persons ? though junior to the claimants ? were in service when the claimants were terminated then the claimants shall be reinstated/shall be deemed to have been reinstated in service from the date of the award.

It is clarified that entire period from the date when the claimants were terminated until the date on which the claimants are reinstated shall be treated as notional and the claimants will not be entitled for wages for the period from the date of termination until the date of actual reinstatement.

It is also clarified that the decision of learned Labour Court to refuse demand for back wages from the date of termination is not disturbed and the said decision is confirmed. The claimants shall not be entitled for back wages.

With the aforesaid clarifications the petitions are partly allowed. Rule is made absolute to the aforesaid extent.

Orders accordingly.