HIGH COURT OF GUJARAT

GUJARAT CANCER AND RESEARCH
Versus
SANJAY CHANDRAKANT VYAS

Date of Decision: 15 September 2000

Citation: 2000 LawSuit(Guj) 1014

Hon'ble Judges: H K Rathod

Eq. Citations: 2000 3 CLR 765, 2000 3 GLH 495, 2001 3 LLJ 854

Subject: Constitution, Labour And Industrial

Acts Referred:
Constitution Of India Art 43A, Art 136, Art 39, Art 226, Art 43, Art 41, Art 42
Industrial Disputes Act, 1947 Sec 17B

Final Decision: Application disposed

Advocates: Nanavati Associates, Madhuben Sharma, Sangita Pahwa

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H.K. Rathod, J.

[1] Mr. Shukla for Mr. S. I. Nanavati appearing on behalf of the applicant-original petitioner. In Civil Application No. 7980 of 2000 Ms. Sangita Pahwa, learned advocate on behalf of the respondent workman and Ms. Madhuben Sharma, learned advocate appearing on behalf or respondent workman in Civil Application No. 7980 of 2000.

[2] I have heard the learned advocates for the respective parties. The present Civil Applications are filed by the applicant-original petitioner before this Court in respect of the order passed by this Court on 26th April, 2000 in Special Civil Application No. 8221 of 1999 while admitting the matter granted adinterim relief in terms of para 8(B) to the petition on condition that the petition - application institution shall regularly pay full current wages to the workman with effect from 9th June, 199 respectively till the final hearing and disposal of the writ petition. Similarly, the same order has also been passed in Special Civil Application No. 8220 of 1999 by this Court on 26th April, 2000, whereby while admitting the matter granted interim relief in terms of paragraph 9(B) on the condition that petitioner shall pay regularly full current wages to the respondent workmen with effect from 1st June, 1999 till final disposal of this writ petition.

[3] The present Civil Applications have been filed for clarification to the effect that whether such interim order with condition has been passed by this Court under S. 17-B or dehors to the provisions of S. 17-B of the Industrial Disputes Act. The order itself is very clear and unambiguous, according to my opinion, there is no need to clarify because a clear direction has been issued by this Court against the applicant institution to pay regularly full current wages to the respondent workman from the date of award. The said direction has been issued by this Court considering the recent decision of the Apex Court in case of Dena Bank v. Kiritkumar T. Patel, 1997 2 GLH 946, wherein para 24 observations which has been by the Apex Court are as under :-

> "As regards the powers of the High Court and the Supreme Court under Arts. 226 and 136 of the Constitution it ring a right on the workman to be paid the amount of full wages last drawn by him during the pendency of the proceedings involving challenge to the award of the Labour Court, Industrial Tribunal or National Tribunal in the High Court or the Supreme Court which amount is not refundable or recoverable in the event of the award being set aside, does not in any way preclude the High Court or the payment of a higher amount to the workman if such higher amount is considered necessary in the interest of justice. Such a direction would be dehors the provisions contained in S. 17-B and while giving the direction regarding refund or recovery of the excess amount in the event of the award being set aside. But we are unable to agree with the view of the Bombay High Court in Elpro International Ltd. that in exercise of the power under Arts. 226 and 136 of the denying the workman the benefit granted such a right under S. 17-B. The conferment of such a right under S. 17-B cannot be regarded as restriction on the powers of the High Court or the Supreme Court under Arts. 226 and 136 of the Constitution."

[4] At this stage, it is also necessary to consider the object and requirements of enacting S. 17-B in the Industrial Disputes Act, 1947.

> "Before the enactment of this Section, the awards of the Tribunals directing reinstatement were often contested by the employers in High Court or the Supreme Court. It was, therefore, felt that the delay in implementation of such awards caused hardships to the workman. It was, therefore, felt necessary to provide payment of "wages last drawn by the workman from the date of the award till the date it is finally decided in the Supreme Court or the High Court" This provision, therefore codifies the right of the workmen to get their wages, which they could not get in time, on account of long drawn litigation. This provision gives a mandate to the Courts to order wages if its conditions are satisfied."

[5] In Bharat Singh v. Management of New Delhi Tuberculosis Center, 1986 LabIC 850S.C. the Supreme Court noted that :

> "even before this Section was enacted, the Courts were, in their discretion, awarding wages to workmen when they felt such a discretion was necessary but that was only a discretionary court." This provision is a piece of social welfare legislation and aims at ameliorating the hardship caused to the workman who were deprived of the benefits of re-instatement awards during the protracted litigation in which awards were injuncted by the High Courts or the Supreme Court. The object of introducing this provision is, therefore, to enable the workman to receive the 'full wages last drawn' by him to sustain himself to resist the litigation carried to the High Courts or the Supreme Court by the Management. More times than not, the employers, as a matter of routine, would prefer proceedings, before a High Court or the Supreme Court challenging such awards and obtain stay of their operation. Instances are legion where workmen have been dragged by the employers into endless mire of litigation with preliminary objections and other technical pleas to tire them out. Though occasionally, in their discretion, the Courts subjected the stay orders to certain conditions, such as payment of certain amounts to the workmen during the pendency of the proceedings before them. There was no standard formula quantifying the payment during the pendency of the proceedings. Nor could such payments be claimed by the workmen as a matter or right because the conditions of payment were imposed on the facts and in the circumstances of each case. Therefore, by and large, during the pendency of such proceedings, workmen were deprived of their legitimate right to wages upon reinstatement. Now this Section, at once, codifies the right of a workman to get the wages and quantifies the amount of such wages payable to him during the pendency of the proceedings before a High Court or the Supreme Court where the award of his reinstatement is challenged by the employer.
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> "Normally, no party has or gets any vested right in the life of the litigation in this or any other court. However, S. 17B of the Industrial Disputes Act is a statutory exception and creates liability in favour of the workman and against the employer and the inevitable elongated life of the litigation in such a case becomes necessary to be watched and controlled by the parties and the system by a process of expedition or characterisation of such petitions as a separate priority - category having preceding position as compared to other pending proceedings." This right is a separate and independent right available to a workman, during the pendency of the proceedings before a High Court or the Supreme Court, where the proceedings have been preferred by the employer, against the award of reinstatement in his favour.

[6] The pre-requirements for invoking this Section are :

(i) the award of the Tribunal should have directed reinstatement of the workmen on setting aside the order of his dismissal or unfair termination of service.

(ii) the employer should have preferred proceedings against such award before a High Court or the Supreme Court;

(iii) the workmen should not have been gainfully employed in any establishment during the pendency of the proceedings; and

(iv) as a proof of that, the workman should have filed an affidavit before the Court before which the proceedings have been preferred.

[7] Once these requirements are satisfied, the workman becomes entitled to the wages as contemplated by this provision and no order of the Court, before which the proceedings are pending, is necessary for entitling him to such wages, as the statute itself creates the right, if, after the workman has filed the affidavit of non-employment, the employer fails to pay wages to the workman, as required by this Section, the workmen may file an application before such Court for direction to the employer to make such payment. Non-compliance with the requirement to pay such wages to the workman should block further hearing of the proceedings before the Court."

[8] In light of the consideration the object and requirements of the provisions of S. 17-B of the Industrial Disputes Act, 1947, the legislation has provided a minimum bare requirement to pay last drawn wages to the workmen during the pendency of proceedings before a High Court or before the Apex Court. This is a minimum bare requirement so at least the workman can get some relief to maintain the family, but this is not an adequate and complete relief which fulfil the total requirement of concerned workman. It is a readymade relief provided by the statutory provision without considering the merits of the matter in question. Therefore, when the award passed by the Labour Court or tribunal wherein reinstatement has been granted and that award is challenged before this Court, on that occasion, the duty of the Court is to see that whether considering the merits of the case, reinstatement which has been granted by the Labour Court or the tribunal is possible at all or not ? If Court considers that looking to the circumstances of the case, reinstatement is not possible because it otherwise, amounts to irreparable loss caused to the employer then in that circumstances, Court may grant only limited relief of Section 17-B of the Industrial Disputes Act, 1947 but if Court considers that the relief of reinstatement cannot be denied looking to the facts and circumstances of the case, then the court may not pass any interim stay against the relief of reinstatement which has been granted by the

Labour Court or Tribunal. But in that event, if the employer wants any interim stay against the relief of reinstatement, then on that occasion, the Court has to consider that relief under Section 17-B is not adequate and proper in comparison to denying the relief of reinstatement to the workman when no circumstances justify the denial of reinstatement. On such occasion, it is the duty of the Court to see that the workman must be paid proper and adequate and complete regular current wages so he can maintain his family with dignity in the society. Therefore, each and every case cannot be considered applying the provisions of section 17-B of Industrial Disputes Act, but at the time of passing the interim order, the Court has to consider various circumstances that looking to the facts and circumstances of the case which is on hand, the relief of reinstatement which has been granted by the Labour Court or the Tribunal is justified on merits and if that order of reinstatement is implemented then, is there any irreparable loss caused to the employer or not and if not so, then the Court shall have to consider another aspect that if implementing relief of reinstatement, there is no irreparable loss caused to the employer and there are no other circumstances which justify the denial of reinstatement, in that circumstances, even though the employer wants stay because of the pendency of the proceedings, on that occasion, the Court shall have to consider for grant of higher wages to the workmen de hors the provisions of section 17-B of the Industrial Disputes Act. Therefore, in both the present cases, I have considered that there is no justification to grant interim stay against the reinstatement but however, the employer wants interim stay against the reinstatement and there is no justification to deny the relief of reinstatement to the workmen looking to the merits of the matter and therefore, when the employer wants interim stay against the reinstatement then, it is the duty of the employer to pay regular current salary to the workmen during the pendency of the proceeding before this Court.

[9] Considering said observations of the Apex Court, the Apex Court has held that conferment of such right under Section 17-B cannot be regarded as restriction on the powers of the High Court or Supreme Court under Articles 226 and 136 of the Constitution. It has also been observed by the Apex Court that it cannot preclude the High Court or Supreme Court to pass order directing payment of higher amount of wages to the workman if such higher amount is considered necessary in the interest of justice. Such direction would be de hors the provisions contained in Section 17-B while giving direction, the Court may also give direction regarding the refund or recovery of the excess amount in the event of award being set aside.

[10] In light of the facts involved in Special Civil Application No. 8220 of 1999, wherein the services of the respondent workman terminated on 31st March, 1995 by the applicant institution, whereas the services of the petitioner of Special Civil Application No. 8221 of 1999 were terminated by the applicant institution on 16th

April, 1994. In both these cases, the Labour Court has granted reinstatement with continuity of service with full back wages of interim period and other consequential benefits and also awarded costs and the very awards are challenged in these two petitions.

[11] In both these petitions, the question mainly involved is that whether the services of the probationer can be terminated by the employer during the pendency of the probation period or at the end of completion of probation period on the ground of some misconduct or unsatisfactory performance of the workman concerned. On perusal of the award impugned in the petitions, it seems that the question has been examined by the Labour Court in both cases on the basis of evidence led by the respective parties before the Labour Court. In both these Civil Applications, the applicant institute has claimed that the applicant institute has strong prima facie case and balance of convenience is also in favour of the institute because the respondent workmen were appointed temporary and on probation and on completion of probationary period, services of the workmen were terminated without any stigma and relying upon the decision of the Apex Court. The submission of the applicant institute as mentioned in para 8 of the application that when the nature of employment of a workman is of probationary, after completion of probation period, termination would not entitle the workmen to claim back wages or reinstatement. The said averments of the applicant institute relying upon two decisions of the Apex Court referred to above. But in view of the aforesaid submission, this Court considers it appropriate to note that law in respect of the termination of probationer has been examined recently by the Apex Court in different perspective and in case of Dipti Prakash Benarji v. S. N. Bose National Centre for Basic Sciences, Calcutta, 1999 AIR(SCW) 605. Thereafter, again in case of V. P. Ahuja v. State of Punjab & Ors., 2000 AIR(SCW) 792, wherein the Apex Court has examined the termination of probationer on the ground of unsatisfactory work which considered to be stigmatic and for that, regular inquiry and opportunity of hearing is must. Thereafter, recently also in case of Narsinh Pal v. Union of India & Ors., 2000 AIR(SC) 1401, has also considered the question of termination of the workman on the basis of allegations or unsatisfactory work whether that considered to be punitive in nature or not has been examined by the Apex Court in detail.

[12] The law recently has been changed to some extent in respect of the termination of probationer based on allegations whether the same has to be considered as punitive or simpliciter. It depends on whether allegations form foundation for motive order. In a case reported in 1999 AIR Supreme Court Weekly 605, wherein it is observed by the Apex Court that as to in what circumstances, the order of termination of probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation. If findings were arrived at

an inquiry as to misconduct behind the back of the Officer or without regular departmental inquiry, simpler order of termination is to be treated as foundation on the allegation and will be bad. In a case reported in AIR Supreme Court Weekly 792 , wherein the Apex Court has observed that the probationer or temporary servant is also entitled to certain protection and his services cannot be terminated arbitrarily nor can those services be terminated in a punitive manner without complying with the principles of natural justice. The termination order based on the ground that the probationer has failed in performance of his duties administratively and technically. Ex facie stigmatic such order which on the face of it is stigmatic could not have been passed without holding regular inquiry and giving an opportunity of hearing to the probationer. Plea that probationer cannot claim any right on the post, his services could be terminated at any time during the period of probation of period without any notice as set out in the appointment letter, cannot be countenanced. In a case reported in AIR 2000 Supreme Court page 1401, wherein the Apex Court has observed that termination of service of casual labour in Government Department who worked continuously as such for more than 10 years and also acquired temporary status, he was prosecuted for criminal offence on allegation of assaulting the gateman on duty, but he was acquitted subsequently. Termination of his service on basis of some incident by paying him retrenchment compensation. The order passed on basis of preliminary inquiry and not on the basis of regular departmental inquiry without issuing chargesheet or giving opportunity of hearing being a punitive in nature liable to be set aside.

[13] In light of the recent three decisions of the Apex Court and also considering the observations of the Apex Court in case of Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdur Sabha, 1980 AIR(SC) 1896, in para 53, it is observed that :

> "Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic processes, but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from the other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinised, the order has a punitive flavour in cause or consequences, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does

not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used".

[14] It is also necessary to consider one another aspect that employers and employees are equal partners even if the employees are not considered superior but what we see today is the reverse. The reason is that the employers harness intelligence on their side. They have the superior advantage which concentration of capital bring with it, and they know how to make use of it. Whilst capital in India is fairly organised, labour is still in a more or less disorganised condition inspite of Unions and Federation. Therefore, it lacks the power that true combination gives. In such situation, the employers would be that they should willingly regard the workers as real owners of the concern which they fancy they have created. Tuned to this value are the policy directives under Articles 39, 41, 42, 43 and 43-A. They speak of the right to adequate means to livelihood, right to work, human condition of work, living wages ensuring distinct decent standard of life and enjoyment of leisure and participation of workers in management of industries. De hors these mandates law will fail functionally. Such is the value vision of Indian industrial jurisprudence. The democratic idea of freedom for instance must lose its 20th Century meaning of individual liberty in economic spare and become adjusted to new conception of social duties and responsibilities. When a big employer talks about his democratic rights to individual freedom meaning thereby a claim to socially irresponsible control over and huge industrial concerns and over the lives ten of thousands of human beings, whom it happens to employ, he is talking in dying language. Homo economicus can no longer warp the social order. Even so the Constitution is ambitiously called socialist but realists will agree that a socialist transformation of the law of labour relations is a slow though steady judicial desideratum. Until specific legislative mandates emerge from Parliament the Court may mould the old but not make the new law. 'Interstitially, from the molar to the molecular' is the limited legislative role of the Court. India is a developing country. It has a vast surplus labour market. Large scale unemployment offers a matching opportunity to the employer to exploit the needy. Under such market conditions the employer can dictate his terms of employment taking advantage of the absence of the bargaining power in the other. The unorganised job seeker is left with no option but to accept employment on take-it-or-leave-it terms offered by the employer. Such terms of employment offer no job security and the employee is left to the mercy of the employer. Employers have betrayed an increasing tendency to employ temporary hands even on regular and permanent jobs with a view to circumventing the protection offered to the working classes under the benevolent legislations enacted

from time to time. One such device adopted is to get the work done through contract labour. The employer cannot take advantage of its dominant position and compel any worker to work even on starving wages. The worker has agreed to work on such low wages because he has no other choice. It is poverty that has driven him to that stage. The effect of full wages last drawn by the workman amounts to starving wages that can be granted as last resort when there is no option with the Court to grant higher wages de hors the provisions of Section 17-B of the Industrial Disputes Act, 1947. Our wage structure is such that the worker is always paid less than what he produces. Anyway they gave got to be fed and clothed, therefore, why do not we provide them with work. Let us remember the slogan "PRODUCE OR PERISH". It is not empty slogan. We fail to produce at our own peril.

[15] In case of probationer what is decisive is the plain reason for discharge not the strategy of a non-inquiry or clever avoidance of stigmatic apithetics. The form of order is not decisive as to whether the order is by way of punishment. Even an unambiguous worded order terminating the services may in the facts and circumstances of the case especially that an inquiry into allegations of serious and grave character of misconduct involving stigma that may in infraction of principles of natural justice.

[16] Therefore, considering all these aspects, according to my opinion, if the workmen are to be paid the salary which was drawn in the year 1994 and 1995, in the year 2000 which definitely will not be sufficient for the workmen to maintain the family in the present days and circumstances. It is also observed that when the relief of reinstatement with the continuity of services has been granted by the Labour Court in both the matters, then while admitting the matters, total blanket stay cannot be granted against the final award which has been passed by the Labour Court but while staying the operation in respect of the direction with regard to the back wages. In the interest of justice, if the applicant petitioner institution may be directed to pay regularly full current wages to the respondent workman during the pendency of the petition, in any circumstances, cannot be considered to be unreasonable or harsh. On the contrary, in such case, it is necessary to grant higher wages in comparison to the wages which provided under Section 17-B of the Industrial Disputes Act, because otherwise, it is very easy for the employer to pay last drawn salary by obtaining stay against the award of reinstatement which rights has been recognised by the Labour Court after adjudicating on merits. Therefore, in such circumstances, if the employer wants any interim stay against the reinstatement, there are no circumstances which justify the denial of relief of reinstatement to the workman then in such circumstances, it is the duty of the Court to see that the workman is properly paid by the employer so that the workman may at least maintain his family with dignity suitable to the workman in the society. Therefore, considering all these aspects, I have passed the

aforesaid orders impugned by way of present Civil Applications for modification, de hors to the statutory provisions prescribed under Section 17-B of the Industrial Disputes Act. The Apex Court also keeping in mind the proposition, in recent decision referred above in case of Dena Bank, has reiterated such proposition of law. However, I make it clear that the workman is entitled to regular current salary as per my earlier order dated 26th April, 2000 with effect from the date of award passed by the Labour Court till final disposal of petition but under such circumstances, the respondent workmen shall have to file undertaking before this Court within a period of three weeks from today to the effect that in case if ultimately applicant petitioner institution succeeds in the petition, then in such event, the respondents workmen will pay back the difference of amount between the last drawn wages and regular current salary which may be received by the workmen from the petitioner institution for such period till final disposal of the petition. The petitioner applicant institute shall pay the said amount as per the directions issued by this Court on 26th April, 2000 within period of two weeks after receiving such undertaking from the respective workman by the petitioner institution. However, it is clarified that it would be open to the respondent workmen to convince the Court concerned whether such amount is refundable or recoverable at the time when the matter is finally decided by the Court.

[17] However, this Court make it clear that observations made by this Court in this order while clarifying the order dated 26th April, 2000, at this stage, will not come in the way of either party at the time of deciding the matter by the Court on final hearing. In nutshell, the aforesaid observations are without prejudice to the rights and contentions of the respective parties. It is also clarified that at the time of final hearing of both these petitions, the Court may examine the legality and validity of the award in question without being influenced by the observations made by this Court while clarifying the order dated 26th April, 2000.

[18] In view of aforesaid clarifications and directions, the Civil Applications stand disposed of accordingly. Directions accordingly. No order as to costs.