HIGH COURT OF GUJARAT

RASAYANIK KAMDAR SANGH
Versus
AMAL PRODUCTS LIMITED

Date of Decision: 16 June 2004

Citation: 2004 LawSuit(Guj) 345

Hon'ble Judges: Jayant Patel

Eq. Citations: 2004 3 GLH 213, 2005 104 FLR 83, 2004 LabIC 3254, 2004 3 GCD 2238

Case Type: Special Civil Application

Case No: 4993 of 2004

Subject: Labour and Industrial

Acts Referred:
Industrial Disputes Act, 1947 Sec 33, Sec 25FF

Advocates: Rajesh P Mankad, Nanavati Associates

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[1] Short facts of the case are that the petitioner is the employees' union of the respondent-company. In the year 1999, a charter of demands was submitted for various items including increase in salary in various grades, increase in House Rent Allowance, leave travel allowance, garden allowance, education allowance, privilege allowance, canteen facilities, medical facilities, dress allowance etc. It appears that thereafter the matter was referred to the industrial tribunal for adjudication being Ref. (IT) No.106/02. It is an admitted position that the reference is pending before the tribunal.However, pending the said reference, the petitioner-Union has submitted an application for interim relief in the month of March, 2004 contending that the respondent-company is contemplating to sell its units and if the properties are sold by transferring of the company or sale of the unit, it would frustrate the main reference and therefore injunction was prayed for prohibiting the company from transferring the same by sale, transfer, exchange or in any manner without prior permission of the court and it was further prayed that pending the adjudication of the reference, statusquo of existing service conditions of salary etc be maintained and without prior permission of the court no workman be relieved and regular salary and the benefits be

continued to be paid. The respondent company submitted its reply contending, interalia, that uptill now no change in service conditions is made and it was further submitted that there is serious financial crisis in the company and if such an injunction is granted it would result into causing irreparable loss and damage to the company and therefore the injunction may not be granted.The petitioner thereafter filed rejoinder and ultimately the industrial tribunal has passed the order on 13.4.04 below interim application whereby the industrial tribunal found that the main reference is for increase in salary, DA, HRA etc and the issue for transfer or sale of the plant of the company is outside the jurisdiction of the tribunal under section 10(4) of Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). The tribunal further recorded that the financial condition of the company has deteriorated and even if the unit is to be sold, the same shall be in accordance with law and on the basis of permission granted by the financial institutions and the company has also made interim payment of Rs.5,00/-per workman and therefore it can not be said that the company is indulging into the activity against the interest of the employees. The tribunal further found that there is express provision made in law for consequences as and when takes place and at the time when the transfer takes place, the requisite clause is required to be incorporated for service conditions of the employees and when the company at this stage has not at all entered into any agreement, on the basis of apprehension, the stay can not be granted against the management from transferring the unit. It may be recorded that so far as the other part of the order of the tribunal is concerned, it is about the change in service conditions of the workmen and since the same is not the subject matter of the petition discussion in this regard is not necessary. The petitioner, under the circumstances, has approached this court, challenging the legality and validity of the order, dated 13.4.04 passed by the tribunal. Even Mr.Sinha, Ld.advocate for the petitioner has also submitted that the petition is essentially concerned with the interim relief against the transfer of the unit.

[2] There is no dispute on the point that the respondent company has uptill now not entered into any transaction/agreement to sale or disposal of the unit. However, Mr.Nanavaty, Ld.Senior Counsel for the respondent company made it clear that a decision has been taken in the shareholders' meeting for transfer/sale of the unit in view of the major reason being the poor financial condition of the company and its inability to run the unit smoothly on account of financial constraints. I would have considered the matter as it was partly considered by the tribunal on the basis that uptill now no agreement is entered into between the company and the purchaser, and therefore, the issue can be said to be premature. However, learned counsel for both sides submitted that when the company has already decided to sell the unit, this court may consider the question as to whether pending reference the employer is entitled to enter into any agreement with the purchaser for disposal of the unit or the company

and it was submitted by Mr.Sinha, Ld.counsel for the petitioner, that if the said question is not decided at this stage, when the company has made clear of its intention, and if the issue is treated as premature, it may result into irreversible consequence and even Mr.Nanavaty has also indeed admitted that the company is contemplating to transfer and sale its unit and therefore said question of entitlement or right of the employer to sell the unit be decided pending the reference. Under the circumstances, when the stand of the respondent company is clear of its intention to transfer or sell the unit, I find that instead of deciding the matter as if it is premature the question be resolved by this court on the entitlement of right of the employer to sell the unit pending the reference under the Act.

[3] The first aspect which is required to be considered is on the right or entitlement of the employer to transfer the unit, and the second aspect which is required to be considered is as to whether such transfer of the unit pending reference would contravene the provisions of section 33 of the Act and the last aspect which is required to be considered is as to what could be the final order considering the facts and circumstances of the case by balancing the situation and keeping in view the interest of the employer and the employees in the best possible manner.

[4] On examination of the first aspect, section 25 FF of the Act, is required to be considered, which reads as under: "25FF. Compensation to workmen in case of transfer of undertakings: Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of section 25F as if the workman had been retrenched: Provided that nothing in this section shall apply to a workman in any case where there has been change of employers by reason of the transfer if,-- (a) the service of the workman has not been interrupted by such transfer, (b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer, and (c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer." If the provisions of section 25FF of the Act are read as it is, it is apparent that as such there is no absolute bar operating under section 25FF of the Act against transfer of ownership of management of the undertaking by agreement or by operation of law. The only contingencies which are contemplated are (i) if the agreement provides for maintenance of terms and conditions of service in the same manner they were in the

transferer company, (ii) if the agreement provides for terms and conditions of service not in anyway less favourable than those before the transfer then the question of retrenchment or payment of compensation may not arise at all. However, if none of the aforesaid contingencies are to be effected, then the third contingency which may be included by express agreement can be that the employer may be legally liable to pay to the workman in the event of retrenchment, the compensation on the basis, as if there is continuous service and the service has not been interrupted by the transfer of management or ownership of the undertaking. Under the circumstances, it appears that if the cases which are not covered by clauses (a), (b) or (c) of proviso to section 25 FF of the Act, the employee would entitled to benefit as if the workman had been retrenched. Therefore, upon a transfer of the ownership or management, as per section 25FF there is no cessation of relationship of employer and employee between the transferor company and the employees of transferer company unless and until by express agreement between the transfer company and the transferee company, the provision is made at par with the contingencies as contemplated under clauses (a), (b) or (c) qua the employees of the transferer company. In the event the cases are covered by clauses (a), (b) or (c) of the proviso to section 25FF by virtue of agreement, the employees of the transferer company would become the employees of the transferee company and such may result into termination of relationship of employer and employee between transferer company and its employees. However, if none of the provisions are made, in the agreement at the time of transfer, the consequences would be of the notice and the compensation as if the employees are retrenched under section 25F of the Act. Reference may be made to the decision of the Apex Court in the matter of N.T.C(South Maharashtra) Ltd vs Rashtriya Mill MazdoorSangh & Ors reported in (1993) 1 SCC 217. In the said case while considering the provisions of section 25FF of the Act, the Apex Court observed at para 15 the relevant portion of which reads as under:

> "In fact, the section envisages the continuation of employment and makes provision for the compensation, only if the transfer results in the termination of the contract of employment. These provisions show that where the employment continues inspite of the transfer of the undertaking, the workmen would not be entitled to notice and retrenchment compensation under section 25F from the transferor-employer. It is only if there is a transfer of the undertaking and the said three conditions are not satisfied that a workman would be entitled to such notice and retrenchment compensation from the transferor employer."

Therefore, it can be concluded that as per section 25FF there is no bar to the right of the employer to transfer the ownership or management of the undertaking. The only liability in case there is no express agreement to cover up the situation under

clauses (a), (b) and (c) of the proviso of section 25FF would be to continue with the relationship of employer and the employee and the right of the workman would be of notice and the retrenchment compensation as if the workman is retrenched as per section 25F of the Act.

[5] The aforesaid would be in normal circumstances as and when the transfer of ownership or management of any undertaking takes place.

[6] The second aspect which deserves consideration is in a situation when the reference is pending between the employer and the employee and to consider the scope and ambit of the protection under section 33 of the Act. Section 33 of the Act reads as under: "33. Conditions of service etc to remain unchanged under certain circumstances during pendency of proceedings:

(1) During the pendency of any conciliation proceedings before conciliation office or a Board or of any proceedings before an arbitrator or a labour court or tribunal or National Tribunal in respect of an industrial dispute, no employer shall:-- (a) in regard to any matter concerned with the dispute, alter to prejudice of the workmen concerned in such dispute the conditions of service applicable to them immediately before the commencement of such proceeding; (b) for any misconduct concerned with the dispute, discharge or punish, whether by dismissal or otherwise any workman concerned in such dispute. save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute, or where there are no such standing orders in accordance with the terms of the contract, whether express or implied between him and the workman (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or (b) for any misconduct not concerned with the dispute, discharge or punish, whether by dismissal or otherwise, that workman: Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the emp0loyer.

(3) Notwithstanding anything contained in subsection (2) nom employer shall, during the pendency of any such proceeding in respect of an industrial dispute take any action against any protected workman concerned in such dispute-- (a) by altering to the prejudice of such protected workman the conditions of service

applicable to him immediately before the commencement of such proceeding; or (b) by discharging or punishing, whether by dismissal or otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending EXPLANATION: For the purpose of this subsection a "protected workman" in relation to an establishment, means a workman who being a member of executive or other office bearer of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognised as protected workmen for the purpose of subsection (3) shall be one per cent, of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Govt may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

(5) Where an employer makes an application to a Conciliation Officer, Board, an arbitrator, a labour court, tribunal or national tribunal under the proviso to subsection (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass within a period of three months from the date of receipt of such application such order in relation thereto as it deems fit. Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit. Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this subsection had expired without such proceedings being completed.

Section 33 of the Act is providing for general protection for not to alter or change the service conditions during the pendency of reference. Subsection (1) of Section 33 of the Act provides that no employer shall alter to the prejudice of the workman concerned the conditions of service in regard to any matter connected with the dispute or no employer shall discharge or punish by dismissal or otherwise any workman for any misconduct connected with the dispute unless there is express permission in writing of the authority before which the proceedings are pending. Therefore, such alteration in service conditions should be with regard to the matter connected with the dispute or the misconduct connected with the dispute. Therefore, if the employer wants to change the service conditions connected with the dispute or wants to impose the punishment for a misconduct then in that case

unless express permission is granted by the authority before whom the proceedings are pending, such action on the part of the employer is not permitted. In a given case, the authority may grant permission, but until such permission is granted, such bar operates. As per subsection (2) of section 33 even for any matter not connected with the dispute or for any misconduct not connected with the dispute the action is to be taken by the employer in accordance with the standing orders applicable to the workman concerned or there are no standing orders in accordance with the terms of contract, then in that case the requirement on the part of the employer would be to pay wages for one month and to make an application to the authority before whom the proceeding is pending for approval of the action taken by the employer. Therefore, if the matter is considered under subsection (2) in comparison with subsection (1) for matter connected with the dispute, there is absolute bar because the legislature has used the word 'no employer shall' whereas under subsection (2) the language used is 'the employer may' and therefore as per subsection (1) there is absolute bar qua the action connected with the dispute and as per subsection (2) there is discretion left with the employer to take action but the requirement is to pay wages of one month and to move an application for approval. As per subsection (3) of section 33 in respect to the action which is contemplated under subsection (2) there is absolute bar qua the protected workman unless express permission has been granted for discharging or punishing the protected workman and for alteration of service conditions there is bar expressly made qua the protected workman.

[7] There can not be any dispute on the point that the main reference pending before the industrial tribunal is pertaining to the increase in salary and other allowances etc whereas the action in question is qua the transfer of ownership or management of the undertaking and therefore the subject matter herein of transfer of ownership or management of the unit is not connected with the dispute. At the most, it can be argued on behalf of the petitioner union that even if the matter is not connected with the dispute the protection of subsection (2) of section 33 of the Act would apply and therefore the transfer of undertaking can not be effected. So far as subsection (3) of section 33 of the Act is concerned, such bar would apply against the protected workman if action is to be taken by the employer as per standing order or in absence of any such standing order in accordance with terms of contract. Therefore, for attracting the provisions of subsection (2) or subsection (3) of section 33 of the Act, the action on the part of the employer should be such an action which is in accordance with standing order applicable to the workman concerned or in absence of any such standing order as per terms of contract which are express or implied.

[8] The interpretation of section 33 of the Act is to be considered keeping in view the provisions of section 25FF. It is required to be noted that the Parliament has put up the transfer of ownership or management of an undertaking at par both category namely the transfer by agreement or by operation of law. Therefore, as observed earlier, while transferring the undertaking, as per the provisions for contingencies as provided under clauses (a), (b) and (c) of proviso to section 25FF the service conditions of the workman even otherwise would not be affected because the transferee steps into the shoes of the transferor for maintaining the service conditions or for protecting the service conditions in any way not less favourable than that it was before and to treat the service as continuous one. If such provision is not made, then also as observed earlier the relationship of employer and employee would continue and the right conferred under the statute to the workman is of entitlement of notice and compensation as if retrenched under section 25F of the Act. It can not be said that the transfer of an undertaking may be by agreement or by operation of law by the employer would be an action in accordance with standing order or in accordance with terms of contract may be express or implied. Section 33 of the Act is having deterrent effect as per section 33A of the Act because it results into complaint or consequential order for prosecution also. Therefore section 33 has to be read strictly as provided for. In view of the aforesaid interpretation of section 33 of the Act, it can not be said that the bar or protection under section 33 would apply against all actions of the employer. As such the bar of section 33 of the Act would apply in absolute if the action is connected with the dispute or the action should be as per standing order or in absence of standing order as per terms of contract. Therefore, even for contingencies under subsection (2) and (3) of section 33 of the Act, the action should be in accordance with standing order or in accordance with terms of contract whether express or implied. It is not the case of the petitioner union that the transfer of an undertaking is as per standing order or as per terms of contract. If the action of the action of the employer is not under either, the bar or protection under section 33 can not be made applicable. Section 33 of the Act can not be read as giving omnibus protection to the employee against the employer in respect of the action whatsoever, but it only protects the employee against the action of the employer qua the matter connected with the dispute or qua the action under standing orders or under express terms of contract if any not connected with the dispute. In the present case, the Parliament itself has expressly provided for action and all the contingencies under section 25FF of the Act and therefore the contention of Mr.Sinha that in view of pendency of reference and in view of section 33 of the Act, there is bar operating against the employer of transfer of undertaking can not be accepted. If such bar is read under section 33 of the Act as sought to be canvassed on behalf of the petitioner by Mr.Sinha, the consequences would be that the effect of section 25FF shall stand nullified and there will be no room for transfer of an undertaking by the employer even if he wants to transfer bonafide

with a view to come out from unavoidable financial constraints or such other circumstances as are valid in law. The reliance placed by Mr.Sinha upon the decision of the Apex Court in the matter of Lokmat Newspapers Pvt.Ltd vs Shankarprasad reported in 1999(6) SCC 275 is illfounded in as much as in the case before the Apex Court the matter was pending before the Conciliation Officer and the termination order of the workmen concerned was passed. Further the main dispute pending before the conciliation officer was on account of transfer of the employees from one department to another since they were surplus. The Apex court, in the said case, at para 22 has observed as under:

> "It can not be disputed that the impugned order was directly connected with the matter in dispute before the conciliation officer wherein the question of legality of the notice under section 9A of the ID Act was under consideration for the purpose of arriving at any settlement between the parties in this connection. The impugned order had definitely altered to the prejudice of the respondent his conditions of service. It was not a case of retrenchment simpliciter but was a consequential retrenchment on the introduction of scheme of rationalisation as contemplated by section 9A read with Schedule IV item 1 of the ID Act."
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> Since it was found by the Apex Court that the impugned order was directly in connection with the matter in dispute it was not a case of retrenchment simpliciter, and therefore, the Apex Court found that there is violation of section 33 (1) of the Act. Such is not the situation in the present case in as much as as observed earlier, the action of the employer of transfer of unit can not be said to be a matter connected with the dispute and further as observed earlier the same would not even fall under the contingencies stipulated under subsection (2) or (3) of section 33 of the Act. Therefore, the observations made by the Apex Court in this regard in the said decision would be of no help to the petitioner.

[9] The learned counsel appearing for both sides have relied upon the decision of the Apex Court in the case of Bhavnagar Municipality vs Alibhai Karimbhai and others reported in AIR 1977 SC 1229 in as much as Mr.Sinha for the petitioner submitted that in reference for granting permanency benefits to the temporary employee alteration in the method of working culminating into termination of service by way of retrenchment was found as having direct impact on the adjudication proceedings in connection with the dispute and therefore it was found by the Apex Court that the case would be covered by section 33(1)(a) of the Act whereas Mr.Nanavaty for the respondent pressed in service the observations made by the Apex court at the earlier portion of para 13 for contending that the retrenchment may not ordinarily under all circumstances amount to alteration of conditions of service and he further submitted that even the illustration given by the Apex Court is that when the dispute is pending

before the tribunal on account of closer of the department, if the retrenchment has taken place, such retrenchment would not amount to alteration of conditions of service. It was also submitted by Mr.Nanavaty that in the present case also there is a dispute for wage structure and if the retrenchment is to take effect as per section 25FF of the Act upon a transfer it can not be said that there would be any contravention of section 33 of the Act.

[10] On overall reading of the aforesaid decision of the Apex Court it appears that even at para 10, the Apex Court has observed that for attracting the provisions of section 33(1)(a) of the Act there must be proceedings pending, the conditions of service are not to be altered and also the condition of service must be with regard to the matter connected with the pending dispute and the alteration of service conditions should be prejudice to the workmen and that the workmen are concerned with the said dispute. Therefore, the Apex Court has made observations at paras 13 and 14 of the said judgment. As such as observed earlier, when the transfer of undertaking takes place and when there are express contingencies provided by statute under section 25FF of the Act, it can not be said that the provisions of section 33 of the Act in the matter where dispute is pertaining to increase in salary, allowances etc would be connected with the transfer, more particularly, when the legislature has expressly made provisions for contingencies. If it is a case resulting into retrenchment by express provisions of statute as per section 25FF even otherwise also it may not result into alteration of service conditions and therefore if the observations made by the Apex Court are considered, the net effect would be that in a matter where the retrenchment is on account of contingencies and the action of the employer is not connected with the dispute, the same would not fall under section 33(1) of the Act, but if it is a case of alteration in the method of working culminating into termination of service by way of retrenchment it has direct impact upon the adjudication proceedings of temporary employee for permanency benefits, therefore, the bar of section 33(1)(a) of the Act would apply. As such, in my view, the case before this court is not of transfer or consequence of transfer by express provisions of the statute as per section 25FF of the Act and therefore said decision would not be directly helpful to either of the parties to the proceedings.

[11] Concentrating upon the third aspect of the matter, it appears that on behalf of respondent company on 29.4.04 during the course of hearing in part, the affidavit has been filed by the Works Manager wherein at para 2 it has been stated that the company does not propose to sell the Dyes and Intermediate plants situated at Ankleshwar employing around 160 workmen at this stage. At para 3 it has been stated that the respondent company proposes to sell Sulfuric Acid plant employing around 20 workmen and no workman will be discharged by the respondent company as a result of

sale of Sulfuric Acid plant. MR.Sinha learned counsel appearing for the petitioner had responded to the aforesaid affidavit stating that the Sulfuric Acid plant is a profit making plant and in the meeting of the company there is no express resolution for disposal of only Sulfuric Acid plant. It appears that thereafter on 5.5.04 another affidavit has been filed by the same deponent on behalf of the respondent company that the respondent company at present proposes to dispose of Sulfuric Acid plant and utilise the funds for payment of outstanding salaries and wages of the workmen and for revamping/restructuring the company's activities and working of the remaining plants reserving its right to dispose of the remaining plants as may be needed after following the procedure of section 25FF of the ID Act. It is also stated in the said affidavit that on the sale of Sulfuric Acid plant, the concerned workmen will be transferred to the remaining plants on the same terms and conditions and would be treated in the same manner as workmen of the remaining plant in the event of sale of any of the remaining plants. Therefore, it appears that for the present the respondent company is desirous of selling Sulfuric Acid plant employing 20 workmen and has declared before the court that all the workmen in the said Sulfuric Acid plant would not be discharged. In view of the aforesaid declaration made before the court, as such the service conditions of the said 20 workmen working in Sulfuric Acid plant would also remain unaltered in as much as they are not to be discharged, except that they may be required to work at the Dyes and Intermediate Plants. Therefore, if the matter is considered as if it has to result into change or alteration in the service conditions on the hypothesis that the same is connected with the dispute then also at the time when the transfer of Sulfuric Acid plant takes places the workmen engaged therein are not to be prejudiced qua their service conditions except the place of their working. Moreover, the money to be realised out of disposal of Sulfuric acid plant is to be used for payment of outstanding salaries and wages of the workmen and for restructuring the company's activities of all remaining plants, and therefore, it can not be said that even otherwise also the company is indulging into activities which may seriously prejudice the rights of the employees concerned. Of course, the right to dispose of remaining plant is resolved, but in my view the application for prohibiting the transfer of undertaking of Dyes and Intermediate plants can be said to be premature at this stage since the company is also not at present desirous to dispose of its Dyes & Intermediate Plant and the application for interim relief made before the tribunal and in the present petition at the most is required to be considered qua the transfer of Sulfuric Acid plant and if the aforesaid facts and circumstances of the case are considered in view of the aforesaid affidavits, dated 29.4.04 and 5.5.04 filed on behalf of respondent company, even otherwise also it can not be said that the service conditions of the employees of Sulfuric Acid plant are to be altered prejudicial to the workmen concerned and the issue of disposal of remaining plant of Dyes and Intermediates is premature at this

stage and therefore the order can be passed to the extent qua the issue which has arisen for consideration before the court.

[12] In view of the aforesaid discussion, the petitioner, at the most, would be entitled to the direction to the respondent company to abide by the statement made and declaration made in affidavits dated 29.4.04 and 5.5.04 qua (i) disposal of Sulfuric Acid plant, (ii) not to discharge any of the workmen working in the Sulfuric Acid plant and for the protection of the salary and allowances and other terms and conditions of service except change in the place of work i.e. from Sulfuric Acid plant to Dyes and Intermediate Plant situated in the same compound at Ankleshwar and (iii) utilisation of funds for payment of outstanding salaries and wages of the workmen and for restructing/revamping of the company's activities and working of the remaining plant. The application of the petitioner before the tribunal and the grievance raised by the petitioner against disposal of remaining plant is concerned, the question is premature at this stage as the company is at present not desirous to dispose of the remaining plant. However, as and when the company decides to dispose of the remaining plant, the rights of the company as well as the petitioner union shall stand remain open and shall be governed by the provisions of the Act in accordance with law. It is clarified that as and when such contingency arises it would be open to both sides to raise all contentions which may be available to them in accordance with law.

[13] Subject to aforesaid observations and directions, rule is discharged.Considering the facts and circumstances of the case, there shall be no order as to costs.