
(2005) 08 CAL CK 0010

In the Calcutta High Court

Case No : G.A. No. 387 of 2004 and W.P. No. 1814 of 2003

Bengal Metrograph Co. (P) Ltd.

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 12-08-2005

Acts Referred:

Industrial Disputes Act, 1947 — Section 10(1), 10(2A), 11A, 15, 15(2)
West Bengal Payment of Subsistence Allowance Act, 1969 — Section 17AA
West Bengal Premises Tenancy Act, 1956 — Section 17(1), 17(2), 17(2A), 17(3)

Citation : (2006) 4 CHN 609

Hon'ble Judges : Arun Kumar Mitra, J

Bench : Single Bench

Advocate : Arunabha Ghosh and Anant Kr. Shaw, for the Appellant; Jayanti Dhar Quader, for the Respondent

Judgement

Arun Kumar Mitra, J.—The petitioner company issued chargesheet on the respondent No. 3. Ashok Mukherjee dated 16.12.1992. The inquiry was held and the Enquiry Officer gave his finding in the domestic inquiry proceedings. The Enquiry Officer in conclusion of the inquiry observed "from the evidence and the documents filed. I am convinced that Sri Mukherjee is guilty of the charges labelled against him." A copy of the inquiry report of the Enquiry Officer dated April 8, 1993 along with the order of the disciplinary authority are annexed hereto and marked with the letter "P-2" collectively to the writ petition.

2. The workman raised an industrial dispute which ultimately culminated into an order of reference dated December 14th 1993 issued by Labour Department, Government of West Bengal for adjudicating the issues as mentioned therein and it was referred to the learned Second Industrial Tribunal, West Bengal.

3. Before the learned Tribunal the respondent No. 3, Ashok Mukherjee filed written statement and the petitioner company also filed a written statement along with a list of documents.

4. Before the learned Tribunal the evidence were adduced by both the parties,

witnesses were examined and cross-examined and the learned Tribunal after considering all the materials on record and the oral and documentary evidence and after hearing the argument of the parties passed an order being order No. 42 dated December 9, 1996. Content of the said order are as follows:

Now after careful perusal of the evidence both oral and documentary on record and after giving due consideration to the evidence of the workman and the witness of the company I find no irregularities to the holding of the domestic enquiry by the Enquiry Officer, specially when for reasons best known to the workman he has not attended the hearing on any of the three days. Therefore, it cannot be held the enquiry as perverse or not according to the norms of law.

In the ordering portion of the said order it was written as follows:

That the domestic enquiry is found to be illegal and not valid and proper-fixed 3.1.1997 for hearing u/s 11A of the Industrial Disputes Act.

5. The copies of the depositions made before the learned Tribunal by the parties and the order No. 42 dated December 9, 1996 have been annexed and collectively marked with the letter "P-3".

6. The respondent No.3/workman filed an application before the learned Tribunal wherein it was pleaded that the workman reserved the right to challenge the said order No. 42 dated December 9, 1996. The petitioner company has annexed the copy of the application filed by the workman on March 20, 1997 as Annexure"P4".

7. The learned Tribunal proceeded with the matter in terms of Section 11A of the Industrial Disputes Act as directed earlier. Evidence were adduced by the parties and the next date was fixed on October 12, 1998 when the workman pointed out to the learned Tribunal about the ordering portion of order No. 42 dated December 9, 1996.

8. The petitioner company filed an application before the learned Tribunal dated November 5, 1998 praying for finding out the real affairs as there was ambiguity in the ordering portion of the learned Tribunal's order No. 42(as there was) dated December 9, 1996. In the writ petition the petitioner company has annexed a copy of the said application and has made it Annexure-"P-5".

9. It is to be noted that thereafter the learned Trial Judge of the Tribunal was transferred and another learned Judge, Sri P.K. Majumdar joined the learned Tribunal. The respondent No. 3/workman filed an objection to the application dated November 5, 1998 filed by the petitioner company and the learned Tribunal heard the parties and passed an order being order No. 68 dated November 25, 1998 holding inter alia as follows:

Prima facie it appears that the ordering portion is not consistent with the other portion of the final order hence the matter should be enquired into.

10. The learned Tribunal fixed the matter on December 24, 1998 by directing the department to issue summons to the 8" Judge, Second Industrial Tribunal. Order

No. 68 dated November 25, 1998 has been made Annexure-"P6" to the writ petition.

11. The learned Tribunal directed that the hearing of the case will be held after enquiry/disposal of the petition of the company dated November 5, 1998.

12. Thereafter, the enquiry was conducted by the learned Tribunal and the examination and cross-examination was held of the ex-Judge as well as other staffs/officers of the Tribunal who had taken the dictation and typed it out of the said order. The copies of the deposition have been annexed to the writ petition as Annexure"P-7".

13. The Judge of the learned Second Industrial Tribunal was transferred and now a new Judge took up the matter and after hearing the parties passed an award dated June 30, 2000. The award of the Tribunal has been made Annexure"P8" to the writ petition. It is also relevant to state that during the pendency of the matter before the learned Tribunal the workman had filed an application for interim relief which was allowed ex parte by order No. 13 dated July 8, 1994. Thereafter the matter was proceeded for hearing and deciding the question of validity of domestic enquiry.

14. Subsequently, the workman/respondent No. 3 filed a petition for direction upon the company to pay interim relief granted to the workman earlier. The said petition was heard by the learned Tribunal and after hearing the parties, the learned Tribunal rejected the said application filed by the workman by order No.88 dated April 26, 2000 and the next date was fixed for argument.

15. Thereafter, the first award of the learned Tribunal dated June 30", 2000 was passed. The workman/respondent No. 3 filed a writ petition being W.P. No. 21479(W) of 2000 challenging the award dated June 30th, 2000 passed by the learned Tribunal. The said writ petition, according to the company, is still pending.

16. The writ petition was affirmed on 13" December, 2000, copy was served upon the learned Advocate of the petitioner company by the learned Advocate of the respondent No. 3/workman with a covering letter dated December 18", 2000 which was received by the petitioner company on December 21", 2000.

17. Thereafter, the matter did not appear as per the intimation of the workman for quite a long time and the learned Advocate on record of the petitioner company requested the learned Advocate of the respondent No. 3/workman, Lakshman Chandra Haider to inform when the said writ petition would be moved to enable the petitioner company to enter appearance but the workman's Advocate never informed the Advocate of the petitioner company about the fate of the said writ petition. The learned Advocate of the company was of the impression that he would be informed whenever the writ petition would be moved but no information was given to him. It was alleged that suddenly, the petitioner company received a communication from the learned Judge, Second Industrial Tribunal whereby a notice dated January 29, 2002 was served upon

the company informing that the original case record was put up before the High Court as per the order dated January 24, 2002 passed by Hon"ble Justice Dilip Kr. Seth on October 19, 2001 and further directing the company to appear on February 27, 2002 before the learned Second Industrial Tribunal for compliance of the said order of the High Court and to pay the interim relief as directed by the High Court and it was stated that in default the matter would be proceeded according to law. Along with the said notice dated January 29, 2002 a copy of the petition dated January 17, 2002 filed by the respondent No. 3/workman before the learned Tribunal was forwarded to the petitioner company and also a xerox copy of the certified copy of the order dated October 19, 2001 passed by Hon"ble Justice Dilip Kr. Seth in the instant writ petition. The petitioner company has annexed xerox copies of the notice dated January 29, 2001 and the petition dated January 17, 2002 along with certified copy of the order dated October 19, 2001 to the writ petition collectively and marked it with the letter "P-9".

18. The said application filed by the workman before the learned Tribunal on January 17, 2002 and from the said application it will appear that the workman had stated in the said application that in spite of the order of the Hon"ble High Court the employer didn't make payment towards interim relief and a huge amount was due and payable to the respondent No. 3/ workman.

19. The petitioner company thereafter immediately filed an application being CAN 2219/02 on March 11, 2002 praying for recording and/or modification of the order dated October 19, 2001 passed by Hon"ble Justice Dilip Kr. Seth in W.P. No. 21479(W) of 2000. The said application was heard by Hon"ble Justice Dilip Kr. Seth on May 7, 2002 and His Lordship passed an order setting further proceeding before the learned Tribunal for eight weeks and directed the matter to appear two weeks thereafter. The petitioner company was further directed to serve the copy of the application upon the learned Advocate of the workman who was appearing before the learned Tribunal. Subsequently, the matter didn't appear in the list as directed by His Lordship and the interim order was expired.

20. According to the petitioner the learned Advocate of the workman proceeded before the learned Tribunal and a notice was issued upon the learned Advocate representing the company.

21. The learned Advocate of the petitioner company duly appeared before the Tribunal and submitted the factual position and the reason for which the matter before the High Court could not be heard and prayed for time but the learned Tribunal refused to grant time and fixed date for further proceeding of the matter. The Tribunal asked the petitioner company to pay interim relief to the workman concerned. The learned Advocate for the company brought to the notice of the learned Tribunal the earlier orders of the learned Tribunal as well as the other findings and observations made by the learned Tribunal but the learned Tribunal didn't consider the same and debarred the company from participating in the proceeding and passed an ex parte award on January 17, 2003. The said award was received by the petitioner on March 26, 2003. In the said award the

company/petitioner was directed to reinstate the workman to back wages and all their consequential relieves. The petitioner has annexed the said impugned award dated January 17, 2003 as Annexure "P 10" to the writ petition.

22. The petitioner company also received a notice u/s 33C(2) of the Industrial Disputes Act in Comp. Case No. 9/03 which has been annexed to the writ petition as Annexure "P 11" and has also been made the subject-matter of challenge in the writ petition.

23. Affidavit-in-opposition to the writ petition has been filed on behalf of respondent No.3. The respondent No. 3 at the outset submitted that because of suppression of material fact the writ petition should be dismissed.

24. The respondent No. 3 also stated that the petitioner company has not come to the Court with clean hands and that is also a ground for dismissal of the writ petition.

25. The respondent No. 3 averred that for those two days (10.12.1992 and 11.12.1992) payment has been made by the company to the respondent No. 3 and as such concerning the said period there can't remain any further dispute. The respondent No. 3 quoted certain evidence from the enquiry proceeding and also annexed copy of the proceeding of enquiry.

26. Written statements filed by the parties have been annexed to the affidavit-in-opposition. The respondent No.3 alleged that the petitioner company with a mala fide intention to delay the proceeding has filed this writ petition.

27. The respondent No. 3 in so many paragraphs stated or detailed about the proceeding, the action of the petitioner as well as the steps taken by him.

28. The respondent No. 3 alleged that he filed an application u/s 15(2)(b) of the Industrial Disputes Act, 1947 praying for interim relief and the learned Tribunal fixed the said petition for hearing on 13.05.1994 and on that a petition was filed by the petitioner company but nobody was there to move that petition when the matter was called on for hearing and the learned Tribunal rejected the said petition of the company for adjournment and heard the petition for interim relief.

29. On 08.07.1994, the learned Tribunal passed an order allowing the prayer for interim relief. On 04.08.1994 the petitioner company prayed for recalling the order of interim relief and the same was rejected by the learned Tribunal on 30.08.1994. The respondent No. 3 however, denied and disputed each and all the allegations made in the writ petition. The respondent No. 3 also averred that Hon"ble Justice Dilip Kumar Seth on 19.12.2001 quashed the said award and remitted back the matter to the learned Tribunal for a decision afresh on the basis of the materials already on record within a period of six months.

30. According to the respondent No. 3 since the writ petitioner in spite of the order of interim relief made no payment, the Hon"ble High Court directed the writ petitioner to pay interim relief in terms of the order of the learned Tribunal.

31. The respondent No. 3 further alleged that initially the said writ petition appeared in the list of Hon''ble Justice Bhaskar Bhattacharyya as a listed motion and ultimately because of change of determination the matter appeared before Hon''ble Justice Dilip Kumar Seth.

32. According to respondent No. 3 on several occasions the matter was called on but prayer for adjournment was made on behalf of the company on the ground of absence of Sri Anant Kumar Shaw, the learned Advocate of the company. Finally, on 19.12.2000 after hearing the respondent No. 3 His Lordship, the Hon''ble Justice Dilip Kumar Seth passed the order and remitted the matter back to the Tribunal.

33. The respondent No. 3 denied the allegation that the learned Advocate on record of the writ petitioner company requested his learned Advocate to inform him or more so the allegations made in paragraph 20 of the writ petition.

34. The respondent No. 3 once again stated that the petitioner company has made false statements in the writ petition. The respondent No. 3 in his exhaustive affidavit-in-opposition stated in details regarding the movement of the writ petition as well as the steps taken in passing the award by the Tribunal and also the circumstances under which the order for interim relief was passed.

35. As pointed out earlier, the respondent No. 3 denied each and every allegation made in the writ petition.

36. Affidavit-in-reply has been filed on behalf of the company. In this reply the company/writ petitioner denied the allegations made by the respondent No. 3 in the affidavit-in-opposition and reiterated its stand taken in the writ petition.

37. Above are the statements of facts insofar as the writ petition, its affidavit-in-opposition and the reply is concerned.

Points for Decision:

Whether the learned Tribunal has got the power or jurisdiction to strike out the defence if there is non-compliance of order passed u/s 15(2)(b).

Whether in the instant case the ex parte award passed by the learned Tribunal is tenable in law or not.

38. When deciding the first question Section 15 of the Industrial Disputes Act, 1947 (West Bengal Amendment) is quoted hereinbelow:

15. Duties of Labour Courts, Tribunals and National Tribunals.-

(1) Where an industrial dispute has been referred to a National Tribunal for adjudication, it shall hold its proceedings expeditiously and shall, within the period specified in the order referring such industrial dispute or the further period extended under the second proviso to Sub-section (2A) of Section 10, submit its award to the appropriate Government.

(2) Where an industrial dispute has been referred to a Labour Court or Tribunal under Sub-section (1) of Section 10, it shall,-

(a) after the filing of statements and taking of evidence, give day-to-day hearing and pronounce its award, other determination or decision in the manner specified in Section 17AA, and

(b) after hearing the parties to the dispute, determine, within a period of sixty days from the date of the order referring such industrial dispute or within such shorter period as may be specified in such order, the quantum of interim relief admissible, if any:

Provided that the quantum of interim relief shall, in the case of discharge, dismissal or retrenchment of a workman from service or termination of service of a workman, be equivalent to the subsistence allowance admissible under the West Bengal Payment of Subsistence Allowance Act, 1969 (West Bengal Act 38 of 1969) W.B. Act 33 of 1986.

39. Let me start from other way round inasmuch as interim relief has been awarded in favour of the workman and for non-payment of the relief defence of the company has been struck down. The learned Counsel for the respondent No. 3/workman relied on the judgment reported in 1998 (2) CHN 446, Debabrata Sen v. State of West Bengal. The learned Counsel also relied on the decision of the Single Bench of this High Court reported in 1999 (1) CHN 234, Rai Bahadur Bissuessurlal Motilal Halwasiya Trust and Ors. v. Presiding Officer, First Industrial Tribunal and Ors.

40. The learned Counsel for the petitioner company relied on the observations made by the Hon'ble Division Bench reported in 1999 (1) CHN 711, Rai Bahadur Bissuessurlal Motilal Halwasiya Trust and Ors. v. Presiding Officer/Judge, First Industrial Tribunal, West Bengal and Ors. It is the appeal against the judgment of the learned Single Bench passed in the case of Rai Bahadur (supra). The learned Counsel for the petitioner also filed a written notes on submission. In the written notes on behalf of the petitioner company the facts has been stated, the order of the learned Tribunal and the validity of the domestic enquiry has also been quoted, the part of the proceeding that is the evidence of the stenographer of the Tribunal has been quoted including the cross-examination on behalf of the company.

41. Now, again let me discuss the submissions made on behalf of the respondent No. 3/workman first.

42. It is submitted on behalf of workman/respondent No. 3 that Section 15(2)(b) is a welfare part of legislation and the interim relief is awarded or granted to the workman for the purpose of his survival or existence and the Tribunal has got the power or jurisdiction to see that its own order passed u/s 15(2)(b) is properly implemented or carried out. It cannot be a fact that when the Tribunal has got the power to pass an order for interim relief it has not power to get the said

order carried out. It has further been submitted that as observed by the Hon''ble Single Judge in the matter of Debabrata Sen that the Writ Court should not remain as silent spectator when there is non-compliance of the order of the Tribunal granting interim relief u/s 15(2)(b) and the Writ Court should come in aid of the steps taken by the Tribunal in implementation of its order for granting interim relief.

43. When placing reliance on the other judgment of the Hon''bte Single Judge in the matter of Rai Bahadur Bissueasurlal Motilal Halwasiya Trust and Ors. v. Presiding Officer, First Industrial Tribunal and Ors. (supra) it has further been submitted that here also the Hon''ble Single Judge made the observation that the Writ Court should interfere in the matter of implementation of the order of Tribunal.

44. It has been submitted on behalf of the respondent No.3 that the learned Tribunal rightly passed the exparte award inasmuch as the petitioner company didn't join the proceeding nor it carry out order of the Tribunal passed u/s 15(2) (b).

45. On behalf of the company both in the written notes and verbally it has been submitted that the Tribunal has no power or jurisdiction to strike out the defence of the company.

46. The learned Counsel for the petitioner company submitted that when the Tribunal has fixed hearing u/s 11A after consideration of the preliminary point with regard to domestic enquiry it was obvious that the Tribunal considered the enquiry to be legal, proper and valid. Otherwise, the Tribunal would not have done so and would have proceeded with the validity of the domestic enquiry if the said domestic enquiry was found to be invalid.

47. It has also been submitted on behalf of the company that the application of the workman against the said preliminary order of the Tribunal clearly goes to show that the workman was assured that the Tribunal has held the domestic enquiry valid and had posted further hearing u/s 11A for which the workman thought it necessary to make an application seeking leave to challenge the said preliminary order of domestic enquiry after the order of reference was finally disposed of.

48. The learned Counsel for the petitioner company then submitted that the Tribunal acted illegally by not hearing the matter in terms of the order passed by Hon''ble Justice Dilip Kumar Seth.

49. The learned Counsel for the company further submitted that the Hon''ble Division Bench in the matter of Rai Bahadur Bissuessurlal Motilal Hahoasiya Trust and Ors. In fact made certain observations which are relevant for the purpose of determination of the issue-in-question as to whether the Tribunal can strike out the defence of the company in such a case or not.

50. The learned Counsel for the petitioner company sought to distinguish the

case of Debabrata Sen v. State of West Bengal (supra) and submitted that the said decision is not in accordance with the provisions of the statute and is also not in consonance with the Division Bench judgment delivered in Rai Bahadur Bissuessurlal Motilal Halwasiya Trust and Ors.

51. The learned Counsel of the petitioner company thereafter sought to distinguish the judgment relied on by the learned Counsel for the respondent No. 3 reported in 2000 (2) CHN 689, Mary Mendes v. Lytton Hotel and Ors. The learned Counsel for the petitioner company submitted that the said case arose from the judgment of the learned Trial Court wherein it was laid down that the order made u/s 15(2)(b) was not enforceable at all. The Appellate Court observed that such construction of Section 15(2)(b) would make the entire provision nugatory and the intention of the legislature, where for such provision has been enacted would be totally frustrated. While referring to Mary Mendes case delivered by the Division Bench, the subsequent Division Bench observed that the earlier judgment was made in the fact situation of that case.

52. The learned Counsel has also submitted that ultimately in the fact situation of the Mary Mendes case the High Court passed direction in paragraph 12 of the said judgment taking that unless the money as directed by the High Court was paid, the Tribunal would not hear the company on merit, save and except the jurisdictional issue.

53. The learned Counsel submitted that it also observed that the order of the learned Tribunal striking down the defence would be set aside if the order of the High Court was carried out by the company.

54. The learned Counsel of the petitioner company submitted that it would appear from the observations made in the judgment delivered in the case of Mary Mendes that no principle of law was laid down as to whether in case of non-payment of interim relief defence can be struck down mechanically without considering any other aspect of the matter.

55. The learned Counsel for the petitioner company therefore, prayed that the exparte order should be set aside and the principle should be decided insofar as the provisions of Section 15(2)(b) is concerned.

56. Heard the learned Counsel for the parties. Before discussing the citations let me see the provisions of Section 15(2)(b) of the Industrial Disputes Act, 1947 first which has already been quoted. This Section or this provision has been introduced in the statute for the purpose of granting interim relief to the workman where his service has been terminated and to determine the quantum of interim relief admissible to such workman. Then from the Section itself the following points come out:

(i) there must be termination of workman;

(ii) there must be grant of interim relief;

- (iii) there must be determination of quantum of relief;
- (iv) the relief must be as admissible.

57. All the above four factors are to be satisfied and then only the purpose of introduction of the provision to the statute will be fulfilled. Neither in the Section itself nor in the subsequent events any default clause is there that is if the charged company does not pay the interim relief what would be the consequence the company has to suffer. The Section is complete in itself; the execution of the Section is not provided. If the execution is not provided as provided in Order 20 onwards of the CPC the Tribunal cannot innovate procedure, more so the Tribunal is not a Court as has been settled observation has also been made in this regard in the case of Rai Bahadur Bissuessurlal Motilal Halwasiya Trust and Ors. (supra), it is however, not said that since this is welfare legislation and has been introduced in the statute book for the purpose of welfare of the terminated workman but there also the award of welfare must be based on reasonable approach or reasons or legal provisions. It is not that the Tribunal passes an order not carried out by the company and the Tribunal says that I will penalize the company by winding up or something like that, this cannot be done. Then the question will arise that if the Tribunal passed an order, if that that is not carried out and if the workman comes to High Court whether the Writ Court should be a silent spectator. The answer is certainly not but it cannot also be the answer that there must be a novel procedure not provided in the statute or not in accordance with law or fairness of justice. The social justice means justice to both the parties and welfare legislation does not mean that since the enacting authority thought it fit to provide welfare to a particular workman he should be entitled to get relief and not the others and not the company.

58. Another question may be raised regarding the conduct of the company. Whether in the instant case it was fair or not that is whether the company was right in not paying the interim relief to the workman as directed by the Tribunal. But in my view Article 51A of the Constitution is not the answer. Duty of a citizen as embodied in Article 51A is always there but if a citizen fails to perform his duty the answer is not provided that is this Article 51A is not enforceable before the Court.

59. There are two parts of a procedure or rather this procedure; one is interim part and the other is main procedure that is one is termination and the other is interim relief. The interim relief is in aid of the main prayer. The workman has been terminated, the Tribunal is to decide whether the termination is good or bad but in doing so the Tribunal has the power to grant ad interim relief and two parts must be separated. If the company does not pay interim relief and if the company does not carry out the award. The first part, we are concerned to deal with, insofar as the second part also we are concerned but the second part goes in straightaway whether the ex parte order was good or bad but the first part requires determination in principle and in specific since it has caste a stigma that the defence of the company is struck down and by virtue of such order the

second part that is the main proceeding has been made in fructuous or has been made ex parte. First part is a Code in itself and it cannot touch the second part. The company can very well say that the quantum determined by the Tribunal is not admissible and there are other factors also. However, in this case the company did not say so but the principle which can be easily enunciated that for the first part default the second part cannot be made nugatory. In the judgment of Debabrata Sen (supra) the Hon"ble Single Judge only observed that since a citizen has got duty under Article 51A, naturally if he does not perform the duty then the Writ Court should pass an order which is not provided in the statute. The order has been passed under Article 226 of the Constitution by the High Court and not under Article 142 of the Constitution by the Supreme Court. Automatically or obviously the question arises whether Article 51A is enforceable or not. The answer is admittedly not.

60. In the judgment delivered by the Hon"ble Division Bench in Rai Bahadur's case (supra) the following observations are important and necessary for the determination of the issue-in-question herein.

61. In paragraph 27 the Division Bench observed "It must be noted that in Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others, , the Hon"ble Apex Court clearly made a distinction between a procedural power of review and a substantive power of review. Thus, whereas an incidental or ancillary power refers to procedural aspect, a substantive power must be specifically conferred. An order can be passed only for the ends of justice but the Court cannot in the guise of passing ancillary or incidental power take a decision which goes to the very root of its jurisdiction."

62. The observations made in paragraphs 39 and 40 of the said judgment are also quoted hereinbelow:

39. It is true that normally a Court or a statutory authority has not only the jurisdiction to exercise a power within the four corners of provisions of the said Act but also to implement it. Assuming that the Industrial Tribunal keeping in view the beneficent provision contained in Section 15(2)(b) of the Act has the jurisdiction to implement its order, the same, in our opinion, can only be done within the four corners of this statute. And ancillary or incidental in the opinion of this Court, does not extend to refuse to answer a question which goes to the root of the jurisdiction of the Industrial Tribunal as for example, when a question arises as to whether a person is a "workman" or not or as to whether the dispute raised is an industrial dispute or not or as to whether the Government making a reference has the jurisdiction to do the same. As the jurisdictional issues go to the root of the matter, by deciding a jurisdictional fact wrongly, the Tribunal cannot usurp a jurisdiction which it did not have. The Tribunal, thus, cannot debar a person from raising such a question or taking any steps by preventing him to do so either striking out his defence or expunging the cross-examination.

40. For such purposes, there cannot be any doubt, it can refuse to adjourn the

matter and proceed ex parte. It can also impose costs. Even at the time of making an award, such costs can be imposed. Having regard to the fact that the appellant bona fide have been raising the said question and further in view of the fact that as many as three writ applications were pending decision of this Court, the respondent No. 1, in our considered opinion, should not have passed any order striking of the defence expunging the cross-examination. To say the least, the impugned order suffers from procedural impropriety. We, however, do not intend to lay down a law that the Court shall have to fold its hands and remain helpless if an interim order passed by the Tribunal is not complied with. It can of course take such action as is permissible in law.

In paragraph 19 the Hon"ble Division Bench observed "but the question as to the extent of such inherent power in the Tribunal is not free from doubt."

In paragraph 41 the Hon"ble Division Bench observed "striking out of a defence is a very serious matter."

In paragraph 14 the Hon"ble Division Bench observed "an Industrial Tribunal, although has all the trappings of Court is not Court." In the instant case the Tribunal has struck out the defence. It is the Tribunal's power and jurisdiction has also been discussed in the decision reported in L. Chandra Kumar Vs. Union of India and others,

63. For non-compliance of the order passed by the learned Tribunal in the matter of interim relief the defence has been struck down. Now, from the decision reported in AIR 1985 SC 964 it will appear that there also the legislation was welfare legislation and there also in the Bihar Building (Lease, Rent and Eviction) Control Act 3 of 1947. Section 11A clearly expressed (Court shall order the defence...to be struck off) but in that judgment the Hon"ble Apex Court observed that the word "shall" used in Section 11A is directory and not mandatory and must be read as "may". From this observation also it appears that even if a legislation is created for the purpose of welfare of a particular class, may be down trodden but the Court should not interpret the provision in such a manner that it becomes one sided.

64. In the West Bengal Premises Tenancy Act, Section 17(3), the provision is as follows:

17(3) If a tenant fails to deposit, or pay any amount referred to in Sub-Section (1) or Sub-Section (2) within the time specified therein or within such extended time as may be allowed under Clause (a) of Sub-Section (2A), or fails to deposit or pay any Installment permitted under clause (b) of Sub-Section (2A) within the time fixed therefore, the Court shall order the defence against delivery of possession to be struck out and shall proceed with the hearing of the suit.

65. But in the decision reported in B.P. Khemka Pvt. Ltd. Vs. Birendra Kumar Bhowmick and Another, ., paragraph 14 runs as follows:

14. Even if the proviso is viewed in a limited sense as being attracted only to

those cases where there has been full and complete compliance with the provisions of Sub-Section (1) or (2) or (2A) of Section 17 and will not apply to a case as the one on hand, the appellant cannot be denied relief because the words "shall order the defence against delivery of possession to be struck out" occurring in Section 17(3) have to be construed as a directory provision and not a mandatory provision as the word "shall" has to be read as "may". Such a canon of construction is warranted because otherwise the intendment of the Legislature will be defeated and the class of tenants for whom the beneficial provisions were made by the Ordinance and the amending Act will stand deprived of them. We may only refer, to two decisions of this Court on this aspect of the matter. In *Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others*, , Chandrachud, C.J. speaking for the Court approved the following passage in *Crawford on "Statutory Construction"* *Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others*,

The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision but also while considering its nature, its design, and the consequences which would follow construing it the one way or the other.

66. In *Ganesh Prasad Sah Kesari and Another Vs. Lakshmi Narayan Gupta*, , this Court, dealing with a similar provision for striking out of defence in Section 11A, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, referred to *Govindlal Chhaganlal Patel's* case (supra), and held as follows:

Applying this well-recognised canon of construction the conclusion is inescapable that the word "shall" used in the provision is directory and not mandatory and must be read as "may".

67. In the above view of the matter it clearly appears that even if the legislature intended Section 15(2)(b) a welfare legislation till then the legislature didn't intend that in default of compliance of an order passed u/s 15(2)(b) the entire right of the company will go.

68. Section 17(3), before the judgment reported in 1987 SC 1010 (supra) also provided that the Court will decide the suit on other points excepting the default clause.

69. I however, am not discussing the resultant effect of *Mendes* case and *Rai Bahadur's* appeal inasmuch as in those two places no principle of law regarding the effect of non-compliance of order passed u/s 15(2)(b) has been laid down. In fact in those two cases decisions have been given in the particular facts and circumstances of the cases.

70. In view of the above discussions, in my opinion, the Tribunal has no power and/or jurisdiction to strike out the defence of a company for non-compliance of

the order passed u/s 15(2)(b) as an interim measure.

71. Insofar as the point No. 2 is concerned let me quote the order passed by Hon''ble Justice Dilip Kumar Seth:

The Tribunal has declined to determine the issue in one way or the other. In the present case the Tribunal has not exercised its jurisdiction to determine the same. Therefore, it is a clear case of failure to exercise jurisdiction and as such the award dated 30.06.2000 in Case No. VIII-29/94 is hereby quashed and the matter is remitted back to the Tribunal for a decision afresh on the basis of the materials already on record and after giving an opportunity to the parties who will be at liberty to adduce further evidence if they are to advise in accordance with law for coming to a definite conclusion one way or the other, within a period of six months from the date of communication of this order. It is alleged that - despite order u/s 15B the employer has not paid to the workman. If it is so, the employer shall pay the amount in terms of the order passed by the learned Tribunal and the workman shall take appropriate steps in case no payment is made.

With these observations this writ petition is disposed of after hearing Mrs. Jayanti Dhar Quader, learned Counsel for the State.

72. It is needless to say that the Tribunal is to hear out the main matter in terms of the judgment passed by Hon''ble Justice Dilip Kumar Seth

73. Now, let me see the award of the Tribunal whether it followed the judgment of Hon''ble Justice Dilip Kumar Seth. Relevant portion of the award is quoted hereinbelow:

As regards the 1" issue I like to mention as there is no dispute, this Court can easily come to a conclusion that the termination of the employee Sri Ashok Mukherjee is not justified because the reason of his termination of his service was his unauthorized absence for 10.12.92 and 11.12.92 has already been authorized by paying his wages for those 2 days by the company. So, it is held that the termination of Sri Ashok Mukherjee is unjustified in view of the fact that there is no other allegations against him at present or in past when domestic enquiry was going on. Hence ordered that the workman Sri Ashok Mukherjee is entitled to reinstate into his job from the date of his termination. In absence of contrary argument and evidence on record I do hereby hold that this award of this case is passed in ex parte and it is allowed.

74. From the award itself it is clear that the Tribunal didn't consider any other documents on record and any other factor and observed that since the reason of his termination is the unauthorized absence for two days and the company has paid the workman for those two days the termination becomes automatically illegal and unjustified.

75. The learned Tribunal, as it appears, didn't consider the other documents on record or other parts of the record as directed by Hon''ble Justice Dilip Kumar

Seth and in that view of the matter in my opinion, this ex parte award is also bad in law and should be set aside.

76. For the ends of justice I direct the company/petitioner to pay the workman, the respondent No. 3 rupees one lakh as against interim relief without prejudice to the rights and contentions of the parties. Such payment is to be made within three weeks from date. The impugned award passed by the learned Tribunal is set aside. The learned Tribunal is directed to hear out the main matter on merit. The learned Tribunal is further directed to complete the hearing within six months from date.

77. The writ petition is thus decided and accordingly in view of the observations made above, the application being G.A. No.387 of 2004 is also disposed of.

78. There will be no order as to costs.

79. Urgent xerox certified copy, if applied for, be given to the parties as expeditiously as possible.