
(1969) 12 DEL CK 0010

In the Delhi High Court

Case No : Civil Writ Appeal No. 462 of 1969

Gammon India Limited

APPELLANT

Vs

R.K. Baweja and Another

RESPONDENT

Date of Decision : 05-12-1969

Acts Referred:

Citation : (1970) ILR Delhi 701

Hon'ble Judges : S.N. Shankar, J

Bench : Single Bench

Advocate : G.B. Rai, Rajender Dhawan, B. Ramrakhani and Y. Dayal, for the Appellant;

Judgement

S.N. Shankar, J.

(1) In this petition under Articles 226 and 227 of the Constitution, Gammon India Ltd., a company incorporated under the Indian Companies Act, 1913, has prayed for a writ of prohibition restraining respondent No. 2 from enforcing the award dated 25th February, 1969 given in his favor by the presiding officer of the Industrial Tribunal, Delhi. Respondent No. 1 to the petition is the presiding officer of the Tribunal and respondent No. 2 is the workman in whose favor the award has been made.

(2) Brief facts according to the petition are that the petitioner- company carried on business as Civil Engineers & Contractors in India and obtained contracts for construction from various Governmental and semi-Governmental authorities. Corporations, etc. For the purpose of executing these contracts, the Company set up offices at the sites of the constructions. Every such office at the site worked under the control of site Engineer, who engaged staff for purposes of execution of the contract. Respondent No. 2 Niranjana Dass, for the first time joined the site office of the company in July, 1956 at Dehra Bridge at Kashipur, (U. P.), but his services were terminated in May, 1957. In October/November 1957 he was re-employed at the site of another work of the company at Ram Ganga Project

Bridge, Dhampur, (U. P.), but in July, 1958 his services from this assignment also were terminated. In September, 1958 he was then employed again for the work of the company at Ram Ganga Project where he worked till September, 1959. In October, 1959 he was again taken in employment at Ram Ganga Project and his services continued till June, 1960. In September, 1960 a fresh appointment was made and he was employed at the works of the company at Kopili Bridge in Assam where he worked till 22nd February, 1962. After a lapse of about 1-1/2 months thereafter, he again applied in April, 1962, for a job with the Central Zonal Office of the company and was employed as a Senior Clerk with effect from 5th April, 1962. The letter of appointment issued in his favor on this occasion has been filed by respondent No. 2 as annexure "A" annexed to his counter-affidavit. On 14th September, 1967 he was served with one month's notice terminating his services, as it was contended that the Central Zonal Office of the company where the petitioner had been employed was closed. This led to a dispute between him and the management, which was considered to be an industrial dispute by the appropriate Government within the meaning of the Industrial Disputes Act, 1947. By order No. 224 (224)/68-Lab. dated 30th May, 1968, Therefore, the Lt. Governor referred this dispute for adjudication to the Industrial Tribunal. On 25th February, 1969 the Tribunal gave its award which was published in Delhi Gazette dated April 10, 1969. The Tribunal held that the order of retrenchment made against respondent No. 2 was illegal and void as retrenchment compensation that had to be paid to him as a condition precedent to his retrenchment had not been paid with the result that this respondent continued to be in service of the management and was entitled to wages till he was lawfully retrenched. This petition is directed against this finding of the award.

(3) In the affidavit filed by respondent No. 2 to oppose the petition the nature of business activity of the petitioner company was not denied and it was also not disputed that for purposes of executing the construction works the petitioner-company had been setting up offices at the sites of constructions, but it was contended that invariably the old staff was retained for subsequent contracts also. The factum of the Central Zonal Office having been closed was emphatically denied and the award of the Tribunal was maintained to be perfectly legal and valid.

(4) After going through the evidence and hearing the parties, the Tribunal in paragraphs 12 and 13 of the award has held that as retrenchment compensation was not paid to respondent No. 2 at the time when the order of retrenchment was made against him, his retrenchment was illegal and unjustified and he continued to be in service of the management and was entitled to his wages till he was lawfully retrenched. This conclusion is based on the view that section 25F of the Industrial Disputes Act, 1947 (hereinafter called the Act) applied to the case and unless the conditions precedent to the retrenchment prescribed therein were fulfilled the retrenchment was void. The workman in terms of this section was entitled to one month's notice in writing indicating the reasons for retrenchment or in lieu of such notice, wages for the period of notice. He was

also entitled to be paid at the time of retrenchment compensation equivalent to fifteen day's average pay for every completed year of service or any part thereof in excess of six months, and the Tribunal found that, in fact, this compensation was not paid to him.

(5) The learned counsel for the petitioner has however contended that the award is vitiated, firstly on the ground that the reference was ab initio invalid as there existed no industrial dispute that could validly be referred for adjudication to the Tribunal under the Act because the dispute between respondent No. 2 and the petitioner was never espoused by any Union and because section 2A of the Act was ultra virus of the Constitution, and secondly because on the facts found by the Tribunal itself the conclusion recorded by it is not sustainable in law.

(6) In regard to the first ground, it is not necessary to go into this question, as the matter stands concluded by the Full Bench decision of this court upholding section 2-A of the Act. [see Toshniwal Brothers (Private) Limited v. Presiding Officer, Labour Court (1969) DI HC 83. This submission has, Therefore, to be rejected.

(7) Coming now to the second ground, the argument raised is that payment of compensation is not a condition precedent to closure. The learned counsel says that it has been found as a fact by the Tribunal that the Central Zonal Office of the petitioner company at Delhi had been abolished and the services of the staff including those of respondent No. 2 were terminated. After this finding, the learned counsel says that there was no warrant to justify the conclusion that provisions of section 25F of the Act were attracted and because of non-payment of compensation the retrenchment order against respondent No. 2 was void. I find force in this submission of the learned counsel.

(8) The Tribunal has found as a fact that the Central Zonal Office of the petitioner-company at Delhi had been abolished when services of respondent No. 2 were terminated. In the concluding part of para 5 of the award the Tribunal has held :-

On account of the reduction in the volume of work and recession and due to abolition of the Central Zonal Office at Delhi, the services of the staff were terminated and this amounted to retrenchment and not termination or discharge simpliciter."

(9) The short question for consideration Therefore, is whether the retrenchment of respondent No. 2 would still be had if the retrenchment compensation had not been paid to him even though the Central Zonal Office was closed in fact. Section 25-FFF read as under :

"25FFF.(1) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub-section (2) be entitled to notice and compensation in accordance with the

provisions of section 25F, as if the workman had been retrenched : Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under clause (b) of section 25F shall not exceed his average pay for three months. Explanation :-An undertaking which is closed down by reason merely of financial difficulties (including financial losses) or accumulation of undisposed stocks shall not be deemed to "have been closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub-section. (2) Where any undertaking set up for the construction of buildings, bridges, roads, canals, dams or other construction work is closed down on account of the completion of the work within two years from the date on which the undertaking had been set up, no workman employed therein shall be entitled to any compensation under clause (b) of section 25F, but if the construction work is not so completed within two years, he shall be entitled to notice and compensation under that section for every completed year of service or any more part thereof in excess of six months."

(10) The use of the words "as if the workman had been retrenched" sub-section (1) of section 25FFF introduces a fiction. Though normally the termination of service in these circumstances may not technically be retrenchment, but by reason of sub-section (1) of this section it will be deemed to be "retrenchment" entailing certain obligations for the employer. It prescribes that in a case covered by this provision the workman will be entitled to notice and also compensation in accordance with the provisions of Section 25-F. It thus, confers a right on the workman in terms of the section to claim both notice as well as compensation, but closure of the undertaking is not subject to the payment of this compensation and has not been put on the same footing as a retrenchment u/s 25-F of the Act. Payment of compensation is not a condition precedent to closure. Reference in this connection may be made to *Hal fusing Manufacturing Co. Ltd. v. Union of India* 1960 1j Lj I (Supreme Court). On pages 6 and 7 of the report their lordships have observed :

There is between the text of S. 25F and S. 25FFF(1) a significant difference in phraseology. Whereas by S. 25F the constitutional validity whereof does not fall to be determined in these petitions certain conditions precedent to retrenchment of work men are prescribed, S. 25FFF(1) merely imposes liability to give notice and to pay compensation on closure of an undertaking which results in termination of employment of the workmen. Under s. 25F, no workmen employed in an industrial undertaking can be retrenched by the employer until: (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period has expired or the workman has been paid salary in lieu of such notice, (b) the workman has been paid retrenchment compensation equivalent to 15 days average salary for every completed year of service, and (c) notice in the prescribed manner is served on the appropriate Government. Section 25FFF(1), however, enacts that the workman shall be entitled to notice and compensation "in accordance with the provision of S. 25F if the undertaking

is closed for any reason, as if the workman has been retrenched. By the plain intendment of S. 25FFF(1), the right to notice and compensation for termination of employment flows from closure of the undertaking; the clause does not seek to make closure effective upon payment of compensation and upon service of notice or payments of wages in lieu of notice. An employer proposing to close his undertaking may serve notice of termination of employment and if he fails to do so, he becomes liable to pay wages for the period of notice. On closure of an undertaking, the workmen are undoubtedly entitled to notice and compensation in accordance with S. 25F as if they had been retrenched, i.e., the workmen are entitled beside compensation to a month's notice or wages in lieu of such notice, but the use of the words "as if the workman had been retrenched" the legislature has not sought to place closure of an undertaking on the same footing as retrenched under S. 25F. By S. 25F, a prohibition against retrenchment until the conditions prescribed by that section are fulfilled is imposed; by S. 25FFF(1), termination of employment on closure of the undertaking without payment of compensation and without either serving notice or paying wages in lieu of notice is not prohibited. Payment of compensation and payment of wages for the period of notice are -not, Therefore, conditions precedent to closure."

(11) In all cases, Therefore, where section 25FFF applies the only claim which the employee of a closed undertaking can legitimately make is a claim for compensation against its employer. Reference to Section 25-F in this section is for the limited purpose of calculating the compensation. This aspect of the question came up for examination before the Supreme Court with reference to section 25FF in *Ankapalla Cooperative Agricultural & Industrial Society v. its Workmen* (1962) 11 Lj 621 at pages 629-30 of the report. The same consideration apply in case of section 25FFF. The moment, Therefore, the Tribunal A found that the Central Zonal Office of the petitioner-company at Delhi had really been abolished it should have proceeded to determine the rights of the parties u/s 25FFF of the Act. There was no occasion to invoke the provisions of section 25F to conclude that the retrenchment was void and respondent No.2 continued to be in service of the management entitled to his wages till he was lawfully retrenched. The conclusion, Therefore, arrived at by the Tribunal on the facts found by it is not sustainable in law. This error is apparent on the face of the award and vitiates it.

(12) The learned counsel for the respondent No. 2, however, contended that the case as now argued was never urged by the petitioner-company before the Tribunal. It is true that it appears from the award that attention of the Tribunal was not drawn to this aspect of the case, but the legal position as set out in the preceding paragraph is a logical conclusion from the facts found by the Tribunal itself and call for intervention of this court under Article 227 of the Constitution. It is not a case where an entirely new case is now being set up by the petitioner. In paragraph 9 of the written statement filed in reply to the claim before the Tribunal it was contended by the company that the Central Zonal Office had been wound up as far back as March, 1967 and there was no question of the workmen

being reinstated. Then, at the time of evidence, this case was specifically put to respondent No. 2 and in his cross-examination he admitted that the Central Zonal Office of the petitioner company had been wound up in February, 1967. It is on the basis of this admitted case that the finding in para 5 of the award extracted above was arrived at by the tribunal. It is, Therefore, not possible to accede to the submission that because no specific argument was raised to urge that section 25FFF was attracted to the facts found by the Tribunal, it is not open to the petitioner company to assail the award on that basis now in the facts of this case.

(13) The learned counsel then contended that the finding in para 5 referred to above was in the background of the plea of the company that the termination of service of respondent No 2 was, in fact, a discharge simplicities and that he was not entitled to any other benefit. It does appear that this plea was raised before the Tribunal and was negatived by it. But the fact that the Zonal Office of the petitioner-company had been wound up is admitted by the respondent himself in his cross-examination dated 6th January, 1969 before the Tribunal and the trial before the Tribunal proceeded on that assumption. The submission, Therefore, that the finding was recorded by the Tribunal in the context of a different plea is not relevant to prevent the provisions of section 25FFF being attracted in the admitted facts of the case.

(14) The learned counsel then contended that the closure admitted by respondent No.2 in this cross-examination was the closure of the Zonal Office of the petitioner-company, but respondent No. 2 had been employed by the company itself and the petitioner-company admittedly having not been wound up, it was not a case of closing of the undertaking within the meaning of section 25FFF. This again is not borne out from the record. Respondent No. 2 himself has filed a copy of his appointment letter, which is annexure "A". It was issued by the Central Zonal Office of the petitioner-company under the signatures of the Zonal Manager and makes reference to the petitioner's application dated 4th April, 1962 seeking appointment and his interview at the Zonal Office on the same day. In his cross-examination dated January 6, 1969 also the respondent admitted that in 1962 there was a Central Zonal Office of the management of the petitioner-company at Delhi and they used to employ their own staff there. It is, Therefore, clear that respondent No. 2 was employed by the Central Zonal Office of the petitioner-company. In this context, Therefore, the fact that the petitioner company as a whole has not closed down is of no consequence, if its Central Zonal Office has, in fact, been abolished, as found by the Tribunal. To attract section 25FFF, it was not necessary for the petitioner company to have proved that the entire company had been wound up and had closed its business or had ceased to exist. It was sufficient if its sub office or branch which had employed respondent No. 2 had, in fact, closed down. A similar question arose before the Supreme Court in *Workmen of the Indian Leaf Tobacco Development Co. Ltd. Guntur v. The Management of the Indian Leaf Tobacco Development Co. Ltd. Guntur*, C.A. 556 of 1966 decided on September 27, 1968. The respondent-

company in this case carried on the main business of purchasing tobacco of all varieties and qualities stemming .grading and packing of tobacco and supplying it to the Imperial Tobacco Company and also exporting the same to various foreign countries in the world. The company had two factories and in the year 1962 maintained 21 depots. On 16th August, 1963 it gave a notice to the Union of its workmen, appellants in this case, that eight out of its 21 depots which were specified in the notice would be closed down with effect from 30th September, 1963. An industrial dispute was thereafter raised by the workmen relating to the closure of the eight depots as well as to a number of other demands including revision of basis wages and dearness allowance, etc. At the stage of adjudication, an objection was taken on behalf of the company that the closure of the depot was a managerial function and there could be no industrial dispute over such closure and the Government. Therefore, had no power to refer this issue for adjudication. The Tribunal, framed a preliminary issue in this plea and gave its interim award upholding this objection. The workmen challenged this decision. Dealing with the question, the court held :

"THEclosure of the 8 depots by the Company even if it is held not to amount to closure "of business of the Company, cannot be interfered with by an industrial Tribunal if, in fact, that closure was genuine and real. The closure may be treated as stoppage of part of the ac- tivity of business of the Company. Such stoppage of part B of a business is an act of management which is entirely in the discretion of the Company carrying on the business ."....."

(15) Proceeding further their lordships observed :

An example may be taken of a case where a Bank with its headquarters in one place and a number of branches at different places decides to close down one of the branches at one of those places where it is functioning. We cannot see, how in such a case, if the employees of that particular branch raise an industrial dispute, the Bank can be directed by the Industrial Tribunal to continue to run that branch. It is for the Bank to decide whether the business of the branch should be continued or not, and no Bank can be compelled to continue a branch which it considers undesirable to do."

(16) It was, Therefore, perfectly open to the petitioner company to close down its Central Zonal Office at Delhi and that would be the case of closing down of an undertaking to attract the provision of section 25FFF."

(17) Referring to sub-section (2) of section 25FFF the learned counsel for the respondent then contended that as the case of respondent No. 2 was not covered by this sub-section, provisions of section 25F clearly applied to it and the Tribunal was justified in invoking them to make the award in terms it has done. The argument has no merits. Sub-section (2) of section 25FFF is by way of an exception in the case of an undertaking set up for the construction of buildings, etc. providing that no workman employed therein would be entitled to any compensation under clause (b) of section 25F, if the undertaking was closed

down on account of the completion of the work within two years from the date on which the undertaking had been set up and then provides that if the construction work was not so completed within two years he shall be entitled to notice and compensation in terms of this sub-section. It is not possible to read this entitlement to be condition precedent to the closure.

(18) In view of this discussion I am of the view that on the facts found by the Tribunal, provisions of section 25FFF were attracted in this case and the rights of respondent No. 2 had to be determined by the Tribunal with reference to these provisions. The impugned award dated February 25, 1969 is thus vitiated by an error apparent on the face of the award and is hereby quashed. The matter is remanded to the Tribunal to decide what directions, if any, are necessary in respect of the retrenchment of respondent No. 2 in the light of the above discussion.

(19) Parties will bear their own costs of this Court.