

(2016) 10 CAL CK 0011

In the Calcutta High Court

Case No : Writ Petition No. 11012 (W) of 2015.

**Hooghly Dock and Port Engineers Limited - Petitioner @HASH Chief
Labour Commissioner (C), Government of India and Others**

Date of Decision : 03-10-2016

Acts Referred:

Citation : (2017) 152 FLR 971 : (2017) LIC 627 : (2016) 4 LLN 334

Hon'ble Judges : Sambuddha Chakrabarti, J.

Bench : Single Bench

Advocate : Mr. Arunava Ghosh and Mr. Ashok Kumar Jena, Advocates, for the Petitioner; Mr. Anup Mukhopadhyay, Advocate, for the Union of India; Mr. Rabilal Maitra, Sr. Advocate and Mr. Arijit Chatterjee, Advocate, for the Respondent No. 5

Final Decision : Allowed

Judgement

Sambuddha Chakrabarti, J. - The petitioner has challenged an order dated April 9, 2015 passed by the respondent no. 1 and prayed for an order not to give effect to the same in any manner whatsoever.

2. Although the issue involved in the writ petition is purely a question of law in order to appreciate the same a brief factual background is necessary to be kept in view. The petitioner, a Government company, has now become sick and is under the Rehabilitation-cum-Restructuring Scheme of the Central Government. The Government of India decided to put the petitioner in the disinvestment policy. At present the company has 195 employees working at its Salkia factory and 136 employees working at the Nazirgunj factory.

3. The petitioner and its employees are bound by the directions and circulars issued by the Department of Public Enterprises (DPE, for short) which acts as the nodal agency for all Public Sector Enterprises. The Central Government introduced a Voluntary Retirement Scheme (VRS, for short) for its employees and workers upon payment of adequate compensation to the employees and workers of the petitioner. Subsequently, the Government of India issued a notification in the year 2000 and introduced a revised Voluntary Retirement Scheme. The employees who had already opted for voluntary retirement till that

period were, the petitioner claims, entitled to VRS, ex-gratia only. The modality of calculation was strictly followed on the monthly salary or wages @ 30 days comprising various pays and dearness allowance. Subsequently, the DPE issued a further notification and modified the revised Voluntary Retirement Scheme. In the said memorandum it was specifically mentioned that the administrative ministries or departments were required to bring the modified VRS to the notice of the public enterprises like the petitioner under their administrative control and to ensure strict compliance with the provision of the said Scheme.

4. In terms of the said notification, the petitioner issued an internal office order on November 19, 2001 whereby it was categorically mentioned that the employees opting for VRS would be entitled to its benefit on a model depending on the choice of the employees.

5. Subsequently, the DPE issued a fresh notification on February 28, 2002 by which it was clarified that commencing from May 5, 2000 till November 5, 2001, calculation of VRS @ 26 days a month was allowed under the Gujarat Pattern only as there was no concept of Gujarat Pattern VRS before May 5, 2000. The employees who had already opted for voluntary retirement under the old guideline would be covered under the Scheme of 30 days a month.

6. The concerned employees of the petitioner accepted the calculation on the basis of the said notifications. Considering the calculation of the VRS on the basis of 30 days a month, the petitioner provided the VRS to at least 281 employees and workmen which they had accepted without any dispute. At present, however, the employees opting for VRS are entitled to the benefit in terms of VRS ex-gratia in compliance of the DEP's guideline dated November 6, 2001. According to the petitioner, in January 2012, the respondent no. 5 Union for the first time contended that the calculation of the Voluntary Retirement Scheme was faulty and the same should be corrected. It was, thereafter, contended that for the purpose of the calculation of the VRS, the petitioner should consider 26 days and not 30 days.

7. In the year 2013, the respondent no. 5 filed a writ petition praying for higher rate of compensation under the VRS implemented by the Government of India on the Gujarat model, relying on an order of this Court and the subsequent decision of the respondent no. 1 in respect of another company, Viz., Burn Standard Company Limited. There the respondent no. 1 had taken a decision that daily wage for the purpose of calculation of compensation of VRS has been directed to be calculated by multiplying hourly rate by 8. Hourly rate had been considered to have been arrived at by dividing the monthly salary by 208 hours notionally and 48 hours a week in cases of hourly rated employees. The petitioner states that the order dated December 2, 2004 and the decision of the respondent no. 1 had not been challenged by any side and the said order also did not consider the notifications dated November 6, 2001 and February 28, 2002.

8. The writ petition filed by the respondent no. 5 was disposed of with a direction

upon the respondent no. 1 herein to consider the representation of the petitioner and to hold a conciliation proceeding between the parties on the basis of the representation to be made by the petitioner within three weeks from the date. The respondent no. 1 herein was further directed to give a reasonable opportunity of hearing to the parties and to take a decision in the manner as he had discharged in the Burn Standard matter within a period of eight weeks from submitting the representation by the petitioner.

9. Pursuant to the said order, the respondent no. 2 forwarded a notice of the respondent no. 1 to the petitioner as well as the respondent no. 5 herein for holding a conciliation meeting. The petitioner appeared before the respondent no. 1. Over and above making verbal submissions it also submitted a written submission. It was specifically submitted that no representation has been made by the concerned Union and its representative in terms of the order of this Court. The submissions made by the petitioner before the respondent no. 1 have been mentioned in the writ petition in details. However, for the present purpose, it is not necessary to consider the same. Pursuant to another notice, the representative of the petitioner attended another conciliation meeting on March 25, 2015 and submitted the second written submission to the respondent no. 1. It has been the contention of the petitioner that the case of Burn Standard has no application to the facts of this case and the petitioner was not a party to the same. That apart, the notifications issued by the DPE, as referred to above, have not been taken into consideration by the respondent no. 1.

10. By an order dated April 9, 2015, the respondent no. 1 had held that the hourly paid workmen were paid on the basis of wages per day for working for eight hours. The compensation under the VRS is in terms of 35 days of wages for each completed year of service and 25 days of wages for remaining period of service upto the date of retirement, subject to the condition that the minimum amount of compensation would be Rs. 25,000/- or wages for 250 days whichever would be higher. It was also held by the respondent no. 1 that the question of dividing monthly salary by 30 comes in case of the monthly rated employees only whereas the employees or workmen of the company whose names appear in the schedule to the writ petition are paid on the basis of wages per day for working eight hours a day, 208 hours notionally a month and 48 hours a week. The said employees or workmen were treated as hourly rated employees or workmen. If the daily wage was to be calculated the hourly rate of wages was to be multiplied by eight only. The VRS compensation amount is to be arrived at by multiplying the daily wages based on the principle mentioned earlier by the number of days' wages entitled for compensation under the Scheme.

11. The petitioner has assailed the said order on various grounds. The High Court in its judgment and order dated February 26, 2014 had clearly observed that dispute before it was in the nature of an industrial dispute which could only be adjudicated by the forum created by Industrial Disputes Act. Therefore, the respondent no. 1 was directed to consider the representation of the respondent

no. 5 by holding a conciliation proceeding between the parties. However, the respondent no. 1 failed to appreciate that as per the order of this Court he was to act as a Conciliation Officer as envisaged in the Industrial Disputes Act, 1947, (the Act, for short), and to hold a conciliation between the parties. But the respondent no. 1 acted in violation of the Act and went beyond the jurisdiction by passing the order. Therefore, the order is a nullity and inexecutable.

12. The respondent no. 5 Union has contested the writ petition by filing an affidavit-in-opposition. According to the Union, the respondent no. 1 employed two categories of employees, viz., monthly paid workers or employees and those employees or workmen who were paid 26 days of notional salary or wages in a month. The wage of the hourly rated workmen should be based on hourly basis multiplied by eight hours a day instead of dividing the monthly earning by 30 days. The respondent no. 1 has given the same recommendation on mathematical basis. The order passed by this Court on February 26, 2014 directed him to consider the representation of the respondent no. 5 and to take a decision in the matter. The representative of the petitioner company attended before the respondent no. 1 and now any complaint with regard to the functioning and passing of the order was unsustainable. The respondent no. 1 acted in compliance with the order passed by this Court.

13. It has been further contended by the respondent no. 5 that VRS is never considered to be for the benefit of the working class and, therefore, any Scheme for compensation is never adequate to the suffering of its people who would be out of employment. For the workmen or employees who are paid salary after working for 26 days in a month one day's salary is to be worked out to do justice to them and unless such a calculation is made the scheme cannot be given effect to. That is why the High Court had felt that to set the debate at rest wages for a day should be worked out to do justice to the workmen. Such a procedure was adopted in the case of Burn Standard Company Limited in W.P. No. 14331 (W) of 2005.

14. The benefit of the employees and the workmen who are drawing their respective salary on the basis of 26 days of work in a month is to be calculated @ 26 days which is the right method of the calculation. The departure from this was made by the petitioner just to deprive the workmen from their legitimate claims. The workmen or employees working for 26 days cannot be treated at par with the employees getting their monthly salaries and any approach contrary to this is banned and amounts to unfair labour practise. The basis of calculation as mentioned in the office order dated November 19, 2001 is entirely wrong and would bring about financial loss to the workmen.

15. The respondent no. 5 Union has denied that an employee or a workman who had surrendered their right have no right to ask the employer to rectify the mistake to mitigate their suffering. Every wrong is to be corrected and no workman was imposing any terms. It is the mistake or the wrong or the error in calculation that has been pointed out by the workmen and such a mistake should

be corrected. Any allegation or suggestion to the contrary was denied. The workmen being entitled to their rights required the petitioner to be true and genuine with the issue and also requested the petitioner not to shut their eyes towards the reality with the hope that justice would be done. The Union has argued in favour of the order impugned as having been passed after taking due care of the entirety of the financial situation. The respondent no. 1 had taken note of the reality of the situation in considering the entitlement under the VRS. Respondent no. 5 prayed for dismissal of the writ petition.

16. The main challenge of Mr. Ghosh, the learned Advocate appearing for the petitioner, is to the jurisdiction of the Conciliation Officer under the Industrial Disputes Act as the respondent no. 1 by virtue of the order passed by this Court on February 26, 2014 was to act as a Conciliation Officer. His duty is to hold conciliation between the parties involved in the industrial dispute under the Act. The writ petition filed by the present respondent no. 5 was disposed of by an order directing the respondents to consider the representation of the petitioner who shall hold a conciliation proceeding between the parties on the basis of the representation to be made by the petitioner within three weeks from the date of the order. The respondent no. 1 was further directed to give a reasonable opportunity of hearing to the parties and to take a decision in the matter as he had discharged in the case of Burn Standard matter preferably within a period of eight weeks from the date of submission of the representation by the respondent no. 5 herein.

17. Thus, the responsibility of the respondent no. 1 herein was essentially to hold a conciliation proceeding. This will also be clear from the very first sentence of the said order that the dispute canvassed in that writ petition involved disputed question of fact and in any event was in the nature of an industrial dispute which can only be considered and adjudicated by the forum created under the said Act.

18. Before appreciating the exact scope of the nature and function to be discharged by a Conciliation Officer it is necessary to keep in mind what the Industrial Disputes Act says about his duties. Section 12 of the Act lays down:

"Section 12. Duties of Conciliation Officers-

1) Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice under section 22 has been given, shall, hold conciliation proceedings in the prescribed manner.

2) The conciliation officer shall, for the purpose of bringing about a settlement of the dispute without delay investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to fair and amicable settlement of the dispute.

3) If a settlement of the dispute or of any of the matters in dispute is arrived at

in the course of the conciliation proceedings the conciliation officer shall send a report thereof to the appropriate Government or an officer authorised in this behalf by the appropriate Government together with a memorandum of the settlement signed by the parties to the dispute.

4) If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances, relating to the dispute and for bringing about a settlement thereof, together with a full settlement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.

5) If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor.

6) A report under this section shall be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government. Provided that, subject to the approval of the conciliation officer, the time for the submission of the report may be extended by such period as may be agreed upon in writing by all the parties to the dispute.

19. A bare reading of Section 12 of the Act unmistakably goes to show that the duty of a Conciliation Officer is to hold conciliation proceedings in the prescribed manner. For the purpose of bringing about a settlement of the dispute he is to investigate the dispute and all matters affecting the merits and do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. In case a settlement of a dispute is arrived at, the Conciliation Officer is required to send a report to the appropriate Government together with a memorandum of the settlement signed by the parties and if no settlement is arrived at, he shall as soon as practicable after the close of the investigation send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement of it. Section 12 further says that in case on a consideration of the report of the Conciliation Officer the Government is satisfied that there is a case for reference to a Labour Court or Industrial Tribunal it may make such reference.

20. But in the present case the respondent no. 1 had given a decision on the representation filed by the respondent no. 5 Union. The nature of responsibility to be discharged by the respondent no. 1 was specifically laid down in the order of the High Court itself. That must have escaped the notice of the respondent no. 1. Narrating the operative portion of the High Court's order, the respondent no.

1 merely recorded that the High Court had directed him to give a reasonable opportunity of hearing to the parties and to take a decision in the matter as he had discharged in the Burn Standard matter. But the respondent no. 1 was also directed to consider the representation of the petitioner and holding a conciliation proceeding between the parties also formed part of the operative portion of the order.

21. Since the respondent no. 1 was to act as a Conciliation Officer he could not transgress beyond the limits set out by the Act itself. As a Conciliation Officer he could not adjudicate the issues before him. In case the parties fail to arrive at any settlement he has only one option and that is to report the matter to the appropriate Government for the latter to take a decision whether to refer or not to refer the dispute as an industrial one before the appropriate Industrial Tribunal or Court.

22. The duty of the Conciliation Officer has been specifically provided in Section 12 (2) of the Act, i.e., to investigate the dispute without the delay and to do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. Thus arriving at a settlement is all that he is required to do. It is not the duty of a Conciliation Officer to take a decision in respect of the dispute in conciliation or relating to any other matter, nor can he give any direction to any of the parties. He is only required to submit a full report including the role he has played and the reasons for his failure as has been held in *Madhavan Kutti v. Union of India*, reported in 1982 II L.L.J. 212. In that case the Conciliation Officer exceeded his powers and acted beyond his jurisdiction by passing the order he did. Having failed to bring out or to arrive at a settlement of the dispute it was the duty of the Conciliation Officer to send a full report to the appropriate Government as mandatorily enjoined under Section 12 (4) of the Act mentioning therein what he has to state under that provision of law. Thereafter, it is for the appropriate Government to consider whether it should make the reference or refuse to make a reference. By disposing of the conciliation proceeding by passing the order the Conciliation Officer had not only failed to perform the statutory functions vested in him under Section 12 (4) of the Act but has also exceeded his powers under Section 12 (1) of the Act.

23. The contention of the respondent no. 5 does not hold a moment's scrutiny. The affidavit-in-opposition used by the Union as well as their submissions are attempts to justify the decision taken by the respondent no. 1. The respondent no. 5 has also, maybe inadvertently, glossed over that the High Court had directed the respondent no. 1 to hold conciliation proceeding. The Union has also proceeded on the basis that the respondent no. 1 had the power to do what he did and then to elaborate why he did what he did. The exercise is entirely uncalled for and not a relevant one for the adjudication of the present dispute. This is hardly any answer to the issue raised by the petitioner. If the respondent no. 1 had no authority to give a decision on the issue before him which he had mistakenly arrogated to himself, the validity of the decision is rendered

immaterial. The order passed by the respondent no. 1 suffers from the lack of jurisdiction and cannot be validated in the name of correction of earlier mistakes.

24. While acting as a Conciliation Officer pursuant to the order passed by this Court the respondent no. 1 could never give a decision on any point. On the contrary, what is found from the order impugned is that he proceeded from a wrong conception of his power right from the beginning. In Paragraph 4, he had mentioned the point to be "decided" by him. Then he proceeded to record the submissions of both the parties and gave a decision on the same. It is true that this Court had directed the respondent no. 1 to take a decision in the matter, but it had to be read in the context of the duties he had to perform as specifically mentioned in the preceding paragraph. Reference to the Burn Standard matter was relatable to taking a decision which in turn was primarily governed by his duties to hold a conciliation proceeding.

25. All that he could do is to hold that the parties have not been able to arrive at a settlement despite his best efforts and to send a full report to the appropriate Government in terms of Section 12 (4) of the Act. A decision by him was clearly not contemplated while acting as a Conciliation Officer. The High Court made the scope of his works is very clear that he was to hold a conciliation proceeding between the parties and once he assumes jurisdiction for holding the conciliation proceeding he has to conform to the parameters setting forth the limitations on his power as provided in Section 12 of the Act.

26. The respondent no. 1 was undoubtedly discharging a public duty. It is trite to remind ourselves that while a private individual can do anything unless prohibited by law a public official or a statutory authority can only do such things which he is permitted to do.

27. Thus, I find sufficient merits in the writ petition and the contention made by the petitioner.

28. The writ petition is allowed.

29. The order impugned in the writ petition is set aside and quashed. The matter is sent back to the respondent no. 1 who is to act strictly in terms of the order of this Court dated February 26, 2014 within a period of eight weeks from the date of communication of the order.

30. There shall be no order as to costs.

31. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.