
(1999) 03 CAL CK 0012

In the Calcutta High Court

Case No : M.A.T. No's. 3432 and C.A.N. No. 8129 of 1998

Indian Iron and Steel Co. Ltd.

APPELLANT

Vs

Tarak Nath Sen Gupta and Others

RESPONDENT

Date of Decision : 19-03-1999

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : (1999) 2 LLJ 291

Hon'ble Judges : Satyabrata Sinha, J;Debi Prasad Sircar-I, J

Bench : Division Bench

Advocate : P.K. Roy, for the Appellant;Debjani Sengupta, for the Respondent

Final Decision : Allowed

Judgement

Satyabrata Sinha, J.—This appeal is directed against a judgment and order dated September 4, 1998 passed by a learned single Judge of this Court whereby and whereunder the writ application filed by the petitioner was allowed.

2. The fact of the matter shortly stated is as follows:

The first respondent was discharged from services by the appellant with effect from January 24, 1971 on the ground that he was absent for more than 14 consecutive days. He raised an industrial dispute which was referred to the Industrial Tribunal by the appropriate Government for adjudication on the following; -

1. Whether the termination of service of Shri Tarak Nath Sengupta, Junior Assistant, Est. No. 309 was justified?

2. What relief, if any is he entitled to?

3. By an award dated December 21, 1993 the learned Tribunal answered the reference in favour of the management and against the 1st respondent. The 1st respondent filed a writ application before this Court which was marked as C.R. No. 5070(W) of 1984. sUSANTA CHATTERJEE. J. by an order dated August 8,

1990 allowed the said writ application, inter alia, commanding the appellant herein to reinstate the 1st respondent within six weeks from the date of communication of the order and further directed that he would be entitled to the benefits of the continuity of service but would not get any back wages from 1971 till date of his joining. It was, however, made clear that the 1st respondent would be entitled to get retirement and other benefits as if he is in continuous service. The said order was passed ex parte. An application for recalling was filed but the same had been dismissed by the learned Judge by an order dated December 15, 1993. A further direction was issued that the 1st respondent would be permitted to join and he would be entitled to all back wages in terms of the earlier judgment i.e. from August 8, 1990.

4. The parties thereafter entered into an agreement on March 11, 1994, the terms and conditions whereof are:-

"1. Shri Taraknath Sengupta will be reinstated as Assistant in his parent department as per direction of the Hon"ble High Court. On joining service, he will be placed in the grade of Rs. 1560-80-1980-65-2500 (B-2) on a basic salary of Rs. 1980/- p.m. He will be given continuity of service only for the purpose of computation of gratuity and allotment of quarters.

2. The total of back wages to be paid to Sri Sengupta from August 8, 1990 has been calculated in accordance with the direction of the Hon"ble High Court to the fullest satisfaction of both the parties. The aforesaid amount comes to Rs. 1,03,500.00 (Rupees One Lakh three thousand five hundred only). It was further agreed by both the parties that the said amount will be paid to Sri Sengupta in three equal monthly instalments after signing this agreement.

3. The above placement in the grade, designation, fitment of salary and calculation of back wages were done to the satisfaction of both the parties considering all aspects of any amount payable to Shri Sengupta in pursuance of the decision of the Hon"ble High Court and settle the dispute fully and finally. It was agreed that neither of the parties will raise any dispute before any Court of Law about the mode of calculation nor payment schedule nor any other benefit in each of kind whatsoever in future".

5. The 1st respondent filed a writ application on May 7, 1996 questioning the said agreement, inter alia, stating:-

"Your petitioner states that during this period his daughter became seriously ill and her treatment was going on. While treatment it was revealed that she has been attacked by acute tuberculosis and both her lungs were seriously affected and her life was at stake. The petitioner being thrown out of his employment since 1971 was financially handicapped and therefore approached the respondent authorities for his reinstatement in the service prevalent to the directions of this Hon"ble Court. Your petitioner also informed the respondent authorities about the severe disease of his daughter and requested the Managing Director to allow him to join and to get the facilities of medical treatment from Company"s

Hospital."

6. According to the petitioner 1st respondent, he had to enter into the said agreement because of the aforementioned circumstances. The appellants, however, in their affidavit-in- opposition denied and disputed the said allegation. In that regard a complaint was allegedly made by the petitioner 1st respondent in terms of his letter dated March 7, 1994. It had been pointed out that except the purported letter dated March 7, 1994 whereby the 1st respondent allegedly raised a grievance, all other letters had been received by them and dealt with. The said letter dated March 7, 1994 allegedly was sent under Certificate of Posting. It has been contended that petitioner 1st respondent was not entitled to be promoted to the executive cadre as a matter of right. It has also been disputed that the 1st respondent had entered into the said agreement under undue influence, coercion or under force or compulsion. According to the appellant, the judgment of this Court merged with the agreement. The learned trial Judge, inter alia held that the said agreement is not a settlement within the meaning of Section 2(b) of the Industrial Disputes Act.

7. The learned trial Judge, however, proceeded to interpret the judgment of SUSANTA CHATTERJEE, J. in the light of the decision of the Apex Court in Anand G. Joshi v. Maharashtra Financial Corporation reported in 1995 Su (1) SCC 186 and held that the petitioner was entitled to all the benefits excluding the back wages from 1971 to August 7, 1990. In the aforementioned situation it was directed:-

"In the result, the writ application is disposed of with a direction upon the respondent to implement the Orders of Justice SUSANTA CHATTERJEE dated August 8, 1990 and January 15, 1993 in C.R. No. 1570 (W) of 1984 within a period of two months from the date of communication of this order by granting the petitioner fitment in the correct pay scale as if the petitioner continued in service and to pay all monetary benefits on and from August 8, 1990 excluding the back wages for the period to which the petitioner is not entitled to the monetary benefits i.e. 1971 to August 7, 1990 and the sum of Rs. 1,03,500/- already paid shall be deducted from the amounts if any, payable to the petitioner.

The respondent shall communicate their decision by a reasoned speaking order to the petitioner as to how the order of High Court in C.C. No. 1570(W) 1984 passed by the Hon"ble Justice SUSANTA CHATTERJEE dated January 15, 1993 read with the order dated December 15, 1993 is implemented and the scale to which the petitioner is entitled to and the grade to which the petitioner has to be fitted in as also the detailed working of the amount arrived at and payable to the petitioner, within the aforesaid period of two months and without in any manner being influenced by the Memorandum, of Settlement dated March 11, 1994 (Annexure D)".

8. Mr. P.K. Roy, the learned Counsel appearing on behalf of the appellants, inter alia, submitted that the writ petition was not maintainable. It was further

submitted that the question as to whether an agreement had been entered into under coercion or compulsion is essentially a question of fact and such a question cannot be gone into in a proceeding under Article 226 of the Constitution of India.

9. Ms. Debjani Sengupta, the learned Counsel appearing on behalf of the respondents, on the other hand, submitted that an agreement entered into by the parties in violation of the order of the Court is a nullity. Reliance in this connection has been placed on a decision reported in (1989-1990) 94 CWN 338. The learned Counsel submits that keeping in view the bargaining power of the parties the agreement must be held to be hit by Section 223 of the Indian Contract Act as explained by the Apex Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another,

10. The 1st respondent in his writ application, inter alia, prayed for issuance of a writ of mandamus for quashing the said agreement dated March 11, 1994 or alternatively a declaration that the same is a nullity.

11. The said agreement as has rightly been held by the learned trial Judge is not a settlement within the meaning of Section 2(b) of the Industrial Disputes Act. It is, however, a bipartite agreement. There is no law which puts an embargo upon the parties to the list to enter into an agreement for the purpose of settlement of their disputes once for all and in such process it is permissible for a winning party to give up a part of the benefit received by him under a judgment. Hon"ble Mr. Justice SUSANTA CHATTERJEE'S order in the earlier writ application was ex parte. An application for recalling of the said order was filed but by a judgment dated December 15, 1993 the said application was dismissed holding that the respondent could have preferred an appeal against the said order in view of the fact that the same had been disposed of on merit. The said order was an appealable one. If instead of preferring an appeal, the appellant company had chosen to negotiate with the petitioner and the parties had entered into an agreement the same per se cannot be said to be illegal. The 1st respondent as noticed hereinbefore has questioned the said order only on the ground that he had entered into the said agreement under compulsion.

12. The allegations made in the writ application have been denied and disputed by the appellants herein. The contract which may be voidable in nature can be declared void only by a competent Court of law particularly when it involves determination of serious disputed question of fact. Furthermore the question as to whether the said purported agreement was illegal or not could have been determined by an Industrial Court in terms of the provision of the Industrial Disputes Act as the same would come within the purview of the Industrial Disputes Act as contained in Section 2(k) of the Industrial Disputes Act.

13. It is now a well settled principle of law that normally a writ Court does not entertain a writ application which falls within the exclusive domain of the Industrial Courts.

14. In Thakur Majhi v. The Chairman-cum-Managing Director, Eastern Coalfields

Ltd. reported in 1995 (2) CLJ 127, it has been held:-

"Moreover, the Industrial Disputes Act, 1947, is a self-contained Code. The rights of a workman arise under the said Act. The said Act also provides forums for adjudicating upon the disputes, inter alia, in relation to dismissal, discharge or removal from service. In view of several decisions of the Supreme Court of India, it is now well known that even if an order of dismissal passed by the employer is found to be illegal/invalid, having been passed in violation of the provisions of the Certified Standing Orders, or without complying with the principles of natural justice, or by an authority having no jurisdiction in such matters, a preliminary issue can be raised at the instance of the employer and a prayer can also be made by him to the effect that he may be permitted to adduce evidence in support of the charges levelled against the workman. This Court in exercise of its jurisdiction under Article 226 of the Constitution of India cannot give such an opportunity to the employer. Moreover, it is well known that this Court cannot convert itself into an Industrial Court. Reference in this connection may be made to the decision in the case of Basant Kumar Sarkar and Others Vs. Eagle Rolling Mills Ltd. and Others, and a recent decision in the case of Mohini v. G.M., Syndicate Bank reported in 1994 69 FLR 1061".

15. Reference in this connection may be also made to Tapas Mondal and Others Vs. Eastern Coalfields Ltd.,

16. Although the decisions on this point are legion, in view of the recent decision of the Division Bench of this Court as also the decision of the Apex Court in this behalf it is not necessary to notice the same.

17. In General Manager, Mugma Area v. Eastern Coalfields Ltd, reported in 1998 (2) CLJ 109, a Division Bench of this Court has held that in a case of dismissal of services of a workman the dispute should be adjudicated upon in a reference made under the Industrial Disputes Act and not by way of a writ application.

18. Yet recently in Scooters India and Others Vs. Vijai E.V. Eldred, in a case where the services of a workman was dismissed on the ground that he had remained absent for a long time, a writ petition was held not to be maintainable stating:-

"The above facts alone are sufficient to indicate that there was no occasion for the High Court to entertain the writ petition directly for adjudication of an industrial dispute involving the termination of disputed questions of fact for which remedy under the industrial laws was available to the workman".

19. We are not in apposition to hold that the said agreement is opposed to public policy and, thus, ultra vires Article 14 of the Constitution of India as also Section 23 of the Contract Act. It may be true as has been submitted by Ms. Sengupta, a bipartite agreement may also be opposed to public policy but the fact situation in the present case does not suggest the same. In that view of the matter the decision of the Apex Court in Brojonath's (sic) case has no application in the

instant case. Furthermore the 1st respondent in his writ application has not raised any plea that the said agreement is opposed to public policy.

20. It is now well settled that a person aware of his legal right can waive the same.

"FRANCIS BENNION in the STATUTORY INTERPRETATION (1984 Edition) has said:-

"A person entitled to the performance of a statutory duty, where the case is within the principle *quilibet protest renuntiare jurt pro se indestructo* (a person may renounce a right introduced for his benefit), can effectively waive performance of the duty by the person bound; and that person can effectively contract out of performing the duty."

In the case of *Shri Lachoo Mal Vs. Shri Radhey Shyam*, it was pointed out:-

The General principle is that every one has a right to waive and to agree to wave the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanctions the non-observance of the statutory provision is *quilibet protest renuntiare jurt pro se intoruducto*. (See MAXWELL on INTERPRETATION OF STATUE, Eleventh Edition, pages 375 and 376). If there is any express prohibition against contracting out of statute in it then no question can arise of anyone entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy. In *HALSBURvs LAWS OF ENGLAND*, Volume 248 at page 1143:-

As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement and, in certain circumstances, the Legislature has expressly provided that any such agreement shall be void.

In the case of *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, it has been said:-

Waiver is a troublesome term in the law. The generally accepted connotation is that to constitute "waiver" there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege.

It has been said in the *HALSBURY'S LAWS OF ENGLAND* (Fourth Edition), Vol. 9 Paragraph 574:-

Waiver may be express or implied from conduct, but in either case it must

amount to an ambiguous representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances. Furthermore, it seems that for a waiver to operate effectively the party to whom the concession is granted must act in reliance of the concession.

In *Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import*, it has been held at pages 2092-2093 of AIR:-

"In the facts of a given case acceptance of a suggestion may be sub silentio reinforced by the subsequent conduct. True it is that the general rule is that an offer is not accepted by mere silence on the part of the offeree. There may, however, be further facts which taken together with the offeree's silence constitute an acceptance. One such case is where a part of the offer was disputed at the negotiation stage and the original offeree communicated that fact to the offerer showing that he understood the offer in a particular sense. This communication probably will amount to a counter offer in which case it may be that mere silence of the original offerer will constitute his acceptance (See *HALSBURY'S LAWS OF ENGLAND*, 4th Edn. Vol.9, para 251). Where there is a mistake as to terms of a document as in this case, amendment to the draft was suggested and a counter offer was made, the signatory to the original contract is not estopped by his signature from denying that he intended to make an offer in the terms set out in the document, to wit, the letter and the cable (*ibid*, para 295). It can, therefore, be stated that where the contract is in a number of parts it is essential to the validity of the contract that the contracting party should either have assented to or taken to have assented to the same thing in the same sense or as it is sometimes put, there should be consensus ad idem. And from this it follows that a party may be taken to have assented if he has so conducted himself as to be estopped from denying that he has so assented (*ibid*, para 288). Even apart from this, it would still be open to the party contending novatio to prove that he had not accepted a part of the original agreement though it has signed the agreement containing that part. It would in this connection be advantageous to refer to *R.V. FUTHAM, HAMMERMITH AND KENSINGTON RENT TRIBUNAL*; ex parte Serek (1951) 1 All Er 482 wherein an oral agreement was entered into between the landlord and a tenant for lease of unfurnished premises at a weekly rent of 35. The landlord subsequently refused to grant the tenant possession unless he agreed to hire his furniture to the landlord for one year at a rental of ?12 and to execute a document certifying, inter alia, that the letting was a furnished letting at a rent of 35 a week. The tenant signed the document and entered into possession. Later the tenant applied to a rent tribunal to fix a reasonable rent for the premises as an unfurnished dwelling house under the Landlord and Tenant (Rent Control) Act, 1949. The tribunal accepted the tenant's evidence that the premises were originally let unfurnished and came to the conclusion that the document signed by the tenant did not constitute a valid agreement and did not modify or replace the earlier oral agreement and that the premises were not bona fide let furnished. The tribunal reduced the rent to 15s.

a week. On an application by the landlord for an order of certiorari, motion for certiorari was refused and in so doing the subsequent written agreement was ignored and the previous oral agreement was accepted as genuine and binding. It would, therefore, be inappropriate to say that because the appellant has signed the subcontract, every part of it is accepted by him even though there is convincing evidence pointing to the contrary. It was however, said that a subsequent negotiation or a repudiation of part of the contract cannot in any manner affect the concluded agreement. Reliance was placed on *Davies v. Sweet* 1962 2 WLR 525, the pertinent observation at page 529 being as under:-

If there was originally a concluded bargain between the parties, this Court only be got rid of by either (a) a mutual agreement to call of the sale, or (b) an agreement for a variation of the terms of the original contract. The mere fact that there have been negotiations which prove to be abortive and do not result in an enforceable agreement does not destroy the original contract: See (*Perry v. Suffieals Ltd.*, (1916) 2 Ch D 187 (CA))"

21. This aspect of the matter has also recently been considered by a Division Bench of this Court in *Ramkrishna Samabay Krishi Unnayan Samiti Ltd. v. Egra Thana Co-operative Agricultural Marketing Society Ltd*, reported in 1999 (1) CLJ 92.

22. Whether the first respondent herein has legally waived his right in the fact situation of the case requires determination by an appropriate forum. It is thus, not a case where an order has been passed by an authority in gross violation of the order passed by a Court. Reference in this connection may be made to *Srimanta Kumar Mondal and Others Vs. The State of West Bengal and Others*,

23. At the cost of repetition we may observe that the allegations made in the writ application give rise to a question of fact which can be adjudicated upon only on the basis of the materials brought on records before a competent Court of law upon adduction of oral evidences. Such a disputed question cannot be adjudicated upon in a writ application.

24. For the reason aforementioned this appeal is allowed. The impugned judgment and order is set aside with liberty to the writ petitioners-respondents to avail alternative remedy. In the facts and circumstances of this case, there will be no order as to costs.

U.P. Sircar-I, J.

25. I agree.