

(2012) 09 DEL CK 0420
In the Delhi High Court
Case No : Writ Petition (C) 5015 of 1999

Indian Medical Assoc

APPELLANT

Vs

P.O. Labour Court-I and Another

RESPONDENT

Date of Decision : 14-09-2012

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 11, 17, 17A, 17B

Citation : (2013) 1 ILR Delhi 272

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Rajeshwar K. Gupta, Ms. Sumati and Ms. Meenakshi, for the Appellant; S.P. Singh Chaudhari, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Hon"ble Ms. Justice Mukta Gupta

1. By the present petition the Petitioner seeks setting aside of the award dated 17th December, 1998 passed by the learned Presiding Officer, Labour Court-I, Tis Hazari Courts, Delhi in Case No. ID-044/86 wherein the learned Labour Court directed the Management/Petitioner to grant workman/Respondent No. 2 reinstatement along with 25% back wages. Learned Counsel for the Petitioner contends that the impugned award was passed on 17th December, 1998 after setting aside an ex-parte award dated 5th October, 1995 published on 11th December, 1995 against the workman after the expiry of a period of thirty days of its publication. The award is violative of Sections, 11, 17A and 10 of the Industrial Disputes Act, 1947 (in short the ID Act). Reliance is placed on the judgment of the Hon"ble Supreme Court in the case of Sagham Tape Company vs. Hans Raj, AIR 2004 SC 4776 in support of this contention. The learned Labour Court has committed an error of law by not holding that the Petitioner/Management is not an "Industry" as defined u/s 2 (j) of the Industrial Disputes Act, 1947. The Petitioner is not engaged in any business or activity as defined under the ID Act, rather it is a registered society under the Societies Registration

Act and as such it cannot be held to be an "industry". The learned Trial Court has deprived the Petitioner of its right of defence and cross-examination of witnesses. The Trial Court ought to have allowed a further opportunity to the Petitioner to cross-examine the witnesses and adduce its evidence. It is lastly contended that granting of relief of reinstatement and back wages in the facts and circumstances of the case is wholly unjustified, illegal and untenable in the eyes of law. Granting the relief of reinstatement with back wages is neither invariable rule nor automatic and depends on the facts and circumstances of each case.

2. Per contra Learned Counsel for Respondent No. 2 contends that the Labour Court is competent to set aside its ex-parte award if it is satisfied that the aggrieved party was prevented from appearing by sufficient cause. Reliance is placed on *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*, . The Petitioner is earning money in various ways from its allied activities. It is letting out halls/premises and is earning rents etc. Hence, is covered under definition of "industry" u/s 2 (j) of the ID Act. Learned Counsel contends that despite several opportunities given to the Petitioner and almost two years time spent in litigation before the learned Labour Court, the Petitioner failed to either cross-examine witnesses or to adduce its own evidence. The Petitioner intentionally absented itself before the learned Labour Court hence it was rightly proceeded ex-parte. The proceedings were undertaken as per law and it was the Petitioner who evaded the said proceedings. Hence, at this stage the Petitioner cannot be allowed to take advantage of its own wrong. The Petitioner has failed to point out any illegality in the award and the proceedings. It is lastly submitted that the Petitioner has also not filed any application to set aside the ex-parte award which would have been a proper course in the case where an ex-parte order is passed and hence, at this stage it cannot be allowed to challenge the legality of the impugned award.

3. I have heard Learned Counsel for the parties and perused the record.

4. Briefly the case of the Petitioner is that Respondent No. 2 was initially appointed on ad-hoc basis for three months. However, his services were allowed to continue. On 17th December, 1980 Respondent No. 2 was suspended on account of gross misbehavior with the caretaker however, he was taken back after he tendered an apology in writing and assured that there would be no complaint in future. On 4th January, 1985 again, there was a complaint against the workman/Respondent for his gross misbehavior, misconduct and he was suspended pending report of the enquiry committee. He was asked to handover the keys, tools, equipments, electrical fittings etc. which were in his possession. However, he failed to handover the same. Subsequently on 13th January, 1985 he was served with a memorandum of enquiry asking him to appear before the Inquiry Officer on 11th February, 1985. The Respondent No. 2 appeared before the Inquiry Officer, when he requested for pardon along with an assurance that no such complaint would be heard in future against him. The inquiry officer

examined two witnesses and their statements were recorded. Respondent No. 2 was given full opportunity to explain his case. However, he failed to do so. The inquiry officer found the Respondent No. 2 guilty of misconduct and hence he was dismissed with effect from 28th February, 1985. Thereafter, Respondent No. 2/workman raised an industrial dispute which was referred by the Secretary (Labour), Delhi Administration to Respondent No. 1 in the following term of reference:

Whether the dismissal from service of Sh. Harnam Singh is illegal and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?

5. On receipt of notice from the learned Labour Court the Petitioner filed its reply to the claim of workman and contested the same. However, the workman failed to lead any evidence before the Labour Court hence vide award dated 5th October, 1995 the learned Court proceeded the workman ex-parte and held that since the workman had failed to lead evidence on the issue of enquiry and abstained from proceedings he was not entitled to any relief. The respondent/workman moved an application to set aside this ex-parte award which was allowed by Respondent No. 1, adjourning the matter to 9th December, 1996 for cross-examination of Respondent No. 2 by the Petitioner. The Petitioner could not appear on the next date of hearing hence the Petitioner was proceeded ex-parte. However, this ex-parte order was also later on set aside by the learned labour Court vide its order dated 21st February, 1997. Learned Court vide its order dated 22nd July, 1998 closed the right of the Petitioner to cross-examine or adduce evidence. Finally on 17th December, 1998 the impugned award was passed holding the enquiry to be illegal and improper thus vitiated and granting reinstatement with 25% back wages to the workman.

6. Learned Counsel for the Petitioner has contended that the Petitioner is not an industry. In Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, their Lordships held:

140. "Industry", as defined in Section 2(j) and explained in Banerji, has a wide import.

(a) Where (i) systematic activity, (ii) organized by cooperation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g. making, on a large scale prasada or food), prima facie, there is an "industry" in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking.

141. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.

(a) "Undertaking" must suffer a contextual and associational shrinkage as explained in Banerji and in this judgment; so also, service, calling and the like. This yields the inference that all organized activity possessing the triple elements in I, although not trade or business, may still be "industry" provided the nature of the activity, viz. the employer-employee basis, bears resemblance to what we find in trade or business. This takes into the fold of "industry" undertakings, callings and services, adventures "analogous to the carrying on the trade or business". All features, other than the methodology of carrying on the activity viz. in organizing the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms there is analogy.

142. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range off this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

(a) The consequences are (i) professions, (ii) clubs, (iii) educational institutions, (iv) co-operatives, (v) research institutes, (vi) charitable projects, and (vii) other kindred adventures, if they fulfil the triple tests listed in I, cannot be exempted from the scope of Section 2(j).

(b) A restricted category of professions, clubs, cooperatives and even gurukulas and little research labs, may qualify for exemption if, in simple ventures, substantially and, going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.

(c) If, in a pious or altruistic mission many employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or ashramites working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then, the institution is not an industry even if stray servants, manual or technical, are hired. Such eleemosynary or like undertakings alone are exempt -- not other generosity, compassion, developmental passion or project.

143. The dominant nature test:

(a) Where a complex of activities, some of which qualify for exemption, others

not, involves employees on the total undertaking, some of whom are not "workmen" as in the University of Delhi case [University of Delhi and Another Vs. Ram Nath,] or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur will be the true test. The whole undertaking will be "industry" although those who are not "workmen" by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2.

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby.

7. A perusal of the judgment and the Objects and Memorandum of Association of the Petitioner would show that though profit making is not the main object of the Petitioner, however, certainly it is an incidental object for which purpose the Petitioner has built up number of properties from which rental/license fee are being received. Thus the dominant purpose test as has been contended by the Learned Counsel for the Petitioner would have no application. Their Lordships held that even cooperative societies, research institutions and other kind of establishments cannot be exempted from Section 2(j) of the ID Act if they fulfill the triple test. It may be noted that absence of profit motive or gainful objective is irrelevant. One of the authorized activity of the Petitioner is to purchase properties and maintain them. Thus, the staff which would be employed for the purposes of maintaining the said buildings which earns profit as well cannot be said to be exempted from the ambit of being employed in an industry. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between the employer and the workmen, the range of this statutory ideology must inform the reach of statutory definition and be taken to the logical conclusion without any pre-conceived notions. Even professions, clubs, educational institutions, cooperatives, research institutes, charitable projects etc., if they fulfill the triple test cannot be exempted from the scope of Section 2 (j)(ii) of the ID Act. Only restricted category of professions, clubs, cooperatives and even gurukulas and little research labs may qualify such exemption if, in simple ventures, substantially and, going by the dominant nature criterion, substantively, no employees are entertained. Where there are a number of complex activities and some of which qualify for exemption and the others do not, even then the predominant nature of services and the integrated nature of the departments will have to be looked into. This activity run by the Petitioner is certainly capable of entering into the world of "Res-commercium" as contended

by the Learned Counsel for the Respondent. It may be noted that the Petitioner has framed its staff services rules for employing various staff. One of the objectives of the Association is to promote improvement of public health and medical education in India. Thus in view of the fact that one of the objectives is improvement of public health and medical education and the Petitioner having staff service rules, I find no infirmity in the learned Trial Court coming to the conclusion that the Petitioner is an industry.

8. In *Grindlays Bank Ltd.* (supra) the Hon^{ble} Supreme Court has held:

14. The contention that the Tribunal had become *functus officio* and therefore, had no jurisdiction to set aside the *ex parte* award and that the Central Government alone could set it aside, does not commend to us. Sub-section (3) of Section 20 of the Act provides that the proceedings before the Tribunal would be deemed to continue till the date on which the award becomes enforceable u/s 17A. u/s 17A of the Act, an award becomes enforceable on the expiry of 30 days from the date of its publication u/s 17. The proceedings with, regard to a reference u/s 10 of the Act are, therefore, not deemed to be concluded until the expiry of 30 days from the publication of the award. Till then the Tribunal retains jurisdiction over the dispute referred to it for adjudication and upto that date it has the power to entertain an application in connection with such dispute. That stage is not reached till the award becomes enforceable u/s 17A. In the instant case, the Tribunal made the *ex parte* award on December 9, 1976. That award was published by the Central Government in the Gazette of India dated December 25, 1976. The application for setting aside the *ex parte* award was filed by respondent No. 3, acting on behalf of respondents Nos. 5 to 17 on January 19, 1977 i.e., before the expiry of 30 days of its publication and was, therefore, rightly entertained by the Tribunal. It had jurisdiction to entertain it and decide it on merits. It was, however, urged that on April 12, 1977 the date on which the impugned order was passed, the Tribunal had in any event become *functus officio*. We cannot accede to this argument. The jurisdiction of the Tribunal had to be seen on the date of the application made to it and not the date on which it passed the impugned order. There is no finality attached to an *ex parte* award because it is always subject to its being set aside on sufficient cause being shown. The Tribunal had the power to deal with an application properly made before it for setting aside the *ex parte* award and pass suitable orders.

9. Further, in *Ms Sangham Tape Company* (supra) the Hon^{ble} Supreme Court observed:

8. The said decision is, therefore, an authority for the proposition that while an Industrial Court will have jurisdiction to set aside an *ex parte* award but having regard to the provision contained in Section 17A of the Act, an application therefore must be filed before the expiry of 30 days from the publication thereof. Till then Tribunal retains jurisdiction over the dispute referred to it for adjudication and only upto that date, it has the power to entertain an application

in connection with such dispute.

10. Learned Counsel for the Petitioner placing reliance on the judgment of the Hon"ble Supreme Court in M/s Sangham Tape Company (Supra) has contended that the award dated 5th October, 1995 was published on 11th December, 1995 and even 30 days had expired post its publication. Thus the learned Labour Court had become functus officio and had no power to recall the award dated 5th October, 1995. However, while contending so, the Learned Counsel has failed to notice that the application to set aside the award dated 5th October, 1995 was filed well within the time period of thirty days post its publication. On a perusal of the records it is observed that the award dated 5th October, 1995 was published on 11th December, 1995 vide Gazette Notification No. 39512-14. The application to set aside this award was filed by the Respondent/workman on 9th January, 1996 which is well within the prescribed period of thirty days from its publication. As held in Grindlay Bank Ltd. (Supra) and M/s Sangham Tape Company (supra) the proceedings before the learned Tribunal would be deemed to be continue till the date on which the award becomes enforceable u/s 17A of the ID Act and under this section the award becomes enforceable only on the expiry of a period of thirty days from its publication. It was further held that the proceedings with regard to a reference u/s 10 of the Act are not deemed to be concluded until the expiry of 30 days from the publication of the award and till then, the Tribunal retains jurisdiction over a dispute referred to it for adjudication and upto that date it has power to entertain an application in connection with such dispute. Clearly in the present case the learned Labour Court had not become functus officio on the date when the application to set aside the ex-parte award was filed by the Respondent/workman. Hence, in the light of the judgment aforementioned this contention of the Petitioner/Management too does not find favour with me.

11. It can be further observed from the perusal of the records that the application to set aside the ex-parte award dated 5th October, 1995 was first taken up for hearing by the learned Trial Court on 11th January, 1996 on which date a notice of appearance was issued to the Petitioner/Management. The said application was allowed and the matter was posted for 18th September, 1996 for workman evidence. On 18th September, 1996 the evidence by way of an affidavit was filed by the workman and the matter was posted for 9th December, 1996 for Management evidence and cross-examination of workman. However, on 9th December, 1996 the Management failed to appear and hence, was proceeded ex-parte. This order was finally set aside on 21st February, 1997 and the matter was put up again for cross-examination and Management evidence on 21st July, 1997. Thereafter the matter was again adjourned to 9th October, 1997. On 9th October, 1997, the Management filed an application for adjournment which was allowed with cost. The matter was posted for cross-examination of the workman and Management evidence to 28th January, 1998, on which date again a joint adjournment was sought. On that date matter was adjourned to 1st May, 1998 and again adjourned to 22nd July, 1998 when the Petitioner's right to cross-examine was closed. The Petitioner/Management had been given ample

opportunities to avail of its right to produce its evidence and cross-examine the workman which it has not been vigilant to pursue. Now, it cannot raise the claim that the learned Tribunal has deprived it of its right to defend and ought to have given him one more opportunity. Clearly, such an opportunity cannot be asked for as a matter of right when the conduct of the Management/Petitioner has been found lax and casual. Hence, this contention also fails.

12. As regards the relief of reinstatement with 25% back wages is concerned, the Hon"ble Supreme Court in Jagbir Singh Vs. Haryana State Agriculture Marketing Board and Another, held that on termination being held illegal, the relief of reinstatement and back wages does not follow automatically. The relevant factor i.e. the nature of appointment, period of appointment, availability of post/vacancy etc. should weigh with the court for determination of such an issue. Keeping in view the fact that the Respondent workman was appointed on an adhoc basis, he has served for 8 years with the management, has already reached the age of superannuation and has received last drawn salary u/s 17-B (ID Act) till his superannuation, I am of the view that Respondent no. 2 is entitled to compensation in lieu of reinstatement. It is therefore directed that the workman Respondent be paid compensation of Rs. One lakh within six weeks. The impugned award is modified to the extent aforesaid. In the light of above discussion, the present petition is disposed of.