

(1996) 10 AP CK 0029

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 3519, 10543 and 13657 of 1992

Large-sized Co-operative Credit Society and Another

APPELLANT

Vs

Labour Court and Another

RESPONDENT

Date of Decision : 08-10-1996

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 17B

Citation : (1996) 4 ALT 658 : (1997) 2 LLJ 442

Hon'ble Judges : S. Dasaradharama Reddy, J

Bench : Single Bench

Advocate : P.V. Narayana Rao and P.A.V. Balaprasad, for the Appellant; Govt. Pleader and I. Aga Reddy, for the Respondent

Judgement

1. These three writ petitions are inter-connected and hence are disposed of by common judgment. The parties are referred to in the judgment as they are arrayed in W.P. No. 10543/92, which is the main writ petition. The Large Sized Co-operative Credit Society, Gattududdenapally, Karimnagar District (for short the "Society") obtained an award on April 20, 1982 from the Deputy Registrar of Co-operative Societies against the second respondent who was working as employee in the society in charge of the poultry section of the godown. The award was passed for Rs. 35,388-98 together with interest at 15% per annum from March 29, 1980, on the ground that the 2nd respondent was responsible for the deficit stocks found on March 23, 1980. The same was confirmed by Co-operative Tribunal in C.T.A. 2/82 on July 28, 1992. Earlier, he was removed from service on August 18, 1980 on this charge. Against this, he filed I.D. 513/87 in the Industrial Tribunal, Warangal, which was transferred to the Labour Court, Godavarikhani and re-numbered as I.D. 219/89. Before the Labour Court, the Society was set ex parte On November 28, 1990 as neither the Society nor its counsel Mr. Vidyasagar Reddy appeared on the date of hearing of the I.D. After examining the witnesses on behalf of the employee, the Labour Court passed ex parte award on December 28, 1990 setting aside the order of removal and

directing reinstatement with continuity of service but without backwages. The Society filed I.A. 52/91 along with affidavit of its Secretary to set aside the ex parte order contending that the I.D. was earlier dismissed for default and restored, that is advocate Mr. Vidyasagar Reddy fell ill with jaundice and was not in a position to attend the case on October 24, 1990 from which date it was adjourned to November 28, 1990 and that as the Society was busy with advancing of loans to the members and recovery process, it could not send any of its officers to attend the Tribunal on the dates of hearing. The Labour Court dismissed the petition on the ground that there was no sufficient cause for the absence of the petitioner or its Advocate on November 28, 1990 when it was set ex parte and on December 28, 1990 when the Court passed the ex parte award and that nobody was examined on behalf of the Society and no documents were filed in support of the affidavit. Against this order, the Society has filed Writ Petition along with the affidavit of Mr. Vidyasagar Reddy, Advocate, stating that as he was suffering from Jaundice at Warangal from October 23, 1990 to December 30, 1990, he could not attend the Labour Court at Godavarikhani on October 24, 1990 and on subsequent dates of hearing of which he had no information and that there was no negligence or want of bona fides for non-appearance.

2. Heard the counsel for parties.

3. The Industrial Dispute has undergone number of adjournments. It was earlier dismissed for default, and the application to set aside the dismissal order was itself dismissed for default, though later it was set aside and I.D. was restored. In view of the illness of the Advocate, in support of which the Advocate has filed his affidavit in this Court, I am of the opinion that there is sufficient cause for the absence of the Society on November 28, 1990 and December 28, 1990. Merely because, nobody was examined by the Society in the Labour Court, and no document was filed, the Labour Court is not justified in dismissing the petition to set aside the ex parte award. Hence, the Writ Petition is allowed and the Labour Court is directed to dispose of the I.D. afresh on merits within Three months from the date of Receipt of Copy of this Order, after giving opportunity to both sides.

4. Consequently, the Writ Petition No. 3519/92 filed by the Society against the order of the Labour Court allowing I.D. 219/89 on December 28, 1990 is also technically allowed. As the award itself is set aside, Writ Petition No. 13657/92 filed by the employee claiming backwages and for quashing the award to that extent fails.

5. Now, the question is what is the relief wages to be granted to the employee of during the pendency of the Writ Petition ? In para-13 of the affidavit filed in support of Writ Petition No. 3519 of 1992, the Society has alleged that the employee is gainfully employed from April 21, 1980 (the date of suspension and not date of dismissal as stated in the affidavit) to the day of filing the writ petition viz., March 10, 1992 and that he also carried on business in Swaraj

Tractors in Karimnagar town. This was denied by the employee in his counter filed on August 3, 1992 and reiterated in another counter filed on September 25, 1992 wherein he stated that he is entitled to get monthly wages of Rs. 206.25 u/s 17B of the Industrial Disputes Act (for short the Act). This Court by its order in W.P.M.P. No. 4354 and 15752 of 1992 and W.V.M.P. No. 1148 of 1992 dated November 19, 1992 directed the Society to pay the employee the amount payable in accordance with Section 17B of the Act from the date of filing of the writ petition, within a period of two months and continue to pay the same pending writ petition. It is admitted by both sides that the Society has paid the employee wages upto December, 1992 only. The employee did not take any steps for recovery of wages from January, 1993 onwards. It is only on December 21, 1995, when the Writ Petition has come up for final hearing that the employee filed W.P.M.P. No. 35552/95 bringing to the notice of the Court that the Society has failed to comply with the interim orders of this Court and incidentally claimed that he is entitled to Rs. 2,500/- per month as salary, which is the salary he would have been entitled on the date of reinstatement but for the removal and not Rs. 206.25 as claimed earlier. After the case was part-heard, the employee filed additional affidavit on March 31, 1996 stating that had he been continued in service his salary would have been Rs. 1512.25 as per month and the statement made in the earlier affidavit that he would be entitled to Rs. 2,500/- per month is a mistake. He also stated that he was unemployed from the date of suspension to March 31, 1996, the day of filing the affidavit. He denied the allegation that he was carrying on business in tractors. To this, the Society filed counter stating that he was only a temporary employee and that he did not claim wages from January, 1993 in view of the agreement reached between him and the Society on January 16, 1993. It is also stated in the counter that even the L.D.Cs. who were appointed prior to September 1, 1995 and whose services were confirmed by resolution dated August 30, 1995 were paid total emoluments of Rs. 816.50 only and at the most the petitioner would be entitled to only Rs. 237.18 per month including D.A. at 15 per cent. The Society has also reiterated in para-8 that the employee is doing business in fertilisers, paddy and other agricultural produce and also earning by giving his tractor on hire and working as a driver as on the date of filing of the affidavit i.e., April 7, 1996.

6. In view of the above, the questions that arise for consideration are :

(1) Whether the wages directed to be paid u/s 17B but not paid are recoverable from the management even though the writ is allowed at the time of final hearing and the award is set aside ?

(2) At what rate the wages are payable ?

7. Mr. I. Aga Reddy, learned counsel for the employee contends that payment of wages u/s 17B is in the nature of subsistence allowance paid to a suspended employee and must be made irrespective of the result of the case and that the management cannot avoid the liability to pay the amount directed to be paid by this Court, but not paid, on the ground that the writ is allowed.

8. Section 17B of the Act reads as follows :

"Payment of full wages to workman pending proceeding in Higher Courts :

Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any Rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court :

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman has been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this Section for such period or part, as the case may be"

The objects and reasons for enacting the Section which was introduced by Act 46/82 but came into force from August 21, 1984 are as follows :

"When Labour Courts pass award of reinstatement, these are often contested by an employer in the Supreme Court and High Courts. It was felt that the delay in the implementation of the award causes hardship to the workman concerned. It was therefore, proposed to provide payment of wages last drawn by the workman concerned, under certain conditions, from the date of the award till the case is finally decided in the Supreme Court or High Court."

9. Mr. Aga Reddy relies on a decision of Bombay High Court in *Elpro International Ltd. Vs. K.B. Joshi and others*, where upholding the validity of Section 17B, the Court observed as follows at pp. 214-215 :

"It is no doubt true that no provision is made as to what will happen to the amount paid u/s 17B, if ultimately the employer succeeds in the litigation. In our view absence of such a provision will not make the Section either vague or arbitrary. In this context a reference could usefully be made to Section 10A of the Industrial Employment (Standing Orders) Act, 1946 which reads as under :

"10-A. Payment of subsistence allowance :

(1) Where any workman is suspended by the employer pending investigation or enquiry into complaints or charges of misconduct against him, the employer shall pay to such workman subsistence allowance -

(a) at the rate of fifty percent of the wages which the workman was entitled to immediately preceding the date of such suspension, for the first ninety days of suspension and

(b) at the rate of seventy-five per cent of such wages for remaining period of

suspension if the delay in the completion of disciplinary proceedings against such workman is not directly attributable to the conduct of such workman.

(2) If any dispute arises regarding the subsistence allowance payable to a workman under sub-section (1) the workman or the employer concerned may refer the dispute to the Labour Court, constituted under the Industrial Disputes Act, 1947 (14 of 1947), within the local limits of whose jurisdiction the industrial establishment wherein such workman is employed is situated and the Labour Court to which the dispute is so referred, shall after giving the parties an opportunity of being heard, decide the dispute and such decision shall be final and binding on the parties

(3) Notwithstanding anything contained in the foregoing provisions of this Section where provisions relating to payment of subsistence allowance under any other law for the time being in force in any State are more beneficial than (sic. than) the provisions of this Section, the provisions of such other law shall be applicable to the payment of subsistence allowance in that State."

The amount paid towards subsistence allowance is neither refundable nor recoverable irrespective of the result of the enquiry. The reason is obvious. The allowance contemplated to be paid under the said Section is nothing but a subsistence allowance. Similarly what is to be paid u/s 17B is also in the nature of subsistence allowance. The expression "inclusive of any maintenance allowance admissible to him under any rule" is indicative of legislative intent. The wages payable during the pendency of the proceedings in the High Courts or Supreme Court are at the rate of the wages last drawn by him. The proviso further lays down that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part so thereof, the Court shall order that no wages shall be payable under this Section for such period or part thereof as the case may be. The payment of wages will be obviously on month to month basis of the practice followed by the concerned industry or factory and therefore, on that ground, it cannot be said or on the basis that the provision is in any way vague or arbitrary and, therefore, in our view the challenge based on that count also must fall.

So far as the challenge of Section 17B of the Act based on the ground that it either interferes or encroaches upon the Constitutional powers of the High Courts or the Supreme Court is concerned, from the bare reading of this Section, it is clear that it does not even remotely refer to the powers of the Courts under Articles 136 or 226, much less of restricting the said powers. This Section only guarantees to the workman the payment of wages by the employer during the pendency of the proceedings before the High Court or the Supreme Court, and that too subject to the conditions laid down by the said Section and the proviso, irrespective of the result of the proceedings. It also imposes an obligation upon the workman concerned to file an affidavit before the Court stating that he has not been employed in any establishment during the pendency of the proceedings.

It also absolves the employer of his obligation to pay such wages, if he is able to prove to the satisfaction of the Court that the workman had been otherwise employed and had been receiving adequate remuneration. As already observed Section 17B operates within a limited sphere. Its operation is subject to conditions laid down by the Section itself. Section nowhere lays down that in extreme cases where it is demonstrated that the award passed is either without jurisdiction or is otherwise a nullity or grossly erroneous or perverse, the High Court or the Supreme Court is debarred from exercising its power under Article 226 and 136 of the Constitution. Therefore it is not possible for us to accept the contention that Section 17B is void as it encroaches upon or overrides the powers of the High Court or the Supreme Court of India under Articles 226 and 136 of the Constitution of India. The powers of the High Courts or the Supreme Court under Articles 226 and 136 of the Constitution are paramount and Section 17B does not interfere nor restrict the said Constitutional powers.

10. I respectfully agree with the view of the Bombay High Court that Section 17B relief is like subsistence allowance payable to a suspended employee. But as observed by the Bombay High Court, in extreme cases where it is demonstrated that the award passed is perverse or is otherwise a nullity or grossly erroneous or without jurisdiction, the High Court is not barred from exercising its powers under Article 226 of the Constitution and denying the relief. Normally, when the writ is disposed of, all interlocutory orders merge in the final order. But Section 17B relief is an exception. When once the High Court directs payment of wages u/s 17B while suspending the operation of the award and the wages are paid to the employee, the management cannot recover them when the writ petition is allowed and the award is set aside even on the ground that it is either erroneous, perverse, without jurisdiction or nullity. But when wages directed to be paid are not paid, the remedy of the employee is to move the Court for vacation of the suspension order granted by the Court and for reinstatement as per order of the Labour Court. If the employee fails to adopt such course, he cannot seek direction to the management to pay the arrears at the time of final hearing of writ petition when the writ is being allowed. However, if the writ petition is dismissed and the award is confirmed, the employee's right to get backwages during the pendency of the Writ Petition remains intact subject to the condition of proof of non-employment elsewhere. This is not traceable to Section 17B, but is a right which accrues to him as a successful party. Thus, the employee is entitled to retain Section 17B wages paid to him from March 10, 1992 to January, 1993 (sic. December, 1992) and cannot claim recovery of arrears from January, 1993 onwards.

11. The next question is at what rate the wages are payable ?

12. It is contended by Mr. Aga Reddy by that the employee is entitled to Section 17B wages at the rate of Rs. 1,512-25 ps. per month as per the decision of the Division Bench of this Court in Management of Praga Tools Ltd. Vs. Chairman-cum-presiding Officer, Additional Industrial Tribunal-cum-additional Labour Court,

Hyderabad, wherein it was held by their Lordships Chief Justice P. S. Mishra and Justice C. V. N. Sastri that the expression "last drawn wages" does not mean wages last drawn by the employee at the time of dismissal or removal but the full wages to which he would have been entitled inclusive of any maintenance allowance, dearness allowance, increase in wages in various revisions of pay - in other words, on par with the current wages payable to the employees of cadre of the workman. Applying this decision, the employee will be entitled to the scale which he would have got on the date of suspension of the award of reinstatement. As the parties are at dispute regarding the exact wages that the respondent is entitled to, the Labour Court is directed to determine the same at the time of disposal of the I.D. in the light of the decision of the Division Bench (supra).

13. In view of the above, the contention that the employee is not employed elsewhere from January, 1993 to this date and that even assuming that he was carrying on business, it does not disentitle him to relief u/s 17B as held by Rajasthan High Court in Management, Hindustan Machine Tools Ltd. Vs. Judge, Labour Court and Another, need not be gone into.

14. To sum up :

(1) Section 17B, which is in the nature of subsistence allowance, when once paid cannot be recovered irrespective of the result of the writ petition even in cases where the award is set aside as perverse, nullity, grossly erroneous or without jurisdiction;

(2) Though Section 17B wages is the normal rule, in exceptional cases when award is perverse or erroneous or patently without jurisdiction or nullity, this Court acting under Article 226 is not debarred from exercising its powers and pass appropriate orders on the petition seeking suspension of the operation of the award;

(3)(a) Section 17B wages directed to be paid but not paid cannot be claimed by the employee at the time of final hearing of the writ and when it is allowed. The remedy of the employee in such cases is to move the Court to vacate the suspension of operation of the award,

(b) In case the writ is dismissed, the employee can always claim back-wages during the pendency of the case subject to the proof of non-employment elsewhere;

(4) Last drawn wages means, as held by the Division Bench in Praga Tools case (supra), the wages which the employee would have been entitled to on the date of suspension of award of reinstatement inclusive of all allowances.

15. Applying the above principles, I hold that

(a) As regards the wages from March 10, 1992 (date of filing of W.P.) to January 1993 (when payment was discontinued by the management), the employee is

entitled to wages at the last drawn scale in the light of decision of the Division. Bench in Praga Tools case (*supra*) and the Tribunal will determine the same at the time of disposal of the I.D., which as already directed shall be disposed of in 3 months from the date of receipt of this order;

(b) As regards the wages for the period between January, 1993 and this date, the employee is not entitled to claim Section 17B wages now at the time of disposal of the writ petition; and

(c) In view of the above, the question whether the employee was employed elsewhere or not from January 1993 need not be decided.

16. The Writ petitions are accordingly disposed of. No costs.