
(2007) 02 GAU CK 0057
In the Gauhati High Court

Management of Bata India Ltd.

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 06-02-2007

Acts Referred:

Industrial Disputes Act, 1947 — Section 11, 12, 22, 25F, 4

Citation : (2007) 113 FLR 532 : (2007) 3 GLR 868 : (2007) 2 GLT 358 : (2007) 3 LLJ 36

Hon'ble Judges : T.N.K. Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

T.N.K. Singh, J.—Heard Mr. S.N. Sarma, learned senior Counsel assisted by Mr. B.M. Chowdhury appearing for the petitioner. Also heard Ms. H.M. Phukan, learned State counsel appearing for the respondents. None appears for the respondent No. 2 and 3 despite the service of notice.

2. By this writ petition, the petitioner has challenged the judgment and order of the appellate authority under the Assam Shops & Establishments Act, 1971 dated July 20, 2001 passed in Appeal Case No. 1 of 2001 u/s 18(2) of the Assam Shops & Establishments Act, 1971.

3. The fact of the present case is very short and simple. The petitioner is a Company registered under the Indian Companies Act, 1956 having its registered office at 6-A, S.N. Banerjee Road, Kolkata-13. The Company is dealing with the business of manufacturing leather goods and marketing of the same through its various outlet and the Company has a retail shop/store at J.B. Road, Jorhat, Assam having its Registered No. SEA/JJ/S-4033 (B) dated December 30, 1994 under the Assam Shops and Establishment Act issued by the Labour Inspector, Government of Assam, Jorhat.

4. The respondent No. 2 and 3 were temporarily appointed by the Manager of the said retail shop/store at J.B. Road, Jorhat under verbal order in the year 1994.

The respondent No. 2 and 3 were simply working as temporary employees under the verbal order of the Manager of the said shop. It is also further case of the petitioner that before they were appointed as temporary employee at retail shop at J.B. Road, Jorhat, they were never subjected to selection test for recruitment as temporary employee.

5. On September 19, 2000 there was recruitment test for appointment of the employees of the petitioner Company for the said retail shop. In the recruitment test the respondent No. 2 and 3 also faced the selection test but they were not selected. Since they were not selected by the Selection Committee in its meeting held on September 19, 2000, the persons who were selected by the said Selection Committee were appointed as employees of the petitioner Company for the said retail shop i.e. at J.B. Road, Jorhat. Under order dated December 22, 2000, respondent No. 2 and 3 had been informed that each of the respondent No. 2 and 3 shall get Rs. 1546.75 being one month's wage in lieu of notice and a sum of Rs. 5413.65 being the retrenchment compensation totalling Rs. 6960.40 for which the draft dated December 20, 2000 in their favour also annexed and also that they have been retrenched from service.

6. Mr. S.N. Sarma, learned senior counsel appearing for the petitioner submits that the said retrenchment order dated December 22, 2000 was in compliance of the provision of Section 25-F of the Industrial Disputes Act 1947. The two conditions have been imposed u/s 25-F of Industrial Disputes Act, 1947 for retrenching of workmen:

(i) The workmen has been given one month's notice in indicating the reasons for retrenchment and the period of notice is expired, or the workmen has been paid in lieu of such notice, wages for the period of the notice.

(ii) The workmen has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days average pay for every completed year of continuous service or any part thereof in excess of six months.

7. By referring the retrenchment order dated December 22, 2000, the learned senior counsel appearing for the petitioner submits that in compliance of the Clause (a) of the Section 25-F of the Industrial Disputes Act, a sum of Rs. 1546.75 had been paid in lieu of one month's notice and further in compliance of the Clause (b) of Section 25-F of the Industrial Disputes Act, a sum of Rs. 5413.65 had been paid as the retrenchment compensation. As such it is the case of the petitioner that the requirements contemplated for retrenchment of the workmen in the Section 25-F of the Industrial Disputes Act have been fully complied while issuing retrenchment order dated December 22, 2000.

8. Learned senior counsel further submits that the conditions for retrenchment mentioned in Section 25-F of the Industrial Disputes Act are *pari materia* with the condition, mentioned in Section 18 of the Assam Shops and Establishments Act, 1971 for dismissal of the employee.

9. For ready reference, Section 25-F of the Industrial Disputes Act, 1947 and the Section 18 of the Assam Shops and Establishments Act, 1971 are quoted herein below:

25-F Conditions precedent to retrenchment of workmen-No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the. period of the notice;
- (b) the workman has been paid, at the time of retrenchment compensation which shall be equivalent to fifteen days' average pay (for every completed year of continuous service) or any part thereof in excess of six months; and
- (c) notice in the prescribed manner is served on the appropriate Government for such authority (as may be specified by the appropriate Government by notification in the Official Gazette).

Section 18 of the Assam Shops and Establishments Act, 1971.

Notice of dismissal.--(1) No employer shall dispense with the service of an employee employed continuously for a period of not less than six months, except for a reasonable cause and without giving such employee at least one month's notice or wages in lieu of such notice; provided however that such notice shall not be necessary where the services of such employee are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an inquiry held for the purpose.

(2) Any employee whose services are dispensed with, may appeal to such authority and within such time as may be prescribed either on the ground that there was no reasonable cause for dispensing with his services or on the ground that he had not been guilty of misconduct as held by the employer.

(3) The appellate authority may, after giving notice in the prescribed manner to the employer and the employee, dismiss the appeal or direct the reinstatement of the employee with or without wages for the period he was kept out of employment or direct payment of compensation without reinstatement or grant such other relief as it may deem fit in the circumstances of the case.

(4) In directing the reinstatement of an employee the appellate authority shall also direct the payment of such amount of compensation as may be specified by him in case the employer fails to reinstate the employee in accordance with the directions.

(5) The decisions of the appellate authority shall be final and binding on both the parties, not be liable to be questioned in any Court of law, and be given effect to within such time as may be specified in the order of the appellate authority.

(6) Any compensation required to be paid by the employer under Sub-sections (3) and (4) but not paid by him shall be recoverable as arrears of land revenue under the provisions of the Revenue Recovery Act, 1890 (Act I of 1890) for the time being in force.

10. After the respondent No. 2 and 3 had been retrenched under the said retrenchment order dated December 22, 2000, the conciliation proceedings under the Industrial Disputes Act, 1947 and the Industrial Dispute was taken up by the Conciliation Officer appointed u/s 4 of the Industrial Disputes Act, 1947. In the present case one Shri R.C. Baidas, Labour Inspector, Jorhat is the Conciliation Officer appointed u/s 4 of the Industrial Dispute Act 1947. Shri R.C. Baidas being the Conciliation Officer issued a notice dated December 22, 2000 to the petitioner intimating that a conciliation proceeding will be taken up for the Industrial Dispute raised by the respondent No. 2 and 3 on January 9, 2001 and further all the parties are requested to produce the relevant records for examination in the said conciliation proceeding.

11. Learned senior counsel also drawn the attention of this Court to Section 11 of the Industrial Dispute Act 1947 wherein and whereunder the procedure, and power of conciliation officers, Boards, Courts and Tribunals are morefully described. Section 12 of the Industrial Disputes Act 1947 deals with the duties of conciliation officers and for easy reference Section 12 is quoted hereunder-

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 u/s 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 right settlement thereof and may 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.

(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 authorized 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 statement 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.

12. By referring to Sub-sections (3) and (6) of Section 12 of the Industrial Disputes Act, 1947, learned senior Counsel submits that there are two options left to the conciliation officer in a conciliation proceeding i.e. one option in the case of settlement of the dispute in the conciliation proceeding, conciliation officer shall send report thereof to the appropriate authority or officer authorized in this behalf by the appropriate Government together with a memorandum of the settlement signed by the parties to the dispute. (2) In the case of non-settlement of the dispute in the conciliation proceeding, the conciliation officer is duty bound to submit the report giving the reasons under which the settlement could not be arrived at and the full report thereof to the appropriate Government. In the present case since there was no settlement of dispute in the conciliation proceeding Mr. R.C. Baidas, conciliation officer appointed u/s 4 of the Industrial Disputes Act, 1947 is duty bound to comply with the procedures contemplated in Sub-section (4) of Section 12 of the Industrial Disputes Act. Sub-section (5) of Section 12 of the Industrial Disputes Act, 1947 further contemplated that on receiving the report contemplated in Sub-section (4) of Section 12 of the Industrial Disputes Act, the appropriate Government is left with two options -first, option to refer the matter to the Labour Court, Tribunal or National Tribunal and the second option appropriate Government itself shall refuse to refer by giving reasons and such decision is to be communicated to the party concerned.

13. Learned senior counsel for the petitioner submits that in the present case, since the respondents No. 2 and 3 had already opted the remedy under the Industrial Disputes Act, 1947, they cannot opt for other remedy under the Assam Shops and Establishments Act, 1947. In support of his contention, the learned senior counsel referred to the decision of the Apex Court in the case of (1) Bank of India Vs. Lakshimani Dass and Others, (2) National Insurance Co. Ltd. Vs. Mastan and Another, and (3) Deepal Girishbhai Soni and Others Vs. United India Insurance Co. Ltd., Baroda, wherein and where under the Apex Court held that as a general principle where two remedies are available under the law one of them should not be taken as operating in derogation of the other. A regular suit should not be barred by a summary and a concurrent remedy being also

provided therefore, but if a party has elected to pursue one remedy he is bound by it and cannot on his failing therein proceed under another provision. By referring to the ratio laid down by the Apex Court in the case of Bank of India (supra), learned senior counsel submits that since the respondent No. 2 and 3 had already opted for the remedy available under the Industrial Disputes Act, 1947, they cannot, on failing to get remedy under the Industrial Disputes Act, 1947, proceed under another provision i.e. Assam Shops Establishment Act. The Apex Court held in the case of National Insurance Co. Ltd. (supra) that 2006-I-LLJ-704 at pp. 708 & 709:

24. The "doctrine of election" is a branch of "rule of estoppel", in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right, which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.

25. In Nagubai Ammal and Others Vs. B. Shama Rao and Others, it was stated:

It is clear from the above observations that the maxim that a person cannot "approbate and reprobate" is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto.

26. In C. Beepathumma and Others Vs. V.S. Kadambolithaya and Others, it was stated:

The doctrine of election which has been applied in this case is well settled and may be stated in the classic words of MAITLAND-

That he who accepts a benefit under a deed or Will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it.

(See MAITLAND'S LECTURES ON EQUITY, LECTURE 18)

The same principle is stated in WHITE AND TUDOR'S LEADING CASES IN EQUITY, VOL. 18th Edn. at p. 444 as follows:

Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy.... That he who accepts a benefit under a deed or Will must adopt the whole contents of the instrument.

See also New India Assurance Co. Ltd. Vs. Smt. Shanti Bai and others,

27. P.R. Deshpande Vs. Maruti Balaram Haibatti, stated the law thus:

The doctrine of election is based on the rule of estoppel the principle that one

cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

14. This Court is of the considered view that submissions of the senior counsel has force of law. Accordingly, this Court held that since the respondent No. 2 and 3 had already opted the remedy contemplated in Industrial Disputes Act, 1947 they cannot pursue for remedy prescribed under the Assam Shops and Establishment Act, 1971 in the case of their failure to get remedy under the Industrial Disputes Act, 1947. In the present case, the respondent No. 2 and 3 who already opted for remedy contemplated under the Industrial Disputes Act, 1947, again approached the Assistant Labour Commissioner, Jorhat by filing the appeal u/s 18(2) of the Assam Shops and Establishments Act, 1971. The learned Assistant Labour Commissioner, Jorhat while taking up the appeal Case No. 1 of 2001 filed by the petitioner u/s 18(2) of the Assam Shops and Establishments Act, 1971 knew very clearly that the appellates had already raised the Industrial Dispute under the Industrial Disputes Act and the matter had already been taken up by the conciliation officer appointed u/s 4 of the Industrial Disputes Act. Learned senior Counsel has drawn the attention of this Court in the para No. 3 of the impugned judgment and order dated July 20, 2001 wherein the learned Assistant Labour Commissioner, Jorhat clearly mentioned that disputes put up by the respondent No. 2 and 3 were taken up for amicable settlement by Labour Inspector, Jorhat who was appointed as the conciliation officer under the Industrial Disputes Act. From bare perusal of the para No. 4 of the impugned judgment and order dated July 20, 2001 passed by the Labour Commissioner, Jorhat in the Appeal Case No. 1 of 2001 filed by the respondent No. 2 and 3, it is clear that the Assistant Labour Commissioner, Jorhat who was the appellate authority under the Assam Shops and Establishments Act, 1971 knew very well that there is a conciliation proceeding between the present writ petitioner and the respondent No. 2 and 3 under the Industrial Disputes Act but matter cannot be settled in the conciliation proceeding.

15. In these circumstances this Court is of the considered view that the respondent No. 2 and 3 cannot approach the appellate authority under the Assam Shop Establishment Act 1971 by filing the appeal being Appeal Case No. 1/2001 u/s 18(2) of the Assam Shops and Establishments Act, 1971 after they could not get remedy contemplated in the Industrial Disputes Act, 1947. Such in a situation, the learned Labour Court, Jorhat, Assam would not have entertained the Appeal No. 1/2001 filed by the respondent No. 2 and 3.

16. For the reasons discussed above and also keeping in view of the ratio laid down by the Apex Court in case discussed above, this Court is of the considered view that interference of the impugned judgment and order dated July 20, 2001 passed by the Assistant Labour Commissioner, Jorhat in Appeal Case No. 1 of

2001 u/s 18(2) of the Assam Shops and Establishments Act, 1971 is called for. Accordingly, the impugned judgment and order dated July 20, 2001 is hereby set aside. The writ petition is allowed. Parties are to bear their own costs.