(2013) 03 RAJ CK 0074

In the Rajasthan High Court

Case No : Civil Writ Petition No''s. 7372 of 2010 and 3739 of 2008, 5042 of 2008, 5043 of 2008

M/s. Cimmco Birla Ltd. APPELLANT

Vs

State of Rajasthan and Others RESPONDENT

Date of Decision : 15-03-2013

Acts Referred:
Constitution of India, 1950 — Article 31C
Industrial Disputes Act, 1947 — Section 18, 18(3)
Payment of Gratuity Act, 1972 — Section 4, 7(3A)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 18, 18(12), 18(3), 18(7), 18(8)

Citation : (2013) 137 FLR 899 : (2013) 3 LLJ 455 : (2013) 2 LLN 794

Hon'ble Judges : Alok Sharma, J

Bench : Single Bench

Advocate : G.K. Garg, Yash Sharma and Anant Kasliwal, for the Appellant; Manoj Bhardwaj, Counsel for the State and S.D. Khaspuriaya, Addl. A.G.C., for the Respondent

Final Decision : Allowed

Judgement

Alok Sharma, J.—The issue in the present writ petitions, which are being disposed of by this common order, is fundamentally the illegality of proceedings taken under the Payment of Gratuity Act, 1972 (hereinafter ''the Act of 1972'') for recovery of gratuity amount determined by the Controlling Authority under its order dated 4.11.2006 in spite of the fact that subsequent to the aforesaid order, the workers/employees of the petitioner-Company through their authorized representative and the management of the petitioner-Company have entered into a settlement dated 5.3.2008 referable to section 18 of the Industrial Disputes Act, 1947 (hereinafter ''the Act of 1947'') which has thereafter been incorporated in a sanctioned scheme on 11.3.2010 u/s 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter ''the Act of 1985'') by the Board for Industrial and Financial Reconstruction (hereinafter ''BIFR''). The facts of the case are that the petitioner-Company declared lockout on 13.11.2000. On a proper application being made as mandated under the provisions of the Act of 1985, the petitioner-Company was declared a sick company by the BIFR on 21.8.2002. Subsequently, an operating agency was appointed by BIFR and the prospects of the petitioner-Company being revived were under consideration of the BIFR.

2. In the meantime, the workers/employees of the petitioner-Company aggrieved of the non-payment of their gratuity in terms of the Act of 1972 approached the Controlling Authority for payment of due gratuity u/s 4 of the Act of 1972 and interest thereon u/s 7(3-A) thereof. Vide order dated 04.11.2006, the Controlling Authority under the Act of 1972 was pleased to pass an order directing that the gratuity amount of the workers/employees of the petitioner-Company as computed by it be paid along with interest @ 9% per annum thereon. No appeal against the order dated 4.11.2006 appears to have been filed by the petitioner-Company under the Act of 1972 consequent to which the order dated 4.11.2006 attained finality. Subsequently, owing to non-payment of gratuity amount in spite of the finality of the order dated 4.11.2006, the workers/employees of the petitioner-Company took steps for the recovery of the amount determined by the Controlling Authority.

3. For this purpose, the Controlling Authority appears to have remitted the matter to the District Collector, Bharatpur, who in turn forwarded the requisition to the Sub-Divisional Officer, Bharatpur. The SDO, Bharatpur consequent to the final order dated 4.11.2006 by the Controlling Authority sought to make recoveries of the gratuity amount determined qua each of the workers/ employees along with interest @ 9% per annum thereon.

4. That it appears that following the petitioner-Company having been declared to be a sick company under the order dated 21.8.2002 by the BIFR under the provisions of the Act of 1985, on 5.3.2008, the representative union of the workers/employees of the petitioner-Company entered into a tripartite settlement with the aid of the Labour Commission with the petitioner-Company''s management, whereunder it was agreed that for the purpose of revival of the petitioner-Company and its proper and profitable running in future, the workers/ employees of the petitioner-Company would make certain scarifies on their dues owing by the petitioner-company and on the receipt of agreed wages due, bonus, leave encashment and gratuity would have no other claim due and outstanding against the petitioner-Company with no dispute on this count in future surviving. Following the settlement dated 5.3.2008 u/s 18(3) of the Act of 1947 with regard which there is no dispute, the matter again came to be considered holistically during the working out of a rehabilitation scheme for the petitioner-Company by the BIFR under the Act of 1985. The BIFR vide order dated 11.3.2010 sanctioned a rehabilitation scheme for the petitioner-Company. Under clause 10.6 the said rehabilitation scheme more particularly clause 10.6.1 thereof relating to settlement of labour dues, it was provided that only statutory dues upto the date of lockout (13.11.2000) were to be paid to the workers/employees which would

include 15 days of gratuity, leave encashment and unpaid wages including variable DA, if any.

5. In the context of the event of the settlement dated 5.3.2008 between the representative union of the workers/employees and the management of the petitioner-Company u/s 18(3) of the Act of 1947 and the sanctioned scheme for the company approved by the BIFR under its order dated 11.3.2010, it is the case of the petitioner-Company that the order dated 4.11.2006 passed by the Controlling Authority under the Act of 1972 for the payment of gratuity alongwith interest thereon @ 9% per annum would stand superseded and only gratuity would liable to be paid to the workers/employees of the petitioner-Company with reference to the settlement dated 5.3.2008 and the rehabilitation scheme sanctioned on 11.3.2010. It has been submitted that 90% workers/employees of the petitioner-Company have accepted the settlement dated 5.3.2008 and the sanctioned scheme dated 11.3.2010 and stand satisfied with payment of gratuity without payment of any interest on account of delay. It has been submitted that only about 114 workers/employees presently continue to agitate their purported right to be paid interest on their gratuity on the basis of the order dated 4.11.2006. It is submitted that the recovery proceedings taken by the workers/ employees in issue on this basis before the statutory authority by resort to the mechanism of the Act of 1972 are without jurisdiction and all orders under challenge in the present bunch of writ petitions are liable to be set aside.

6. Mr. G.K. Garg, Sr. Advocate with Mr. Yash Sharma and Mr. Anant Kasliwal, both appearing for the petitioner-Company in different but connected petitions have submitted that there was a total of 2619 workers/employees with the petitioner-Company and except 128 workers/employees in the first instance, all have fully discharged the petitioner-Company of its liability to them inter alia for payment on account of gratuity in terms of settlement dated 5.3.2008 and the sanctioned scheme dated 11.3.2010, wholly and fully satisfied on the receipt of gratuity at the rate of 15 days per year of employment without laying a claim of interest thereon. It has been submitted that of the remainder 128 workers/ employees, another 14 have also been paid and received without demur their dues including gratuity at the rate of 15 days per year of the employment with the petitioner-Company without interest and have issued discharge receipts to the petitioner-Company in respect of their monetary claims including gratuity. It is submitted that only 114 workers/employees continue to agitate an absolutely unsustainable and misdirected demand of interest @ 9% per annum on the gratuity otherwise payable to them under settlement dated 5.3.2008 and the sanctioned scheme dated 11.3.2010.

7. Counsel have submitted that recovery proceedings purportedly in terms of and pursuant to the order dated 4.11.2006, passed by the Controlling Authority under the provisions of the Act of 1972 have been initiated under the Act of 1972 despite the binding and overriding settlement dated 05.03.2008. Consequently the petitioner-Company had earlier approached the BIFR. It is submitted that

consequently the BIFR vide its order dated 4.11.2008, took note of the recovery proceedings by the SDO, Bharatpur and directed that the immoveable property of the petitioner-Company attached by the SDO purporting to recover the amount under the order dated 4.11.2006 passed by the Controlling Authority would not be auctioned even though the workers/employees would be entitled to be paid arrears as per the rehabilitation scheme. Counsel submit that the protection of the BIFR under the said order dated 4.11.2008 was never modified nor varied till the sanction of the scheme u/s 18 of the Act of 1985 on 11.3.2010.

8. Counsel further submit that the Hon''ble Supreme Court in catena of cases has held that a sanctioned scheme u/s 18 of the Act of 1985 is binding and the binding nature of a sanctioned rehabilitation scheme would with equal force bind all the workers where their representative unions were party before the BIFR-as they were in this case. Reference has been made to section 18(8) of the Act of 1985 which provides that "on and from the date of the coming into operation of the sanctioned scheme or any provision thereof, the scheme or such provision shall be binding on the sick industrial company and the transferee company or, as the case may be, the other company and also on the shareholders, creditors and guarantors and employees of the said companies." It is submitted that the rehabilitation scheme sanctioned for the petitioner-Company by the BIFR on 11.3.2010 incorporating the settlement between the representative union of the workers/employees and the management of the petitioner-Company on 5.3.2008 is therefore binding on the workers/employees and would eclipse all preexisting liability of the petitioner-Company towards their workers/employees. It has been further submitted that in this view of the matter, the order dated 4.11.2006, passed by the Controlling Authority under the provisions of the Act of 1972 directing the payment of interest on the gratuity due resulting from delayed payment of gratuity would stand overridden. For this submission, reference has been made u/s 32 of the Act of 1985 which provides that the provisions of the Act of 1985 or any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976 for the time being in force or in the Memorandum or Articles of Association of an industrial company or in any other instrument having effect by virtue of any law other than the Act of 1985. It is submitted that the Payment of Gratuity Act, 1972 does not fall in the expected category of statutes u/s 32 of the Act of 1985 and would thus on the pain language of section 32 stand superseded by the provisions of the Act of 1985 and the scheme sanctioned thereunder with reference to section 18 thereof.

9. Counsel submit that a bare look at the scheme indicates that it provides inter alia only for payment of gratuity. It is submitted that the gratuity under the Act of 1985 is distinct and separate from interest thereon referable to section 7(3-A) of the Act of 1972. It is further submitted that a reference to gratuity in the settlement dated 5.3.2008 and the rehabilitation scheme dated 11.3.2010 would thus not include interest thereon. Counsel would invoke the maxim "expressio

unius est exclusio alterius" to contend that what has been included in the settlement dated 5.3.2008 and sanctioned scheme dated 11.3.2010 alone would have taken to be covenanted between the parties and nothing more. The parties would be accordingly bound and any claim in excess of the covenant would be wholly unsustainable and impermissible in law. It is submitted that as only gratuity has been included in the settlement dated 5.3.2008 and in the sanctioned scheme dated 11.3.2010 and interest thereon-of a different statutory genre-excluded, by no manner of interpretation can the respondent-workmen be entitled to interest on the gratuity agreed to be paid under the aforesaid two instruments. It is submitted that aside of the aforesaid, the factum of over 90% workers/employees having accepted gratuity without demanding interest thereon would be indicative of the contemporaneous understanding of the parties qua the terms of the settlement dated 5.3.2008 as included in the sanctioned scheme dated 11.3.2010. It is submitted that contemporaneous conduct is extremely relevant for the interpretation of a contract (agreement) and should be so also in the present case. Counsel submits that in this view of the matter, the proceedings before the SDO, Bharatpur for recovery pursuant to the order dated 4.11.2006, passed by the Controlling Authority under the Act of 1972 directing payment of interest over gratuity are wholly without jurisdiction, completely ultra virus the clause of a scheme sanctioned u/s 18 of the Act of 1985 (in presence of representative Union of the workers/employees) which overrides provisions of the Act of 1972 in view of section 32 of the Act of 1985.

10. Per contra, Mr. Manoj Bhardwaj, appearing for the respondents-workers and Mr. S.D. Khaspuriya, Addl. G.C. for the State, would submit that the interest on delayed payment of gratuity is a statutory liability under the Act of 1972 and unless specifically excluded would be liable to be paid. It is submitted that both the settlement dated 5.3.2008 and the sanctioned scheme dated 11.3.2010 u/s 18 of the Act of 1985 provide for payment of gratuity and would automatically entail payment of interest on delayed payment of interest in view of section 7(3-A) of the Act of 1972. It is submitted that a statutory liability cannot be impliedly waived and unless a case of express waiver is established, statutory interest mandated in law allows no escape.

11. Heard the Counsel for the petitioner-Company as also the respondents.

12. The Hon''ble Supreme Court in the case of Navnit R. Kamani and Others Vs. R.R. Kamani, has held with reference to a scheme sanctioned u/s 18 of the Act of 1985 that "since the scheme is being framed under the statutory authority and directive in order to revive" the company "it is in the larger public interest and inasmuch as there is a necessary declaration u/s 2 of the Act, which attracts the applicability of Article 31-C of the Constitution of India, the decision rendered by the BIFR is unassailable and unimpeachable." In the instant case before this Court the finality BIFR''s sanctioned scheme of 11.3.2010 is not in dispute and in fact the parties to the petition admit to this fact. The scheme sanctioned by BIFR on 11.3.2010 is thus "unassailable and unimpeachable" and hence binding. The

Hon''ble Supreme Court in the case of Raheja Universal Limited Vs. NRC Limited and Others, . has held that the Act of 1985 is a special law overriding other laws outside the excepted categories of statute detailed u/s 32 of the Act of 1985. The Act of 1985 is a self-contained code to ensure revival of sick industries through the due implementation of the sanctioned scheme. It has been held that the sanctioned scheme under the Act of 1985 is binding on the parties to the scheme.

13. The issue which however remains is about the interpretation of clause 10.6.1 of the BIFR''s sanctioned scheme'' dated 11.3.2010 formulated in the presence of representative union of the workers/employees of the petitioner-Company which incorporates effectively the settlement dated 5.3.2008 between the representative Union of the workers/employees and the management of the petitioner-Company. A dispute with regard to the interpretation of the provisions of sanctioned scheme, in my considered opinion, would be a subject matter of proceedings only before the BIFR and not before the authority under the Act of 1972 in view of the overriding provisions of section 32 of the Act of 1985. The settlement u/s 18(3) of the Act of 1985 and the sanctioned scheme of 11.3.2010 approved by the BIFR incorporating the settlement subsumes and overrides the order dated 4.11.2006 passed by the Controlling Authority under the Act of 1972. Section 18(7) of the Act of 1985 provides that a scheme sanctioned by the BIFR shall be conclusive evidence that all measures specified in the scheme have been complied with. Section 18(9) of the Act of 1985 then proceeds to state that difficulties arising in the implementation of the

scheme will be removable by the Board on the recommendation of the operating agency or otherwise. Section 18(12) of the Act of 1985 provides that subsequent to the sanction of a scheme, the Board is to monitor periodically its implementation. The word ''monitor'' is used as a verb in section 18(12) of the Act of 1985. The dictionary meaning of the word ''monitor'' as indicated in the Concise Oxford English Dictionary (Eleventh Edition) is to "observe" and "check over a period of time". The Board therefore in my considered opinion on a plain reading of sections 18(9) and 18(12) of the Act of 1985 alone has the powers to review and determine as to whether the scheme sanctioned by it, is being implemented as approved or not.

14. In this view of the matter, I am of the considered opinion that the order dated 23.2.2010 passed by the SDM, Bharatpur and the order dated 22.3.2010, passed by the SDO, Bharatpur, purporting to make recovery of interest on gratuity based on the basis of order dated 4.11.2006, passed by the Controlling Authority under the Act of 1972 and all other orders passed by the Recovery Officer as also the Controlling Officer with reference to their powers under the Act of 1972 such as on 14.10.2008, 16.10.2008, 15.3.2008, 30.4.2008 under the Act of 1972 are liable to be quashed and set aside for complete lack of jurisdiction.

15. The parties or such of them as may desire are free to approach the BIFR for clarification on the issue as to whether clause 10.6.1 of the sanctioned scheme

dated 11.3.2010 entails payment of gratuity alone or also interest thereon. It is however made clear that the determination of the BIFR on any application made by any party to the present batch of writ petitions will apply only to the workers/ employees before this Court in the present petitions and will not in any event be relevant to the workers/employees who have already accepted payment of gratuity without demur and issued duly discharged receipts of full and final settlement on that count to the petitioner-Company. The writ petitions are allowed accordingly. Stay applications need no address in view of the petitions being allowed.

