

(2012) 03 MAD CK 0130

In the Madras High Court

Case No : Writ Petition No. 16810 of 2008 and M.P. No's. 1 of 2008 and 1 of 2011

M/s. Flakt (India) Limited

APPELLANT

Vs

The Presiding Officer, Second Additional Labour Court,
Chennai, P. Ramasamy, M/s. Asea Brown Boveri Ltd., No.
22A, Shah Industrial Estate, off. Veera Desai Road, Andheri
(West), Mumbai-400053 (R-3 impleaded as per court order
dt. 28.10.2008 in M.P. No. 3 of 2008) and M/s. Flakt (India)
Ltd.

RESPONDENT

Date of Decision : 19-03-2012

Acts Referred:

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

Citation : (2012) 03 MAD CK 0130

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : Sai Prasad for M/s. Sai Raaj Associates in W.P. No. 16810 of 2008, Mr. Sanjay Mohan for M/s. S. Ramasubramanian and Associates in W.P. No. 21260 of 2008 and Mr. S. Ayyathurai in W.P. No. 24851 of 2009, for the Appellant; Sai Prasad for M/s. Sai Raaj Associates for R-2 in W.P. No. 24851 of 2009 and for R-2 in W.P. No. 21260 of 2008, Mr. S. Ayyathurai for R-2 in W.P. Nos. 16810 and 21260 of 2008 and Mr. Sanjay Mohan for M/s. S. Ramasubramanian and Associates for R-3 in W.P. No. 16810 of 2008, for the Respondent

Judgement

Honourable Mr. Justice K. Chandru

1. All the three writ petitions challenges the same Award in I.D. No. 58 of 1999, dated 26.3.2008 passed by the II Additional Labour Court, Chennai. By the impugned Award, the labour court had directed reinstatement of the workman with continuity of service, but without backwages.

2. In W.P. No. 16810 of 2008, the petitioner is M/s. Flakt (India) Ltd., Numbal village, Chennai-600 077, represented by its General Manager. That writ petition

was admitted on 16.7.2008. Pending the writ petition, this Court had granted an interim stay. Subsequently, the workman P. Ramasamy filed two applications, one for vacate the stay granted and the another for the grant of an interim direction in M.P. Nos. 4 and 5 of 2008. In those two applications, this Court after observing that since Flakt (India) Ltd. has been taken over by M/s. Asea Brown Boveri Ltd.,, whether the labour court had put notice on the new company was doubted and therefore, the court did not grant any direction and declined to grant any relief. At that stage, subsequently the matter was heard at length. By a detailed order dated 18.9.2009 this Court directed the Flakt (India) Limited to pay the workmen the last drawn wages in terms of Section 17-B of the Industrial Disputes Act. Insofar as the interim stay was concerned, it was made absolute and the vacate stay petition was dismissed. M/s. Flakt (India) Limited filed M.P. No. 3 of 2008 for bringing M/s. Asea Brown Boveri Ltd., Mumbai-53 as third respondent in the writ petition claiming that they are the successor in interest. Hence they should be made as a party. That impleading petition was ordered on 28.10.2008.

3. As against the order dated 18.9.2009, the management filed W.A. No. 1774 of 2009. By an order dated 29.3.2010, the writ appeal was disposed of directing the management of Asea Brown Boveri Ltd. to pay arrears of Section 17-B.

4. In the meanwhile, M/s. Asea Brown Boveri Ltd., impleaded as the third respondent in the first writ petition, filed their own independent writ petition after obtaining leave from this Court on 27.8.2008 against the very same award. On leave being granted, they filed W.P. No. 21260 of 2008. That writ petition was admitted on 29.8.2008. Pending the writ petition, notice was ordered in the application for interim stay. Both the writ petitions were clubbed together for final disposal.

5. Though the management paid a consolidated amount of arrears of Rs. 85,000/- and the matter was directed to be listed during April, 2010, since the matter was not listed, the workmen filed M.P. No. 1 of 2011 for further direction to pay wages u/s 17-B with effect from 1.4.2010. That application is yet to be listed. The workmen also filed W.P. No. 24851 of 2009 challenging the same award insofar as it had denied the backwages from the date of the dismissal dated 20.12.2004 till the date of the Award. That writ petition was admitted on 03.12.2009. In view of the interconnectivity among all the three writ petitions, they were clubbed together and a common order is passed.

6. For the sake of the convenience, the parties are referred to as the workmen, FI Limited (erstwhile employer) and ABB Limited (successor employer).

7. It is the case of ABB Limited that the workman was employed as a semi-skilled worker (Fitter) by the Flakt India Limited on 29.7.1984. The said company was amalgamated with ABB Limited on 29.6.1994. just before its amagamation, the workman's attendance records in the company was not satisfactory from 1985 to 1993. The workman had hardly worked 50% of the days the company

had worked. During the year 1993, out of 306 days, the workman's attendance was only for 59 days. From March, 1993 to June, 1994, the petitioner was given several advice for improving his attendance and also was warned of unauthorised absence. At one time, his wages was also deducted for his unauthorised absence. He was given a charge memo on 31.8.1994 for being authorised absence for more than 103 days for the period from 19.5.1994 to 31.8.1994. The charge memo sent to him came back undelivered with a postal endorsement "left". A copy of the charge memo was exhibited in the notice board as per the standing orders. The workman did not choose to submit his explanation.

8. It was stated that an outsider was appointed as an Enquiry Officer and a notice of enquiry was sent. The said notice also came back with the same endorsement. Hence it was notified in the factory's notice board. The Enquiry officer had proceeded ex parte and found the petitioner guilty of charges vide his report dated 7.11.1994. The Management after considering his report found that there was no extenuating circumstance. It is at this stage, the workmen came to the factory on 22.10.1994 and gave a letter regarding change of address with the time office. The Management sent a second show cause notice on 03.12.1994 to both the old and new addresses as to why he should not be dismissed from service. A copy of the notice was also put in the company's notice board. But, the workman did not choose to sent any explanation. After considering relevant records, he was given a dismissal order dated 20.12.1994 and the same was also sent to both the addresses and simultaneously exhibited in the notice board.

9. The workman had raised an industrial dispute before the Assistant Labour Commissioner-II, Chennai as against the ABB Limited describing the company as formerly Flakt (India) Limited. The said officer as he could not bring about medication between the parties, gave a failure report dated 29.9.1998. on the strength of the failure report, he filed a claim statement before the labour court dated 17.2.1999. The labour court had registered the dispute as I.D. No. 58 of 1999 and ordered notice to ABB Limited. The ABB Limited filed a counter statement dated Nil (November, 1999). In the claim statement, the workman did not mention anything about his unauthorised absence, but merely stated that after his dismissal on 09.08.1995 (sic. the actual date was 20.12.1994), he could not stay in Chennai and therefore left for his native place at Salem. Therefore, there was a delay in raising the dispute. The ABB Limited contended that the workman's track record regarding attendance was miserable. After conducting due enquiry, it had dispensed him from service.

10. In the meanwhile, Flakt India Limited had obtained a fresh Certificate of Incorporation from the Registrar of Companies on 15.5.2002. M/s. ABB Limited and Flakt (India) Limited had entered into a purchase agreement of the company once again giving back the establishment to the Flakt India Limited. In the purchase agreement marked as Ex. M. 22 before the Labour Court, the ABB Limited described itself as an Asset Seller in paragraph 4.1.1(a). Paragraphs

4.11(a) and (b) reads as follows:

4.1. Employees and Related Matters :

4.1.1(a) The Asset Seller shall discharge all of its obligations as employer (including complying with any obligations referred to in sub-section (b) hereof) in respect of all the Local Employees up to and including the day immediately prior to the Local Closing Date.

(b) The Asset Seller shall complete the works council consultations it is legally required to complete prior to the Local Closing in connection with the Transaction and shall have complied with all other notification, consultation and similar obligations (whether statutory or contractual) of the Asset Seller required to be complied with by it prior to the Local Closing in connection with the Transaction.

11. The labour court after framing preliminary issue by its preliminary Award dated 28.7.2006 held that the enquiry was not fair and proper and further evidence was directed to be let in. Thereafter, evidence was let in.

12. Thereafter, ABB Limited filed an additional counter statement. In the additional counter statement dated Nil (July, 2007), in paragraphs 19 and 20, it was contended as follows:

19. In view of above, my most respectful submission that M/s. ABB Limited has no factories at Tamilnadu. Hence, without prejudice to any of the submissions made, it is respectfully submitted that the petitioner cannot seek any relief at the hands of M/s. ABB Ltd.

20. I further submit that while non-employment of the petitioner was brought about by M/s. ABB Ltd., is justified, if at all the petitioner is entitled to any relief, it can only be against M/s. Flakt (India) Limited and not against the us, who as on date having the factory at Numbal Village that manufactures "Air Pollution Control Equipments.

13. The workman on seeing the additional counter statement and was wrongly advised, filed I.A. No. 279 of 2007 seeking to implead Flakt (India) Limited. He also filed an amended claim statement seeking relief against Flakt (India) Limited, which had repurchased the factory. Before the Labour Court, the workman examined himself as W.W.1. The Management examined one Anantha Murthy as M.W.1. The workman filed five documents which were marked as Exs. W.1 to W.5. The Management ABB Limited filed 22 documents and marked them as Exs. M.1 to M.22. The labour court on the validity of the enquiry found that the enquiry was not proper. This was on the ground that there was no proof that the enquiry notices were sent to the workman and were received by him as they had not produced any returned cover or acknowledgments before the court. But at the same time, it had found without letting a fresh evidence as requested by the ABB Limited in their counter statement in paragraph 19 for leading fresh evidence, had recorded in paragraph 21 as follows:

...After hearing both sides it was decided in the preliminary issue that the enquiry held was not proper. Even though the unauthorised absence is proved by Ex. M.2, M.3 and M.9 he was not given proper opportunity to defend his case. Another thing that must have borne in mind is proportionate punishment should be given to the petitioner. In the above circumstances, I find that the petitioner was not given proper opportunity to participate in enquiry by the respondent. Hence, the petitioner is entitled to reinstatement with continuity of service but without backwages and all other attendant benefits and accordingly these points are answered.

14. But curiously as per the amended claim statement of the workman, direction to reinstate was given to the Flakt India Limited and not to ABB Limited. The labour court in paragraph 7 of the impugned Award referred to Ex. M.22, but while discussing the relevant document in paragraph 13 did not look into Ex. M.22, wherein the liability of the workman only vests with the ABB Limited and not with the Flakt India Limited. The labour court also did not take note of the relevant clause found in Ex. M.22 that after sale of the factory to Flakt (India) Limited, there is no factory for ABB Limited at Chennai. The Labour Court also did not take into account while ordering Section 11-A the decisions cited by ABB Limited relating to two judgments of the Supreme Court in *L and T Komatsu Ltd. Vs. N. Udayakumar*, as well as *Mahindra and Mahindra Ltd. Vs. N.B. Naravade etc.*, but yet ordered reinstatement of workman against the Flakt India Limited with continuity of service, but without backwages. This thoughtless Award, dated 26.03.2008 passed by the labour court has given rise to three writ petitions, one by the ABB Limited, the second by the Flakt India Limited and the third by the workman.

15. While ABB Limited against which no direction was given in the Award, yet they filed the writ petition by contending that their filing writ petition is by way of abundant caution and in case the Award was substituted to be binding on the ABB Limited. They have also contended that no opportunity was given to lead evidence after holding that the enquiry was bad.

16. In the writ petition filed by the Flakt (India) Limited, their contention as found in paragraphs 4 and 8 of the affidavit reads as follows:

4. I submit that M/s. ABB Ltd., (where the petitioner had lastly worked till the termination of his services), had on 31/05/02 entered into an Agreement with the Petitioner herein with regard to Sale of Asset as listed in the said Agreement including the asset viz., factory situated at Poonamallee High Road, Numbal Village, Chennai-600 077. Since, then the said factory is owned by the petitioner. However, as regards the liabilities of the past employees, other than the employees listed in the Annexure to the said Local Asset Sale and Purchase agreement, the responsibility continued to vest with M/s. ABB Ltd. I submit that thus, the responsibility and financial liability in respect of the 2nd respondent continued to vest with M/s. ABB Ltd.

....

8. I submit that no notice was issued to the petitioner either with reference to the main dispute or the interim application before substitution of the petitioner to that of M/s. ABB Ltd. I submit that the petitioner is an independent company having nothing to do with another Company called ABB Limited. I submit that the Petitioner has only purchased certain assets of M/s. ABB Ltd., as contemplated in the agreement dated 31/05/02 under the conditions stated therein and which was also placed before the 1st respondent. I submit that the said agreement never contemplated absorption of any liabilities relating to the 2nd respondent, including providing employment of the 2nd respondent. In any case, any award could not have been passed by the 1st respondent against the petitioner without any due notice to the petitioner herein or without hearing the petitioner herein. I submit that if notice was issued by the 1st respondent to the petitioner, the petitioner could certainly have brought in all these facts before the 1st respondent including the fact that the petitioner could not be mulcted with any liability relating to the 2nd respondent.

17. The workman in his writ petition contended that no 17-B wages was given to him during the pendency of the writ petition so far. Since the charge of unauthorised absence was only proved before the labour court, they should have ordered payment of wages upto 26.3.2008. On 6.8.1993, he met with an accident during the course of the employment. He had suffered an eye injury while doing grinding job and was treated in the ESI Hospital. Therefore, he had to take leave. Subsequently, he developed Asthma due to industrial dust and have applied for leave several times. Hence the labour court was wrong in denying him backwages for the entire period.

18. In the light of these facts, the following issues arise for consideration:

- a) Whether the misconduct alleged against the workman was proved?
- b) If so whether the labour court was right in exercising the power u/s 11A of the ID Act to grant the relief?
- c) If any relief is to be granted whether it should be ordered against ABB Limited?
- d) Whether the relief can be quantified in terms of the monetary payment?

19. In the writ petition filed by the ABB Limited, they have not chosen to challenge the preliminary Award passed by the labour court dated 28.7.2006. Similarly, in the writ petition filed by the Flakt India Limited also there is no such challenge. Therefore, the preliminary award dated 28.7.2006 insofar as holding that the enquiry conducted by the management was not valid has become final.

20. Further, before the labour court they have established the charges of unauthorised absence. In this case, undoubtedly the unauthorised absence of the workman was found proved before the labour court. Therefore, the misconduct regarding unauthorised absence for several days without lawful excuse was

found proved. The labour court also did not advert to the decisions referred to by the management of ABB Limited before the grant of relief of reinstatement. Certainly, the Award to this extent calls for interference. Hence the first two questions are answered against the workman.

21. The next question is whether the relief should be granted against the ABB Limited. The labour court did not take note of the effect of Ex. M. 22 wherein excepting for the named individual, the agreement between the ABB Limited and Flakt India Limited did not provide for any liability on the ABB Limited. Further in Ex. M. 22, they have stated that there is no factory for ABB Limited in Tamil Nadu. Therefore, if at all any relief, it has to be granted only against the ABB Limited. Hence this issue is answered against the ABB Limited.

22. If for proved misconduct that too for unauthorised absence, the decisions of the Supreme Court was very clear that such workman does not deserve for any relief of reinstatement. In the present case, the workman had only put in 10 years of service. He had also raised the dispute after four years after his non employment. Though this Court at the time of the argument suggested for a mutual settlement on the question of grant of monetary benefits, since the parties are at variance regarding the quantum of monetary benefits, they could not reach any settlement. But however all the counsels have fairly submitted that an appropriate quantum of monetary benefit can be fixed by this Court.

23. In this case the workman was said to have been dismissed on 20.12.1994. The failure report was given during 1998. The preliminary award was granted by the labour court on 28.7.2006. It was thereafter evidence was let in to prove the charges. Finally, an Award dated 26.3.2008 came to be passed. The first writ petition filed by Flakt India Limited was admitted on 16.7.2008 and the writ petition filed by the ABB Limited was admitted on 29.8.2008. From the date of the writ petition till its disposal today, i.e. (19.03.2012), the workman is entitled to get last drawn wages in terms of Section 17-B of the I.D. Act. It was claimed that his last drawn wage was paid. However, he filed miscellaneous petitions for vacating the stay and for a direction in W.P. No. 16810 of 2008. By an order dated 18.9.2009, this Court directed the payment of last drawn wages as per Section 17-B. It is now claimed that the management has paid only Rs. 85000/- towards last drawn wages u/s 17-B. Though the workman wrote a letter dated 11.11.2010, the management replied that they could not comply with the order. Hence he filed M.P. No. 1 of 2011 and that has not been ordered.

24. From the time when the workman raised the dispute till the labour court framed preliminary issue and passed the preliminary award and gave a right to the management to lead evidence, the workman should have been given some relief. Similarly, they have not paid the last drawn wages in terms of Section 17-B of the I.D. Act and stopped the payment after paying a lump sum amount. For that also, the workman is entitled for payment. According to the workman, if monthly wages in 2008 was Rs. 14,500/-, but the last drawn wages referred to here is the last drawn wage as on the date of dismissal, i.e., 20.12.1994 and no

details were forthcoming.

25. It is the claim of the workman that from the period from 26.3.2008 to 31.7.2011, he is entitled to get Rs. 5,80,000/- towards payment u/s 17-B. If as per the above calculation, (i.e., as it is held to be subsistence allowance) from the period of preliminary award to the final award less the amount already paid, this Court is inclined to order Rs. 10,00,000/- (Ten lakhs only) towards full and final settlement of all claims in respect of his non employment. The said amount shall be paid by the ABB Limited. The liability fastened on the Flakt India Limited is discharged.

26. In the result, the writ petition filed by the ABB Limited in W.P. No. 21260 of 2008 is partly allowed and a compensation of Rs. 10 lakhs is ordered towards all claims for the workman. W.P. No. 16810 of 2008 filed by the Flakt (India) Limited is allowed. W.P. No. 24851 of 2009 filed by the workman P.Ramasamy is dismissed. However, the parties are allowed to bear their own costs. Consequently connected miscellaneous petitions stand closed.