
(2010) 05 CAL CK 0060

In the Calcutta High Court

Case No : G.A. No. 1199 of 2010, A.P.O.T. No. 209 of 2010 and W.P. No. 878 of 2003

M/s. J.K. industries Limited

APPELLANT

Vs

Upendra Chowdhary and Others

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5
Evidence Act, 1872 — Section 114, 58
Industrial Disputes Act, 1947 — Section 17B

Citation : (2012) 4 CALLT 97 : (2012) 5 CHN 628

Hon'ble Judges : Pratap Kumar Ray, J;Mrinal Kanti Sinha, J

Bench : Division Bench

Advocate : P.S. Sengupta, Mr. S.K. Dutta and Mr. D. Das Gupta, for the Appellant;R.N. Mazumdar and Mr. Swarup Pal for the State, for the Respondent

Final Decision : Allowed

Judgement

1. Leave is granted to the appellant to file supplementary affidavit. Heard the learned Advocate appearing for the parties.
2. Assailing the order dated 11th March, 2010 passed by the learned Trial Judge in accordance with G.A. No. 2010 of 2003 as filed in W.P. No. 878 of 2003, this appeal has been preferred alongwith the stay application. The stay application has been moved today.
3. In view of the tenor of the order, we are of the view that both the stay application and the appeal could be disposed of. The appeal is taken up for bearing as on day's list. Since the parties are appearing through learned Advocates, service of formal notice of appeal and other formalities stand dispensed with.
4. Appeal is now being heard alongwith the stay application. The impugned order reads such.

The Court: This is an application u/s 17B of the Industrial Disputes Act made by the workman praying for an order directing the writ petitioner/employer to pay the full wages at the last drawn rate pursuant to the award dated 21st November, 2002.

Mr. Sengupta, learned Advocate appearing for the employer, advanced the following submissions.

(a) Before an application u/s 17B of the Industrial Disputes Act may succeed, the workman has to satisfy the Court that he is not gainfully employed. He admits that the workman has indeed in the application, which is supported by an affidavit stated that he is not gainfully employed. But that, according to Mr. Sengupta, affirmed in the year 2003, has spent its force and cannot be relied upon for the purpose of granting relief u/s 17B of the Industrial Disputes Act. A further affidavit should be filed.

(b) The prayer for payment of monthly salary at the rate of Rs. 2,000/-per month which is claimed to be the last drawn rate of pay is a mere assertion made by the workman which is not backed by any evidence.

(c) The fact that the writ petitioner has survived over the years is a premise giving rise to the presumption that he is gainfully employed.

(d) There was never any order staying operation of the award. The employer is, therefore, not liable to pay any wages to the workman.

(e) In any event the liability as regards payment should be apportioned considering the fact that hearing of the writ petition was earlier concluded by a learned Judge who retired without delivering the judgment.

None of these submission advanced by Mr. Sengupta has impressed me. It would be appropriate to notice section 17B in extenso before answering the issues raised by Mr. Sengupta.

[17B. Payment of full wages to workman pending proceedings 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 had 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.]

It would appear that there are two limbs of section 17B. The first limb providing for evidence by the workman reads as follows: "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."

The second limb providing for evidence by the employer is to be found in the proviso to section 17B, which I already have noticed.

The intention of the legislature, according to me, is that the workman has to discharge his onus by affirming an affidavit that he is not employed in any establishment. If the claim of the workman is to be resisted thereafter then it is for the employer to prove to the satisfaction of the High Court that the workman has been employed in any establishment and has been receiving adequate remuneration. In this case not only that no such proof has been adduced by the employer, but also there is no affidavit-in-opposition denying the contents of paragraph 9 of the petition, which reads as follows:

9. It is stated that the applicant is still unemployed and he has to maintain a big family with the help of his nearest relatives and well wishers.

Any statement of fact made in a pleading not denied will amount to have been admitted under Order VIII Rule 5 of the CPC which is also recognised by section 58 of the Evidence Act. While I am answering the first issue raised by Mr. Sengupta, the issue as regards presumption may also be disposed of. My attention was not drawn by Mr. Sengupta to any provision of law which provides that the mere fact that a person is living goes to say that he is gainfully employed in any establishment. Presumptions can be raised u/s 114 of the Evidence Act in respect of any fact which the Court thinks likely to have happened regard being had to the common course of natural events and human conduct etc. As a matter of fact. in our country the position is that more than one-third youth are unemployed and all of them are living. Going by the argument advanced by Mr. Sengupta, one has to conclude that all of them are gainfully employed in any establishment. This is bound to be an absurd conclusion. For the aforesaid reasons the first and the third issues are rejected.

In so far second issue as regards the last drawn rate of the wages, the averment to be found in paragraph 3 of the application u/s 17B has remained undisputed wherein it is stated that his monthly salary was Rs. 2000/- per month. On the top of that from the award I find that the evidence adduced by P.W. Nos. 1 and 2 before the Tribunal was that the workman was getting salary at the rate of Rs. 2000/- per month. Therefore, there is adequate evidence to show that the last drawn pay was Rs. 2000/-.

For the aforesaid reasons, the second issue raised by Mr. Sengupta is also rejected.

The fourth issue raised by Mr. Sengupta is equally without any merit. The legislature has provided in section 17B that in a case where the Tribunal has

directed reinstatement and the employer preferred any proceeding against the award in the High Court, the employer shall be liable to pay to the workman, during the pendency of such proceeding, full wages last drawn by him. This has not been made subject to any order of stay by the High Court. Admittedly, this petition seeking an order setting aside the award was filed by the employer in the year 2003 and which is still pending. Therefore, nothing really turns on the submission as to whether the operation of the award was stayed or not stayed. Admittedly the order of the tribunal directing reinstatement has not been carried out. On the top of that the operation of the award appears to have, in fact, been stayed by the order dated 11th February, 2004 as regards which there is no dispute. But the exact wording of that order is not clear to me nor are the learned advocates equipped with any copy of that order. Therefore. this issue raised by Mr. Sengupta is also rejected.

Last point of Mr. Sengupta as regards apportionment has not also impressed me. The submission is that hearing of the writ petition was concluded on 11th February, 2004 and the judgment was reserved. The learned Judge never delivered the judgment and he ultimately retired. Therefore, Mr. Sengupta contends that there should be apportionment of the liability. I have not been impressed by this submission. section 17B does not restrict the liability of the employer to pay the wages until the conclusion of the hearing. On the contrary. the provision is that the employer shall be liable to pay the workman during the pendency of the proceedings.

I, therefore, am unable to accept this submission. I am told that the learned Judge did not deliver the judgment but the learned Judge, who had concluded the hearing of the writ petition, retired from this Court around the year 2005. So, the matter could have been mentioned immediately thereafter.

For the aforesaid reasons, all the points raised by Mr. Sengupta, are rejected. The application u/s 17B succeeds. This writ petition, it appears from the proforma, was filed on 25th April. 2003. The writ petitioner-employer is, therefore, directed to pay salary to the applicant-workman at the rate of Rs. 2000/- per month commencing from 25th April, 2003 until 28th February, 2010. Payment should be made within 4 weeks and the employer shall go on paying thereafter by the seventh of each succeeding month commencing from 7th April 2010 until the writ petition is finally disposed of.

Mr. Majumdar submits that since the employer has enjoyed the benefit of the money, which should have been paid to the workman, the employer is liable to pay interest and this Court should also direct payment of interest.

This question is reserved and shall be considered at the final hearing of the writ petition.

Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

5. It is the positive point of the appellant before us that on the basis of an affidavit filed in the year 2003 seeking relief u/s 17B of the Industrial Disputes Act, an adjudication was made on 11th March, 2010 by the Learned Trial Judge granting relief to that effect as such the order is vitiated for the sole reason that there was no records before the learned Trial Judge in the form of a supplementary affidavit to this effect that the workman did not engage himself gainfully from the period 2003 to 2010 when the application was pending before the High Court for adjudication.

6. It is a settled law that u/s 17B of the Industrial Disputes Act, an order could be passed only on satisfaction of the Court that the workman is not gainfully employed otherwise while passing any order of stay of the award assailed in the writ application. The condition precedent/sine qua non for grant of relief in an application u/s 17B of said Act is proof of factual matrix that the workman was not in gainfully employment and is not at the present moment gainfully employed.

7. Since on the basis of the factual scenario existing in the year 2003 the issue was decided, we are of the view that the order is accordingly vitiated and it is not legally sustainable. Considering that the impugned order is set aside and quashed.

8. The learned Trial Judge is directed to dispose of the application filed u/s 17B of the said Act on taking a supplementary affidavit from the workman concerned on the issue that the workman is not gainfully employed even at the present moment and he was not gainfully employed for the period when this application was pending in the High Court.

9. Needless to mention that in the event of filing such supplementary affidavit, the appellant will get an opportunity to counter it by filing a rejoinder. The appellant has also filed supplementary affidavit disclosing some material facts about gainful employment of the workman. This fact also been taken into account by the learned Trial Judge while disposing of the application and appellant is at liberty to file affidavit on that score before the learned Trial Court.

10. With the aforesaid findings, the appeal is allowed. The stay application is accordingly disposed of.

11. It is expected that the Learned Trial Judge will dispose of the matter as expeditiously as possible.

12. It is made clear that in the event determination is changed from the Learned Trial Judge who passed the order under appeal, matter could be heard by the appropriate Bench having determination. Certified copy of the order filed in Court today be kept on record.

Urgent certified photostat copy of this order be made available to the parties, if applied for. upon compliance of all requisite formalities.