

(2008) 10 BOM CK 0117

In the Bombay High Court

Case No : Civil Application No. 194 of 2008 in Writ Petition No. 5700 of 2006

Ninan Thomas

APPELLANT

Vs

Oil and Natural Gas Corporation Ltd. and Another

RESPONDENT

Date of Decision : 01-10-2008

Acts Referred:

Constitution of India, 1950 — Article 136, 226
Industrial Disputes Act, 1947 — Section 17B

Citation : (2009) 1 BomCR 137 : (2009) 120 FLR 867 : (2009) 7 SLR 283

Hon'ble Judges : Chandrachud D.Y., J

Bench : Single Bench

Advocate : Gopal Krishnan and Shobha Gopal, instructed by S.S. Pakale, for the Appellant; J.P. Cama G.D. Talreja, instructed by Govindram D. Talreja and Associates, for the Respondent

Judgement

Chandrachud D.Y., J.—The civil application has been taken out by the workman for payment of wages u/s 17-B of the Industrial Disputes Act, 1947. In the present case there is an award of the Industrial Tribunal granting reinstatement with 50% backwages to the workman. The award is the subject-matter of a challenge before this Court in the main writ proceedings. The petition has been admitted and an interim stay was granted on 21st March, 2007 subject to the condition that the employer deposits 50% of the backwages in Court.

2. In paragraph 6 of the application for Section 17-B wages, the workman has pleaded that he had sought employment; that after his services were terminated on 3rd October, 2006 with retrospective effect from 15th August, 1993, he had been attempting to obtain employment either with the Government or with a public sector undertaking; but he was unable to do so since an application for employment would have to be required to be sent through the proper channel viz. through the present employer -ONGC. It has also been stated that the applicant has attempted to obtain employment with several private companies viz. Bayer India, Kuwait Airways, Doha Petroleum Co., Tata Consultancy Services, Siemens India Ltd., Conferry International Placement Services from October,

1996 till August, 2003. However, all the private sector companies also require a letter from the previous employer and a last salary certificate which the applicant was unable to obtain from ONGC who had terminated his services. A reply was filed on behalf of the employer in which in paragraph 3(a) it has been stated that the applicant is "gainfully employed and economically well off.

3. A Division Bench of this Court presided over by the learned Chief Justice, Hon"ble Mr. Justice Swatanter Kumar has in a recent judgment delivered on 17th January, 2008 in U.P. State Bridge Corporation Limited Vs. Maharashtra General Kamgar Union, , and connected matters dealt extensively with the law on the subject. The Division Bench has referred to the judgments of the Supreme Court which hold the field. The principle which has been laid down by the Division Bench is that the filing of an affidavit by the workman u/s 17-B is not a mere technicality but, is in order to ensure that a substantive disclosure of true and correct facts which would unequivocally show that the workman was not gainfully employed is made. The Division Bench has held that the expression "gainfully employed" would include self employment from where income could be generated by the workman. A true disclosure of facts which fall within the personal knowledge of the workman is necessary and the onus is placed on the workman to comply with the statutory provisions contained in Section 17-B. The Division Bench held thus:

In the light of the judgments that we have noted above, there can be no doubt that the onus for seeking statutory interim protection is upon the workman and where Management claims benefit of the proviso of Section 17-B, the onus is upon the Management. The onus on the workman is a very limited one and once an affidavit as contemplated under the provisions of Section 17-B is filed and the Court is satisfied that the workman was not employed in any establishment during the relevant period, direction for payment of wages u/s 17-B would be issued. Such an affidavit filed by the workman has to be true and correct description of facts as per the requirements of law. It is expected that the workman would make a definite and correct averment in the affidavit in regard to his non-employment and would show that he could not be employed despite his efforts. It will be for the workman to state categorically that he was not gainfully employed and was not in self-gainful employment which dependent on the facts and circumstances of the case would be a consideration before the Court to pass a directive for payment of wages and determination of such wages even at the interim stage.

The Division Bench has further observed that the requirement of filing an affidavit cannot be held to be met by merely saying that the workman was not employed in any establishment:

The onus is on the workman and he must discharge such onus by filing affidavit in definite terms and disclosing the correct facts. Whenever and wherever the Management places before the Court apparent material to show the employment in an establishment or gainful self-employment of the workman during the

relevant period then the workman will also be expected to show that his affidavit was correct and the question as to how he subsisted during that period would also become relevant.

4. In the present case, as already noted above the management had filed its affidavit in which in paragraph 3(a), there was a bald statement that the workman was gainfully employed and economically well off. The workman has filed a further affidavit dated 11th September, 2008 in order to ensure that there is due compliance with the judgment of the Division Bench which requires a disclosure of how the workman has subsisted. In paragraph 7 of the affidavit it has been stated that the family of the workman comprises of his wife and son; that his wife is employed as a clerk (redesignated as a computer terminal operator) with Punjab National Bank and that the family subsists on the income of his wife. There is in the circumstances full compliance with the requirements of Section 17-B as interpreted by the judgments of the Supreme Court and of the Division Bench of this Court. The workman has made a true disclosure of the efforts which were made by him to seek employment and the circumstances in which he would not obtain employment either in the Government, a public sector undertaking or a private organization. The workman has also disclosed how he has subsisted in the meantime.

5. However, on behalf of the employer, it has been sought to be urged that when an application is moved by the workman u/s 17-B of the Industrial Disputes Act, 1947, it is open to the High Court, in the exercise of its jurisdiction under Article 226 of the Constitution to deny relief u/s 17-B when the Court comes to the conclusion that the award is without jurisdiction or a nullity. Reliance was placed on the observations contained in the judgment of a Division Bench of this Court in *Elpro International Ltd. Vs. K.B. Joshi and others*, . The decision in *Elpro*, it may be noted, involved a challenge to the constitutional validity of the provisions of Section 17-B. One of the grounds of challenge was that Section 17-B encroaches upon the powers of the High Court under Article 226 and of the Supreme Court under Article 136. Repelling that challenge, the Division Bench observed that there was no such encroachment and in that context held thus:

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 powers under Articles 226 and 136 of the Constitution.

6. These observations of the Division Bench were cited with approval in a judgment of the Karnataka High Court in (*Vysa Bank Ltd. v. All India Vysya Bank Employees' Union*) 1995(II) C.L.R. 700. Relying on these observations, it was urged that the employer is entitled to assert at this stage that no relief u/s 17-B should be granted on the ground that the award is without jurisdiction.

7. The submission which has been urged cannot be accepted. The view which was taken in *Elpro International Ltd.* by the Division Bench of this Court has been

expressly held to be incorrect in the judgment of the Supreme Court in AIR 1998 511 (SC) . In the judgment of the Supreme Court in Dena Bank, the judgment of this Court in Elpro was extensively extracted in paragraph 17 of the judgment, including the observation that where an award was without jurisdiction or is otherwise a nullity or grossly erroneous or perverse, the High Court or the Supreme Court was not debarred from exercising the powers under the Article 226 or 136 respectively. The view in Elpro was overruled by the Supreme Court as would be evident from the following observations:

But we are unable to agree with the view of the Bombay High Court in Elpro International Ltd. 1987(1) L.L.N. 695 {vide supra}, that in exercise of the power under Articles 226 and 136 of the Constitution an order can be passed denying the workman the benefit granted u/s 17-B. The conferment of such a right u/s 17-B cannot be regarded as a restriction on the powers of the High Court or the Supreme Court under Articles 226 and 136 of the Constitution.

8. Section 17-B has been enacted by Parliament in order to provide relief to a workman who is ordered to be reinstated under an award of the Labour Court or the Industrial Tribunal during the pendency of the proceedings where the award is under challenge before the High Court or the Supreme Court. The payment which is required to be made is in the nature of subsistence allowance which is not refundable or recoverable from the workman even if the award is set aside by the High Court or the Supreme Court. Having regard to the nature and object of the provision and the judgment of the Supreme Court, it is impossible to subscribe to the view that this Court should in the exercise of its jurisdiction under Article 226, reject the application u/s 17-B, even though all the requirements which have been spelt out in the statutory provision have been fulfilled, by looking into the legality of the award. That would amount to rewriting legislation and imposing a condition which Parliament has not imposed. That lies beyond the jurisdiction of the Court under Article 226. In these circumstances, the civil application would have to be allowed and is accordingly allowed.

9. Accordingly, the civil application is disposed of directing the employer, ONGC, to pay to the applicant before the Court the wages last drawn by him from 21st March, 2007 which is the date on which the award was stayed by a learned Single Judge of this Court. The civil application is accordingly disposed of.