

(2001) 06 BOM CK 0045
In the Bombay High Court
Case No : O.O.C.J. W.P. No. 1228 of 2001

Rallis Group Employees Union

APPELLANT

Vs

Rallis India Limited and Others

RESPONDENT

Date of Decision : 12-06-2001

Acts Referred:

Industrial Disputes Act, 1947 — Section 25FF

Citation : (2001) 91 FLR 462 : (2002) 1 LLJ 173

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

Bench : Single Bench

Advocate : C.U. Singh and M.D. Nagle, for the Appellant; J.P. Cama and V.K. Shiralkar, instructed by Shiralkar and Co. for Respondent Nos. 5 to 7, for the Respondent

Judgement

D.Y. Chandrachud, J.—Rule. Returnable forthwith. Respondents waive service. By consent taken up for hearing and final disposal.

2. The writ petition is directed against an interim order passed by the Industrial Court on April 27, 2001, by which an application for the grant of relief by the Union came to be rejected. The dispute between the parties arises out of an agreement dated February 12, 2001, which was entered into by the First Respondent with the Fifth Respondent to these proceedings. By and under the terms of the Agreement, the First Respondent has agreed to sell to the Fifth Respondent, the whole of its Pharmaceutical Business Undertaking as a going concern for an aggregate consideration of Rs. 49 crores. The Pharmaceutical Business Undertaking is defined in clause (1) of the recitals to the Agreement as follows:

"1. The Seller is engaged, inter alia, in the business of the manufacture and marketing of Drugs and Pharmaceuticals and other medicinal preparations. The Seller has a factory and manufacturing facilities situated at Plot No. B-9/2 in the Waluj Industrial Area, within the village limits of Wadgaon and outside the limits of Aurangabad Municipal Corporation, in the rural area and within District

Aurangabad, Maharashtra, for the processing, production, formulation and manufacture of drugs and pharmaceutical products and is seized and possessed of and otherwise well and sufficiently entitled free from all encumbrances together with all the lands, buildings, constructions, assets, rights, benefits and other assets and property thereof or relating thereto all agreements, arrangements and undertaking pertaining thereto save and except the mortgages and charges referred to in Article 4.3 of this Agreement (hereinafter referred to as "the Pharmaceutical Business Undertaking")."

Clause 3 of the recitals to the Agreement defines what the Pharmaceutical Business Undertaking would consist of. This is defined to include (i) fixed assets in Schedule "A", (ii) the movable assets in Schedule "B", (iii) intellectual property and brand names referred to in Schedule "C", (iv) the benefits of licences and permits set out in Schedule "D", (v) the benefits of agreement set out in Schedule "E" (vi) transfer of liabilities set out in a copy of the Balance Sheet annexed as Schedule F and (vii) certain investments in foreign Companies set out in Schedule "G". Clause (g. 1) of Article 2 to the agreement is entitled "Continued Employment" and provides as follows

"g. 1 Continued Employment: With immediate effect from the Closing Date and simultaneously with the transfer of the Business, the Purchaser shall take over the Pharmaceutical Business Undertaking Personnel (except those Pharmaceutical Business Undertaking Personnel who have less than 12 months of service left as of Closing Date) and be responsible for the fulfilment and maintenance of the Personnel Plan. The Purchaser shall continue to employ the Company personnel including, . in the terms of Section 25-FF of the Industrial Disputes Act, 1947, inter alia, that (a) the services of the Company Personnel, shall not be or deemed to be interrupted by such transfer; (b) the terms and conditions of service applicable to the Pharmaceutical Business Undertaking Personnel after such transfer are not in any way less favourable to the Pharmaceutical Business Undertaking Personnel than those applicable to them immediately before the transfer; and (c) the Purchaser is, under the terms of the transfer herein, legally liable to pay to the Pharmaceutical Business Undertaking Personnel, in the event of their retrenchment, compensation on the basis that the services have been continuous and have not been interrupted by the transfer of the Business."

3. The dispute in the present case that has been espoused by the Petitioner is on behalf of 106 employees who apprehend that upon the transfer of the Pharmaceutical Business Undertaking, the services of these workmen would be transferred from the pay roll of the First Respondent to the pay roll of the Fifth Respondent upon which they would cease to be the employees of the First Respondent. The apprehension of the workmen is set out in para 1(xii) and para J of the Complaint which has been filed before the Industrial Court, under Items 5, 9 and 10 of Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of "Unfair Labour Practices Act, 1971. In sum and substance

therefore, the grievance of the workmen is that upon the transfer of the Undertaking, the services of the workmen would be transferred to the Fifth Respondent and that in the event, that the workmen do not consent to the transfer, their services would come to an end. The Industrial Court has rejected the application for interim relief holding, inter alia, that the Pharmaceutical Division of the Company was an independent establishment and that the workmen are sufficiently protected by the provisions of Section 25-FF of the Industrial Disputes Act, 1947.

4. The Agreement dated February 12, 2001 which was entered into between the First Respondent and the Fifth Respondent was not placed on the record of the Industrial Court. But, in the reply which was filed on behalf of the First Respondent what was stated is that it was the "Pharma Undertaking" of the First Respondent comprising of (i) the manufacturing unit at Aurangabad, (ii) about 90 Medical Representatives all over India and (iii) Rallis brand products with brand names made by third parties at various locations that was the subject matter of the undertaking. In the affidavit-in-reply, it was stated that the total number of employees in the Pharma Unit are about 300 and that all the employees who are associated with the Pharma Unit would be transferred to the Fifth Respondent. The interim order of the Industrial Court has been impugned by the Union. The Learned counsel appearing on behalf of the Petitioner, inter alia, sought to submit that the appointment letters both of the staff at the Head Office as well as of the Medical Representatives contain a power of transfer and that in fact, a large number of employees in various establishments of the Company, the details whereof have been spelt out at page 47 of the Paper-Book, have been transferred. The learned counsel thus sought to urge that the finding of the Industrial Court that the workmen concerned were employees of the Pharmaceutical Business Undertaking is not, correct. It was sought to be submitted that under the provisions of Section 25-FF of the Industrial Disputes Act, 1947 what is contemplated is the transfer of the ownership or management of an undertaking. The expression "industrial establishment or undertaking" is defined by Section 2(ka) of the Act to mean an establishment or undertaking in which any industry is carried on. The submission, therefore, was that for the purposes of Section 25-FF, the transfer which is contemplated must have relation to the place of work or business of the workmen. Reliance was sought to be placed on the letters of appointment of the workmen concerned and the attention of the Court is drawn to the fact that even in the case of Medical Sales Representatives, an appointment is made as Medical Representative in the Pharmaceutical Division of the establishment. The establishment is referred to in the letter of appointment as Rallis India Limited. The contention, therefore, was that the employees are the employees not of the Pharmaceutical Division or Unit, but of the First Respondent and that, therefore, the transfer of the undertaking to the Fifth Respondent should not operate to prejudice their position. Reliance was also placed on the Judgment of the Supreme Court in Management of R.S. Madhoram and Sons Agencies (P) Ltd. Vs. Its Workmen, . The learned counsel

submitted that in order to avoid complying with the provisions of Chapter V-B of the Industrial Disputes Act, 1947 an effort is being made to dispense with the service of the workmen by taking recourse to Section 25-FF. On the other hand, on behalf of the First Respondent it was sought to be submitted that the First Respondent has only one factory which has been in the production of pharmaceuticals. The Pharmaceutical Business Undertaking which comprises inter alia, of this factory and the trade marks belonging to the First Respondent are being sold to the Fifth Respondent under the agreement dated February 12, 2001. The Learned counsel submitted that the Medical Sales Representatives numbering about 93, have been exclusively doing the work of the Pharmaceutical Division since only the products of the Pharmaceutical Division can be sold by them. The Learned counsel submitted that upon the sale of the Pharmaceutical Business Undertaking, there would really be no work for these representatives and that the First Respondent as the employer would be within its right in exercising its power u/s 25-FF of the Industrial Disputes Act, 1947.

5. Before considering the rival submissions of the learned counsel, it would be material to extract Section 25-FF of the Industrial Disputes Act, 1947 which provides as follows:

"25-FF. Compensation to workmen in case of transfer of undertakings--Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25-F, as if the workman had been retrenched:

Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if -

- (a) the service of the workman has not been interrupted by such transfer;
- (b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and
- (c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer."

6. Section 25-FF of the Act postulates a situation where the ownership or management of an undertaking is transferred. As already noticed, the expression "industrial establishment or undertaking" is defined as an establishment or undertaking in which any industry is carried on, by Section 2(ka) of the Act. In a case involving the transfer of the ownership or management of an undertaking, every workman who has been in continuous service for at least one year is

entitled to notice and compensation in accordance with the provisions of Section 25-FF. The proviso to Section 25-FF lays down that if the conditions stipulated in Clauses (a), (b) and (c) thereto are fulfilled, then nothing contained in the Section shall apply where there is a change of employer. Clauses (a), (b) and (c) of the proviso stipulate that the service of the workman should not be interrupted and that there should be protection of existing terms and conditions of service and the new employer should be bound to pay compensation in the event of retrenchment.

7. In so far as the transfer of the Pharmaceutical Business Undertaking is concerned, the Learned counsel for the Petitioner- Union expressly states that the Union does not challenge the business decision of the First Respondent to transfer the ownership of the undertaking to the Fifth Respondent. The agreement which has been entered into between the First and Fifth Respondents is not therefore, challenged. The learned counsel, however, submitted that the provisions of Section 25-FF cannot be read to mean that existing employees of the First Respondent are under a compulsion to accept transfer to the new employer viz., the Fifth Respondent. There is merit in this submission for the reason that even upon the transfer of the ownership of an undertaking from one owner to another, the existing employees cannot be compelled to accept employment (sic) with the new employer. Section 25-FF provides that in the case of such a transfer of the undertaking, the employees are entitled to the payment of retrenchment compensation as stipulated in Section 25-F. The proviso to the section, however, relieves the employer of that burden if the conditions stipulated therein are fulfilled. Be that as it may, Section 25-FF does not and cannot be read to import a compulsion on any of the existing employees of the First Respondent to accept the transfer to the services of the Fifth Respondent. Indeed, that was not the submission of Mr. Cama appearing on behalf of the First Respondent. The learned counsel appearing on behalf of the First Respondent submitted that the First Respondent and the Fifth Respondent would be willing to furnish employment to those of the existing employees of the Pharmaceutical Business Undertaking without interruption in service and on the same terms and conditions as are applicable to them at present. In other words, those of the existing employees of the Pharmaceutical Business Undertaking of the First Respondent who are willing to accept employment with the Fifth Respondent would be provided employment with continuity of service and with full protection to their terms and conditions of service. The assurance and statement of the learned counsel appearing on behalf of the First Respondent as aforesaid is accordingly recorded.

8. In so far as those employees who are not ready and willing to accept employment with the Fifth Respondent are concerned, as already noticed earlier, the apprehension in the industrial complaint is that the services of these employees may stand terminated in the event that they do not consent to transfer. Here again, the position cannot be in dispute that the transfer of the Undertaking of the Pharmaceutical Business Undertaking of the First Respondent

to the Fifth Respondent, does not bring an end to the contract of employment of the existing employees with the First Respondent. In fairness it must also be stated that the learned counsel appearing on behalf of the First Respondent has stated that those of the employees of the Pharmaceutical Business Undertaking who do not accept employment with the new employer shall continue in the service of the First Respondent subject to such rights and remedies to which the First Respondent is entitled to have recourse under the Industrial Disputes Act, 1947. This position does, in my view, afford sufficient protection for the workmen concerned. Those of them who are willing to seek employment with the Fifth Respondent are assured that their existing terms and conditions of service will be protected without any interruption in service. Those who do not accept employment with the Fifth Respondent will continue to remain in service of the First Respondent subject to the right of the First Respondent to have recourse to its remedies under the Industrial Disputes Act, 1947.

9. A considerable amount of argument has gone into the question as to whether or not, the staff of the Head Office and the Medical Representatives can be regarded as employees engaged in the Pharmaceutical Business Undertaking as defined in the agreement dated February 12, 2001 so as to attract the provisions of Section 25-FF. The Union would contend that the employees of the Pharmaceutical Business Undertaking would include those employees in the factory of Aurangabad whereas according to the First Respondent, it would also include the Medical Sales Representatives who are dependent on work exclusively with the Pharmaceutical Division as well as those at the Head Office engaged in the Pharmaceutical Division. This is an issue upon which there is a serious dispute between the parties and it is only appropriate and proper that the resolution of that question must await the final hearing of the complaint. Relying upon the terms of appointment, the Union has placed reliance on the following observations of the Supreme Court in Madho Ram's case (supra) 1964 I LLJ 366 :

"It is not disputed that the terms and conditions of service were the same for all the employees and what is most significant is the fact that the employees could be transferred from one department run by the transfer or-firm to another department, though the transferor conducted several branches of business which are more or less allied, the services of the employees were not confined to any one business, but were able to be transferred from one branch to another. In the payment of bonus all the employees were treated as constituting one unit and there was thus both the unity of employment and the identity of the terms and conditions of service. In fact, it is purely a matter of accident that the 57 workmen with whose transfer we are concerned in the present appeal happened to be engaged in retail business which was the subject matter of the transfer between the firm and the company. These 57 employees had not been appointed solely for the purpose of the retail business but were in-charge of the retail business as a mere matter of accident. Under these circumstances, it appears to us to be very difficult to accept Sri Setalvad's argument that because the retail business has an identity of its own it should be treated as an independent and

distinct business run by the firm and as such, the transfer should be deemed to have constituted the company into a successor-in-interest of the transferor-firm for the purpose of Section 25-FF. As in other industrial matters, so on this question too, it would be difficult to lay down any categorical or general proposition. Whether or not the transfer in 1 question attracts the provisions of Section 25-FF must be determined in the light of the circumstances of each case. It is hardly necessary to emphasize that in dealing with the problem, what industrial adjudication should consider is the matter of substance and not of form. As has been observed by this Court in *Anakapalla Co-operative Agricultural and Industrial Society Limited Vs. Workmen*, the question as to whether a transfer has been effected so as to attract Section 25-FF must ultimately depend upon the evaluation of all the relevant factors and it cannot be answered by treating any one of them as of overriding or conclusive significance."

10. The complaint in the present case is pending before the Industrial Court and a resolution of the controversy as aforesaid must await the conclusion of the trial before the Industrial Court after evidence is led by the contesting parties. In the present case, the Industrial Court has not had the benefit of considering the agreement dated February 12, 2001 as it was not placed on the record by the employer. A copy of the agreement was made available to the learned counsel appearing on behalf of the petitioner in the Court. The Industrial Court shall decide upon the question as to whether the complainant workmen are engaged in the undertaking of the Pharmaceutical Business Undertaking within the meaning of Section 25-FF while trying and disposing of the complaint. Mr. Cama, the learned counsel for the First Respondent submitted that this Court grant to the employer at this stage, the liberty to retrench those of the 106 workmen who do not accept a transfer to the Fifth Respondent u/s 25-FF. It would not be possible for this Court to grant the liberty as prayed since the question as to whether the workmen have been engaged in the Pharmaceutical Business Undertaking must await determination in the pending complaint. It would not be appropriate to enter a finding at the present stage.

11. In so far as the 13 employees of the Head Office are concerned, the learned counsel appearing on behalf of the First Respondent has stated that these employees shall continue to work in the Head Office of the First Respondent during the pendency of the complaint in the Industrial Court.

12. In the circumstances, the writ petition is disposed of, incorporating the statement and assurance of the learned counsel appearing on behalf of the First Respondent to the effect (i) that the Fifth Respondent is ready and willing to take on its roll all those employees of the Pharmaceutical Business Undertaking of the First Respondent without interruption in service and on conditions of service which are no less favourable than those which are applicable to them at present; (ii) that those employees who do not wish to accept a transfer to the Fifth Respondent as an employer, shall continue in the service of the First Respondent subject to the rights, if any, of the First Respondent to have recourse to the

Industrial Disputes Act, 1947; (iii) the 13 employees in the Head Office shall be permitted to continue therein during the pendency of the complaint. With these observations, the Writ Petition is disposed of. No order as to costs.