

(1965) 01 CAL CK 0019
In the Calcutta High Court
Case No : Appeal No. 38 of 1964

Ram Hari De

APPELLANT

Vs

Official Liquidator, High Court

RESPONDENT

Date of Decision : 05-01-1965

Acts Referred:

Companies Act, 1956 — Section 445(3)
Industrial Disputes Act, 1947 — Section 25F, 25FFF

Citation : AIR 1965 Cal 552 : 69 CWN 317 : (1965) 2 LLJ 230

Hon'ble Judges : R.N. Dutt, J;D.N. Sinha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sinha, J.—This is an appeal against an order of B. C. Mitra, J., dated 9th July, 1963. The learned Judge was dealing with a number of appeals under Rule 164 of the Companies (Court) Rules, 1959, against the decision of the Official Liquidator rejecting the claims of the appellants to various sums of moneys to which they claim to be entitled by reason of termination of their services under the Bank of China (in liquidation). The facts are shortly as follows: The Bank of China carried on business in India. Sometime in May, 1962 the Reserve Bank of India revoked the license given to it for doing foreign exchange business in India, thereby making it impossible for it to act as an exchange bank. On the 14th June, 1962 the Bank of China issued a notice under paragraph 522(6) of the All India Industrial Tribunal (Bank Disputes) Award, intimating its intention to effect retrenchment of staff with regard to certain employees on the ground that consequent upon revocation by the Reserve Bank of India of its license to do foreign exchange business in India, the volume of its business as an exchange bank has been (sic) cally reduced. The Bank of China's employed Union, representing the workmen, raised an industrial dispute over the said retrenchment. Conciliation proceedings were held and ultimately certain terms of settlement were arrived at. The terms are set out in the order of the learned Judge and briefly speaking, provide for the grant of retrenchment compensation,

gratuity, allowances and other payments. It may be stated that these payments are on a very generous scale. Thereafter, the political atmosphere between China and India became more complicated and the bank served further notice of retrenchment upon a fresh batch of employees. On the 3rd September, 1962 the President of the Employees' Union wrote to the bank that it was presumed that the retrenchment benefits to be given to the further batch of employees proposed to be retrenched, would be the same as provided in the aforesaid tripartite agreement. In answer to the said letter, the Acting Manager of the Bank wrote a letter dated 5th September, 1962 confirming that the retrenchment benefits as provided in the tripartite agreement dated 4th August, 1962 will be given by the Bank to its employees in all stages of retrenchment. On the 2nd November, 1962 the licence of the bank to do business in India was cancelled. On the 10th December, 1962 a winding-up order was made for liquidation of the said bank. The appellants, who were employees of the said bank now in liquidation, claimed before the Official Liquidator that the bank was indebted to them in respect of full allowance, leave pay, notice pay, gratuity and compensation for discharge and/or retrenchment and special gratuity, in terms of the tripartite agreement mentioned above. The Liquidator allowed one item of the claim, namely, the annual allowance for 1962. He rejected the claims for payment of retrenchment compensation, salary in lieu of notice for retrenchment, special gratuity etc. The court below has held that the appellants were not entitled to the benefits under the terms of the tripartite agreement, but they were entitled to benefits u/s 25FFF of the Industrial Disputes Act, 1947, but subject to the conditions contained in that Act and the Companies Act of 1956. Before us, Mr. Sen on behalf of the appellants has challenged the order on two grounds: The first ground is that the learned Judge was in error in holding that the appellants were not entitled to benefits under the terms of the tripartite agreement and secondly, that the particular form of the order made by the learned Judge in respect of the claim u/s 25FFF of the Industrial Disputes Act, 1947, is erroneous.

2. On the first point, the argument advanced is as follows; It is stated that the said agreement dated 4th August, 1962 was arrived at between the bank and the union in respect of retrenchment of 15 clerical and 15 subordinate staff. The bank was, however, slowly closing down and the correspondence, particularly the letters dated 3rd September 1962 and 5th September, 1962 mentioned above, clearly shows that the bank agreed to extend the benefits of that agreement to all workmen who would be (sic) in future. It is, therefore, stated that (sic) agreement came into existence for the benefit of all the workmen of the bank and that the appellants are entitled to take benefit thereof. The short answer given by the learned Judge to this contention is that the tripartite agreement only dealt with the question of retrenchment, "Retrenchment", and the compensation to be paid in the nature of retrenchment compensation, can only arise when a business continues but a number of workmen were retrenched. It cannot arise in the case of a total closure of the business or when the

employment comes to an end by operation of law. Section 445(3) of the Companies Act 1956 deals with the effect of the making of a winding-up order and runs as follows:

"Such order shall be deemed to be a notice of discharge of the officers and employees of the company, except when the business of the company is continued."

3. The position is that an order for a compulsory winding-up has the same effect as notice of discharge given on the date when the winding up order is made. It is nobody's case that the business of the company has been continued after the date of the winding-up order. The point, therefore, is in a very small compass. The tripartite agreement expressly stated that the amount payable thereon was in the nature of "retrenchment compensation". The question is whether the discharge of employees u/s 445(3) of the Companies Act, upon the compulsory liquidation of a company, operates as an order of retrenchment. If it does, then the appellants would be entitled to amounts agreed upon between the parties under the so-called tripartite agreement. If not, they are not entitled to the same, although they may be entitled to payment u/s 25FFF of the Industrial Disputes Act, 1947. It was argued in the court below that all the employees were entitled to take advantage of the tripartite agreement, firstly, on the ground that it became part of their contract of service and secondly, on the ground that the discharge of employees u/s 445(3) of the Companies Act is equivalent to retrenchment as contemplated by the tripartite agreement. The learned Judge was right in rejecting both the contentions. So far as the first ground is concerned, the so-called tripartite agreement expressly used the word "retrenchment". There is nothing to show that at the date when it was agreed upon, the bank had closed its business. It closed its business only when it was compulsorily wound up by the court. The memorandum dated 4th August, 1962 embodying the terms of settlement itself states that it is a settlement of an "industrial dispute". There can be no doubt that the expression "retrenchment" was used in the sense that it is used under the Industrial Disputes Act. Therefore, even if the terms became a part of the contract of service of the appellants it does not advance matters any further, because the benefits thereunder would only be available in the case of retrenchment and not otherwise. Therefore, the short point is as to whether the termination of services of the workmen u/s 445(3) of the Companies Act, gives rise to a "retrenchment as contemplated by the Industrial Disputes Act. Section 25J of the Industrial Disputes Act provides that the provisions contained in Chapter VA which deals with "lay-off and retrenchment", shall have effect notwithstanding anything inconsistent therewith contained in any other law. We must therefore, find out what is the meaning of "retrenchment" under the Industrial Disputes Act. Section 2(oo) defines retrenchment as follows:

"2 (oo). "Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever otherwise than as a punishment inflicted

by way of disciplinary action, but does not include-

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(c) termination of the service of a workman on the ground of continued ill-health;"

4. The definition, of course is very wide, and it was argued once that the expression "retrenchment" includes the case where a business was closed or compulsorily came to an end. This argument was, however, repelled by the Supreme Court. Before I come to the decided cases, I must refer to some other provisions of the Industrial Disputes Act. The first is Section 25F. This section lays down certain conditions precedent to the retrenchment of workmen. For example, it provides that no workman employed in any industry who has been in continuous service for not less than one year under an employer, shall be retrenched by that employer until the workman has been given one month's notice in writing indicating the reasons of his retrenchment, and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice. Upon retrenchment, the workman has to be paid compensation equivalent to 15 days' average pay for every completed year of service or any part thereof in excess of six months. The section to be considered in Section 25FFF. This section was introduced by the Amending Act of 1957, because it was held by the Supreme Court that a workman could not be said to be retrenched when there was a bona fide closure of business and no retrenchment compensation was payable. u/s 25FFF, where an undertaking is closed for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking shall, subject to certain exceptions, be entitled to notice and compensation in accordance with the provisions of Section 25F, "as if" the workmen had been retrenched. This shows almost conclusively that the meaning of "retrenchment" u/s 25F is restrictive and does not in terms apply to the case of a bona fide closure of business. I shall now come to the decided cases.

5. The first case to be considered is a Supreme Court decision in *Pipraich Sugar Mills Ltd. Vs. Pipraich Sugar Mills Mazdoor Union*, . The facts in that case were as follows: The appellant was a company which had been carrying on business in crushing sugar cane at a place called Pipraich in Gorakhpur District. The sugar industry was passing through a crisis owing to shortage of sugarcane and the Government assumed control of its production and supply. The quota allotted to the appellant proved to be too small and the undertaking was suffering continued loss. With the permission of the Government, the company sold its machineries etc., to a party in Madras with the arrangement that their workmen would be employed by the Madras party when the machineries were set up at Madras. The

workmen, however, became hostile and opposed the idea. There were a series of strikes and other hostile demonstrations and an industrial dispute was raised. The Industrial Tribunal held that the company was liable to pay Rs. 45,000/- to the workmen. This finding was confirmed by the Labour Appellate Tribunal, from which an appeal was preferred to the Supreme Court. Ayyar, J., said as follows:

"Though there is discharge of workmen both when there is retrenchment and closure to business, the compensation is to be awarded under the law, not for discharge as such but for discharge on retrenchment, and if, as is conceded, retrenchment means in ordinary parlance, discharge of the surplus, it cannot include discharge on closure of business."

6. This decision was followed by another decision of the Supreme Court in *Barsi Light Rly. Co. Ltd. v. K. N. Joglekar* (S) AIR 1957 SC 121. In that case, a number of applications from various States were considered, upon the interpretation of Sections 25F and 25FF of the said Act. Das, J., said as follows:

"... Retrenchment as defined in Section 2(oo) and as used in Section 25-F has no wider meaning than the ordinary, accepted connotation of the word: It means the discharge of surplus labour or a staff by the employer for any reasons whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and it has no application where the services of all workmen have been terminated by the employer on a real and bona fide closure of business as in the case of *Shri Dinesh Mills Ltd.*, or where the services of all workmen have been terminated by the employer on the business or undertaking being taken over by another employer in circumstances like those of the *Railway Company*. Mr. Mehta, appearing for respondents Nos. 4 and 5 in Civil Appeal No. 105 of 1956, tried to make a distinction between transfer of ownership with continuation of employment (which according to him did not come within the definition) and termination of service on closure of business. There is in fact a distinction between transfer of business and closure of business but so far as the definition clause is concerned, both stand on the same footing if they involve termination of service of the workmen by the employer for any reason whatsoever, otherwise than as a punishment by way of disciplinary action. On our interpretation, in no case is there any retrenchment, unless there is discharge of surplus labour or staff in a continuing or running industry."

7. It is because of this decision that the Act was amended and Section 25FFF was introduced by the Amending Act of 1957. It will be observed that u/s 25FFF, workmen are not to be considered as retrenched where there is a bona fide closure of business, but under certain circumstances they are to be considered "as if" the workmen had been retrenched. As I have pointed out above, the so-called tripartite agreement is one which applies only in the case of retrenchment. Therefore, its terms cannot apply in the case of compulsory closure, because in such a case there can be no question that the closure was bona fide. In the circumstances, workmen may get the benefit of Section 25FFF but their case cannot be considered to be that of retrenchment. The so-called tripartite

agreement said that certain liberal grants should be made when a number of workmen were retrenched. It laid down the amount of retrenchment compensation. The employer agreed to pay a special rate of retrenchment compensation when there was actual retrenchment and not notionally as is the case u/s 25FFF. u/s 25FFF, they can get only that amount of compensation which the statute provides, namely on the basis of Section 25F. In our opinion, the law upon this point has been sufficiently declared by the Supreme Court. It is, therefore, unnecessary to go into the cases decided by the Labour Court like *Benett Coleman and Co. Ltd. v. Their Employees* (1954) Lab AC 24 (Cal) which were overruled by the Supreme Court, or a number of English decisions cited in the court below, which do not turn on the special provisions of Section 445(3) of the Companies Act, 1956. Mr. Sen has argued that the tripartite agreement contemplated a gradual and phased reduction in the staff until the business was closed and that this is exactly what happened when the winding-up order was made. In our opinion, this is not an accurate description of what happened in this case. It is true that the bank was contemplating a gradual retrenchment in the staff, but we cannot presume that at the time when it entered into the so-called tripartite agreement, it had made up its mind to close the business altogether. At that time, the situation was one which is sometimes colourfully described as "fluid", and the bank did not know whether matters would come to a head or not. Many things may have happened. The two countries may have adjusted their differences or the situation may have ceased as a result of international intervention. Nobody in fact, knew what was going to happen, although the worst might have been apprehended. If the circumstances had improved, the bank may not have continued to effect retrenchment and might have retained the services of the rest of its workmen. But by the operation of Section 445(3) of the Companies Act, 1956 all this was altered and no option or choice remained with the bank. By operation of law, all workmen were deemed to have been dismissed. It was not the case of a voluntary closure of business or discharge of workmen by the employer as a result of any deliberate act on their part. The learned Judge has rightly held that Section 25FFF of the Industrial Disputes Act has nothing to do with retrenchment compensation as such. This new section deals with the question of compensation to workmen in the case of closure of the undertaking. The compensation will be calculated on the basis of Section 25F, as if the workmen had been retrenched. It does not deal with the question of retrenchment compensation at all. The learned Judge has also pointed out that according to the definition of retrenchment as laid down in Section 2(oo), there must be the termination of services of workmen by the employer. It is nobody's case that the bank terminated the services of the appellants. They stood discharged by operation of Section 445(3) of the Companies Act, 1956. The principle to be observed has been laid down in *Tait's case*, (1871) 16 Solicitors' Journal 46. In that case, the terms of engagement of an officer by a company was that pounds 5000 would be paid to him if the company would discontinue his services. There was a winding-up order and the question arose as to whether the officer was entitled to compensation. Lord Cairns said as follows:

"In my opinion, in order to bring the assets of the Company under a liability on this contract there must be a voluntary, active, intelligent discontinuance by the company of the employment of Mr. Tait as their agent at a time and under circumstances when it is optional with them either to continue or to discontinue it. That in my opinion is what is pointed at by the contract he has entered into, and that in my opinion is not what has been done in this case."

8. It was held that the claim failed because the company had no option when the services of the officer came to an end upon an order for winding up being made. Mr. Sen on behalf of the appellants has relied on a Supreme Court decision *Anakapalla Co-operative Agricultural and Industrial Society Limited Vs. Workmen*, . According to him, this decision has in some way altered the existing concept of retrenchment compensation. In our opinion it does not do anything of the kind. That was a case u/s 25FF of the Industrial Disputes Act. A historical narrative as to how Section 25FF came to be inserted and amended has been given, and the tests for finding out whether a purchaser of an industrial concern can be held to be a successor-in-interest of the vendor have been laid down. This decision does not deal with the problem that has arisen in this case. It may, however, be pointed out that Gajendragadkar, J. (as he then was) has explained the words "as if used in Section 25FF. He states as follows:

"..... the termination of services resulting from transfer or closure is not retrenchment, and it is on the basis of the correctness of this decision that Section 25-FF as amended has been enacted. Besides, on a construction of Section 25-FF itself, it is difficult to equate the termination of services with which it deals with retrenchment covered by Section 25-F. As we have already indicated, Section 25-F is referred to in Section 25-FF to enable the assessment of compensation payable to the employees covered by Section 25-FF. The clause "as if clearly shows the distinction between retrenchment u/s 25-F and termination of service u/s 25-FF. In this connection, we may refer to the decision of this Court in *Hatisingh Mfg. Co. Ltd. and Another Vs. Union of India (UOI) and Others*, . In that case this Court had to consider the effect of the words "as if" occurring in Section 25FF and it had been held that by the use of the words "as if the workmen had been retrenched" under the said section, the Legislature has not sought to place closure of an undertaking on the same footing as retrenchment u/s 25-F."

9. It is clear therefore that a closure of business as a result of a winding-up order cannot be equated with retrenchment and does not attract compensation which can be described as "retrenchment compensation." We are unable to consider this decision as a departure from the principles laid down in the previous decisions of the Supreme Court mentioned above, It remains for us to consider the only other point taken, namely the form of the order. Clause (a) of the order (at page 65 of the paper book) runs as follows:

"(a) Upon giving up their claims on the basis of any contract of employment, the employees of the Bank other than Biswanath Das will be entitled to submit their

claims for compensation u/s 25FFF of the Industrial Disputes Act, 1947. Such claims, if any, are to be submitted, within fifteen days from the date of signing of this order.

(b) The Liquidator is directed to entertain such claims and if satisfied, to admit them, subject to the provisions contained in (i) Section 530 Sub-section (2) of the Companies Act, 1956, (ii) in the proviso to Section 25-FFF and (iii) in Section 2 Sub-section (s) (iv) of the Industrial Disputes Act, 1947. Such of the claims as are admitted under this clause should be treated as preferential claims u/s 530 of the Companies Act, 1956."

10. Mr. Sen has rightly argued that if his clients have got the right to compensation u/s 25FFF of the Industrial Disputes Act, that cannot be made conditional upon giving up any other claim. They have made a claim which has failed for the time being. But no condition could be imposed as has been done by the learned Judge for claiming compensation u/s 25FFF, to which his clients were entitled under the law. Mr. Sen has further pointed out that the learned Judge was settling claims, and a claim u/s 25FFF has already been made before the liquidator, so that the learned Judge should not have imposed the onerous task of making a further claim. He says that his clients were very poor and were unable to incur the further cost that may be occasioned thereby Mr. Das appearing on behalf of the respondent has said that if the Court so directed, the claim already made will be considered, and no formal claim need be filed once again.

11. the result js that we affirm the order of the court below and dismiss the appeal, save and except as to Clause (a) of the order, which is set aside. We direct that the claims already made u/s 25FFF of the Industrial Disputes Act shall be considered and the Official Liquidator will proceed under Clause (b) of the order as if a claim u/s 25FFF has been Act shall be considered and the Official Liquidates and treat it as a preferential claim u/s 530 of the Companies Act as directed by the Court below. He will be at liberty to ask for further particulars if necessary with regard to this appeal, each party will bear and pay his own cost. The Liquidator will retain his costs as between attorney and client out of the assets in his hands. Certified for two counsel

R.N. Dutt, J.

12. I agree.