
(2008) 02 BOM CK 0081

In the Bombay High Court

Case No : Letters Patent Appeal No. 168 of 1998 in Writ Petition No. 243 of 1997

Shree Steel Castings (Pvt.) Ltd.

APPELLANT

Vs

Vasanta Kumbhare and Others

RESPONDENT

Date of Decision : 14-02-2008

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 28, 30
Industrial Disputes Act, 1947 — Section 11, 25FFA, 25FFF, 25H, 25J
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 28

Citation : (2008) 3 ALLMR 747 : (2008) 5 BomCR 191 : (2008) 110 BOMLR 843 : (2008) 119 FLR 418 : (2008) 3 LLJ 133 : (2008) 4 MhLj 525 : (2008) 4 MhLj 524

Hon'ble Judges : R.C. Chavan, J;K.J. Rohee, J

Bench : Division Bench

Advocate : M.V. Samarth, for the Appellant; S.D. Thakur and T.R. Kankale, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

R.C. Chavan, J.—This appeal, by employer, takes exception to the judgment of the learned single Judge allowing Writ Petition No. 243 of 1997, whereby the learned Judge allowed the complaint of the employees bearing No. 942 of 1995, u/s 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, which had been rejected by the learned Member, Industrial Court, Nagpur.

2. The appellant-employer is a small scale industry which commenced production in the year 1985. On 17.10.1993 the appellant gave a statutory notice of closure, since due to financial difficulties, the appellant was not in a position to run the factory. On completion of the statutory period of sixty days, on 17.12.1993, the employees were paid compensation admissible u/s 25FFF of the Industrial Disputes Act. On 18.01.1994 the respondents, who claimed to be the representatives of employees, applied before the Labour Court complaining of an

illegal change and illegal lock out in the garb of closure. In June, 1995 the company made efforts to restart the factory on trial basis, and though it claimed that it had no obligation to pay the employees whose services had been terminated at the time of closure, as a matter of good gesture, on 25.10.1995 it sent letters to the employees offering them employment. Though 19 persons reported for duty on 25.06.1995 and were asked to collect appointment letters on 02.07.1995, they refused to accept letters of appointment and join the duties. On 07.07.1995 the employees were given one more chance to reconsider, however, none joined. Respondent No. 1 made an application u/s 11 of the Industrial Disputes Act for conciliation. The conciliation failed on 14.07.1995. The complaint, which was rejected by the learned Member, Industrial Court and which led to filing of the writ petition, leading to the impugned judgment, was filed on 16.08.1995.

3. The learned single Judge held that the closure applied for by the appellant was not for the reason of unavoidable circumstances beyond the control of the employer, but was due to financial difficulties. The learned Judge observed that only when the closure was applied for on account of unavoidable circumstances beyond the control of the employer, workmen would be disentitled to reemployment u/s 25H of the Industrial Disputes Act. The learned Judge drew this conclusion after considering the observations of the Apex Court in Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, . The learned Judge found that in offer of re-employment there was variance in English and Hindi versions and, therefore, concluded that there was no clear and unambiguous offer. He held that since there was no compliance with the requirement of Section 25H of the Industrial Disputes Act, the complaint ought to have been allowed and therefore, proceeded to allow the petition by quashing and setting aside contrary order of the learned Member, Industrial Court. This judgment is assailed by the employer on the ground that the learned Judge erred in holding that Section 25H of the Industrial Disputes Act was attracted to the case of respondents-employees.

4. Learned Advocate Shri Samarth for the appellant-employer placed for our perusal, judgments of the Apex Court in Maruti Udyog Ltd. Vs. Ram Lal and Others, and District Red Cross Society Vs. Babita Arora and Others, , apart from the judgment in Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others, , which was before the learned single Judge. The leaned counsel submitted that it has been categorically held by the Apex Court in these decisions that termination of services of the employees on account of closure does not amount to retrenchment, but is deemed to be retrenchment only for the purpose of computation of compensation payable to such workmen. Clause-I of Section 25FFF of the Industrial Disputes Act clearly provides that a workman who has been in continuous service for not less than one year, immediately before such closure would be entitled to notice and compensation in accordance with the provisions of Section 25F, as if the workman had been retrenched. He submitted

that these words have been duly considered by the Apex Court in the decisions, referred to above, and it has been held that this deeming fiction cannot lead to the conclusion that such workmen had been retrenched for the purpose of Section 25H of the Industrial Disputes Act. In paragraph 35 of the judgment, in Maruti Udyog Ltd. the Apex Court observed as under:

35. In construing a legal fiction the purpose for which it is created should be kept in mind and should not be extended beyond the scope thereof or beyond the language by which it is created. Furthermore, it is well known that a deeming provision cannot be pushed too far so as to result in an anomalous or absurd position. The court must remind itself that the expressions like "as if" are adopted in law for a limited purpose and there cannot be any justification to extend the same beyond the purpose for which the legislature adopted it.

5. In fact, even in Punjab Land Development Corporation, the Apex Court had come to a similar conclusion. Observations of the Apex Court in paragraph 76 of the judgment may be usefully reproduced as under:

76. ...Section 25FFA provides that sixty days" notice must be given of intention to close down any undertaking and Section 25FFF provides for compensation to workmen in case of closing down of undertakings. Very briefly stated Section 25FFF which has been already discussed lays down that "where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of Sub-section (2), be entitled to notice and compensation in accordance with the provisions of Section 25F, as if the workman had been retrenched". Section 25H provides for re-employment of retrenched workmen. In brief, it provides that where any workmen are retrenched, and the employer proposes to take into his employment any person, he shall give an opportunity to the retrenched workmen to offer themselves for reemployment as provided in the section subject to the conditions as set out in the section. In our view, the principle of harmonious construction implies that in a case where there is a genuine transfer of an undertaking or genuine closure of an undertaking as contemplated in the aforesaid sections, it would be inconsistent to read into the provisions a right given to workman "deemed to be retrenched" a right to claim re-employment as provided in Section 25H. In such cases, as specifically provided in the relevant sections the workmen concerned would only be entitled to notice and compensation in accordance with Section 25F. It is significant that the in case of transfer of an undertaking or closure of an undertaking in accordance with the aforesaid provisions, the benefit specifically given to the workmen is "as if the workmen had been retrenched" and this benefit is restricted to notice and compensation in accordance with the provisions of Section 25F.

6. We have carefully considered the conclusion drawn by the learned single Judge in light of observations in the judgments referred to above, particularly the one in Punjab Land Development & Reclamation Corporation, which was also

considered by the learned single Judge. It would not be permissible, in our view, to stretch the fiction u/s 25FFF, for any purpose beyond computation of compensation u/s 25F and it cannot, in any case, be extended to Section 25H. Therefore, the contention of the learned Counsel for the appellant that the appellant was not required to offer employment u/s 25H of the Industrial Disputes Act since the respondents were not workmen who had been retrenched, has to be accepted.

7. However, as rightly pointed out by the learned Counsel for the respondents, this does not conclude the matter, since the entitlement of the respondents to re-employment, upon starting or restarting the establishment after it was closed down, flows independently from Model Standing Order No. 10 under the Bombay Industrial Relations Act. The learned Counsel pointed out that Section 25J of the Industrial Disputes Act, which is a provision to override other laws inconsistent with Chapter 5-A of the Industrial Disputes Act, contains a proviso, specifically carving out an exception which would make benefits flowing from Model Standing Order No. 10 available to the employees. Section 25J of the Industrial Disputes Act reads as under:

25J. Effect of laws inconsistent with this Chapter:

(1) The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law (including standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946):

[Provided that where under the provisions of any other Act or Rules, orders or notification issued thereunder or under any standing orders or any award, contract of service or otherwise, a workman is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the workman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act]

(2) For the removal of doubts, it is hereby declared that nothing contained in this Chapter shall be deemed to affect the provisions of any other law for the time being in force in any State in so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of this Chapter.

In view of the proviso to Sub-section (1) it is clear that if a workman is entitled, under any Standing Orders, to benefits which are more favourable to him than those to which he would be entitled under Chapter v. A of the Industrial Disputes Act, the workman would continue to be entitled to such favourable benefits.

8. Clauses 3 to 5 of the Model Standing order No. 10 read as under:

MODEL STANDING ORDER No. 10:

(3) The Manager may close down the whole undertaking after giving one month's notice to the operatives. Seven days' public notice of the re-starting of the undertaking shall be given either in a newspaper having wide local circulation or by letters to individual operatives concerned.

(4) Notice of

(i) starting, re-starting, alteration and discontinuance of shift working,

(ii) the closure and reopening of a department or section of a department, and

(iii) the closure and re-opening of the undertaking shall be displayed in the time-keeper's office or at the main entrance of the undertaking and at the gate or gates appointed under the Standing Order 16, and in the case of a department or section, also in the department concerned.

(5) On the re-opening of a department or section of the undertaking, as the case may be, preference for employment will be given to the operatives whose services were terminated on account of the closure according to the length of their service in the undertaking and the department and the occupation concerned, provided that they present themselves for service at the latest by the day of reopening.

9. It may be seen from Clause (5) that upon reopening of the undertaking preference has to be given to the employees whose services were terminated on account of closure. In view of this clear provision which had been pressed in aid by the respondents, in ground (R) of the Writ Petition, non-availability of opportunity of reemployment u/s 25H of the Industrial Disputes Act would not matter. Therefore, it would be futile for the appellant to contend that it was not obliged to re-employ the respondents and yet offered them an olive branch as a matter of grace. We hold that it was not as a matter of grace, but in compliance to the requirement in Model Standing Orders, that the appellant was obliged to offer re-employment to the petitioners.

10. The contention of the learned Advocate Shri Samarth for the appellant, that since the respondents had founded their claim on Section 25H of the Industrial Disputes Act in paragraph 4 of their complaint they can not be permitted to claim re-employment under Clause 5 of the Model Standing Order No. 10, has to be rejected, because law is not required to be pleaded.

11. In our view, in the matters pertaining to labour and industrial Courts it may be impermissible to restrict the claims of parties to the expression chosen by them while initially approaching a Court, because myriad provisions and plethora of judgments can, at times, make a lay workman feel lost. There is nothing wrong in foundations of a claim getting clearer as parties join the issue and realise what can or cannot be claimed.

12. The learned Counsel for the respondents also pointed that, in this case, the learned Member, Industrial Court had by an order dated 29th September, 1995

granted interim relief to the workmen and while doing so had duly considered, in paragraphs 11 and 12 of the said Order, the entitlement of the workmen to be re-employed under the provisions of Model Standing Order framed under the Bombay Industrial Relations Act. The learned Counsel for the respondents states that this interim order had been confirmed right up to the Supreme Court, which fact is not disputed by the learned Counsel for the appellants. Thus the respondents cannot be non-suited for not referring to Clause 5 of the Model Standing Order 10 in the complaint, since appellants had due notice of this claim when the matter was in the Industrial Court itself.

13. The real issue, however, is not whether the respondents were entitled to be offered employment. The appellant had already offered employment to the respondents. The question is, whether the respondents can be offered employment on terms which were disadvantageous to them. According to the learned Counsel for the appellant, since what was offered was re-employment upon reopening of the undertaking after it was duly closed, with requisite permissions, such employment could be, only on such terms as the employer may offer and the terms could not be pegged to any particular wage structure. He submitted that in *Delta Wires Pvt. Ltd. Vs. General Labour Union (Reg. Flag) and Another*, a learned single Judge of this Court had held that Section 25H only gives a right to a workman to have preference in the matter of re-employment, and that the said provision does not give him a right to secure employment on his previous terms and conditions of service. He, therefore, submitted that it was open to the employer to offer employment on such terms and conditions, as may be appropriate, upon restarting the undertaking, and there can be no fetters on the employer while offering such re-employment. There can be no doubt about the proposition that while offering fresh employment to a workman upon re-starting a closed undertaking the workman would not be in a position to insist upon any specific terms or even the same terms of employment which prevailed at the time of closure. Yet what was offered was wages prevailing at the time of closure or minimum wages prevailing at the time of closure, in terms of offer Exh.37.

14. Learned Counsel for respondents, Shri Thakur, rightly pointed out that the question is not of the employees seeking any higher wages. The workmen merely objected to freezing the wages to the level prevailing at the time of closure because such a freeze would violate other provisions of law relating to minimum wages. Whatever the workmen claimed were wages legally payable to them. He candidly submitted that had there been any contract regulating the terms of employment in force between the parties, such contract should have governed the question of wages to which the workmen were entitled. He pointed out that last memorandum of agreement between the appellant and its workmen was signed on 30th August, 1988 and was to be in force under Clause (vi) thereto, till 31.12.1989. This agreement seems to have been exhibited before the Industrial Court at Exh.37. Thus, the agreement had expired before the factory was closed on 17.12.1993. The learned Counsel for the respondent workmen submitted that

in view of absence of any agreement governing the terms of employment, the employees were entitled to the statutory protection, or wages to which they were statutorily entitled upon being employed again by the appellant.

15. What has been claimed, according to learned Advocate Shri Thakur for the respondents, is only a declaration that refusing reemployment to the retrenched workmen w.e.f. 28.06.1995, amounted to and constituted unfair labour practice, and direction to re-employ the retrenched workmen forthwith and to pay them full wages w.e.f. 29.06.1995 as if they were re-employed. The whole grievance has sprang up because the company stated in the English offer of employment that the workmen would be paid wages that the workman was drawing at the time of closure of the factory or the minimum wages existing at that time. We have ascertained from the learned Counsel for the respondent that what the workmen seek is wages to which they are statutorily entitled upon re-employment and not more, which claim is indefeasible.

16. The learned Counsel for the appellant next submitted that the respondents had no standing as representatives of the employees under the Bombay Industrial Relations Act. He pointed out that five persons had challenged the closure, out of them three settled the disputes with the management, one died and only one now remains. Therefore, according to the learned Counsel, the respondents cannot claim to represent the employees u/s 30 of the Bombay Industrial Relations Act. The respondents are Vasant Kumbhare, Raju Badole, Ramsagar Kushwaha and Ramnivassingh Awadhiya. The question of electing them as representatives under the provisions of Section 28 of the Bombay Industrial Relations Act would not arise, since, according to the appellant, the undertaking had closed and, therefore, ceased to exist when impugned offer was made. Re-opening had just taken place and there would have been no occasion to elect the representatives. In any case, the question of standing of the respondents cannot be allowed to be raised when the respondents are shown to be the persons who had suffered as a consequences of the appellants erroneously offering to employ them on the terms other than those prescribed by the statute. In view of this, we do not find any substance in this contention.

17. To sum up, we hold that in the peculiar facts and circumstances of this case the appellant was obliged under Clause (5) of the Model Standing Order No. 10 to offer re-employment, though Section 25H of the Industrial Disputes Act could not be invoked by the respondents, and that the respondents had right to raise the grievance that the appellant had indulged in unfair labour practice by not offering re-employment to them on the terms to which they were statutorily entitled.

18. In view of this, we do not find that the judgment of the learned single Judge suffers from any error, which need to be corrected in exercise of appellate jurisdiction by us. The appeal is, therefore, dismissed.