

(2012) 09 DEL CK 0160

In the Delhi High Court

Case No : LPA 504 of 2012, CM No. 11930 of 2012 (for stay) , CM No. 11931 of 2012 (for exemption) and CM No. 11932 of 2012 (for condonation of delay)

Shriram Institute for Industrial Research

APPELLANT

Vs

Rajesh Kumar Gandhi

RESPONDENT

Date of Decision : 03-09-2012

Acts Referred:

Industrial Disputes Act, 1947 — Section 17B

Citation : (2013) 136 FLR 12 : (2012) LLR 1135

Hon'ble Judges : A.K. Sikri, Acting C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Harvinder Singh and Mr. B.K. Mishra, for the Appellant; Rajesh Kumar Gandhi, for the Respondent

Judgement

A.K. Sikri (Acting Chief Justice)

1. The respondent herein (hereinafter referred to as workman) was employed by the appellant as Junior Analyst Trainee in the Fibre Division. A chargesheet was served upon him which led to initiation of inquiry into those charges. As per the Inquiry Officer, charges were found proved and based thereupon, penalty of dismissal from service was imposed upon the workman vide order dated 30.03.1992. The workman raised industrial dispute challenging the validity of the dismissal order which was referred for adjudication. The Labour Court framed preliminary issue about the validity of the inquiry in addition to the second issue which was in terms of reference made to the Labour Court. The aforesaid preliminary issue was decided in favour of the appellant vide order dated 25.04.2009 holding that the inquiry was conducted in a fair and appropriate manner and in accordance with the principles of natural justice. It was also found that the findings of the Inquiry Officer were not perverse. With this, the only question that remained was the quantum of penalty, as according to the workman even if the charge was established, the penalty of dismissal from

service was harsh and disproportionate. After hearing the arguments on this aspect, the Labour Court rendered its Award dated 04.09.2009 inter alia holding that penalty of dismissal should not have been given in this case having regard to the fact that charge against the workman was that he absented from 25.04.1991 to 19.07.1991 and also did not do the work given to him for sometime. Accordingly, the punishment of dismissal was set aside and the appellant directed to reinstate the workman with all legal dues.

2. Challenging this Award, the appellant has filed Writ Petition No. 4019/2010 which is pending adjudication before the learned Single Judge. Along with the writ petition, stay application has also been filed seeking stay of the operation of the Award. Vide order dated 03.06.2010, an ex parte stay of the operation of the impugned Award was granted subject to deposit of 50% of the back wages with the Registrar General of this Court.

3. During the pendency of the said writ petition, workman filed application u/s 17B of the Industrial Disputes Act, 1947 (hereinafter referred to as "the ID Act") for payment of wages to him.

In this application, the respondent workman stated that ever since his illegal suspension from 05.09.1991, he remained unemployed all throughout and had been having a rough time. He further stated that he was not in gainful employment of any establishment and had not been able to get any employment despite his best efforts. However, at the same time, he accepted the fact that he had got himself enrolled with Bar Council of Delhi but stated that he had failed to earn even bread from this profession for long because of tough competition and he had no office/space to sit in the Court complex.

4. The appellant filed reply thereto contesting the application. It was submitted that since the respondent workman had himself accepted that he was gainfully self-employed, as he was a practicing advocate since 2002, he was not entitled to the benefits under the provisions of Section 17B of the ID Act. It was also mentioned that the respondent was working as associate advocate with one Mr. Swarn Singh, advocate and had been filing income tax return to the tune of Rs. 3.05 Lakhs. Application was contested on the aforesaid ground.

5. During arguments, submission of respondent-workman was that he was entitled to invoke the provisions of Section 17B of the ID Act as it provided for the following requirements which were satisfied in his case:

- (i) The award of the Labour Court, Tribunal or National Tribunal should have directed reinstatement of the workman;
- (ii) The employer should have preferred any proceeding against such award in the High Court or the Supreme Court.
- (iii) The workman should not have been employed in any establishment during the pendency of such proceedings; and

(iv) The workman should have filed an affidavit to that effect before the Court before which the proceedings have been preferred.

6. It is not in dispute that requirements (i) and (ii) in the present case are satisfied. The workman had even filed an affidavit also regarding his unemployment. However, as admitted by him, he was self-employed, namely, a practicing advocate and earning as well. Still, his submission was that this "self-employment" did not amount to employment in any establishment which was the terminology used in Section 17B of the Act and, therefore, all the requirements u/s 17B of the ID Act were satisfied. Section 17B reads as under:

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.

(emphasis supplied)

7. As is clear from the above, since provisions of Section 17B stipulate the requirement "if the workman had not been employed in any establishment during such period", the submission of the workman was predicated on this phraseology used in the aforesaid provision on the basis of which he argued that only that workman who has been employed in any establishment can be deprived of the benefit of Section 17B of the Act.

8. The learned Single Judge vide impugned order has accepted the aforesaid interpretation suggested by the workman as is clear from the following discussion in the impugned order:

The phraseology of Section 17B is very clear that in case the workman who has succeeded in getting an award from the industrial adjudicator for his reinstatement in service by his employer claims before the superior court where his employer challenges the award that he is not gainfully employed in any establishment and was not having adequate income then the superior court has no discretion but to grant him the benefit u/s 17B which is in the nature of a sustenance allowance for the successful workman so long as his employer's battle against the award before the superior court continues and not only that,

the Supreme Court has also held in Dena Bank's case that the High Court can in fact grant relief more than last drawn wages also in the interest of justice. Of course, it is also now well settled that as far as last drawn wages are concerned the same are not returnable by the workman even if his employer succeeds in the superior court. In the present case, the management has not been able to show that the respondent-workman was employed in any establishment and was also having adequate income. Just because the respondent-workman was enrolled as an advocate that would not show that he was having sufficient good number of clients as also handsome professional income. In the case of the Supreme Court relied upon by the counsel for the petitioner-management the employer had brought on record sufficient material to show that the concerned workman was having good number of clients and cases and good professional income also so relief u/s 17B was denied to the workman.

9. It would be pertinent to mention at this stage that before the learned Single Judge, information was placed to the effect that the income of the respondent as per return filed, in last three years was as under:

?Assessment Year

2008-2009

Assessed Income

Rs. 193994/-

Assessment Year

2009-2010

Assessed Income

Rs. 315074/-

Assessment Year

2010-2011

Assessed Income

Rs. 303450/-?

This is an admitted position between the parties. The impugned award of the Labour Court is dated 4th September, 2009. The benefit of Section 17B of the ID Act, therefore, could be admissible from the date of the award and, therefore, relevant period for ascertaining the income of the respondent workman would be 4th September, 2009 onwards. This would mean assessment year 2010-2011 (corresponding to the financial year 2009-2010 and onwards). As pointed out above, respondent got himself enrolled as an advocate in the year 2002 and no doubt in the application filed by the respondent-workman, it was stated that though he had enrolled himself as an advocate, he had failed to earn even bread

from this profession for a long time because of tough competition, but initial period i.e. period prior to 4th September, 2009 would not be relevant for the purposes of application u/s 17B of the Act. In the relevant period, the assessed income of the respondent-workman from the profession is Rs. 303450/- per annum and, therefore, it cannot be said that he had not been earning from the profession. It would also be necessary to point out at this stage that the last drawn wages of the respondent were, even as per his own assertion Rs. 4,050/- which would make annual salary of about Rs. 48,600/-. Going by these considerations, it can safely be said that the workman had been earning sufficient income to make him disentitled to the benefit u/s 17B of the ID Act. In this backdrop, the only question that arises for consideration is as to whether the income from self-employment, i.e. legal profession, has to be ignored having regard to the provisions of Section 17B of the Act as this income has not accrued to the workman from employment in "industrial establishment".

10. It is difficult to accept the contention of the respondent-workman in this behalf. No doubt, Section 17B uses the expression "industrial establishment". However, while interpreting this provision, one cannot ignore the purport and objective with which this provision was introduced. While considering an application u/s 17B of the ID Act, it is necessary to bear in mind that the spirit, intendment and object underlying the statutory provision of Section 17B is to mitigate and relieve, to a certain extent, the hardship resulting to a workman due to delay in the implementation of an Award directing reinstatement of his services on account of the challenge made to it by the employer. The primary consideration for making available such a relief to a workman is to be found in the benevolent purpose of the enactment. It recognizes a workman's right to a bare minimum to keep body and soul together when a challenge has been made to an Award directing his reinstatement. The statutory provisions provide no inherent right of assailing an order or an award by an industrial adjudicator by way of an appeal. The payment which is required to be made by the employer to the workman has been held to be akin to a subsistence allowance which is neither refundable nor recoverable from a workman even if the Award in favour of the workman is set aside by the High Court. In AIR 1998 511 (SC) , the Apex Court was of the view that the object u/s 17B of the ID Act is only to relieve to a certain extent, the hardship that is caused to the workman due to the delay in implementation of the Award.

11. Keeping in mind the aforesaid objective as highlighted by the Supreme Court in number of judgments taken note of above, the provision requires purposive interpretation. We are therefore of the view that if the workman is having professional income/self-employment or even from any other vocation etc. and is making a decent income therefrom, he would not be entitled to invoke the provisions of Section 17B of the Act.

12. There are some judgments of the Apex Court also which give an indication to this effect. In Administrator Kamala Nehru Memorial Hospital Vs. Vinod Kumar ,

the Supreme Court denied the benefit of Section 17B of the Act to an advocate who was earning decent income from the profession. The relevant observations to this effect are as under:

8. The High Court's conclusions about entitlement of respondent u/s 17B of the Act is relatable to non-employment and non-receipt of adequate remuneration of the workman. The appellant had adduced ample material to show that the respondent was enrolled as an Advocate in 1983 and was a busy practitioner with decent professional income. It had even given a list of large number of cases in which the respondent had appeared. Without any material to support its conclusions, the High Court observed that "because of the compulsions of unemployment he has no option but to continue for a short period as a practising Advocate" (underlined for emphasis). The conclusions are clearly contrary to material on record. The respondent was not entitled to any entitlement u/s 17B of the Act. However if any amount has already been paid in the peculiar facts of the case, the respondent shall not be liable to refund the same.

13. Likewise, in North East Karnataka Road Transport Corporation Vs. M. Nagangouda, , the Court specifically dealt with this aspect and came to the conclusion that "gainful employment" also includes self-employment wherefrom income is generated. In that case, the respondent was having agricultural income and for this reason he was denied the benefit of Section 17B of the Act. We would like to quote the following passage from that judgment:

12. On the said question, we are unable to accept the reasoning of the Labour Court that the income received by the respondent from agricultural pursuits could not be equated with income from gainful employment in any establishment. In our view, "gainful employment" would also include self-employment wherefrom income is generated. Income either from employment in an establishment or from self-employment merely differentiates the sources from which income is generated, the end use being the same. Since the respondent was earning some amount from his agricultural pursuits to maintain himself, the Labour Court was not justified in holding that merely because the respondent was receiving agricultural income, he could not be treated to be engaged in "gainful employment."

14. This judgment is the clincher on the issue being discussed above. We would also like to refer to the judgment of Rajasthan High Court in Municipal Council, Sikar v. Rawat Singh & Anr., 2009 LLR 104 where similar view was taken, as is clear from the following discussion therein:

7. Learned Counsel for the respondent however relied upon the decision of Kerla High Court in the case of Commandant Defence Security Corps Centre Cannalore v. Secretary N.C.C. Groups URC Employees wherein the Kerala High Court has held that such denial is possible only if proved that workman is gainfully employed in some establishment receiving adequate income. However, in my view, when it is proved that the respondent workman is getting adequate income

in the form of pensionary benefits every month, which amount he is getting towards retiral benefits from his earner employer, it cannot be said that unless a workman is in physical employment under an establishment, he is required to be paid last drawn salary irrespective of his monthly income, which he might be getting during the pendency of the proceedings before the court.

15. We thus are of the view that learned Single Judge has wrongly passed the order u/s 17B of the ID Act. We thus allow this appeal and set aside the impugned order. In the facts and circumstances of this case, we are of the view that the writ petition should be heard immediately. We accordingly fix the case before the learned Single Judge for directions on 26th September, 2012. The learned Single Judge shall fix a date for hearing in the writ petition.