

(2016) 05 CAL CK 0046

In the Calcutta High Court

Case No : G.A. No. 2900 of 2004 and W.P. No. 290 of 2004

Sukumar Adak

APPELLANT

Vs

M/s. Business Horizon (P) Limited and Another

RESPONDENT

Date of Decision : 17-05-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 17B

Citation : (2016) 2 CLR 684 : (2016) 150 FLR 597 : (2016) 3 LLJ 689 : (2016) 2 LLN 646 : (2016) 6 WBLR 597

Hon'ble Judges : Sambuddha Chakrabarti, J.

Bench : Single Bench

Advocate : Mr. Nayan Rakshit, Advocate, for the Appellant; Mr. Siddhartha Mitra, Mr. D. Gomes, Mr. Bhaskar Mukherjee, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Sambuddha Chakrabarti, J.—The short question involved in the present application relates to whether and if so, to what extent, the subject matter of challenge in the writ petition can be allowed to be taken as a defence in a proceeding under Section 17B of the Industrial Disputes Act, 1947 (‘the Act’ for short). The writ petitioner, i.e., the opposite party herein, challenged the award dated January 2, 2004 passed by the learned Judge of the Second Labour Court in Case No. 18 of 2003 as well as Order No. 16 dated January 30, 2004 rejecting the application of review by the writ petitioner. The learned judge of the labour court passed an award in favour of the present applicant directing the writ petitioner to reinstate him service with full back wages.

2. Challenging the same the petitioner filed the present writ petition which is still pending. The present applicant has taken out an application under Section 17B of the Act for a direction upon the writ petitioner to pay him full wages last drawn by him and further directing them to pay other statutory and admissible dues in terms of the award impugned.

3. The writ petitioners opposed this application by filing an affidavit-in-opposition, affirmed by the Director of the petitioner's company. The preliminary objection taken by the writ petitioners was that the preconditions for maintaining an application under Section 17B of the Act having not been fulfilled the application was clearly unsustainable. The applicant, the writ petitioners alleged, was a personal driver of a privately owned car of late Dr. Amiya Roychowdhury who was the father of the petitioner no. 2. Therefore, he could not have raised any industrial dispute. The applicant was never employed by the company at all and as such, the question of making payment of monthly salary to the applicant does not arise.

4. The applicant filed a supplementary affidavit in connection with the said application. To the said application a letter of authority executed in his favour was only annexed.

5. The writ petitioners filed an affidavit-in-opposition to the supplementary affidavit reiterating their basic objection to the application. Over and above that it was alleged that the late Dr. Amiya Kumar Roychowdhury, who was the father of the writ petitioner no. 2. Late Dr. Roychowdhury had no connection with the company. The respondent no. 3 never served the company nor was the car owned by Dr. Roychowdhury ever used for the business of the petitioner No. 1 Company. Dr. Roychowdhury died on January 2, 1998, his widow had no requirement even for part time use of the car and, therefore, she requested the applicant to leave. The applicant left on his own in January 2001.

6. It has been the stand of the writ petitioners that there was no employer-employee relationship between the applicant and the petitioner No. 1 Company. The writ petitioner further asserted that the letter annexed to the supplementary affidavit did not establish any employer-employee relationship between the petitioner and the respondent No. 3. On the contrary, it is only a letter of authorisation issued by the widow of Late Dr. Amiya Kumar Roychowdhury.

7. It may be mentioned that when this application came up for hearing earlier a learned Single Judge of the Court by an Order dated August 3, 2012 directed the applicant to affirm a supplementary affidavit for the purpose of disclosing the appointment letter and other documents from which he might have to show that he received salary from the petitioner from time to time. The learned Single Judge further observed that His Lordship was not inclined to take up the application under Section 17B of the Act without getting a definite proof that he was employed by and got salary from the writ petitioner from time to time. It was pursuant to this order that the applicant filed the supplementary affidavit as mentioned above.

8. The learned advocate for the writ petitioners in his submissions reiterated the stand taken by them in their respective affidavits. He further argued that the company was not even in existence at the relevant time although that point was not taken in the affidavit.

9. The sheet anchor of the case of the writ petitioners was the order of the learned Single Judge directing the applicant to provide proof of his employment and the observation that His Lordship was not willing to take up the application under Section 17B of the Act until and unless the applicant provided the said proof.

10. Mr. Mitra, the learned Advocate for the writ petitioners, submitted that the applicant had not only filed any appeal from the said order but had accepted the said order inasmuch as he filed an affidavit pursuant to the direction by the learned Single Judge. Thus, the applicant now cannot alter his stand and ask for disposal of the application under Section 17B of the Act without complying with the direction of the learned Single Judge. Moreover, by not filing the appeal, the order has become binding on him.

11. In order to appreciate the validity of the submission of the writ petitioners it is necessary to consider the scope of Section 17B of the Act which 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."

12. Section 17B was not on the original statute book but was introduced by way of an amendment in the year 1982. This provision by conferring a right on the workman to be paid the full wages last drawn by him during the pendency of certain proceedings is aimed at achieving a certain social purpose, i.e., to make a provision so that he may sustain himself to resist the litigation being carried to the High Court by management of the company. The Supreme Court in the case of *Bharat Singh v. Management of New Delhi Tuberculosis Centre*, reported in AIR 1986 SC 842, has held that the position of the workman having succeeded before the tribunal could not be worse than it was on the date the award was passed, merely because, the writ petition challenging the award was entertained. This is a piece of social-welfare legislation and aims at ameliorating the hardship caused to the workman who has been deprived of the benefits of reinstatement awards during the protracted litigation in which awards were enjoined by the

High Courts or the Supreme Court. Even if, in some cases courts used to grant payment of certain amount in favour of the workman there was no standard formula quantifying the payment. No such payment could be claimed by the workman as a matter of right. It was to ameliorate this condition that this provision was enacted.

13. Section 17B constitutes an independent right available to a workman during the pendency of the entire proceeding before this Court. Before getting the benefit under Section 17B of the Act three ingredients are necessary to be complied with, viz, i) reinstatement of the workman by the labour court; ii) employer preferred a proceeding against the award in High Court or Supreme Court; and iii) the workman should not have been employed in any establishment during such period. On these three conditions being fulfilled the right of the workman cannot be denied. The workman becomes entitled to the wages as contemplated in Section 17B of the Act and no order of the court is necessary for the entitlement of the workman as the statute has created the right. In other words, once the requirements under Section 17B are satisfied the workman becomes automatically entitled to the last drawn wages from the employer. The point of challenge to an award is very different from the nature of enquiry under Section 17B of the Act.

14. In the case of *Dena Bank v. Kirit Kumar T. Patel*, reported in AIR 1998 SC 511, the Supreme Court held that in exercise of the power under Articles 226 and 136 of the Constitution of India an order cannot be passed denying the workman the benefit granted under Section 17B of the Act. The right of a workman cannot be regarded as a restriction on the powers of the High Court or the Supreme Court under those two provisions of law.

15. The question for the present purpose is not so much whether the defence of the employer is valid for the adjudication of the writ petition. The question is whether such a defence can be entertained by a court while disposing of an application under Section 17B of the Act. The purpose of the provision being to provide relief in the nature of a subsistence allowance in favour of a workman who has been directed to be reinstated it is not for the court to consider the plea of the employer about the validity of the Award at the present stage.

16. The writ petitioners also cannot take advantage of the interim order passed by a learned Single Judge, inter alia, holding that His Lordship was not inclined to take up the application without getting a definite proof of employment and receipt of salary. Even if the order had not been appealed against or the applicant has filed the supplementary affidavit pursuant to the direction contained in the said order, the order being entirely against the weight of the statutory requirement and the settled principle of law decided in umpteen number of judgments and orders, even of the Supreme Court, cannot be considered as a proposition of law disentitling the applicant to maintain an application under Section 17B of the Act.

17. In the celebrated case of *Young v. Bristol Aeroplane Co. Ltd.*, reported in (1944) 2 All E.R. 293 the Court on Appeal laid down that one of the circumstances where a court may refuse to follow a decision of its own is if it is satisfied that the decision was given per incuriam, e.g., where a statute, or rule having statutory effect or other binding authority which would have affected the decision, had not been brought to the attention of the earlier court. Professor R.W.M. Dias in *Jurisprudence* had explained the position that if the court of appeal had misapprehended the principle or material point in a previous decision the case in which the error had been made is not binding. (London, 1964, p. 44).

18. The Supreme Court in the case of *Government of A.P. v. B. Satyanarayana Rao*, reported in (2000) 4 SCC 262, observed:

"The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

19. The order of the learned Single Judge, in view of the settled principle of law, is thus an order having no binding effect and consequently cannot debar the applicant from pursuing the remedy under Section 17B of the Act.

20. The Supreme Court and different High Courts having uniformly held that the validity of the Award being an irrelevant consideration while disposing of the application under Section 17B of the Act, the direction by the learned Single Judge on December 3, 2012 directing the applicant to produce any materials evincing his employment under the writ petitioner no. 1 is plainly invalid. In the case of *Suresh Mahato (Supra)* also the failure on the part of the workman to produce any materials to show that he was ever in employment under the respondents was the ground on which the learned Single Judge rejected the application under Section 17B of the Act. The very reasons for which the Division Bench had reversed the judgment are also the reasons why this application should also be allowed.

21. Moreover, the order being entirely in the nature of an interim order must not be held to be binding the applicant from getting an adjudication of the issue.

22. In *CM. Saralah v. E.E., Panchayat Raj Department and Another*, reported in 2000 (I) LLJ (SC 23), the Supreme Court had held that a court has no jurisdiction to direct non-compliance with the provisions of Section 17B of the Act when the conditions precedent for passing an order in terms of Section 17B of the Act is satisfied.

23. In *Ram Dhan v. Judge Labour Court No. 2 Jaipur and Others*, reported in 2003 (II) CLR 803, a Division Bench of the Rajasthan High Court had held that the grant of benefits under Section 17B of the Act depends upon fulfilment of conditions to the satisfaction of the court as provided in Section 17B of the Act and in view of the language of Section 17B of the Act the court is not required to go into the merits of the award.

24. Mr. Rakshit, the learned Advocate for the applicant, has relied on the case of Rajasthan State Granite & Marbles Mazdoor Sangh v. Rajasthan Mines & Minerals Ltd. & Others, reported in 2007-I-CLR 1049. There a learned Single Judge of Rajasthan High Court rejected the application under Section 17B of the Act on the plea that the management denied the relationship of employer-employee. The stand of the management was that the respondent-workman was not their employee. In appeal, the Division Bench held that the learned Single Judge committed an apparent error of law in rejecting the application under Section 17B on the specious ground of denial of relationship of employer and employee. It was further held that it is not open to the respondent to challenge the validity of the award at the stage of consideration of the application under Section 17B of the Act and on that ground deny the claim of the workman for wages as admissible under that Section.

25. The case of Suresh Mahato v. G.E. Industrial Pvt. Ltd. & Other, reported in 2009(IV) LLJ 489 is worth taking note of. In that case also during the pendency of the writ petition the appellant-workman filed an application for payment of full wages under Section 17B of the Act. The application had been rejected by the trial Judge after making reference to the deposition of the appellant-workman. The learned Single Judge concluded that the workman had failed to produce any materials on record to show that he was ever in any employment under the respondents.

26. From that order the workman filed an appeal. Allowing the appeal and thereby rejecting the view taken by the learned Single Judge a Division Bench of this Court had held that the law is too well settled to admit any further doubt on the proposition that once an award is passed by the labour court holding the termination of the services of a workman to be illegal and directing reinstatement, the employer is bound to pay the wages last drawn to the workman under Section 17B of the Act during the pendency of any challenge to the award by the employer in the High Court or in the Supreme Court.

27. A question similar to the one involved in the present application cropped up for consideration in the case of Sri Bidyadhar Palai and Another v. Loomtex Engineering Pvt. Ltd. and Others, reported in 2005 (1) CLJ (Cal) 122. There a Division Bench of this Court had held that when there is an award directing reinstatement of the workmen by the writ petitioner, till such time the award is not altered and or modified it continues to be in force and the provisions of Section 17B of the Industrial Disputes Act are attracted as soon as the award is challenged by the employer. The moment a challenge is thrown to an award directing reinstatement the relief under Section 17B becomes available to the workman who has been directed to be reinstated in service. The payment in terms of an order passed under Section 17B would, therefore, be effective from the date on which the proceedings are initiated.

28. More recently, a Division Bench of this Court in the case of Emco General Plastic Industries (P) Ltd. v. State of West Bengal and Others, reported in 2015-

III-LLJ 304, has also expressed its view in the same line, but more specifically and elaborately upholding the contention of the workman who was directed by the Tribunal to be reinstated. There also an employer had, inter alia, taken a point that the expression 'award' used in Section 17B of the said Act must mean a valid award on the face of it. It was one of the contentions of the employer that since the award passed by the Tribunal was patently illegal and void the learned Single Judge ought to have rejected the application filed by the workman under Section 17B of the Act. The employer asserted that when an award passed by the Labour Court or the Industrial Tribunal directing reinstatement of a workman is patently illegal or perverse or nullity and the same has been challenged in the High Court, no order should be passed by the High Court in an application under Section 17B of the Act filed by the workman for directing the employer to pay such workman full wages last drawn by him.

29. Rejecting the contentions of the employer the Division Bench held that from the language used in Section 17B of the Act it is clear that once the workman fulfils the conditions of the said section, the High Court does not have the discretion to refuse the workman's claim for payment of wages last drawn by him during the pendency of any challenge to the award of the Labour Court/Tribunal. This interpretation of Section 17B of the Act does not lead to any anomaly or injustice or absurdity. The right of a workman under Section 17B has no connection with the merit of the award of the Labour Court/Tribunal. If this Court is to accept the contention of the appellant that in a case where the award passed by the Labour Court/Tribunal directing reinstatement of the workman as contended by the employer to be patently illegal or perverse or a nullity and the workman is not entitled to receive full wages last drawn by him under Section 17B of the Act, this Court will be re-writing, re-casting and re-framing Section 17B of the Act which would be contrary to the settled principle of law that while interpreting a provision a court only interprets the law and cannot legislate it. The statute requires to be interpreted without doing any violence to the language used therein.

30. The facts of this reported judgment very closely approximates the facts of the case in hand.

31. Thus, it is clear that in disposing of the application under Section 17B of the Act the validity of the award or the stand of the employer that the workman was never employed by him is an extraneous consideration. The whole purpose of enacting Section 17B has been to mitigate the hardship of a workman because of delay in implementation of the award and, therefore, the payment of wages last drawn by the workman under certain conditions from the date of the award till the case is finally decided was enacted.

32. I find that the requirements of law under Section 17B of the Act have been fulfilled.

33. The writ petitioners are directed to pay the applicant-workman full wages last

drawn by him month by month from the date of filing of the present writ petition. The first of such payment shall be made by May 30, 2016. Payment for each month thereafter shall be made by the 30th of the month next succeeding. So far as the back wages are concerned, the writ petitioners are directed to liquidate the same in eight equal monthly instalments starting from June 30, 2016. Payment of arrear wages shall be over and above the payment of the current wages.

34. The application under Section 17B of the Act is allowed.

35. There shall be no order as to costs.

36. Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

37. Later

38. After the judgment was delivered Mr. Mitra, the learned Advocate for the writ petitioner, prayed for stay of operation of the order. The prayer is heard, considered and in view of the reasons discussed in the body of the judgment, is rejected.