

(2012) 04 BOM CK 0178

In the Bombay High Court

Case No : Civil Application Caw No. 821 of 2012 in Writ Petition No. 1142 of 2011

The Senior Divisional Commercial Manager

APPELLANT

Vs

The General Secretary, Parcel Porter Sanghatana S.E. Central
Railway

RESPONDENT

Date of Decision : 10-04-2012

Acts Referred:

Industrial Disputes Act, 1947 — Section 17B, 2(s)

Citation : (2012) 4 ALLMR 755

Hon'ble Judges : M.N. Gilani, J

Bench : Single Bench

Advocate : P.S. Lambat, for the Appellant; K.H. Deshpande and N.W. Almelkar,
for the Respondent

Final Decision : Allowed

Judgement

M.N. Gilani, J.—This is an application u/s 17-B of the Industrial Disputes Act, 1947 for directions to the petitioner to pay full wages to the members of the respondent -union during the pendency of the present petition. This court vide order dated 28.6.2011 granted stay to the execution and operation of the award dated 15.6.2010 passed by the learned Presiding Officer, Central Government Industrial Tribunal, - Labour Court at Nagpur [for short Tribunal]. The present petition is the second round of litigation. The award passed by the Tribunal on 20th March 2008, was subject matter of challenge in the earlier Writ Petition No. 4472/2008. It was partly allowed. The matter was remanded back to the Tribunal for fresh disposal of the reference in the light of the findings and observations made by this court in the judgment. It was clarified that the issue whether members of respondent - union are workmen or not is decided by this Court. In pursuance to the directions issued by this court, the learned Tribunal allowed the parties to adduce evidence and after considering the same, passed following award:

1- Regularize the petitioners whose names are appearing in the list Annexure "B"

and "D" attached with this award giving them temporary status and regular pay scale of Group "D" at par with the regularly appointed parcel porters treating them as per railway employees.

2- To fix their pay in the Group "D" regular cadre from the date of their respective appointments.

3- To give them regular increments and pay the salary with prospective effect from the date of notification of this award.

2. Aggrieved by this, the present petition has been preferred and in that interim relief was sought. This court vide order dated 28.6.2011 stayed effect, and operation of the impugned award pending consideration of this petition.

3. It is the case of the respondent union that in the year 2005, when the reference was pending before the Tribunal, services of their members were terminated. They are out of employment and have been suffering financial hardship. None of them is gainfully employed during all these years right from the year 2005. They have therefore, sought relief of payment of last pay drawn during the pendency of this writ petition.

4. Petitioner resisted the application on the following grounds:

(i) There are no directions in the award requiring reinstatement of the members of the respondent-union. What was claimed before the Tribunal was regularisation of their services and same was granted by the Tribunal. Therefore, it cannot be termed that the Tribunal has directed reinstatement of the workmen on setting aside the order of dismissal or unfair termination of service;

(ii) Provisions of section 17-B are mandatory in character. It can only be invoked if there is a direction of reinstatement. Word "reinstatement" postulates that the workmen should be put back in the position in which he was before regularisation of his service as if his services were never terminated. In other words he is to be put back in the same position which he was holding before the alleged termination.

It may be observed that as regards claim of the respondent - union that services of their members were terminated in the year 2005 and since then they are out of employment and none of them is gainfully employed, nothing has been stated in the reply.

(iii) Resisting the application Mr. Lambat, raised the grounds touching to the merits of the case. In case of Union of India (UOI) Vs. Hemant Shamrao Sankpal,] the Division Bench of this Court observed that:

Whether on merits the order of reinstatement could have been granted or not is required to be decided in a writ petition but till the petition is decided the employer is bound to comply with the provisions of section 17 -B of the I.D. Act which is a mandate of law. We once again reiterate that while deciding the application u/s 170B of the Act, the Court is not required to find out whether the

reinstatement order could have been passed or not.

5. In the first round of litigation this court in para 10 of the judgment in Writ Petition No. 4472/2008, categorically held that

The minimum wages are paid by the Railways for such work done by such licensed porters. The manual work is performed by the licensed porters as well as parcel porters and this is the systematic activity of cooperation between the employer and the workmen.

Thereafter it is observed that:

I hold that the members of the respondent union are workmen and entitled to maintain the reference before the Tribunal.

While remanding back the matter it was also clarified that:

The issue whether members of Respondent Union are workmen or not is decided against the petitioner by me and shall not be tried by the tribunal again.

6. It is therefore, not open for the petitioner to raise the issue that there was no relationship of employer and employee between the petitioner and the members of the respondent union.

7. The issue which needs adjudication in this application is whether the award passed by the Tribunal directing regularisation of the members of the respondent - union and further directing them to pay to them regular pay scale admissible to regularly appointed parcel porters i.e. Group D employees and further direction to grant them regular increments, regular salary, fix their pay in regular cadre etc. would fall within the ambit of the "reinstatement" as occurring u/s 17-B of the Act.

8. For invoking Section 17-B, following conditions should be satisfied:

i) There must be an award by the competent court directing reinstatement of the workmen;

ii) The award should have been challenged in a proceedings pending in the High Court or the Supreme Court; and iii) The workmen should not have been gainfully employed in any employment during the pendency of the said proceedings.

9. The legislature clearly intended that the workmen should not be permitted to starve because the party wants to take further proceedings by way of appeal or otherwise. It is a beneficial legislation and narrow interpretation can not be given. Position of workmen having succeeded before the Tribunal cannot be made worst than it was on the date the award was passed, merely because the writ petition challenging the award is entertained.

10. Mr. Lambat, relied upon the decision of the Division Bench of the Jharkhand High court reported in case of Bharat Coking Coal Ltd. vs. Their Workmen

reported in 2004 II CLR 688. The facts of the case are some what similar to the present case. The Tribunal passed award granting the relief of regularisation of services of the workmen. The learned Single Judge held that the provisions of section 17-B are attracted and workmen are entitled for wages last drawn by them. In the above case the Division Bench held that:

5- Section 17-B of the Act has application when the award is one for reinstatement of the workman and the employer prefers any proceeding against such an award in the High Court or the Supreme Court. On the wording of section 17-B, it can have application only when the award is one for reinstatement and not in any other case. When the words of a statute are plain and unambiguous, the Court must understand the purport of the statutory provision based on the language used by the statute. This is the fundamental principle of interpretation and the other aids can be resorted to only when the words of section 17-B are not plain or are ambiguous. From a reading of the section, there cannot be any doubt that it applies to a case of reinstatement. "Reinstatement" in industrial jurisprudence is a well known concept and is an unambiguous reinstatement, the High Court does not get jurisdiction u/s 17-B of the Act to pass an order under that provision. Normally, the court is not entitled to enlarge is intended to cover the very situation envisaged by the statute. In fact, this Court has held in the judgment in L.P.A. No. 9/2003 that section 17-B has no application in a case where the award did not order reinstatement.

11. Subsequently this decision was relied upon by the same court in case of Raj rap pa Washery of Central Coalfields Limited vs. Their Workmen in L.P.A. No. 1/2009 decided on 14.10.2009 [unreported judgment]. Their Lordships observed that:

As noticed above, the impugned award passed by the Tribunal is in respect of the regularisation of service and not for reinstatement after setting aside the order of termination of service. It was not the case of the workman that his service was terminated rather during the pendency of the conciliation proceeding before the Labour Court, the Management stopped taking any work from the concerned workman. Having regard to the fact, it is evidently clear that the Tribunal passed an award for regularisation of service which was the actual dispute referred to the Tribunal. In that view of the matter the scope of Section 17-B of the Act cannot be enlarged on assumption that service of the workman was terminated while the matter was pending before the Labour Court for conciliation. In our considered opinion, therefore, the impugned judgment passed by the learned Single Judge is against the spirit and object of the provisions of Section 17-B of the Act. Hence, the impugned judgment passed by the learned Single Judge is against the spirit and object of the provisions of Section 17-B of the Act. Hence, the impugned judgment passed by the learned Single Judge cannot be sustained in law.

In that case also learned Single Judge had granted relief to the workmen u/s 17-B in whose favour directions were issued to regularise their services. The Division

Bench disagreed with the said view.

12. The facts of the case cited supra and facts of the present case are different in the sense that the case of the workman in that case was not that during pendency of the conciliation proceedings before the Labour Court, the management stopped taking any work from him or his services were terminated. In the present case, there is a categorical averment that services of the members of the respondent - union have been brought to an end since the year 2005 and they are out of employment since then. It is also evident that they have not been paid any salary or remuneration since the year 2005.

13. In order to appreciate the controversy, a brief reference to the facts of the case is necessary. Gist of the reference before the Tribunal was whether the members of the respondent - union claiming to be parcel porters were workmen u/s 2(s) of the Industrial Disputes Act and whether they could be regularised as Railway Employees. It was submitted that the members of the respondent - union were engaged as parcel porters to load and unload, seal and unseal parcels which work was perennial in nature.

Initially they were allowed to work only for four hours, but after May 1997 they were given regular duty of 8 hours. Their names appeared on the muster roll. The Tribunal while passing the award dated 20th March 2008 and thereafter this court as has been reproduced earlier held that minimum wages are paid by the railways for the work carried out by the members of the respondent - union in the capacity of licenced porters which is the systematic activity and falls within the definition of workmen under the Industrial Disputes Act and ultimately held that members of the respondent union are workmen. The Tribunal in paragraph 31 of the award observed that "The most important and undisputed thing is that the Railway was paying wages to them through supervisors, station masters. They were paid at the rate as per Minimum Wages Act on monthly basis." In paragraph 32 it is observed that "The most important thing is that they were provided with identity cards as parcel porters." In paragraph 34 it is observed that "I have already concluded that they are the workmen of railway even the Hon. H.C. has maintained these findings and now there are directions not to interfere in it.

14 Further it is not disputed that petitioner had stopped taking any work from these workmen since the year 2005 and as such they are out of employment and since then not gainfully employed anywhere. In this premise the import of the word "regularisation" will have to be understood by applying hypothetical test based on the facts of the present case.

(i) Suppose the petitioner decides to implement the award or there is no stay, what consequence would have been followed? In that event workmen would have been required to be reinstated in service, not merely as casual parcel porters, but as regular employees of the railways. They would have been entitled to the fixation of their pay which is admissible to Group-D employees. In other words

the term regularisation involves taking steps of reinstating the workmen in service since and admittedly their services were brought to an end in the year 2005 and particularly when the reference was pending decision. Undoubtedly, the term regularisation is of wider connotation comprising in it reinstatement, provided services of the workmen have already been terminated. Had it been the case that the members of the respondent union were continued to get same work and similar wages, which they were getting at the time of making of reference, there would have been no occasion to apply section 17-B. This follows that, to regularise, in the context would mean to reinstate.

(ii) Suppose respondent - union intends to executes this award in present form, is it not executable without there being any prayer for reinstatement?. Layman's answer would be that it is executable, although the expression reinstatement is missing from the award. This is for the reason that the original reference before the Tribunal was, whether the members of the respondent - union claiming to be parcel porters were workmen u/s 2(s) of the Industrial Disputes Act and whether they could be regularised as Railway Employees. During pendency of this reference their services were discontinued. Thus regularisation would have preceded by the step "reinstatement". Differently put, there cannot be regularisation without reinstatement.

15. If any narrow interpretation is given to word reinstatement occurring u/s 17-B, it would frustrate the very object of such beneficial legislation. It is there to make it incumbent upon the employer to see to it that workman is in a position to sustain himself and his family members during pendency of the proceeding by paying last drawn wages. No doubt in such a situation the employer is at liberty to take work from the employee to avoid payment of the idle wages during the pendency of the proceedings.

16. In this view of the matter, and having regard to the facts and circumstances of the present case the judgment in case of Bharat Coking Coal Ltd vs. Their Workmen reported in 2004 II CLR 688 (supra), cannot be of any help to the case of the petitioner. In the result, the application is allowed. The members of the respondent -union shall be entitled to wages last drawn by them and shall continue to receive the same during the pendency of this writ petition. Benefit will be admissible to them from the date of application i.e. 6.3.2012. [Referred Cadila Pharmaceuticals Limited Vs. Jyotiben Harishbhai Pandit,].