

(2010) 11 CAL CK 0004
In the Calcutta High Court
Case No : Writ Petition No. 947 of 2009

Workmen of Jenson and Nicholson (India)	APPELLANT
Vs	
State of West Bengal	RESPONDENT

Date of Decision : 25-11-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 25F, 25F(1), 25F(2), 25FFF

Citation : (2011) 2 CHN 101

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : P.S. Sengupta, Mazumdar and Tarun Kanti, for the Appellant; R.R. Prasad, Susanta Pal and Surndra Kumar for the Respondent No. 3., for the Respondent

Judgement

Aniruddha Bose, J.—The Petitioners before me are the workmen of Jenson & Nicholson (India) Ltd., being the Respondent No. 3 herein. In this writ petition, they challenge an award made by the Third Industrial Tribunal, West Bengal dismissing the reference made to it by the State Government on the question of legality of closure of the head office of the company. The closure was declared on 17th June 2003. The two issues referred to the Tribunal by the State Government were:

(1) Whether the closure of the head office of the Company at 225, A.J.C. Bose Road, Kolkata-700 020 declared by the management w.e.f. 17.06.2003 is justified?

(1) What relief, if any, are the workmen entitled to?

2. Prior to effecting closure, it is the admitted position that 48 employees of the company were disbursed arrear salary of 15 days and one month's pay in lieu of notice. What was computed as closure compensation was sought to be paid by 18 postdated cheques of diverse sums for the individual workmen. Through these

cheques, closure compensation was sought to be disbursed on equal monthly instalments (EMI) basis. In course of hearing, it was submitted by Mr. Sengupta, learned Counsel appearing for the Petitioners that none of the workmen had encashed the cheques through which such closure compensation was sought to be disbursed. The Tribunal found the closure of the head office bona fide. The Tribunal further held that under those circumstances it had No. jurisdiction to entertain the reference or to adjudicate upon the issues referred to it.

3. Mr. Sengupta drew my attention to the provisions of Section 25FFF of the Industrial Disputes Act, 1947, as operational in West Bengal and submitted that the requirement of the said provision was not complied with by the management of the Respondent company while declaring closure. On this ground, he argued, decision of the Tribunal confirming closure was not sustainable. The provision relating to closure is contained in the said section of the Act. Sub-section (1) of the said provision is relevant for adjudication of the present proceeding, which stipulates:

[25FFF. Compensation to workmen in case of closing down of undertakings. - (1) 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:

Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under Clause (b) of Section 25F, shall not exceed his average pay for three months.

[Explanation--An undertaking which is closed down by reason merely of--

- (i) financial difficulties (including financial losses); or
- (ii) accumulation of undisposed stocks; or
- (iii) the expiry of the period of the lease or licence granted to it; or
- (iv) in case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which operations are carried on, shall not be deemed to be closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this Sub-section.]

4. The aforesaid provision was further amended by West Bengal Act 57 of 1980, which provides:

(1) before the existing proviso, insert the following proviso, namely:

Provided that prior payment of compensation to the workman shall be condition precedent to the closure of any undertaking.;

(b) in the existing proviso, for the words "provided that", substitute the words

"Provided further that.

5. In the present case, main argument of Mr. Sengupta is that since No. prior payment of compensation was made by the company, and the condition precedent for effecting closure was not satisfied, the Tribunal committed error of law in finding the closure to be bona fide, and the reference bad in law.

6. The award does not reflect any argument on this point. In the writ petition, however, specific plea on this count has been taken in paragraphs 33 and 34 and this has not been effectively denied by the company in their affidavit-in-opposition. Argument has been advanced on behalf of the company that such a plea ought not to be allowed to be raised for the first time in the writ petition. I shall deal with this argument in the later stage of this judgment.

7. Mr. Sengupta submitted that if the statute prescribes that there should be prior payment of compensation to the workmen, and it is emphasised in the statute that such payment shall be condition precedent to the closure of any undertaking, in the absence of such prior payment being made, the closure would be a nullity.

8. He relied on the decision of the Hon''ble Supreme Court in the case of India General Navigation and Railway Co. Ltd. and Another Vs. Their Workmen, in support of his submission that if an act suffers from any inherent illegality, then such an act cannot under any circumstances be held to be justified. On the question of non-payment of the compensation amount, he submitted that non-compliance of a mandatory provision of law would render all actions flowing from such act invalid and on this point he relied on two other authorities, both being decisions of the Hon''ble Supreme Court, in the cases Mohan Lal Vs. Management of Bharat Electronics Ltd., and Anoop Sharma v. Executive Engineer, Public Health Division No. 1, Panipath, reported in 2010 (5) Supreme 99. He also argued that payment by postdated cheques could not constitute payment of compensation as this would be deferred payment as the concerned workmen would be in a position to realise the sum on a date admittedly later than the date of closure. In substance, the main case of the workmen is that failure to comply with mandatory provision of law would render the act complained against void ab initio and the natural consequence in the present case would be reinstatement of the workmen with consequential benefits.

9. Mr. Prasad, learned Senior Counsel appearing for the company resisted the petition arguing that the question which was being raised before this Court was never raised before the Tribunal. He submitted that No. point could be allowed to be raised for the first time in a proceeding under Article 226 of the Constitution of India. In support of his submission he relied on the decision of the Hon''ble Supreme Court in the case of State of West Bengal and Another Vs. West Bengal Regn. Copy Writers Assn. and Another, . The other plank of his submission was based on the principles of acquiescence and waiver. He argued that the aforesaid arrangement i.e. payment terms was subsequently confirmed by the workmen

themselves as there was further negotiation by and between the parties in that regard. According to him, the workmen having accepted the payment made through post dated cheques ought not to be permitted to raise a plea that such payment was illegal, and claim reinstatement in service with consequential benefits.

10. It was further urged on behalf of the company that this Court ought to consider the totality of the circumstances emphasising on the fact that the company in question was in a bad financial state and many of their units were in the process of being closed down and the company had also been referred to the Board for Industrial and Financial Reconstruction (BIFR).

11. I shall examine first the question as to whether in this proceeding I can test the legality of closure on the ground of there being violation of the provisions of Section 25FFF of the Act. As I have observed earlier, this issue was actually not deliberated upon before the Tribunal and natural inference in such circumstances would be that this point had not been raised by the workmen before the Tribunal. But would this factor deprive the workmen from relying on certain statutory provisions before me at this stage while assailing the award which went against them?

12. I do not think so. The point which has been argued before me by Mr. Sengupta is purely a point of law. It is clear from the pleadings and evidence led before the Tribunal that closure compensation was not paid to the workmen prior to declaration of closure in terms of the aforesaid provision of the Act. Thus, there remains no factual dispute to be determined for coming to a finding as to whether the mandatory provisions of the said Act as regards prior payment of closure compensation were complied with or not by the employer while effecting closure. Though in Article 226, the scope of exercise of power of judicial review in respect of an award of the Tribunal is restricted, in an industrial adjudication, in my view, the effort of the Constitutional Court would be to minimise the number of proceedings relating to a particular dispute as far as possible. The wide jurisdiction of the Constitutional Writ Court in granting relief where injustice is manifest has been recognised by the Hon'ble Supreme Court in the case of Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, .

13. In this matter, for coming to a conclusion on the subject controversy no further factual enquiry is necessary as the only ground on which the award is impugned is failure on the part of the Tribunal to take cognizance of the statutory provisions relating to payment of compensation under the Act.

14. As there is clear violation of the provisions of the statute, in my opinion remanding the matter to the Tribunal on this sole point would only lead to multiplicity of judicial proceedings. I have contemplated an order of remand here because I am of the view that since the question of noncompliance of the mandatory provisions of the Industrial Disputes Act, 1947 has been specifically

raised in this proceeding, dismissal of the writ petition on the sole ground that the point was not raised in the Tribunal would not subserve the interest of justice and only perpetuate an illegality. The terms of reference to the Tribunal broadly cover the question of legality of closure, and questioning the legality of closure on the ground of non-compliance of mandatory provisions of the statute does not constitute raising an inconsistent plea. The ratio of the decision of the Hon''ble Supreme Court in the case of West Bengal Registration Copywriters Assn (supra) thus cannot apply in the facts of the present case. Moreover, in the case of Anoop Sharma (supra), the Hon''ble Supreme Court found compliance of similar provisions contained in Sub-clauses (a) and (b) of Section 25F of the Act relating to retrenchment to be mandatory. It was held in that decision that non-compliances of such provisions would render retrenchment of an employee nullity. I am of the opinion that the same principle of construction would apply in the present case as well. I shall, however, remand the matter to the Tribunal on a limited issue, which I shall refer to later on in this judgment.

15. I am also satisfied that issueance of post dated cheques cannot constitute prior payment. I accept the submission made on behalf of the Petitioners that issuance of such cheques imply deferred payment, the payment falling due on the dates the cheques become encashable. Accordingly, I am of the opinion, for the reasons indicated above that there has been a violation on the part of the company in compliance of the provisions of the Section 25FFF of the Industrial Disputes Act in not paying to the workmen closure compensation prior to effecting closure of the undertaking. On behalf of the company, reliance was placed on a decision of the Hon''ble Andhra Pradesh High Court in the case of N. Narasimhalu and Ors. v. Commissioner of Industries and Ors., reported in 1987 (XI) LLJ 482, in support of their contention that non-compliance of the provisions of Section 25FFF of the Act would not render the closure invalid. The reasoning in that judgment against holding the closure illegal is that by declaring the closure illegal, several other problems would arise which would be difficult of solution. I respectfully disagree with this opinion. If mandatory provisions of statute are violated, then, in my opinion, Court cannot confer legitimacy on such action on the ground of practical difficulties. In any event, in my view the ratio of the decision of the Hon''ble Supreme Court in the case of Anoop Sharma (supra) now holds the field, and this decision applies in the facts of the present case.

16. I find that the Tribunal had also touched upon the question as to whether there were 50 workmen in the head office or not while adjudicating the reference. This point, however, was not urged before me by Mr. Sengupta or Mr. Prasad in support of their respective stand. It was specifically argued by Mr. Sengupta that the question of number of workman does not apply in a proceeding u/s 25FFF of the Act. In that sense, the approach of the Tribunal was misdirected. But as this point was not urged before me, I do not think it is necessary to come to any finding on that issue.

17. I also do not think because of subsequent deliberations or negotiations which

did not reach any finality, the workmen could be deemed to have had waived their right to enforce the stipulations of the aforesaid provisions. I would think that in a statute of this nature, which is beneficial legislation, so far as a workman is concerned, there can be No. possibility of entertaining this argument of waiver when the consequence of such waiver would facilitate violation on the part of the employer of certain statutory provisions enacted in favour of the workmen. That would defeat the very purpose of the statute. Moreover, the manner in which the aforesaid provision has been framed, with stipulation on prior payment and further emphasis that this should be a condition precedent, requirements of this provision cannot be held to be possible of being waived. The rule of evidence relating waiver to stopple or acquiescence cannot be imported in a proceeding of this nature to subvert clear mandate of a statute. In the light of these facts, the finding of the Tribunal that the reference was invalid or illegal cannot be sustained. I set aside the award of the Tribunal accordingly.

18. Now what would be the relief which the workmen would be entitled to? Since I have held that closure was illegal, the parties to the proceeding ought to be relegated to the position they were in prior to declaration of closure. The three authorities referred to by Mr. Sengupta lay down that there can be No. legitimacy of actions taken in pursuance of an inherently invalid act. The natural consequence thus would be reinstatement of the workmen.

19. Under these circumstances, I direct the Respondent No. 3 to reinstate the workmen to their respective positions which they held prior to closing down of the undertaking and they shall be deemed to have been in continuous service. On the issue of back wages, Mr. Prasad had referred to the judgment of the Hon'ble Supreme Court in the case of U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, , in support of his submission that to sustain his claim of back wages, a dismissed workman directed to be reinstated has to demonstrate that he was not gainfully employed during the interim period. In this case, there is No. material before me from which I can come to such a finding.

20. My own view is that the normal enquiry as to whether a workman was gainfully employed or not during the period between the date of his termination till the date of reinstatement for deciding the question of back wages ought not to apply in a case where reinstatement is being directed as a natural consequence when closure in a particular case is found illegal. In the case of Anoop Sharma (supra) it has been held that violation of mandatory provisions of a statute or non-compliance thereof would render retrenchment of an employee a nullity or void ab initio. If that is the case, then all the benefits which an individual workman would have been deprived of ought to be restored. Since there may be necessity of adducing evidence on this count, let the Tribunal decide that question within a period of three weeks. On the issue of back wages, I accordingly give liberty to the Petitioners to approach the Tribunal with an appropriate application within three weeks from the date the photostat certified

copy of this judgment becomes available.

21. Prayer is made for stay of operation of this judgment. Such prayer is considered. There shall be a stay of operation the judgment for a period of two weeks after the certified copy of this judgment becomes available. There shall be No. order as to costs.

22. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.