

20
11.01.2023
sb/saswata
Ct 550

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

WPA 19567 of 2019

With
CAN 1 of 2019 (Old No.10414 of 2019)

Stoplift Infotech India Pvt. Ltd.

Vs.

Subhasis Mahindar & Anr.

Mr. Soumya Majumder

Ms. Pubali Sinha Chowdhury

Mr. Sushovit Dutt Majumder

Ms. Ratnadipa Sarkar

... For the petitioner.

Mr. Suvadeep Bhattacharjee

... For the applicant/respondent
no.1.

Mr. Narayan Chandra Bhattacharyya

Ms. Sujata Ghosh

... For the State.

The present writ application has been filed, *inter alia*, challenging the award dated 29th April, 2019, passed by the learned Third Industrial Tribunal, West Bengal. In connection with the aforesaid application, a connected application being CAN 1 of 2019 has been filed under Section 17B of the Industrial Disputes Act, 1947 (hereinafter referred to as the “said Act”).

Mr. Bhattacharjee, learned advocate representing the applicant herein after referred to as the respondent no.1 submits that by an award dated 29th April, 2019, the learned Third Industrial Tribunal, West Bengal, was *inter alia* pleased to direct reinstatement of the respondent no.1 along with payment of 50 per cent of the back wages,

since the date of termination of service i.e. 7th August, 2014. He says that the writ petitioner had not complied with the aforesaid direction, on the contrary, had filed this writ application before the Hon'ble Court *inter alia* challenging the said award. He says that the respondent no.1, from the date of his dismissal i.e., 7th August, 2014 has remained unemployed, till date and it has become very difficult for him to maintain his family. It is submitted that he is somehow surviving, without any means of livelihood and is on the mercy of relatives and well-wishers. He says that the respondent no.1 has also specifically made an averment in this application that he is not gainfully employed, even after termination of his service and despite trying his level best the respondent no.1 could not secure a job. It is also claimed that at the time of termination, his last drawn monthly wages was Rs.7570/- and in support thereof, he relies on a pay slip issued by the petitioner in favour of the respondent no.1. Mr. Bhattacharya, by drawing attention of this Court to the order passed by the Appropriate Government submits that the proceedings before the Tribunal arose out of a reference made under Section 10 of the said Act. He says that the appropriate Government while making the reference was *inter alia* pleased to frame issues, whether the termination of service of the respondent no.1 by way of dismissal, by the management with effect from 7th August, 2014 is justified? and to what reliefs, if any, the said

workman is entitled to. He says pursuant to the direction issued by the Tribunal, the respondent no.1 had filed a written statement and in such written statement a specific prayer for reinstatement along with full back wages with consequential relief had been made. By drawing attention of this Court to the operative portion of the aforesaid award, he submits that the Tribunal had been pleased to allow the written statement filed by the respondent no.1 on contest. He says that when the written statement had been allowed on contest, it consequentially follows that the writ petitioner is required to reinstate the respondent no.1 in service. The aforesaid would become explicit from the intention gathered from the award wherein the Tribunal had specifically provided that the applicant is entitled to reinstatement with 50 per cent back wages since the date of termination from service i.e. 7th August 2014. He says that the respondent no.1 is not gainfully employed, such fact has been categorically stated in the application affirmed by the respondent no.1. No document has been disclosed by the writ petitioner in support of its contention that the respondent no.1 is not gainfully employed. He says that in the given facts the respondent no.1 having fulfilled the ingredients, for invoking the provisions of Section 17B of the said Act, should be entitled to the benefit of the said Section and the minimum maintenance in the form of last drawn wages should be directed, to be disbursed in favour of the

respondent no.1.

The aforesaid connected application is contested by the writ petitioner by filing an affidavit-in-opposition.

Per Contra Mr. Majumder, learned advocate representing the writ petitioner submits that the ingredients for applying under Section 17B of the said Act is absent in the application filed by the respondent no.1. He says that there is no direction passed by the learned Tribunal directing reinstatement of the respondent no.1, for the respondent no.1 to apply under Section 17B of the said Act. Drawing attention of this Court to the award passed by the learned Tribunal he says that learned Tribunal despite declaring that the respondent no.1 is entitled to reinstatement, in the operative portion of the award did not issue a direction for reinstatement. He says in ordinary course such an award, declaring entitlement, for reinstatement of service cannot be implemented. By relying on the provisions of Section 29 of the said Act, he says that the writ petitioner cannot be penalized for not implementing the aforesaid order as there is no specific direction for reinstatement. By referring to Section 36A of the said Act he says that in the event of any dispute, it is always open to the appropriate Government to refer the matter to the learned Tribunal for interpretation of such award. He says in the instant case, it was for the respondent no.1, to take appropriate steps for

interpretation of the award. He says no steps had been taken by the respondent no.1. The aforesaid award otherwise cannot be implemented and, as such, does not constitute an unfair labour practice within the meaning of Schedule V, item No.13 of the said Act. According to Mr. Majumder only the direction for payment back wages can be implemented. By, once again referring to the operative portion of the award, he says that there are two separate sentences in the award; one, indicating the intent and the other indicating what actual order had been passed.

This apart, he submits that the respondent no.1 has also, not even averred in the connected application that the respondent no.1 is not self-employed. He says self-employment is also a means of employment by which one can earn his livelihood. He says unless the respondent no.1 discharges his onus and burden by stating that the respondent no.1 is not self-employed, no relief under section 17B of the said Act, can be awarded in his favour. In support of his aforesaid contention, he relies on a judgment delivered by the Hon'ble Supreme Court in the case of **Dena Bank vs. Tiritikumar T. Patel**, reported in **(1999) 2 SCC, 106**. By referring to, paragraph 21 thereof, he says that Section 17B of the said Act, can be brought into action, provided the workman concerned has been ordered to be reinstated. He says that unless there is an order of reinstatement, the provisions of Section 17B

cannot be invoked. He says that ordinarily, the amount paid by the employer to the workman pursuant to the orders passed under Section 17B cannot be recovered even if ultimately, the writ petition succeeds. It is for such reason, the framers of the section 17B of the said Act, thought it fit, to permit payment of the wages which were last drawn by the workman when he was in service provided that the said workman was otherwise not gainfully employed. He says self-employed is also construed as a gainful employment. In this case since the respondent no.1 has not discharged his onus of stating on oath that he is not self-employed; no relief should be awarded in his favour.

I have heard the learned advocates appearing for the respective parties and have considered the materials on record. I find that the appropriate government by an order dated 19th August 2015 had referred the disputes between the parties to the learned 3rd Industrial Tribunal, West Bengal by framing the following issues:

“I S S U E (S)

1. *Whether termination of the service of the workman namely Sri Subhasis Mahindar by way of dismissal by the Mgt. of M/S Stoplift Infotech India Ptd. Ltd. W.e.f. 07.08.2014 is justified?*
2. *To what relief, if any, is the workman entitled?”*

Since, thereafter, pursuant to the directions issued by the learned 3rd Industrial Tribunal, the respondent no. 1 had

filed his written statement, inter alia, praying, therein as follows:

“It is, therefore, humbly prayed that your Honour would be graciously pleased to pass necessary Award, holding the dismissal order dated 7.8.14, issued by the company is totally unlawful and unjustified also with granting relief of reinstatement in service with full back wages along with consequential relief and/or pass any other relief as your Honour may deem fit proper.”

The matter was duly contested by the writ petitioner by filing written statement, wherein the petitioner prayed for following reliefs:

“It is therefore, prayed that Your Honour would be pleased to reject the application filed by the applicant on the grounds that the dismissal is justified and the workman is not entitled to get any relief on the fact of the case and pass an Award in favour of the Company herein and/or pass such other orders as Your Honour may deem fit and proper.”

On contested hearing, the learned Tribunal was, inter alia, pleased to pass the following order:

“Ordered

That the written statement filed by the workman is allowed on contest, but without cost. The applicant/workman is entitled to get reinstatement with 50% back wages since the termination of service dt. 07.08.2014. The O.P./Company is hereby directed to pay 50% of the back wages to the applicant within a period of 90 (ninety) days from the date of

passing of this award in default the workman is entitled to put the award in execution.”

Before proceeding further, it must be remembered that to invoke the provisions of Section 17B of the said Act, there must be:

- I. an award directing reinstatement of the workman;
- II. that the employer prefers any proceedings against such award in a High Court or the Supreme Court; and
- III. The workman files an affidavit, inter alia, claiming that he had not been employed in any establishment during such period.

Proviso to Section 17B of the said Act, however, makes it abundantly clear that if the High Court or the Supreme Court is satisfied that the workman had been employed and had received adequate remuneration during such period or part thereof, the Court shall order that no wages shall be payable to him under the aforesaid Section for such period or part, as the case may be.

In the instant case, I find that the respondent no. 1 in paragraph 6 of the application has categorically stated that he has remained unemployed since 7th August 2014 till date, and it is also difficult for him to maintain his family members without any means of livelihood and that he is not gainfully employed elsewhere after the termination of service and has not been able to secure any job.

I also find that in the aforesaid application, he has

claimed that his full last drawn salary was Rs.7570/-. In support of his claim, he has relied on a salary sheet. In the affidavit-in-opposition, although the factum of unemployment of the petitioner has been denied, no document in support thereof, has been disclosed. I find that it has been strenuously argued on behalf of the writ petitioner to demonstrate that the respondent no. 1 had not discharged his onus by not making an averment that he is not self-employed. I am afraid and am unable to accept such contention of the writ petitioner. The statute does not mandate the workman concerned to make an averment that he is not self-employed, what the statute mandates, is that he is not employed in any establishment during such period. In my understanding of the aforesaid section, the respondent no. 1 has complied with the provisions of the statute and has, therefore, discharged his onus and the same has shifted to the writ petitioner for them, to prove to the satisfaction of the Court that the respondent no.1 has been employed and has been receiving adequate remuneration.

Mr. Mazumder, learned advocate appearing for the writ petitioner has also made elaborate submission that unless an order is made directing reinstatement of the workman, the provision of Section 17B of the said Act cannot be invoked. I am in full agreement with such submissions made by Mr. Mazumder. In the instant case, however, I find that the Tribunal had directed that the written statement filed by the workman had been allowed on contest. It would appear

from the written statement filed by the respondent no.1 that the respondent no. 1 had categorically prayed that he be granted relief of reinstatement. Mr. Mazumder, despite questioning the award had accepted that it was the intent of the learned Tribunal to direct reinstatement. He has only submitted that reinstatement had ultimately not been ordered. I am afraid, the aforesaid contention of Mr. Majumdar cannot be accepted. Once the intention to reinstate the respondent no. 1, can be gathered from the award, the same read with the direction to allow the written statement filed by the respondent no.1 leaves no room for doubt, as to the direction issued by the learned Tribunal. I find that not only the learned Tribunal passed a declaration as regards entitlement of the respondent no. 1 to be reinstated but has also directed reinstatement of the workman by allowing the written statement.

In the judgment delivered by the Hon'ble Supreme Court in the case of **Dena Bank vs. Tiritikumar T. Patel** (*supra*), as referred to by Mr. Mazumder, the Hon'ble Supreme Court, in paragraph 7 thereof was inter alia, was pleased to observe as follows:

'7. It would be convenient at this stage to set out the provisions contained in Section 17-B of the Act which read as under:

"17-B. 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.”

The Objects and Reasons for enacting the said provisions were as follows:

“When Labour Courts pass award of reinstatement, these are often contested by an employer in the Supreme Court or High Court. It was felt that the delay in the implementation of the award causes hardship to the workman concerned. It was, therefore, proposed to provide the payment of wages last drawn by the workman concerned, under certain conditions, from the date of the award till the case is finally decided in the Supreme Court or High Courts.”

It would thus appear that the object underlying the enacting of the provisions

contained in Section 17-B is to give relief to the workman in whose favour an award of reinstatement has been passed by the Labour Court and the said award is under challenge in the High Court or this Court. The said relief has been given with a view to relieve the hardship that would be caused to a workman on account of delay in implementation of the award as a result of the pendency of the proceedings in the High Court or this Court. The question for consideration is: what is the extent to which such relief has been granted to a workman under this provision? The Objects and Reasons do not indicate an answer to this question and its answer has to be found in the provisions of the enactment. Since the expression "full wages last drawn" in Section 17-B has been construed by the various High Courts in the decisions referred to above we would briefly refer to the same.'

It thus necessarily follows that for provisions of section 17B of the said Act to be invoked, there must be an award of reinstatement of a workman. In this case an award for reinstatement has been passed by the Tribunal.

In paragraph 21 of the aforesaid judgment the Hon'ble Supreme Court has discussed what would constitute full wages. The aforesaid judgment, does not assist the writ petitioner for reasons morefully stated herein above.

In the light of the aforesaid, I am of the view there cannot be any controversy as regards the direction issued by the learned Tribunal to reinstate the petitioner. Since, I have

already held that there is an award for reinstatement of the workman, other issues raised by Mr. Mazumder as regards implementation of the aforesaid Award pales into insignificance.

I find that the writ petitioner apart from stating in paragraph 7 of the affidavit in opposition that it has come to learn from reliable source that the respondent no.1 is gainfully employed and has suppressed his income, has not disclosed the source of such information. Such paragraph in its entirety, has also not been affirmed as true to knowledge. Although, it has been contended that the respondent no. 1 has failed to discharge his onus for invoking the provision of Section 17B of the said Act, I am not in agreement with the same. I find that the respondent no. 1 has made a statement on oath that he is unemployed and not gainfully employed elsewhere after termination of service and his last drawn wages was Rs 7570 per month. I find that the writ petitioner has failed to demonstrate to the satisfaction of this Court that the respondent no. 1 has been employed in any establishment and has been receiving adequate remuneration. I find that the present writ application has been registered on 27th September 2019.

In view thereof, the connected application being CAN 1 of 2019 succeeds. The respondent no. 1 shall be entitled to last drawn wages at the rate of Rs.7570/- from 27th September 2019, in terms of section 17B of the said Act, such wages shall be paid by the writ

petitioner month by month, within 27th day of every month, to the respondent no.1, till disposal of the present proceedings or until further orders, whichever is earlier. The arrears from 27th September, 2019 till 27th December, 2022 must be paid by the writ petitioner to the respondent no.1 within a period of three months from date.

The application being CAN 1 of 2019 is accordingly disposed of.

There shall be no order as to costs.

The writ application being WPA 19567 of 2019 shall appear in the **monthly list of February 2023**.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis upon completion of requisite formalities.

(Raja Basu Chowdhury, J.)