(2001) 89 FLR 192 : (2001) 2 LLJ 39

Calcutta High Court

Case No: C.W.J.A.S. W.P. No. 844 (W) of 2000

Parry"s (Cal) Employees" Union and Another		APPELLANT
	Vs	
Third Industrial Tribunal and Others		RESPONDENT

Date of Decision: Aug. 25, 2000

Acts Referred:

- Factories Act, 1948 - Section 2
- Industrial Disputes Act, 1947 - Section 25F

Citation: (2001) 89 FLR 192 : (2001) 2 LLJ 39

Hon'ble Judges: Bhaskar Bhattacharya, J

Bench: Single Bench

Advocate: Kalyan Bandopadhyay, P. Banja Chowdhury and S. Pal, for the Appellant; Partha Sengupta, D. Ghosh and R. De, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.
In this writ application an Employees" Union has challenged an award dated August 16, 1996 passed by the Third Industrial Tribunal, West Bengal in Case No. VIII-94 of 1984 thereby answering a reference made to it u/s 10 of the Industrial Disputes Act, 1947 in favour of the employer. The following disputes were referred to the Tribunal:

"Whether retrenchment of workmen whose names are given in the attached list is justified? To what relief if any are they entitled to?"

2. Pursuant to the retrenchment of 89 workmen of the Company, the aforesaid disputes were referred to the Tribunal. Before the Tribunal, both oral and documentary evidence were led by the parties and ultimately the Tribunal below by a detailed judgment held that

the retrenchment was effected for bona fide reason and that the "surplus" as pleaded by the Company was also bona fide. The Tribunal further arrived at a conclusion that all the formalities of retrenchment as provided in the Industrial Disputes Act were complied with and as such there was no illegality in the order of retrenchment. Being dissatisfied, the employees" union has come up with the instant writ application.

3. In this writ application although several grounds have been taken, Mr. Bandopadhyay, the learned counsel appearing on behalf of the petitioner has restricted his submission to four points only.

4. The first point taken by Mr. Bandopadhyay is that the order of retrenchment in this case ought to have been preceded by a notice u/s 25-N of the Industrial Disputes Act and not the one mentioned in Section 25-F of the Act. According to Mr. Bandopadhyay undisputedly more than 100 employees were working on an average per working day and as such Section 25-N applies to the facts of the present case.

5. The second contention of Mr. Bandopadhyay is that assuming for the sake of argument but not conceding that Section 25-F applies, even then, the provision contained therein has not been complied with before passing of the order of retrenchment.

6. Mr. Bandopadhyay submits that in this case the notice was not validly served and mere sending of money by A/c Payee cheque under registered post cannot amount to payment within the meaning of Section 25-F of the Act.

7. Mr. Bandopadhyay next contends that while assessing the amount of compensation in terms of Section 25-F of the Act, the average monthly wages should be divided by 26 and it should be then multiplied by 15. But in the instant case, Mr. Bandopadhyay alleges, the employer has divided the average monthly wages by 30 and then multiplied the same by 15. In support of such contention Mr. Bandopadhyay has referred to the decision of Bombay High Court in the case of Trade-Wings Limited Vs. Prabhakar Dattaram Phodkar and Others, . Mr. Bandopadhyay in this connection also relied upon a decision of the Madras High Court in the case of Management of Shadlow India Ltd. Vs. Presiding Officer, Principal Labour Court and Another, .

8. Mr. Bandopadhyay lastly contends that while retrenching the workmen, the employer not having followed the "last come first go policy", such order is liable to be set aside.

9. Mr. Sengupta, the learned counsel appearing on behalf of the employer has opposed all the aforesaid contentions raised by Mr. Bandopadhyay and in addition, has raised a further objection that this Court should not entertain this writ application on the ground of gross delay in filing this application.

10. As regards the first point taken by Mr. Bandopadhyay regarding application of Section 25-N of the Act to the fact of the present case, Mr. Sengupta contends that such point was never pleaded before the Tribunal below and this question being dependent on

adjudication of new facts, this Court should not entertain such question. Mr. Sengupta points out that in order that the provision of Section 25-N of the aforesaid Act applies, the establishment must be of any of the categories mentioned in Section 25-L(a) of the Act and as such in the absence of any material showing that the same is a factory such question cannot be adjudicated. It is not even the case of the petitioner, Mr. Sengupta submits, that the establishment is either a mine or a plantation.

11. As regards the second contention of Mr. Bandopadhyay, Mr. Sengupta contends that even if no notice contemplated u/s 25-F is served, the amount of compensation mentioned in Second part of Section 25-F(a) and 25-F(b) of the Act having been sent by registered post by A/c Payee cheque on the date of retrenchment, it should be presumed that the amount has been paid on the self same date.

12. As regards the third contention of the learned counsel for the petitioner, Mr. Sengupta submits that for the purpose of calculating 15 days" wages it is not necessary that monthly wages should be divided by 26 and then it should be multiplied by 15. In this connection Mr. Sengupta relies upon a decision of Bombay High Court in the case ofManaging Director, Managing Director, Bombay Film Laboratory Ltd. Vs. Vasule. L.G. and Another,). Mr. Sengupta further contends that the employees in this case having accepted the said amount without any protest, even if there was any infraction of the provision of law, it should be presumed that those have been waived.

13. As regards the last contention of the learned counsel for the petitioner, Mr. Sengupta points out that the attention of the Tribunal could not be drawn to any specific instance where "last come first go policy" has been given a go bye. In view of finding recommended by the Tribunal that there has been no violation of that principle, this Court sitting in a writ jurisdiction should not reappreciate the materials on record.

14. Mr. Sengupta lastly contends that in view of inordinate delay in moving this application this Court should not entertain this writ application and in support of such contention, Mr. Sengupta relies upon a decision of the Apex Court in the case of Sudhir Vishnu Panvalkar Vs. Bank of India, . After hearing the learned counsel for the parties and after going through the materials on record I am not at all convinced by any of the points raised by Mr. Bandopadhyay.

15. As regards the first point that Section 25-N of the Act applies to the present case, I am at one with Mr. Sengupta that unless there is specific defence taken by the petitioners before the Tribunal, such point should not be permitted to be raised before this writ Court. In the written statement filed by the petitioner, no specific defence has been taken that the establishment concerned was a factory and that Section 25-N of the Act applies, instead of Section 25-F of the Act. Mr. Bandopadhyay in this connection strongly relied upon a decision of the Madras High Court in the case of Parry & Co. Ltd. v. Presiding Officer, Second Additional Labour Court, Madras and Ors. 1998 I LLJ 406 (Mad) and contended that the establishment of the respondent having been held to be a factory in

the said case, the said decision is res judicata and/or binding upon the respondent. After going through the said decision I find that the Madras Unit of the said factory in the said case was found to be factory. But the said decision, in my opinion, cannot be held binding upon the establishment of the Petitioner in the Eastern Region. Moreover, Mr. Sengupta has placed before this Court a Xerox copy of the order of the Division Bench of the Madras High Court dated April 3, 1998 showing that an appeal is pending against the aforesaid decision of the learned single Judge. Whether the establishment in this case was a factory or not should be adjudicated on the basis of materials on record after specific defence is taken and the employer is given opportunity to controvert such plea. Mr. Bandopadhyay in this connection drew attention of this Court by referring to Annexure "G" to the writ application wherein a category of "packer cum store worker" has found place. By relying upon the aforesaid document, Mr. Bandopadhyay strenuously contended that once there are "packers" employed in the establishment, the said facts indicate that packing is going on in the establishment and if that be so, the establishment is a factory within the meaning of Section 2(m) of Factories Act. I am however unable to accept such contention. Mere designation of an employee as a "packer" will not make the establishment a factory unless it is shown that the ingredients of factories as mentioned in Section 2(m) of the Factories Act are present. If I accept the contention of Mr. Bandopadhyay, then in a case where really a factory is being run, the employer can by changing the designation of the workmen to either a clerk, or officer etc. avoid the rigour of the Act. Therefore, for the purpose of entertaining the aforesaid plea taken by Mr. Bandopadhyay investigation of disputed fact is necessary and as such the petitioner is not entitled to raise such question in this writ application. I thus find no merit in the first contention of Mr. Bandopadhyay.

16. As regards the second contention of Mr. Bandopadhyay, the same is equally devoid of any substance. Once on July 8, 1983, the date of retrenchment, an A/c Payee cheque by registered post with acknowledgment due has been sent, it amounts to payment notwithstanding the fact that actual amount has been received subsequently. I am not at all impressed by the contention of Mr. Bandopadhyay the "actual payment" must be made on that date or atleast the money should be sent by money order. It is rightly pointed out by Mr. Sengupta that once the A/c Payee cheque has been sent by registered post with acknowledgment due, the employer had no control over the money so dispatched unless of course the cheque is dishonoured, which is not the case before us and under such circumstances sending of cheque by registered post amounts to payment within the meaning of Section 25-F or the Act. Moreover, all the employees have encashed the cheques. In this connection reference may be made to the decision of the Karnataka High Court in the case of Ramesh v. Labour Court, Hubli FJR 66 468 wherein it was held that sending of money by cheque or Bank draft was sufficient compliance of the provision contained in Section 25-F of the Act.

17. As regards the third point, I agree with Mr. Sengupta that for the purpose of assessing 15 days" wages, monthly wages need not be divided by 26. In the case of Jeewanlal

(1929) Ltd. Vs. Appellate Authority under the Payment of Gratuity Act and Others, , the Supreme Court was dealing with a case of the manner of working out daily wages for the purpose of Section 4(2) of the Payment of Gratuity Act and such calculation must be different from the calculations made with reference to Section 25-F(b) read with Section 2-AAA(i) of the Industrial Disputes Act in view of difference of language. The procedure adopted in the case of Jeewan Lal (supra) based on interpretation of Section 4(2) of the Payment of Gratuity Act cannot be applied to the fact of the present case. In the two decisions cited by Mr. Bandopadhyay, one of Bombay High Court and other of Madras High Court, the learned Judges did not consider the aforesaid fact. Thus, I am of the view that those decisions do not reflect the correct proposition of law. It appears that there has been subsequent amendment in Section 4(2) of the Payment of Gratuity Act by addition of explanation in the light of the observation of the Apex Court but no such explanation has been added to the Industrial Disputes Act. Thus, for the purpose of calculation of 15 days'' wages, monthly wages are not required to be divided by 26 then multiplied by 15. I thus find no substance in the aforesaid contention of Mr. Bandopadhyay.

18. As regards the other point that the respondent has not followed the principle of ''last come first go'', I agree with the Tribunal below that in the absence of material showing departure from such rule, the plea is not available to the petitioner. The petitioner as it appears from the record did not dispute the correctness of the seniority list published by the company by raising any objection before the employer. Therefore, in the absence of the specific instance showing deviation from the aforesaid rule and of any objection before the Company disputing the correctness of the seniority list, I do not find any illegality in the finding of the Tribunal below on the aforesaid question. Moreover, as pointed out by the Supreme Court in the case of Om Oil and Oilseeds Exchange Ltd., Delhi Vs. Their Workmen, , although it is an accepted principle of industrial law that in ordering retrenchment, ordinarily, the management should commence with the latest recruit and progressively retrench employees higher up in the list of seniority, but the said rule is not immutable and for valid reasons may be departed from. Be that as it may, I have already pointed out that the petitioner could not disclose any specific instance from the materials on record showing that there has been deviation from the above rule.

19. Apart from the aforesaid findings, in my view, this writ application should not at all be entertained even on the ground of delay in moving the same. The award impugned was passed on August 16, 1996 and though this writ application was filed on January 24, 2000 the same was moved for the first time on August 7, 2000. Even the delay of three years and five months have not at all been properly explained. The petitioner in paragraph 89 of this writ application has tried to explain delay in moving such application. According to the petitioner although the petitioner received the award on October 11, 1996, it made all efforts to collect required amount of money by which it could move this Court. From 1996, the petitioner faced various problems and difficulties in contacting with its members who were retrenched because after lapse of 12 years or more all the members had left their original place of residence. According to the petitioner; the case

was being sponsored by all 89 retrenched workers and if anybody was left out there would be multiplicity of proceedings and extra costs. Therefore the petitioner submitted that it took long time to get hold of the members. Thereafter individual opinion was sought for from all concerned relating to challenge of award impugned herein and in the process there was delay. The aforesaid ground cannot be said to be a sufficient ground, As pointed out by the Supreme Court in the case of Sudhir Vishnu Panvalkar (supra) delay of three and half years was found to be sufficient to reject a writ application. Therefore, this writ application should be dismissed also on the ground of delay not satisfactorily explained.

20. I thus find no merit in the instant writ application and the same is dismissed.

21. In the facts and circumstances there will be no order as to costs.

22. If xerox certified copy of this order is applied for, let the same be supplied by Wednesday next.