(1973) 03 CAL CK 0002

Calcutta High Court

Case No: Matter No. 499 of 1968

National Tobacco Co. of India Ltd.		APPELLANT
	Vs	
State of West Bengal		RESPONDENT

Date of Decision: March 2, 1973

Acts Referred:

- Industrial Disputes Act, 1947 - Section 33(2)
- Limitation Act, 1908 - Article 102
- Limitation Act, 1963 - Article 102, 7, 5, 6
- Payment of Wages Act, 1936 - Section 15(2)

Citation: 77 CWN 556 : (1974) 2 ILR (Cal) 341

Hon'ble Judges: T.K. Basu, J; S.K. Mukherjea, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

S.K. Mukherjea, J.
This case has been referred to us for disposal on a report made by Sankar Prasad Mitra J. under Rule 2 of chapter 5 of the Original Side Rules.

2. On November 15, 1961, the Respondent No. 3, an employee of the Petitioner, National Tobacco Company of India Ltd., was served with an order of suspension. On April 12, 1962, he was dismissed. As an industrial dispute was pending on that date before a Tribunal, the Petitioner applied under the provisions of Section 33(2)(b) of the Industrial Disputes Act, 1947, for approval of the order of dismissal. On December 2, 1964, the Second Labour Court, to which the case had been transferred, refused to grant its approval. Thereafter, on April 24, 1965, the Respondent No. 3 made an application for payment of arrears of wages u/s 15(2) of the Payment of Wages Act. It appears from the record that on February 16, 1966, an order was made by the Authority appointed under the Payment of Wages Act

enlarging time for making the application under the second proviso to Section 15(2). The order for payment was made on May 31, 1968.

3. The Petitioner, by means of this writ application, questions the order for payment. The application was heard by Sankar Prasad Mitra J. On behalf of the Petitioner it was argued before the learned Judge that though the application was one for payment of arrears of wages which have accrued due from April 1962, the application having been made in April 1965 was made after expiry of three years from the date from which the period of limitation began to run. In the application for enlargement of time the Respondent No. 3 ought to have explained each day''s delay. The said Respondent having failed to give any explanation, the delay should not have been condoned. In these circumstances, the counsel contended that the Respondent No. 3 might be entitled to wages for 12 months prior to April 1965 under the provisions of the Payment of Wages Act, but he is not entitled to wages from April 1962, as have been awarded by the Order dated May 31, 1968.

4. Before Sankar Prasad Mitra J. as also before us, the counsel heavily relied on a decision of B.C. Mitra J. in National Tobacco Co. of India Ltd. v. The Authority appointed under the Payment of Wages Act 71 C.W.N. 159 (164). The learned Judge held on good authority that when the Tribunal refuses to approve of an order of dismissal, the employee must be held to have been in the service of the employer from the date of dismissal and would be entitled to claim all his wages for the entire period but subject to the law of limitation. We respectfully agree. The difficulty arises where the learned Judge holds in course of his judgment that the period of limitation under the first proviso to Section 15(2) of the Payment of Wages Act commences not from the date when the Tribunal refuses to sanction the order of dismissal u/s 33(2)(b) of the Industrial Disputes Act but from the date of dismissal. B.C. Mitra J. observed:

In this case the order condoning the delay has been made by the Respondent No. 1 in total disregard of the settled law, namely, that limitation should run not from the date when the Labour Court refused to approve of the order of dismissal u/s 33(2)(b) of the Industrial Disputes Act but from the date of termination of service which is January 6,1962. The Respondent No. 1 has, in my view, quite clearly failed to apply the law which is now well-settled, namely, that limitation under the first proviso to Section 15(2) of the Act commenced not from the date when the Tribunal refused to sanction the order of dismissal u/s 33(2)(b)of the Act but from the date of dismissal of the Respondent No. 2 on January 6, 1962. This error, in my view, is an error apparent on the face of the records and a writ of certiorari can be issued for the purpose of dealing with such an error.

5. We invited the counsel appearing for the Petitioner to draw our attention to precedents, if there be any, by which the question of limitation, which arose before his Lordship, may be said to have been settled. Mr. Dutt could not cite any possibly because there is none.

6. In the case decided by B.C. Mitra J. it was taken for granted that the starting point of limitation was not the date of the order refusing approval of the order of dismissal but the date of dismissal itself. The learned Judge was not invited to construe the expression ''the date on which the payment of wages was due to be made'' in the first proviso to Section 15(2) in the light of the provisions of Section 33(2)(b) of the Payment of Wages Act.

7. In the present case, the date of dismissal is April 12, 1962. On the same date, the application was made by the Petitioner for approval of the dismissal u/s 33(2)(b). The order refusing approval of the dismissal was passed by the Tribunal on December 2, 1964. The Respondent No. 3 made the application for payment of arrears of wages under the Payment of Wages Act on April 24, 1965, well within the period of 12 months from the date of that order.

8. Sub-section (2) of Section 15 of the Payment of Wages Act reads as follows:

15(2) Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been delayed, such person himself, or any legal practitioner, or any official of a registered trade union authorised in writing to act on his behalf, or any Inspector under this Act, or any other person acting with the permission of the authority appointed under Sub-section (1) may apply to such authority for a direction under Sub-section (3).

Provided that every such application shall be presented within (twelve months) from the date of which the deduction from the wages was made or from the date on which the payment of the wages was due to be made, as the case may be.

Provided further that any application may be admitted after the said period of (twelve months) when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

9. In the case of The Management of Hotel Imperial, New Delhi and Others Vs. Hotel Workers'' Union, it was held that the undisputed common law right of the master to dismiss his servant for proper cause has been subjected by Section 33 of the Industrial Disputes Act to a ban, and that in fairness must mean that pending the removal of the statutory ban, the master can after holding a proper enquiry temporarily terminate the relationship of master and servant by suspending his employee pending proceedings u/s 33. It follows, therefore, that if the Tribunal grants permission, the suspended contract would come to an end and there will be no further obligation to pay any wages at the date of suspension. If on the other hand permission is refused, the suspension would be wrong and the workman would be entitled to all his wages from the date of suspension. On a parity of reasoning, what the Court observed regarding suspension is equally applicable to dismissal in the context of Section 33.

10. It cannot be disputed that it is only by reason of the Tribunal''s refusal to approve of the order of dismissal that the Respondent No. 3 became entitled to claim his wages. No order for payment could have been made on an application under the Payment of Wages Act until the Tribunal had made an order refusing approval of the dismissal. One may go further and say that, if the application were made before the Tribunal had pronounced on the validity of the dismissal, the application should have been held to be premature because the cause of action in the application did not mature until the Tribunal had made its pronouncement. Therefore, payment of arrears of wages cannot be said to have been due to be made before the Tribunal''s refusal to approve of the order of dismissal. The application was made within 12 months from the date of the refusal of approval and there has, therefore, been no delay in making the application and there is no delay to explain. In that view of the matter, no application need have been made for condonation of delay under the second proviso to Section 15(2) of the Payment of Wages Act.

11. It is noteworthy that Section 33(2)(b) requires the employer to pay only one month''s salary and not salary for all subsequent months until the Tribunal approves or refuses to approve of the order of dismissal. This indicates that during the pendency of the application u/s 33(2)(b) the employee is to be treated as having been lawfully dismissed although once the Tribunal has refused to approve of the order of dismissal, the employee must be treated as if he had never been dismissed and the salary for the entire period subsequent to his dismissal becomes payable.

12. The view we are taking is in consonance with the maxim actio curiae neminem gravabit acts of Court injure none. To hold that the starting point of limitation is the date of dismissal will mean that, if the application u/s 33(2)(b) remains pending for a long time, as well it may, a good part of the claim for arrears of salary of the dismissed employee, who ultimately succeeds in his application, will be barred by limitation on the basis that payment of arrears of salary has become due to be made on the date of dismissal and not on the date when the Tribunal refused to approve of the dismissal. To say that the employee should make the application for payment of arrears of wages within a year of dismissal, is no answer; for even if it be held, that the application is not premature, it will remain in a state of suspended animation; it cannot be pressed until the Tribunal refuses to approve of the order of dismissal. Moreover, successive applications will have to be made at intervals of one year, and each application will remain on the file to be disposed of only after the Tribunal has approved of or refused to approve of the order of dismissal. In our view, the law does not require an application to be made u/s 15 of the Payment of Wages Act for recovery of arrears of wages before the Tribunal refuses to approve of the order of dismissal.

13. In this connection a comparison between Article 7 of the Limitation Act and the first proviso to Section 15(2) of the Payment of Wages Act is instructive. Under the

third column of Article 7 of the Limitation Act, which corresponds to the same column of Article 102 of the old Limitation Act, the starting point of limitation is ''when the wages accrue due''. In the first proviso to Section 15(2) the starting point of limitation is ''the date on which the payment of the wages was due to be made''. In is clear that in the present case no payment could legally be required to be made until the Tribunal refused to approve of the order of dismissal. Moreover, the proviso contemplates that on the date of the application payment of arrears of wages or deductions made from wages are due to be made, not that wages have merely accrued due. Ordinarily, in a situation contemplated by Section 33(2) of the Industrial Disputes Act, no wages will be due for payment on the date of dismissal because the employee is expected to have been paid all his wages payable for the period during which he has been in employment. Moreover, Section 33(2)(b) requires the employer to pay one month''s wages at the time of termination of employment.

14. Reliance was placed on the decision of the Supreme Court in Jai Chand Sawhney Vs. Union of India (UOI), . In that case the Court held that when the order of dismissal is set aside by the Court on the ground of failure to afford the constitutional protection, the order is declared invalid ab initio, i.e. as if in law it never existed. The period of limitation under Article 102 commences to run when the salary accrues due and salary accrues due when in law the servant becomes entitled to his salary. If the order of dismissal is set aside, the public servant is deemed to be in service throughout the period during which the order of dismissal remained operative, and his right to sue for salary arises at the end of every month in which he was unlawfully prevented from earning the salary, which but for the illegal order of dismissal he could have earned. It was held that the Plaintiff''s claim for arrears of salary was governed by Article 102 of the Limitation Act, that the remuneration payable to him accrued due month after month, and his claim for salary beyond the period provided by the third column of Article 102 was barred by the law of limitation.

15. The counsel also relied on the decision of the Supreme Court in Anand Swarup Singh v. State of Punjab (1972) SLR 147. In that case the Plaintiff, who was the Appellant before the High Court, had brought an action for recovery of arrears of pension said to be due from August 25, 1959, till October 24, 1965. The trial Court decreed the claim as prayed for. On appeal, the High Court came to the conclusion that the suit was not maintainable and, accordingly, dismissed the suit in its entirety. On a further appeal to the Supreme Court a decree was passed in favour of the Plaintiff against the Defendants for arrears of pension for three years preceding the suit with interest. In course of his judgment Hegde J. speaking for the Court said:

Now coming to the question whether the Plaintiff is entitled to claim arrears of six years'' pension, the question appears to be concluded by the decision of this Court in Shri Madhav Laxman Vaikunthe v. State of Mysore wherein this Court held that in

the case of a claim for arrears of salary the period of limitation will be that laid down in Article 102 of the Indian Limitation, 1908. It has not been shown that the ratio of that decision is not applicable to the present case.

16. The cases cited by the counsel may well be disposed of by pointing out that the present case is not governed by Article 102 of the old Limitation Act or Section 6 of the Limitation Act now in force. The case is governed by the first proviso to Section 15(2) of the Payment of Wages Act, a provision which, as has been indicated, is quite different from the corresponding provision of Article 102 of the Limitation Act.

17. It remains for us to deal with the question of the Authority''s power to enlarge time under the second proviso to Section 15(2) of the Payment of Wages Act.

18. In course of his judgment B.C. Mitra J. said:

The Respondent No. 1 cannot, in my view, proceed to condone the delay in an application for a claim for the entire period.... The impugned order shows that the delay has been condoned for the entire claim and this, in my view, the Respondent No. 1 was not entitled to do. The order condoning the delay was made in complete disregard of the principles of limitation applicable to the case and this order, in my view, cannot stand.

19. In our opinion, in a proper case the Authority will be fully competent to extend the time for making an application under the second proviso to Section 15(2) of the Payment of Wages Act irrespective of the period for which the applicant claims his wages. To condone the delay in making an application u/s 15(2) of the Payment of Wages Act for payment of arrears of wages is not to hold that no part of the claim is barred by limitation. Whether it is or not, is to be decided at the hearing of the application. In this connection, reference may be made to the case of Sitaram Ramcharan etc. Vs. M.N. Nagarshana and Others, where it was held that the second proviso to Section 15(2) of the Payment of Wages Act is, in substance, similar to the provision of Section 5 of the Limitation Act and can be availed of only by proving sufficient cause for the entire period of delay till the presentation of the application. That proposition has not been disputed before us.

20. In the view we have taken, we are unable to apply the decision of B.C. Mitra J. in National Tobacco Co. of India v. Authority appointed under the payment of wages Act Supra or accept the ratio which commended itself to his Lordship in deciding that case.

21. In our view, the application for payment of arrears of wages under the Payment of Wages Act was not barred by limitation. The Rule is therefore discharged. Parties will pay and bear their own costs.

22. The operation of this order is stayed for a period of six weeks from date.

T.K. Basu, J.

I agree.