(2004) 09 CAL CK 0048

Calcutta High Court

Case No: F.M.A. No. 36 of 1997

Amarendra Nath Ghosh		APPELLANT
	Vs	
Indian Iron and Steel Co. Ltd.		RESPONDENT

Date of Decision: Sept. 29, 2004

Acts Referred:

- Constitution of India, 1950 - Article 226
- Industrial Disputes Act, 1947 - Section 17A, 29

Citation: (2005) 2 CALLT 96 : (2005) 104 FLR 420 : (2005) 1 LLJ 1052

Hon'ble Judges: Rajendra Nath Sinha, J; D.K. Seth, J

Bench: Division Bench

Advocate: Swapan Kumar Dutta and Dipankar Das Gupta, for the Appellant;A.K. Ghosal and Soumendra Kumar Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

D.K. Seth, J.

The Objection:

1. A preliminary objection as to the eligibility of the writ petitioner to maintain the writ petition has been taken in the affidavit-in-opposition. It is contended by the learned counsel for the appellant that this was not considered by the learned single Judge. It seems that the submission of the learned counsel for the appellant has some substance. After having gone through the order appealed against, we do not find that the learned single Judge has considered the said preliminary objection taken by the earned counsel for the appellant.

Breach of Section 29 ID Act : Whether disentitles employer to maintain writ petition:

2. In the circumstances, we permitted the learned counsel for the appellant to elaborate his submission on the preliminary objection, which he did. The preliminary

objection is that by reason of Section 17A of the Industrial Disputes Act, 1947 (1947 Act) the award becomes final and enforceable. By reason of Section 29, in case of breach of any term of settlement or award binding on him under the 1947 Act, make such person punishable with imprisonment or fine, as the case may be, as well as for continuous breach. In this case, the award became final and enforceable on February 3, 1990 on account of being published on January 3, 1990; whereas this writ petition was filed in August 1990; as such the writ petitioners were liable to be punished u/s 29 of the 1947 Act. Therefore, having been guilty of an offence is not entitled to seek any relief in equitable jurisdiction.

3. The seeking of equitable relief is dependent on the principle that one must come with clean hands. If a person, suffering an award binding upon him, seeks relief under Article 226 of the Constitution of India challenging the very same award, non-compliance thereof would not amount to an offence disentitling such person from seeking relief. This would not amount to come with unclean hands. It is the same award, which is being challenged. If such a situation is accepted, in that case, no relief would be available to any employer seeking to challenge an award under Article 226 after expiry of one month of publication of the award. In any event, such non-implementation of the award entitles the petitioner to seek relief u/s 17B in the form of interim relief. At the same time, the Court is not powerless to stay or pass appropriate orders to secure the interest of the employee, as the case may be. In the circumstances, we do not find there is any substance in the preliminary objection raised by the learned counsel for the appellant on the question of maintainability of the writ petition, as stated above.

4. The learned counsel for the appellant had relied on a decision in Management of Teok Tea Estate Vs. P.O., Labour Court and Another, where it was held that u/s 17A on the expiry of the period mentioned therein from the publication of the award, the award becomes enforceable. This principle is a settled principle of law.

5. Relying on the decision in Northern Coalfields Limited v. Industrial Tribunal/Labour Court and Ors. 1996 (72) FLR 728 by a learned single Judge, he pointed out that on the expiry of 30 days from the publication of the award u/s 17A, the learned Court becomes functus officio and the award becomes enforceable. This is also equally settled proposition of law.

6. These two decisions do not help him on the question of preliminary objection with which we are now dealing with. Since the award became enforceable from the period mentioned in Section 17A, the liability imposed u/s 29 of the 1947 Act would not affect the eligibility of or entitlement to the right to challenge the award and seek relief under the writ jurisdiction.

7. Inasmuch as a constitutional right to justice cannot be taken away on such a ground. The jurisdiction exercised by the High Court is discretionary. It may decline to grant relief on such ground. But that would be dependent on the gravity of the

situation. Then again the jurisdiction is very wide. In an appropriate case it can pass appropriate order to secure the interest of the employee/workman. That apart such an in-built protection is provided in the 1947 Act through Section 17B. In terms of this provision, the High Court may pass appropriate directions/orders. The ground urged by the counsel may be a reason for exercising the discretion by the High Court in the matter of grant of stay of the award. But such a situation cannot be conceived to disentitle the employer from challenging the award invoking writ jurisdiction altogether so as to make the writ petition not maintainable. This might be a case where proceeding is initiated u/s 29 and a process might have been issued. But even then the question cannot be conclusively determined to prevent a person from seeking relief under Article 226 when he is challenging the very same award out of which Section 29 is alleged to have been applied.

Appellant''s contention:

8. The learned counsel for the appellant, next contended that the learned Tribunal had rightly decided the question and passed an award on the basis of the materials available before it applying the correct principles of law when the initial burden having been discharged by the workman, the employer did not discharge, the onus shifted upon it. Despite having been requested, the employer did not produce the relevant records, even though, at the time of giving evidence, the witness had pointed out that his knowledge was derived from the records. He has also pointed out that the allegation, which was made in the letter dated April 3, 1969 has not been denied by the employer, which amounts to an acceptance of the statements made in the letter dated April 3, 1969. Therefore, it is not open to the employer to deny the said situation that the alleged bond was submitted under duress and coercion by the appellant. It is also pointed out that the said bond did not contain any date and the original bond was not produced by the employer. The workman was prevented from putting the date in the said bond and it was obtained before the resignation letter was allowed to be withdrawn. The employer had put the date according to its own convenience on the said bond. According to the learned counsel for the appellant, in the absence of the original bond having not been produced on record, the learned Tribunal had rightly accepted the uncontroverted averment of the workman.

9. With regard to the supersession of the workman, the workman has given a list of employees who superseded him and had produced sufficient material. In the absence of any document, in order to show that there was no supersession, the learned Tribunal was justified in arriving at a conclusion that there was supersession. Thus, it appears that the learned single Judge has completely overlooked the materials and had come to a wrong finding that the conclusion arrived at by the learned Tribunal was preverse. According to him, the learned single Judge, while exercising jurisdiction under Article 226, had, in fact, exercised the power conferred in the Appellate Court, which for a Writ Court is not justified. The

only jurisdiction the Writ Court could have exercised in such a situation is to examine the process of arriving at a conclusion but not the conclusion. Therefore, the judgment appealed against is wholly perverse and cannot be sustained. Therefore, the writ petition should be dismissed and the award should be affirmed.

Respondent''s contention:

10. Mr. Ghosal, the learned counsel for the respondent, on the other hand, had controverted all these questions and had pointed out that the initial burden lay on the workman and the workman in order to avoid the onus, have tried to shift the onus on the employer. However, the management of the industrial undertaking was taken over by the Government under the Indian Iron & Steel Co. Ltd. (Taking-over of the Management) Ordinance, 1972, since replaced by the Act. He submitted that employees working under the erstwhile employers continued to work on the same terms and conditions as on the appointed date. Therefore, no incident relating to a period anterior to the appointed date can be looked into in respect of the relation between the present management and the employee. At the same time, the workman having come late and after having accepted the situation till 1969 from 1961, he himself having asked for promotion seeking to withdraw the under taking/bond, which have been permitted on condition that his seniority would be counted on and from April 3, 1969. The workman had also accepted all the subsequent promotions without any objection or demur. After having accepted all these situations, he cannot now turn around to revive all that had happened 18 years before. The learned single Judge rightly found the entire finding of the learned Tribunal perverse since there was no material to come to a conclusion as the learned Tribunal had come to. Therefore, the appeal must be dismissed.
Could the claim anterior to the appointed date be re-opened by the Tribunal?:

11. Having heard the learned counsel for the parties and perusing the materials and going through the decisions cited, we do not find that there is any substance in the submission of the learned counsel for the appellant. Inasmuch as by reason of the Taking-over of Management under a statute, which creates a fiction in law in favour of the workman on and from the appointed date, the workman cannot claim any right, which he could not have claimed against the erstwhile employer, after the management was taken over. The continuation of the workman under the present management after the taking over of the management, is a fresh contract of employment statutorily created by fiction of law between the present employer and the workman binding on the parties, disentitling the workman to lodge any claim related to period anterior to the appointed date against the present employer. Under the provisions of the 1972 Ordinance since replaced by an Act, all claims relating to the period prior to the appointed date was enforceable against the erstwhile management and certain claims could be lodged before the Commissioner of Payments appointed under the said Act on conditions stipulated therein. Therefore, the learned Tribunal could not have travelled beyond the appointed date

to look into the question as to what had happened prior to the appointed date.

Whether oral evidence could dislodge facts available on record:

12. That apart, the fact discloses that the resignation was tendered on May 6, 1961. The workman wanted to resume his duty. This was allowed with effect from May 29, 1961. Whereas, the bond was given on June 28, 1961. This is now being sought to be explained on oral evidence. Now, this oral evidence cannot satisfy the very case of the workman because he himself submits that the bond was submitted on June 28, 1961. If the bond does not precede the resumption of the duty, in that event, it cannot be said that the employer was inimical towards the workman. Mere stating such fact would not be of any use unless evident from the fact. It is admitted by the workman that the bond is dated June 28, 1961. But this date was put by the employer. Thus, an admission is being sought to be overcome by oral evidence seeking to explain the record. Evidence on record can be rebutted by oral evidence in certain circumstances where the evidence is so glaring and there are materials to conclusively determine that the records were forged or fabricated or incorrect. On the strength of simple averment would not entitle the Tribunal to replace the facts on record by oral evidence.

13. The learned Tribunal proceeded on the basis of non-production of the original bond in order to draw adverse inference. When the workman himself admitted the bond to be dated June 28, 1961, the non-production would not entitle the learned Tribunal to draw adverse inference. The Tribunal was supposed to consider as to whether there was sufficient material to come to the conclusion that the workman was able to establish a rebuttal of the presumption on record admitted by him on the strength of his explanation.

Whether the workman was estopped:

14. Since the workman had withdrawn the bond, his seniority was counted from 1969, which was purely a policy decision and pursuant thereto he had received series of promotions within a short span of time, all of which were accepted by him. Now he cannot turn around and contend otherwise. On the principle of estoppel, he was estopped from doing so.

Whether the workman could claim promotion:

15. That apart, he had also pointed out that he was superseded by five or six persons named in the earlier writ petition. We may refer to his own statement at page 125 in paragraph 7 where it was pointed out that in view of his qualification, he was supposed to be promoted to the post of Assistant Roller and Roller skipping over the intermediary promotions and that such persons were given such promotion skipping over intermediary promotions. This was known to him. It was rightly held by the learned single Judge that promotion was not a matter of right and it was the discretion of the employer whom to consider for promotion and

whom not to consider. If the employer gives promotion skipping over intermediary promotions that cannot be a ground for the workman that he should also be given identical promotion skipping over the intermediary promotion and that too by directing the employer where no industrial disputes had been raised at that point of time and had continued without the promotion and had given a bond. Even if he had given bond informally, he did not raise his voice since 1961 till 1969 and continued as such. The moment he asked for withdrawal of the bond, the employer having accepted the same, it can be presumed that if he had asked for it earlier, the employer would have denied it. If he himself had waited till 1969, he should blame himself. Be that as it may, by reason of the provisions contained in the 1972 ordinance, since replaced by the Act, he cannot raise these questions prior to the cut- off date i. e. the appointed date. The question has to be looked into from the appointed date. On and from the appointed date, the petitioner was given the benefit, which he was enjoying before taking over.

Supersession after 1969 : Whether established:

16. The supersession after 1969, as has been alleged, has not been established through sufficient materials placed before the learned Tribunal. Though a list has been given and some statements have been made but no specific case of supersession was pointed out and no comparative table was shown that the persons alleged to have superseded were otherwise ineligible and the workman was eligible or the workman was equally eligible.

Scope of writ jurisdiction:

17. The Writ Court can only examine the process of arriving at a conclusion. It cannot examine the order challenged before it in the manner as the Appeal Court could deal with it. The Writ Court does not sit on appeal. It can only examine the process. In such examination of process it is well within the bounds of the jurisdiction of the Writ Court to find out as to whether there was any perversity in the finding or not; whether the finding arrived at was based on materials; whether such conclusion could at all be arrived at or not by a reasonable man. It can also look into as to whether jurisdiction has been properly exercised or not.

18. As discussed above, we find that the learned Tribunal could not have travelled to the period anterior to the cut-off date, being the appointed date prescribed under the Act by which the management was taken over. It also could not re-open the case. The workman ought to have raised his claim against the erstwhile employer in respect of his claim anterior to the appointed date.

Conclusion:

19. In the circumstances, we are in agreement with the learned single Judge that the findings of the learned Tribunal are perverse, though might be for added reasons, and we do not find any reason to interfere with the decision of the learned single

Judge.

Order:

20. The appeal, therefore, fails, and is accordingly dismissed. There will, however, be no order as to costs.

Rajendra Nath Singh, J.

21. I agree.