Raibahadur Bissessurlal Motilal Haluwasiya Trust and Another Vs Presiding Officer/Judge, First Industrial Tribunal and Others

Court: Calcutta High Court

Date of Decision: May 10, 1999

Acts Referred: Industrial Disputes Act, 1947 â€" Section 15(2), 2

Citation: (2000) 1 LLJ 104

Hon'ble Judges: S.N. Bhattacharjee, J; S.B. Sinha, J

Bench: Division Bench

Advocate: R.M. Chatterjee, for the Appellant;Parthasarathi Sen Gupta, Arunava Ghosh, Partha Bhanja Chowdhury and Swarup Paul, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S.B. Sinha, J.
Both the appeals and the writ application filed by the appellants herein involving similar questions of fact and law were taken

up for hearing together and are being disposed of by this common judgment.

2. The fact of the matter is in a narrow compass.

3. The concerned workman Sitala Prasad Pandey had admittedly been working with the appellant-trust. His services had been terminated; with

regard whereto an industrial dispute was raised and pursuant thereto a reference was made by the State of West Bengal to the respondent No. 1

herein. The said reference was registered as a Reference No. VIII-330/85.

4. In its written statement, the appellant in the said reference raised various contentions including one that the trust being a charitable institution, is

not an industry. The said question was raised as a preliminary issue but the Tribunal directed that the said issue would be considered along with the

merit of the matter. However, an application was filed by the concerned workman for grant of an interim relief as envisaged u/s 15(2)(b) of the

Industrial Disputes Act as inserted by amendment made by the State Government i.e. West Bengal Industrial Disputes (Amendment) Act. The

appellant filed an objection thereto. An ex parte order was passed on the said application on June 27, 1991. The appellant herein filed an

application for recalling the said order whereafter the said order was recalled and the appellant was also heard. A contested order was thereafter

passed on May 17, 1995 whereby and whereunder the appellant was directed to pay a sum of Rs. 500/- p.m. by way of interim relief. In the said

order, it was held that the appellant is an "industry" and the concerned workman is "workman" within the meaning of the provisions of Industrial

Disputes Act.

5. A writ petition being C.O. No. 12015 (W) of 1995 was filed by the appellant herein questioning the said order. The appellant had prayed for

but was not granted any order of stay, as a result whereof, the interim relief granted in favour of the workman by the Tribunal became enforceable.

Undaunted, the appellant filed another application for stay which was refused by the 1st respondent and the appellant was directed to comply with

the said order. In the mean time the question as regard validity of the domestic enquiry had been taken up. The workman pointed out that the

appellant had not complied with order dated May 17, 1995 whereupon the respondent No. 1 asked the appellant to comply with the same within

a time frame. The appellant filed an application for further cross-examination of the workman which was dismissed by an order dated July 16,

1995 with a direction to pay costs of Rs. 500/-. The appellant was further directed to comply with the order dated May 17, 1995. Further

opportunities had been granted by the 1st respondent to the appellant to comply with the said order.

6. The appellant filed an application for recalling the order dated July 16, 1998 making various allegations against the Presiding Officer. A question

was also raised whether in view of the fact that the workman admittedly was occupying a quarter with his brother, the rental payable in respect

thereof should be taken into consideration for the purpose of computation of wages defined in Section 2(rr) of the Industrial Disputes Act. It was

stated that the market rent for the said accommodation was Rs. 1,000/- p.m. and on that account, the appellant is entitled to receive a sum of Rs.

1,80,000/- from the workman. The said petition was rejected by an order dated August 10, 1998. Such an order which was mandatory and

imperative in character and the same having not been complied with, the appellant filed the second writ application being No. W.P. 16297 (W) of

1999 in this Court questioning both the orders dated July 16, 1998 and August 10, 1998.

7. Yet again the prayer for interim relief was refused by this Court. The 1st respondent thereafter insisted that such a payment be made by a date

fixed therefore. The appellant having not paid the same, the cross-examination of the witnesses examined on behalf of the workman by the

appellant was directed to be expunged and its defence was also struck off by passing three orders on September 11, 1998. As against the said

order dated September 11, 1998, the third writ application was filed being W.P. 11875 (W) of 1998 which was moved on October 26, 1998. It

is stated that on September 10, 1998, hearing on the second writ application was complete and September 14, 1998 was fixed for passing order

thereon. However, hearing of the 2nd and 3rd writ application was taken up on November 10, 1998 and further proceedings before the Tribunal

were stayed.

8. By reason of an order dated November 17, 1998 the learned single Judge of this Court found that the 1st respondent had an inherent power or

jurisdiction to pass such orders and thus, the second and third writ applications filed by the appellant herein, were dismissed. The learned trial

Judge, however, granted liberty to the appellant to pay the amount of Rs. 30,000/- towards arrears by December 15, 1998 and stayed the

proceedings before the Tribunal upto January 20, 1999 and further directed the appellant to pay a further sum of Rs. 38,625/- and continue to pay

the current amount of interim maintenance month by month from December 7, 1998 failing which the Tribunal was directed to resume the

proceeding from the stage, it had reached on August 10, 1998.

9. In the mean time although an appeal was filed, the stay application did not come up for hearing. As the appellant also did not deposit the

amount, an award was passed by the 1st respondent on December 17, 1998. When the stay application came up for hearing before this Court, it

was pointed out by the respondent that an award has already been passed. Upon verification of the said fact by the appellant, a prayer was made

for amendment of the writ application, the said prayer was allowed by order dated March 8, 1999. As the appellant had preferred only one appeal

against composite order passed by the learned Trial Judge in Writ Petition No. 16297 (W) of 1998 and Writ Petition No. 18875 (W) of 1998,

keeping in view the fact that one appeal against an order passed in two writ applications was not maintainable, the appellant was allowed to file

another appeal as also an application for condonation of delay. Such an appeal having been filed, the delay in filing the same has been condoned by

an order dated March 24, 1999. It may be placed on records that as it was found that the questions involved in these appeals were also involved

in the 1st writ application being No. 12015 (W) of 1995 this Court thought it fit to hear the said writ application also so that the dispute between

the parties may be resolved once for all.

10. Mr. R.M. Chatterjee, the learned Counsel appearing on behalf of the appellant has raised a number of contentions. The learned Counsel

submitted that the appellant being a Charitable Trust and having been constituted in terms of a decree passed by a Civil Court, the same cannot be

said to be an industry. The learned Counsel further submitted that a Tribunal which is a creature of statute is bound to act fairly and without any

bias whatsoever. According to the learned Counsel, as the 1st respondent has shown judicial obstinacy, the same would amount to a bias

inasmuch as despite pendency of these writ applications, he had passed orders including ex parte orders and refused to recall the said orders. In

support of his aforementioned contention reliance has been placed on State of West Bengal and Others Vs. Shivananda Pathak and Others, .

11. According to the learned Counsel, Section 15(2)(b) of the Act provides for a subsistence allowance which is to be paid in terms of West

Bengal Payment of Subsistence Allowance Act, 1969. The learned Counsel has also referred to West Bengal Workmen"s House Rent Allowance

Act and submitted that both the aforementioned Acts refer to the definition of "wages" as contained in Section 2(rr) of Industrial Disputes Act. The

learned Counsel submits that the Industrial Tribunal being a Tribunal of limited jurisdiction has no inherent jurisdiction. According to the learned

Counsel, the jurisdiction of the Industrial Tribunal is confined to Section 11 of the Act. Scheme of the Act, urges Mr. Chatterjee, merely postulates

settlement of dispute which cannot be done by shutting put one party from taking part in the proceedings at all. In any event contends the learned

Counsel, the Industrial Tribunal has no jurisdiction to impose penalty. Strong reliance in this connection has been placed on Gungaram Tea

Company Ltd. Vs. Second Labour Court and Another, The learned Counsel further submits that in any event it is a fit case in which the 1st

respondent should have allowed the parties to lead their respective evidences and make an award on merit.

12. Mr. Partha Sarathi Sengupta, the learned Counsel appearing on behalf of the respondents, on the other hand, submitted that the Tribunal has

an inherent jurisdiction to pass orders incidentally or ancillary to its main powers. Strong reliance in this connection has been placed on Grindlays

Bank Ltd. Vs. Central Government Industrial Tribunal and Others, According to learned Counsel although mere does not exist any provision

conferring inherent power upon the Industrial Tribunal or a power to strike out a defence or expunge the cross-examination upon failure of a party

to comply with a mandatory order, such a power must be held to be inherent in such Tribunals and for that purposes, the Court can iron out the

creases in interpreting the statute. Strong reliance in this connection has been placed on State of Bihar and Others Vs. Dr. Asis Kumar Mukherjee

and Others, and State of Karnataka and Another Vs. Hansa Corporation, . The learned Counsel submits that the power of the Tribunals to pass

an interim relief has been upheld by this Court. Reliance in this connection has also been placed on 1986 (53) FLR 617. The learned Counsel

submits that the Tribunal is a substitute for the Civil Court and, thus, all the powers which are available to the Civil Court must be held to be

impliedly conferred upon the Tribunal. Mr. Sengupta has also taken us through the evidences on record and submitted that a bare perusal of the

said evidence would clearly show that the trust is an industry and consequently the concerned workman is a workman. According to the learned

Counsel only because the appellant is a charitable trust, the same would not mean that it does not answer the description of an industry. Strong

reliance in this connection has been placed on Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others,

13. The primary question which has to be posed and answered by this Court is as to whether the Industrial Tribunal has an inherent power to

strike off a defence which raises a jurisdictional question.

14. An Industrial Tribunal, although has all the trappings of Court, is not a Court.

15. Before coming into force of the Industrial Disputes Act, the services of the workmen were not protected. They used to be governed by the

contract of service. Under the provisions of Section 14 of the Specific Relief Act, such a contract could not have been specifically enforced and

the remedy of a dismissed workman was to pray for a decree for declaration that his termination is illegal and for a money decree by way of

damages suffered by him in consequences thereof. By reason of Industrial Disputes Act, 1947, a legal right was created in favour of a workman.

For enforcement of the said right, a forum had also been created thereunder, and, thus, the Civil Court''s jurisdiction was held to be barred by

necessary implication. See The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others,

16. The distinction between a Tribunal and a Court must be borne in mind. Tribunal is a species of which the Court is a genus. The Court has the

power to execute its own order whereas the Tribunal does not have. See K.P. Verma v. I.K. Saran, reported in 1988 PLJR 1036. When an

award is passed, the same can only be enforced by taking recourse to the provisions contained in Section 29 thereof or by taking recourse to an

adjudicatory proceedings contained in Section 33-C(2) thereof.

17. Although in a sense the Tribunal has been given a greater power than a Civil Court as in settling the dispute between the employer and

employee, the functioning of the Tribunal is not confined to administration of justice in accordance with law, but also it can confer rights and

privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not

merely to confine to contractual rights and obligations of the parties, it can create new right and obligation between them which it considers

essential for keeping industrial peace. See Bharat Bank Ltd. v. Employees of Bharat Bank Ltd., reported in (1950 LLJ 921) (SC). But still it is not

a Court having plenary power.

18. There cannot be any doubt whatsoever that each Tribunal has, by necessary implication, an incidental or ancillary power. Such powers are

inherent for administration of justice and adjudicating the lis in a fair and reasonable manner. Each body exercising adjudicatory function has to

comply with the principles of natural justice. Thus, when an order is passed in violation of the principles of natural justice, there cannot be any

doubt that a Tribunal despite absence of any specific power may recall its orders. Such a power has been held to be incidental or ancillary to the

power of the Tribunal.

19. But the question as to the extent of such inherent power in the Tribunal is not free from doubt.

20. In Re: Grapco Industries Ltd. v. Industrial Credit Investment, reported in CLT 1998 (1) HC 278, a learned single Judge of this Court held that

the Debt Recovery Tribunal constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 although is empowered to

grant interim injunction but it has no power to grant ad interim injunction.

21. In Morgan Stanley Mutual Fund Vs. Kartick Das, , the Apex Court has held that the authorities created under the Consumer Protection Act

has no power to grant injunction.

22. However, in Re: In the matter of : CAUVERY WATER DISPUTES TRIBUNAL, , the Apex Court held:

The contention that since the Order does not say that it is a report and decision, and, therefore, it is not so u/s 5(2) of the Act is to say the least

facetious. Either the Order is such a report and decision because of its contents or not so at all. If the contents do not show that it is such a report,

it will not become one because the Order states so. As is pointed out a little later the contents of the Order clearly show that it is a report and a

decision within the meaning of Section 5(2).

Some of the aforesaid submissions relate to the merits of the Order passed and its consequences rather than to the jurisdiction and the power of

the Tribunal to pass the said Order. While giving our opinion on the present question, we are not concerned with the merits of the order and with

the question where there was sufficient material before the Tribunal, where the Tribunal had supplied the copies of the advice given by the assessor

to the respective parties and whether it had heard them on the same before passing the Order in question. The limited question we are required to

answer is whether the order granting interim relief is a report and a decision within the meaning of Section 5(2) and is required to be published in

the Official Gazette u/s 6 of the Act. It is needless to observe in this connection that the scope of the investigation that a Tribunal or a Court makes

at the stage of passing an interim order is limited compared to that made before making the final adjudication. The extent and the nature of the

investigation and the degree of satisfaction required for granting or rejecting the application for interim relief would depend upon the nature of the

dispute and the circumstances in each case. No hard and fast rule can be laid down in this respect. However, no Tribunal or Court is prevented or

prohibited from passing interim orders on the ground that it does not have at that stage all the material required to take the final decision. To read

such an inhibition in the power of the Tribunal or a Court is to deny to it the power to grant interim relief when reference for such relief is made.

Hence, it will have to be held that the Tribunal constituted under the Act is not prevented from passing an interim order or direction, or granting an

interim relief pursuant to the reference merely because at the interim stage it has not carried out a complete investigation which is required to be

done before it makes its final report and gives its final decision. It can pass interim orders on such material as according to it it is appropriate to the

nature of the interim order.

23. The aforementioned decisions leave no manner of doubt that the question as regard the extent of inherent power depends on the Scheme of the

Act. It is true that in terms of Section 151 of the CPC a Civil Court has inherent power. Such inherent power contained in Section 151 of the CPC

has not been enacted for the purpose of conferment of a new right upon the Civil Courts but thereby merely a declaration has been made as regard

subsistence of such power in the Civil Court. The Civil Court in exercise of its power u/s 151 of the CPC can pass an order of injunction. See

Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, .

24. In Dhenkanal Municipality v. Industrial Tribunal, Orissa, reported in 1974 Lab I.C. 836, a Division Bench of the Orissa High Court has held

that the Court had the same power to set aside, an ex parte award and such power can be exercised, in the event an application is filed before the

expiry of 30 days from the date of the publication of the award and became enforceable in terms of Section 17-A of the Act.

25. In Bella Asbestos & Engineering (India) Pvt. Ltd. v. A. Heartgrove and Ors. reported in 1976 Lab I.C. 521, SABYASACHI MUKHERJI, J.

(as His Lordship then was) following the aforementioned Division Bench decision of the Orissa High Court held:

I am of the opinion that the Tribunal had the power to pass the impugned order if it thought it fit in the interest of justice. It is true that there is no

express power giving the Tribunal jurisdiction to do so. But it is well known rule of statutory construction that a Tribunal or a body should be

considered to be endowed with such ancillary and necessary powers as are necessary to discharge its functions effectively for the purpose of doing

justice between the parties.

The learned Judge further observed:

This is an Act to provide machinery and method for settlement of industrial disputes. Its provisions, express or implied, must be construed in that

light. The provisions of the Act should be construed if the provisions reasonably and pragmatically viewed can lead to such construction, as helps

industrial harmony by settling industrial disputes. Judged from that point of view I have no doubt that the Tribunal had jurisdiction to pass the

impugned order.

26. It may be true that if the statute is ambiguous, the Court can iron out the creases but to confer a power upon a Tribunal, which it does not

necessarily have, is not the job of interpreter. Thus, the decisions of the Supreme Court in State of Bihar and Others Vs. Dr. Asis Kumar

Mukherjee and Others, and State of Karnataka and Another Vs. Hansa Corporation, upon which Mr. Sengupta placed strong reliance cannot

have any application.

27. It must be noted that in Grindlays Bank Ltd. v. The Central Government Industrial Tribunal and Ors. (supra) the Apex Court has clearly made

a distinction between a procedural power of review and a substantive power of review thus, whereas an incidental or ancillary power refers to

procedural aspect, a substantive power must be specifically conferred. An order can be passed only for the ends of justice but the Court cannot in

the guise of passing ancillary or incidental power, take a decision which goes to the very root of its jurisdiction. 28. Reliance placed by Sarva

Shramik Sangh, Bombay Vs. Indian Hume Pipe Co. Ltd. and Another, is misplaced. In that case the Labour Court was held to have power to

grant relief from a date anterior to the date of raising the dispute and it was, in that situation, observed:

It must be remembered that the Industrial Tribunal/Labour Court is supposed to be a substitute forum to the Civil Court. Broadly speaking, the

relief which the Civil Court could grant in an industrial dispute can be granted by the Industrial Tribunal/Labour Court.

29. However in Food Corporation of India Workers Union Vs. Food Corporation of India and another, it has been held that Tribunal is not a

Court.

30. The very fact that the Apex Court in Indian Hume Pipe (supra) was laying down a broad principle only to the effect that a relief which the Civil

Court may grant in an industrial dispute can be granted by the Industrial Tribunal/Labour Court but the same does not mean that the Industrial

Tribunal or a Labour Court had all the powers of a Civil Court. In fact, by reason of the Rules framed under the Industrial Disputes Act only some

provisions of CPC have been made applicable.

31. In the matter of In Re: Tushar Kanti Ghosh. Editor, Amrit Bazar Patrika, and Another, , a Special Bench of this Court held that in contempt of

High Court the contemnor can be punished by adopting summary procedure.

32. In The State of Bihar Vs. Usha Devi and Another, , it has also been held that the Civil Court in a proceeding of disobedience of its own order,

has the jurisdiction to put the plaintiff to the same position, as if the order of injunction has not been violated. See also Magna and Another Vs.

Rustam and Another, and Hari Nandan Agrawal and Another Vs. S.N. Pandita and Others,

33. The Civil Court has also the inherent jurisdiction to strike out the defence for non-compliance of its order in exercise of its inherent power. See

ILR 47 All 538 and Venkatacharyulu v. Manchala Yesobu and Anr. reported in AIR 1932 Mad 263.

34. A Court u/s 75 of the Employees'' State Insurance Act has the power to grant injunction. In Shriram Bearings Ltd, v. E.S.I. Corporation,

reported in 1977 Lab I.C. 1482, it was held:

An Insurance Court can, in appropriate cases, grant injunction restraining the Corporation from taking steps for realisation of the amount. A

Bench of Calcutta High Court also in the case of Agarwal Hardware Industries v. The Employees'' State Insurance Corporation 1967 Lab IC

1354 (Cal), held that when the Act has conferred jurisdiction on such Insurance Court to adjudicate a dispute specified in Section 75 of the Act, it

will be deemed that impliedly it had granted power of doing all such acts and to employing all such means as are essentially necessary for

effectively discharging its obligation to adjudicate. It was also held that this statutory power carries with it duty in proper cases to make order for

stay. The Supreme Court also in the case of Income Tax Officer Cannanore v. M.K. Mohammed Kunhi AIR 1969 SC 430 while construing the

power of the Appellate Tribunal under the Income Tax Act, held that an express grant of statutory power, carried with it by necessary implication

to use all reasonable means to make such grant effective, and it was held that the Appellate Tribunal must be held to have power to grant stay as

incidental or ancillary to its appellate jurisdiction once it is held that the relief claimed on behalf of the petitioner can be granted by the Insurance

Court under the provisions of the Insurance Act which has also power to enforce its orders, the necessary corollary will be that this will deem to be

a remedy for redress of the grievance of the petitioner provided under any other law for the time being in force. The result will be that no relief can

be granted to the petitioner under Article 226 of the Constitution, and in view of Sub-section (2) of Section 58 of the Constitution Act the petition

will be deemed to have abated. The proviso to Sub-section (2) of Section 58 of the Insurance Act provides that for seeking relief under any other

law for the time being in force, if some limitation is prescribed, in computing the period of limitation, the period during which the writ application

was pending before this Court has to be excluded. It is not one of those cases where the limitation prescribed under the Act or Statute for redress

of the grievances had already expired before filing the writ application before this Court so as to disentitle the petitioner to pursue that alternative

remedy. u/s 77(1A) of the Insurance Act, the period of limitation prescribed for filing such application is three years from the date on which the

cause of action arose. This writ application was filed on April 25, 1972 and since then it has remained pending. If this period is excluded in view of

Sub-section (2) of Section 58 of the Insurance Act, the petitioner''s application which may be filed before the Insurance Court will be well within

time. The stay granted by this Court on May 8, 1972 will also be deemed to have been vacated in view of Sub-section (2) of Section 58 of the

aforesaid Insurance Act. If an application is filed, it will be open to the said Insurance Court to grant an injunction after hearing the parties. It is also

expected that, if an injunction is granted restraining the Corporation from proceeding with the certificate case for realisation of the amount in

question, the Collector concerned or the Certificate Officer, before whom the case is pending, shall not proceed with that case. It is true that there

is no specific provision under the Insurance Court that can restrain or stay a proceeding pending before the Collector or the Certificate Officer,

under Revenue Act or the Public Demands Recovery Act, but it is well settled that two authorities constituted under two different enactments

should not act in a manner which may lead to conflict of jurisdiction. In such a situation, any order passed by a Court which has exclusive

jurisdiction over the matter has to prevail.

35. But then, an order passed by the E.S.I. Court has the same force as a decree passed by a Civil Court.

36. On the other hand, in Gungaram Tea Co. v. Second Labour Court, (supra) it has been held that a Tribunal has no jurisdiction even to recall its

earlier order.

37. However, in the opinion of this Court the distinction between a Civil Court and an Industrial Tribunal is so apparent that it cannot be said that

the inherent power of a Tribunal which is only incidental or ancillary to its main power cannot be said to be akin to the inherent power of Civil

Court.

38. A Civil Court has a plenary jurisdiction in terms of Section 9 of the Code of Civil Procedure. It can try any suit of civil nature unless its

jurisdiction is barred expressly or by necessary implication by or under a statute. On the contrary, an Industrial Tribunal or Labour Court

constituted under the provisions of the Industrial Disputes Act, 1947, exercise a limited jurisdiction. It derives jurisdiction to adjudicate upon a

dispute only in terms of a reference made to it by an Appropriate Government u/s 10(1) read with Section 12(5) of the Act. It cannot go beyond

the reference. It can only interpret the reference but it cannot determine a question which had not been raised before it. It, as a statutory authority,

has to act within the four corners of the statute. Its jurisdiction is confined to the provisions of Industrial Disputes Act.

39. It is true that normally a Court or a statutory authority has not only the jurisdiction to exercise a power within the four corners of provisions of

the said Act but also to implement it. Assuming that the Industrial Tribunal keeping in view the beneficent provision contained in 15(2)(b) of the Act

has the jurisdiction to implement its order, the same, in our opinion, can only be done within the four corners of the statute. An ancillary or

incidental in the opinion of this Court, does not extend to refuse to answer a question which goes to the root of the jurisdiction of the Industrial

Tribunal as for example, when a question arises as to whether a person is a "workman" or not or as to whether the dispute raised is an industrial

dispute or not or as to whether the Government making a reference, has the jurisdiction to do the same. As the jurisdictional issues go to the root

of the matter, by deciding a jurisdictional fact wrongly, the Tribunal cannot usurp a jurisdiction which it did not have. The Tribunal, thus, cannot

debar a person from raising such a question or taking any steps by preventing him to do so either striking out his defence or expunging the cross-

examination.

40. For such purposes, there cannot be any doubt, it can refuse to adjourn the matter and proceed ex parte. It can also impose costs. Even at the

time of making an award, such costs can be imposed. Having regard to the fact that the appellant bona fide had been raising the said question and

further in view of the fact that as many as three writ applications were pending decision of this Court, the respondent No. 1, in our considered

opinion, should not have passed an order striking off the defence and expunging the cross-examination. To say the least, the impugned orders

suffer from procedural impropriety. We, however, do not intend to lay down a law that the Court shall have to fold its hands and remain helpless if

an interim order passed by a Tribunal is not complied with. It can of course take such action as is permissible in law.

41. Striking out of a defence is a very serious matter. Section 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 contained

a provision that in the event the tenant fails to deposit all arrears and current rent as directed by the Court, the Court shall order the defence to be

struck off. Even in that situation the word "shall" was held to be directory and not mandatory in a case reported in Ganesh Prasad Sah Kesari and

Another Vs. Lakshmi Narayan Gupta, . The said decision is a pointer as regard the effect of an order striking off a defence. In any event, decisions

are legion on the point that even where such a defence is struck off, the same does not debar the tenant from raising the question of absence of

relationship of landlord and tenant by cross-examination of the witnesses examined on behalf of the plaintiff and adducing his own evidence

thereupon. Thus, there is no doubt that even if a defence is struck off, the jurisdictional questions could be raised by the appellant concerned.

42. The contention of the appellant herein to the effect that order for interim relief passed by the learned Tribunal was illegal as thereby it had

decided the jurisdictional fact cannot be accepted. In view of the beneficent provision contained in Section 15(2)(b) of the Act, the Tribunal had

the jurisdiction to arrive at a prima facie conclusion that there exists a relationship of employer and workman by and between the appellant and the

concerned workman and further the appellant is an industry within the meaning of Section 2(j) of the Industrial Disputes Act. Such a prima facie

finding would not have, however, debarred the appellant herein to adduce evidence and cross examine the witnesses examined on behalf of the

workman on the said question. By reason of the said decision, therefore, the learned Tribunal cannot be said to have arrived at a final finding of

fact.

43. So far as the submission of the appellant to the effect that the Tribunal ought to have recalled its earlier order on the ground that it had not

taken into consideration the provision of the West Bengal Payment of Subsistence Allowance Act, 1969 is concerned, the same cannot also be

accepted. The petitioner filed the said application for recalling after a period of three years. It did not raise the said question at the initial stage. Had

such question been raised at an appropriate stage, the concerned workman could have shown that he was being paid House Rent Allowance and

thus, the said amount could have been taken into consideration while computing the amount of interim relief. In any event, in view of the affidavit

affirmed by the concerned workman we do not find any reason as to why the appellant did not deposit the said amount under protest keeping in

view the fact that its interest was adequately safeguarded.

44. Mr. Sengupta appearing on behalf of the workman had taken us through the evidences with a view to show that the appellant"s case comes

within the purview of an "industry" in the light of the decision of the Apex Court in Bangalore Water Supply and Sewarage Board (supra).

However, as the appellant herein is yet to adduce its own evidence and cross-examine the witnesses examined on behalf of the workman, we

refrain from entering into merit of the said question.

45. Although in view of our findings aforementioned, these appeals ought to have been allowed and the matter ought to have been directed to be

remitted back to the learned Tribunal below we are of the opinion, that although the learned Tribunal below had no jurisdiction to pass the

impugned order directing striking off the defence and debarring the appellant from cross-examining the witnesses, keeping in view the conduct of

the appellant we are of the opinion that this Court with a view to do complete justice to the parties can put the appellant to terms.

46. The purport and object of Section 15(2)(b) of the Act is beneficent one. It had been enacted for granting some subsistence for the concerned

workman. In the instant case, although there does not exist any such provision but the Tribunal had also obtained an affidavit from the concerned

workman in terms whereof an undertaking had been given by him to refund, the entire amount in the event the reference is answered against him.

Such precautions having been taken by the Tribunal, we do not find any justification in the appellant is refusing to comply with the said order.

47. The Supreme Court while interpreting similar beneficent provision as contained in Section 17-B of the Act in Dena Bank v. Kirti Kumar T.

Patel, reported in (1998 II LLJ 1) (SC) held that amounts so paid, are non-refundable in nature. While giving a restricted meaning of the word "full

wages last drawn" the Apex Court held at p 8:

As regards the powers of the High Courts and the Supreme Court under Articles 226 and 136 of the Constitution it may be stated that Section

17-B, by conferring a right on the workman to be paid the amount of full wages last drawn by him during the pendency of the proceedings

involving challenge to the award of the Labour Court, Industrial Tribunal or National Tribunal in the High Court or the Supreme Court which

amount is not refundable or recoverable in the event of the award being set aside, does not in any way preclude the High Court or the Supreme

Court to pass an order directing payment of a higher amount to the workman if such higher amount is considered necessary in the interest of

justice.

48. The appellant has not questioned the constitutionality of the Act. Its main grievance is that the Court had decided the question that it is an

industry although such a question was to be decided along with the merit of the order.

49. We do not find any infirmity in the learned Tribunal''s order directing payment of interim relief and refusing to recall the said order as the said

recalling application was based on a misconception inasmuch as, if the contention of the appellant is upheld, the concerned workman would be

entitled to a higher amount of subsistence allowance.

50. We would not have exercised our discretion in the matter but keeping in view the fact that appellant must have been labouring under a

misconception that Tribunal had acted wholly without jurisdiction, we are of the opinion that a chance should be given to the appellant to take part

in the adjudicatory process subject of course to the conditions laid down hereinafter. This order is being passed keeping in view the fact that even

the learned trial Judge granted such opportunities to the appellant. These appeals and the writ application are disposed of upon setting aside the

impugned orders and the award with the following directions:

(1) The appellant must pay all the arrears to the concerned workman which is apart from the amount which had been deposited in terms of this

Court''s order dated March 8, 1999 whereby and whereunder this Court, directed payments of the last drawn amount in terms of Section 17-B of

the Act from the date of passing of the award within three weeks from date.

(2) The appellant shall further pay to the concerned workman a sum of Rs. 5,000/- by way of costs.

(3) On failure of the appellant to deposit the said amount within the aforementioned period, the writ petition- and the appeal shall stand dismissed

without any further reference to this Bench.

(4) In the event such payments are made, the learned Tribunal shall commence hearing of the matter de novo from the same stage and allow the

appellant to cross-examine the witnesses examined on behalf of the workman and adduce his own evidence.

(5) In the event the appellant does not co-operate with the Tribunal in the matter of hearing, it can proceed ex-parte and pass an appropriate

award on the basis of material placed on records.

(6) The Tribunal shall, if necessary, proceed to hear out the matters as far as possible, on day-to-day basis and make all endeavours to pass an

award within 8 weeks from the date of communication of this order.

51. Before parting with this case we may observe that although the parties had addressed us on merits as also on the jurisdictional fact involved in

the reference and referred to the evidences recorded by the learned trial Judge, we are of the view that the question as to whether an employee is a

workman or not should not be adjudicated in writ proceeding under Article 226 of the Constitution of India because it involves several disputed

questions of fact which have to be proved by adduction of oral or documentary evidences and by evidence of conduct and circumstances and the

ultimate decision will depend on careful consideration of the whole of the evidence. It is a well settled principle that where basic facts are disputed

and complicated questions of law and fact depending on the evidence are involved the writ Court is not proper forum for seeking relief.

Furthermore, the question whether the concerned employee is a workman or not is not a pure question of law, but is a mixed question of fact and

law. In arriving at such a conclusion, the Tribunal has to address itself on many questions which we think would not be proper for us to do.

52. We may further place on record that although the learned Counsel appearing on behalf of the appellant has argued that the learned Tribunal

suffers from a judicial bias, keeping in view the fact that no presumption as regard to the same can be raised and the Tribunal being an experienced

judicial officer and having sufficient training in law, beyond doubt, he shall consider the matter afresh dispassionately without any fear or favour and

strictly in accordance with law. We are sure that any insinuation made against the respondent No. 1 by the appellant, if any, would not be a ground

for not disposing of the matter in just and fair manner and in accordance with law.

53. These appeals and the writ petition are disposed of accordingly.

S.N. Bhattacharjee, J.

54. I agree.