Purna Theatre Vs State of West Bengal and Others

Court: Calcutta High Court

Date of Decision: Oct. 13, 1999

Acts Referred: Industrial Disputes Act, 1947 â€" Section 25F

Citation: (2000) 86 FLR 819 : (2000) 1 LLJ 519

Hon'ble Judges: V.K. Gupta, J; Gora Chand De, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Gora Chand De, J.
The only point for consideration in this appeal is whether a short payment of retrenchment compensation u/s 25-F of

the Industrial Disputes Act, not specifically pleaded by the workman vitiates the order of retrenchment.

2. The workman was appointed in the rank of messenger-cum-bearer in the petitioner company, Purna Theatre which is a cinema house on March

31, 1978. For gross misconduct a charge-sheet was issued against him on October 16, 1985 and in the domestic inquiry, he was found guilty and

was dismissed from his service on July 20, 1985. The workman moved the Industrial Tribunal which by an award dated January 10, 1991 set

aside the order of dismissal and reinstated the workman with full back wages. The workman joined the service as per the award on May 1, 1991.

But on May 30, 1991 the Company retrenched the workman, w.e.f. June 6, 1991 on the ground that he was a surplus hand due to loss of

business volume in the Company and an amount of Rs. 9030.30 was paid as retrenchment compensation. The workman received the said amount

without raising any objection before the date of retrenchment. By a letter dated June 4, 1991, the Joint Secretary of the Bengal Motion Picture

Employees" Union protested against the order of retrenchment and a similar letter was issued by the workman on June 8, 1991 protesting against

his retrenchment from the service.

3. The workman being aggrieved by the order of retrenchment raised an industrial dispute and ultimately a reference was made to the third

Industrial Tribunal on the following issues:

Whether the retrenchment of Shri Krishna Bahadur w.e.f. May 6, 1991 is justified?

What relief, if any, is the workman entitled to?

The workman filed his written statement before the Industrial Tribunal on September 14, 1993 and the Company also filed its written statement on

November 9, 1993. Evidence was adduced by the rival parties and ultimately the Industrial Tribunal passed an award on December 28, 1995

holding that the retrenchment of the workman was illegal mainly on the ground that full retrenchment compensation was not paid and the principle

of Mast come first go was not followed. The said award was challenged by an application under Article 226 of the Constitution of India which was

registered as W.P. No. 1872 of 1996 and the learned single Judge by his judgment dated September 25, 1996 dismissed the appeal upholding

findings of the Tribunal mainly on the ground of non-compliance of the mandatory requirements of Section 25-F(b) of the Industrial Disputes Act.

4. The learned advocate for the appellant challenged the award as well as the judgment of the learned single Judge mainly on the ground that the

plea of short payment of retrenchment compensation was not specifically raised in the pleading of the workman. Placing reliance on the decision

reported in AIR 1930 57 (Privy Council) the learned advocate contended that when plea was not raised in the defence, no evidence can be

looked upon it. In support of such contention, the learned advocate also relied on a decision of the Apex Court reported in Shankar Chakravarti

Vs. Britannia Biscuit Co. Ltd. and Another, and also the cases reported in The Pioneer Limited v. State of U. P. 1980 (41) FLR 95, and The

Management of Jugglic Electronics, Delhi and Anr. v. Governor of UT of Delhi 1988 (5) SLR 696.

5. The learned advocate for the appellant also contended that the workman having accepted the amount paid to him as retrenchment compensation

practically waived his right to challenge the compensation. On this score reliance was placed on decision reported in Dhirendra Nath Gorai and

Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, , to show that when a mandatory provision is intended only for the

benefit of the judgment debtor, he can waive the right conferred on him under that section. Reliance was placed in another decision of the Apex

Court reported in Shri Lachoo Mal Vs. Shri Radhey Shyam, , in: support of the contention that if one wishes to avail of the benefit of a section

without infringing any public right or public policy and if the section does not create a bar for waiving, it amounts to waiver. Reliance was also

placed. in a decision reported in Rajendra Singh Vs. State of Madhya Pradesh and others, , to strengthen the argument that even a mandatory

provision of a statute can be waived, but if it is in public interest, it cannot be waived. On the point of waiver, the learned advocate also placed

reliance on Krishan Lal Vs. State of Jammu & Kashmir, , in which the Apex Court took the view that requirement despite being mandatory can be

waived.

6. The learned advocate for the appellant also placed reliance on the other decisions that were placed before the learned single Judge in support of

the contention that immediately on payment of the retrenchment compensation, the mandatory provision of Section 25-F was duly complied with.

However, specific reliance was placed on a decision reported in Workmen of Coimbatore Pioneer ''B'' Mills Ltd. Vs. Presiding Officer, Labour

Court, Coimbatore and Ors, where the Apex Court approved the payment of a substantial amount as compensation for non-compliance with the

provisions of Clause (b) of Section 25-F in its rigid term. The learned advocate also placed reliance on a decision of Bombay High Court reported

in Managing Director, Bombay Film Laboratory Ltd. Vs. Vasule. L.G. and Another, in support of the contention that even if there was a breach of

the mandatory provision of Section 25-F due to short payment of retrenchment compensation, there is scope to make good the shortfall if pointed

out in the written statement or earlier.

7. The learned advocate for the respondent No. 4, of course, supported the judgment of the single Judge as well as of the Tribunal and contended

that the series of decisions of the Apex Court have termed the provisions of Section 25-F as mandatory and non-''compliance of such mandatory

provisions has been viewed to be fatal and made the retrenchment order invalid. So the learned lawyer concluded that whether the fact of short

payment was actually pleaded or not is not vital as non-payment itself strikes at the root of the mandatory provisions of Section 25-F.

8. Admittedly, the workman was served with the notice of retrenchment along with a cheque of Rs. 9030.30 on May 30, 1991 fixing the date of

retrenchment w.e.f. June 6, 1991. The relevant portion of the notice is reproduced below :

The management, however is taking steps towards the payment of legal compensation which is payable to you u/s 25-F of the Industrial Disputes

Act, 1947 as per details of calculation given below.

STATEMENT OF CALCULATION

1. One month''s wages in lieu of Notice..... Rs. 1,105.75

2. 15 days'' wages for each completed year of Rs. 6,634.50

service .....

3. Due wages upto June 5,1991 from the date of

your joining i.e. May 1,1991 as per your Rs. 1,290.05

joining report dated April 30, 1991 .....

Total amount payable Rs. 9,030.30

Your above dues are being tendered by Registered Post with A/D by A/C Payee Cheque No. CHM 033740 dated May 30, 1991 drawn on

Punjab National Bank, Bhawanipore Branch amounting to Rs. 9,030.30 (Rupees Nine thousand thirty and paise thirty only) in full and final

settlement of all your claims for legal dues except; gratuity which will be paid to you on submission of the application in Form I of the Payment of

Gratuity Act.

If there is any omission and/or commission in the computation of payment tendered, due to mistake, the same may be rectified in future.

9. The workman duly accepted the said amount and never challenged the calculation, of the employer as regards retrenchment compensation. On

the other hand workman unilaterally took a view that he adjusted the entire retrenchment compensation towards his backwages. In the written

statement also the retrenchment compensation was never attacked on the ground of short payment. Only at the time of hearing before the Tribunal,

the plea of shortfall was argued and the learned Judge of the Industrial Tribunal himself took the pains of calculating the entire retrenchment

compensation which, according to him, would have been Rs. 7187.37 and not Rs. 6634.50 as was calculated by the employer. So, according to

the Tribunal there was a shortfall of Rs. 552.87. But it is rightly pointed out by the learned advocate for the appellant that the amount was never

claimed in the pleadings or in the evidence and if this shortfall was pointed out to the employer earlier, it could have been paid instantly as was

done in the Bombay case reported (supra). It is pertinent to mention in this connection that excepting this plea of short payment of retrenchment

compensation, the other plea of Mast come first go was not taken before us and hence we do not find any reason to examine this question and in

fact, before the learned Single Judge also the plea was not seriously taken. However the evidence on record, as was assessed by the learned single

Judge, is sufficient to show that there was another messenger-cum-bearer who was admittedly the senior of the present workman.

10. It is already discussed above that the plea of short payment was not taken in the pleading and hence we hold that such a plea should not have

been allowed to be taken either by the Tribunal or by the learned single Judge. Moreover, the conduct of the workman is sufficient to indicate that

he thought it fit not to raise any objection as regards short payment of retrenchment compensation. He duly admitted in his evidence that all

backwages were duly paid to him and hence what prompted him to take the plea of adjustment of the sum of Rs. 9030.30 paid to him as

retrenchment compensation towards his backwages, is not clear. From the materials on record, it transpires that all backwages were duly paid in

terms of the Bipartite Settlement dated September 20, 1992. So, it is clear that no backwages as claimed by the workman was payable. On the

other hand, a sum of Rs. 1290.05 was paid to the workman on account of due wages from May 1, 1991 to June 5, 1991 as indicated in the item

No. 3 of the notice of retrenchment.

11. So, the fact remains that the employer bonafidely paid the said amount of Rs. 9030.30 along with the notice of retrenchment and the workman

duly accepted the said amount. Hence, the plea of waiver in a case of this nature as argued by the learned advocate for the appellant can be

upheld. Above all, when the employer bonafidely paid the major part of retrenchment compensation after a bonafide calculation, not opposed by

anybody till the argument before the Tribunal, we fail to understand as to why the employer can be punished by ordering him to pay the entire

backwages with the privilege of immediate reinstatement as ordered in the award. Following the principle adopted by the Apex Court in Workmen

of Sudder Workshop of Jorehaut Tea Co. Ltd. Vs. Management of Jorehaut Tea Co. Ltd., we deem it proper not to punish the employer as

above only for an alleged shortfall of Rs. 552.87 which was not pleaded in the written statement of the workman. We do not think that

nonpayment of Rs. 552.87 as calculated in the award at the argument stage only, can make the retrenchment order nugatory. On the other hand,

we take the view, following the principle adopted in Workmen of Coimbatore Pioneer "B" Ltd. (supra) that for non-payment of the shortfall in

compensation of Rs. 552.87, a substantial amount can be paid as compensation.

12. Accordingly, in setting aside the award and allowing this appeal, the appellant is directed to pay a sum of Rs. 552.87 (rounded off to Rs.

553.00) along with a compensation of Rs. 663-4.50 (equivalent to wages for six months) to the workman-the respondent No. 4 within six weeks.

Vinod Kumar Gupta, J.

13. I agree.

Later:

Let a xerox copy of this judgment, duly countersigned by the Assistant Registrar of this Court, be given to the parties upon their undertaking to

apply for and obtain certified copy of the same upon usual undertaking.