(2011) 07 DEL CK 0457

Delhi High Court

Case No: Writ Petition (C) No. 10941 of 2004

Ircon International Ltd.	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision: July 13, 2011

Acts Referred:

- Industrial Disputes Act, 1947 - Section 17B, 25F, 25FFF(1), 25FFF(2), 25O(1)

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Chetan Sharma, Saurabh Mishra and A.P. Nagrath, for the Appellant; M.P. Raju and E.J. Varghese, for the Respondent

Final Decision: Allowed

Judgement

Rajiv Sahai Endlaw, J.

The writ petition impugns the award dated 27th April, 2004 of the Industrial Adjudicator on the following reference:

Whether the demand of the Rashtriya Mazdoor Congress, U.P. Shakha for reinstatement and regularization of 37 workmen (As per list) in the management of M/s Ircon International Ltd. is legal and justified? If so, to what relief the said workmen are entitled?

and holding the termination by the Petitioner of the 37 workmen arrayed as Respondent No. s 2 to 38 to be illegal and unjustified and directing the Petitioner to reinstate the said Respondent workmen with 50% of the back wages, continuity in service and all other consequential benefits to them.

2. Notice of the petition was issued and vide ex parte order dated 14th July, 2004, the operation of the award stayed subject to the Petitioner depositing a sum of ` 1,00,000/- in this Court. The said order has continued in force. The Respondent workmen applied u/s 17B of the Industrial Disputes Act, 1947. The said applications

were allowed vide order dated 26th April, 2006. The Petitioner preferred intra court appeal being LPA No. 1049/2006. During the pendency of the said appeal, the amount due u/s 17B of the Act was directed to be deposited in the Court and subsequently ordered to be released to the Respondent workmen. It was the contention of the Petitioner in appeal that the Industrial Adjudicator while dealing with a claim for regularization could not have directed reinstatement and solely because the word "reinstatement" had been used in the award would not make Section 17B applicable. The Division Bench disposed of the said appeal vide order dated 28th October, 2010 without expressing any opinion on the merits of the case and without interfering with the order u/s 17B and only with a direction for expeditious disposal of the writ petition and with a further direction that the payments so made by the Petitioner u/s 17B of the Act will be subject to the final decision of the writ petition. The counsels have been heard and the records including of the Industrial Adjudicator perused.

3. The Respondent workmen in their statement of claim before the Industrial Adjudicator pleaded that they were under the employment of the Petitioner at Mathura, for four to five years without any break, till the termination of their services on 3rd June, 1998; that the Petitioner had closed the work of the Mathura Project on 3rd June, 1998 and illegally retrenched the Respondent workmen; that the retrenchment compensation was not paid as per the law at the time of retrenchment; that the Petitioner has several Projects in different States of the country as well as in Uttar Pradesh and even abroad and the nature of work in which the Petitioner is engaged is perennial in nature and the Respondent workmen engaged in any Project of construction can be engaged in another Project by maintaining continuity of their employment; that instructions existed in the Petitioner for absorption in permanent grades of pay but the said instructions had also not been complied with qua the Respondent workmen; that the reference entailed two disputes i.e. qua reinstatement in service and qua regularization in service.

4. The Respondent workmen in the claim petition before the Industrial Adjudicator itself also disclosed that they along with other workmen also employed at Mathura and who were also not being regularized in service inspite of employment for more than four years had earlier also raised a dispute which was referred by the Government of Uttar Pradesh for adjudication before the Industrial Tribunal, Agra. A perusal of the award dated 8th January, 1998 of the Industrial Tribunal, Agra shows that one of the disputes then referred for adjudication was "Whether the action of the employer /management in not regularizing the services of 102 labours was illegal and /or unjustified? And if yes to what relief and from which date the concerned labour are entitled to and with other details, if any?"

5. The Industrial Tribunal, Agra in the award aforesaid answered the reference aforesaid as under:

There is no right available to the workers for their regular appointment. They have already been appointed on ad-hoc basis. It is legal and justified to give them the regular appointment whenever the post becomes available at any place and till then all the efforts will be made by the Company to keep them regularly on the job and they shall be removed from the services as per the seniority of the workers and as far as possible regular appointment will be given to them according to the policies and rules of the Company, if they fulfill educational and other qualifications. But otherwise the workers have no right for their regular appointment. That will be available only according to the rules and as per the feasibility of the work of the Company, but as the work of the Company is going on in whole of the Country and also in the foreign countries there should not be any break, as far as possible, in the services of the workers.

6. The Respondent workmen challenged the award aforesaid of the Industrial Tribunal, Agra by filing a writ petition in the High Court at Allahabad but thereafter withdrew the said writ petition. The counsel for the Respondent workmen explains that since during the pendency of the said writ petition before the High Court of Allahabad, the services of the Respondent workmen were terminated as aforesaid on 3rd June, 1998, the Respondent workmen abandoned the challenge to the award of the Industrial Tribunal, Agra.

7. It is further the admitted position that the Respondent workmen thereafter filed a writ petition before the High Court of Allahabad impugning the termination of their services. The said writ petition was dismissed on 30th July, 1998 with liberty to the Respondent workmen to approach the Industrial Adjudicator. The Respondent workmen preferred a SLP to the Supreme Court which was also dismissed vide order dated 20th November, 1998 but with a direction that upon a dispute being raised by the Respondent workmen, the same shall be referred for adjudication to the Industrial Adjudicator. It was thereafter that the dispute on which reference as set out in para 1 hereinabove was made, was raised by the Respondent workmen and the award made whereon is impugned in the present petition.

8. The Industrial Adjudicator in the award impugned in this petition observed /held:

(i) That each of the workman had completed more than 240 days in each year of their service before their termination;

(ii) That there is no dispute that the provisions of Section 25F of the ID Act are applicable in this case;

(iii) According to the Respondent workmen their services were illegally terminated without compliance of the provision of Section 25F of the ID Act; they were paid nothing at the time of their retrenchment /termination nor any earlier notice of termination was given to them; on the other hand the Petitioner claims that the management had paid to all the Respondent workmen one month''s salary, compensation, gratuity, etc. as required by the provisions of Section 25F of the ID

Act;

(iv) It is admitted fact that the Petitioner carries on its industrial work and business throughout the country as well as in U.P. and even abroad; the nature of work in which the Petitioner is engaged is perennial in nature;

(v) There is no evidence that the Respondent workmen were employed in respect of construction of Delhi Mathura Road Project only; there is also no evidence that they were engaged for a limited period only; they could also be engaged anywhere in any of the Project of the Petitioner but the Petitioner has wrongly applied the principle of close down of undertaking in the instant case; there is nothing on record to show that the entire business of the management was closed down on completion of Delhi Mathura Road Project;

(vi) That though the Petitioner had produced copies of termination order showing that certain amounts of salary, one month salary in lieu of notice and compensation as required u/s 25FFF(2) and u/s 25F(b) of the ID Act along with other amount of gratuity and leave encashment was tendered but there was no detail therein of the period of service for fixation of compensation at 15 days? salary /pay for every completed year of service;

(vii) That no payment was made to the Respondent workmen at the time of their termination /retrenchment, though the Respondent workmen admitted that certain amount through cheque was received by them later on much after their termination;

(viii) That there was no evidence to show the compliance of Section 25F(c);

(ix) That there was thus no direct compliance of Section 25F or Section 25FFF of the ID Act before retrenchment /termination of the Respondent workmen;

(x) Therefore the termination of the Respondent workmen was illegal as the amount of their salary and compensation was not correctly computed and the provisions of Section 25F not correctly followed;

(xi) That the Petitioner had not abided by the award of the Industrial Tribunal, Agra also.

9. It is not in dispute that the Petitioner is a construction Company and was on 23rd May, 1991 awarded contract by the Uttar Pradesh PWD for widening of National Highway-2 between Delhi and Mathura from two lanes to four lanes and that all the Respondent workmen came to be engaged /employed by the Petitioner for the said work. As per the contract, the said work was to be completed and handed over within four years but was completed and handed over by the Petitioner only on 19th February, 1998 and whereafter the services of the Respondent workmen were terminated as aforesaid on 3rd June, 1998.

10. The senior counsel for the Petitioner has contended that it was the case of the Respondent workmen themselves that they were employees of the said Project of the Petitioner which constitutes an "undertaking" within the meaning of Section 25FFF of the ID Act and not of the Petitioner Company. Reference in this regard is made to:

(i) The application for withdrawal of the Writ Petition No. 14128/1998 before the High Court of Allahabad, where it was stated that the Respondents "were engaged in a Project" started by the Petitioner at Mathura but "were treated as casual labour on daily rated basis"; that they had raised industrial dispute regarding their regularization and in which award against the Respondent workmen challenged in the said writ petition has been given; "that now the Project is over" and the Petitioner had terminated the services "of all employees working in the project on or before 3rd June, 1998"; that thus the said writ petition had become infructuous

(ii) Writ Petition No. 15419/2004 preferred by the Respondent workmen in this Court against the award (impugned in this petition also) insofar as awarding back wages of 50% only to the Respondent workmen and claiming full back wages (and which writ petition stands dismissed for non-prosecution on 27th March, 2006); where also it is pleaded that the Respondent workmen "were engaged locally in various categories and their services were liable to be retained for duration of the project" and that "after completing and handing over of the Project to the Uttar Pradesh PWD, on 3rd June, 1998, the services of all the Respondent workmen were terminated after tendering compensation as required u/s 25FFF(2) of the ID Act";

(iii) To the cross examination of Sh. Brijesh Kumar Yadav (Respondent No. 3) sole witness on behalf of all the 37 Respondent workmen before the Industrial Adjudicator, where it was admitted that the Respondent workmen were engaged orally and there was no order of appointment;

(iv) The letters of contractual appointment issued by the Chief Project Manager of the Delhi Mathura Highway Project of the Petitioner to each of the Respondent workmen (it was contended that had the appointment been by the Petitioner Company, the letters would not have been issued by the Project Manager but by the Head /Corporate Office of the Petitioner Company);

(v) The application for appointment made by the Respondent workmen also to the Project Manager of the Petitioner and not to the Petitioner;

(vi) The terms and conditions of contractual appointment whereunder it was terminable without any notice;

(vii) To the counter affidavit of the Respondent workmen to the present petition also where it is pleaded that the main dispute revolved around the concept of "closure" with the contention of the Petitioner being that completion of project amounted to "closure" and the contention of the Respondent workmen being that as per Section

25FFF(2) they were entitled to notice and payment in terms of Section 25F and of which no details had been given.

11. The senior counsel for the Petitioner has contended that in view of the aforesaid material on record and inspite of the Industrial Adjudicator noticing the judgment of the Apex Court in Management of Hindustan Steel Ltd. Vs. The Workmen and Others, the Industrial Adjudicator has held to the contrary, making the award perverse and liable to be set aside. It is further contended that the Respondent workmen before this Court have for the first time made out a new case of being employees of the Petitioner Company and not of the Project. It is yet further contended that the appointment of each of the Respondent workmen being not as per Recruitment Rules of the Petitioner, the direction of the Industrial Adjudicator to the Petitioner to regularize the Respondent workmen is contrary to the dicta of the Apex Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, It is yet further contended that since the Project in which the Respondent workmen were employed had ceased to exist, the Industrial Adjudicator could not have directed reinstatement. Reliance in this regard is placed on F.R. Jesuratnam v. UOI AIR 1981 SC 1595. The senior counsel for the Petitioner has further contended that the present was not a case of closure governed by Section 25O(1) but a case governed by Section 25FFF(2).

12. The counsel for the Respondent workmen has on the contrary contended that if the Respondent workmen are found to be employees of the Project then they would be governed by Section 25FFF(2) but their contention is that they are employees not of the Project but of the Petitioner Company and were working in one of the Projects of the Petitioner Company. He has further argued that it has never been the case of the Respondent workmen that they were recruited only for a particular Project. He has argued that each of the Respondent workmen is a skilled workman and the Recruitment Rules relied upon by the Petitioner relate to executive posts while the rules applicable are those for non executive posts and as per which they became entitled to absorption after completion of five years of employment and which they had. He has further contended that the contracts of appointment placed by the Petitioner before this Court and relied upon as aforesaid did not form part of the record of the Industrial Adjudicator and thus cannot be considered. He has further contended that none of the admissions attributed to the Respondent workmen and as noticed in para 10 hereinabove are admissions of being Project employees but only amount to admissions of working in the Project. He claims that the Respondent workmen are entitled to Section 25F protection and the question for determination was whether the Respondent workmen were employees of the Petitioner Company or of the Project and which has not been determined either by the Industrial Adjudicator at Delhi or by the Industrial Tribunal at Agra. He has further contended that in the judgment Lal Mohammad v. Indian Railway Construction Co. Ltd. AIR 2007 SC 230 relied upon by the Petitioner, there was a finding of the employees therein being employees of the Project and which is not

the case here. He has further contended that some of the Respondent workmen had been transferred and which was one of the disputes referred to the Industrial Tribunal, Agra; there could be no question of Project employees being transferred and the same was also indicative of the Respondent workmen being the employees of the Petitioner Company and not of the Project. Reliance is placed on the judgment dated 4th August, 2005 of the High Court of Allahabad in Civil Misc. WP No. 9762/2003 titled Ircon International Ltd. v. Baikunth Nath Dubey and Ors.. He has yet further contended that the factual findings of the Industrial Adjudicator are not to be interfered with. Reliance in this regard is placed on Harjinder Singh Vs. Punjab State Warehousing Corporation, and it is contended that judgments of earlier date relied upon by the Petitioner are to be ignored. Reference is also made to Krishan Singh Vs. Executive Engineer, Haryana State Agricultural Marketing Board, Rohtak (Haryana), and Anoop Sharma Vs. Executive Engineer, Public Health Division No. 1 Panipat (Haryana), as to the effect of non compliance of Section 25F. It is contended that there is a categorical finding by the Industrial Adjudicator of the Respondent workmen being employees of the Petitioner Company and sufficiency of evidence is no ground for interference.

13. The senior counsel for the Petitioner in rejoinder has urged that the judgments cited by the Respondent workmen do not relate to the construction industry for which specific provision is made in Section 25FFF. He has further contended that considering the nature of the business/works of the Petitioner Company, except those employed in the Head Office at Delhi, all others are Project employee. He has further contended that no such case was ever set up.

14. In my opinion, the Respondent workmen by making the claim for regularization before the Industrial Tribunal, Agra as well as in the reference, award whereon is impugned in this petition admitted that they were employees of the Mathura Project of the Petitioner and were not the employees of the Petitioner Company. Had the Respondent workmen been the employees of the Petitioner Company, as they have now urged in this Court, there would have been no occasion for their claiming the relief of regularization.

15. I am further of the opinion that the claim of the Petitioners for regularization stands finally adjudicated vide the award of the Industrial Tribunal, Agra. The Industrial Tribunal, Agra unequivocally held that the Respondent workmen have "no right for their regular appointment". Though the Respondent workmen challenged the said award before the High Court of Allahabad but subsequently withdrew the said writ petition. A perusal of the order dated 15th October, 2004 of the High Court of Allahabad shows that the writ petition impugning the award of the Industrial Tribunal, Agra was withdrawn and no liberty whatsoever was granted to the Respondent workmen. With the withdrawal of the said writ petition, the award of the Industrial Tribunal, Agra attained finality and as per which the Respondent workmen are/were employees of the Project and not of the Petitioner Company and

had no right to regularization.

16. In fact, in view of the award of the Industrial Tribunal, Agra, the reference on which the award impugned in the present petition has been made, insofar as again claiming the relief of regularization was not even maintainable and was bad. It appears that the said reference came to be made owing to the order dated 20th November, 1998 (supra) of the Supreme Court while dismissing the appeal preferred by the Respondent workmen against the order of the High Court of Allahabad in the second round of writ petition impugning the order of termination. However, the said order cannot confer upon the Respondent workmen a right to again claim what had already been denied to them vide the award of the Industrial Tribunal, Agra. Neither the Supreme Court nor the High Court of Allahabad had gone into the said aspect or dealt therewith.

17. The Supreme Court in Bharat Barrel and Drum Manufacturing Co. Pvt. Ltd. Vs. Bharat Barrel Employees Union, held that rule of res judicata applies to proceedings before the Industrial Tribunals also. It was held that any legislation regulating the relation between the Capital and the Labour, as the Industrial Disputes Act is, has two objects in view - it seeks to ensure to the workmen fair returns for their labour, it also seeks to prevent disputes between employer and employees, so that production might not be adversely affected and the larger interests of the society might not suffer. It was held that to hold that the rule of res judicata does not apply to industrial disputes would rather than bringing in industrial peace, make the awards mere truces giving only breathing time before resuming hostile action with renewed vigour.

18. Thus, the only dispute which could have been raised by the Respondent workmen after the award of the Industrial Tribunal, Agra had attained finality was as to the validity of the action dated 3rd June, 1998 of the Petitioner Company of terminating the services of the Respondent workmen.

19. The said action dated 3rd June, 1998 was post the award of the Industrial Tribunal, Agra and thus could not possibly be subject thereof. Even otherwise, merely because the Respondent workmen had been held by the Industrial Tribunal, Agra to be employees of the Mathura Project and ad-hoc and not entitled to absorption in any other Project of the Petitioner Company, would not deprive the Respondent workmen from raising a dispute as to their termination. It is settled position in law (see Balley v. MCD ILR (2010) VI Del 44 discussing the case law on the subject) that the provisions of Section 25F of the I.D. Act apply to both the regular as well as the temporary or ad-hoc employees if they have completed more than 240 days of employment and which the Respondent workmen in the instant case had.

20. However, the Respondent workmen challenged the action of 3rd June, 1998 not as being in violation of Section 25F but again on the premise of their being entitled to regularization and which question as aforesaid stood settled vide the award of

the Industrial Tribunal, Agra. A perusal of the record including of the Industrial Adjudicator shows that the parties proceeded on the said basis only rather than establishing as to whether the ingredients of Section 25F had been complied with or not. Though in the pleadings and in the evidence, it was generally so stated but if the case of the Respondent workmen was of their removal being in violation of Section 25F, they ought to have expressly pleaded and proved as to how compensation in accordance with Section 25F(b) had not been tendered /paid. There exists on record the termination letters dated 3rd June, 1998 issued by the Petitioner to each of the 37 Respondent workmen and which disclose the tender of compensation in terms of Section 25F(b). The Respondent workmen though sought to argue before this Court that the computation of the said compensation has not been disclosed, ought to have themselves stated as to how the said tender was not in accordance with Section 25F(b). The same has not been done. On the contrary, it is the admitted position that the cheques tendered by the Petitioner Company to the Respondent workmen stand encashed.

21. Though it is correct that the Petitioner also in its evidence did not expressly prove as to since when each of the Respondent workmen was employed and at what emoluments but in the face of the letters of termination disclosing that compensation in terms of Section 25F(b) had been tendered and paid, the onus was on the Respondent workmen to establish as to how the said tender /payment was not complete. Rather there also exists on record, a copy of the notice issued by the Petitioner Company in terms of Section 25F(c) of the ID Act.

22. Unfortunately the Industrial Adjudicator also has not addressed himself on the aforesaid aspect and has merely made a general statement that Section 25F has not been complied with.

23. The energy expended by the counsels for the parties on as to whether Section 25F or Section 25FFF(2) is applicable is not found to be apposite in the aforesaid circumstances.

24. I may notice that it has never been the case of the Petitioner Company that it is liable for compensation u/s 25FFF(1) only. Its case unequivocally has been that it was liable for compensation in accordance with Section 25FFF(2) and compensation whereunder is the same as u/s 25F(b).

25. However, the Respondent workmen having failed to plead, neither before the Industrial Adjudicator nor before this Court as to how the compensation is not in accordance with Section 25F(b) and more than 10 years having elapsed, it is not deemed expedient to grant a second chance to the Respondent workmen when they have failed to avail of the first.

26. The award of the Industrial Adjudicator impugned in this petition is thus found to be perverse and is set aside.

27. The Division Bench of this Court in appeal (supra) against the Section 17B order having made the payments to the Respondent workmen subject to the outcome of the petition, it also needs to be adjudicated whether in view of the dismissal of the writ petition, the Respondent workmen are liable to refund the amounts received under the order u/s 17B. The senior counsel for the Petitioner has however chosen not to address any arguments on the said aspect. The contention of the Petitioner before the Division Bench was that the dispute raised being as to regularization, the direction in the award of reinstatement is beyond reference and superfluous and thus Section 17B is not attracted.

28. I am unable to agree. As aforesaid, the claim of the Respondent workmen of regularization stood adjudicated by the award of the Industrial Tribunal, Agra which had attained finality. The only dispute which could be raised was only as to termination; termination if found to be illegal would have entitled the Respondent workmen to the relief of reinstatement. The Industrial Adjudicator, even though wrongly as held hereinabove, granted the relief of reinstatement. The order u/s 17B was thus appropriate and cannot be said to be superfluous and without jurisdiction so as to invite a direction for refund of the amounts paid u/s 17B.

29. The writ petition is accordingly allowed. The award dated 27th April, 2004 of the Industrial Adjudicator is set aside and quashed. The reference insofar as on the claim of the Respondent workmen for regularization is held to be bad owing to the award of the Industrial Tribunal, Agra. The Respondent workmen are found to have failed to prove any illegality in the order dated 3rd June, 1998 of their termination. The Petitioner will accordingly be allowed refund of amount deposited in this Court together with interest if any accrued thereon. It is directed accordingly.

No order as to costs.