

Sh. Massod Ahmed Khan and Others Vs Hamdard Dawakhana (Wakf)/Hamdard (Wakf) Laboratories and Others

Court: Delhi High Court

Date of Decision: April 13, 2012

Acts Referred: Constitution of India, 1950 " Article 226

Employees Provident Funds and Miscellaneous Provisions Act, 1952 " Section 7A

Industrial Disputes Act, 1947 " Section 10(4), 2, 25 FFA, 25 FFF, 25F

Citation: (2012) 189 DLT 664 : (2012) 129 DRJ 348 : (2012) 134 FLR 896 : (2012) LLR 792

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Sanjay Kumar and Mr. Ajay Kumar Talesara, for the Appellant; Amit Seth Advocate, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J.

The six petitioners impugn the award dated 13th July, 1989 of the Industrial Adjudicator on the following

reference-

Whether the services of Shri Masood Ahmad, Shakeel Ahmad, Bashir Ahmad, Salar Bux, Mohd. Zakir Qureshi and Bhagat Singh have been

terminated illegally and/or unjustifiably and if so, to what relief are they entitled and what directions are necessary in this respect?

and holding the respondent no.3 M/s Hamdard Research Clinic and Nursing Home (HRC Nursing Home) having effected ""closure"" and further

holding HRC Nursing Home to be not part and parcel of respondent no.2 M/s Hamdard National Foundation (India) (Foundation) or respondent

no.5 M/s Majidia Hospital (Hospital) or respondent no. 4 M/s Institute of History of Medicine and Medical Research (Institute) and finding the

petitioners to be entitled only to compensation as provided u/s 25F of the Industrial Disputes Act, 1947 minus the amount already received. The

petitioners also seek declaration that the closure notice dated 16th June, 1982 is illegal and claim the relief of reinstatement in service with back

wages. 2. Rule was issued. During the pendency of the petition, the petitioners applied for subsistence allowance u/s 10(4) of the Act and which

application was dismissed vide order dated 10th July, 1992. The counsel for the parties have been heard. The synopsis of submissions filed by the

counsel for the petitioners as well as the counsel for the respondents have also been perused.

2. It was the case of the petitioners before the Industrial Adjudicator, that they had been employed with the respondent no.3 HRC Nursing Home

for the periods ranging from 10-17 years; that the HRC Nursing Home was a part and parcel of the Foundation and was started as stepping stone

for a hospital i.e. the Institute; that the Hospital was also a part and parcel of the Institute; that their services were terminated vide notice dated

16th June, 1982; that individual notices terminating their services w.e.f. 18th June, 1982 were also served on them; that they had served a charter

of demands dated 26th March, 1982 on the management demanding revision of pay scales etc. and upon the management not conceding thereto

had approached the Labour Department; that owing to their said action they were victimized; that on 16th June, 1982, the Management put up

notice of closure of HRC Nursing Home; that the closure notice was contrary to law; that HRC Nursing Home alone could not be shut; that the

nursing home activities, being carried on by HRC Nursing Home were continued at the Hospital and the equipment was also shifted there and

some of the employees who were the puppets of the Management had also been absorbed therein; that there was thus no closure in law and the

veil thereof was used to victimize the agitating workmen; mandatory provision of Section 25 FFA had not been complied with.

3. The Management, before the Industrial Adjudicator pleaded that it was not an industry; that the dispute raised was not an industrial dispute; that

the reference was bad; it was denied that HRC Nursing Home was a part and parcel of the Foundation; it was contended that the Foundation,

Hospital and Institute were not necessary parties and had been impleaded only to harass and no relief could be granted there against ;that each of

the said was an independent legal entity; that the petitioners had already filed claim for payment of gratuity based on closure of establishment and

consequential termination of service and had already been paid gratuity on the said basis and thus were not entitled to challenge the closure; that

the establishment of HRC Nursing Home was lying closed and was not functioning and no staff was employed therein; it was denied that the

equipment was shifted to the Hospital or that any employee of HRC Nursing Home had been shifted to the Hospital; it was however stated that if

the Hospital had on its own employed any ex employees of HRC Nursing Home, the nursing home was not concerned therewith; that the

petitioners could also apply for appointment with the Hospital.

4. The Industrial Adjudicator in the face of the aforesaid pleadings framed the following issues:

1. Whether there is closure of Hamdard Research Training and Nursing Home? If so, its effect?

2. Whether respondent no.1 is part and parcel of respondent nos. 2 to 4? If so, its effect?

3. Whether the services of S/Shri Masood Ahmad, Shakeel Ahmad, Bashir Ahmad, Salar Bux, Mohd. Sakir Qureshi and Bhagat Singh have been

terminated illegally and / or unjustifiably and if so what relief are they entitled?

5. The Industrial Adjudicator in the impugned award has found/observed/held -

(i) that each of the petitioners had applied for and received gratuity on the premise of the closure of HRC Nursing Home; though they claimed to

have received the said gratuity under protest but could not establish the same;

(ii) that the petitioners admitted that according to the petitioners also the HRC Nursing Home functioned till January, 1983 and did not function

thereafter; they could not however explain as to how the work was going on till January, 1983 though they admitted that no patient was admitted in

the nursing home after 18 June, 1982;

(iii) that the entire grant for running the HRC Nursing Home were paid by the Foundation and for this reason the equipment and building of the

HRC Nursing Home on closure, were surrendered to the Foundation;

(iv) that 80 workers of HRC Nursing Home, upon closure had been paid their dues in full and final settlement including closure compensation;

(v) that though the petitioners had contended that the closure was of a part of the ""management"" but they admitted that HRC Nursing Home was a

separate unit although controlled by the Foundation;

(vi) the Supreme Court in Hindustan Steel Ltd. vs. Their Workmen 1973 (43) FJR 192 held that separate unit can be closed;

(vii) motive for closure is not relevant for testing whether the closure is bonafide or not;

(viii) what is to be adjudicated is whether the establishment has closed down in fact;

(ix) The management had succeeded in proving that the establishment of HRC Nursing Home had been closed down definitely and as a matter of

fact and that no activity was going on there since then;

(x) that since no unavoidable circumstances beyond the control of the Management for closure had been proved, the petitioners were entitled to

retrenchment compensation of one month's pay in lieu of the notice, compensation equivalent to 15 days average pay for every completed year of

service or any part thereof in excess of six months;

(xi) that payment/tender of such compensation was not a condition precedent for closure and the compensation could be paid subsequently also.

Accordingly, the petitioners were held entitled to closure compensation only.

6. The challenge by the petitioners to the award aforesaid is on the ground that the Industrial Adjudicator erred in holding the HRC Nursing Home

and the other establishments aforesaid to be separate and independent. The counsel for the petitioners has invited attention to the Personnel

Regulations of the HRC Nursing Home to contend that under clause 8 thereof the employees of HRC Nursing Home were liable to transfer to any

sister organization under or financed by the Foundation. He has further contended that the other establishments aforesaid were/are carrying on the

same business and thus it was not a case of closure of business but of closure of a unit. Reliance is placed on M/s Biddle Sawyer Ltd. Vs.

Chemical Employees Union 2007 LAB. I.C. (NOC) 452 (BOM) where a Division Bench of the Bombay High Court held that a closure of a

place of business would not amount to closure if the same business is re-started at another place or transferred to another employer; that the

business in such case remains alive and the source of employment continues to exist. It is further argued that the HRC Nursing Home, Institute and

Hospital were/are all run by the Foundation and which in turn is controlled by Hamdard Dawakhana (Wakf) / Hamdard (Wakf) Laboratories.

Attention is also invited to the documents annexed to the writ petition to buttress the said point. It is further argued that Section 25 FFA was not

complied with and only two days notice was given. Reliance is placed on Maharashtra General Kamgar Union Vs. Glass Containers Pvt. Ltd. and

another,) in this regard. Attention is also invited to Hamdard (Wakf) Lab. (India) Vs. Sh. K.L. Sehgal, Regional Provident Fund Commisisoner

and Others, to show inter-dependence between the various units aforesaid. Attention is also invited to the affidavit by way of evidence of the

witnesses of the management before the Industrial Adjudicator to show that only the petitioners have been victimized. It is contended that in the

premises of the HRC Nursing Home, now the Foundation is carrying on the same business and at other places also.

7. The counsel for the respondents has invited attention t Poonvasi and Others Vs. Crown Silk Weaving Industries and Others, laying down that

notice u/s 25 FFA is not a condition precedent for closure and non- compliance therewith cannot have the effect of rendering the closure illegal and

non-est from its very commencement. It is contended that for non- compliance, the only liability is for wages for 60 days. I may however record

that the said judgment does not notice the earlier judgment of the Bombay High Court in Maharashtra General Kamgar Union (supra). The counsel

for the respondents has next contended that since each of the petitioners had applied for gratuity and received the same on the basis of closure,

they are not entitled to challenge the closure now. It is contended that the Industrial Adjudicator has taken note of the argument u/s 25 FFA. It is

further argued that the surrender of the equipment of the HRC Nursing Home to the Foundation which was the owner of the equipment, is of no

avail. It is further argued that the judgment supra though relating to Hamdard but qua the Employee's Provident Fund and Miscellaneous

Provisions Act, 1952 is also not relevant since the test applied therein is that provided u/s 7A of that Act and which has no relevance here. It is

argued that merely because the two units are of the same group is immaterial. With reference to Section 2 (cc) of ID Act it is contended that the

same admits of part closure also. Attention is invited to Section 2(ka) of ID Act to contend that an undertaking is severable from the industrial

establishment. Reliance is placed on Workmen of the Indian Leaf Tobacco Development Co., Ltd., Guntur Vs. The Management of Indian Leaf

Tobacco Development Co. Ltd., Guntur, in this regard. It is contended that the only test to be applied is of whether the closure is real and genuine

or not; that a closure would not be genuine where the unit is found to be open and functional. It is argued that in the judgments cited by the counsel

for the petitioners, the business had been re-started and which is not so in the present case. It is yet further contended that the test of inter-

dependence under the Provident Fund Act does not apply to closure. It is yet further contended that the fresh employment even if any in other

establishments aforesaid, does not entitle continuity of employment. Attention is also invited to Management of Hindustan Steel Ltd. Vs. The

Workmen and Others, on what is ""undertaking"". Reference is next invited to Indian Hume Pipe Co. Ltd. Vs. Their Workmen, to contend that the

motive of closure is not relevant. It is yet further urged that the argument of the petitioners that the HRC Nursing Home was closed down merely

because of the petitioners having raised a dispute and the matter being before the Conciliation Officer is unbelievable.

8. The counsel for the petitioners in rejoinder has sought to distinguish the judgments relied upon by the counsel for the respondents by contending

that each of them are on a finding of the closure being genuine. He has contended that the challenge by the petitioners to the award is on the ground

of the closure being not genuine.

9. Though that is the challenge by the petitioners before this Court but the petitioners have been unable to prove such a case before the Industrial

Adjudicator. The questions aforesaid raised by the petitioners are factual in nature. This Court is exercising power, not of appeal but of judicial

review over the award of the Industrial Adjudicator. The findings of fact are not to be interfered with unless shown to be perverse i.e. based on no

evidence or in ignorance of material evidence on record. The onus was on the petitioners to establish before the Industrial Adjudicator that the

closure was not genuine. The petitioners, now in this petition have to establish that the Industrial Adjudicator has ignored the relevant evidence in

this regard, in rendering the award. However, no such effort has been made by the petitioners. The petitioners are unable to show any evidence to

the said effect. The annexures to the writ petition are not shown to have been proved before the Industrial Adjudicator. This Court cannot appraise

evidence afresh or arrive at its own findings. 11. Be that as it may, I have independently also considered the matter, including on the basis of the

documents annexed to the writ petition. The factum of closure of business of HRC Nursing Home in which the petitioners were employed, is not in

dispute. The only two questions for adjudication are, firstly, whether for the reason of HRC Nursing Home being under the aegis of the

Foundation, which under its aegis, also had/has the Hospital and the Institute, engaged in same / similar activities as the HRC Nursing Home, it can

be said that there is no closure in law; secondly, the effect of notice of two days only, of closure having been given.

11. As aforesaid, the petitioners also admit the business/activity of HRC Nursing Home to have closed/shut down. The annexures to the writ

petition show the HRC Nursing Home, Hospital and the Institute, though all under the aegis of the Foundation, to be separate legal entities having

their own independent business/activity, even though of same/similar nature. The Personnel Regulations referred to, are of the HRC Nursing Home

only and show that HRC Nursing Home had its own rules/regulations/terms of employment; it is not as if the terms/conditions of employment were

the same or common in HRC Nursing Home, Hospital and the Institute. Rather, the annexures to the writ petition show that HRC Nursing Home

was set up with twenty beds only, for carrying out clinical research in specified diseases. Though the said annexures show that the HRC Nursing

Home was a stepping stone for the Hospital but it is not as if the HRC Nursing Home was converted into or at any time intended to be converted

into Hospital or Institute. In fact, when the HRC Nursing Home was established, the Hospital and the Institute were already in existence and

building thereof under construction. A right reserved by an employer to transfer an employee to another concern, cannot confer any right in the

employee to seek continuity of employment in that concern after closure of business of its employer.

12. Section 25FFF speaks of closure of business of an "undertaking". The word "undertaking" connotes "work", "enterprise", "project" or business

undertaking and is not intended to cover the entire industry or business of the employer. Even a branch office, project, part of business,

department, depots, division of business, workshop have been held to be "undertaking". The petitioners have not led any evidence of any functional

integrity between the HRC Nursing Home on the one hand and Hospital or Institute on the other hand. The arguments now even, of the petitioners,

are at best of, each of the HRC Nursing Home, Hospital and Institute being separate units/undertakings of the Foundation. Even in that case,

closure of HRC Nursing Home would be valid. The findings of the Industrial Adjudicator, thus cannot be faulted with or interfered in exercise of

powers under Article 226 of the Constitution of India.

13. I find the matter to be no longer res-integra. The Supreme Court in District Red Cross Society Vs. Babita Arora and Others, held closure of

the Maternity Hospital, being one of the units of the Red Cross Society, to be valid, even when the same was challenged on the ground inter alia of

other units viz drug de-addiction center, family planning centre and vikalang centre of the society continuing to operate. It was held that in the

absence of any functional integrity among units the word "undertaking" in Section 25 FFF does not cover the entire business/industry of the

employer and covers an independent unit.

14. As far as the second question aforesaid is concerned, though undoubtedly there is a conflict between the two judgments of Bombay High

Court i.e., Maharashtra General Kamgar Union (supra) cited by the counsel for the petitioners and Poonvasi (supra) cited by the counsel for the

respondents but Section 25FFA providing for 60 days notice to the appropriate Government does not apply to undertakings in which less than 50

workmen are employed. There is no finding of HRC Nursing Home employing more than 50 workmen. Even before this Court, no material has

been shown in this regard. Even otherwise now after nearly three decades of closure, it would not be prudent to interfere on the said ground. No

merit is thus found in the petition. The same is dismissed. No order as to costs.