(1997) 02 BOM CK 0076

Bombay High Court

Case No: Writ Petition No. 5632 of 1995

Managing Director, Bombay Film Laboratory Ltd.		APPELLANT
	Vs	
Vasule. L.G. and Another		RESPONDENT

Date of Decision: Feb. 25, 1997

Acts Referred:

- Industrial Disputes Act, 1947 - Section 2, 25F, 33, 33(2)
- Payment of Gratuity Act, 1972 - Section 4(2)

Citation: (1997) 3 BomCR 585 : (1998) 1 LLJ 208 : (1997) 2 MhLj 386

Hon'ble Judges: B.N. Srikrishna, J

Bench: Single Bench

Judgement

1. A public limited Company engaged in business of processing of films terminated services of 60 workmen which included first respondent who was working as a Senior Developer - Reason given for termination slackness in business along letter of termination. The management offered retrenchment compensation wages in lieu of one month''s notice and earned salary. The letter of retrenchment along with the above amount in cash was tendered to first respondent and other workmen, who refused to accept the same. First respondent raised industrial dispute claiming reinstatement in service and the same was referred to adjudication in Labour Court. Labour Court recorded its findings that statutory dues had been tendered to first respondent but he refused to accept the same Labour Court took the view that there was short payment of compensation and therefore there was violation of Section 25-F of Industrial Disputes Act. However Labour Court declined to Grant relief of reinstatement and granted compensation equivalent to 3.3 years last drawn salary. Hence writ petition filed by management.

ORAL JUDGMENT

By this Writ petition under Articles 226 and 227 of the Constitution of India, the petitioner company challenges an Award of the 5th Labour Court, Bombay, dated August 31, 1995 made in Reference (IDA) No. 263 of 1985 under the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act").

2. The facts relevant for disposal of this Writ Petition are : The Petitioner is a Public Limited Company which used to do processing of films at its laboratory at Prabhadevi, Bombay. The first Respondent joined the Petitioner''s service as Cabin Boy on February 1, 1972. He was promoted to the post of Senior Developer in the year 1981. The processing laboratory of the petitioner company was not economical and, therefore, the Petitioner decided to trim its work force. On June 14, 1984 the petitioner terminated the services of about sixty workmen including the first Respondent. By a letter dated June 13, 1984 the first Respondent was informed that due to slackness in business the film processing laboratory was being closed down with effect from the close of the shift on June 14, 1984 and that the first Respondent''s service as a Senior Developer was being terminated by way of retrenchment. In the said letter, the first Respondent was offered the following amounts :

The letter of retrenchment together with the amount of Rs. 9444.98 paise in cash was unconditionally tendered to the first Respondent on June 13, 1984 at about 7.00 pm in the presence of witnesses, but the first Respondent and other workmen refused to accept the same.

3. The first Respondent raised an industrial dispute for reinstatement in service together with back wages and continuity. The industrial dispute was processed and resulted in Reference (IDA) No. 263 of 1985 being referred to the Labour Court at Bombay.

4. The Labour Court tried the Reference and by its impugned Award, disbelieved the case of the workman that he had been retrenched because of victimisation. It also accepted the case of the petitioner that the statutory dues had been tendered to the first Respondent but were refused by him. The Labour Court also found that there was compliance with the rule of last come first go. However, the Labour Court held that Section 25-F had been breached, by taking the view that there was short payment of the compensation. Despite the Labour Court''s finding that there was non-compliance with the statutory provisions of Section 25-F of the Act in full, the Labour Court declined to grant the relief of reinstatement and referred to grant relief of compensation equivalent to 3.3 years last drawn salary. Thus, a total sum of Rs. 50,000 (Rupees fifty thousand only) was directed to be paid to the first Respondent in lieu of reinstatement and back wages with the liberty to the petitioner to set off therefrom any outstanding of the first Respondent workman. Being aggrieved, the Petitioner company is before this Court.

5. Mr. Cama learned Counsel appearing for the petitioner company, raised two contentions. First, he contends that the view taken by the Labour Court that there was short payment of the retrenchment compensation payable u/s 25-F of the Act is incorrect. He points out from the record that during the months of March, April and May 1984, the first Respondent, had respectively earned wages of Rs. 1252/- Rs. 1255/- and Rs. 1264/- thus making a total of Rs. 3371/- for the three complete calendar months and that the average pay over the said period would amount to Rs. 1257/-. Mr. Cama explained the calculations made by the petitioner company by saying that, though the average pay was a smaller amount of Rs. 1257/- the retrenchment compensation was calculated in the following manner :

which is the amount unconditionally tendered to the First Respondent along with the letter of retrenchment. He contends that the manner of extracting the daily wage from the average pay of the workman over the three complete calendar months by dividing it by 26, is erroneous and that the Labour Court misdirected itself in thinking that the workman was entitled to a sum of Rs. 8750/- which was arrived at by dividing the last wage of Rs. 1264/- by 26 and multiplying it by 15 and further multiplying by 12 i.e.

Mr. Cama distinguished Workmen of U. P. is State Electricity Board v. U. V. V. El. Supply Co., (1996) 1 LLJ 730SC , Associated Cement Co. Limited Kistna Cement Works Vs. Appellate Authority under Payment of Gratuity Act (Regional Assistant Commissioner of Labour) and Others, and Jeewanlal (1929) Ltd. Vs. Appellate Authority under the Payment of Gratuity Act and Others, and contended that these judgments were under the provisions of the Payment of Gratuity Act, 1972, the provisions of which are not pari materia with Section 25-F of the Industrial Disputes Act, 1947 and, therefore, the judgment of the learned Single Judge of this Court in Trade-Wings Limited v. Prabhakar Dattaram Phodkar of Bombay & Ors. 1992 1 CLR 480 was wrongly decided. This judgment was fully relied upon by the Labour Court while deciding the Reference. I have been taken through this judgment very meticulously by Mr. Cama. Mr. Cama was at pains to urge that, though the case on hand before this Court was one with regard to compliance with Section 25-F of the Industrial Disputes Act, 1947, the learned Judge who decided Trade Wings case relied on the provisions of Section 4(2) of the Payment of Gratuity Act, 1972, and the interpretation put on the said Section by the Judgment of the Supreme Court in Jeewanlal (supra). This, in the submission of the learned counsel, could not have been done for the reasons that even in the very judgment of Jeewanlal (supra), the Supreme Court has clearly opined that the view it was adopting was dictated by the peculiar phraseology used in Section 4(2) of the Payment of Gratuity Act, 1972 and had the words ''at the rate of'' and ''on the rate of wages last drawn'' were not there in the Statute, the Supreme Court might have been inclined to accept the contention urged therein by the employers. I think there is some justification in the submission of My. Cama. A careful perusal of the observations of justice O. Chinnappa Reddy in Jeewanlal (supra) does indicate that because of the different phraseologies used in

the two statutes, namely, Payment of Gratuity Act, 1972 and Industrial Disputes Act, 1947, the manner of working out the daily wage for the purpose of Section 4(2) of the Payment of the Gratuity Act might be different than such calculation made with reference to Section 25F(b) read with Section 2(aaa)(i) of the Industrial Disputes Act, 1947, However, since the issue was squarely raised and has been answered by the learned Single Judge in Trade Wings Limited (supra), I would have to follow the same, leaving it to the parties to reagitate the question of law. Since second contention urged by Mr. Cama appeals to me and the petitioner is liable to succeed thereupon, I do not need to decide the first contention urged by Mr. Cama.

6. The second contention of Mr. Cama is that, even if there were a breach of the provisions of Section 25-F due to short payment of the retrenchment compensation at the time of retrenchment, there was immediate remedial compliance with the said Section in that the shortfall in the amount was made good by the petitioner by deposit in the Labour Court, as soon as the said fact was highlighted by the amendment application moved by the first Respondent in January 1995. There appears to be substance in the contention of the learned Counsel. A perusal of the impugned Award also shows that the learned Judge was quite conscious of the fact that despite there being short payment initially, as soon as the amendment application giving particulars of short payment was moved by the first Respondent, the petitioner unconditionally sought leave to deposit and deposited the deficit amount of retrenchment compensation in the Labour Court. The Labour Court took the view that the said action of the Petitioner company was, therefore, bona fide.

7. Mr. Cama relied on the judgment of a learned Single Judge of this Court in Balmer Lawtie & Co. Ltd. v. Waman B. More & Anr 1981 (42) FLR 272 in support.

8. Balmer Lawrie (supra) was a case under the provisions of Section 33(2)(b) of the Act. Section 33(2)(b) requires post facto approval of an order of dismissal or discharge passed against a workman concerned in an industrial dispute pending adjudication in an appropriate forum. The proviso to the said sub-section mandates that no such workman shall be discharged or dismissed "unless he has been paid wages for one month" and an application for approval of action taken has been made by the employer to the appropriate forum. The language used in the proviso to sub-section (2)(b) of Section 33 is also peremptory and mandatory. The crystallized interpretation of Section 33(2)(b) of the Act is that non-compliance with requirement of the proviso to sub-section (2)(b) of Section 33 vitiates and invalidates the action taken against the employee and, consequently there would be automatic reinstatement of the workman concerned. In Balmer Lawrie (supra) the employer had paid one month''s wages without including the House Rent Allowance. The Tribunal interpreted the expression "wages" with reference to Section 2(rr) of the Act and was of the view that House Rent Allowance of Rs. 67/- and Shift Allowance of Rs. 1.25 Per day formed part of the ''wages'' of the workman and, therefore, there was failure on the part of the employer in complying with the proviso to Section

33(2)(b) of the Act inasmuch as there was short payment. However, it appears that sometimes during the trial before the Tribunal, the employer unconditionally offered to deposit the short paid amount and it was done, The question, whether such payment in the Court or unconditional offer to pay before the Court after industrial dispute had been raised, could cure the initial infirmity in the action of non-payment of one month''s wages, was canvassed before this Court in Balmer Lawde (supra). The observations of this Court in regard are to be found in paragraphs 5 and 7 as under :-

"5. The provisions of Section 33(2)(b) have come to be considered by the Supreme Court as well as by the High Courts in a number of decided cases. The requirements contained particularly in the proviso have been observed to be mandatory requirements and it has been further opined that the payment or tender of wages for one month and the application must be part and parcel of any transaction. Some decisions have indicated that an element of flexibility is permissible in considering what would constitute one transaction, but it is quite clear that compliance will have to be correlated with the immediate offer to make payment and the statements made in the application. The requirements postulated by the proviso can never be said to be complied with if the shortfall is either to be made good after being pointed out in the written statement. Even as far as the reply to the written statement in the present matter is concerned, I do not accept the reply as indicative of the employer making an unconditional offer to make good the shortfall. The phraseology in paragraph 11 of the reply is couched in the manner of an argument or a submission. It suggests that Tribunal should first give its opinion on the tour items in respect of which a claim made by the workman and that stage the employer can make good the shortfall, if any. There is no decision brought to my notice which will permit the concept of one transaction being stretched to include the entire proceedings before the Tribunal in the course of such application for permission.
6. ....

7. However, a fundamental question does arise. In this case it is impossible to accept the contention of the employer that nonpayment of house rent allowance was bona fide action on proper advice. However, there may be occasions when the amount paid, tendered or remitted to the workman falls short of the amount which may ultimately be found payable to the workman, but the difference arises because of some difficulty or inability to make the necessary calculation at a particular point of time which difficulty or inability gets removed subsequently. The shortfall may also arise in case where two views are possible on the employer''s liability to pay certain amounts to the workman. For example, we may have a case where an employer in Bombay is faced with two conflicting decisions of other High Courts which have taken diametrically opposite views"

9. The ratio of Balmer Lawrie (supra) would, therefore, amount to this : If there is a bona fide mistake, either of fact or law, pertaining to the mandatory requirement of

the Statute, then an employer who rectifies the mistake at the earliest available opportunity and deposits in Court the amount of shortfall, would he deemed to have substantially complied with the provisions of the Statute. See no reason why the, ratio in Balmer Lawile (supra), laid down with the reference to the mandatory provisions of Section 33(2)(b) of the Act, should not be made applicable in the case of short payment u/s 25-F also. Both are statutory payments; both are intended to be paid as a cushion against forced unemployment of a workman. There is thus no substantial difference in the intention of the Legislature for making such payment mandatory.

10. In the present case, the record shows that the first Respondent was served with a letter of retrenchment dated June 13, 1984 which gave the break up of the retrenchment compensation and the period of service for which it was calculated and full particulars from which any reasonable person could have noticed the deficiency, if any in the calculation of the retrenchment compensation. When the statement of claim was filed on behalf of the first Respondent, the first Respondent did not urge this material defect, but chose to raise a false and dishonest contention that he was not even offered any retrenchment compensation. Upon trial, the Labour Court has rightly disbelieved that part of the story and accepted the petitioner''s version that the amount indicated in the letter of retrenchment dated June 13, 1984 had actually been unconditionally tendered. It was only when the employer filed the documents sometimes in January 1995, that perhaps the first Respondent realised the nature of short payment. An amendment application was moved by the first Respondent in January 1995 seeking to specifically put on record the fact of short payment and the reasons therefore .Immediately upon being served with a copy of the amendment application, the Petitioner employer made good the deficit by depositing the short amount before the Labour Court. In my view, this conduct of the employer cannot but be said to be bona fide. The issue as to whether the daily wage of a monthly rated workman, for the purpose of Section 25-F of the Act, should be extracted by dividing the monthly rate by 30 or 26 is not a controversy which is free from doubt. Despite number of judgments having been rendered in connection with Section 4(2) of the Payment of Gratuity Act, 1972, I have my own doubts whether the ratio in those cases can straightaway be applied to a case arising u/s 25-F of the Industrial Disputes Act, 1947, in view of the radical differences in the phraseology and the concept of "Average pay" in Section 2(aaa) of the Industrial Disputes Act, 1947, which is significantly absent in Section 4(2) of the Payment of Gratuity Act, 1972. In such circumstances, to expect any employer, however astute, to unerringly take a correct position on a vexed question of law and modulate his conduct, would be utopian. This is not a case where the employer has acted despotically by driving away the workman without having offered any amount of compensation. The shortfall was also not on account of any deliberate intention on the part of the employer, but on account of a doubtful legal situation which has arisen on account of the judgment of this Court in Trade Wing''s case (supra). In

these circumstances, in my opinion, the conduct of the petitioner employer would certainly fall within the principles, laid down in paragraphs 5 and 7 of Balmer Lawrie''s case (supra). The employer did cure the deficiency at the earliest possible opportunity in a bona fide manner. I think this is a fit case in which the petitioner employer should not be penalised for having unwittingly trod on the toes of the law.

11. A perusal of the impugned Award of the Labour Court does not show that its attention was drawn to the ratio laid down in Balmer Lawrie (supra). Perhaps, if the Labour Court had been apprised of the said judgment, it might have been disinclined to grant the relief which he has done.

12. In the result, I am of the view that the Writ Petition needs to be allowed on the second contention urged by Mr. Cama and the impugned Award of the Labour Court needs to he interfered with.

13. Writ Petition allowed. Impugned Award dated August 31, 1995 made by the 5th Labour Court, Bombay in Reference (IDA) No. 263 of 1985 is hereby quashed and set aside. However, there will be no order as to costs.

14. The petitioner company shall be entitled to withdraw the amount of back wages if deposited in reference (IDA) No. 263 of 1985 before is the Labour Court at Bombay.

15. Issuance of certified copy of this judgment expedited.