

B. Kumar Vs. the Presiding Officer, Central Govt. Indl. Tribunal-cum-labour Court and Management of National Institute of Port Management, Rep. by Its Administrative Officer

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Court : Chennai

Decided On : Apr-11-2005

Reported in : (2005)IIILLJ30Mad

Judge : Prabha Sridevan, J.

Acts : [Industrial Disputes Act, 1947](#) - Sections 11A and 17B; Shops and Establishments Act; [Constitution of India](#) - Articles 136 and 226

Appeal No. : W.P.M.P. No. 6855 of 2005, W.V.M.P. No. 464 of 2005 and W.P.M.P. No. 36222 of 2004 in W.P. No. 29827

Appellant : B. Kumar

Respondent : The Presiding Officer, Central Govt. Indl. Tribunal-cum-labour Court and Management of National Inst

Advocate for Def. : S. Ravindran, Adv. for T.S. Gopalan & Co. for R2

Advocate for Pet/Ap. : N.G.R. Prasad, Adv. for Row and Reddy in WPMP. 6855/2005

Judgement :

ORDER

Prabha Sridevan, J.

1. The question raised in this writ miscellaneous petition is regarding the entitlement of the respondent employee to wages under Section 17-B of the Industrial `Disputes Act, 1947 (hereinafter be referred to as 'the Act' for short). The second respondent was working as a driver in the appellant undertaking. He was issued with a show-cause notice on the ground that he had contracted a second marriage with his co-employee while the first wife was living. The Enquiry Officer gave a report absolving the second respondent from the guilt. But the disciplinary authority found the second respondent guilty and terminated him from service. This was confirmed by the appellate authority. The Industrial Tribunal came to the conclusion that the termination order must be set aside and that the second respondent was entitled to the prayer of reinstatement. However, the Industrial Tribunal did not grant the second respondent any backwages. Against this, the present writ miscellaneous petition is filed by the management.

2. While admitting the writ petition, this Court granted interim stay on 14.10.2004. The second respondent moved two petitions, viz., W.P.M.P. No. 6855 of 2005 for payment of 17-B wages and W.V.M.P. No. 464 of 2005 for vacating the stay granted earlier. In addition to the affidavit filed in support of the writ petition, counter has been filed by the writ petitioner management to the vacate stay petition. A reply affidavit and a rejoinder have also been filed. We are now mainly concerned with W.P.M.P. No. 6855 of 2005.

3. The second respondent-workman was removed from service on 02.6.1997. He raised an industrial dispute on 17.2.2002. The Industrial Tribunal passed an Award on 13.7.2004. According to the workman, his last drawn wage was Rs. 6821/-. According to the management, the workman is not entitled to 17-B wages, since he has been working elsewhere and in any event his last drawn wages is Rs. 5,244.50. According to the learned counsel appearing for the second respondent, the law requires that a workman, whose order of reinstatement is challenged by

the employer in the High Court or the Supreme Court, is entitled to be paid during the pendency of such proceedings the full wages last drawn by him, if he had not been employed in any establishment during such period and an affidavit by such workman has been filed to that effect in such Court. The learned counsel for the second respondent would also submit that the words used in the section are 'the employer shall' and, therefore, it is a duty cast upon the employer. The learned counsel further submitted that in a long drawn out litigation, where the parties are unequally placed like an employer and a workman, the employer may unfairly protract the matter and the workman cannot be driven to the streets and it is in this background that Section 17-B of the Act has been enacted and it was submitted that even de hors Section 17-B, the High Court and the Supreme Court have the power to direct the employer to pay any sum that they so deem fit during the pendency of the proceedings. Learned counsel also submitted that the mere fact that he has been employed intermittently to keep his body and soul together would not amount to gainful employment disentitling the workman from the benefit given to him.

4. The learned counsel appearing for the writ petitioner management would submit that the workman is entitled to 17-B wages only if he has not received any adequate remuneration during the period when the proceedings are pending before the High Court. A workman who has been receiving remuneration is not entitled to get the protection and this is seen from the proviso to the Section. Learned counsel further submitted that in the present case, the workman had falsely sworn to an affidavit that he is not employed anywhere and when this was proved to be wrong, he came up with a case of intermittent employment and, therefore, such a person is not entitled to the protection of Section 17-B.

5. The power of the Supreme Court and the High Court under Articles 136 and 226 of the [Constitution of India](#) to direct payment to the workman de hors the provisions of Section 17-B is laid down in the decision reported in 1998 (1) L.L.N.375 (DENA BANK v. KIRITI KUMAR T. PATEL). Therefore, it is not necessary that while exercising writ jurisdiction, this Court should be constrained or constricted by the provisions of Section 17-B of the Act. The objects and reasons for enacting the said provisions were as follows:-

'When Labour Court pass award of reinstatement, these are often contested by an employer in the Supreme Court or High Courts. It was felt that the delay in the implementation of the award causes hardship to the workman concerned. It was, therefore, proposed to provide the payment of wages last drawn by the workman concerned, under certain conditions, from the date of the award till the case is finally decided in the supreme Court or High Courts'.

6. The learned counsel for the workman submitted that the perspective from which the Court should approach such questions has been dealt with in CAPT. M. PAUL ANTHONY v. BHARAT GOLD MINES LIMITED . According to the learned counsel though that was a case which related to non-payment of subsistence allowance, the principle is the same. In 1985 (1) L.L.N. 11 (R.K. KINDRA v. DELHI ADMINISTRATION) a workman who was directed to be reinstated on a finding that the domestic enquiry was vitiated, had admitted in the cross-examination that he was maintaining his family by helping his father-in-law. The Supreme Court held that this was not gainful employment so as to deny the workman his backwages and that if this is gainful employment, the employer can contend if the dismissed employee, in order to keep his body and soul together, had taken to begging and that would as well be a gainful employment. The Supreme Court further held that the fact that the appellant was helping his father-in-law in a coal depot cannot amount to gainful employment. In the judgment reported in 2003 (4) L.L.N. 315 (UNIVERSITY GRANTH NIRMAL BOARD v. UDESINH TOGAJI SOLANKI), the Gujarat High Court held thus:-

'.. for denying the benefits under Section 17-B of the [Industrial Disputes Act, 1947](#), an employer is required to establish and prove to the satisfaction of the Court concerned that the workman had been employed in any establishment and had been receiving adequate remuneration. In absence of such evidence, in spite of any kind of income received by the workman, such benefit cannot be denied and such income cannot be considered as a gainful employment for want of any employment in any establishment.'

The Gujarat High Court rejected the case of the employer that the workman was owning an autorickshaw and earning therefrom and held that even if he had been

earning by driving the autorickshaw, it would not amount to working in any establishment.

7. In Writ Appeal Nos. 2094 and 2691 of 2004, the Division Bench of this Court, drawing a parallel between the Shops and Establishments Act and the Industrial Disputes Act, held that even in the absence of any specific provision in the Shops and Establishments Act, the High Court is not powerless to issue appropriate interim direction regarding reinstatement or payment of salary or payment of part of the salary depending on the facts and circumstances. This was relied on by the learned counsel for the petitioner to show that even when there was no statutory provision in the Shops and Establishments Act, this Court had extended its protective hand to the workman since that alone would be in consonance with the spirit of such enactments.

8. In 2004 (2) L.L.N 1074 (MANAGEMENT OF KASTURI MILLS LTD. v. DEVARAJ), the Division Bench of this Court confirmed the order passed by the learned single Judge in 2004 (2) L.L.N 1063 (MANAGEMENT OF KASTURI MILLS LIMITED v. S. DEVARAJ). In this case, relying on Dena Bank's case, referred to above, the workman was awarded 17-B wages. In 2005 LLR 275 (KENDRIYA VIDYALAYA SANGHATHAN AND ANR. v. S.C. SHARMA), the Supreme Court held that for entitlement of backwages on reinstatement, the burden of proof initially is on the employee to show that he was not gainfully employed and once that is discharged, the burden shifts to the employer to produce materials to rebut the same. Therefore, the law is clear that the Section makes it mandatory for the management to pay 17-B wages to the workman, if they want to challenge the order of reinstatement, since it has been held that the benefit of legislation must flow in favour of the workman and the Courts have the obligation to fulfil the social commitment that the legislature had made while enacting the said provision and technicality should not outweigh the course of justice. There is no doubt that 'an unscrupulous management may by all possible means delay the proceedings .. ' (FAKIRBHAI FULABHAI SOLANKI v. PRESIDING OFFICER AND Anr.).

9. In (BHARAT SINGH v. NEW DELHI TUBERCULOSIS CENTRE), the Supreme Court observed in para 8 thus :-

'8. It is common knowledge that even before Section 17-B was enacted, courts were, in their discretion, awarding wages to workmen when they felt such a direction was necessary, but that was only a discretionary remedy depending upon court to court. Instances are legion where workmen have been dragged by the employers in endless litigation with preliminary objections and other technical pleas to tire them out. A fight between a workman and his employer is oftentimes an unequal fight. The legislature was thus aware that because of the long pendency of disputes in tribunals and courts, on account of the dilatory tactics adopted by the employer, workmen had suffered. It is against this background that the introduction of this Section has to be viewed and its effects considered.'

10. So as far as the law is concerned, there can be no doubt regarding the entitlement of a workman. Now we have to see what this workman is actually entitled to. In the affidavit filed in support of the writ petition in para 13, the management has stated that 'for the past many years, the second respondent is gainfully employed as an instructor with New Gopalakrishna Driving School, No. 4, Kamarajar Nagar, L.B. Road, Chennai-41'. This affidavit was sworn to on 08.10.2004. In W.P.M.P. No. 6855 of 2005, which was filed by the second respondent workman claiming 17-B wages, the second respondent has stated in para 12, 'I submit that I have never been gainfully employed. I submit that the allegation that I was gainfully employed as an Instructor at the Gopalakrishna Driving School is not correct. This statement has been made only to deny him 17-B wages as per the I.D. Act, 1947'. This is the affidavit filed by the workman in accordance with the provisions of the Act and it was sworn to on 12.2.2005. To this, a counter was filed by the management signed on 02.3.2005, in which the management categorically states that the petitioner's affidavit is not true. The following is the extract of para 3 of the counter:-

'I affirm that the statement made in paragraph 13 of the affidavit filed in support of the writ petition is true and correct. The petitioner's denial in paragraph 12 of the affidavit filed by him is not true. After perusing the petitioner's affidavit, I addressed

a letter dated 25.2.2005 to RTO, Chennai South, Thiruvannamipur, Chennai-600 041 requesting him to confirm about the gainful employment of the petitioner in New Gopalakrishna Driving school. It is submitted that by reply dated 01.3.2005, the RTO, Chennai (South), Chennai-600 041 has stated that the petitioner is working at New Gopalakrishna Driving school for the past few years. I respectfully submit that I have myself seen the petitioner being employed with New Gopalakrishna Driving School, Chennai-600 041. I personally know that he is gainfully employed in the said office for the past 10 years. My enquiry also reveal that he is being paid about Rs. 5000/- and above per month as salary.'

Along with this counter, an additional typed set of papers is filed enclosing a copy of the letter dated 25.2.2005 addressed to the Regional Transport Officer, Chennai South, to which the Regional Transport Officer has replied on 01.3.2005 that they are informed as per the Motor Vehicle Inspector's Report that the employee B. Kumar, S/o. Thiru R. Balakrishnan, Chennai-41 is working at New Gopalakrishna Driving School, Chennai-41 for the past few years. This additional typed set of papers was filed on 03.3.2005. To this, a reply is filed by the second respondent on 03.3.2005. Paras 3 and 4 of the reply are extracted as follows:-

'3. Eversince my termination, I did not have any definite source of employment. In the Driving School, I was not given any permanent job. In some months I will get some job and in certain other months the School will say there are not enough students and I will not get work. At the most I used to get Rs. 2000/- to Rs. 3000/- p.m. Even that was not certain. Even the transport department who had sent a reply have not asserted what the petitioner had stated. They have only stated that I was working with the driving school for the past few years.

4. If at all, any one is guilty of perjury it is the Administrative Officer, Mr. R. Rajendran, who had sworn to the counter affidavit and not me.'

To this, another rejoinder is filed by the second respondent stating that the fact that the second respondent is still working with the driving school and his affidavit stating that he has been stopped from work is false.

11. While considering the question of backwages or reinstatement, the question of gainful employment matters and is relevant. Section 11-A merely says 'reinstatement on such terms and conditions'. But normally backwages follow reinstatement. The general rule in the industrial law is that when a workman is reinstated after a period of forced unemployment on account of illegal termination of service, then in the absence of cogent reasons he should be entitled to full wages or remuneration. In 1978 (2) LLJ 474 (HINDUSTAN TIN WORKS LIMITED v. ITS EMPLOYEES) it was held that in the very nature of things, there cannot be a straight-jacket formula for awarding the relief of backwages. Full backwages would be the normal rule and the party objecting to it must establish the circumstances necessitating the departure. At that stage, the Tribunal while exercising its discretion must keep in view all the relevant considerations. But discretion must be exercised in a judicial and judicious manner. Therefore, even while ordering reinstatement, the Tribunal has the discretion in the matter of backwages and one of the factors which it takes into consideration is the gainful employment of the workman during the period.

12. On the other hand, Section 17-B only uses the words 'adequate remuneration' not 'gainful employment'. The word 'gainful' normally means 'producing profit or advantage', 'lucrative', whereas 'adequate' means 'sufficient' or 'reasonably sufficient'. Therefore, it is enough if the High Court is satisfied that the workman is receiving reasonable remuneration during the period when the litigation is pending.

13. When the reinstatement is ordered, the worker must ordinarily get back the complete benefit of the order, and this means payment of full back wages unless there are circumstances which justify any reduction in the amount. There could be various reasons for such reduction e.g. Prolonged litigation not on account of the employer. But if he has been lucratively employed in the interregnum, he will not get the benefit of backwages. But in a case under Section 17-B, the reinstatement is under challenge and is not final. The employer does not want to implement the award of reinstatement, he wants an order of stay, he can also prolong the litigation without feeling a pinch. But, the worker who is denied the benefit of the award because of the order of stay, is bound to feel the pinch everyday in order to keep the home fires burning, so he may take up some employment. In such an

event, even if he receives reasonable pay, he will not get the benefit of Section 17-B. The section itself is intended to provide an interim benefit so that the workman and his family are not driven to the streets. Perhaps that is why the legislature has thought it fit to use the words 'adequate remuneration' instead of 'gainful employment'.

14. One has to bear in mind the inequality of status between the parties. While the management can withstand a prolonged litigation, the workman cannot and, therefore, the workman should be given the umbrella of protection.

15. But yet we find in this case that the workman has betrayed the confidence that has been reposed by the legislature on him for earning payment of full wages pending proceedings. The legislature did not insist upon a very high standard of proof to show that he was not employed in any other establishment. It was sufficient if an affidavit is filed into the Court and, therefore, the workman was bound to have sworn to the truth and only the truth. Because it was on the basis of the affidavit alone that he would be granted the relief. It was open to the workman to have stated in his affidavit that while it is true that he is working in a driving school, the salary that he earns is not adequate or that the employment is not regular. Even before he filed the petition claiming 17-B wages, the management had stated in the affidavit in support of the writ petition that the second respondent is working in a driving school. He could have sworn to the truth, and the Court could have decided whether his earnings were adequate. But the workman does not do that, instead he states a falsehood that he is not working in the driving school. Then comes the counter filed by the management, in which details are given to show that the workman is indeed working in the driving school. It is only thereafter that the workman comes up with the answer that he was not given a permanent job and that he would get some job in certain months and not in any other months and at the most he would get Rs. 2000/- or Rs. 3000/- and that the management cannot expect him to remain idle and that after 04.3.2005, the school became suspicious about him and not to give him job. This is again denied by the management. When the workman's first statement is proved to be false and a document has been produced before Court which is really not denied by the workman, i.e. the document relating to the workman's employment at the driving

school, then the burden is heavier on the workman to show that he was only intermittently employed in the driving school and his wages was only Rs. 3000/-. He could have obtained a certificate from the school to the effect that he was not regularly employed. The management has produced a certificate to show that he has been employed. When this Court is not satisfied that the workman's affidavit is true, the workman must be denied the wages under section 17-B. An affidavit by its very definition is a written declaration under oath. No relief can be granted to a person who has sworn to something that has been proved to be wrong. The petitioner has himself to blame.

16. To get 17-B wages, the following conditions must exist :-

- a) There should be an order of reinstatement.
- b) The employer should prefer proceedings against the order before High Court or Supreme Court.
- c) The workman should not be employed in any establishment during the period of pendency of the proceedings.
- d) The workman shall file an affidavit before such Court to that effect.
- e) Such Court should be satisfied that the workman had neither been employed nor had been receiving adequate remuneration during such period.

If all these conditions do not exist, 17-B wages cannot be ordered. The law provides for award of wages even for a part of the period of pendency of proceedings, if it is shown that the workman has not received adequate remuneration. All that the workman has to do is to state the facts as they are. In this case, he suppressed the facts and the other side proved that his affidavit was not correct.

17. Writ jurisdiction is a discretionary jurisdiction. CHANDRA SINGH v. STATE OF RAJASTHAN). I am not inclined to exercise the discretionary jurisdiction under Article 226 in favour of the second respondent who has not stated the truth. So neither under Article 226 nor under Section 17-B, is the second respondent

entitled to relief. In view of this conclusion, it is not necessary to decide what is the last drawn wages.

18. In the result, W.P.M.P. No. 6855 of 2005 is dismissed. Interim stay earlier granted in W.P.M.P. No. 36222 of 2004 is made absolute. In view of the order passed in the stay petition, the vacate stay petition, viz., W.V.M.P. No. 464 of 2005 is closed.

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