

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 25.04.2011

+ LPA 378/2011

SK MITRA

....

APPELLANT

Through: Mr.Piyush Sharma, Advocate

versus

ASST GENERAL MANAGER

STATE BANK OF INDIA

....

RESPONDENT

Through: Mr.Vipin Pillai, Advocate

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether reporters of the local papers be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

DIPAK MISRA, CJ

The present appeal is directed against the order dated 11.1.2011 passed in CM No.6449/2006 in W.P.(C) No.11776/2005 whereby the learned Single Judge had passed the following order:

“This is an application under Section 17-B of the Industrial Disputes Act, 1947 by the workman/respondent no.1. The workman is said to be not gainfully employed since 1994 but the application has been filed in

the year 2006 i.e. after 12 years. The respondent no.1/workman is therefore directed to file his statements of bank accounts from 1994 till date or in any case, as soon as reasonably possible after 1994 till date to show whether he was having other sources of income during this period from 1994 till 2006. The workman must also file his Election Identity Card/Ration Card, telephone numbers, both landline and mobile, if any, and the payments which have been made with respect to the telephones during this period of 12 years. The respondent/workman must also state that the period during where he resided from 1994 to 2006 i.e in his own premises or he was living on rent. If the premises belonged to the workman, the workman must also state that what is the extent of premises and whether any part of the premises were in any manner let out/licenced out for earning any income therefrom. An affidavit incorporating the aforesaid terms and documents be filed within a period of six weeks from today.

List this CM for further consideration on 21st April, 2011.”

2. It is submitted by Mr.Piyush Sharma, learned counsel for the appellant, that the writ petition was filed in the year 2005 and thereafter he immediately filed the application under Section 17-B of the Industrial Disputes Act, 1947 (for short ‘the Act’) and, therefore, the learned Single has fallen into grave error by opining that the application has been filed after 12 years. Learned counsel for the petitioner submitted that in the scheme of things of Section 17-B of the Act such inquiry is not necessary. It is also

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contended by him that the affidavit as required in terms of Section 17-B of the Act was filed clearly stating that the respondent-workman was not gainfully employed and when there was only a bald denial, the directions which have been issued by the learned Single Judge would come in the compartment of making a roving enquiry which is not permissible in law.

3. Resisting the aforesaid submissions, it is contended by Mr.Rajiv Kapur that the respondent has been gainfully employed as is understood within the parameters of Section 17-B of the Act and, therefore, he is not entitled to the benefit of the said section and by finding out the veracity of the assertions, the learned Single Judge has appositely issued the directions in the order impugned.

4. To appreciate the submissions raised at the Bar, we think it appropriate to refer to certain citations in the field. In ***Dena Bank v. Ghanshyam*, (2001) 5 SCC 169** while dealing with the basic concept involved under Section 17-B of the Act their Lordships have opined thus:

“8. Section 17-B provides that where the employer prefers any proceedings against an award directing reinstatement of any workman, the employer shall be liable to pay such workman, during the period of pendency of such proceeding in the High Court or the

Supreme Court, *full wages last drawn* by him inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court. The proviso says that if the High Court or the Supreme Court is satisfied that the workman had been employed and had been receiving adequate remuneration during such period or part thereof, the Court shall order that no wages shall be payable under that section for such period or part, as the case may be.

9. The Statement of Objects and Reasons for inserting the said provision indicates that when Labour Court pass awards of reinstatement, they are often contested by employers in the Supreme Court and High Courts. To mitigate the hardship that would be caused due to delay in implementation of the award, it was proposed to provide for payment of wages last drawn by the workman concerned from the date of the award till the dispute between the parties is finally decided in the High Courts or the Supreme Court. It follows that in the event of an employer not reinstating the workman and not seeking any interim relief in respect of the award directing reinstatement of the workman or in a case where the Court is not inclined to stay such award in toto the workman has two options, either to initiate proceeding to enforce the award or be content with receiving the full wages last drawn by him without prejudice to the result of the proceedings preferred by the employer against the award till he is reinstated or proceedings are terminated in his favour, whichever is earlier. In *Dena Bank's case* (1999) 2 SCC 106 this Court elucidated the expression "full wages last drawn" as follows: (SCC p.115, para 21)

“...Parliament thought it proper to limit it to the

extent of the wages which were drawn by the workman when he was in service and when his services were terminated and therefore used the words ‘full wages last drawn’.”

10. It may be noticed that Section 17-B of the Act does not preclude the High Courts or this Court under Articles 226 and 136 of the Constitution respectively from passing appropriate interlocutory orders, having regard to the facts and circumstances of the case, in the interests of justice (*Dena Bank case*). The High Court or this Court may, while entertaining the employer's challenge to the award, in its discretion, in appropriate cases, stay the operation of the award in its entirety or in regard to back wages only or in regard to reinstatement without interfering with payment of back wages or on payment of wages in future irrespective of the result of the proceedings before it etc. and/or impose such conditions as to the payment of the salary as on the date of the order or a part of the back wages and its withdrawal by the workman as it may deem fit in the interests of justice. The Court may, depending on the facts of a case, direct payment of full wages last drawn under Section 17-B of the Act only by the employer to the workman. The question whether a workman is entitled to the full wages last drawn or full salary which he would be entitled to in the event of reinstatement while the award is under challenge in the High Courts or this Court depends upon the terms of the order passed by the court, which has to be determined on interpretation of the order granting relief.”

5. In *Viveka Nand Sethi v. Chairman, J & K Bank Ltd. and others*, (2005) 5 SCC 337 a two-Judge Bench of the Apex Court has held that filing

of an affidavit in support of the contentions as required under Section 17-B is imperative.

6. In *Uttaranchal Forest Development Corpn. and another v. K.B. Singh and others*, (2005) 11 SCC 449, it has been opined that only such workmen in whose favour there are awards of reinstatement and who have filed affidavits of their not being in gainful employment, shall be entitled to be granted reinstatement or in lieu thereof paid wages last drawn by them on respective dates on their terminations from services and their entitlement for such wages would be from the respective dates by filing affidavits by each of them in this Court in compliance with Section 17-B of the Act.

7. In *Administrator, Kamala Nehru Memorial Hospital v. Vinod Kumar*, AIR 2006 SC 584, the Apex Court has held that:

“8. The High Court's conclusions about entitlement of respondent under Section 17-B of the Act is relatable to non-employment and non-receipt of adequate remuneration of the workman. The appellant had adduced ample material to show that the respondent was enrolled as an Advocate in 1983 and was a busy practitioner with decent professional income. It had even given a list of large number of cases in which the respondent had appeared. Without any material to support its conclusions, the High Court observed that "because of the compulsions of unemployment he has no

option but to continue for a short period as a practising Advocate" (underlined for emphasis). The conclusions are clearly contrary to material on record. The respondent was not entitled to any entitlement under Section 17-B of the Act. However if any amount has already been paid in the peculiar facts of the case, the respondent shall not be liable to refund the same."

8. In this context, we think it appropriate to refer to a passage from a Division Bench decision of the High Court of Rajasthan in *Union of India v. Bhagawan Giri and another*, 2008-I-LLJ-925 (Raj.) wherein it has been stated thus:

"3. On a plain reading it is manifest that the scope of inquiry, if any, under Section 17-B is limited to the question as to whether the employee has been gainfully employed during the period of pendency of proceeding in the High Court or the Supreme Court or not. It is enough, so far as the workman is concerned, that he files an affidavit that he is not gainfully employed elsewhere. On such affidavit being filed the onus shifts on the employer to prove that he is gainfully employed. No person can be asked to prove the non-existence of a fact. The employee cannot be called upon to prove that he is not gainfully employed. That is whey filing of affidavit to that effect is treated as sufficient. No such stand has been taken on behalf of the appellant that the employee is gainfully employed elsewhere. The only objection is that he is out of employment for about two decades and if he could make his both ends meet during this period, there is jurisdiction to pass any order for payment of wages. The submission, as observed above is in teeth of the specific

mandate of Section 17-B which lays down in clear terms that in the event of the award of Labour Court etc. directing reinstatement being challenged in the High Court or the Supreme Court, the employer 'shall' be liable to pay full wages last drawn by him. The fact that the employee has survived for two decades does not mean that he is disentitled to seek direction for payment of last wages, for such argument proceeds on the assumption that if a person has been able to survive, he is not in need of money in the shape of wages which he is entitled to. Surely, if he dies in the mean time there may be no occasion to pass any such order in his favour."

9. We have referred to the aforesaid authorities for the purpose of the legislative intendment inhered under Section 17-B of the Act; the nature of affidavit to be filed by the workman; the meaning of gainful employment; adequate remuneration and obligation on the part of the employer to show that there is adequate remuneration being received by the workman; the concept of onus and such other aspects. As is manifest, in the case at hand, the workman has filed the affidavit stating, inter alia, that he was not gainfully employed since the date of his discharge from the bank. The bank relied on the report of the investigating agency hired by it that the respondent was working in the shop of iron and steel as a computer operator-cum-accountant officer and is earning Rs.6500/- per month and that he owns a Maruti Car, a scooter and a house. The appellant has disputed the above

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finding of the bank.

10. In view of the allegations and counter allegations made, it is the duty of the Court to arrive at a conclusion with regard to the entitlement of the benefit under Section 17-B of the Act keeping in view the decisions in ***Dena Bank*** (supra), ***Viveka Nand Sethi*** (supra), ***K.B. Singh & Ors.*** (supra), ***Vinod Kumar*** (supra) and ***Bhagawan Giri*** (supra). The writ court has to see whether the workman received adequate remuneration during such period and whether the respondent-management has produced ample material to show that the workman has been really gainfully employed. Mere survival would not be enough. It will depend upon the factum of adequacy of amount received. In the case at hand, as we perceive, the learned Single Judge has erroneously observed that the workman had filed an application after 12 years as the same is not factually correct. It is clear that the appellant filed the application in quite promptitude. The informations that have been directed by the learned Single Judge to be given by the workman are in the realm of roving enquiry putting the entire burden on the workman. Such a roving enquiry, in our considered opinion, is unwarranted and, accordingly, the order impugned has to be set aside.

11. Consequently, the appeal is allowed and the order passed by the learned Single Judge is set aside. The learned Single Judge is requested to dispose of the application preferred under Section 17-B of the Act on the basis of observations made hereinabove. There shall be no order as to costs.

CHIEF JUSTICE

APRIL 25, 2011
sv/dk

SANJIV KHANNA, J