

IN THE HIGH COURT OF BOMBAY AT GOA
MISC. CIVIL APPLICATION NO. 680 OF 2014
IN
WRIT PETITION NO. 663 OF 2013

SHRI RAJAN NAIK ... Applicant

Versus

M/S KARTHIK ALLOYS LTD., THROUGH
ITS MANAGING DIRECTOR MR. B.
SHRINIVASSA ... Respondent

Shri Ryan Menezes, Advocate for the Applicant.

Shri Gaurish N. Agni with Shri Eeshan Usapkar, Advocates for
the Respondent.

CORAM:- C. V. BHADANG, J.

DATE:- 13th FEBRUARY, 2017.

ORAL ORDER:

This is an application under Section 17B of the Industrial Disputes Act, 1947 (Act, for short), claiming last drawn wages, inclusive of maintenance allowance as admissible from the date of the award i.e. 18.02.2013.

2. The brief facts are that the applicant was employed as a "Control Room Operator", with the respondent. The services of the applicant came to be terminated with effect

from 20.08.2009, which was the subject matter of an industrial dispute before the Labour Court. The Labour Court by an award dated 18.02.2013, has directed the respondent to reinstate the applicant with 50% back wages and continuity in service alongwith all consequential benefits. This judgment and award is subject matter of challenge in Writ Petition No. 663/2013. The respondent in compliance with order dated 29.10.2013 has deposited the entire back wages as per the impugned award.

3. This application is filed under Section 17B of the Act, claiming that the applicant is not gainfully employed, since the order of his termination and is being maintained by his father, who is working as a mason.

4. The respondent has filed an affidavit in reply of Mrs. Pushpalata G. Kalangutkar, who is the Senior Manager (Administration and Finance) of the respondent, contending that the applicant is gainfully employed. It is claimed that applicant has filed a false affidavit, which would dis-entitle him to relief under Section 17B of the Act. It is submitted that in order to find out the veracity of the claim of the applicant, the

respondent engaged the services of a private investigating agency, namely, Cobra Personnel and Intelligence Services. The Investigator of the private agency visited the house of the applicant on 25.02.2015 and learnt that the applicant was earlier employed with his uncle Mr. Sachin, who is having a truck and was 'supplying mud and stones'. He also learnt that in the last preceding year, he was employed with one boat manufacturing Company. It is contended that the Investigator contacted the applicant on his mobile on 03.03.2015 and in the course of the discussion with the applicant, it was disclosed that the applicant was working on a boat manufacturing Company on an island.

5. On 12.03.2015, the Investigator visited M/s Aquarius Fibreglass Pvt. Ltd. at Divar island and on inquiry with the security guard stationed at the main gate of the factory, learnt that the applicant was employed as a Driver and was present at the factory premises. The Investigating Agency has submitted a confidential report, which is placed on record alongwith a CD/DVD of the conversation between the Investigator and the Security Guard and the Investigator and the applicant.

6. The applicant has filed a rejoinder, denying the allegations. It is however claimed that Mr. Sachin, who is the cousin of the applicant and "not his uncle", is having some business and out of the relationship, the applicant had assisted Mr. Sachin for some period. It is contended that whenever, Mr. Sachin was required to leave his office for his personal work, he used to request the applicant to attend the office, so as the office work could continue in his absence. It is informed that the applicant provided help to Mr. Sachin as a close family member and it was not by way of any employment. Insofar as M/s Aquarius Fibreglass Pvt. Ltd. at Divar Island is concerned, it is submitted that one Mr. Ramakant Gaonkar, who oversees the day to day operations there, happens to be of the same village as that of the applicant and whenever there was a need for additional manpower for some odd jobs, Mr. Ramakant Gaonkar used to call the applicant, where he used to work as a daily wage worker. It is contended that the total period of such employment did not exceed 30 days. It is contended that the applicant never worked prior to October 2014 and subsequent to March 2015. It is submitted that at the time when the application was filed, neither the applicant had worked for Mr. Sachin nor with M/s Aquarius Fibreglass Pvt. Ltd. and as such,

the applicant has not filed any false affidavit, in support of the application.

7. I have heard Shri Menezes, the learned Counsel for the applicant and Shri Agni, the learned Counsel for the respondent.

8. It is contended on behalf of the applicant that under Section 17B of the Act, the workman is entitled to the last drawn wages, whenever his employer challenges the award of reinstatement before this Court or the Hon'ble Supreme Court. It is submitted that this is subject to the workman filing an affidavit that he is not employed in any Establishment during such period. It is submitted that the applicant has filed an affidavit, which is acceptable and the so called report of the Investigator, cannot satisfy the requirements of the proviso to Section 17B of the Act, so as to dis-entitle the applicant from the benefits of the said Section.

9. It is submitted that the applicant is being supported and maintained by his father. It is submitted that the applicant has merely helped Mr. Sachin, out of his family

relations and not by way of an employment. It is submitted that even, in respect of M/s Aquarius Fibreglass Pvt. Ltd., there is no regular appointment as such, but the applicant was called for a short period on daily wages, which are not commensurate with the last pay drawn by the applicant.

10. On the contrary, the learned Counsel for the respondent contended that the applicant has to satisfy that he was not gainfully employed, after his termination and in the absence of such satisfaction, the Court can decline to grant benefits of Section 17B of the Act.

On behalf of the respondent, reliance is placed on the decision of the Supreme Court in the case of **Kamala Nehru Memorial Hospital Vs. Vinod Kumar, AIR 2006 SC 584** and **Rajasthan Gramin Bank Vs. Bishan Lal Bairwa, (2010) 13 SCC 248** and the decision of this Court in the case of **M/s U.P. State Bridge Corporation Limited Vs. Maharashtra General Kamgar Union, CDJ 2008 BHC 546**. It is submitted that once, the affidavit filed by the applicant, is not admissible as being found to be false, the applicant is not entitled to the reliefs as claimed.

11. I have carefully considered the rival circumstances and the submissions made.

12. Section 17B of the Act reads thus:

"17B. Payment of full wages to workman pending proceedings in higher courts.- Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings 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:

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be.

13. It can thus be seen that the payment of full back wages and maintenance allowance during the proceedings, challenging against the award of reinstatement, can be granted to the workman, subject to the workman not being employed in any Establishment during such period. The applicant-workman is required to file an affidavit to that effect that he is not employed in any Establishment during such period. Proviso to Section 17B of the Act makes it explicit that where it is proved to the satisfaction of the Court that such workman had been employed during such period or part thereof and was receiving "adequate remuneration" during such period or part thereof, the Court shall order that no wages shall be payable under this Section, during such period or part thereof, as the case may be.

14. Before turning to consider the rival contentions, it would be appropriate to make a reference, to the Division Bench judgment of this Court in the case of **M/s U.P. State Bridge Corporation Limited** (supra). The question involved in the said case was whether, the absence of a format of an affidavit (as is required to be filed by the workman), absolves the workman of any primary onus in relation to the

requirements of the Section and shifts the entire burden on the management, restricting their right only to the proviso to Section 17B of the Act. The Division Bench after taking a survey of various decisions has found that the essential ingredients for applicability of the provisions are (i) that by the impugned award, there is an order for reinstatement of any workman (ii) the employer prefers any proceedings against such award in the High Court or Supreme Court (iii) the liability to pay arises if, the workman had not been employed in any Establishment, during such period and an affidavit to that effect is filed in the Court and (iv) even if the above conditions exist, however if, it is shown to the satisfaction of the Court that workman had been employed and is receiving adequate remuneration during any such period or part thereof, then no back wages would be payable during that period. In para 11 of the judgment, the Division Bench has inter-alia held that the intention of the legislature in enacting Section 17B of the Act was to provide definite protection to the workman against prolix litigation and exploitation by the affluent management. Similar view is expressed by the Hon'ble Supreme Court in the case of **Dena Bank & Another Vs. Ghanshyam, JT 2001 (supp.1) SC 229.**

15. In para 16, the Division Bench has held that there cannot be any doubt that the onus for seeking the statutory relief is upon the workman and where the management claims the benefit of the proviso of Section 17B of the Act, the onus is upon the management. It has been held that the onus on the workman is a limited one and once, an affidavit as contemplated under the provisions of Section 17B of the Act, is filed and the Court finds that the workman was not employed in any Establishment during the relevant period, direction for payment of wages under Section 17B of the Act, would be issued. It is further held that the affidavit filed by the workman has to be true and correct description of facts as per the requirements of law and the workman would make a definite and correct averment in the affidavit with regard to his non-employment, inspite of his efforts. However, when it comes to the benefit of the proviso to Section 17B of the Act, it is for the management to show that the workman was employed (which includes self employment) and was receiving adequate remuneration. If not, the Court would be justified in granting relief under Section 17B of the Act, to the workman.

16. Coming back to the present case, the applicant has averred in his affidavit that from the time of termination of his services from 28.08.2009 till date, he has not been working in any Establishment during such period or for any part thereof and the question of receiving any adequate remuneration does not arise. As noticed earlier, there is no specific format of the affidavit and the question depends on facts and circumstances of each case. In any event, the workman has to aver that he was not gainfully employed during the period after his termination. The respondent is placing reliance on the report of the private Investigator in order to contend that the applicant was gainfully employed. It would be significant to note that the affidavit filed by the applicant is dated 05.08.2014, while according to the reply, of the respondent, the Investigator had visited the house of the applicant on 25.02.2015 and claimed to have learnt that the applicant was employed with his uncle Mr. Sachin. Subsequently, the Investigator claims to have contacted the applicant on his mobile, where the applicant has allegedly disclosed that he was working for a boat manufacturing Company on an island. Thereafter, the Investigator claims to have visited M/s Aquarius Fibreglass Pvt. Ltd. on 12.03.2015 and during the interaction

with the Security Guard had learned that the applicant was working as a Driver there.

17. It may be mentioned at this stage that although, a CD (allegedly of the conversation, which the Investigator had with the applicant and the security guard) is produced, there is no transcription produced on record and thus, it is not possible to access the contents thereof. Be that as it may, the applicant has filed a rejoinder in which, the applicant claims that Mr. Sachin, is his Cousin and out of the relationship, the applicant had helped him out and it was not a matter of regular employment.

18. Insofar as M/s Aquarius Fibreglass Pvt. Ltd. is concerned, it is contended that one Ramakant Goankar, who oversees the day to day operations of the said Company, happens to be from the same village as that of the applicant. Mr. Ramakant Gaonkar had called the applicant on some occasions, whenever there are requirements of some manpower for some odd jobs. The applicant was called there on daily wages and not on regular employment and this was intermittently from 14.11.2014 to 05.03.2015.

19. The question is whether, the affidavit filed by the respondent and the report of the private investigating agency would be sufficient to entitle the respondent to take the benefit of the proviso to Section 17B of the Act and in my considered view, the answer has to be in the negative. In my considered view, the report of the Investigator would not be sufficient to hold that the applicant was gainfully employed for the whole or any substantial part of the period of his unemployment and/or was receiving adequate remuneration. In fact the reply or the report of the Investigator do not speak about the nature of remuneration/wages received by the applicant during the said period. On the basis of such an affidavit, the benefit of the proviso to Section 17B of the Act, in my considered view cannot be extended to the respondent.

20. Let us now briefly refer to the cases on which reliance is placed on behalf of the respondent.

In the case of **Administrator, Kamala Nehru Memorial Hospital** (supra), there was ample material to show that the respondent/workman was enrolled as an Advocate and was having a decent professional income and in support of the

same, a list of large number of cases in which the respondent had appeared, was placed.

21. In the case of **Rajasthan Gramin Bank** (supra), the management had placed the copies of the vouchers showing payment of the salary by the transport companies, where the respondent had worked after his dismissal, with supporting affidavit, which was not considered by the Trial Court and hence, the matter was remanded.

It can thus be seen that in both these cases, there was sufficient material produced not only on the aspect of gainful employment of the concerned workman, but also on the aspect of "adequate remuneration", which is not forthcoming in this case.

22. The Division Bench of this Court in the case of **Ramjee Jaisinh & Company Vs. R.K. Meshram, 1997-III-LLJ Suppl. 737**, has held that the liability of the employer for payment of full wages accrues from the date of institution of the petition and not from the date of award.

23. In the result, the following order is passed:

ORDER

(a) The application is allowed.

(b) The respondent shall pay to the applicant, during pendency of the petition, full wages, last drawn by the applicant, inclusive of maintenance allowance, if any, admissible under any Rule.

(c) The arrears of the last drawn wages/maintenance allowance, from the date of the filing of the petition till 28.02.2017, shall be paid within a period of eight weeks from today.

(d) The respondent shall continue to pay the last drawn wages/maintenance allowance, to the applicant from March, 2017 onwards, on or before 10th of each English Calendar month.

(e) The application is disposed of in the aforesaid terms.

C. V. BHADANG, J.