IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 2412 OF 2017

Sind Brahma Sikhya Samelan & Ors. ... Petitioners

V/s

Taruna Bhagtani & Ors. ... Respondents

Mr.Mohan Bir Singh a/w. Mr.Rahul Jalan i/b. MBS and Company for the Petitioner.

Mr.Mahendra Agavekar for Respondent No. 1.

CORAM: S.J. KATHAWALLA, J.

DATE: 20TH NOVEMBER, 2017

P.C.:

1. By the present Petition, the Petitioners - Sind Brahma Sikhya Samelan and others have challenged the Judgment and Order dated 31st July, 2017 passed by the Labour Court at Bandra, partly allowing the Application No.IDA 23 of 2013 filed by the respondent No.1 – Taruna Bhagtani. The said Application was filed under the provisions of Section 33(C)(2) of the Industrial Disputes Act, 1947 (IDA). The Writ Petition was admitted on 3rd October, 2017 and is now taken up for final hearing.

2. The Petitioners are a registered Public Charitable Trust managing and running diverse educational institutions for over the last seven decades. The respondent No.1 was employed as an Office Assistant at one of their Schools, Dharamdas & Chandiram English Primary School from 25/11/1999 till 12/5/2008.

3. The respondent No.1 had filed an Application (No.23 of 2013) before the Labour Court at Bandra in February 2013 i.e. nearly 5 years after leaving the services of the petitioners. In the said Application, the respondent No.1 had claimed diverse amounts towards encashment of leave (pay with wages) pending to her credit at the time of cessation of her services, overtime services purportedly rendered by her during the tenure of her services and towards bonus for all the years of her services, i.e. from 1999 to 2008. The said application was resisted by the petitioners by filing their Written Statement (Affidavit in reply dated 19/4/2013, Exh. "M" to the petition). The Labour Court, amongst others framed the following issue which is relevant for the present Petition :

> "Whether the applicant proves that she is entitled to receive the amount of Rs.73,674/- towards encashment of leave with wages from the opponents?"

4. The Labour Court has held that the respondent No.1 is entitled to receive the amount of Rs.73,674/- towards encashment of leave. It is this finding and decision of the Labour Court which is under challenge in the present petition.

5. It is the Petitioners' case that Respondent No.1 having voluntarily resigned from the services of the Petitioners in May 2008 and having been relieved with effect from 12/5/2008, was not a workman at the time of filing of Application No.23 of 2013. It is also the Petitioners' case that additionally, the Court ought not to have entertained

a highly belated claim. However, it is submitted by the Petitioners that the above Petition can be disposed of on the sole ground that the proceedings under Section 33(c) (2) are in the nature of execution proceedings and there exists no right or entitlement in favour of Respondent No.1 to receive payment towards encashment of leave with wages. In support of the above contentions, the Petitioners have relied on several decisions, more particularly the decision of the Division Bench of this Court in the case of Life Insurance Corporation of India V/s. John Anton D'souza and Ors. 1996 1 CLR 729, wherein the decision of the Hon'ble Supreme Court of India in the case of C.I.W.T. Corpn. V/s. Workmen (AIR 1974 SC 1604) and Management of Reserve Bank of India V. Bhopal Singh Panchal (1994 I CLR 28) has been relied upon. The Petitioners have also pointed out that the Labour Court erred in holding that the Respondent No.1 was entitled to leave encashment in view of the provisions of sub-section 2 and 3 of Section 35 of the Maharashtra Shops and Establishment Act, 1948, though the Petitioners' establishment is exempt from the provisions of the said Act.

6. The Petitioners are correct in their submission that the proceedings under 33(c)(2) of the IDA are in the nature of execution proceedings and the Application under Section 33(1)(2) is tenable only in respect of an existing right. Such a right may flow from an agreement, settlement, an award or an un-interrupted practice or usage and / or under a statute. Admittedly, there is no agreement, settlement, award, practice or usage for payment of any amount towards encashment

of leave at the time of cessation of service upon resignation, voluntary retirement and/or termination of services by the employer.

7. As stated earlier, the Hon'ble Division Bench of this Court, in the case of Life Insurance Corporation of India v/s. John Anton D'Souza & Ors. (supra) has relied upon the decision of the Hon'ble Supreme Court in C.I.W.T. Corporation (supra) and has in paragraph 11 of its decision reproduced paragraphs 12 & 13 of the decision of the Hon'ble Supreme Court in the case of C.I.W.T. Corporation (Supra), which are reproduced hereunder :

> *"11. Now we will deal with the second limb of the argument of the learned Counsel. He submitted that sub-section (1) of Section 33-C of the Act provided that if any money was due to an employee from his employer under an Award or a decision of an Industrial Tribunal, it may be recovered as arrears of land revenue or as a public demand by the appropriate Government on an application made to it by the employee entitled to the said money. Sub-section (2) of Section 33-C took within its purview the benefit under an award or decision of an Industrial Court to which an employee was entitled to receive from the employer and which benefit was capable of being computed in terms of money. It presupposes that the entitlement is already determined and what has to be determined is the benefit which accrues from that entitlement in terms of money. The Labour Court is not competent to determine the question of entitlement under Section 33-C(2). In support of his submission he placed reliance on C. I.*

W. T. Corpn. v. Workmen and Management of Reserve Bank of India v. Bhopal Singh Panchal *(1994-I-LLJ-791). In C.I.W.T. Corporation's case (supra), the Apex Court laid down that a plaintiff s suit may involve investigation regarding the following matters :- (i) the plaintiff's right to relief; (ii) the corresponding liability of the defendant, including whether the defendant is, at all, liable or not; and (iii) the extent of the defendant's liability, if any. The Labour Court cannot make adjudication in the nature of determination of (i) and (ii); (iii) is a consequential relief of determination of (i) and (ii). Labour Court could only determine the extent of liability after (i) and (ii) have been determined by the Industrial Court. It would be useful to reproduce paras 12 and 13 of the judgment which read as under :*

> *"It is now well-settled that a proceeding under Section 33-C(2) is a proceeding, generally, in the nature of an execution proceeding wherein the labour Court calculates the amount of money due to a workman from his employer, or if the workman is entitled to any benefit which is capable of being computed in terms of money, the Labour Court proceeds to compute the benefit in terms of money. This calculation or computation follows upon an existing right to the money or benefit, in view of it being previously adjudged, or, otherwise, duly provided for. In Chief Mining Engineer East India Coal Co. Ltd. v. Rameswar it was reiterated that proceedings under*

Section 33-C(2) are analogous to execution proceedings, and the Labour Court being called upon to compute in terms of money the benefit claimed by workmen in such cases in the position of an executing Court. It was also reiterated that the right to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between an Industrial workman and his employer.

13. In a suit, a claim for relief made by the plaintiff against the defendant involves an investigation directed to the determination of (i) the plaintiff's right to relief, (ii) the corresponding liability of the defendant, including, whether the defendant is, at all, liable or not; and (iii) the extent of the defendant's liability, if any. The working out of such liability with a view to give relief is generally, regarded as the function of an execution proceeding. Determination No. (iii) referred to above, that is to say, the extent of the defendant's liability may sometimes be left over for determination in execution proceedings. But that is not the case with the determinations under heads (i) and (ii). They are normally regarded as the functions of a suit and not an execution proceeding. Since a proceeding under Section 33-C(2)is in the nature of an execution proceeding, it should follow that an *investigation of the nature of determinations (i) and (ii) above, is normally outside its scope. It is true that in a proceeding under Section 33-C(2), as in an execution proceeding, it may be necessary to determine the identity of the person by whom or against whom the claim is made if there is a challenge on that score. But that is merely 'incidental'. To call determinations (i) and (ii) 'incidental' to an execution proceeding would be a perversion, because execution proceedings in which the extent of liability is worked out are just consequential upon the determinations (i) and (ii) and represent the last stage in a process leading to final relief. Therefore, when a claim is made before the Labour Court under Section 33-C(2) that court must clearly understand the limitations under which it is to function. It cannot arrogate to itself the functions - say of an Industrial Tribunal which alone is entitled to make adjudications in the nature of determinations (i) and (ii) referred to above, or proceed to compute the benefit by dubbing the former as 'incidental' to its main business of computation. In such cases determinations (i) and (ii) are not 'incidental' to the computation. The computation itself is consequential upon and subsidiary to determinations (i) and (ii) as the last stage in the process which commenced with a reference to the Industrial Tribunal. It was, therefore, held in State Bank of Bikaner* *and Jaipur v. R. L. Khandelwal, (1968-II-LLJ-589) (SC), that a workman cannot put forward a claim in an application under Section 33-C(2) in respect of a matter which is not based on an existing right and which can be appropriately the subject matter of an Industrial Dispute which requires a reference under Section 10 of the Act. (underlining supplied)."*

7. The conditions of service of employees of Private Schools are governed by the Maharashtra Employees Private Schools (Conditions of Service) Regulation Act, 1977 and the Rules framed thereunder. Rule 16 of the said Rules deals with the subject of leave and provides for encashment of leave standing to the credit of an employee retiring on superannuation. Sub rule 29 of Rule 16 reads as follows:

> *"(29) An employee (including an employee to whom provisions of sub-rule (18) apply) retiring on superannuation shall be eligible to receive payment of cash equivalent to leave salary in respect of the period of earned leave at his credit at the time of retirement limited to a maximum of 180 days of earned leave. He shall also be entitled to pension and pension equivalent of Death-cum-Retirement Gratuity in addition to the cash payment of leave salary, subject to the following conditions namely:*

> *(a) the payment of cash equivalent of leave salary shall be limited to a maximum of 180 days earned leave.*
>
> *(b) the cash equivalent of leave salary thus admissible shall become payable on retirement and shall be paid in one lump-sum as a one-time settlement.*
>
> *(c) the cash payment shall be equal to leave salary as admissible for earned leave and Dearness Allowance and House Rent Allowance shall be payable.*
>
> (d) *the authority competent to grant leave shall suo moto issue orders granting cash equivalent of earned leave at the credit of the employee on the date of retirement.*" (underlining supplied)."

There is no provision in the said Rules for encashment of leave upon cessation of services at any time other than at the time of retiring on superannuation. As such, Respondent No.1 was not entitled to the leave encashment at the time of her resignation, which was much before the age of superannuation, therefore, in the absence of any existing right in favour of the Respondent, who voluntarily resigned from service, the Application filed by the Respondent under Section 33(c)(2) of the I.D. Act, which is in the nature of execution proceedings, is untenable.

8. The Trial Court has considered the Respondent No.1 as entitled to leave encashment relying on the provisions of sub-section 2 & 3 of Sec. 35 of the Maharashtra Shops & Establishments Act. The Petitioners are correct in submitting that the said provisions are not applicable to their establishment and the petitioners' establishment is exempt from all the provisions of Maharashtra Shops & Establishments Act. Sec. 4 of the Maharashtra Shops & Establishments Act, 1948 reads as follows:

> " *4. Exemption. – Notwithstanding anything contained in this Act, the provisions of this Act mentioned in the third column of Schedule II shall not apply to the establishments, employees and other persons mentioned against them in the second column of the said Schedule……..*"
>
> Schedule II of the said Act specifically provides at Sr. No.6F that *"Establishment pertaining to any kind of educational activities are exempt from all the provisions of the Maharashtra Shops & Establishments Act."*

9. Therefore, since the Respondent No.1 has been held to be entitled to the reliefs claimed only under the provisions of Maharashtra Shops & Establishments Act, and the provisions of the said Act do not apply to the establishment of the Petitioner, the Order passed by the Labour Court

dated 31st July, 2017 in Application No. IDA 23 of 2013 is ex-facie without jurisdiction, suffers from an error of law apparent on the face of record and is thus set aside. The Rule is made absolute and the above Writ Petition stands disposed of with no orders as to cost.

(S.J.Kathawalla, J.)