

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

Judgment reserved on: 15.03.2023

% **Judgment delivered on: 10.04.2023**

+ **LPA 120/2021 and C.M. No. 11198/2021**

SH. SURJEET SINGH Appellant

Through: Mr. Atul T. N., Mr. Vishal Choubey
and Ms. K. Pallavi, Advocates.

versus

DOMINANT SYSTEMS PVT. LIMITED Respondent

Through: Mr. Kamal Kant Tyagi, Advocate.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

J U D G M E N T

SATISH CHANDRA SHARMA, C.J.

1. Section-17B of the Industrial Disputes Act, 1947¹ enjoins the employer to grant full wages to an employee, who has secured an award in his favour, during the pendency of the proceedings before the High Court or the Supreme Court. The pre-condition for such grant is that the employee must not be gainfully employed during the said period. The impugned order

¹ Hereinafter referred as “the 1947 Act” or “the Act”

granted 50% of the back wages from the date of the award. The appellant before us prays for the grant of full wages or full minimum wages, whichever is higher, for the entire period from the date of award as he was not gainfully employed during the said period.

2. Shorn of unnecessary details, the controversy between the worker and the management began in the year 2015. Later, on 20.02.2017, the appellant was dismissed from employment. Upon failure of the attempt at conciliation, the matter was referred to the Labour Court at Dwarka, New Delhi for testing the legality of the dismissal order. By its order dated 27.01.2018, the Labour Court passed an award in favour of the appellant and held the termination to be unjustified. The Court further ordered reinstatement of the appellant with continuity of service and 25% of the last drawn wages from the date of termination. Thereafter, a writ was preferred by the respondent management before this Court. Vide order dated 26.07.2018, the operation of the award dated 27.01.2018 was stayed by this Court. Thereafter, the appellant also preferred a writ petition seeking modification of the award to the effect that full back wages be granted to the appellant instead of 25%, as ordered in the award. Additionally, the appellant also moved an application under Section-17B of the 1947 Act for the grant of wages during the pendency of proceedings before this Court.

3. Ld. Single Judge, while adjudicating upon the application under Section-17B, examined the contested fact of gainful employment of the appellant. The management had contended that the appellant was working at a shop under the name of “*Satpal Halwai*” and was receiving adequate remuneration for the same. Thus, the management contended that the

appellant was gainfully employed and was ineligible for the grant of wages under Section 17-B of the Act. The appellant, on the other hand, contended that the said shop was being run by his father for the last ten years. Further, he tried to demonstrate that he was merely helping his father in his business and was not at all gainfully employed as contemplated under Section-17B. To substantiate the contention, the appellant also placed on record an affidavit on behalf of his father corroborating that the said shop was his individual business and the appellant was merely lending a helping hand to his father, being a part of the family and being out of job. Additionally, the appellant also placed on record a certificate issued by the temple committee wherein the said shop was located, a letter written by the village sarpanch as well as an affidavit from neighbouring shop owners to advance three important points –

- i. That the appellant was not “employed” at the said shop and was not earning adequate remuneration as contemplated under Section-17B;
- ii. That the said shop was allotted to his father and was being run by him for the last ten years;
- iii. That he was merely lending a helping hand in his father’s business and his presence at the shop ought not to be construed as gainful employment for defeating his right under Section-17B.

4. To buttress the submission, the appellant relied upon two decisions, namely – *Icon Printing Process (P) Ltd. v. Govt. of NCT of Delhi*² and

² 2007 (4) Ad (Delhi)

Rajinder Kumar Kindra v. Delhi Administration³, wherein engagement of a worker in order to meet the daily sustenance needs of his family or extending help to the father in father's shop, was not held to be gainful employment.

5. *Per contra*, the respondent advanced that the appellant was managing the shop by himself. It was contended that the appellant's father had two businesses – *halwai* shop and catering business – and the appellant was single handedly deriving the entire income out of one shop which was managed by him. A video was placed on record to advance this submission which revealed the presence of the appellant at the said shop. The respondent also advanced the submission that even self-employment falls within the scope of gainful employment and reliance in this regard was placed upon the decision of the Hon'ble Supreme Court in ***North East Karnataka Road Transport Corporation v. M. Nagangouda***⁴.

6. In light of the competing submissions advanced by the parties, Ld. Single Judge, vide order dated 08.12.2020, observed that there was no proof of any income being earned by the appellant, however, the material on record did indicate that the appellant was having some business at the said shop. The relevant para reads thus:

“16. In the facts of the present case, the documents placed on record show that the Workman is actively working in a shop called Satpal Halwai. It is possible that the shop was initially allotted to the father, however, the Workman could either be helping his father or even running the business of his father. The

³ (1984) 4 SCC 635

⁴ AIR 2007 SC 973

*video placed on record shows that the Workman is independently handling the business at the shop. The Management has argued that there are two businesses i.e., the Halwai business and Catering services, both of which are separate. **However, there is no material on record to show the income being earned by the workman from the shop, even if it is presumed that he is exclusively running it or helping his father. The material does show that he is having some business from the shop. Thus, at this stage, only a broad view can be taken.***”(emphasis supplied)

7. The Court then noted that since the appellant was an able-bodied man, he could not be expected to sit idle and any income earned by him, even from self-employment, could be considered for the purpose of adjudicating a Section-17B application. Observing so, the Court further noted that the exact income earned by the appellant, during the period in question, could not be ascertained. Keeping in view the broad facts of the case, the Court awarded 50% of the last drawn wages or minimum wage, whichever is higher, to the appellant. The operative para in this regard reads thus:

*“18. The above reasons would also hold good for the Section 17B application. Thus, while it cannot be said that the Workman has to sit idle, any earning which he has been making, even through self-employment, could be considered for the purpose of the Section 17B application. The main writ petition itself has been listed for hearing on 15th February, 2021 along with connected writ petitions. The Management has also deposited some part of the back wages which were awarded. **Since the exact income earned if any, is not established from the record, this Court deems it appropriate to direct the Management to pay to the Workman 50% of the last drawn wages or 50% of the minimum wages, whichever is higher, on or before the 10th of every month, after statutory deductions, if any.***”(emphasis supplied)

8. The said order dated 08.12.2020 passed by Ld. Single Judge stands impugned before us. The short issue that arises for adjudication in this appeal is whether the appellant was entitled to get full wages i.e. 100% of the last drawn wages or minimum wages, whichever is on the higher side, instead of 50% as decided in the impugned order.

9. Strictly speaking, the entire controversy pertains to the quantum of the wages and not the entitlement thereof. Ld. Single Judge, upon an analysis of the decisions cited before the Court, rightly observed that there is no standard rule for the determination of the quantum of wages to be paid to the worker and that the question is to be decided in the specific factual matrix of the case. 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.”

10. A perusal of the aforesaid provision indicates that the provision was enacted to protect the worker, who has obtained an award of reinstatement in his favour, and the award has been impugned by the employer before the High Court or the Hon'ble Supreme Court. The provision offers protection to the worker by enabling the grant of full wages by the employer during the pendency of such proceedings, if the worker is unemployed during the said period. The main provision is worded in an unambiguous manner and contains the word "shall" to indicate the grant of wages. Moreover, the burden upon the worker to show the fact of his unemployment could be discharged by giving an affidavit to that effect. However, it does not mean that the provision lays down an absolute rule in favour of the worker. The proviso which follows the provision, shifts the ball in the court of the employer and provides it an opportunity to prove that the worker was gainfully employed during the period of proceedings. The burden to rebut the worker's affidavit falls upon the employer.

11. One may rightly note that the legislature has created a clear distinction between the burden falling upon the worker and the employer. Whereas, the burden on the worker gets discharged by filing of an affidavit, the burden on the employer is two-fold –

- i. To establish to the satisfaction of the Court that the worker was actually employed; and
- ii. That the worker was receiving "adequate remuneration" for such work.

Thus, the employer must prove the factum of employment as well as of “adequate remuneration”. This variable onus falling upon the parties, as noted above, is not only clear from the provision but is also a sound one. In order to appreciate the same, we must dive into the legislative intent behind the enactment of the provision.

12. The provision gets triggered when the worker has secured an award directing reinstatement. In view of the fact that the employer has a remedy in law to impugn the award, an interim statutory protection has been provided in Section-17B to the worker to ensure that the employer’s right to avail its remedies in law does not render the worker’s sustenance at the mercy of the legal process. What is inherent in this provision is an acknowledgement of the constitutional guarantee to secure basic livelihood and dignity of life to one and all.

13. However, the inquiry on employment and adequate remuneration is essentially a factual one and the Court has to proceed in accordance with the material placed before it. As noted above, the worker’s liability is limited to the affidavit, however, it must be ascertained that the affidavit is a true and full disclosure of his income. It is fairly settled that any income, even from self-employment, would be calculated for ascertaining the wages to be ordered in the interim. In the present case, the appellant had given an affidavit stating that he was not employed during the relevant period. The respondent, on the other hand, has placed material on record to show that the worker was engaged at the shop of his father. As noted in the impugned order as well, there is nothing on record to indicate whether the worker was actually employed or not. Even if we assume that the worker was employed

by his father or that he was in self-employment, there must be material to indicate the second ingredient i.e. that the worker was getting adequate remuneration for his services. The ultimate test is the earning of income and not the nature of employment. As per the proviso, the respondent has made an effort to show that the appellant was self-employed, however, there is no material on record to indicate that the worker was earning adequate remuneration. Moreover, even the fact of employment is not clear. Mere presence of the appellant at the shop of his father is inconclusive. In light of the same, the worker's affidavit cannot be displaced in the eyes of the Court and a statutory right ought not to be defeated on an assumption that the worker must be earning something. On the basis of the material on record, it is the admitted position that the shop belonged to the father of the appellant and was allotted to him. In the absence of any material to indicate the contrary, the appellant's sworn statement that being a family member, he was only assisting his father at the shop cannot be rejected. The import of the proviso is fairly clear. Although, no absolute rule can be laid down to mechanically grant interim wages to the workman, the proviso places an unambiguous burden upon the employer and the same can be discharged by bringing cogent material on record.

14. In view of the same, we are not inclined to uphold the impugned order and modify the same only to the extent of the quantum of wages ordered by the Court. We, therefore, hold that the worker is entitled to the payment of full back wages i.e. 100% of the last drawn wages or the minimum wages, whichever is on the higher side, from the date of the award. The impugned order stands good on all other aspects including the timeline of payment and

stands modified to the limited aspect of quantum of wages to be paid in the facts and circumstances of the case.

15. The present appeal stands disposed of in the aforesaid terms as allowed. Interim application, if any, also stands disposed of.

16. No order as to costs.

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

(SUBRAMONIUM PRASAD)
JUDGE

APRIL 10, 2023

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