IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT:

HON'BLE MR. JUSTICE ABHIJIT GANGOPADHYAY

WPA 6797 of 2018

Webfil Ltd.
-Versus-
Dipesh Kumar Bagchi & Anr.

For the petitioners	**: Mr. Soumya Majumdar** **Mr. Victor Chatterjee** **Mr. Ranjit Talukdar**
For the State	**: Mr. Susanta Pal** **Mr. Ananda Dulal Sarkar**
For the Respondent No. 1	**: Mr. Jayanta Dasgupta** **Mr. Rananeesh Guha Thakurta**
Heard on	**: 11.01.2021, 12.01.2021,** **20.01.2021 & 21.01.2021**
Judgment on	**: 30.06.2021**

Abhijit Gangopadhyay, J .:

1. This writ application has been filed by the employer (Webfil Limited) challenging an award dated 15.01.2018 passed by the 8th Industrial Tribunal, state of West Bengal in case No. 01/2A (2) 11 (Sri Dipesh Kumar Bagchi -versus- Webfil Limited).

2. The tribunal passed the award in favour of the employee for payment of all the back wages including the benefit of revised wages or salary etc. The tribunal also held that the termination of the employee by the employer with effect from 31.03.2010 is not justified and the employee is entitled to get reliefs as prayed for.

3. This award dated 15.01.2018 has been challenged by the employer by filing the present writ application wherein the employer raised three objections. The first one is related to the jurisdiction of the tribunal and it has been submitted that the tribunal is to be held coram non-judice as it had no jurisdiction to decide the dispute raised by the employee. The second objection is, the employee is not a workman and therefore, he does not come within the purview of the Industrial Disputes Act, 1947 (ID Act, in short, hereafter) and the third contention is, the employee did not plea specifically that after termination he was not employed elsewhere and therefore back wages from the date of his termination till the date of his retirement is not required to be paid to him.

4. Referring to two notifications dated 25.07.1997 and 02.02.2012 the employer/petitioner has stated that by notification dated 2nd February, 2012 the 4th Industrial Tribunal was given jurisdiction over the territorial limits of the District Nadia where the cause of action of the dispute had arisen. But the case was filed before the 8th Industrial Tribunal (instead of 4th Tribunal) which ultimately passed the award. This defect in jurisdiction was also taken at the very inception by the petitioner but the 8th Tribunal decided that it had jurisdiction to decide the matter.

On a reading of the award I have found that the application of employee under Section 2A (2) of the ID Act was filed on 20th January, 2011 which is an admitted fact (vide paragraph No. 9 of the writ application). The notification dated 02.02.2012 was issued much after filing of the application under Section 2A (2) of the ID Act and the said notification was not given any retrospective effect.

5. The employee being the respondent No. 1 of the writ application also made similar submission as above.

6. Now, the question is whether there was any reasonable ground for uncertainty as to the tribunal having jurisdiction to adjudicate the matter when it was filed on 20.01.2011? It is to be noted that Section 2A (2) of the ID Act came in the statue book on 15.09.2010. Before coming into force of Section 2A (2) of the ID Act Government Notifications dated 7th January, 1988 and 25th July, 1997. Therefore, following the principle laid down in Section 18 (2) of the Code of Civil Procedure I hold that when the application of the employee under Section 2A (2) was filed in the 8th Industrial Tribunal there was reasonable ground for uncertainty as to the tribunal having jurisdiction to adjudicate the dispute. The interesting feature in the whole of the writ application is that nothing has been shown by the employer as to how due to adjudication of the dispute by the 8th Industrial Tribunal prejudice has been caused, if any, to the writ petitioner/employer.

7. Prejudice, as is understood in legal parlance, is harm or injury or disadvantage caused to a party. Though the writ petitioner in its written notes of arguments and also during the hearing spent a

lot of words on the question of jurisdiction of 8th Tribunal it has never stated how prejudice has been caused to it due to adjudication by the 8th Tribunal and if there was any failure of justice for adjudication by the 8th Tribunal.

Did the writ petitioner lose a forum for adjudication of the dispute in any higher forum as the dispute was adjudicated by the 8th Tribunal? Was the procedure followed by the 8th Tribunal for adjudicating the dispute different from the procedure that was to be followed by the 4th Tribunal? Did the writ petitioner get no opportunity to examine and cross-examine witnesses and to argue the matter before the 8th Tribunal which he could get had the adjudication been done by the 4th Tribunal? Had the dispute been adjudicated by the 4th Tribunal instead of the 8th Tribunal, did the writ petitioner/employer got further or better opportunity to adduce evidence which it did not get before the 8th Tribunal? Could the 4th tribunal had the power to consider other materials while adjudicating the dispute which power was not vested with the 8th Tribunal?

All or any of the situations giving rise to the above questions and any other similar situation (s) which could cause 'prejudice' to the writ petitioner/employer for adjudication of the matter by the 8th tribunal has not been pleaded at all and therefore, the employer, it can be safely held, did not face any consequential prejudice due to adjudication by a tribunal (i.e. the 8th Tribunal) which allegedly did not have jurisdiction to adjudicate the dispute.

This concept of 'consequential prejudice' in a situation where adjudication has been made by a court not having jurisdiction is

writ large in Section 18 and 21 of the Code of Civil Procedure. But this case has a much better footing, as I have already hold that when the dispute was raised by the employee under Section 2A (2) in January 2011, 4th Tribunal was not given any territorial jurisdiction to adjudicate the matter under Section 2A (2). Therefore, when the application by the employee was filed, it had 'reasonable ground for uncertainty' as to the tribunal having jurisdiction to adjudicate the matter. This concept of 'reasonable ground of uncertainty' (in the opinion of the court) is also there in Section 18 of the Code of Civil Procedure and it is not a thing unknown to law.

I have no hesitation to hold that for adjudication by the 8th Tribunal of the dispute there was no consequential failure of justice.

8. The principle is, "when a case had been tried by the court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds unless it had resultant in failure of justice, and the policy of the legislature has been to treat objection to jurisdiction both territorial and pecuniary and not open to consideration by an appellate court unless, there has been prejudice on the merits".

This principle is laid down by a four Judges Bench of the Supreme Court (vide **AIR 1954 SC 340**).

Therefore when the application under Section 2A (2) of the ID Act was filed by the employee there was no specified Tribunal or Labour Court for adjudication of such application. So the employee (respondent No. 1 herein) cannot be blamed for filing the application in the 8th Tribunal. Another important and

relevant point is, the employer (i.e. the writ petitioner herein) never took any steps for transferring the matter to the 4th Tribunal after the notification was made specifying the Tribunal before which the matter was to be adjudicated.

For the above reasons the contention of the writ petitioner as to jurisdiction of the tribunal is wholly baseless and frivolous and this contention is rejected.

9. The other contention of the employer/writ petitioner is that the employee was not a workman within the meaning of Section 2 (S) of the ID Act.

In this regard I think it is better to reproduce the observations made by the Labour Court in respect of this question.

> "In my considered view having workers below his post would not go to prove that he had control over them and/or they were his subordinates, rather from his said cross examination it is evident that those workers were under the control of the Contractors and he had control over 30 machines.
>
> Ld. Lawyer for the O.P. Company gave much emphasize on the job descriptions of the applicant. But on meticulous scrutiny of the job description entrusted to the applicant I find that he was entrusted to coordinate, supervise and maintain the production output of the machines, which is obviously a technical job and those job descriptions go to show that the applicant had control over the machine and not over the man. I would like to mention herein that in his

cross-examination the applicant has specifically stated that he had control over 30 machines.

It is relevant to mention here being custodian and possessor of documentary evidences, the company failed to produce any piece of document showing that Sri Bagchi either used to sanction leave, gate pass and overtime or asses performance of any worker of the company or take any independent decision which was blinding upon the company. Even no workman came forward to give evidence orally that he was under control and supervision of Sri. Bagchi. There is also nothing on record to show that he had authority to allot duties of the workers or lay off/suspend any worker of the company. For the reason best known to the O.P. management as to what prevented to examine Sri Udit Sharma, Sri Shymal Bal and Sri Susanta Bhattacharya, who could have gave light to the truth.

I would like to mention herein supervisory work and duties in supervisory capacity are completely different concept. Supervision of machine is not but supervision of men certainly is duty of supervisory capacity, which is wanting".

10. The above observations have been made by the tribunal on the basis of oral evidence recorded and on the basis of documentary evidence. No allegation has been made by the writ petitioner/employer that there is any perversity in making the above observations by the tribunal. On perusal of papers and documents before me I have also not found any illegality

whatsoever in the award for which above observation of the tribunal as to 'workman' can be interfered with. The writ petitioner has referred to different judgments in respect of this question but I do not find any applicability of those cases as in the present case the employer/ writ petitioner has failed to show anything in its evidence that the employee was working in a supervisory capacity. When such things have not come in the evidence, judgments cited in respect of the question whether an employee is a workman within the meaning of Section 2 (s) of the ID Act or not is not required to be considered.

Judgments can be considered if the facts of a case are proved which facts are similar in the judgment cited and then only the law laid down by the judgment has any binding effect. Here, in this case the writ petitioner/employer has not been able to prove the basic facts to show that the employee/ respondent No. 1 did not satisfy the tests for being held as a workman under Section 2 (S) of the ID Act. Here, the tribunal came to the conclusion on the basis of evidence that the petitioner comes within the meaning of workman. The observation made by the tribunal in this respect has not been challenged in the writ application as perverse.

Therefore, I do not find any merit in the objection of the writ petitioner that the employee was not a workman within the meaning of Section 2 (S) of the ID Act and this contention is also rejected.

11. The next contention of the employer/writ petitioner is that the petitioner has not taken the plea that after his termination he was not re-employed and therefore the oral evidence of the employee/respondent No. 1 herein was wrongly accepted on the

basis of which full back wages has been awarded by the tribunal. In the short notes of submission filed before the tribunal (pages 141 to 148 of the writ application) I have not found any such objection that the employee did not plead unemployment after his termination. In the writ application also I have not found any pleading where such question was raised. This question for the first time has been raised at time of argument of the writ application. However, I find that in the prayer of the application of the employee under Section 2A (2) of the ID Act the employee has prayed reinstatement with full back wages. Therefore, the abstract of the application of the employee under Section 2A (2) of the ID Act was reinstatement with full back wages. The strict rules of pleadings as applicable in suits cannot be made applicable in the application of a terminated workman before the Industrial Tribunal. Therefore, this objection is not accepted by this court raised for the first time in the argument.

12. While terminating the petitioner only a clause in his appointment letter was used to terminate his service and there was no domestic enquiry against the employee. Such clause of termination of service by giving one month's notice is not an acceptable situation at all in view of the change of the entire atmosphere of employer-employee relationship in last 60/70 years and such high-handed action of termination which fits in a feudal minded society for termination of service of a person by merely giving a notice without holding him guilty of any offence is wholly unfit in the atmosphere of a democratic country like ours where the dynamics of law is towards fairness in all actions.

13. In this respect the employee has referred to one judgment reported in **(2010) 3 SCC 192** (Harjinder Singh -versus- Punjab State Warehousing Corporation) where the Supreme Court has shown the way that is to be followed while granting relief to the weaker section of this country respecting the constitutional provisions. Some paragraphs of that judgment are required to be quoted:

> *"*37. As early as in 1956, in a Constitution Bench judgment dealing with Article 32 petition, Vivian Bose, J. while interpreting Article 14 of the Constitution, posed the following question:
>
> "*23*. After all, for whose benefit was the Constitution enacted?"
>
> (*Bidi Supply Co.* v. *Union of India* [AIR 1956 SC 479] , AIR at p. 487, para 23)
>
> 38. Having posed the question, the learned Judge answered the same in his inimitable words and which I may quote: (*Bidi Supply case* [AIR 1956 SC 479] , AIR p. 487, para 23)
>
> "*23*. … I am clear that the Constitution is not for the exclusive benefit of Governments and States; it is not only for lawyers and politicians and officials and those highly placed. *It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the 'butcher, the baker and the candlestick-maker*'. It lays down for this land 'a rule of law' as understood in the free democracies of the world. It constitutes India into a Sovereign Democratic Republic and guarantees in every

page rights and freedom to the individual side by side and consistent with the overriding power of the State to act for the common good of all."

39. The essence of our Constitution was also explained by the eminent jurist Palkhivala in the following words:

"Our Constitution is primarily shaped and moulded for the common man. It takes no account of 'the portly presence of the potentates, goodly in girth'. It is a Constitution not meant for the ruler

'but the ranker, the tramp of the road,

The slave with the sack on his shoulders

pricked on with the goad,

The man with too weighty a burden,

too weary a load.' "

(N.A. Palkhivala, *Our Constitution Defaced and Defiled*, MacMillan, 1974, p. 29)

I am in entire agreement with the aforesaid interpretation of the Constitution given by this Court and also by the eminent jurist.

40. In this context another aspect is of some relevance and it was pointed out by Hidayatullah, J. as His Lordship then was, in *Naresh Shridhar Mirajkar* v. *State of Maharashtra* [AIR 1967 SC 1] . In a minority judgment, His Lordship held that the judiciary is a State within the meaning of Article 12. (See AIR paras 100, 101 at pp. 28 and 29 of the Report.) This minority view of His Lordship was endorsed by Mathew, J. in *Kesavananda Bharati* [(1973) 4 SCC 225 : AIR 1973 SC 1461] (at SCC p. 877, para 1703 : AIR p. 1949,

para 1717 of the Report) and it was held that the State under Article 12 would include the judiciary. This was again reiterated by Mathew, J. in the Constitution Bench judgment in *State of Kerela* -Verus- *N.M. Thomas* [(1976) 2 SCC 310 : 1976 SCC (L&S) 227 : AIR 1976 SC 490] where Mathew, J.'s view was the majority view, though given separately. At SCC p. 343, para 64 : AIR p. 515, para 89 of the Report, His Lordship held that under Article 12, "State" would include "Court".

41. In view of such an authoritative pronouncement the definition of the State under Article 12 encompass the judiciary and in *Kesavananda case* [(1973) 4 SCC 225 : AIR 1973 SC 1461] it was held that "judicial process" is also "State action". (SCC p. 877, para 1703 : AIR p. 1949, para 1717)

42 That being the legal position, under Article 38 of the Constitution, a duty is cast on the State, which includes the judiciary, to secure a social order for the promotion of the welfare of the people. Article 38(1) runs as follows:

"38. *State to secure a social order for the promotion of welfare of the people*.—(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

I follow the above principles and cannot support the action of the employer/writ petitioner in terminating the service by merely giving a notice.

14. On the basis of the above discussions I dismiss the writ application with cost of Rs. 20,000/- to be paid by the writ petitioner i.e. the employer to the employee. The award of payment of full back wages is required to be complied with by the writ petitioner within 31 July, 2021.

15. With the above observations this writ application is dismissed with the cost as aforesaid.

(Abhijit Gangopadhyay, J)

Later: After passing of this judgment and order prayer has been made on behalf of the writ petitioner for stay of operation of the order which is considered and rejected.

(Abhijit Gangopadhyay, J)