CASE NO.:
Appeal (civil) 7251 of 2001

PETITIONER:
Krishna Bahadur

RESPONDENT:
M/s Purna Theatre & Ors.

DATE OF JUDGMENT: 25/08/2004

BENCH:
N. Santosh Hegde & S.B. Sinha

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

The workman is in appeal before us being aggrieved by and dissatisfied with the judgment and order dated 13.10.2000 passed by the Division Bench of the High Court of Calcutta in Appeal No.434 of 1996.

The case at hand has a chequered history. The appellant herein was appointed in the post of Messenger-cum-Bearer in the establishment of the respondent herein, a Cinema House, on 31.3.1978. He was subsequently confirmed on the said post. A disciplinary proceeding was initiated against him wherein he was found guilty, whereupon he was dismissed from services. The said order of dismissal was the subject-matter of an industrial dispute. The Industrial Tribunal by reason of an award set aside the said order of dismissal with full back-wages and compensation. On or about 1.5.1991, the appellant was permitted to join his duties but back-wages were not paid. He was, however, retrenched from services within one month from his joining i.e. 30.5.1991. A sum of Rs.9,030/- was paid as retrenchment compensation which the appellant is said to have received under protest. A trade union known as Bengal Motion Pictures Employees Union took up the cause of the Appellant, inter alia, on the ground of contravention of the legal requirements as contained in Section 25-G of the Industrial Disputes Act, 1947 as also insufficiency of the amount of compensation paid to the appellant in terms of Section 25-F(b) thereof. An industrial dispute as regard his retrenchment was raised before the Assistant Labour Commissioner which failed; whereupon the Industrial Tribunal was approached by the Appellant. In the meanwhile, the appellant had also initiated a proceeding under Section 33-C(2) of the Industrial Disputes Act, 1947 which ended in an amicable settlement in terms whereof the Appellant allegedly agreed to receive a sum of Rs.39,000/- as full and final settlement. He had accepted a cheque for the aforementioned sum of Rs.9,030/- issued by the management allegedly as part payment of his compensation of Rs.39,000/- which was deducted from the aforementioned settled amount of Rs.39,000/-. The Industrial Tribunal by its order dated 28.12.1995 held :

"Having regard to the facts and circumstances and in consideration of the evidence and record I hold that the retrenchment of the concerned workman was illegal and as such he should be deemed to be in continuous service with all benefits. The issues are answered accordingly."

A writ petition was filed by the respondent herein questioning the correctness or otherwise of the said award before the Calcutta High Court which was marked as Writ Petition No.1872 of 1996. The said writ petition was dismissed by a learned Single Judge, holding :

"Thus, regarding (sic regard) being had the principles of law discussed above in the light of the fact and circumstances of the instant case, I have no hesitation to hold that the impugned retrenchment was effected without complying with the mandatory requirements of Section 25F(b) of the Industrial Disputes Act and that the Tribunal was well within its jurisdiction in recoding a finding to that effect. Such a retrenchment must, accordingly, be held to be void ab intio and consequently, the respondent must be deemed to be in service and entitled to all consequential benefits. I, therefore, find no justification for quashing the impugned Award. In such view of the matter, the petitioner is not entitled to any relief and the instant writ application fails. The writ application is, accordingly, dismissed without, however, any order as to costs."

The respondent herein preferred an appeal thereagainst before a Division Bench of the Calcutta High Court which was marked as Appeal No.434 of 1996. A plea as regard substantial compliance of the requirements of law on the part of the workman was raised for the first time. Accepting the said plea, the Division Bench by reason of the impugned judgment allowed the appeal holding :

"So, the fact remains that the employer bona fidely paid the said amount of Rs.9030.30 along with the notice of retrenchment and the workman duly accepted the said amount. Hence, the plea of waiver in a case of this nature as argued by the ld. Advocate for the appellant can be upheld. Above all, when the employer bona fidely paid the major part of retrenchment compensation after a bona fide calculation, not opposed by anybody till the argument before the Tribunal, we fail to understand as to why the employer can be punished by ordering him to pay the entire backwages with the privilege of immediate reinstatement as ordered in the award. Following the principle adopted by the Apex Court in 1980 (II) LLJ 124 (SC) (Workman of Sudder Workshop of Jhorhat Tea Company \026 vs. The Management), we deem, it proper not to punish the employer as above only for an alleged shortfall of Rs.552..87 which was not pleaded in the written statement of the workman. We do not think that non-payment of Rs.552.87 as calculated in the award at the argument stage only, can make the retrenchment order nugatory. On the other hand, we take the view, following the principle adopted in Workmen of Coimbatore Pioneer 'B' Ltd. (supra) that for non non-payment of the short compensation of Rs.552.87, a substantial amount can be paid as compensation.

Accordingly, in setting aside the award and allowing this appeal, the appellant is directed to pay a sum of Rs.552.87 (rounded off to Rs.553) along with a compensation of Rs.6634.50 (equivalent to wages for six months) to the workman \026 the respondent no.4 within six weeks."

The workman, thus, is in appeal before us from the said judgment. The respondent management has not appeared despite service of notice.

Mr. Bijan Kumar Ghosh, learned counsel appearing on behalf of the appellant, would submit that the Division Bench of the High Court committed a manifest error in passing the impugned judgment and order insofar as it failed to take into consideration that Section 25-F(b) of the Industrial Disputes Act is imperative in character. Keeping in view the fact that admittedly the said legal requirements thereof had not been complied with and furthermore plea of waiver having not been raised before the Tribunal or before the learned Single Judge, it was impermissible for the Division Bench to pass the impugned judgment.

We may usefully refer to the submissions made on behalf of the respondent \026 management in writ proceedings as had been noticed by the learned Single Judge of the High Court in his judgment:

"Mr. Arunava Ghosh, ld. Advocate appearing for the petitioner company, raised the following points.

First, it was urged that the Tribunal fell into error of law in coming to a conclusion that there was non-compliance of requirements of Sec.25-F(b) in as much as such a plea was never put forward on behalf of the workman in his written statement nor was it substantiated by any evidence. Secondly it was contended that when the Workman did neither raised any plea of inadequacy of the retrenchment compensation nor adduce any evidence in this regard, the Tribunal should not have embarked upon an inquiry for the purpose of ascertaining whether the compensation money was adequate or not. Thirdly, it was contended that as there was neither any pleading nor any evidence regarding the shortfall in the payment of retrenchment compensation, the Tribunal could not go into that question at the stage of argument. Fourthly, it was urged that omission to maintain seniority list under Rule 77A does not render the retrenchment illegal or bad in law, particularly when there was clear admission on the part of the workman in his evidence that he was the last person to be employed in the category of workman to which he belonged and as such the Tribunal's finding, if there be any, regarding the observance of the principles of 'last come first go' as contemplated under Section 25G was perverse and was not based on evidence. Mr. Ghosh cited a number of decisions in support of his contentions."

It is, therefore, evident that the question of a bona fide action on the part of the employer or waiver on the part of the appellant herein had not been raised. The respondent before the learned Single Judge was although very emphatic as regard compliance of requirements of Section 25-F(b) of the Industrial Disputes Act but no contention as regard the plea of waiver was raised. Even the question of substantial compliance or bonafide action on the part of the said respondent was not raised.

The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

A right can be waived by the party for whose benefit certain

requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

In Bank of India and Others etc. vs. O.P. Swarnakar and Others etc. [(2003) 2 SCC 721], it was noticed :

"115.The Scheme is contractual in nature. The contractual right derived by the employees concerned, therefore, could be waived. The employees concerned having accepted a part of the benefit could not be permitted to approbate and reprobate nor can they be permitted to resile from their earlier stand."

It is neither in doubt nor in dispute that the provision of Section 25-F(b) is imperative in character. The provision postulates the fulfillment of the following three conditions :

(i) One month's notice in writing indicating the reasons for retrenchment or wages in lieu of such notice;
(ii) Payment of compensation equivalent to fifteen days, average pay for every completed year of continuous service or any part thereof in excess of six months; and
(iii) Notice to the appropriate Government in the prescribed manner.

The requirement to comply with the provision of Section 25-F(b) has been held to be mandatory before retrenchment of a workman is given effect to. In the event of any contravention of the said mandatory requirement, the retrenchment would be rendered void ab initio.

In Workmen of Sudder Workshop of Jorehaut Tea Co. Ltd. vs. The Management [(1980) 2 L.L.J. 124], whereupon reliance had been placed by the Division Bench, this Court held :

"\005That apart, if there be non-compliance with S. 25F, the law is plain that the retrenchment is bad\005."

In that case, however, compensation had been computed on the basis of wages previously paid and not on the basis of the Wage Board Award. The retrenchment took place on 5.11.1986. No plea as regard non-payment of compensation calculated on the basis thereof was taken before the Tribunal. Even the award did not proceed on that basis.

The new plea based on the facts was not permitted to be raised by the High Court. This Court noticed that the Wage Board Award was subsequent to the retrenchment; although it was applied retrospectively i.e. with effect from 1.4.1966. In that situation, it was observed :

"\005In the absence of any basis for this new plea we are unable to reopen an ancient matter of 1966 and, agreeing with the High Court, dismiss the appeal. But the 16 workmen, being eligible admittedly for the Wage Board scale, will be paid the difference for the period between 1.4.1966 to 5.11.1966."

We may furthermore notice that the learned Industrial Tribunal interfered with the retrenchment of the appellant not only on the ground of

non-compliance of the provisions of Section 25-F(b) of the Industrial Disputes Act also on the ground of contravention of Rule 77-A of the West Bengal Industrial Disputes Rules, stating :

"Moreover the company has not shown by means of a seniority lists that the concerned workman was the junior most amongst the same category of workers. When there is such a controversy and when no such lists was maintained by the company although maintaining of such lists can be said to be a compulsory compliance of the rules framed under the Industrial Disputes Act on the part of the Company (Vide 77A of the West Bengal Industrial Disputes Rules) it must be held that the retrenchment was illegal. Mere evidence to show the seniority of the workman of a particular category is not enough to justify a retrenchment of a workman on the ground of surplus hand."

After a detailed reference to the evidence adduced on behalf of the Management, the Tribunal held :

"I do not understand why the company keeps lacuna in observing the legal procedure provided by the rules framed under the statute to maintain peace and harmony. In the industry particularly which are very much formal and not at all difficult to be maintained and can be done with least effort. This has been very much necessary and essential in this case in its peculiar background when the concerned workman is going to be retrenched within a very short period after his reinstatement with full back wages and incidental benefits by virtue of an award by the Seventh Industrial Tribunal in an earlier reference Case No.1647-I.R./IR/11L-24/85 corresponding to Case NO.VIII-152/86 after he was dismissed from service. The Company should have maintained the seniority lists as required under the rule to show from impartial attitude towards the workman in the category to which Krishna Bahadur belongs. That having not been done the action of the Company suffers from informative (sic for infirmities) and it deserves to be nullified."

It would appear from the judgment of the learned Single Judge dated 25.9.1996 in Writ Petition No.1872 of 1996 that correctness or otherwise of the finding of the Industrial Tribunal as regard non-compliance of the provisions of Rule 77A of the West Bengal Industrial Disputes Rules had been questioned. The said contention must be held to have negatived by the learned Single Judge also keeping in view the provisions analogous to Explanation-V appended to Section 11 of the Code of Civil Procedure. The Division Bench of the High Court unfortunately did not address itself to the said question at all.

For the reasons aforementioned, the impugned judgment of the Division Bench cannot be upheld. It is set aside accordingly and the judgment of the learned Single Judge upholding the award passed by the Industrial Tribunal is restored. The appeal is allowed. In the facts and circumstances of the case, there shall be no order as to costs.