Karnani Properties Ltd.

Vs

State of West Bengal and Others

Civil Appeal No. 2080(L) of 1977

(S. C. Agrawal, S. C. Agarwal JJ)

22.08.1990

JUDGMENT

S. C. AGRAWAL, J. -

1. This appeal, by certificate granted under Article 133 (1) (a) of the Constitution, is directed against judgment and order of the High Court of Judicature at Calcutta dated December 20, 1974, in Appeal No. 104 of 1972.

2. Karnani Properties Ltd., appellant herein, is a company incorporated under the Companies Act, 1913. It owns several mansion houses known as Karnani Mansions at Park Street, Calcutta. There are about 300 flats in these mansions which have been let out to tenants. The appellant provides various facilities to its tenants in these flats, e.g. free supply of electricity, washing and cleaning of floors and lavatories, lift service, electric repairs and replacing, sanitary repairs and replacing, etc. and for that purpose the appellant employs over 50 persons, namely sweepers, plumbers, malis, lift-man, durwans, pumpmen, electric and other mistries, bill collectors and bearers, etc. in connection with these properties. A dispute arose between the employees of the appellant represented by Barabazar Zamandar Sangh (hereinafter referred to as 'the union') and the appellant with regard to wages, scales of pay, dearness allowance and gratuity. The Government of West Bengal, by order dated July 29, 1967, referred for adjudication to the 6th Industrial Tribunal, West Bengal, the industrial dispute relating to :

(a) Fixation of grades and scales of pay of the different categories of workmen;

(b) Dearness allowance; and

(c) Gratuity.

3. The appellant raised preliminary objections with regard to the validity of the reference before the Industrial Tribunal on the ground that the alleged dispute is not an industrial dispute and that the reference is barred by Section 19 of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') for the reason that in 1960 there was an award on the basis of settlement made with the union, and the said award has not been terminated by either of the parties and is still binding on the parties. The Industrial Tribunal, by its order dated August 24, 1968, overruled the said preliminary objections raised by the appellant and thereafter the Tribunal gave the award dated March 3, 1969. The Industrial Tribunal expressed its inability to fix any grades and scales of pay of the workmen for the reason that the evidence adduced by the union on this issue was scrappy, none too convincing and not very much acceptable. As regards dearness allowance the Industrial Tribunal

held that since November 1964 the price index of working class in Calcutta has considerably gone up from 460 to 750 points (as was in October 1968), i.e. roughly by 300 points. The Industrial Tribunal awarded enhanced DA at the rate of Rs. 60 per month (Rs. 20 per 100 points) to the sweeper, bearer, helper, mali, mazdoor, lift-man, head sweeper, durwan, pumpman and assistant electric mistry. DA at the rate of Rs. 54 per month (Rs. 18 per 100 points) was awarded to the plumber, raj mistry, head durwan, electric mistry and driver and bill collector. It was also directed that the said rates of DA would remain in force as long as the price index will remain between 600 to 800 points and if the price index goes up beyond 800 points the rate of DA will be revised according to the rates mentioned and if it goes below 600 points it also may be revised accordingly. With regard to gratuity the Industrial Tribunal pointed out that under the existing scheme gratuity is payable to every workmen after completion of three years continued, faithful and satisfactory service at the rate of 10 days consolidated salary for every completed year of service since the date of appointment. The Industrial Tribunal held that three years ' period was too short to make a workman entitled to gratuity and that "satisfactory" and "faithful" are vague terms. The Industrial Tribunal framed a scheme of gratuity whereunder after completion of six years of continuous service with the appellant every workmen on retirement or on death will get an amount of gratuity at the rate of 10 days' consolidated salary for every completed year of service since the date of appointment and a workman who resigns voluntarily would also be entitled to get the gratuity at the same rate provided he completed 10 years of continuous service. The Industrial Tribunal also directed that if the termination of service is the result of misconduct which caused financial loss to the employer that loss would first be compensated from the gratuity payable to employee and the balance, if any, should be paid to him. It was also directed that the services of the workmen prior to 1950 would not be taken into consideration for the purpose of payment of gratuity.

4. The appellant filed a writ petition in the High Court under Article 226 of the Constitution wherein the order dated August 24, 1968 and the award dated March 7, 1969 given by the Industrial Tribunal were challenged. The said writ petition was heard by a learned Single Judge, who by his judgment dated March 17, and 20, 1972, dismissed the said writ petition. Before the learned Single Judge it was urged that the award made by the Industrial Tribunal was without jurisdiction for the reason that the appellant does not carry on an "industry" as defined in the Act and that the dispute between the appellant and the workmen cannot come within the ambit of industrial dispute, and also for the reason that there was a previous award dated March 3, 1960 which has not been terminated and was still subsisting and in view of the said award the present reference was invalid and further that no dispute was raised between the workmen and the appellant prior to the reference before the Industrial Tribunal and as such the Tribunal has no jurisdiction to deal with the matter. The learned Single Judge rejected all these objections. He held that in view of the nature of the activity carried on the appellant does carry on an industry within the meaning of the Act and the dispute between the appellant and its workmen come within the ambit of the Act. As regards the award dated March 3, 1960 the learned Single Judge found that the workmen concerned had given notice to terminate the previous award and as such the existence of previous award would not preclude a fresh reference. The learned Single Judge observed that no specific plea was raised by the appellant before the Industrial Tribunal challenging the order and the reference on the ground that there was no such dispute prior to the reference between the workmen and the appellant about the questions referred to in the order of reference and that whether there was any demand or not is a question of fact. The learned Single Judge, however, held that from the evidence it is clear that the workmen concerned has demanded before the order of reference in their charter of demands dearness allowance and provident fund and gratuity and as such there was a dispute between the workmen concerned and the employees before the order of reference was made. The award was challenged on

merits before the learned Single Judge on the ground that the Industrial Tribunal did not consider the appellant's capacity to pay in granting dearness allowance to the workmen concerned. The learned Single Judge rejected the said contention on the view that reading the award as a whole it could not be contended that the Tribunal did not take into consideration either the capacity to pay or the level of the cost of living.

5. The appellant filed an appeal against the judgment of the learned Single Judge which was dismissed by a Division Bench of the High Court by its judgment and order dated December 20, 1974. The learned Judges agreed with the decision of the learned Single Judge that the appellant is carrying on an industry under Section 2(j) of the Act. Before the Division Bench it was contended on behalf of the appellant that the earlier award was made on the basis of a settlement between the two parties and that since the said award was in a nature of settlement it could only be terminated in accordance with the provisions of Section 19(2) of the Act relating to termination of a settlement. The learned Judges of the Division Bench held that the said contention was not raised by the appellant before the Tribunal and also before the learned Single Judge and it could not be raised for the first time at the stage of appeal and that it cannot be considered to be a pure question of law because for a settlement under Section 2(p) of the Act the necessary requirements of settlement as laid down in the statute and the rules have to be satisfied and whether the necessary requirements have been satisfied or not will involve investigation into facts. The learned Judges were, however, of the view that even if the said plea was allowed to be raised it could not be accepted inasmuch as the materials on record do not establish that the requirement of "settlement" as defined in Section 2(p) of the Act are satisfied in respect of the earlier award. It was held that an award does not necessarily cease to be an award merely because the same was made on the basis of a settlement arrived at between the parties and that the earlier award was an "award" within the meaning of Section 2(b) of the Act and was not a settlement as contemplated by Section 2(p) of the Act. With regard to the termination of the earlier award, the learned Judges have held that in the facts and circumstances of the case it had been validly terminated in accordance with Section 19(6) as well as Section 19(2) of the Act. Before the Division Bench it was urged on behalf of the appellant that the Tribunal has not considered the financial capacity of the appellant while making the award with regard to dearness allowance and reliance was placed on certain documents which were filed before the Division Bench. The learned Judges held that in considering the findings arrived at by the Tribunal the court should generally consider the materials which were made available to the Tribunal and fresh or further materials which were not before the Tribunal should not be allowed to be placed before the court in a writ petition for determining whether the findings of the Tribunal are justified or not and that in the instant case no proper grounds have been made out for not producing the materials which were then available at the time of the hearing before the Tribunal and why the said documents could not be produced even before the learned Single Judge. The learned Judges further held that even if the said documents are taken into consideration the same would be of no particular assistance to the appellant inasmuch as the said documents consist mainly of balance sheets and assessment orders, and that the legal position is settled that while computing gross profits for the purpose of revising wage structure and dearness allowance the provision made for taxation, depreciation and development rebate cannot be deducted and the provisions of the Companies Act contained in Sections 205 and 211 and the principles of accountancy involved in preparation of profit and loss accounts have no relevance or bearing while considering the revision of wages and dearness allowance. The learned Judges have held that on the materials on record the Tribunal was justified in making the award and that the materials on record before the Tribunal establish that the amount ordered by the Tribunal was not beyond the financial capacity of the appellant.

6. Aggrieved by the decision of the Division Bench of the High Court the appellant has filed this

appeal after obtaining leave to appeal from the High Court under Article 133(1)(a) of the Constitution.

7. Shri R. N. Nath, the learned counsel for the appellant, has submitted that the High Court was in error in holding that the appellant is an industry under Section 2(j) of the Act. Shri. Nath has submitted that in arriving at the said conclusion the learned Judges of the Division Bench of the High Court have relied upon the decision of this Court in Management of Safdarjung Hospital v. Kuldip Singh Sethi ((1970) 1 SCC 735 : (1971) 1 SCR 177), which decision was overruled by this Court in Bangalore Water Supply and Sewerage Board v. R. Rajappa ((1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207). The submission of Shri. Nath is that in accordance with the principles laid down in Bangalore Water Supply and Sewerage Board case ((1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207) the appellant cannot be taken to be carrying on an "industry" under Section 2(j) of the Act. In our opinion there is no substance in this contention. It is no doubt true that the learned Judges of the Division Bench of the High Court have placed reliance on the decision of this Court in the Safdarjung Hospital case ((1970) 1 SCC 735 : (1971) 1 SCR 177) for holding that the appellant is carrying on an industry under Section 2(J) of the Act and the decision in Safdarjung Hospital case ((1970) 1 SCC 735 : (1971) 1 SCR 177) has been overruled by a larger bench of this Court in Bangalore Water Supply and Sewarage case (1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207). But this does not mean that the view of the High Court that the appellant is carrying on an industry under Section 2(j) of the Act is erroneous. In Safdarjung Hospital case ((1970) 1 SCC 735 : (1971) 1 SCR 177), a six member bench of this Court had overruled the earlier decision in State of Bombay v. Hospital Mazdoor Sabha ((1960) 2 SCR 866 : AIR 1960 SC 610 : (1960) 1 LLJ 251) and gave a restricted interpretation to the definition of "industry" contained in Section 2(j) of the Act. Bangalore Water Supply and Sewerage Board case ((1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207) (decided by a seven member bench of this Court) by overruling the decision in Safdarjung Hospital case ((1970) 1 SCC 735 : (1971) 1 SCR 177), has restored the Hospital Mazdoor Sabha case ((1960) 2 SCR 866 : AIR 1960 SC 610 : (1960) 1 LLJ 251). In other words, the effect of decision in Bangalore Water Supply and Sewerage Board case ((1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207) is that the expression "industry" as defined in Section 2(j) has to be given the meaning assigned to it by this Court in the earlier decisions in D. N. Banerji v. P. R. Mukherjee (1953 SCR 302 : AIR 1953 SC 58 : (1953) 1 LLJ 195), Corporation of the City of Nagpur v. Employees ((1960) 2 SCR 942 : AIR 1960 SC 675 : (1960) 1 LLJ 523), and the Hospital Mazdoor Sabha case ((1960) 2 SCR 866 : AIR 1960 SC 610 : (1960) 1 LLJ 251). Krishna Iyer, J., who delivered the main judgment in Bangalore Water Supply and Sewerage Board case ((1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207), has summed up the principles which are decisive, positively and negatively, of the identity of "industry" under the Act. The first principle formulated by the learned Judge is as under : (SSC p. 282, para 140)

> "I. 'Industry', as defined in Section 2(j) and explained in Banerji (1953 SCR 302 : AIR 1953 SC 58 : (1953) 1 LLJ 195) has a wide import.
>
> (a) Where (i) systematic activity, (ii) organised by co-operation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g. making, on a large scale prasad or food), prima facie, there is an 'industry' in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organisation is a trade or business it does not cease to be one because of philanthropy animating the undertaking."

8. If the said principles are applied to the facts of the present case and there can be no doubt that the activity carried on by the appellant satisfies the requirements of the definition of "industry" contained in Section 2(j) of the Act. In this regard, it may be mentioned that the learned Judges of the Division Bench of the High Court have found as under :

(i) The Memorandum of Association of the appellant company indicate that the principal object for which the appellant company was incorporated is to acquire by purchase, transfer, assignment or otherwise lands, buildings and landed properties of all description and in particular to acquire from the Karnani Industrial Bank Ltd., the immovable properties now belonging to the said Bank and to improve, manage and develop the properties and to let out the same on lease or otherwise dispose of the same.

(ii) The principal business of the company is to deal with the real property and it is a real estate company

(iii) The income which the appellant derives is not from mere letting out the properties to the tenants and that the tenants pay not only for mere occupation of the property but also for enjoyment of the various services which are rendered by the appellant to the tenants and to which services the tenants are entitled as a matter of right for the occupation of the premises.

(iv) The services which are rendered to the tenants and about which there does not appear to be any dispute are :

(a) elaborate arrangements for supply of water;

(b) free supply of electricity;

(c) washing and cleaning of floors and lavatories;

(d) lift services;

(e) electric repairs and replacing; and

(f) sanitary repairs and replacing etc.

(v) For offering those services to the tenants, the appellant has employed a number of workmen and these services which undoubtedly confer material benefits on the tenants and constitute material services, are rendered by the employees.

(vi) The employees of the appellant company are engaged in their respective calling or employment to do their work in rendering the services.

(vii) Activity carried on by the appellant company is undoubtedly not casual and is distinctly systematic.

(viii) The work for which labour of workmen is required is clearly productive of the services to which the tenants are entitled and which also form a part of the consideration for the payments made by the tenants.

(ix) The appellant carries on its business with a view to profits and it makes profits and declares dividends out of the profits earned.

9. From the aforesaid findings recorded by the High Court, with which we find no reason to disagree, it is evident that the activity carried on by the appellant falls within the ambit of the expression "industry" defined in Section 2(j) of the Act as construed by this Court in Bangalore Water Supply and Sewerage Board case ((1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207). The award of the Industrial Tribunal cannot, therefore, be assailed on the basis that the appellant is not carrying on an industry under the Act.

10. Shri. Nath has next contended that the Industrial Tribunal was not competent to make the award as the earlier award dated March 3, 1960, had not been validly terminated. He has urged that the earlier award was in the nature of a settlement under Section 2(p) of the Act and it could be terminated only in accordance with Section 19(2) of the Act. Shri. Nath has pointed out that for terminating a settlement under Section 19(2) a written notice is necessary whereas for termination of an award under Section 19(6) of the Act a written notice is not required and a notice is sufficient.

11. In our opinion this contention does not require consideration in view of the finding recorded by the learned Judges of Division Bench of the High Court that the letter dated November 24, 1966 was a notice under Section 19(6) as well as under Section 19(2) of the Act. It has been found that the said letter of the union which was addressed to the Labour Commissioner was sent to the appellant company and that in the said letter there is a clear intimation of the intention of the employees to terminate the award and from the letter of the appellant dated February 13, 1967 it appears that the appellant had become aware of the intention of the union to terminate the award and that the order of reference was made on July 29, 1967, long after the expiry of the period of two months. It is not the requirement of Section 19(2) of the Act that there should be a formal notice terminating a settlement and notice can be inferred from the correspondence between the parties (See : Indian Link Chain Manufacturers Ltd. v. Their Workmen ((1971) 2 SCC 759 : (1972) 1 SCR 790)). In the aforesaid facts and circumstances the High Court was justified in holding that the award dated March 3, 1960 had been validly terminated before the passing of the order of reference.

12. Shri. Nath has urged that there has been non-compliance of the provisions of Section 19(7) of the Act which lays down that no notice given under sub-section (2) or sub-section (6) shall have effect unless it is given by a party representing the majority of the persons bound by the settlement or award as the case may be. This question has been raised by the appellant for the first time in this Court. It involves an inquiry into questions of fact which cannot be made at this stage. The same, therefore, cannot be allowed to be agitated.

13. Shri. Nath has lastly urged that the Industrial Tribunal was in error in making the award in

relation to dearness allowance without examining the capacity of the appellant to pay the additional amount and that the High Court should have remanded the matter to the Tribunal for considering this issue in the light of the documents which were submitted by the appellant before the High Court. We find no substance in this contention. The High Court has rightly held that in considering the finding arrived at by the Tribunal the High Court while exercising its jurisdiction under Article 226 of the Constitution should generally consider the materials which were made available to the Tribunal and fresh or further materials which were not before the Tribunal should not normally be allowed to be placed before the court. The appellant has not been able to show why the said documents were not produced before the Tribunal. It is not the case of the appellant that the Tribunal had precluded the appellant from producing these documents. In these circumstances we find no justification for accepting the plea of the learned counsel for the appellant for reconsideration of the award of the Tribunal in the light of the documents submitted by the appellant during the pendency of the appeal before the High Court.

14. The appeal is, therefore, dismissed with costs.

15. During the pendency of this appeal, the appellant has made a deposit before the Tribunal. The respondent union will be entitled to withdraw the said amount along with the interest that has accrued on it.

</html