The Sindhu Resettlement Corporation Ltd.

Vs

The Industrial Tribunal of Gujarat & Ors.

Civil Appeal No. 656 of 1966

(M. Hidayatullah, V. Bhargava, C. A. Vaidialingam JJ)

13.09.1967

JUDGMENT

BHARGAVA, J. -

R. S. Ambwaney, respondent No. 3, was employed by the Sindhu Resettlement Corporation Ltd., the appellant, as an Accounts Clerk at Gandhidham on 13th December, 1950 in the pay-scale of Rs. 150 - 10 - 250 on a salary of Rs. 200 Plus 2 per cent. as site allowance. This site allowance was discontinued in March, 1952. In the year 1953, the Government of India decided to develop on Kandla as a port and a subsidiary company was formed by the appellant under the name of Makenzies Heinrich Bulzer (India) Ltd. in which one of the principle shareholders was the appellant. This Company later came to be known as Sindhu Hotchief (India) Ltd. For convenience, both Makenzies Heinrich Bulzer (India) Ltd., and Sindhu Hotchief (India) Ltd. shall hereinafter be referred to as "Sindhu Hotchief". This subsidiary Company, Sindhu Hotchief, wanted some trained employees and, amongst others, the service of the respondent No. 3 were placed at its disposal by the appellant. The case of respondent No. 3 was that he was told orally by the officers of the appellant on 2nd September, 1953 that he was to work in the subsidiary company. Respondent No. 3 was appointed in Sindhu Hotchief by its order dated 5th September, 1953 on a salary of Rs. 240 p.m. as an Accounts Clerk on the conditions of service laid down in that order. It appears that, just about this time, the father of respondent No. 3 died and he was granted leave by the appellant for the period from 2nd September to 17th September, 1953. With effect from 18th September 1953, his services were placed at the disposal of Sindhu Hotchief and an order to that effect was issued in writing on behalf of the appellant on 24th September, 1953. Respondent No. 3 worked with Sindhu Hotchief up to 20th February, 1958 when his services were terminated after payment of retrenchment compensation and other dues payable to him. On 21st February, 1958, respondent No. 3 went to the office of the appellant, reported himself for duty and requested that he might be given posting orders in the appellant Corporation. The appellant informed respondent No. 3 of its inability to re-employ him on the ground that the post, which he had been occupying in 1953, had been permanently filed up. Thereupon, respondent No. 3 demanded retrenchment compensation from the appellant also. this was also refused. His case was taken up by Mazdoor Mahajan Sangh, Gandhidham, Kutch, respondent No. 2. The Secretary of respondent No. 2 also wrote a letter to the management of the appellant asking for payment of retrenchment compensation to respondent No. 3 on the ground that the appellant had refused to take him back in its employment. It seems that, thereafter, there were some conciliation proceeding and, subsequently, on the report of the Conciliation Officer, the Government of the State of Gujarat, by its notification dated 15th November, 1960, referred the dispute to the Industrial Tribunal, Gujarat, for adjudication. The matter referred for adjudication was described in the notification as follows :-

> "Demand No. 1 - Shri R. S. Ambwaney should be reinstated in the service of M/s. Sindhu Resettlement Corporation Ltd., and he should be paid his wages from 21st February, 1958."

The Tribunal, after hearing the parties, gave its Award on 10th August 1961, directing reinstatement of respondent No. 3 and payment of back wages from 21st February, 1958. The appellant challenged this award before the High Court of Gujarat by a petition under Articles 226 and 227 of the Constitution, but the petition was dismissed. Consequently, the appellant has come up to this Court in this appeal by special leave.

In this appeal, three points have been urged on behalf of the appellant to challenge the orders of the Industrial Tribunal and the High Court. The points are :

> (1) that respondent No. 3, having been given permanent appointment in Sindhu Hotchief and having obtained retrenchment compensation from that Company, could not claim that he was still holding a post in the appellant Corporation and could not, therefore, claim reinstatement;
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> (2) that the dispute that was raised by respondent No. 3 as well as respondent No. 2 with the management of the appellant was confined to compensation for retrenchment and did not relate to the validity of the retrenchment of reinstatement, so that the Government of Gujarat had no jurisdiction to refer the dispute to the Industrial Tribunal which it did; and
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> (3) that, in any case, since the validity of the retrenchment of respondent No. 3 by the appellant was not challenged, the Tribunal committed a manifest error in directing reinstatement instead of awarding retrenchment compensation.

After hearing learned counsel for parties, we have come to the conclusion that the first the first two grounds urged on behalf of the appellant must be accepted, while the third does not arise.

The case put forward on behalf of the respondents before the Industrial Tribunal was that respondent No. 3 was a permanent employee of the appellant and, when he joined the service of Sindhu Hotchief in the year 1953, he only went there on deputation or transfer, so that the continued to hold a lien on his permanent post in the appellant Corporation. Two facts, no doubt, support this plea. One is that Sindhu Hotchief was only a Subsidiary Company of the appellant, and the other is that, in its order dated 24th September, 1953, the appellant merely stated that, with effect from the 18th September, 1953, the services of respondent No. 3 were placed at the disposal of Sindhu Hotchief. No specific order was passed terminating his services in the appellant Corporation. Though this circumstance would raise a presumption that respondent No. 3 did not cease to be an employee of the appellant when this order was issued on 24th September, 1953, this presumption is rebutted by two circumstances. The first is that respondent No. 3 was appointed in Sindhu Hotchief under the order dated 5th September, 1953, which laid down that in that Company he would be on a probation for a period of three months in the first instance. The probationary period may have to be further extended by any period upto three months. The confirmation of his appointment would be considered at the end of his probationary period and would depend on the efficiency and utility of his services to Company. Thereafter, respondent No. 3 continued to serve in that Company until 20th February, 1958, i.e. for a period of about 4 1/2 years. Clearly, he must have been confirmed in his appointment in that company. Once he was confirmed in Sindhu Hotchief, he could obviously

not continue to be an employee of the appellant-corporation simultaneously. The High Court did not attach any value to this order of appointment dated 5th September, 1953, issued by Sindhu Hotchief, on the ground that no evidence was tendered before the Tribunal to show that this order was actually served on respondent No. 3. In proceeding on this basis, the High Court clearly fell into an error, because, in this case, when the adjudication of the industrial dispute was taken up by the Tribunal, all the parties contented themselves with filing documentary evidence and no oral evidence was given by any party. At no stage was it challenged that the documents filed could not be taken into account until proved formally in the manner acquired to be proved in a regular civil proceeding in accordance with the provisions of the Indian Evidence Act. This order of Sindhu Hotchief dated 5th September, 1953, was addressed to respondent No. 3 himself and, when there was no challenge on behalf of respondent No. 3 that he did not receive this order, there was no justification for the High Court to hold that this order had not been served on him. In proceedings before the Industrial Tribunal, strict proof of documents in accordance with the provisions of the Indian Evidence Act is not required. Parties having agreed to base their case on the documents filed, this order issued to respondent No. 3 could not be ignored on the ground that no oral evidence had been tendered to prove that respondent No. 3 actually received it. It was in accordance with the conditions of service laid down in this order that respondent No. 3 was appointed in Sindhu Hotchief and, by joining service there and continuing in that service for 4 1/2 years, respondent No. 3 clearly agreed to work in that Company on these conditions. As we have indicated earlier, one of the conditions was that he would be confirmed at the end of the probationary period and, once he was confirmed, he would become a permanent employee of Sindhu Hotchief and would cease to be the employee of the appellant. Thus, though respondent No. 3 did not cease to be an employee of the appellant. Thus, though respondent No. 3 did not cease to be an employee of the appellant when his services were first placed at the disposal of Sindhu Hotchief by the appellant with effect from 18th September, 1953, he ceased to be an employee of the appellant later when he was confirmed in Sindhu Hotchief. The other circumstance that bears out this conclusion is that, at the time of termination of the employment of respondent No. 3 in Sindhu Hotchief, he was given retrenchment compensation which he accepted. In case he had continued to be in the service of the appellant, he would not have been entitled to retrenchment compensation from Sindhu Hotchief and, even if Sindhu Hotchief had any legal liability to contribute towards his retrenchment compensation which might have become ultimately payable to him on his retrenchment from the appellant Corpn., that amount would have been paid by Sindhu Hotchief to the appellant and not to respondents No. 3 himself. It appears that respondent No. 3 very well knew that he had become a permanent employee of Sindhu Hotchief and, consequently, on retrenchment, he accepted the compensation but, thereafter, he seems to have decided to assert his claim to continuance of employment under the appellant. This claim also, however, very half hearted. No doubt, at the first stage on 21st February, 1958, he demanded reinstatement in appellant Corpn., but very soon thereafter, when that requests was refused, he demanded retrenchment compensation and one month' salary in lieu of notice. This demand was put forward by him in his letter dated 7th March, 1959, wherein he stated that, if the appellant refused to recognize Sindhu Hotchief as a sister concern and did not take him back in its organisation, where he had a genuine claim of service, the appellant should please pay off his legal claims in respect of retrenchment compensation and one month's pay in lieu of notice. This position taken up by respondents No. 3 himself thus shows that he was aware that his services under the appellant Corpn. had already come to an end. Learned counsel appearing for the respondents urged that we should not hold that the services of respondent No. 3 in the appellant Corpn. had come to an end when he was absorbed in Sindhu Hotchief, because no retrenchment compensation was given to respondent No. 3 by the appellant Corporation at the stage when his services ended in that Corporation. The submission ignores that circumstance that, when respondents No. 3 went to Sindhu Hotchief, he did

so willingly. There was no compulsion on him to go to that Company. His terms of series with the appellant did not entitle the appellant to transfer his services to the Subsidiary Company, and the mere officer order placing his services at the disposal of Sindhu Hotchief could not have been made effective unless respondent No. 3 also voluntarily agreed to take service in Sindhu Hotchief. At no stage was it asserted on behalf of respondent No. 3 that he did not go voluntarily or with his consent to Sindhu Hotchief. In case he took the service in Sindhu Hotchief and accepted permanent appointment there willingly, it cannot be held that his services were retrenched by the appellant Corporation. He was not entitled to any retrenchment compensation when he left the service of the appellant willingly. The non-payment of retrenchment compensation by the appellant at that stage does not, therefore, indicate that the services of respondent No. 3 with the appellant had not come to an end. On the facts of this case, it is clear that the Tribunal committed an error in draw in the legal inference that respondent No. 3 continued to be in the service of the appellant Corporation even after he had received permanent appointment in Sindhu Hotchief. On a correct inference, it is clear that the services of respondent No. 3 under the appellant Corporation had come to an end and, when he was retrenched by Sindhu Hotchief, he could not claim reinstatement in the appellant Corporation. In this connection, Mr. Gopala Krishnan, learned counsel for the respondent, relied on some remarks of the House of Lords in Nokes v. Doncaster Amalgamated Collieries, Ltd. ([1940] A.C. 1014), where it was held :

Counsel for the appellant argued that a contractual right to personal service was a personal right of the employer and was incapable of being transferred by him to any one else, and that a duty to serve a specific master could not be part of the property or rights of that master capable of becoming, by transfer, a duty to serve someone else. It is, of course indisputable that (apart from statutory provision to the contrary) the benefit of a contract entered into by A to render personal service to X cannot be transferred by X to Y without A's consent, which is the same thing as saying that, in order to produce the desired result, the old contract between A and X would have to be terminated by notice or by mutual consent and new contract of service entered into by agreement between A and Y."

This principle laid down by the House of Lords is not applicable to the facts of the case before us, because we have already held that respondent No. 3 joined the service of Sindhu Hotchief willingly and with his consent, and it was not a case where he was transferred to Sindhu Hotchief by the appellant without his consent. This case does not, help the respondents.

The second ground urged on behalf of the appellant is that, in this case, no dispute relating to reinstatement was actually raised either by respondent No. 2 or respondent No. 3 before the reference was made to the Industrial Tribunal by the Government of Gujarat and, consequently, that reference itself was without jurisdiction. When Mr. A. K. Sen, counsel for the appellant, raised this ground, it was urged by Mr. Gopalakrishnan on behalf of the respondents that this ground was being taken for the first time in this Court and had not been raised at any earlier stage, so that it should not be allowed to be taken in this Court. It, however, appears that the question of jurisdiction of the State Government to refer the demand for reinstatement for adjudication to the Tribunal was special urged in the High Court and the High Court and the High Court actually dealt with it in its judgment, dismissing the petition field on behalf of the appellant. The High Court clearly mentions that the counsel for the appellant contended that the Industrial Tribunal had no jurisdiction as the question referred to it and which it was called upon to adjudicate relating to reinstatement of respondent No. 3 in the service of the Corporation would not fall within the scope of item 3 in the Second Schedule to the Industrial Disputes Act, 1947. It was further urged that, since the third respondent was neither discharged nor dismissed by the applicant, the question of relief of

reinstatement would not arise under that item and, there being no item under which the demand would fall, the State Government had no jurisdiction to refer such a demand for adjudication to the Tribunal. These points urged before the High Court would cover the ground now urged by Mr. Sen before us. It is true that the form in which it was urged before the High Court was slightly different. There, the point raised was that a demand for reinstatement, when there had been retrenchment only and no discharge or dismissal, could not be held to constitute an industrial dispute. On the facts of the case as they appeared from the material before the Tribunal, it is now urged that, in fact, the demand, which was being pressed with the management by both the respondents, was in respect of retrenchment compensation and not reinstatement. The demand for reinstatement seems to have been given up, because the respondents realised that the services of respondent No. 3 had not been terminated by discharge or dismissal, but, by retrenchment only, and that retrenchment not being the result of any unfair labour practice or victimization, respondent No. 3 could only claim retrenchment compensation. In the evidence given before the Tribunal, there were included two letters written by the two respondents containing the demand for retrenchment compensation. We have already referred to one of these letters which was sent on 7th March, 1958 by respondents No. 3 to the Administrative Officer of the appellant. The other letter was sent on 10th July, 1958 by the General Secretary of respondent No. 2 in which again it was stated that Sindhu Hotchief had paid retrenchment dues to respondent No. 3 in respect of the services he had rendered in that Company, but the appellant Corporation was responsible for his retrenchment dues for the service which had been rendered by respondent No. 3 in the appellant Corpn. The prayer was that, as the appellant had refused him re-employment, arrangement should be made to pay his retrenchment dues according to section 25F of the Industrial Disputes Act, 1947. Thus, both the respondents, in their claims put forward before the management of the appellant, requested for payment of retrenchment compensation and did not raise any dispute for reinstatement. Since no such dispute about reinstatement was raised by either of the respondents before the management of the appellant, it is clear that the State Government was not competent to refer a question of reinstatement as an industrial dispute for adjudication by the Tribunal. The dispute that the State Government could have referred competently was the dispute relating to payment of retrenchment compensation by the appellant to respondent No. 3 which had been refused. No doubt, the order of the State Government making the reference mentions that the Government had considered the report submitted by the Conciliation Officer under sub-section (4) of section 12 of the Industrial Disputes Act, in respect of the dispute between the appellant and workmen employed under it, over the demand mentioned in the Schedule appended to that order; and, in the Schedule, the Government mentioned that the dispute was that of reinstatement of respondent No. 3 in the service of the appellant and payment of his waged from 21st February, 1958. It was urged by Mr. Gopalakrishnan on behalf of the respondents that this Court cannot examine whether the Government, in forming its opinion that an industrial dispute exists, came to its view correctly or incorrectly on the material before it. This proposition is, no doubt, correct; but the aspect that is being examined is entirely different. It may be that the Conciliation Officer reported to the Government that an industrial dispute did exist relating to the reinstatement of respondent No. 3 and payment of wages to him from 21st February, 1958, but when the dispute came up for adjudication before, the Tribunal, the evidence produced clearly showed that no such dispute had ever been raised by either respondent with the management of the appellant. If no dispute at all was raised by the respondents with the management, any request sent by them to the Government would only be a demand by them and not an industrial dispute between them and their employer. An industrial dispute, as defined, must be a dispute between employers and employers, employers and workmen and workmen and workmen. A mere demand to a Government, without a dispute being raised by the workmen with their employer, cannot become an industrial dispute. Consequently, the material before the Tribunal clearly showed that no such

industrial dispute, as was purported to be referred by the State Government to the Tribunal, had ever existed between the appellant Corpn. and the respondents and the State Government in making a reference, obviously committed an error in basing its opinion on material which was not relevant to the formation of opinion. The Government had to come to an opinion than an industrial dispute did exist and that opinion could only be formed on the basis that there was a dispute between the appellant and the respondents relating to reinstatement. Such material could not possibly exist when, as early as March and July, 1958, respondent No. 3 and respondent No. 2 respectively had confined their demands to the management to retrenchment compensate only and did not make any demand for reinstatement. On these facts, it is clear that the reference made by the Government was not competent. The only reference that the Government could have made had to be related to payment of retrenchment compensation which was the only subject-matter of dispute between the appellant and the respondents.

So far as the third ground is concerned, it loses force and does not arise in view of our decision relating to the first ground. We have already held, when dealing with the first ground, that the appellant had neither dismissed respondent No. 3, nor had it discharged him from service. There was no question of wrongful dismissal or discharge by the appellant. It was not even a case of retrenchment, because respondent No. 3 had willingly gone to join the service under Sindhu Hotchief. He obviously joined the service in Sindhu Hotchief because of the financial advantages that were to accrue to him. In September 1953, he was drawing a salary of Rs. 200 P.M. in the scale of Rs. 150 - 10 - 250 while serving the appellant. The site allowance of 20 per cent., which he had been receiving earlier, had been discontinued from March, 1952 and he was not getting it at the time when he went to join Sindhu Hotchief, where has given start of Rs. 240 in the grade of Rs. 200 - 20 - 400. Consequently, in addition to the immediate rise in salary of Rs. 40 P.M., he had the advantage of working in the higher grade, in which, within two years, he exceeded the maximum of the scale in which he had been working with the appellant. He served Sindhu Hotchief for a period of about 4 1/2 years and become confirmed there in accordance with the terms and condition which were offered to him by Sindhu Hotchief. In these circumstances the respondents cannot urge that the services of respondent No. 3 were retrenchment by the appellant, either when he went and joined Sindhu Hotchief, or when he wanted to get back to his post with the appellant. His appointment in the service of the appellant having terminated, no question could arise of retrenching him at the stage when he wanted to come back after serving Sindhu Hotchief. His services were, in fact, retrenched by his new employer, Sindhu Hotchief, A and from that Company he received retrenchment compensation. The third ground, therefore, needs no consideration.

The appeal succeeds and is allowed. The award of the Tribunal is quashed. In the circumstances of this case, there will be no order as to costs.

Y.P.

Appeal allowed.

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