GUJARAT HIGH COURT

Indian Extractions Private Ltd.

Vs.

A.V. Vyas, Conciliation Officer

Special Civil Appln. No, 248 of 1960

(Desai, C.J. and Bhagwati, J.)

29.08.1960

JUDGMENT

Desai, C.J.

1. This petition raises a question of some importance affecting the construction of Section 33(2) of the Industrial Disputes Act, 1947, to be referred to by us hereinafter as "the Act". The matter has been argued before us by Mr. S.D. Parekh with ability and discernment and he has made a valiant attempt to persuade us to hold that a decision of the Bombay High Court on the identical question should not be regarded by us as binding on this Court and he has taken his stand on the ground that that decision to which we shall presently turn was delivered per incuriam.

2. The facts may be succinctly stated. The petitioners are a limited Company which owns a factory at Jamnagar. The second respondent was in the employment of the petitioner Company and ha was charge-sheeted by the Company on 14-9-1959 and a departmental inquiry was held against him. After the inquiry the employer dismissed the second respondent from employment. At that time conciliation proceedings were pending before the first respondent. An order was passed by the employer discharging the services of the second respondent and in that order it was mentioned that the amount of one month's salary had been sent by Money Order to the second respondent, along with certain, other amounts due to him in respect of outstanding leave. After the order of dismissal, the petitioner Company made an application to the first respondent who is the Conciliation Officer asking for his approval in respect of the order of dismissal. The Conciliation Officer passed an order on that application on 27th January 1960 and by that order he refused to grant approval to the action taken by the petitioner-Company and rejected the application. The ground on which the application asking for approval of the dismissal was rejected was that the application had been made subsequent to the order of dismissal. In that order he has expressly referred to Section 33 (2) of the Act. The petitioner-Company has challenged the correctness of that order on this petition.

3. It has been argued before us by Mr. Parekh that the Conciliation Officer has erroneously interpreted the relevant provisions of Section 33 of the Act. In order to appreciate the argument it is necessary to set out here the material and relevant part of Section 33.

> "33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings : (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall
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> (a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
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> (b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.
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> (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute,-
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> (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
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> (b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman;
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> Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.
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> (5) Where an employer makes an application to a conciliation officer, Board, Labour Court, Tribunal or National Tribunal under the proviso to Sub-Section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, as expeditionary as possible, such order in relation thereto as it deems fit". The brief argument on behalf of the petitioner company founded on the difference in the language of Sub-Sections (1) and (2) of Section 33, is firstly that whereas Sub-Section (1) speaks of express permission which it is said requires to be granted before any order of dismissal or discharge can be made, Sub-Section (2) and particularly the proviso to that Sub-Section speaks of only an approval to the action taken by the employer. The greatest stress has been laid by Mr. Parekh on the proviso to Sub-Section (2). The keystone of the argument is that although the initial part of the proviso may suggest a different meaning, the crucial words of the proviso are "for approval of the action taken by the employer". It is said that the proviso though not very happily worded must be read in a manner which harmonises Sub-Section (2) with Sub-Section (1) and if it be so read, greater emphasis should be laid on the words "for approval of the action taken

> by the employer" rather than the words in the initial part of the proviso which state "unless he has been paid wages for one month and an application has been made by the employer to the authority". Mr. Parekh has also relied on Sub-Section (5) of Section 33 and leaned strongly on the words "under the proviso to Sub-Section (2) for approval of the action taken by him".

4. He has also drawn our attention to Section 38 which relates to the rule-making power of the Government. Sub-Section (4) of that section is as under :-

> "(4) All rules made under this section shall, as soon as possible after they are made, be laid before the State Legislature or, where the appropriate Government is the Central Government, before both Houses of Parliament".

Rules have been framed both by the Central Government and the Bombay Government under the Act. Rule 60 of the rules framed by the Central Government is as under :-

> "60. Application under Section 33 :- (1) An employer intending to obtain the express permission in writing of the conciliation officer, Board, Labour Court, Tribunal or National Tribunal as the case may be, under Sub-Section (1) or Sub-Section (3) of Section 33 shall present an application in Form J in triplicate to such conciliation officer, Board, Labour Court, Tribunal or National Tribunal and shall file along with the application as many copies thereof as there are opposite parties.
> (2) An employer seeking the approval of the conciliation officer. Board, Labour Court, Tribunal or National Tribunal, as the case may be, of any action taken by him under clause (a) or (b) of Sub-Section (2) of Section 33 shall present an application in Form K in triplicate to such conciliation officer. Board, Labour Court, Tribunal or National Tribunal and shall file along with the application as many copies thereof as there are opposite parties.

3. Every application under sub-rule (1) or sub-rule (2) shall be verified at the foot by the employer making it or by some other person proved to the satisfaction of the conciliation officer. Board Labor Court, Tribunal or National Tribunal to be acquainted with the facts of the case.

4. The person verifying shall specify by reference to the numbered paragraphs of the application, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

5. The verification shall be signed by the person making it and shall state the date on which and the place at which it was verified".

The argument here is that this is a statutory rule and must be accorded greater efficacy and

importance than any ordinary rule framed by virtue of delegated authority. Particular reliance has been placed on sub-rule (2) which deals expressly with any action taken inter alia by a conciliation officer under clause (a) or clause (b) of Sub-Section (2) of Section 33. The rule, it is pointed out, speaks of "any action taken by the employer and the argument is that this clearly envisages the situation that the order of dismissal has already been passed and approval of the conciliation officer is sought in respect of an order of dismissal which has already been made. Reliance has further been placed on the Forms J and K referred to in sub-rule (1) and sub-rule (2) respectively of rule 60. The material part of Form K which relates to rule 60(2) is as under :-

> "The workman .... discharged/dismissed under clause (b) of Sub-Section (2) of Section 33 has ...... been paid wages for one month. The applicant prays that the conciliation officer.................may be pleased to approve of the action taken, namely :

(Here mention the action taken under clause (a) or clause (b) of Sub-Section (2) of Section 33)".

There can be no doubt that rule 60 and the material part of Form K which we have quoted above proceed on an interpretation of Section 33(2) for which Mr. Parekh contends.

5. The argument on behalf of the petitioners ran that rules made by the Central Government were laid before both Houses of Parliament and we must attach fullest importance to rule 60 and the language of Form K while interpreting Section 33(2). It will be necessary to advert to this argument a little later in our judgment.

6. Were the matter res integra, we should have found some difficulty in negativing the argument canvassed before us by Mr. Parekh. But this question of construction of Section 33(2) must, however, be regarded, so far as this Court is concerned, as concluded by authority. In *Premier Automobiles Ltd. v. Ramchandra*[1], this provision came up for examination before a Division Bench of the Bombay High Court and it was there held that the application for approval to the authority concerned required to be made by the employer under the proviso to Section 33(2) of the Industrial Disputes Act, 1947, must be made by the employer before he passes the order of dismissal or discharge. The view was also expressed that the words "action taken" in the proviso to Section 33(2) of the Act must be construed as "action proposed to be taken". In delivering the judgment of the Court, Chainani, C.J., examined the scheme of Section 33 and referred to the amendments made in 1956. The learned Chief Justice then referred in the judgment to what was said in the Statement of Objects and Reasons relating to the amendments in Section 33. Mr. Parekh has sought to rely before us on what is said in that Statement of Objects and Reasons set out in the judgment of the learned Chief Justice. With great respect, we on our part do not deem it permissible to us nor do we deem it desirable that we should seek any assistance from that Statement of Objects and Reasons. It is not necessary to examine cases on this aspect of the matter as, in our opinion, it is a well settled principle of construction favored by the Courts of this country that in case of any legislation of the nature before us, the court should not look at the

Statement of Objects and Reasons. The learned Chief Justice has pointed out in his judgment that there was considerable force in the arguments advanced on either side regarding the construction of the wording of the proviso and observed that it was possible to take both the views. Ultimately the Court reached the conclusion that harmony between Sub-Section (1) and Sub-Section (2) of Section 33 would be brought about by preferring the view which it ultimately took and which we have already mentioned above. This decision of a Division Bench of the Bombay High Court was delivered on 15th October 1959 and as held by a Full Bench of this High Court, this Court is bound to follow the decision of that High Court unless that decision can be brought into one of the well recognized exceptions to the rule, that a decision of a Court of co-ordinate jurisdiction should be followed by another Court similarly constituted.

7. One of the exceptions is that a judgment delivered per incuriam is not binding on a

[1]62 Bom LR 199 : (AIR 1960 Bom 390)

Court of co-ordinate jurisdiction. Mr. Parekh has tried his utmost to persuade us to take the view that the decision of the Bombay High Court should be treated by us as per incuriam. It is in this contest that we must revert to Section 38(4) of the Act. The argument here is that the rules framed by the Central Government under Section 38 were placed before both the Houses of Parliament and we must read rule 60 and, if necessary, Form K as if they were part of the Act. In support of the present argument, reliance has been placed by counsel on the following passage from Maxwell on Interpretation of Statutes, Tenth Edition pages 50 and 51 :-

> "Instruments made under an Act which prescribes that they should be laid before Parliament for a prescribed number of days, during which period they may be annulled by a resolution of either House, but that if not so annulled they are to be of the same effect as if contained in the Act and are to be judicially noticed, must be treated for all purposes of construction or obligation or otherwise, exactly as if they were in the Act. If there is a conflict between one of these instruments and a section of the Act, it must be dealt with in the same spirit as a conflict between two sections of the Act would be dealt with. If reconciliation is impossible, the subordinate provision must give way and probably the instrument would be treated as subordinate to the section".

Reliance has also been placed by counsel on the following passage in May's Parliamentary Practice, 16th Edition, pages 849-850 :-

> "Apart from the special opportunities of the affirmative and negative procedures .... there exists in the House of Lords a general power of challenging delegated legislation by moving for papers (and dividing the House upon the motion), or by asking a question. In the House of Commons, a Member, if he does not avail himself of the facilities of "exempted business" to move a "prayer" for the annulment of delegated legislation might move it on another occasion; .... The opportunities of question time are freely used for inquiry as to the purpose, meaning or effect of Statutory Instrument".

Our attention has also been drawn by Mr. Parekh to Article 105(3) of the Constitution which relates inter alia to powers, privileges and immunities of the Houses of Parliament and lays down that in respect of matters not expressly mentioned in the Constitution, the powers, privileges and immunities of each House of Parliament and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees, at the commencement of the Constitution. Our attention has also been drawn to the Rules of Procedure and Conduct of Business in Lok Sabha, (Fifth edition). Chapter XXI of the Rules of Procedure relates to Subordinate Legislation. Rules 234 and 235 are as under :-

> "234. (1) Where a regulation, rule, sub-rule, bye-law etc., framed in pursuance of the Constitution or of the legislative functions delegated by Parliament to a subordinate authority is laid before the House, the period specified in the Constitution or the relevant Act for which it is required to be laid shall be completed before the House is adjourned sine the and later prorogued, unless otherwise provided in the Constitution or the relevant Act.
> (2) Where the specified period is not so completed, the regulation, rule, sub-rule, bye-law etc., shall be re-laid in the succeeding session or sessions until the said period is completed in one session.
> 235. The Speaker shall, in consultation with the Leader of the House, fix a day or days or part of a day as he may think fit for the consideration and passing of an amendment to such regulation, rule, sub-rule, bye-law etc., of which notice may be given by a member :
> Provided that notice of the amendment shall be in such form as the Speaker may consider appropriate and shall comply with these rules".

Founded on these rules and the passages quoted above, the argument is that a very material aspect of construction of Section 33(2) was not brought to the notice of the Division Bench which decided the Bombay case and, therefore, we must regard that decision as per incuriam.

8. We are unable to accede to this argument. It is true that the rules relied on by Mr. Parekh and the quotations from May's Parliamentary Practice and Maxwell do lend support to the argument of Mr. Parekh. It is also true that Sub-Section (5) of Section 33 goes to advance that argument as furnishing intrinsic evidence which would afford useful assistance in interpreting another provision of the same section. It is also true that Section 33(2) is not happily worded. Even so, we do not think that these considerations are sufficient to lead us to the conclusion that the Bombay decision must be treated as delivered per incuriam. Our attention has been drawn by Mr. Parekh to a number of decisions which explain the principle underlying this exception to the principle of comity of judgments. It is not necessary to burden this judgment with an examination of all those decisions and we shall be referring to only one or two of them. In *Nicholas v. Penny*[2],

the Court of appeal had to consider this question. Lord Goddard, Chief Justice, made the following observations at pages 472-473 :-

> "........,. it has been laid down by the Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd*[3]*.,* which has been followed quite recently in this court, that where material cases or statutory provisions, which show that a court has decided a case wrongly, were not brought to its attention the court is not bound by that decision in a subsequent case".

9. These are instructive observations. Equally instructive are the following observations of Lord Greene in *Young v. Bristol Aeroplane Co. Ltd*[4]*.,* at page 729 :-

> "Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its

[2](1950) 2 KB 466
[3](1944) 1 KB 718
[4](1944) 1 KB 718

> own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given 'per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts".

In *Bengal Immunity Co. Ltd. v. State of Bihar*[5]*,* the learned Acting Chief Justice, Mr. S.R. Das, (as he then was), made mention of tie decision of the Court in England in 1944-1 KB 718, in the context of a decision given per incuriam.

10. Here it seems convenient to allude to the juridical meaning of the expression per incuriam. In its primary sense it means something determined through want of care. The law lexicons point out that the expression connotes an order obviously made through some mistake or under some misapprehension; a decision or a dictum of a judge which clearly 15 the result of some material oversight. The doctrine of binding precedent of a co-ordinate Court is not absolute in its applicability. It does not require a Court to abdicate wholly its own judgment. It does, however, test strongly on the principle of comity which requires uniformity of decisions of Courts and certainly about the law. Moreover the sound principle that confusion and uncertainty should as far as possible be avoided also requires that precedents of the nature under consideration should

be respected and followed unless there is strong permissible reason for not doing so, for instance in case of a decision delivered per incuriam. It is not, however, every relevant consideration or aspect or facet of a question or point for determination about which there may have been some mistake or misapprehension or which might have been overlooked by the Court which decided the question or point that can be regarded as adequate ground for treating the decision as per incuriam.

11. To apply these considerations to the present case. We put to ourselves the question whether we would be justified in concluding that any precedent, any binding decision, any material and important provision of law or any governing principle of law was not brought to the attention of the Division Bench which decided the Bombay case ? The answer, in our opinion, must be in the negative. The mere circumstance that an argument founded on Section 38(4) of the Act had not been presented before that Court cannot be sufficient for reaching the conclusion that the decision was given per incuriam and, therefore, need not be followed by a Court otherwise bound to do so. Reference to Section 38(4) and the reasoning underlying the passages from May's Parliamentary Practice and Maxwell as also the two rules in Rules of Procedure and Conduct of Business in Lok Sabha at the highest afford an argument founded on one of the principles of construction. However sound that principle may be, it is in the context of the present case only one aspect of the matter and one step in the ratiocination which would lead the Court to a proper interpretation of Section 33 (2). In our judgment that sole consideration should not, in case of the decision of the Bombay High Court in 62 Bom LR 199 : (AIR 1960 Bombay 390) be so magnified as to invite the impress of one delivered per

[5](1955) 2 SCR 603 : AIR 1955 SC 661

incuriam. Therefore, whatever view we might have taken of the case before us, were the matter res integra, we are bound to follow that decision.

12. For reasons already discussed, the petition fails and will be dismissed. The rule will be discharged with costs.

Petition dismissed.