

KERALA HIGH COURT

S.L. Emmatty, Proprietor

Vs

C. Venkataswami Naidu

O.P. No. 493 of 1958

(C.A. Vaidialingam, J.)

26.11.1958

JUDGMENT

C.A. Vaidialingam, J.

1. This is an application under Article 226 of the Constitution by Proprietor, Jai Hind Motor Service., Ernakulam, to call for the records and to quash the award of the Industrial Tribunal Trivandrum dated 25-5-1958 and passed in I.D. 3/57.

2. An Industrial dispute numbered as I.D. 67/55 was pending before the Industrial Tribunal Respondents 1 to 14 to this application are workmen of the Jai Hind Motor Service employed in various categories. During the pendency of I.D. 67/55, the management alleging certain misconduct against the respondents 1 to 14 suspended them from service in October 1956. On 5-11-1956 the management filed two petitions before the Tribunal under Section 33 of the Industrial Disputes Act asking for permission to dismiss all the 14 workmen, for their alleged misconduct on 12-1-57, the Industrial Tribunal declined to give the permission asked for on the ground that the decision of the management to dismiss the 14 workers was unjustified. As the workmen were not taken back and allowed to resume their employment, the respondents 1 to 14 filed a complaint under Section 33-A of the Industrial Disputes Act, 1947 before the Tribunal on 15-2-1957. This complaint was taken on file by the Tribunal and numbered as ID No. 3/57.

3. On 21-3-1957, the management filed two petitions in the Kerala High Court under Article 226 namely, O.Ps. 120 and 121/57 to quash the order dated 5-11-56 (12-1-57?) of the Industrial Tribunal refusing to lift the ban under Section 33 of the Act. On 3-1-58, the High Court (Sankaran and Kumara Pillai, JJ.) dismissed O.P. 120 and 121/57. After the dismissal of the O.Ps. by the High Court I.D. No. 3/57 was taken up by the Tribunal and finally disposed of on 22-5-58. The Tribunal has directed the reinstatement of respondents 1 to 14 with 1/2 of their wages being paid from the date of the suspension till the date of their reinstatement. It is this award that is being sought to be challenged in these writ proceedings.

4. Two counter affidavits have been filed on behalf of the respondents 1 to 14, one by the third respondent and another by the 4th respondent. It is stated in the counter affidavits that the award in I.D. 3/57 has been passed in accordance with law and it is not liable to be quashed on any

ground. The prior proceedings under Section 33 and the judgment of the High Court confirming the order of the Tribunal have all been mentioned in great detail. It is alleged that the act of the management is purely vindictive and this O.P. has been filed merely to protract and delay the proceedings which have ended in favor of the workmen. It is also stated in the counter affidavits that the petitioner applied for special leave to appeal to the Supreme Court under Article 136 of the Constitution challenging the decision of the High Court in the two O.Ps. and it has also been dismissed. The petitioner also challenged the present award in I.D. 3/57 by independently filing an application to the Supreme Court on 26-6-58 by applying for special leave under Article 136. But the Supreme Court, by its order dated 15-7-58 declined to grant special leave. The order of the Supreme Court refusing to grant special leave concludes the rights of the parties and it is not open to the petitioner to again challenge the very same proceedings independently under Article 226.

5. It is further stated that after the dismissal by the High Court on 3-11-58 of O.Ps. 120 and 121/57, the applicant himself moved the Tribunal on 4-1-58 to take up I.D. 3/57 and dispose it of early and therefore, it is not open to him to challenge the jurisdiction of the Tribunal to dispose of I.D. 3/57. Finally, it is stated that the respondents 1 to 14 have been kept out of employment for over 22 months and they are put to a great deal of hardship by the conduct of the petitioner.

6. Mr. T.S. Krishnamurthi Iyer, learned counsel for the petitioner, raises two contentions before me and they are :

- (1) the application under Section 33-A was not maintainable because the order of the Tribunal dated 5-11-56 refusing permission under Section 33, was pending final adjudication by the High Court in O.Ps. 120 and 121/57; and
- (2) In any event, the Tribunal has not dispassionately considered the application under Section 33-A and recorded findings independently of what has happened in the proceedings under Section 33 of the Act.

7. On the other hand, the learned counsel appearing for the workers supported by the learned Government Pleader, have contended that the application under Section 33-A filed by the workers, was perfectly justified and was maintainable. As soon as the order was passed on 5-11-56 by the Tribunal refusing to lift the ban in favour of the employer, the management had no right to continue to keep the workers under suspension. The writ proceedings filed in the High Court cannot be considered in law, to be a continuation of proceedings under Section 33 of the Act. The continuance of the suspension after 5-11-1956 amounts to a contravention of the provisions of Section 33 and the Tribunal was bound to adjudicate upon the complaint as if it were a dispute referred to it in accordance with the provisions of the Act. The management had no fresh evidence to offer before the Tribunal and they themselves invited the tribunal to give a decision on the materials already filed in the proceedings under Section 33 of the Act. In spite of the fact that no fresh evidence was adduced, the tribunal has considered the matter in the light of the provisions of Section 33-A and recorded findings against the petitioner which could not be challenged in proceedings under Article 226. Before I consider the contentions of Mr. T.S. Krishnamurthi Iyer, I will dispose of a preliminary objection that has been raised as to the maintainability of the application on behalf of the respondents. The preliminary objection is based upon the fact that the petitioner filed an application, Ext. R. 3, in the Supreme Court under

Article 136 of the Constitution for special leave to appeal against the award in I.D. 3/57 dated 25-5-58. The same grounds as are mentioned in this writ application were taken in the application filed for special leave. The application was filed on 26-6-58 and it was rejected on 15-7-58 by their Lordships of the Supreme Court. As the Supreme Court has declined to entertain an appeal against the award, it must be deemed to have impliedly held that the award is valid in law.

8. On the other hand, Mr. Krishnamurthi Iyer relied upon the decision of the Madras High Court reported in *Western India Match Co. v. Industrial Tribunal*¹, in support of his contention that notwithstanding the rejection by the Supreme Court of the special leave application, the present application under Article 226 is maintainable. The learned counsel for the Union did not challenge the correctness of this decision. The learned Government Pleader did not no doubt concede that he is accepting the position laid down by the learned Judges of the Madras High Court. He only pointed out that the learned Judges in that case entertained an application under Article 226 on the ground of natural justice. He also submitted that it will be rather incongruous if the High Court is to interfere and take a different view when the Supreme Court has declined to grant special leave, to appeal under Article 136.

9. After hearing the learned counsel on this point as at present advised, I am inclined to follow, with respect, the judgment of Rajagopalan and Ramachandra Iyer, JJ. in the decision reported in AIR 1958 Madras 398. The learned Judges observe at page 402 as follows :

"The scope of the proceedings under Article 226 of the Constitution is very much more limited compared to what the Supreme Court could order in an appeal, once leave is granted under Article 136 of the Constitution and the appeal is admitted. The grant of leave under Article 136 of the Constitution, is, however, essentially discretionary. So is the issue of a writ of certiorari under Article 226 of the Constitution. That discretion however, has to be exercised on well recognized lines."

Again the learned Judges observed at page 403 as follows :

"The right to apply for leave to appeal to the Supreme Court under Article 136 of the Constitution if it could be called a "right" at all cannot be equated to a right to appeal. Obviously a High Court cannot refuse to entertain an application under Article 226 of the Constitution on the ground that the aggrieved party could move the Supreme Court under Article 136 of the Constitution. That the Supreme Court declined to exercise its discretion in favor of the petitioner by granting the leave asked for cannot, in our opinion, affect the jurisdiction vested in the High Court under Article 226 of the Constitution.

¹ AIR 1958 Mad 398

Even had there been a right of appeal to any other forum whether it was availed of or not, the jurisdiction under Article 226 of the Constitution would be left untouched. It has been consistently held that the existence of an alternative remedy is no bar to the assumption of jurisdiction under Article 226 of the Constitution though it would be a very relevant factor in deciding whether the discretion to grant the relief would be exercised in a given case. That was restated by the Supreme Court in *U.P. State v. Muhammad Nooh*², As the learned Advocate General however pointed out Article 136 of the Constitution does not really provide a remedy as

such as an alternative to what could be granted under Article 226 of the Constitution." The learned Judges rejected the contention that a recourse to Article 136 would deprive a party to ask for relief under Article 226 in the following words :

"We have no hesitation in rejecting the extreme contention of the learned counsel for the respondents, that once the aggrieved party had had recourse to Article 136 of the Constitution though it failed, this court would have no jurisdiction to grant a rule nisi under Article 226 of the Constitution. Whether in the exercise of its discretion the court should discharge the rule issued in the present case is, however, a wholly different question." The correct position in such cases, if I may say so with respect, has been indicated by the learned Judges at page 403 as follows :

"That the Supreme Court declined to exercise its discretion in favor of the petitioner appears to us to be a factor that ought to be taken into account and given due weight, when we are called upon to exercise our discretion in favor of interference with the award of the Tribunal on some of the very grounds specified in the application for leave to appeal that failed"

Following the decision of the Madras High Court, I hold that the petitioner is not precluded from filing this application under Article 226 of the Constitution. But whether he could be granted any relief is another aspect of the matter.

10. The first contention of Mr. Krishnamoorthy Ayyar is that the application under Section 33-A which has been numbered as I.D. 3/57, is not maintainable because the order dated 5-11-56 refusing permission under Section 33 was being challenged in the High Court in O.P. 120 and 121/57. The O.Ps. must be considered to be a continuation of the proceedings under Section 33. The Supreme Court has laid down that suspension pending enquiry or suspension pending an application to lift the ban under Section 33 are legal and valid. If so in this case, the suspension which is continued and which is the subject of the fresh application under Section 33-A, must be considered to be only suspension pending the final adjudication of the proceedings under Section 33. No doubt, the tribunal has rejected on 5-11-56 the application of the management filed under Section 33 to lift the ban and up to that date at least there can be no controversy that the order of suspension was valid. Though the complaints were filed on 15-2-57, still the O.Ps. themselves were filed in the High Court on 21-3-57.

The finding of the O.Ps. takes away the finality of the order dated 5-11-56 of the Industrial Tribunal and therefore, there is no scope for any application to be filed under Section 33-A. So ran the argument of Mr. Krishnamoorthy Ayyar.

² AIR 1958 SC 86 at p. 93

11. I cannot accept this line of reasoning of Mr. Krishnamoorthy Iyer. It may be that the petitioner can invoke the jurisdiction of this court under Article 226. But it has been held by the Supreme Court that the High Courts do not and should not act as courts of appeal under Article 226. There is no right of appeal to the High Court provided in the Industrial Disputes Act itself. The proceedings initiated under Article 226, by filing O.Ps. 120 and 121, cannot in my view, be considered to be a continuation of the proceedings under Section 33 of the Industrial Disputes Act so as to make the continuance of an order of suspension valid even after 5-11-56 namely, the date of dismissal by the tribunal of the application of the management under Section 33. After

the dismissal of the application on 5-11-56, the present application complaint under Section 33-A had been filed on 15-2-57 and the tribunal had perfect jurisdiction to entertain the same. Because those proceedings were stayed by the High Court, they could not be immediately taken up for disposal. After the dismissal by the High Court on 3-1-58 of the two O. Ps. the petitioner himself filed an application before the tribunal on 4-1-58, Ext. R. 2, requesting the tribunal to take up I.D. 3/57 for disposal as quickly as possible. The position of the parties on a refusal being given by the Tribunal to lift the ban under Section 33, has been dealt with by the Supreme Court when dealing with the analogous provisions in the Industrial Disputes (Appellate Tribunal) Act 1950, in the decision reported in *L.D. Sugar Mills v. Ram Sarup*³, At p. 94 of the reports their Lordships observed as follows :

"If the permission is granted, the ban would be lifted and the employer would be at liberty, if he so chooses thereafter, to deal out the punishments to the workman. On such action being taken by the employer the workman would be entitled to raise an industrial dispute which would have to be referral to the appropriate Tribunal for adjudication by the Government on proper steps being taken in that behalf. When such industrial dispute comes to be adjudicated upon by the appropriate Tribunal, the workman would be entitled to have all the circumstances of the case scrutinized by the Tribunal and would be entitled to get the appropriate relief at the hands of the Tribunal. If, on the other hand, such permission is refused, the parties would be relegated to the status quo and the employer would not be able to deal out the punishment which he intends to do to the workmen."

12. Therefore, according to the principle laid down by the Supreme Court, inasmuch as permission has been refused by the Tribunal on 5-11-56, the parties are relegated to the status quo and the right of the management to continue the punishment stops. Therefore, the Tribunal had jurisdiction to entertain the complaint filed under Section 33-A by the respondents 1 to 14 on 15-2-57 and it had also jurisdiction to adjudicate upon the complaint as if it were a dispute referred to it in accordance, with the provisions of the Act.

13. The second attack made on the award is that the Tribunal has merely incorporated its previous findings recorded in the application under Section 33 as also the findings of the High Court in O.Ps. 120 and 121/57. No doubt, the legal position is clear that the proceedings under Section 33-A must be considered as a separate dispute on the materials placed before it. A reference to the award passed by the Tribunal will

³ AIR 1957 SC 82 at p. 94

clearly show that the criticism of Mr. Krishnamoorthy Iyer is not well founded.

14. It is seen that in this case, the employer's objection to the complaint under Section 33-A was substantially what was stated by him in his application under Section 33. The same reasons for taking action against the workmen and given in his previous application before the Tribunal, were substantially taken by the management in these proceedings also. After charging the workmen with disobedience etc., the management wound up by saying that charge-sheets were given to the workmen and they were found guilty and after enquiry, they have been placed under suspension. It is also seen from paragraph 3 of the award that the management specifically

prayed that the petitions presented by him on 6-11-56 under Section 33 to dismiss the workmen he treated as part of the objections to the complaint and be gone into on merits. These show that the management invited the Tribunal to traverse the same ground over again. After setting out the various contentions and the proceedings connected with the application under Section 33, the Tribunal has quite properly stated in paragraph 7 of the award that the approach to be made to an application under Section 33 is different from that to be made under Section 33-A of the Act. It has also stated in that paragraph as to how the two proceedings are different. Therefore, that clearly shows that the Tribunal was fully aware of its duties and responsibilities when disposing of an application under Section 33-A. It is made clear by its' further observation namely :

"But the jurisdiction of the Tribunal when dealing under Section 33-A is more comprehensive in that it has to go into the merits in more detail treating it as a regular dispute referred under Section 10 of the Act and grant appropriate relief. Hence the fact that think Tribunal in the earlier proceedings refused to lift the ban on the materials placed before it then, could not deter it from entering into the merits afresh and arriving at proper conclusions on the basis of new materials, if any, placed before it in these proceedings".

Further, the Tribunal, observes in paragraph 8 of the award as follows :

"It may be noted that no new evidence either oral or documentary was produced at the trial of this dispute. On behalf of the management, the manager was examined. He does not swear to any new facts not covered by the prior proceedings. There was a prayer from the employer to incorporate all the records produced and marked in the Section 33 proceedings in this dispute and that was allowed," These statements in the award have not been controverted before me by Mr. Krishnamoorthy Iyer. It is also stated in the award that the learned counsel appearing for the management, advanced more or less the same old arguments as were advanced by him in the earlier proceedings. In view of all these circumstances, the Tribunal has been invited by the management itself to dispose of the application under Section 33-A on the very materials already on record. It is in this context that the Tribunal refers to its previous order and also to the order of the High Court. In the circumstances of this case, I cannot find anything wrong or illegal in that procedure. The petitioner had absolutely no new or additional material to be placed before the Tribunal for any reconsideration. He relied on the old records and he advanced the same old arguments. Therefore, the tribunal was left with no other alternative but to refer to its previous findings especially when those findings have been confirmed by the High Court.

15. It is also seen that the management pressed vehemently before the Tribunal that the workmen have gone on an illegal strike and therefore, the management was justified in dismissing them on this score. The Tribunal in dealing with this contention has stated that this charge was being put forward for the first time and the workmen were not given any opportunity of meeting a case that they had indulged in any strike much less illegal strike and this finding is arrived at by the Tribunal on going through the enquiry proceedings conducted by the management.

16. Finally, the Tribunal comes to the conclusion that the workmen are not guilty of any misconduct and that the management was not justified in dismissing them on the charges leveled against them.

17. That the Tribunal has considered flier case independently and without in any way being influenced by its previous decision against the employer is also clear when it refused to accede to the request of the counsel for the workmen that respondents 1 to 14 must be reinstated in service with hill back-wages from the date of suspension. The Tribunal has taken the interest of the Industry into account and held that as award with full wages at that distance of time as prayed for by the counsel for the workmen, will tend to paralise the industry. Therefore, the Tribunal directed the reinstatement of all the workmen by being paid only half of their wages from the date of suspension.

18. I do not see any error apparent on the face of the record to warrant interference with the award under Article 226. The Tribunal has considered the entire material placed before it and if the petitioner had no fresh material to offer, he cannot find fault with the Tribunal for referring to its previous findings. In spite of that, the Tribunal has kept in mind its duties under Section 33-A and has done the best in the circumstances.

19. The application fails and is dismissed with costs of respondents 1 to 14 one set fixed at Rs. 150/- and the costs of the Government Pleader appearing for the 15th respondent fixed at Rs. 100/-.

Application dismissed.