KERALA HIGH COURT

C.V.A. Hydross and Son

Vs

Joseph Sanjon

O.P. Nos. 1770 to 1778, 1782, 1804, to 1809, 1811 to 1821, 1835, 1836 and 1837 of 1965

(K.K. Mathew, J.)

06.09.1966

JUDGMENT

K.K. Mathew, J.

1. These are applications for issuing the appropriate writs or directions quashing Ex. A order passed by respondent 2, the labour court, Quilon, on 14 May 1964. Exhibit A order was passed on the basis of the applications made by the workmen concerned under Section 330 (2) of the Industrial Disputes Act, 1947, hereinafter called the Act, requesting the Court to determine the compensation and notice-pay payable to them for their past services with the petitioners. Their case was that they were permanent workmen under the petitioners, who are stevedores and that with the promulgation of the Cochin Dock Workers (Regulation of Employment) Scheme, 1959, under the Dock Workers (Regulation of Employment) Act, 1948, their services were terminated without payment of compensation or notice-pay as required by Section 25F and therefore they were entitled to have amounts payable to them to be computed under Section 33C (2) of the Act. Pursuant to the notices on the applications petitioners entered appearance and filed written statements denying their liability to pay retrenchment compensation and notice-pay. The petitioners resisted the claims on the ground that the workmen in question were casual workers who used to get work, off and on, under various stevedores according to the arrival of the steamers in the Port and the availability of work, that they had not actually worked under the petitioners for 240 days during a period of twelve calendar months, and so they were not entitled to claim compensation and notice-pay under Section 25P of the Act. They also contended that there was no termination of the service of the workmen by them and that they still continued to be their employees. Respondent 2 by his order, Ex. A, negatived the contentions of the petitioners and determined the amounts due to the workmen thereby allowing the petitions filed by the workmen. He found that the workmen were permanent workmen, that from 5 November 1962 they ceased to be in the employment of the petitioners, that thereafter they became employees of the Cochin Dock Labour Board, that the workmen were discharged on the ground that they were surplus personnel in the industry run by the petitioners, and therefore they were retrenched under Section 25P of the Act.
2. The petitioners impeach this order. Two contentions were urged by counsel for the petitioners: (1) that the workmen were casual workmen and therefore they are not entitled to retrenchment

compensation or notice-pay under Section 25P of the Act, and (2) that there was no voluntary termination of the services of the workmen so that it may be said that there has been any retrenchment of them.

3. The Cochin Dock Workers (Regulation of Employment) Scheme, 1959, hereinafter called the scheme, was promulgated by the Central Government in exercise of the powers conferred by Sub-section (1) of Section 4 of the Dock Workers (Regulation of Employment) Act, 1948. The object of the scheme was to ensure the regularity of employment of dock workers and to define the terms and conditions of their service. The preamble of the Act of 1948 states that the Act has been passed for regulating the employment of dock workers. " Dock worker" is defined in Section 2(b) of the Act of 1948 as a person employed or to be employed in or in the vicinity of any port on work in connexion with the loading, unloading movement of storage of cargoes, or work in connexion with the preparation of ships or other vessels for the receipt or discharge of cargoes or leaving port. Section 3 says that provisions may be made by a scheme for registration of dock workers and employers with a view to ensure greater regularity of employment and for regulating the employment of dock workers, whether registered or not, in a port. It also states the matters which a scheme may provide. Clause (c) of Sub-section (2) of that section says that the scheme may pro-vide for regulating the recruitment and entry into the scheme of dock workers and the registration of dock workers and employers including the maintenance of registers, the removal, either temporarily or permanently of names from the registers and the imposition of fees for registration. Clause (d) provides for regulating the employment of dock workers, whether registered or not, and the terms and conditions of such employment, including rates of remuneration, hours of work and other conditions; and Clause (f) provides for prohibiting, restricting or otherwise controlling the employment of workers to whom the scheme does not apply, and the employment of dock workers by employers to whom the scheme does not apply. Section 4 says that Government may by notification in the gazette make one or more schemes for a port. Section 5 provides for an advisory committee to be constituted by Government and Section 5A for constituting a Dock Labour Board by Government by notification in the gazette.
The relevant provisions of the scheme may be referred to. Clause 3(f) of the scheme defines a " dock employer" as the person by whom a dock worker is employed or is to be employed and includes a group of dock employers. A " registered employer " is defined in Clause 3(c) as a dock employer whose name for the time being is entered in the employers' register. " Reserve pool" is defined in Clause 3(p) as a pool of registered dock workers who are available for work, and who are not for the time being in the employment of a registered employer or a group of dock employers as monthly workers. Clause 4 provides for the constitution of the Dock Labour Board; Clause 5 provides for the constitution of the administrative body; Clause 7 provides for the function to be performed by the board. Sub-clause (1)(b) of that clause provides for regulating the recruitment and entry into and the discharge from the scheme of dock workers and the allocation of registered dock workers in the reserve pool to registered employers. Sub-clause (1)(c) provides for determining and keeping under review, in consultation with the administrative body the number of registered employers and registered dock workers from time to time on the register. Sub-clause (1)(h) provides for levying and recovering from registered employers contributions in respect of the scheme. Clause 9 deals with the responsibilities and the duties of Chairman of the Board. Sub-clause (1)(d) of that clause says that the Chairman shall have the executive and administrative power to provide for the proper and adequate supervision by the registered employers over the workers employed on their ships. Sub-clause (1)(k) provides for disciplinary action against the workers and employers in accordance with the provisions of the

scheme. Clause 11 deals with the functions of the administrative body and Sub-clause (e) of that clause provides for allocation of registered dock workers in reserve pool who are available for work to registered employers and for this purpose, it says, the administrative body shall be deemed to act as an agent for the employer. Clause 11(f)(i) provides for collection of levy, contribution to the dock workers welfare fund or any other contribution from the employers as may be prescribed under the scheme. Clause 15 provides for the maintenance of the registers of employers and employees. Clause 18 says that any dock worker who, immediately before the coming into force of the scheme, is in the employment of any employer to whom the scheme applies, shall be eligible for registration, and that the qualification for such new registration shall be such age as may be prescribed by the board having regard to local conditions and other matters. It also provides for priority of registration and the method of registration. Clause 19 provides for transfer of workers. Sub-clause (4) of that clause states that if the services of a monthly worker are terminated by an employer for an act of indiscipline or misconduct he may apply to the board for employment in the reserve pool. Sub-clause (5) states that if a monthly worker is transferred to or employed in the reserve pool, his previous service shall be reckoned for all benefits in the reserve pool end the employer shall transfer to the pool all the benefits in respect of his previous service.

Clause 27 provides that a registered dock worker in the reserve pool shall hand over his attendance card and wage card to the administrative body at the time he is allocated for work to a registered employer unless any of the cards has already been deposited with the said body previously and has not been returned to the worker. It is also provided that the administrative body shall arrange to make necessary entries in the attendance card and wage card in respect of the period of work done by the worker and return them to him as soon as the entries have been made. Clause 28 provides for employment of workers. It says that a monthly worker of a particular category attached to a registered employer or a group of employers shall be entitled to be employed for work in that category by that employer or group of employers in preference to any worker of the same category in the reserve pool. Clause 31 provides for guaranteed minimum wages for the monthly worker. It says that a worker in the reserve pool shall be paid wages at least for twelve days in a month at the wage-rate, inclusive of dearness allowance, as may be prescribed by the board appropriate to the category to which he permanently belongs. Clause 82 provides for attendance allowance for a worker in the reserve pool who is available for work but for whom no work is found. Clause 37(1) says that every registered dock worker shall be deemed to have accepted the obligation of the scheme and Sub-clause (2) of that clause states that a registered dock worker in the reserve pool who is available for work shall be deemed to be in the employment of the board. Sub-clause (3) provides that a registered clock worker in the reserve pool who is available for work shall not engage himself for employment under a registered employer unless be is allocated to that employer by the administrative body. Sub-clause (4) says that a registered dock worker in the reserve pool who is available for work shall carry out the directions of the administrative body. Sub-clause (5) states that a registered dock worker who is available for work when allocated by the administrative body for employment under a registered employer shall carry out his duties in accordance with the directions of such registered employer or his authorized representative. Clause 38 (1) provides that every registered employer shall accept the obligations of the scheme and Sub-clause (2) states that a registered employer shall not employ a worker other than a dock worker who has been allocated to him by the administrative body in accordance with the provisions of Clause 11(e). Sub-clause (4) says that a registered employer shall lodge with the administrative body unless otherwise directed, particulars of the tonnage handled by workers on piece-rate and such other statistical data as may

be required in respect of the registered dock workers engaged by him. Clause (5) provides that a registered employer shall pay to the administrative body in such manner and at such times as the board may direct the levy payable under Clause 52 (1) and the gross wages due to daily workers. Clause 39 say a that no person other than a registered employer shall employ any worker on dock work nor shall a registered employer engage subject to the relaxation provided in Clause 18(2), for employment or employ a worker on deck work unless that worker is a registered dock worker. Clause 40 provides that the scheme shall cease to apply to a registered dock worker when his name has been removed from the register or record. Clause 41 states that unless otherwise specifically provided for in the scheme, it shall be an implied condition of the contract between a registered dock worker not being a worker to whom the provisions of Clause 42 apply and a registered employer that the wages, allowances and overtime hours of work, and other conditions of service shall be such as may be prescribed by the board for each category of workers. Clause 42 states that unless otherwise specifically provided for in the scheme, it shall be an implied condition of the contract between a registered dock worker in the categories of winchman, tindal and stevedore mazdoor, and a registered employer that the rates of wages, allowances and overtime, hours of work, rest intervale and other conditions of service shall be each as may be prescribed by the board for each category of workers subject to the provisions of Sub-clauses (2), (3), (4), (5), (6) and (7) of that clause. Clause 45 provides for disciplinary proceedings. It says that the personnel officer on receipt of a complaint or otherwise, that a registered employer has failed to carry out the provisions of the scheme, may after investigating the matter, give him a warning in writing or such other punishment as may be necessary to be inflicted. Sub-clause (2) provides that a registered dock worker in the reserve pool, who fails to comply with any of the provisions of the scheme, or commits any act of indiscipline or misconduct may be reported in writing to the labour officer who may, after investigating the matter, take any steps in the matter or suspend him without pay for a period not exceeding three days. Clause 47(1) provides that the employment of a registered dock worker in the reserve pool shall not be terminated except in accordance with the provisions of the scheme. Sub-clause (2) of that clause provides that a registered dock worker in the reserve pool shall not leave his employment with the board except by giving fourteen days' notice in writing to the board or fourteen days' wages inclusive of dearness allowance in lieu thereof.

4. From the provisions of the scheme it would appear that a certain amount of control is exercised by the registered employers when the workers are actually in employment under them. They also show that the Dock Labour Board is the employer of the workmen and that there is a general relationship of master and servant between the Dock Labour Board and the registered employees. One contention of the petitioners' counsel, as I have already said, was that the workmen continued even after the coming into force of the scheme to be under the employment of the petitioners and that no change in the Judicial relationship ban been brought about by the introduction of the scheme, that the Dock Labour Board functions only as agent for the registered employers in the matter of registering the employees and allocating them to the employers whenever necessary and that it is only on a technical sense that the board can be said to be the employer. Respondent 2 found that since the workmen in question are registered workmen under the scheme, the Dock Labour Board became their employer and the termination of their services under the petitioners by them would amount to retrenchment. Counsel for the petitioners submitted that the decisive factor in considering the question whether there is master and servant, relationship is one of control, and that neither the registration of the workmen in pursuance of the scheme nor the power of the board to terminate their services is material. In *Mersey Docks and*

Harbour Board v. Coggins and Griffith (Liverpool), Ltd[1]. Lord Macmillan said that the real test to decide whether there is a relationship of master and servant is whether the master has got the right to control the manner of doing the work. In that case a harbour authority let a mobile crane to a firm of stevedores for loading a ship, providing a craneman who was employed and paid and liable to be dismissed by it, though the general hiring conditions stipulated that craneman so provided should be the servants of the hirers. In the course of the operation he injured a third person by negligently driving the crane. At the time the stevedores had the immediate direction and control of the operation of picking up and moving each piece of cargo but had no power to direct how the crane should be worked or the controls manipulated. The injured person sued the harbour authority and the stevedores for damages. It was held that the harbour authority, as general permanent employer, was liable, not having discharged the heavy burden of proof so as to shift to the stevedores its prima facie responsibility for the negligence of the craneman who in the manner of his driving was exercising the discretion it had vested in him. In the course of his speech, Lord Macmillan said:

> "The stevedores were entitled to tell him where to go, what parcels to lift and where to take them, that is to say, they could direct him as to what they wanted him to do; but they had no authority to tell him how he was to handle the crane in doing his work. In driving the crane, which was the appellant-board's property confided to his charge, he was acting as the servant of the appellant-board, not as the servant of the stevedores. It was not in consequence of any order of the stevedores that he negligently ran down the plaintiff; it was in consequence of his negligence in driving the crane, that is to say, in performing the work which he was employed by the appellant-board to do . . , Here the driver became the servant of the stevedores only to the extent and effect of his taking directions from them as to the utilization of the crane in assisting their work, not as to how he should drive it. Many reported cases were cited to your lordships but where, as all agree, the question in each case turns on its own circumstances, decisions in other cases are rather illustrative than determinative.

[1]1947 A.C. 1

In *Donova v. Laing Wharton and Down Construction Syndicate*[2] Lord Bowen said:

> "There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another-that is, he may lend them-and in that case he does not retain control over the work. It is clear here that the defendants placed their man at the disposal of Jones & Co. and did not have any control over the work he was to do."

In that case also a crane-driver was lent to a firm of stevedores to enable them to load a ship and an employee of the wharfingers whose duty it was to direct the working of the crane was injured by the driver's negligence. It was held that his general employers were not liable, as they had parted with the power of controlling him. In *Shivanandan Sharma v. Punjab National Bank, Ltd*[3].

the Supreme Court had considered this question, and it would seem that the Court has accepted the test stated by Pollock in his book on Torts, 15th Edn., p. 62, to the following effect:

> "A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or as, it has been put, ' retains' the power of controlling the work ; a servant is a person subject to the command of his master as to the manner in which he shall do his work."

Though great weight should be attached to this circumstance, the question ultimately has to be decided by looking into the facts and circumstances of each case. Lord Porter, in the course of his speech in 1947 A.O. 1 said:

> "Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged.

It is rather a difficult question to decide whether the workmen continue to be the employees of the petitioners after they got themselves registered under the provisions of the scheme. Petitioners' counsel referred to the various clauses in the scheme to show that the workmen are still in the employment of the petitioners. But I am not sure whether these provisions would unequivocally indicate that the relationship of master and servant exists between the petitioners and the workmen. If the real test is the control of the manner of work, there is great force in the submission of the

[2]1893) 1 Q.B. 629 at 634

[3]1955-I L.L.J. 688 at 693

petitioners' counsel that the petitioners are the employers of the workmen in question. The fact that the petitioners cannot impose any punishment for disobedience of their directions in the matter of carrying out the work may not derogate from this proposition. Even assuming that the petitioners have no power to punish the workmen for disobedience of their lawful directions in the matter of executing or carrying out the work that may not show that there is no relationship of master and servant between them. If the petitioners make report about the disobedience of their directions in the manner of doing the work, the board can take action against the concerned employee on the ground that he has not carried out the direction given by the employer. The approach made by the labour court to the question does not appear to be correct. The Court seems to think that control as to manner of doing the work is not material and that what, is important is the question where the power of appointment and dismissal is lodged. I do not think that I need tackle this question in these cases in view of my conclusion on the next point.

5. Assuming, therefore, that the workmen ceased to be in the employment of the petitioners, I cannot agree with the view of the labour court that there has been a " retrenchment" in these oases within the meaning of Section 2(oo) of the Act, Section 2(oo) reads:

> "retrenchment' means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-
> (a) voluntary retirement of the workman ; or
> (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
> (c) termination of the service of a workman on the ground of continued ill-health.

The expression " termination by the employer of the service of a workman for any reason whatsoever" appearing in Section 2(oo) of the Act, has its own limitations. The limitations are that such termination shall be a termination for a reason. In other words, the words "termination" and "reason" imply a certain amount of volition and choice and free action on the part of the employer. If volition or free choice is not available by compelling circumstances which leave no option to the employer but to terminate the service, then, the termination is not within the ambit of the connotation of the words " termination of service for any reason whatsoever." If the objective situation is such that both " termination" and " reason " are beyond the control of the employer, then, termination in that context would not be "retrenchment." While all retrenchment is termination of service, all termination of service is not retrenchment under Section 2(oo) of the Act. Some limitation must be imposed as being Inherent in the definition of " retrenchment " in Section 2(oo) as meaning the termination by the employer of the service of workman for any reason whatsoever, save and except the exceptions expressly mentioned. The Supreme Court in *Barsi Light Railway Company, Ltd. and Anr. v. Joglekar and Ors*[4]. observed at p. 252: that " retrenchment " as defined in Section 2(oo) and as used in Section 25P has no wider meaning than

[4]1957-I L.L.J. 243

the ordinary accepted connotation of the word: ... and that there is no retrenchment unless there is discharge of surplus labour or staff in a continuing or running industry.
In *Pipraich Sugar Mills, Ltd. v. Pipraich Sugar Mills Mazdoor Union*[5] the Supreme Court said at p. 241:

> "... But retrenchment connotes in its ordinary acceptation that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplus age and the termination of services of all the workmen as a result of the closure of the business cannot, therefore, be properly described as retrenchment."

In 1957-I L.L.J. 243 at 248, after quoting the above passage, the ingredients of retrenchment were laid down in the following words:

> When a portion of the staff or labour force is discharged as surplusage in a continuing business, there are
> (a) termination of the service of a workman;
> (b) by the employer;
> (c) for any reason whatsoever ; and

(d) otherwise than as a punishment inflicted by way of disciplinary action.

At p. 249 the Court said:

> "Learned counsel for the appellants have adverted to some surprising results which would follow the wider interpretation of the definition clause. If an employer dies and his heirs carry on the business or there is compulsory winding up of a company and the company is reconstructed or a business is converted into a limited company, or a new partner is taken into the business, there is in law a termination of service by a particular employer and a MOW employer appears on the scene; will the workmen in such circumstances be entitled to retrenchment compensation though they continue in service as before ? There must indeed be found very compelling reasons in the words of the statute before it can be held that such was the intention of the legislature. We think that no such compelling reasons are available from the provisions of the Act; on the contrary, they point really one way that the Act contemplates an existing or continuing industry and not a dead industry."

It seems to be that for attracting Section 25P of the Act the termination of the service of the employee must be by a voluntary act of the employer. If there is no termination of services by the employer out of his own volition but that discharge of the employee was brought about on account of supervening act or event over which the employer has no control, then, it cannot by any stretch of language be said that there was termination of the service of a workman by the employer. The essence of the idea of retrenchment is the termination of the workman's service by a voluntary act on the part of the employer. If the effect of the coming into force of the scheme and the registration of the workmen thereunder is to sunder the antecedent relationship of master and servant between the petitioners and the workmen and make the Dock

[5]1957-I L.L.J. 235

Labour Board their employer, as contended by the workmen, then I cannot say that the services of the workmen were terminated by any act on the part of the petitioners within the meaning of Section 2(oo)of the Act. After the scheme was promulgated the workmen were at liberty to register themselves as workmen under the scheme. And after they were included in the " reserve pool " the petitioners could not have employed them directly. The workmen in the pool could be employed by the employers only if they are allocated to them by the board. In other words, after the scheme was promulgated, the petitioners had no liberty to continue in their employment the workmen in question. A termination of services of workmen when the employer has no option in law to continue them in the service, is not retrenchment. In *Workmen of Bangalore Woollen, Cotton and Mills Company, Ltd. v. its management*[6] the Court observed at pp. 216-217:

> The definition makes ' retrenchment' a termination of service. It seems to us that a service cannot be said to be terminated unless it was capable of being continued. If it is not capable of being continued, that is to say, in the same manner in which it had been going on before, and it is, therefore, brought to an end, that is not a termination of the service. It is the contract of service which is terminated and that contract requires certain physical fitness In the workmen. Where, therefore, a workman is discharged on the ground of ill-health, it is because he was unfit to discharge the service which he had undertaken to

render and, therefore, it had really come to an end itself. That this is the idea involved in the definition of the word ' retrenchment' is also supported by Section 25G of the Act ..."

6. It was by voluntary act on the part of the workmen that they got themselves registered as workmen under the scheme. This ought in one sense be said to be abandonment of employment under the previous employers. It was contended for the workmen that their services were terminated by the petitioners because of the settlement referred to in the award in Industrial Dispute No. 3 of 1931 (Central). The argument was that the petitioners were really responsible for bringing about the termination of services of the workmen as is clear from Annexure A to the above award. At this stage it is necessary to mention a few facts. After the promulgation of the scheme dispute arose on the question of the priority of registration among stevedore workers and the dispute was referred to the industrial tribunal, Ernakulam, for adjudication in Industrial Dispute No. 3 of 1961 (Central). During the pendency of that proceedings, a settlement was arrived at between stevedores on the one hand and the workmen on the other as regards the priority, method and the qualification for registration. That is Annexure A to the award mentioned above. Counsel for the workmen submitted that it was by virtue of this settlement that the services of the workmen in question were terminated by the petitioners. I am not able to find anything in the settlement which would show that services of the workmen were terminated by the petitioners out of their volition. The settlement begins by saying:

> "This memorandum of settlement la arrived at Cochin on 14 July 1962 between the United Stevedores Association representing the Stevedores Employers and the Cochin Thuramugha Thozhtlall Union (hereinafter referred

[6]1962-I L.L J. 213

> to as the union) representing their member-stevedore workers working in the port of Cochin"

and the relevant clause states:

> "While preparing the above list, priority will be accorded to such workers who had applied both before the registration committee and the Dock Labour Board provided they are physically fit ...

* * *

> (e) The parties agree that the workers who would otherwise be eligible to be registered but for their old age or unfitness on medical grounds, will be paid a lumpsum compensation of ₹ 39,000 to be divided amongst all such workers for loss of registration."

Counsel said that it was by way of compensation that ₹ 39,000 was paid to be divided amongst the workers for loss of registration, and, therefore, there was termination of the services of the workmen by the employers. The employers out of compassion for the medically unfit gave an amount to be distributed among them for " loss of registration." I cannot spell out from this that

the employers terminated the services of the workmen by the settlement. Secondly, retrenchment connotes the discharge of the surplus personnel in an industry. Here the discharges, if there were any, were of the whole employees engaged in the industries of the petitioners, and, therefore, I feel considerable doubt whether I would be right if I hold that there have been retrenchments in these cases within the meaning of Section 2(oo) of the Act, an interpreted by the Supreme Court. I think that the labour court committed an error of law [in thinking that there was termination of the services of the workmen in question by the employers and that Section 25F of the Act was attracted to these cases. In this view, it is unnecessary to consider the other point urged by counsel for the petitioners that the workmen under consideration had no continuous service for one year as required by Sections 25F and 25B of the Act even on the basis of the finding of the labour court that they are permanent workmen. I, there fore, refrain from deciding the question. I quash Ex. A order and allow the writ petitions. In the circumstances of the cases, I make no order as to costs.

Petition allowed.