

MADHYA PRADESH HIGH COURT

Modern Stores (Cigarettes)

Vs.

another v. Krishnadas Shah

Misc. Petn. No. 185 of 1968
(A.P. Sen and G.P. Singh, JJ.)

20.02.1969

JUDGMENT

A.P. Sen, J.

1. By this application under Articles 226 and 227 of the Constitution of India, the petitioners, the Modern Stores, Jabalpur and their Manager (hereinafter referred to as the 'Management') apply for a writ of Certiorari for quashing an award of the Presiding Officer, Labour Court, Jabalpur, dated 15th April 1968, which directs the re-instatement of the 9 salesmen discharged from their service and payment of back wages and allowances to them with effect from 1st January 1968, and for an appropriate writ or direction to restrain that authority, from implementing the said Award.

2. The relevant facts, briefly stated, are these. The Modern Stores, Jabalpur, are the sole distributors of cigarettes manufactured by the Imperial Tobacco Company, Limited, under a distributing agreement dated 20th May 1967, for the Jabalpur region. For distributing cigarettes to the retail dealers, the Management employed the respondents nos. 3 to 11 as salesmen (hereinafter referred to as the 9 'salesmen'). These 9 salesmen have formed an Union of themselves, known as the Cigarettes Salesmen's Union, which is duly registered as a trade Union. Apparently, the Union started agitation for betterment of the Service conditions of its members and eventually, the Management entered into an agreement dated 16th March 1967 with the Union, laying down the terms and conditions of their employment. Among other terms, what is of significance, is Clause 4, which guarantees to them permanence of their service. It reads:

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After this notice of retrenchment, the 9 salesmen started an agitation alleging that in reality there was a wrongful termination of their employment, as a mark of punishment for their trade Union activities. The Management, accordingly, entered into an agreement with the Union on 22nd January 1968 in Form 'C' under Rule 7 of the Madhya Pradesh Industrial Disputes Rules, 1957. In accordance therewith, the dispute as "regards the termination of service of the 9 salesmen was referred to the respondent no. 1 Shri Krishnadas Shah, Presiding Officer, Labor Court, Jabalpur, for his arbitration under Section 10-A of the Industrial Disputes Act, 1947. Incidentally the agreement shows that 9 out of 11 salesmen are affected by the notice of termination. Immediately upon the reference being made, the learned Presiding Officer commenced his arbitration proceedings. The Union filed its statement of claim before the Tribunal, attributing ulterior motives to the management in terminating the services of its members, i. e., of the 9 salesmen in question. It was alleged that these 9 salesmen were not rendered really surplus, on account of any genuine change in the method of business by the Management, but that they, in the guise of ordering retrenchment had, in fact victimized the 9 salesmen, for forming a trade Union and for agitating for the betterment of their service conditions. In other words, the Union urged that the notice of termination was a colorable exercise of the power of retrenchment which the Management ordinarily has, and was, in reality, an unfair labor practice which was lacking in good faith and the notice was, therefore, a notice of termination of services as a disciplinary action, by way of punishment. Apart from this, the Union also alleged that the mandatory requirements of Section 25-F were not complied with and, therefore, the retrenchment, if any, was invalid and also that the notice of termination being in breach of the settlement arrived at between the Union and the Management was invalid. The Management however, in their written statement denied the charge of victimization and asserted that the difference between the purchase price charged by the manufacturers and the retail selling price fixed by them was the margin of profit of the Modern Stores. Apart from this, the Management are not entitled to any discount or commission on the price for employing salesmen for distribution of cigarettes and their margin of profit was not sufficient to cover the cost of distribution. That they had, therefore, terminated the employment of the 9 salesmen on grounds of economy as they had now decided to distribute cigarettes themselves to the retailers directly, instead of through the salesmen in question and, therefore, their services had become surplus. In their supplementary statement, the Management also tried to support their order of termination on the ground of misconduct of the 9 salesmen, and furnished a statement of allegations which showed that their working

had become increasingly unsatisfactory. After taking the evidence adduced by the parties, the Tribunal has by the impugned Award found the retrenchment of the 9 salesmen to be illegal and has, accordingly, directed the Management to re-instate all these 9 salesmen and to pay them their back wages and allowances w.e.f. 1st January 1968.

3. It is urged by the learned Counsel appearing on behalf of the Union that although the functions of an arbitrator to whom a dispute is referred under section 10-A of the Act are of a quasi-judicial nature, the High Court should not ordinarily interfere with an Award rendered by him settling the dispute, unless there was some kind of injustice caused by his adjudication. In support of this contention, the learned counsel placed reliance on *Agnani v. Badri Das*¹ and *Parry's (Calcutta) Employees' Union v. Parry and Co.*,² We are unable to accept the contention. In Agnani's case, 1963-1 Lab LJ 684 (SC) (supra), their Lordships of the Supreme Court had reversed the decision of the Punjab High Court reported in *Badri Das v. Industrial Tribunal, Punjab, Patiala*,³ mainly on the ground that it had exceeded in its jurisdiction under Article 226 of the Constitution, in interfering with the findings of the Industrial Tribunal in regard to the construction of a resolution by which an Inquiry Committee was appointed by the Management and as regards the nature of misconduct proved against the petitioner in that case. Now, it is well settled that, only errors of jurisdiction, the wrongful assumption or non-exercise of it, or errors of law apparent on the face of the record, justify the issue of a writ of Certiorari and not on a mere error of fact which has to be demonstrated by a process of reasoning. The Punjab High Court had in that case, unwittingly assumed the jurisdiction of an appellate Court, which clearly is distinguishable from the jurisdiction of the High Courts under Article 226 of the Constitution. In Parry's case, 1966-1 Lab LJ 535 : (AIR 1961 Calcutta 31) (supra), H. K. Bose, C.J. and B. C. Mitra, J., reversed the judgment of a Single Judge of the Calcutta High Court because he had tried to review findings of fact or inference drawn by the Industrial Tribunal in that case, from the evidence adduced before it by the parties and upon a re-appraisal of the evidence, substituted another set of findings of his own, on the merits of controversy which had to be tried and decided exclusively by the Industrial Tribunal itself. Neither of these decisions are, in our opinion, really applicable, to the present case. Recently, we had occasion to deal with this aspect in *Hindustan Steel Ltd. v. Presiding Officer, Industrial Tribunal-cum-Labour Court (Central), Jabalpur*,⁴ and this is what we have stated:

"We would like to affirm that a writ of Certiorari can issue against an arbitrator functioning under Section 10-A of the Industrial Disputes Act. In *Rex v. Disputes Committee of National Joint Council for the Craft of Dental Technicians, 1953-1 All England Reporter 327*, Lord Goddard C. J. had stated: 'There is no instance of which I know in the books, where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom, by a statute, the parties must resort.'

Following this dictum, there was a conflict of opinion whether an arbitrator functioning under Section 10-A of the Industrial Disputes Act, 1947, was a statutory arbitrator against which a "writ of certiorari" can issue under Article 226. That conflict has now been settled by their Lordships of the Supreme Court in *Engineering Mazdoor Sabha v. Hind Cycle Ltd.*,⁵ Having regard to the different provisions of the Industrial Disputes Act and the rules framed there under, their Lordships have stated that, although an arbitrator appointed under Section 10-A cannot be treated to be exactly similar to a private arbitrator to whom a dispute has been referred by an arbitration agreement under the Arbitration Act, nevertheless, he is clothed with certain powers, his procedure is regulated by a set of rules and the award pronounced by him is given by statutory provisions a certain validity and a binding character for a specified period; therefore, such an arbitrator must be regarded as a statutory arbitrator. Their Lordships, accordingly held that a writ may issue for quashing his award under Article 226 of the Constitution. These principles equally apply to this case. Even otherwise, the present reference of an industrial dispute for its adjudication is to the Industrial Court, which undoubtedly is a tribunal amenable to this Court's directions under Article 227 of the Constitution." We find no reason to take view of this Court's powers under Articles 226 and 227 of the Constitution in relation to adjudications and/or arbitrations under Section 10-A of the Industrial Disputes Act, 1947, different from that taken by us in this case. It would, indeed, result in a "complete failure of justice", to use the words of the learned counsel for the Union, if we did not issue a writ of Certiorari in this case for quashing the impugned Award which is vitiated by errors apparent on the face of the record.

4. The true legal concept of "retrenchment" in the Industrial law is not in doubt. Retrenchment is a managerial function, and it is for the Management to decide the number of workmen required to carry out efficiently the work involved in their industrial undertaking, and this must always be left to be determined by the

Management in their discretion. Sometimes, the number of employees may, however, exceed the reasonable and legitimate needs of the undertaking. In such a case, if any workmen become surplus, it would then be open to the Management to retrench them, for proper reasons. The principle that it is always open to an employer to terminate the services of an employee, as a result of a reorganisation of his business, has now been authoritatively laid down by their Lordships of the Supreme Court in *Macropollo D. and Co. (Pvt.) Ltd. v. Macropollo D. and Co. (Pvt.) Ltd. Employees' Union*, AIR 1958 Supreme Court 1012. In that case, the facts were that previous to 1946 the firm of M/s D. Macropollo, which carries on business in Calcutta as tobacconists, used to sell their manufactured products through distributors. They had no workmen of their own for distributing the goods. In 1946, because of the communal riots, the system had to be changed. The concern, therefore, introduced the use of their own outdoor-salesmen who distributed the goods to the Panwalas and petty retail dealers. In or about 1954, owing to the slackness of business, it was found no longer practicable from the business point of view to continue the Company's own outdoor-sales department. In other words, the Company decided to revert back to the old practice of selling through distributors again. In these altered circumstances, the distributors again appointed their own outdoor-salesmen and the Company had no concern with it, and, accordingly, served notices of termination. It was alleged that this discharge of the outdoor-salesmen by M/s D. Macropollo and Co. Ltd., was against the provisions of the Industrial Disputes Act and was, therefore, illegal. This contention was, however, repelled by their Lordships of the Supreme Court, stating:

"We have no doubt that on the record it must be taken as fully proved that the appellant has adopted the re-organization scheme and the same has been implemented in all the areas where the appellant's business is conducted, between 1954 to 1957. It would be fantastic to suggest that in adopting this scheme of re-organization over such a wide area the appellant was actuated by malice against its employees in Calcutta or that the scheme is a mere device adopted by the appellant for the purpose of discharging them.

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If the re-organized scheme has been adopted by the appellant for reasons of economy and convenience, and it has been introduced in all the areas of its business, the fact that its implementation would lead to the discharge of some of the employees would have no material bearing on the question as to whether the re-organization has been adopted by the appellant *bona fide* or not; and so the

learned Judge was clearly in error in attaching importance to the consequence of reorganization, in regard to the fourteen salesmen in the present case. Their discharge and retrenchment would have to be considered as an inevitable, though very unfortunate, consequence of the reorganized scheme which the employer, acting *bona fide*, was entitled to adopt."

Thus it follows that an employer has the right to re-organize his business, and if such re-organization becomes necessary for reasons of economy or convenience, then the fact that it may lead to discharge of some of his employees will not matter and no inference can be drawn that such discharge is *mala fide*. In other words, such discharge will be an inevitable, though a very unfortunate consequence of a re-organization scheme, which the employer acting *bona fide* is entitled to adopt. In *Royal Calcutta Golf Club v. Third Industrial Tribunal, West Bengal*.⁶ D. N. Sinha, J. (as he then was), reiterated this principle, in the following words:

"A person has the right to re-organize his business in any fashion he likes, for the purpose of economy or convenience and nobody is entitled to tell him how he should conduct his business. The only limitation is that he should do it *bona fide* and not for the purpose of victimizing his employees and in order to get rid of their services, which it would otherwise not be permissible. Provided, however, that he acts within these limits, it is not for the Court of the Tribunal to tell him how he should conduct his business."

In that particular case, the Royal Calcutta Golf Club decided to terminate the employment of its female laborers who were all along engaged on a temporary basis for removing leaves, weeding the greens, etc., from its golf courses, with the intention of handing over this part of the work to a contractor, as the Club officials felt that employment of female laborers was undesirable on account of difficulty experienced by them, in carrying out proper supervision of their work. According to Sinha J., the question whether this particular change would bring about any economic relief to the Club was not one and the only test. Apart from this, there was also the test of convenience and the Club authorities had adduced evidence to the effect that they found it extremely inconvenient to supervise this kind of labour and at various times of the year the female labour had to sit idle, and could not be diverted into other employment and, therefore, became altogether a dead-weight upon the Club. The learned Judge held that if for that reason the Club wanted to re-organise its system of employment of labour, and brought in a contractor to do the job, there was no

explicable reason why the well accepted principle should not be applied. In *Workmen of Subong Tea Estate v. The Outgoing Management of Subong Tea Estate*,⁷ M/s Macneill and Barry Ltd., who managed the Subong Tea Estate, transferred the said Estate to another concern, and their Manager, accordingly, served notices on 8 employees, intimating that their services would no longer be required. The employees in question were also paid retrenchment compensation, but it appears that the requirements of Section 25-F were not fully complied with. The Union representing the said employees protested against the retrenchment. The dispute in regard to the retrenchment, was referred to the Industrial Tribunal, under Section 10(1)(d) of the Industrial Disputes Act. Although, their Lordships held that the retrenchment was invalid in law and the acceptance of retrenchment compensation, if any, by the workmen concerned, would not create a bar against them in the proceedings, for the reason that such technical pleas are not generally entertained in an industrial adjudication, and though they also held that no case had been made out there for effecting any retrenchment at all, that case is, however, an authority for the following proposition:

"The management can retrench its employees for proper reasons. It is undoubtedly true that it is for the management to decide the strength of its labor force, for the number of workmen required to carry out efficiently the work involved in the industrial undertaking of any employer must always be left to be determined by the management in its discretion, and so, occasions may arise when the number of employees may exceed the reasonable and legitimate needs of the undertaking. In such a case, if any workmen become surplus, it would be open to the management to retrench them. Workmen may become surplus on the ground of rationalization or on the ground of economy reasonably and *bona fide* adopted by the management, or of other industrial or trade reasons. In all these cases, the management would be justified in effecting retrenchment in its labor force."

5. Applying these principles to the facts of the present case, we find that the Tribunal has arrived at its adjudication, on a complete misconception of law. It has held that the termination of employment of these salesmen be illegal, not on any finding that no new system had really been adopted by the Management for distribution of cigarettes, as alleged by them but on the hypothesis that the change in the system of working introduced by the Management was with an ulterior object (i) of victimizing their

employees, for their trade union activities, and (ii) of earning greater profits, by dispensing with their services. In this connection, the Tribunal observed:
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And, eventually the conclusion reached by it, was to the following effect :

7. The learned counsel appearing on behalf of the Union has, however, strenuously endeavored to support the Award, on other grounds. Firstly, it is urged that the finding reached by the Tribunal that the Management had *bona fide* adopted a new system of distribution of cigarettes, was wholly outside the terms of reference. In fact, the termination of employment was not claimed by the Management themselves to be a retrenchment of the workmen in question. Our attention was invited to (i) the notice of termination, (ii) the terms of reference under section 10-A *ibid*, as well as to (iii) the written statement filed by the Management, before the Tribunal. Now, the question whether the Management were entitled to justify the termination of employment as a "retrenchment", is one for the Tribunal to decide, having regard to the notice of termination, the terms of reference which define the extent of its jurisdiction as also the written statement. Secondly, relying on the Supreme Court decision in the case of Workmen of Subong Tea Estate, 1964-5 SCR 602 : AIR 1967 Supreme Court 420 (*supra*), it is also urged that the impugned retrenchment had not been validly effected by the Management because the requirements of Section 25-F had not been fully complied with. No doubt, Section 25-F prescribes the conditions precedent for retrenchment, Section 25-G lays down the procedure for such retrenchment and Section 25-H recognises the rights of retrenched workers for re-employment. When the requirements of Section 25-F are not fulfilled, the retrenchment would *per se* be invalid but this is a question which cannot be decided without further investigation. Thirdly, it was urged that the retrenchment, if any, was also invalid, because it was in breach of the settlement arrived at between the Union and the Management, as per the Agreement dated 16th March 1966 which guaranteed to the workmen their permanence of employment, and the retrenchment being contrary to this agreement could not be supported, unless the said settlement was avoided in the manner provided under the Act. It is clear that under Section 25-J, the Management cannot act in derogation of any right which the workmen may have, under an Award for the time being in force, or, any subsisting contract with the employer. In our view, the term of permanency in an employment is itself a "benefit" within the meaning of Section 25-J *ibid*. But we do not know whether the aforesaid Agreement has the force of a "settlement" under the Act. We would, therefore, leave the parties free to urge these

questions before the Tribunal itself, particularly when the infirmity in the Award already adverted to, vitiates it altogether.

8. Before remitting the reference for a fresh adjudication under Section 10-A *ibid*, we feel it necessary to state that the following contentions urged by the Management in challenging the validity of the Award, namely –

(1) The existence of an industrial dispute i.e., a dispute between the employers and their workmen, is a pre-requisite of a reference under Section 10-A of the Industrial Disputes Act, 1947, and inasmuch as a dispute between the Union and the Management cannot be so regarded, the proceedings before the Tribunal are vitiated; and

(2) The failure of the State Government to publish the arbitration agreement in the Official Gazette within one month from the date of receipt of its copy, has resulted in a non-compliance of the mandatory requirements of Section 10-A(3) of the Act, and hence the impugned award is vitiated;

cannot be accepted, for the reasons we shall presently state.

9. As to the first, the reliance placed on the decision of this Court in *Aulia Bidi Factory, Burhanpur v. Industrial Tribunal, Madhya Pradesh*,⁸ is wholly inapposite. In that case, the Court was concerned with the validity of a reference under Section 10(1) of the Industrial Disputes Act, under which the State Government was required to form an opinion that an "industrial dispute", as defined in Section 2(k), existed, or, was apprehended. Now, the formation of an opinion as regards the existence of an "industrial dispute" between the employers and their employees, is a condition precedent to the validity of the reference of such dispute under Section 10(1), as unless there was an "industrial dispute" factually in existence within the meaning of Section 2(k), in respect of which a reference is made, the reference itself would be invalid. That case is hardly an authority for the proposition now sought to be advanced by the learned counsel, for challenging the validity of a reference under Section 10-A, in the present case. The agreement in Form 'C' under Rule 7 was signed on behalf of the workmen by the Secretary, the Cigarettes Salesmen's Union, of which the 8 salesmen are members. The Management knew full well that non-employment of all these 9 salesmen was the "industrial dispute" in question which existed between them and their employees, and having agreed to a reference of such dispute for adjudication in arbitration, they cannot now be heard to say that the dispute referred was not an

'Industrial Dispute' within the meaning of Section 2(k) of the Act, or, that the reference under Section 10-A ibid made by the parties, or, the Award rendered therein were invalid, particularly when they throughout participated in the proceedings before the Tribunal, with full knowledge of the nature of the actual dispute that had been referred, without any objection. Once it is shown that a body of workmen, acting through their union or otherwise, sponsored a workmen's dispute with the management, it becomes an 'industrial dispute' as defined in Section 2(k) ibid. See, *Newspapers Ltd. v. State Industrial Tribunal*,⁹ *The Bombay Union of Journalists v. The Hindu, Bombay*,¹⁰ and *Suman Verma v. Nav-Bharat Karmachari Sangh*,¹¹ According to these decisions, what is essential for converting a dispute in respect of an alleged wrongful termination of employment into an 'industrial dispute' is that before it is referred to the Labour Court or the Tribunal for adjudication, it must be supported by the Union of the employees or by an appreciable number of the employees in the same establishment. That test is clearly satisfied in the present case. The decision in Aulia Bidi Factory's case, 1966 MP LJ 354 : AIR 1967 Madhya Pradesh 44 (supra) is not applicable to the circumstances of the present case, being clearly distinguishable on facts.

10. The only other contention is equally untenable. Section 10-A(3) in terms makes it obligatory for the State Government to publish the arbitration agreement in their Official Gazette within one month from the date of its receipt. The Agreement between the Management and the Union, in Form 'C', under Rule 7, was executed by the parties before the Assistant Labour Commissioner, Jabalpur Division on 21st January 1968, who by his D.O. letter dated 23rd January 1968 forwarded it in original, to the Presiding Officer, Labour Court, Jabalpur, for his formal consent so that it could be sent to the Government for publication in the Gazette, as required by Section 10-A(3) of the Act. The Tribunal signified its willingness to take up the dispute in arbitration, by its letter No. 140/68 of even date. Thereafter, the agreement in question was forwarded to the State Government for publication, and it appears that it was actually published in the Official Gazette on 29th March 1968. In the meanwhile, the Tribunal had assumed the reference and completed its proceedings by drawing up an award on 8th March 1968, but did not make and pronounce it until 15th April 1968 for want of a notification under section 10-A(3) which was still awaited. In the circumstances, it may be that the publication of the agreement in the Official Gazette was actually after the award had been prepared by the Tribunal. The learned counsel appearing for the Management, however, contends that all the requirements of Section

10-A(3) are mandatory. We are unable to accept the contention. Now, that Section reads:

10-A(3). A copy of the arbitration agreement shall be forwarded to the appropriate Government and the conciliation officer and the appropriate Government shall, within one month from the date of the receipt of such copy, publish the same in the official Gazette. On a true construction of the section, we are of the view that although the first condition as regards the publication of an agreement in the official Gazette is obligatory, i.e., a sine qua non, the other requirement, namely, of its notification within one month from its receipt, is only directory and not imperative. In our view, the requirements of Section 10-A(3) are partly mandatory and partly directory. The Award is, therefore, not rendered invalid merely by the subsequent notification of the Agreement in the Official Gazette, not on account of the Tribunal having assumed the reference or having written out the Award in anticipation.

11. The result is that the petition partly succeeds and is allowed. The Award of the Presiding Officer, Labour Court, Jabalpur, dated 15th April 1968, is hereby quashed by a writ of Certiorari, with the direction that he shall now re-adjudicate upon the dispute referred to him under Section 10-A of the Industrial Disputes Act, 1947, in the light of our observations made above. The costs shall abide the event. Hearing fee Rs. 100/-, if certified.

Order accordingly.

Cases Referred.

1. 1963-1 Lab LJ 684 (SC)
2. 1966-1 Lab LJ 535: (AIR 1961 Cal 31)
3. 1962-1 Lab LJ 526: (AIR 1961 Pun 515)
4. Misc. Petn. No. 153 of 1967, D/-10-2-69 (MP)
5. AIR 1963 SC 874
6. (1960) 64 Cal WN 186
7. 1964-5 SCR 602: AIR 1967 SC 420
8. 1966 MPLJ 354: AIR 1967 Mad Pra 44
9. AIR 1960 SC 1328;
10. 1961-2 Lab LJ 436: AIR 1963 SC 318
11. 1967 MP LJ 184 : AIR 1967 Mad Pra 275

