BOMBAY HIGH COURT

Mervin Albert Veiyra

Vs.

C.P. Fernandes

Civil Appln. No. 1953 of 1955

(Chagla, C.J. and Dixit, J.)

07.12.1955

JUDGMENT

Chagla, C.J.

1. The petitioner is one of the employees of the second respondent company, who, along with several others, were served with a notice on the 23rd October 1953 by which the second respondent company intimated to them that they proposed to lay-off these employees owing to certain difficulties which might result in the stoppage of work. On the 24th October 1953 an Ordinance was promulgated which provided for compensation for lay-off and compensation for retrenchment. The provisions of this Ordinance were ultimately incorporated in the Industrial Disputes Act, 1947 as Chapter VA. Some of these employees were reinstated. With regard to the rest, including the petitioner a notice of termination of service was served upon them on the 28th September 1954. The second respondent company then approached the Labour Appellate Tribunal, before which certain disputes between the second respondent company and its employees were pending, for permission to discharge these employees. The Labour Appellate Tribunal granted the permission with certain conditions. The second respondent company appealed to the Supreme Court and in January 1955 the Supreme Court decided that in granting permission no conditions could be attached by the Labour Appellate Tribunal and it remanded the matter to the Labour Appellate Tribunal to dispose of the application of the company on merits. The Labour Appellate Tribunal ultimately gave permission and on the 24th April 1955 the employees including the petitioner were discharged. The present application was filed by the petitioner and others, out of which this Special Civil Application arises, before the Payment of Wages Authority claiming full wages for the period 1st November 1953 to the 31st October 1954. It may be stated that the second respondent company has paid to its employees compensation for lay-off according to the provisions of the Act and also retrenchment compensation. But the contention of the petitioner before the Authority was that he was entitled to full wages from the 1st November 1953 to the 31st October 1954. This contention was

rejected by the Authority and the petitioner has now come before us on this application.

2. What has been urged by Mr. Buch before us is that an employer has no right to lay-off his workmen under the provisions of the Industrial Disputes Act. According to him, the Act merely provides for compensation for workmen laid-off. The Act does not confer any right upon the employer to lay-off an employee. Such a right must be conferred upon the employer by contract of service between him and the employee. If such a contract does not confer a right, that right cannot arise out of the provisions of the Act. It is pointed out that in this case the contract between the employer and the employee does not confer any such right upon the employer. The contract permits the employer to determine the service of the employee summarily without notice and the employee can determine his employment at the end of any day by notice in writing given by him to the company. It is clear that under the common law an employer could terminate the services of an employee at any time even though his business or his industry may only be temporarily stopped and there was every prospect of resumption of that business or industry. There was no obligation upon the employer temporarily to suspend the services of his employee and reinstate him when his business or industry was resumed. He was perfectly free to dismiss him and to employ new men when the business or industry was resumed. Nor did the common law impose any obligation upon the employer to give any compensation to an employee it his services were retrenched. The expression used by Mr. Buch on which he has based the whole of his argument that the employer does not possess the rignt to lay-off an employee under the provisions of the Industrial Disputes Act is not a very appropriate expression. Far from laying-off an employee, being a right, in our opinion it is really an obligation. The common law right of the employer to which we have just referred is curtailed and limited if he is bound to lay-off his employee under certain circumstances. Instead of being free to dispense with his services, if there is a temporary break down and the conditions laid down in the Act prevail, he cannot put an end to the contract between himself and his employee, but all that he can do is to suspend the contract for the time being and the employee is entitled to resume his services and to receive full wages as soon as that temporary stoppage has come to an end. From the point of view of the employee the importance of not being dismissed but merely being laid-off can be understood and appreciated. He may or may not find new work if his services are dispensed with. Even when he finds new work the number of years that he has already put in service with his old employer would be thrown away and whatever benefits might have accrued to him by continuity of service would also be lost to him.

3. Therefore, in our opinion, and we shall presently point out the scheme of the Act, what the Legislature did by Chapter VA was to impose a certain obligation upon the employer and confer a certain right upon the employee. The obligation was that if the conditions referred to in the definition of "lay-off" exist, the employer was bound to continue the services of the employee, but was not bound to pay him full wages but compensation provided in the Act. The employer was also entitled to retrench the services of his employee, but that also he could only do provided he paid retrenchment compensation. Therefore, two options were open to the employer. Under

given circumstances he could either lay-off his employee, pay him lay-off compensation, and when the crisis passed and the emergency ceased to exist he had to reinstate him or rather he had to give him his full wages as an employee, the suspension of the contract having come to an end, or he could dismiss him, but unless the dismissal was for misconduct or for certain other reasons mentioned in the Act, he had to give him retrenchment compensation. Therefore, Chapter VA constituted a serious encroachment upon the employer's rights under the common law, and it is entirely erroneous to look upon the provisions of Chapter VA as conferring rights upon the employer which he did not possess under the common law. Therefore, when it is sought to be argued that unless the employer has the right to lay-off an employee under the contract between him and his employee, he cannot claim that right by reason of the provisions of the Act, there is a complete misapprehension both as to the true effect of Chapter VA and the object that the Legislature had in enacting this Chapter. The whole of industrial law in India today constitutes an inroad upon the common law rights of the employer. We no longer live in the age when the rights of workers were regulated by the contract between the employee and the employer. Whatever the provisions of the contract might be, the industrial law interferes with those provisions in the interest of labour, and it is futile to suggest today that the Legislature enacted Chapter VA in order to confer rights upon the employers and not upon the employees. It is with this background that we must approach the provisions of the Industrial Disputes Act to see whether the contentions put forward by Mr. Buch are justified.

4. We had occasion recently in *Nutan Mills v. Employees State Insurance Corporation*[1], to consider the scheme of this Act when we were considering whether compensation for lay-off constituted wages. The definition of "lay-off" which is given in Section 2 (kkk) makes it clear that it must result from the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the break down of machinery or for any other reason to give employment to a workman whose name is borne on the muster rolls of the industrial establishment and who has not been retrenched. Section 25C deals with right of workmen laid-off for compensation, and what is emphasized by Mr. Buch is that this section merely confers upon the workmen a right to receive compensation when they are laid-off; but there is nothing in this section which provides for the right of the employer to lay-off a workman. When we look at this section, the first part provides : "Whenever a workman whose name is borne on the muster rolls of an industrial establishment and who has completed not less than one year of continuous service under an employer is laid-off" and then the second part deals with the compensation to be paid to him. Therefore, this section would only apply provided the conditions of lay-off mentioned in the definition exist and the lay-off is in accordance with the conditions and the definition contained in the Act. In our opinion, implicit in this first part of Section 25C is the obligation of the employer to lay-off his employee and not to dismiss him or discharge him as he would be entitled to under the common law or under the contract between him and his employee. It is true that the Legislature has not used clear and explicit words conferring power upon the employer to lay-off his employee, but looking to the whole scheme of Chapter VA, that power or that obligation is implicit in the provisions of that Chapter. Then, when we look at

Section 25B, it defines one year of continuous service, and in the explanation to that section there is a clear indication that the Act itself permits an employer to lay-off an employee, and the explanation is :-

> "In computing the number of days on which a workman has actually worked in an industry, the days on which -
> (a) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946, or under this Act or under any other law applicable to the industrial establishment, the largest number of days during which he has been so laid-off being taken into account for the purposes of this clause."

[1] Civil Reference No. 16 of 1955 : (AIR 1956 Bom 336)

Therefore, the explanation clearly indicates that a workman could be laid-off under the provisions of the Industrial Disputes Act although there may be no provision to that effect under any agreement or even under any standing orders. Then Section 25J(2) provides :-

> "For the removal of doubts, it is hereby declared that nothing contained in this Chapter shall be deemed to affect the provisions of any other law for the time being in force in any State in so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of this Chapter."

Therefore, this Chapter determines not merely the right of the workmen to receive compensation and the liability of the employer to pay compensation, but also the wider rights and liabilities with regard to the lay-off itself.

5. It is urged by Mr. Buch that in this case we have neither a contract which entitles the employer to lay-off nor are any standing orders framed which would be determinative of the rights of the employer and the employee which permit such a lay-off, and therefore the employer is claiming something to which he is not entitled under the contract or under the standing orders and to the extent that this claim of the employer may be allowed it would derogate from the rights of the employees and such derogation is not permissible under the proviso to Section 25J. That proviso is to the effect that nothing contained in this Act shall have effect to derogate from any right which a workman has under the Minimum Wages Act, 1948, or any notification or order issued thereunder or any award for the time being in operation or any contract with the employer. It is difficult to understand the contention that the employee in this case had any right under his contract with the employer which has been derogated from by permitting the employer to lay-off an employee and to give him lay-off compensation. As we have already pointed out, the contract in question does not deal with lay-off at all. The employee as a matter of fact under the contract had no right whatsoever for the period during which the business or industry was suspended, he was liable to be dismissed summarily, and therefore if anything the obligation cast upon the

employer under Chapter VA, far from derogating any right of the employee, conferred a new right upon him during the time when the circumstances mentioned in the definition of "lay-off" continued to exist.

6. Mr. Buch has emphasized the fact that the result of the lay-off in this case has been that the employee has had to go without his full wages for a period of one year, that the employer was in the happy position of not paying him full wages, not making up his mind whether he should retrench him or not and pay him retrenchment compensation, and the employee was unable to decide whether he should join another service and thereby lose the benefit of the continuity which the service with the second respondent company gave him. We would be very reluctant to construe any provision of the Industrial Disputes Act in a manner which would prejudice the rights of workmen. We realise the hardship caused to workmen as in this case where for a whole year they were paid no wages at all and ultimately they were given a small pittance of their wages in the form of lay-off compensation. Therefore, it is desirable to make clear what rights the workmen have under the provisions of this Act. It is always open to the workmen to challenge before the appropriate authority that the conditions necessary before it could be said that there can be a lay-off in law do not exist, and they could equally insist that instead of being laid-off they should be retrenched and retrenchment compensation paid to them. Of course, it is not necessary to emphasize the fact that apart from this it is always open to the employee to terminate his services with the employer and to seek fresh employment. But naturally an employee would like to continue in the service of his old employer and it is precisely because of this that the Legislature has provided for a sort of interregnum during which the contract of service is merely suspended but has not come to an end. It is not open to the employer under the cloak of the provision with regard to lay-off to keep his employees in a state of suspended animation, not make up his mind whether the industry or business would ultimately continue or there would be a permanent stoppage, and thereby deprive his employees of full wages. The very essence of a lay-off is that it is a temporary stoppage. It is equally the essence of lay-off that within a reasonable period of time the employer expects that the business or industry would continue and his employees who have been laid-off will be restored to their full rights as employees. We agree with Mr. Buch that it is not open to the employer, although he knows that the conditions are not such that it is possible to resume the work or the business, just to postpone coming to a conclusion and just to put off the evil day by continuing with the lay-off and not retrench the workmen who have been laid-off and whose services would no longer be required. Therefore, it is clear that the Act does not compel the workmen to continue in the state of affairs where the contract between them and their employer is merely suspended and where they get no wages. But what Mr. Buch relies upon and which contention was not accepted by the Authority and which we are also compelled to reject, is that a lay-off is only permissible so long as it is for a fixed period of time and does not extend beyond what he says a month or two.

7. Now, in the definition of lay-off there is no indication whatever that it should continue for a particular period of time. Mr. Buch says that not only should it be temporary but it should be

definite also and he says that in this case the lay-off is not legal because it was for an indefinite period and as a matter of fact it lasted for a whole year. Whether a lay-off at any particular time is proper and legal must depend upon the circumstances of each case. The law does not lay down any definite period, as indeed it could not, and therefore there is no principle of law involved in the contention that in this particular case the lay-off was illegal or improper. The petitioner never contended before the Authority that the lay-off was not *bona fide* or that it was used as a cloak to enable the employer not to pay full wages, and the Authority has found as a fact that there was a continuous lack of raw materials which did not enable the employer to give work to the employee. Mr. Buch has been compelled to admit that a lay-off for a short period may be beneficial to the workmen, but if it extends beyond the short period then it would lead to serious consequences. Once it is conceded that the lay-off is beneficial even for a short period, it takes away completely the ground from under the feet of Mr. Buch when he argues that lay-off is a right conferred upon the employer. How short the lay-off must be in any particular case and at what point of the time the lay-off ceases to be proper and legal and becomes improper and illegal must depend upon the facts of each case and cannot possibly be postulated as a proposition of law. As we said before, it is always open to the employee at any particular point of time to contend that the lay-off is no longer legal, no longer satisfies the conditions of the definition, and that they are entitled to be retrenched and paid retrenchment compensation. But to argue, as Mr. Buch has argued, that the lay-off in this case was initially illegal because in the notice of lay-off no definite period was fixed is a contention which is clearly untenable looking both to the language of the definition and the scheme of Chapter VA. As we said before, we agree with Mr. Buch that a layoff in its very nature must be temporary. It is not suggested in this case that the lay-off was not temporary. We also agree with him that in order that the lay-off should be legal it must satisfy the conditions laid down in the definition. It is not suggested in this case that those conditions were not satisfied. But where we disagree with Mr. Buch is that the law does not require that the lay-off must be for a definite period, nor does the law require that it must be for a specific period. In this connection reliance was placed on the provision with regard to compensation and it was pointed out that while the compensation provided was 50 per cent. of the total of the basic wages and dearness allowance, there was proviso (a) to this provision which laid down that the compensation payable to a workman during any period of twelve months shall not be for more than forty-five days except in the case specified in clause (b), and clause (b) deals with broken periods, and where a workman has been paid compensation for forty-five days and during the same period of twelve months he is again laid-off for further continuous periods of more than one week at a time, he shall, unless there is any agreement to the contrary between him and the employer, be paid for all the days during such subsequent periods of layoff compensation at the rate specified in this section. It is therefore pointed out that if there is an unbroken, period the workman would only be entitled to forty-five days in the whole year, whereas if there were broken periods he would be entitled to much more. In this case there was a lay-off for a whole year and the workmen are only entitled to compensation under proviso (a) to Section 25C. It is therefore urged by Mr. Buch and with considerable force that it could not have been the intention of the Legislature that when the workmen were earning no wages for a whole

year they should only receive compensation for forty-five days, but if they had been working from time to time and if there were broken periods of lay-off they would have earned much more, and from this it is suggested that the Legislature intended that a continuous period of lay-off should not be very long, certainly not one year as in this case. It may be that the Legislature might have taken the view that normally a lay-off would not be for a very long period and it may be pointed out that it is possible for the interest of the workmen to be protected by standing orders which may provide that a lay-off should not be for a longer period than specified in the relevant standing order, and we understand that when standing orders are framed they do provide for periods of lay-off. But from this possible lacuna in Section 25C we cannot possibly infer that the Legislature has provided a time limit for a lay-off and has provided that when the time limit expires the lay-off becomes illegal. If that was the intention of the Legislature it should have been provided either in the definition of lay-off or by some specific provision in the Act itself. In the absence of any such provision we cannot accede to Mr. Buch's contention that a lay-off which exceeds any particular period is necessarily illegal and contrary to law.

8. A further point raised by Mr. Buch was that on a true construction of Section 25C he would be entitled to much more compensation for lay-off than has been awarded to him. We have already held that compensation for lay-off is not wages and from our decision it must follow that the Authority for Payment of Wages would have no jurisdiction to grant any claim made by a worker with regard to compensation for lay-off. It is therefore unnecessary for us to consider the contention put forward by Mr. Buch. It will be open to him to put forward that contention before the appropriate authority which would have jurisdiction to grant him compensation for lay-off. As this is an application against the order of the Payment of Wages Authority, we are only concerned with his order and as he has no jurisdiction to award compensation for lay-off it is unnecessary for us to pronounce on what the rights of the petitioner are under Section 25C.

9. The result therefore is that the petition fails and must be dismissed. No order as to costs.
Petition dismissed.