BOMBAY HIGH COURT

N.J. Chavan

Vs.

P.D. Sawarkar

Special Civil Appln. No. 780 of 1957

(Tendolkar and Shelat, JJ.)

10.07.1957

JUDGMENT

Tendolkar, J.

1. This petition raises an important question 01 law relating to industrial relations. The petitioners before us were employed in the Nishat Talkies, Poona. These Talkies were started about 15 years ago and were originally owned by one Mr. Kakde. Kakde sold it to one Mr, Bhole. Mr. Bhole could not pay the whole of the purchase price and he therefore mortgaged it to Kakde. Upon this mortgage Kakde obtained a decree for the sale of the mortgaged property. There was also a mortgage held by the Bank of Maharashtra on the same property and the Bank obtained a decree against both Kakde and Bhole, The property was sold in execution of the decree and Kakde purchased the property at the auction. The Bank filed an execution application against the judgment-debtors and got one Shri Gowaikar appointed a Receiver. The Receiver took possession on the 22nd of February 1954. On the 11th of October. 1959 one Hapal M. Tata entered into an agreement with the Receiver for the supply of films for exhibition in this theatre. On the 27th January, 1956 the Receiver was discharged and on that very day he served notices of discharge on the employees of Nishat Talkies. On the 28th January, 1956 Kakde gave a lease to Tata for ten years beginning from the 1st or February. 1956 On the 31st of January, 1956 Tata issued letters of appointment to the employees of the Nishat Talkies. The employees were paid by the Receiver all their past dues and passed receipts in respect thereof. Thereafter on the 7th of May, 1956, 13 disputes raised by the employees were referred for adjudication by the Government of Bombay to the Industrial Tribunal. The reference was against the Nishat Talkies and the Court Receiver; but as the Receiver had ceased to have any interest in the Nishat Talkies by reason of his discharge, the reference continued against the Nishat Talkies only. Kakde, as the owner of the Nishat Talkies, was made a party to the reference and appeared before the Industrial Tribunal and stated that as from the 1st of February, 1956 S. M. Tata, was conducting the business and all the dues prior, to that date had been paid to the employees. Tata was served with a notice by the Industrial Tribunal but did not appear in the proceedings. Presumably, he was content to let Mr. Kakde safe-guard his interest in these proceedings for, if at the date When this "dispute" came up for determination before the Industrial Tribunal Tata was carrying on business of Nishat Talkies, and the party to the reference was Nishat Talkies, obviously "the real party was

'rata and not Kakde, for any individual carrying on business in a business name may be sued in that name; but obviously Kakde was left to dispute the claim of the employees in this particular industrial dispute.

2. Now, one of the disputes, viz. dispute No. 12, was "Continuity of service: The past services of every employee should be considered as continuous for all purposes." This demand also affected other demands which were dependent upon the determination of the question of continuity of service. Regarding continuity of service the Tribunal rejected the demand. Consequently they also came to certain conclusions on other demands which were affected necessarily by the rejection of this demand. The main grievance on this petition is that in rejecting the demand for continuity of service there is an error apparent on the face of the record in the order passed by the Industrial Tribunal and that they have also erred in law in not having applied to the facts of this case law which is now well established.

3. Now, before dealing with the question as to whether there is or is not an error apparent on the face of the record, it would be convenient to state what the position in law is with regard to continuity of service where business changes hands from one management to another but the employees continue in the same business. Do the employees under such circumstances continue to enjoy the benefits that have accrued to them by reason of their past service when the business comes into the hands of a new management or do they lose such benefits?

4. The question fell to be determined by me on a writ petition as long as on 15th February, 1949 and the judgment is reported in *The Bombay Garage Ltd. v. The Industrial Tribunal Bombay*[1]*,* In that petition an award of the industrial Tribunal was challenged by the Bombay Garage Ltd. The said company had commenced business on 1-4-1945 and took over the business of M/s. F. M. Chinoy and Co. Ltd. who were the proprietors of the Bombay Garage. In July. 1946 certain disputes arose between the petitioners and their employees and they were referred by the Provincial Government to the Industrial Tribunal. One of the demands was gratuity at the rate of one month's salary for every completed year of service after a minimum of 10 years; and in connection with the question of gratuity it was urged by the Bombay Garage Ltd. that the period during which the employees were in the service of M/s. F. M. Chinoy and Co. Ltd. should not be taken into account but the employees should be deemed to have become the employees of the Bombay Garage Ltd. only when they took over the business from F. Chinoy and Co. Ltd. with regard to this contention I observed on P. 16 :

> "That contention is, in my opinion, not well founded. An employer cannot deprive his employees of the benefits that have accrued to them by reason of past services merely by transferring his business to another person or to another limited company. The work done by the employees primarily benefits the concern, although, of course, the owner also receives benefits therefrom. In any case, therefore, where there is a continuity of service, a new employer is bound to take into account the services rendered by the workers to his predecessors in title, and it was open to the respondent (The Industrial Tribunal) to award that, for the purposes of calculating gratuity, service rendered to the former employers should also be taken into account,"

[1](1953) 1 Cri CJ 14 (Bom)

Therefore, in this decision I clearly laid down the proposition that if there was a transfer of

business the rights of the employees as against their employer were not in any manner affected provided there was continuity of service. So that, in order that the employees should continue to enjoy any rights that they had acquired by reason of past service, two conditions have to be satisfied: (1) that there is a transfer of the business, and (2) that there is continuity of service.

5. The matter came to be considered by the Madras High Court in the case of *Odeon Cinema v. Workers of Sagar Talkies*[2] by Justice Sri Rajagopala Ayyangar. The facts, as set out in the judgment by the learned Judge, are that whilst the Sagar Talkies were conducting a cinema business, a firm by name Ishwardas Sahni and Brothers, who carried on business in several places in India of running cinemas under the name of Odeon Cinema, obtained a lease of the Sagar Talkies to enable them to conduct "their own cinema business" in the said place. "What appears to have happened is that it was alleged that the petitioners had assured the workers that all the previous employees under the lessors would be taken in their employment; but in breach of this assurance they subsequently refused to employ all these persons and offered to take only a certain number of them on terms of service different from those which these persons had enjoyed in the past. Therefore, an industrial dispute was raised and one of the questions raised before the Tribunal was that there could be no industrial dispute between those workers who were not absorbed by the lessee in his business and the lessee. The Tribunal came to the conclusion that there was no industrial dispute and this was affirmed by the Labour Appellate Tribunal and it is this award that was challenged before the Madras High Court. Justice Sri Rajgopala Ayyangar in the course of his judgment enunciated the position in law to be as follows:

> "The industrial tribunal has cited a number of decisions of other industrial tribunals, in the course of which it has been held that where is a transfer of business of one management to another, the rights and obligations which existed as between the old management and their workers continue to exist vis-a-vis the new management, after the date of the transfer."

We are in respectful agreement with the statement of the law in the passage quoted above. We assume for this purpose that the transfer of a business includes also continuity in the service of the workers, because if the workers did not continue in the service of the new management different considerations might well apply. On the facts of that case the learned Judge held that there could be no industrial dispute between the workers not employed and the lessee. There are other matters referred to in this judgment to which we will have to revert as they have been relied upon by Mr. Palkhwala in support of some of his arguments: but we may merely mention one more fact that in a later passage of this decision the learned Judge poses the question as to whether there is such a continuity of business as to constitute the lesseee the successors in business of the lessors. Obviously, in our view, the words "successors in business" are used here as equivalent to the transferees of a business and no more. Although a successor of a business will necessarily be a transferee, there may be a transferee of a business who is not necessarily a successor; and we take it that the correct test is not whether there is succession to the business but the correct test is whether the business has been transferred without disturbing the identity

[2](1954) 2 Lab. L.J. 314 : (AIR 1954 Mad 1045)

of the business and its continuity.

6. We next turn to a decision of a Division Bench of this Court in *The New Gujarat Cotton Mills*

Ltd. Vs. The Labour Appellate Tribunal[3], The Division Bench was dealing with an application for a writ quashing an order of the Labour Appellate Tribunal and the relevant facts are these. There were certain employees of the Gujarat Cotton Mills Co. Ltd. which manufactures textiles in a factory at Ahmedabad. The Company closed its business in October 1952. In February 1953, the Company was compulsorily wound up by an order of Court and an Official Liquidator was appointed. The Liquidator sold as a going concern the assets and the goodwill of the company including the lease-hold rights to the land on which the factory stood. The purchasers were the New Gujrat Cotton Mills Ltd. This new company commenced working the factory in November, 1953. The Liquidator executed a sale deed in favor of this new company on the 4th March, 1954. The New Company declined to continue in its employment certain employees of the old company. Such persons filed applications before the Labour Court at Ahmedabad for an order against the new company for re-instatement or for re-employment. The Labour Court held that the applicants were not employees, and the application filed by them was not maintainable in the view that it took that the old company having been ordered to be wound up the employees of the old company were in law discharged from employment, and also on the ground that the old company had terminated the services of its employees before it was ordered to be wound up. Against the order of the Labour Court, there was an appeal to the Industrial Court which confirmed the view of the Labour Court. Against the order of the Industrial Court appeals were filed to the Labour Appellate Tribunal which disagreed with the view of the Labour Court and the Industrial Court and held that the business of the company, on a true construction of the sale deed, was purchased as a running concern by the new company and the new company must be regarded as a successor of the old company. It is this view of the Labour Appellate Tribunal which was challenged before the Division Bench of this Court: and in pointing out what the law applicable to such a case is Mr. Justice Shah, who delivered the judgment of the Division Bench, quoted with approval the observations of Rajagopala Ayyangar J. in *Odeon Cinema v Workers of Sagar Talkies* which I have already set out above. Having done so there are various places in the judgment where the learned Judge refers to a 'successor' or to a 'succession' but in the context in which these expressions are used we have little doubt that the word "successor" is used in the sense of.....transferee and "succession" in the sense of transfer of business and no more; and it is in that sense that' we understand these expressions in the context of this judgment for it is clear that our learned brother Shah J. expressly approved of the decision of the Madras High Court which we have already quoted above.

7. The principle that emerges from these decisions is that employees of a business continue to be entitled to all the rights and privileges acquired by them by reason of past services even after a transfer of business provided (1) there is continuity of service, and (2) there is identity of business.

8. By continuity of service is not meant necessarily legal continuity but only continuity in fact; that is the employees must continue to serve the business without a substantial break in service. Thus, if the transferor gives notice of termination of service and the transferee

[3]59 Bom. L. R. 209: (AIR 1957 Bom 111)

makes a fresh appointment, this by itself, although it may in law amount to a break in continuity, will not affect the continuity of service for the purpose of determining industrial relations. Nor does it constitute a break in service if a short time elapses between such termination of service by the transferor and appointment by the transferee (which are legal forms resorted to by the

employer in an attempt to deprive the employees of the rights and privileges they have acquired by reason of past service) so long as the employees continue to serve the business even after the termination and before the re-employment.

9. Regarding identity of business, what is required is that the same business, which was carried on by the transferor, must be carried on by the transferee. It is not sufficient that the business is similar or of the same nature, if the business carried on by the transferee is new as was the case in *Odeon Cinema v. Sagar Talkies* where the transferees obtained a lease of the Sagar Talkies to carry on "their own business."

10. Keeping these principles in mind when one turns to the decision of the Industrial Tribunal, the Tribunal has disposed of the dispute as to continuity of service in these words :

> "From the short history that I have given above it will be noticed that Shri Tata has come on the scene only on 1-2-1956. All the past dues have been paid to the workmen. The services of the workmen were properly terminated by the Receiver by the discharge notice dated 27-01-1956. There was break of 4 days in the service of the workmen. It is no doubt true that during these 4 days the theatre was not closed. All the same by a letter of appointment dated 31-1-1956 the workmen were appointed afresh by Shri Tata. These letters of appointment were accepted by the workmen without any objection. No one made a reservation in the acceptance of these letters of appointment by saying that their demand for a continuity of service from the time to Shri Bhole would be pressed before the Industrial Tribunal. Shri Tata did not accept the liabilities of the past owners of this theatre, and therefore, I agree with his Advocate. Shri A.T. Joshi, that the workmen should be considered as having been appointed afresh as from 1-2-1956. The demand of the workmen for continuity of service has no force and is therefore rejected."

With respect to the Tribunal, it is plain that they have completely lost sight of the principles of law to be applied in determining the question of continuity of service. They appear to have decided the matter relying upon the doctrine of sanctity of contract. This doctrine governed the relations of employer and employees in the 19th Century but is now obsolete: and it is the duty of an Industrial Court or Tribunal to modify the contractual rights and obligations if it becomes necessary to do so in the light of industrial legislation and legal decisions relating there-to. The whole approach of the Tribunal to the question is with respect, wrong in law and thereby the decision of the Tribunal on this point is vitiated and must be set aside.

11. The question then arises as to whether we should send back the matter to the Tribunal to determine the question afresh in the light of our judgment. Ordinarily we would have adopted such a course; but in this particular case all the facts that are necessary for the determination of the question of continuity of service are admitted facts, they are facts on the record and, therefore, not only will it be possible for this Court to determine the question but it would involve unnecessary delay and possibly further litigation if the matter was to be sent back for determination of this question. We, therefore, propose to determine the question ourselves on the facts which are admitted and on the basis of the deed of transfer which is before us. Now, in the first instance although it is true that the Receiver discharged the employees by a notice dated 27th

January 1956 and Mr. Tata reappointed them on the 31st of January, 1956, it is admitted that the theatre was not closed between these two days and the employees continued to serve. Therefore, although a situation was brought about in law of a termination of service on the 27th January and a reappointment on the 31st of January, the rendering of service by the employees to the business itself was in no manner interrupted and the employees continued to serve at the theatre and the theatre earned profits. Therefore, within the ratio of the principles that we have set out above there was continuity of service and the first essential ingredient for the purpose of determining whether the past service of the employees should be taken into account for all purposes is, therefore, satisfied.

12. We next proceed to consider the second ingredient, namely, the identity of business. Now, in this connection we must, in the first instance, look at some of the provisions of the lease dated 28th January, 1956. Term 1 (c) of the lease Provides :

> "The Lessee hereby agrees with the Lessor as follows :
> "(c) To make payments to the members of the staff."

Now, prima facie this would indicate that the old staff was being taken over by the lessee who became liable for the payment of the staff as between himself and the lessor, because if the lessor had not taken the precaution of terminating the services of the staff he would have continued to be liable for the salaries of this staff. Mr. Palkhiwala has, however, urged that such a construction of this sub-clause is not warranted in law. He has relied on certain passages in the judgment of the Madras High Court in *Odeon Cinema v. Sagar Talkies*, in support of this submission. Now, what had happened in that case was that the lessees had addressed to a friend of theirs a letter in which it was stated

> "We shall have the complete control of the theatre without any interference, whatsoever. The staff, etc., will be paid by us direct;".

The learned Judge Rajagopala Ayyangar J. in the first instance held that it was wrong to utilise this letter written by the lessees to their friend for the purpose of construing the obligations undertaken by the lessees when they were the subject-matter of a written instrument of lease. Having held this, it did not become necessary for the learned Judge to construe this letter; but it is true that learned Judge expresses the opinion that the proper construction of this letter is that the lessee did not wish to take a lease of a theatre where the staff was under the control of the lessors and expressed a desire that the staff which would be employed in the theatre would be his own staff. In the first instance, this expression of opinion is obiter, but quite apart from it, we do not have to deal with the same words that the learned Judge had to interpret. Whilst in the lease we are construing the lessee agreed to make payment to the members of the staff which could not mean any other members than the members then existing, in the letter which the learned Judge had to interpret, payment of the staff was mentioned in the context of the lessees having complete control of the theatre. In cur opinion, therefore, the judgment of Rajagopala Ayyangar J. does not in any manner affect the interpretation of the document of lease before us; and we are of opinion that the obligation undertaken by the lessee under clause 1 (c) is an obligation to pay the then existing members of the staff although, of course, the obligation to the extent to which it is a contract is contract between the lessor and the lessee and may not be legally enforceable by the

employees.

13. Then by clause 1 (f) the lessee has agreed inter alia "to deliver all the machinery as at present" on the expiration or termination of the lease. This shows that the lessee did not merely take a lease of the building of the theatre but also of the machinery therein. Then by subclause (j) the lessee agrees to make at his own cost every and all repairs and improvement that may be necessary or desirable to carry on the concern or to efficiently run the cinema. This clearly shows that the lease was taken for the purpose of carrying on the concern, and not of closing it and starting a new one, and for efficiently running it as a cinema as it had been in the past. Then by sub-clause (k) the lessee agreed

> "to replace new machinery or parts thereof in lieu of the existing machinery or parts thereof and to incur all expenses incidental to the purchase installation and make them in a working condition."

This again shows that the machinery was to be used for the purpose of running a cinema and if it got worn out in the process, it had to be replaced by the lessee at his own cost. Lastly, we have in clause 2 (c) a provision whereby the lessor agrees to transfer or get transferred to the lessee all the necessary licences on the name of the lessee from the date of the lease. Taking all these terms collectively, there is not the least doubt that the object of the lease was to enable the lessee to continue the same cinema business which the lessor was carrying on in the same, premises with the same machinery and equipment with the same licences and with the same staff. We can hardly imagine a stronger case of identity of business. All that has happened is a change of beneficial interest in the business. Therefore, we have here clearly a case of a transfer of business where the identity of business has remained the same and the staff has continued to serve the business. In such a case it is clear to our minds that the employees continue to enjoy the same rights and privileges that they had acquired by reason of past services to the said business. In our opinion, therefore, demand No. 12 "Continuity of service: The past services of every employee should be considered as continuous for all purposes" should have been allowed and we accordingly modify the award of the Tribunal.

14. Now, since we have reversed the finding of the Tribunal on this particular demand, it necessarily affects the determination of some demands. In paragraph 8 of the Tribunal's judgment the Tribunal has dealt with the question of increments on the footing that the service was not continuous. In paragraph 13.....the Tribunal has dealt with the demand for gratuity also on the same footing and in paragraph 19 the demand for giving retrospective effect has also been dealt with on the same footing. Since the basis on which these demands were dealt with has now been altered by reason of our judgment. We set aside the findings of the Tribunal in regard to these three matters and remand the matter back to the Tribunal for determining these three matters on the footing that there was continuity of service.
15. Respondents 2 and 3 to pay the costs.
Petition allowed.