PATNA HIGH COURT

State of Bihar

Vs

Presiding Officer

Civil Writ Jurisdiction Case No. 777 of 1976

(S. Sarwar Ali and R.P. Sinha, JJ.)

19.08.1976

JUDGMENT

S. Sarwar Ali And R.P. Sinha, JJ.

1.The hearing of this case was concluded on 6th July, 1976 and the case was directed to be placed for Judgment in Court on 12th July, 1976. On that date we were intimated that there was some talk of settling the matter between the parties outside the Court. In view of the nature of the disputes involved and the number of employees affected by the same, we thought it proper that we should give fullest opportunity to the parties to have the matter settled outside the Court, if possible. We, therefore, adjourned the delivery of the Judgment on several occasions, but it now appears that it is not possible for the parties to come to any amicable settlement and Judgment has to be delivered in this case.

2. In this writ application the petitioner, the State of Bihar. prays for quashing of the award dated 27th February. 1975 (Annex. 1) made by the Respondent No. 1. the Presiding Officer, Industrial Tribunal, Patna, in Reference No. 87 of 1969 and Reference No. 4 of 1970.

3. Certain disputes arose between the petitioner and respondent Nos. 2 and 3, the Workmen of the River Valley Projects Department, Kosi Project, and the Workmen of the River Valley Projects Department, Gandak Project respectively. The notifications dated 19th August, 1969, (Annex. 2) and 4th February. 1970 (Annexure 3) were issued by the Government of Bihar, referring the disputes mentioned in the said notifications. under Section 10 (1) (d) of the Industrial Disputes Act, 1947. Those disputes related to work charged employees of the Kosi and Gandak Projects of the River Valley Projects Department (hereinafter referred to as the 'Department'). An award was given by the Presiding Officer. Industrial Tribunal, Patna, which is Annex. 1 to this writ application. The disputes referred to for adjudication are mentioned in paragraph 1 of the award and related to four matters. Out of these, we are concerned in this case with only three of the disputes. Reference to those disputes will be made later.

4. There is a preliminary objection as to the maintainability of the writ application raised on behalf of the contesting respondents, namely, the Workmen of the two Projects. It is said that the

award was made on 27th February, 1975. but the writ application was filed on 10th March, 1976. There is thus considerable delay in filing the writ application, and as such, in the circumstances of the case, the discretionary power to examine and quash the award should not be exercised by this Court. It is true that delay is one of the factors to be taken into consideration in the exercise of the discretionary power under Art. 226 of the Constitution, but each case has to be examined on the basis of the relevant facts involved in the case. Mere delay, therefore, does not disentitle the petitioner from challenging the award under Art. 226 of the Constitution. In this case, the reason for the delay in filing the present application has been explained in paragraphs 38 to 49 of the writ application. It appears that after a certified copy of the award was received in the Department, which is the River Valley Projects Department, the matter was examined, according to the petitioner, with great care at various levels. First the matter was referred to the Standing Counsel for his opinion in March 1975. Various in formations were required for the purpose of formulating the opinion and ultimately the opinion of the Advocate general was sought to be obtained and the file was sent to the Advocate general in May, 1975. The Advocate general, in his turn, endorsed the file to the Government Advocate and the opinion of the Government Advocate was received on 21st June, 1975. On 2nd July, 1975, the Advocate General sent his opinion to the Law Department and the file was returned to the River Valley Projects Department on 3rd July, 1975. Thereafter the matter was put up before the Chief Minister, who was also the Irrigation Minister. He ordered the Finance Depart-. tent to examine the financial implication of the award thoroughly, The Finance Department felt that it could not give its concluded opinion without certain further information and the matter was again referred to the Department for giving certain information. It is stated that the works of the Department are spread all over the State in 99 Divisions and in formations had to be gathered from far off places. It was in the end of September, 1975, that the Finance Department could give its views in the matter after obtaining the said in formations. The matter was discussed in the Department once again. Further discussions followed between the Additional Secretary. Finance Department, and the Finance Commr. and the Irrigation Commr, in the month of October and November 1975. After collection of all available in formations, it was again found necessary to refer the matter to the Advocate General, and this was done in the middle of December, 1975. Eventually it was decided to consult the Solicitor General, After obtaining the opinion of the Solicitor General, the matter was again examined and in the light of the legal opinion, it was decided to file a writ application. The said decision to file a writ application was taken on the files by the Chief Minister on 27th February. 1976.

5. Thus the case of the petitioner is that the State was not acting like an ordinary litigant and hastening to challenge an order which appeared to be adverse to the State. It wanted to examine the whole matter, both from financial and legal point of view. The legal aspect of the matter had to be examined by the Advocate General and ultimately by the Solicitor General. It was after thorough examination that the State. presumably an the basis of the legal opinion, decided to file the writ application. Although it is true that two standards cannot he laid down; one for the State and the other for the ordinary citizens, nevertheless, in the circumstances indicated above, since the State was considering the matter seriously and was trying to appraise itself of the financial implications and taking expert legal opinion, it cannot be said that this process was not necessary or was dilatory. Taking the totality of the circumstances into consideration. we do not think that it would be right to throw out this writ application on the ground of delay in filing the same, particularly when the application has been admitted.

6. We may now state the various matters which had been referred for adjudication to the Tribunal on which the award is against the petitioner, the State of Bihar. They are:

> "1. Whether the wage structure of the work charged workmen should be revised ? If so, what should be the revised wage structure and since when ?
> 2. Whether the demand to make all workmen, who have completed one year of continuous service, permanent is justified ? If so. in what manner and since when ?
> 3. Whether all the work charged workmen are entitled to field allowance ? If so, at what rate and since when ?"

7. The learned Solicitor General contended that the reference of the dispute itself was illegal and that the disputes referred for adjudication were not industrial disputes. He contended that the projects in question are not industry within the meaning of the Industrial Disputes Act, and as such reference of the disputes to the Tribunal was not valid. Learned Counsel for the contesting respondents contended that the State could not ask for a writ against itself, and having taken the chance of a favorable order in the reference, it was precluded from saying that the reference was not a valid reference in law and lastly whether the projects in question were industry or not, was a question of fact and the petitioner has not been able to establish that the projects in question were not industry within the meaning of the Industrial Disputes Act.

8. The learned Solicitor General relied on the decisions in the Safdarjung Hospital, New Delhi v, Kuldip Singh Sethi, AIR 1970 SC 1407 and the Dhanrajgirji Hospital v, The Workmen, AIR 1975 SC 2032. in support of his contention. In the case of Safdarjung Hospital, New Delhi. the proposition laid down in *Secy., Madras Gymkhana Club, Employees' Union v. Management of the Gymkhana Club*[1], to the following effect was approved: before the work engaged in can be described as an industry, it must bear the definite character of 'trade' orI 'business' or 'manufacture' or 'calling' or, must be capable of being described as an undertaking resulting in material goods or material services." In Dhanrajgirji Hospital's case (Supra), the same view was reiterated and it was emphasized that rendering of material services by bringing in an element of trade or business in its activity was necessary. The legal proposition, therefore, does not appear to be in dispute. We. however, find that the factual foundation to make good this contention has not been laid by the petitioner in this case. Many of the activities of the State are activities which are not concerned with 'trade' or ('business' or 'manufacture' or 'calling', but there are several activities in which these elements are present, Whether they are (present in connection with certain activities of the State or not. is a question of fact. It has to be properly pleaded. In this case we do not find sufficient materials in the writ application or even clear averments on the basis of which it could be said that the activities of the Projects do not come within the definition of 'industry' as understood in the aforesaid decisions. The onus was clearly heavier on the State when the reference was made under Section 10 (1) (d) of the Industrial Disputes Act on the assumption that there was an industrial dispute between the State and the workmen of the two Projects, and this contention was not even raised before the Tribunal. In the circumstances of the case, it cannot be said that the petitioner has been able to show on the materials that are present in the case that the Projects in question could not be taken to be an 'industry' in the sense already explained.

9. Learned Solicitor General suggested that we should take into consideration matters which are

of common knowledge. He contended that it was a matter of common knowledge that the Projects were not of such a nature as to attract the definition of the term 'industry'. We do not think that it is possible to accept this contention. Unless we know the actual nature of the activities and the actual work done, it is not possible to come to a definite conclusion in favor of the petitioner. In this view of the matter, it is not necessary to examine the other contentions raised on behalf of the respondents. except the contention that no writ can be issued by this Court in this case.

10. The basis of the contention of the learned counsel for the respondents is that writ cannot be issued by this Court against the State itself. But what the State wants in this case is the quashing of the award (Annexure 1.) The award has been given by a Quasi Judicial Tribunal. The State is not pre eluded from challenging the award provided it makes good its contentions that the award is fit to be quashed in exercise of the writ jurisdiction of this Court.

11. The next contention that has been raised by the learned Solicitor General is that the reference of the disputes under Section 10 (1) (d) of the Industrial Disputes Act was illegal and in fructuous on the ground that the award attempts to alter the service condition of persons who are in the service of the State, The Constitution has entrusted the jurisdiction to lay down the service conditions either to the Legislature or to the Governor by making a provision in the proviso to Art. 309 of the Constitution, or by laying down conditions of service in exercise of its executive power. It is not permissible for the Industrial Tribunal to constitute itself as a supervisory body over the Governor where conditions of service have been laid down in exercise of power conferred tinder the proviso to Art. 309. Learned Counsel pointed out that the award made by a Tribunal could not prevent the Legislature or the Governor from laying down fresh conditions of service in supersession of the terms of the award. This was a clear indication that the Industrial Tribunal could not adjudicate and decide in relation to the conditions of service of Government servants.

12. Article 309 of the Constitution is as follows:

> "Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:
> Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union. and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating of recruitment, and the conditions of service of persons appointed. to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."
> It is true that the conditions of service of a Government servant can be laid down either by the appropriate Legislature and in the absence of the same having been so laid down, by the Governor of a State. But the mere fact that there is such a power, does not in our view, affect the jurisdiction of a properly constituted Tribunal to adjudicate in relation to an industrial dispute between the Government servant and the State. Article 309 of the

Constitution itself indicates that the powers conferred therein are "subject to the provisions of this Constitution". In our opinion, therefore, the mere fact that conditions of service have been laid down under Article 309 of the Constitution does not affect the exercise of powers by a validly constituted authority. If it derives its power under a provision of the Constitution itself. Art. 246 of the Constitution enumerates the subject matter of laws which can be made by the Parliament and by the Legislature of a State. It is not in dispute that the industrial Disputes Act has been enacted in exercise of the powers conferred by the Constitution. If the Industrial Disputes Act provides for adjudication of disputes. the power to so adjudicate is derived under a provision of the Constitution itself and the exercise of such power, affecting the conditions of service of persons serving the State would be permissible as Art. 309 of the Constitution itself indicated that this Article is subject to the provisions of the Constitution. This includes any law validly enacted by a competent Legislature. Thus, in our opinion, the Industrial Tribunal is not shut out or precluded from adjudicating an industrial dispute which may have an impact, either direct or indirect, on the service conditions of persons serving in the Union or the State.

13. Learned Solicitor General tried to get some support from Art. 310 of the Constitution. Article 310 (1) of the Constitution is as follows:

"Except as expressly provided by this Constitution. every person who is a member of a defense service or of a civil service of the Union or of an all India service or holds any post connected with defense or any civil post under the Union. holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State."

It was contended that the tenure of office of a person serving the Union or the State is during the pleasure of the President or the Governor, as the case may be. He contended that the Industrial Disputes Act is incapable of qualifying the pleasure tenure under Art. 310. He further contended that as the power under Art. 310 cannot be cut down by the Legislature, similarly the power under Art. 309 of the Constitution cannot be cut down, with this difference that while the power under Art. 310 cannot be cut down even by Legislature, the power tinder Art. 309 can be cut down by Legislature. In our opinion, Arts, 309 and 310 are on completely different footing. Article 310 in its opening words says "Except as expressly provided by this Constitution". Art. 309 says "Subject to the provisions of this Constitution". Thus in case of Art. 310, only express provision of the Constitution can curtail the power conferred under this Article. On the other hand. Art. 309 is subject to all the provisions of the Constitution. This vital difference in the wordings of the two Articles makes all the difference,

14. The learned Solicitor General next contended, relying on the proviso to Art. 309 of the Constitution, that the service conditions laid down by the Governor (as in the present case) are to

prevail until the provision in that behalf is made by an Act of appropriate legislature. The emphasis was that except for an Act of an appropriate Legislature, the rules are always to prevail. In our view, the proper way to read this Article is not to read the proviso first and then to hold that since the rules made by the Governor can only be superseded by an Act of appropriate Legislature, there is no power in any authority to adjudicate on a matter which relates to the rules laid down by the Governor in exercise of powers under the proviso to Art. 309 of the Constitution. The power of the Governor would not be greater than the power of the Legislature as envisaged in the first paragraph of this Article. The first paragraph of this Article clearly says that the power is subject to the provisions of the Constitution. We have already explained as to what we understand by this expression. It, therefore, appears to us that when the proviso to Art. 309 says that the rules made by the Governor cannot he superseded except by or under an Act of the appropriate Legislature, it only emphasizes the fact that the rules made by the Governor are to prevail until modified, changed or superseded by the Legislature. It does not have the effect of nullifying the opening words of Art. 309 of the Constitution. It is, therefore. not possible to accede to the contention of the State that the reference in this case was invalid or in fructuous for the reasons already discussed.

15. The next contention that has been raised on behalf of the State is, what may be termed as the attack on the award (Annex. 1) on its merits. In other words, assuming that the Tribunal has the jurisdiction to adjudicate, the learned Solicitor General contends that even then the award must be quashed. The reason advanced for this argument is that in arriving at its finding in relation to the questions as already indicated, the Tribunal has not applied its mind to all the materials on the record and has proceeded on the basis of irrelevant considerations ignoring the material considerations. It is contended that it has also made certain presumptions which are speculation.

16. We first take up the award (Annexure 1) in relation to the first dispute referred to it, namely, "whether the wage structure of the work charged workmen should be revised ? If so, what should be the revised wage structure and since when ?" The operative part of the award in relation to this matter is as follows:

> "(i) The members of the work charged staff in both Kosi Project and Gandak Project will be entitled to the pay scales as given in Appendix I of this award with effect from 1-1-1971.
> (ii) The manner and procedure of fixation of the pay of individual workmen in the new scales will be guided by the procedure as laid down in Sch. IV at page 201 of the Third Pay Revision Committee Report with the variation that instead of 15 per cent. as provided in para. 2 of the Schedule, 20 per cent. of their emoluments as were existing on 1-1-1971 will be added subject to the minimum of ₹ 401- and maximum of ₹ 80/- to the basic pay of the individual workmen on 1-1-1971."
> It would now be necessary to indicate briefly as to what the case of the respective parties was. In the words of the Tribunal. the case of the workmen was as follows:
> "The case of the workmen is that the pay scales of the work charged workmen are not revised for a long period. Since the cost of living has gone up extremely high there is no relationship between the wages of the work charged workmen and the cost of living. Even

minimum wages are not paid to them. The grievance of the workmen is that though the same work is being done by the regular staff as well as work charged staff there is much difference in the wages of the regular staff and work charged staff and different scales are provided for the two categories of workmen. Therefore, they claim that for the same kind of work all workmen should be paid equally and they should be treated equally."

17. The case of the State, on the other hand, is that the Department has undertaken various projects like the Kosi Project, Gandak Project, Sone Barrage Project, etc., and employs a large number of workmen (numbering about over 18000) apart from regular employees. The Kosi Project was started in 1954 and the Gandak Project in 1960. In 1959-60, the pay scales of the work charged employees of the Department was revised and higher pay scales were fixed after merging the cost of living allowance. That was slightly altered in September 1961. But so far as the regular employees were concerned, their pay scales remained unaltered. The work charged workmen were thus getting higher than the regular staff in corresponding category. As a result of the recommendation of the Second Pay Revision Committee, with effect from 1-4-1964, there was a general revision of pay scale of Government employees. So far as regular employees were concerned. there had been no revision of their pay scales since 1947. The Government, therefore, decided that for the purpose of fitment in the replacement scales of 1964, what should be taken into consideration was not their actual pay, but their deemed emolument after adding 12% thereto. If the regular employees and the work charged employees were to be treated alike, it would have been necessary to take into consideration the emoluments of the work charged employees before 1959-60 and then to add 121", thereto. But since this would have worked to the disadvantage of the work charged employees, another method was employed for the purpose of their fitment in the revised pay scales of 1964 by applying R. 78 (a) (ii) of the Bihar Service Code. As a result of the recommendation of the Third Pay Revision Committee, the pay scales of all the Government employees, including those of the work charged staff of the Department was again revised with effect from 1-1-1971. As regards fixation of pay, that is, fitment in the revised scales, the Government annexed a chart in Sch. 4 of the report. This procedure envisaged inter alia addition of 15% to the existing emoluments for determining the deemed emolument for the purpose of fitment in the new scale. Thus the case of the State is that the claim of the workmen is fit to be rejected.

18. Having given the case of the contesting parties and the conclusion of the Tribunal, it is now necessary to indicate as to how the Tribunal has approached the matter and come to its conclusion. In paragraph 9 of the award (Annex. 1), the Tribunal has indicated that an examination of the replacement scales Ext. 1/a, it appeared that there were anomalies in the replacement scales. In paragraph 10. after referring to the evidence of Sri Bandyopadhyay, Deputy Secretary to the Government in the River Valley Projects Department, to the effect that subsequently those anomalies were rectified, the Tribunal has observed that there ,vas no proof before him whether those anomalies were removed or not. In paragraph 11, the Tribunal has observed that no material was placed before him to show as to on what basis the pay scales of the work charged staff were fixed. He has observed that he wanted to examine the file and record of the pay fixation of the work charged staff, but the same was not produced and an affidavit was filed by the State that the file was traceless. In the concluding portion of this paragraph, he observed.

"Any way, various provisions of the Government Resolutions and notifications which have been placed before me show that the work charged staffs were unjustifiably refused the addition of 120% of their basic pay while fixing their pay in the new replacement scales . . Learned Solicitor General characterised the above quoted passage as speculative. We find substance in this contention. The Tribunal has mentioned that there are various provisions of the Government Resolutions and notifications which show that the work charged staff were unjustifiably refused the addition of 12% of their basic pay. No reference is made to those resolutions or notifications. A quasi judicial Tribunal is required to discuss the materials on which it bases its finding. Mere reference to the resolutions and notifications without indicating as to what they are and what they say is not ,enough, When the materials which are the basis of the finding are not disclosed, an authority exercising supervisory jurisdiction G.n is precluded from examining whether the inference drawn from the undisclosed resolution or, notification could be reasonably drawn from the said materials. This appears to be an error, which is of a basic nature, in the approach of the Tribunal.

19. The learned Solicitor General also pointed out, and in our view rightly. that the Tribunal appears to have drawn adverse inference on account of the non production of the relevant Government file. Although the Tribunal has not said in so many words that it was drawing an adverse inference from the non production of the file, the reasonable interpretation of the order of the Tribunal is that it has taken the fact of non production into consideration against the State in deciding the relevant issue. It is well settled that adverse inference can only be drawn where a document in possession of a party is not produced before an authority, but such adverse inference cannot be drawn if the document does not exist or is not in possession of the party from whom it has been called. In this case, there is no finding of the Tribunal that) the State is deliberately withholding certain materials which were in its posses-1 sion.

20. The learned Solicitor General further contended that apart from the Government file, there were other materials which, according to his contention, would have assisted the Tribunal in coming to the conclusion as to the basis on which the earlier fixation of pay of the work charged workmen of the Department had taken place, and the comparative emoluments of the regular staff and the work charged staff. These documents are Ext. l/iv and the extract from the departmental notes. They, explain as to how the revised pay scales of the work charged establishment of Kosi Project was fixed and disclose the actual emoluments. The Tribunal, in our view, erred in not taking into consideration these material documents which would have thrown light on the question which was for consideration of the Tribunal. All these in our view bring infirmity in the order of the Tribunal which would justify interference by this Court. Learned Solicitor General referred to certain other materials in support of his contention. Since we are of the view that for reasons already discussed, the award on item No. 1 of the dispute is fit to be quashed, we need not pursue the matter further.

21. So far as the second item referred to the Tribunal is concerned, the only objection that could be raised in relation thereto was in respect of the last portion of the award which is as follows:

"So far the rest of the work charged workmen are concerned, the Government should try

to absorb them in the regular work and surplus hands could only be retrenched after observing the procedures as laid down under Section 25-F and S. 25-G of the Industrial Disputes Act."

The learned Solicitor General contended that in requiring that the procedure of Sections 25-F and 25-G of the Industrial Disputes Act had to be followed, the Tribunal was ignoring the provision of Art. 310 of the Constitution. Since in our view, the order of the Tribunal has to be quashed on the grounds already indicated, it is not necessary to give any concluded opinion on this question. It is, however, made clear that so far as the other part of the award (Annex. 1) in relation to item No. 2 aforesaid is concerned, we have not found nor the Solicitor General has been able to contend anything to show that the conclusions in relation thereto are fit to be quashed in exercise of the writ jurisdiction of this Court.

22. The learned Solicitor General challenged the finding of the Tribunal given in the award so far as the third item. namely, the field allowance to the work charged staff is concerned. We do not propose to decide this question at this stage as the matter will have to be sent back to the Tribunal for decision afresh. It would be open to the parties to place their respective points of view on this questions also,

23. In the result, while holding that the reference of the dispute under Section 10 (1) (d) of the Industrial Disputes Act has riot been shown to be invalid and that the disputes in question could be referred for adjudication by the Tribunal. we quash the award (Annex. 1) and direct that the Tribunal should, after giving opportunities of hearing to the parties, give a fresh award in accordance with law. The parties will be entitled to adduce further documentary evidence as they may be advised. The fresh award must be given latest by the 30th October, 1976. The Tribunal should not grant adjournments to the parties concerned unless it becomes absolutely necessary. It is also made clear that no fresh adjudication is necessary on that part of the award which has not either been set aside by this Court or in relation whereto the matter has not been left open. There will be no order as to costs.

Order Accordingly.

Cases Referred.

[1] AIR 1968 SC 554