

(1991) 10 CAL CK 0002
In the Calcutta High Court
Case No : Matter No. 3255 of 1990

Aajkaal Publishers Pvt. Ltd.	Vs	APPELLANT
State of West Bengal		RESPONDENT

Date of Decision : 10-10-1991

Acts Referred:

Companies Act, 1956 — Section 235, 236, 237, 237B
Constitution of India, 1950 — Article 14, 19, 226
Industrial Disputes Act, 1947 — Section 10(2A), 10(4), 12(4), 2, 2A

Citation : (1993) 2 ILR (Cal) 1

Hon'ble Judges : Paritosh K. Mukherjee, J

Bench : Single Bench

Advocate : Samaraditya Pal, Partita Sarathi Sengnpta and Arunava Ghosh, for the Appellant; Arun Prokash Chatterjee and Ratna Bhattacharya and S.R. Ghosh, for State, for the Respondent

Final Decision : Allowed

Judgement

Paritosh K. Mukherjee, J.—The present writ petition was moved challenging an order of reference dated August 17, 1990, passed by the Government of West Bengal (Department of Labour) under the provisions of Sub-section (2A) read with Section 10 of the Industrial Disputes Act, 1947.

2. The order of reference is as follows:

Whether termination of service of Shri Arunangshu Chakraborty, Principal CorRespondent, is justified ? To what relief, if any, is he entitled?

3. This writ petition has come up for final hearing after completion of affidavits in the presence of learned Advocate for the Petitioner, Respondent No. 5 as well as State of West Bengal.

4. The facts of the case is as follows:

The Petitioner company is a newspaper organisation publishing Bengali daily

from Calcutta in the name of Aajkaal (hereinafter referred to as the petitioner newspaper). The Respondent No. 5, Arunangshu Chakraborty (hereinafter referred to as the Respondent workman) had joined the Petitioner newspaper's publication as Trainee Journalist with effect from April 1, 1982, and promoted to the rank of Senior Reporter with effect from April 1, 1986, and subsequently, with effect from April 1, 1987, he was promoted to the rank of Principal CorRespondent.

5. According to the Petitioner newspaper, during the employment of the Respondent workman at the Delhi office as Principal CorRespondent, the Respondent workman committed certain acts which prima facie constitute misconduct, relating to coverage of news item of the Petitioner newspaper relating to the visit of Jyoti Basu, Chief Minister at Simla to address a public rally at Simla.

6. According to the Petitioner newspaper, the Respondent workman along with Sri Goutam Lahiri, the then Special CorRespondent of the Petitioner newspaper's Delhi Office, to prevent Sm. Arundhuti Mukherjee from covering the Chief Minister's meeting at Simla conspired whereby Sri Goutam Lahiri made a telephonic call on October 5, 1988, from the, Delhi Press Club to the Delhi Airport security falsely communicating that a bomb had been planted in flight No. IC 402 in which Sm. Arundhuti Mukherjee was to have flown from Calcutta to Delhi. Due to the said bomb threat the flight was delayed by 6 hours as a result of which Sm. Arundhuti Mukherjee had to face serious inconvenience in reaching Simla. The purpose of delaying the flight was to prevent Sm. Arundhuti Mukherjee from reaching Simla so that she might not bypass the Respondent workman and Sri Goutam Lahiri in covering the Chief Minister's public meeting at Simla on October 6, 1988.

7. According to the Petitioner newspaper, Sri Goutam Lahiri had resigned from the Petitioner's publication on December 5, 1988, by submitting a letter, of confession dated November 26, 1988. On the basis of the aforesaid allegations, the Respondent workman was suspended by the Director of the Petitioner's publication by an order dated December 5, 1988, and a regular departmental proceeding was initiated against the said Respondent workman, after serving a charge-sheet dated January 6, 1989.

8. In the said charge-sheet, the following allegations have been made against the Respondent workman:

(1) That you are employed as Principal CorRespondent of Aajkaal at its Delhi Office.

(2) That Shri Jyoti Basu, Chief Minister, Government of West Bengal, was scheduled to address a public rally at Simla on October 6, 1988, and also a mass rally at Hyderabad on October 10, 1988.

(3) That Sm. Arundhuti Mukherjee,, a Principal CorRespondent of Aajkaal,

Calcutta Office, was deputed to cover both the aforesaid public meetings and rallies to be addressed by Shri Jyoti, Basu and as such Arundhuti Mukherjee was scheduled to go to Simla via Delhi from Calcutta, availing flight No. IC 402, bearing ticket No. 05822342108 from Calcutta to Delhi on October 5, 1988.

(4) That it transpires that you alongwith one" Shri Gautam Lahiri, a Special Correspondent of Aajkaal at Delhi (since resigned) conspired whereby Shri Gautam Lahiri made telephonic call on October 5, 1988 from the Press Club, Delhi, to the Delhi Airport Security falsely alleging a bomb threat in flight No. IC 402 in which Sm. Arundhuti Mukherjee was to have flown from Calcutta to Delhi on October 5, 1988 evening.

(5) That there is reason to presume that the said act of making false bomb threat in flight No. IC 402 on October 5, 1988 was done in furtherance of the common intention to cause delay and detention of Sm. Arundhuti Mukherjee, so that she might not be ultimately able to cover the assignment of the news relating to the meeting at Simla on October 6, 1988, and the purpose of Sm. Arundhuti Mukherjee's visit is totally frustrated.

(6) That there is further reason to presume that the said act of making a false bomb threat in flight No. IC 402 from Calcutta to Delhi on October-5, 1988, was done in furtherance of a common intention whereby Sm. Arundhuti Mukherjee might not bypass you and Shri Gautam Lahiri posted at New Delhi in covering the public meeting report at Simla on October 6, 1988, which Shri Jyoti Basu was due to address.

(7) That as a result of the fake bomb threat over the phone in flight no IC 402, the flight was delayed by 6 hours for security check-up and Sm. Arundhuti Mukherjee because of the delayed arrival at Delhi had to face serious inconveniences and incur financial strain in reaching Simla on October 6, 1988.

(8) That you have allegedly entered into the said conspiracy with "Shri Gautam Lahiri (since resigned) in spite of being aware of the fact that the said act is highly illegal and the means adopted is also illegal.

(9) That as a result of such alleged act, the prestige and reputation of the newspaper Aajkaal has been-seriously affected and the said alleged act is unbecoming of an employee.

9. After a detailed enquiry, the Enquiring Officer, Sri S. Chakraborty had submitted a detailed report on September 11, 1989, and came to the conclusion, as follows:

So from the foregoing discussion it is conclusively proved that on October 5, 1988 a fake bomb-threat was made over telephone to the Delhi Airport intimating the Airport Authorities that a bomb had been planted in flight No. IC-402, and as a result thereof the flight was delayed in taking off from the Calcutta Airport. It has been alleged that Sri Gautam Lahiri and the CO. had conspired and made the joint phone call. Shri Gautam Lahiri has confessed his

guilt, admitted the allegation of his involvement in the whole matter and resigned from Aajkaal. The present enquiry is directed to find out the truth of the charges against the CO. From all that has been discussed above and taking an over-all view of the matter and weighing and considering all the pieces of evidence, both documentary and oral, I am of the view that the charge against the CO. stands conclusively proved.

10. Thereafter, the Petitioner was supplied with the documentary evidence and the day-to-day minutes of the enquiry proceedings along with letter dated September 30, 1989, and by Memo, dated September 25, 1989, and the Petitioner was served with second show-cause notice with the proposal for dismissal which are as follows:

(1) Resolved that the Board considered and noted the proceedings, enquiry report, evidence both oral and documentary in relation to enquiry held against Shri Arunangshu Chakraborty and all connected matters relating thereto and felt the gravity of the misconduct done by the said Shri Chakraborty against the interest of the Company.

(2) Resolved further that Sri Arunangshu Chakraborty be dismissed from his service of the company after being given an opportunity to make his representation in the finding of the Enquiry Officer and also the penalty in order to and the justice in its all fairness and equity.

(3) Resolved further that a notice be issued by Shri Asoke Kunlar Ghosh -- Director on behalf of the company containing the decisions of the Board of Directors adopted to-day and the same be communicated to Shri Arunangshu Chakraborty giving him an opportunity to represent himself to the Board of Directors in reply to the above notice within seven days from the date of receipt of the above notice.

(4) Resolved further that Shri Asoke Kumar Ghosh --Director be empowered on behalf of the company to send a certified copy of the resolutions and other related papers to Shri Arunangshu Chakraborty immediately.

(5) Resolved further that it is hereby noted that in absence of Shri P. B. Ghosh -- Chairman, Shri Asoke Kumar Ghosh being a senior Director of the company presided over the meeting as a Chairman.

11. On October 12, 1989, the Respondent workman made a representation against the proposed order of punishment. Ultimately, an order of reversion was passed by the Petitioner after considering the representation of the Respondent workman submitted on October 12, 1989.. It appears that after considering the entire proceedings, evidence, both documentary and oral, as well as the written argument filed by the learned Advocate for the Respondent workman, the Petitioner came to the decision that the conclusions arrived at by the Enquiry Officer were fair, proper and just and had agreed with the conclusion.

By the order dated January 22, 1990, the Petitioner further held that, however,

considering the fact that there is widespread unemployment and Shri Arunangshu Chakraborty having reached an age, when it will be difficult for him to secure a job to earn enough to run his family, particularly after the incident of misconduct done by Shri Arunangshu Chakraborty, and further, considering the fact that this is his first misconduct though very serious, and considering the rapid progression of Shri Chakraborty from a Trainee in 1982 to Principal corRespondent in 1987, we are of the opinion that Shri Chakraborty be given an opportunity to reform himself and therefore instead of imposing the maximum penalty of dismissal, we take a lenient view of the matter and decide that he be reduced in rank and be placed in the rank of a Reporter.

12. Against the said decision, the Respondent workman raised a dispute before the Labour Commissioner, through the Indian Journalists' Association and Mihir Ganguly on behalf of the Indian Journalists' Association by his letter dated April 21, 1990, informed the Labour Commissioner that the management of Aajkaal Publishers had victimised Shri Arunangshu Chakraborty, a Principal CorRespondent of "Aajkaal" by suspending him on December 5, 1988, and he further reported, that perhaps the management has now realised that their action has been arbitrary and illegal. To cover up its whimsical action against Shri, Chakraborty the management has late hatched a conspiracy to drive him out of Calcutta to the remote island of Andaman on transfer as a Staff Reporter. The change of Shri Chakraborty's designation from Principal CorRespondent to a Staff Reporter is another act of punishment for Sri Chakraborty because it amounted to demotion by two stages Along with the said letter Shri Ganguly enclosed the letter of promotion of the Respondent workman to the rank of Principal CorRespondent and the transfer order was virtual demotion to the rank of Staff Reporter.

13. On behalf of the Petitioner newspaper it was specifically mentioned before the Assistant-Labour Commissioner by the letter dated May 6, 1990, which is as follows:

(a) The alleged dispute is admittedly an individual dispute between Shri Arunangshu Chakraborty and Aajkaal Publishers Ltd. as is found from the enclosures to the memo, as referred to hereinabove.

(b) Shri Arunangshu Chakraborty, as far as we know, never held any membership of IJA. On the contrary, he has the membership of both the two Unions of which the employees of Aajkaal are members.

(c) An individual dispute between an individual employee and his employer can be an industrial dispute u/s 2(k) of the Industrial Disputes Act, 1947, only when the majority or a large portion of the workmen employed in that particular establishment or their Union in the establishment are concerned in the dispute. Therefore an employee or a workman's cause cannot be taken up by a Trade Union unconnected with the employee or the industry or the establishment concerned and in the instant case IJA having no following in the Aajkaal,

individual workman/journalist of Aajkaal and name it an Industrial Dispute u/s 2(k) of the I.D. Act.

14. It was also stated in the said objection that Shri Chakraborty has been given the punishment of reduction in rank after the charge of misconduct against him has been proved in an enquiry. The allegation of transferring him out of Calcutta has no basis whatsoever as Sri Chakraborty before his suspension was working at Delhi. All journalists of Aajkaal are required to go anywhere in India when directed by the Management.

15. On the basis of the aforesaid objections made by the Petitioner newspaper, the Respondent workman changed his stand at a subsequent stage, i.e. on June.5, 1990 and submitted that the dispute came squarely within Section 2A of the Industrial Disputes Act because the principal order by which he was aggrieved, is the termination of his employment as Principal Correspondent, and on the basis of the aforesaid submissions reference was made by the State Government for adjudication by the Second Industrial Tribunal.

16. At the final hearing of the writ petition, Mr. Samaraditya Pal, learned Advocate for the Petitioner newspaper, in the first place submitted that the impugned order of reference was passed in utter misconception of law and without application of mind, and the State Government failed to appreciate that the case of the Respondent workman was not "a termination" but "demotion" in service.

17. In the second place, he submitted that there was no formation of opinion by the State Government and the State Government failed to consider the relevant materials and formed its opinion on consideration which is not germane to the real dispute.

18. In the third place, Mr. Pal submitted that the appropriate Government had acted on the basis of extraneous consideration and in view of the fact that the Government had realised that the reference could not be made u/s 2(k) of the Industrial Dispute Act, 1947, and as such, they have referred the dispute u/s 10 read with Section 2A knowing fully well that it was not a case of termination" but a case of "demotion".

19. Lastly, he contended that condition precedent for issuance of the order of reference relating to alleged termination did not and could not arise in the facts of the present case, -as there was no termination at all, but admittedly the Respondent workman was demoted to the rank of Staff Reporter.

20. In elaborating the aforesaid submissions, he further submitted that discretionary power conferred by the statute, even subjective, must be exercised reasonable and honestly and after due application of mind and not capriciously or arbitrarily.

21. In support of this branch of submissions, he has placed reliance on the judgment of the Supreme Court in the case of Rohtas Industries Vs. S.D. Agarwal

and Others, .

22. In the said case at para. 45, the Supreme Court in interpreting the provisions of Sections 235 to 237 of the Companies Act, 1956, in the matter of formation of opinion by the Central Government relating to investigation into the affairs of the company, observed as follows:

The discretionary power u/s 237(b) must be exercised honestly and not for corrupt or ulterior purposes. The authority must form the requisite opinion honestly and after applying its mind to the relevant materials before it. In exercising the discretion the authority must have regard only to circumstances suggesting one or more of the matters specified in Sub-clauses (i), (ii) and (iii). It must act reasonably and not capriciously or arbitrarily. It will be an absurd exercise of discretion, if, for example, the authority forms the requisite opinion on the ground that the Director in charge of the company is a member of a particular community. Within these narrow limits the opinion is not conclusive and can be challenged in a Court of law. Had Section 237(B) made the opinion conclusive, it might be open to challenge as violative of Articles 14 and 19 of the Constitution.

23. Relating to non-application of mind, Mr. Pal. has referred to the second show-cause notice dated September 30, 1990, which is Annex. "E" to the writ petition wherein the Petitioner newspaper has proposed the punishment of dismissal. But ultimately, by letter dated January 22, 1990, the authorities had decided that instead of maximum, penalty of dismissal, a lenient view in the matter was taken and the Respondent workman be reduced in rank and placed in the rank of a Reporter, which is nothing but demotion.

24. He further added that the Respondent workman himself clearly stated that it was to be an order of demotion and not termination, and before the Labour Commissioner on behalf of the Respondent workman Shri Mihir Ganguly for the Indian Journalists' Association having admitted that the change, of Shri Chakraborty's designation from Principal Correspondent to a Staff Reporter is another act of punishment, because it amounted to a "demotion" which has been set out at p. 110 of the writ petition. According to Mr. Pal, there was no break of service and the Respondent workman had continuity in service.

25. In attacking the order of reference, Mr. Pal further submitted that the State Government having assumed that there was a termination made a reference on pretended assumption and, as such, the reference is bad in law and liable to set aside.

26. Regarding the maintainability of the writ petition at this stage immediately after the issuance of the reference, Mr. Pal submitted that the Tribunal cannot go into the question as to whether this is a case of termination or demotion for the following reasons: (a) By reason of Section 10(4) of the Industrial Disputes Act, the Tribunal cannot go beyond the order of reference. In support of this branch of submission he has placed reliance on the Division Bench judgment of this Court,

in the case of Sabitri Motor Service Pvt. Ltd. v. State West Bengal and Ors. 1976 (33) F.L.R. 15 wherein the Division Bench consisting of S.K. Mukherjee and Sudhamay Basu, JJ. observed as follows:

It seems to us that the Tribunal was wrong in posing the question whether the company had terminated services of the workmen. The issue raised by the order of reference was whether the termination of services of the workmen was justified. It was not, therefore, open to the parties or to the Tribunal to go behind the order of reference and raise the issue as to whether there was in fact termination of service of the two workmen. The question which was referred to the Tribunal for decision was the justifiability of the termination.

27. In the said case, referring to the case of the Delhi Cloth and General Mills Co. Ltd. Vs. The Workmen and Others, Their lordships further observed as follows:

It was held that on the order of reference it was not competent for the workmen to contend before the Tribunal that there was no strike or for the Management to contend that there was no strike or for the Management to contend that there was no lock-out. It was pointed out by G. K. Mitter J. delivering the judgment of the Court that it was not open to the parties to contend that the foundation of the dispute mentioned in the order of reference was non-existent and the true dispute was something else. u/s 10(4) of the Industrial Disputes Act it was not competent for the Tribunal to entertain such dispute. In the light of these observations of the Supreme Court it is clear that the learned Tribunal erred in raising the question of termination of service as a fact.

28. After placing the aforesaid observations from the Division Bench judgments of this Court in the case of Sabitri Motor Service Pvt. Ltd. (Supra) and the case of The Delhi Cloth and General Mills Co. Ltd.(Supra) Mr. Pal submitted that the Tribunal was not competent to adjudicate the said question and, as such, the writ petition is maintainable before this Court for quashing the order of reference at the initial stage.

29. Mr. Arun Prokash Chatterjee, learned Advocate appearing for the Respondent workman has referred to the provisions of Sections 2A, 2(k) and 10 of the Industrial Disputes Act about its scope and applicability.

30. He submitted that it was not a case before the State Government that the Respondent workman has been reduced in rank, but in a sense it is a termination and since in Section 2A the word "termination" or "otherwise termination" appears, in the said section and it should be interpreted by this Court that the appointment of the Respondent workman, as Principal Correspondent, has been terminated and a new appointment as a Staff Reporter has been given, giving aside a go-bye to all continuity in service of the Respondent workman.

31. In this connection, he has referred to the "Pay Scale" of Principal Correspondent and the recommendations of the Wage Board dated August 31, 1989, and the "Pay Scale" of the Staff Reporter.

32. According to Mr. Chatterjee, Tribunal is entitled to go into the question of such fact as to whether there was "demotion" or actually it amounts to "termination", having regard to the loss of Pay Scale from the post of Principal CorRespondent to the post of Staff Reporter.

33. Mr. S. R. Ghosh, appearing for the State, has produced the records of reference for judicial scrutiny.

34. It appears that the said report was prepared by the Conciliation Officer, u/s 12(4) of the Industrial Disputes Act.

35. The said authority had posed the following questions, before the State Government, in submitting the report, which are, as follows:

The point of determination is whether the appointment and posting of Shri Chakraborty as a Staff Reporter at Port Blair in terms of the order of the management dated February 28, 1990, actually involved termination of his employment as a Principal CorRespondent and subsequent re-employment as a Staff Reporter. The fact that Shri Chakraborty's gross salary was reduced and that his basic pay was fixed at the bottom of the grade meant for the post of Staff Reporter gives the impression that actually the management got rid of his employment as a Principal CorRespondent and re-employed him as a Staff Reporter. Theoretically, all promotions are new appointments to higher posts, but for practical purposes those are not deemed to be new appointments since the benefits of the past services are counted. Similarly, demotions are also mere termination of services of the higher posts and fresh appointments in the lower post. But the common practice is that unless there is specific provision in the service rule to that effect, such demotions do not involve reduction in the pay packet. At any rate, order of the management does not indicate that Shri Chakraborty's past services remained intact. However, the point involved is a debatable one and deserves a judicial scrutiny. It is, therefore, felt that Government should examine the legal points involved judicially, and in case it is found that the action of the management involved termination of employment of Shri Arunangshu Chakraborty from the post Principal CorRespondent the matter may be referred to an Industrial Tribunal for adjudication.

36. From the said report, it further appears that the Conciliation Officer in conclusion has suggested and had already framed the following issues:

Whether termination of services of Shri Arunangshu Chakraborty, Principal CorRespondent, is justified ? To what relief, if any, is he entitled?

37. It appears from the record that on the basis of the aforesaid suggestions and the report of the Conciliation Officer, State Government had formed the opinion that there was in fact termination of services, although there was no detailed deliberation and discussion, in the file, before sending such industrial dispute to the Tribunal.

38. In reply to the aforesaid submissions, Mr. Arunava Ghosh, led by Mr. Partha

Sarathi Sengupta and Mr. S. Pal, has referred to a Full Bench decision of Delhi Court, in the case of I.T. Development Corporation v. Delhi Administration 1982 L.I.C. 1309 In para. 32 of the said judgment it has been observed by the Full Bench as follows:

It is settled law that the jurisdiction of the Labour Court/Industrial Tribunal in industrial disputes is limited to the points specifically referred for its adjudication and the matters incidental thereto and it is not permissible to go beyond the terms of the reference. An Industrial Adjudicator constituted under the Act is not vested with any inherent power of jurisdiction. It exercises such jurisdiction and power only upon and under order of reference limited to its terms. It cannot travel beyond the terms of reference except for ancillary matters. Making of an order of reference is undoubtedly an administrative function, but even that is amenable to judicial review in the proceedings under Article 226 under certain facts and circumstances. An order of reference is open to judicial review if it is shown that the appropriate Government has not applied its mind to the material before it or has not taken into consideration certain vital facts which it ought to have taken into consideration. The whole of the correspondence between the management and the Labour Commissioner, the Union of the workmen and the Labour Commissioner and the notices displayed by the management (the substance of which has been reproduced above) Were before the Secretary (Labour), Delhi Administration, when it passed the order of reference dated April 27, 1981. We are of the view that the existence of lock-out itself being the real dispute between the management and its workmen, the term of reference proceeds on the assumption that there was lock-out with effect from January 1, 1981.

39. He has also referred to a Division Bench judgment of Orissa High Court in the case of Orient Paper Mills Sramik Congress Vs. State of Orissa and Others, wherein it has been held as follows:

Even though as to the factual existence of the industrial dispute and of the expediency to refer that dispute for adjudication, the Government is the sole judge, yet having regard to the scheme of the Act, there cannot be any manner of doubt that the Government must consider the relevant materials and form its own opinion on germane considerations. However subjective the satisfaction of the State Government may be, if the satisfaction is based on non-consideration of the relevant materials or considerations not germane to the issue, then the opinion has to be interfered under Arts. 226 and 227.

40. Therefore, it has become necessary for me to examine the order of reference after considering the aforesaid submissions of all the parties.

41. After considering the rival submissions from the side of the employer and the employee, I am of the view that since the Petitioner newspaper had taken a lenient view and, instead of termination of services, decided to demote the Respondent workman, the State Government had no material before it to

consider the same as termination of services of the Respondent workman and refer the dispute to the Second Industrial Tribunal.

42. In this context, I am of the view, that on behalf of the Respondent workman, Mihir Ganguly, on behalf of the Indian Journalists' Association, once by his letter dated April 21, 1990, having considered the said punishment as a demotion, which would be evident from p. 110 of the writ petition, neither the State Government nor the Respondent workman is entitled to term the same as "termination of service", in the facts and circumstances of the present case.

43. Further after going through the necessary papers relating to issue of order of reference, I am of the view that the State Government had no occasion to apply their mind, but they have solely relied on the report submitted by Shri S. R. Chakraborty, Conciliation Officer, dated July 18, 1990, wherein Shri Chakraborty had himself posed that the problem had to be decided by the State Government, before taking further action, including making a reference of the dispute to the Tribunal, if it is at all a case of termination.

44. In conclusion, I am of the view that there was no material before the State Government to arrive at the necessary satisfaction that there was an order of termination of service of the Respondent workman from the post of Principal Correspondent and a new appointment to the post of Staff Reporter, and as such, in my opinion the State Government has referred the dispute without any application of mind, hence calls for interference by the writ Court, in exercise of power under Article 226 of the Constitution.

45. In the premises, the writ petition is entitled to succeed.

46. The impugned order of reference No. 1458-I.R. / I.R./131-14/90 dated August 17, 1990, is liable to be quashed.

47. A writ in the nature of mandamus be issued commanding the Respondents and each one of them from giving any effect to and further effect to the impugned order.

48. The writ petition is allowed.

49. There will be no order as to costs.

50. Prayer for stay of the operation of the judgment is considered and refused.

51. Xerox copy of the entire judgment be supplied to the parties on usual undertaking.