
(1998) 07 KL CK 0049
In the High Court Of Kerala
Case No : W.A. No. 1171 of 1998

Abdul Rahiman Kunju M.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 20-07-1998

Acts Referred:

Industrial Disputes Act, 1947 — Section 10

Citation : (1998) 3 ILR (Ker) 675 : (1998) 3 ILR (Ker) 331 : (1998) 2 LLJ 908

Hon'ble Judges : D. Sreedevi, J;AR. Lakshmanan, J

Bench : Division Bench

Advocate : C.P. Sudhakara Prasad, for the Appellant; P.K. Ravikrishnan, G.P. for Respondent Nos. 1 and 2 and Ashok Shenoy, for the Respondent

Final Decision : Allowed

Judgement

A.C. Lakshmanan, J.—Heard Mr. C.P. Sudhakara Prasad for the appellant, learned Government Pleader for respondents 1 and 2 and Mr. Ashok Shenoy for respondents 3 and 4.

2. Appellant is the petitioner in OP 8944/91 which was filed by him to call for the records leading to Ext. P7 and quashing the same and for a mandamus directing the Industrial Tribunal, Quilon to proceed with the adjudication of the issue referred under Ext. P3. A further prayer by way of mandamus seeking an order declaring that the Government have no power to interfere with the issue referred to in Ext. P3 while the adjudication proceedings are pending before the Industrial Tribunal.

3. The facts of the case are as follows: Appellant is a cashew exporter manufacturing cashew in his factory. The fourth respondent, Sarasamma Amma, was employed as a shelling worker in his factory at Mukhathala. On November 26, 1988, the fourth respondent refused to give attendance card to the watchman who was posted at the factory and talked in an indecent manner to the watchman and also to a clerk at that time. She also shouted with indecent

words to the manager. A show cause notice was prepared on November 26, 1988. When it was attempted to be given to her, she did not receive it and went from the factory without permission. She did not turn up for work from November 28, 1988 onwards. Hence the show cause: notice dated November 26, 1988 and another show cause notice dated November 28, 1988 were sent to her by post. She sent replies to the show cause notices. An enquiry was conducted by an advocate, who submitted his report, Ext.P1. She was found guilty. On the basis of the findings of the enquiry officer and after following the procedure prescribed by law, the fourth respondent was dismissed from service on July 18, 1989. After the dismissal of the fourth respondent, the Government referred an industrial dispute at the instance of the third respondent-Union to the Industrial Tribunal by Ext. P3 Government Order dated September 25, 1989. The question referred for adjudication by Ext. P3 was "denial of employment to Sarasamma Amma, Shelling No. 58 of Mukhathala Cashew Factory with effect from November 26, 1988". Before the Tribunal, the union filed Ext. P4 statement to which Ext.P5 reply was filed by the appellant. In the reply, the appellant pointed out to the Tribunal that there was no denial of employment to the fourth respondent, but the fourth respondent abandoned the work assigned to her in the factory after creating an unpleasant situation. Proceedings before the Tribunal started on November 3, 1989. Thereafter, there were several postings of the case and the last of such positing was on July 18, 1991. The fourth respondent was examined in full regarding the dispute Ext.P3 referred for adjudication. Thereupon, respondents 3 and 4 seem to have approached the District Labour Officer and the Government for withdrawing Ext.P3 reference and making another reference for adjudication before the Tribunal. Thereafter, Government issued Ext.P7 order dated February 26, 1991 by which the reference made under Ext.P3 was modified as follows:

"Dismissal of Smt. Sarasamma Amma Shelling Worker, M.Abdul Rahiman Kunju Cashew Factory, Mukhathala."

Since the reference now made under Ext.P7 was different from the reference made earlier under Ext.P3, the appellant tiled the Original Petition contending that once a reference is made u/s 10 of the Industrial Disputes Act, 1947 (for short "the Act"), that is necessarily to end by an award u/s 17-A of the Act and hence the modification of the reference of "denial of employment" to that of "dismissal from service" is without the authority of law. Respondents did not file counter affidavit in the case. The Original Petition was dismissed on May 22, 1998. The learned Judge held that denial of employment takes in its ambit dismissal also. In that view, the learned Judge has dismissed the Original Petition with a cost of Rs. 2,500/- to the advocate appearing for the fourth respondent. Aggrieved by the Order in the Original Petition, the present writ appeal has been filed by the appellant.

4. We have heard the respective counsel for the parties. Mr. Sudhakara Prasad made the following submissions:

(A) When a reference under Ext.P3 was made u/s 10 of the Act and the question referred for adjudication was "denial of employment of the fourth respondent", if it is impermissible in law for the Government to issue another Order of reference under Ext.P7 by way of modification to that of "dismissal from service" and, therefore, the same is without authority of law.

(B) Once an employee is dismissed from service or service was validly terminated by any other means, there is no right to work available to the employee concerned. This being the position, there is no question of: denial of employment arising when the right to work does not subsist. Hence, the view taken by the learned Judge in paragraph 4 of the judgment that by the modification proceedings by Ext.P7, there is no change in the Order of reference issued by Ext.P3, is not correct.

(C) Referring to a judgment of a learned single Judge of the Madras High Court reported in *Management of Thambi Motor Service, Salem Vs. Presiding Officer, Labour Court, Coimbatore and Another*, wherein the learned Judge held that the appropriate Government has got no power to amend or modify a reference once made u/s 10 of the Act which view taken by the learned single Judge was upheld by the Division Bench of the Madras High Court in the decision reported in *Workers employed in Thambi Motor Service Vs. Management of Thambi Motor Service and Another*, the reference under Ext.P7 virtually amounts to a modification by way of suppression of the earlier reference which is not allowable in law.

(D) Relying on the decision reported in *Chandra Spinning and Weaving Mills Ltd., Bangalore Vs. State of Mysore and Others*, of the Mysore High Court which has taken the view that a reference made regarding the validity of dismissal from service cannot be modified to one for adjudication regarding the justifiability in refusing to give work, it is submitted that the reference now made is not correct in view of the law laid down in the above case.

(E) The view taken by the learned single Judge in paragraph 7 of the Judgment that the present challenge is only technical and no prejudice is caused to the appellant is not correct. In the reference of "denial of employment", the only thing the appellant has to show is that the fourth respondent, as a matter of fact, has abandoned her work and hence there is no question of denial of employment. The justifiability or otherwise of the disciplinary proceedings and the ultimate order of dismissal need not be a subject matter of adjudication of the first reference of "denial of employment" and if the reference under Ext.P7 is to be adjudicated, necessarily the Tribunal will have to go into the correctness of the disciplinary proceedings and the ultimate decision taken by the management in dismissing the fourth respondent from service. The evidence to be adduced before the Tribunal for adjudication of the reference under Ext.P3 is totally different in adjudication of the reference under Ext. P7. Therefore, it is submitted that prejudice is caused to the appellant by the modification of the reference substantially changing the issue to be adjudicated made by Ext.P7.

5. In support of his contention, learned counsel for the appellant drew our attention to the following rulings:

- (1) The State of Bihar Vs. D.N. Ganguly and Others,
- (2) Chandra Spg. & Wvg. Mills v. State of Mysore (supra)
- (3) Thambi Motor Service v. Presiding Officer (supra)
- (4) MPM. Niligiris Motor Workers" Union v. Thambi Motor Service (supra)

6. Per contra, Mr. Ashok Shenoy invited our attention to Ext.P4 statement of claim, Ext.P7 and also relied on the judgment of this Court in Kollam Jilla Hotel & Shop Workers Union v. Industrial Tribunal 1997 2 KLT 535 Delhi Cloth and General Mills Co. Ltd. Vs. The Workmen and Others, , Commissioner of Income Tax, U.P.,Lucknow Vs. Kanpur Coal Syndicate, , Sheshrao Bhaduji Hatwar Vs. P.O., First Labour Court and others, and State of Maharashtra v. Kamani Employees" Union 1975 LABIC 387.

7. Section 10 of the Act deals with reference of disputes to Boards, Courts or Tribunals. Where the appropriate Government is of opinion that if any industrial dispute exists or is apprehended, it may at any time, by order in writing refer the dispute or any matter appearing to be connected with or relevant to the dispute whether it relates to any matters specified in the Second Schedule or the Third Schedule to a Tribunal for adjudication u/s 10(1) of the Act. Section 10(4) states that where in an order referring an industrial dispute to a Labour Court/ Tribunal etc. under this Section or in a subsequent order the appropriate Government has specified the point of dispute for adjudication, the Labour Court or the Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto.

8. We shall now consider the decision cited by learned counsel for the appellant first.

The State of Bihar Vs. D.N. Ganguly and Others,

This decision was cited by the counsel to say for the proposition that the appropriate Government has no power to amend or add to a reference u/s 10(1) of the Act and to cancel the prior reference. The Supreme Court also referred to the Judgment in Madras State v. C.P.Sarathy 1953 I LLJ 74 wherein it has been held that in making a reference u/s 10(1) of the Act, the appropriate Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its functions does not make it any the less administrative in character. That being so in such a case, it would be more appropriate to issue a writ of mandamus against the appropriate Government restraining it from enforcing the notification cancelling the prior reference.

Chandra Spinning and Weaving Mills Ltd., Bangalore Vs. State of Mysore and Others,

In the above case, the Mysore High Court held thus at p607:

"The sole question agitated by the petitioner before us relates to the scope and extent of the power of the State Government to amend a reference made under the Act. It is not disputed that the first reference was made u/s 10(1) of the Act. The second reference purports to be an amendment u/s 10(4) of the Act."

After quoting Section 10(4) of the Act, the High Court further observed that:

"It is obvious that this sub-section does not confer any power or jurisdiction on the State Government but defines the jurisdiction of the Labour Court, the tribunal or the national tribunal, as the case may be, by laying down that it shall confine its adjudication to those points (i.e., the points specified in it) and matters incidental thereto."

Workers employed in Thambi Motor Service Vs. Management of Thambi Motor Service and Another,

In the above case, the judgment of Rajagopala Ayyangar, J. was under appeal. The learned single Judge's judgment has been reported in 1960 II LLJ 63 (ad) (supra). In this case, two workmen were retrenched by the management and the concerned workers raised a dispute which was sponsored by the union. The Government of Madras made a reference u/s 10 of the Act on the following question:

"What retrenchment compensation, if any, are the workers Irusappan and Manickam, entitled to?"

The reference was received by the Labour Court which called upon the management and union to file their respective statements. The union was not satisfied with the terms of reference. It wanted to challenge the validity of the retrenchment by having an amendment to the question already referred to the Labour Court. Its attempt in that direction met with no response initially from the Government. However, the Government finally agreed to modify the same by memorandum dated December 12, 1957. The following amendments to the original reference were directed:

"(1) Whether the retrenchment of cleaners, Irusappan and Manickam, is justified and to what relief they are entitled?

(2) To compute the relief in terms of money, if it can be so computed."

Counsel for the union contended that it was certainly within the competence of the Government to correct any mistaken reference made by it and that in any event it had the power to make a supplemental reference adding certain questions for adjudication in addition to the pre-existing one. According to the counsel, the second question in the latter reference would be wide enough to include a claim of retrenchment compensation if the answer to the first question happened to be against the workers. In other words, the contention was that the second reference merely added an alternative case to the first one and,

therefore, a valid one. In that case, the learned single Judge held, where the fundamental basis of the original order of reference is nullified by the second reference, it may not be within the competence of the Government to amend the original reference. This view is also supported by the decision of the Supreme Court in 1958 I LJ 14 upra).

The Division Bench agreed with the view of the learned single Judge that the order of the Government dated December 12, 1957 is ultra vires and cannot confer jurisdiction upon the Labour Court to adjudicate the dispute referred to therein. The Bench issued a direction to the Labour Court to take up the first reference and adjudicate the question therein contained.

9. Mr. Ashok Shenpy submitted that Ext.P-7 does not amount to withdrawal or cancellation of Ext.P-3 reference, but only amplifies and clarifies Ext.P-3 reference. He relied on the judgment of this Court in Kollam Jilla H. & S.W. Union v. Industrial Tribunal (supra). In that case, the petitioner challenged the award of the Tribunal. Denial of employment of seven workers was referred for adjudication. The management submitted that there is no valid industrial dispute. The learned Judge directed the Tribunal to pass an award even in such cases if matters are disputed it is appropriate to file objections before the Industrial Tribunal or Labour Court and after adducing evidence on these points if the tribunal come to the conclusion that there is no valid industrial dispute it can pass an award accordingly and that the Tribunal cannot enter upon the consideration as to whether the preconditions empowering the State Government to make the reference existed or not. The Tribunal cannot also say that formation of the opinion by the Government that an industrial dispute will exist is not correct.

Delhi Cloth and General Mills Co. Ltd. Vs. The Workmen and Others,

The above case was cited by the counsel to say that it is the duty of the Tribunal to look into the pleadings of the parties to find out the exact nature of the dispute. In that case, the order of reference was based on the report of the conciliation officer and it was certainly open to the management to say that the dispute which had been referred was not an industrial dispute at all so as to attract jurisdiction under the Industrial Disputes Act. The Supreme Court held that the parties cannot be allowed to go a stage further and contend that the foundation of the dispute mentioned in the order of reference was non-existent and that the true dispute was something else. The Supreme Court held that Section 10(4) of the Act does not permit the Tribunal to entertain such a question. It was for the Tribunal to examine the evidence only on the question as to whether the strikes were justified and legal. It then had to come to its decision as to whether the workers were entitled to the wages for the period of the lock-out and for the period of sit down strike.

Commissioner of Income Tax, U.P., Lucknow Vs. Kanpur Coal Syndicate,

The above case was cited for the proposition that the appellate Tribunal has

jurisdiction to give directions to the appropriate authority to cancel the assessment made on that association of persons and to give appropriate directions to the authority concerned to make a fresh assessment on the members of that association individually. The above case, in our view, is not applicable to the facts and circumstances of the case on hand and that it does not also pertain to a dispute under the industrial/labour law. So the proposition laid down in the above judgment will have no application to the case on hand.

Sheshrao Bhaduji Hatwar Vs. P.O., First Labour Court and others,

The above case also will have no application to the facts of the present case. In the case on hand, the dispute is as to whether a second reference is competent. In the above case, the Division Bench of the Bombay High Court held that if points of difference are discernible from the materials placed before the Court or Tribunal, it has only one duty and that is to decide the points on merits and not be astute to discover formal defects in the wording of the reference.

1975 LabIC 387 (supra)

In the above case, the Maharashtra Government first referred for adjudication to the Industrial Tribunal certain disputes between the union and their company. One of the disputes concerned the production bonus scheme for monthly rated employees. During the pendency of the adjudication, the State Government made another reference to the same Tribunal of the question whether the existing incentive scheme of production bonus should be replaced by the new incentive scheme evolved by another company. A two-judge Bench of the Supreme Court held that the question covered by the second reference was a matter connected with or relevant to the dispute of the first reference and hence the State Government was well within its jurisdiction u/s 10(1)(d) in making a second reference. In holding so, the Supreme Court has reversed the decision of the Bombay High Court in *Kamani Employees' Union Vs. Kamani Engineering Corporation, Ltd. and Others*. The above case is also not on the point.

10. However, the Judgment rendered by the three-judge Bench of the Supreme Court in *Bihar State v. D.N. Ganguly* (supra) would resolve the dispute now raised by both the parties. The question before the Patna High Court was where an industrial dispute has been referred to a Tribunal for adjudication by the appropriate Government u/s 10(1)(d) of the Industrial Disputes Act, can the Government supersede the said reference pending adjudication before the Tribunal constituted for the purpose. In the above case, the first reference was whether the dismissal of the workmen in question was justified; if not whether they were entitled to reinstatement or any other relief.

11. A similar industrial dispute between the same company and its 29 workers was referred by the Government of Bihar to the same Tribunal and this was reference No. 1/55. While the proceedings in respect of the two references which had been consolidated by the Tribunal were pending before it and it had made some progress, the Government of Bihar issued a third notification on September

17, 1955 by which it purported to supersede the two earlier notifications to combine the said two disputes into one dispute to implead the two sets of workmen involved in the two sets of disputes together to add the Bata Mazdoor Union to the dispute and to refer it to the adjudication of the Tribunal. The dispute thus referred to the Tribunal was whether the dismissal of the 60 workmen mentioned in Annexure B was justified or unjustified and to what relief, if any, those workmen are entitled. The Company filed two separate applications and prayed that the last notification should be quashed as being illegal and ultra vires. The High Court held that the Government of Bihar had no power or authority to supersede the earlier notification, allowed both the applications and issued a writ in the nature of Certiorari quashing the impugned notification of September 17, 1955 and also a writ in the nature of mandamus requiring the Industrial Tribunal to proceed as expeditiously as possible with reference case No. 10/54 and 1/55. Against this order, the Government of Bihar applied and obtained Special Leave from the Supreme Court. That is now the two appeals came before the Supreme Court for its consideration.

12. On behalf of the State, it was urged before the Supreme Court that the High Court was in error in holding that the Government of Bihar had no power or authority to set aside the two earlier notifications and to refer the dispute in question for adjudication to the Tribunal u/s 10(1) of the Act. The Supreme Court after referring to the relevant material facts under the impugned notifications, came to the conclusion that the notification issued by the State of Bihar cancelling the first two notifications is invalid and ultra vires and has further directed the Tribunal to take up the earlier two notifications of its and dispose of the same as expeditiously as possible. A reference was made to the decision of the Madras High Court (Rajamannar, C.J. and Venkatarama Aiyar, J.) in *South India Estate Labour Relations Organisation Vs. The State of Madras and Others*, . In that case, the Government of Madras had purported to amend the reference made by it u/s 10 of the Act and the validity of: the amendment was challenged before the Madras High Court. This objection was repelled on the ground that it would be open to the Government to make an independent reference concerning any matter not covered by the previous reference. That it took the form of an amendment to the existing reference and not additional reference is a mere technicality which does not merit any interference in the writ proceedings. The objection was one of form and was without substance. It would thus appear that the question before the Court was whether the appropriate Government can amend the reference originally made u/s 10 so far as the new matters not covered by the original reference are governed, and the Court held that what the appropriate Government could have achieved by making an independent reference, it sought to do by amending the original reference itself. The Supreme Court has observed that this decision would not assist the appellant-State of Bihar because in that case the Supreme Court was not considering the power of the Government to amend or add to a reference made u/s 10(1) of the Act and their present decision was confined to the narrow question as to whether an

order of reference made by the appropriate Government u/s 10(1) can be subsequently cancelled or superseded by it. The Supreme Court confirmed the findings made by the learned Judges of the High Court of Patna that the notification issued by the appellant cancelling the first two notifications is invalid and ultra vires.

13. In our opinion, the above judgment of the Supreme Court will conclusively decide the dispute raised by the appellant in his favour. The argument advanced by the Counsel has force and is acceptable in view of the Supreme Court ruling in Bihar State v. D.N. Ganguly (supra). The view taken by the learned single Judge that the present challenge is only technical and no prejudice is caused to the appellant is not correct. In the reference of "denial of employment" , the only thing that the appellant has to show is that the fourth respondent-workman has, as a matter of fact, abandoned her work and hence there is no question of denial of employment and that the justifiability or otherwise of the disciplinary proceedings and the ultimate order of dismissal cannot be the subject matter of adjudication of the first reference of "denial of employment."

14. The Writ Appeal, therefore, succeeds. It appears from the case diary that the reference is pending before the Industrial Tribunal from October 1989 onwards. The case was posted on several days after the examination of the workman. In the meanwhile, the second reference was made under Ext.P7 in the year 1991. The matter was also pending before this Court from 1991 onwards till it was dismissed by the learned single Judge in May 1998. There was also a stay of all further proceedings before the Industrial Tribunal. Since the matter is a decade old one, we direct the Industrial Tribunal to dispose of the same on the basis of Ext. P3 reference as expeditiously as possible and after giving notice to both parties within three months from the date of receipt of a copy of this judgment from this Court. If the cost, as ordered by the learned single Judge, is not paid so far, the appellant need not pay the same to the fourth respondent. There will be no order as to costs in this appeal.