
(2016) 03 CAL CK 0096

In the Calcutta High Court

Case No : APO 397 of 2001 in WP 3123 of 2000, APO 277 of 2006 in WP 3122 of 2000 and APO 278 of 2006 in WP 3121 of 2000

Air India Limited

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-03-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Industrial Disputes Act, 1947 — Section 10, Section 33, Section 33(2)(b)

Citation : (2016) 2 CalHCN 226 : (2016) 1 CLR 1018 : (2016) 149 FLR 666 : (2016) 149 FLR 431 : (2016) 4 WBLR 112

Hon'ble Judges : Sanjib Banerjee, J.

Bench : Single Bench

Advocate : Arijit Chaudhuri, Sr. Adv., Arunava Ghosh, Biswaroop Bhattacharya and Rai Kumar Basu, Advocates, for the Appellant; J.S. Dhatt, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Sanjib Banerjee, J.—1. The three appeals arising out of three petitions under Article 226 of the Constitution in identical circumstances produced divergent opinions in course of a common judgment of September 20, 2006. The concerned Division Bench passed the following order without penning the point of difference on which the matter would be taken up by a third judge:

"Since we are not unanimous on the issue, the matter be placed before the Hon"ble Chief Justice for making a reference to a third judge."

2. It is, therefore, necessary to see the operative part of the different opinions:

Per Ashim Kumar Banerjee, J:

"Considering the above, in my humble view, that appeals filed by the employer must succeed"

Per Tapan Mukherjee, J:

"Under the circumstances, I am not inclined to interfere with the decision of Learned Single Judge in respect of the aforesaid three writ petitions. The appeals therefore must fail."

3. By individual orders passed on November 3, 1981, the three workmen involved in these matters were removed from service upon being found guilty of misconduct in disciplinary proceedings. At the relevant point of time, there was an industrial dispute pending between the employer and its union of workmen. Accordingly, the employer applied to the National Industrial Tribunal, then in Bombay, for obtaining approval of such action taken by the employer under Section 33(2)(b) of the Industrial Disputes Act, 1947. On April 30, 1983 the said tribunal declined to accord approval on the ground that a full one-month's wages had not been paid to the workmen. Such orders were challenged by way of petitions under Article 226 of the Constitution before the High Court at Bombay. On January 21, 1986 a Single Bench of the Bombay High Court set aside the tribunal's orders. The workmen preferred appeals before a Division Bench, which rejected the same by a common judgment and order of July 12, 1991. A petition for special leave to appeal was carried to the Supreme Court by the workmen and the same was dismissed on June 16, 1993.

4. As a consequence of the tribunal's order of April 30, 1983 being set aside and such decision attaining finality upon the dismissal of the special leave petition by the Supreme Court, the matter reached the tribunal for a fresh consideration in the light of the order passed on the writ petitions.

5. However, prior to the said tribunal deciding the applications under Section 33(2)(b) of the said Act afresh, each of the workmen raised an industrial dispute before the designated officer of the Central government on April 22, 1997. The concerned official forwarded the workmen's representations of April 22, 1997 to the employer under cover of letters dated July 7, 1997 and the employer furnished its comments thereon by July 29, 1997. The employer claimed that since the applications were pending before the tribunal for obtaining approval of the orders of removal from service pertaining to the three employees, "there cannot be multiplicity of proceeding for the same cause of action when the NIT is already seized with the matter." The employer also asserted that the industrial disputes raised by the employees were grossly delayed.

6. Conciliation proceedings were thereafter held and the employer repeated in course thereof, by letters dated September 30, 1997 and October 28, 1997, that the industrial disputes raised could not be entertained because of delay. The conciliation proceedings failed and a failure report was submitted by the relevant Labour Commissioner on October 15, 1998. On May 18, 1999 the industrial dispute raised by each of the three employees was referred under Section 10 of the said Act to the appropriate industrial tribunal for adjudication.

7. On November 1, 1999, the National Industrial Tribunal approved the dismissal

of the three employees under Section 33(2)(b) of the said Act.

8. In the reference for adjudication made under the said Act, the employer appeared before the tribunal and filed its written statement. Some 15 months after the reference for adjudication was made to the tribunal, the employer filed the three petitions pertaining to the three employees in this court. Paragraph 23 of each of the petitions claimed that the petitions had been filed pursuant to the employer "coming to know of the decision of the Hon"ble Supreme Court" in a judgment reported at , (2000) 2 SCC 455 (Nedungadi Bank Limited v. K.P. Madhavankutty). The employer also claimed at paragraph 16 of the petitions that the original records pertaining to the matters were not traceable before the National Industrial Tribunal and the documents were not available with the employer. According to the employer, since the original documents had been lost and relevant witnesses were no longer available, any adjudication of the references on merits would deprive the employer of its "legitimate and reasonable opportunity to defend its action and ... result in irreparable loss and injustice to the management."

9. The petitions were dismissed by a common order of December 8, 2000 on, primarily, twin grounds: that the orders of dismissal had not become final prior to the approval being granted by the National Tribunal under Section 33(2)(b) of the Act; and, that the writ petitions were filed more than 15 months after the reference for adjudication had been made and after the employer had submitted to the jurisdiction of the tribunal by filing its written statement therein.

10. The disparate views taken in the resultant appeals gives rise to the following issue or terms of reference at the present stage:

"Was the industrial dispute raised by each of the workmen on April 22, 1997 so delayed in the context of the facts that no reference for adjudication ought to have been made thereon?"

11. The employer contends that since the scope of Section 10 of the said Act is distinct from the manner in which Section 33 of the Act operates, there was no impediment to an industrial dispute against the disciplinary order being raised by each of the workmen within reasonable time of the relevant order of dismissal being passed in the year 1981. The employer insists that the delay in the raising of the industrial dispute should be counted from the date of the orders and such delay of about 16 years was per se inexcusable without looking into any other aspect of the matter. The employer complains that the relevant documents are no longer available and it will not be able to justify its action by producing relevant witnesses in course of the impugned reference. The substance of the employer's grievance is that such matters ought to have been taken into consideration by the relevant government while making the reference; and, in it being evident that such considerations were completely overlooked by the government in making the reference, the orders of reference should be set aside as arbitrary and irrational.

12. In support of the employer's contention that the provisions of Sections 10 and 33 of the said Act operate in different spheres, the judgments reported at , (1955) 1 SCR 1241 (Automobile Products of India Limited v. Rukmaji Bala) and , (1961) 3 SCR 204 (Lord Krishna Textile Mills v. Workmen) have been placed. Such judgments unequivocally recognise that the extent of the jurisdiction which a tribunal can exercise under Section 33 of the Act is only to satisfy itself that there is a prima facie case against the employee, but under such provision the tribunal may not consider the propriety or adequacy of the proposed action. Indeed, the judgment in Lord Krishna Textile Mills observed that the permission or approval granted by the tribunal to remove the ban imposed by Section 33 of the Act "does not necessarily validate the dismissal or prevent the said dismissal from being challenged in an industrial dispute."

13. The next decision brought by the employer, reported at , (1973) 1 SCC 813 (Workmen v. Firestone Tyre and Rubber Company), noticed the change in the said Act of 1947 by the incorporation of Section 11-A in 1971. The court found that the change in law had empowered the tribunal in seisin of adjudication proceedings to appraise the evidence in the domestic inquiry to satisfy itself whether such evidence established the misconduct alleged against the concerned workman. The court opined that the change of law had resulted in the tribunal to be the final arbiter rather than it exercising a mere supervisory role.

14. The employer has cited several authorities on the ground of delay. In the judgment reported at (2008) 17 SCC 627 (U.P. State Road Transport Corporation v. Ram Singh), the court found that a delay of 13 years in raising an industrial dispute was unreasonable as "the records pertaining to an employee might have been destroyed and it would be difficult to obtain witnesses who would be competent to give evidence so many years later if the Labour Court wishes to hold a further enquiry into the matter." In the decision reported at , (2003) 4 SCC 27 (S.M. Nilajkar v. Telecom District Manager), the court held that delay would be fatal if it results in material evidence being lost or rendered unavailable; but, on facts, the delay in that case was found not to be of any consequence. In the judgment reported at (2002) 10 SCC 167 (Assistant Executive Engineer, Karnataka v. Shivalinga), the services of the workmen stood terminated in 1985 and the workmen approached the labour officer in 1995. In the context of such delay and the lack of any explanation in such regard, the court found that the reference could not be pursued as the claim had become stale because of the delay. In the decision reported at , (2006) 5 SCC 433 (U.P. State Road Transport Corporation v. Babu Ram), there was a delay of about 15 years in seeking a reference which was found to be inexcusable since the workman could not demonstrate that he was not responsible for the delay.

15. The employer has also referred to the judgments reported at , (1964) 6 SCR 261 (State of Madhya Pradesh v. Bhailal Bhai) and , (2006) 4 SCC 322 (Karnataka Power Corporation Limited v. K. Thangappan) for the proposition that the delay in approaching a writ court without any consequential prejudice to the

other side may not be regarded as fatal. These judgments have been relied on by the employer in the context of the second limb of the order impugned in the appeal that the writ petitions had been filed 15 months after the orders of reference had been made and after the employer had submitted to the jurisdiction of the tribunal by filing its written statement. However, such aspect of the matter is not relevant in the context of the question framed herein for adjudication. Though the judges of the Division Bench also differed on whether the writ petitions ought to have been entertained at all in view of the perceived delay, such difference need not be addressed if the question framed herein is answered against the employer.

16. The prescription of limitation is founded on public policy and the maxim in equity, *vigilantibus non dormientibus jura subveniunt* - the laws comes to the assistance of the vigilant and not of the sleepy. Where there is no prescribed period of limitation, as in the raising of an industrial dispute or the making of a reference thereof under the said Act of 1947 or the institution of a petition under Article 226 of the Constitution, courts justify the refusal to receive long-delayed claims on certain equitable considerations. The three principal grounds are, that long dormant claims have more of cruelty than justice in them; that the person against whom the claim is made may have lost the evidence to dispute the same; and, that persons with good causes of action should pursue them with reasonable diligence.

17. The orders passed by the employer in the disciplinary proceedings against the concerned workmen did not attain any degree of finality in view of the prohibition under Section 33 of the said Act. The orders of removal from service became final only upon the National Tribunal approving the same under Section 33(2)(b) of the Act in November, 1999. That does not imply that prior to such approval being accorded by the National Tribunal, the workmen were precluded from raising a dispute under Section 10 of the Act. The workmen may have approached the government with an industrial dispute anytime after the disciplinary order was passed and the government may also have referred the same under Section 10 of the Act to a tribunal for adjudication since a reference may be made either when any industrial dispute exists or any industrial dispute is apprehended. It was also open to the concerned workmen to raise the industrial dispute after the National Tribunal approved the disciplinary order.

18. The test, therefore, has to be whether the industrial dispute in this case is so stale that the reference for adjudication thereof under Section 10 of the Act may be regarded as unreasonable or unconscionable. The dispute in this case was not stale by any stretch of imagination as on the date on which a reference thereof was made to the tribunal for adjudication in May, 1999. The workmen and the employer were fighting each other in the National Tribunal and the courts and the final outcome was still awaited at the time that the reference was made. If the approval was subsequently declined under Section 33 of the Act, the adjudication on the reference would have become unnecessary; or else, it called for an

adjudication. As noticed above, the judgment in Lord Krishna Textile Mills conceived of a disciplinary order being challenged after permission or approval in respect thereof is obtained under Section 33 of the Act.

19. It is a matter of regret that the matter pertaining to the approval sought under Section 33 of the Act was not finally disposed of for a period of 18 years till November, 1999. If it was open to the concerned workmen to raise an industrial dispute after the approval was granted by the National Tribunal in November, 1999, it cannot be said that an industrial dispute raised in the apprehension that the approval may be granted can be seen to be stale. The employer says that the documents have been lost to it in course of the long time that it spent in the tribunal and the courts; but that cannot be a stick with which the workmen can be beaten. The employer ought to have been more vigilant and preserved its documents. That the relevant witnesses can no longer be summoned to justify the orders, is again something that should not be held against the workmen. As to how the matter proceeds before the tribunal may not be conjectured at this stage.

20. If at all, the Constitutional principles that instruct our daily life permit the system to err, if unavoidable, on the side of the underdog. At any rate, the opinion formed by a government to make a reference under Section 10 of the Act can scarcely be scrutinised in judicial review unless exceptional circumstances are cited. It is not as if the objection on the ground of delay was not permitted to be raised. Such objection was raised and the government still went ahead with the reference. The government was not obliged to pass a detailed order indicating its reasons for making the reference despite the objection.

21. Since the dispute between the employer and the workmen remained live and dragged on in the tribunal and the courts till November, 1999, the impugned reference made in apprehension of the industrial dispute arising upon the approval of the punishment being accorded by the National Tribunal cannot be flawed on the ground of delay or perceived staleness. The issue raised is answered in the negative and against the employer and this reference disposed of accordingly. As a consequence, the three appeals, APO 397 of 2001, APO 277 of 2006 and APO 278 of 2006, fail. Since no costs were awarded by the Division Bench, there is no question of costs at this stage.

22. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.