
(1984) 08 PAT CK 0043

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No's. 351, 360, 364, 365, 372 and 373 of 1983

Ashok Kumar Jain and 23 Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 16-08-1984

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(kkk), 25M, 25Q

Citation : (1985) PLJR 142

Hon'ble Judges : N.P. Singh, J; M.P. Varma, J

Bench : Division Bench

Advocate : R.K. Katriar and S.K. Katriar, for the Appellant; K.P. Varma, Advocate General in all the cases, Kamlapati Singh (G.P.V.) with Ram Krishna Singh (J.C.) in Cr.W.J.C. 351 83, C.K. Sinha (G.P. I) with Ishwari Singh (J.C.) in Cr.W.J.C. 360/83, Narendra Kishore Sinha (S.C. V) with Devendra Pd. Sinha (J.C.) and Chandramauli Kumar Prasad (J.C.) in Cr.W.J.C. 364 and 365 of 1983, Krishna Nandan Prasad Singh (G.P. III) with Madhukar Krishna Sinha (J.C.) in Cr.W.J.C. No. 372/83, Karuna Nidhan Keshava (G.P. IV) with Premnath Singh (J.C.) in Cr.W.J.C. 373/83 and Aftab Alam, A.S.C. for Union of India in all cases, for the Respondent

Judgement

N.P. Singh, J.—Whether the petitioners can be prosecuted for having contravened the provision of section 25-M of the Industrial Disputes Act which according to the petitioners is ultra vires, is the primary question raised in these writ applications. The petitioners are the Chairman, Managing Director, Executive Director, Manager (Administration) of M/s. Rohtas Industries Ltd. (hereinafter to be referred to as "the Company"). Six petitions of complaint were filed by the Labour Superintendent alleging that as the different manufacturing units of the said Company had laid-off their workmen without prior permission of the authority specified by the appropriate Government, it amounted to contravention of section 25-M of the Industrial Disputes Act (hereinafter to be referred to as "the Act"), and the petitioners were liable for punishment u/s 25-Q of the Act. On basis of the said petitions of complaint the petitioners have been summoned

to stand trial for the aforesaid offences. According to the petitioners, as section 25-M itself is ultra vires, the prosecution of the petitioners for the alleged contravention of section 25-M of the Act amounts to an abuse of the process of the Court.

2. "Lay Off" has been defined u/s 2(kkk) of the Act to mean "the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the breakdown of machinery or natural calamity, or for any other connected reason to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched." Sub-section (1) of section 25-M is as follows:--

No workman other than a badli workman or a casual workman whose name is borne on the muster rolls of an industrial establishment to which this Chapter applies shall be laid-off by his employer except with the previous permission of such authority as may be specified by the appropriate Government by notification in the Official Gazette, unless such lay-off is due to shortage of power or to natural calamity and in the case of mine, such lay-off is due also to fire, flood excess, of inflammable gas or explosion.

3. On behalf of the petitioners it was urged that section 25-M does not provide any guideline for the exercise of the power to grant or refuse permission. The authority specified by the appropriate Government may whimsically and capriciously refuse the permission to layoff. It was also pointed out that order passed by the authority is not subject to any scrutiny by any higher authority or Tribunal in an appeal or in revision. According to the petitioners, because of aforesaid vices the section should be held to be ultra vires. In this connection reliance was placed on the judgment of the Supreme Court in the case of Excel Wear and Others Vs. Union of India (UOI) and Others, where section 25-O of the Act was held to be violative of Article 19(1)(g) of the Constitution and, as such, invalid. Section 25-O contains the procedure for closing down an undertaking. The validity of the said section as it stood prior to the amendment by Act 46 of 1982, was considered by the Supreme Court in the case referred to above. It was pointed out by the Supreme Court that even in case of a bona fide closure where the reasons given by the employer are correct, adequate and sufficient, yet the permission to close down can be refused on the ground of public interest and the authority may compel the employer to manage the Undertaking even when the employer does not find it safe and practicable to manage the affairs. According to the Supreme Court, this amounted to compelling the employer to go on incurring losses year after year. In view of the Supreme Court, it was not a reasonable restriction within the meaning of Article 19(6) of the Constitution. In that connection it was also observed:--

S. 25-O does not provide any guidelines for the exercise of the power to grant or refuse permission. The appropriate Government may whimsically and capriciously refuse the permission to close down even if a case has been made out for closure. The section does not compel the appropriate Government to give

reasons for the refusal. Any order passed by the authority is not subject to any scrutiny by any higher authority or Tribunal in appeal or in revision.

On behalf of the petitioners it was urged that the only difference between section 25-M and section 25-O, as it stood before the amendment, is that whereas section 25-M(3), requires the authority to make inquiry on the application for permission to lay-off and to grant or refuse permission for the reasons to be recorded in writing, there was no such condition prescribed for exercise of power u/s 25-O. While granting or rejecting permission for closure the appropriate Government was not required to give any reason in writing.

4. While deciding the reasonableness of a provision in light of Article 19 of the Constitution the object of the provision, nature of restriction it purports to impose on the fundamental right of a citizen, both have to be balanced before a verdict can be recorded as to whether such provision is reasonable or unreasonable. It cannot be disputed that a provision vesting power in the appropriate Government to grant or refuse to grant permission to an employer to close down his undertaking, is a provision having far reaching effect because it affects the very existence and functioning of the establishment. That is why it was observed by the Supreme Court in the aforesaid case:--

Public interest and social justice do require the protection of the labour. But is it reasonable to give them protection against all unemployment after affecting the interests of so many persons interested and connected with the management apart from the employers. Is it possible to compel the employer to manage the undertaking even when they do not find it safe and practicable to manage the affairs? Can they be asked to go on facing tremendous difficulties of management even at the risk of their person and property? Can they be compelled to go on incurring losses year after year 7

It was then pointed out:--

.... no jurisprudence of any country recognizes that the concept of injury is widened and the area of restraint is broadened to an extent that it may result in the annihilation of the person affected by the restraint.

Can it be said even in respect of Section 25-M that when it regulates lay-off of workmen by the employer, it amounts to an annihilation of the employer by the restraint contained in that section so as to be at par with section 25-O? In my opinion, section 25-M cannot be treated at par with section 25-O.

5. With the emergence of the concept of welfare State the collective bargaining came into existence and lest the conflicting interest of the workmen and employer disturbed and industrial peace and harmony, a machinery for adjustment of such conflicting interest was provided under the Act. The State intervention permeates the Act, the object being to minimise industrial unrest and industrial dispute. Under the common law an employer could terminate the services of an employee at any time even when his business or industry was

temporarily stopped; he could employ new men in place of the dismissed employees. The common law did not impose any obligation upon the employer to give any compensation to an employee if his services were retrenched. But the provisions of the Act put different restrictions on the right of the employer to terminate the services of the workman and section 25-M is one of such provisions which prescribes that prior permission must be obtained before a workman is laid-off unless "such lay-off is due to shortage of power, or due to natural calamity". Any such restriction cannot result in the closure of the establishment. The test applied in the aforesaid judgment of the Supreme Court in connection with closure of an establishment u/s 25-O are not applicable, in relation to section 25-M. I have already pointed out that one basic difference between section 25-O, as it stood then, and section 25-M is that sub-section (3) of section 25-M requires the authority to make such enquiry as he thinks fit and to record reasons in writing for granting or refusing the permission applied for. When such reason is recorded, it can be subject matter of judicial review by the High Court. This was not possible in respect of order passed under the old section 25-O(2), because appropriate Government while rejecting permission for closure was not required to give any reason. In the aforesaid case Supreme Court took note of this aspect when it was observed:--

In contrast to the other provisions, section 25-O(2) does not require the giving of reasons in the order. In two of the impugned order communicated to the petitioners, Excel Wear and Acme Manufacturing Co. Ltd., it is merely stated that the reasons for the intended closure are prejudicial to public interest suggesting thereby that the reasons given by the employers are correct, adequate and sufficient, yet they are prejudicial to the public interest. In cases of bona fide closures it would be generally so.

If no reason was to be recorded under section. 25-O(2), there was not much scope for judicial review by the High Court or the Supreme Court. That is not the case so far as section 25-M is concerned, because it can be examined whether the reasons given by the authority are real and relevant and not arbitrary and capricious.

6. It was then submitted that no appeal has been provided against an order requiring to grant permission to lay-off. It is well known that a provision cannot be held to be ultra vires merely because no appeal has been provided against the order passed under such provision. Reference in this connection may be made to the cases of K.L. Gupta and Others Vs. The Bombay Municipal Corporation and Others, and Chinta Lingam and Others Vs. Government of India and Others, . In the former case (K.L. Gupta and Others Vs. The Bombay Municipal Corporation and Others,) while testing the validity of section 13 of the Bombay Town Planning Act as to whether it gave an uncontrolled and uncanalised power-to the local authority to refuse a commencement certificate arbitrarily, it was observed:--

The fact that no appeal from the decision u/s 13 was provided for is a matter of

no moment for the authority u/s 13 is no less than the Municipal Commissioner himself or the Chief Officer of the Municipal Borough or a person exercising the power of an Executive Officer of any local authority.

The same view was expressed by the Supreme Court in the case of *Organo Chemical Industries and Another Vs. Union of India (UOI) and Others*, where Krishna Iyer, J. observed as follows:--

An appeal is desirable corrective but not an indispensable imperative and while its presence is an extra check on wayward orders its absence is not a sure index of arbitrary potential. It depends on the nature of the subject matter, possible harm flowing from, wrong orders and a wealth of other factors.

When in the aforesaid judgment of the Supreme Court (AIR 1978 SC 25) it was observed that the orders u/s 25-O(2) could not be "subject to any scrutiny by any higher authority or Tribunal either in appeal or revision" because no reason was required to be given, in my view, the Supreme Court never purported to say that in absence of a provision for appeal, the said section was *ultravires*. The emphasis was more on the fact that appropriate Government was not required to give any reason in writing for refusing the permission.

7. Apart from that in respect of section 25-O the Supreme Court pointed out that it does not provide any guideline for exercise of the power to grant or refuse permission, and, as such, the appropriate Government may whimsically or capriciously refuse to grant permission to close down even if a case had been made out for closure. u/s 25-M no previous permission of the authority is required if the lay-off is due to shortage of power or natural calamity. In my view, the section provides sufficient guidelines for exercise of the power and there is a proper check on the authority concerned by requiring him to record reasons for grant or refusal of the permission.

8. Section 25-M is in Chapter V-B of the Act which applies to a large industrial establishments which employ not less than 300 workmen on an average per working day. In that background the framers of the Act must have felt that laying off workman would result in serious dislocation of production and unemployment to a large number of workmen and so it was provided that before laying off the workmen for reasons other than shortage of power or natural calamity, previous permission must be taken of the authority as may be specified. Section 25-M does not totally prohibit lay-off. It also requires previous permission not in all events. It is true that while granting or refusing permission, the authority may take some time, the upper limit being a period of two months and during this period the employer cannot lay-off the workmen concerned. But there is no reason to suppose that in normal course such orders will be passed only when the period of two months is to expire.

9. On behalf of the petitioners reliance was placed on a Bench decision of Madras High Court in the case of *K. Qurumurthy v. Simpson and Co. Madras and others* (1982 LAIC 737). In that case section 25-M of the Act was held to be

constitutionally invalid. The aforesaid view has been taken because according to the learned Judges the vices pointed out by the Supreme Court in the case of Excel Wear and Others Vs. Union of India (UOI) and Others, in respect of section 25-O were applicable even in case of section 25-M. I have already pointed out the difference between section 25-O, as it was then, and section 25-M. As such, in my view, on basis of the aforesaid judgment of the Supreme Court section 25-M cannot be held to be ultra vires. A Bench of Andhra Pradesh High Court has also upheld the validity of section 25-M of the Act in the case of General Industrial Society Ltd. v. Commissioner of Labour, Hyderabad and another-- [56 (1980) IFJ 419]. In my opinion, it is not possible to hold that section 25-M of the Act imposes an unreasonable restriction on the right of the petitioners to carry on trade and business guaranteed by Article 19(1)(g) of the Constitution.

10. It was then submitted that even if the allegations made in the petitions of complaint are accepted on their face value, the petitioners could not have been summoned to stand trial because there is no statement in the petitions of complaint that the petitioners are employers within the meaning of the Act. Section 25-Q, which provides penalty and sentence or contravention of section 25-M, is as follows:--

Any employer who contravenes the provisions of Section 25-M or clause (c) of sub-section (i) or sub-section (4) of Section 25-N shall be punished with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

On a plain reading of the aforesaid section it is apparent that if any employer contravenes the provision of section 25-M, he shall be punishable under that section. In the petitions of complaint in the column meant for description of the accused persons, names of the petitioners are mentioned. They have been described as Chairman, Managing Director, Jt. Managing Director, General Manager of M/s. Rohtas Industries. It may be mentioned that the Company which is a juristic person, has not been made an accused. Now the question is as to whether it can be, held that the Chairman of the Company, its Managing Director or its General Manager shall be deemed to be employer of the workmen who have been laid off.

11. The word "employer" has not been specifically defined under the Act. Section 2(g) says that,

"employer" means --

(i) in relation to an industry carried on by or under the authority of any department of the Central Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, the head of the department;

(ii) in relation to an industry carried on by or on behalf of a local authority, the Chief executive of that authority.

The definition of "employer" is neither exhaustive nor inclusive. This might have been left out for the benefits of the employees. From time to time courts have to interpret in facts and circumstances of a particular case whether the person in question shall be deemed to be employer or not. There is no difficulty to find out as to who shall be employer in relation to proprietary concern because the employer will be the owner of the concern. The problem arises in relation to a firm, a joint stock company, Central Government, State Government and local authority. So far as Central Government, State Government and local authority are concerned, the Act in section 2(g) prescribes as to who shall be deemed to be the employer. But nothing has been said in respect of firm and joint stock companies. In some judicial pronouncements it has been held that in relation to a firm the partners shall be deemed to be the employer, whereas in relation to a joint stock company it shall mean the corporate body. In this connection reference may be made to the case of Birla Brothers Ltd. Vs. Modak where it was observed by Harries, C.J.:-

Section 2(g) merely states who is to be regarded as the employer if an industry is carried on by a department of Government or a local authority. The section in no way defines the term "employer" generally and, as there is no definition of that term in the Act, it must be given its ordinary or dictionary meaning.

In the case of Western India Automobile Association Vs. The Industrial Tribunal, it was pointed out that no attempt "was made to define the term "employer" generally or in relation to other persons carrying on industries or running undertakings." In case of Management of Cuttack Motor Association Vs. Administrative Staff of Cuttack Motor Association and Others, it was observed:

Under the Industrial Disputes Act, "employer" has a special status and whether a legal entity or not, if he is the employer, certainly in regard to statutory proceedings under the Act, can sue and be sued.

In the case of United Province Electric Supply Co. and Others Vs. Industrial Tribunal (III) Allahabad and Others, it was pointed out as follows:

so long as the company is not dissolved, whoever is managing" the company is to be regarded as an "employer" relating to the dispute which was raised, before the company was in liquidation.

In the case of Kantaya Ramlu Naidu and Others Vs. State Industrial Court, M.P. Indore and Others, a Bench of the Madhya Pradesh High Court approved the finding of the Industrial court that even an Agent of a Company can be held to be an employer under the Act. The "Supreme Court in the case of Hussainbhai, Calicut Vs. The Alath Factory Thezhilali Union, Kozhikode and Others, had to consider as to who can be held to be an employer in respect of an industry. In that connection Krishna Iyer, J. pointed out as follows:

The true test may, with brevity, be indicated once again. Where a worker or group of workers, labours to produce goods or services and these goods or

services are for the business of another, that other is, in fact, the employer. He has economic control over the worker's subsistence, skill, and continued employment. If he, for any reasons chokes off. the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement that the real employer is the Management, not the immediate contractor.

12. There should not be any controversy that in appropriate cases on the facts alleged and proved in respect of Joint Stock Company any person other than the Company can be held to be employer, the earlier view that in cases of Joint Stock company, the company itself is the employer has been diluted to some extent. But there must be allegation in the petition of complaint in that respect. Once there is an allegation that any particular officer of the Company is the employer, that can be substantiated at the trial. But, if there is no allegation in the petitions of complaint that the persons who have been arrayed as accused are employers of the workmen concerned, it is difficult to hold that an offence u/s 25-Q has been disclosed against the persons named in the petitions of complaint. In such a situation, I am left with no option, but to quash the orders summoning the petitioners to stand trial in all the six cases.

13. Now the next question which falls for consideration is as to whether the whole proceeding pending before the learned Magistrate should be quashed. The whole proceeding can be quashed only if taking the allegations made in the petitions of complaint on their face value no offence is disclosed. In the instant case, the petitions of complaint disclose an offence u/s 25-Q of the Act, when it is alleged that accused persons have without complying with the requirement of section 25-M of the Act, laid off their workers. Once an offence is disclosed in the petitions of complaint the learned Magistrate could have taken cognizance thereof u/s 190(1)(a) of the Code of Criminal Procedure (hereinafter to be referred to as "the Code"). It is well known that u/s 190 of the Code cognizance is taken of an offence and not of individual offender. Reference in this connection may be made to one of the earliest decision of this Court in the case of Mathura Singh and Others Vs. Emperor, . As such, order taking cognizance cannot be held to be illegal or invalid. It is only just and proper in the facts and circumstances of the present case to direct the learned Magistrate to hold enquiry u/s 202 of the Code for purpose of ascertaining as to whether the petitioners or any one of them can be held to be employer so that they may be summoned to stand trial for an offence u/s 25-Q of the Act. In the result, the applications are allowed to the extent indicated above.