

(1950) 04 PAT CK 0008

In the Patna High Court

Case No : Criminal Miscellaneous No. 155 of 1950

Bagaram Tuloule

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 05-04-1950

Acts Referred:

Constitution of India, 1950 — Article 226, 226(1)
Industrial Disputes Act, 1947 — Section 10(1)

Citation : AIR 1950 Patna 387

Hon'ble Judges : Meredith, C.J;Shearer, J;Das, J

Bench : Full Bench

Advocate : Awadhesh Nandan Sahay and S.L. Nandkeolyar, for the Appellant;
The A.G. and Balabhadra Singh, Baldeva Sahay, N.N. Roy and Bajrang Sahay, for the Respondent

Judgement

Meredith, C.J

1. This is an application under Article 226 of Indian Constitution for the issue of a writ in the nature of mandamus upon the State Government of Bihar directing it to refer an industrial dispute to a Tribunal for adjudication under the proviso to Section 10(1), Industrial Disputes Act, 1947 (Act xiv [14] of 1947).

2. The petitioner is the Vice-President of the Wire Products Labour Union, Jamshedpur, which, it is stated, is a registered trade union and has a membership of over 2000 workers who are employed in the Indian Steel and Wire Products Limited, which is a public utility service.

3. The facts stated in the petition may be summarised as follows : In the year 1947, an award was given by the Chairman, Industrial Tribunal, who decided inter alia that the management and the Union should evolve through mutual consultation a suitable wage structure for the workmen. One Mr. John was then the President of the Union, and he agreed to a wage structure which was later enforced by the management some time in February 1949. This wage structure

was detrimental to the interests of the workers and had not been sanctioned either by the executive committee of the Union or its general body. Accordingly, the workers, through their executive committee, passed a vote of non-confidence against Mr. John and the other office bearers of the Union in April 1949, and elected one Munshi Ahmad Din as their President and other trade union workers allied to the socialist party of India as office bearers, including the petitioner as Vice-President. On 26th July 1949, the Union addressed a letter to the management asking that the question of wage structure might be re-opened. But this proposal was rejected. It is further stated that a number of items of the award of 1947 had not been given effect to by the management, and the Union forwarded a list of the outstanding grievances of the workers to the management and requested immediate attention to be paid to them, failing which the Union would take such steps as it thought fit. As this was not accepted by the management on 19th September 1949, notice was served on the managing director under Sub-section (1) of Section 22, Industrial Disputes Act, stating that a strike would be organised on and from Friday the 14th October 1949. A Conciliation Officer attempted to arrive at a settlement but failed, and the Conciliation Officer intimated this failure to the Government, But on 18th October 1949, the Government informed the Union by telegram that it had decided not to refer the dispute to a Board or Tribunal as it considered it inexpedient to do so. The strike of the workers commenced on 14th October 1949, and continued for 75 days, on which date the Deputy Commissioner of Jamshedpur declared the strike illegal, whereupon the Union called off the strike.

4. It is stated that the Government acted mala fide in refusing to refer the dispute to a Tribunal for adjudication, and therefore, did not carry out its legal duty u/s 10.

5. The first question is whether the Court has any power to issue writs or directions in a matter of this kind which cannot be said to involve the enforcement of the fundamental rights laid down in part III of the Constitution. Article 226 (1) is in these terms ;

"226 (1). Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases any Government, within those territories directions, orders, or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

Reliance is placed on the words "and for any other purpose." It is quite clear that these words have been added advisedly and must mean something in addition to the enforcement of the rights conferred by part III, and this is so whether they be read ejusdem generis or otherwise. It is clear because Article 32, which is the corresponding provision for the Supreme Court, does not contain these words, but speaks merely of the enforcement of "any of the rights conferred by this

part," and that is obviously because the original jurisdiction of the Supreme Court extends only to the enforcement of the fundamental rights. And this view receives confirmation from the terms of Article 139 which says:

"The Parliament may by law confer on the Supreme Court power to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus prohibition, quo warranto and certiorari, or any of them (or any purposes other than those mentioned in Clause (2) of Article 32."

Undoubtedly, therefore, Article 226 contemplates the issue of writs and directions for purposes other than the enforcement of the fundamental rights. At the same time, the words can hardly mean that the High Court can issue writs for any purpose it pleases. I think the correct interpretation is that the words mean for the enforcement of any legal right and the performance of any legal duty. To that extent the words must be read ejusdem generis, which is the ordinary principle of construction.

6. Moreover, it could never have been intended that resort could be had to this extraordinary procedure where an adequate remedy is available by ordinary legal process, for example, by suit. Otherwise, the ordinary legal procedure, including the payment of court-fees, would be abrogated. An application under Article 226, in my judgment, is and must remain an extraordinary remedy to be used where ordinary legal process cannot give adequate and prompt relief.

7. Now, turning to the present case, let us see if there is any clear legal duty of the Government which it has failed to perform. To this the answer must clearly be in the negative. Section 10(1), Industrial Disputes Act, says :

"10 (1). If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing-

- (a) refer the dispute to a Board for promoting a settlement thereof, or
- (b) refer any matter appearing to be connected with or relevant to the dispute to a Court (or inquiry, or
- (c) refer the dispute to a Tribunal (or adjudication."

All this is clearly purely discretionary. Next comes the proviso in these terms:

"Provided that where the dispute relates to a public utility service and a notice u/s 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced."

8. It is conceded that we are concerned with a public utility service and that a notice u/s 22 has been given. But, on the other side, it is conceded that Government has refused to make the reference on the express ground that it

considers it would be inexpedient so to do. The word "inexpedient" is very wide, and in my judgment despite the use of the word "shall" it gives a complete discretion to Government. Government might consider a reference inexpedient for all sorts of reasons, including reasons of policy, which are no business of the Courts and it might well be that Government would not wish to disclose its reasons. That being so, in my opinion, the question of bona fides or mala fides cannot at all arise, since the matter is left entirely to the discretion of Government.

9. It is well settled, both in England and in America, that mandamus will not issue in a matter of discretions, see for example *The King v. Marshland Smeeth and Fen District Commissioners* (1920) 1 K. B. 155 : 89 L. J. K. B. 116 ; *Ex parte Bassett* (1857) 119 E. R. 1251 : 7 E. B. 280 and in America *In the matter of Robert L. Cutting* 94 U. S. S. C. R. 14 : 24 L. E. 49; *United States ex. rel. International Contracting Co. v. Danial Section Lament* 155 U. S. S. C. R. 303 : 39 L. E. 160 and *Intestate Commerce Commission v. United States of America ex. rel. Members of the Waste Merchants Association of New York* 260 U. S. S. C. R. 32 : 67 L. E. 112 .

10. The reason why this limitation is imposed is quite plain. Suppose we order the Government to make the reference by the issue of a writ. We are depriving Government of the discretion which the law allows it. "While if the writ is issued to compel exercise of this discretion, then it will be infectious because the reply would be "We have exercised our discretion."

11. In my opinion, the present application was misconceived and must, therefore, be rejected The State Government is entitled to its costs, which I would assess at five gold mohars.

Shearer J.

12. I agree with my Lord the Chief Justice and have nothing to add.

Das J.

13. I have had the advantage of seeing the judgment proposed to be delivered by my Lord the Chief Justice, I so entirely agree with him that it is not necessary for me to add anything except a few words about two decisions on which Mr. Awadhesh Nandan Sahay placed reliance.

14. Mr. Sahay has contended that the proviso to Section 10(1), Industrial Disputes Act, 1947, imposes a duty on the appropriate Government to refer an industrial dispute, relating to a public utility service, in which a notice u/s 22 has been given, to a Board or a Court of Inquiry or a Tribunal for adjudication. His contention is that the use of the word "may" in the sub-section, and "shall" in the proviso, makes no difference and despite the use of the word "may" in the sub-section, a duty is imposed, though the duty is to be performed subject to the fulfilment of certain conditions. Mr. Sahay argues that even when a duty is to be performed subject to certain conditions the non-performance of the duty on

arbitrary grounds is no exercise of discretion, and will give the party aggrieved a right to move this Court for an order directing performance of that duty. The two decisions on which Mr. Sahay has relied are Alderman Backwell's case, 1 Vern. 152: 23 E. R. 381 and The King v. Marshland Smeeth and Fen District Commissioners (1920) 1 K. B. 155 : 89 L. J. K. B. 116. In Alderman Beckwell's case 1 Ver. 152 : 23 E. R. 381, several creditors of the Alderman petitioned for a commission of bankruptcy against him. On behalf of the Alderman, the plea taken was that a majority of the creditors had compounded with him, and the Alderman having already made very fair proposals, the granting of the Commission might for some time be suspended. The matter came before the Lord Keeper who declared that though the words in the Act of Parliament were that the Chancellor may grant a commission of bankruptcy yet that "may" was in effect "must", and the granting of a commission was not a matter discretionary in him. A reference was made to Julius v. Bishop of Oxford (1880) 5 A. C. 214 : 49 L. J. Q. B. 577 where it was observed that where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as "shall". It was, however, pointed out that the construction of the words "may" and "shall" depended on circumstances. In the other case King v. Marshland Smeeth and Fen District Commissioners 1920 1 K. B. 155: 89 L. J. K.B. 116 also, the word "shall" was used in the statute. By Section I, Marshland Smeeth and Fen District Act, 1796 (36 Geo. III, C. 100), it was provided as follows:

"Be it enacted that the said tracts of common and waste lands called Marshland Smeeth and Marshland Fen, shall be effectually drained and that the same shall be stinted and regulated, get out in closed, divided and allotted, by such Commissioners, in such manner and under such powers and authorities, and subject to such rules, orders and directions, as are hereinafter appointed, mentioned and declared."

One of the owners of land in the district alleged that the Commissioners had failed to drain the district effectually. The Divisional Court issued a writ of mandamus which, after reciting that the Commissioners had neglected to drain the district effectually, commanded them to do so. The Commissioners by their return to the writ alleged that they had carried out the order of the Court to the best of their ability. The plaintiff by his reply to the return joined issue thereon, and claimed damages for injury sustained by his land through the Commissioners' neglect to drain the district. One of the questions raised was whether the Commissioners were entitled to argue that the writ of mandamus should not have been issued by the Divisional Court. Mc Cardie J. held that the Commissioners were so entitled. He then observed as follows :

"Concisely put, the defendants contend that the Acts which govern them are permissive rather than directory, and that the Commissioners have a discretion as to the carrying out of those Acts of Parliament which, if exercised bona fide, cannot be supervised, governed or directed. The validity of this contention must, I think, depend in every case upon the true construction of the enactment in

question. If, for example, a jurisdiction be given to an inferior Court all that that Court can be called upon by the High Court to do, save in special circumstances, is to hear and determine the matters brought before it in a regular and proper manner. Hence, a mandamus is granted, if jurisdiction has been declined by the inferior Court, to hear and determine only. If the inferior Court has a discretion as to the decision it may give, then if that discretion be exercised bona fide and not arbitrarily or illegally and without reference to extraneous considerations the Court will not control the exercise of that discretion. See the cases cited in Short and Mellor on Crown Office Practice, Edn. 2, pp. 200 and 201. But I conceive that Acts of Parliament which confer a judicial discretion upon a subordinate Tribunal are fundamentally different from Acts of Parliament which place duties upon such bodies as canal companies, dock companies, land drainage corporations and the like. The object of the former enactments is to secure a hearing and determination. They could scarcely provide that a decision should be given contrary to the view of the tribunal. But the object of the latter class of enactments is wholly distinct. They aim at securing a benefit to the public or a particular section of the community by creating a body for the performance of certain public works and the discharge of the duties appropriate thereto. But even in the latter class it may be that the Act of Parliament has granted a power rather than imposed a duty, has conferred a discretion rather than an obligation. If a power or discretion only, as distinct from a duty, exists then the prerogative writ of mandamus will not be issued by the Court."

15. Therefore, the test laid down by Mc-Cardie J. is whether the statute has granted a power rather than imposed a duty, has conferred a discretion rather than an obligation. It was pointed out that the use of the word "may" as distinguished from the word "shall" was, in no way, conclusive. It is a mere point for consideration. Taking Sub-section (1) of Section 10, Industrial Disputes Act, 1947, and the proviso thereto, it seems clear to me that what is intended by the statute is to give the appropriate Government a power to refer for settlement or adjudication an industrial dispute in a public utility service, when a strike notice has been given, notwithstanding that any other proceedings under the Act in respect of the dispute may have commenced. It is a power or a discretion which is given rather than a duty or an obligation. The use of such expressions as "unless it considers that the notice has been frivolously or vexatiously given." "Or that it would be inexpedient SO to do" makes it quite clear, in my opinion, that a very wide and unfettered discretion is given to the appropriate Government. If that be the correct construction of the proviso, and I do not think any other construction is possible, then on the very decisions relied on by Mr. Sahay, this Court should not issue any writ or order of the nature wanted by Mr. Sahay against the State Government.