
(2004) 09 AHC CK 0040

In the Allahabad High Court

Case No : C.M.W.P. No's. 39403 of 1999 ; 32788, 44848 and 53016 of 2000;
12468 of 2002

Duncans Industries Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 17-09-2004

Acts Referred:

Constitution of India, 1950 — Article 14
Industrial Disputes (Central) Rules, 1957 — Rule 26
Industrial Disputes Act, 1947 — Section 6, 6(3), 6(4), 6A, 6B

Citation : (2005) 5 AWC 4437

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : J.N. Tiwari and S. Chatterjee, for the Appellant; K.P. Agarwal and Bushra Marium, S.C., for the Respondent

Final Decision : Allowed

Judgement

Sunil Ambwani, J.—Heard Sri J. N. Tiwari, senior advocate assisted by Sri S. Chatterjee for Duncans Industries Limited, the Petitioners ; and Sri K. P. Agarwal, senior advocate assisted by Ms. Bushra Marium for I.E.L. Supervisors Association-Respondents.

2. In the Writ Petition No. 12468 of 2002, the Duncans" Industries Limited have prayed for quashing the award dated 29.4.1999 (published on 7.1.2002, by Industrial Tribunal-III, U.P. Kanpur) in Adjudication Case No. 11 of 1988. By this award, the Tribunal has returned the finding, that the concerned employees are workmen within the meaning of Industrial Disputes Act, 1947 and that the decision of the employers to retire them at the age of 58 years as against the workmen in pursuance of the registered settlement entered into between the employers and the workmen at 60 years, is not legal and proper, and thus the claimants are entitled to retirement at the age of 60 years after January, 1999.

3. From the submissions made by the parties, only two issues arise to be

considered in this writ petition, namely whether the claimants are workmen within the meaning of U.P. Industrial Disputes Act, 1947 and whether they are entitled to the retirement at the age of 60 years in pursuance of the registered settlement with the Union of the workmen, dated 7.2.1978.

4. Before proceeding to decide these questions, the objections with regard to publication of the award require consideration. The industrial dispute, giving rise to these proceedings at the instance of Deputy Superintendents/Supervisors, was referred for adjudication as Adjudication Case No. 11 of 1988. Sri Pushkar Kumar Sharma, Presiding Officer of the Tribunal gave an award and sent the same for publication to the State Government on 30.7.1999, u/s 6 of the U.P. Industrial Disputes Act, 1947. Before its publication, the employers filed an application before the Tribunal with a prayer that the matter be reheard. It is alleged that on this application, the Tribunal called back the award on 30.7.1999 and the parties were noticed for rehearing. The Tribunal heard both the parties and resubmitted the award to the State Government, on 16.6.2000. This award, it is alleged, was not published. It is contended that the adjudication proceedings are treated to be pending till 30 days after publication, when the award becomes effective, and that on submitting the award the Tribunal does not become *functus officio*. It has power to amend, cancel and withdraw the award. Relying upon judgment in *Grindleys Bank Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*, and the Full Bench judgment of this Court in *Badri Prasad v. Hari Prasad*, 1984 (48) FLR 315, it is submitted by Sri J. N. Tiwari that the Tribunal did not become *functus officio* even after submitting the award to the State Government for publication.

5. Shri J. N. Tiwari submits that the award was recalled and was resubmitted on 16.6.2000 and thus the earlier award dated 30.7.1999 did not come into existence. The State Government as such committed gross illegality in publishing the award dated 24.9.1999 on 8.1.2002. It is contended that the award dated 24.9.1999 is non-existing award and that the State Government had no jurisdiction to publish it u/s 6 of the Act.

6. Sri K. P. Agarwal, senior counsel appearing for I.E.L. Supervisors Association submits that once the dispute has been referred to the Labour Court or the industrial Tribunal, the dispute is to be decided expeditiously and as soon as it is practical. On the conclusion, the award is submitted to the State Government. The award is not made in open Court. It is to be published within 30 days from the date of receipt and become enforceable 30 days after the date of its publication u/s 6 of the Act. The award is put on the notice board of the Tribunal and a copy is sent to the contesting parties. In the present case, the award was sent by the Tribunal to the State Government on 30.7.1999. It was not published by the State Government. The Labour Commissioner is the Special Secretary of the State Government and that the submission of the award to the Labour Commissioner is the submission to the State Government. The Writ Petition No. 39403/1999 was filed by the I.E.L. Superintendents Association with a prayer to

direct the Industrial Tribunal-III, U.P. Kanpur to again submit the award which was earlier submitted under despatch No. 314 dated 30.7.1999 and to recall the award in Adjudication Case No. 11/1988 and to publish the same in the manner as provided u/s 6 (3) of the Act. Sri K. P. Agarwal fairly states that this writ petition after publication of the award which is under challenge by the employer has become infructuous.

7. The employees later on came to know that the award was returned back by the Special Secretary. Section 6 (4) of the U.P. Industrial Disputes Act, 1947 permits the State Government to remit the award for reconsideration and to publish it after it has been received back after reconsideration. In the present case, according to Sri K. P. Agarwal, senior counsel, the State Government did not pass any order for remitting the award for reconsideration. Section 6 (6) only permits correction of any clerical and arithmetic error in the award and errors arising from any incidental head and official and whenever any correction is made, a copy of the order is to be sent to the State Government and the provisions of publication are to apply mutatis mutandis. The award becomes enforceable 30 days after its publication. The proviso to Section 6 states that the State Government may, if it is of the opinion, that it is expedient on public grounds affecting National and State economy, or social justice, may not publish the whole or any part of the award, and make a declaration to that effect by the notification in the official Gazette and publish it within 90 days. In this case at no point of time, the State Government was of the opinion that the award should not be published and no such declaration was made in the official Gazette.

8. Sri K. P. Agarwal submits that there is no provision in the Act to recall an award and to rehear the matter, after the employers have come to know that the award is against them. The Tribunal proceeded with the hearing of the case despite the protests made by the I.E.L. Supervisors' Association. The Writ Petition No. 32788 of 2000 was filed for restraining the State Government to publish the fresh award and to quash all consequential proceedings from 29.4.1999 upto 16.6.2000. In this writ petition notices were issued. This writ petition has also become infructuous.

9. The Writ Petition No. 44848 of 2000 is by Duncan Industries Limited with the prayers to quash reference order dated 30.9.2000 of the State Government, and for a writ of mandamus commanding the State Government to publish the award given by Industrial Tribunal-III, U.P., Kanpur, in Adjudication Case No. 11 of 1988, submitted on 20.6.2000 for publication. The Writ Petition No. 53016 of 2000 is by I.E.L. Supervisors' Association with a prayer to Respondent Nos. 1 and 2 to summon the records and to quash the order of reference dated 30.9.2000 and for a further relief to Respondent No. 1 not to proceed with the hearing of the industrial dispute pursuant to the order of reference dated 30.9.2000. These two writ petitions arise out of a reference made by the State Government on 30.9.2000 to the Industrial Tribunal, Lucknow. This reference is almost the same, which was decided by award dated 29.4.1999. The second

reference appears to have been made by the State Government, to expedite the adjudication of the dispute. The proceedings on this second reference dated 30.9.2000 were stayed by this Court by interim order dated 18.10.2000.

10. Sri J. N. Tiwari, the counsel for Duncans" Industries Limited submits that the award dated 27.4.1999 sent by Industrial Tribunal-III, U.P., Kanpur, for publication on 30.7.1999 to the State Government was recalled by the Tribunal for rehearing and that after rehearing of of fresh award was sent for publication on 16.6.2000, which has not been published and instead the award dated 29.4.1999, which is not an award, as it was recalled, and does not bear the signatures of the Presiding Officer has been published. It is stated that the award dated 29.4.1999 is not signed and in fact a photostat copy has been published whereas the award dated 16.6.2000 is duly signed and is in possession of the State Government.

11. The Section 6 (4) of the U.P. Industrial Disputes Act, 1947 (in short the Act) provides that the State Government may before publication of an award of a Labour Court or Tribunal under Sub-section (3) remit the award for reconsideration of the adjudicating authority, and that the award shall, after reconsideration submit its award to the State Government, and the State Government shall publish the award in the manner provided in Sub-section (3). In B.B. Rajwanshi Vs. State of U.P. and Ors, , the Supreme Court declared Sub-section (4) of Section 6 to be violative of Article 14 of the Constitution of India as it conferred uncontrolled and unguided power on the State Government to remit an award of Labour Court or Tribunal for reconsideration, and thereby to cancel or annul the award. Sub-section (4) of Section 6 was consequently amended to cure the defect by which it was declared to be violative of Article 14 of Constitution of India. The amending U.P. Act No. 3 of 1991 came into effect on 13.8.1990. The amended Section 6 of the U.P. Industrial Disputes Act, 1947 is quoted as bellows :

6. Awards and action to be taken thereon.- (2) The award of a Labour Court or Tribunal shall be in writing and shall be signed by its Presiding Officer.

(2A) An award in an industrial dispute relating to the discharge or dismissal of a workman may direct the setting aside of the discharge or dismissal and reinstatement of the workman on such terms and conditions if any, as the authority making the award may think fit, or granting such other relief to the workman, including the substitution of any lesser punishment for discharge or dismissal, as the circumstances of the case may require.

(3) Subject to the provisions of Sub-section (4) every arbitration award and the award of a Labour Court or Tribunal shall, within a period or thirty days from the date of its receipt by the State Government be published in such manner as the State Government thinks fit.

(4) Before publication of an award of a Labour Court or Tribunal under Sub-section (3), if the State Government is of the opinion that (a) the adjudicating

authority has unreasonably refused permission to any party to adduce evidence ; or (b) any party was prevented by any other sufficient cause from adducing evidence ; or (c) new and important material fact or evidence has come to notice, which after the exercise of due diligence, was not within the knowledge of, or could not be produced by, the party at the time when the award was made ; or (d) the award is likely to disturb the industrial peace ; or (e) the award is likely to affect prejudicially the National or State economy ; or (f) the award is likely to interfere with the principles of social justice ; or (g) the award has left undetermined any of the matters referred for adjudication, or where it determines any matter not referred for adjudication and such matter cannot be separated without affecting the determination of the matters referred ; or (h) the award is so indefinite as to be incapable of being enforced ; or (i) illegality of the award is apparent upon the fact of it, it may, after giving the parties reasonable opportunity of being heard, for reasons to be recorded, remit the award for reconsideration of the adjudicating authority, and that authority shall, after reconsideration, submit its award to the State Government, and the State Government shall publish the award in the manner provided in Sub-section (3).

(5) Subject to the provision of Section 6A, an award published under Sub-section (3) shall be final and shall not be called in question in any Court in any manner whatsoever.

(6) A Labour Court, Tribunal or Arbitrator may either of its own motion or on the application of any party to the dispute, correct any clerical or arithmetical mistake in the award, or errors arising therein from any accidental slip or omission ; wherever any correction is made as aforesaid, a copy of the order shall be sent to the State Government and the provision of this Act ; relating to the publication of an award shall mutatis mutandis apply thereto.

12. The scheme of Section 6 of the Act as amended by U.P. Act No. 3 of 1991 provides that the Labour Court, Tribunal or Arbitrator under Sub-section (6) of Section 6, may either of their own motion or on an application of a party correct any clerical and arithmetic mistake in the award or errors arising therein from any accidental slip or omission. The conditions for remitting the award for reconsideration have been set out in the amended Sub-section (4). The power as such, to remit the award, except in cases of ex parte decision or for correction of any clerical or arithmetic mistake, or error, is only with the State Government and this power can be exercised after giving the parties reasonable opportunity of being heard and after recording reasons.

13. In the present case, the Duncans" Industries Limited has neither pleaded nor placed on record any order of the State Government, for remitting the dispute back to the industrial Tribunal after the Tribunal had forwarded its award for publication on 30.7.1999. The employers have not set up any case, that the award was remitted on the grounds set out in Sub-section (4) of Section 6 of the Act. The State Government was not empowered to remit the award for reconsideration before the Industrial Tribunal unless opportunity was given to

both the disputants and reasons were given for such remittance. Hence the proceedings in Adjudication Case No. 11 of 1988 after the alleged reopening of the matter were wholly without jurisdiction and that the fresh award was a nullity. The State Government as such did not commit any illegality, in publishing the award dated 24.4.1999 on 8.1.2002. Further proceedings pursuant to reference dated 30.9.2000 were stayed by this Court in Writ Petition No. 44848 of 2000 filed by Duncans" Industries Limited. It appears that the State Government referred the same dispute to the industrial Tribunal at Lucknow vide reference order dated 30.9.2000 and that at the relevant time the same dispute appears to be pending both before the Industrial Tribunal-III at Kanpur and Industrial Tribunal at Lucknow. In Writ Petition No. 53016 of 2000 filed by I.E.L. Supervisors" Association by an order dated 18.12.2000, the proceedings before the Lucknow Tribunal were stayed. I have already discussed and held that remittance of the matter back to the Industrial Tribunal-III at Kanpur was illegal and violative of the Section 6 (4) of the Act. For the same reasons, I find that the reference dated 30.9.2000 of the same dispute to the Industrial Tribunal at Lucknow also cannot be sustained and thus the Writ Petition No. 53016 of 2000 for closing the reference order dated 30.9.2000 to the Industrial Tribunal at Lucknow is allowed and the second reference dated 30.9.2000, declared to be illegal and is hereby set aside.

14. The Industrial Tribunal allowed both the parties to lead evidence, and recorded finding that these posts were earlier called Technical Supervisors and Office Supervisors. The name of the post in Grade-A was changed as Office Supervisor and the same post was designated as Deputy Superintendent. The service conditions of the workmen were regulated by the Standing Orders and that according to the establishment, the working conditions of Deputy Superintendent were regulated by "Record Note of the Discussions". After considering the nature of duties and responsibility in great detail in the light of oral and documentary evidence, the Tribunal found that the workmen concerned in the department are primarily discharging technical work and are also carrying out the duties involving writing work such as preparation of log book. In filling up the details of the duties of the workmen and production, the Deputy Superintendents/ Superintendents under the directions of the Departmental Manager are not carrying out any managerial, administrative or supervisory duties. Essentially the nature of their duties concern with the process of production. Relying upon various decisions cited before the Tribunal it was held that the disputes in workmen have not been conferred any managerial, administrative or supervisory powers.

15. Sri J. N. Tiwari submits that Deputy Superintendents/ Supervisors are not workmen. He has relied upon the definition of workmen u/s 2 (z) of the U.P. Industrial Disputes Act, 1947, and the exception clause in Sub-section (iv) which states as follows :

"2 (z): (iv) Who being employed in a supervisory capacity draws wages

exceeding Rs. 500 per mensem also exercises, either by the nature of the duties attached to the offices, or by reason of the power vested in him, functions mainly of a managerial nature."

He submits that the principles laid down by the Supreme Court to be followed in deciding whether the person is employed for a supervisory capacity is that if a person is mainly doing supervisory work but incidentally are in for a construction of a time also does same clerical work.

16. He has relied upon, *Anand Bazar Patrika Private Limited v. Workmen*, 1969 (II) LLJ 676 followed in *Burmah Shell Oil Storage and Distribution Company of India Ltd. Vs. The Burma Shell Management Staff Association and Others*, and *Heavy Engineering Corporation Ltd. Vs. Presiding Officer, Labour Court and Others*, and also *S. K. Maini v. Carona Sahu Company Limited*, 1994 (64) FLR 1101. These cases lay down that the nature of work and not the designation is the dominant purpose for which the person is employed and the duty allotted to him and his control over the work of others or the relevant factor. If he can check the work of others and direct the faults to be revoked, grant leave and permit person to leave the work at any time, indent and summon or the material from the stores distribution workmen and assigns duties, he performs supervisory duties.

17. In the present case, the Tribunal has discussed the evidence in great details, which is not necessary to be reiterated, and has held that the disputant workmen were primarily engaged in technical work. The preparation of log book, requisitions from stores, are not carried out by them independently, and they are not authorized to do so without the permission of the Manager. The paper work done by these persons is routine and does not involve any decision making and exercise of independent authority. They are not granting any leave and/or only forwarding the applications. The employers have not been able to demonstrate any illegality, material irregularity, or non-consideration of any evidence in recording these findings. Employers could not place on record any such fact, which may authorize the Petitioner to do managerial and supervisory functions.

18. In *T. P. Srivastava v. National Tobacco Company of India Ltd.* AIR 1991 SC 2294 , the Supreme Court found that salesmen in the company were not workmen as their duties involved suggestions, the wages and means to improve sales study of the type and status of the public to whom the product must reach and to suggest about the publicity the market advertisement, which involved imaginative and creative mind. In *Management of May and Baker (India) Ltd. Vs. Their Workmen*, . It was held as follows :

What was of importance was the nature of his duties. If the nature of the duties is manual or clerical then the person must be held to be a workman. On the other hand if manual or clerical work is only a small part of the duties of the person concerned and incidental to his main work which is not manual or clerical, then such a person would not be a workman. It has, therefore, to be seen in

each case from the nature of the duties whether a person employed is a workman or not, under the definition of that word as it existed before the amendment of 1956.

We find from the nature of the duties assigned to Mukherjee that his main work was that of canvassing and any clerical or manual work that he had to do was incidental to his main work of canvassing and could not take more than a small fraction of the time for which he had to work.

19. The employers in the present case have not established and I do not find any such evidence which was not considered by the Tribunal in arriving at the finding that primarily and substantially the duties of the disputant workmen were not managerial or supervisory in nature.

20. Sri J. N. Tiwari submits that the service conditions of the disputant-workmen were regulated by "Record Note of Discussions" which according to him was an agreement with Deputy Superintendents and Supervisors and thus the agreement with the union of workmen dated 7.2.1978, effective from 1.9.1977, providing that the retirement age for such employees, who are medically and physically fit shall be 60 days, is not applicable to Deputy Superintendent/ Supervisors. The "Record Note of Discussions" is not a settlement entered into between/with the workmen as defined u/s 2 (t) and Section 6B of the Act, read with Rule 26 of the Industrial Disputes Act. The disputants were not excluded from the definition of the workmen as they are neither employed in supervisory capacity nor their duties attached to their office or by reason of the powers vested in them is of managerial nature. Any settlement, as such, which has been arrived in accordance with the procedure set out in Section 6B read with Rule 26 is binding upon of the workmen whether they were parties to such settlement or not. The retirement age of the disputants workmen as such is regulated by the registered agreement dated 7.2.1978. In *Tata Chemicals Ltd. v. Workmen*, it was held by Supreme Court that the settlement arrived at in the course of conciliation proceedings is binding not only on the parties to the industrial dispute but also on other persons, to which the dispute relate.

21. For the reasons given as aforesaid Writ Petition No. 53016 of 2000 is allowed, and the reference dated 30.9.2000 is quashed. All other writ petitions are dismissed. The award dated 29.4.1999 in Adjudication Case No. 11 of 1988 given by Industrial Tribunal-III, U.P., Kanpur and published on 7.1.2002 is upheld.