
(2015) 08 KL CK 0047
In the High Court Of Kerala
Case No : W.A. No. 265 of 2015

Esmario Export Enterprises, Kollam

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 21-08-2015

Acts Referred:

Constitution of India, 1950 — Article 32
Employees State Insurance Act, 1948 — Section 73
Industrial Disputes Act, 1947 — Section 10(1), 10(1)(c), 2(k), 2A, 7

Citation : (2016) 1 ILR (Ker) 578 : (2015) 5 KHC 82 : (2015) 4 LLJ 377

Hon'ble Judges : P.R. Ramachandra Menon and Babu Mathew P. Joseph, JJ.

Bench : Division Bench

Advocate : Bechu Kurian Thomas and Enoch David Simon Joel, Advocates, for the Appellant; Muhammed Shafi Advocate Government Pleader and Subash Chandra Bose, Advocate, for the Respondent

Judgement

P.R. Ramachandra Menon, J.—Interference declined by the learned Single Judge in respect of the challenge raised by the appellant Management against Ext. P5 award passed by the Labour Court, Kollam, holding that transfer of the worker from Kollam to Secunderabad was not justified in the absence of enabling provision as per the conditions of service either by way of appointment order, binding settlement or by way of standing orders and thus directing to reinstate him with backwages from 31/05/1996 is under challenge in this appeal. The worker by name Sadasivan Pillai was admittedly engaged as a driver in the establishment of the appellant Management at Kollam and was continuing in service from 01/03/1990. According to the Management, his service was required to be transferred to their office at Secunderabad in Andhra Pradesh as instructed from the Head Office and accordingly, Ext. W4-Letter No. EEE/QLN/572/96-97 dated 26/04/1996 (in ID No. 92 of 1998 of Labour Court, Kollam) was issued transferring the service of the workman to Secunderabad. It is contended that, on trying to serve the order of transfer in person, it was refused to be accepted and hence it had to be sent by Registered Post on the

next day. According to the worker, the Management was not in good terms with him, for having filed a claim petition which was pending before the Labour Court and he was sought to be ousted from the establishment somehow or other. As a matter of fact, he was physically indisposed and had availed ESI leave as certified by the ESI Doctor, for the period from 30/04/1996 to 30/05/1996. It appeared that the Management doubted genuineness of the leave and it was accordingly, that a pre-dated order of transfer as per memo dated 26/04/1996 was served to the worker, transferring his service from Kollam to Secunderabad.

2. After the leave period, the petitioner reported for duty on 31/05/1996, but he was denied employment in the Unit at Kollam. The second respondent Union, in which the worker was a member, took up the matter by raising an industrial dispute, which after the preliminary steps by way of conciliation, came to be referred to the Labour Court, Kollam, as per Ext. P1 Order of Reference dated 29/09/1998.

3. On obtaining notice from the Labour Court, Kollam, both the sides appeared. The Union filed Ext. P2 claim statement, in response to which Ext. P3 written statement was filed by the appellant/Management. The worker gave evidence as WW 1 and Exts. W1 to W3 were marked. The appellant/Management establishment examined MW 1 and documents on behalf of the Management were marked as Exts. M1 to M5.

4. The issue referred for adjudication as per Ext. P1 was whether the deputation/transfer of Shri R. Sadasivan Pillai, Driver to Secunderabad as per letter dated 26/04/1996 of the Management is justifiable, if not what reliefs, he is entitled to. After evaluating the pleadings and evidence, the Labour Court arrived at a clear finding that the appellant/Management did not have any right to have the worker transferred from Kollam to Secunderabad. No document was ever produced from the part of the Management, either in the form of appointment order, settlement or any standing order enabling the management to have effected the transfer, as part of conditions of service. In the said circumstance, the Labour Court declared that the transfer was bad and beyond the power and competence of the Management and hence ordered reinstatement of the worker with backwages from 31/05/1996.

5. Being aggrieved by the said award, the management approached this Court by way of writ petition No. 28599 of 2005 contending that many vital points raised by the management were not considered by the Labour Court. It was also stated that, on the date fixed for hearing, the lawyer appearing for the Management was suffering from acute Laryngitis and hence adjournment was sought for. Subsequently, a petition was filed with a copy of the medical certificate (copies of which have been produced as Ext. P4 along with the writ petition). The main contention raised in the writ petition was that the dispute involved in the above case was not an industrial dispute but an "individual dispute" and hence it did not come within the purview of Section 10(1)(c) of the ID Act. It was contended that the Reference" itself was bad in law. It was also pointed out that the subject-

matter of dispute did not come within the purview of the "Second Schedule" of the ID Act, but under the Third Schedule. This being the position, it was never for the Labour Court to have had the matter considered, as it came exclusively within the jurisdiction of the Industrial Tribunal, if the dispute was legally valid and raised. The locus standi of the Union was also challenged, stating that it was a Union representing the workers of Motor Transport Undertakings in general, and was thoroughly incompetent to represent any worker of the Management establishment, which was a factory. The Union did not represent substantial number of workers in the establishment and as such, the dispute raised by the Union in respect of the individual grievance of the worker in relation to transfer was never an industrial dispute under Section 2(k) of the ID Act and hence invalid. The matter was finally heard by the learned Single Judge, who declined interference for the reasons stated in the judgment which is now under challenge.

6. Pointing out that the Management did not get an effective opportunity to submit the facts and figures and the position of law before the learned Single Judge, particularly since the lawyer was not feeling well in the morning session and was absent in the afternoon, a Review Petition was filed as RP No. 635 of 2013, seeking the matter to be reconsidered. However, observing that there was no error apparent on the face of the records, the RP also came to be dismissed. It is in the said circumstance, that the above appeal is sought to be pursued.

7. The Registry noted some defects and the proceedings were returned, but the appellant failed to cure the defects on time. They have turned up before this Court, re-presenting the proceedings after curing the defects, with a petition to condone the delay of 435 days. After considering the explanation offered in the affidavit, the delay in representing the proceedings was condoned; more so since the appellant/writ petitioner had a case that no effective opportunity was obtained either before the Labour Court or before the learned Single Judge. It was accordingly, that the matter was heard in detail; both on the question of facts as well as law.

8. Mr. Bechu Kurian Thomas, the learned counsel for the appellant argued the matter in detail, contending that there was every right for the Management to transfer the service of the worker from Kollam to Secunderabad. The finding on fact was sought to be disputed; but no material or document is ever adverted to, in support thereof. The challenge with regard to the legality involved, is particularly as to the nature of the dispute contending that it is only an "Individual Dispute" and not an Industrial Dispute; the locus standi of the Union and such other aspects. Heavy reliance was placed on the decisions rendered by the Apex Court in *Bombay Union of The Bombay Union of Journalists and Others Vs. The "Hindu", Bombay and Another*, . Reliance was also placed on the judgment rendered by a learned Single Judge of this Court as reported in *Mangalam Publications (India) Pvt. Ltd. Vs. Thampy*, , wherein the aforesaid verdict passed by the Apex Court was relied on. Reference was also made to the decision rendered by the Apex Court in *Mahendra L. Jain and Others Vs. Indore*

Development Authority and Others, and in Gouri Shankar Chatterjee and Others Vs. Texmaco Limited and Others, in support of the contention that the terms of reference can't be widened by the Labour Court/Industrial Tribunal.

9. Mr. Subhash Chandra Bose who entered appearance on behalf of the second respondent Union sought to sustain the course and proceedings, pointing out that the idea and understanding of the appellant/Management is thoroughly wrong and misconceived. The adverse consequences resulted and the fact that the worker bid farewell to this world in the year 2011 were also brought to the notice of this Court (which fact is conceded by the Management as well).

10. Heard the learned Government Pleader as well.

11. The first point mooted by the learned counsel for the appellant is that the Labour Court has exceeded its jurisdiction insofar as it has gone beyond the terms of reference. The issue referred for adjudication to the Labour Court as per Ext. P1 is as follows:

"Whether the deputation/transfer of Shri R. Sadasivan Pillai driver to Secunderabad as per letter No. EEE/QLN/5/72/96-97 dated 26/04/1996 of the Management is justifiable? If not what reliefs he is entitled to?"

After considering the pleadings and prayers, the Labour Court held that no material was produced to substantiate the case of the Management that it was entitled to transfer the worker from Kollam to Secunderabad in Andhra Pradesh or elsewhere. No copy of the "Appointment Order" was produced, nor was there any case that the Management was entitled to transfer the employee based on any "Settlement" executed between the Management and the Union. It was also observed by the Labour Court that no provision was pressed into service, if any contained in the Certified Standing Orders to have enabled the Management in this regard and admittedly, no Certified Standing Order was in existence.

12. The contention of the Management was that the Standing Orders Act is not applicable to the establishment as there were only less than 100 employees in the unit at Kollam. During the course of examination of the Manager as MW 1, it was conceded that the Unit had branches in Bangalore and that the Head Office was situated at Secunderabad in Andhra Pradesh. MW 1 himself conceded that there were 85 employees in the Unit at Kollam. By virtue of the powers vested with the State under the Standing Orders Act, the State Government had issued a notification as SRO 49/84 whereby the Standing Orders Act was made applicable to the establishments engaging more than 50 workers and this came into effect from 24/01/1984. This was specifically taken note of by the Labour Court as observed in paragraph 9 of Ext. P5 Award. In any view of the matter, absolutely no piece of paper was produced before the Labour Court to establish the fact that, as per the conditions of service, the appellant/Management was entitled to transfer the service of the worker who was engaged as a Driver in the Unit at Kollam, to the State of Andhra Pradesh. It was accordingly, that a finding was rendered that the transfer was not justified and in the said circumstance, the

consequential relief was moulded to the effect that the worker was liable to be reinstated with backwages from 31/05/1996.

13. While passing the verdict, the Labour Court has observed that the Management had chosen to justify their stand in not engaging the worker by branding the same as abandonment from service. If it was abandonment from service, it clearly amounted to a "misconduct" involving unauthorised absence. Admittedly, no disciplinary action was taken, no charge-sheet was issued, no enquiry was conducted and no order of termination was ever passed. This being the position, the finding and reasoning given by the Labour Court, granting the relief as given herein was well within the four walls of law with reference to the terms of reference. As such, the version of the Management that the Labour Court has exceeded the jurisdiction going beyond the track, is not at all correct or sustainable. For this reason, the reliance sought to be placed on the decisions rendered by the Apex Court in Gouri Shankar Chatterjee and Others Vs. Texmaco Limited and Others, and Mahendra L. Jain and Others Vs. Indore Development Authority and Others, to the effect that the Labour Court/Industrial Tribunal cannot widen the scope of reference by going beyond the issue, is quite out of place and are not at all applicable to the case in hand.

14. The next point highlighted by the learned counsel for the appellant is that the "Labour Court" did not have power, jurisdiction or competence to have dealt with the issue involving transfer". The ground raised is that it is not a subject-matter that comes within the "Second Schedule", but comes only under the "Third Schedule" and hence the matter could have been pursued only before the Industrial Tribunal and not before the Labour Court. This Court finds it difficult to accept the said proposition. There is no dispute with regard to the fact that the Labour Court has jurisdiction only in respect of matters which are covered by the "Second Schedule" or that the matters included in the "Third Schedule" can only be dealt with by the Industrial Tribunal, though the Industrial Tribunal may have power to deal with a matter included under the "Second Schedule" as well.

15. The matters which come within the jurisdiction of the Labour Court (as contained in the Second Schedule with reference to Section 7 of the ID Act) are the following:

"MATTERS WITHIN THE JURISDICTION OF LABOUR COURTS

1. The propriety or legality of an order passed by an employer under the standing orders;
2. The application and interpretation of standing orders;
3. Discharge or dismissal of workmen including reinstatement of, or grant of relief to, workmen wrongfully dismissed;
4. Withdrawal of any customary concession or privilege;
5. Illegality or otherwise of a strike or lockout; and

6. All matters other than those specified in the Third Schedule.

The matters which come within the jurisdiction of the Industrial Tribunal (as given in the "Third Schedule" with reference to Section 7A of the ID Act) are the following:

"MATTERS WITHIN THE JURISDICTION OF INDUSTRIAL TRIBUNALS:

1. Wages, including the period and mode of payment;
2. Compensatory and other allowances;
3. Hours of work and rest intervals;
4. Leave with wages and holidays;
5. Bonus, profit sharing, provident fund and gratuity;
6. Shift working otherwise than in accordance with standing orders;
7. Classification by grades;
8. Rules of discipline;
9. Rationalisation;
10. Retrenchment of workmen and closure of establishment; and
11. Any other matter that may be prescribed."

From the above, it is very much evident that "transfer" is not a subject-matter coming within the purview of the "Third Schedule". Coming to the Second Schedule, it is specifically stipulated under "Sl No. 6" that all matters other than those specified in the third Schedule are within the jurisdiction of the Labour Court. This being the position, "transfer" not being a subject-matter included in the Third Schedule, it is very much a matter which comes within the "Second Schedule" and hence the Labour Court was justified in proceeding with the issue. The point stands answered against the appellant.

16. The next and most crucial point sought to be pressed from the part of the appellant is with regard to the nature of the dispute, contending that it is only an "individual dispute" and not an "industrial dispute" to have invited a reference under Section 10(1)(c). The term "industrial dispute" as defined under Section 2(k) of the Industrial Disputes Act, 1947 is as follows:

"(k) "industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

It is settled law that a dispute will get the colour and characteristic of an "industrial dispute" only when it is taken up by a Union representing the workers in the establishment or it is supported by substantial number of workmen in the

establishment. Earlier, no subject was spared; but later, the Statute was amended whereby Section 2A was incorporated in the ID Act, to the effect that if the subject-matter involves dismissal/removal from service, the dispute can be raised by the individual himself. The appellant heavily relies on the decision rendered by the Apex Court in *The Bombay Union of Journalists and Others Vs. The "Hindu", Bombay and Another*, .

17. In *The Bombay Union of Journalists and Others Vs. The "Hindu", Bombay and Another*, , the dispute dealt with was between the employer and an employee, with regard to denial of employment, which was sought to be raised by the Union in which the employee was having a membership. It is true that the said Union was not a Union exclusively in the respondent's establishment-"The HINDU", Bombay, but was representing the working journalists of Bombay generally. The worker, who was a correspondent, sought for leave for visiting Europe, which was not acceded to by the management, who informed him that even though he was not a full time employee of "The Hindu", he could not be allowed frequent breaks in the performance of duties. Accordingly, he was relieved of duties as correspondent on 01/03/1956. The workman, after returning from Europe, demanded reinstatement which was not acceded to, when the worker filed an application under Section 17 of the Bombay Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955 claiming compensation of Rs. 1,57,172.80 under different heads. The management disputed the status of the worker, disowning him as their employee and submitted that the concerned authority under the Act 45 of 1955 had no jurisdiction to decide the disputed question of facts. The authority repelled the contention of the management with regard to jurisdiction, which was sought to be challenged by approaching the Apex Court under Article 32 of the Constitution of India. The plea of the management was upheld by the Supreme Court; but the petition was dismissed, holding that no fundamental right of The Hindu/Management was infringed by the order passed by the authority. In view of the above observations, no further action was pursued by the authority to proceed with the application.

18. In the above case, the main contention raised by the management was that the Union admittedly was not a Union of employees of "The Hindu", Bombay, but a Union of all who depended upon journalism for their livelihood in Bombay. As per the resolution dated 16/08/1956, it was contended before the Court that the Bombay Union of Journalists supported the claim of the worker in the application filed under Section 17 of the Act 45 of 1955. The Court held that the dispute between "The Hindu", Bombay and the worker, was in respect of the alleged wrongful termination of the employee and it could acquire the characteristic of an industrial dispute, only if it was proved, before it was referred, that the course was supported by a Union of the employees of "The Hindu", Bombay or by an appreciable number of its employees. It was also made clear that, if the dispute at the inception was an "individual dispute" and continued as such till the date of reference by the Government of Bombay, it could not be converted into an

"industrial dispute" by support subsequent to reference. Accordingly, holding that the issue concerned was only an "individual dispute" and not an "industrial dispute", the appeal was dismissed with cost. Reliance is also placed on the decision rendered by a learned Single Judge of this Court in Mangalam Publications (India) Pvt. Ltd. Vs. Thampy, holding a similar view, relying on the verdict passed by the Apex Court in The Bombay Union of Journalists and Others Vs. The "Hindu", Bombay and Another, . By virtue of the declaration of law as above, it is contended by the learned counsel for the appellant that the Labour Court and the learned Single Judge were not at all correct or justified in having extended relief in respect of the worker and hence seeks to set aside Ext. P5 Award and the verdict passed in the writ petition.

19. There is no dispute that power of the Labour Court and Industrial Tribunal to deal with the matter is only subject to the existence of an "industrial dispute" as defined under Section 2(k) and not any individual dispute, unless it is caused to be raised by a union or supported by substantial number of workers. The verdict sought to be relied on from the part of the appellant as reported in The Bombay Union of Journalists and Others Vs. The "Hindu", Bombay and Another, was subsequently considered by a Larger Bench of the Apex Court (consisting of 4 Judges) and stands explained in Workmen of Dharampal Premchand (Saughandhi) Vs. Dharampal Premchand (Saughandhi), . The evolution of law, Scheme of the Statute and the circumstances/requirements to be satisfied to constitute an industrial dispute and the scope of reference were explained in detail in the aforesaid judgment authored by His Lordship Gajendragadkar, J., on behalf of the Bench. One of the learned Judges who rendered the judgment in The Bombay Union of Journalists and Others Vs. The "Hindu", Bombay and Another, was also a member of the Larger Bench. It was also a case where, reliance was placed on the verdict passed by the Apex Court in Bombay Union of Journalists" case. The Larger Bench observed while dealing with the effect of the decision rendered by the Court in Bombay Union of Journalists" case, that, in the Bombay Union of Journalists" case, the appellants strongly relied upon a resolution passed on 17/04/1948, by which it was alleged that the Bombay Union of journalists had taken up the dispute of the worker against "The Hindu" and it was decided to demand relief for the "retrenched journalist". Evidence was also let in, to prove passing of such resolution, but that evidence was discarded both by the Tribunal and also by the Supreme Court. The Bench proceeded further to hold that the disputed observation made by the Apex Court in Bombay Union of Journalists" case was obiter dicta.

20. In support of the view expressed by the Larger Bench, the relevant portion of the decision in Bombay Union of Journalists" case was also extracted in the judgment, in the following terms:

"the evidence tends to establish the plea raised by respondent 1 that the record of the alleged resolution was fabricated with a view to support the case of Salivateeswaran.

In other words, in point of fact, there was no reliable evidence to show that the Bombay Union of Journalists had taken up the case of the retrenched employee Salivateeswaran. In view of this finding, it follows that the observations made by this Court in regard to the requirements of a valid reference under Section 10(1) of the Act are in the nature of obiter observations. It does appear that in dealing with the point of law as to the requirements of a valid reference, this Court observed that

"the dispute, in the present case, being prima facie an individual dispute, in order that it may become an industrial dispute, it had to be established that it had been taken up by the union of employees of the Hindu Bombay, or by an appropriate number of employees of the Hindu, Bombay."

Similarly, it was also observed that the

"principle that the persons who seek to support the cause of a workman must themselves be directly and substantially interested in the dispute, applied to the case before the Court."

and so, one of the tests which this Court applied was whether the persons who supported the cause, were employees of the same employer; if they were not, it was thought that they could not be regarded as interested in the dispute and as such, their support may not convert an individual dispute into an industrial dispute. That is why support lent to the cause of Salivateeswaran by the Bombay Union of Journalists was found to be insufficient to convert the cause into an industrial dispute."

The Bench held that, in industrial adjudication, a pragmatic view has to be taken which may vary from case to case. The observation in this regard is extracted below:

"It is well-known that in dealing with industrial disputes, industrial adjudication is generally reluctant to lay down any hard and fast rule or adopt any test of general or universal application. The approach of industrial adjudication in dealing with industrial dispute has necessarily to be pragmatic, and the tests which it applies and the consideration on which it relies would vary from case to case and would not admit of any rigid or inflexible formula. There is no doubt that the limitations introduced by the decisions of this Court in interpreting the effect of the definition prescribed by Section 2(k) of the Act were based on such pragmatic considerations."

How the issue has to be approached is further explained by the Larger Bench in the penultimate paragraph of the verdict; the relevant portion of which is extracted below:

"In fact, the object of trade union movement is to encourage the formation of larger and bigger unions on healthy and proper trade union lines, and this object would be frustrated if industrial adjudication were to adopt the rigid rule that before any dispute about wrongful dismissal can be validly referred under Section

10(1) of the Act, it should receive the support of the union consisting exclusively of the workmen working in the establishment concerned."

21. From the above, it is very clear that the reliance sought to be placed by the appellant on the decision rendered by the Apex Court in Bombay Union of Journalists" case is quite wrong and misconceived. The said decision was rendered mainly on the basis of the factual position with reference to a resolution stated as taken by the concerned Union, genuineness of which was held against the Union. That apart, one of the two Judges who rendered the decision in Bombay Union of journalists case (His Lordship Justice K.N. Wanchoo) was also a member of the Larger Bench (Four Judges) who explained the scope of the former judgment in the subsequent decision reported in Workmen of Dharampal Premchand (Saughandhi) Vs. Dharampal Premchand (Saughandhi), . In the above circumstances, this Court finds that the challenge raised by the appellant with reference to nature of the dispute, is not liable to be sustained and the same stands repelled.

22. Coming to the merit of the case, it has already been held above by this Court, that the management failed to produce any relevant document to sustain their power to have transferred the worker from the Unit at Kollam, to Secunderabad in Andhra Pradesh. Similarly, the case of the management that it was an instance of voluntary abandonment, is also held as not liable to be sustained, insofar as no disciplinary action was taken against the worker in respect of the alleged misconduct of unauthorised absence and the subsequent events. The Union has a case that the worker had sought for ESI leave from 30/04/1996 to 30/05/1996, which was not granted and that transfer was ordered only under particular circumstances, in administrative exigency. Paragraph 11 of Ext. P5 Award is relevant in this context, which is extracted below:

"11. The timing of transferring the employee was much high lighted on behalf of the workman. The workman had availed ESI leave for the period 30/04/1996 to 30/05/1996 and Ext. W1 is the copy of the certificate of ESI doctor dated 30/04/1996 recommending leave. This was admittedly received by the management and the postal receipt and acknowledgments are produced as W2 and W3. The management issued Ext. W4 order bearing date 26/04/1996. But the worker has produced the cover in which Ext. W4 was sent to him, which shows that it was actually sent only 01/05/1996. The postal seal bears the above date 01/05/1996; and it was confronted to who had to admit the same, though he claimed that there are documents in his officer to show the despatch of letter W4 on 27/04/1996 no such document is produced. According to the worker, this was clandestine attempt on the part of the management to circumvent Section 73 of the ESI Act, and with a malicious intention to see that the worker is somehow thrown off from the establishments. It was further pointed out that the claim petition was pending as CP 30/96 against the management by the worker which motivated them in doing so. Thus the complaint of the worker that the management was motivated in transferring him and it was a clandestine attempt

circumvent the provisions of Section 73 of the ESI Act appears to be justified."

23. The above circumstances persuade this Court to hold that there is absolutely no merit in the contentions taken by the management/appellant and no interference is warranted either with Ext. P5 Award or with the verdict passed by the learned Single Judge declining interference. The fact remains that the employee bid farewell to the world in the year 2011; and the workman was aged about "54 years" at the time of unsustainable transfer. The worker could have continued only up to the age of retirement as applicable in the establishment and as pursued in the case of similar workers who were engaged as drivers. Since the worker is no more, his reinstatement as per Ext. P5 Award passed by the Labour Court is out of question; and also since he would have already crossed the age of superannuation, had he been alive. In the said circumstances, the back wages ordered to be paid because of the wrongful transfer resulting in denial of employment will stand modified and confined to a period from 31/05/1996 to the date of attaining the age of superannuation.