

(1988) 01 OHC CK 0007

In the Orissa High Court

Case No : Original Jurisdiction Case No. 876 of 1987

Executive Engineer Anandapur Barrage Division APPELLANT

Vs

President, Work-charged and N.M.R. Employees Union and RESPONDENT
Another

Date of Decision : 15-01-1988

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(3), 25F

Citation : (1988) 65 CLT 366 : (1990) 2 LLJ 178

Hon'ble Judges : H.L. Agrawal, C.J.; P.C. Misra, J

Bench : Division Bench

Advocate : N.C. Panigrahi, for the Appellant; K.N. Jena, A.K. Mohapatra and B. Misra, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Agrawal, C.J.—In this application by the Executive Engineer, Anandapur Barrage Division in the District of Keonjhar against the award of the Labour Court, Sambalpur, the main questions that arise for our consideration are as follows:

(1) Whether the Barrage Division under the Irrigation Department of the State Government is an "Industry" within the meaning of Section 2(j) of the Industrial Disputes Act?;

(2) If so, whether the members of the union (opp.party No. 1) were entitled to the protection of the provisions of the Industrial Disputes Act? and

(3) Whether the order of reinstatement should be set aside taking into consideration the events taking place after the passing of the order of retrenchment of the employees or after the passing of the impugned award (Annexure-1)?

2. The facts briefly stated are as follows:

A number of employees were engaged in the various sub-divisions of the Anandapur Barrage Division under the Nominal Muster Roll (N.M.R.). These 282 employees were subsequently discharged from service with effect from 1st November 1984 without, however, following the provisions of Section 25F of the Industrial Disputes Act (for short "the Act") giving rise to disputes between the parties which ultimately led to a reference under Sections 10 and 12 of the Act for adjudication of the following question by Labour Court:

"Whether the retrenchment/refusal of employment to 284 number of N.M.R. and Work-charged workmen from 1st November 1984 by the Executive Engineer, Anandapur Barrage Division, is legal and/or justified? If not, to what relief the workmen are entitled?"

3. The case of the petitioner is that this labourers were engaged on daily-wage basis occasionally as the work was generally being executed by the contractors through their own labourers and the action was not "retrenchment" but only their "disengagement". Accordingly, before the Labour Court the main defence of the petitioner was that the provisions of the Act would not apply to the case and therefore the employees were not entitled to any benefit.

4. The Labour Court framed the following issues:

(1) Is the management "industry" within the provision of Section 2(j) of the Industrial Disputes Act;

(2) Whether the retrenchment/refusal of employment of the workmen from 1st November 1984 by the Management is legal and/or justified? and

(3) What relief, if any, the workmen are entitled to?

5. According to the award, no evidence was led by the union with respect to issue No. 1 although the petitioner had examined two witnesses. The evidence of the petitioner was concentrated on the appointment and removal of the workmen. The Labour Court has further stated that no argument was either addressed on this question and therefore it held that the Irrigation Department was an "industry" within the meaning of Section 2(j) of the Act.

6. Long arguments were advanced by Mr. Panigrahi, learned Additional Government Advocate, on the question as to whether the Irrigation Department was an "industry" within the meaning of the Act. As this question needs determination before proceeding to consider the other questions, let me take up it first.

Apart from the fact that the petitioner led no evidence to wriggle out of this situation, he also suffers from the disability of estoppel or acquiescence and is precluded from raising this plea in this Court. Even on merits, the submission does not appear to have any substance. The matter happens to have been considered on earlier occasions by Courts.

7. Let me first refer to some of the decisions of this Court. In the case of Chief.

Engineer, Irrigation, Orissa v. Harihar Patra and Ors. 1977 LIC 1033 the question in issue was whether the Salandi Irrigation Project was an "industry". On the materials on record and applying the tests laid down by an earlier Full Bench decision of this Court in Orissa Pipe and Water Worker's Union v. The Registrar of Trade Union ILR 1975 Cut 1923 it was held that the project was an "industry".

A Full Bench of the Patna High Court was also confronted with a somewhat similar situation in Bijoy Kumar Bharti and Others Vs. State of Bihar and Others, . Termination orders of various temporary employees of the Forest Department, Agriculture Department, Health Department, Irrigation Department etc. were challenged on the ground that the employees were entitled to the protection of Section 25F of the Act. On consideration of a series of decisions on the question as also of the Supreme Court in the leading case of Bangalore Water Supply v. A. Rajappa 1978 ILU 349 it was held that (pp 227-228):

"The Department of Irrigation was an "industry" in as much as the Irrigation Department was involved in a systematic activity with co-operation of its employees to satisfy the needs of the public in general by (i) construction of canals for the irrigation of lands, (ii) construction of barrage for storage of water for the purpose of irrigation, (iii) construction of roads and bridges (iv) construction of dams for supply of water for industrial purposes (v) construction of barrage for control of floods (vi) construction of projects for generation of electricity, and (vii) maintenance of workshops for repair of the equipments engaged in the construction of canals, barrages, embankments and roads. It has also been asserted that the water is supplied to the cultivators for irrigating their lands and others on charges being paid by them".

The conclusion was recorded on the authority of the decision of the Supreme Court in Bangalore Water Supply's case (supra). It was pointed out by Mr. Justice Krishna Iyer in the majority judgment in paragraph 131 that:

"Where (i) systematic activity;

(ii) organised by co-operation between employer and employee; and

(iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes, prima facie there is an "industry" in that enterprise....."

It was further observed:

"Notwithstanding the previous clauses, sovereign functions, strictly understood (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies"

In this very case, the Supreme Court took note of the fact that the activity of some of the undertakings or the Departments is so complex that part of it qualifies for exemption whereas the other calls for inclusion thereof in the definition of "industry". In respect of such undertaking and Department, another

test known as "dominant nature test" was pointed out.

However even in department discharging sovereign functions, there may be a unit severable which can be said to be "industry" within the meaning of the Act. The department of police, discharging sovereign functions may run a gun and ammunition factory. Can that unit be excluded from the definition of industry? Legislative Department may run a Press. That unit has to be included within the ambit of "industry". As such, whenever a question arises as to whether a particular department of Government is an "industry", the functions of the whole department should be examined in the light the guidelines laid down by the Court for answering the question as to whether the whole department or any unit thereof can be held to be an "industry" within the meaning of the Act.

It cannot be disputed that the works undertaken by a Government agency are not confined only to a sovereign function. In this Department (Irrigation), "there is a systematic activity organised by the State Government and its employees for satisfying the need of irrigation, supply of electricity, protection from flood; for supplying most of the aforesaid facilities people have to pay charges. As such, it has to be held that such activities for satisfying human needs are analogous to trade and business.

A similar view was taken by a later decision of our own High Court in the case of *Rabindra Kumar Prusty v. Government of Orissa* and Ors. 1985 LIC 170.

8. Learned counsel for the petitioner, however, referred to an unreported decision of this very Bench in *Executive Engineer v. Regional Provident Fund Commissioner* O.J.C. No. 686/84-Dated 31st August 1987, and the connected cases disposed of on 31st August 1987. This decision has got no relevance to the facts of the present case in as much as there the question was entirely different, namely, as to whether the labourers working under the contractors executing the Government schemes were entitled to contribution from the State Government under the provisions of the Provident Fund Act on the ground that the State Government was the "principal employer"

In that view of the matter, it is not necessary to refer to some other decisions cited on behalf of the petitioner with respect to other Departments, such as National High Way Project or the like.

9. Once the first question is answered, the answer to the second question becomes very easy, namely, that the employees were entitled to the protection of Section 25F of the Act.

10. Undisputedly, no recourse was taken to the procedure indicated in Section 25F, nor any argument advanced before us to show that the employees or any one of them retrenched by the petitioner and ordered to be reinstated was not entitled to the protection of Section 25F."

11. The Labour Court has further held that the order of retrenchment was also bad u/s 25G of the Act as the "first come last go" principle was also not strictly

followed in preparing the list of the N.M.R. employees for their retrenchment in accordance with their seniority. The Labour Court accordingly, while holding that the retrenchment of the workmen was not legal and justified, ordered their reinstatement (except of those who were still continuing in the service) with full back wages.

12. As already said no argument whatsoever has been made independently regarding the application of the provisions of Section 25F or ; 25G of the Act. Therefore, it is not possible to interfere with the award of reinstatement as such. But the learned State Counsel vehemently contended that in view of the misconduct of the workmen, such as their misbehaviour, highhandedness, breach of discipline and criminal activities leading to the institution of criminal cases and in view of the fact that 95 per cent of the work of the Division having been almost completed and there being no possibility of any future work to be undertaken by the Division, it would not be possible to engage the retrenched employees and pay them wages and therefore it would not be proper for this Court to maintain the order of reinstatement. It may be noticed here that no such evidence was brought before the Labour Court, much less any argument was advanced there. Here also, these facts have been alleged only in a petition filed in the stay matter. Learned counsel appearing for opposite party No. 1 therefore strongly repudiated the stand and contended that this Court should not take into consideration these facts.

13. It was submitted on behalf of the petitioner on the basis of the decision in Variety Emporium Vs. V.R.M. Mohd. Ibrahim Naina, the Court should take notice of the subsequent events. The case relied upon by the learned counsel for the petitioner was under the provisions of the Building Control Act seeking eviction of a tenant. Although the proposition that the Court can take notice of subsequent events is well settled, I am afraid, in the nature of the present case, it would not be proper for this Court to do that and examine the correctness of the order of the Labour Court which is based upon the action of the Management with reference to the facts and circumstances prevailing on a particular date, by importing further facts and events which might have taken place later on. In my considered opinion, the order of termination, dismissal or discharge etc. has got to be examined only in the context and with reference to the facts obtaining at the time when any such order is passed. If any farther development takes place, then the employer would be free to pass any fresh order subsequently and those circumstances cannot be pressed into service to support an order which otherwise would be illegal in the absence of the subsequent events or supporting circumstances.

I, therefore, feel no difficulty in holding that the correctness of the directions in the impugned award must be examined only with reference to the facts and circumstances leading to the dispute which was referred to the Labour Court for adjudication and that the petitioner cannot support his action by any fact, material or event coming into existence subsequent thereto.

14. On the above discussion, I come to the irresistible conclusion that the retrenchment of the workmen for the reasons indicated in the award of the Labour Court was invalid and therefore cannot be maintained.

15. The question that now arises for consideration is as to what relief should be given to the 195 workmen who have been held to have been wrongly retrenched.

Two principles have been applied in this case, namely, (1) violation of the provisions of Section 25F and (2), violation of the provisions of Section 25G. The Labour Court has directed reinstatement of the aforesaid workmen with full back wages. Some argument was also made on the question of "full back wages" and I think that it is desirable that this matter is clarified.

According to the petitioner's case, the services of the N.M.R. employees were required by the Barrage Division on daily wages only when there was necessity for additional labourers. In the counter affidavit, this fact is not controverted save and except in paragraph 11 in reply to paragraph 18 of the writ application where it is stated that the N.M.R. employees were in regular employment and that the order of termination was hit by Section 25F. The very fact that the petitioners were N.M.R. employees shows that their employment was casual in nature. In that view of the matter, the direction that there should be payment of "full back wages", in common parlance, would be a misnomer.

The order of termination was passed late in the year 1984. It is claimed that even working as casual employees on daily rate basis, the employees had become entitled to the protection of Section 25F having worked for more than the prescribed number of days. Since the workmen were not working continuously like regular workers, a question arises how their back wages should be computed. In my opinion, on the facts and circumstances of this case, back wages should be calculated on taking the average or ratio, as the case may be, of the wages received by each of the workmen during the immediate preceding two years to the period in question on the workmen further satisfying that in this period they were not "gainfully employed" elsewhere.

16. Mr. Panigrahi had also contended that the conduct of the employees did not justify for payment of the full back wages, particularly when the Court has been appraised on additional affidavit that the schemes have been completed and, therefore, there was now no work for these workmen. In my opinion, these facts and circumstances might justify the employer to have passed subsequent orders of retrenchment or termination on these factors but he could not resist the order of reinstatement. Taking, however, into consideration the entire pros and cons and particularly the large number of workmen and the financial constraints on account of the unprecedented drought under which the State Government is faced, I would direct that only 50 per cent of the amount of back wages as determined and found payable to them would be paid by the petitioner

17. Subject to the above clarifications and directions the writ application must fail and is hereby dismissed, but I relieve the petitioner of the burden of costs.