

(1969) 05 DEL CK 0015

In the Delhi High Court

Case No : Civil Writ Appeal No. 100 of 1969

Fedders Lloyd Corporation Pvt. Ltd.

APPELLANT

Vs

Lt. Governor, Delhi and Others

RESPONDENT

Date of Decision : 28-05-1969

Acts Referred:

Citation : AIR 1970 Delhi 60 : (1970) 20 FLR 343 : (1969) ILR Delhi 632

Hon'ble Judges : V.S. Deshpande, J; I.D. Dua, J

Bench : Division Bench

Advocate : S.N. Bhandari and Y.K. Mathur, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) This writ petition is directed against the order of the Delhi Administration passed on the 28th November, 1968 u/s 10(1)(c) and 12(5) of the Industrial Disputes Act, 1947, (hereinafter called "the Act"), copy of which being annexure "A" to the writ petition, referring to the Labour Court at Delhi, presided over by Shri R. K. Baweja, the following industrial dispute :

Whether the non-employment of Shri Ajab Singh is unjustified and/or illegal and if so, to what relief is he entitled ?"

(2) The undisputed facts leading to the above reference are as follows: Respondent No. 3 Ajab Singh was employed by the petitioner-company as Security Officer from 22-11-1961 till 4-7-1967, when he is said to have expressed his inability to work and resigned. He was, Therefore, relieved of his duties on 4-7- 1967. On 31-8-1967 ex-gratia payment was made to respondent No. 3 on the basis of compensation generally paid to workers who are retrenched from service. Respondent No. 3 accepted the payment and gave receipt in full and final settlement of all his claims. On 18-11-1967, respondent No. 3 requested for a service certificate which was issued by the petitioner-company, a copy being at annexure "C" to the written statement. The petitioner-company has stated therein that respondent No. 3 had resigned from service and he has

endorsed thereon that he received the certificate with thanks. Respondent No. 3 did not thereafter make any demand on the petitioner-company directly. He, however, appears to have written to the Labour Commissioner Delhi a letter, as per annexure "D" to the written-statement, on 10-1-1968 stating that an industrial dispute existed between him and the petitioner-company and it was expedient that the matters specified in the enclosed statement should be referred to industrial adjudication. In the attached statement, it was stated that respondent No. 3's services were terminated by way of retrenchment by the petitioner-company and that the said retrenchment was wrongful and arbitrary. It was prayed that the said retrenchment should be set aside and respondent No. 3 should be reinstated in the service.

(3) The petitioner came to know of the above only when a notice was received by it on 12-1-1968 from the Conciliation Officer, Delhi, calling upon the petitioner company to appear before the Conciliation Officer on 17-1-1968. The petitioner company resisted the claim of respondent No. 3 during the conciliation proceedings on the ground that there was no industrial dispute between the parties which could be referred to industrial adjudication. Nevertheless, the Delhi Administration made order of reference reproduced above. This order of reference was challenged by the petitioner-company on the following grounds :-

(1)The reference to the Labour Court presided over by Shri R. K. Baweja was invalid inasmuch as Shri Baweja was on leave from 26th November, 1968 to the 1st of January, 1969 and during this period Shri Desh Deepak was appointed as the presiding officer of the Labour Court by an order dated 12-12-1968 at annexure "B" to the writ petition;

(2)Respondent No. 3 did not raise any dispute with petitioner-company and hence respondent No. 1 Lt. Governor of Delhi, was not competent to refer the dispute to the Labour Court;

(3)The dispute, if any, between individual workman, like respondent No. 3 and the petitioner-company, is not an industrial dispute and cannot be referred to adjudication. Section 2-A of the Industrial Dispute Act, 1947 authorising such reference is bad and ultra vires : and

(4)The terms of the reference are so vague that no adjudication can take place on the basis of it.

(4) In resisting the writ petition, respondent No. 3 reiterated that he did not resign but was retrenched from service and was paid retrenchment compensation. He also stated that he had requested the petitioner-company several times to reinstate him in service and that it was after the refusal to do so that he approached the Conciliation Officer. He averred that his retrenchment was illegal as Security Officers, who were junior to him were retained in service. He supported the order of reference as being valid.

(5) It is the second contention urged by the petitioner which made this reference

to the Division Bench necessary as certain High Court decisions and a general observation of a learned single Judge of this Court in the Management of M/s. Toshniwal Bros. Pvt. Ltd. v. Lt. Governor, Delhi & others (1) and of the Letters Patent Bench consisting of two of us in Lpa 65 of 1968 decided on 18-3-1969, had to be re-examined in the light of the Sindhu Resettlement Corporation v. Industrial Tribunal Gujarat. We, Therefore, proceed to consider the pros and cons of the above mentioned contention of the petitioner-company below.

(1) Reading the order dated 28-11-1968 with the order dated 12-12-1968, it is clear that the Labour Court is presided over by Shri R. K. Baweja and that he does not cease to be the presiding officer of the Labour Court during the period of his leave. This is why the reference of the dispute has been made to the Labour court presided over by Shri R. K. Baweja on 28-11-1968, though he had proceeded on leave from 26-11-1968 to 1st of January, 1969. Under sub-section (3) of section 20 of the Act, the proceeding before the Labour Court is deemed to have commenced on the date of the reference. This, however, is a commencement in the eye of law only. Physically, the order of reference may not reach the Labour Court on the same day and the parties to the dispute would not be before the Labour Court from the same date. This does not, however, prevent the pendency of the dispute before the Labour Court beginning from the date of the reference. Under Rule IO-B(I) of the Industrial Disputes (Central Rules, 1957 hereinafter called "the Rules"). the workmen have to file with the Labour Court a statement of their demands included in the order of reference within two weeks after receiving the order of reference. Under Rule 10-B (2) the opposite party has to file a reply within the next two weeks. Under Rule 10-B(3) the Labour Court shall ordinary fix the date for the first hearing of the dispute within six weeks of the date on which the dispute was referred to it for adjudication, provided that for reasons to be recorded in writing, it can fix a later date for the first hearing of the dispute. The statements in the present case, could, Therefore, be filed in the Labour Court presided over by Shri R. K. Baweja and he could have fixed the date for hearing of the case on his return from leave in compliance with the above provisions of law. The reference was properly made to him and he was in a position to adjudicate upon the same.

(6) The only disturbing element in the situation is the order dated 12-12-1968 by which Shri Desh Deepak is appointed as the presiding officer of the same Labour Court from 26-11-1968 to 1-1-1969, vice Shri R. K. Baweja on leave. u/s 7(1), the appropriate Government may constitute one or more Labour Courts. The Labour Court presided over by Shri Baweja is one such Labour Court. u/s 7(2) a Labour Court shall consist of one person only to be appointed by the appropriate Government. It is, thus, clear that at one time one Labour Court can be presided over only by one person. Therefore, Shri Baweja and Shri Desh Deepak cannot be said to be simultaneously presiding over this Labour Court between 26-11-1968 and 1-1-1969. The intention of the Government that Shri Baweja continues to preside over this Labour Court during the period of leave is clear from the fact that on 28-11-1968 the Government referred the dispute to the

Labour Court at present presided over by Shri R. K. Baweja. The appointment of Shri Desh Deepak is purported to be made u/s 8 of the Act. Section 8, however, refers to the filling of vacancies, it distinguishes a vacancy from a temporary absence. The absence of Shri Baweja on leave from actually doing the work of a Labour Court must be regarded as a temporary absence, inasmuch as the absence was not only for a short period, but after the leave Shri Baweja was to resume work and during the leave also he was to continue to remain to be the presiding officer of the Labour Court. In *United Commercial Bank v. Their Workmen, Kania C. J.*, speaking for the majority of the Court discussed when a vacancy can be said to arise within the meaning of section 8 and when it does not arise due to a temporary absence of a member of the Tribunal. The absence of Shri Chandrashekar Iyer J. in that case could not be considered to be temporary firstly because he was appointed a whole time member of another Tribunal and secondly, initially it was not known how long he would continue to do the other duty. In *Alok Kumar v. Dr. S. N. Sharma*, the Supreme Court pointed out that a High Court Judge appointed to do another whole time work could not act as a High Court Judge so long as the other work lasted. In the *United Commercial Bank's* case, Therefore, a vacancy within the meaning of section 8 had arisen. In the present case, on the other hand, Shri Baweja was merely on leave and it is well known that a leave is merely a period of rest and recreation, but the office is not demitted during leave. The reason for the insertion of the words "other than a temporary absence" after the word "vacancy" in section 8 by the amending Act 36 of 1956 was to clarify that a vacancy must be a permanent one and is not caused by the temporary absence of the presiding officer. The amendment, thus, seems to have given effect to the view of the Supreme Court expressed in the *United Commercial Bank's* case. For, when a vacancy is filled u/s 8 of the Act, proceeding is continued from the stage at which the vacancy is filled. The intention obviously is to make a permanent arrangement necessitated by the occurrence of a permanent vacancy. It is obvious that there was no "vacancy" within the meaning of section 8 caused by the going on leave of Shri R.K. Baweja for a period of 34 days. The appointment of Shri Deepak as a presiding officer of the same Labour Court for these 34 days could not then be regarded as being made u/s 8 though the Government Notification dated 12-12-1968 purports to do so.

(7) We further consider whether the notification dated 12-12-1968 could be construed to be one u/s 7 assuming that the mention of section 8 therein was wrong. A notification u/s 7 would have to be for the constitution of another Labour Court, inasmuch as the Labour Court presided over by Shri Baweja still continued. The notification dated 12-12-1968 does not constitute a new Labour Court presided over by Shri Desh Deepak and cannot, Therefore, be upheld u/s 7 also.

(8) We appreciate the desire of the Government to make some provision for the performance of the work of the Labour Court during the temporary absence of leave of its presiding officer, but the method adopted by the Government in the

present case to achieve this purpose does not seem to be the right one. It is for the Government to consider if at all the object could have been achieved in some other way such as by the Constitution of a separate Labour Court presided over by Shri Desh Deepak u/s 7 of the Act for the specified period and then by making an order u/s 33-B that the cases before the second Court should after these 34 days be transferred to the court of Shri Baweja.

(9) The notification dated 12-12-1968 being unsupportable either u/s 8 or section 7 of the Act, the appointment of Shri Desh Deepak seems to be invalid. However, from 1-1-1969 Shri Baweja came back from leave and is actually presiding over the Labour Court. This reference which was made to him by name can be adjudicated upon by him. If during his leave any initial handling of this reference, such as issuing of notices to the parties was made by Shri Desh Deepak, it does not affect the jurisdiction of Shri Baweja to adjudicate on this reference. Even if the petitioner-company were to ignore whatever steps were taken by Shri Desh Deepak, all that would happen is that Shri Baweja may have to issue notice again to the petitioner company. Fundamentally, the jurisdiction of Shri Baweja to adjudicate on the reference is not affected by the order of the Government dated 12-12-1968.

(2) u/s 10(1) of the Act, the appropriate Government is empowered to make a reference if it is of the opinion that an industrial dispute either exists or is apprehended. The reference at annexure "A" to the petition is of an existing industrial dispute. We are not, Therefore, concerned in this case with any apprehended dispute. The question is whether an industrial dispute existed before it was referred to the Labour Court. Section 2(k) of the Act defining an "industrial dispute" refers to a dispute or difference. This means that one party asserts something, which is denied by the other or that the demand of one party is refused by the other. Preamble of the Act says that the Act makes provision for the investigation and settlement of Industrial Disputes. Chapter Ii of the Act constitutes certain authorities to compose any material difference of opinion or to settle industrial disputes between the employers and the employees. Such authorities include Conciliation Officers as well as the Labour Courts. In Chapter Iii of the Act, Section 10 deals with the reference of the disputes by the appropriate Government for settlement to the authorities under the Act and section 10-A deals with voluntary reference of the disputes by the parties to arbitration. Chapter Iv has laid down the procedure, powers and duties of the authorities in dealing with industrial disputes. From the scheme of the Act, Therefore it is clear that an industrial dispute must exist or must be apprehended before it can be referred by the appropriate Government u/s 10(1) to the authorities mentioned therein. Section 12 which deals with the duties of the Conciliation Officer pre-supposes that an industrial dispute exists or/is apprehended before the Conciliation Officer can deal with it there-under, it does not contemplate that an Industrial dispute can arise for the first time during the proceedings before the Conciliation Officer. When the parties are unable to settle the dispute between themselves, an application is made under sub-section (2) of

section 10 of the Act for reference of the dispute to an authority under the Act by the appropriate Government. The contents of such an application are to include, according to Rule 3(e) of the Rules, the efforts made by the parties themselves to adjust the dispute. This would also show that a dispute must exist between the parties before an approach is made to the appropriate Government for reference of the dispute to adjudication. The application made by respondent No. 3 in the present case is at annexure "D" of the writ petition. It begins by saying that an industrial dispute exists between the parties. But the particulars of the dispute given in accordance with the requirements of Rule 3 are significantly silent about any demand made by respondent No. 3 against the petitioner-company. It does not say that any effort was made by respondent No. 3 to settle any dispute with the petitioner-company. The inference that arises is that no demand whatever was made by respondent No. 3 on the petitioner-company before he applied u/s 10(2) to the appropriate Government, for such reference of the dispute for adjudication. Respondent No. 3 has not placed any documentary evidence on the record that he made demand on the petitioner-company before making the application u/s 10(2). The referring Judge, Therefore, called for the proceedings before the Conciliation Officer and found that the same application u/s 10(2) was before the Conciliation Officer. The claim of respondent No. 3 was sent by the Conciliation Officer to the management for comments, but no comments were received in writing. The matter was, however, orally discussed and the management conveyed to the Conciliation Officer their defense on merits. As there was no possibility of settlement, the Conciliation proceedings were closed and a report was made by the Conciliation Officer to the Government. u/s 12(5) of the Act on a consideration of this report, the Government was satisfied that there was a case for reference to the Labour Court and accordingly the reference at annexure "A" to the petition was made.

(10) The petitioner-company relies upon the Supreme Court decision in *Sindhy Resettlement Corporation Ltd. v. Industrial Tribunal of Gujarat*, for the proposition that the reference is incompetent as no industrial dispute existed between the parties prior to the reference. In that case the demand on the management related only to retrenchment compensation and not to reinstatement. The Supreme Court, Therefore, observed in paragraph (4) of the judgment as follows :-

Since no such dispute about reinstatement was raised by either of the respondents before the management of the appellant, it is clear that the State Government was not competent to refer a question, "of reinstatement as an industrial dispute for adjudication by the Tribunal." The dispute that the State Government could have referred competently was the dispute relating to payment of retrenchment compensation by the appellant to respondent No. 3 which had been refused. No doubt, the order of the State Government making the reference mention that the Government had considered the report submitted by the Conciliation Officer under sub-section (4) of section 12 of the Industrial Dispute Act, in respect of the dispute between the appellant and workmen

employed under it, over the demand mentioned in the Schedule appended to that order; and, in the Schedule, the Government mentioned that the dispute was that of reinstatement of respondent No. 3 in the service of the appellant and payment of his wages from 21st February, 1958. It was urged by Mr. Gopalkrishana on behalf of the respondents that this Court cannot examine whether the Government, in forming its opinion that an industrial dispute exists, came to its view correctly or incorrectly on the material before it. This proposition, is, "no doubt, correct, but the aspect that is being examined is entirely different. It may be that the Conciliation Officer reported to the Government that an industrial dispute did exist relating to the reinstatement of respondent No. 3 and payment of wages to him from 21st February, 1958, but when the dispute came up for adjudication before the Tribunal the evidence produced clearly showed that no such dispute had ever been raised by either respondent with the management of the appellant. If no dispute at all was raised by the respondents, with the management, any request sent by them to the Government would only be a demand by them and not an industrial dispute between them and their employer. An industrial dispute, as defined, must be a dispute between employers and employees, employers and workmen, and workmen and workmen. A mere demand to a Government, without a dispute being raised by the workmen with their employer, cannot become an industrial dispute. Consequently, the material before the Tribunal clearly showed that no such industrial dispute, as was purported to be referred by the State Government to the tribunal, had ever existed between the appellant Corporation and the reference, obviously committed an error in basing its opinion on material which was not relevant to the formation of opinion. The Government had to come to an opinion that an industrial dispute did exist and that opinion could only be formed on the basis that there was a dispute between the appellant and the respondent relating to reinstatement. Such material could not possibly exist when as early as March and July, 1958, respondent No. 3 and respondent No. 2 respectively had confined their demands to the management to retrenchment compensation only and did not make any demand for reinstatement. On these facts, it is clear that the reference made by the Government was not competent. The only reference that the Government could have made had to be related to payment of retrenchment compensation which was the only subject-matter of dispute between the appellant and the respondents."

(11) In our anxiety to understand precisely what the Supreme Court meant I studied the whole of their decision and also the Gujarat High Court decision reported in (1965) 2 LlJ 268, which was reversed by the Supreme Court. At page 271 of the report of the Gujarat High Court judgment it is stated that respondent No. 3 had made a complaint to his Union, respondent No. 2, who thereupon presented the demand to the Corporation for the reinstatement of respondent No. 3. But the Supreme Court has held that the evidence before the Tribunal clearly showed that no such demand was made by the workmen concerned or by the Union on the Management of the Sindhu Resettlement Corporation and I feel

bound to accept this latter position. The Supreme Court has also clarified that even if the Conciliation Officer found that an industrial dispute existed and so reported to the Government, this could not be regarded as the existence of the industrial dispute which has to be founded upon a demand by the workmen on the employers. If this is the ratio of the Supreme Court decision, it cannot be said that an industrial dispute existed in the present case as no demand was made by respondent No. 3 on the petitioner-company before he made an application u/s 10(2) for reference. In that event the fact that the demand of respondent No. 3 was forwarded by the Conciliation Officer to the petitioner-company and was not accepted by the latter would not constitute an industrial dispute. The observation in *Standard Coal Company v. S.P. Verma* in paragraph (15), that "where workers may consider it wholly useless to make a demand on the management and prefer to move the appropriate machinery set up by the Government for the redress of their grievances,it will be an industrial dispute" may not be correct if it is opposed to the above Supreme Court decision. In *Goodyear (India) Limited v. Industrial Tribunal Rajasthan, Jaipur* Mehta J., purported to distinguish the decision of the Supreme Court in *S.R. Corporation v. Industrial Tribunal*, referred to above, on the ground that in the case before him the employee had made an application to the Conciliation Officer challenging the termination of his services and requesting for reinstatement and the employer opposed the reinstatement. The learned Judge did not consider that in the Supreme Court case also the application to the conciliation Officer had been made. In accordance with the usual procedure the comments of the employer on the said application might have been called for by the Conciliation Officer and at this stage the employer may have opposed the demand for reinstatement. Nevertheless, the Supreme Court held that no industrial dispute regarding reinstatement existed. We have re-examined our decision in the *Management of M/s. Toshimwal Bros. Pvt. Ltd. v. Lt. Governor, Delhi*, referred to above, dismissing the appeal against the decision of Kapur J. in that case(I). We find that in that case a demand by some workmen including all the workmen of the subordinate staff had at first been made on the Management and was refused by the Management. That dispute was not referred to industrial adjudication. Inasmuch as it had not been supported by a substantial number of workmen, but later the same industrial dispute in respect of the subordinate staff" only was referred to industrial adjudication as between the management and the subordinate staff only. The subordinate staff did not repeat their demands to the management again before the reference was made. But the demand of the subordinate staff was included in the first demand made by them and some others on the Management. In that case, Therefore, an industrial dispute between the subordinate staff and the management had come into existence before the said industrial dispute was referred to adjudication by the management. It is not quite clear if the following observation of Mack, J. in *Kandan Textile Limited v. Industrial Tribunal Madras*, takes the view that a demand not directly made on the Management could be made on the Labour Commissioner and would still constitute an industrial dispute. The observation is

as follows :-

This may have been in law an industrial dispute brought as it was to the notice of the Government by one of its responsible officers, which would have justified a reference to a Tribunal of a dispute of very limited scope."

(12) We are of the view that the decision of the Supreme Court in *S.R. Corporation v. Industrial Tribunal, Gujarat*, referred to above, has finally established the proposition that a demand by the workmen must be raised first on the Management and rejected by them before an industrial dispute can be said to arise and exist and that the making of such a demand to the Conciliation Officer and its communication by him to the Management, who reject the same is not sufficient to constitute an industrial dispute. The decision and dicta of some of the High Court to the contrary can no longer be considered good law.

(3) It is clear that section 2-A enables the Government to refer to adjudication an industrial dispute between an individual workman and his employer. The previous view that an industrial dispute must be between the employer on the one side and the workmen collectively on the other side or at any rate the dispute of an individual workman must be sponsored collectively by the other workmen to constitute an industrial dispute is to that extent superseded by legislation. It is true that the insertion of section 2-A in the Act was not accompanied by consequential changes in the Act to make it clear that even a dispute between a single workman and the employer can constitute an industrial dispute. But the relevant provision in the Act referring to "workmen" would henceforth have to be construed as including "workman", so that section 2-A is harmonised with the rest of the provision of the Act. At any rate section 2-A being a later provision is in no danger of being impliedly repealed by the older provisions. The implied repeal can only be of an older provision by a later provision. Further, the expression "industrial dispute" as used in entry 29 of the Concurrent Legislative List in the Government of India Act, 1935 was not based on any judicial decisions construing the said expression as relating only to a dispute between the workmen collectively and their employer. It cannot be said, Therefore, that the use of the said expression in the Act necessarily meant a dispute between the employer and the workmen collectively. Entry 22 of the Concurrent List of the Constitution, Therefore, did not use the said expression as being restricted to disputes of workmen collectively. Parliament was, Therefore, competent to enact Section 2-A under entry 22 of the Concurrent List of the Constitution. Even if it is assumed for the sake of argument that entry 22 of the Concurrent List was not wide enough to include the dispute of an individual workman with his employer, Parliament could legislate about such an individual dispute under the residuary entry 97 of the Union List read with Article 248 of the Constitution, on the ground that the subject fell outside the Concurrent List and the State List of the Constitution and the Parliament had, Therefore, unrestricted power to legislate upon it. This contention has Therefore, no substance.

(4) The claim of respondent No. 3 in annexure "D" is for the setting aside of the

retrenchment and for the reinstatement. According to his learned counsel it is covered by items 3 and 6 of the Second Schedule and item 10 of the Third Schedule of the Act. The learned counsel for the petitioner, however, contends that the word "non-employment" used in the reference is vague. This argument overlooks the fact that the very definition of "industrial dispute" in section 2(k) of the Act says that the dispute or difference which is connected with "the employment or non-employment" is an industrial dispute. The word "nonemployment" would, Therefore, include retrenchment as well as refusal to reinstate, which is the grievance of respondent No. 3. We are fortified in this view by the decision of the Federal Court in *Western India Automobile Association v. Industrial Tribunal, Bombay*, and the Gujarat High Court decision in *Sindhu Resettlement Corporation v. Industrial Tribunal*, which was not reversed by the Supreme Court on this point.

(13) For the above reasons, we quash and set aside the order of reference dated 28-11-1968, copy for which is at annexure "A" to the writ petition, and direct the Labour Court, Delhi, presided over by Shri R. K.. Baweja not to entertain the same. We make no order as to costs.