

(1991) 05 MP CK 0005

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 2603 of 1990

Fertilizer Corporation of India, Eastern Marketing Zone
Employees Association

APPELLANT

Vs

Hindustan Fertilizers Corporation Ltd. and Another

RESPONDENT

Date of Decision : 08-05-1991

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2, 250

Citation : (1991) 2 MPJR 256 : (1993) 38 MPLJ 244 : (1993) MPLJ 244

Hon'ble Judges : P.N.S. Chouhan, J;D.M. Dharmadhikari, J

Bench : Division Bench

Advocate : R.K. Gupta, for the Appellant; P.P. Naolekar, for the Respondent

Final Decision : Dismissed

Judgement

P.N.S. Chouhan, J.

Respondent No. 1 Hindustan Fertilizer Corporation Ltd., a Government of India undertaking (hereinafter referred to as the Corporation) had 48 member work force, 7 officers and 41 workmen in its marketing division in Madhya Pradesh to market the produce of its fertilizer factories at Baroni, Durgapur and Namroop in Assam and West Bengal. The petitioner is a registered trade union representing the workmen of the said marketing division. Fertilizer is an essential commodity under the Essential Commodities Act requiring allocation order known as E.C.A. allocation issued by the Government for its movement. Probably because of considerations of economy in logistics, the Government of India has stopped such E.C.A. allocation to the Corporation in Madhya Pradesh since last 3 years. This necessitated the winding up of the marketing division in Madhya Pradesh and shifting of its staff to establishments of the Corporation out of M. P. On 7-6-1990 this decision was conveyed to the union representatives in a meeting held at Calcutta and reiterated in next meeting at Delhi. The minutes of the meetings are Annexures A, B and C. Representatives of the petitioner union

informed the management in the Calcutta meeting that they will have no objection on their adjustments in other areas but impressed upon the need to explore alternatives to avert a closure which was bound to result in immense difficulties to the workmen who were mostly of Class III and IV in case of their transfer to far flung areas of the country. Petitioner's attempts at the political level to persuade Government of India to release E.C.A. allocation to the Corporation in M. P. to keep its marketing unit going did not yield any result. Ultimately the M. P. unit was closed down from 14-9-1990 and its 35 employees have been transferred to places out of M. P. vide Annexure-K which is sought to be quashed under Articles 226 and 227 of the Constitution of India.

Petitioner's contention is that winding up of marketing unit in M. P. amounts to closure as defined in Section 2(cc) of the Industrial Disputes Act (hereinafter called the Act). Therefore, the Corporation was required to seek permission from the appropriate Government u/s 25O of the Act before the closure. Since no such permission was obtained and the procedure prescribed u/s 25O was not followed, the closure is illegal and impugned order of transfer of its personnel is liable to be quashed.

The closure has also been assailed on the ground of mala fides with a view to victimize the poor employees. It has been stressed that the affected employees are low-paid belonging to class 3 and 4, whose transfers in mid-session to places like Delhi, Patna, Lucknow etc. are bound to cause immense difficulties. Although in the transfer orders it is stated that the marketing unit in M. P. is being closed down still some of the employees are transferred to Durg and Bhopal which shows mala fide intention on the part of the Corporation. Doubts have been expressed on the question of protection of seniority in the new set-up where they are transferred. In case they are given bottom seniority at the new place the same is bound to adversely affect prospects of their future promotion. Thus, the impugned transfer order is liable to be quashed being arbitrary and violative of Articles 14 and 16 of the Constitution of India. The petitioner has prayed besides quashing of the mass transfer order, Annexure-K, issuance of a writ in the nature of certiorari/mandamus directing the respondents not to close down its marketing unit in M. P. unless permission is obtained u/s 25O of the Act, and a direction to the Corporation to prepare a policy in respect of seniority and promotion of the affected employees in consultation with the petitioner before taking any action in this behalf.

The Corporation has raised the plea of alternative remedy. As per the Corporation the petitioners remedy lies in raising an industrial dispute under the Act. In fact at petitioners' instance conciliation proceeding has been initiated and is pending before the Asstt. Labour Commissioner, Raipur (Annexure R-2). The impugned order of transfer of employees having been passed under express condition of service that they may be transferred anywhere in India (sample service contract Annex. R-1) is not liable to be challenged in a writ petition. It has been denied that the mass transfer order is arbitrary. The petitioner is a public sector

undertaking having its officers in districts and States throughout India. Due to non-grant of E.C.A. allocation by Government of India for nearly 3 years, there was no work for its marketing unit in M. P. Therefore, the Board of Directors took a decision to shift the marketing division office of M. P. The employees were given the option to go out of M. P. or to opt for voluntary retirement with retirement benefits. Though the Corporation had absolute right to transfer these employees for gainful utilization of their services to any part of India according to their service condition, yet with a view to maintain goodwill the union representatives and the workmen were told individually to accept a place where they desired to be posted. All this was done to obviate the necessity of retrenchment of workmen. In June 1990, 2 workmen have opted for voluntary retirement and they have left services after taking retirement benefits. Two widows and one driver were accommodated at Bhopal and Durg on grounds of hardship. 7 have accepted posting in union territory of Delhi and only 22 are left out to be accommodated. In fact the work men have been relieved by order dated 14-9-1990 as per relieving order Annexure R-4. The Corporation went to Supreme Court to challenge the ad interim writ and the Supreme Court was pleased to dispose of SLP on 24-1-1991 with a direction to this court to dispose of the matter by the end of April, 1991 (Annexure R-5). Shri Sorabji learned counsel for the Corporation before the Supreme Court had indicated that the remaining 22 workmen may disclose their preference for place of transfer and the Corporation will consider the same. In terms of this undertaking the Corporation offered to accommodate the remaining 22 workmen in the adjoining State of UP. However, this offer has been turned down by the petitioner. The Corporation contends that Section 25O of the Act is not applicable to the present case because the services of the employees are not being terminated and therefore it is not a case of closure. Shifting of business from one place to another as is being done in this case does not amount to closure. The Corporation has no option but to shift its marketing unit of M. P. elsewhere because there was no work for the employees on account of non-grant of E.C.A. allocation. It has been contended that provisions of Section 25O of the Act will not be attracted because the number of workmen serving in M. P. unit is less than 100. Section 25O read with Section 25L and 25-K falls under Chapter VII-B of the Act. Provisions whereof are not applicable to an industrial establishment employing less than 100 workmen on an average per working day for the preceding 12 months. The Corporation in para 4 of its additional return has stated that seniority of workmen being transferred will be fully protected.

S.G. Chemicals and Dyes Trading Employees" Union Vs. S.G. Chemicals and Dyes Trading Limited and Another, wherein the Supreme Court has laid down tests for determining as to whether the unit closed down is an undertaking of an industrial establishment, the learned counsel for the Corporation argued that this will require ascertainment of facts which cannot be done in a writ petition but only in an industrial dispute before the labour Court. Therefore the petition is liable to be rejected on the ground of availability of efficacious alternative remedy to the

petitioner. Reliance was then placed on *Basant Kumar Sarkar and Others Vs. Eagle Rolling Mills Ltd. and Others*, which lays down that notwithstanding the fact that reference of an industrial dispute is dependent on the discretion of the appropriate Government in some measure it will still be an alternative remedy excluding the writ jurisdiction of High Court. This proposition has been reiterated in *R. G. V. S. v. State of M. P.* 1991 MPLJ 225. In reply the learned counsel for the petitioner cited *John Fernandes v. Executive Engineer, P.H. Dvn.* 1979 LAB. I.C. 255, and *Asstt. Personnel Officer, S. Rly. v. K. T. Anthony*, 1978 LIC 394, wherein it has been held :

"Reference of industrial disputes to the Tribunal can only be at the instance of the appropriate Government on certain conditions mentioned in Section 10 of the I. D. Act. Hence it cannot be regarded as an alternative remedy to the respondent for the purpose of holding that petition under Article 226 is not maintainable."

Then in *Indian Hume Pipe Co Ltd. v. Their Workmen*, 1969 LLJ 242, it has been held :

" It is not for industrial tribunals to inquire into the motive for closure to find out whether the closure is justified or not. Once the tribunal finds that an employer has closed its factory as a matter of fact it is not concerned to go into the question as to the motive which guided him and to come to a conclusion that because of the previous history of the dispute between the employer and the employees the closure was not justified. Such a closure cannot give rise to an industrial dispute."

Shri Gupta further stressed that Section 250 of the said Act contains a complete procedure for closure and therefore it should be construed to have excluded the alternative remedy to raise an industrial dispute in such cases by implication. Lastly, Shri Gupta relied on *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, to contend that after hearing the parties on merits case cannot be thrown out on the ground of alternative remedy. Elaborating his arguments he submitted that since the basic facts relating to closure are admitted and on the record it will not be just and proper to leave the issue undecided on the ground of alternative remedy to the petitioners.

On hearing parties on merits we find petitioner's contention that that issues involved are capable of being decided on the basis of material available on the record acceptable. In fact the conciliation proceedings before the Asstt. Labour Commissioner, Raipur (Annex. R-2), were rendered infructuous by the Corporation by its non-compliance of the direction issued by the A.L.C. to stay the transfer of affected employees pending final outcome of the conciliation proceedings. The present writ was filed only after these developments and therefore the Corporation cannot be heard saying that the petition is liable to be dismissed as the petitioners failed to take recourse to the procedure for raising an industrial dispute before the appropriate Government and seeking its

reference to the labour Court. We therefore hold that this Misc. Petition is not liable to be thrown overboard on the plea of availability of alternative remedy to the petitioners.

Definition of closure u/s 2(cc) of the Act is given below:

"2(cc) "closure" means the permanent closing down of a place of employment or part thereof."

Relying on this wide definition the learned counsel for the petitioner argued that the closing down of marketing activities in M. P. by the Corporation amounts to closure u/s 2(cc) of the Act for which the Corporation was required to apply for permission to the appropriate Government u/s 250 of the Act. Since, admittedly, no such permission was obtained and the procedure prescribed u/s 250 above was not followed, the closure is illegal which renders the consequential impugned transfers of these employees void. In reply the learned counsel for the Corporation stressed that form Order under Rule 76-B of the Rules framed under the Act requires information of the number of workmen whose services will be terminated on account of the closure of the undertaking along with the details of their categories, addresses and wages drawn by them, to be furnished to the Government while seeking permission for closure. From this it is evident that closure essentially entails termination of the services of concerned employees. The Corporation in the best interest of its employees decided not to terminate their services. Instead they have been accommodated in the other units of the Corporation under the express service condition applicable to them. As such the mass transfer of employees is not the result of closure as defined u/s 2(cc) of the Act but merely shifting of the marketing activity to other units of the Corporation. In order to judge which of the two rival contentions closure versus shifting is correct, we have to turn to the allegations of mala fide. If no mala fide is proved, Corporation's case of bona fide transfers as a result of shifting of the unit has to be accepted.

The Corporation has filed documents (E.C.A. allocation papers 1987 to 1989) which clearly show; and this fact has not been denied; that E.C.A. allocation was stopped by the Government of India to the Corporation in M. P. since about 3 years. We see no reason to doubt the submission made on behalf of the Corporation that such stoppage of E.C.A. allocation was the result of a policy decision by the Government of India to issue allocations for areas closure to the factories to avoid longer lead. Since the Corporation does not have any of its factories either in M.P. or any State adjoining to it there was no hope for its getting E.C.A. allocations in M.P. That is why the efforts made by the petitioner at the political level to impress upon the Government of India to review its policy in this behalf and permit E.C.A. allocation to the Corporation to ensure continuance of its marketing unit in M.P. proved abortive. In this background Corporation's decision to wind up its marketing unit in M.P. for want of E.C.A. allocations cannot be faulted as unreasonable much less mala fide. The bona fides of the Corporation are also evident from the fact that it took the petitioner into

confidence in its Calcutta and Delhi meetings to appraise the union of its decision in this behalf at the earliest. As is clear from Annexure-B filed by the petitioner the compulsions which forced the Corporation to wind up its marketing activity in the State of M. P. were clearly stated to the representatives of the union. In fact the representatives of the union instead of questioning the bona fides of the decision of resisting it, consented to its implementation as is clear from the following excerpt of Annexure-B.

" The representatives of the Union informed that they will R.F.32 certainly not have any objection of their adjustment in other areas since they are part of HFC but they will like that the Management should still explore the possibility of availability of some materials so that closure of M.P. region be avoided. However, GM (M) and IRM made it clear that since all efforts have already been made and there is no such chance and in case we get Haldia products for M.P., this would take another 2 years from now onwards, the staff can be posted to strategic areas of requirement Therefore, M.P. staff should either opt for V. R. or they can be posted to any other regions."

The decision was reiterated by the management in its next meeting with petitioner's representatives at Delhi held on 28-7-1990 (Annexure-C). The minutes of both these meetings leave no doubt that the Corporation did not hide any fact from the petitioner and was successful in eliciting their cooperation in this behalf. In this background the commitments by the Corporation in para 4 of its additional return to the effect that the seniority of the transferred workmen will be fully protected exposes the apprehension expressed by the petitioner as groundless. The case of 3 workmen transferred within the State of M.P. cited as example to show mala fides has been explained by the Corporation to be on valid humanitarian grounds since it involved 2 widows and a very hard case of a driver. Thus, the heavy burden on the petitioner to show mala fides in passing of the impugned order (Annexure-K) remained wholly undischarged. We therefore, hold that the Corporation was not actuated by malice or any extraneous considerations other than the best interest of Corporation and its employees in issuing the impugned order (Annexure-K) and the controversy is relateable to petitioner's unreasonable obstinacy.

Simply because the word closure has been used in Annexures A and B, it cannot be assumed that Corporation's action in this behalf, amounted to closure as defined u/s 2(cc) of the said Act It has been argued on behalf of the Corporation that closure as held in General Labour Union (Red Flag) Bombay Vs. B.V. Chavan and Others, implies closing of industrial activity as a consequence of which workmen are: rendered jobless. Shri Naolekar drew our attention to the form in which the employer is required u/s 25O of the said Act to apply for permission to the appropriate Government, which requires information of the number of employees being thrown out of job to be included in the pro forma. On this basis he argued that since the Corporation had decided to accommodate the employees of its marketing unit in M.P. in its offices outside M.P. and such a

course was open to the Corporation in view of the clear condition in their appointment orders, their transfer is the result of shifting of the M.P. unit to other places to avoid the harsh consequences of retrenchment and does not amount to closure u/s 2(cc) of the said Act. The bona fides of the Corporation are made further clear from the fact that it offered to accommodate the remaining 22 employees in the adjoining State of UP. Unfortunately this offer was not accepted by the petitioner. We are therefore, satisfied that in the facts and circumstances of the case the mass transfer of its employees vide Annexure-K is not the result of the closure of M.P. unit and therefore the Corporation was under no obligation to have followed the procedure prescribed u/s 250 of the said Act before issuing the impugned order.

In view of the above finding it is not necessary to go into the question as to whether the marketing unit in M.P. is or is not an undertaking of an industrial establishment so as to attract the provisions of Section 250 of the Act.

In result, the petition fails and is hereby dismissed with costs. Corporation's costs be borne by the petitioner. Counsel fee Rs. 500/-.