

(1997) 03 KL CK 0036
In the High Court Of Kerala
Case No : O.P. No. 13150 of 1991

Indian Express Employees Union

APPELLANT

Vs

Indian Express (Madurai) Ltd. and Another

RESPONDENT

Date of Decision : 11-03-1997

Acts Referred:

Industrial Employment (Standing Orders) Act, 1946 — Section 10(2)

Citation : (1999) 1 LLJ 490

Hon'ble Judges : K.A. Abdul Gafoor, J

Bench : Single Bench

Advocate : K.S. Madhusoodanan, for the Appellant; V.K. Ramakrishnan and T.P. Sajan, Govt. Pleader, for the Respondent

Final Decision : Partly Allowed

Judgement

K.A. Abdul Gafoor, J.—The petitioner, a registered union of the workmen under the first respondent company has approached this Court challenging Ext. P-5 and seeking a declaration that the Standing Order No. 16 of the 1st respondent, certified on June 23, 1978, concerning transfer is null and void. The certified Standing Orders contained a condition of service on transfer when it was certified on June 23, 1978. The petitioner submitted Ext. P-1 application for modification of that Standing Order deleting clause No. 16 which provides that "A workman is liable to be transferred inter-departmentally or to any of the offices or branches or subsidiary concerns managed by the company". After considering Ext. P-2 objections and Ext. P-3 amendment to the Industrial Employment (Standing Orders) Central Rule s, by Ext. P-5 the second respondent declined modification. The second respondent declined to modify it on the grounds that the certified Standing Orders had been followed since 1978 without any complaint, that the appointment orders contained transfer as a condition of service, that Govt. of India had issued Ext. P-3 amendment to the Rules which is applicable to "whole of India", that Ext. P-1 application was filed for deletion of certified Standing Order No. 16 and not for modification and that the authority had no jurisdiction u/

s 10(2) of the Industrial Employment (Standing Orders) Act, 1946 to delete any Standing Order certified by the authority.

2. The petitioner submits that inclusion of transfer as a condition of service in the Standing Order is against the provision of the said Act and the Rules framed thereunder. The appropriate Government in this case is Government of Kerala and therefore the Kerala Industrial Employment (Standing Orders) Rule s, 1958 alone shall apply to the issue and not the Central Rule s. The appropriate authority in terms of Section 2(b) or the Act is the State Government and not the Central Government. The Kerala Rules do not contain any clause regarding transfer. Therefore, Government of Kerala has not prescribed transfer as a condition of service to be included in the Standing Orders. Standing Orders to be certified shall be relating to the matters set out in the Schedule to the Act. But Section 15 empowers the appropriate Government to prescribe additional matters to be included in the Schedule and the State Government has not made any Rule to include the transfer as a condition of service to the model Standing Orders scheduled to the Kerala Rule s. So the transfer could not have been an item to be included in 1978 when the workers were not unionised and were not conscious of their statutory rights. Relying on the transfer clause contained in the Standing Orders indiscriminate transfers were being effected and it was in the above circumstances Ext. P-2 application was submitted for modification of the Standing Orders u/s 10(2) of the Act. The authority has therefore perfect jurisdiction to allow the modification. It is further contended that there is no time limit for seeking modification and modification can be applied for, at any time, when the conditions contained in the Standing Orders become inconvenient or against the interest of any of the parties.

3. It is contended by the first respondent that the petitioner trade union is not a recognised one, does not have the representative character as it represented only a very thin minority of workmen, that the Certified Standing Orders had been followed since 1978 and majority of the workmen had not raised any complaint over that, that a transfer is a condition of service included in the appointment order, therefore it can be included in the Standing Order as a condition of service and that item No. 11 in the schedule to the Act enumerating matters to be provided in the Standing Orders included "any other matter which may be prescribed" and on its basis transfer can be included as a condition of service in the Standing Orders. It is further submitted that once a Standing Order is certified in terms of the provisions of the said Act, deletion of any of the clauses is not permissible. Only a modification is possible. Notification means only a minor change.

4. u/s 10(2), an employer or workmen or trade union or other representative body of the workmen can apply for modification of the Standing Orders. This shows that applicant need not be a trade union. It can either be workmen. That workmen need not be the sizeable number of workmen. Trade Union can also be an applicant. It need only be a trade union registered under the Trade Unions

Act. Act does not say that it shall have recognition or a representative character with substantial majority. It is obviously so because notice on such application for modification shall, necessarily, be given, after applied for by the workmen or any one of the trade unions, to other trade unions or such other representatives of the workmen in terms of Section 5(2) read with Sub-section (3) of Section 10. If the applicant is not the sizeable majority and majority of the workmen represented by other trade unions or other body can object to it, necessarily the certifying officer can ascertain the will of the workers. So as Section 10(2) enables even a workman to make an application for modification of an existing Standing Order, the contention of the first respondent that the application by the petitioner could not have been entertained as it does not have representative character does not merit consideration. Consequently there is no merit in the contention that the petitioner is not a recognised union. Even if application for modification is by a minority union, the majority union can object to such modification. Further if the modification application is filed by a majority union and it is not in conformity with the provisions of the Act, it will not be allowed. So the position of the applicant is not a consideration at all. Thus decisions in *Workmen of Indian Express (P) Ltd. Vs. The Management*, and *Kerala Minerals Employees Congress Vs. Assistant Labour Commissioner and Others*, cited on behalf of the 1st respondent regarding representative nature and recognition of trade union for the purpose of Industrial Disputes Act, do not have any relevance to this issue.

5. There is also no merit in the contention of the first respondent that certified Standing Orders were being followed from 1978 without any complaint. This is also one among the reasons mentioned in Ext. P-5 to reject Ext. P-1 modification application. When a modification is filed all the workmen get notice as mentioned above. Even if they did not complain earlier, they can think; whether suggested modification is acceptable. Merely because certified Standing Orders were certified in 1978 and till 1990 no application for modification had been presented, it does not mean that no modification application u/s 10(2) can be made at all. By efflux of time there may require modification or the workers may feel, by lapse of time that one among the Standing Orders had become inconvenient to them or had been made contrary to the statute. So on such valid ground, necessarily application u/s 10(2) can be made to the appropriate authority. Section 10(2) does not contain any time limit to prefer a modification application. Therefore this contention also has no relevance and it fails. Consequently the conclusion to that effect in Ext. P- 5 also is unsustainable and it has no statutory backing.

6. Another contention raised by the first respondent is that appointment order contains a condition regarding transfer. Therefore necessarily, there is no illegality in including such a provision in the Standing Orders.

7. The intention of enacting the Act was to require the employers to define with sufficient precision, the conditions of employment, so that the workmen shall not

be subjected to the vagaries of employers. The conditions of service shall be definite and shall be reduced in writing to avoid unnecessary disputes. Once Standing Orders come into force, thereby all the employees in an industrial establishment are made known of the conditions of service and the employer cannot include any other conditions as a condition of service, whether it is in the appointment order or any other office order. The appointment order has also no relevance in the certification process of the Standing Orders, under the Act. The certifying authority and the appellate authority are required u/s 4 of the Act to examine whether the Standing Orders are in conformity with the provisions of the Act with reference to the matters set out in the Schedule. The certifying authority or the appellate authority are not required to examine whether the Standing Orders are in conformity with the appointment order or with any other office order prevalent in the establishment. Therefore condition contained in the appointment orders is not relevant for the purpose of framing statutory Standing Orders. Standing Orders shall be in conformity with the Act and the matters set out in the Schedule to the Act as amended by the appropriate Government from time to time as per the Rules framed under the Act. So the contention with reference to the appointment order, raised by the first respondent has no legal backing. Equally so is the conclusion contained in Ext. P-5 that the appointment orders issued to each of the employees contained transfer as a condition and on its basis Standing Orders cannot be modified to take away the condition regarding transfer.

8. The most important point arising in this case is whether the transfer can be prescribed as a condition in Standing Order. The petitioner contends that this is against the provisions in the Act and the Rules and the Schedule to the Act, whereas the first respondent contends that transfer comes within item No. 11 in the Schedule to the Act namely, "any other matter which may be prescribed".

9. The Schedule is a part of the Act. Therefore any word in the Schedule shall have the meaning ascribed to it in the definition clause. Item No. 11 in the Schedule says that the Standing Orders shall contain any other matter which may be prescribed. "Prescribed" means, as defined in Section 2(f), "prescribed by rules made by the appropriate Government." Appropriate Government in this case is the State Government because the first respondent is not an industrial establishment under the control of the Central Government. Therefore the State Government is the appropriate Govt. So only the State Government can prescribe any matters to be included in the Schedule. The rule making power contained in Section 15 provides that:

"The appropriate Government may after previous publication, by notification in the Official Gazette, make rules to carry out the purpose of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may-

(a) prescribe additional matters to be included in the Schedule xxx xxx xxx.

(b) set out model Standing Orders for the purposes of this Act."

Therefore the State Government is empowered to prescribe additional matters to be included in the Schedule. So "any other matter which may be prescribed" as contained in item No. 11 to the Schedule to the Act shall be the additional matters to be included in the Schedule and the power to prescribe such additional matters is vested with the State Govt. The State Government has issued Kerala Industrial Employment (Standing Orders) Rules, 1958 setting out in Schedule I, a model Standing Order which includes the additional matters prescribed by the State Government Thus any other matter under item No. 11 of the Schedule to the Act had already been prescribed in the model Standing Orders schedule to the Kerala Rules. Those model Standing Orders do not contain anything regarding transfer. Transfer has not been prescribed as a condition of service to be included in the Standing Orders by the State Government in terms of item No. 11 in the Schedule to the Act.

10. Section 3(2) of the Act reads as follows:

"Provision shall be made in such draft for every matter set out in the Schedule which may be applicable to the industrial establishment, and where model Standing Orders have been prescribed, shall be, so far as is practicable in conformity with such model."

As already mentioned above, the model Standing Orders schedule to the Kerala Rules do not contain any provision regarding transfer. So transfer is not a matter to be provided in the standing orders to be certified under the Act.

11. Section 4 of the Act confers an important power on the Certifying Officer and appellate authority. Thus over and above the powers conferred on them u/s 5 or Section 10 as regards the Certifying Officer and u/s 6 as regards the appellate authority, it is provided in Section 4 as follows:-

"Standing Orders shall be certifiable under this Act if-

(a) provision is made therein for every matter set out in the Schedule which is applicable to the industrial establishment, and

(b) the Standing Orders are otherwise in conformity with provisions of this Act; and it shall be the function of the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any Standing Orders."

So the Certifying Officer has to satisfy himself that Standing Orders are in conformity with the provisions of the Act. It shall be in conformity with the model Standing Orders scheduled to the Rules and as that schedule had prescribed other matters which may be prescribed in terms of item No. 11 in the Schedule to the Act and as the schedule to the Rules does not contain anything regarding transfer, it has to be taken that transfer is not a matter prescribed to be provided in the Standing Orders under the Act, so far as Kerala is concerned.

12. Relying on the decision reported in *Management of the "Hindu", Madras Vs. Secretary Hindu Office and National Press Employees Union and Another*, and *Md. Yasin Vs. Presiding Officer, Industrial Tribunal and Another*, the Counsel for the respondents submits that certified Standing Orders shall also provide for matters which are not mentioned in the Schedule and the Schedule is not exhaustive. Any reasonable provision can be incorporated even if it does not find a place in the Schedule. The issue covered by the Madras case was regarding modification of the condition regarding retirement on superannuation. The contentions on either side were that the "Schedule to the Industrial Employment (Standing Orders) Act enumerates all matters in respect of which the statute requires provision should be made in Standing Orders. The matter in which provision was made in Standing Order No. 45 is not a such matter, it is outside the scope of the Schedule". Regarding item 8 of the schedule, namely, "termination of employment and notice thereof to be given by the employer and workmen", the Madras High Court found that at pages 109-110:

"Retirement from service by superannuation on attaining prescribed age or on completing the prescribed period of service would seem to be contemplated even by the model Standing Orders as a form of termination of service."

Thus the modification, applied for and certified by the Certifying Officer, was traced to an entry in the schedule. In spite of that the Court in para 5 of the judgment made an observation as follows:

"If the view for which Mr. Ramamurthi Aiyar contended were right, these and several other situations would be left unprovided for by the Schedule. I recognise that it is open to the parties concerned to include in the Standing Orders matters which are outside the Schedule."

But regarding the issue focussed in the case as already mentioned above, the Court related the modification challenged to an entry existing in the Schedule to the Act. While making the observation as extracted above the Madras High Court did not advert to item No. 11 that "any other matter which may be prescribed" and the meaning to the word "prescribed" ascribed in Section 2(f) and also the power vested with the State Government to prescribe additional matters as provided u/s 15(2)(a). Therefore that observation cannot be relied on to decide the issue arising in this case.

13. The observation of the High Court of Orissa in *Md. Yasin Vs. Presiding Officer, Industrial Tribunal and Another*, is as follows at page 106:

"No decision of the Supreme Court has been cited before us which has specifically laid down that after the amendment of Section 4 of the Act in 1956, it is not open to a Certifying Officer, even if he holds as fair and reasonable, to certify a Standing Order, if it relates to a subject not covered by any of the items in the Schedule. The compulsion of the statute appears to be that the Standing Orders shall make provision for such of the matters set out in the Schedule with the additional matters prescribed by the Government as are applicable to the

industrial establishment in question."

Relying on this the counsel submits that any item which is not provided for in the Schedule shall also be included in the certified Standing Orders because the Schedule contains items which shall invariably be covered by Standing Orders. But it is pertinent to note that the Orissa High Court also did not decide the issue. The Orissa High Court found that:

"But if provision is made in the Standing Orders incorporating therein Standing Order No. 31, which is impugned in this case, and the certifying and the appellate authorities being satisfied about the fairness and or reasonableness of the provision certified the same, can it be said that the Standing Order is bad merely because there is no specific provision in the Schedule? It appears to us that it would not be reasonable to take such a view, we need not, however, in the present case decide this question because in our opinion, item No. 8 of the Schedule is wide enough to cover the matter enumerated in the Standing Order No. 31."

The Standing Order in issue in that case was one relating to removal or dismissal of a workman without following the due procedure on the ground of conviction by a Criminal Court. The Orissa High Court relied on the Madras decision only for the purpose of understanding the meaning of expression "termination of service" appearing in item No. 8 of Schedule to the Act. Therefore the Orissa decision also did not decide the issue as discernable from the passage extracted above. Therefore, that decision also is of no help to the first respondent.

14. So I am of the view that relying on item No. 11 in the Schedule to the Act anything cannot be included in the Standing Order unless it is a matter prescribed by the State Government and included in the Model Standing Orders. As transfer is not a condition of service enumerated in the model Standing Orders or has not been prescribed as an additional item to the Schedule to the Act, it cannot be included as a condition in the certified Standing Orders. In the case of the workmen under the first respondent, the Standing Orders were certified as early as in 1978 and that did include a Standing Order regarding transfer, obviously because no one did contest with regard to the legality of inclusion of the said Standing Order. But the certifying officer had a duty cast on him u/s 4 of the Act to see that the Standing Orders were otherwise in conformity with the provisions of the Act and it was fair and reasonable. Something opposed to the statute cannot be said to be fair. Therefore, while certifying the Standing Order in 1978, this duty cast upon the Certifying Officer u/s 4 of the Act was not properly performed.

15. When it was understood by the workmen represented by the petitioner that the Standing Order regarding transfer was not in conformity with the Act, the petitioner Union filed Ext. P-1 application for modification, which resulted in Ext. P-5. That application is for deletion of the Standing Order No. 16, which deals with the transfer. When a clause is deleted, that means modification of the

certified Standing Orders.

16. It cannot be said that deletion of a clause is not a modification of the certified Standing Orders. There is no other provision for amendment of the Standing Orders other than that contained in Section 10. A modification can be applied for at any time after the expiry of six months or after six months from any modification last effected. It cannot be understood that Standing Orders certified at a point of time shall remain as such without amendment. It is contended by the first respondent that modification contemplated in Section 10 is only minor changes to be brought about in any of the Standing Orders and it cannot be exactly synonymous to amendment. In the absence of any provision for amendment of the Standing Orders, this contention cannot be accepted. When once Standing Orders had been certified and later if one or few among the Standing Orders are found to be adverse to the interest of either the workmen or the employer, none can take a stand that such provision cannot be deleted because of the absence of provision for an amendment in the Act and that the provision contained in Section 10 for modification is only to effect minor changes and not for deletion of any clause. The modification mentioned in Section 10(2) is really an amendment to the Standing Orders which can be applied for further certification. The word modification used in Section 10 shall not be given a so restricted meaning that it means only a minor change.

17. Apart from that, in this case, as I have already found above, the Standing Orders certified in 1978 contained a standing order on transfer which could not have been included in it. Therefore it is not in conformity with the provisions of the Act. The Certifying Officer has a special function or duty u/s 6 of the Act to see that Standing Orders are in conformity with the provisions of the Act and are fair. Something opposed to the statute is not fair. Apart from exercising power u/s 10, he can also modify the Standing Orders by reason of the power conferred by Section 6 deleting that part of the certified Standing Orders which is not in conformity with the provisions of the Act. It cannot be said that, as decided by the Certifying Officer in Ext. P-5, an application for deletion of a clause is not an application for modification or that he has no jurisdiction to delete any Standing Order.

18. Reading of Ext. P-5 shows that the first respondent management had relied on Ext. P-3 amendment to the Industrial Employment (Standing Orders) Central Rules, 1946, incorporating transfer as a matter to be included in the Standing Order as item 10-B(4). It was also contended that this amendment is applicable to all Industrial Establishments and that contention was accepted by the Certifying Officer, the second respondent who found, on its basis that the subject matter was covered by the Schedule.

19. As already mentioned above the appropriate Government in the case of the industrial establishment managed by the first respondent is the State Government. So any other matter, over and above item Nos. 1 to 10 contained in Schedule to the Act, can be prescribed in terms of Section 15(2) read with

Section 2(b) of the Act only by the State Government and the State Government have promulgated the Rules, prescribing such additional matters in model Standing Order as Schedule to the State Rules. In such case the Central Rules cannot have any application and consequently Ext. P-3 cannot be relied on to certify a Standing Order by a Certifying Officer appointed by the State Government in terms of Section 2(c). Thus Ext. P-3 cannot be pressed into service to order that transfer is a matter included in the Schedule. The order of the second respondent in that regard in Ext. P-5 is also unsustainable.

20. The petitioner has, in addition to challenging Ext. P-5, sought a declaration that Standing Order No. 16 in the certified Standing Order dealing with transfer is null and void. That has to be considered by the Certifying Officer afresh in the light of the findings in this judgment after notice to all the Unions of the workmen under the 1st respondent.

21. It is contended that Ext. P-5 is amenable for an appeal u/s 6 read with Section 10 of the Act and that the Original Petition cannot be maintained as the petitioner did not resort to that alternate remedy. The petitioner submits that appeal provided u/s 6 is against order u/s 5(2). Section 10(3) makes applicable all foregoing Sections of the Act "in respect of an application under Sub-section (2)" of Section 10 for modification and not in respect of an order made on such application. Thus in strict terms, Ext. P-5 is not appealable.

In the above circumstances I quash Ext. P-5 and direct the second respondent to take up Ext. P-1 for consideration afresh. The second respondent shall issue notice to the parties herein and also to the other unions of workmen and any other representative bodies of the workmen of the first respondent and shall consider their contentions and pass orders as expeditiously as possible.

Original Petition is allowed to the above extent.