
(1967) 11 MP CK 0003
In the Madhya Pradesh High Court

Jamul Cement Works

APPELLANT

Vs

State Industrial Court and Others

RESPONDENT

Date of Decision : 10-11-1967

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : (1971) ILR (MP) 445 : (1968) JLJ 242 : (1968) 1 LLJ 131 : (1968) 13 MPLJ 95 : (1968) MPLJ 95

Hon'ble Judges : P.V. Dixit, C.J;R.J. Bhawe, J

Bench : Division Bench

Judgement

The petitioner is a company owning a factory at Jamul for manufacturing cement.

By a notification, dated 31 December 1960, issued by the State Government In exercise of its powers u/s 1 (3) of the Madhya Pradesh Industrial Relations Act, 1960 (hereinafter referred to as the Act), the Government applied the provisions of the Act to "undertakings in the industries" specified in the schedule to the notification, which included " (cement" The construction of the petitioner's cement factory started in 1960-61. The factory went into production in 1965. Even after 1985 construction of two kilns continued. in December 1965. a dispute arose between the petitioner and respondent 2, the Cement Labour Union, Bhilai, as regards the employment of a large number of workers by the petitioner with intermittent break of a few days; the respondent-union alleged that this practice of the petitioner employing workman with intermittent breaks of a few days in their service was an unfair labour practical adopted with a view to depriving the workman of the benefits of permanency, retrenchment compensation, etc. As the dispute was not resolved by consolidation, the state Government, acting u/s 51 of the Act, referred the dispute to the industrial tribunal for arbitration in the following words:

Whether the appointment of the employees on periodical contracts by the Jamul Cement Works of the Associated Cement Company, Ltd., Jamul, is proper ? If not, to what relief they are entitled and from which date ?

On the statements filed before the tribunal on behalf of the petitioner and the respondent-union, the tribunal framed the following issues:

(1) Whether the dispute before the consolidator was restricted only to 33 persons including 28 named in the annexure A to the statement of claim, as alleged by party 2?

Or was it of a general nature affecting approximately 400 workmen as stated by party 1?

(2) Should the scope of the reference made by the State Government be restricted to the persons who were named in the dispute before the conciliator ?

(3) Do the standing orders apply to labour which was engaged in construction work ? If so, what is the effect ?

(4) Is the work of construction in this case an industry to which Madhya Pradesh Industrial Relations Act applies ?

(5) Is the practice of employing labour for fixed periods an unfair labour practice ?

(6) Whether the appointment of the employees on periodical contracts by the Jamul Cement Works of Associated Cement Company, Ltd., Jamul, is proper ? If not, to what relief they are entitled and from which date ?

The learned president of the tribunal held that the reference made by the Government was of a general nature, and not with reference to any particular worker; that the constructional work was not claimed and detached from the work of the factory itself but was essential " for the purpose of bringing into existence the necessary factory building with proper installation of machinery for the purpose of producing cement," and that, therefore, the constructional work was a part of "cement industry," and, consequently, the Act applied and the reference made to the tribunal was not bad. The tribunal further held that the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961, applied to the cement Industry, as also to the constructional work therein; that the standard standing orders were also applicable to the petitioner's concern; and that in view of the definition of " temporary employee " given in Clause (vi) of standard standing order 2, the practice adopted by the petitioner of employing workmen for less than six months with breaks of three to five days was not bona fide but was one adopted " only to break the continuity of employment to escape from the standing orders." The tribunal summed up its conclusions thus :

(i) The appointment of employees on periodical contracts is not proper during the period during which the construction is continuing.

(ii) The workers are entitled to be treated as permanent for the purposes of the standard standing orders and shall have all the rights which these orders give to a permanent employee. The date from which the benefit is to be given shall have to be decided as a question of fact in each case, if and when a dispute arises.

The petitioner now seeks a writ of certiorari for quashing the award of the tribunal.

Sri Nanavati, learned Counsel appearing for the petitioner, assailed the validity of the award by arguing that the Madhya Pradesh Industrial Relations Act, 1960, applied only to undertakings in the Industries notified under S 1 (3) thereof; and u/s 2 (13) of the Act an "employee " meant a person employed in a notified Industry or undertaking; the notification issued by the Government on 31 December 1960 u/s 1 (3) of the Act no doubt applied the Act Inter alia to "Cement"; this meant that the Act was made applicable to an industry manufacturing Cement; the construction of a Cement factory was in no way a part of Cement-manufacturing industry; nor was it any operation incidental to the main industry of manufacturing Cement; and, therefore, the Act was not applicable to employees working on the constructional side, and the references of the dispute in question by the State to the tribunal was invalid. Learned counsel proceeded to say that though the reference of the dispute was made in general terms, before the tribunal there was no dispute between the parties; that the dispute was restricted to the employment of temporary workers on constructional work, and that in fact no demand was ever made on behalf of the workers employed on the production side for being given the benefits of permanent employment. It was further said that the standard standing orders were not applicable to every undertaking to which the Madhya Pradesh Industrial Employment (Standing Order) Act, 1961, applied by virtue of Section 2 thereof, and that as laid down by Section 6 of that Act the standard standing orders were applicable only to such class of undertaking to which the State Government may, by notification, apply the standard standing orders. It was pointed out that the notification No. 1905-839-XVI, dated 14 March 1963, which the Government Issued in exercise of its powers u/s 6 (1) of the Midhya Pradesh Industrial Employment (Standing Orders) Act, 1961, applied the said standing orders only to the undertakings specified in the table appended to the notification, that this table Included "Cement," that as the construction of a Cement factory was not a part of Cement Industry, therefore, the standard standing orders were not applicable to workers employed in the construction of the Cement factory, and that the tribunal was, therefore, in error in relying on the definition of "temporary employee " given in Clause (vi) of standard standing order 2. It was also submitted that even on the definition of " temporary employee" an employee who has been employed for work, which is essentially of a temporary character, is a temporary employee, that the constructional work of a Cement factory is necessarily of a temporary character, and that being so, all workers employed on the construction of a factory are temporary employees.

On behalf of the respondent-union, sri Gulab Gupta urged that the contentions raised on behalf of the petitioner did not at all arise inasmuch as the reference to the tribunal covered temporary employees, not only on the constructional side but also on the manufacturing and conduction side and that as u/s 51 of the Act the State Government could refer an industrial dispute to the tribunal

notwithstanding anything contained in the Act, the scope of the reference was wide. According to the learned Counsel, the work of the setting up of a Cement factory was not a work of temporary nature, but was an essential part of the manufacturing process of cement and, therefore, both the Madhya Pradesh Industrial Relations Act, 1960, and the standard standing orders applied to the employees of the petitioner's concern.

In our judgment, the contentions advanced on behalf of the petitioner must be given effect to. As is clear from 3.1 (3) of the Act, the provisions of the Act, other than Sections 1 and 112, do not apply to all industries or undertakings in any industry, but, apply to those Industries and undertakings in any industry as may be notified u/s 1 (3). The notification issued on 31 December 1960 u/s 1 (3) of the Act applied the provisions of the Act, other than Sections 1 and 112, inter alia to "cement". The word "cement" means Cement-manufacturing industry and activities or operations incidental to the main industry of manufacturing Cement. The setting up and construction of a cement factory is no doubt essential before Cement can be manufactured and thereafter distributed and sold. But the construction of a Cement factory cannot in any way be likened to any activity or operation in the manufacture of Cement or its distribution or sale. It is not necessary that a company engaged in the manufacture should itself set up the Cement factory. The constructional work can be entrusted to any contractor or a firm of structural engineers, and when the construction is complete, the company can take over the completed construction and commence manufacturing Cement. The contractor and the firm, to whom the constructional work has been entrusted, cannot clearly be said to be engaged in the manufacture of Cement. For the same reason, if a company, which intends to manufacture Cement, itself undertakes the constructional work of its factory, then it cannot be said that the cement industry has come into existence from the moment the constructional work started. Again, the constructional work of a Cement factory cannot be said to be an activity or operation incidental to the main industry of Cement-manufacturing. The constructional work is not something which follows or depends upon or appertains to the manufacture of cement as the primary Activity. The constructional work of a cement factory is in itself an independent primary work. In our opinion, to say that the construction of a Cement factory is a part of Cement industry, is to ignore totally the real nature, both of the cement-manufacturing industry and the construction of a Cement factory. As has been pointed out by this Court in *Mishra (R.N.) v. Burn & Co. Ltd., Refractory and Ceramic Works* 1986 I LLJ 622 as the Act does not apply to all Industries or undertakings therein but only to those which the Government may select for being governed by the Act, the industries that may be specified in a notification u/s 1 (3) must be understood in a limited sense and not in a wider sense. In that case, it was also pointed out that the reason why the legislature has not made the Act applicable to all industries or undertakings therein, but has left to the Government to determine the industry or industries or undertakings therein to which it should be applied, is that conditions of work and employment vary from

industry to industry, and also from undertaking to undertaking in any industry. It is plain enough that the nature of work done in the construction of a cement factory and the conditions under which the employees on the constructional side work are altogether different from the work which the employees engaged in the manufacture of cement do and the conditions under which they work.

There is in the schedule to the notification dated 31 December 1960 itself an indication to justify the view that the term "Cement" used therein cannot be given a wide connotation so as to include the constructional work of a cement factory. In the schedule "asbestos cement" and "engineering" have been separately specified. If it had been intended that the manufacture of cement should be understood in a wide sense so as to include manufacture of every kind of cement and also the construction of a cement factory, then the separate enumeration of "asbestos cement" and "engineering," which clearly includes constructional work, becomes purposeless. In that case, manufacture of asbestos cement would be included in the cement-manufacturing industry and the constructional work of any factory; in any industry would be included in the various industries specified in the schedule. The fact that "engineering," which includes constructional work, is one of the industries specified in the schedule to the notification, does not, however, lead to the conclusion that the workers employed by the petitioner on the constructional work are employees in an industry to which the Act applies. The reason is that the constructional activity, which the petitioner-company carries on, is casual and not one systematically or habitually undertaken and, therefore, is not an "industry." In *D.N. Banerjee v. P.R. Mukherjee* 1953 I L.L.J. 195, *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, and *University of Delhi and Another Vs. Ram Nath*, the Supreme Court has considered the definition of "industry" given in Section 2(j) of the Industrial Disputes Act, 1947, and of "workman" in Section 2(s) of that Act. These definitions are analogous to the definitions contained in Sections 2(13) and 2(19) of the Madhya Pradesh Industrial Relations Act, 1960. What the Supreme Court has said in the aforesaid three cases about the scope of the terms "industry" and "workman" occurring in the Act of 1947 applies equally to the definitions of "industry" and "employee" given in the local Act, because the intent underlying the two enactments is the same and the language is almost similar. The Supreme Court has pointed out that it is the character of the activity which decides the question as to whether the activity in question attracts the provisions of Section 2(f) of the Act of 1947 who conducts the activity and whether it is conducted for profit or not, do not make a material difference. The working principle laid down by the Supreme Court for determining whether a particular form of activity is an undertaking making it an industry is that

(i) the activity must be systematically or habitually undertaken for the production or distribution of goods or for the rendering of material services to the community at large or a part of such community with the help of the employees;

- (ii) the activity must involve co-operation of the employer and the employees;
- (iii) the object must be the satisfaction of material human needs;
- (iv) it must be an organized one in a manner in which trade or business is generally organized;
- (v) it must not be casual; and
- (vi) no quid pro quo is necessary for constituting the Activity an "industry."

Judged by these tests, the constructional work of the Cement factory undertaken by the petitioner cannot be said to be an "industry"; it is a casual activity and not an activity systematically or habitually undertaken. The petitioner-company is not an engineering company. Its business is to manufacture Cement and not the construction of Cement factories as an organized trade or business.

Learned counsel for the respondent-union suggested that the constructional work undertaken by the petitioner is a regular and permanent work of the petitioner's establishment and the labourers, and that the construction work also includes lining of rotary kilns almost every week. There is no material whatsoever to support this suggestion, and the tribunal has not found as fact that the labour employed by the petitioner on the constructional side is for the maintenance of plant and machinery of the cement factory and the petitioner-company is required to undertake constantly constructional work and that this work is of a permanent nature. The matter would have been otherwise if a dispute had been raised with respect to any contract labour employed by the petitioner-company for cleaning, maintenance and repairing of the plant, machinery and premises of the petitioner-company's factory. Such a repair and maintenance Activity would be an operation incidental to the main industry. Learned counsel for the respondent-union laid much stress on the fact that the constructional work was undertaken by the petitioner-company even after the factory went into production. In our opinion, this does not make any difference in the nature and character of the constructional activity. If, as we think, the constructional work of the factory undertaken by the petitioner is neither an industry in itself nor a part of the cement industry, then it is wholly immaterial whether the constructional activity began before the factory went into production or it continued thereafter or whether the petitioner-company embarked on an expansion of the factory. In our opinion, the constructional work of the setting up of a cement factory undertaken by the petitioner is not an "industry," as defined in Section 2(19) of the Act, or a part of the "cement industry," the employees working on the constructional side cannot be regarded as "employees" within the definition of the term given in Section 2 (13) of the Act, and consequently, the reference made by the Government to the tribunal u/s 51 of the Act with respect to the dispute raised by those employees was incompetent and invalid.

Learned counsel for the respondent-union also referred to Section 51, and said that under that provision the State Government could refer an industrial dispute

to the tribunal notwithstanding anything contained in the Act. If the argument was intended to suggest that u/s 51 the Government could refer a dispute raised by workmen in an industry to which the Act does not at all apply, then it must; be rejected. The non obstinate clause, with which Section 51 opens, only overrides the procedure with regard to raising of disputes, their settlement by conciliation and arbitration. It does not in any way abrogate the requirement of the Act that before any dispute can be referred to a labour court or an industrial court or a board for arbitration, it must be an " industrial dispute," as defined in s.2 (17) of the Act. This is clear from the fact that Section 51 itself says that the Government must be satisfied that an industrial dispute exists before it can be referred for arbitration to a labour court or an industrial court or a board. " Industrial dispute " means any dispute or difference between an employer and employee or between employers and employees or between employees and employees in an " industry " as defined in Section 2 (19) of the Act.

Coming to the applicability of the standard Standing orders, they are clearly not applicable to the workers employed by the petitioner on the constructional work. Section 2 (1) of the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961, is as follows:

(1) This Act shall apply to-

(a) every undertaking wherein the number of employees on any day during the twelve months preceding or on the day this Act comes into force or on any day thereafter was or is more than twenty; and

(b) such other class or classes of undertakings as the State Government may, from time to time, by notification, specify in this behalf :

Provided that it shall not apply to an undertaking carried on by or under the authority of the Central Government or railway administration or a mine or an oilfield.

It will be seen that this provision does not say anything about the application of standard standing orders to The undertakings to which that Act applies. It is Section 6 of the Act of 1901. that deals with the application of standard standing orders to undertakings. Sub-section (L) of Section 6 says that-

The State Government may, by notification, apply standard standing orders to such class of undertakings and from such date as may be specified therein.

Now, the notification, which was issued by the Government on 14 March 1963 applying the standard standing orders to certain undertakings specified in the table appended to that notification, does not contain anything to indicate that the standard standing orders have been made applicable to the constructional work of a Cement factory in the Cable appended to that notification also "Cement," "asbestos cement;" and "engineering " have been specified as undertakings to which standard standing orders apply. The term " Cement" occurring in the notification, dated 14 March 1963, issued u/s 6 (1) of the 1961 Act,, must bear

The same construction which has been put on that word as used in the schedule to the notification, dated 31 December 1960, Issued u/s 1 (3) of the Madhya Pradesh Industrial Relations Act, 1960. So construing, it must be held that the standard standing orders have no applicability to the employees working on the constructional work of the petitioner's cement factory.

Even on the definition of the term "temporary employee," given in Clause (vi) of standard standing order 2, workers employed to work continuously for a period of less than six months cannot be regarded as permanent employees. That definition is as follows:

(vi) temporary employee" means an employee who has been employed for work which is essentially of a temporary character, or who is temporarily employed as an additional employee in connection with the temporary increase in the work of a permanent nature: provided that in case such employee is required to work continuously for more than six months, he shall be deemed to be a permanent employee, within the meaning of Clause (1) above.

The constructional work of a factory is essentially of a temporary character. That being so, a person employed to work continuously for less than six months cannot, under the very definition of "temporary employee," be regarded as a permanent employee. The employment of a person in a work of a temporary character for a period of less than six months and his reemployment again with a break may be open to objection and may be described as a practice adopted to avoid the effect of his being deemed to be a permanent employee. But if the employment for a duration of less than six months is legal, then its propriety must be determined not merely on theoretical or abstract objections to contract-labour, but also on the terms and conditions of employment and the grievance made by the employee in respect thereof. This the tribunal failed to do. What the learned president of the tribunal did was to rest his conclusion, namely, that the

appointment of employee on periodical contracts is not proper during the period during which the construction is continuing,

solely on the definition of "temporary employee" given, in Clause (vi) of the standard standing order 2. and of a permanent employee" given in Clause (i) of that standard standing order. A "permanent employee" has been defined by Clause (i) of the standard standing order 2 as one who has completed six months' satisfactory service in a clear vacancy in one or more posts whether as a probationer or otherwise. It was never the case of the respondent-union that the workers employed on the constructional work of the factory were entitled to get the status of "permanent employee" under Clause (1) of the standard standing order 2. As we have said earlier, they are clearly "temporary employees" within the meaning of that term as given in Clause (vi) of the standard standing order 2. Merely because a person, who has completed six months' satisfactory service in a clear vacancy in one or more posts, is a permanent employee, or that a temporary employee has worked continuously for

more than six months and therefore is entitled to be deemed to be a permanent employee, it does not follow that the practice of employing workers on the constructional work of the factory for less than six months is not proper.

Learned counsel for the respondent-union referred us to *Sone Valley Portland Cement Company v. their workmen* 1962 I LL.J. 218 and *J.K. Cotton Spinning and Weaving Mills Company v. Labour Appellate Tribunal of India* 1963 II L.L.J. 436 in support of his contention that the constructional work of a cement factory was an industry. Those cases are not in point for the simple reason that the nature and character of the activity considered by the Supreme court there were altogether different from the nature and character of the Activity of constructing a Cement factory. In *Sone Valley Portland Cement Company v. their workmen* (vide supra), the Supreme Court held that Cement-packing is not a work of temporary nature but is a part of the manufacturing process which goes on all the time. In the other case, namely, *J.K. Cotton Spinning and Weaving Mills Company v. Labour Appellate Tribunal of India* (vide supra), the main question, which the Supreme Court considered, was the position of the employees engaged in any work or operation which is incidentally connected with the main industry of the employers. It was ruled by the Supreme court that the expression "employed in any industry" in the definition of "workman" in Section 2(s) of the Industrial Disputes Act, 1947, cannot be literally considered and an employee who is engaged in any work or operation which is incidentally connected with the main industry of the employer would be a workman, provided the other requirements of Section 2(s) of the 1947 Act are satisfied. As we have endeavored to point out earlier, the work of construction of a Cement factory cannot in any sense be said to be a work incidental to the manufacture of cement. The decision of the Supreme court in *Rohtas Industries Ltd. Vs. Brijnandan Pandey*, however, shows that in erection works for the extension and enlargement of Cement factories there can be a number of temporary employees.

There is no force in the contention of the learned Counsel for the respondent-union that the dispute referred to the tribunal covered temporary employees engaged not only on the constructional work but also on other industrial activities of the petitioner-company. The award of the tribunal clearly shows that before the tribunal both the parties proceeded on the basis that the dispute related to the "appointment of employees on periodical contracts" on the constructional work of the factory. The answer given by the tribunal that the appointment of employees on periodical contracts is not proper during which the construction is continuing as also the statement which the respondent-union filed before the tribunal (annexure E-1, p. 31, of paper book), leave no doubt about this position.

To conclude, the award made by the tribunal must be quashed, first because the reference of the dispute made to it by the State Government was invalid, and secondly because there is an error of law apparent on the face of the award in applying the standard standing order 2 (vi) to the employees engaged on the

constructional work of. the petitioner's Cement factory. The result is that this petition is allowed, and the award dated 29 April 1967 of the tribunal is quashed. The petitioner shall have costs of this application from respondent 2, the Cement Labour Union, Bhilai. Counsel's fee is fixed at Rs. 200. The outstanding amount of security deposit shall be refunded to the petitioner.