

(1958) 02 PAT CK 0017

In the Patna High Court

Case No : Misc. Judicial Case No's. 473 and 474 of 1956

Jugal Kishore Bhadani

APPELLANT

Vs

Labour Commissioner and Others

RESPONDENT

Date of Decision : 26-02-1958

Acts Referred:

Bihar Shops and Establishments Act, 1953 — Section 26(2)
Bihar Shops and Establishments Rules, 1955 — Rule 21
Constitution of India, 1950 — Article 19(1), 19(6), 254, 41, 43
Contract Act, 1872 — Section 27

Citation : AIR 1958 Patna 442 : (1958) 6 BLJR 225 : (1958) 2 LLJ 234

Hon'ble Judges : V. Ramaswami, C.J;R.K. Choudhary, J

Bench : Division Bench

Advocate : Balbhadra Prasad Singh and L.M. Sharma, for the Appellant; Govt. Pleader and Jagdish Pande, (in No. 473) and Govt. Pleader and Thakur Prasad, (in No. 474), for the Respondent

Final Decision : Allowed

Judgement

K.K. Choudhary, J.—These two applications under Articles 226 and 227 of the Constitution of India have been made by one Jugal Kishore Bhadani, proprietor of Messrs Ramlal Jugal Kishore of Purani-Godown in the town of Gaya, and arise out of two orders of the Labour Commissioner of Bihar, respondent No. 1, one dated 21-1-1956, passed in favour of Basudev Prasad, respondent No. 4 in M. J. C. No. 473 of 1956, and the other dated 27-1-1956, passed in favour of Chhotan Prasad Singh, respondent No. 4 in M. J. C. No. 474 of 1956, u/s 26 (2) of the Bihar Shops and Establishments Act, 1953 (Bihar Act VIII of 1954), hereinafter to be referred to as the Act, read with Rule 21 of the Bihar Shops and Establishments Rules, 1955, framed u/s 40 of the Act, hereinafter to be referred to as the rules.

2. The short facts are these: The above named Basudeo Prasad and Chhotan Prasad Singh were employees in the firm of the petitioner and had served therein for several years. On 15-3-1955, Chhotan Prasad Singh was discharged from his employment and on 19-3-1955, Basudeo Prasad was discharged from the

service. They thereafter preferred appeals before the Labour Commissioner, Bihar, u/s 26 (2) of the Act, and the Labour Commissioner held that the discharge orders of both these persons were illegal, and the orders of discharge were, therefore, set aside.

The reasons for taking the above view were that no notice was served on the two employees and they were not guilty of any misconduct as alleged by the employer. The Labour Commissioner, however, considered that the relationship between the employer and the employees had so deteriorated that no useful purpose would be served if they are reinstated. He, therefore, instead of passing an order for reinstatement, made an order that the employer should pay to each of them Rs. 500 as compensation.

Thereafter, in the case of Basudeo Prasad, respondent No. 3, S.A. Rahman, Magistrate, first class, Gaya, being directed by respondent No. 2, the District Magistrate, Gaya, realised the amount of Rs. 500 from the petitioner by issue of a distress warrant, but the payment of the money to the employee has been stayed, and in the case of Chhotan Prasad Singh, the same Magistrate, as directed by the District Magistrate, Gaya, took steps to realise the amount from the petitioner by issue of a distress warrant. In these circumstances, the proprietor, Sri Jugal Kishore Bhadani, made the two applications in this Court.

3. Cause has been shown by the above two employees by filing counter-affidavits in both the cases and they have contested the applications. A contest is also made by the learned Government Pleader on behalf of respondents 1 to 3.

4. Mr. Balbhadra Prasad Singh appearing for the petitioner in both the cases has contended that the order passed by the appellate authority, namely, the Labour Commissioner, Bihar, is not contemplated by the Act, and, therefore, is illegal. Section 26 (2) of the Act lays down that every such employee shall have a right of appeal to such authority and within such time as may be prescribed either on the ground that (1) there was no reasonable cause for dispensing with his services, or (2) no notice was served on him as required by Sub-section (1), or (3) he had not been guilty of any misconduct as held by the employer.

As to what would be the nature of the order that the appellate authority will pass on such appeal, is not given in the Act. It has, therefore, been contended by Mr. Singh that the appellate authority had no power to award any compensation. His contention is that the authority being of limited jurisdiction, it could not impose pecuniary liability on a citizen unless it was expressly authorised to do so and he has put forward an argument that what the law required him to do was only to pass orders with respect to the grounds on which the appeal lay as mentioned in Section 26 (2) of the Act. I am unable to accept this contention.

The grounds given in the above section are grounds on which the order of discharge made by the employer could be challenged. But the order that may have to be passed by the appellate authority would necessarily be consequential to the findings of the authority on the grounds referred to above in regard to the

discharge or otherwise of the employees. In this connection. Rule 21 of the rules may be referred to. Sub-rule (5) of this rule lays down that if the employer or his agent fails to appear at the specified time, the authority may proceed to hear and determine the appeal ex parte.

Sub-rule (6) provides that if the appellant fails to appear at the specified time, the authority may dismiss the appeal. Sub-rule (7) gives power to the appellate authority to review orders passed under Sub-rules (5) and (6) of that rule. Sub-rule (8) provides that the Labour Commissioner, or the officer authorised in this behalf, as the case may be, shall record briefly the evidence adduced before him, shall hear the parties summarily and after making such further enquiry as he may consider necessary, pass orders giving reasons therefor, and the orders, so passed, shall be final and binding on the parties.

Thus, it appears that the appellate authority has been given all such powers under which ordinarily a court of appeal is entitled to pass an order in the circumstances of the case. The provision for passing an order by the appellate authority under the above Sub-rule (8) in my opinion, gives him power to pass orders as the case under consideration may lawfully admit. In the present case, the appellate authority has considered that it was not inclined to pass an order for reinstatement which ordinarily it could have passed on the finding that the discharge was illegal.

It has, therefore, passed an order for compensation to avoid any future trouble both to the employer and the employees. After the discharge of the employees, the employer ordinarily must have engaged other employees in substitution. If, therefore, the discharged employees were to be forced upon the employer against his will, that might not have perhaps brought about healthy atmosphere in the shop or establishment in question.

Moreover, the employees might not have been in a position to retain, their services because, as the Labour Commissioner has also pointed out, the "employer would have always been on the look out for an opportunity to give a month's notice and remove them, from the employment. In these circumstances, the awarding of the compensation was, in my opinion, the only possible and just order which the appellate authority could legally pass in the case. The above contention, therefore, has to be rejected as having no substance.

5. It was next suggested, though faintly, that the above section is repugnant to the Indian Contract Act. The argument is that under the provisions of the Indian Contract Act, subject to any condition to the contrary, an employer is entitled to terminate the contract of service subject to such rights and liabilities of the parties as may arise under the provisions of that Act.

But by the above section of the Act in question, the employer is forced not to terminate the contract of service and to retain the employee against his will. Our attention has been drawn in this regard to item No. 7 of the Concurrent List which includes contracts excluding those relating to agricultural land. It is,

therefore, contended that the above provision of the Act is repugnant to the existing law in respect of the matters specified in the Concurrent List.

Article 254(1) of the Constitution, so far as is relevant for the purpose of the present enquiry, provides that if any provision of a law made by the Legislature of a State is repugnant to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of repugnancy, be void.

Clause (2) of that article, so far as this matter is concerned, says that where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to an earlier law with respect to that matter, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

In the case of the Act, however, it appears that it received assent of the President on 15-2-1954, and the assent was first published in the Bihar Gazette dated 17-3-1954. The above argument, therefore, seems to have been made perhaps under confusion. Moreover, the provision of the Act referred to above is covered by items 23 and 24 of the Concurrent List. Item 23 is "social security and social insurance; employment and unemployment."

Item 24 is "welfare of labour including conditions of work, provident funds, employer's, liability, workmen's compensation, invalidity and old age pensions and maternity benefits." The present legislation, therefore, comes under these two items, with respect to which there is no repugnancy between the Act with any other Act of the Parliament or existing law.

6. The last contention, and which is the most important contention, is that Section 26 (2) of the Act is ultra vires as It infringes with the right of the petitioner guaranteed to him under Article 19(1)(g) of the Constitution. That article says that all citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.

It is contended that the provision of the Act which has the effect of forcing an employee on the employer infringes with the right of trade or business of the employer, and, as such, it is unconstitutional. Clause (6) of that article, however, provides that nothing in Sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

Mr. Singh has, however, contended that the restriction imposed is neither in the interest of the general public nor reasonable. His contention is that the term "general public" means all the members of the public in general and not a particular section of the public. There is no legal foundation for such a narrow

construction of the term "general public". In my opinion, the interest of a section of the members of the public is included in the above term as used in Article 19(1)(g) of the Constitution.

The preamble of the Act itself says that the Act is enacted as it is expedient to provide for the regulation of conditions of work and employment in shops and other establishments and for certain other purposes specified therein. The Act, therefore, tends to make laws for the interest of a large section of people, namely, the workmen and the employees employed in shop and other establishments. This view gains support from Articles 41, 43 and 46 of the Constitution itself. Those articles are in these terms:

"41. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."

"43. The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas."

"46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

The validity of the Act, therefore, cannot be challenged on this ground.

7. It is then contended that even though it is in the interest of the general public, it is not reasonable, and in support of this contention reference has been made to the following points--

(1) No provision has been made for giving reasons for the order of the appellate authority; and

(2) The appellate authority has been given unlimited and uncontrolled power.

So far as the first point is concerned, it has no merit because Sub-rule (8) of Rule 21 of the rules has clearly made a provision for the reasons to be given by the appellate authority for any order passed by it. The second question, however, is not free from difficulty.

8. It is contended on behalf of the petitioner that Section 26(2) of the Act provides for an appeal to an authority as may be prescribed & in the present case the prescribed appellate authority is the Labour Commissioner who is a mere administrative or executive officer, and there is no right of appeal given to the parties and, specially, to the employer, against the order of that appellate

authority.

The argument put forward is that the expression "appellate authority" in the section is merely an expression of an authority who may examine the order of discharge passed by the employer in certain cases. There is no order of any tribunal against which the appeal lies to that appellate authority. All that the appellate authority has to do is to examine the correctness of the order of discharge passed by one of the parties before it, namely, the employer and to pass consequential order.

Thus, this appellate authority is really a tribunal of first instance. The order that it may pass is not, however, subject to the test of any appellate authority or in a civil court as Sub-section (3) of that section provides that the decision of the appellate authority shall be final and binding on both the employer and the employee. Thus, if the grievance is made by an employee against the order of discharge by the employer, the Act has made provision, for the redress of that grievance by an authority and the order of that authority becomes final and binding on the employer without giving him any right to go up in appeal against the order of that authority or to question the same for any judicial determination.

That, in my opinion, is a great lacuna in the Act and the restrictions imposed cannot be held to be reasonable. This view is borne out by the authority of the Supreme Court in *Mahant Sri Jagannath Ramanuj Das and Another Vs. The State of Orissa and Another*, . In that case, certain sections of the Orissa Hindu Religious Endowments Act of 1939 as amended by the amending Act of 1952 were sought to be declared unconstitutional. Sections 38 and 39 of that Act related to the framing of a scheme, but the scheme had to be framed not by a civil court or under its supervision but by a commissioner who is a mere administrative or executive officer.

There was also no provision for an appeal against the order to the court. There was indeed a provision in the earlier Act in Sub-section (4) of Section 39 allowing the trustee or any person having an interest in the institution to file a suit in a civil court to modify or set aside an order framing a scheme and Section 40 provided that the order made u/s 39 could be final only subject to the result of such suit. Sub-section (4) of Section 39 was deleted by the amending Act of 1952 and a new Sub-section (4) was added according to which the order passed by the Commissioner became final and conclusive.

Their Lordships held that the settling of a scheme in regard to the religious institution by an executive officer without the intervention of any judicial tribunal amounts to an unreasonable restriction upon the right of property of the superior of the religious institution which is blended with his office, and Sections 38 and 39 were, therefore, held to be invalid.

9. It has, however, been contended by the learned Government Pleader that Section 39 of the Act read with Section 30 of the Workmen's Compensation Act 1923 (Act VIII of 1923), gives a right to the employer to prefer an appeal in the

High Court. Section 39 of the Act runs as follows:

"Workmen's Compensation Act, 1923, to apply to persons employed in the establishment to which this Act applies -- The provisions of the Workmen's Compensation Act, 1923 (VIII of 1923), and of rules made thereunder shall mutatis mutandis apply to every person employed in an establishment under this Act."

Section 30 of the Workmen's Compensation Act provides for an appeal to the High Court from certain orders of a commissioner appointed under that Act. A reading of the above two sections, in my opinion, makes the position of the respondents all the more worse. u/s 30 of the Workmen's Compensation Act there is a right of appeal to the High Court and by Section 39 of the Act that right, if the argument of the learned Government Pleader is accepted, is given to every person employed in an establishment under the Act, Therefore, according to the above reading, an employee is given a right to appeal to the High Court against the order of the appellate authority under the Act.

But no such right is given to the employer. Thus, if the argument of the learned Government Pleader is accepted, Sub-sections (2) and (3) of Section 26 of the Act become all the more unconstitutional.

10. For the reasons given above, it appears to me that Sub-sections (2) and (3) of Section 26 of the Act are unconstitutional and, therefore, illegal. The result, therefore, is that the applications have to be allowed. A writ in the nature of the certiorari, therefore, would issue quashing the above two orders of respondent No. 1 and a writ in the nature of mandamus would issue restraining the respondents from enforcing against the petitioner the provision of the section mentioned above. The petitioner is entitled to his cost. Hearing fee Rs. 100 in each case.

V. Ramaswami, C.J.

11. I agree.