

(1979) 02 MAD CK 0016
In the Madras High Court

K.N. Vellayan

APPELLANT

Vs

Government of Tamil Nadu and Another

RESPONDENT

Date of Decision : 23-02-1979

Acts Referred:

Constitution of India, 1950 — Article 226, 311

Industrial Disputes Act, 1947 — Section 10, 12, 2, 33, 33A

Citation : (1979) 2 LLJ 186

Hon'ble Judges : Sengottuvelan, J;Ramanujam, J

Bench : Division Bench

Judgement

Ramanujam, J.—These four appeals arise out of a common judgment rendered by Ismail, J., dismissing Writ Petitions Nos. 253, 360, 361

and 362 of 1974, wherein the petitioners sought writs of mandamus directing the Government of Tamil Nadu to refer certain disputes u/s 10(1) of

the Industrial Disputes Act. All the four appellants were employees of the second respondent which is the same in all the appeals. The appellants

had been arrested in August, 1970 and detained in prison as they were involved in the land grab agitation organised by the Communist Party of

India of Tamil Nadu. While they were in prison they had sent leave letters to the second respondent praying for leave till they were released and

were in a position to report for duty. The second respondent did not grant the leave applied for by the appellants, but on 1st September, 1970,

sent a communication to the appellants stating that in view of their absence, as per the relevant standing orders, they should be taken to have

abandoned their employment. After their release, the appellants wanted to report for duty but the second respondent, hereinafter referred to as the

management, did not allow them to join duty on the ground that they have

already ceased to be in employment.

2. The appellants thereafter filed petitions before the Industrial Tribunal, Madras, u/s 33A of the Industrial Disputes Act, since an industrial dispute concerning the management was then pending before it. The Industrial Tribunal, however, dismissed those petitions holding that it had no jurisdiction to entertain the same as there was no dismissal or discharge of the appellants by the management. Thereafter, the appellant sought to raise an industrial dispute as regards their non-employment and approached the Government for referring the matter for adjudication u/s 10(1) of the said Act. The Government, by G.O. Rt. No. 1003, Labour and Employment Department dated 22nd May, 1973, declined to make a reference on the ground that the services of the appellants had been terminated in accordance with the standing orders of the management and that their petitions u/s 33A of the Act had been rejected by the Industrial Tribunal, Madras, on the basis that there was no dismissal or discharged and that, therefore, they did not consider it necessary to refer the issue in dispute for adjudication. Aggrieved against the said order of the Government the appellants filed the above writ petitions seeking writs of mandamus directing the first respondent to reconsider the question of making a reference of the dispute relating to the non-employment of the appellants.

3. Ismail, J., had earlier, held in Writ Petition No. 1857 of 1967, after an elaborate consideration of the decisions of the Supreme Court in *State of Bombay Vs. K.P. Krishnan and Others*, , *Bombay Union of Journalists and Others Vs. The State of Bombay* and *Another*, and the decision of *Kailasam, J. (as he then was), in Coimbatore District Textile Mills Staff Union v. State of Madras (1967) 33 F.J.R. 474*, that the High Court in exercising its jurisdiction under Article 226 of the Constitution of India, cannot sit in judgment over the order of the Government, as if it were a court of appeal, that it cannot go into the propriety or correctness of the reasons given by the Government for not making a reference, and that it will be justified in issuing a writ of mandamus only if it is satisfied that the action of the Government in not making a reference was not bonafide or that the Government have taken into account totally irrelevant and extraneous considerations. Subsequently, a Bench of this Court (consisting of *Veeraswami, C.J. and Varadarajan, J.*) in *Coimbatore District Textile Mills Staff*

Union (by Secretary) Vs. State of Madras (by Secretary to Government, Industries, Labour and Co-operative Department) and Another, ; has also taken the same view.

4. Following his own judgment rendered earlier, Ismail, J., dismissed the writ petitions holding that the writ petitioners not having established that the order made by the Government was not bona fide or that it is based on irrelevant and extraneous considerations there is no scope for issuing a writ of mandamus directing the Government to reconsider the matter. This view taken by Ismail, J., while dismissing the writ petitions has been challenged in these appeals.

5. Mr. S. Ramaswami, learned counsel for the appellants, contends that the view of the Government expressed in their order on the merits of the case is not correct and that the said view is in conflict with the view expressed by the Supreme Court in certain decisions and, therefore, the Government should be taken to have misdirected itself in declining to make the reference. The further contention of the learned counsel is that a misdirection by the Government has also been recognised by the Supreme Court as one of the grounds for the Court to interfere with the order of the Government declining to make a reference, apart from the two grounds (1) mala fides, and (2) taking into consideration irrelevant or extraneous considerations. The question is whether the said contention of the learned counsel for the appellant is legally sustainable.

6. In *State of Bombay v. K.P. Krishnan* (supra) it has been held that even though the order passed by the Government u/s 12(5) of the Industrial Disputes Act refusing to make a reference is an administrative order, and the reasons given by it may not be justifiable in the sense that their propriety, adequacy of satisfactory character may not be open to judicial scrutiny, nonetheless if the Court is satisfied that the reasons given by the Government for refusing to make a reference are extraneous and not germane, then the Court can issue, and would be justified in issuing a writ of mandamus. In *Bombay Union of Journalists v. State of Bombay*, (supra) the Supreme Court pointed out that if the appropriate Government refuses to make a reference on irrelevant considerations, or on extraneous grounds, or acts mala fide, in such a case a party would be entitled to move the High Court for a writ of mandamus. In *Hochtief Gammon Vs. State of*

Orissa and Others, , the Supreme Court, after reviewing the earlier decisions above referred to, took the view that those are not the only powers of the Courts in relation to the orders of the Government or an officer of the Government who has been conferred with discretionary powers under any statute and that as per the decision of the House of Lords in *Padfield v. Minister of Agriculture Fisheries and Food* [1968] A.C. 997, the Court will be justified in issuing a writ of mandamus if the order of the Government declining to refer the dispute amounts to an outright refusal to consider relevant matters, or the Government has misdirected itself in point of law in wholly omitting to take into account the relevant considerations which will amount to an unlawful behaviour. There cannot be any doubt that after the decision in *Hochtief Gammon Vs. State of Orissa and Others*, , the Court will be justified in issuing a writ of mandamus directing the Government to reconsider the matter if it is found (1) that the Government has acted mala fide, (2) relevant considerations have not been taken into account and (3) that the Government has misdirected itself in law in wholly omitting to take into account relevant considerations. The question is whether any of these grounds have been established by the appellants so as to enable them to seek writs of mandamus from this Court under Article 226.

7. As regards the first ground based on mala fides, though in affidavit filed in support of the writ petitions the appellants had attributed mala fides to the Government in not making a reference for adjudication, no arguments were advanced on those allegations either before the learned single Judge or before us and, therefore, those allegations should be taken to have been given up by them.

8. Then the question is whether the order of the Government can be taken to have been vitiated for the reason that irrelevant considerations have been taken into account or that relevant considerations have not been considered. As already pointed out, one of the reasons given by the Government in their order declining to make the reference is that the termination of the services of the appellants was in accordance with the standing orders of the management. It is not in dispute that the relevant standing order of the second respondent provided that any worker who is continuously absent for 8 days will be deemed to have voluntarily left the

services of the second respondent even though he had applied for leave and the leave has not been sanctioned. There is also no case of the appellants. Whatever be the reason, the appellants had been continuously absent for more than 8 days and, therefore, the standing order stands attracted. The existence of the relevant standing order and its application to the appellants' case cannot be said to be an irrelevant or extraneous matter. The mode of termination of services and the causes leading to it cannot be said to be extraneous. In fact, the question whether the termination of services was by a positive act of the management or by the voluntary act of the workman himself is quite relevant to decide whether there is a non-employment as alleged by the appellants and such a question can be resolved only with reference to the standing orders or other conditions of service applicable to the appellants. If the termination is automatic as per the standing orders of the management in view of the continued absence for 8 days, then whether the management has acted in accordance with the standing order or not will be a relevant factor and it cannot be said to be irrelevant. Now that it has been found that the order of the Government is not vitiated by mala fides or by taking into account irrelevant or extraneous consideration, the only question that remains to be considered is whether the Government can be said to have misdirected itself in law in not taking any relevant material.

9. Mr. Ramaswami, for the appellants, contends that the Supreme Court in a series of cases has held that even though service conditions provide for the automatic termination of service for absence or desertion from duty by an employee, still the employee is entitled to a hearing on the question as to whether the absence or desertion from duty was not voluntary but was due to circumstances beyond his control and that if the absence or desertion from duty is duly explained by the employee, the management cannot treat the employee as having gone out of service on the basis of the automatic clause contained in the service conditions. It is also pointed out by the learned counsel that the Supreme Court has particularly held that in cases of preventive detention of an employee as a result of which he is kept out of his duties, it cannot be taken to be a voluntary act of the employee and that, therefore, the employer cannot take advantage of the employee's detention so as to treat him as having

voluntarily gone out of employment. The learned counsel has referred to the following decisions in support of his stand

10. Calcutta Dock Labour Board Vs. Jaffar Imam and Others, , was a case of detention of a worker of the Calcutta Dock Labour Board under

the Preventive Detention Act, 1950. On the basis of the said detention, his services were terminated by the employer, Dock Labour Board,

without giving him any opportunity to defend. In those circumstances the Supreme Court observed that though a citizen may suffer loss of liberty if

he is detained validly under the Preventive Detention Act, it does not follow that the detention order should also serve indirectly but effectively the

purpose of depriving the said citizen of his livelihood, that the termination of services merely and solely by reason of such detention is obviously and

demonstrably inconsistent with the elementary concept of rule of law on which our Constitution is founded, that it is possible for the person

detained to establish before the disciplinary authority that the detention was not justified and, therefore, no action could be taken on the basis of the

said detention. In this view the Supreme Court held that the order of termination in those cases cannot be sustained. In this case the service

conditions do not provide for automatic termination of service for absence or desertion from duty. The factum of detention under the Preventive

Detention Act was alone taken to be the reason for dismissal without giving the affected employee an opportunity to say that the detention order

was not justified in law. The Supreme Court does not deal with a case where the service conditions provide for an automatic termination of service

if certain events take place.

11. Jai Shanker Vs. State of Rajasthan, , was a case where the employee went on leave on medical grounds. After the expiry of the said leave, he

applied for extension which was not granted but he was discharged under Regulation 13 of the Jodhpur Service Regulations which laid down that

an individual who absented himself without permission for one month or longer after the end of his leave would be considered as having sacrificed

his appointment and could only be reinstated with the sanction of the competent authority. The said order of discharge was challenged by the

employee ultimately before the Supreme Court. It was contended before the Supreme Court by the employer that the appointment stood

13. Hindustan Tin Works Ltd. v. Its Employees (supra) reiterated the view taken in Workmen of Calcutta Dock Labour Board v. Calcutta Dock

Labour Board (supra) and expressed that full back wages would be the normal rule, that the party objecting to it must establish the circumstances

necessitating departure from that rule, and that the discretion must be exercised in a judicious manner by giving cogent and convincing reasons for

refusing the relief of back wages.

14. The decisions of the Supreme Court above referred to and which have been relied on by the learned counsel for the appellant do not touch

upon the question in what circumstances the order of the Government refusing reference could be interfered with by the Court which is be only

question that arises in this case.

15. It is well-established that when the service of a workman stands terminated under the standing orders, the Government is not bound to refer

the dispute arising out of such termination of service for adjudication as the claim will be inconsistent with the agreement between the parties. In

Coimbatore Textile Mills Staff Union v. State of Madras (supra) Kailasam, J. (as he then was), took the view that if the Government was satisfied

that the service of a workman was terminated under the standing orders and refuses to refer the matter for adjudication on the ground that it is

inconsistent with the agreement between the parties, the Court cannot interfere, unless the refusal to refer the dispute was due to want of bona fides

or due to taking into consideration irrelevant and extraneous matters. This decision has been affirmed by a Division Bench of this Court in Writ

Appeal No. 307 of 1967. In The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another, , the Supreme Court had to consider the effect

of a similar standing order as the one in the present-case. In that case Standing Order 8(ii) provided:

Any employee who absents himself for eight consecutive working days without leave shall be deemed to have left the company's service without

notice thereby terminating his contract of service. If he gives an explanation to the satisfaction of the management, the absence shall be converted

into leave without pay or dearness allowance.

Dealing with the scope of the said clause, the Supreme Court pointed out:

...the position under the standing orders appears to be that absence without

leave for more than eight consecutive days can give rise to the termination of the contract of service either under Standing Order 8(ii) or may lead to the penalties awardable for misconduct after a due enquiry is held as required by the relevant standing order. The fact that the same conduct is dealt with in two different standing orders cannot affect the applicability of Standing Order 8(ii) to the present case.

This decision of the Supreme Court lays down that once there is an automatic termination of service by one's continued absence for the period provided in the standing order, then there is no question of the management being forced to take up disciplinary proceedings under the other clauses of the standing order. This decision has been followed by Ismail, J., in *The Mangement of Bhavani Mills Ltd. Vs. The Presiding Officer,*

Labour Court and Another, . The learned Judge has taken the view that the automatic termination of service of an industrial employee remaining absent for more than 8 days consecutively under the relevant standing orders of the establishment cannot be a subject-matter of reference by the

Government u/s 10(1) read with Section 12 of the Industrial Disputes Act. In that case a worker was arrested on suspicion in connection with the murder of his wife on 21st November, 1964, and was released in July, 1965. He reported for duty on 2nd August, 1965. The management did not

permit him to join duty on the ground that by virtue of Clause 11 of the standing orders providing for an automatic termination if the employee had

absented himself for 8 consecutive working days without leave, there was an automatic termination of his service. When the worker raised a

dispute as regards his non-employment, the matter was referred to the Labour Court and the Labour Court held that the dismissal of the employee

was unjustified as the management did not proceed under Clause 19(h) of the standing orders which provides for an enquiry in cases of

misconduct. Quashing the order of the Labour Court, Ismail, J., held that though absence from duty will also be a misconduct and proceedings

could be taken under Clause 19(h) for such misconduct, once there is an automatic termination of service of an employee remaining absent for

more than 8 days consecutively provided for in Standing Order 11, there is no question of dismissal of the employee by the management, and once

there is no dismissal, there is no question of any reinstatement. While rejecting

the contention that 11 of the standing order would apply only to cases of wilful or deliberate absence of an employee but not to cases of involuntary absence, the learned Judge has observed that Standing Order 11 providing for automatic termination of service for continued absence of the employee for 9 consecutive days will operate whether the detention was voluntary or involuntary.

16. In *National Engineering Industries Ltd. Vs. Hanuman*, the Supreme Court again dealt with the similar question where the standing order

provided for a workman losing his lien on his appointment in case he does not join his duty within eight days of the expiry of his leave. In that case

an employee took leave but did not join duty but applied for extension of leave. But the leave was not granted and the management relied on the

relevant standing order providing for automatic termination of service for absence without leave for more than 8 days. The workman raised a

dispute and the Labour Court held that the termination of service in that case without enquiry amounted to denial of natural justice and ordered

reinstatement with full back wages. The Supreme Court, on appeal, took the view that when the standing order provides that the workman will

lose his lien on his appointment in case he does not join duty within eight days of the expiry of his leave, it will mean that his services are

automatically terminated on the happening of the contingency, that it is not understood how a workman who has lost his lien on his appointment can

continue in service thereafter, that the employee's service in that case stood automatically terminated in view of his not reporting for duty after the

expiry of his leave and that, therefore, there is no question of any contravention of Section 33 of the Industrial Disputes Act by the management. In

this case the Supreme Court referred to some of the decisions taking a similar view, viz., *Chandri Bai Uma v. Elephant Oil Mills Ltd. Bombay*

(1951) 2 F.J.R. 235 and *Sahajan v. A. Firpo Co. Ltd.* 1953 II L.L.J. 686 and its earlier decision in *Buckingham and Carnatic Co. Ltd. v.*

Venkatiah (supra). The above decisions lay down the principle that where a standing order provides for automatic termination of service in the

event of the employee absenting himself continuously for more than 8 days, such automatic termination of service resulting from the conduct of the

employee himself cannot be said to be the result of an order of discharge,

termination or dismissal by the management, but can be taken to have been brought about only by the conduct of the employee. In such cases there is no question of any enquiry being held against the employee as per the standing orders treating the absence from duty as misconduct. It is true the latest decision in Hindustan Tin Works Pvt. Ltd. v. Its Employee (1979) 54 F.J.R. 14, dealt with a case of retrenchment of workmen and the Supreme Court held that the employee will be entitled to back wages once the Labour Court orders reinstatement. However, as already stated, that case does not deal with a situation as in this case, where we are at the threshold of the reference (sic) could be refused by the Government. Even assuming that the Supreme Court in the above case has made a distinction between a voluntary detention and an involuntary detention, the facts in this case will indicate that the detention in this case is voluntary, that is, of the employee's own making. The detention was due to the fact that the workers were involved in the land grab movement announced by the Communist Party. Therefore, it cannot be said to be involuntary. The detention in this case is not in any way different from the detention of a person charged of murder or other criminal offences. There cannot be any dispute that the detention in such cases cannot be said to be involuntary that is, it is not his own making. We are, therefore, of the view that the detention in this case is not involuntary and it cannot be said that the detention was brought about by circumstances beyond their control.

17. Having regard to the decision we have reached as per the above discussion that the services of the employees stood automatically terminated and the management did not discharge or terminate their service by any positive act, the further question that will arise is as to whether the persons whose services automatically stood terminated could be considered as workmen as defined in Section 2(s) so as to enable them to raise an industrial dispute u/s 10(1).

18. Mr. M.R. Narayanaswami, learned counsel for the respondents, would say that such persons whose services stood automatically terminated as a result of their own conduct cannot claim to be workmen for the purpose of raising an industrial dispute. The learned counsel has referred to Section 10(1) of the Act and submitted that only workman who has been discharged or dismissed could raise an industrial dispute and the

appellants not being persons who have been dismissed or discharged, they cannot invoke Section 10(1). He also submits that the Government

acting u/s 12 can go into the question as to whether the persons raising a dispute and seeking a reference are workmen or not, and if it comes to

the conclusion that such a person is not a workman as defined in the Act it is well within its powers to refuse the reference. In support of this

submission the learned counsel placed reliance on the decision of the Supreme Court in *Prem Kakar v. State of Haryana* (1976) 40 F.J.R. 51. In

that case the State Government, on receipt of the report of the conciliation officer, had found that the petitioner was not a workman within the

meaning of the Act and, therefore, declined to make a reference stating that it is not a fit case for reference for adjudication. The question was

whether a mandamus could be issued to the Government to make a reference u/s 10(1). The Supreme Court expressed the view that the

Government had jurisdiction to go into the question as to whether the persons seeking a reference are workmen or not, and if the Government

found that they are not workmen, it can decline to make the reference.

19. In this case the reason given by the Government declining to refer the dispute u/s 10(1) is that the appellants' services stood automatically

terminated in view of the standing orders and that there is no dismissal or discharge by the management as has been held by the Industrial Tribunal

in proceedings u/s 33A. Both the reasons are not only relevant but are also factually correct. There is an automatic termination of services as a

result of the appellants' own conduct in view of the standing orders and there is no discharge or dismissal or termination of services by the

management which alone could be the subject-matter of a dispute to be referred. Since the appellants are not persons who have been discharged

or dismissed from service, they cannot seek a reference u/s 10(1). In this view of the matter, we do not think that the Government has misdirected

itself in law in not making a reference. The learned counsel for the appellants does not dispute that the action of the management which is done

strictly in accordance with the standing orders or as per the terms of any settlement between the management and the workmen cannot be the

subject-matter of a reference, in this case there is no action of the management which could be called in question by raising a dispute by the

appellants. It is by virtue of their own conduct they have brought about the termination of their services under the standing orders of the management which had been agreed to by the workmen. Therefore, the Government is right in observing that the termination of services is not by any action of the management but by the operation of the standing orders arising out of the appellants' own conduct. This view of the Government which is based on the factual position cannot be said to be a misdirection in law as alleged by the appellants. We do not see any merit in these writ appeals. The writ appeals are, therefore, dismissed. There will, however, be no order as to costs.