

(1980) 03 MAD CK 0037
In the Madras High Court
Case No : Writ Petition No. 1257 of 1977

K.V. Rajendran

APPELLANT

Vs

Dy. Commissioner of Labour, Madurai and Others

RESPONDENT

Date of Decision : 20-03-1980

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)
Industrial Disputes Act, 1947 — Section 2, 25N, 25Q, 25R

Citation : (1981) 42 FLR 138 : (1981) ILR (Mad) 304 : (1980) 2 LLJ 275 :
(1981) 94 LW 583

Hon'ble Judges : Ramanujam, J;P.K. Sethuraman, J

Bench : Division Bench

Judgement

Ramanujam, J.—The petitioner is a director of Sri Ganapathy Mills Co. Ltd., Tirunelveli, hereinafter referred to as the company and he

seeks a writ of mandamus directing the first respondent herein to forbear from taking any further action under S. 25Q for violation of S. 25N of the

Industrial Disputes Act, hereinafter referred to as the Act on the ground that Ss. 25N and 25Q are unconstitutional.

2. The company is a spinning mill employing more than 300 workmen, In or about the beginning of 1977 it found the posts of two clerks, one store

assistant and one office boy to be superfluous to its needs and as a measure of economy it decided to abolish those posts. By a notice dated 16-1-

77, the company retrenched respondents 2 to 5 holding the posts occupied by them to be surplus in accordance with S. 25F of the Act. Each of

them was given one month's pay in lieu of notice and retrenchment compensation as per S. 25F. Further, by a notice in Form R dated 16-1-77 the

company informed the Government of Tamil Nadu about the retrenchment of the four employees with effect from 17-1-1977 for the reasons set

out in the said notice.

3. The Deputy Commissioner of Labour, the first respondent herein, however, issued a show-cause notice dated 16-4-1977 calling upon the

petitioner and the other Directors of the company to show cause why prosecution should not be launched against each of them under S. 25Q of

the Act for non-compliance with S. 25N(i) of the Act as amended by the Amending Act of 1976. Apprehending that prosecution may be launched

against him, the petitioner has come forward with this writ petition challenging the constitutional validity of S. 25N and S. 25Q of the Act.

4. According to the petitioner, S. 25N is violative of Art. 19(1)(g) of the Constitution as the provisions of the said section are unreasonable as well

as onerous and cannot, therefore, be treated as reasonable restrictions saved by clause (6). It is also his case that S. 25N in so far as it provides

for a prior permission before effecting retrenchment affects the autonomy and discretion of the employer in matters which are legitimately and solely

within its province and as such it is an unreasonable restriction on the right of the employer to carry on his business and that in any event, S. 25N in

so far as it does not lay down any guidelines to control the discretion of the Government in granting or refusing permission for retrenchment, the

power should be taken to be arbitrary and violative of Art. 14 of the Constitution. It is also submitted that in so far as S. 25N applies only to

employers employing more than 300 persons and not to all employers, it is discriminatory in that an employer employing less than 300 persons will

have an absolute discretion to retrench his surplus labour while the employers employing more than 300 persons will have no such discretion and

the discretion in such cases is left to the Government and this classification of employees into two categories has no nexus at all to the objects

sought to be achieved and, therefore, S. 25N introducing such a classification is discriminatory and as such violative of Art. 14 of the Constitution.

5. In the counter-affidavit filed by the Union of India, the 6th respondent herein it is stated that there is nothing unconstitutional or illegal in S. 25N

or 25Q of the Act, that S. 25N does not prohibit an employer from retrenching his workmen but before doing so, he must satisfy the specified

authority about the reasonableness of the proposed action, that the Act being a social welfare legislation the Government is entitled to check up

unreasonable and indiscriminate actions of the employers in the interest of the working class, that Chapter VB of the Act was inserted by the

Amending Act of 1976 with a view to check the incidence of lay-off, retrenchment and closure in larger industrial establishments to avoid labour

unrest resulting from indiscriminate action on the part of the employers and that there is nothing unreasonable in the provisions of S. 25N so as to

make it violative of Art. 19(1) of the Constitution. According to the 6th respondent it is not connect to state that the Government had not laid down

any guidelines for the exercise of the power under R. 25N, that the guidelines are built in the provisions itself, that the specified authority has to give

an opportunity to the employers wherever it considers it necessary that whenever permission is refused the reasons are to be recorded in writing,

that time limit has also been prescribed for granting or refusing the permission that if permission is not granted within the time the employer can take

it for granted that the permission asked for has been granted and, therefore, it should be taken that there are, sufficient guidelines for the exercise of

the power under S. 25N. It is also stated that the guidelines issued to the State Governments contemplate both enquiry and hearing. The distinction

made with regard to establishments employing 300 or more workers and other establishments is not discriminatory as larger industrial

establishments have a capacity to withstand higher financial burden and in view of the larger number they employ they have to show further concern

for their employees and it is not proper to burden smaller industrial establishments with procedural bottlenecks and, therefore, the number of

workmen engaged is the most reasonable criterion for drawing a line of demarcation.

6. It is in the light of the above rival pleadings the question whether S. 25N and 25Q of the Industrial Disputes Act infringes the fundamental rights

of the petitioner under Arts. 14 and 19(1)(g) of the Constitution.

7. Section 25N so far as it is relevant for the present discussion is as follows :

25.N. Conditions precedent to retrenchment of workmen : (1) No workmen employed in any industrial establishment to which this Chapter

applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until, -

(a) the workman has been given three months" notice in writing indicating the

reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; Provided that no such notice shall be necessary, if the retrenchment is under an agreement, which specifies a date for termination of service;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette, and the permission of such Government or authority is obtained under sub-s. (2).

(2) On receipt of the notice under clause (c) of sub-s. (1) the appropriate Government or authority may, after making such enquiry as such Government or authority thinks fit, grant or refuse, for reasons to be recorded in writing, the permission for the retrenchment to which the notice relates.

(3) Where the Government or authority does not communicate the permission or the refusal to grant the permission to the employer within three months of the date of service of the notice under clause (c) of sub-s. (1), the Government or authority shall be deemed to have granted permission for such retrenchment on the expiration of the said period of three months

Section 25Q is as follows :

Penalty for lay-off and retrenchment without previous permission : Any employer who contravenes the provisions of S. 25M or clause (c) of sub-s. (1) of sub-s. (4) of S. 25N shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

The above sections occur in Chapter VB which VB which was introduced by the Amending Act of 1976 and which applies to industrial establishments in which not less than 300 workmen are employed on an average per working day for the preceding twelve months as per S. 25K.

It is not in dispute that Ss. 25N and 25Q apply to the company in question. As per the above provisions of S. 25N an employer employing more

than 300 workmen has to give three months' notice in writing giving the reasons for retrenchment or payment of three months' wages in lieu of

such notice and also issue a notice in the prescribed manner to the appropriate Government or such authority as may be specified by notification in

the Official Gazette and obtain the permission of such Government or authority for retrenchment to which the notice relates. Section 25Q provides

for punishment by way of imprisonment or fine of an employer who contravenes clause (c) of sub-s. (1) or (4) of S. 25N. According to the

petitioner Ss. 25N and 25Q of the Act

are unconstitutional in that they impose unreasonable restrictions on the fundamental right to carry on business guaranteed under Art. 19(1)(g) of

the Constitution.

8. The law relating to retrenchment prior to the introduction of Chapter VB may briefly be traced. Section 2(oo) of the Industrial Disputes Act

defines "retrenchment" as termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment

inflicted by way of disciplinary action. Section 25F occurring in Chapter VA lays down three preconditions for effecting retrenchment of workmen,

(i) the workmen concerned shall be given one month's previous notice indicating the reasons for retrenchment or paid one month's wages in lieu of

such notice, (ii) the workmen have been paid retrenchment compensation calculated at the rate of fifteen days average pay for every completed

year of service and (iii) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified. Section

25G lays down the procedure for retrenchment and it ensures the observance of the rule of last come first go. Section 25H provides that if at any

future time the employer proposes to employ workmen, the retrenched workmen shall have preference in employment. Section 31(2) provides for

a penalty for contravention by the employer of any of the provisions of the Act and the rules made thereunder. Under the said provisions the

employer had the right to retrench his workmen provided retrenchment is justified. This right is, however, subject to the statutory liability to pay

compensation and can be exercised only on certain statutory conditions being satisfied. If an employer retrenches any of his workman unjustifiably

or without following the statutory procedure, the retrenchment will be "illegal"

and the employer will face prosecution under S. 31(2) of the Act.

However, if the employer acting bona fide for reasons of economy effects retrenchment strictly following the statutory procedure the Labour

Courts and the Tribunals cannot sit in judgment over the employer's action. The retrenchment, if bonafide, cannot be interfered with even by the

Labour Courts or the Industrial Tribunals has been held in Parry and Co. Ltd. Vs. P.C. Pal and Others, .

9. The learned counsel for the petitioner submits that the law before the enactment of Amending Act 32 of 1976 with effect from 5th March, 1976

has sufficiently ensured by making stringent provisions to prevent the misuse of the right of the employer to retrench his workmen and ensured its

proper exercise only in genuine and bonafide cases, and any infringement of the provisions relating to the retrenchment has also been made penal.

In view of the then existing law it is said there was no necessity or justification for imposing stringent restrictions on the power of the employer to

retrench his workmen even for bonafide causes by enacting Ss. 25N and 25R and, therefore, these provisions are onerous and unreasonable.

According to the petitioner the restrictions imposed by S. 25N are unreasonable and as such violative of Arts. 19(1)(g) and 14 of the Constitution

because (i) it confers power to give permission for retrenchment on an executive authority instead of a judicial Tribunal and even judicial or

quasijudicial Tribunals like the Labour Courts and Industrial Tribunals cannot go into the propriety of the policy of retrenchment adopted or

followed by the employer as held by judicial decisions but the executive authority has been given the power under S. 25N to grant or withhold

permission to retrench in its discretion. This virtually takes away the employer's right to retrench its workmen for bona fide reasons. The

constitution of an executive authority to control the discretion of the employer to retrench his workmen for bonafide causes is virtually an unjustified

interference with the employer's right to carry on his business. While under the earlier law even quasi-judicial Tribunals like the Labour Courts and

Industrial Tribunals cannot go into the wisdom of the employer in retrenching its workmen for bonafide causes, S. 25N gives an unguided and

arbitrary power to the executive authority to sit in judgment over the employer's decision and such an interference is unreasonable. (2) Against the

decision of the executive authority refusing permission there is no right of appeal provided and, therefore, the employer is without any remedy to

challenge even an arbitrary decision of the executive authority withholding the permission even in bona fide cases. (3) If permission is given,

workers can go by way of an industrial dispute questioning the retrenchment. But if permission is refused, no remedy is available to the employer

who is virtually the other party to the dispute. (4) No procedure for the proper working of S. 25N has been provided either in the Act or in the

rules. (5) Section 25N itself does not give any guidelines for the exercise of the power thereunder by the executive authority.

10. The learned counsel for the petitioner in support of his submission relies on a recent decision of the Supreme Court in *Excel Wear and Others*

Vs. Union of India (UOI) and Others, wherein Ss. 25-O and 25R of the Act imposing similar restrictions and penalties have been held to be

unconstitutional. To find out whether the reasons given by the Supreme Court for striking down Ss. 25-O and 25R will apply here, it is necessary

to consider the scope of the said provisions. Sections 25-O and 25R also occur in Chapter VB which governs all undertaking wherein more than

300 workers are employed. Section 25-O(1) provides that an employer who intends to close down his industrial establishment shall serve a notice

in the prescribed manner, on the appropriate Government stating clearly the reasons for the intended closure of the undertaking and apply for the

prior permission of the appropriate Government to close down the undertaking. Sub-section (2) of S. 25-O provided that where the appropriate

Government is satisfied that the reasons for the intended closure are not adequate and sufficient it can direct the employer not to close down the

undertaking. Section 25-O(5) says that where no application is made or where the permission applied for has been refused, the closure of the

undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time

being in force as if no notice had been given to him. Section 25R provides for a penalty by way of imprisonment for a period not exceeding 6

months or fine extending to Rs. 5,000, or with both for closing down an undertaking without complying with the provisions of S. 25-O(1). The

Constitutional validity of these Ss. 25-O and 25R was challenged on the ground that they are violative of Art. 19(1)(g) of the Constitution.

Upholding the said objection the Supreme Court expressed the view that S. 25-O as a whole S. 25R in so far as it relates to the awarding of

punishment for infraction of the provisions of S. 25-O are constitutionally invalid for the following reasons : Intrinsically on provision of Chapter

VB suggests that the object of carrying on the production can be achieved by the refusal to grant permission although in the Objects and Reasons

of the Amending Act such an object seems to be there, although remotely. It is highly unreasonable to achieve the object by compelling the

employer not to close down in public interest for maintaining production. Although Chapter VB deals with certain comparatively bigger

undertakings, it does not make the law reasonable, though the classification of undertakings for purposes of the provisions of Chapter VB can be

taken to be a reasonable classification for saving the law from violation of Art. 14, it certainly does not make the restriction reasonable within the

meaning of Art. 19(6). The reasonableness has got to be tested both from the procedural and substantive aspects of the law. In cases of bona fide

closures though the reasons given by the employers are correct, adequate and sufficient, yet the permission to close down can be refused on the

ground of public interest because the interest of labour for the time being is bound to suffer as it makes a worker unemployed, but it is not

reasonable to give then protection by compelling the employer to manage the undertaking even when they do not find it safe and practicable to

manage the affairs, that they cannot be compelled to go on incurring losses year after year. There is already a built in safeguard in S. 25FFF to

prevent a mala fide closure and the requirement as to permission before closure which may be refused by the appropriate Government even if the

grounds set out in S. 25FFF are established will amount to an unreasonable restriction. The law may provide to deter the reckless, unfair, unjust or

mala fide closures but cannot prevent the employer from closing down as it is essentially an interference with his fundamental right to carry on the

business. Section 25-O does not provide any guidelines for the exercise of the power to grant or refuse permission. The appropriate Government

may whimsically and capriciously refuse the permission to close down even if a case has been made out for closure. The section does not compel

the appropriate Government to give reasons for the refusal. Any order passed by the authority is not subject to any scrutiny by any higher authority

or Tribunal in appeal or in revision.

11. The learned counsel for the petitioner strongly relies on the said judgment of the Supreme Court and submits that the reasons for invalidating

Ss. 25-O and 25R squarely apply here. It is said that even in S. 25N it has been left to the caprice and whims of the authority to decide one way

or the other in the matter of grant of permission to retrench, and the guidelines have been given, that though S. 25N(2) requires reasons to be given

unlike S. 25-O, so long as there are no guidelines the reasons for refusal may be whimsical and fanciful but such orders cannot be corrected either

by way of an appeal or revision. According to the learned counsel for the petitioner the only difference between Ss. 25N and 25-O is that S. 25N

compels the authority to give reasons and S. 25-O does not make the recording of reasons a statutory necessity, and the mere provision in S. 25N

for giving reasons for refusal without providing the guidelines and without setting up a machinery for rectifying the whimsical and fanciful orders

cannot make the section reasonable if it is otherwise unreasonable.

12. Having due regard to the above decision of the Supreme Court we are of the view that S. 25N suffers from arbitrariness and

unreasonableness. Section 25N or any other provisions of the Act does not provide the guidelines as to how the applications for permission by an

employer for retrenchment have to be disposed of and on what grounds the permission could be refused. It does not provide for any appeal or

revision even against the arbitrary orders of refusal. The provision so far as it imposes such a restriction is unreasonable having regard to the fact

that the employer is forced to continue the employment of personnel who are found to be surplus for his requirements and thus incur unnecessary

expenditure in connection with his undertaking, leading ultimately to curtailment of his profits. Sections 25F, 25G and 25H provide for sufficient

safeguards in the matter of retrenchment of workmen by the employer. In addition to those provisions to compel an employer to continue to

employ surplus labour by refusing permission under S. 25N will be an unreasonable restriction which will violate Arts. 19(1)(f) and (g) of the

Constitution.

13. The learned counsel for the respondents would, however, point out that though there are no specific guidelines provided in the section,

elaborate details which the applicant has to give in the prescribed form for applying for permission will sufficiently guide the authority in the matter

of grant of permission, and, therefore, it cannot be said that S. 25N is bad for the reason that no guidelines are given therein. But the Supreme

Court in the above case has rejected an identical contention put forward on behalf of the Union of India by observing that all the comprehensive

and detailed information given in the application form are of no avail to the employer if the law permits the authority to pass capricious, whimsical

and one sided orders without actually providing guidelines and without providing for rectification of the order by any higher authority in appeal or in

revision. The learned counsel for the respondent submits that a bare possibility that powers may be misused or abused cannot per se make the

power bad and the power having been entrusted to the Government and not to any petty official, the abuse of power cannot be easily assumed.

The power under S. 25N(2) can be exercised not only by the appropriate Government but also by a subordinate authority if authorised by that

Government. The power to grant permission may be exercised by other authorities as well. It is not, therefore, possible, to accept the above

submission as tenable. It has been held in *Dwarka Prasad Laxmi Narain Vs. The State of Uttar Pradesh and Others*, , that an absolute power to

grant or reject a licence without guidelines is unreasonable and as such amenable to constitutional attack. Here in addition to the absence of

guidelines any order passed is not subject to scrutiny by higher authority. We are, therefore, of the view that the principle laid down by the

Supreme Court in the above case while dealing with the validity of Ss. 25-O and 25R will apply here as well.

14. The learned counsel for the respondents would, however, invite our attention to an unreported decision of the Andhra Pradesh High Court in

W.P. Nos. 3086, 6060 and 6161 of 1978 wherein Division Bench upheld the validity of S. 25M. Before that Court the decision of the Supreme

Court above referred to was relied on by the employer but the Court held that S. 25M is not in pari materia with S. 25-O which was the subject-

matter before the Supreme Court, that there are two points of difference between the two Ss. 25-O and 25M that S. 25M requires reasons to be

recorded in writing, that it provides that permission shall be deemed to have been granted on the expiry of the period of two months and that the

two points of difference are substantial, and, therefore, the decision of the Supreme Court cannot be invoked to invalidate S. 25M. With respect,

we are not inclined to agree with the reasoning given by the Bench of the Andhra Pradesh High Court in the said decision, Firstly, a mere provision

requiring reasons to be given cannot be taken to be a sufficient safeguard against arbitrary refusal unless guidelines are set out. Unless guidelines

are there, it is not possible to find out whether the reasons given for refusal are proper and germane. Even in a case where the employer makes out

a good case for retrenchment, it is possible for the appropriate authority to refuse to grant permission by giving some reasons. There is no

provision in the Act to question such whimsical orders by filing appeals or revisions. Therefore, the possibility of permission being withheld

unreasonably cannot be ruled out. The mere provision providing for reasons to be given by the authority cannot be said to be a sufficient safeguard

for the proper exercise of the power to grant or refuse permission. As has been held in Dwarka Prasad Laxmi Narain Vs. The State of Uttar

Pradesh and Others, , the requirement as to the recording of reasons for the order is not a sufficient safeguard as it is hardly effective for there is no

higher authority prescribed in the section who could examine the propriety or the reasons given and revise or review the decision of the authority,

and the reasons to be recorded are only for its personal or subjective satisfaction and not for furnishing any remedy to the aggrieved person.

Secondly, the provision for a deemed permission on the expiry of the two months period is not also a sufficient safeguard against arbitrary refusal

to give permission. The two main and substantial reasons given by the Supreme Court are that no guidelines are available from the statute and that

there is no provision to set right an arbitrary exercise of power. Those defects are present even in Ss. 25N as well as in S. 25M. In the Andhra

Pradesh case the Court has also taken the view that there is a sufficient guideline in S. 2(KKK) of the Act which says when there can be a valid

lay-off. With respect, we are not inclined to agree. As we have already said, even in a case where the employer had made out a case for a valid

lay-off as provided in S. 2(KKK) the authority may refuse the permission and there is no way of challenging that refusal under the Act. Before the

introduction of Chapter VB, even the Judicial Tribunals cannot question the right of management to retrench for bona fide causes. Now under S.

25, an executive authority has been given the power to question the right of the employer to retrench even in bona fide cases, and the power is

quite unguided. We are, therefore, of the view that the reasons given by the Supreme Court for invalidating S. 25-O and S. 25R will also apply

here and S. 25N and S. 25Q are to be taken to be invalid for violation of Art. 19(1)(g) of the Constitution.

15. We cannot, however, agree with the contention of the petitioner that the classification of industries into two groups for the purpose of

application of Chapter VB is violative of Art. 14 of the Constitution. As a matter of the fact the Supreme Court dealing with such a contention in

Excel Wear and Others Vs. Union of India (UOI) and Others, , has observed :

It is no doubt true that Chapter VB deals with certain comparatively bigger undertakings and of a few types only ... It may be a reasonable

classification for saving the law from violation of Art. 14 but certainly it does not make the restriction reasonable within the meaning of Art. 19(6)".

From the above passage it is clear that the Supreme Court has taken the view that the classification of Industrial establishments for the purpose of

Chapter VB is a reasonable classification. The petitioner would put his argument slightly differently and contend that the classification of employers

into two categories, those employing more than 300 workmen and those employing less and curtailing or taking away the right of the employers in

the first category alone to retrench their workmen will violate Art. 14 of the Constitution. Whether it is taken as a classification of undertakings or

of the employers, it is based on the number of persons employed. This classification has sufficient nexus with the object sought to be achieved by

the Act which is to avoid or settle industrial disputes. It cannot be disputed that more the workmen, the possibility of industrial unrest is more.

Therefore, a special provision with reference to larger undertakings or bigger employers to avoid industrial unrest cannot be taken to offend Art.

14.

16. Following the decision of the Supreme Court in Excel Wear v. Union of India (supra) the writ petition is allowed and it is declared that S. 25N

of the Act as a whole and S. 25Q in so far as it relates to the awarding of punishment for infraction of the provisions of S. 25N are constitutionally

bad and invalid for violation of Art. 19(1)(g) of the Constitution. There will,

however, be no order as to costs. Learned counsel for the sixth respondent craves leave of this Court for filing an appeal against the judgment just now rendered before the Supreme Court. However, having regard to the fact that in rendering the said judgment we have merely applied the decision of the Supreme Court, this does not appear to be a fit case for granting leave. Hence the request for leave is rejected.