
(2016) 10 MAD CK 0074

In the Madras High Court

Case No : W.A. No. 1189 of 2012 and M.P. No. 1 of 2012

Larsen & Toubro Employees Union

APPELLANT

Vs

Labour Officer (Conciliation)

RESPONDENT

Date of Decision : 20-10-2016

Acts Referred:

Citation : (2017) 1 LLJ 82 : (2017) 1 LLN 763 : (2017) 1 WritLR 80

Hon'ble Judges : Mr. S. Manikumar and Mr. N. Authinathan, JJ.

Bench : Division Bench

Advocate : Mr. D. Bharatha Chakravarthy for M/s. Sai Bharath and Ilan, Advocates, for the Appellant; Mr. Syed Mustaffa, Government Pleader (Pondy), for the Respondents No. 1

Final Decision : Dismissed

Judgement

Mr. S.Manikumar, J. - Office bearer of M/s. Larsen & Toubro Employees Union, has been transferred by the management of M/s.Larsen & Toubro Limited, Pudhucherry vide proceedings in Ref.No.M-RH/ST-T/AP-1/40343 dated 04.01.2012.

2. According to the petitioner, an industrial dispute has been raised before the office of the Labour Officer (Conciliation), Government of Pudhucherry and the said officer has issued notice. Since transfer has been effected pending conciliation, there is infraction of Section 33 (2) of the Industrial Disputes Act and in such circumstances, writ petition has been filed. However, after going through the conciliation notice and taking note of a decision of the Hon"ble Apex Court in Transport and Dock Workers Union v. Mumbai Port Trust reported in (2011) 2 SCC 575, at paragraph Nos. 3 to 5, the writ Court vide order dated 28.02.2012, dismissed the writ petition. Paragraph Nos.3 to 5 of the order are extracted hereunder.

"3. But, however a perusal of the notice sent by the first respondent conciliation officer did not indicate that there was actually any conciliation pending either

pursuant to the strike notice by the trade union or that the officer has suo motu initiated conciliation proceedings. The notice merely reads that on the basis of the charter of demands placed by the union, the management and the union were directed to appeal either for joint discussion or for conciliation proceedings. The conciliation proceedings cannot be said to be pending unless the conciliation officer initiated conciliation and issued statutory notice expressing his intention to hold conciliation. Even otherwise, the right created here is on the basis of the Industrial Disputes Act. The petitioner must necessarily approach the forum provided under the Act and cannot file the writ petition that too against the private employer.

4. The Supreme Court in issue concerning labour legislation, held that remedy provided under the Industrial Disputes Act has to be availed before coming to this Court vide judgment in Transport and Dock Workers Union v. Mumbai Port Trust reported in (2011) 2 SCC 575 and in paragraph 14 had observed as follows:

"14. In our opinion the writ petition filed by the appellant should have been dismissed by the High Court on the ground of existence of an alternative remedy under the Industrial Disputes Act. It is well settled that writ jurisdiction is discretionary jurisdiction, and the discretion should not ordinarily be exercised if there is an alternative remedy available to the appellant. In this case there was a clear alternative remedy available to the appellants by raising an industrial dispute and hence we fail to understand why the High Court entertained the writ petition. It seems to us that some High Courts by adopting an over liberal approach are unnecessarily adding to their load of arrears instead of observing judicial discipline in following settled legal principles. However, we may also consider the case on merits."

5. Further in normal circumstances, no writ petition will lie against the private company unless the private company is obliged with statutory obligation and that there is clear infraction of statutory obligation by the said company. In this case, whether there is actually conciliation pending or not itself is disputed question of fact. It is not contended that there is no power of transfer of an employee from one station to another station by the employer. If there is power of transfer, then it cannot be said to be alteration of condition of service. In such circumstances, the invocation of Section 33(1)(a) of the I.A. Act for the purpose of maintaining the writ petition itself is doubtful."

3. Though, Mr. D. Bharatha Chakravarthy, learned counsel for the appellant reiterated the very same grounds and further contended that when the conciliation is pending, without getting approval, transfer cannot be effected and therefore, the writ is maintainable, this Court is not inclined to accept the said contentions.

4. In The Praga Tools Corporation v. C.A. Imanu reported in 1969 (1) SCC 585, the Hon'ble Supreme Court, at Paragraph 9, held as follows:

"In our view once the writ petition was held to be misconceived on the ground

that it could not lie against a company which was neither a statutory company nor one having public duties or responsibilities imposed on it by a statute, no relief by way of a declaration as to invalidity of an impugned agreement between it and its employees could be granted. The High Court in these circumstances ought to have left the workmen to resort to the remedy available to them under the Industrial Disputes Act by raising an industrial dispute thereunder. The only course left open to the High Court was therefore to dismiss it. No such declaration against a company registered under the Companies Act and not set up under any statute or having any public duties and responsibilities to perform under such a statute could be issued in writ proceedings in respect of an agreement which was essentially of a private character between it and its workmen. The High Court, therefore, was in error in granting the said declaration."

5. A Hon"ble Division Bench of Bombay High Court in *Roche Anglo French Employees" v. Conciliation Officer*, reported in 1985 (51) FLR 244 = 1987 (II) LLJ 169 (Bom), at Paragraph 12, held as follows:

"12. The learned single Judge in this case, therefore, was right in taking the view that the company had no public duty and mere non-observance of the provisions of Section 33(2) of the Act would not entitle the High Court to issue a writ of mandamus. In the result, the appeal fails and is dismissed. In the circumstances of the case there shall be no order as to costs."

6. In *Workman Employed in The Canteen In S.R.F. Ltd., v. Government of Tamil nadu and others* (SC) reported in 1996 (II) LLN 965, while dealing with the preliminary objection raised by the management that a writ petition was not maintainable for the relief of a writ of mandamus to forbear the company from dispensing with services of canteen employees without prior permission under Section 25-O of the Act, the Apex Court held that if a writ petition was not maintainable ab initio the High Court ought not to have entertained and proceeded to examine the claim on merits and that the writ petition in that case was not maintainable on the private company.

7. In *VST Industries Ltd., v. VST Industries Workers" Union* reported in 2001 (1) SCC 298, at Paragraph 7, the Hon"ble Supreme Court held as follows:

"In *De Smith, Woolf and Jowells Judicial Review of Administrative Action*, 5th Edn., it is noticed that not all the activities of the private bodies are subject to private law, e.g., the activities by private bodies may be governed by the standards of public law when its decisions are subject to duties conferred by statute or when, by virtue of the function it is performing or possibly its dominant position in the market, it is under an implied duty to act in the public interest. By way of illustration, it is noticed that a private company selected to run a prison although motivated by commercial profit should be regarded, at least in relation to some of its activities, as subject to public law because of the nature of the function it is performing. This is because the prisoners, for whose

custody and care it is responsible, are in the prison in consequence of an order of the court, and the purpose and nature of their detention is a matter of public concern and interest. After detailed discussion, the learned authors have summarised the position with the following propositions:

(1) The test of whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a public or a private body.

(2) The principles of judicial review *prima facie* govern the activities of bodies performing public functions.

(3) However, not all decisions taken by bodies in the course of their public functions are the subject matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function:

(a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and

(b) Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic Tribunals) has been agreed by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute."

8. In *Director of Settlements, A.P. v. M.R.Apparao* reported in (2002) 4 SCC 638 : AIR 2002 SC 1598, the Hon'ble Supreme Court held as follows:-

"The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion. They must be exercised along the recognised lines and subject to certain self-imposed limitations. The expression "for any other purpose" in Article 226 makes the jurisdiction of the High Courts more extensive yet the courts must exercise the same with certain restraints and within some parameters."

9. In *Bihari Lal Chauhan v. Director of Factories, U.P. Kanpur and anr.*, reported in 2003 (2) AWC 1069, it is has held that a writ petition against the company is not maintainable. It repelled the petitioner's argument, who was an employee of the company and challenged the transfer order, holding that merely because there are statutory rules governing the services of the petitioner, it does not mean that the respondent company is an instrumentality of the State. If the plea of the learned Counsel for the petitioner is accepted, then logically it will have to hold that a writ can be issued against the private factory owner since every factory is governed by statutory rules i.e the Factories Act, Industrial Disputes Act, etc.

Such a view cannot be countenanced. It is in very exceptional cases, where a public duty is imposed upon the person concerned, that a writ can be issued.

10. In *Dwarka Prasad Agarwal v. B.D. Agarwal* reported in 2003 (6) SCC 230, at Paragraph 28, the Hon''ble Supreme Court, held as follows:

"A writ petition is filed in public law remedy. The High Court while exercising a power of judicial review is concerned with illegality, irrationality and procedural impropriety of an order passed by the State or a statutory authority. Remedy under Article 226 of the Constitution of India cannot be invoked for resolution of a private law dispute as contra distinguished from a dispute involving public law character."

11. In *Federal Bank of India v. Sagar Thomas* reported in 2003 (10) SCC 733, after considering several decisions, at Paragraph 18, the Hon''ble Supreme Court, held as follows:

"18.the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Govt); (ii) Authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature (viii) a person or a body under liability to discharge any function under any Statute, to compel it to perform such a statutory function."

At paragraph 33, the Apex Court in *Federal Bank Ltd.*,''s case (cited supra), further held that,

".....a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don''t find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor puts any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. Respondent''s service with the bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank."

It is also worthwhile to extract the observations made in a decision in *Ajay Hasia v. Khalid Mujib Sehravardi* reported in 1981 (1) SCC 722, considered in *Federal Bank Ltd.*,''s case (cited supra), as follows:

"(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (para 14)

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (para 15)

(3) It may also be a relevant factor .. whether the corporation enjoys monopoly status which is State-conferred or State-protected. (para 15)

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (para 15)

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. (para 16)

(6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of Government. (para 18)"

12. A full Bench of this Court in *P.Pitchumani v. The Management of Sri Chakra Tyres Ltd.*, reported in 2004 (II) LLJ 994, at Paragraphs 12, 13 and 14, held as follows:

"12. Transfers of the employees effected are personal to them and do not involve any public duties. For making out a statutory violation, fact-finding is necessary and the employees have to seek recourse to Section 10 of I.D. Act. There is no embargo on the part of even one employee or a group of employees, even without any reference to any Union, for approaching the Government under Section 10 of ID Act seeking a reference. In the matter of seeking reference, the guiding principles are already there and enunciated in the case of *Rajasthan State Road Transport Corporation* (supra) that reference is the rule and not referring is an exception, unless the Government feels that the averments seeking reference result in abuse of process of law.

13. The apprehension of delay in adjudication by the forums created under ID Act cannot be a ground to invoke Writ jurisdiction. As already stated above, Writ jurisdiction can be invoked only when an action involves a public duty. However, in appropriate cases, the High Court can always fix a time for adjudicating the disputes. In some cases, as the employees have failed to comply with the orders of transfer by joining at the transferred places, they have been dismissed from service without holding any enquiry. In those cases, the matter has to be viewed with some mercy and there is no need for emphasis that justice should always be tempered with mercy.

14. In view of what is stated supra, we hold that,

(i) only such violations under I.D. Act, which involve public duties, are amenable

to Writ jurisdiction under Article 226 of Constitution of India;

(ii) dismissals, transfers and other matters concerning the service conditions of employees governed by I.D. Act, have to be adjudicated only by the forums created under the said statute and not otherwise;

(iii) it is needless to mention that the disputes relating to matters not governed by I.D. Act, have to be resolved only by common law Courts;

(iv) the transfers effected in these cases do not involve any public duties and involve the disputed questions of fact and they should be resolved only before the forums under the I.D. Act;

(v) the appellants/petitioners-employees shall be entitled to seek for reference by filing application under Section 10 of the ID Act within two weeks from the date of receipt of a copy of this order;

(vi) if any industrial disputes are raised, then the concerned forums, be it Labour Court or Industrial Tribunal, shall dispose of the same within four months from the date of receipt of the reference, after affording opportunity to either party;

(vii) without prejudice to the contentions of the appellants/ petitioners-employees, one week time from the date of receipt of a copy of this order is given to the employees to join at the transferred places and in respect to such of those dismissed employees, for non-joining at the transferred places, the delay is condoned if they join as stipulated above and in that event, dismissal orders passed against them disappear automatically; and

(viii) the respondents-managements shall sympathetically consider the payments of wages/salaries to the appellants/petitioners-employees so as to maintain the industrial peace and harmony.

The Writ Appeals and Writ Petitions are disposed of accordingly."

13. In *Binny Ltd., v. V.S.Sadasivan* reported in 2005 (6) SCC 657, the Hon"ble Supreme Court, at Paragraphs 9 to 11 and 29, held as follows:

"9. The Superior Court's supervisory jurisdiction of judicial review is invoked by an aggrieved party in myriad cases. High Courts in India are empowered under Article 226 of the Constitution to exercise judicial review to correct administrative decisions and under this jurisdiction High Court can issue to any person or authority, any direction or order or writs for enforcement of any of the rights conferred by Part III or for any other purpose. The jurisdiction conferred on the High Court under Article 226 is very wide. However, it is an accepted principle that this is a public law remedy and it is available against a body or person performing public law function. Before considering the scope and ambit of public law remedy in the light of certain English decisions, it is worthwhile to remember the words of Subha Rao J. expressed in relation to the powers conferred on the High Court under Article 226 of the Constitution in *Dwarkanath v. Income Tax Officer* 1965(3) SCR 536 at pages 540-41:

"This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution of India with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."

10. The Writ of Mandamus lies to secure the performance of a public or a statutory duty. The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the sovereign to subordinates. In England, in early times, it was made generally available through the Court of King's Bench, when the Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporation which did not duly hold elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of public authorities. The courts always retained the discretion to withhold the remedy where it would not be in the interest of justice to grant it. It is also to be noticed that the statutory duty imposed on the public authorities may not be of discretionary character. A distinction had always been drawn between the public duties enforceable by mandamus that are statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration. In the Administrative Law (Ninth Edition) by Sir William Wade and Christopher Forsyth, (Oxford University Press) at page 621, the following opinion is expressed:

"A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where

there are other adequate remedies. This difference is brought out by the relief granted in cases of ultra vires. If for example a minister or a licensing authority acts contrary to the principles of natural justice, certiorari and mandamus are standard remedies. But if a trade union disciplinary committee acts in the same way, these remedies are inapplicable: the rights of its members depend upon their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases."

Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and that the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as Public Sector Undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. In a book on Judicial Review of Administrative Action (Fifth Edn.) by de Smith, Woolf & Jowell in Chapter 3 para 0.24, it is stated thus:

"A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including: rule-making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the state. Charities, self-regulatory organisations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, it is important for the courts to "recognise the realities of executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted". Non-governmental bodies such as these are just as capable of abusing their powers as is government.

.....

29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel the public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England 3rd ed. Vol. 30, page- 682,

"a public authority is a body not necessarily a county council, municipal corporation or other local authority which has public statutory duties to perform and which perform the duties and carries out its transactions for the benefit of the public and not for private profit."

There cannot be any general definition of public authority or public action. The facts of each case decide the point."

14. In the light of the above decisions, the writ petition filed against a private company, challenging an order of transfer, under Article 226 of the Constitution of India, is not maintainable.

15. Hence, the Writ Appeal is dismissed. No Costs. Consequently, the connected Miscellaneous Petition is closed.