

(1999) 03 BOM CK 0053

In the Bombay High Court

Case No : Writ Petition No. 3949 of 1998

M/s. Modern Foundry and Machine Works Ltd.

APPELLANT

Vs

The State of Maharashtra and others

RESPONDENT

Date of Decision : 16-03-1999

Acts Referred:

Constitution of India, 1950 — Article 19(6)
Industrial Disputes Act, 1947 — Section 10(1), 12, 18(1), 19, 2
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 24(2)

Citation : (1999) 3 ALLMR 305 : (1999) 2 BomCR 756 : (1999) 1 LLJ 1137 : (1999) 2 MhLj 106

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : A.H. Joshi, for the Appellant; Mrs. Geeta Deshpande, A.G.P. and S.K. Shelke, for the Respondent

Judgement

B.H. Marlapalle, J.—Heard the learned Counsel for the respective parties. Rule. Taken up for final hearing forthwith.

2. The petitioner company has a factory at Ahmednagar, which is engaged in the manufacture of Iron Casting of different types and it is an ancillary industry to various automobile & engineering industries. At some point of time, it had become a sick industry and due to revitalization efforts, made by the Board for Industrial Finance and Rehabilitation (B.I.F.R.), under the provisions of the Sick Companies (Special Provisions) Act, 1982, the factory was being run by the new management. The new management has also invested additional funds and therefore, the manufacturing activity was restarted. A settlement came to be signed between the petitioner company and the respondent No. 3 Union, which is registered as a Recognized Union under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as M.R.T.U. & P.U.L.P. Act, 1970 for short). This settlement was entered into u/s 2(p) read with section 18(1) of the Industrial

Disputes Act, 1947 (hereinafter referred to as the I.D. Act for short) on 25-2-1994 and it was to be in operation for the period from 1-1-1994 to 31-12-1996. The settlement had a productivity clause, in which, it was agreed that the workmen would give additional production of 25% and work, as per the specifications given in the schedule and shall not make any dispute or controversy for giving production, as per the norms. The management contended that the workmen and union failed to maintain the commitments so incorporated in the settlement and more particularly, in clause No. 1.3 and therefore, it had to issue several notices during the period starting from 24-3-1994 to 11-8-1996. By these notices, it was brought to the attention of the workmen and the union that the deficiencies attributable to the workmen, in terms of quantity and rejection had, resulted in losses and the union and the workmen had failed to maintain their commitments. It is further contended that as there was no response-the company reached to a conclusion that it was no more viable to continue the manufacturing operation and hence, it issued a notice of lockout on 3-10-1996, u/s 24(2) of the M.R.T.U. and P.U.L.P. Act, 1971 and declared its intention to commence the lockout from the beginning of the 1st shift on 20-6-1996, for the reasons stated in the annexure attached to the said notice.

3. The union retaliated to this notice of lockout as well as the action of lockout by giving notice on 7-11-1996 and terminated the settlement dated 25-2-1994. It is also pertinent to note that before the lockout had commenced, the respondent No. 3-Union had served a notice on the management, demanding withdrawal of the lockout and it also served a second notice dt. 7-11-1996, submitting a fresh charter of demands and requested the management to initiate negotiations in respect of the said charter of demands. In pursuance of these notices and also as a consequence of the lockout that had commenced, the conciliation proceedings were initiated in the office of the Deputy Commissioner of Labour at Nasik, u/s 12 of the I.D. Act. The petitioner-company submitted its reply on 29-1-1997 before the conciliation Officer and inspite of repeated discussions, the conciliation proceedings resulted in submission of a failure report to respondent No. 2. Subsequently, the respondent No. 2 also arranged meetings between the parties to invoice a viable compromise between the parties to restart the factory operations and these efforts proved to be futile. The respondent No. 2, therefore, passed an order on 10-10-1997 u/s 10(1)(d) of the I.D. Act and referred the issue of lockout for adjudication to the Industrial Tribunal at Ahmednagar. The issues referred for adjudication were as under :

(1) What should be an appropriate Scheme of incentives in the Foundry Industry with a view to minimize the rejection percentage

AND

(2) Whether the reasons mentioned in the notice dt. 3-10-1996 are legal, genuine and justified for the lockout which has been effected by the Modern Foundry and Machinery Works Ltd. (Being the Management), Ahmednagar from 20-10-1996. If not, what relief should be granted to the workers ?

4. On the same day, another order came to be passed by the respondent No. 2, u/s 10(3) of the I.D. Act and the lockout commenced from 20-10-1996 was prohibited. As a result of this second order, it became incumbent upon the petitioner-company to withdraw the lockout and restart the manufacturing activities, by allowing the workmen to report for duty. The order of reference for adjudication was further modified/amended by the respondent No. 2 by order dt. 21-10-1997, so far as the first issue for adjudication was concerned. The amended first issue reads as under :

What should be an appropriate Scheme of incentives in the "Modern Foundry and Machinery Works Ltd." with a view to minimize the rejection percentage.

It is thus clear that the earlier issue No. 1, which was with reference to the entire foundry industry as such, came to be confined only to the petitioner-company by the amendment.

5. On or about 3-11-1997, the petitioner submitted a review application before the respondent No. 2, praying for review of the orders passed on 3-10-1996, regarding reference for adjudication as well as prohibition of lockout. At the same time, the management did not take any steps to withdraw the lockout and commence the manufacturing activities. As the review was not decided, the management filed Writ Petition No. 5050/97 before this Court. It appears that after filing of this petition, by letter dt. 18-11-1997, the respondent No. 2 informed the petitioner that it had declined to entertain the review application for want of provisions for that purpose under the I.D. Act. The W.P. No. 5050/97 came to be rejected by this Court by an order dt. 5-12-1997 and the said order was challenged by the petitioner in L.P.A. No. 38/ 1997, which was allowed to be withdrawn by order dt. 29-6-1998, with liberty to file an appropriate petition against the order of reference, which was sought to be reviewed by the petitioner. It is under these circumstances that the instant petition has been filed, challenging the orders dt. 10-10-1997 regarding the reference for adjudication as well as prohibition of lockout.

6. In support of its challenge to these orders, it has been contended by the petitioner-management that :

(a) the reference for adjudication of demands vide order dt. 10-10-1996 was illegal and unjust, in as much as there was no material before the Government to come to a conclusion that it was to make such a reference for adjudication and no reasons were given to make such a reference ;

(b) by the order of prohibition of lockout u/s 10(3) of the I.D. Act, the Government has acted in excess of the exceptional authority and power which it has under Article 19(6) of the Constitution of India and that the management has fundamental right to run a business and it also has a right to stop running such a business and therefore, the said order is violative of such a fundamental right under Article 19(1)(g) of the Constitution of India;

(c) the order passed u/s 10(3) of the I.D. Act is against the principles of natural justice in as much as no hearing was given to the petitioner before the order was passed;

(d) the respondent No. 2 has inherent powers of Review under I.D. Act and the review application submitted on 3-11-1997 ought to have been entertained and the orders passed on 10-10-1996 ought to have been recalled, by invoking such inherent powers.

7. In the case of *M/s. Hochtief Gammon v. State of Orissa & others*, reported in 1969 L.I.C. 1034, a Division Bench of the Orissa High Court had taken a view that an order passed u/s 10(1) of the I.D. Act is an administrative order and hence, it was not justiciable in a Court. This order came to be challenged before the Supreme Court in *Hochtief Gammon Vs. State of Orissa and Others*, and while allowing the appeal, the Apex Court, held that though the order passed u/s 10(1) is administrative in nature, it is justiciable and it is amenable to judicial scrutiny.

In the case of *State of Bombay Vs. K.P. Krishnan and Others*, , while dealing with the powers of the Government u/s 10(1) and section 12(5) of the I.D. Act, the Apex Court has observed thus :

"It is a common ground that a writ of mandamus would lie against the Government if the order passed by it u/s 10(1) is, for an instance, contrary to the provisions of section 10(1)(a) to (d) in the matter of selecting the appropriate authority. It is also a common ground that in refusing to make a reference u/s 12(5) if the Government does not record and communicate to the parties concerned its reasons, therefore, a writ of mandamus would lie. Similarly, it is not disputed that if a party can show that the refusal to refer a dispute is not bona fide or is based on a consideration of wholly irrelevant facts and circumstances, a writ of mandamus would lie. The order passed by the Government u/s 12(5) may be an administrative order and the reasons recorded by it need not be justiciable in the sense that their appropriateness, adequacy or satisfactory character may not be open to judicial scrutiny; in that sense it would be correct "to say that the Court hearing a petition for mandamus is not sitting" in appeal over the decision of the Government. Nevertheless, 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 justiciable in issuing a writ of mandamus even in respect of such an administrative order."

A Constitutional Bench of the Supreme Court, in the case of *State of Madras v. C.P. Sarthy* reported in Supreme Court LLJ I 1950 312 while dealing with the powers of the Government u/s 10(1) of the I.D. Act has held as under :

"It is also desirable that the Government should, wherever possible, indicate the nature of the dispute in order of reference. But, it must be remembered that in making a reference u/s 10(1), the Government is doing an administrative act and

the fact that it has to form an opinion as to the factual existence of the industrial dispute as a preliminary step to the discharge of its function, does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. No doubt, it will be open to a party, seeking to impugn the resulting award to show what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, the factual existence and expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it may not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters."

8. It is, thus, well established in law that the order of reference passed u/s 10(1) of the I.D. Act is an administrative order and the actual existence of an industrial dispute or apprehension of an existence of an industrial dispute or the expediency of making a reference in the circumstances of a particular case are entirely for the Government to decide and, it will not be competent for the Court to hold the reference bad and quash the proceedings, even though such an order of reference is justiciable. The Court has no powers to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters. There are three requirements which must exist for a valid reference and these are :

- (a) the existence of an industrial dispute either u/s 2(A) or 2(k) of the I.D. Act;
- (b) expediency of making reference i.e. whether dispute requires adjudication
AND
- (c) stating of specific points for adjudication.

It is also well settled that existence of an industrial dispute also includes a dispute apprehended by the competent authority, for exercising the powers u/s 10(1) of the I.D. Act and such apprehension, as concluded or arrived at by the Competent Authority in the facts and circumstances of a given case, could not be adjudicated upon by a Court, as an appellate authority on a challenge to the order of reference.

9. Though a management has a right to run a business and to run it in the manner it desires, such rights are always conditioned by the specific statutes. It is also equally true that the management has a right to close down the business, as & when it deems it fit & proper, but such a right is also governed & conditioned by the provisions of special statutes, such as provisions of the I.D. Act or the provisions of the Industrial Employment (Standing Orders) Act, 1946

or the Companies Act, 1956. Exercising powers u/s 10(1)(d) or section 10(3) of the I.D. Act, in a given case, is a discretion of the Competent Authority, having been satisfied in the facts & circumstances of that case, taking into consideration the welfare of the parties to the dispute and also the society at large and one of the prime considerations, in invoking such powers, would be to ensure that the wheels of manufacture must continue to run and generate revenue for the welfare of the parties to the dispute as well as the nation. While making a reference u/s 10(1) of the I.D. Act, the Government has to form an opinion as to the factual existence or apprehension of existence of an industrial dispute, as the preliminary step to discharge its function and so long as the Government is satisfied about the existence of such a dispute and its necessity for adjudication, the order of reference cannot be invalidated on the ground that there was no material before the Government to pass such an order, as rightly observed by the Apex Court in *M/s. Hochtief Gammon (supra)*. The writ Court cannot sit in appeal over the judgment of the Government to make such a reference or the circumstances & reasons for making such a reference. The power to make a reference conferred upon the Government u/s 10(1) of the I.D. Act is to be exercised to effectuate the object of the enactment and hence, not unguided. The rule is to make a reference unless, of course, the dispute raised is totally frivolous one, *ex-facie*. The power conferred is the power to refer and not the power to decide, though it may be that the Government is entitled to examine whether the dispute is *ex-facie* frivolous, not meriting adjudication. An arbitrary refusal to refer is not unchallengeable, as has been held by the Supreme Court in the case of *Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others*, .

10. Section 19 of the I.D. Act deals with the period of operation of settlement/awards and sub-section (2) of the said section provides that a settlement shall be binding for such period as is agreed upon by the parties and if no such period is agreed upon for a period of six months from the date on which the memorandum of settlement is signed by the parties to the dispute and shall continue to be binding on the parties, after the expiry period as aforesaid, until the expiry of two months from the date of notice in writing of an intimation to terminate the settlement given by one of the parties to the other party or parties to the settlement. In the instant case, Clause 11 of the settlement dt. 25-2-1994 stated that the settlement will be in operation for the period from 1-1-1994 to 31-12-1996 and it will be operative even after that period until any party to the settlement terminated it by a specific notice. It is equally true that if a settlement is terminated by either of the parties to the settlement, by giving notice u/s 19(2) of the I.D. Act, the terms of the settlement shall continue to be binding on the parties, even thereafter and until a new settlement is signed between the parties. Termination of a settlement by either of the parties does not mean that the terms of the settlement ceased to exist or the parties to the settlement were not bound by these terms. This view is well recognized by the Supreme Court in the case of *L.I.C. v. Bahadur and other*, 1981(1) A.C.R. 1083

and more recently, in the case of the Management of Karnataka State Road Transport Corporation Vs. KSRTC Staff and Workers' Federation and Another, . In any case, the respondent No. 2 has not referred the charter of demands submitted by the respondent No. 3-Union by the impugned orders and the reference is confined only to the two issues as originally set out in the schedule attached to the reference and specifically amended by the order dt. 21-10-1997.

11. The next question to be considered is whether a hearing was required to be given to the petitioner before the order u/s 10(3) of the I.D. Act was passed, thereby, prohibiting the continuance of the lockout commenced from 20-10-1996. This issue is no more res integra. This Court in the case of Shree Digvijay Cement Company Ltd. v. State of Maharashtra, 1986 2 C.L.R. 272 held that a plain reading of section 10(3) of the Act makes it clear that the powers conferred under it could be exercised by the State Government provided an industrial dispute has been referred to the tribunal & the dispute which is referred is in respect of the action of the management in suspending the work & declaring a lockout and such a dispute has a direct connection with the action of the management. This Court further held that it was not necessary to issue a show cause notice before exercising the powers u/s 10(3) of the I.D. Act. Similarly, in the case of Harish Vijaykumar Khaitan and another Vs. State of Maharashtra and others, this Court held that the Government while exercising the powers u/s 10(3) of the I.D. Act, acts with a view to prevent illegal strikes or lockouts in order to maintain industrial peace, whenever the Government acts, it acts administratively and it would not be reasonable and prudent in such situations to issue a show cause notice and hear the concerned parties. This Court further held that it is difficult to accept the contentions that the principles of natural justice are violated in not hearing the parties and if no show cause notice is issued to the parties before passing such prohibitory orders. In short, the rule of "audit alteram partem" is not applicable to the orders passed u/s 10(3) of the I.D. Act.

12. The principle conditions to exercise the powers u/s 10(3) of the I.D. Act are:

(i) an industrial dispute should have been referred to a Board, Labour Court, Tribunal or National Tribunal u/s 10 of the said Act.

AND

(ii) on the date of the reference, there should be a strike or lockout in existence in connection with such dispute.

If these two conditions are in existence, the appropriate Government has the power to prohibit the continuance of such strike or lockout. The words "appropriate Government may order" indicate that unless appropriate Government makes the prohibitory order, the strike or lockout will not be automatically prohibited. The power, therefore, has to be exercised by the Government in its discretion. The effect of this sub-section (3) of the section 10 of the I.D. Act is that even though a strike or lockout, when commenced was

legal, it cannot remain legal if continued, after the prohibitory order under it has been made. On a true construction of section 10(3), the position of law is that when there is a strike in connection with the number of demands, some of which have been referred for adjudication to the adjudicating authority, the Government has a right to prohibit the continuance of the strike by invoking that provision. When the strike was commenced, it was in connection with the demands in dispute and after the reference of some of the demands for adjudication, the strike does not cease to be in connection with the referred dispute. This gives the right to the Government to prohibit the continuance of the strike. The law, as applicable to a situation of strike, is equally applicable to a situation of lockout, as they are the two sides of the same coin.

The discretion of the Government u/s 10(3) of the I.D. Act is not unchallengeable or arbitrary because it provides for exercise of discretion for attaining the objects of the Act; which are, the settlement of the industrial dispute, promotion of industrial peace, maintenance of operations and benefit of the community in general. It cannot, be therefore, assumed that appropriate Government will abuse its powers even though the power was wide and was to be exercised in its discretion. In view of the objects of the I.D. Act, the discretion vested in the appropriate Government cannot be said to be unfettered and uncontrolled. The Legislature while giving the power to the appropriate Government to prohibit the continuance of the strike and lockouts, could not have foreseen itself further contingencies and emergencies that would arise and to specifically narrate it in the I.D. Act.

Even though such contingences or provisions have not been specifically provided for, it cannot be, therefore, accepted that giving pre-hearing to the parties concerned is necessary before the appropriate Government exercises its powers u/s 10(3) of the I.D. Act, and the absence of such a pre-hearing, cannot be fatal to the order passed u/s 10(3) of the I.D. Act.

13. With respect to the issue of inherent powers of review under the I.D. Act, the Supreme Court in the case of *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*, , has held that the expression "Review" is used in two distinct senses viz. (1) a procedural review which is either inherent or implied in a Court or tribunal to set aside a palpably erroneous order passed under misapprehension by it and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. The Apex Court further held that in the later case, no review lies on merits, unless a statute specifically provides for it and obviously, when a review is sought due to procedural defects, the inadvertent error committed by the tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process and such power inheres in every Court or tribunal. Therefore, it is clear that what has been considered by the Supreme Court in *A.N.Z. Grindlays Bank's* case (*supra*) was the issue regarding review of powers of the Court or tribunal under the I.D. Act and not the powers of the Government in reviewing its administrative orders

passed u/s 10 of the said Act. It is well recognized that the Government has inherent powers for correction, modification or for addition of parties to a dispute and therefore, the order passed u/s 10(1)(d) of the I.D. Act can be corrected, modified, if there is an error apparent in impleading a party which ought to have been impleaded or in referring a particular subject for adjudication as has been done in the instant case, by an order dt. 21-10-1997. But, that does not mean that the Government has powers to recall an order of reference for adjudicating and say that the reference was not warranted.

14. In the case of M/s. Hochtief Gammon (supra), the appropriate Government had exercised its powers u/s 10(1) of the Act and referred the demands of contract labour for payment of bonus for adjudication by the Industrial Tribunal. On such a reference, the employer-contractor filed an application u/s 18(3)(b) of the I.D. Act before the Industrial Tribunal, praying for the principal employer company as a party to the proceeding. This application was rejected and which gave rise to file a writ petition before the High Court of Orissa and this petition was also dismissed. The Supreme Court while allowing the SLP upheld the contentions that the Government had the power to amend the reference on an application filed by either of the parties to the reference for adding the necessary party or parties for proper and effective adjudication of the demands. Consensus of the judicial opinion is that while the appropriate Court, acting u/s 10 of the I.D. Act, it will have power to add or amplify a matter already referred for adjudication, will have no power to supersede or cancel the old reference in such a way as to effect a withdrawal of the reference validly referred. But, there is no bar to amend a pending reference by a subsequent notification as has been done in the instant cases.

15. By way of review application dt. 3-11-1997, the petitioner company has impliedly urged before the competent authority that there was no case of making a reference u/s 10(1)(d) of the I.D. Act and the reference should have been refused. Even if it is presumed that the Company wanted some additional issues to be added in the reference, as suggested by it, it is open for the company to agitate such issues before the Tribunal during the course of adjudication of the original reference and to convince the tribunal that the reference should be answered by considering the issues raised by the management in its written statement before the tribunal. It is, therefore, difficult to accept the contention that it was incumbent upon the respondent No. 2 to entertain the review application and therefore, the contention of the Government that it had no powers to review its order passed u/s 10(1)(d) of the I.B. Act, in the facts & circumstances of this case does not warrant interference by this Court. The powers of this Court under Article 227 of the Constitution of India are limited and a writ of certiorari cannot be issued for quashing and setting aside the impugned orders, so long as the view taken by the authority below is a possible view.

16. The order u/s 10(1)(d) of the I.D. Act, referring the two issues for adjudication by the Industrial Tribunal, has been passed in exercise of

administrative powers and it cannot be faulted with by this Court, by exercising its powers under Article 227 of the Constitution of India, on the ground that the Government did not give any reason to pass such an order. So long as the Government has reached to a subjective satisfaction that an industrial dispute existed, it required adjudication and specific points for adjudication have been framed the order of reference needs no interference. There is no dispute that the lockout had commenced, the same was resisted by the union, the workmen & the parties were at variance regarding the production/productivity standards, the workmen also have a right to claim wages though it is for the tribunal to decide whether the claim for wages is required to be allowed or not and it is for the management to make out a case to satisfy the adjudicator that the demand for wages for the period of lockout is not legal and justified. It is, therefore, held that both the orders referred by the Government vide impugned orders dt. 3-10-1997 required adjudication and thus, challenge to such orders must be negatived and the same is hereby negatived. An order prohibiting the continuance of lockout or strike passed u/s 10(3) of the I.D. Act cannot amount to be violative of fundamental rights of the management as enshrined under Article 19(1)(g) of the Constitution of India.

17. For the foregoing reasons, the petition is devoid of merits and the same is hereby rejected. Rule is discharged but without any order as to cost.

18. Petition dismissed.