
(2008) 05 SHI CK 0009
In the High Court Of Himachal Pradesh

Ravi Dutt and Others

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 16-05-2008

Acts Referred:

Industrial Disputes Act, 1947 — Section 25N, 25O

Citation : (2008) 3 LLJ 795 : (2008) 2 ShimLC 324 : (2009) 2 SLR 430

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—The brief facts necessary for the adjudication of this petition are that the members of the petitioners" union were engaged by respondent No. 3 since 1983-84 onwards. Respondent No. 3 had moved an application to respondent No. 1 seeking permission of closure of the factory under Sub-section (1) of Section 25-O of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act for brevity sake) on 4.4.2003. It was specifically mentioned in the application dated 4.4.2003 that number of employees whose services were to be terminated on account of the closure of the unit was 149. The application was rejected on 9.5.2003 whereby the permission was not accorded for the proposed closure of the unit. Respondent No. 3 i.e. management approached the State Government on 15.12.2003 u/s 29(N) of the Act seeking permission for retrenchment of 50 workmen out of 141 workmen with effect from 15.3.2004. The application was decided on 12.12.2004 whereby the State Government accorded permission to retrench 32 workmen out of 141 workmen. A settlement was arrived at between the workmen and the management on 8.2.2004. It appears from the record that a settlement was arrived at between individual workman and the management u/s 18(1) of the Act on 31.1.2005. A communication to this effect was sent by the management to the State Government on 8.2.2005. The Labour Inspector, Dehra issued a notice to respondent No. 3 on 15.2.2005 bringing to its notice that the workmen have been retrenched with intention to close down the factory without complying with

the provisions of the Act and the Rules framed thereunder. The management sent a reply to the notice on 21.2.2005 primarily contending therein that the workmen had tendered their resignations voluntarily. It was also highlighted that there was no settlement with the union and the matter was settled with the individual workman. An inquiry was also conducted by the Labour Inspector and he submitted his report to the Labour Officer on 22.3.2005. The copy of the same is Annexure R-3/H. The management had also filed CMP Bearing No. 641 of 2008 to reinforce their plea that Chapter-V-B of the Act was not applicable for the reasons that less than 100 workmen were engaged in the factory. It also appears from the pleadings of the parties that a review petition was also filed by the management against the order dated 9.5.2003 but the same was withdrawn.

2. Mr. Ajay Sharma, Advocate appearing on behalf of the petitioners had strenuously argued that the purported settlement dated 31.1.2005 is contrary to the mandatory provisions of Section 25-N of the Act. He also contended that the management had to seek the permission of the State before effecting the retrenchment of the workmen and the factory in question has been closed by the management without seeking the mandatory permission of the State u/s 25(O) of the Act. He further contended that since the settlement is against the public policy and is also in violation of the mandatory provisions of the Act, this will not bind the workmen even though they might have accepted the compensation money paid to them. He also submitted that the workmen cannot waive off their legal and fundamental rights even though they may have accepted the money paid to them by the management.

3. The learned Additional Advocate General had supported the decisions taken by the State Government from time to time.

4. Mr. S.S. Kaushal, Advocate appearing on behalf of the management had strenuously argued that the Writ petition is not maintainable by a non-registered union. He also contended that once a settlement has been arrived at between the workmen and the management u/s 18(1) of the Act, the same is binding between the parties and neither of the parties can be permitted to wriggle out of the same. He further submitted that Chapter-V-B of the Act was not applicable in the present case since according to him less than 100 workmen were engaged in the factory. He also argued that the petitioners had alternative remedy to approach the machinery provided under the provisions of the Act and the petition in the present form is not maintainable. He lastly argued that the workmen had tendered their resignations which were accepted by the management and their dues have already been paid. He denies that the factory has been closed down without the permission of the Government.

5. I have heard the learned Counsel for the parties and perused the record carefully.

6. At the first instance the Court has to address to the preliminary objection taken by Mr. S.S. Kaushal, Advocate with regard to maintainability of the writ

petition in the present form by the union. Mr. Ajay Sharma, Advocate had strenuously argued that the petitioners have been authorized by way of resolution dated 6th March, 2005 to take necessary steps for the redressal of grievance of the members of the union. He has referred to Annexure P-1/E dated 6.3.2005. The question whether the writ petition can be filed only by a registered union or not is no more res Integra in view of the law laid down by the Hon''ble Supreme Court of India.

7. It is settled law by now that it is not necessary that for espousal of the grievance of the members of the union, it should be registered. Their Lordships of the Hon''ble Supreme Court have held in Newspapers Ltd., Allahabad Vs. U.P. State Industrial Tribunal and Others, , that cause of workman can be taken up by unregistered association of workmen. Their Lordships have held as under:

Then it was urged that the association which sponsored the case of respondents 3 to 5 was an unregistered body and that made the reference invalid. Both the Courts have held, and rightly, that it is not necessary that a registered body should sponsor a workman's case to make it an industrial dispute. Once it is shown that a body of workmen, either acting through their union or otherwise had sponsored a workman's case it becomes an industrial dispute.

8. Their Lordships of the Hon''ble Supreme Court have held in State of Bihar Vs. Kripa Shankar Jaiswal, , that for a dispute to constitute an industrial dispute it is not a requisite condition that it should be sponsored by a recognized union and that all the workmen of an industrial establishment should be parties to it. Their Lordships have held as under :

It would be an erroneous view if it were said that for a dispute to constitute an industrial dispute it is a requisite condition that it should be sponsored by a recognised union or that all the workmen of an industrial establishment should be parties to it. A dispute becomes an industrial dispute even where it is sponsored by a union which is not registered as in the instant case or where the dispute raised is by some only of the workmen because in either case the matter falls within Section 18(3)(a) and (d) of the Act. See also Newspapers Ltd., Allahabad Vs. U.P. State Industrial Tribunal and Others, . The settlement of March 18, 1954, arrived at during the conciliation proceedings was signed by the Central Secretary and members of the executive committee of the Union though it was unregistered at the time. We cannot therefore give our accord to the decision that the settlement of March 18, 1954, was not a settlement binding between the parties.

9. Similarly, their Lordships of the Hon''ble Supreme Court in Pradip Lamp Works, Patna v. Workmen of Pradip Lamp Works, Patna and Anr. 1970 LLJ 507, have held that dispute relating to the dismissal of 10 workmen espoused by union which was not registered but in which substantial number of workmen are members held to be an industrial dispute. Their Lordships have held as under:

There is, thus clear evidence of these cases having been espoused by the new

union or, being yet unregistered, by a substantial number of workmen. The fact that these cases were not taken up by the recognized union does not mean that they were not industrial disputes. There are decisions of this Court which have laid down that espousal of a dispute before a reference is made even by a minority union, having a membership of substantial number of workmen, is sufficient to make such a dispute an industrial dispute. [See *Workmen of Indian Express V. Management* (Civil Appeal No. 1733 of 1967, dated 26 November 1968).] It is, therefore, impossible to say that these disputes were individual and not industrial disputes and that for that reason the impugned reference was incompetent.

10. In *Chairman, State Bank of India and Another Vs. All Orissa State Bank Officers Association and Others*, , their Lordships of the Hon"ble Supreme Court have held that unregistered union is not a superfluous entity and it is entitled to meet and discuss with the management/employer about grievances of any individual member relating to his service conditions and to represent an individual member in domestic or departmental inquiry and proceedings before Conciliation Officer or Labour Court or Industrial Tribunal. Their Lordships have held as under:

With growth of industrialization in the country and progress made in the field of trade union activities, the necessity for having multiple unions in an industry-has been felt very often Taking note of this position, power has been vested in the management to recognize one of the trade unions for the purpose of having discussions and negotiations in labour related matters. This arrangement is in recognition of the right of collective bargaining of workmen/employees in an industry. To avoid arbitrariness, bias and favouritism in the matter of recognition of a trade union, rules have been framed laying down the procedure for ascertaining which of the trade unions command support of majority of workmen/employees. Such procedure is for the benefit of the workmen/employees as well as the management/employer since collective bargaining with a trade union having the support of majority of workmen will help in maintaining industrial peace and will help smooth functioning of the establishment Taking note of the possibility of multiple trade unions coming into existence in the industry, provisions have been made in the rules conceding certain rights to non-recognized unions Though such non-recognized unions may not have the right to participate in the process of collective bargaining with the management/employer over issues concerning the workmen in general, they have the right to meet and discuss with the employer or any person appointed by him on issues relating to grievances of any individual member regarding his service conditions and to appear on behalf of their members in any domestic or departmental enquiry held by the employer or before the conciliation officer or labour Court or industrial tribunal. In essence the distinction between the two categories of trade unions is that while the recognized union has the right to participate in the discussions/negotiations regarding general issues affecting all workmen/employees and settlement if any arrived at as a result of such discussion/

negotiations is binding on all workman/employees whereas a non-recognized union cannot claim such a right but it has the right to meet and discuss with the management/employer about the grievances of any individual member relating to his service conditions and to represent an individual member in domestic inquiry or departmental inquiry and proceedings before the conciliation officer and adjudicator. The very fact that certain rights are vested in a non-recognised union shows that the Trade Union Act and the rules framed thereunder acknowledge the existence of a non-recognised union. Such a union is not superfluous entity and it has a relevance in specific matters relating to administration of the establishment. It follows, therefore, that the management/ employer cannot outrightly refuse to have any discussion with a non-recognized union in matters relating to service conditions of individual members and other matters incidental thereto. It is relevant to note here that the right of the citizens of this country to form an association or union is recognized under the Constitution in Article 19(1)(c). It is also to be kept in mind that for the sake of industrial peace and proper administration of the industry, it is necessary for the management to seek co-operation of the entire work force. The management by its conduct should not give an impression as if it favours a certain Sections of its employees to the exclusion of others which, to say the least, will not be conducive to industrial peace and smooth management. Whether negotiation relating to a particular issue is necessary to be made with representatives of the recognized union alone or relating to certain matters concerning individual workmen, it will be fruitful to have discussion/negotiations with a non-recognized union of which those individual workmen/employees are members, is for the management or its representative at the spot-to decide. At the cost of repetition, we may state that it has to be kept in mind that the arrangement is intended to help in resolving the issue raised on behalf of the workmen and will assist the management in avoiding industrial unrest. The management should act in a manner which helps in uniting its workmen/employees and not give an impression of a divisive force, out to create differences and distrust amongst workmen and employees Judged in this light the contents of paragraph 2 of the staff circular No. 91 of 1987 clearly give an impression that the management has decided at the threshold before being aware of the nature of the dispute raised that its representatives should have no discussion at all with office bearers of the non-recognized association. Such a circular is not only contrary to the express provision in Rule 24 but also runs counter to the scheme of the Trade Union Act and the rules.

11. In view of the definite law laid down by the Hon"ble Supreme Court, the Court is of the firm opinion that the present writ petition is maintainable, on behalf of the petitioners for the enforcement of their legal and fundamental rights.

12. The writ petition has been primarily filed for the enforcement of Sections 25-N and 25-O of the Industrial Disputes Act, 1947. It is imperative for the State to enforce these provisions scrupulously. Since the State has failed to enforce these

provisions, as discussed hereinabove, the writ petition is maintainable for enforcing the provisions of the Industrial Disputes Act, 1947.

Now, the Court has to consider the manner in which the matter has been dealt with by the State Government while enforcing the provisions of the Act. The management had sought permission for the closure of the factory on 4.4.2003, which was declined by the State Government on 9.5.2003. The review petition was withdrawn on 27.5.2003. An application was preferred by the management u/s 25-N of the Act on 15.12.2003 seeking retrenchment of 50 workmen. The same was allowed on 12.2.2004 whereby 32 workmen were permitted to be retrenched. It is the case of the management that though the permission was accorded by the State Government to retrench the workman, but in fact they were not retrenched. Thereafter a settlement was arrived at between the workmen and the management on 8.2.2004: The management as per the documents placed on record had entered into settlement with the workmen on 31.1.2005 u/s 18(1) of the Act. The details of the settlement were sent to the State Government on 8.2.2005 by the management. Mr. Ajay Sharma, Advocate has argued that the settlement dated 31.1.2005 is against the public policy and in violation of Section 25-N of the Act. It is evident that the management has done indirectly which it could not achieve directly i.e. purported closure of the factory. The management has been denied the closure of the factory on 9.5.2003 by the State Government and the review petition was also withdrawn by the management on 27.5.2003. The State Government has only permitted the retrenchment of 32 workmen on 12.2.2004.

13. The question whether settlement could be arrived at in violation of Sections 25-N and 25-O of the Act is no more *res integra* in view of the law laid down by their Lordships of the Hon'ble Supreme Court in *Oswal Agro Furane Ltd. and Another Vs. Oswal Agro Furane Workers Union and Others*, . Their Lordships have held as under:

A bare perusal of the provisions contained in Sections 25-N and 25-O of the Act leaves no manner of doubt that the employer who intends to close down the undertaking and/or effect retrenchment of workmen working in such industrial establishment, is bound to apply for prior permission at least ninety days before the date on which the intended closure is to take place. They constitute conditions precedent for effecting a valid closure, whereas the provisions of Section 25-N of the Act provides for conditions precedent to retrenchment; Section 25-O speaks of procedure for closing down an undertaking. Obtaining a prior permission from the appropriate Government, thus, must be held to be imperative in character.

A settlement within the meaning of Section 2(p) read with Sub-section (3) of Section 18 of the Act undoubtedly binds the workmen but the question which would arise is. would it mean that thereby the provisions contained in Sections 25-N and 25-O are not required to be complied with? The answer to the said question must be rendered in the negative. A settlement can be arrived at

between the employer and workmen in case of an industrial dispute. An industrial dispute may arise as regard the validity of a retrenchment or a closure or otherwise. Such a settlement, however, as regard retrenchment or closure can be arrived at provided such retrenchment or closure has been effected in accordance with law. Requirements of issuance of a notice in terms of Sections 25-N and 25-O, as the case may, and/or a decision thereupon by the appropriate Government are clearly suggestive of the fact that thereby a public policy has been laid down. The State Government before granting or refusing such permission is not only required to comply with the principles of natural justice by giving an opportunity of hearing both to the employer and the workmen but also is required to assign reasons in support thereof and is also required to pass an order having regard to the several factors laid down therein. One of the factors besides others which is required to be taken into consideration by the appropriate Government before grant or refusal of such permission is the interest of the workmen. The aforementioned provisions being imperative in character would prevail over the right of the parties to arrive at a settlement. Such a settlement must conform to the statutory conditions laying down a public policy. A contract which may otherwise be valid, however, must satisfy the tests of public policy not only in terms of the aforementioned provisions but also in terms of Section 23 of the Indian Contract Act.

It is trite that having regard to the maxim "*ex turpi causa non oritur actio*", an agreement which opposes public policy as laid down in terms of Sections 25-N and 25-O of the Act would be void and of no effect. The Parliament has acknowledged the governing factors of such public policy. Furthermore, the imperative character of the statutory requirements would also be borne out from the fact that in terms of Sub-section (7) of Section 25-N and Sub-section (6) of Section 25-O, a legal fiction has been created. The effect of such a legal fiction is now well-known. [See *Om Hemrajani Vs. State of U.P. and Another*, and *Maruti Udyog Ltd. v. Ram Lal and Ors.* 2005 (1) SCALE 585.

The consequences flowing from such a mandatory requirements as contained in Sections 25-N and 25-O must, therefore, be given full effect. The decision of this Court in *P. Virudhachalarn* (supra) relied upon by Mr. Puri does not advance the case of the Appellant herein. In that case, this Court was concerned with a settlement arrived at in terms of Section 25-C of the Act. The validity of such a settlement was upheld in view of the first proviso to Section 25-C of the Act. Having regard to the provisions contained in the first proviso appended to Section 25-C of the Act, this Court observed that Section 25-J thereof would not come in the way of giving effect to such settlement. However, the provisions contained in Sections 25-N and 25-O do not contain any such provision in terms whereof the employer and employees can arrive at a settlement.

14. Their Lordships have held that an agreement which is opposed to the public policy u/s 23 of the Indian Contract Act and as per the provisions of Sections 25-N and 25-O of the Act would be void and of no effect. Their Lordships have

further held that the provisions contained in Sections 25-N and 25-O do not contain any such provision in terms whereof the employer and employees can arrive at a settlement. It was mandatory for the management to seek the necessary permission u/s 25-O before the intended closure was to take place. It is condition precedent to seek the State's permission before effecting the retrenchment u/s 25-N of the Act.

15. In the present case, there is sufficient material on record to come to a conclusion that respondent No. 3 had engaged more than 100 workmen to attract Chapter-V of the Act. It is clear from Annexure P-2 that the number of employees whose services were to be terminated on account of closure was 149. Similarly, it is clear from Annexure P-4 dated 12.2.2004 that respondent No. 3 had sought permission for retrenchment of 50 workmen out of 141 workmen from 15.3.2004. Even in Annexure R-3/H, the Labour Inspector had given the details of 132 workmen which according to him had arrived at a settlement with the management. Since more than 100 workmen were engaged by respondent No. 3-management, Chapter V-B of the Act was applicable. Respondent No. 3 has not sought prior permission of the State Government before entering into a settlement with the workmen under Sections 25-N and 25-O of the Act. The settlement arrived at between the workmen and the management dated 31.1.2005 is declared void ab initio and against the public policy. The workmen are entitled to get the benefit in terms of Section 25-O of the Act. It is clear from condition No. 8 of the agreement that the management had pre-supposed that there is a closure of the unit that is why it was stipulated in this condition that if the factory starts its production again, the workmen can apply afresh seeking employment. There cannot be any closure of the factory without complying with the mandatory provisions of Section 25-O of the Act. A valid closure is a sine qua non of such type of settlement i.e. dated 31.1.2005. Similarly Section 25(N) of the Act provides, namely, (i) three months' notice in writing indicating the reasons for retrenchment or the workman has been paid in lieu of such notice and (ii) prior permission of the appropriate Government. These conditions are mandatory. A settlement arrived at in violation of Sections 25-N and 25-O of the Act will not be binding on the workmen as noticed above.

16. Mr. S.S. Kaushal, Advocate had strenuously argued that once the workmen had accepted the lump sum compensation, they cannot agitate their rights before this Court. This contention has been raised merely to be rejected. Their Lordships of the Hon'ble Supreme Court in *Nar Singh Pal Vs. Union of India and Others*, have held that the receipt of the money by the workmen will not preclude them to enforce legal and fundamental rights. Their Lordships have held as under:

The Tribunal as also the High Court, both appear to have been moved by the fact that the appellant had encashed the cheque through which retrenchment compensation was paid to him. They intended to say that once retrenchment compensation was accepted by the appellant, the chapter stands closed and it is

no longer open to the appellant to challenge his retrenchment. Thus, we are constrained to observe, was wholly erroneous and was not the correct approach. The appellant was a casual labour who had attained the "temporary" status after having put in ten years" of service. Like any other employee, he had to sustain himself, or may be, his family members on the wages he got. On the termination of his services, there was no hope left for payment of salary in future. The retrenchment compensation paid to him, which was only a Deager amount of Rs. 6,350/-, was utilised by him to sustain himself. This does not mean that he had surrendered all his constitutional rights in favour of the respondents. Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution. As pointed out earlier, the termination of the appellant from service was punitive in nature and was in violation of the principles of natural justice and his constitutional rights. Such an order cannot be sustained.

17. In the present case the State Government has miserably failed to enforce the provisions of the Act in its letter and spirit. The underline objective of the Act is to maintain industrial peace by striking balance between the management and the workmen. It was incumbent upon the State Government to see that once the permission has not been accorded to the management to close down the factory on 9.5.2003 how the settlement has been arrived at between the management and the workmen. Similarly, the State Government was informed by the management of the settlement dated 31.1.2005 on 8.2.2005, but the State Government has failed to look into whether the same is in conformity with Sections 25-N and 25-O of the Act or not. The role of the State was definitely to inquire into whether the purported settlement is in conformity with law or not as well as to see that it has not violated the public policy. It appears from the pleadings of the parties that the State knew that the management had closed down the factory and has achieved something indirectly, which it could not achieve directly by entering into settlement with the workmen on 31.1.2005. It is in this backdrop that the Labour Inspector had sent a notice to the management on 15.2.2005 highlighting the following points:

1. You have not served a notice in the prescribed manner on the appropriate Government (State Government, Labour Commissioner, Conciliation Officer and Employment Exchange of the area) stating clearly the reason for the intended closure before the closure of the factory (Section 25-FFA and Rule 81-A).
2. You have not applied for prior permission before the effective date of intended closure to the State Government. (Section 25-O).
3. You have not sent a copy of settlement arrived at between the management and the union of the workers to the State Government, the Labour Commissioner, the Conciliation Officer of the area (Rule 62 (u)).

18. The management filed a reply to the same on 21.2.2005. An inquiry was

Held by the Labour Inspector as is evident from his report dated 22.5.2005. In the report it is nowhere mentioned that the settlement dated 31.1.2005 was in conformity with Sections 25-N and 25-O of the Act. In his entire report, he has stressed upon that 132 workmen had entered into settlement with the management and had voluntarily resigned. The Labour Inspector has failed to discharge his statutory duties contemplated under the Industrial Disputes Act, 1947.

19. Though the management had also filed CMP No. 641/2008 for placing additional material on record to substantiate its plea that it had engaged less than 100 workmen, but in view of the observations made herein above, it is clearly established that more than 100 workmen were engaged by respondent No. 3. The management has failed to prove that less than 100 workmen were engaged as projected by it in CMP No. 641/2008.

20. This petition was admitted by this Court on 29.8.2005. This Court had not reserved any liberty to the respondents to take up the plea of alternative remedy at the time of admission of the writ petition. In view of this, the Court will not relegate the petitioners to alternative remedy as canvassed by Mr. S.S. Kaushal. It is also settled law by now that once the petitioner has been admitted and proceedings are pending for considerable period for adjudication, it will not be appropriate for the Courts to relegate the parties to alternative remedy.

21. Consequently, the writ petition is allowed. The purported settlement dated 31.1.2005 is quashed and set aside. The workmen are held entitled to the benefits flowing u/s 25-O of the Industrial Disputes Act, 1947. They will be deemed to be in continuous employment of respondent No. 3 i.e. management. The amount, which has been received by them towards compensation, will be adjusted towards their future wages. There shall be no orders as to costs.