

(1957) 09 PAT CK 0024

In the Patna High Court

Case No : Misc. Judicial Case No. 110 of 1957

Sitapore Sugar Works Ltd.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 10-09-1957

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Industrial Disputes Act, 1947 — Section 11(2), 2

Citation : AIR 1958 Patna 120 : (1958) 2 LLJ 95

Hon'ble Judges : Ramaswami, C.J.; Raj Kishore Prasad, J

Bench : Division Bench

Advocate : A.B.N. Sinha and Ramji Sharan, for the Appellant; Govt. Advocate, Ranen Roy, Tara Kumar Das and L.S. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Raj Kishore Prasad, J.—The applicant, Sitalpore Sugar Works Ltd., Garaul, Muzaffarpur, moves for a writ in the nature of certiorari to quash the award of respondent 2, Chairman, Industrial Tribunal, Bihar, dated the 29th November 1956, Annexure C to the applicant's affidavit, in respect of respondents 3 to 7.

2. The applicant is a public limited Company, and, it carries on the business of manufacture of sugar from sugarcane, and, it owns a vacuum pan sugar factory at Garaul. On the 21st January 1955, a notification, Annexure A to the petitioner's affidavit, was issued by respondent 1, the State of Bihar, referring an industrial dispute between the managements of seven different sugar factories in the State of Bihar and their workmen including the petitioner's factory, and, its workmen, including respondents 3 to 7 also, to the adjudication of respondent 2.

This notification was, however, superseded by a second notification which was issued by the State of Bihar, respondent 1, on the 12th March 1955, which is Annexure B to the petitioner's application. By this notification, issued in exercise of the powers conferred by Section 7, read with Sub-section (1) of Section 10 of the "Industrial-Disputes Act, 1947 (Act XIV of 1947), hereinafter referred to as

the "Act", the number of factories involved was reduced by two, and, the industrial dispute referred to the matters specified in Annexure A to the notification which was to the following effect:--

"Whether the workmen named in Annexure B are entitled to reinstatement with compensation or any other relief?"

In this industrial dispute, the petitioner and its workmen, respondents 3 to 7, were also concerned, and, their dispute was referred to respondent 2, who was constituted one-member Industrial Tribunal for adjudication of this dispute.

3. The Industrial Tribunal, respondent 2, gave its award on the 29th November 1956, which is Annexure C to the petitioner's affidavit, with respect to respondents 3 to 7 also. It set aside the punishment of dismissal from service inflicted by the management, the petitioner, on each of these respondents and gave its directions which it thought fit and proper in respect of each of them.

4. The petitioner, by his application, under Articles 226 and 227 of the Constitution, has obtained a rule from the High Court against the respondents to show cause why the directions of the Tribunal, in respect of respondents 3 to 7, be not quashed by an appropriate writ, on the ground that they are illegal and contrary to the Certified Standing Orders which applied to the respondents 3 to 7.

5. I will deal with the three sets of workmen who are respondents 3 to 7 separately hereafter.

6. Respondents 3 to 5 (1) Mohammad Islam, (2) Ram Briksh, Fitter, and (3) Ram Narain. The case of these three workmen has been dealt with by the Tribunal in para. 16 of its award. The petitioner dismissed them from service for their absence on the 1st of March 1953, and for participation in an illegal strike. The Tribunal on the materials before it, came to the conclusion that these three workmen. no doubt, were present in the demonstration; but there was no satisfactory evidence that they took any leading part in the demonstration, and, as such, they could not be penalised for their mere presence in the crowd; and, even their presence in the crowd itself would have been only a matter of speculation, but for their explanation, (Ex. P).

The Tribunal, therefore, considered that the punishment of dismissal inflicted on them, in the circumstances, was too severe. The Tribunal however, took the view that their conduct in defying the authority of the management and absenting themselves deliberately under a plan to paralyse the work in the factory has to be taken notice of; and, accordingly, the Tribunal directed that they should be reinstated but without compensation with effect from the date the award becomes enforceable, but the period of their employment would not cause any break in their service and would be treated as leave without pay.

7. Mr. A.B.N. Sinha, in support of the rule, has argued that on the finding of the Tribunal that these three workmen took part in an illegal strike, and, that they absented themselves on the 1st March 1953, their reinstatement was not proper

and legal. Mr. Sinha has, therefore, contended that their dismissal was in accordance with the Certified Standing Orders of the Company, which governed both the parties, and, as such, the Tribunal's award granting them reinstatement was unwarranted and unjustified.

8. There are separate Standing Orders for employees and for operatives. What acts or omissions shall be treated as misconduct with regard to a strike has been defined in Clause L(1) (b) of the Standing Orders for Employees, and, the same has also been defined in Clause M(1)(b) of the Standing Orders for Operatives. Clause L of Standing Orders for Employees corresponds to Clause M of Standing Orders for Operatives. Mr. Sinha conceded that to the present workmen, Standing Orders for Operatives would apply. Clauses M(1)(b), M(2), M(4) and M(5), on which reliance has been placed by the parties, and, which are material for our purpose, may be quoted below:

"M. Suspension or dismissal for misconduct pending enquiry into alleged misconduct and the acts or omissions which constitute misconduct.

1. The following acts or omissions shall be treated as misconduct:

X X X X X

(b) Striking work either singly or with others or inciting others to strike work in contravention of the provisions of the Industrial Disputes Act, 1947, or any other enactment or Rule in force, for the time being.

X XX X X

2. Any operative who is adjudged by the manager or management on examination of the man, if present, and of the facts, if absent, to be guilty of misconduct is liable to be summarily dismissed under the Standing Order M (4) or alternatively to be suspended for a period not exceeding 7 days. He may also be liable to reduction in or forfeiture of privileges (including leave and holidays) provided for operatives by the mills, subject to the Payment of Wages Act.

X XX XX

4. No order of dismissal shall be made unless the operative concerned is informed of the alleged misconduct and is given an opportunity to explain the circumstances alleged against him.

5. In awarding punishment under this Standing Order, the manager shall take into account the gravity of the misconduct and the previous record, if any, of the operative and any other extenuating or aggravating circumstances that may exist.

X X X X"

With regard to the charge against these three workmen of having taken part in an illegal strike, the case of the petitioner is that the State of Bihar, in exercise of its powers conferred by Sub-clause (vi) of Clause (n) of Section 2 of the Act issued a notification on the 27th October 1952, which is Annexure D to the

petitioner's application, declaring the sugar industry in the State of Bihar to be a Public Utility Service for a period of six months from the 1st November 1952.

The strike, which took place on the 1st March 1953, in the factory of the petitioner, was illegal, because it took place without any previous notice to the applicant or the manager of the factory and, as such, it was an illegal strike as provided in Section 22(a) of the Act; and, the Standing Orders for Operatives M(1) (b) read with Clause M(2) provide that striking work, either singly or with others in contravention of the provisions of the Act amounted to misconduct of the workman for which the person guilty of such misconduct was liable to be summarily dismissed under Clause M(4) of the Standing Orders for Operatives.

The petitioner, therefore, contended that the Tribunal, in granting the reinstatement to these three workmen, obviously, overlooked the relevant provisions of the Certified Standing Orders for Operatives, and, therefore, his decision was vitiated. Mr. Sinha has further contended that the direction of the Tribunal, that the period of their unemployment would not cause any break in their service, and, that it would be treated as leave without pay, is also illegal and in contravention of the provisions of the Act.

9. Mr. Sinha, in support of his argument, relied on Sections 2(q) and 2(eee) of the Act, which define "strike" and "continuous service".

10. "Strike" has been defined in Section 2(q) as below:--

"2. Definitions -- In this Act, unless there is anything repugnant in the subject or context, --

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(q) "Strike" means a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment";

"Continuous service" has been defined by Section 2(eee) of the Act as below:--

"2. Definitions -- In this Act, unless there is anything repugnant in the subject or context, --

X XX X X

(eee) "Continuous service" means uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman."

11. Section 22 of the Act deals with "Prohibition of strikes and lock-outs". Section 22(1)(a), with which we are concerned, is in the following terms:--

""22. Prohibition of a strike and lock-out --

(1) No person employed in a public utility service shall go on strike in breach of contract.

(a) without giving to the employer notice of strike, as hereinafter provided, within six weeks before striking; or

x x x x x"

Mr. Sinha, therefore, argued relying on section 2(q) read with Section 22(1)(a) of the Act that the cessation of their work by and absence of these workmen on the 1st March, 1953 and their joining in the strike was obviously illegal and this act of theirs under Clause M 1 (b) of the Standing Orders for Operatives amounted to misconduct for which under Clause M 4 of these standing orders, they were liable to be dismissed, and, therefore, they had rightly been dismissed by the petitioner.

Mr. Sinha, further, argued relying on Section 2(eee) of the Act, that interruption in service due to an illegal strike cannot amount to and does not mean "continuous service", and, therefore, the Tribunal's direction to treat the unemployed period of these workmen as continuous service is illegal being in contravention of Section 2(eee) of the Act.

12. Mr. Ranen Roy, however, in reply to the last contention of Mr. Sinha, submitted that Section 2(eee) was introduced in 1953 which applied to Chapter VA which dealt with "Layoff and retrenchment", and, which was introduced along with Section 2(eee), for the first time, in 1953 by Act 43 of 1953, and, therefore, Section 2(eee) will not apply to the present case, because "Strike and Lock-outs" are dealt with in Chapter V in which one of the sections is Section 22.

13. In my opinion, even if Section 2(eee) applies, even then, it does not help the petitioner here; rather it goes against it.

14. From the definition of "continuous service" in Section 2(eee) of the Act, it appears that it not only means uninterrupted service, but it also includes service which may be interrupted merely on account of the reasons given therein, and, one of such reasons is "a strike, which is not illegal". Reading, therefore, Section 2(q), along with Section 2(eee), it is clear that if a strike is not illegal, then in that case interruption in service of a workman merely on account of such strike, which is not illegal, will be considered to be "continuous service".

15. What is ""illegal strike" has been defined in Section 24 of the Act, according to which a strike shall be illegal if (i) it is commenced or declared in contravention of Section 22 or Section 23; or (ii) it is continued in contravention of an order made under Sub-section (3) of Section 10 of the Act.

16. In the present case, however, there is no finding of the Tribunal that the strike was illegal. The Tribunal has simply found that these three workmen were merely present in the crowd, and, that there was no satisfactory proof of their having taken any leading part in the demonstration. It has further observed that:

"Even if the strike was illegal, as pointed out on behalf of the labour, mere participation in an illegal strike could not be a ground for dismissal."

The Tribunal has further mentioned that none of the witnesses examined on behalf of the Management did name any of these three workmen as being responsible for any of indiscipline in the crowd; and; as a matter of fact, they were not named by any of the witnesses of the Management at all, and that but for their explanation (Ext. P) their presence in the crowd itself would have been only a matter of speculation. In these circumstances, it cannot be held that these three workmen took part in an illegal strike within the meaning of Standing Orders for Operatives under Clause M 1 (b) so as to be liable to the punishment of dismissal provided in Clause M 2 of the Standing Orders.

The argument of Mr. Sinha was based on the assumption that the Tribunal had found that these three workmen took part in an illegal strike, but the foundation of this argument disappears on a correct reading of the award itself. In my opinion, therefore, there is no substance in the contention of Mr. Sinha that these workmen had been rightly dismissed by the Management, and, that the Tribunal's direction that these workmen would be reinstated, and, the period of their unemployment would not cause any break in their service, and, that it would be treated as leave without pay was illegal.

It may be mentioned here that it was within the discretion of the Tribunal to consider, on the materials before it, and, in the circumstances of the case, whether dismissal of these three workmen was proper or as to what punishment should, in the circumstances of the case be inflicted on these workmen, taking into consideration the gravity of the misconduct. In my opinion, therefore, the award of the Tribunal with respect to these three workmen cannot be challenged on the ground of the alleged illegality at all.

17. Respondent 6: A. Wahid. The case of A. Wahid has been dealt with by the Tribunal in paragraph 8 of its award. The charge against him was that he was guilty of habitual absence from duty, in that, on one occasion he was absent from duty from 22nd February, 1954 to 4th April, 1954 without leave, and, again on another occasion from 6th May, 1954, when he left the station without permission and sent an application praying for five months' leave a day earlier, but before that application could be dealt with, he left the station without permission, and, only on notice of termination of his service on that account he wrote back saying that he was entitled to one month's notice or pay on the termination of his service.

According to the Management, it acted bona fide, and, the punishment meted out by it to him in dismissing him from service, in the circumstances, was quite justified. Another charge against him was of misconduct. It was alleged that in a dispute between his two sons-in-law, one of whom was named James, this workman repeatedly told the Manager that he would see James when he went outside the factory compound, and, this utterance amounted to misconduct.

The Tribunal, on the materials on the record, regarding the first charge that he was guilty of habitual absence from duty, found that this workman availed of the leave on the oral orders of the Manager, and, therefore, he was absolved from this charge of habitual absence from duty. But on the second charge of misconduct, the Tribunal found that in view of the fact that the dispute between the two sons-in-law of the workman did not occur in the factory premises and that no overt act in that incident is assigned to this workman, it was difficult to support the punishment inflicted by the Management on this workman.

The Tribunal, however, came to the conclusion that the utterance of the workman before the Manager that he would see James when he went out of factory was undoubtedly an act of impertinence, but the Tribunal took the view that this incident has also to be considered in the light that he was speaking so in respect of his own son-in-law, which shows that it was merely an outburst of anger, and, he never meant to any that utterance into execution.

The Tribunal further found that no enquiry was held in the case of this workman before passing the order of dismissal as required by Clause M 4 of Standing Orders for Operatives. Taking all these circumstances into consideration, the Tribunal considered that the order of dismissal passed against this workman was unjustified, and, therefore it set it aside and held that the workman was entitled to reinstatement, and, for the period of his idleness he was allowed 50 per cent. of his wages, and, his absence was directed not to cause any break in his service.

18. The first ground taken by Mr. Sinha for attacking the validity of this part of the award is that the Tribunal had no jurisdiction to entertain the dispute regarding A. Wahid, because he was not a "workman" within the meaning of the Act. He relied on Section 2(s) of the Act which defines "workman" as below:

" "workman" means any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward and includes, for the purposes of any proceedings under this Act in relation to an industrial dispute, a workman discharged during that dispute, but does not include any person employed in the naval, military or air service of the Government."

19. This objection of want of jurisdiction of the Tribunal was, however, not taken before the Tribunal, and, it was not raised either in the written statement or in the Written argument submitted by the petitioner. Mr. Ranen Hoy, who appeared for the workman, as well as the learned Government Advocate, who appeared for respondents 1 and 2, therefore, contended that this plea of want of jurisdiction in the Tribunal to decide the dispute in respect of A. Wahid respondent 6, should not be entertained at this stage by this Court on an application under Article 226, or Article 227, when no foundation for it was laid before the Tribunal itself. In my judgment, this objection taken on the part of the respondents is correct, and must be upheld.

20. The High Court cannot allow this point to be taken for the first time here,

when no such plea was taken earlier before the Tribunal, whose jurisdiction is challenged now. It is well settled by the decision of the Supreme Court in *United Commercial Bank Ltd. Vs. Secretary, U.P. Bank Employees Union and Others*, , that where the question of jurisdiction is not a pure question of law, but it is mingled with facts, a party cannot be allowed to raise it for the first time in an appeal to the Supreme Court from the decision of the Appellate Tribunal.

In my opinion, the ratio of this case will apply a fortiori here also. The point to jurisdiction was not taken by the petitioner before the Tribunal. Had it been raised, the Tribunal could have investigated whether the respondent Wahid was a "workman" within the Act.

21. As regards the contention of Mr. Sinha, for the petitioner, that this workman was guilty of misconduct in view of Standing Orders for Employees, it was conceded that this workman was Tally Clerk from May, 1951, getting a salary of Rs. 100/- per month, and, therefore, he was governed by Standing Orders for Employees. Mr. Sinha relied on Standing Orders for Employees on Clause L. 1 (e), which is as follows :

"L. Suspension or Dismissal for Misconduct pending enquiry into alleged Misconduct and the acts or omissions which constitute Misconduct and the acts or omissions which constitute Misconduct.

1. The following acts or omissions shall be treated as misconduct:

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(e) Habitual absence without leave or absence without leave for more than three consecutive days."

It was conceded by the petitioner that the case of Wahid was a case of dismissal, and not termination of service. The charge of the Management that he was found guilty of habitual absence from duty was found not proved, because the Tribunal found that the main cause of annoyance to the Management was the quarrel which took place between the two sons-in-law of this workman, who were living in the factory's quarters, and, probably on a complaint by one of his sons-in-law, named James, the Manager called Wahid to explain.

Wahid was examined before the Tribunal on 18th August, 1955, and, he was also cross-examined by the petitioner, and, after a consideration of the materials, the Tribunal accepted the evidence of Wahid that he was given oral orders by the Manager to go on leave pending written orders, and, the Manager, though examined in this case, did not speak a word contrary to it. The charge of the Management, therefore, that he was guilty of habitual absence from duty, and, therefore, he was liable to be dismissed, had not been found proved.

22. Mr. Sinha, for the Management, further contended that award of compensation only was more appropriate relief which should have been granted to the respondent Wahid, and, as such, his reinstatement with the direction that

his absence will not cause any break in his service was unjustified and not proper. In my opinion, this contention is not well founded.

23. The Tribunal had absolute discretion in the matter to maintain the punishment of dismissal inflicted by the Management on Wahid or to set it aside and to pass such order or give such directions as it liked in the circumstances of the case, and in view of the gravity of offence. Such a discretion could not be interfered with on a writ application.

24. Mr. Ranen Roy relied on a decision of the Supreme Court in *United Commercial Bank Ltd. Vs. Secretary, U.P. Bank Employees Union and Others*, in which it was held that whether a discharged employee is to be reinstated in service, or whether compensation would be an adequate relief, is a matter for the discretion of the Tribunal and when it has exercised it in any particular way, it will not be interfered with in appeal unless there are reasons for such interference. In my opinion, the above principles will all the more apply to a writ application.

25. I may mention that the common law right of an employer to discharge or dismiss an employee, or what is popularly known in some countries as "the right to hire and fire," has been subjected to statutory restrictions. Some such restrictions are to be found in the Act under consideration.

26. In order to protect an employee against vindictive or capricious action on the part of the management, it is open, under the Act, to the Tribunal, to examine the findings of the Management on the charge of misconduct under the Act or the Standing Orders to assure itself that there is evidence to support the finding. If the Tribunal finds that it ought not to interfere with the findings of the management that the charge has been proved, even then the Tribunal must next consider whether it should interfere with the punishment awarded by the management.

The Tribunal, therefore, has the absolute discretion to decide what punishment, in the circumstances of each particular case, should be meted out to the guilty workman. Under the Act, the question whether dismissal of the workman was proper, or, whether such a discharged workman should be reinstated in service or whether compensation would be an adequate and appropriate relief, was a matter of discretion for the Tribunal alone. If the Tribunal is of opinion that the punishment is so unjust that remedy is called for in the interest of justice, it can, after scrutiny of the circumstances and materials placed before it, decide what the appropriate punishment should be.

The Tribunal considered the workman's reinstatement and wages at 50 per cent. for the period of his idleness and his absence not to cause any break in service to be proper, and, with this discretion the High Court, therefore, cannot interfere, and finds no reason for interference with the exercise of that discretion, in my judgment, therefore, the award of the Tribunal with regard to this workman also cannot be challenged on the ground of the alleged illegality.

27. Respondent No. 7: Ram Briksh, Planner. His case has been dealt with by the Tribunal in paragraph 6 of its award. The charge against this workman was that he was neither retrenched nor discharged, But he was asked to join his duties in the season which he did not do and left the employment voluntarily. The workman examined himself, and he stated that when there was an assault on Faujdar Singh, he, apprehending assault, absented himself on and from 8th June, 1953, and went away from the factory. He admitted that he left the factory on 8th June, 1953, without permission.

He further admitted in his cross-examination that he received a letter dated 24th July, 1953, from the Management on 4th August, 1953, to rejoin, but he sent a reply to it. He was asked to report himself to duty which he never did, and, ultimately, his name was struck off from the register with due notice to him. The Tribunal, after a consideration of the materials, came to the conclusion that the Management gave opportunities to this workman to join his duties but, for reasons best known to him, he absented himself for a long period without any satisfactory reason.

The Tribunal, therefore, came to the conclusion that it was a case of gross carelessness of this workman, and, therefore, it was a fit case for his reinstatement, and, accordingly, he directed re-employment of this workman from the current season. Mr. Sinha contended that the charge of the Management was that this employee was guilty of habitual absence without leave or absence without leave for more than three consecutive days and as provided by Standing Orders for Employees, Clause L 1 (e), quoted earlier, this act of the workman amounted to misconduct for which he was liable to even dismissal, but in his case only his name had been struck off from the register, and, therefore, his employment had been terminated, and, such a termination of his employment was justified by Standing Orders.

He referred to Standing Orders for Employees, Clause K (3) which corresponds to Clause L (3) of the Standing Orders for operatives, and, both are in the same terms. Standing Orders for Operatives, Clause L (3), which deals with termination of employment, is in these terms :

"L. Termination of Employment.

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(3) The reasons for the termination of service shall be recorded by the Manager and shall be communicated to the operative if he so desires at the time of discharge, unless such communication in the opinion of the Manager may directly or indirectly lay the mills and the Manager or person "signing the communication open to criminal or civil proceeding at the instance of the operative or otherwise."

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Mr. Sinha challenged this part of the award on the ground that the order of the Tribunal was perverse, and, therefore, it was liable to be set aside. In my

opinion, no doubt, the Management, with the knowledge and experience of the problems, which confronted in the day to day working of the concern, ordinarily ought to have the right to decide what the appropriate punishment should be, but its decision is liable to be reversed if the Tribunal is of the opinion that the punishment is so unjust that remedy is called for in the interest of justice.

In my opinion, in the circumstances of the case, it cannot be said either that the order of the Tribunal is perverse, or, that it exercised discretion illegally in ordering re-employment of this workman from the current season, in view of its finding that the case of this workman was not a case of misconduct but a case of only gross carelessness. In my opinion, therefore, the award of the Tribunal with respect to this workman also cannot be said to be illegal or not in accordance with the provisions of the law.

28. For the reasons given above, in my judgment, the award of the Tribunal, Annexure C, cannot be said to be illegal, and, therefore, it cannot be quashed on the grounds urged by the petitioner.

29. In the result, the application fails, and the rule is discharged as no case has been made out for issuing any writ either Under Article 226 or Article 227, of the Constitution, for quashing the award of the Tribunal dated 29th November, 1956, in respect of Respondents 3 to 7.

30. The application is, accordingly, dismissed. The petitioner will pay Rs. 200/- as costs to respondents 3 to 7 only.

Ramaswami, C.J.

31. I agree.