

(2006) 12 KL CK 0077
In the High Court Of Kerala
Case No : W.A. No. 2050 of 2006

St. Thomas Missions Hospital

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 19-12-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 17B

Citation : (2006) 12 KL CK 0077

Hon'ble Judges : V.K. Bali, C.J;S. Siri Jagan, J

Bench : Division Bench

Advocate : Bechu Kurian Thomas, for the Appellant; Ashok M. Cherian and M.R. Sabu, Govt. Pleaders, for the Respondent

Final Decision : Allowed

Judgement

S. Siri Jagan, J.—Management in I.D. No. 16/2000 on the files of the Labour Court, Kollam, the preliminary order in which was under challenge in the writ Petition at their instance, is the Appellant herein, the learned Single Judge having dismissed the writ Petition. The facts necessary for the disposal of the writ appeal are as under.

2. The Government referred the following issue for adjudication of the Labour Court:

Whether the dismissal of M.C. Jacob and P.M. Jacob, X-ray Technicians is illegal?

The said workmen were dismissed after conducting a domestic enquiry. Therefore, the Labour Court considered the question as to whether the enquiry is valid or liable to be set aside. The Labour Court found that on an overall consideration of the entire facts and circumstances and the evidence of the enquiry officer, the enquiry is liable to be set aside. The learned Single Judge did not decide the question on merits but relying on certain Judgments of the Supreme Court, held that the impugned order being only a preliminary order, the

Petitioner should challenge the same while challenging the ultimate award to be passed in the I.D at the appropriate stage and therefore reserving such right, the writ Petition was dismissed. This Judgment is under challenge in this writ appeal.

3. The first question we have to decide is as to whether this Court should interfere with the preliminary order of the Labour Court or leave it to the Appellant to challenge that also if the ultimate award to be passed by the Labour Court is also against the management. Learned Counsel for the Appellant would submit that a bare perusal of the reasoning given by the Labour Court for setting aside the enquiry would be sufficient to show that those reasoning was per se perverse and if the Labour Court is allowed to proceed further on the basis of such a perverse preliminary order, the management would be put to severe hardship as they would be forced to go through the entire process of adducing evidence against the workmen before the Labour Court, even though the findings of the Labour Court was based on totally unsustainable reasons. Therefore, learned Counsel for the Appellant argues that this is an eminently fit case where this Court should interfere at the preliminary stage itself.

4. On the other hand, citing various decisions of the Supreme Court, learned Counsel for the 2nd Respondent would submit that it is settled law that this Court should not interfere with preliminary orders passed in industrial disputes and should relegate the parties to challenge the present order also while challenging the final award itself, if occasion arises for the same.

5. We are of the opinion that there should not be any hard and fast rules regarding challenge of preliminary orders in industrial disputes. It is true that the Supreme Court had in several decisions, held that parties should not be allowed to challenge preliminary orders and they should be left to challenge that order also while challenging the final award. But, we are of opinion that that proposition of law is not for universal application without any exception in all cases. Just because the management is in a better bargaining position viz-a-viz the workmen, that alone is no good ground for denying managements also their rights. When the management has conducted a domestic enquiry in strict compliance with the principles of natural justice, we cannot hold that the hands of this Court are tied until the final award comes. In this connection, we also note that a learned Single Judge of this Court has in the decision of Dy. General Manager, S.B.I. Vs. Roy Samuel, , had taken such a view. Paragraphs 14 to 16 of that decision are noteworthy for the purpose which we extract below:

14. I do not think it is necessary at this juncture for me to go to the merits of the contentions as above, but will have to deal with the preliminary objection that the Writ Petition is not maintainable. The principle is not absolute that a preliminary order is beyond the purview of challenge. In a later decision, Anr. Division Bench of the Madras High Court, themselves, referring to the decision of the Supreme Court in The Cooper Engineering Limited Vs. Shri P.P. Mundhe, had held as follows:

There can be no doubt that the proposition of law canvassed by the learned Counsel for the Appellant and we make it clear that it is open to the Appellant to question the award of the Labour Court on the question of preliminary issue decided by it

Cater Pillar India (P) Ltd. v. Presiding Officer Labour Court 2004 (1) L.I.J. 984. The Counsel submits that this challenge itself can be only after the final award. I cannot agree. The Supreme Court had only pointed out the restrictive practices which might develop. If the order was worthy of challenge, it was to be challenged, and it could have been entertained. The edifice of an award was to be built not on shaky foundations. If error was committed, it should have been got rectified at the earliest point of time. Possible hardships could not have been avoided only for the sake of convenience and advantage to one party to the proceedings. Otherwise, it would have only contributed to vagaries of litigation, inflicted without reason, and not to be recognised or upheld as a sound practice.

15. This appears to be a case where interference is called for at this juncture since the risk that is faced by one of the parties in this case is that, even though there was an enquiry held in consonance with the principles of natural justice, the Tribunal has declared the findings unacceptable. The result is that there is no enquiry at all. Extreme consequences are likely to arise there from. Since procedural formalities are completed, it is to be presumed that there cannot be any further evidence that could be let in. Thus, the management will be forced to await final award to be passed which necessarily have to be adverse to them. In other words, even if it is prima facie possible for this Court to find that the said findings deserves nonetheless to be vacated, the Labour Court is to be permitted to continue with the adjudication and to pass award and such award has to be so awaited and then subjected to challenge. This circuitous process cannot be recommended acceptable as an expedient measure. The Supreme Court has in Cooper Engineering Ltd. v. P.P. Mundhe crystalised the law governing the circumstance by using a single adjective. If the cause is "worthy" challenge is indeed possible. I respectfully follow the dictum.

16. Mr. Kishore submits that if the procedure suggested by him is the procedure followed, it may be advantageous to the weaker section, viz., the worker. There is likely to be a direction for reinstatement and if award is challenged, there can be claim for wages as envisaged u/s 17B of the I.D. Act. I think the submission is too far fetched to be noticed, though he has an authority of a Division Bench of Anr. High Court for the proposition. The benefit of Section 17B has been envisaged for a totally different purpose. As the Supreme Court in a number of occasion held, nothing prevents a person from engaging himself in a profitable pursuit during the pendency of the adjudication and gaining livelihood. Section 17B is an enabling provision, and not an end in itself. If as a matter of fact the findings of Tribunal are perverse, ultimately this Court will have to interfere with the award and by the same, substantial sums will have to be paid as per Section 17B which normally would not have been possible for the workman concerned

to claim, if in final verdict it would have been found that the management is not at fault.

We are in respectful agreement with the reasoning given by the learned Single Judge. In appropriate cases where the Labour Court has on a totally misconceived reasons, set aside an enquiry, we feel that the management cannot be asked to wait till the final award is passed to challenge the preliminary order also. In such cases, this Court should certainly interfere at the first stage itself without relegating the management to the circuitous process as held in the above decision. We cannot assume all rights in favour of the workmen alone although they are weaker in bargaining power, and should recognise rights in management also where they have such rights and cannot postpone such rights in the name of comparative weakness in bargaining power.

6. Now, let us see whether this is a fit case where we should interfere at the preliminary stage of deciding the validity of the enquiry.

7. The Labour Court set aside the enquiry on four grounds. The first is that the management had not issued a memo of charges to the workmen in question, in consonance with the principles to be followed in the matter of conducting domestic enquiries. Apparently, the Labour Court was under the impression that either the management or the enquiry officer would have to frame a formal charge-sheet before the commencement of the enquiry as in criminal cases. We are not satisfied that the Labour Law could so validly insist upon any such formal charge-sheet for a valid enquiry. Such procedural requirements are not necessary concomitants of a valid domestic enquiry. All what is required to be done by the management is to inform the delinquent workman as to the allegations of misconduct against him on which the management proposes to conduct the enquiry and the enquiry should be into those allegations of misconduct. If the management issues a show cause notice specifying therein the allegations of misconduct against the workman calling upon him to file his explanation, if any, and on finding his explanation to be unsatisfactory, a domestic enquiry is ordered, the show cause notice itself would constitute a charge-sheet in the enquiry, which would be sufficient for a valid enquiry. In this case, the Labour Court itself notices in the preliminary order that there was a show cause notice issued to the delinquent workmen dated 1-4-1998. In the course of arguments, a copy of the said show cause notice has been placed before us for perusal, receipt of which by the workmen is confirmed in the preliminary order itself, which the counsel for the 2nd Respondent also does not deny. Although show cause notice is quite long, we find it necessary to extract the same here to enter a finding regarding whether the decision on this point by the Labour Court is perverse:

Whereas you Sri M.C. Jacob had been in employment with St. Thomas Mission Hospital, Kattanam as X-ray Specialist since 1985 and your appointment was purely on the basis of your application and declaration made by you at the time of appointment.

You are aware that Bhabha Atomic Research Centre of Government of India has been personally monitoring encumbrances working in X-ray department with direct involvement and badges are being monthly supplied by Bhabha Atomic Research Centre to make an assessment about the exposure of encumbrance to radiation. The said centre made assessment regarding the radiation effect on you, through the badges returned since September 1997, and based on the evaluation made by the said centre against the institution and the management was asked to provide you with alternative employment till final decision was made. The management was also directed by the said centre to furnish certain details in a pro forma which should include certain test results of the encumbrance. As per the said directions you were also directed to furnish certain details in a pro forma which should include the test results suggested by the said centre. The management conducted the said test with your cooperation initially in St. Thomas Mission Hospital, Kattanam which was repeated at Pushpagiri Hospital, Thiruvalla. As per the directions given by Bhabha Atomic Research Centre through the management, you have furnished the pro forma independently. The data given by the management pertaining to you had been accepted by the said centre and the data furnished by you were discarded by the said centre as they are utter falsehood. By furnishing wrong and misleading statements to the said centre you had been trying to degrade the status of the management and thereby to bring ill reputation on the management in the eyes of Bhabha Atomic Research Centre.

Your submissions in the pro forma revealed the following false and fabricated statements.

You had given contradictory statement regarding your experience as a X-ray technician by stating in the pro forma submitted to the Bhabha Atomic Research Centre that you had no previous experience as an X-ray technician prior to the assuming of employment in radiology department. St. Thomas Mission Hospital, Kattanam, whereas your previous experience was shown as 9 years in your application dated 8-6-1985 the agreement dated 1 -7-1985 which contains descriptive statement regarding your previous employers.

In your submission in the pro forma furnished to Bhabha Atomic Research Centre you reported that the hospital did not have the required radiation safety accessories in the radiation room. In fact, the management had set up the X-ray rooms in accordance with the specification and adopting all safety measures. Your submission to the contrary was with the sinister intention to make the management guilty of not providing sufficient radiation safety measures and accessories as specified by the Centre. The management has provided proper radiation preventive accessories and the same was found in favour of the management by the said centre.

The number of exposures during September 1997 to November 1997 appears to be normal and your declaration through the submission through by pro forma was with sinister intention to show that the number of exposures during the

month was excessive.

It is seen from the record that M.C. Jacob was working as a X-ray technician since 1-7-1985 to 1-6-1995 alone without any assistance from any Radiographer. It may also be noted from the records that after M.C. Jacob and RM. Jacob were given alternative employment

You had also suggested in your submission that our X-ray machine is 23 years old and as such as leak of radiation is suspected, you suppressed the fact that our X-ray unit is being subjected to proper service, repairs and updating by Wipro, who are the manufacturer of the X-ray unit and the said unit is kept fault free by the management. The suppression of material facts through your submission to the research centre brought about will reputation on the management in minds of said research centre.

The details regarding the distance free X-ray tube to control panel as shown in your submission is also fabricated falsehood.

According to the management, your badge was kept directly opposite to the range of radiation, while you were on (illegible) and the said badge was submitted to investigation by the centre. Subsequently when the correct investigation report and the submission of management were considered by Bhabha Atomic Research Centre they found that you were not exposed to radiation, but your badge was exposed to radiation presumably with the intention to fight against the management. Your submission through the pro forma the fabricated falsehood incorporated therein would support the contention of the Management.

You are called upon by the management to show cause why disciplinary action should not be taken against you based on the allegations mentioned hereinabove and on other charges that may be levelled against you by the management based on the connected records. You are called upon to furnish explanation in writing within 15 days of the receipt of this notice.

A reading of the above show cause notice would disclose very distinct charges of misconduct against the delinquent workmen which admits of no vagueness therein. As such, we have absolutely no hesitation to hold that the finding of the Labour Court that no charges were framed as referred to in the employees service rules or otherwise in the enquiry, is totally perverse.

8. The second ground on which the enquiry was found to be defective was that the delinquents were denied the assistance of a lawyer. The contention before us is that this question is also settled by various decisions of the Supreme Court and this Court. In this connection, reference was made by the learned Counsel for the Appellant to the decision of the Supreme Court in *Bharat Petroleum Corporation Ltd. Vs. Maharashtra General. Kamgar Union and Ors*, , and a Division Bench decision of this Court in *Saran v. Cochin Refineries Ltd.* 1985 KLT 1171 It categorically holds that the right to be represented by Anr. person much less a

lawyer is available to the delinquent only to the extent specifically provided in the service rules. It is settled law that unless the service rules or the standing orders permit, the delinquent workmen cannot as of right claim assistance of a lawyer. Further, charges against them as stated in the show cause notice stated above is not that complicated as to require the assistance of a lawyer to defend themselves.

In any event, from a reading of the allegations of misconduct in the show cause notice referred to above, we are not at all satisfied that denial of assistance of a lawyer in this particular case would in any way affect the validity of the enquiry. That being so, the order of the Labour Court is against the settled legal position and as such can only be regarded as perverse.

9. The third ground on which the enquiry was found defective was that the enquiry officer was biased as he was a close associate of the legal adviser of the management. It is settled law that even an officer of the management can validly conduct a domestic enquiry. It has also been held in several decisions of Supreme Court that enquiry cannot be found to be vitiated simply because the enquiry officer is the lawyer representing the Company in other cases. On the face of such settled law, we are at a loss to understand how the Labour Court could come to a finding that simply because the enquiry officer is a close associate of the legal adviser of the management (which itself is denied by the management and not proved by the Union) the enquiry could be found to be vitiated. As such, this ground is also totally perverse.

10. There is Anr. ground on which the Labour Court relied upon. It is that four applications submitted by the delinquent workmen were rejected by the enquiry officer. This question was specifically dealt with in Ext. P-5 enquiry report as follows:

On 27-7-1998, evidence of the Management was closed and posted to 31-7-1998, for the evidence of the delinquents. On 31-7-1998, both the delinquents produced four Petitions and their witness schedule. One Petition was again for seeking assistance of Advocate in the proceedings, raising scandalous allegation against the Enquiry Officer. The said applications was rejected. Another Petition filed them was to allow them to prepare layout-plan of the X-ray Unit with the help of an expert of their choice. The Enquiry Officer is not having any authority to give permission to anybody to get into the X-ray Unit of Hospital and wit the help of a stranger to prepare a plan, law out etc. Hence that request was also disallowed, holding that delinquents, if producing layout plan, it shall be marked and expert can be examined as their witness. The Enquiry Officer can not go beyond his power and intrude into the Hospital Administration of the Management, that is why delinquents' request was disallowed. Another Petition was to grant them one month's time to consult legal and technical experts. Such a Petition was found to be not bona fide and hence rejected.

The delinquents on the same date filed Anr. Petition to direct the Management to

produce ten listed documents in their custody as part of their evidence to disprove the evidence of the Management. Those list were exhaustive and not specific that was the objection raised by the Management. The delinquents were not prepared to specify some of the documents, they wanted. Hence the Enquiry Officer, directed the Management to produce all available documents on the next posting date. The delinquents also produced their witness schedule, numbering 12 witnesses. The delinquents were given time up to 6-8-1998, to adduce their evidence and to examine their witness. Soon after the proceedings, both the delinquents outburst, insulted, accused and even abused the Enquiry Officer and boycotted the proceedings without signing the proceedings, disclosing that they won't participate in further and Enquiry Officer can do anything as wishes and they have nothing and even threatened the Enquiry Officer of dare consequences. All these acts of the delinquents were preplanned that is what the Enquiry Officer felt, at the end of the proceedings. From the very beginning of the said day's proceedings itself, there were unusual provocation and insulting to the Enquiry Officer, to get them out of the proceedings. The Enquiry Officer never got provoked and hence, was able to complete that day's proceedings on delinquents participation. In the copies of both the delinquents, the Enquiry Officer acknowledged receipts of all their applications and lists. When both the delinquents boycotted without signing the proceedings, that fact was endorsed in the proceedings and got it signed from the Presenting Officer.

From the same, we could not find any infirmity in the decision of the enquiry officer in those four Petitions submitted by the delinquent workmen and decisions on those Petitions cannot by any stretch of imagination be held to be violative of principles of natural justice. The decision on those Petitions were perfectly in accordance with law on the subject and the Labour Court could not have missed this point while considering the validity of the enquiry. Therefore, we are perfectly satisfied that the said reason also could not have been pressed into service by the Labour Court for holding that the enquiry is vitiated. Thus, we are perfectly satisfied that all the four reasons stated by the Labour Court for finding that the enquiry is vitiated is totally perverse and could not have been countenanced under law. The question then would be whether this Court would be justified in interfering with the preliminary order at this preliminary stage.

We are of opinion that the very perversity of the findings of the Labour Court would be sufficient to invoke our jurisdiction under Article 226 of the Constitution of India to interfere with such perverse findings in the preliminary order. Accordingly, we set aside the judgment of the learned Single Judge and quash Ext. P-4 preliminary order passed by the Labour Court in I.D. No. 16/2000. There would be a direction to the Labour Court to consider the matter afresh in the light of the findings in this judgment. The writ appeal is allowed as above.