

(2000) 12 MAD CK 0097

In the Madras High Court

Case No : Writ Petition No. 13412 of 2000 and W.M.P. No. 19425 of 2000

Tamil Nadu Atomic Power Employees Union

APPELLANT

Vs

Nuclear Power Corporation and Another

RESPONDENT

Date of Decision : 22-12-2000

Acts Referred:

Industrial Disputes Act, 1947 — Section 10(1), 10A, 12(5), 20(1), 22

Citation : (2001) 2 LLJ 192

Hon'ble Judges : F.M. Ibrahim Kalifulla, J

Bench : Single Bench

Advocate : D. Hariparanthaman, for the Appellant; N. Jothi, for the Respondent

Judgement

F.M. Ibrahim Kalifulla, J.—The challenge in this writ petition is to the order of the first respondent dated July 26, 2000, in and by which, the first respondent declined to refer an issue relating to the change in the shift pattern of the workmen of the second respondent as raised by the petitioner for adjudication on the ground that the said change was sought to be introduced by the second respondent after due notice u/s 9-A of the Industrial Disputes Act.

2. According to the petitioner, which claims membership of substantial section of workmen working in the first respondent, that it was a recognised union representing the workmen of the second respondent, that from its inception, the working hours in the second respondent Power Station is by way of round the clock working in three shifts namely,

1. Night Shift: 10.00 p.m. to 6.00 a.m. (First Shift)
2. Morning Shift: 6.00 a.m. to 2.00 p.m. (Second Shift)
3. Evening Shift: 2.00 p.m. to 10.00 p.m. (Third Shift)

It is claimed that the shift pattern is in a cycle and the crew in each shift has to work for six days and should switch over to the next shift, that the crew undergo four cycles in a month and each of the cycle consisting of six days spell. It is also

stated that the crew who worked in night shift for six days will get three off days following the cycle, that thereafter, the crew would move to evening shift and after completing the six days in the evening shift, the crew would have one day off, and then they would move to morning shift for six days, and when after completion of six days, they would get two day off. Again they would go to night shift as before. It is also contended that the said system which was prevailing from the date of inception, was applicable only in regard to the employees employed in the round the clock shift system who were not given weekly off and off on second Saturdays and they were also not given National and Festival holidays. It is further claimed that the other employees employed in the general shifts i.e. between 8.00 a.m. to 4.00 p.m. and 9.00 a.m. to 5.00 p.m. are given weekly off, off on second Saturdays and National and Festival holidays.

3. According to the petitioner, while the abovesaid shift timings are satisfactorily working, by a notice dated April 27, 2000 purported to have been issued u/s 9-A of the Industrial Disputes Act, the second respondent proposed to change the round the clock system and also the shift timings with effect from May 22, 2000 i.e. on the expiry of 21 days" notice. The proposed change, according to the petitioner, sought to introduce two days off after four days night shift instead of three days off, one day off after four days of morning shift and four days of evening shift, thereby reducing two days off in the morning shift. The proposed timings as per the change sought to be introduced were as under:

1. Night shift: 11.00 p.m. to 7.00 a.m. (First Shift)
2. Morning shift: 7.00 a.m. to 3.00 p.m. (Second Shift)
3. Evening shift: 3.00 p.m. to 11.00 p.m. (Third Shift)

It is claimed that the petitioner union opposed the proposed change through their letter dated May 6, 2000, that a strike notice was also marked to the Conciliation Officer, that in such circumstances, by virtue of the operation of Section 20(1) of the Industrial Disputes Act, the conciliation deemed to have commenced, that by a notice dated May 8, 2000, the Conciliation Officer initiated conciliation proceedings by calling upon the parties to come for conciliation on May 11, 2000, that when the proceedings pending before the Conciliation Officer, a counter proposal was made at the instance of the petitioner which was not acceptable to the second respondent and that thereafter, the second respondent was not willing to hold further talks at the bilateral level by sending a communication dated June 8, 2000 to the Conciliation Officer. It is claimed that in those circumstances, the conciliation failure report was sent on June 30, 2000, that though the petitioner agreed for arbitration u/s 10-A of the Industrial Disputes Act, the same was not agreed to by the second respondent. It was in those circumstances, the impugned order of the first respondent declining to refer the dispute for adjudication came to be issued which according to the petitioner is contrary to the provisions of the Industrial Disputes Act, 1947.

4. The claim of the petitioner was resisted by the second respondent and a

detailed counter affidavit was filed, inter alia, contending that the implementation of change in shift pattern was sought to be introduced having regard to various factors such as in the matter of performance of continuous night shift which resulted in:

- a) lack of concentration,
- b) inadequate communication during shift change overs,
- c) Restraint on exercising skill and judgment,
- d) With fatigue, complacency develops in long night shifts and attitude of just making it till morning result, and
- e) Slows down response, logical analysis and warning of alertness, etc.

It is claimed that the change in the shift pattern was sought to be introduced after issuing necessary notice u/s 9-A of the Industrial Disputes Act, that by virtue of the revised pattern sought to be introduced, the same would not involve any drastic change nor in the payment of the night shift allowance, that in the course of conciliation, when bilateral level talks were held, the suggestion of the petitioner union for six hours working during the round the clock shift system could not be acceded to since instead of the existing of four crew pattern, the second respondent management had plans for five crew, that it also involved further financial burden in the form of additional crew, and therefore the alternate proposal suggested by the petitioner did not fall through.

5. It is therefore contended that in the above stated circumstances, when the change sought to be introduced was after issuance of the necessary notice u/s 9-A of the Industrial Disputes Act, there was no scope for finding fault with the order impugned in this writ petition. The various averments found in the counter affidavit have been made to justify the action of the second respondent in seeking to introduce the revised shift pattern in regard to round the clock shift working.

6. Now the point that arises for consideration in this writ petition is what is the scope, power and ambit of the first respondent while declining to refer an industrial dispute for adjudication before the forum constituted under the provisions of the Industrial Disputes Act?

7. As regards the consequences of change that is sought to be introduced by following the provisions contained u/s 9-A of the Industrial Disputes Act, the question is no longer open for discussion inasmuch as the Hon'ble Supreme Court in the judgment reported in Life Insurance Corporation of India Vs. D.J. Bahadur and Others, has succinctly stated the legal position in paragraph 42 as under at p. 21:

"The catena of cases we have briefly catalogued discloses an unbroken stream of case-law binding on this Court, the ratio whereof even otherwise, commends itself to us. The award or settlement under the Industrial Disputes Act replaces

the earlier contract of service and is given plenary effect as between the parties. It is not a case of the earlier contract being kept under suspended animation but suffering supersession. Once the earlier contract is extinguished and fresh conditions of service are created by the award or the settlement, the inevitable consequence is that even though the period of operation and the span of binding force expire, on the notice to terminate the contract being given, the said contract continues to govern the relations between the parties until new agreement by way of settlement or statutory contract by the force of an award takes its place. If notice had not been given, the door for raising an industrial dispute and fresh conditions of service would not have been legally open. With action u/s 9-A, Section 19(2) or (6), the door is ajar for disputes being raised and resolved. This, in short, is the legal effect not the lethal effect of invitation to industrial trial of strength with no contract of service or reversion to an obsolete and long ago "dead" contract of service."

(Italicisation is mine)

Therefore the statement of law of the Hon"ble Supreme Court on the implication of notice being issued u/s 9-A and the consequence thereof is clear to the effect that the initiation of such a move is only for an ultimate result in the resolution of the said issue culminating in the form of an industrial dispute to ultimately get resolved.

8. This legal position apart, the real question that remains for consideration in this writ petition is with regard to the justification of the first respondent in declining to refer the dispute raised at the instance of the petitioner for adjudication. Here again the question is no longer *res integra*. As early as in the year 1988, Division Bench of this Hon"ble Court in the Judgment reported in *Shaw Wallace and Co. Ltd. Vs. State of Tamil Nadu and Others*, after a detailed reference to the various judgments both the Hon"ble Supreme Court as well as the other Judgment has set out the law on this subject in para 32 to the following effect at p. 195:

"32. On a final analysis, the following principles emerge:

1. The Government would normally refer the dispute for adjudication;
2. The Government may refuse to make reference, if-
 - (a) the claim is very stale;
 - (b) the claim is opposed to the provisions of the Act;
 - (c) the claim is inconsistent with any agreement between the parties;
 - (d) the claim is patently frivolous;
 - (e) the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse;
 - (f) the person concerned is not a workman as defined by the Act;

- (3) The Government should not act on irrelevant and extraneous considerations;
- (4) The Government should act honestly and bona fide;
- (5) The Government should not embark on adjudication of the dispute; and
- (6) The Government should not refuse reference on the ground that domestic enquiry was fairly and properly held and punishment awarded was appropriate.

Subsequently in the Judgment reported in *Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others*, the Hon''ble Supreme Court has set out the legal position once again to the following effect at p. 560:

"Attractive though the contention is we regret, we are unable to accept the same. It is now well settled that, while exercising power u/s 10(1) of the Act, the: function of the appropriate Government is an administrative function and not a judicial or quasi-judicial function, and that in performing this administrative function the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act."

In the Judgment reported in *Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others*, , the Hon''ble Supreme Court while emerging certain principles in that case has held as under at pp. 741, 742 of LLJ:

"It is not correct to say that the remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate Government. The power to make a reference conferred upon the Government 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 a 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 an adjudication."

(Italicisation is mine)

9. The Hon''ble Supreme Court in the judgment reported in *Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others*, while finding that the order declining reference by the Government was not justified, issued a direction to the Government to refer the dispute for adjudication to an appropriate Tribunal within a specified period. Similarly in the Judgment reported in *M.P. Irrigation Karamchari Sangh Vs. State of M.P. and Another*, the Hon''ble Supreme Court in dealing with a similar situation ultimately directed the Government to refer all the questions raised by the appellant therein to the appropriate Tribunal.

10. The learned counsel for the second respondent raised a contention, namely, about the right of the second respondent to introduce the change and as to whether the petitioner has got right to insist for a reference. The learned counsel contended that the impugned order being an administrative order u/s 12(5) of

the Industrial Disputes Act, and when Section 9-A of the Industrial Disputes Act has been fully taken care of the order impugned in the writ petition was fully justified. The learned counsel further submitted that in any event, there should not be a direction for a reference and that the first respondent may be directed to reconsider and pass appropriate orders. On the other hand, the learned counsel for the petitioner by referring to the second proviso to Sub-section (1) of Section 10 and Section 22 of the Industrial Disputes Act, contended that having regard to the facts of this case, the second respondent being a public utility service and a notice u/s 22(1), of the Act having been already given on May 6, 2000, it is the bounden duty of the first respondent to make a reference notwithstanding the notice issued u/s 9-A of the Industrial Disputes Act.

11. The learned counsel for the second respondent relied upon the various decisions reported in Engineering Staff Union and Others Vs. State of Bombay and Others, ; Bombay Union of Journalists and Others Vs. The State of Bombay and Another, ; National Union of Commercial Employees and Others Vs. State of Maharashtra and Another, ; Workmen of Dalmia Cement (Bharat) Ltd. and Others Vs. State Government of Madras and Others, ; Madras District Automobile and General Employees" Union Vs. State of Madras and Another, to contend that only in case where the Government acted and passed orders on extraneous or irrelevant ground or on ground not germane to the issue, the matter can be remitted for reconsideration or otherwise it was not necessary. Having regard to the subsequent rulings of the Hon"ble Supreme Court as has been considered in depth and spelt out in the Division Bench Judgment reported in 1988 1 LLJ 177 the above stated proposition attempted to be advanced on behalf of the second respondent no longer survives for consideration. As far as the judgment reported in Ram Avtar Sharma and Others Vs. State of Haryana and Another, , is concerned, even in that judgment, the Hon"ble Supreme Court have held that while performing an administrative act while either making or refusing to make a reference u/s 10(1), it cannot delve into the merits of the dispute and take upon itself determination of the lis and that would certainly be in excess of the powers conferred u/s 10. The Division Bench Judgment reported in 1991 LIC 1031 was cited by the learned counsel for the proposition that even if it is ultimately found that the order is not justified, there cannot be a direction for reference.

12. The learned counsel sought to distinguish the judgment in Tata Iron and Steel Co. Ltd. Vs. The Workmen and Others, by stating that that was a case where 9-A notice was admittedly not given and when the second respondent sought to introduce the changes after resorting to Section 9-A there can be no impediment in implementing the proposed changes. Apparently, the submission is on the misapprehension that when once Section 9-A notice is issued proposing certain changes in the conditions of the service, there is no scope at all for the affected workmen to challenge the said proposals and that they should abide by the changes sought to be introduced by the management, I am unable to agree with the proposition propounded by the learned counsel for the second respondent on the lines suggested above. In fact, the first respondent has

unfortunately proceeded only on the basis that since the second respondent has issued 9-A notice, that one circumstance was sufficient to decline reference of the dispute raised by the petitioner union for adjudication. When the dispute raised by the petitioner union is substantial in nature, having regard to the fact that the system sought to be introduced now would upset the system which was prevailing for more than thirty years and when admittedly various factors weighed with the second respondent for introducing such change, the failure of the first respondent in its conception of the pros and cons involved in the dispute, is sufficient to interfere with the order impugned in this writ petition.

13. From the various decisions referred to in the earlier paragraphs relating to the scope of exercise of power of Government in a matter relating to the reference of a dispute for adjudication, it is well settled that it is no longer open to the Government to delve into the merits of the case or rests its conclusion on matters not germane for consideration. The understanding of the first respondent about the scope of operation of Section 9-A in the case on hand is totally a misconceived one. The application of Section 9-A in regard to change in service condition cannot be held to be decisive for declining a reference u/s 12(5) of the Industrial Disputes Act. On the other hand, the very fact that the change which was sought to be introduced by resorting to Section 9-A of the Industrial Disputes Act was under challenge at the instance of the petitioner, as held by the Hon'ble Supreme Court in the judgment reported in 1981 I LLJ I unless the said dispute is resolved one way or the other, the change cannot be brought into force especially in a case like this where it is claimed that the present shift pattern was prevailing right from the date of inception of Power Station of the second respondent. Moreover, even according to the second respondent, very many factors were taken into account before the change was sought to be introduced. In such circumstances, it would only be appropriate that the second respondent establish the justification of the change sought to be introduced before an appropriate adjudicatory forum before its implementation. Unfortunately, the first respondent having misled itself by holding that the change sought to be introduced was after following Section 9-A and therefore no reference was called for being on the face of it on total misunderstanding of the legal position, the same is liable to be set aside. Therefore I am unable to subscribe to the submission of the learned counsel for the second respondent that the second respondent having got a right to introduce the change by resorting to Section 9-A and the said provision namely Section 9-A having been complied with, there should be no scope for further adjudication about the justification of the change as claimed by the petitioner.

14. As regards the other question as to whether there should be a direction for reference to the first respondent, I am of the view that since it is held that reference of the issue involved in the dispute is inevitable and even according to the second respondent, it has got every justification in introducing the changes, it would be in the interests of the second respondent itself to speed up the process of adjudication so that a finality could be reached at the earliest point of

time. Therefore applying the ratio of the judgment of the Hon''ble Supreme Court reported in Telco Convey Drivers Mazdoor Sangh and Anr. v. State of Bihar and Ors. (supra), and The M. P. Irrigation Karamchari Sangh v. The State of M.P. and Anr. (supra), there should be a direction, to the first respondent to refer the issue relating to the justification of the changes sought to be introduced by the second respondent for adjudication to the appropriate Tribunal.

15. In the result, while setting aside the order impugned in this writ petition, dated July 26, 2000, the first respondent is directed to refer the question relating to justification of the change in the shift pattern in round the clock I duty of the second respondent Power Station for adjudication to the appropriate Tribunal within a period of one month from the date of receipt of copy of this Order. The W.P. is allowed on the above terms. No costs. Consequently, the connected W.M.P. is closed.