
(1977) 08 KL CK 0029
In the High Court Of Kerala
Case No : W.A. No. 99 of 1977

Thomas Paul

APPELLANT

Vs

Industrial Tribunal and Others

RESPONDENT

Date of Decision : 31-08-1977

Acts Referred:

Citation : (1977) 08 KL CK 0029

Hon'ble Judges : Gopalan Nambiyar, C.J.;Narendran, J

Bench : Division Bench

Advocate : V. Sivaraman Nair, K. Raveendran and M. Krishnakumar, for the Appellant; N. Dharmadan, Government Pleader for 1st Respondent, M. Ratnasingh, for 2nd Respondent and Menon and Pai for 3rd Respondent, for the Respondent

Final Decision : Allowed

Judgement

Gopalan Nambiyar, C.J.—This Writ Appeal discloses the persistence and tenacity with which an industrial dispute is being fought out between the employers and their workmen, this being the third round of the legal battle waged in this Court in connection with the dispute. The Appellant whom we may call the "workman" was the 1st Respondent in the writ petition filed by the third Respondent, the "employer". The 3rd Respondent owned several tile factories, one of them being the Feroke Tile Works at Kozhikode. It was decided to sell the same to the 2nd Respondent with effect from the close of business on 28th April 1967. All workmen except four managerial/supervisory personnel were to be employed by the transferee -- 2nd Respondent. The four managerial supervisory personnel were given three months' notices of termination with offer for payment of compensation. A notice dated 25th April 1967 was issued to the Appellant and served on him after 4 p.m. on 27th April 1967 that his services were no longer required. The Appellant was a Foreman in the Company. He replied that he is only a Clerk, Grade II, and that according to the agreement of transfer the undertaking had to be transferred as a going concern along with the workmen

and staff. It is the Appellant's case that at the time he was served with notice, Industrial Dispute No. 139 of 1964 was pending before the Industrial Tribunal, Calicut, regarding the question of bonus. The Appellant therefore filed Ext. P-1 complaint u/s 33A read with Section 33(2)(b) of the Industrial Disputes Act. This resulted in an award of the Tribunal dated 19th August 1969 directing reinstatement of the Appellant. That was challenged by the transferor and the transferee of the undertaking in O.P. Nos. 4736/69 and 314 of 1970 of this Court. The writ petitions were allowed by Ext. P-3 judgment dated 14th August 1970, and the matter was remanded back to the tribunal for fresh determination, without expressing any opinion on the merits of the contentions of the parties. The Industrial Tribunal passed a fresh award on 19th December 1972. It understood Ext. P-3 judgment as holding that the complaint was not maintainable and dismissed the same. Against that decision the present Appellant filed O.P. No. 1109 of 1973 in this Court. That was allowed by Ext. P-5 judgment dated 21st June 1974, and the Tribunal was directed again to go into the matter afresh. This was done, resulting in Ext. P-6 award dated 28th April 1975. The Tribunal found the discharge of the Appellant, illegal and unjustified and amounting to victimisation and recorded that he was entitled to be reinstated with back wages. But as the factory had been closed on 20th May 1969 and the closure had been accepted by the unions, and their workmen, the relief of reinstatement was infructuous. On the ground that the termination was illegal, the Tribunal stated that the Appellant should be deemed to have continued in service till 20th May 1969 and would be entitled to wages till that date; and in addition, to closure compensation at the rate offered to the other workmen. The back wages and compensation were directed to be paid by the transferor-management. The transferor-management challenged the award by a writ petition which was allowed by a learned Judge of this Court against whose judgment this appeal has been filed.

2. The learned Judge took the view that transfer of an undertaking was not prohibited by the law and was indeed recognised by Section 25FF of the Industrial Disputes Act. The learned Judge expressed himself thus:

4. No law prohibits transfer of an undertaking. In fact Section 25FF of the Act recognises the right of the employer to transfer the undertaking. On such transfer the employer-employee relationship existing between the transferor-employer and as employee of the undertaking comes to an end. The transferee may or may not re-employ him. However, the transferee cannot be compelled to re-employ him. In such a case the only right the employee has is as against the transferor and that right is for compensation in accordance with Section 25F of the Act as if he had been retrenched. That this is so is clear from the decision of the Supreme Court in Anakapalla Co-operative Agricultural and Industrial Society Limited Vs. Workmen, where that court said:

Therefore, reading Section 25FF as a whole, it does appear that unless the transfer falls under the proviso, the employees of the transferred concern are

entitled to claim compensation against the transferor and they cannot make any claim for re-employment against the transferee of the undertaking.

(Extracted from Supreme Court Labour Judgments 1950-57 Vol. IV, Page 2457 at 2456 -- underline by me).

The transfer in question does not fall under the proviso since the first Respondent's service was interrupted that is to say, he was not re-employed by the transferee from 28th April 1967. Since the first Respondent was in service till the close of business on 27th April 1967, that is to say, so long as the transferor was the employer and he ceased to be in service from 28th April 1967, the date on which the undertaking was transferred, this, it appears to me, is a case of interruption of service as contemplated by Section 25FF of the Act.

3. The learned Judge found that the proviso to Section 25FF was not attracted as the workmen's service was interrupted. Posing the question whether the workmen could be said to have been discharged for his misconduct as envisaged by Section 33 of the Act, the learned Judge stated:

For this part of the case I am assuming without deciding that the first Respondent was concerned in I.O. No. 139 of 1964 and that the misconduct was connected with that dispute -- no findings have been entered by the Tribunal on these points.

(para 5)

Discussing the question further, the learned Judge was of the view that the word "discharge" in Section 33 of the Act meant to deprive the workmen of the right to continue in service; and that this pre-supposed a right in the person discharged to so continue in service. The learned Judge reasoned that interruption of services of an employee on transfer of an undertaking will not be a discharge u/s 33 of the Act. The learned Judge noticed the decisions in Banaras Ice Factory Limited Vs. Its Workmen, and Tea Districts Labour Association, Calcutta Vs. Ex-employees of Tea Districts Labour Association and Another, both of which were concerned with closure and observed that they were appropriate even to a case of a transfer of an undertaking and that in such a case there was hardly any occasion for praying for permission to lift the ban imposed by Section 33 when the employer had a right to transfer the undertaking and bona fide does so, with the result that the employees of the undertaking are deprived of their right to continue in service of that undertaking. In this view, the learned Judge quashed the award and allowed the writ petition.

4. Counsel for the Appellant submitted to us that the ground on which the learned Judge allowed the writ petition was of a jurisdictional nature, holding that a complaint u/s 33A read with Section 33(2)(b) of the Act is not maintainable where action has been taken by the management after due compliance with the provisions of Section 25FF of the Act; and that this jurisdictional objection had never been raised either before the Tribunal or at any

of the two preceding stages when the matter had come up this Court and been disposed of by it in Exts. P-3 and P-5 judgments. Counsel invited our attention to paragraph 6 of Ext. P-3 judgment. In the said paragraph, a learned Judge of this Court who decided the writ petition pointed out with respect the decision of the Supreme Court in *Management of Murgugan Mills Ltd. Vs. Industrial Tribunal Madras and Another*, that it would be open to the Tribunal to find out the real nature of the termination if a contention is put forward by the employee that the termination was really by way of dismissal for misconduct. This Court observed:

If the Tribunal on such investigation comes to the conclusion that the termination was really by way of punishment for misconduct it would thereafter be perfectly open to it to adjudicate upon the validity of the dismissal by examining the merits of the action taken by the management and to determine whether there were grounds justifying the action. What the Supreme Court has laid down in the aforesaid decision is only that in the event of it being found by the Tribunal in such a case that the termination of service was a colourable exercise of power or an instance of victimisation or unfair labour practice the Industrial Tribunal would have the jurisdiction to intervene and set aside such termination. There is nothing in that decision which supports the view that the Tribunal has apparently taken in the present case, that even if there has been no violation of the provisions of Section 33 of the Act it is open to the Tribunal in a proceeding initiated u/s 33A of the Act to embark upon an inquiry into the merits of the action taken by the employer.

(para 6)

On the second occasion when the matter came up before this Court, the learned Judge who dealt with the matter, referring to Ext. P-3 judgment stated:

This Court had made it clear that if the Tribunal on a proper investigation comes to the conclusion that the termination may really be by way of punishment for misconduct it would then be perfectly open to the Tribunal to adjudicate upon the validity of the dismissal by examining the merit of the action taken by the management. The Tribunal had to decide in the first instance where there was colourable exercise of power by the management or victimisation or unfair labour practice. On the basis of such finding alone, it was made clear in Ext. P-2, the Tribunal could proceed further.

It was after such discussion and observations that the award was set aside and the matter was remanded back.

5. In addition to the above observations of this Court on the two occasions, counsel for the Appellant drew our attention to paragraphs 12 and 16 of Ext. P-6 award. In paragraph 12, after noticing that the transfer of the factory was as a going concern, the Tribunal noticed that the transfer was to take effect on 28th April 1967 and that the transferee had not stated in its letter in the first week of April 1967 that the Appellant was one among the persons whom it did not want to employ. It noticed that in the additional counter-affidavit filed by the

transferee after it was impleaded, there was no averment that it did not desire to employ the Appellant. The sale deed which was exhibited before the Tribunal was relied on to show that the transfer was as a going concern. The termination of the Appellant was only a last-minute act. From these circumstances, the Tribunal concluded in paragraph 12 that the reasons advanced for termination were not real and that the termination was a colourable exercise of power and amounted to victimisation. Counsel contended that the learned Judge was wrong in applying the analogy of closure and the principles relating to the same to a case of transfer of an undertaking u/s 25FF. It was stressed that in the case of closure, the industry itself was dead, whereas in the case of a transfer of undertaking, it was not necessarily so, and this should make a vital difference. Counsel cited the decision in *P.S. Mills Ltd. v. P.S. Mills Mazdoor Union* AIR 1957 S.C. 99 where occurs the following observation:

If a workman improperly dismissed raises an industrial dispute, and before action is taken by the Government the industry is closed, what happens to the right which the Act gives him for appropriate relief, if the Act vanishes into thin air as soon as the industry is closed? If the contention of the Appellant is correct, what is there to prevent an employer who intends, for good and commercial reason, to close his business from indulging on a large scale in unfair labour practices, in victimisation and in wrongful dismissals, and escaping the consequences thereof by closing down the industry? We think that on a true construction of Section 3, the power of the State to make a reference under that section must be determined with reference not to the date on which it is made but to the date on which the right which is the subject-matter of the dispute arises, and that the machinery provided under the act would be available for working out the rights which had accrued prior to the dissolution of the business.

The principle of the above observation was commended to us. Our attention was also called to *The U.P. Electricity Supply Co. Ltd. Vs. The Workmen and Others*, (paragraphs 5, 6 and 11). Noticing the provisions of Chapter V-A of the Act, the Supreme Court observed:

In our view, by these provisions the legislature sought to give redress to workman in the contingencies mentioned in the said sections which are of common occurrence. These sections do not lay down that on the closure or transfer of an undertaking the employers were to be relieved of all other obligations to or claims of the workers. The preamble to the Industrial Disputes Act which expressly aims at preventing strikes and lockouts is in pari materia to the U.P. Industrial Disputes Act i.e., "to make provision for the investigation and settlement of industrial disputes, and for certain other purposes" cannot be read down to mean that the statute was being enacted only for the purpose of securing industrial peace so far as the future working of the industry was concerned. No doubt the main object of the act is to ensure industrial peace but equally important is the purpose behind the act that the workmen should not be deprived of their legitimate share of profits made by the industry. The central

object of the act is to preserve industrial harmony which would be meaningless if the workers of a particular industry were to be deprived of benefits of services rendered in the past. (para 5)

In paragraph 6, the Court noticed the decision in *Pipraich Sugar Mills Ltd. Vs. Pipraich Sugar Mills Mazdoor Union*, and the observations which we have quoted earlier; and in paragraph 11, the Court observed:

Retrenchment has been specially provided for by the legislature and the questions of closure of an industry and the transfer of an industry have been expressly provided for in the Industrial Disputes Act. Although the main purpose of the Act is to provide for collective settlement of disputes and maintenance of industrial peace we cannot hold that a tribunal which is called upon to adjudicate on a dispute relating to a share of the profits earned by the company in the past on behalf of the workman becomes functus officio or that the dispute becomes incapable of determination under the Act when the industry is closed. The claim, as already pointed out is for services rendered in the past and the dispute was a live one at the time when the reference was made by the State Government and indeed continued so for more than three years thereafter. It was only because of the protracted proceedings of the tribunal that the award came to be made as late as November 1965. The closure of the business long after the rendering of the services by the workmen and the reference of the dispute to the tribunal cannot wipe out the claim of the workmen or annul the adjudication in respect thereof.

6. We see considerable force in the submissions made by counsel for the Appellant. Counsel for the Respondents submitted that transfer of an undertaking u/s 25FF of the Industrial Disputes Act would be a sufficient defence to a petition u/s 33-A read with Section 33(2)(b) of the Industrial Disputes Act. In view of the observations of the Supreme Court which we have cited earlier, it is difficult, if not impossible, to accept the submission of counsel for the Respondents in this form. We will assume, without deciding, that the proposition submitted by him is correct. But even then, there can be little doubt -- and indeed counsel for the Respondents himself was obliged to admit -- that it is only a real and bona fide case of an action u/s 25FF and not a colourable exercise of power, or an act of victimisation that can be pleaded as a defence to an application u/s 33-A of the Act. Here, we have to take note of the finding recorded by the Tribunal in paragraph 12, to which we have called attention earlier. That has to be related to the discussion in Exts. P-3 and P-5 judgments of this Court on the earlier occasions, which again we have noticed. In the light of these, counsel for the Appellant submitted that the finding was that the employers' action in this case was a colourable exercise of power and an act of victimisation. Counsel for the Respondents submitted that the stigmatisation of the action by the Tribunal in paragraph 12 cannot possibly relate to the transfer of the undertaking as such, because no case that the transfer as such was mala fide or was a colourable exercise of power was either pleaded or argued, or could possibly be found. We

are prepared, here again, to assume, without deciding, that this is so. But there is no gainsaying the fact that there is a finding of colourable exercise of power and of victimisation and that the same has undoubtedly at least a restrictive operation in regard to the discharge or termination of the Appellant. We are of the opinion that if this part of the action u/s 25FF resulting in the discharge or termination of the Appellant is found to be a colourable exercise of power and an act of victimisation, as done by the Tribunal, that is sufficient to grant the reliefs granted by it. The learned Judge, we are afraid, lost sight of this important aspect of the finding recorded by the Tribunal, and proceeded on the assumption that the entire gamut of the action u/s 25FF was real, genuine and bona fide. We cannot endorse this in view of the Tribunal's finding preceded by the observations in Exts. P-3 and P-5, which we have sufficiently emphasised.

7. Counsel for the Respondents argued before us that Exts. P-3 and P-5 judgments, read and understood as a whole, did not sanction an investigation regarding the mala fides of the action u/s 25FF, or consideration of the question whether it was a colourable exercise of power or an act of victimisation. We have been taken carefully through Exts. P-3 and P-5 judgments and through the award of the Tribunal. We cannot agree that the previous judgments of this Court did not sanction an investigation into the bona fides of the action of the management. In any event, the Tribunal was not palpably wrong in having entered into an examination of this aspect of the question in the light of Exts. P-3 and P-5 judgments. We reject the submission of counsel for the Respondents that Exts. P-3 and P-5 judgments have been misconstrued by the Tribunal and that they did not authorise an investigation into the mala fides of the action of the management u/s 25FF.

8. Counsel for the Respondents complained that the Tribunal has not entered a finding that the Appellant was "concerned with" Industrial Dispute No. 139 of 1964, and that the misconduct complained of by him was "connected with" the said dispute, as required by Section 33(2)(b) of the Act. This appears to us to be a desperate attempt on the part of the management. Paragraph 13 of Ext. P-6 award stated:

13. In view of this fact this complaint is maintainable for the reason that the first opposite party has not obtained permission, as there was an Industrial Dispute pending in which the complainant was interested.

Counsel for the Respondents complained that the said finding was unrelated to any prior discussion of the evidence or material on which it could be based. We cannot accept the submission. Even in Ext. P-3 judgment, we find the following statement in paragraph 3:

On that date an Industrial dispute concerning some of the service conditions of the workmen of the Feroke Tile Works was pending before the Industrial Tribunal, Calicut as I.D. No. 139 of 1964. The Respondent complained to the Industrial Tribunal that the termination of his service was in violation of the provisions of

Section 33 of the Act and that he should, therefore, be granted the relief of reinstatement with back wages. He impleaded as counter-Petitioners in that proceeding the Madura Company Private Ltd., and the Sudarsan Trading Company Ltd.

We notice also that there was no issue or point before the Tribunal as to whether the requirements of Section 33-A read with Section 33(2)(b) were complied with or not. In the circumstances, we are unable to accept the submission on behalf of the Respondents.

9. We are not considering in detail the cases cited by counsel for the Respondents in support of the proposition that an action u/s 25FF is a defence against an application u/s 33-A of the Act. He cited the decision in Tea Districts Labour Association, Calcutta Vs. Ex-employees of Tea Districts Labour Association and Another, where the Tribunal found that the closure was bona fide; and it was conceded that there was a right of closure. Nevertheless, the Tribunal held that the management was guilty of contravening Section 22(b) of the Act there in question, corresponding to Section 33(2)(b) read with Section 33A of the Industrial Disputes Act. That finding was held to be unsustainable. The decision in The Bhavnagar Municipality Vs. Alibhai Karimbhai and Others, was cited. There, it was conceded that the case cannot be brought under Sections 33(2)(b) and 33A of the Act. The observation in paragraph 13 of the judgment was that retrenchment ordinarily does not affect the conditions of service.

10. Mahendra Singh Dhantwal Vs. Hindustan Motors Ltd. and Others, was relied on. That decision, we think, is quite material and important, and contains, according to us, sufficient indication to reject the contention of counsel for the Respondents. The case arose out of an application u/s 33(2)(b) of the Act and was concerned with pointing out the distinction between a termination simpliciter and a termination for misconduct. It was held:

24. Termination simpliciter or automatic termination of service under the conditions of service or under the standing orders is outside the scope of Section 33 of the Act. This does not mean that the employer has the last word about the termination of service of an employee and can get away with it by describing it to be a simple termination in his letter of discharge addressed to the employee. It is also not a correct proposition of law that in case of a complaint u/s 33A the Tribunal would be debarred from going into the question whether, notwithstanding the form of the order, in substance, it is an action of dismissal for misconduct and not termination simpliciter.

After rejecting the contention that the termination of services need not be for misconduct in order to attract Section 33(2)(b) of the Act, the Supreme Court made the following pertinent observation:

28. If the Tribunal finds that a particular termination of service of a workman is in truth and substance innocuous or in exercise of a bona fide right under the contract, Section 33(2)(b) will not be applicable and necessarily there will be no

contravention of Section 33A of the Act.

By implication, we have no doubt, that if the finding of the Tribunal be that the termination was a colourable exercise of power -- as in this case -- Section 33(2) (b) will be attracted.

11. In *Anakapalla Co-operative Agricultural and Industrial Society Limited Vs. Workmen*, was cited. The decision only states that on termination u/s 25FF the worker is entitled to compensation as if the case were one of retrenchment. But from this, the reverse proposition does not follow that once compensation u/s 25FF has been paid, the termination is lawful and not actionable u/s 33(2)(b). The decision explained the scope of the proviso to Section 25FF as follows:

The scheme of the proviso to Section 25FF emphasises the same policy. If the three conditions specified in the proviso are satisfied, there is no termination of service either in fact or in law, and so there is no scope for the payment of any compensation. That is the effect of the proviso. Therefore, reading Section 25FF as a whole, it does appear that unless the transfer falls under the proviso, the employees of the transferred concern are entitled to claim compensation against the transferor and they cannot make any claim for re-employment against the transferee of the undertaking. Thus, the effect of the enactment of Section 25FF is to restore the position which the legislature had apparently in mind when Section 25FF was originally enacted on 4th September 1956. By amending Section 25FF the legislature has made it clear that if industrial undertakings are transferred, the employees of such transferred undertakings should be entitled to compensation unless; of course, the continuity in their service or employment is not disturbed and that can happen if the transfer satisfies the three requirements of the proviso.

12. In the result, we allow this appeal, set aside the judgment of the learned Single Judge and direct that O.P. No. 4663 of 1975 will stand dismissed. We make no order as to costs.