
(1960) 04 BOM CK 0008

In the Bombay High Court

Case No : Special Civil Application No. 1342 of 1959

Tulsidas Khimji

APPELLANT

Vs

Jeejeebhoy (F.)

RESPONDENT

Date of Decision : 14-04-1960

Acts Referred:

Industrial Disputes Act, 1947 — Section 10(1), 12(4), 2, 25E, 25F

Citation : (1961) 1 LLJ 42

Hon'ble Judges : V.S. Desai, J;S.T. Desai, J

Bench : Division Bench

Judgement

V.S. Desai, J.—This is a petition under Arts. 226 and 227 of the Constitution of India challenging the award made by respondent 1, the Industrial Tribunal, Bombay, on 31 August 1959, in Reference (CGIT) No. 7 of 1959.

2. The petitioners are a partnership firm registered under the Indian Partnership Act, 1932, and carry on business as (1) clearing and shipping agents, (2) insurance agents, (3) godown keepers and (4) cotton supervisors and controllers. The petitioner have four different departments for the business carried on by them and these departments are :

- (1) the clearing and shipping department,
- (2) the insurance department,
- (3) the godown department, and
- (4) the cotton supervising and controlling department.

3. On 15 November 1958, the petitioners gave notice of termination of employment to 14 clerks and 2 peons from their clearing and forwarding departments and the godown department and after following the principle "last come, first go" from the said respective departments, they retrenched, as from 15 November, 1958, 14 clerks and 2 peons after these retrenched employees all their earned wages, leave wages, one month's pay in lieu of notice,

retrenchment compensation and also the bonus, which was due to them. Respondent 2, which is a trade union of the transport and dock workers, raised a dispute with regard to the retrenchment of these employees. The conciliation in respect of this dispute before the Regional Labour Commissioner, Central Bombay, failed and failure report under S. 12(4) of the Industrial Disputes Act was made by that authority to the Central Government on 7 February, 1959. The Government of India, thereafter on 28 February, 1959, referred the dispute to the Central Government Industrial Tribunal, Bombay, under S. 7(a) and Clause (d) of Sub-section (1) of S. 10 of the Industrial Disputes Act, 1947.

4. In the statement of claim filed by respondent 2 before the tribunal, it was contended that the retrenchment was not justified and secondly the proper procedure according to law was not adopted by the petitioners in retrenching the employees. On these contentions, respondent 2 prayed that the petitioner be ordered to reinstate the employees with back-wages from 15 November, 1958, till they were reinstated and the petitioners should be further ordered to pay compensation for the period of their enforced unemployment. The petitioners in their written statement before the tribunal contended that inasmuch as the order of reference included workmen in their employment other than those engaged in the clearing and shipping works at the docks, the Central Government had no jurisdiction and authority to make any order refereeing the industrial dispute to adjudication relating to the workmen other than those employed in the docks, and, therefore, the order of reference was bad in law and the tribunal had no jurisdiction to entertain the reference. On merits it was contended that the retrenchment was justified and the proper procedure was followed in retrenching the employees.

5. The preliminary objection raised by the petitioners to the jurisdiction of the tribunal was negatived by the tribunal. Although respondent 2 had contended that the retrenchment was not justified, that contention was given up before the tribunal. The only dispute, therefore, which was canvassed before the tribunal related to whether proper procedure had been followed by the petitioners in retrenching the employees. In this connexion it was the contention of respondent 2 on behalf of the employees that all the different departments of the petitioners constituted one industrial establishment and the retrenchment should have been effected on the principle of "last come, first go" with reference to the entire staff of all the departments and the head office together. On the other hand, it was contended by the petitioners that the four different departments were distinct and different industrial establishments and the retrenchment which the petitioners had effected by following the principle "last come, first go" in the respective departments was perfectly proper and in accordance with the provisions of S. 25G of the Industrial Disputes Act.

6. The tribunal held that for the purposes of the S. 25G of the Industrial Disputes Act the whole business was a single industrial establishment and, consequently, the retrenchment should have proceeded upon the basis of "last come, first go"

from amongst the whole clerical cadre and from the peons respectively. Proceeding then to consider the individual cases of the 14 clerks and the 2 peons on the basis of this conclusion, the tribunal further held that in the case of the two peons the retrenchment was proper; that the retrenchment of two of the 14 clerks was also proper inasmuch as they were the junior most from the entire clerical cadre and in the case of two more clerks the tribunal held that they had voluntarily resigned. In the case of the remaining 10 clerks, the retrenchment was held to be illegal and they were ordered to be reinstated within a fortnight of the publication of the award on their paying back to the concern any moneys received by them by way of provident fund, gratuity or compensation.

7. The petitioners have urged that on the findings of fact arrived at by the tribunal and on a true interpretation of the provisions of the S. 25G the four departments of the petitioners are distinct and different departments, which do not constitute a single industrial establishment. Consequently, the order passed by the tribunal treating all the departments as one industrial establishment is contrary to law and unsustainable. The petitioners have urged that in retrenching the employees on the basis of "last come, first go" from the respective departments, the petitioners have followed the correct procedure and the retrenchment effected by them is in accordance with the procedure prescribed by law. Apart from this contention merits of the case, Mr. Gupte, the learned counsel for the petitioners, has also urged that the reference to the Central Government Industrial Tribunal was without jurisdiction and that the tribunal had no jurisdiction to deal with the dispute raised by the employees in the present case. Before dealing with the contention on merits, we will proceed to dispose of the point as to jurisdiction raised by Mr. Gupte.

8. Mr. Gupte has urged that the reference in the present case has been made by the Central Government to the Central Government Industrial Tribunal. Now under s. 2(a) of the Industrial Disputes Act, the Central Government is the appropriate Government in relation to an industrial dispute concerning a banking or insurance company, a mine, an oil-field or a major port. The Industrial activities carried on by the petitioners in their four departments do not fall in the aforesaid items mentioned in S. 2(a) in respect of which the Central Government is the appropriate Government. It is, therefore, urged that the Central Government had no authority to make the reference in the present case and the Central Government Industrial Tribunal, therefore, had no jurisdiction to deal with the matter.

9. Now, in the first place, the contention as is urged before us was not raised before the industrial tribunal. There was a preliminary point as to jurisdiction taken before the tribunal, but the contention raised there was that the order of reference included workmen in their employment other than those engaged in the clearing and shipping work at the docks and the Central Government therefore had no jurisdiction and authority to make an order referring the industrial dispute to adjudication relating to workmen other than those employed

at the docks Mr. Gupte's argument, therefore, that none of the activities of the petitioners concerns a major part cannot be allowed to be entertained in this special civil application. The retrenchment effected is from the clearing and shipping department and from the godown department. Under S. 25G notice of the proposed retrenchment was required to be served in the prescribed manner on the appropriate Government. The notice has been served in respect of the retrenchment by the petitioner in the forwarding and clearing departments, the godown department, on the Central Government as the appropriate Government. The petitioners themselves, therefore, have accepted the position that the Central Government was the appropriate Government in relation to the dispute connected with the retrenchment in the present case. It may also be noted that although the contention was taken in the written statement that the employees other than those engaged in the clearing and shipping departments at the docks were outside the scope of the reference, the argument advanced before the tribunal was that the cotton department and the insurance department were unconnected with any activity at the docks. So far as the activities of the godown department were concerned, it was admitted that 25 per cent of the space in the godowns was utilized for storing the goods for clearing and shipping. In view of all these circumstances, it cannot be said that the activity of the godown department had no relation to major port. Since the dispute raised is with regard to the retrenchment in the clearing and forwarding department and the godown department, the activities of which, as we have seen, can be said to be concerning a major port, it would come within the scope of S. 2(a). The Central Government, therefore, had authority to make the reference and the Central Government Industrial Tribunal had jurisdiction to deal with it. The contention, therefore, which has been raised by Mr. Gupte fails.

10. Coming now to the other point on merits, namely, that the four departments of the petitioners are distinct and different industrial establishments and not one single industrial establishment and consequently the retrenchment effected by the petitioners is perfectly legal and proper, it will be desirable to state the findings of fact arrived at by the tribunal. With reference to the work carried out by the different departments, the tribunal has observed :

"There is no doubt that the clearing and forwarding department is different to the cotton control department. Both of these are in turn somewhat different to the godown department where 75 per cent is hired out to outsiders, the insurance department is small and very little insurance is effected in respect of the clearing and forwarding departments."

11. As to how these departments are managed, the tribunal has observed :

"Each of the four departments is under the charge of a partner of the concern, who normally would have under him the head of the department. The partner in charge of a particular department selects and appoints his own personnel without consulting any other department or the head office. Each partner looks after his own department and accounts are kept separately at the head office but they are

ultimately amalgamated inter alia for the purpose of incometax payable by the concern and no doubt also for the general purpose of the partnership."

12. As to the conditions of service of the clerks employed in these four departments, the tribunal has held that the recruitment is departmentwise and the seniority of the employees is also departmentwise. There is no general policy of transferability between the departments although there have been some stray cases and it is only in these stray cases that on transfer the transferred clerks have taken the seniority which they enjoyed in the department from which they were transferred to the department to which they were transferred. The industrial tribunal has also held that considering the requirements of the different departments when the retrenchment was effected the fall in business was only in the clearing and forwarding department and in the godown department and the reduction in the clerical staff of these departments was undoubtedly justified. There was, however, no such retrenchment required in the other two departments. The tribunal has also observed that if the principle "last came, first go" is followed treating the entire clerical cadre as belonging to one single establishment, the retrenchment may have to be made from the cotton department and the insurance department from which no staff is required to be reduced or from the accounts department at the head office which cannot be said to be belonging to any of the four departments.

13. The question to be considered is whether on these facts found by the industrial tribunal, the conclusion arrived at by the industrial tribunal is in accordance with law.

14. Mr. Phadke, who appears for respondents 2 and 3 (respondent 3 being the employees of the petitioner and not represented by the union, respondent 2) has urged that the conclusion which is the basis of the decision of the tribunal is a conclusion of fact and there is no scope for interfering with it in the present special civil application. We do not think that this contention of Mr. Phadke is correct. The question whether there is a single industrial establishment of different and distinct industrial establishments is a question, which required to be determined with reference to the interpretation and scope of the term "industrial establishment" is S. 25G of the Industrial Disputes Act. What is "one industrial establishment" within the meaning of that section must be considered with reference to the object and purpose of the provision contained in that section and also involves the consideration of the tests which should be applied in determining the meaning of that expression. It is no doubt true that for the purpose of this determination certain facts will have to be found as have been found by the industrial tribunal and these findings we must take as binding on us. But the final conclusion to be drawn from these facts as found by the tribunal is not a mere question of fact. If the correct and proper conclusion, which in law should have followed on the findings as found by the tribunal is different from the one to which it has come, the order of the tribunal will undoubtedly be contrary to law, and the effect of the order will be an interference with the right

to carry on business of the petitioner in a manner not justified by law. There is no doubt that the Industrial Disputes Act is a regulatory measure regulating and restricting the fundamental right to carry on business and that right can be restricted only in the manner provided by the provisions of the Act. If the order passed by the tribunal is, therefore, not such as would be justified in view of the provisions of S. 25G of the Industrial Disputes Act, the petitioner will be entitled to challenge the said order and have it set aside in an application under Arts. 226 and 227 of the Constitution. We cannot, therefore, accept Mr. Phadke's contention that the present special civil application can be disposed on the short ground that it involves a question of fact.

15. On the findings as recorded by the industrial tribunal it found considerable difficulty in deciding the question. This is clear from the observations of the tribunal in Para. 18 of the award where it said that "the decision on the issue referred to me is not easy" and further in Para. 19 when it observed :

"I realize that there is much to be said for both points of view now before me . . ."

16. Ultimately, however, it took the view that the different departments constituted one industrial establishment, because all the departments were owned by the same firm with a single head office; that the different departments were all situated within the city of Bombay and the employees were mostly from the same locality and had, therefore, a resultant homogeneity in service and also in view of the fact that there have been a few stray cases of transfer from one department to the other.

17. Mr. Gupte has argued that these facts, on which the tribunal has relied for its conclusion, have not much reluctance or importance in holding that the four departments constitute one industrial establishment within the meaning of S. 25G in view of the object and purpose of the said provision. According to Mr. Gupte, the other facts, which have been found by the tribunal, namely, that the four departments are different from one another; that each department from one another; that each department is separately and independently managed by a different partner; that the recruitment of clerks to the different departments is departmentwise and the seniority of the recruitment of clerks in the different departments also is departmentwise, are the more important and relevant factors in the present case for coming to the conclusion as to whether the four departments constitute or do not constitute a single industrial establishment.

18. The provisions of the Industrial Disputes Act, 1947, relating to retrenchment are contained in Ss. 25F to 25H. Section 25F prescribes the condition precedent to the retrenchment of the workmen in a continuing industry under the same ownership or management. The provision of S. 25FF relates to retrenchment consequent on change of ownership or management of an undertaking by transfer and S. 25FFF deals with retrenchment brought about by the closing down of an industrial undertaking. Section 25G, with which we are primarily

concerned, lays down the rule, which requires to be followed by an employer in effecting retrenchment of the employees. This rule prescribed that when retrenchment is to be effected in an industrial establishment from a category of workmen employed in that industrial establishment, in the absence of any agreement between the employer and the employee and in the absence or special reasons, the rule of "last come, first go" will have to be followed in retrenching the workmen from that category. The object and purpose of the rules contained in these sections is undoubtedly to improve the conditions of service of labour by regulating and restricting the contractual right of the master to dispense with the service of the servant and by providing safeguards against the indiscriminate and improper exercise of that right by the master in relation to the service of the servant. The safeguard provided by S. 25G is that when a retrenchment becomes necessary from a category of workers employed in an industrial establishment, the retrenchment will have to be effected by following the rule "last come, first go" in respect of the category of workers in the industrial establishment. What then is an "industrial establishment" with reference to this provision of S. 25G ?

19. The expression "industrial establishment" had not been defined in the Act, but there can be no doubt that an industrial undertaking or a business organization or firm may have several different and distinct industrial establishments and a single industrial establishment may also have different and distinct departments. The question whether in a given case there is a single industrial establishment or different industrial establishments will have, therefore, to be determined on considerations as in ordinary industrial or business sense determine the unity of an industrial establishment, bearing in mind no doubt the purpose and object of the provision of the Act in which the expression is used.

20. In a recent decision of the Supreme Court in the case of The Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs. Their Workmen, their lordships of the Supreme Court had to consider the meaning of "one industrial establishment" with reference to the provisions of S. 25E(iii) relating to lay-off. The provisions of S. 26F(iii) provide that no compensation shall be paid to workmen, who have been laid off if such lay-off is due to a strike or slowing down of the production on the part of the workmen in another part of the establishment and the question which their lordships had to consider was whether the Chaibassa Cement Works at Jhinkpani and the Rajank Limestone Quarry at a distance of about a mile and a half from the cement works both owned by the Associated Cement Companies, Ltd., were parts of one establishment or different establishments for the purpose of the provisions of S. 25E(iii). In dealing with the question of unity of establishment, their lordships considered the tests which would be relevant and helpful in determining the question. These facts considered by their lordships were geographical proximity, unity of ownership, management and control, unity of employment and conditions of service, functional integrality, general unity of purpose, etc. After

referring to these several tests, their lordships observed :

"The real purpose of these tests is to find out the true relation between the parts, branches, etc. If in their true relation they constitute one integrated whole, we say that the establishment is one : if on the contrary they do not constitute one integrated whole, each unit is then a separate one. How the relation between the units will be judged must depend upon the facts proved having regard to the scheme and object of the statute which gives the right to unemployment compensation and also prescribes the disqualification thereto."

21. Their lordships have also pointed out that it would be impossible to lay down any one of the test mentioned by them as an absolute and invariable test in all cases. Which of the several tests will be important and material in determining the true relation between the parts, branches, units, etc., will depend upon the facts proved in each case having regard to the scheme and object and the provision of the statute with reference to which the question has to be determined. In the light of these observations of their lordships of the Supreme Court our task in the present case is to find out which of the several tests are material and relevant in determining whether the different departments of the business of the petitioner constitute a single industrial establishment or different industrial establishments with reference to the provisions contained in S. 25G of the Industrial Disputes Act.

22. In our opinion, the provision of S. 25G relates to the duration or continuance of the services and provides a safeguard in the matter of discontinuance or dispensing with the service by prescribing the rules "last come, first go." That being the object and purpose of the provision, we must proceed to find out in the present case on what basis the recruitment of the employees is made by the employers. Have the employers recruited the employees on the basis that they belong to one category of clerks of the four different departments of the employers taken as an integrated whole or is the recruitment made on the basis of a category of clerks belonging to each of the different departments separately ? Can the employment of the clerks be regarded as the employment in a single category of clerks by reason of the unity of ownership of the different departments or by reason of the geographical proximity of the four different department or by reasons of the further fact that there is a head office supervision of the four different departments and ultimate amalgamation of the accounts of the four departments in the final accounts of the partnership ? Are the four different departments functionally integrated or by reason of the conditions of transferability or seniority amongst the clerical cadre, can the four departments be treated as forming a single integrated industrial establishment for the purpose of S. 25G ?

23. It seems to us that the main point of our enquiry in the present case is to find out whether there exists the necessary thread of unity by reason of which we may be able to say that the four departments can be regarded as a single industrial establishment for the purpose of S. 25G and the answers to the three

questions which we have set out above will help us in determining whether that thread of unity exists in the present case.

24. As to the basis on which the recruitment of the employees is made, the facts found by the industrial tribunal show that the recruitment to each of the departments is made separately and is governed by the requirements of that department also. The recruitment, therefore, is not made on the basis that the recruited clerk belongs to one single category of clerks belonging to the four departments taken as an integrated whole. The basis of recruitment, therefore, does not show that there is a unity of employment between the clerks belonging to the different departments.

25. It is true that in the present case the four departments belong to the same business firm. There is also no doubt that the four departments are situated in the same locality and it is also undisputed that there is a general head office supervision over the different departments and the accounts are also finally amalgamated. These facts, however, will not enable us to conclude that the clerks were employed as in a single category for the whole of the business of the four departments together in view of the other facts on record, namely, that the four departments were managed and worked as independent units and that each had its own staff, its own management and its own accounts separately. The fact that each department was amenable to the head office supervision to the fact that the accounts were ultimately amalgamated in the accounts of the firm would not detract from the departments being distinct and independent units so far as the employment and conditions of service of the employees engaged in them are concerned.

26. Coming now to the third line of enquiry, the facts found by the tribunal show that the four departments are not functionally integrated. The conditions of service on which the employees are recruited are departmentwise, their seniority also is departmentwise and there is no policy or rule of transferability and such stray cases of transfer as there might have been in the long life of the business cannot be regarded as establishing a rule or condition of transferability.

27. The result of the above discussion is that the four departments of the petitioner cannot be regarded as constituting a single industrial establishment for the purpose of S. 25G of the Act. That section relates to the duration and continuance of the service of the employee and it is from the point of view of the employment, the duration and continuance of the employments and the terms and conditions of employment that we have to determine whether the four departments can be regarded as one single industrial establishment. In the present case we have found that the four departments are distinct and complete units carrying on different lines of business and there is no functional integrality existing between them. The management and control of each department is separate and independent so far as its working and business is concerned. Each department employs its own staff according to its requirements : the employees belong solely and exclusively to that department and are not transferable as a

rule. The seniority of the employees is also departmentwise. There is thus no unity of employment and conditions of service between the four departments. These, in our opinion, are the main and important tests in the present case and these tests are against the respondents.

28. In our opinion, therefore, the contention urged before us by Mr. Gupte, learned counsel for the petitioner, that the view taken by the tribunal is erroneous and unsustainable, is correct. We must, accordingly, quash and set aside the award passed by respondent 1.

29. The rule is, accordingly, made absolute. There will be no order as to costs.