HINDUSTAN TIN WORKS PVT. LTD.

v.

EMPLOYEES OF HINDUSTAN TIN WORKS PVT. LTD.

September 7, 1978

[V. R. KRISHNA IYER, D. A. DESAI AND O. CHINNAPPA REDDY, JJ]

Constitution of India 1950—*Article* 136—*Scope of in labour matters—Article* 43*A*—*Explained—Participation of workmen in the Management.*

Uttar Pradesh Industrial Disputes Act 1947—*Workers retrenched on grounds of losses—Tribunal found retrenchment unjustified—Ordered reinstatement with back wages—Special leave refused regarding reinstatement—Employer if could reopen at the time of hearing.*

Awarding full or partial back wages—Principles for awarding—Employee's financial viability to pay back wages—If could be a factor for not awarding full back wages.

The management (Appellant) retrenched 56 of its workmen alleging non-availability of raw material to utilise the full installed capacity, power shedding limiting the working of the unit to 5 days a week and mounting losses. As a result of negotiations between the parties, the retrenched workmen were taken back in service. A few days later, however, the workmen demanded revision of wage scales, but the appellant pleaded inability to revise the pay scales in view of the mounting losses. Thereafter, the employer retrenched 43 workmen. The dispute resulting out of the retrenchment was referred to adjudication under section 4K of the U.P. Industrial Disputes Act, 1947.

The Labour Court held that the real reason for retrenchment was annoyance felt by the management when the employees refused to agree to the terms of settlement and that it was not for the reasons stated by the employer. The Labour Court ordered reinstatement of the retrenched workmen with full back wages.

In the Special leave petition the employer questioned the correctness of the Labour Court's view that the retrenched workmen should be reinstated. This Court rejected this prayer and limited the special leave to the question of granting back wages to the retrenched workmen ordered to be reinstated.

HELD : 1. Since the emoloyer's prayer in the special leave petition that the retrenched workmen should not be reinestated was rejected by this Court it meant that the Labour Court's view that retrenchment was unjustified was correct. For the reasons found by the Labour Court retrenchment was motivated and so invalid. The workmen were entitled to the relief of reinstatement from the date they were sought to be retrenched. The order of the Labour Court on the question of reinstatement became final. [567 C-E]

2. Article 136 of the Constitution does not envisage this Court to be a regular Court of Appeal, but it confers a discretionary power on it to grant special leave to appeal, *inter alia,* against the Award of any Tribunal. The scope and ambit of this vide constitutional discretionary power cannot be

A exhaustively defined. It cannot be so construed as to confer a right to a party when he has none under the law. The Court will entertain a petition for special leave in which a question of general public importance is involved or when the decisions would shock the conscience of this Court. The Industrial Disputes Act is intended to be a self-contained code and it seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given on circumstances peculiar to each dispute and B the Tribunals are to a large extent free from restrictions of technical considerations imposed on Courts. A free and liberal exercise of the power under Article 136 may materially affect the fundamental basis of such decisions, viz., quick solution of such disputes to achieve industrial peace. [567 F—568 A]

Bengal Chemical & Pharmaceutical Works Ltd., Calcutta v. *Their Workmen* [1959] Suppl. 2 SCR 136 at 140 referred to.

C

2. In the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. [568 G-H]

D

3. Where termination of service is questioned as being invalid or illegal and the workman has to go through the litigation, his capacity to sustain himself throughout the protracted litigation is itself so precarious that he may not survive to see the day when relief is granted. If after such prolonged litigation the workman is not paid his back wages it would amount to a penalty for no fault of his. The workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was E gainfully employed during the enforced idleness. If the termination is illegal or motivated it may amount to unfair labour practice. In such circumstances reinstatement being the normal rule it should be done with full back wages. [569 B-D]

Workmen of Calcutta Dock Labour Board & Anr. v. *Employers in relation to Calcutta Dock Labour Board & Ors.*, [1974] 3 S.C.C. 216, referred to.

F

Management of Panitole Tea Estate v. *The Workmen* [1971] 3 SCR 774 referred to.

Dhari Gram Panchayat v. *Safai Kamdar Mandal* [1971] 1 LLJ 508 approved.

Postal Seals Industrial Co-operative Society Ltd. v. *Labour Court II Lucknow & Ors.* [1971] 1 LLJ 327 approved.

G

For awarding relief of back wages all relevant considerations will enter the verdict of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. The Tribunal will then exercise its discretion. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the H record. It should not be arbitrary, vague and fanciful but legal and regular. [570 E-G]

Susannah Sharn v. *Wakefield* [1891] AC 173 at 179 referred to.

On the question of the employer's financial viability to pay back wages in view of mounting losses the Supreme Court held : A

(a) Industry is a common venture, the participants being capital and labour. Article 43A requires the State to take steps to secure participation of workmen in the management. From being a factor of production labour has become a partner in industry. It is a common venture in pursuit of a desired goal. If sacrifice is necessary in the overall interest of the industry it would be unfair to expect only labour to make the sacrifice. It should be a common sacrifice. If sacrifice is necessary those who can afford and have the capacity must bear the brunt. [571 A-F] B

(b) In the present case there is nothing to show that the Managing Director has made any sacrifice. In the absence of such information the weaker section of society cannot be expected to make a greater sacrifice than the directors. In an appropriate case it would be appropriate to direct that till the loss is wiped out the managing directors shall not charge any fees for the services rendered and no dividend shall be paid. [571 G, 572 E-F] C

(c) As the appellant has turned the corner, and the industrial unit is looking up and started making profits, the retrenched workmen having already been reinstated and started earning their wages it would be appropriate to award 75% of the back wages to the workmen to be paid in two equal instalments. [572 D] D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 656 of 1978.

Appeal by Special Leave from the Award dated 21-9-1977 of the Labour Court, Meerut in Adjudication Case No. 160/74.

G. B. Pai, L. R. Singh, R. P. Singh, R. K. Jain, Suman Kapoor and *Sukumar Sahu* for the Appellant. E

R. K. Garg, V. J. Francis and *Madan Mohan* for Respondent No. 1.

G. N. Dikshit and *O. P. Rana* for Respondents 2-3.

The Judgment of the Court was delivered by F

DESAI, J. This appeal by special leave, limited to the question of grant of back wages, raises a very humane problem in the field of industrial jurisprudence, namely, where termination of service either by dismissal, discharge or even retrenchment is held invalid and the relief of reinstatement with continuity of service is awarded what ought to be the criterion for grant of compensation, to the extent of full wages or a part of it ? G

A few relevant facts will highlight the problem posed. Appellant is a private limited Company having set up an industrial unit in engineering industry. The raw material for its manufacturing process is tin plates. The appellant served notice of retrenchment on 56 workmen in February 1974 alleging non-availability of raw material to utilise the full installed capacity, power shedding limiting the H

working of the unit to 5 days a week, and the mounting loss. Subsequently, negotiations took place between the Union and the appellant leading to an agreement dated 1st April 1974 whereby the workmen who were sought to be retrenched were taken back in service with continuity of service by the appellant and the workmen on their part agreed to co-operate with the management in implementing certain economy measures and in increasing the productivity so as to make the undertaking economically viable. Simultaneously, the workmen demanded a revision of the wage scales and the appellant pleaded its inability in view of the mounting losses. Some negotiations took place and a draft memorandum of settlement was drawn up which provided for revision of wages on the one hand and higher norms of production on the other, but ultimately the settlement fell through. Appellant thereafter on 1st July, 1974 served a notice of retrenchment on 43 workmen. The Tin Workers' Union, Ghaziabad, espoused the cause of such retrenched workmen and ultimately the Government of Uttar Pradesh by its notification dated 9th October 1974, issued in exercise of the power conferred by Section 4-K of the U.P. Industrial Disputes Act, 1947, referred the industrial dispute arising out of retrenchment of 43 workmen, between the parties, for adjudication to the Labour Court. Names of the retrenched workmen were set out in an Annexure to the order of reference.

The Labour Court, after examining the evidence led on both sides and considering various relevant circumstances, held that the reasons stated in the notice dated 1st July, 1974, Ext. E-2, viz., heavy loss caused by non-availability of tin plates, persistent power curbs and mounting cost of production, were not the real reasons for affecting retrenchment but the real reason was the annoyance felt by the management consequent upon the refusal of the workmen to agree to the terms of settlement contained in the draft dated 5th April, 1974 and, therefore, the retrenchment was illegal. The Labour Court by its award directed that all the workmen shall be reinstated in service from 1st August, 1974 with full back wages, permitting the appellant to deduct any amount paid as retrenchment compensation from the amount payable to the workmen as back wages. The appellant challenged the Award in this appeal. When the special leave petition came up for admission, this Court rejected the special leave petition with regard to the relief of reinstatement but limited the leave to the grant of full back wages.

The question whether the workmen who were retrenched were entitled to the relief of reinstatement is no more open to challenge. In other words, it would mean that the retrenchment of workmen was invalid for the reasons found by the Labour Court and the workmen were

entitled to the relief of reinstatement effective from the day on which they were sought to be retrenched. The workmen were sought to be retrenched from 1st August, 1974 and the Labour Court has directed their reinstatement effective from that date. The Labour Court has also awarded full back wages to the workmen on its finding that the retrenchment was not *bona fide* and that the non-availability of the raw material or recurrent power shedding and lack of profitability was a mere pretence or a ruse to torment the workmen by depriving them of their livelihood, the real reason being the annoyance of the appellant consequent upon the refusal of the workmen to be a party to a proposed settlement by which work-load was sought to be raised.

Mr. Pai, learned counsel for the appellant in his attempt to persuade us to give something less than full back wages, attempted to re-open the controversy concluded by the order of this Court while granting limited leave that the retrenchment was inevitable in view of the mounting losses and falling production for want of raw material and persistent power shedding. It was said that for the limited purpose of arriving at a just decision on the question whether the workmen should be awarded full back wages, we should look into the compelling necessity for retrenchment of the workmen. Once leave against relief of reinstatement was rejected, the order of the Labour Court holding that retrenchment was invalid and it was motivated and the relief of reinstatement must follow, has become final. Under no pretext or guise it could now be re-opened.

Before dealing with the contentions in this appeal we must bear in mind the scope of jurisdiction of this Court under Article 136 of the Constitution *vis-a-vis* the Awards of the Industrial Tribunals. Article 136 of the Constitution does not envisage this Court to be a regular Court of Appeal but it confers a discretionary power on the Supreme Court to grant special leave to appeal, *inter alia,* against the Award of any Tribunal in the territory of India. The scope and ambit of this wide constitutional discretionary power cannot be exhaustively defined. It cannot obviously be so construed as to confer a right to a party when he has none under the law. The Court will entertain a petition for special leave in which a question of general public importance is involved or when the decision would shock the conscience of this Court. The Industrial Disputes Act is intended to be a self-contained one and it seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given on circumstances peculiar to each dispute and the Tribunals are to a large extent free from restrictions of technical considerations imposed on courts. A free and

A liberal exercise of the power under Article 136 may materially affect the fundamental basis of such decisions, viz., quick solution of such disputes to achieve industrial peace. Though Article 136 is couched in widest terms, it is necessary for this Court to exercise its discretionary jurisdiction only in cases where Awards are made in violation of the B principles of natural justice causing substantial and grave injustice to parties or raises an important principle of industrial law requiring elucidation and final decision by this Court or discloses such other exceptional or special circumstances which merit consideration of this Court (See *Bengal Chemical & Pharmaceutical Works Ltd., Calcutta* v. *Their Workmen*) (1).

C

The question in controversy which fairly often is raised in this Court is whether even where reinstatement is found to be an appropriate relief, what should be the guiding considerations for awarding full or partial back wages. This question is neither new nor raised for the first time. It crops up every time when the workman questions the D validity and legality of termination of his service howsoever brought about, to wit, by dismissal, removal, discharge or retrenchment, and the relief of reinstatement is granted. As a necessary corollary the question immediately is raised as to whether the workman should be awarded full back wages or some sacrifice is expected of him.

E Let us steer clear of one controversy whether where termination of service is found to be invalid, reinstatement as a matter of course should be awarded or compensation would be an adequate relief. That question does not arise in this appeal. Here the relief of reinstatement has been granted and the award has been implemented and the retrenched workmen have been reinstated in service. The only limited F question is whether the Labour Court in the facts and circumstances of this case was justified in awarding full back wages.

It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common G law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to H work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If

(1) [1959] Supp1. 2 SCR 136 at 140.

thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case, *viz.*, to resist the workman's demand for revision of wages. the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation upto the apex Court and now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. A Division Bench of the Gujarat High Court in *Dhari Gram Panchayat* v. *Safai Kamdar Mandal*(1), and a Division Bench of the Allahabad

(1) [1971] 1 Labour Law Journal 508.

A High Court in *Postal Seals Industrial Co-operative Society Ltd.* v. *Labour Court II, Lucknow & Ors.*(1), have taken this view and we are of the opinion that the view taken therein is correct.

The view taken by us gets support from the decision of this Court in *Workmen of Calcutta Dock Labour Board & Anr.* v. *Employers in* B *relation to Calcutta Dock Labour Board & Ors.*(2). In this case seven workmen had been detained under the Defence of India Rules and one of the disputes was that when they were released and reported for duty, they were not taken in service and the demand was for their reinstatement. The Tribunal directed reinstatement of five out of seven workmen and this part of the Award was challenged before this Court. C This Court held that the workmen concerned did not have any opportunity of explaining why their services should not be terminated and, therefore, reinstatement was held to be the appropriate relief, and set aside the order of the Tribunal. It was observed that there was no justification for not awarding full back wages from the day they offered to resume work till their reinstatement. Almost an identical view was D taken in *Management of Panitole Tea Estate* v. *The Workmen*(3).

In the very nature of things there cannot be a straight jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule E and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on F the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular (See *Susannah Sharn* v. *Wakefield*(4).

It was, however, very strenuously contended that as the appellant G company is suffering loss and its carry-forward loss as on 31st March 1978 is Rs. 8,12,416.90, in order to see that the industry survives and the workmen continue to get employment, there must be some sacrifice on the part of workmen. If the normal rule in a case like this is to award full back wages, the burden will be on the appellant employer

H (1) [1971] 1 Labour Law Journal 327.
(2) [1974] 3 SCC 216.
(3) [1971] 3 SCR 774.
(4) [1891] AC 173 at 179.

to establish circumstances which would permit a departure from the normal rule. To substantiate the contention that this is an exceptional case for departing from the normal rule it was stated that loss is mounting up and if the appellant is called upon to pay full back wages in the aggregate amount of Rs. 2,80,000/-, it would shake the financial viability of the company and the burden would be unbearable. More often when some monetary claim by the workmen is being examined, this financial inability of the company consequent upon the demand being granted is voiced. Now, undoubtedly an industry is a common venture, the participants being the capital and the labour. Gone are the days when labour was considered a factor of production. Article 43A of the Constitution requires the State to take steps to secure the participation of workmen in the management of the undertaking, establishments or other organisations engaged in any industry. Thus, from being a factor of production the labour has become a partner in industry. It is a common venture in the pursuit of desired goal.

Now, if a sacrifice is necessary in the overall interest of the industry or a particular undertaking, it would be both unfair and inequitous to expect only one partner of the industry to make the sacrifice. Pragmatism compels common sacrifice on the part of both. The sacrifice must come from both the partners and we need not state the obvious that the labour is a weaker partner who is more often called upon to make the sacrifice. Sacrifice for the survival of an industrial undertaking cannot be an unilateral action. It must be a two way traffic. The management need not have merry time to itself making the workmen the sacrificial goat. If sacrifice is necessary, those who can afford and have the cushion and the capacity must bear the greater brunt making the shock of sacrifice as less poignant as possible for those who keep body and soul together with utmost difficulty.

The appellant wants us to give something less than full back wages in this case which the Labour Court has awarded. There is nothing to show whether the Managing Director has made any sacrifice; whether his salary and perks have been adversely affected; whether the managerial coterie has reduced some expenses on itself. If there is no such material on record, how do we expect the workmen, the less affording of the weaker segment of the society, to make the sacrifice, because sacrifice on their part is denial of the very means of livelihood.

We have also found that since 1976-77 the appellant is making profit. A Statement of Account certified by the Chartered Accountants of the company dated 25th July, 1978 shows that the appellant has been making profit since 1976-77. The unit is, therefore, looking up.

A One relevant aspect which would assist us in reaching a just conclusion is that after retrenching 43 workmen effective from 1st August 1974, 36 of them were recalled for service on large number of days in 1975-1976 and 1977, the maximum being the case of Jai Hind who was given work for 724½ days, and the minimum being Harsaran s/o Baldev who was given work for 15 days. An amount of B Rs. 74,587.26 was paid to these 36 workmen for the work rendered by them since the date of retrenchment. Certainly, the appellant would get credit for the amount so paid plus the retrenchment compensation it must have paid. Even then we were told that the employer will have to pay Rs. 2,80,000/- by way of back wages. We were also told that the appellant had offered to pay by way of settlement 50% C of the back wages. Therefore, the only question is whether we should confirm the Award for full back wages.

Now, undoubtedly the appellant appears to have turned the corner. The industrial unit is looking up. It has started making profits. The workmen have already been reinstated and therefore, they have started D earning their wages. It may, however, be recalled that the appellant has still not cleared its accumulated loss. Keeping in view all the facts and circumstances of this case it would be appropriate to award 75% of the back wages to the workmen to be paid in two equal instalments.

E It may well be that in appropriate cases the Court may, in the spirit of labour and management being partners in the industry, direct scaling down of back wages with some sacrifice on management's part too. We were, even here, inclined to saddle the condition that till the loss is totally wiped out the Managing Director and the Directors shall not charge any fee for the services rendered as Director, no dividend shall F be paid to equity shareholders, and the Managing Director shall not be paid any overriding commission, if there be any, on the turnover of the company since this will account for the pragmatic approach of common sacrifice in the interest of the industry. We indicate the implications of Article 43A in this area of law but do not impose it here for want of fuller facts.

G The Award shall stand accordingly modified to the effect that the retrenched workmen who are now reinstated shall be paid 75% of the back wages after deducting the amount paid to them as wages when recalled for work since the date of retrenchment and adjustment of the retrenchment compensation towards the amount found due and pay- H able. The appellant shall pay the costs of the respondents as directed while granting special leave.

N.V.K. *Appeal dismissed.*