

A ROHTAS INDUSTRIES LTD. & ANR.

v.

ROHTAS INDUSTRIES STAFF UNION AND ORS.

December 18, 1975

B [Y. V. CHANDRACHUD, V. R. KRISHNA IYER AND A. C. GUPTA, JJ.]

B *Constitution of India Article 226 and 226(1A)—Powers of High Court to issue Writ against arbitrators under section 10A of Industrial Disputes Act—Arbitration Act—Error apparent on the face of the record—Speaking award—Error of Law. Industrial Disputes Act, 1947—Secs. 2(k) 10-A, 23, 24, 33C—Whether employers can be awarded compensation for loss of profit due to illegal strike under Industrial Disputes Act—Industrial Dispute—Enforcement of special rights created by special statute whether confined to remedies provided by the statute.*

C During the year 1948, the respondent, workmen working with both the appellants went on illegal strike on account of Trade Union rivalry. The workmen were not paid wages for the strike period and the appellants lost their profit during the period. The employers and the workmen entered into an agreement during the pendency of the conciliation proceedings and referred the claims of workmen for salaries during the strike period and the claims of the employers for compensation for loss due to the strike to the joint arbitration of two retired High Court Judges and one retired Member of a Labour Appellate Tribunal under section 10-A of the Industrial Disputes Act 1947.

D The arbitrator delivered their award and held that the workmen participating in the strike were not entitled to wages for the strike period. The arbitrators, however, awarded huge compensation to the employers against the workmen for the losses incurred by the employers during the strike period. The workmen challenged the award as illegal and void by filing two writ petitions in the High Court. The High Court upheld that part of the award which directed that the workmen participating in the strike were not entitled to wages. The High Court, however, quashed the part of the award which directed payment of compensation by the workers to the management.

E In appeal by Special Leave under Article 136, the appellants contended :—

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1. The award under section 10-A of the Act savours of a private arbitration and is not amenable to correction under Article 226 of the Constitution.
 2. The award of compensation by the arbitrators suffers from no vice which can be regarded as recognised grounds for the High Court interference.

G HELD : (1) The expansive and extraordinary powers of the High Court under Article 226, as wide as the amplitude of the language used, indicates and so can affect "any person", even a private individual and be available for "any other purpose", even one for which another remedy may exist. The insertion of Article 226(1A) reiterates that writ power can be exercised against any person by reference to the residence of such person. It is one thing to affirm the jurisdiction and another to authorise free exercise. This Court has spelt out wise and clear restraints on the use of this extraordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. [17C—E]

H 2. An arbitrator exercising powers under section 10A can bind even those who are not parties to the reference or agreement and the whole exercise under section 10A as well as the source of the force of the award on publication derive from the statute. It is legitimate to regard such an arbitrator now as part of the methodology of the sovereign's dispensation of justice, thus falling within the rainbow of statutory tribunals amenable to judicial review. The award in the present case is not beyond the legal reach of Article 226. [18B—C]

3. The answer to the question whether the High Court should have exercised its powers under Article 226 in the present case will depend upon whether the arbitrator has tied himself down to obviously unsound legal proposition in reaching his verdict appearing from the face of the award. The arbitrator may not state the law such, even then such cute silence confers no greater or subtler immunity on the award than plain speech. The need for speaking order, where considerable numbers are affected in their substantial rights, may well be a facet of natural justice or fair procedure although in this case we do not have to go so far. The law sets no premium on juggling with drafting the award or hiding the legal error by blanking out. The inscrutable face of the sphinx has no better title to invulnerability than a speaking face which is a candid index of the mind. [19D, 20F—H]

4. According to the arbitrators, the strike was illegal being in violation of section 24 of the Act, the illegal strike was animated by inter-union power struggle and that it inflicted loss on the management by forced closure and that the loss flowing from the strike was liable to be recompensed by award of damages. In this chain of reasoning the question of law whether an illegal strike causing loss of profit justifies award of damages is necessarily involved. The arbitrator held in the affirmative and according to us it is an unhappy error of law. In the present case the arbitrators have made a sufficiently speaking award both on facts and on law. After coming to the conclusion that the strike was illegal they held that compensation necessarily follows based on the rule of English common law. The English cases laying down the rule of common law were a response to the requirement of Industrial civilization of the 19th Century England. Trade and industry on the *laissez faire* doctrine flourished and the law of torts was shaped to serve the economic interests of the trading and industrial community. Whatever the merits of the norms, violation of which constituted 'conspiracy' in English Law, it is a problem for creative Indian Jurisprudence to consider how far a mere combination of men working for furthering certain objective can be prohibited as a tort according to the Indian value system. Our constitution guarantees the right to form associations, not for gregarious pleasure, but to fight effectively for the redressal of grievances. Our constitution is sensitive to workers rights. English history, political theory and life style being different from Indian conditions where the Father of the Nation organised boycotts and mass satyagrahas we cannot incorporate English conditions without any adaptation into Indian Law. [21B—C, 22A, B—C, D]

5. Even in England, till recently it could not be said with any certainty that there was any such tort as conspiracy. The tort is unusual because it emphasizes the purpose of the defendants rather than the result of their conduct. Even when there are mixed motives liability will depend on ascertaining which is the predominant object of the true motive or the real purpose of the defendant. The motive of an illegal strike may be to advance the workers' interest or steal a march over a rival union but never or rarely to destroy or damage the industry. However, if some individuals destroy the plant and machinery wilfully to cause loss to the employer such individuals will be liable for the injury so caused. Sabotage is no weapon in workers' legal armoury. It is absolutely plain that the tort of conspiracy necessarily involves advertence to the object of the combination being the infliction of damage on the plaintiff. The strike may be illegal but if the object is to bring the employer to terms with the employees or to bully the rival trade union into submission there cannot be an actionable combination in tort. In the present case, the arbitrators did not investigate the object of the strike. The arbitrators assumed that if the strike is illegal the tort of conspiracy is made out. The counsel for the appellants fairly conceded that the object of the strike was inter-union rivalry. There is thus a clear lapse in the law on the part of the arbitrators manifest on the face of the award. [22F, 23B—C, E, H, & 24A—B]

6. It is common case that the demand for the wages during the strike period constitutes an Industrial Dispute within section 2(k) of the Act. It is agreed by both the sides that section 23 read with section 24 makes the strike in question illegal. An illegal strike is the creation of the statute and the remedy for the illegal strike and its fall out has to be sought within the statute and not *de hors*

A it. No other relief outside the Act can be claimed on general principles of jurisprudence. The case of *Premier Automobiles* followed. [25 B—C]

B 7. The enforcement of a right or obligation under the Act must be by a remedy provided in the Statute. The right of the management to claim compensation is not provided by the Act, and, therefore, the arbitrators Committed an *ex facie* legal error. The consent of the parties cannot create arbitral jurisdiction under the Industrial Disputes Act. The claim for compensation cannot be a lawful subject for arbitration because it is not covered within the definition of Industrial Disputes in section 2(k). We are unable to imagine a tort of liability or compensation based on loss of business being regarded as an industrial dispute as defined in the Act. Section 33 C provides for speedy recovery of money due to a workman from an employer under a settlement or award. It does not provide for recovery of money by the employer from the workman. Obviously because the workman belongs to the weaker section. Claims by employers against the workmen on grounds of tortious liability have not found a place in the pharmacopoeia of Indian Industrial Law. [26 D, 27A, C, D—E]

C CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1727-1728 of 1969.

Appeals by Special Leave from the Judgment and Order dated the 2nd May, 1962 of the Patna High Court of Judicature at Patna, in M.J.C. Nos. 475 and 498 of 1959.

D *A. B. N. Sinha, B. P. Maheshwari and Suresh Sethi* for the Appellants (in both the appeals).

B. C. Ghose, S. S. Jauhar, D. N. Pandey, A. Sinha and D. P. Mukherjee for Respondent 1 (In C.A. 1727) and Respondents 1-3 (In CA 1728).

E *D. P. Singh, S. C. Agarwal and V. J. Francis* for respondents 7 and 8 (In CA 1727 and Respondent 4 in (1728/69)).

The Judgment of the Court was delivered by

KRISHNA IYER, J.—We permit ourselves a few preliminary observations disturbingly induced by the not altogether untypical circumstances of these two appeals, before proceeding to state the facts, set out the submissions and decide the points.

F Industrial law in India has not fully lived up to the current challenges of industrial life, both in the substantive norms or regulations binding the three parties—the States, Management and Labour—and in the processual system which has baulked, by dawdling dysfunction, early finality and prompt remedy in a sensitive area where quick solution is of the very essence of real justice. The legislative and judicial processes have promises to keep if positive industrial peace, in tune with distributive economic justice and continuity of active production, were to be accomplished. The architects of these processes will, we hopefully expect, fabricate creative changes in the system, normative and adjectival.

H The two appeals before us, passported by special leave under Art. 136, relate to an industrial dispute with its roots in 1948, meandering along truce, union rivalry and the like, into strikes and settlements, the last of which led to an arbitration award in 1959 which, in turn, prompted two writ petitions before the High Court. After a spell of a few years they ripened into a judgment. Appeals to this Court followed and, after long gestation of six years for preparation of papers and a

like period the cases are ready for final hearing or parturition, in all 12 years after the grant of leave. By this cumulative lapse of time the generation of workers who struck work two decades ago have themselves all but retired, the representative Union itself which sponsored the dispute has, the other side faintly states, ceased to command representative character, the Managements themselves have, out of many motives, disclaimed the intention to recover the huge sums awarded to them by the arbitrators and the only survival after death, as it were, is a die-hard litigation tied up to a few near-academic, but important, legal points for adjudication by the highest Bench! On this elegiac note we will enter the relevant area of facts and law since we *must* decide cases brought before us, however stale the *lis*.

At this stage we may mention our strong feeling that where the superior courts, after hearing full arguments, are clearly inclined to affirm the judgment under appeal for substantially similar reasons as have weighed with the lower Court, there is no need to give lengthy reasons for dismissing the appeal. Brevity, except in special cases, may well fill the bill where the fate is dismissal. On this score we are disposed to make short shrift of the appeals with stating but the necessary facts and focusing on the larger legal facets. Nevertheless, the significance and plurality of the points pressed have defeated condensation.

The facts

Two connected managements of industries in the same locality, who figure as appellants before us, had a running industrial dispute with their workers, which has had a long history moving in a zigzag course and sicklied over by alleged internecine trade-union strife. There were two trade unions which were perhaps of competitive strength and enjoying recognition. One of them, the Rohtas Industries Mazdoor Sangh (for short, the Mazdoor Sangh) was the representative union during the relevant period while the other, the Rohtas Industries Seva Sangh (for brevity, the Seva Sangh) is not a party before this Court and so we are not concerned with it except for the purpose of noticing its presence in the settlement of the dispute which starts the story so far as the litigation is concerned. There was a strike in the Industry (for our purposes this expression embraces both the appellants) which came to an end by virtue of a memorandum of agreement dated October 2, 1957, to which not merely the management but also the two registered unions aforementioned and the two un-registered unions which had a lesser following, were party. The terms of the said agreement provided *inter alia* that :

“The employees’ claim for wages and salaries for the period of strike and the company’s claim for compensation for losses due to strike shall be submitted for arbitration of Sri J. N. Majumdar and Sri R. C. Mitter, ex-High Court Judges and Ex-Members of the Labour Appellate Tribunal of India as joint arbitrators and their decisions on the two questions shall be final and binding on all the parties.”

(Clause 7 of agreement)

A This agreement was admittedly arrived at during conciliation proceedings contemplated by the Industrial Disputes Act, 1947 (for short, the Act) and the reference to arbitration spelt out in clause 7 directly and admittedly fell under s. 10A of the Act.

B It is apparent that the arbitrators were seised of two questions : (a) the claim of the workers for wages for the period of strike; and (b) the claim of the management for compensation for its losses flowing from the strike. The Board of arbitrators, two retired Judges of the Calcutta High Court—held extensive hearings spread over a year and a half, made a lengthy award marshalling the evidence, adducing the reasons, discussing the law and recording its decision on the two vital issues. At the end of the detailed and reasoned record of conclusions, the award runs thus :

C “Our award accordingly is :—

(1) That the workmen participating in the strike are not entitled to wages and salaries for the period of the strike.

D (2) That the company do recover from the workmen participating in the strike, compensation assessed at Rs. 80,000 (rupees eighty thousand).

E (3) That the workmen jointly and severally do pay to the company one eighth of the total costs of the arbitration. In default of payment the company will be at liberty to recover the same in such manner as it thinks fit. Subject to this the parties do bear their respective costs.”

F The workmen were deprived of their wages during the period of the strike on the score that it was an illegal strike. Both sides seem to have accepted this finding after an unsuccessful challenge in the High Court and happily industrial peace is said to be prevailing currently. What did hurt the Mazdoor Sangh more and what the management did try to have and to hold as a bonanza was the second finding that the strikers, apart from forfeiting wages, do pay compensation in the huge sum of Rs. 6,90,000/- in one case and Rs. 80,000/- in the other, for the loss of profits suffered by the manufacturing business of the management, a pronouncement unusual even according to counsel for the appellant, although sustainable in law, according to him. For the workers this unique direction of industrial law is fraught with ominous consternation and dangerous detriment. The Mazdoor Sangh challenged the award as illegal and void by filing two writ petitions but the High Court quashed that part of the award which directed payment of compensation by the workers to the management and, as earlier pointed out, both sides have chosen to abide by the award in relation to the denial of wages during the strike period.

The Main Points Urged

H The short but important issue, which has projected some serious questions of law, is as to whether the impugned part of the award has been rightly voided by the High Court. We may as well formulate

them but highlight the only major submission that merits close examination, dealing with the rest with terse sufficiency. In logical order, counsel for the appellant urged that (1) (a) an award under s. 10A of the Act savours of a private arbitration and is not amenable to correction under Art. 226 of the Constitution. (b) Even if there be jurisdiction, a discretionary desistence from its exercise is wise, proper and in consonance with the canons of restraint this Court has set down. (2) The award of compensation by the arbitrators suffers from no vice which can be regarded as a recognised ground for the High Court's interference. (3) The view of law taken by the High Court on (i) the supposed flaw in the award based on 'mixed motives' for the offending strike; (ii) the exclusion of remedies other than under s. 26 of the Act; and (iii) the implied immunity from all legal proceedings against strikers allegedly arising from s. 18 of the Trade Unions Act, 1926 is wrong. A few other incidental arguments have cropped up but the core contentions are what we have itemised above.

(1) (a) & (b)

The expansive and extraordinary power of the High Courts under Art. 226 as wide as the amplitude of the language used indicates and so can affect *any person*—even a private individual—and be available for *any* (other) *purpose*—even one for which another remedy may exist. The amendment to Art. 226 in 1963 inserting Art. 226(1A) reiterates the targets of the writ power as inclusive of any person by the expressive reference to 'the residence of such person'. But it is one thing to affirm the jurisdiction, another to authorise its free exercise like a bull in a china shop. This Court has spelt out wise and clear restraints on the use of this extra-ordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect, the writ power has, by and large, been the people's sentinel on the *qui vive* and to cut back on or liquidate that power may cast a peril to human rights. We hold that the award here is not beyond the legal reach of Art. 226, although this power must be kept in severely judicious leash.

Many rulings of the High Courts, pro and con, were cited before us to show that an award under s. 10A of the Act is insulated from interference under Art. 226 but we respectfully agree with the observations of Gajendragadkar J., (as he then was) in *Engineering Mazdoor Sabha v. Hind Cycles Ltd*⁽¹⁾ which nail the argument against the existence of jurisdiction. The learned Judge clarified at p. 640 :

“Article 226 under which a writ of certiorari can be issued in an appropriate case, is, in a sense, wider than Art. 136, because the power conferred on the High Courts to issue certain writs is not conditioned or limited by the requirement that the said writs can be issued only against the orders of Courts or Tribunals. Under Art. 226(1), an appropriate writ can

(1) [1963] Supp. I S.C.R. 625.

A be issued to any person or authority, including in appropriate cases any Government, within the territories prescribed. Therefore even if the arbitrator appointed under section 10A is not a Tribunal under Art. 136 in a proper cases, a writ may lie against his award under Art. 226".

(p. 640)

B We agree that the position of an arbitrator under s. 10A of the Act (as it then stood) *vis a vis* Art. 227 might have been different. Today, however, such an arbitrator has power to bind even those who are not parties to the reference or agreement and the whole exercise under s. 10A as well as the source of the force of the award on publication derive from the statute. It is legitimate to regard such an arbitrator *now* as part of the methodology of the sovereign's dispensation of justice, thus falling within the rainbow of statutory tribunals amenable to judicial review. This observation made *en passant* by us is induced by the discussion at the bar and turns on the amendments to s. 10A and cognate provisions like s. 23, by Act XXXVI of 1964.

C Should the Court invoke this high prerogative under Art. 226 in the present case? That depends. We will examine the grounds on which the High Court has, in the present case, excised a portion of the award as illegal, keeping in mind the settled rules governing judicial review of private arbitrator's awards. Suffice it to say, an award under s. 10A is not only not invulnerable but more sensitively susceptible to the writ *lancet* being a quasi-statutory body's decision. Admittedly, such an award can be upset if an apparent error of law stains its face. The distinction, in this area, between a private award and one under s. 10A is fine, but real. However it makes slight practical difference in the present case; in other cases it may. The further grounds for invalidating an award need not be considered as enough unto the day is the evil thereof.

D (2) Thus, we arrive at a consideration of the appellants second submission, perhaps the most significant in the case, that the High Court had no legitimate justification to jettison the compensation portion of the award. Even here, we may state that counsel for the appellants, right at the outset, mollified possible judicial apprehensions springing from striking workers being held liable for loss of management's profits during the strike period by the assurance that his clients were inclined to abandon realisation of the entire compensation, even if this Court upheld that part of the award in reversal of the judgment of the High Court—a generous realism. He fought a battle for principle, not pecunia. We record this welcome fact and proceed on that footing.

E The relevant law which is beyond controversy now has been clearly stated in Halsbury's Laws of England thus :

F "Error of law on the face of award : An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. . . The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually

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incorporated with it, some legal proposition which is the basis of the award and which is erroneous.

... where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

(para 623, p. 334, Vol. 2, Fourth Edn)

We adopt this as sound statement of the law. Not that English law binds us but that the jurisprudence of judicial review in this branch is substantially common for Indian and Anglo-American systems and so Halsbury has considerable persuasive value. The wider emergence of common canons of judicial review is a welcome trend towards a one-world public law. Indeed, this Court has relied on the leading English decisions in several cases. We may content ourselves with adverting to *Bungo Steel Furniture*⁽¹⁾ and to the unreported decision *Babu Ram*⁽²⁾. In simple terms, the Court has to ask itself whether the arbitrator has not tied himself down to an obviously unsound legal proposition in reaching his verdict as appears from the face of the award. Bhargava J., speaking for the majority, in *Bungo Steel*⁽¹⁾ stated the law :

"It is now a well-settled principle that if an arbitrator, in deciding a dispute before him, does not record his reasons and does not indicate the principles of law on which he has proceeded, the award is not on that account vitiated. It is only when the arbitrator proceeds to give his reasons or to lay down principles on which he has arrived at his decisions that the Court is competent to examine whether he has proceeded contrary to law and is entitled to interfere if such error in law is apparent on the face of the award itself."

(p. 640—641)

In *Bharat Barrel & Drum Manufacturing Co.*⁽³⁾ dealing with a private award and the conditions necessary for exercise of writ jurisdiction to correct an error of law apparent on the record, did not lay down the law differently from what we have delineated.

In one of the leading English cases *Champsey Bhara & Co.*⁽⁴⁾ followed in India, Lord Dunedin defined 'error of law on the face of the award' as 'where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award' and said that then only the error of law therein would warrant judicial correction. The Law Lord expressed himself lucidly when he stated :

"An error in law on the face of the award means, in their Lordships' view, that you can find in the award... some legal

(1) [1967] 1 S.C.R. 633.

(2) C.A. 107 of 1966 decided on 5-12-68.

(3) A.J.R. 1967 S.C. 361.

(4) 50 I.A. 324.

A proposition which is the basis of the award and which you can then say is erroneous."

Williams J., in the case of *Hodkinson v. Verne*⁽¹⁾ hit the nail on the head by using the telling test as firmly established, viz., 'where the question of law necessarily arises on the face of the award'. In this view the enquiry by the Court before venturing to interfere is to ascertain whether an erroneous legal proposition is the *basis* of the award. Nay, still less. Does a *question of law* (not even a *proposition of law*) necessarily arise on the award followed by a flawsome finding explicit or visibly implicit? Then the Court can correct.

Tucker J., in *James Clark* ⁽²⁾ formulates the law to mean that if the award were founded on a finding which admits of only one proposition of law as its foundation and that law is erroneous on its face, the Court has the power and, therefore, the duty to set right. While the Judge cannot explore, by chasing subterranean routes or ferret out by delving deep what lies buried in the unspoken cerebration of the arbitrator and interfere with the award on the discovery of an error of law by such adventure, it is within his purview to look closely at the face of the award to, discern the law on which the arbitrator has acted if it is transparent, even translucent but lingering between the lines or merely wearing a verbal veil. If by such an intelligent inspection of the mien of the award—which is an index of the mind of the author—an error of law forming the basis of the verdict is directly disclosed, the decision is liable to judicial demolition. In *James Clark* ⁽²⁾, the issue was posed with considerable clarity and nicety. If, at its face value, the award appears to be based on an erroneous finding of law alone, it must fail. The clincher is that the factual conclusion involving a legal question must necessarily be wrong in point of law. Even though the award contains no *statement of the legal proposition*, if the facts found raise 'a clear point of law which is erroneous on the face of it', the Court may rightly hold that an error of law on the face of the award exists and invalidates.

Let us put the proposition more expressively and explicitly. What is important is a question of law arising on the face of the facts found and its resolution *ex facie* of *sub silentio*. The arbitrator may not *state* the law as such. Even then such cute silence confers no greater or subtler immunity on the award than plain speech. The need for a speaking order, where considerable numbers are affected in their substantial rights, may well be a fact of natural justice or fair procedure, although, in this case, we do not have to go so far. If, as here, you find an erroneous law as the necessary buckle between the facts found and the conclusions recorded, the award bears its condemnation on its bosom. Not a reference in a narrative but a clear legal nexus between the facts and the finding. The law sets no premium on juggling with drafting the award or hiding the legal error by blanking out. The inscrutable face of the sphinx has no better title to invulnerability than a speaking face which is a candid index of the mind. We may, by way aside express hopefully the view that a minimal judicialisation by statement, laconic or lengthy, of the essential law that guides the decision, is not only reasonable and desirable but has, over the ages, been observed by arbitrators and quasi-judicial tribunals as a norm of processual justice. We

(1) [1857] 3 C.B. (N.S.) 189,

(2) [1944] 1 K.B. 566.

do not dilate on this part of the argument as we are satisfied that be the test the deeply embedded rules to issue *certiorari* or the traditional grounds to set aside an arbitration award 'thin partition do their bounds divide' on the facts and circumstances of the present case. A

The decisive question now comes to the fore. Did the arbitrators commit an error of law on the face of the award in the expanded sense we have explained? The basic facts found by the arbitrators are beyond dispute and admit of a brief statement. We summarise the fact situation succinctly and fairly when we state that according to the arbitrators, the strike in question was in violation of s. 24 of the Act and therefore illegal. This illegal strike animated by inter-union power struggle, inflicted losses on the management by forced closure. The loss flowing from the strike was liable to be recompensed by award of damages. In this chain of reasoning is necessarily involved the question of law as to whether an illegal strike causing loss of profit is a delict justifying award of damages. The arbitrators held, yes. We hold this to be an unhappy error of law—loudly obtrusive on the face of the award. We may as well set out, for the sake of assurance, the simple steps in the logic of the arbitrators best expressed in their own words which we excerpt : B C

“(a) It is argued that strike is a legitimate weapon in the hands of workmen for redressal of their grievances and if they are made liable for loss on account of strike then the basic idea of strike as a means for having the grievances redressed will be taken away. The fallacy in this argument is that it presupposes the strike not to be illegal and unjustified. In the present case we found the strike to be otherwise. The workmen have got no right of getting their grievances redressed by resorting to illegal means which is an offence. D E

(b) It has been argued that the claim for compensation is not an industrial dispute as defined in the Industrial Disputes Act. Considering the issue of compensation in a water-tight compartment the argument might appear to be attractive. But, in our opinion, in this case the claim for compensation by the company is a consequence flowing from an admitted industrial dispute, which in this case is whether the strike was illegal and/or unjustified and as against the condition of service as laid down in the certified standing order on which point our finding has been against the workmen...” F

The award of the Tribunal, in its totality, is quite prolix, the reasons stated in arguing out its conclusions many and thus it is just to state that in the present case the arbitrators—two retired Judges of the Calcutta High Court—have made a sufficiently speaking award both on facts and on law. They have referred to the strike being illegal with specific reference to the provisions of the Act, but faulted themselves in law by upholding a case for compensation as axiomatic, necessarily based on a rule of common law i.e., English common law. The rule of common law thus necessarily arising on the face of the award is a clear question of law. G H

- A What is this rule of common law? Counsel for the appellants inevitably relied on the tort of 'conspiracy' and referred us to *Moghul Steamship Co.*(¹); *Allen v. Floor*(²); *Quinn v. Leatham*(³) and *Sorrel v. Smith* (⁴). These decisions of the English Courts are a response to the societal requirements of the industrial civilisation of the 19th Century England. Trade and Industry on the *laissez faire*
- B doctrine flourished and the law of torts was shaped to serve the economic interests of the trading and industrial community. Political philosophy and economic necessity of the dominant class animate legal theory. Naturally, the British law in this area protected business from the operations of a combination of men, including workers, in certain circumstances. Whatever the merits of the norms, violation of which constituted 'conspiracy' in English law, it is a problem for creative Indian jurisprudence to consider, detached from anglo-
- C phonic inclination, how far a mere combination of men working for furthering certain objectives can be prohibited as a tort, according to the Indian value system. Our Constitution guarantees the right to form associations, not for gregarious pleasure, but to fight effectively for the redressal of grievances. Our Constitution is sensitive to workers' rights. Our story of freedom and social emancipation led by the Father of the Nation has employed, from the highest of motives, combined action to resist evil and to right wrong even if it meant loss of business profits for the liquor vendor, the brothel-keeper and the foreign-cloth dealer. Without expatiating on these seminal factors, we may observe that English history, political theory and life-style being different from Indian conditions replete with organised boycotts and mass satyagrahas, we cannot incorporate English torts without any adaptation into Indian law. A tort transplant into a social organism
- D is as complex and careful an operation as a heart-transplant into an individual organism, law being life's instrumentality and rejection of exotics being a natural tendency. Here, judges are sociological surgeons.
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F Let us examine 'conspiracy' in the English Law of Torts to see if even there it is possible to hold that an illegal strike *per se* spells the wrong. We may state that till recently it could not be said with any certainty that there was any such tort as 'conspiracy'. Salmond thought that there was not (See Salmond-Law of Torts-p. 505, 15 Ed.). It is interesting that that in Edition of Salmond, *Mogul* is linked up by the learned author with a capitalist economy. Be that as it may, the common law of England today is more or less clear, some rumblings notwithstanding.

- G "A combination wilfully to do an act causing damage to a man in his trade or other interests is unlawful and if damage in fact is caused is actionable as a conspiracy. To this there is an exception where the defendants' real and predominant purpose is to advance their own lawful interests in a matter in which they honestly believe that those interests would directly suffer if the action against the plaintiff was not taken. In truth, the Crofter case has made section 1
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(1) [1892] A.C. 25.

(3) [1901] A.C. 495.

(2) [1898] A.C. 1.

(4) [1925] A.C. 700.

of the Trade Disputes Act, 1906, largely unnecessary, for *there will now be few conspiracies arising out of trade disputes which are not protected at common law.*"

(pp. 508-509, 15th Edn., Sweet & Maxwell)
(emphasis, ours)

The essence of actionable conspiracy is best brought out by Salmond :

"The tort is unusual because *it emphasises the purpose of the defendants* rather than the results of their conduct."

(p.513, 15th Edn., Sweet & Maxwell)
(emphasis, ours)

Even when there are mixed motives, liability will depend on ascertaining which is the predominant object or the true motive or the real purpose of the defendant. Mere combination or action, even if it be by illegal strike, may be far away from a 'conspiracy' in the sense of the law because in all such cases, except in conceivably exceptional instances, the object or motive is to advance the workers' interests or to steal a march over a rival union but never or rarely to destroy or damage the industry. It is difficult to fancy workers who live by working in the industry combining to kill the goose that lays the golden eggs. The inevitable by-product of combination for cessation of work may be loss to the management but the obvious intention of such a collective bargaining strategy is to force the employer to accept the demand of the workers for betterment of their lot or redressal of injustice, not to inflict damage on the boss. In short, it is far too recondite for an employer to urge that a strike, *albeit* illegal, was motivated by destruction of the industry. A scorched earth policy may, in critical times of a war, be reluctantly adopted by a people, but such an imputed motive is largely imaginary in strike situations. However, we are clear in our minds that if some individuals destroy the plant or damage the machinery wilfully to cause loss to the employer, such individuals will be liable for the injury so caused. Sabotage is no weapon in workers' legal armoury.

The leading case of *Sorrel v. Smith* (supra) emphasizes that a combination of two or more persons for the purpose of injuring a man in his trade is unlawful and, if it results in damage to him, is actionable. The real purpose of the combination is the crucial test between innocence and injury. It may well be that even where there is an offending object, it may be difficult for a court to hold that there is a tort if one may read into the facts an equal anxiety for the defendants to promote their success which produces the plaintiff's extinction. There is a penumbral region, as Lord Sumner pointed out in *Sorrel* (Supra) :

"How any definite line is to be drawn between acts, whose real purpose is to advance the defendant's interests, and acts, whose real purpose is to injure the plaintiff in his trade, is a thing which I feel at present beyond my power."

It is absolutely plain that the tort of conspiracy *necessarily* involves advertance to and affirmation of the object of the combination being the infliction of damage or distraction on the plaintiff. The strike

- A may be illegal but if the object is to bring the employer to terms with the employees or to bully the rival trade union into submission, there cannot be an actionable combination in tort. In the present case, it is unfortunate that the arbitrators simply did not investigate or pass upon the object of the strike. If the strike is illegal, the tort of conspiracy is made out, appears to be the proposition of law writ tersely into the award. On the other hand, it is freely conceded by counsel B for the appellant that the object was inter-union rivalry. There is thus a clear lapse in the law on the part of the arbitrators manifest on the face of the award.

- C We have earlier referred to the need for a fresh look at conspiracy as a tort when we bodily borrow the elements of English law and apply them to Indian law. It is as well that we notice that even in England considerable criticism is mounting on the confused state of the law of conspiracy. J.T. Cameron has argued (in 1965 Vol. 28 Modern Law Review p. 448) that :

- D “experience has already shown that conspiracy is a hydra perfectly capable of growing two heads to replace an amputated one, and the authorities contain material which could be used to impose liability in very wide and varied circumstances. It is time, therefore, to consider what form legislation *should* take, and to urge that the proper answer is to remove the tort of conspiracy from the law altogether, and with it the Rookes v. Barnard version of intimidation, and to put in its place a different basis of liability.

- E (CONSPIRACY AND INTIMIDATION : An Anti-Metaphysical Approach)

The author complains that the fundamental basis is unsatisfactory and uncertain and demands that a complete re-writing of the principles on which the tort of conspiracy and intimidation is necessary.

- F We may as well suggest that, to silence possible mischief flowing from the confused state of the law and remembering how dangerous it would be if long, protracted, but technically illegal strikes were to be followed by claims by managements for compensation for loss of profits, a legislative reform and re-statement of the law were undertaken at a time when the State is anxious for industrial harmony consistent with workers' welfare. This rather longish discussion has become necessary because the problem is serious and sensitive and the law is somewhat slippery even in England. We are convinced G that the award is bad because the error of law is patent.

- H The High Court has touched upon another fatal frailty in the tenability of the award of compensation for the loss of profits flowing from the illegal strike. We express our concurrence with the High Court that the sole and whole foundation of the award of compensation by the arbitrators, ignoring the casual reference to an ulterior motive of inter-union rivalry, is squarely the illegality of the strike. The workers went on strike claiming payment of bonus as crystalized

by the earlier settlement (d/2-10-1957). There thus arose an industrial dispute within s. 2(k) of the Act. Since conciliation proceedings were pending the strike was *ipso jure* illegal (ss. 23 and 24). The consequence, near or remote, of this combined cessation of work caused loss to the management. Therefore the strikers were liable in damage to make good the loss. Such is the logic of the award.

It is common case that the demands covered by the strike and the wages during the period of the strike constitute an industrial dispute within the sense of s. 2(k), of the Act. Section 23, read with s. 24, it is agreed by both sides, make the strike in question illegal. An 'illegal strike' is a creation of the Act. As we have pointed out earlier, the compensation claimed and awarded is a direct reparation for the loss of profits of the employer caused by the illegal strike. If so; it is contended by the respondents, the remedy for the illegal strike and its fall-out has to be sought within the statute and not *de hors* it. If this stand of the workers is right, the remedy indicated in s. 26 of the Act, viz., prosecution for starting and continuing an illegal strike, is the designated statutory remedy. No other relief outside the Act can be claimed on general principles of jurisprudence. The result is that the relief of compensation by proceedings in arbitration is contrary to law and bad.

The *Premier Automobiles Case*⁽¹⁾ settles the legal issue involved in the above argument. The industrial Disputes Act is a comprehensive and self-contained Code so far as it speaks and the enforcement of rights created thereby can only be through the procedure laid down therein. Neither the civil court nor any other Tribunal or body can award relief. Untwalia J., speaking for an unanimous court, has, in *Premier Automobiles* (Supra) observed :

"The object of the Act, as its preamble indicates, is to make provision for the investigation and settlement of industrial disputes, which means adjudication of such disputes also. The Act envisages collective bargaining, contracts between Union representing the workmen and the management, a matter which is outside the realm of the common law or the Indian law of Contract."

After sketching the scheme of the Act, the learned Judge stated the law thus.

"... the Civil Court will have no jurisdiction to try and adjudicate upon an industrial dispute if it concerned enforcement of certain right or liability created only under the Act."

* * * * *

"In *Deo v. Bridges* (1831 1B and Ad, 847 (2)-(1898) A.C. 387 at p. 859 are the famous and of quoted words of Lord Tenterden, C.J., saying :

"where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other."

(1) [1976] 1 S.C.R. 427.

A *Barraclough v. Brown & Ors*⁽¹⁾, decided by the House of Lords is telling, particularly Lord Watson's statement of the law at p. 622 :

"The right and the remedy are given *uno flatu* and one cannot be dissociated from the other."

In short, the enforcement of a right or obligation under the Act, must be by a remedy provided *uno flatu* in the statute. To sum up, in the language of the *Premier Automobiles Ltd.* (Supra) :

B

"If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act."

C Since the Act which creates rights and remedies has to be considered as one homogenous whole, it has to be regarded *uno flatu*, in one breath, as it were. On this doctrinal basis, the remedy for the illegal strike (a concept which is the creature not of the common law but of s. 24 of the Act) has to be sought exclusively in s. 26 of the Act. The claim for compensation and the award thereof in arbitral proceedings is invalid on its face—'on its face' we say because this jurisdictional point has been considered by the arbitrators and decided by committing an *ex-facie* legal error.

D

It was argued, and with force in our view, that the question of compensation by workers to the management was wholly extraneous to the Act and therefore, outside the jurisdiction of a voluntary reference of industrial dispute under s.10A. While we are not called upon to pronounce conclusively on the contention, since we have expressed our concurrence with the High Court on other grounds, we rest content with briefly sketching the reasoning and its apparent tenability. The scheme of the Act, if we may silhouette it, is to codify the law bearing on industrial dispute. The jurisdictional essence of proceedings under the Act is the presence of an 'industrial dispute'. Strikes and lock-outs stem from such disputes. The machinery for settlement of such disputes at various stages is provided for by the act. The statutory imprimatur is given to settlement and awards, and norms of discipline during the pendency of proceedings are set down in the Act. The proscriptions stipulated, as for example the prohibition of a strike, are followed by penalties, if breached. Summary procedures for adjudication as to whether conditions of service etc., of employees have been changed during the pendency of proceedings, special provision for recovery of money due to workers from employers and other related regulations, are also written into the Act. Against this backdrop, we have to see whether a claim by an employer from his workmen of compensation consequent on any conduct of theirs, comes within the purview of the Act. Suffice it to say that a reference to arbitration under s. 10A is restricted to existing or apprehended industrial disputes. Be it noted that we are not concerned with a private arbitration, but a statutory one governed by the Industrial Disputes Act, deriving its validity, enforceability and protective mantle during the pendency of the proceedings, from s.10A. No industrial dispute, no valid arbitral

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(1) [1897] A.C. 615.

reference. Once we grasp this truth, the rest of the logic is simple. What is the industrial dispute in the present case? Everything that overflows such disputes spills into areas where the arbitrator deriving authority under s.10A has no jurisdiction. The consent of the parties cannot create arbitral jurisdiction under the Act. In this perspective, the claim for compensation can be a lawful subject for arbitration only if it can be accommodated by the definition of 'industrial dispute' in s.2(k). Undoubtedly this expression must receive a wide connotation, calculated as it is to produce industrial peace. Indeed, the legislation substitutes for free bargaining between the parties a binding award; but what disputes or differences fall within the scope of the Act? This matter fell for the consideration of the Federal Court in *Western India Automobile Association*(¹). Without launching on a long discussion, we may state that compensation for loss of business is not a dispute or difference between employers and workmen 'which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person'. We are unable to imagine a tort liability or compensation claim based on loss of business being regarded as an industrial dispute as defined in the Act, having regard to the language used, the setting and purpose of the statute and the industrial flavour of the dispute as one between the management and workmen.

In this context, we are strengthened in our conclusion by the provisions of s. 33C which provides for speedy recovery of money due to a workman from an employer under a settlement or an award, but not for the converse case of money due to an employer from workmen. There is no provision in the Act which contemplates a claim for money by an employer from the workmen. And indeed, it may be a little startling to find such a provision, having regard to workmen being the weaker section and Part IV of the Constitution being loaded in their favour. The new light shed by the benign clauses of Part IV must illumine even pre-Independence statutes in the interpretative process. As yet, and hopefully, claims by employers against workmen on ground of tortious liability have not found a place in the pharmacopoeia of Indian Industrial Law. However, as earlier stated, we do not pronounce finally as it is not necessary.

There was argument at the bar that the High Court was in error in relying on s. 18 of the Trade Unions Act, 1926 to rebuff the claim for compensation. We have listened to the arguments of Shri B.C. Ghosh in support of the view of the High Court, understood on a wider basis. Nevertheless, we do not wish to rest our judgment on that ground. Counsel for the appellants cited some decisions to show that an award falling outside the orbit of the Indian Arbitration Act can be enforced by action in court. We do not think the problem so posed arises in the instant case.

We dismiss the appeal but, in the circumstances, there will be no order as to costs.

P.H.P.

Appeal dismissed.

(1) [1949] I L. L. J. 245.