A

WORKMEN OF SUDDER WORKSHOP OF JOREHAUT TEA CO. LTD.

v.

ITS MANAGEMENT AND VICE-VERSA

May 1, 1980

B

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

New Plea—Article 136 *of the Constitution—Supreme Court cannot accept new plea not taken earlier.*

Industrial Diputes Act, Sections 25F *and* 25G, *scope of—Back wages payment of.*

C

The Management Tea Co. Ltd. appellant in C. A. 1538/71 retrenched on November 5, 1966, 23 workmen, 16 of whom were paid retrenchment compensation allegedly in terms of section 25F of the Industrial Disputes Act based on wages obtaining prior to Wage Board Award, which came into force on 1-4-66 retroactively and in the order of 'last come, first go', while the services D of other seven were terminated, although on payment of retrenchment compensation, allegedly in breach of Section 25G of the Act, i.e. out of turn. The dispute that was raised was decided by the Tribunal which upheld the validity of the retrenchment of the 16, but set aside the termination of the other seven. The High Court agreed with the Tribunal's Award and hence the appeals both by the workmen and the management after obtaining special leave.

E

Dismissing both the appeals, the Court

HELD : 1. The plea that the amount paid by way of retrenchment compensation envisaged in Section 25F of the Industrial Disputes Act, not having been computed as per the revised pay scales as per the Wage Board Award, fell short of what was legally due and hence there was non-compliance is not tenable because before the Tribunal this contention was neither pleaded nor F proved. There was no hint of it in the Award. In the High Court this new plea based on the facts was not permitted. Further the Wage Boards' Award was subsequent to the retrenchment although retroactively applied and the workmen had accepted the retrenchment compensation on the wages prevalent at the time of the retrenchment. In the absence of any basis for this new plea Supreme Court cannot reopen an ancient matter of 1966. But the 16 Workmen, being admittedly eligible for the Wage Board scale, would be paid the G difference for the period between 1-4-66 to 5-11-66. [969 A-E]

2. Section 25G of the Industrial Disputes Act postulates that ordinarily the 'last come, first go' will be the methodology of retrenchment. Of course, it is not an inflexible rule and extra-ordinary situations may justify variations. There must be valid reason for this decision, and, obviously, the burden is on the Management to substantiate the special ground for departure from the rule. Surely, *valid and justifiable reasons are for the management to make* H *our,* and if made out, s. 25G will be vindicated and not violated, varying the ordinary rule of 'last come first go.' There is none made out here, nor even alleged, except the only plea that the retrenchment was done in compliance

with s. 25G *grade-wise*. Absence of mala fides by itself is no absolution from the rule in s.25G. Affirmatively, some valid and justifiable grounds must be proved by the Management to be exonerated from the 'last come first go' principle. The above rule can be applied *category wise*. That is to say those who fell in the same category shall suffer retrenchment only in accordance with the principle of last come first go. [969 E, H, 970 A, B, D-F]

M/s. Om Oil & Oil Seeds Exchange Ltd., Delhi v. *Their Workmen*, [1966] Suppl. S.C.R. 74, followed.

3. Grading for purposes of scales of pay and like considerations will not create new categorisation. It is a confusion or unwarranted circumvention to contend that within the same category if grades for scales of pay, based on length of service etc., are evolved, that process amounts to creation of separate categories. In the instant case, the seniority List is the same which is a telling circumstance to show that they fell in the same category. [971 C-E]

4. Supreme Court cannot sympathise with a party who gambles in litigation to put off the evil day and when that day arrives prays to be saved from his own gamble. The Award had given convincing reasons for reinstatement and even reduced the back wages to half. Still, the workmen were dragged to the High Court and, worse, when worsted there, were driven from Assam to Delhi to defend their pittance. The logistics of litigation for indigent workmen is a burden the management tried to use by a covert blackmail through the judicial process. Misplaced sympathy is a mirage justice. [971 G-H, 972 A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1303 of 1972 and 1538 of 1971.

Appeals by Special Leave from the Judgment and Orders dated 13-4-1971 of the Assam and Nagaland High Court in Civil Rule No. 368/68 and 174/68.

M. N. Phadke and *S. N. Choudhary* for the appellant in CA. No. 1538 and Respondent in CA No. 1303/72.

P. R. Mridul and *K. P. Gupta* for Respondent No. 1 in CA 1538 and Appellant in CA No. 1303/72.

The Judgment of the Court was delivered by

KRISHNA IYER, J. These two appeals, turning on the validity of the retrenchment of 23 workmen way back in 1966, are amenable to common disposal. Mr. Phadke, appearing for the Management, argued straight to the point; so did Shri Mridul, with the result that we could get the hang of the case without much wrestling with time or getting paper-logged. Since, in substance, we are inclined to leave undisturbed the Award of the Industrial Tribunal, affirmed, as it were, by the High Court, both these appeals will be given short shrift with brief reasons.

A The facts, to the extent necessary to appreciate the issues canvassed, are brief. The Management of a tea plantation by name Jorehaut Tea Co., Ltd., retrenched 23 workmen, 16 of whom were paid retrenchment compensation allegedly in terms of s.25F of the Industrial Disputes Act (for short, the Act) and in the order of 'last come, first go', while the services of the other seven were terminated, although on payB ment of retrenchment compensation, allegedly in breach of s. 25G of the Act, i.e. out of turn. The dispute that was raised was decided by the Tribunal which upheld the validity of the retrenchment of the 16 but set aside the termination of the other 7. Consequently it directed their re-instatement with some back wages. The Award granted the followC wing relief:

> In respect of the workmen, viz., Sri Bhogeswar Saikia Sri Nandeswar Bora, Sri Gunai Bora, Sri Premodhar Sarma, Sri Alimuddin Ahmed, Sri Deven Sarma and Shri Harlal Biswas whose retrenchment has been found to be not justified they are entitled to reinstatement with continuity of service. D These workmen have not come forward to say that they remained unemployed from the date of their retrenchment. In the circumstances of the case, I think they may be given wages at half the rate from the date of retrenchment till the date of publication of the award in the Gazette.

E We may first dispose of the workers' appeal. In all, 23 persons were retrenched. In respect of 16 the rule of 'last come, first go' was applied. Thus homage was paid to s.25G of the Act. But then, the workmen in their appeal, contended before us that s. 25F had been breached and, therefore, the termination was bad in law. The F Management's case is that, as a fact, all or most of them had been reinstated when fresh vacancies had arisen, although neither party is able to assert with certainty this case of reinstatement. That apart, if there be non-compliance with s.25F, the law is plain that the retrenchment is bad. However, when probed further as to how s.25F had been violated, Shri Mridul argued that the amount paid by way of retrenchG ment compensation envisaged in s.25F fell short of what was legally due and hence there was non-compliance. Under more searching interrogation, Shri Mridul stated that the compensation had been computed on the basis of wages previously paid and in derogation of the Wage Board Award which had been implemented by the Management with effect from 1-4-1966. The retrenchment was on November 5, H 1966, i.e. months after April 1, 1966. Therefore, the revised pay-scales as per the Wage Board Award should have been adopted in calculating the retrenchment compensation. This spinal flaw rendered

the tender of compensation insufficient and, therefore, the retrenchment itself was invalid. Maybe, there is apparent force in this contention. But Shri Phadke countered it by saying that it was not open to the workmen to spring a surprise on the Management especially when the question was one of fact. He urged that before the Tribunal no plea based on the Wage Board Award was made and it was quite possible that the Management would have adequately met the contention if such a plea had been raised. The fact is that before the Tribunal the contention pressed before us was neither pleaded nor proved. There is no hint of it in the Award. In the High Court this new plea based on the facts was not permitted. Had there been some foundation laid at least in the written statement of the workmen, we might have been inclined to explore the tenability of the plea, especially because there is no dispute about the Wage Board Award and the fact that it had been given effect to from 1-4-1966 and the further fact that in the retrenchment notice the wages were not calculated according to the Wage Board's Award. It must be remembered, however, that the Wage Board's Award was subsequent to the retrenchment although retroactively applied and the workmen had accepted the retrenchment compensation on the wages prevalent at the time of the retrenchment. In the absence of any basis for this new plea we are unable to reopen an ancient matter of 1966 and, agreeing with the High Court, dismiss the appeal. But the 16 workmen, being eligible admittedly for the Wage Board scale, will be paid the difference for the period between 1-4-1966 to 5-11-1966.

Now, we will take up the merits of the Management's appeal which relates to the retrenchment of seven workmen. Admittedly, the rule in s.25G of the Act, which postulates that ordinarily the 'last come, first go' will be the methodology of retrenchment, has not been complied with provided we treat all the workmen in the category as one group. It makes for better appreciation of the point if we read s. 25G at this stage :

> Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a *particular category of workmen* in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

The key-note thought of the provision, even on a bare reading, is evident. The rule is that the employer shall retrench the workman who came last, first, popularly known as 'last come first go'. Of

A course it is not an inflexible rule and extra-ordinary situations may justify variations. For instance, a junior recruit who has a special qualification needed by the employer may be retained even though another who is one up is retrenched. There must be a valid reason for this deviation, and obviously, the burden is on the Management to substantiate the special ground for departure from the rule.

B

Shri Phadke brought to our notice the decision in *M/s Om Oil & Oilseeds Exchange Ltd., Delhi* v. *Their Workmen*(1) to make out that it was not a universal principle which could not be departed from by the Management that the last should go first. The Management had a discretion provided it acted *bona fide* and on good C grounds. Shah, J. in that very ruling, while agreeing that a breach of the rule could not be assumed as prompted by *mala fides* or induced by unfair labour practice merely because of a departure or deviation, further observed that the Tribunal had to determine in each case whether the Management had acted fairly and not with ulterior motive. The crucial consideration next mentioned by the learned Judge is D that the Management's decision to depart from the rule must be for *valid and justifiable reasons*, in which case "the senior employee may be retrenched before his junior in employment." Surely, *valid and justifiable reasons are for the Management to make out*, and if made out, s. 25G will be vindicated and not violated. Indeed, that very decision stresses the necessity for valid and good ground for varying the E ordinary rule of 'last come first go'. There is none made out here, nor even alleged, except the only plea that the retrenchment was done in compliance with s. 25G grade-wise. Absence of *mala fides* by itself is no absolution from the rule in s. 25G. Affirmatively, some valid and justifiable grounds must be proved by the Management to F be exonerated from the 'last come first go' principle.

It must be remembered that the above provision which we have quoted insists on the rule being applied *category-wise*. That is to say, those who fall in the same category shall suffer retrenchment only in accordance with the principle of last come first go. The short point raised is that the seven workmen are not in the same *cate-* G *gory*. The finding of the Tribunal, concurred in by the High Court is that they fell in the same category. We quote the award :

> "It will be seen that when there is no trade test or anything to mark efficiency, there is no basis for placing the workmen in different grades and when all the workmen of H the same category are to do the same work inasmuch as by the management's own evidence there is no gradewise allo-

(1) [1966] Supp. SCR. 74.

cation of duty within the same category. Although in the evidence the Management wanted to justify their departure from the principle of 'last come first go' there is nothing to show that such a reason was recorded for deviating from the principle. In the circumstances of the case it cannot be said that the management's selection of persons to be retrenched leaving the juniormost in some category was justified and the reason now adduced for deviating from the principle cannot be accepted in the absence of the reason being not recorded at the time of retrenchment. Further it will be also noticed that although there is classification of workmen into grades (?) within the category, there is nothing to distinguish one workman of one grade from another workman of another Grade inasmuch as there is no allocation of duties amongst the workmen of different Grades in the category."

The seniority list is the same, which is a telling circumstance to show that they fell in the same category. Grading for purposes of scales of pay and like considerations will not create new categorisation. It is a confusion or unwarranted circumvention to contend that within the same category if grades for scales of pay, based on length of service etc., are evolved, that process amounts to creation of separate categories. This fallacy has been rightly negatived by a detailed discussion in the Award. The High Court has avoided the pitfall and we decline to accept the submission. The result is that the Award must hold good in regard to the illegally retrenched seven workmen.

What remains to be considered is the last submission of Shri Phadke that the engineering establishment wherein these seven workmen are to be reinstated is no longer in existence. Further, he pleads that on account of long lapse of time on account of the pendency of the appeal in this Court the compensation payable by way of full wages may amount to a huge sum disproportionate to the deviance from the law. He, therefore, pleads for moulding the relief less harshly.

We cannot sympathise with a party who gambles in litigation to put off the evil day and when that day arrives prays to be saved from his own gamble. The Award had given convincing reasons for reinstatement and even reduced the back wages to half. Still, the workmen were dragged to the High Court and, worse, when worsted there, were driven from Assam to Delhi to defend their pittance. The logistics of litigation for indigent workmen is a burden the Management tried to use by a covert blackmail through the judicial process.

A Misplaced sympathy is mirage justice. We cannot agree. Even so, we take note of the inordinate delay due to long pendency which is part of the pathology of processual justice in the Supreme Court. So we direct that half the back wages between the date of retrenchment and the publication of the Award shall be paid, as directed in the Award itself. For the post-Award period, full wages will be paid B until the High Court's judgment on 13-4-71 and thereafter 75% of the wages will be paid until 30-4-1980.

Counsel contends that the Workshop is not in existence now and reinstatement is physically impossible. Sri Mridul, for the workmen, states that a just solution by the court in the given circumstances is C acceptable. We direct that, in lieu of reinstatement, one year's wages calculated on the scale sanctioned by the Wage Board recommendations for each such workman be paid. All the sums, if not paid before 15-5-80, shall carry 12% interest. And upto 15-5-80 they shall carry 9% interest in supersession of the interim order dated 5-5-72. Rough and ready justice, for want of full information, is not satisfactory but D cannot be helped.

We dismiss the workmen's appeal. No costs. We dismiss the Management's appeal, subject to the above directions, with costs quantified at Rs. 5,000/-.

S. R.

Appeals dismissed