(2002) 10 MAD CK 0157

Madras High Court

Case No: Writ Petition No. 17633 of 1998 and W.M.P. No''s. 26694 of 1998 and 16863 of 1999

Indian Oxygen Employees Union and		APPELLANT
	Vs	
Srinivasan Vs Union of India (UOI), BOC India Limited and DATEX Ohmeda India (P) Ltd.		RESPONDENT

Date of Decision: Oct. 28, 2002

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (2003) 97 FLR 100 : (2003) 2 LLJ 222

Hon'ble Judges: V. Kanagaraj, J

Bench: Single Bench

Advocate: N.G.R. Prasad, for Row and Reddy, for the Appellant; S. Selvanandam, A.C.G.S.C. for R1, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

V. Kanagaraj, J.
The writ petition praying to issue a writ of declaration that Section 25FF of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") is unconstitutional to the extent it does not require the consent of a workman for transfer of the services on the transfer of an undertaking and consequently direct the second respondent to continue the second petitioner in service from 01.10.98 and pay him all the wages and other dues as before 01.10.98 or in the alternative issue a writ of declaration that the sale by the second respondent to the third respondent vide the second respondent''s notice No. PD/ID/002 dated 30.09.98 does not constitute a transfer of undertaking as per the proviso to Section 25FF of the Act and

consequently direct the second respondent to continue the second petitioner in its service in the same manner as before 01.10.98 without any interruption and pay all his arrears and wages and other benefits.

2. In the affidavit filed in support of the writ petition, the petitioners would submit that the second respondent is a Public Limited Company which has branches and factories all over India with its head Office at Calcutta; that in the year 1991, the Company sold the factory situated at Calcutta to Esaab India Limited; that the Company transferred all the workmen in the factory and the employees doing the work of the medical and welding divisions in its administrative offices by invoking Section 25FF of the Act; that this was objected to by the petitioner-Union and that the said objection was accepted as an interim injunction by this Court on 27.06.1991 and the same was made absolute on 25.10.91 in O.A. No. 483 of 1991 in C.S. No. 741 of 1991.

3. The petitioners would further submit that after 1991, the business of trading in medical equipments was thereafter handled by the existing employees of the second respondent who were engaged in its other activities of manufacture and trading of gas and ancillary business as well; that the employees are transferred from one post to another anywhere in the establishment and there is a common seniority list maintained for all the sections; that the second petitioner joined Indian Oxygen Limited on 08.11.65 as Clerk cum Typist at Trichy sales Depot; that he has put in 33 years of blemishless service working in various departments of the second respondent; that the second respondent is maintaining a common attendance register in the time office in which he has signed upto 07.10.98; that the order of appointment does not contain the name of a particular department to which he was appointed meaning thereby his service could be utilised in all the departments of the second respondent and that the employees working in the Ohmeda Division were all drawn from other departments of the second respondent on a rotation basis.

4. The petitioner would further submit that all of a sudden, the second respondent has published a letter ref.PD/ID/002 dt.30.09.1998 stating that Ohmeda Division has been sold to one DATEX Ohmeda India Pvt. Ltd. and the employees who happened to be working in the said division are transferred to the said new employer; that while effecting the transfer, the second respondent has neither sought consent from the affected employees nor held any discussion with the union; that the said transfer was effected in a most arbitrary manner; that if as a result of selling a portion of the business activity to DATEX, some workers had become surplus, the second respondent should have resorted to Section 25-N of the Act; the action of the second respondent in transferring the services of the second petitioner to the third respondent in the guise of transfer of undertaking u/s 25FF of the Act is patently illegal; that all the employees were paid by the second respondent and that since there has been no transfer of undertaking, the second respondent cannot transfer

the second petitioner''s contract of service to the third respondent.

5. The petitioners would also submit that since the second respondent is a large establishment having more than 100 workers, they are also entitled to the protection of Chapter V-B of the Act which prohibits lay off, retrenchment and closure without the prior permission of the Government'' that since the so called sale cannot be covered by the proviso to Section 25FF of the Act, the conditions of service of workmen have been changed; that the action of the second respondent in this case is really covered by items 10 and 11 of the Schedule IV to section 9A of the Act; that any change introduced without such notice and negotiation and settlement thereafter is illegal and void as held by several judgments of the Supreme Court and this Court; that the second respondent cannot refuse employment to the second petitioner in this case since no notice was given to the petitioners; that since on transfer of an undertaking covered by section 25FF of the Act, the service of a workman is transferred to the new employer, without his consent, it amounts to forced employment and is contrary to the fundamental right of a workman under Article 19(1)(g) of the Act and that consent has to be read into Section 25FF of the Act as otherwise Section itself would be unconstitutional, being violative of Article 19(1)(g) and Articles 21 and 23 of the Constitution of India. On such averments, the petitioners would pray to the relief extracted supra.

6. In the counter affidavit filed by the first respondent, it is submitted that the petitioner has challenged the constitutional validity of Section 25FF of the Act to the extent it does not require the consent of a workman for transfer of his services on transfer of an undertaking; that the employment of the workman engaged by the transfer of ownership or management on an undertaking comes to an end and it provides for the payment of compensation to the said employees because of the said termination of their services provided they satisfy the length of service prescribed by the Section; that the introduction of Section 25FF of the Act as held by the Supreme Court that if industrial undertakings are transferred the employees of such transferred undertaking should be entitled to compensation unless of course the continuity of service in employment is not disturbed and that can happen if the transfer satisfies the three requirements of the proviso; that when the legal position remains that the service of the workmen on a transfer of undertaking comes to an end, the fact that the transferree has opted to give continuity of service on the same terms and conditions of service to the workmen is only to the benefit of the workmen and consequently cannot be challenged on the ground that the workmen has been compelled to work with a new employer; that Section 25FF of the Act is for the limited purpose of calculating the compensation payable to workman under this section; that this section has nothing to do with the procedure or legality of transfer of an undertaking. On such grounds the first respondent would pray that the above writ petition may be dismissed with costs since Section 25FF of the Act is constitutionally and legally valid.

7. In the counter affidavit filed by the second respondent, it is submitted that since this respondent is only public limited Company and is not performing any public duty, a writ of mandamus is not maintainable; that BOC is manufacturing industrial and medical gas whereas ohmeda division has been trading in the health care equipments; that an agreement dt.24.09.98 was entered into between the second respondent whereby the Ohmeda division has been sold off to the third respondent; that the said transfer was not only in India but throughout the world; that by virtue of transfer of undertaking, the second respondent issued a notice dt.30.09.98 informing the employees about the transfer of the entire undertaking of Ohmeda Health Care Division to the third respondent; that on and from 07.10.98, the employees working in the Ohmeda Health Care Division in chennai including the second petitioner became employees of the third respondent by virtue of transfer to undertaking; that the issue regarding consent of workmen on a transfer of undertaking is covered by Section 25FF of the Act has been finally settled by a Division Bench of this Court in Spencer Group Aerated Water Factory Employees'' Union and Another Vs. The Presiding Officer, Industrial Tribunal and Others, ; that the legal position on a transfer of ownership or management of an undertaking is that the employment of the workmen engaged by the said undertaking comes to an end and it provides for the payment of compensation to the said employees because of the said termination of their services provided they satisfy the length of service prescribed by the Section; that such termination of service of the employees by the employer on transfer of undertaking does not in law amount to retrenchment but the workmen concerned are entitled to compensation as if the said termination was retrenched; that this provision has been made only for the purpose of calculating the amount of compensation payable to such workmen; that with reference to interim order in O.A. No. 483 of 1991, it was only an interim order and there was no conclusive pronouncement; that though interim order was initially granted by this Court, the suit itself was ultimately withdrawn by the employees; that the allegation that the transfer was effected in an arbitrary and unilateral manner is without any basis; that there is no basis to read Section 25N of the Act in a situation arising on a transfer of undertaking; that when the law permits the transfer of undertaking, it is not open to the petitioner to insist on the consent of the workmen for such transfer as the provision to that effect would amount to imposing unreasonable restriction on the rights of the employer; that when the third respondent is always willing to provide employment on the same term and conditions and with continuity of service, it is not open to the second petitioner to claim employment or wages with this respondent and that the prayers in the writ petition are factually and legally without basis and hence it is ought to be dismissed.

8. In the counter affidavit filed by the third respondent, it is submitted that the petitioners have not claimed any relief against the third respondent in the main writ petition; when no relief has been claimed against the third respondent, it is not permissible for the petitioners to seek any interim order against the third

respondent; that there is no merit in the present writ petition and the same deserves to be rejected; that when transfer of an undertaking takes place and such transfer provides for continued employment of the workmen of the transferor in the services of the transferee on the same terms and conditions and without disruption, the concerned workman should offer his services without any disruption and on continuous basis; that there is no question of the second petitioner having an option of making a claim for employment against the third respondent while pursuing his claim against the second respondent for continued employment; that when the petitioner had not offered his services for more than six months, the third respondent was justified in proceeding on the footing that the second petitioner has forfeited his claim for employment and has prayed that the writ petition against the third respondent should be dismissed.

9. During arguments, learned counsel appearing on behalf of the petitioners, besides reiterating the facts pleaded in the writ petition, would also bring out the instances such as the offer of appointment, the order of confirmation and the selection as a Stenographer, the reports, the confirmation orders as Stenographer and then as a Senior Stenographer, personal representation of the second petitioner and the first petitioner Union''s representation, the salary mention etc., learned counsel would ultimately exort that it is a transfer of only part of the undertaking and not the transfer of entire undertaking i.e. Indian Oxygen Employees Union, citing various correspondences, learned counsel would point out that the second petitioner has been transferred to several departments in the health care division, secondly the learned counsel would point out that the second respondent is washing off his hands stating that the new employer is willing to take over on the same terms and conditions but the third respondent says that the employees'' consent is not necessary and would bluntly say that once you are transferred better go and work there on the same terms and conditions and therefore Section 25FF of the Act is relevant in this context. It could also be said that in such event, he is only entitled to retrenchment compensation and cite the following judgments respectively reported in (1) (R.S. MADHO RAM & SONS(AGENCIES) v. ITS WORKMEN 1964 I L.L.J. 213 , (2) Manager, Pyarchand Kesarimal Ponwal Bidi Factory Vs. Omkar Laxman Thange and Others, , (3) Jawaharlal Nehru University Vs. Dr. K.S. Jawatkar and Others, and (4) VOLTAS VOLKART EMPLOYEES UNION v. VOLTAS LTD. (1999) 4 L.L.N. 1107.

10. Insofar as the first judgment cited above is concerned, it is held as follows:-

" The first and foremost condition for the application of Section 25FF of the Industrial Disputes Act is that the ownership or management of an undertaking is transferred from the employer in relation to that undertaking to a new employer. What the Section contemplates is that either the ownership or the management of an undertaking should be transferred; normally this would mean that the ownership or the management of the entire undertaking should be transferred before Section

25FF comes into operation. If an undertaking conducts one business, it would normally be difficult to imagine that its ownership or management can be partially transferred to invoke the application of Section 25FF. A business conducted by an industrial undertaking would ordinarily be an integrated business and though it may consist of different branches or departments, they would generally be interrelated with each other so as to constitute one whole business. In such a case, Section 25FF would not apply if a transfer is made in regard to a department or branch of the business run by the undertaking and the workmen would be entitled to contend that such a partial transfer is outside the scope of Section 25FF of the Act."

11. In the second judgment cited above, it is held as follows:-

" A contract of service being incapable of transfer unilaterally a transfer of service from one employer to another can only be effected by a tripartite agreement between the employer, the employee and the third party, the effect of which would be to terminate the original contract of service and to make a new contract between the employee and the third party. So long as the contract of service is not terminated, a new contract is not made and the employee continues to be in the employment of the employer. When an employer orders him to do a certain work for another person, the employee still continues to be in his employment. The employee has the right to claim his wages from the employer and not from the third party. Such third party-hirer may pay his wages but that is because of his agreement with the employer. The hirer may also exercise control and direction in the doing of the thing for which he is hired or even the manner in which it is to be done. But the hirer third party cannot dismiss him."

12. In the third judgment cited above, it is held as follows:-

" The Centre of Post-graduate Studies at Imphal was set up as an activity of Jawaharlal Nehru University. Since the Centre of Post-graduate Studies at Imophal represented an activity of the Jawaharlal Nehru University, the teaching and administrative staff of the Centre at Imphal must be understood as employees of the Jawaharlal Nehru University. The respondent Assistant Professor continues to be an employee of Jawaharlal Nehru University. His employment could not be transferred by Jawaharlal Nehru University to the Manipur University without his consent notwithstanding any statutory provision to that effect, whether in the Manipur University Act or elsewhere. The contract of service of the Assistant Professor was a contract with the Jawaharlal Nehru University and no law can convert that contract into a contract between him and the Manipur University without simultaneously making it, either expressly or by necessary implication, subject to the Assistant Professor''s consent. When the Manipur University Act provides for the transfer of the services of the staff working at the Centre of Post-graduate Studies, Imphal to employment in the Manipur University, it must be construed as a provision enabling such transfer of employment but only on the

assumption that the employee concerned is a consenting party to such transfer. No employee can be transferred without his consent from one employer to another. The consent may be express or implied."

13. In the last judgment cited above, it is held as follows:-

" If the management chooses to vary the existing practice in vogue namely, of excluding Saturdays and Sundays from the list of holidays, the management is at liberty to comply with the requirement u/s 9A of the Act. The finding of the Bench that the practice adopted till now had become a condition of service will be restricted only to the extent that the union was allowed to opt for holidays excluding Saturdays and Sundays and not as regards the claim of the union that their choice of holidays was binding on the management."

With such averments, learned counsel would seek to the relief sought for in the writ petition.

14. On the other hand, learned counsel appearing on behalf of the first respondent submits that the petitioners have challenged the constitutional validity of Section 25FF of the Act; that on transfer of an undertaking, the employer of the workmen engaged by the Management or an undertaking comes to an end and it only provides for payment of compensation to the employees because of the termination of their services provided they satisfy the length of services prescribed by that Section; that even this compensation is not available by the provision of law wherein the continuity of service in employment is not disturbed and that can happen if the transfer satisfies three requirements of the provisions; that the service of a workman on a transfer of undertaking comes to an end and its option of continuity of service on the same terms and conditions of service is only to his benefit which cannot be challenged on ground that the workmen have been compelled to work with the new employer; that Section 25FF of the Act is for the limited purpose of calculating the compensation payable to the workmen under this Section and that this Section has nothing to do with the procedure or legality of the transfer of undertaking.

15. Learned counsel appearing on behalf of the second respondent, besides pointing out that it is a public limited Company and it is not performing any public duty, would submit that a writ of mandamus is not maintainable. He would further submit that the issue regarding consent of workmen on a transfer of undertaking is covered by Section 25FF of the Act and this question has been finally settled in a case reported in Spencer Group Aerated Water Factory Employees'' Union and Another Vs. The Presiding Officer, Industrial Tribunal and Others, ; that the legal position is that in such transfer, the employment of the workmen engaged by the said undertaking comes to an end and it provides only for the payment of compensation to the employees because of termination of service provided they satisfy the length of service prescribed by that Section and the same does not

amount to retrenchment and this provision has been made only for the purpose of calculating the amount of compensation payable to such workmen.

On such arguments, learned counsel appearing on behalf of the respondents would pray to dismiss the above writ petition with costs.

16. In consideration of the facts pleaded by parties, having regard to the materials placed on record and upon hearing the learned counsel appearing for both, what comes to be known is that the above writ petition has been filed by the petitioners seeking to declare Section 25FF of the Act unconstitutional to the extent it does not require the consent of a workman for transfer of the services on the transfer of an undertaking and consequently direct the second respondent to continue the second petitioner in service from 01.10.98 and pay him all the wages and other dues as before 01.10.98 or in the alternative issue a writ of declaration that the sale by the second respondent to the third respondent vide the second respondent''s notice No. PD/ID/002 dated 30.09.98 which is impugned herein does not constitute a transfer of an undertaking as per proviso to Section 25FF of the Act.

17. At the outset, it would be appropriate to mention that the relief sought for in the above writ petition is rather luxurious, particularly meant to serve the purpose of the second respondent for the moment. Section 25FF of the Act has been designed to serve the purpose of the employees and in fact as a safety valve or a protective measure to safeguard the genuine cause of workmen in case of transfer of an undertaking, but the petitioners'' case is that there should not be any transfer of undertaking at all without any tripartite settlement, thus giving such opportunity for the petitioners to have the participation in all such transfer of the very undertaking to the hands of some other party as it is in the case of the undertaking being transferred from the hands of the second respondent to the hands of the third respondent.

18. But the intention of the law is different in the sense that to safeguard the genuine interest of the workmen, law also does not want to interfere with or to obstruct the transfer of undertaking which is the fundamental right guaranteed to the employer or the undertaking, and therefore, in order to safeguard the genuine interest of the workmen, the framers of law have thought it fit to introduce Section 25FF of the Act, whereunder every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to (i) notice and (ii) compensation in accordance with the provisions of Section 25FF of the Act as if the workman had been retrenched.

19. However, the proviso to Section 25FF of the Act would contemplate that the above provision for notice and compensation shall not apply in cases of change of employer by reason of transfer if (a) the service of the workman has not been interrupted (b) the terms and conditions of service applicable to the workman does not alter or less favourable to the workmen and (c) the new employer is legally liable

to pay compensation. It is this provision of law which according to the petitioners should be declared unconstitutional to the extent it does not require the consent of workmen for transfer of service of an undertaking.

20. At this juncture, the appropriate judgment already decided is one reported in Spencer Group Aerated Water Factory Employees'' Union and Another Vs. The Presiding Officer, Industrial Tribunal and Others, wherein a Division Bench of this Court has held on the subject as follows:-

" After the advent of Section 25FF of the I.D. Act there was no scope for invalidating the transfer of the ownershi0p or management of an undertaking whether by agreement or by operation of law on the ground that consent of the workmen had not been obtained. All that the workmen were entitled to was notice and compensation, if the workman was in continuous service for not less than one year and that too only if the proviso to Section 25FF was not attracted. It is needless to point out that if the transfer is male fide or benami in character then the transfer itself would be not only illegal but it would have no effect in law and could be ignored."

21. Section only safeguards the interest of the workmen and even according to the petitioners, no other provisions of Section 25FF of the Act is harmful to them and the only grievance is that since it does not require the consent of workmen for transfer, the petitioners want the Section to be declared unconstitutional which is meaningless. For declaring non- existent clause requiring the consent of the workmen as unconstitutional but instead the petitioners'' prayer should be for a mandamus directing inclusion of clause requiring the consent of the workmen for transfer of service on the transfer of an undertaking and therefore if at all they could only pray to this extent and the very prayer to declare the non-existent clause requiring the consent of the workmen unconstitutional is not only meaningless but would not arise at all. Needless to mention that the consequential relief of directing the second respondent to continue the service as it had been prior to 01.10.98 that all the conditions established cannot be granted and the above writ petition in the circumstances would only become liable to be dismissed.

22. In result,

(i) the writ petition is dismissed.

(ii) consequently, the connected W.M.P.Nos.26694 of 1998 and 16863 of 1999 are also dismissed.

(iii) however, there shall be no order as to costs.