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Calcutta High Court

Case No: Appeal No. 266 of 1996

Ananda Bazar Patrika Ltd.	APPELLANT
Vs	
State of West Bengal	RESPONDENT

Date of Decision: April 11, 1997

Acts Referred:

- Constitution of India, 1950 - Article 226
- Factories Act, 1948 - Section 46(1)
- Industrial Disputes Act, 1947 - Section 10(2), 12(4), 12(5), 18(1)
- West Bengal Industrial Disputes Rules, 1958 - Rule 68, 68(3)

Citation: (1998) 2 ILR (Cal) 514

Hon'ble Judges: Ruma Pal, J; Devendra Jain, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Ruma Pal, J.

The Appellant company carries on the business of publishing newspapers, periodicals and magazines. Its workmen, numbering 1804, include working journalists and non-journalists. Of these, the non-journalists workmen number 662. The Respondents Nos. 3 and 4 are the Unions representing the non-journalist workmen. Prior to 1971 the Respondent No. 3 Union negotiated with the Appellant company on behalf of the non-journalists. Between 1971 and 1977 the Respondent No. 4 represented the non-journalists workmen. Again between 1977 and 1984 the Respondent No. 3 came to the fore. The several settlements entered into between the Appellant company and its workmen reflect this position.

2. In April, 1984 a strike was called by the Respondent No. 3 union. It has not been disputed, at least on affidavits, that when the strike ended in June, 1984, the members of the Respondent No. 3 were 196 out of the total 662 non working journalists. The remainder were members of the Respondent No. 4. The Respondent

No. 4 and three unions representing the working journalists formed a union being the Respondent No. 5. In August, 1984 the Appellant de-recognized the Respondent No. 3.

3. After 1984 all the settlements which were entered into between the Appellant company and its workmen were negotiated by the Respondent No. 5 and the settlements covered both working journalists and non-journalists.

4. It is the Appellants'' case that the Respondent No. 5 representing the majority of its workmen entered into a bipartite settlement with the management on October 26, 1989 (referred to as the 1989 settlement). The settlement covered various aspects of the service conditions of the workmen including the grant of tiffin allowance instead of subsidised canteen expenses, payment of increased night shift allowance instead of night allowance and night incentive and the increase of tiffin allowance to include the miscellaneous incentive allowance granted for punctual attendance.

5. On November 2, 1989 the Respondent No. 3 Union raised a dispute with regard to the abolition of subsidised canteen expenses, the discontinuance of the night incentive and the conversion of miscellaneous incentive into tiffin allowance. The matter was referred to the Conciliation Officer by the Respondent No. 1. The Conciliation proceedings failed. An order of reference was thereafter made u/s 10(2)(a) of the Industrial Dispute Act, 1947 to the Third Industrial Tribunal for adjudication of the issue:

Whether the management is justified by abolishing subsidised cheap canteen allowance discontinuing night incentive and converting miscellaneous incentive into tiffin allowance ? To what relief, if any, are the workmen entitled to ?

6. The Appellants challenged the order of reference under Article 226 of the Constitution of India. Initially an interim order was passed. The writ application, however, was dismissed on June 21, 1996. This appeal was thereafter preferred from the order dated June 21, 1996. Stay of operation of the order under appeal was granted and the Respondents were restrained from proceeding with the order of reference.

7. During the pendency of the appeal an application was made by the Appellants seeking to urge further grounds, which according to the Appellants, could not be urged earlier as no certified copy of the judgment of the Learned Single Judge was available. The additional grounds which were sought to be added arose from an argument raised during the hearing of the matter before the Learned Single Judge. The argument was that the settlement dated October 26, 1989 was invalid as Rule 68(3) of the West Bengal Industrial Dispute Rules, 1958 had not been complied with. The Appellants have contended that the Learned Single Judge acted on the basis of the submissions of the Respondent No. 3 without the same being reflected in the pleadings and without giving the Appellants an opportunity of producing the

records to show that Rule 68(3) had in fact been duly complied with.

8. The Appellants have submitted that the Respondent No. 3 represented only the minority of the Appellant No. 1''s workmen and they cannot challenge a settlement accepted by the majority of workmen. The Appellants contend that the present action of the Respondent No. 3 was initiated by the Respondent No. 3 in a desperate attempt to make a come-back as the majority union. According to the Appellants there had been no abolition of the subsidised canteen as such. They say that the agreement dated October 26, 1989 provided that instead of a subsidy, an increased tiffin allowance would be paid @ Rs. 10.00 to every non-journalist workman and Rs. 8.00 for every working journalist. It was agreed that this tiffin allowance would be paid for each day the workman attended punctually including a grace period of 30 minutes per day. The canteen subsidy was accordingly discontinued with effect from November 11, 1989 but the Appellant No. 1 agreed to provide the space, furniture, utensils, fuel and power for running the canteen free of cost. As far as the night incentive is concerned the Appellants state that earlier a night shift allowance was paid at.75 paise per head per night. This was increased in 1972 at Rs. 1.50 per head per night, 9. In 1977 pursuant to an agreement between the management and the Respondent No. 3 the night shift was increased to Rs. 2.00 and a night incentive was given in addition to the night shift allowance at rates which depended upon certain conditions. On December 26, 1980 and July 20, 1981 the Palekar award was accepted by the Central Government and brought into effect from October 1, 1979. Under the Palekar award the night shift allowance was increased to Rs. 3.00 per head per night. In 1981 the night shift allowance was increased to Rs. 4.00 by virtue of an agreement between the management and the Respondent No. 3 union.

10. There was a further revision on March 18, 1985 under a settlement with the Respondent No. 5. With effect from February 1,.1988 the Bachawat Wage Board Report came into effect under which the night allowance was fixed at Rs. 12.00 per head per night of work subject to certain provisions which need not detain us at this stage. It is the Appellants'' case that the 1989 memorandum of settlement implemented the Bachawat Wage Board Report and that was why the system of granting of a separate night incentive was discontinued.

11. On the miscellaneous incentive it is the Appellant''s submission that the Miscellaneous incentive was first agreed to be paid by the Appellant No. 1 on August 11, 1977 in an agreement between the Appellant and the Respondent No. 3 union. The rate of incentive was 0.25 paise per day per head for punctual attendance. This rate was increased in 1981 under an agreement between the Appellant No. 1 and the Respondent No. 3 to Rs. 1.00 per day per head. There was a further increase to Rs. 1.50 under an agreement between the Appellant No. 1 and the Respondent No. 5 on March 18, 1985. The 1989 Memorandum clubbed the miscellaneous incentive together with the canteen subsidy. The total amount was called tiffin allowance and was to be paid by the Appellant No. 1 at the rates already stated subject to punctual

attendance of the workmen including the grace period of 30 minutes per day. According to the Appellant it was in this background CI. 8 of the 1989 Agreement provided:

It is further agreed by and between the parties that the existing miscellaneous incentive, tiffin allowance and incentive night allowance stand discontinued With effect from 1.10.89.

12. The Appellants say that in any event the members of the Respondent No. 3 had accepted all the benefits under the 1989 Settlement and could not approbate and reprobate. The Appellants annexed documents to show the acceptance of the benefits under the 1989 Settlement by the members of the Respondent No. 3. It is also submitted that the Respondent No. 3 could not partially accept one part of the settlement and reject another part. The submission is that if the settlement is challenged it will have to be challenged after it is terminated and as a whole. The Appellants have also stated that the Conciliation Officer had gone into merits of the matter and given a report on the basis of his views on the merits.

13. It is submitted that the Conciliation Officer has no right to go into the merits of the matter. It is alleged that the State Government had been influenced by the report of the Conciliation Officer in deciding to make the reference. The further submission is that subsequent to the order of reference a third settlement had been entered into between the management and its workmen which substantially incorporated several clauses of the 1989 Settlement. This new settlement had not been challenged at all. The last submission of the Appellants is that the Learned Single Judge had erred in holding that the 1989 Settlement was bad. It is said that the validity of the settlement was not the subject matter of the writ and the decision was in any event wrong in fact. Several decisions have been cited by the Appellants in support of the propositions put forwarded by them which will be considered at the appropriate stage.

14. The State Government Authorities have not either appeared nor filed any affidavit at any stage of the proceedings. The records were not produced before this Court nor indeed in the Court below.

15. The Respondent ho. 3 has submitted that the 1989 Settlement in so far as it is sought to abolish the canteen benefit could not be contracted out of. It was a statutory requirement imposed by Section 46(1) of the Factories Act. The Respondent No. 3 has also denied that it or its members had ever accepted the abolition of the canteen benefit as previously enjoyed. It is said that the signature on the pay sheets was subsequent to the protest raised by it and that its members were forced to sign on the pay sheets and it was printed thereon that the pay and other benefits were in terms of the memorandum of settlement dated October 26, 1989. It is claimed that the Respondent No. 3 was not the minority union and although it was derecognised illegally in 1984 the Appellants had not stated that the

other four employees union with which 1989 settlement was arrived at were recognised and that the agreement was not binding upon it or its members. It is also urged on the basis of several authorities, which are discussed subsequently, that ii was open to the workmen to partially accept a settlement.

16. It is also submitted that the 1989 settlement was not in proper form as there was no compliance with r, 68(3). The final submission is that in any event the reference was valid as there were disputed questions of fact and law and the Government was bound in the circumstances to refer the dispute. It is denied that there was any question of the State Government being influenced by the Conciliation Officer''s report. It is contended that the State Government was entitled to form a prima facie view as to the merits of the dispute. It is submitted that there was no question of merger o the 1989 Settlement with the 1994 Settlement as the 1984 Settlement was different from the 1989 Settlement and in any event the demand had been raised by the Respondent No. 3 prior to the 1994 settlement.

17. The merits of the action of the Appellant No. 1 cannot be considered for the purposes of this appeal neither can the issues raised with regard to the merits be resolved in this forum. But certain facts are undisputed. The first is that under cover of a letter dated November 3, 1989 the 1989 memorandum of settlement was forwarded by the Appellant No. 1 as well as the Respondent No. 5 to the Labour Commissioner compliance with Rule 68(3) of the West Bengal Industrial Disputes Rule, 1958. The second is that the pay sheets from the periods November 1989 onwards show that all the employees of the Appellant No. 1 including the members of the Respondent No. 3 union accepted the memorandum of settlement dated October 26, 1989 and have been receiving payments in terms thereof.

18. The Respondent No. 3 union raised its demands regarding the 3 points noted above on November 2, 1989. The Conciliation Officer gave notice on November 4, 1989. Apart from the Respondent No. 3 and the Appellant No. 1''s representatives no other union was asked to participate. The Conciliation Officer''s report was handed up to this Court by the Respondent No. 3. The report is elaborate. Each grievance of the Respondent No. 3 was discussed and the following observations made:

The task of holding collective work embodies one of the great challenges to what we call democratic process. But in the instant collective bargaining process industrial democracy has been overlooked by not calling this union to join the discussion. As regards Canteen it may be stated that it falls under labour welfare having the very objective to increase efficiency of workmen by providing food having sufficient calorific value and to maintain good physical and mental condition of them apart from imparting education in respect of hygiene. The present terms and conditions as embodied in Clauses 7 & 8 of the settlement dated 26.10.89 are apt not to justify the fulfilment of the above very objective of a subsidised Canteen now virtually converted into a restaurant run by a contractor who invests the money for

preparation of food which when to be consumed by an individual workman requires payment from the money received as tiffin allowance under Clause (6) of the present agreement. So the management is not at all justified by abolishing the subsidised Cheap Canteen the very purpose of which is welfare.

Incentive and allowance have two different connotations. Incentive is a special drive for motivation of the workmen by arranging payment for specific acceptable performance. It can neither be equated to nor can be converted into allowance as has been done by imposing terms under Clauses 6 & 8 of the present agreement dated 26.10.89. Further by discontinuing night incentive there has been deviation from allowing the workmen to enjoy the existing benefit. Here also the management is not justified by converting an incentive into an allowance and abolishing the existing right of enjoying night incentive.

From the discussions above the attitude of the management seems definitely not sympathetic to a steady industrial development. It seems rather an act for fomenting inter union rivalry amounting to unfair labour practice.

Incidentally it may be mentioned since the arrangement dated 26.10.89 does not bind the complainant union as per Section 18(1) of the I.D. Act, there remains no bar for adjudication over the issues though the members of this union have been found to observe the terms of this settlement under protest to maintain industrial harmoney.(sic) The matter requires judicial probe. Under the circumstances the case may be referred to an Industrial Tribunal/Labour Court for adjudication on the following issues:

Whether the management is justified by abolishing Subsidised Cheap Canteen, discontinuing Night Incentive and converting Miscellaneous Incentive into Tiffin Allowance.

To what relief, if any, are the workmen entitled ?

19. The State Government''s reference followed the recommendation of the Conciliation Officer, and the issue referred to the Tribunal for adjudication was in terms the one framed by the Conciliation Officer.

20. It must be remembered that tue challenge in this case is to the order of reference. None of the decisions cited by the Appellants is an authority for the proposition that a reference itself can be struck down on the ground of waiver or for the reason that the Industrial dispute had been raised by the minority of the workmen. The submission of the Appellants that the Respondent No. 3 could not raise an industrial dispute in respect of issues covered by the 1989 settlement because it had been accepted by the majority of the workmen, apart from not being a submission relevant to the question of the maintainability of the reference, also ''appears to be misconceived in law.

21. The 1989 settlement having been arrived at otherwise than in the course of conciliation proceeding is not binding on the members of the Respondent No. 3 who were not parties to it. Therefore even if the Respondent No. 3 is a minority union of the workmen, it can still raise an industrial dispute in respect of the 1989 settlement. Vide Tata Chemicals Limited v. Its Workmen 1978 (XI) L.L.J. 22 and Tata Engineering & Locomotive Company Ltd. v. Workmen. Furthermore, assuming treat the members of the minority union have accepted the benefits under the settlement, this could neither make them parties to the settlement nor debar them from challenging it - Jhagra Khan Collieries (P) Ltd. v. Presiding Officer cum Labour Court, Jabalpur 1981 (XI) L.L.J. 429 and The Jhagrakhan Collieries (P) Ltd. Vs. Shri G.C. Agrawal, Presiding Officer, Central Government Industrial Tribunal-Cum-Labour Court, Jabalpur and Others, However, the fact that the majority of the workmen were parties to the settlement and that the minority union had accepted the benefits thereunder would be relevant considerations for the Tribunal to arrive at a decision whether the 1989 settlement was just or fair - New Standard Engineering Company Ltd. Vs. N.L. Abhyankar and Others,

22. It follows from this that the State Government in making the order of reference cannot itself decide the merits of the dispute raised. It cannot make a final assessment of the reasonableness of the demands on merits - M.P. Irrigation Karmachari Sangha v. State of M.P. 1995 (I) L.L.J. 519. It cannot also decide any disputed question of fact or law - V. Veerarajan and others Vs. Government of Tamil Nadu and others, and Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others, But it can consider, at least prima facie, whether the dispute raised by the workmen is, patently frivolous Bombay Union of Journalists v. State of Bombay 1964 L.L.J. 351 : (1964) S.C.L.J. 265.

23. u/s 12(5) of the Act the State Government is to make a reference to the Tribunal if after considering the Conciliation Officers report it is satisfied that there is a case for reference. In other words, the satisfaction is to be arrived at independently by the State Government. It cannot abdicate its functions in favour of the conciliation Officer.

24. In this case the State Government has not come forward to sustain the order of reference. There is also no record before this Court to show that the State Government had formed the necessary satisfaction which is a pre-requisite to making the reference.

25. Although the State Government did not say so and although no records were produced before him by the State Government, the Learned Single Judge has said that the Government of West Bengal, after having considered the ''failure report of the Conciliation Officer and other papers came to (the) conclusion that it was bound under the law to make the reference''. What these ''other papers'', if any, are, are also not specified and we cannot speculate. It appears therefore that it was the Conciliation Officer''s report alone which was the foundation of the satisfaction of

the State Government. It is this acceptance of the particular Conciliation Officer''s report in question which, in our opinion, vitiates the reference, not only because of the absence of any evidence of the State Government independently considering the matter, but also because the Conciliation Officer has decided on the merits of the dispute in categorical terms.

26. The Conciliation Officers role u/s 12(4) of the Act is a limited one. He has merely to:

.....send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to. the dispute and for bringing about a settlement thereof, together with a full statement of such facts and cirumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.

He is not required to decide the merits of the dispute at all. In doing so he has acted in excess of jurisdiction.

27. Proceeding on the basis that the reasons given in the Conciliation Officer''s report persuaded the Government to make the reference, it is clear that the Government by accepting the report had adopted the reasoning. Seen from this perspective it must be held that the Government had also accepted the final findings of the Conciliation Officer on the merits of the dispute raised by the Respondent No. 3. This the State Government could not do.

28. The learned Judge appears to have proceeded on a misapprehension as to the nature of the Appellants'' challenge. He says that the conciliation proceedings were not challenged. It could not have been. The Conciliation Report is a confidential document to be placed before the State Government. What the observations in the conciliation report were could not have been known to the parties although a copy was produced by the Respondent no, 3 at the hearing before this Court. Further, it is not necessary to challenge the conciliation proceedings. The grievance of the Appellant was to the order of reference. The challenge in the writ petition was that the order of reference was perverse and showed a non-application of mind. The State Government did not answer the challenge.

29. That the State Government did not, at least on record, independently assess the situation is clear from the language of the order of reference. It is a verbatim reproduction of the question framed by the Conciliation Officer in his report and is a ''loaded'' reference. The issue framed proceeds on the basis of assumptions of facts which were themselves in dispute thereby precluding the Appellants from agitating those facts before the Tribunal. It is because of the pre decision on merits that the order of reference was framed in the manner it was. If the matter is referred to the Tribunal it should be left to the Tribunal to consider first whether there has been an abolition of the canteen benefit as contended by the Respondent No. 3 or whether there was a replacement of the benefit by a tiffin allowance as contended by the

Appellants. If the Tribunal determines the first question in favour of the Respondent No. 3 the further submission of the Respondent No. 3 based on Section 46(1) of the Factories Act. would be relevant. Similarly the questions whether the night incentive was merely clubbed with an increased night allowance and the miscellaneous incentive clubbed with an increased tiffin allowance or was there in effect a discontinuance of these benefits are for the Tribunal to decide.

30. The State Government can even after finding there is an industrial dispute, refuse to refer the matter on stated reasons of expediency. The observation in the decision of Bombay Union of Journalists v. State of Bombay (Supra) that ''that the Government may take into account the fact that the impact of the claim on the general relations between the employer and the employees to the region is likely to be adverse'' in deciding whether or not to make a reference supports the submission that the State Government should have taken all factors into consideration (provided they were undisputed) in deciding the expediency of making a reference. There is nothing before us to show that there was any such consideration. The specific grievance of the Appellants is that the. State Government did No. t at all consider that the 1989 settlement which had been arrived at with the majority union and that any reopening of the issues so settled would by itself create an industrial dispute. Significantly, in their affidavit in opposition the Respondent No. 3 has said that its members had been ''bound, to observe the terms of settlement under protest to maintain industrial harmony.

31. The learned Single Judge that no grievance could be made of non-consideration of the settlement by the Government as the 1989 Settlement was invalid because of non-compliance with Rule 68 of the West Bengal Rules. The finding was incorrect. No one disputes that a settlement arrived at otherwise than in the course of conciliation proceeding in order to be valid must comply with the mandatory provisions of Rule 68(3) of the West Bengal Industrial Rules, 1958. The plea was never taken by the Respondent No. 3 either before the Conciliation Officer or in answer to the writ application. The only plea taken was that the 1989 settlement was unfair and unjust. The question of non-compliance with Rule 68(3) is a question of fact. It was not open to the Learned Single Judge to have even allowed the point to'' be agitated without an amendment of the pleadings of the Respondent No. 3 and without giving the Appellants an opportunity of dealing with it. In fact the provisions of Rule 68(3) were complied with. That fact was brought on record before this Court by affidavit and the receipted notice of settlement to the State Government was also annexed. The State Government has not disputed this. The decisions cited by the Respondent No. 3 in this context are therefore distinguishable.

v 32. Apart from considering the possibility of industrial unrest, a settlement is a package deal. There is some give and take on both sides. The Respondent No. 3 has challenged only those terms which, according to it, are unfair to the workman. But the Tribunal is bound to consider the entire context in which the terms were agreed

to. If only the three clauses are referred to the Tribunal by the State Government the Tribunal would be bound by the terms of the reference to consider only those ''bits and pieces'' of the Settlement. Now a settlement cannot be challenged in bits and pieces. It has to be accepted or rejected as a whole - Herberstons Ltd. v. The Workmen of Herberston Ltd. and Ors. AIR 1977 S.C. 322 and Indian Overseas Bank Officers'' Union, Madras Vs. Indian Overseas Bank, Central Office, Madras, The State Government could only have referred the entire settlement to the Tribunal for a determination whether it was fair and just.

33. The fact that there has been a subsequent settlement between the Respondent No. 5 and the Appellants which has not been challenged by the Respondent No. 3 would not by itself be a relevant fact to strike down the reference. The Appellant could, if the situation arises, show before the Tribunal that the subsequent settlement incorporated the terms of the^ earlier settlement and that the subsequent settlement had not been impugned by the Respondent No. 3. This again might be a factor which the Tribunal could take into consideration in determining whether the 1989 settlement was a fair and just one but cannot be relied upon as ground to defeat the order of reference particularly in view of the dispute between the parties as to whether he subsequent settlement incorporates the impugned terms of the 1989 settlement or not.

To sum up:

(1) An industrial dispute can be raised by the minority Union in respect of a settlement arrived at between the management and the majority of the workmen.

(2) In deciding whether the dispute should be referred, the appropriate Government should consider the fact of such a settlement and the expediency of referring the dispute to the Tribunal.

(3) If the Government decides that the reference is expedient, it must refer the whole settlement and not a portion of it.

(4)- In framing the issue for determination by the Tribunal, the State Government should not foreclose a decision on the facts or the issues to be decided by the Tribunal.

34. The appeal must succeed on points 2, 3 and 4 enumerated above. The appeal and consequently the writ application are accordingly allowed. The order under appeal as well as the order of reference impugned in the writ petition are set aside. The matter is remanded back to the State Government for reconsideration of the matter in the light of the observations contained in this judgment.

There will be no order as to costs.

Devendra Kumar Jain, J.

35. I agree.