

U.P. State Electricity Board and anr. Vs. State of U.P. and ors.

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SooperKanoon Citation : sooperkanoon.com/480258

Court : Allahabad

Decided On : Dec-05-1996

Reported in : (1998)IIILLJ326All

Judge : D.K. Seth, J.

Acts : Utter Pradesh Industrial Disputes Act, 1947 - Sections 4

Appeal No. : C.M.W.P. No. 17763/1992

Appellant : U.P. State Electricity Board and anr.

Respondent : State of U.P. and ors.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : Tarun Agarwala, Adv.

Disposition : Petition dismissed

Judgement :

D.K. Seth, J.

1. These bunch petitions were disposed of following the decision in the writ petition No. 14033 of 1992 Dr. J.B. Banerjee and Ors. v. State of U.P. and Ors. Subsequently an application for review has been filed on behalf of the respondents. The said review application has been taken up for hearing alongwith

these Bunch cases on merits inasmuch as it was contended that the facts of these bunch cases are not identical with that of Dr. J.B. Banerjee's case (supra).

2. After having heard learned counsel for either side, in my view the contention raised by the learned counsel for respondent that the facts are not identical and issues are distinguishable is correct. Therefore, the application for review is allowed. Since learned counsel for the parties have agreed that the matter may be disposed of on merits, the hearing of the matter was also taken up simultaneously.

3. A very short question arises in the present case which Mr. Rakesh Pandey, learned counsel has raised is that the reference, which is admittedly a second one, made by the Government under Section 10(1) of the U.P. Industrial Disputes Act, hereinafter referred to as 'the Act' is valid and cannot be challenged as a preliminary issue in view of the decision in the case of D. P. Maheshwari v. Delhi Administration and Ors. (1983-II-LLJ-425) (SC).

4. Mr. Pandey had supported the reference while Mr. Tarun Agarwal, learned counsel for U.P. State Electricity Board sought to assail the same on the ground that the present case is same with that of Dr. J.B. Banerjee (supra). Though somewhat similar consideration arose in the case of Dr. J.B. Banerjee (supra) but the facts of these bunch cases appear to be somewhat different from that of Dr. J.B. Banerjee.

5. In the present case on August 15, 1985 services of 60 workmen were terminated by U.P.S.E.B. On November 23, 1985 for the first time an application for reconciliation was moved. By an order dated March 14, 1988, the State Government refused to make a reference (Annexure-5), On December 26, 1990, the Union moved an application without a copy to U.P.S.E.B., pursuant to which the State Government made a reference on May 30, 1991 (Annexure-6). It is this order of reference which has been challenged by Mr. Tarun Agarwal, learned counsel on the ground that the same was made ex parte without any notice to U.P.S.E.B. violating the principles of Audi Alteram Partem. He further contends that the reference having become stale, the same cannot be referred to for the second time. Unless there is apprehension of disturbance in the industrial harmony and unless there is an industrial dispute existing, no reference could be made. He

contends that the second reference can be made only on certain eventualities after giving hearing to other side since civil consequences flow from such reference. He contends further that the expression 'at any time' used in Section 4(k) of the Act does not mean that there would be no limitation for raising the dispute. He contends next that there was no sufficient material relevant for making the second reference after having refused one. Next he contended that the alleged ground that the juniors have been retained it cannot be a ground for making the reference at such a belated stage.

6. Mr. Rakesh Pandey, on the other hand, contended that refusal to make reference is an administrative order and is in exercise of power under Section 10 of the Act. So there is a scope of making the second reference. A reference made, after once refused earlier in the first reference in exercise of power under Section 10 of the Act, therefore cannot be assailed. Next he contends that in similar circumstances two workmen having been taken back on the basis of assurance given by the petitioner, the relief cannot be denied to these workmen who are identically situated. He further contends that in view of the assurance given for taking back the respondents and having laid down prescribed procedure for the purpose in 1980, it cannot be said that claim has become stale. He further contends that similar writ petitions raising the same contentions stood dismissed by this Court.

7. Admittedly all the four cases are identical except the fact that in all the three cases reference was made after refusal on the basis of an application but only in one case the reference is made after refusal without any such application being made.

8. According to Mr. Rakesh Pandey, the second reference is maintainable and that the question raised is being a preliminary one cannot be raised and entertained by this writ Court in view of the decision in the case of D.P. Maheshwari (supra). On this background, learned counsel have cited various decisions to which I shall be referring shortly hereinafter.

9. Though the facts are somewhat different but the questions raised in the case of Dr. J.B. Banerjee (supra) in Writ Petition No. 14033 of 1992 disposed on February

27, 1996 were identical inasmuch as in the said case also after having refused to make reference once, the Government had made second reference without giving any opportunity to the employer as in the present case. In the said case it was held that the second reference is very well maintainable but the same can be done by the appropriate Government only after forming an opinion that there exists sufficient material to make a reference and accordingly it was held that there was no material on which the Government could form its opinion to make the second reference. The proposition is also admitted by both the learned counsel.

10. Mr. Rakesh Pandey relied on the decision in the case of Avon Services Production Agencies (P) Ltd v. Industrial Tribunal, Haryana and Others, (1979-I-LLJ-I) (SC), in order to substantiate his submission that the refusal to make a reference is an administrative function, decline to make reference does not mean that the industrial dispute ceases to exist or that the second reference amounts to review of any judicial or quasi judicial order for, determination. In the said case it was held at pp. 5-6 :--

'The industrial dispute may nonetheless continue to remain in existence and if at a subsequent stage the appropriate Government is satisfied that in the interest of industrial peace and for promoting industrial harmony it is desirable to make a reference, the appropriate Government does not lack power to do so under Section 10(1), nor is it precluded from making the reference on the only ground that on an earlier occasion it had declined to make the reference. The expression 'at any time' in Section 10(1) will clearly negative the contention that once the Government declines to make a reference the power to make a reference under Section 10(i) in respect of the same dispute gets exhausted. Such a construction would denude a very vital power conferred on the Government in the interest of industrial peace and harmony and it need not be whittled down by interpretative process. In Western India Match Co. Ltd. v. Workers Union, an identical contention was raised in respect of a reference made under Section 4(k) of the U.P. Industrial Disputes Act which is in pari materia with Section 10(1) of the Act. Negating this contention this Court observed as under :

'In the light of the nature of the function of the Government and the object for which the power is conferred on it, it would be difficult to hold that once the Government has refused to refer, it cannot change its mind on a reconsideration of the matter either because new facts have come to light or because it has misunderstood the existing facts or for any other relevant consideration and decide to make the reference. But where it reconsiders its earlier decision it can make the reference only if the dispute is an industrial one and either exists at that stage or is apprehended and the reference it makes must be with regard to that and no other industrial dispute,' 8. It follows that the Government does not lack the power to make the reference in respect of the same industrial dispute which it once declined to refer. But it was urged that the ratio of the decision would show that the Government must have some fresh material made available to it subsequent to its refusal to make a reference, for the formation of a fresh opinion, for making the reference. It is not absolutely necessary that there ought to be some fresh material before the Government for consideration of its earlier decision. The Government may reconsider its decision on account of some new facts brought to its notice or for any other relevant consideration and such other relevant consideration may include the threat to industrial peace by the continued existence of the industrial dispute without any attempt at resolving it and that a reference would at least bring the parties to the talking table. A refusal of the appropriate Government to make a reference is not indicative of an exercise of power under Section 10(1) the exercise of the power would be a positive act of making a reference. Therefore, when the Government declines to make a reference the source of power is neither dried up nor exhausted. It only indicates that the Government for the time being refused to make the reference remains intact and can be exercised if the material and relevant considerations for exercise of power are available; they being the continued existence of the dispute and the wisdom of referring it, in the larger industrial peace and harmony. Refusal to make the reference does not tantamount to saying that the dispute, if at all it existed stands resolved. On the contrary the refusal to make a reference not compelling the parties to come to a talking table or before a quasi-judicial Tribunal would further accentuate the feelings and a threat to direct action may become imminent and the Government may as well reconsider the decision and make the reference. It is, therefore, not possible to

accept the submission that if the Government had on an earlier occasion declined to make a reference unless it be shown that there was some fresh or additional material before the Government the second reference would be incompetent. It has not been shown that the dispute had ceased to exist and the very existence of the dispute enables the Government to exercise the power under Section 10(1) and it has been rightly exercised. The view which we are taking is in accord with the decision of this Court in *Binny Ltd v. Their Workmen* wherein it was found that the Government had declined to make a reference of the dispute on two previous occasions on the basis of which it was contended that the reference was invalid. The contention was negatived observing that the mere fact that on two previous occasions the Government had taken the view that no reference was called for does not entitle the Court to conclude that there could be no cause for a reference at a later date.'

11. Relying on the decision in the case of *Deepak Industries 1988 Lab. I.C. 1202*. Mr. Pandey contends that second reference can be made. The said decision needs no repetition in view of the decision in the case of *M/s. Avon Services Production Agencies (P) Ltd. (supra)*. He also refers to the case of *U.P. State Electricity Board, Lucknow and Anr. v. State of U.P. and Ors. 1991 (63) FLR 184 (All)*, wherein similar question arose. In the said case it was held that opportunity of hearing is not required to be given for making reference on the reason that the reference of the dispute does not directly affect the employer and it only brings the parties before a forum for adjudication of their dispute which is necessary for industrial peace and harmony and that such reference can be made once it has been declined since the refusal only indicates that the Government for the time being refused to exercise the power that does not denude the power. The power to make reference remains intact and can be exercised if the material and relevant considerations for exercise of powers are available.

12. Mr. Rakesh Pandey has also relied on the decision in the case of *U.P. State Electricity Board and Anr. v. State of U.P. and Ors. (1994-II-LLJ-1008) (All)* where it has been held that the power to make a reference where it was once declined can be exercised. The only rider is that the opinion of the State Government should be based on some material. Once the order of reference stands the said

test, the courts should not intervene in the matter and create a situation of unrest in the industry and thereby defeat the cause for which the Act has been enacted. It was further held that there cannot be any rider that before making such reference an opportunity of hearing is to be provided to the employer. The right of the employer is not prejudiced in any manner if the dispute is referred to the Labour Court.

13. The Apex Court in the case of Sultan Singh v. State of Haryana and Anr., (1996-I-LLJ-879), has supported the view taken in the said two judgments in the case of U.P.S.E.B. referred to above. In the said case it has been laid down that:

'The first question is whether the State should give a hearing to the employer before making a reference on the second application, since on an earlier occasion, it was rejected. Section 10(1) of the Act provides that where an appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may, at any time, by order in writing refer the dispute to named authorities. Section 12(5) of the Act postulates that on receipt and consideration of a report from the conciliation officer, if the Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, as the case may be it may make such reference. Where the appropriate Government does not make such a reference it shall record reasons therefor and communicate to the parties concerned.

A conjoint reading, therefore, would yield to the conclusion that on making an application for reference, it would be open to the State Government to form an opinion whether an industrial dispute exists or is apprehended and then either to make a reference to the appropriate authorities or refuse to make the reference. Only on rejection thereof, the order needs to be communicated to the applicant. Nonetheless the order is only an administrative order and not a quasi-judicial order. When it rejects, it records reasons as indicated in Sub-section (5) of Section 12 of the Act. The appropriate Government is entitled to go into the question whether an industrial dispute exists or is apprehended. It would be only a subjective satisfaction on the basis of the material on record. Being an administrative order no lis is involved. Thereby there is no need to issue any notice

to the employer nor to hear the employer before making a reference or refusing to make a reference. Sub-section (5) of Section 12 of the Act does not enjoin the appropriate Government to record reasons for making reference under Section 10(1). It enjoins to record reasons only when it refuses to make a reference.

The need for hearing is obviated, it is considered on the second occasion as even then if it makes reference, it does not cease to be an administrative order and so it is not incumbent upon the State Government to record reasons therein. Therefore, it is not necessary to issue a notice to the employer nor to consider his objections nor to hear him before making a reference. Accordingly, we are of the view that the High Court was wholly wrong in its conclusion that before, making reference on the second application, it was incumbent upon the State Government to give notice to the employer and to give an opportunity and record reasons for making a reference. The previous decision of that Court relied on the case at hand was wrongly decided.'

14. Therefore, the point raised by Tarun Agarwal, learned counsel for the petitioner that hearing is to be given before making second reference since civil consequences flow from such a reference cannot be sustained in view of the judgment in the case of Sultan Singh (supra). His reference to the decision in the case of Management of Theatre Sanjaya v. The State and Ors., (1984-II-LLJ- 400) rendered by Full Bench of Karnataka High Court; G. Muthukrishnan v. New Horizon Sugar Mills (P) Ltd., Pondicherry and Ors., (1980-I-LLJ-215) rendered by Full Bench Madras; and Escorts Limited v. Industrial Tribunal Haryana, Faridabad and Ors., 1983 Lab I.C. 223 rendered by Division Bench of Punjab & Haryana High Court cannot be of any assistance.

15. Therefore, the absence of notice before making second reference does not affect the reference itself in any way.

16. Mr. Tarun Agarwal next contends that the expression 'at any time' does not mean that 'there should not be any limitation for raising a dispute. He relied on paragraph Nos. 7 & 8 in the case of M/s. Avon Services Production Agencies (P) Ltd. (supra), but the ratio decided in the said case does not specifically lay down any such proposition. However, 'at any time' cannot mean that the same can be

stretched for indefinitely a long period. It should be made within a reasonable time. In case it is made belatedly the period may be explained. But the moot question remains that the dispute should be in existence which is to be found out from the materials on record. The said question was dealt with in the case of *Western India Match Co. Ltd. v. The Western India Match Co. Workers Union and Ors.* (1970-II-LLJ-256)(SC). While interpreting the phrase 'at any time', the Apex Court had laid down at p 261 :

'From the words used in Section 4(k) of the Act there can be no doubt that the legislature has left the question of making or refusing to make a reference for adjudication to the discretion of the Government. But the discretion is neither unfettered nor arbitrary for the section clearly provides that there must exist an industrial dispute as defined by the Act or such a dispute must be apprehended when the Government decides to refer it for adjudication. No reference thus can be made unless at the time when the Government decides to make it an industrial dispute between the employer and his employees either exists or is apprehended. Therefore, the expression 'at any time', though seemingly without any limits, is governed by the context in which it appears. Ordinarily, the question of making a reference would arise after conciliation proceedings have been gone through and the conciliation officer has made a failure report. But the Government need not wait until such a procedure has been completed. In an urgent case, it can 'at any time', i.e., even when such proceedings have not begun or are still pending, decide to refer the dispute for adjudication. The expression 'at any time' thus takes in such cases as where the Government decides to make a reference without waiting for conciliation proceedings to begin or to be completed. As already stated, the expression 'at any time' in the context, in which it is used postulates that a reference can only be made if an industrial dispute exists or is apprehended. No reference is contemplated by the section when the dispute is not an industrial dispute, or even if it is so, it no longer exists or is not apprehended, for instance, where it is already adjudicated or in respect of which there is an agreement or a settlement between the parties or where the industry in question is no longer in existence.'

17. While concluding on the basis of the facts of the case as was involved in the said case of Western India Watch Co. Ltd. (supra), it was observed further:

'In the present case though nearly four years had gone by since the earlier decision not to make the reference, if the Government was satisfied that its earlier decision had been arrived at on a misapprehension of facts, and therefore, required its reconsideration, neither its decision to do so nor its determination to make the reference can be challenged on the ground of want of power. The fact that the dispute between the concerned workman and the management had become an industrial dispute by its having been espoused by the union since 1957 cannot be disputed. The fact that the workman was then not a member of the union does not preclude or negative the existence of the community of interest nor can it disable the other workmen through their union from making that dispute their own. The fact that the Government refused then to exercise its power cannot mean that the dispute had ended or was in any manner resolved.'

18. Section 10 of the Central Act which is *par materia* the same with Section 4(k) of the U.P. Industrial Disputes Act so far as the opening words are concerned, namely, 'Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended.' Therefore, the Government in order to form an opinion, there must exist sufficient material and with all such materials the opinion that has been formed which though may not encroach upon the jurisdiction of the Tribunal in deciding the disputed question of fact but still may at least show judicious formation of opinion without being mechanical. Such formation of opinion if shows patently on the fact of it perverse, then in exercise of writ jurisdiction, such order or reference can be reviewed. If formation of opinion appears to be possible on the facts and circumstances of the case, even though the High Court may be of a different opinion, the High Court cannot substitute its own views in such cases. The High Court may interfere only when on the basis of materials on record it arrives at a finding that formation of opinion is either perverse or that the same was not based on sufficient materials and suffers from non-application of mind or has been made mechanically or on extraneous consideration.

19. In the case of Binny Ltd v. Their Workmen, (1972-I-LLJ-478) (SC) it was held :

'The order of reference must on the face of it show what impelled the Government to depart from its earlier decision and that in the absence thereof, the Court must hold that there was no reason why such a change of opinion is without any force.'

20. In the said case as well, the power to make a reference after having refused earlier has been recognised.

21. In the case of *Prem Kakar v. State of Haryana and Anr.*, 1976 (3) S.C.C. 433 it has been held :

'7. Section 12 of the Act deals with duties of Conciliation Officers. If the Conciliation Officer cannot arrive at a settlement of the dispute, he sends a report to the appropriate Government. Under Section 12(5) of the Act, if on a consideration of the report referred to in Sub-section (4), the appropriate Government is satisfied that there is a case for reference, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor.

8. This Court in *State of Madras v. C.P. Sarathy* and *State of Bombay v. K.P. Krishnan* held that the order of the Government acting under Section 10(1) read with Section 12(5) of the Act is an administrative order and not a judicial or a quasi-judicial one.'

22. In the present case it is alleged that an assurance was given to the respondents that they would be taken in which is apparent from Annexure-1, 2 and 5 of the counter affidavit to which Mr. Rakesh Pandey pointed out and that the Scheme was also laid down in 1980, Therefore, it appears that the delay has been explained and as such the question of limitation as has been raised by Shri Agarwal does not stand in the way of making the present reference.

23. The State Government has not produced any material to show as to how the said decision was arrived at. Whether there was any consideration of representation or not cannot be gone into in the absence of the material placed before this Hon'ble Court. Mr. Pandey has also not been able to point out any such material. In that view of the matter, it would not be wise to decide the said question

here in this case on account of lack of material before this Court.

24. As observed earlier, all the points raised in the present case by either of the parties have since been concluded by the observation made above except the question as to the reliance of sufficient material for the purpose of making the reference. After declining once earlier, it can be open to be agitated before the Learned Tribunal in the reference itself as one of the issues which is to be decided alongwith the merit and not as a preliminary issue unnecessarily dragging and prolonging the agony of the workmen as has been deprecated in the case of D.P. Maheshwari (supra).

25. In that view of the matter, these writ petitions fail and are accordingly dismissed. This order shall not prevent the petitioner from raising the issue as to the validity of the reference only on the sole question that there was no sufficient material to form an opinion by the Government for making reference as one of the issues alongwith the merits of the case. If such an issue is raised, the learned Tribunal shall decide the said question in accordance with law on the basis of materials produced before it independently without being influenced by any observation made in this judgment.

There will be no order as to cost.