

**Bhandari Vs. State of Madras**

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**Court :** Chennai

**Decided On :** Apr-08-1969

**Reported in :** (1970)IILLJ238Mad

**Judge :** Ramakrishnan and ;Kailasam, JJ.

**Appellant :** Bhandari

**Respondent :** State of Madras

**Judgement :**

**Ramakrishnan, J.**

1. This criminal revision case raises for decision an interesting question about the scope of Sections 50 and 51 of the Madras Shops and Establishments Act, 1947 (hereinafter called the Act), in the context of what is well known as the Desai Tribunal Award made in the industrial dispute between certain banking companies and their workmen. The Desai Award modified an earlier award known as the Sastri Award. Thiru K.N. Mudaliar J., before whom the criminal revision case came for disposal, considered that this case involved 'a complicated question of law, which has the character of substantial public importance.' That is how the criminal revision case has come before a Bench for disposal.

2. The facts relating to the case are briefly as follows : On the complaint of the Assistant Inspector of Labour, Erode, Sri Bandari, Deputy General Manager,

Establishment Department, Administrative Office of the Canara Bank Ltd. Bangalore, was prosecuted before the S.D.M. Erode and convicted under Section 45(1) read with Section 25(2) of the Act, and sentenced to pay a fine of Rs. 20, in default to undergo simple imprisonment for two days. The complainant alleged that one Sri Moolanathan an employee of the bank at Erode was on sick leave for two days; the management paid him only half his wages for the two days in question. It was the contention of the complainant that under Section 25(2) of the Act, the employee was entitled to sick leave with full wages for a period not exceeding 12 days during one year of service. When the authorities of the Labour department directed the bank to pay full wages to the above said employee, they refused to comply. This non-compliance was treated as a contravention attracting the penalty under Section 45 of the Act.

3. The bank, before the lower court, relied on the provisions of the Desai Award, which granted the employees of banks the benefit of sick leave up to 30 days during one year of service, but only on half wages per day. In the view of the bank this provision for the sick leave in the Desai Award should be taken along with other leave benefits, which that award has granted to banking employees and if so taken, the benefits under the Award are more advantageous from the point of view of the employees, than similar benefits which the Act had granted to the employees before the Desai Award. The bank contended that under Section 50 of the Act, the workers are entitled to elect the more favourable of the terms as to leave as between the Desai Award and the Act.

As against this contention, the complainant in the lower court referred to a communication from the Commissioner of Labour to the bank on 8.3.1966, stating that for the purpose of casual and sick leave the Act should apply and not the Desai Award. It was urged that under Section 51 of the Act, the decision of the Commissioner thus communicated will be binding on the employer.

4. We will now set out Sections 50 and 51 of the Act, which are in the following terms:

50. Nothing contained in this Act shall affect any rights or privileges which any person employed in any establishment is entitled to, on the date on which this Act

comes into operation in respect of such establishment, under any other law, contract, custom or usage applicable to such establishment, if such rights or privileges are more favourable to him than those to which he would be entitled under this Act.

51. If any question arises whether all or any of the provisions of this Act apply to an establishment or to a person employed therein or whether Section 50 applies to any case or not, it shall be decided by the Commissioner of Labour and his decision thereon shall be final and shall not be liable to be questioned in any court of law.

The privileges under the Desai Award in respect of leave are briefly the following :

1. One month's privilege leave on full pay for 12 months of service; and the leave can be accumulated up to three months; 2. Casual leave with full pay for 12 days in a year; 3. Sick leave with half pay for 30 days in a year, The corresponding privileges under the Act are the following : 1. 'Privilege leave for 12 days for 12 months service which can be accumulated up to a maximum of 24 days; 2. 12 days casual leave with full pay; 3. 12 days sick leave with full pay in a year.

5. The Desai Award while conferring the above privileges, in paragraph 9(33) under Chapter IX, Leave Rules, stated thus:

I make an award in connection with leave rules in terms of the Sastry Award as modified by the Labour Appellate Tribunal's decision set out earlier, with the alterations, modifications and additions made by me as set out above. Wherever the provisions of any law applicable to any place are in conflict with the provisions herein contained, the provisions of law should be applied.

Prima facie, the leave privileges under the Act are different from those granted under the Desai Award. The learned Public Prosecutor for the State opposing the revision filed by the accused contends that because of the conflict between the leave privileges granted under the Act and the corresponding privileges allowed under the Award, the terms of the Act should prevail and therefore the bank was obliged to give 12 days sick leave with full pay to its employees. For this purpose he refers to the terms contained in the underlined (herein ") portion in para 9(33) of

the Desai Award which we have extracted above.

But this argument overlooks the important point that the Act itself does not say that it should be applied absolutely. Section 50, which we have extracted above, lays down a fetter or limitation, in the application of the Act itself in the matter of rights and privileges of employees. It grants to the employees a power of election to choose the better and more favourable as between the privileges conferred under the Act and those under any other law, contract, custom or usage applicable to the establishment. The Act was in force from 1948. The benefits under the Desai Award became enforceable from 30.7.1962. Since this is a question of benefits to the workmen, it is they who have to make the election in terms of Section 50. They could do so, either by themselves or through a representative Union.

The Supreme Court in *Tata Oil Mills Co. v. Gopala* 1965 I.L.J. 124 : : (1965)IILLJ124SC , dealing with a similar power of election conferred under Section 11 of the Kerala Industrial Establishments (National and Festival Holidays) Act 1958, observes as follows (at page 127 of L.L.J.) (at P. 1861 of A.I.R):

This section gives an option to the employees; they can choose to have the paid holidays either as prescribed by Section 3 or as are available to them under any other law, contract, custom or usage.

The further contention of the management in this case is that Sri Moolanathan had already enjoyed during the year in question 32 days privilege leave. In other words, he had elected the leave terms under the Desai award, which alone grants one month's privilege leave, for a year of service with the right to accumulate leave up to three months, while under the Act such leave is at 12 days for 12 months' service, which can be accumulated only up to 24 days. That is the reason why the management held that he was bound to enjoy the sickness leave only in terms of Desai Award. They claimed, in our opinion, with justification, that the leave privileges should be viewed as a whole and not separately. Therefore, the sick leave cannot be dissociated from the other kinds of leave.

The prosecution in the court below relied upon certain correspondence between management and the Commissioner of Labour ending with letter dated 8.5.1966 of

the Commissioner of Labour to the manager of the bank which reads thus:

2. Grant of sick leave on half pay : According to Section 25(2) of the Madras Shops and Establishments Act, 1947, casual leave and sick leave shall be granted to employees, with full pay. The Desai Award itself provides that if its directions are inconsistent with the statutory provisions of local Shops and Establishments Act, they must give place to the statutory provisions. You are therefore requested to comply with the provisions of the Madras Shops and Establishments Act, 1947.

It is clear from this correspondence that it does not touch on the general question to be decided under Section 51 of the Act as to whether the terms of the Desai Award in regard to leave benefits as a whole, or the terms of the Act, are more advantageous. No doubt when a question is referred in a case of dispute, for the decision of the Commissioner of Labour under Section 51 of the Act, the Act or the rules do not prescribe any particular procedure for the enquiry. But nevertheless thing an enquiry under the statute certain minimum formalities have to be followed. All the interested parties have to be given an opportunity to make their representations so as to comply with the requirements of natural justice.

While dealing with an analogous provision in Article 217(3) of the Constitution wherein the President of India has to decide the question, if it is raised as to the age of a Judge of a High Court, the Supreme Court in *Jyoti Prakash Mitter v. Chief Justice Calcutta*, : [1965]2SCR53 at page 966 held thus:

It is also implicit in this provision that before the President reaches his decision on the question, he ought to give the Judge concerned a reasonable opportunity to give his version in support of the age stated by him at the time of his appointment and produce his evidence in that behalf. How this should be done is, of course, for the President to decide; but the requirement of natural justice that the Judge must have a reasonable opportunity to put before the President his contention, his version and his evidence, is obviously implicit in the provision itself.

It is not contended that in the present case the Commissioner of Labour held any formal enquiry for deciding the question under Section 51 and gave an opportunity to all the interested parties to make their representations. The learned Public

Prosecutor also fairly concedes that such an enquiry was not held and a decision given by the Commissioner of Labour on the question of leave benefits as a whole, as between the Desai Award and the Act.

6. On the other hand, as already mentioned, the learned Public Prosecutor relies on a very narrow ground that as the Desai Award is in conflict with the Act so far as leave benefits are concerned, Section 50 of the Act should be interpreted so as to mean that the Act should prevail. But we have already held that Section 50 itself confers on the worker a power of election between two sets of benefits. Unless it is shown in a given case, that the worker has exercised this option, and elected one or the other of the benefits, whether under the Act or the Desai Award, or a question has been raised for the decision of the Labour Commissioner and he has decided the question one way or the other, a prosecution cannot be launched against the management on the allegation, that they have failed to comply with the terms of the Act in regard to the grant of leave benefits to a worker. In the present case, the facts show that the Desai Award in many respects is more advantageous to the worker than the Act, from the point of view of leave benefits. This will be apparent if a comparison is made between the terms of the Desai Award and the terms of the Act, which we have extracted above. The worker, Sri Moolanathan, has also enjoyed the privilege leave in accordance with the terms of the Desai Award. In the above circumstances the prosecution cannot urge that there has been a non-compliance with the provisions of the Act, in the matter of grant of sickness leave pay to the worker concerned. For the above-said reasons we allow the revision case and quash the conviction of the petitioner. The fine amount, if paid, will be ordered to be refunded.