WORKMEN EMPLOYED BY HINDUSTAN LEVER LTD. A

v.

HINDUSTAN LEVER LIMITED

August 28, 1984

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[D.A. DESAI, V. BALAKRISHNA ERADI AND V. KHALID, JJ.]

Industrial Disputes Act 1947, sec. 2(k)—Industrial disputes—Demand by workmen for confirmation in the promoted posts—Whether industrial dispute—Whether Industrial Tribunal has jurisdiction to entertain such a demand.

C

Promotions—Whether giving promotion and confirmation in the promoted posts is wholly a management function.

Section 2(k) of the Industrial Disputes Act, 1947 (the Act, for short) defines an 'industrial dispute' to mean any dispute or difference between employers and employers, or between employers and workmen or between workmen and workmen, which is connected with the emyloyment or non-employment or the terms of employment or with the conditions of labour, of any person. Section 7-A of the Act provides that the appropriate Government may by notification in the Official Gazette constitute one or more Industrial Tribunal for the adjudication of industrial disputes relating to any matter whether specified in the Second Schedule or the Third Schedule. Entry at plecitum 7 in the Third Schedule reads 'Classification by grades'. D E

Sec, 4 of the Industrial Employment (Standing Orders) Act, 1946 (1946 Act, for short) also requires the employer in an industrial establishment to make provision in the standing orders for every matter set out in the Schedule which is applicable to the industrial establishment. The Schedule provides, amongst others, for making provision in the standing orders for classification of workmen for example, whether permanent, temporary apprentices, probationers or badlis. F

The Government of Maharashtra referred to the Industrial Tribunal a dispute between appellants—workmen and the respondent—employer as to whether "All the employees who are acting continuously in higher grades for more than three months should be confirmed in the respective grades immediately and all the benefits should be given to the concerned employees with retrospective effect had they been confirmed immediately after three months of their continuous acting." The respondent raised a preliminary objection that the dispute was not an industrial dispute within the meaning of the expression in the Act, because if the demand as raised is conceded, it would tantamount to allowing the workmen to decide the work force required in various grades which is a managerial function. The Industrial Tribunal up- G H

held the preliminary objection and rejected the Reference as incompetent holding that the demand shorn of verbiage is one for promotion which is the managerial function and therefore cannot be the subject matter of industrial adjudication. Hence this appeal by special leave.

Allowing the appeal and remitting the matter to the Tribunal for disposing of the Reference on merits,

HELD : (1) It is well settled that certified Standing Orders under the 1946 Act which have a statutory flavour prescribe the conditions of service and they shall be deemed to be incorporated in the contract of employment of each workman with his employer. Since there is a statutory obligation on the employer in an 'industrial establishment' to classifi workmen under the 1946 Act, the classification would be permanent, temporary, apprentices, probationers and all other known categories, such as, acting, officiatingetc. In respect of the classification, a dispute can conceivably arise between the employer and the workmen because failure of the employer to carry out the statutory obligation would enable the workman to question his action which will bring into existence a dispute. It would become an industrial dispute because it would be connected with the condition of employment. It becomes a condition of employment because necessary conditions of service have been statutorily prescribed one such being classification of workmen. Therefore, without anything more where the demand of the workmen was to confirm employees employed in an acting capacity in a grade, it would unquestionably be an industrial dispute. [646 C—G]

Sudhir Chandra Sarkar v. *Tata Iron & Steel Co. Ltd.*, [1984] 3 S.C.C. 269, referred to.

(2) Even if one does not reach the conclusion that the dispute raised in question would be an industrial dispute by reference to the Standing Orders certified under the 1946 Act, a mere reference to Entry 7 of the Third Schedule read with Sec. 7-A would clinch the issue. Entry at plecitum 7 in the Third Schedule reads "Classification by Grades". If there is any dispute in respect of classification by grades, it will necessarily be an industrial dispute. This would flow indisputably from the language of section 7-A which provides for setting up of Industrial Tribunal for adjudication of industrial dispute relating to any matter specified, amongst others, in the Third Schedule. In the instant case, the demand of the workmen was for classification of the workmen officiating in the higher grades either as permanent or temporary and they should not be continued indefinitely as temporary by making them permanent on rendering of continuous service in the higher grade for a period of three months. The demand involves both the classification of employees and classification by grade. Therefore, the Industrial Tribunal overlooked this obvious fact situation by mis-interpreting the demand and reached a wholly untenable conclusion that the demand was for promotion which appeared to the Tribunal to be a managerial function and beyond the reach of adjudication. [647 C—E]

(3) Even on the footing of the law as it stands at present in this country that promotion is a management function, the industrial dispute referred

to the Tribunal was not one for claiming promotion. The Tribunal committed a grave error in so misinterpreting the dispute referred to it. The Tribunal overlooked the fact that the demand was in respect of workmen already promoted i.e. in respect of whom managerial function of selecting personnel for promotion had been already performed. The demand was in respect of already promoted workmen, may be in an officiating capacity, for their classification from acting or temporary to confirmed, that is, permanent, in the higher grade to which they were promoted, after a reasonable period of service which according to the Union must be three months of service. By no canon of construction this demand could be said to be one for promotion. [550 B—D]

Management of Brooke Bond India (P) Ltd. v. *Workmen* [1966] 2 SCR 465 and *The Hindustan Lever Ltd.* v. *The Workmen* [1974] 3 SCC 510 ; held inapplicable.

In the decisions of this Court in *Management of Brooke Bond India (P) Ltd.* v. *Workmen* [1966] 2 SCR 465 and *The Hindustan Lever Ltd.* v. *The Workmen* [1974] 3 SCC 510 it is assumed without controversy that promotion is a managerial function. But in view of the decision of this court in *All India S.M. and A.S.M.'s Association* v. *General Manager*, Central Railway [1960] 2 SCR 311, it is time to reconsider this archaic view of the *laissez faire* days that promotion is a management function. The expression "terms and conditions of employment" would ordinarily include not only the contractual terms and conditions but those terms which are understood and applied by the parties in practice or habitually or by common consent without ever being incorporated in the contract. [649 E–G]

British Broadcasting Corporation v. *Hearn & Others*, [1978] 2 All E.R. 111 and *R. Industrial Disputes Tribunal &Anr.* v. *Ex parte Queen Mary College University of London*, [1957] 2 All E.R. 776, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 179 of 1983.

Appeal by special leave from the Award dated the 13th June, 1979 of the Industrial Tribunal, Maharashtra at Bombay in Ref (IT) No. 453 of 1975.

Jitender Sharma for the Appellant.

Dr. Y.S. Chitale, O.C. Mathur, S. Kumar and *Ms. Meera Mathur* for the Respondent.

The Judgment of the Court was delivered by

DESAI, J. It is most unfortunate that all those unhealthy and

A injudicious practices resorted to for unduly delaying the culmination of civil proceedings have stealthily crept in, for reasons not unknown, in the adjudication of industrial dispute for the resolution of which an informal forum and simple procedure were devised with the avowed object of keeping them free from the dilatory practices of civil courts. Times without number this Court, to quote only B two *D.P. Maheswari* v. *Delhi Administration & Ors.*(1) and *S.K. Verma* v. *Mahesh Chandra & Anr.*(2) disapproved the practice of raising frivolous preliminary objections at the instance of the employer to delay and defeat by exhausting the workmen the outcome of the dispute yet we have to deal with the same situation in this appeal by special leave.

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The Government of Maharastra by its order dated October 22, 1975 referred a dispute between Hindustan Lever Ltd. ('employer' for short) and the workmen employed by them for adjudication under Sec. 10 of the Industrial Disputes Act, 1947 to the Industrial Tribunal, Maharashtra. The schedule annexed to the order of re- D ference specified the dispute as under :

> "All the employees who are acting continously in higher grades (as per annexure) for more than three months should be confirmed in the respective grades immediately and all the benefits should be given to the concerned employees with retrospective effect had they been confirmed immedia- E tely after three months or their continuous acting."

After the workmen governed by the reference filed a statement of claim, M/s Hindustan Lever Ltd., the employer, appeared and contested the reference on diverse grounds. A preliminary objection F was raised that the reference was incompetent because the dispute raised by the workmen and referred by the Government to the Industrial Tribunal for adjudication was not an industrial dispute within the meaning of the expression in the Industrial Dispute Act, 1947. Elaborating the contention, it was submitted that the dispute is not an industrial disputes because if the demand as raised is con- G ceded, it would tantamount to allowing the workmen to decide the strength of the work force required in various grades and it is well-settled that determining and deciding the strength of work force

(1) [1983] 4 SCC 293
H (2) [1983] 4 SCC 214

required in any industry is a managerial function. There were other contentions with which we are not concerned in this appeal at this stage. A

The Industrial Tribunal held that whatever camouflage of the language in which the demand is couched, the attempt is to obtain promotion which cannot be claimed as a matter of right, it being a managerial function. The Tribunal in terms held that promotion is the function of the management and the Industrial Tribunal will have no power and jurisdiction to take away the function of the management and direct that such and such workmen should be promoted to a particular post. In this view of the matter' the Tribunal held that the dispute was not an industrial dispute within the meaning of the expression and rejected the reference as incompetent. Hence this appeal by special leave. B C

Sec. 10(1) confers power on the appropriate Government to refer an existing or apprehended industrial dispute, amongst others, to the Industrial Tribunal for adjudication. The dispute therefore, which can be referrfed for adjudication, of necessity, has to be an industrial dispute which would clothe the appropriate Government with power to make the reference and the Industrial Tribunal to adjudicate it. D

The expression 'Industrial dispute' is defined in Sec. 2(k) to mean 'any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person'. The question is : whether a demand for confirmation in the promoted post after a lapse of a certain time would be a dispute which is connected with the terms of employment or the condition of labour in the facts ond circumstance of this case ? The expression 'industrial dispute' has been the subject matter of numerous decissons of this Court and the High Courts. The one feature common to all the decisions is that the expressions has been so widely defined as not to leave anything out of its comprehension and purview involving the area of conflict that may develop between the employer and the workmen and in respect of which a compulsory adjudication may not be available. This is recognised to be the width and comprehension of the expression. Keeping in view this extensive definition, let us approach the contention in this appeal. E F G

It cannot be gain said that the dispute is between the employer H

A and their workmen. The question is : whether the dispute is connected (leaving aside the words not necessary) with the terms of employment of the workmen ?

Since the introduction of the Industrial Employment (Standing Orders) Act, 1946 (1946 Act for short), it has been made obligatory B for the employer in an industrial establishment to prepare a draft of standing orders and get them certified under the Act. Sec. 4 of the 1946 Act requires the employer to make provision in the standing orders for every matter set out in the Schedule which is applicable to the industrial establishment. The Schedule provides amongst others for making provision in the standing orders for classification C of workmen for example, whether permanent, temporary, apprentices, probationers or badlis. This classification of workmen by the employer is thus made obligatory and has to be provided for in the standing orders. It is also well-settled that certified standing orders which have a statutory flavour prescribe the conditions of service and they shall be deemed to be incorporated in the contract of employment of each workman with his employer-*Sudhir Chandra* D *Sarkar* v. *Tata Iron & Steel Co. Ltd.*(1) It would therefore follow as a corollary that the employer will have to classify the workmen and failure to classify would be violative of the 1946 Act. Now if there is a statutory obligation to classify workmen under the 1946 Act, the classification would be permanent, temporary, apprentices, pro- E bationers and all other known categories such as acting, officiating etc. In respect of the classification, a dispute can conceivably arise between the employer and the workman because failure of the employer to carry out the statutory obligation would enable the workman to question his action which will bring into existence a dispute. It would become an industrial dispute because it would be connec- F ted with the conditions of employment. It becomes a condition of employment because necessary conditions of service have to be statutorily prescribed, one such being classification of workmen. Therefore, without anything more where the demand of the workmen was to confirm employees employed in an acting capacity in a grade, it would unquestionably be an industrial dispute. This conclusion gets G reinforced by a slightly different approach.

Sec. 7—A of the Industrial Disputes Act, 1947 provides that

H (1) [1984] 3 SCC 269

the appropriate Government may by notification in the Official Gazette constitute one or more Industrial Tribunal for the adjudication of industrial dispute relating to any matter whether specified in the Second Schedule or the Third Schedule. Entry at plecitum 7 in the Third Schedule reads 'Classification by Grades'. If there is any dispute in respect of classification by grades, it will necessarily be an industrial dispute. This was not only not questioned but would flow indisputably from the language of Sec. 7—A, which provides for setting up of Industrial Tribunal for adjudication of industrial dispute relating to any matter specified amongst others, in the Third Schedule. Therefore, even if one does not reach the conclusion that the dispute raised in question would be an industrial dispute by reference to the standing orders certified under the 1946 Act, a mere reference to Entry 7 of the Third Schedule read with Sec. 7—A would clinch the issue. Let it be recalled that the demand of the workmen was for confirmation of employees promoted to the higher grade and acting in the higher grade for more than 3 months. In other words, the demand was for classification of the workmen officiating in the higher grades either as permanent or temporary and they should not be continued indefinitely as temporary by making them permanent on rendering of continuous service in the higher grade for a period of three months. The demand involves both the classification of employees and classification by grade. Unfortunately, the Industrial Tribunal overlooked this obvious fact situation by mis-interpreting the demand and reached a wholly untenable conclusion that the demand was for promotion which appeared to the Tribunal to be a managerial function and beyond the reach of adjudication.

A B C D E

It appears to have been contended before the Tribunal and vigorously re-canvassed before us that removing the camouflage of language, the demand in terms seeks promotion to higher grade and promotion being a managerial function, the Industrial Tribunal had no jurisdiction to entertain the same. The Tribunal after referring to the decision of this Court in *Management of Brooke Bond India (P) Ltd.* v. *Workmen*[1] held that the demand shorn of verbiage is one for promotion which is the managerial function and therefore cannot be the subject matter of industrial adjudication. To recall the words of the Tribunal, 'to seek confirmation of a workman in

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(1) [1966] 2 SCR 465

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A a particular higher grade would mean a promotion as a confirmed workman who is entitled to some of the benefits such as not being removed from service without following certain procedure or promotion to higher post which benefits may not be available to a temporary hand,' and this is nothing short of demanding promotion which is a managerial function. We are unable to appreciate this B approach unwarranted in the facts and circumstances of this case, because the decision in the *Brooke Bond Case* has to be understood in the context of the demand that was referred to the Industrial Tribunal for adjudication. The demand was as under :

> "All things being equal, seniority shall count for C promotton. If the senior person has been overlooked in the question of promotion, he is at liberty to ask the concern for the reason why he has been overlooked, in which case the concern shall give him the reasons, provided that it does not expose the concern or the officer giving reasons, to any civil or criminal proceedings."

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The Tribunal in that case after accepting that promotion was a management function and had to be left to the discretion of the management which had to make choice from amongst the employees for promotion proceeded to hold that the action of management in the facts and circumstances of the case was malafide. E In appeal against this award of the Tribunal, a Constitution Bench of this Court observed as under :

> "Generally speaking, promotion is a management function ; but it may be recognised that there may be occasions when a tribunal may have to interfere with F promotions made by the management where it is felt that persons superseded have been so superseded on account of mala fides or victimisation."

This view was also reiterated in the case of the present G employer in *The Hindustan Lever Ltd*, v. *The Workmen*(1) wherein the Court observed that it was not disputed before them that ordinarily promotion is a management function.

H (1) [1975] 3 S.C.C. 510

In the heyday of *laissez faire* and market economy, wage determination, hours of work, disciplinary measures including quantum of punishment, in short prescribing all enveloping conditions of service were the preserve of management, styled as managerial functions. This relic of the past is slowly whithering away since the introduction of the Constiturion ushering in socio-economic revolution through law. Most of the managerial functions in relation to work force have been swept away by legislative enac'ments enacted to give effect to Arts. 38, 39 and 41 of the Constitution yet the Tribunal dug out from the bebris of the past, the concept of managerial function and by a distorted construction of the language of the reference comprehended it in the concept of managerial function and denied to itself the jurisdiction to adjudicate it. In the process the Tribunal failed to take note of the development of law since the decision in *Brooke Bond Case.*

Since the decision of the Constitution Bench of this Court in *All India S.M. and A.S.M.'s Association* v. *General Manager, Central Railway*[1] it is well-settled that equality of opportunity in the matter of public employment guaranteed by Art. 16 (1) not only ensures it at the time of entry in public employment but ensures it even in the matter of promotion. If equality in the matter of promotion is constitutionally guaranteed as the fundamental right, it is time to reconsider this archaic view of the *laissez faire* days that promotion is a management function. The whole gamut of labour legislation is to check, control and circumscribe uncontrolled managerial exercise of power with a view to eschew the inherent arbitrariness in the exercise of such functions. In the decisions of this Court it is assumed without controversy that promotion is a managerial function. It may have to be re-examined in an appropriate case. But it is not necessary to go so far in this case and we would proceed on the assumption that the passing observation made by the Constitution Bench in *Brooke Bond case* settled the law as far as this country is concerned that promotion is a management function though we would like to point out that the expression 'terms of conditions of employment' would ordinarily include not only the contractual terms and conditions but those terms which are understood and applied by the parties in practice or habitually or by common consent without ever being incorporated in the contract. In England, it is settled law that promotion is comprehended in the

(1) [1960] 2 SCR 311

A expression' terms of employment of the employees.' *In British Broadcasting Corporation* v. *Hearn & others*(1) and in *R. Indnstrial Disputes Tribunal & Anr. Ex parte Queen Mary College, University of London*(2) it was held that claim for promotion is connected with terms of the employment of the employees.

Even on the footing of the law, as it stands at present in this B country, that promotion is a management function, the industrial dispute referred to the Tribunal was not one for claiming promotion. The Tribunal committed a grave error in so mis-interpreting the dispute referred to it. The Tribunal overlooked the fact that the demand was in respect of workmen already promoted i.e. in respect of whom managerial function of selecting personal for promotion C had been already performed. The demand was in respect of already promoted workmen, may be in an officiating capacity, for their classification from acting or temporary to confirmed that is permanent, in the higher grade to which they were promoted, after a reasonable period of service which according to the Union be three months of service. By no cannon of construction, this demand could be said to be one for promotion. Therefore, the decision in D *Brooke Bond case* and followed in the case of this very employer had no application to the facts of this case and the Tribunal misdirected itself in rejecting the reference on this narrow ground.

Accordingly, this appeal succeeds and is allowed and the award of the Industrial Tribunal on the preliminary issue is quashed and set aside and the matter is remitted to the Tribunal for dis- posing of the reference on merits. As the matter is an old one and we were told that persons continuously officiating in the higher grade for more than five years are not confirmed, the Tribunal is directed to give top priority to the reference and dispose it of as early as possible and not later than six months from today. The respondent shall pay the costs of the appellant quantified at Rs. 2,000.

M.L.A. *Appeal allowed.*

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(1) [1978] 2 All E.R. 111
(2) [1957] 2 All E.R. 776