CASE NO.:
Appeal (civil) 443 of 2004

PETITIONER:
U.P. State Bridge Corporation Ltd. & Ors.

RESPONDENT:
U.P. Rajya Setu Nigam S.Karamchari Sangh

DATE OF JUDGMENT: 13/02/2004

BENCH:
Ruma Pal & B.P. Singh.

JUDGMENT:
J U D G M E N T

with
Civil Appeal No 442/2004

RUMA PAL, J.

The appellant is a Government company

within the meaning of Section 617 of the Companies Act. It carries on construction activities at various sites throughout the country and abroad. The respondent-Union represents the cause of 168 muster roll employees. The respondents were working at the bridge construction unit of the appellant at Kanpur in various capacities. The terms and conditions of employees of the appellant are governed by Standing Orders Certified under the U.P. Industrial Employment (Standing Orders) Act, 1946, clause L- 2.12 of which reads:

"Any workman who remains absent from duty without leave or in excess of the period of leave originally sanctioned or subsequently extended for more than 10 consecutive days, shall be deemed to have left the services of the corporation on his own accord, without notice, thereby terminating his contract of service with the corporation and his name will accordingly be struck of the rolls."

From 12th October 1995 the respondents-workmen did not attend their jobs. On 18th October 1995 the appellant issued an order which is quoted:

"Some of the workmen working at Betwa Bridge, Arichghat, Jhansi are absenting from duty since 12.10.1995. Direction for smooth functioning of the work in the interest of the Corporation has already been given vide this Office Notice No. 1102/1E/126 dated 16.10.1995 to such workmen.

In the light of the aforesaid, it is made

clear that such of the workmen who do not present themselves for duty and do not perform work or discharge their duty, then in accordance with the provision contained in Clause L-2.12 of the Certified Standing Order of the U.P. State Bridge Corporation Ltd. [such of the workmen, who are continuously absent for more than 10 days, in respect of them, it shall be presumed that they have left the services of the Corporation without any notice and thus, their contract of service with the Corporation has come to an end and accordingly, their names from the muster roll shall be removed] action shall be taken in the interest of the Corporation."

On 22nd December 1995 as amended on 28th December 1995 a similar notice was published in a Hindi newspaper which also stated that if the workmen whose names were appended to the notice did not report for duty within a period of three days from the date of the publication of the notice, it would be presumed that they had abandoned their services with the Corporation without notice and their contract of service would come to an end and their names would be removed from the muster roll. According to the appellant despite the repeated notices the workmen continued to absent themselves and ultimately on 19th January 1996 an order was issued putting an end to the services of 168 workmen on the presumption that they had abandoned their services with the Corporation on their own.

On 9th May 1996, one of the workmen whose services were so terminated, namely Anand Prakash filed a writ petition in the High Court before the Lucknow Bench challenging the order of termination. The writ petition was dismissed on the ground that the workman could raise an industrial dispute if he so desired. A second writ petition was filed by the respondent-Union in the High Court at Allahabad. This writ petition was allowed by orders which now are the subject matter of challenge before us.

The learned Single Judge rejected the preliminary objections raised by the appellant that the writ petition was not maintainable, inter-alia, on the grounds that the Corporation was not a State within the meaning of Article 12 and that an un-registered Union did not have the locus to represent the workmen's cause. It is not necessary to consider the reasoning of the learned Single Judge as neither of these points were raised before us by the appellant. On the question of the alternative remedy which was available to the workmen under the Industrial Disputes Act, the learned Single Judge was of the view that the case did not involve any investigation into nor determination of disputed questions of fact and that since the writ petition was moved in 1995 and a long time had lapsed the Court was justified in exercising its discretion under Article 226 to entertain and dispose of the dispute. It was also held that although in Anand Prakash's case, the writ petition raising the same issue had been dismissed, the second writ petition challenging the same order was not barred by the principles

of res-judicata particularly when no decision had been taken by the Court while dismissing Anand Prakash's writ petition. On the other hand although the order in Anand Prakash should not be affected in these proceedings, nevertheless, the Learned Judge held, since the decision of the High Court in the second writ petition would be binding, it would be an "infructuous exercise and mere formality" if Anand Prakash were driven to a Labour Court causing him to "suffer unnecessary agony".

On the merits, the learned Single Judge came to the conclusion that the word "absence" did not by itself mean "abandonment of service" and when an employee went on strike it was not the intention to abandon service. It was said that "Resorting to strike is neither misuse of leave nor over staying of leave. Standing order does not provide for any provision as to how the question of strike is to be dealt with." It was further said that the strike was not illegal as no notice was required to be given to the respondent under Section 22 of the Industrial Disputes Act, 1947. It was also held that in any event- whether a strike was illegal or legal - it did not amount to abandonment of service justifying action under L-2.12. At the highest, it would be an action of misconduct for which a punishment was provided under the Standing Orders after an inquiry. As there was admittedly no inquiry before the services of the workmen were terminated, therefore, the impugned order of termination was also held to have been passed in violation of principles of natural justice. Finally, it was held that the order was also bad because it did not specify the period during which the workmen were supposed to be absent and, therefore, the order was not an order within the meaning of clause L-2.12 and could not be sustained. The order terminating their services was accordingly quashed and it was directed that the workmen including the said Anand Prakash, would be deemed to be in service and "be treated as on continuous service with all notional service benefits, except however, that they would not be entitled to any payment of arrears for the period during which they did not work actually. Except that each of them would be entitled to a compensation for the whole period assessed at Rs.5000/- each".

The appellants' appeal was rejected by the Division Bench. The Division Bench has given brief reasons for upholding the decision of the learned Single Judge. In addition, note was taken of the appellant's submission that the project being completed, there was no question of appointing the respondents in any other project. This submission was however rejected on the ground that there was no specific pleading to this effect and no details had been given of the project nor of the employees engaged therein nor were the appointment letters of the respondents produced.

An interim order granted by this Court on the special leave petitions filed by the appellants directing maintenance of status quo has been continuing since 3rd March 2003.

The appellants have submitted that the High Court should not have entertained the writ petition at all not only because disputed questions of fact were involved but also because the High Court had acted contrary to its previous decision in Anand Prakash's case. It was argued that the reasons given by the High Court for entertaining the writ petition by exercising discretion under Article 226 were wrong and that the matter should have been left for decision by the fora provided under the Industrial Dispute Act, 1947.

On the merits, it is submitted that clause L-2.12 of the

Standing Orders had been properly invoked because the workmen had in fact unauthorisedly absented themselves without any reason. According to the appellants, it could not also be said that the workmen were on strike because they had not given any notice of strike as was mandatorily required under the U.P. Industrial Act, 1947.

Learned counsel appearing on behalf of the respondent-Union contended that the notice published in the newspaper was invalid as it did not comply with clause L-2.12 of the Standing Orders. It is also submitted that on the basis of the decisions of this Court reported in Express Newspapers (P) Ltd. V. Michael Mark and Another 1963 (3) SCR 405 and G.T. Lad and Others V. Chemical and Fibres of India Ltd. 1979 (1) SCC 590 that even if the strike was illegal it could not be deemed to be an abandonment of services. It is stated that U.P. Industrial Dispute Act (UPIDA) specifically provided for punishment for an employee going on an illegal strike. This was on the basis that the workmen continued in duty and that action could be taken in the case of such abstention from work against the workman but only after holding a proper inquiry. On the issue whether the High Court should have entertained the writ petition, it is submitted that the respondent should not be relegated to its remedies under the UPIDA as the matter had been pending before the High Court for several years. It is further submitted that the appellant was a State within the meaning of Article 12 of the Constitution and was answerable to Court for any arbitrary action. The Certified Standing Orders, according to the respondent, had statutory force and therefore Article 226 was properly invoked.

We are of the firm opinion that the High Court erred in entertaining the writ petition of the respondent-Union at all. The dispute was an industrial dispute both within the meaning of the Industrial Disputes Act, 1947 as well the UPIDA, 1947. The rights and obligations sought to be enforced by the respondent-Union in the writ petition are those created by the Industrial Disputes Act. In The Premier Automobiles Ltd. V. Kemlekar Shantaram Wadke 1976 (1) SCC 496, it was held that when the dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the claimant is to get adjudication under the Act. This was because the Industrial Disputes Act was made to provide "\005 a speedy, inexpensive and effective forum for resolution of disputes arising between workmen and their employers. The idea has been to ensure that the workmen do not get caught in the labyrinth of civil courts with their layers upon layers of appeals and revisions and the elaborate procedural laws, which the workmen can ill afford. The procedure followed by civil courts, it was thought, would not facilitate a prompt and effective disposal of these disputes. As against this, the courts and tribunals created by the Industrial Disputes Act are not shackled by these procedural laws nor is their award subject to any appeals or revisions. Because of their informality, the workmen and their representatives can themselves prosecute or defend their cases. These forums are empowered to grant such relief as they think just and appropriate. They can even substitute the punishment in many cases. They can make and re-make the contracts, settlement, wage structures and what not. Their awards are no doubt amenable to jurisdiction of the High Court under Article 226 as also to the jurisdiction of this Court under Article 32, but they are extraordinary remedies subject to several self-imposed constraints. It is, therefore, always in

the interest of the workmen that disputes concerning them are adjudicated in the forums created by the Act and not in a civil court. That is the entire policy underlying the vast array of enactments concerning workmen. This legislative policy and intendment should necessarily weigh with the courts in interpreting these enactments and the disputes arising under them".

Although these observations were made in the context of the jurisdiction of the Civil Court to entertain the proceedings relating to an industrial dispute and may not be read as a limitation on the Court's powers under Article 226, nevertheless it would need a very strong case indeed for the High Court to deviate from the principle that where a specific remedy is given by the statute, the person who insists upon such remedy can avail of the process as provided in that statute and in no other manner.

There is another aspect of the matter. Certified Standing Orders have been held to constitute statutory terms and conditions of service - D.K. Yadav V. J.M.A Industries 1993 (3) SCC 259. Although this statement of the law was doubted in Rajasthan State Road Transport Corporation and Another V. Krishna Kant and Others 1995 (5) SCC 75, it was not deviated from. It was however made clear that Certified Standing Orders do not constitute 'Statutory Provisions' in the sense that dismissal or removal of an employee in contravention of the Certified Standing Orders would be a contravention of statutory provisions enabling the workman to file a writ petition for their enforcement. This is what was said by this Court in Rajasthan Transport Corporation (supra):

"Indeed, if it is held that certified Standing Orders constitute statutory provisions or have statutory force, a writ petition would also lie for their enforcement just as in the case of violation of the Rules made under the proviso to Article 309 of the Constitution. Neither a suit would be necessary nor a reference under Industrial Disputes Act. We do not think the certified Standing Orders can be elevated to that status. It is one thing to say that they are statutorily imposed conditions of service and an altogether different thing to say that they constitute statutory provisions themselves."

Finally, it is an established practice that the Court exercising extra-ordinary jurisdiction under Article 226 should have refused to do so where there are disputed questions of fact. In the present case, the nature of the employment of the workmen was in dispute. According to the appellant, the workmen had been appointed in connection with a particular project and there was no question of absorbing them or their continuing in service once the project was completed. Admittedly, when the matter was pending before the High Court, there were 29 such projects under execution or awarded. According to the respondent-workmen, they were appointed as regular employees and they cited orders by which some of them were transferred to various projects at various places. In answer to this the appellants' said that although the appellant corporation tried to accommodate as many daily wagers as they could in any new project, they were always

under compulsion to engage local people of the locality where work was awarded. There was as such no question of transfer of any workman from one project to another. This was an issue which should have been resolved on the basis of evidence led. The Division Bench erred in rejecting the appellants submission summarily as also in placing the onus on the appellant to produce the appointment letters of the respondent-workmen.

There was also a dispute as to the nature of the absence of the respondent-workmen. Correspondence said to have been exchanged between the parties with regard to the demands raised by the respondent-Union has been relied upon by the respondent in support of the submission that the absence was really on account of a strike. It is also submitted that the correspondence indicated that notice of the strike had been given. To counter the statement made in the writ petition by the respondent that the workmen were on strike, the appellants had said that no notice of strike had been given and, therefore, the strike, if any, was illegal. Significantly, the High Court has not relied upon the correspondence nor has it come to any decision on the question whether the strike was illegal or legal. In fact the High Court has proceeded on the basis that it was the accepted case that there was no notice given by the workmen that they were on strike. It cannot, therefore, be said, without more, that the absence of the respondent-workmen from work was because they were on strike.

The High Court incorrectly applied the provisions of Section 22 of the Industrial Disputes Act, 1947 to hold that no notice of strike was necessary. It is conceded by the respondent that the operative Act was the UPIDA which differs materially, in this connection, with the Industrial Disputes Act. Under Section 22 of the Industrial Disputes Act, a notice of strike is required to be given, as held by the High Court, only in the case of any public utility service and the appellant corporation is not a public utility service. However, under Section 65 of the UPIDA the notice of strike is required to be given in respect of an industrial establishment. It is not argued on behalf of the respondent that the appellant-Corporation is not an industrial establishment. Whatever the legal consequences of not giving of such notice may be, it cannot be said in the circumstances that the employees were admittedly on strike as a matter of fact.

The only reason given by the High Court to finally dispose of the issues in its writ jurisdiction which appears to be sustainable, is the factor of delay, on the part of the High Court in disposing of the dispute. Doubtless the issue of alternative remedy should be raised and decided at the earliest opportunity so that a litigant is not prejudiced by the action of the Court since the objection is one in the nature of a demurer. Nevertheless even when there has been such a delay where the issue raised requires the resolution of factual controversies, the High Court should not, even when there is a delay, short-circuit the process for effectively determining the facts. Indeed the factual controversies which have arisen in this case remain unresolved. They must be resolved in a manner which is just and fair to both the parties. The High Court was not the appropriate forum for the enforcement of the right and the learned Single Judge in Anand Prakash’s case had correctly refused to entertain the writ petition for such relief.

Apart from this, there is an additional reason why the judgment of the High Court cannot be sustained on the ground of alternative remedy. When it was drawn to the

attention of the High Court that a previous writ petition raising the same issue had been dismissed on the ground of the existence of an adequate alternative remedy, the High Court should not have continued to dispose of the matter itself under Article 226 and in effect set aside the decision in the previous writ petition.

It was argued before us by the respondent-Union that the notice issued by the appellant-Corporation to the workmen to rejoin duties did not sufficiently comply with the principles of natural justice and that individual notices were required to be given to each of the workmen. The submission was not raised by the respondent at any stage. Besides, whether the notice by advertisement was sufficient information for the purposes of compliance with the requirements of natural justice is again a question of fact the foundation of which should be pleaded and sufficiently proved.

The constitutional validity of CSO L-2.12 has not been questioned by the respondent. The respondent has contended that the illegal strike cannot amount to abandonment of service for the purpose of Clause L-2.12 of the Standing Orders(CSO). But was there a strike at all? Or was it mass absenteeism unconnected with the terms and conditions of service?

Besides the submission that a person on illegal strike does not abandon his job is erroneous. An illegal 'strike' cannot by definition be "authorised absence". It would be a contradiction in terms. We may also draw support from Section 25-B which defines "continuous service" as "uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman". The specific exclusion of persons on illegal strike plainly means that the period a person is on illegal strike does not amount to service. Different considerations would no doubt prevail where the strike is legal. Workers on strike continue to be in service although they may have ceased work. If the strike is a legal one such cessation of work or refusal to continue would be absence authorised by law. Under CSO L-2.12 a presumption is to be drawn against an employee if such employee is unauthorisedly absent. Clearly, a person on illegal strike and a person on legal strike are both 'absent', but the absence of the first is unauthorised and the second is not. CSO L-2.12 raises a presumption against the employee and it is for the employee to rebut that presumption by adducing the evidence. It is, therefore, imperative that the factual basis is determined by the appropriate forum. In any event the decisions cited by the learned counsel for the respondent as noted earlier, are factually distinguishable. In Express Newspapers (supra), there was no condition of service similar to Certified Standing Order L-2.12. The fact of strike was also not in dispute. The Management had issued notice terming the strike as unauthorised abandonment. In other words, abandonment was pleaded as a fact on the basis of the strike. The contention of the employer was that there was no order of termination of service by the employer but a relinquishment of service by the workmen. The submission was not accepted because "the respondents by going on strike clearly indicated that they wanted to continue in their employment but were only demanding better terms. Such an attitude, far from indicating abandonment of employment, emphasised the fact that the employment continued as far as they were concerned. The management

could not, by imposing a new term of employment, unilaterally convert the absence from duty of striking employees into abandonment of their employment".

The fact of strike was also admitted in G.T. Lad (supra). Here again there was no condition of service similar to CSO L-2.12. The Management had issued a notice calling upon the workmen to report within a specified period otherwise it would be construed as an abandonment. The workmen f ailed to report within the aforesaid period. The Management struck out the names of the workers from the rolls on the ground that the workmen were not interested in service and had totally abandoned it. This Court held that the abandonment was not a question of fact which was required to be proved. Where the only evidence was absence because of strike, there was no abandonment. It was also held, following Express Newspaper (supra) that it was not open to the company to introduce such changed terms and conditions of service pending an industrial dispute.

D.K. Yadav (supra) is an authority for the proposition that the principle of natural justice would have to be read in the Standing Orders. That was a case where there was a standing order similar to CSO L-2.12 except that 8 days' margin was granted within which the workman was required to return and satisfactorily explain the reasons for his absence or inability to return after the expiry of leave. This view was reiterated in the later decision of this Court in Lakshmi Precision Screws Ltd. V. Ram Bhagat 2002 (6) SCC 552 where it was held that the element of natural justice was an in-built requirement of the Standing Orders.

In this case, the appellant- Corporation had issued two notices calling upon the workmen represented by the respondent to return to duty. The workmen did not respond to either of the notices. As we have noted it was not pleaded that the advertisement did not sufficiently comply with the principles of natural justice. The notice was issued giving an opportunity to the respondent to show cause why the presumption should not be drawn under CSO L-2.12. The respondent did not show cause. In the circumstances, the Management drew the presumption in terms of the CSO.

The respondent said that the notice was invalid because it did not otherwise comply with the CSO L-2.12 because of the shortening of the period of absence. This was not an issue raised at any stage. In any event, we do not see how the notice is not in compliance with the Certified Standing Orders as quoted earlier.

The final submission of the respondent was that the UPIDA provided for penalty after a departmental enquiry, in respect of the workman who may have gone on illegal strike and, therefore, there could be no termination of services on account of illegal strike. The submission is unacceptable as we have said there is no proof that the respondents were on strike at all. Besides, merely because the action is punishable does not mean that the consequence of an unauthorised absence is not available under the Certified Standing Orders if it so specifically provides.

In the circumstances, we have no hesitation in setting aside the decision of the High Court in dismissing the writ petition. This order will, however, not preclude the respondent-Union if it is otherwise so entitled to raise an industrial dispute under the UPIDA.

The appeals are allowed but without any order as to costs.