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nal that order cannot be in any way interfered with by the Labour Appellate Tribunal. But the Labour Appellate Tribunal is not interfering with the order of the High Court. On the contrary it is respecting that order and carrying out its directions. It could only be said of the Labour Appellate Tribunal that it was interfering with the order if the High Court had confirmed the order and dismissed the petition for a writ of certiorari presented by the respondent No. 2 in the first instance. Therefore in our opinion there is no force in that contention put forward by Mr. Sule.

[The rest of the Judgment is not material to the Report.]

Rule discharged.

K. B. S.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

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ISMAIL PAPAMIA AND OTHERS, PETITIONERS *v.* THE LABOUR APPELLATE TRIBUNAL OF INDIA AND ANOTHER, RESPONDENTS.*

Industrial Employment (Standing Orders) Act (XX of 1946), ss. 7 and 9 —Whether the provisions of s. 9 requiring the text of the standing orders to be prominently posted by the employer in the language understood by the majority of his workmen mandatory—Construction of Statutes.

The provisions of s. 9 of the Industrial Employment (Standing Orders) Act which requires that the text of the Standing Orders should be posted by the employer prominently in the language of the majority of workers are not mandatory.

Special Civil Application under arts. 226 and 227 of the Constitution of India against the decision of the Labour Appellate Tribunal.

The facts are fully stated in the Judgment.

K. T. Sule with *Kamdar & Co.*, for the Petitioners.

S. D. Vimadalal with *Bhaishankar Kanga & Girdharlal* for Respondent No. 2.

Chagla C. J.—This petition raises a rather interesting question of construction of ss. 7 and 9 of the Industrial Employment (Standing Orders) Act (Act XX of 1946).

The second respondent company applied to the Industrial Tribunal under s. 33 of the Industrial Disputes Act for permission to dismiss 27 of its employees. Its contention was that there was an illegal strike on November 11, 1953, of the workers of the company, that these 27 employees had participated in the illegal strike and they had also refused to obey lawful orders.

* Special Civil Application No. 1435 of 1955.

It was further the contention of the second respondent company that a proper inquiry as required by the Standing Orders had been held, that the charge of misconduct with regard to these two acts had been established and therefore under the Standing Orders the Company was entitled to inflict the penalty of dismissal upon these 27 workers. The Industrial Court granted permission with regard to 3 out of the 27 employees and refused permission with regard to 24, and the reason that induced the Industrial Tribunal to come to this conclusion was that the respondent company had failed to comply with the provisions of s. 9 of the Act, that no translation in Marathi of the Standing Orders had been posted on special boards and therefore the 27 employees who did not know English had no notice of the Standing Orders. Therefore, the Standing Orders were not binding upon those 24 employees and no proper inquiry could be deemed to have been held as required by the Standing Orders. With regard to the other three employees, as they knew English, and a copy of the standing orders had been posted on the notice board, the Tribunal took the view that the Standing Orders were binding upon those 3 employees and gave the necessary permission to the respondent company. It was also urged by the respondent company in the alternative that the dismissal could be justified under the ordinary law of Master and Servant. This contention was also rejected by the Industrial Tribunal. The employer company went in appeal to the Labour Appellate Tribunal. The Labour Appellate Tribunal did not accept the construction put by the Industrial Tribunal upon ss. 7 and 9 of the Act and remanded the matter to the Industrial Tribunal, and the employees have now come on this petition.

Turning to the two relevant sections, s. 7 provides:

> "Standing orders shall, unless an appeal is preferred under s. 6, come into operation on the expiry of thirty days from the date on which authenticated copies thereof are sent under sub-s. (3) of s. 5, or where an appeal as aforesaid is preferred, on the expiry of seven days from the date on which copies of the order of the appellate authority are sent under sub-s. (2) of s. 6."

Now, in this case there was an appeal from the decision of the certifying officer certifying the Standing Orders under s. 5 and the copies of the appellate Court's decision were forwarded to the Trade Unions concerned and also to the employer on September 30, 1953, and therefore by reason of s. 7 the Standing Orders came into operation on October 8, 1953. The illegal strike took place on November 11, 1953. The misconduct charged against the employees was subsequent to October 8, 1953, and it is because of this that the employer company contended that it had rightly acted under the Standing Orders, held an inquiry laid down under the Standing Orders and the penalty inflicted

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upon the employees was a penalty permitted under the Standing Orders to the employer.

The answer given by the employees to this contention of the employer is to be found in s. 9 and that section provides:

> "The text of the standing orders, as finally certified under this Act shall be prominently posted by the employer in English and in the language understood by the majority of his workmen on special boards to be maintained for the purpose at or near the entrance through which the majority of the workmen enter the industrial establishments and in all departments thereof where the workmen are employed."

Now, admittedly, the text of the Standing Orders in the language understood by the majority of the second respondent company's workmen, which is Marathi, was not posted on the special boards, and it is therefore urged that this mandatory provision of s. 9 was not complied with and the workmen affected are not bound by the provisions of the Standing Orders. It is true that the Legislature has used the language of obligation in s. 9, but it is always a matter of construction as to whether a particular provision in a statute is mandatory in its character or is only directory, and one of the several tests that has been laid down is that in the first instance the Court must consider whether the noncompliance of the directions given by the Legislature is likely to lead to injustice or inconvenience, and if the Court comes to the conclusion that it would lead to injustice or inconvenience it should lean in favour of construing the provisions as a mandatory direction and not merely directory. But that is not the only principle which the Court adopts in construing a provision in a statute which is couched in a language of obligation. The other principle which is equally important is that the Court must consider what is the real aim and object of a particular enactment it is construing, and if in giving to a provision a mandatory construction it is likely to defeat the aim and object of the enactment, then the Court should not give such a construction. It should come to the conclusion that the language used by the Legislature was intended to give effect merely to a directory provision and not a mandatory provision. In this case it is urged with considerable force by Mr. Sule that but for the Standing Orders the effect on the workmen participating in an illegal strike would have been that they would have been prosecuted and possibly convicted of an offence. It was by reason of the Standing Orders that participation in an illegal strike was constituted a misconduct and the workmen were liable to be dismissed. It is said by Mr. Sule that if the workmen had realised that participation in an illegal strike entailed such serious consequences they would have thought twice before participating in such an activity. It is therefore pointed out by Mr. Sule that the notice required under s. 7 has such an important consequence bearing upon the

rights and obligations of the workers and in the absence of a notice contemplated by s. 9 the Court should not come to the conclusion that the Standing Orders became operative in the sense that they affected the rights and obligations of the workers. That argument of justice and convenience cannot be accepted by us because it is in total opposition to the real aim and object of the Legislature in enacting s. 7. Section 7 is clear and precise in its language and it brings the Standing Orders into operation on a particular date, and in this case the date is October 8, 1953. The result of the Standing Orders coming into operation is that it creates rights and liabilities not only in the employees but also in the employers. By reason of the Standing Orders certain liabilities are imposed upon the employers and certain rights are created in favour of the employees. It is seriously suggested by Mr. Sule that as far as the employers are concerned the Standing Orders would be binding but as far as the employees are concerned they would not be binding unless the notice contemplated by s. 9 was given to them by posting the Standing Orders in the language of the majority. It is an entirely untenable proposition in law that if a particular statute or a particular statutory order comes into operation it should have a binding effect only with regard to one party and not with regard to the other. The object of Standing Orders is to regulate the conditions of service between the employer and the employees; and it is in our opinion impossible to contend that the Standing Orders which mutually regulate the conditions of service between the employer and employees at a particular point of time can regulate only the obligations of the employer and not the obligations of the employees. In view of the language used by s. 7, in our opinion, even though in certain cases it may cause inconvenience or even injustice, it is impossible to give any other construction to s. 9 than that its provisions are directory and not mandatory.

The position may be looked at from a different point of view. If notice was the all important factor, which according to Mr. Sule it is, then it is rather surprising that under s. 9 a notice would only be given to the employees knowing English and the language of the majority. What would happen to a fairly large section of the workers who may neither know English nor the regional language or the language of the majority? Admittedly in this case there are employees who know neither English nor Marathi. There may even be employees who may be illiterate. Therefore it is wrong to suggest that the absence of notice is so important and so significant in the context of this Act that that fact alone brings about a situation whereby the Standing Orders which have come into operation by reason of s. 7 do not affect or bind the employees, who have no notice contemplated by s. 9.

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It is then suggested by Mr. Sule that there is a class of cases decided by this Court where it has been held that a prohibitory order, although brought into force at a particular point of time, does not operate against a particular individual or institution unless the individual or institution has notice of that prohibitory order. What this class of cases lays down is that if an act was *per se* legal and is rendered illegal by an order issued by Government, the person who was under the belief that what he was doing and was continuing to do was a legal act should have notice that it had ceased to be legal before he is prosecuted for the committing of that act. Those decisions stand on an entirely different footing. We are not dealing here with a case of an offence nor are we dealing here with a case where the employees' act which was initially legal has been suddenly rendered illegal. The Standing Orders do not deal with offences. They deal with civil or industrial rights and liabilities of employer and employees, and there is no principle in law that if a statute or statutory orders create civil rights, those rights cannot come into force unless every party affected by it has special notice. Further, participation in an illegal strike is *per se* an offence, and it is an illegal activity. Therefore the employees cannot urge before us that what they were doing was something lawful which was for the first time made unlawful by the coming into operation of the Standing Orders.

Mr. Sule then points out that if that is the view we take of s. 9, then an employer can with impunity defy the direction given by the Legislature under s. 9 and refuse to post the translation of the Standing Orders on the notice board or negligently delay it as long as possible. We are most anxious that our decision should not lead employers to feel that they are not under an obligation to carry out a direction given in s. 9 of the Act. The Legislature has given that direction for very good reasons. The Legislature wanted notice of the Standing Orders which were settled to be given to the employees in the best manner possible. It was not possible to provide for every language or for the possibility that some of the employees might be illiterate. But dealing with the question fairly and broadly, the Legislature directed that the employer should put up the Standing Orders in the English language and in the language of the majority, and we wish to point out precisely what the effect of non-compliance by the employer of this direction in s. 9 would be. It may well be that non-compliance of the direction in s. 9 with regard to the Standing Orders to be put up in the language of the majority may cause prejudice to the workers. It may be that the workers may be able to satisfy the Industrial Tribunal that they had no notice of the Standing Orders, and further, if they had notice they would not have participated in the illegal strike and risked the penalty of a dismissal. If such

a prejudice is caused and the Industrial Tribunal is satisfied, it would be the duty of the Industrial Tribunal to take this circumstance into consideration in deciding whether the application made by the employer for dismissing the employees should be granted or not. Again, there may be a case where the employer's non-compliance may not be wilful or negligent. In this case Mr. Vimadalal says that the second respondent company took every step to get the Standing Orders translated into Marathi as speedily as possible. That again is a circumstance which the Industrial Tribunal will take into consideration. Surely it cannot be suggested that where the Industrial Tribunal has a case where the employer is guilty of wilful default in failing to comply with the directions contained in s. 9 that is a factor which the Industrial Tribunal should not take into consideration in considering whether the application of the employer for dismissal of the employees, which right to the employer arose under those very Standing Orders, should be granted. Again Mr. Vimadalal points out that in this case the draft Standing Orders were submitted to the Certifying Officer in 1949, that copies of the draft as required by the Act were sent to the Trade Union, that in the draft these two acts were constituted misconduct, and in fact in this respect the draft was following the Model Standing Orders, and Mr. Vimadalal says that from 1949 to 1953 the Trade Union was closely associated with this draft and throughout that period those two acts remained in the draft as constituting misconduct, and therefore it is not likely that the employees would not have known that the ultimate Standing Orders which were settled by the Appellate Tribunal did not make these two acts misconduct. Again, in our opinion, that is a circumstance which the Industrial Tribunal will take into consideration in deciding whether the workers had notice of the Standing Orders *de hors* the provisions of s. 9. But these are all arguments on merits, and we agree with Mr. Sule that the absence of notice is an important circumstance which any Tribunal dealing with the merits of the application made by the employer should take into consideration. But when Mr. Sule asks us to elevate the absence of notice to that high position that it must render the provision of s. 7 nugatory and unworkable, we cannot accede to that. Therefore, in our opinion, the date when the Standing Orders come into operation is fixed by the statute under s. 7 and when the Standing Orders come into operation they bind both the employer and the employees. Section 9 is merely directory and we expect the employer to carry out the provisions which the Legislature clearly enacted to be in the interest of the workers and, as we have already pointed out, non-compliance with that direction may result in the employer not succeeding in satisfy-

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ing the Industrial Tribunal that it is a proper case for dismissing its employees.

The result is that the petition fails and must be dismissed. No order as to costs.

Rule discharged.

G. N. V.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

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THE COMMISSIONER OF INCOME-TAX, BOMBAY NORTH, KUTCH AND SAURASHTRA, AHMEDABAD, APPLICANT *v.* MESSRS. WELJI DAMJI, PACHORA, RESPONDENT.*

Indian Income-tax Act (XI of 1922), s. 12 B, third proviso to s. 12 B (1); 41 (2)—Sale by receivers of capital assets of dissolved firm for making distribution among partners—Such sale realising gain—Whether such gain capital gain?—Whether such sale is sale by operation of law and not falling under s. 12 B?—Whether such sale saved by third proviso to s. 12 B (1)?—Open to Taxing Department to assess assessee on whose behalf capital gain received by receivers.

A sale effected by the Receivers appointed to sell the capital assets of a partnership on its dissolution realised a gain of Rs. 30,447 over the written-down value of the assets. On appeal against the order of the Taxing Department holding such gain liable to tax under s. 12 B of the Indian Income-tax Act, 1922, the Income-tax Appellate Tribunal upheld the assessee's contention that by reason of third proviso to s. 12 B (*1*) of the Act, the profits were not liable to tax. On reference to the High Court at the instance of the Commissioner of Income-tax, Bombay North, Kutch and Saurashtra it was contended on behalf of the assessee, firstly, that the sale by the Receivers was a sale by operation of law and, therefore s. 12 B was not applicable and secondly, that in any case the sale of capital assets was a sale for the purpose of distribution of capital assets on dissolution of the firm and as such saved by the third proviso to s. 12 B (*1*) of the Act and hence profits realised on sale were not liable to tax

Held, negativing both these contentions, that the sale of the capital assets of the firm by the Receivers was not a sale by operation of law but a sale as contemplated by the Transfer of Property Act, 1882, and was therefore a sale which fell within the meaning of s. 12 B of the Act and that the third proviso to s. 12 B (*1*) of the Act saved only distribution of capital assets *in specie;* it did not save the distribution of the proceeds realised on sale of capital assets.

The Commissioner of Income-tax, Bombay City v. *James Anderson,*[1] followed.

Held, therefore, that the gain on sale of capital assets by the Receivers was capital gain within the meaning of s. 12 B of the Act and was liable to tax.

* Income-tax Reference No. 7 of 1955.

1. [1955] Bom. 90.