CASES AND COMMENTS

Relation of Individual Hiring Contracts to Standing Orders.

A recent decision of the Supreme Court has gone far toward resolving a conflict between the High Courts of Allahabad and Patna as to the status of standing orders and their effect upon individual hiring agreements. In an opinion by Judge Gajendragadkar in the *Bagalkot Cement Co. Ltd.* v. *Pathan* [1] that Court has recognized that standing orders " constitute the statutory terms of employment ". In this pronouncement, the Court without referring to either case has in effect rejected the position of the High Court of Allahabad in *J. K. Cotton Manufacturers* v. *J. N. Tewari* [2] and has approved that of the Patna High Court in *Bihar Journals Ltd.* v. *Ali Hassan.* [3]

In the Supreme Court decision, the issue involved a controversy as to the powers of the certifying officer (under sec. 5 of the Industrial Employment (Standing orders) Act) to make a substantive addition to the company's draft of a Standing Order in relation to the allowance of holidays and leave. In giving a liberal construction to these powers the honourable judge expressed certain broad principles of policy that throw important light on the nature of standing orders.

Quoting the preamble to the Act as " to require employers in individual establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them ", he noted that prior to the Act's passage these conditions were often oral, ill-defined and ambiguous; that the legislative purpose was to render them " well defined and precisely known to both the parties." He concluded that the appropriate authorities had been entrusted with the power to examine " their reasonableness " and to make " suitable modifications " and, under cl. 11, even to make " an addition ..... if it is thought necessary to do so ". The Court then sustained the action of the certifying officer and thereupon made this important pronouncement: " the Act has made provisions for making Standing Orders which, after they are certified, *constitute the statutory terms of employment* between the industrial establishment in question and their employees " [Italics added].

1. [1962] 1 L.L. J. 203 (S. C.).
2. A.I.R. 1959 All. 639.
3. A.I.R. 1959 Pat. 431.

In the Allahabad case. M/s. *J. K. Cotton Manufacturers* v. *Tewari*,[4] 159 workers had been employed as substitute and temporary workers. Before being recruited, all the workmen were individually required to sign a form which provided that "I fully understand that I am being engaged as a temporary workman.....and that the company can discharge me without notice, or wages in lieu of notice when my services are not required". At the time of employment, however, certain standing orders were in effect which, among other things, defined both temporary and permanent employees in a fashion which, it was contended, was in contradiction to the language of the individual agreement.

In November of 1953 the Company experienced a shortage in raw materials and so discharged the workmen in question without giving them notice or wages in lieu of notice. A dispute was raised by the trade union and the matter was referred to the Regional Conciliation Officer. As no settlement was arrived at in conciliation proceeding, the Government of Uttar Pradesh referred the dispute to the State Industrial tribunal in 1954. The Industrial tribunal gave an award in favour of the workmen. But on appeal, the Labour Appellate Tribunal reversed the award and allowed the appeal filed by the company. Thereafter the Government of Uttar Pradesh issued a fresh notification dated Feb. 6, 1956 referring the dispute for adjudication to J. N. Tewari, Deputy Labour Commissioner. He gave an award holding that the workmen in question were permanent employees and directed the petitioner company to pay the workmen compensation for the period they remained unemployed. Against this award, the company filed a writ petition in the Allahabad High Court under Article 226 of the Constitution to get the award quashed.

In considering the case the High Court accepted the facts in the following fashion: ".....according to the written contract entered into by the workmen, they were substitutes or temporary employees. On the other hand according to the definitions contained in the standing orders, they could not be described as substitutes or temporary operatives."[5] Hence the main question which arose for consideration before the High Court was: in the case of a conflict between the provisions of an individual agreement and of the standing orders, which must prevail?

The High Court held that individual agreements prevail over the provisions of the standing orders unless it is proved that the agreements

4. A.I.R. 1959 All. 639.
5. A.I.R. 1959 All. 639 (642).

were signed under coercion, fraud or misrepresention.[6] His Lordship observed: "It is true that standing orders lay down the conditions of employment. But it does not follow that conditions of employment cannot be laid down in any other manner. Section 12 of the Act bars oral evidence in contradiction of standing orders. But I do not find any provision prohibiting written agreements. So in spite of Act XX of 1946 and standing orders framed under the Act, it is open to an employer and an employee to enter into a special contract." Then follows the following significant statement: "Standing orders lay down general condition of employment. A written agreement may contain special terms of service. In the case of a conflict between general conditions of employment contained in standing orders and special terms contained in a written contract, the terms of the special contract will prevail."[7]

The same question arose in the Patna Case, *Behar Journals* v. *Ali Hasan*[8] in which the Division Bench of the Patna High Court took the opposite view and held that individual agreements cannot override the provisions of the certified standing orders of the Company.

In that case, Mr. R. K. Sharma, respondent No. 2 was appointed as a probationer for a period of six months in the permanent vacancy of sub-editor from 1st September, 1955. According to the letter of appointment, his service could be terminated during the probationary period without notice and without giving any reasons. The certified standing orders of the Company provided that the probationary period would be of three months duration and clause (b) of order 2 stated that a "permanent workman is" one "who has been engaged on a permanent basis and includes any person who satisfactorily completes a probationary period of three months in the same or another occupation in the industrial establishment, including breaks due to sickness, accident, leave, lockout, strike (not being an illegal strike) or involuntary closure of establishment."

As certain differences arose between the workers and the management of the company, the workers went on strike from the 3rd of February to the 9th, 1956. Respondent No. 2 was a member of the action committee and apparently took an active part in that strike. On the 29th of February, respondent No. 2 was discharged from service without notice and without being given any reason. A dispute

6. A.I.R. 1959 All. 639 (642). Section 19 of Indian Contract Act, was quoted.
7. A.I.R. 1959 All. 639 (642). Quoted with approval by Bhargava, J., in *J. K. Cotton Manufacturers* v. *U.P. Government* A.I.R. 1960 All. 734 (738).
8. A.I.R. 1959 Pat. 431.

thereafter arose between the management of the petitioner company and its trade Union in regard to certain matters including this discharge. The Governor of Bihar, acting under section 7 read with section 10 (1) of the Industrial Disputes Act, 1947, constituted an Industrial Tribunal of which Sri Ali Hasan, respondent No. 1 was the sole member. This Tribunal held that according to the certified standing orders of the petitioner company, respondent No. 2 was to be on probation for a period of three months only even though, under the terms of the appointment letter, the period of probation was six months, and before the date of the strike there was no record of any bad work of the said respondent so as to prevent him from being made permanent. It also held that he was entitled to have been given an opportunity to show cause before being terminated summarily and found that it was a glaring case of arbitrary discharge. Against this award, the petitioner company filed a writ petition in the Patna High Court under Article 226 of the Constitution.

The Patna High Court dismissed the petition and upheld the decision of the Industrial Tribunal. R. K. Choudhry, J., observed: ".....The certified Standing Orders have the statutory force and under the above standing orders there is a statutory contract between the employer and the workman. It could not, therefore, be possible in law for the parties in this case, namely, the petitioner and respondent No. 2, to enter into a contract over-riding the statutory contract as embodied in the certified Standing Orders and any contract contrary to the above orders must be ignored. In the face of the above Standing Orders the petitioner could not appoint respondent No. 2 on conditions of service different from those defined in the Standing Orders without modification of the Standings Orders themselves."

The question involved in each of these opinions was: whether the provisions of the standing orders can be altered by written agreement between the employer and his employees. The contradictory answers that have been given to this question by these two High Courts, and the important pronouncement recently made by the Supreme Court, together with the inherent importance of the problem it raises, make this a matter of particular and immediate interest.

Any discussion of this issue must necessarily open with a consideration of the aim and object of enacting the Industrial Employment (Standing Orders) Act, 1946, and the evils the Legislature wanted to eradicate. In this connection it is interesting to note that before the Industrial Employment (Standing Orders) Act, 1946, was placed on the

statute book, the Labour Investigation Committee[9] commented upon the question of standing orders as follows:

"An industrial worker has the right to know the terms and conditions under which he is employed and the rules of discipline which he is expected to follow. Broadly speaking, in Indian Industry the rules of service are not definitely set out, and like all unwritten laws, where they exist they have been very elastic to suit the convenience of employers. No doubt, several large scale industrial establishments have adopted standing orders and rules to govern the day-to-day relations between the employers and workers; but such standing orders or rules are merely one sided. Neither workers' organisations nor Government are generally consulted before these orders are drawn up and more often than not, they have given the employers the upper hand in respect of all disputable points." Even earlier the Bombay Textile Labour Enquiry Committee[10] had commented in a similar vein that "there is no fear which haunts an industrial worker more constantly than the fear of losing his job as there is nothing which he prizes more than economic security. The fear of being summarily dismissed for even a slight breach of rules of discipline or for interesting himself in trade union activity disturbs his mind. It is a notorious fact that dismissals of workers have been the originating causes of not a few industrial disputes and strikes. The provision of effective safeguards against unjust and wrong dismissals is, therefore, in the interest as much of the industry as of the workers."

To eradicate these evils, the Industrial Employment (Standing Orders) Act was passed in 1946. The statement of objects and reasons points out that, "Experience has shown that 'Standing Orders' defining the conditions of recruitment, discharge, disciplinary action, holidays, leave etc., go a long way towards minimizing friction between the management and workers in industrial undertaking". The Act applies to every industrial establishment where one hundred or more workmen are employed or were employed on any day of the preceding twelve months and sets up an elaborate machinery for the framing of the initial draft of the standing orders by the employer,[11] including a hearing for the parties (management and workers) before final order is passed,[12] the duties of the certifying officer to see that all the matters

9. Main Report, Labour Investigation Committee (1946) p. 113.
10. Report of the Textile Enquiry Committee (1940) Vol. II—Final Report. p. 355.
11. S. 1 (3).
12. S. 5.

set out in the schedule of the Act are incorporated in the standing orders and to adjudicate upon the fairness and reasonableness of the provisions of standing orders,[13] and the right of appeal.[14] It also makes provisions for maintaining a register of certified standing orders,[15] their enforcement,[16] procedure for their modification,[17] for their display by the employer on the notice board of the Company[18] and prohibits the court from admitting oral evidence which will have the effect of adding or otherwise varying or contradicting standing orders as finally certified under the Act.[19] Section 13 provides for penalties and procedure to enforce the standing orders and section 14 and 15 confer power on the government to exempt conditionally or unconditionally certain industries and to make rules to carry out the purpose of the Act.

It is relevant to recall here Judge Gajendragadkar's opinion that the standing orders have a statutory force as soon as they are certified by the government. Applying this to the Allahabad case, it would then follow that since the standing orders had been so certified and were published,[20] they became the statutory terms of employment between the employer and the employees. Section 23 of the Indian Contract Act provides that, "The consideration or object of an agreement is lawful unless.....it is forbidden by law; *is of such a nature that, if permitted, it would defeat the provisions of any law;* or is fraudulent; or involves or implies injury to the person or property of another; or the court regards it as immoral, or opposed to public policy..... Every agreement of which the object or consideration is unlawful is void." [Italics added] The words, "if permitted, it would defeat the provisions of any law" have been interpreted by the Allahabad High Court in an earlier case to invalidate "a contract which seeks to exclude the application of a statutory provision to the parties".[21] Since the Supreme Court now views standing orders as

13. S. 4.
14. S. 6.
15. S. 8.
16. S. 7.
17. S. 10.
18. S. 9.
19. S. 12.
20. In the *Annual Review of Activities*. 1953 Parts I and II issued by the Department of Labour, U. P. at. p. 685.
21. *Madan Mohan* v. *Ramchander Rao*, A.I.R. 1935 All. 619 See also F. Pollock and D. F. Mulla *Indian Contract and Specific Relief Acts* p. 164 and 165: The *A.I.R. Manual* Volume III, pages 3334 to 3336, Note 5.

that police custody has strong effect on confessions, that it is indeed a form of coercion." [120]

B. PREVENTIVE DETENTIONS [121]

The most significant fact about preventive detention, as against ordinary arrests and detentions, is that it is a process by which a person is taken into custody and detained without any trial at any stage. No offence is proved nor any charge formulated, and the justification for such detention is suspicion or reasonable probability and not criminal conviction, which can be warranted only by legal evidence. [122] While the object of punitive detention is to punish a person for what he has done, the object of preventive detention is to prevent him from doing something. In India, this power can be exercised only for the purposes mentioned in List I Entry 9 [123] and List III Entry 3 [124] of the Seventh Schedule appended to the Constitution of India. The makers of the Indian Constitution thought that such a measure was necessary for an infant Republic. But any such measure in peace times or when there is no national emergency prevailing means the very negation of the due process of law. Nothing like this extra-ordinary governmental power is to be found under the American constitutional system during normal peace times. [125] However, the Indian constitution does not

120. William O. Douglas, *We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukherjea*, 1956 at p. 372.

121. The purpose here is not to discuss in detail all the aspects of the law relating to preventive detention in India or the U.S.A. It is only intended to show here that the constitutional provisions in India afford sufficient protection to one detained preventively. For a detailed study of law relating to preventive detention specially from the point of view of procedural safeguards available to detenu the reader is requested to refer to other works; in particular, Markose, *Judical Review of Administrative Action in India*, 141–56 (1956); Jain: 'Preventive Detention in India', 1 *Vyavahar Nirnaya* 41 (1952); Tripathi, 'Preventive Detention: The Indian Experience', 9 *Am. Journal of Comparative Law*, 219 (1960); and Vivian Bose, 'Preventive Detention in India' 3 *Journal of the International Commission of Jurists* 87 (spr. 1961).

122. *Gopalan* v. *State of Madras*, [1950] S.C.J. 174: [1950] S.C.R. 88.

123. Items in this Entry are Defence, Foreign Affairs and Security of India, and since these fall in List I the federal government has the exclusive power to legislate with respect to these matters.

124. This mentions Security of a State, maintenance of Public Order or of Supplies and Services essential to the community. With respect to these items both the federal and state governments have power to legislate since these items fall in the Concurrent List (List III). However, in view of the federal law, Preventive Dentention Act, 1950, the states have not legislated.

125. Compare, however, the story of detention of over 110,000 U.S. citizens and resident aliens of Japanese ancestry in the Spring of 1942 during the World War II. For a general survey of this episode from the constitutional point of view, see, Brock,

a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement." If in this quotation the words "standing orders" were to be substituted for "collective" or "trade agreement", the relevance of this American opinion takes on startling proportions.[23]

Nor are the policy considerations far different. The encouragement of collective bargaining, so basic in the United States, and the protection of the workers under Indian legislation, would each seem to require the subordination of all individual hiring contracts to the national objectives. Yet if such contracts are to prevail, over the standing orders, as permitted by the Allahabad High Court, the aims of the Act will clearly be frustrated. As has already been seen, the object of the Act is not only to make the terms and conditions of employment known to both parties, as stated by Judge Gajendragadkar, but also to safeguard the interest of the workers. This was well stated in the Bombay Textile Enquiry Committee's report. Moreover, it serves two additional purposes: (1) It seeks to ensure fair returns for their labour to the workmen who have not the capacity to treat with capital on equal terms and (2) It seeks to prevent disputes between employers and employees, so that production may not be adversely affected and the larger interests of the society may not suffer.[24] These aims can be fulfilled only when standing orders are held sacrosanct. Individual agreements should be able to supplement the standing orders but not to contradict them. Moreover, 'the consequences of following the view of their Lordship's of the Allahabad High Court will be that management is in a position to introduce any condition it

23. The significance of the American case and of its companion, *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342 (1944) is interestingly commented upon by Ruth Weyand in "Majority Rule in Collective Bargaining", 45 *Col. L. Rev.* 556, 569-579. The holdings of American State Courts, prior to these two opinions, is presented in a note, "Employee's Rights under conflicting Terms in Collective Agreement and Individual Contract", 50 *Yale L. J.* 595 (1941). The principle of prevalance of normative terms in collective contracts over individual hiring agreements has long been recognized in Europe. Perhaps the most recent observation on this is found in "The Contract of Employment in Polish Labour Law" by Waolow Szubert, 25 *Mod. L. Rev. 36* at p. 39 (1962). For comparative studies, see Arthur Lenhoff's notes in Labour Relations and the Law (Mathews' Ed. 1953) pp. 66 and 309 et seq; and Otto Kahn-Freund, "Collective Labour Relations", 3 *Revista di Diritto Internationale Comparato di Lavoro* 353, 389 (1960).

24. *Burn & Co.* v. *Their Employees* (1957) I LL. J. 226 (230) S.C.

likes in the service agreement regardless of the terms of its governmentally certified standing orders. Hence, it is gratifying that the Supreme Court has now established the principle, even as did the Patna High Court three years ago, that standing orders have statutory status and must therefore, prevail over all conflicting agreements. In the light of these holdings it is respectfully submitted that their Lordships of the Allahabad High Court might wisely, reconsider their position in the *Cotton Manufacturers* case.

Balkishan Rathi *

Protection against self-incrimination

"If Courts were to depend on volunteers who will choose for themselves whether to give evidence or not, then the entire machinery for discovery of facts on which the very foundation of justice depends will crumble to pieces. Testimonial compulsion, therefore, is not a legal fetish. It is a necessity. Testimonial compulsion is the general rule. The constitutional prohibition of self-incriminating evidence is an exception designed to defend justice and insure the accused against self created criminal traps." [1]

"It [Principle of protection against self-incrimination] resulted from a feeling of revulsion against the inquisitorial methods adopted... by the Court of Star Chamber in the exercise of it's criminal jurisdiction." [2]

Between these two views as to the interpretation, of Article 20(3) [3] of the Constitution the substance of the right against self-incrimination has varied and the purport of some of the decisions has not been happy. An examination of these decisions may be useful.

Starting with the decision of the Supreme Court in *Sharma* v. *Satishchandra* [4] one gathers a feeling of reassurance. In that case as a result of first information report filed against the directors of a certain

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1. P. B. Mukerjee, J., in *In Re*: *Central Calcutta Bank*, A.I.R. 1957 p. 520 at 523.

2. Jagannadhadas, J., in *M. P. Sharma* v. *Satish Chandra*, A.I.R. 1954 S.C. p. 300 at p. 302.

3. Article 20(3): "No person accused of any offence shall be compelled to be a witness against himself."

4. A.I.R. 1954 S.C. 300.