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'Strikes' and 'Lockouts' in India: Judicial Perspectives

'STRIKES— AND 'LOCKOUTS— IN INDIA: JUDICIAL PERSPECTIVES

by
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I. INTRODUCTORY

A. Right to 'strike': the source

The right to form trade unions has been located by the judiciary under Article 19(1)(c) of the Constitution of India, which confers fundamental right on the citizens to form associations or unions.[1] This right under Article 19(1)(c) is, however, subject to reasonable restrictions that may be imposed under clause (4) of Article 19[2] and Article 33[3] of the Constitution. The attempt to expand this right to include the right to engage in concerted activities (strikes) for mutual aid and protection including collective bargaining has, however, been rejected by the Supreme Court.[4] There is no statute which gives to the Indian workers the right to strike in express terms as is given to the workers in USA under Sections 7 and 13 of the National Labour Relations Act, 1935. However, this gap has been filled by the Indian judiciary by locating this right in the common law. In *Raja Bahadur Motilal Poona Mills Ltd.* v. *Poona Girni Kamgar Union*,[5] Chagla C.J. declared thus:[6]

> There is nothing inherently unlawful or illegal in a strike...common law permitted an employee to stop work if he so desired.

This declaration of the right to strike in a language that is not so assertive has had its implications of treating it as a very limited right. However, over the years, this right came to be recognized as a lawful right of the working class to bring the employer to the negotiating table. To use the expression of Ahmadi J. of the Supreme Court in *B.R. Singh* v. *Union of India*,[7] the right of the worker to go on strike "though not raised to highest pedestal of a fundamental right, is recognized as a mode of redress for resolving the grievances of workers".

B. Definition of 'strike'

According to Ludwig Teller,[8] the word 'strike', in its broad connotation, has reference to a dispute between an employer and his workers, in the course of which, there is a concerned suspension of employment. He described four characteristics of a 'strike', as the term is employed in modern times, which are:

(i) an established relationship between the strikers and the person or persons against whom the strike is called;

(ii) the constituting of that relationship as one of employer and employee;

(iii) the existence of a dispute between the parties and the utilization by the labour of the weapon of concerted refusal to continue to work as the method of persuading or coercing compliance with the workmen's demand; and

(iv) the contention advanced by workers that, although work ceases, the employment relation is deemed to continue, albeit in a state of a belligerent

suspension.

Section 2(q) of the Industrial Disputes Act, 1947 (ID Act) gives an exhaustive definition of 'strike' which incorporates substantially the characteristics of strike as given by Ludwig Teller. Section 2(q) defines strike thus:

> 'Strike' means a cessation of work by a body of persons employed in any industry, acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons, who are or have been so employed, to continue to work or to accept employment.

A bare perusal of this definition shows that there has to be a 'concerted cessation of work' during normal working hours by a body of workers under a common understanding, etc. in an industry. The notion of quitting, cessation or discontinuance of work in combination, is an essential requirement of the definition of strike. Over the years, the various facets of this definition were subject to interpretation by the labour courts/industrial tribunals as also the Supreme Court in a number of cases.

Thus, it has been held that in order to establish such concert, there need be no formal meetings, discussions, or even an interchange. It may be deduced from similar acts and course of conduct. The fact that the duration of strike was for a few minutes or for a few hours or for days together is irrelevant.[9] There is nothing in the scheme of the Act or its provisions which shows that in order to constitute 'strike', the cessation or stoppage of work must be by virtue of an 'industrial dispute'.[10] Likewise, the purpose behind the cessation of work would also be irrelevant in determining whether the cessation of work would constitute strike or not.[11] It is implicit in the definition of strike that the 'cessation of work' or 'concerted refusal to work' must be in breach of the legal obligation to work or in defiance of the employer's authority.[12] Therefore, when the workmen refuse to do additional work, which the employer has no right to ask for, it would not amount to strike even if such refusal is concerted or under common understanding.[13] The judiciary has recognized in the face of low unionization that for constituting a strike situation, it is not necessary that there should be concerted refusal or cessation of work by all the workers of the employer. It is sufficient if a substantial number of workers, say, 25 to 30 per cent, under a concert, refuse to work for the employer.

Some of the illustrative forms of strike situations recognized by judicial decisions under Section 2(q) of the ID Act, in a number of cases, include: 'pen down' strike by clerical staff, 'tool down' strike by factory workers, 'stay in' or 'sit down' strike by a group of employees who enter the premises but do not leave the plant or place of work.[14]

However, it has been the consistent approach of the Supreme Court to treat 'go slow' and 'work to rule' as serious misconducts as these do not fit into the definition of 'strike' since there is no cessation of work in either

of the two situations.[15] In both these situations, the workers do their work so that they do not lose wages but at the same time do not work in terms of their contract of employment. In fact, under the Model Standing Orders framed under the Industrial

Employment (Standing Orders) Act, 1946, 'go slow' has been held to be a serious misconduct.[16] Das Gupta J. stated the legal position with respect to 'go-slow' thus:[17]

> 'Go-slow', which is a picturesque description of a deliberate delaying of production, by workmen pretending to be engaged in the factory, is one of the most pernicious practices that discontented or disgruntled workmen sometimes resort to. It would not be far wrong to call this dishonest. For, while thus delaying production and thereby reducing the output, the workmen claim to have remained employed and thus to be entitled to full wages. Apart from this also, 'go-slow' is likely to be much more harmful than a total cessation of work by strike. For, while during a strike, much of the machinery can be fully turned off, during the 'go-slow', the machinery is kept going on a reduced speed, which is often extremely damaging to the machinery parts. For all these reasons, 'go-slow' has always been considered a serious type of misconduct.

In subsequent decisions also the Supreme Court consistently took serious view of the 'go-slow' and repeatedly emphasized the serious consequences that result therefrom.[18] The court has rightly condemned such tactics and has dealt with such cases severely.[19] Sawant J., speaking for the court, has observed thus:[20]

> There cannot be two opinions that go-slow is a serious misconduct, being a covert and a more damaging breach of the contract of employment: It is an insidious method of undermining discipline and at the same time, a crude device to defy the norms of work. It has been roundly condemned as an industrial action and has not been recognized as a legitimate weapon of the workmen to redress their grievances. In fact, the Model Standing Orders, as

well as the certified Standing Orders of most of the industrial establishments, define it as misconduct and provide for disciplinary action for it. Hence, once it is proved, those guilty of it have to face the consequences which may include a deduction of wages and even a dismissal from service.

C. Lockouts and strikes treated at par

The ID Act treats 'strikes' and 'lockouts' similarly - one as the counterpart of the other.[21] Strike is an efficacious weapon in the hands of the workers in the process of collective bargaining; so is lockout in the hands of the employers. As strike does not contemplate a severance of employer-employee relationship, lockout too does not severe the relationship. The law applicable to strikes under the Act is the law applicable to lockouts as well. An illegal strike followed by a lockout renders the lockout legal and *vice versa*.

Under the statutory law also, the right to strike and lockout is not absolute in view of the restrictions placed on them under Sections 10(3), 10-A(4-A), 22 and 23 of the ID Act. The purpose being that the proceedings before the conciliation or adjudication authorities, as the case may be, are held in a peaceful atmosphere and the society is not to be inconvenienced by 'strikes' and 'lockouts'. Whereas Sections 10(3) and 10-A (4-A) of the Act empower the appropriate government to prohibit continuance of a strike which is in progress in certain situations, Sections 22 and 23 seek to prohibit strike at the threshold.

The terms 'protected' and 'unprotected' strikes, 'economic strikes' and 'strikes against unfair labour practices' of the employer are not often used in India, though at times it may be stated that the cause of the strike was 'unfair labour practice' of the

employer.[22] However, by and large, all strikes are considered as economic strikes.[23]

Under the ID Act, the commonly used terms are: (a) legal strikes; and (b) illegal strikes. Strikes which are in violation of any of the provisions of Sections 10(3), 10-A (3-A), 22 or 23 of the Act are described as 'illegal' strikes and those which do not violate any of these provisions are treated as 'legal' strikes. Legality or illegality of a strike is a question of law depending upon the issue as to whether there is technical compliance with the aforesaid provisions and has nothing to do with the object of the strike. A

strike, even though well intended and in furtherance of the legitimate trade union objectives, resorted to in violation of any of the aforesaid provisions, would be illegal and punishable under Section 26 of the Act.

Giving a purposive interpretation to strikes/lockouts the Supreme Court has further classified them into 'justified' and 'unjustified' categories. It is submitted that this approach of the court was necessitated by the lack of a uniform approach to 'strikes' and 'lockouts' by the legislature. Whereas the purpose of the Trade Unions Act, 1926 (TU Act) is insulation of trade unions, its members and office-bearers from certain civil and criminal action in respect of their activities in pursuance of legitimate trade union objectives, the purpose of the ID Act is primarily to protect the interest of social control. Under the latter Act, it is the technical compliance with the provisions contained in Sections 22 and 23 of the Act, and not the purpose of the combination, which insulates trade unions, their office-bearers and members against penal actions under the Act. A 'legal strike' under the ID Act unrelated to the object of combination is, therefore, not liable to penal actions under this Act. But it may render workers liable for penal and civil actions under the general law if it is not in furtherance of legitimate trade union objectives. On the other hand, a strike which is 'illegal' under the ID Act, but intended to further the legitimate trade union objectives, will make workers liable for punishment only under the ID Act; they are insulated against certain civil and penal actions under the general law if they are members of a registered trade union. In other words, the legality or illegality of a strike under the ID Act is unrelated to the purpose of strike; the purpose of the strike is all-important for being entitled to the immunities under the TU Act. Through judicial activism, the purpose of combination has been made a common feature in both the statutes to make strikes and lockouts object-oriented. Thus, a particular strike/lockout may have more than one classification. A strike/lockout may be 'legal' yet 'unjustified' or it may be 'illegal' but 'justified.'[24] As stated above, the distinction between 'justified' and 'unjustified' strikes has not been established by the legislature but by the courts. A strike is considered justified, if it is in connection with a current labour dispute or directed against an unfair labour practice of the employer and is resorted to only after remedies provided by the statutory machinery of the ID Act, have been exhausted or proved futile.[25] Further instances are where the management has adopted an adamant attitude and shown no eagerness to settle the matter or has resorted to discharge of union officials as an act of unfair labour practice.[26] Unjustified strikes can

be where the workers have not waited for the statutory machinery under the ID Act to intervene, or they have made unreasonably high demands, or where the demands are

not bonafide.[27] The nature, content and consequence of a strike, therefore, depend upon the approach of the court. The contours of this right are determined by the court.

D. Effect of strike on contract of employment

There are no express provisions under the industrial relations law in India stating the effect of strike on the contract of employment. But industrial adjudication under the overall guidance of the Supreme Court has through case law built up a body of principles laying down the effect of strike on the contract of employment. A strike, legal or illegal, justified or unjustified, does not dissolve the employer-employee relationship automatically.[28] The right to strike is in no way abridged by temporary replacements and the strikers may be entitled to wages for the strike period.

The justifiability or unjustifiability of a legal strike is relevant in the context of wages payable to the workmen for the period of strike. The effect of legality or illegality of a strike is also relevant in the context of disciplinary action because going on an illegal strike is generally made an act of misconduct under the Standing Orders.[29] As observed in *India General Navigation and Railway Co. Ltd.*,[30] the only question of any practical importance, which may arise in the case of an illegal strike, would be the kind or quantum of punishment which has to be modulated in accordance with the facts and circumstance of each case.

The Supreme Court in *Express Newspapers (P) Ltd.* v. *Michael Mark*[31] held that if employees absent themselves from work because of a strike, for the enforcement of their demands, there can be no question of abandonment of the employment by them. And, if the strike was in fact illegal, the employer may take disciplinary action against the workmen under the Standing Orders or otherwise, and dismiss them. This principle was further elaborated and the legal position was reiterated in *Oriental Textile Finishing Mills* v. *Labour Court*[32] and *G.T. Lad* v. *Chemical and Fibers of India Ltd.*[33] In the former case, the court, while dealing with the issue of resorting

to replacement during an illegal strike, has taken a neutral position and observed thus:[34]

> While it is an accepted principle of industrial adjudication, the workmen can resort to strike in order to press for their demands, without snapping the relationship of employer and employee, it is equally a well-accepted principle, that the work of the factory cannot be paralysed and brought to a stand-still by an illegal strike, in spite of legal steps being taken by the management to resolve the conflict. The management has the right in those circumstances, to carry on the work of the factory, in furtherance of which, it would employ other workmen and justify its action on merits, in any adjudication of the dispute arising therefrom.

E. Punishment for participating in illegal strike

Participating in an illegal strike amounts to misconduct on the part of the employee and can expose him to disciplinary action.[35] However, until an employee is formally dismissed from service for such misconduct, the relation of employment subsists and the continuity of service is not affected. However, dismissal of workmen for going on an illegal strike, without holding a domestic enquiry against them for the charge, in accordance with the principles of natural justice, will not be sustained in industrial adjudication.[36] In *Oriental Textile Finishing Mills*,[37] the Supreme Court held that where the strike is illegal, the management, in order to justify dismissal or order of termination of the services of the workmen on the ground of misconduct, need not

prove that they were guilty of some overt act such as intimidation, incitement or violence. If the workmen persistently and obdurately refuse to join duty notwithstanding the fact that the management has done everything possible to persuade them and given them opportunity to come to work but they have without any sufficient cause refused, it would constitute misconduct and justify the termination of service. But if the strike is not illegal, disciplinary action of discharge or dismissal will be uncalled for.

The position of law, therefore, seems to be that if there are Standing Orders providing for a dismissal in an event of participating in an illegal strike while working in an establishment, the striking workmen may be punished or dismissed in compliance with its requirements which generally

provide for holding of a departmental enquiry or giving an opportunity to the workmen to resume work after notice. In cases where there are no such Standing Orders, it would be necessary to serve the individual workman, who participated in the strike, with a charge sheet and also hold a regular domestic enquiry to determine the nature of misconduct and the quantum of punishment including dismissal. It is only after complying with these requirements that a workman, if found guilty of the charges, may be dismissed.[38]

There may be actual participation or passive participation on the part of the workmen in an illegal strike. It may be that those who actually participated may deserve a more serious punishment than the passive participants. In *Gujarat Steel Tubes*[39], the Supreme Court held that passive participants could not be punished to the same extent as the active participants or the militant workmen. The court has taken the stand that a mere participation in an illegal strike does not bar the strikers' claim for reinstatement if they are dismissed[40] for "there may be reasons for distinguishing the case of those who have acted as dumb-driven cattle from those who have taken part in fomenting the trouble and instigating workmen to join such a strike or have taken recourse to violence."[41] In the former case, dismissal may not be justified, whereas it may be so in the latter. The court has, however, been very clear that violence has no place in industrial life and, therefore, even if a strike is legal and justified, if the workmen resort to violence, an order of dismissal may be proper.[42]

In *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha*,[43] the court underlined the following requirements of law which need to be satisfied before a just punishment for going on an illegal or unjustified strike can be inflicted upon a delinquent workman:[44]

> The short position is this. Is there a punishment of any workman? If yes, has it been preceded by an inquiry? If not, does the management desire to prove the charge

before the tribunal? If yes, what is the evidence, against whom, of what misconduct? If individuated proof be forthcoming and relates to an illegal strike, the further probe is this: was the strike unjustified? If yes, was the accused worker an active participant therein? If yes, what role did he play and of what acts was he the author? Then alone the stage is set for a just punishment. These exercises, as an assembly line process,

are fundamental. Generalisation of a violent strike, of a vicious union leadership, of strikers fanatically or foolishly or out of fear, failing to report for work, are good background material, beyond that, they must be identified by a rational process, the workman, their individual delinquency and the sentence according to their sin. Sans that, the dismissal is bad.

It is neither in the interest of the industry nor the workmen themselves that there should be a wholesale dismissal of all the workmen who merely participated in a strike. The question of the quantum of punishment has to be judged by the industrial adjudicator keeping in view the overriding consideration of the full and efficient working of the industry as a whole.[45]

A clear distinction has to be made between workers who participated in illegal strikes by putting them in two categories, namely, (i) peaceful strikers; (ii) violent strikers. And the industry has to be non-discriminatory in its response to the workers. The employer cannot afford to pick and choose workmen for punishment. In *Northern Dooars Tea Co. Ltd.* v. *Workmen of Dem Dima Tea Estate*,[46] the court set aside the action of the employer in selecting six workers out of a large number of strikers for punishment on irrational grounds.

F. Wages for the strike period

The question as to whether the workmen who participated in a strike, whether legal or illegal, are entitled to wages for the period of strike, has been subject of adjudication in some cases. In 1953, in *Buckingham & Carnatic Co. Ltd.* v. *Workmen*,[47] the Supreme Court rejected the claim of the workers for wages for the strike period because the strike was found to be illegal for their failure to give notice of strike to the textile mill, a public utility service. In *Chandramalai Tea Estate* v. *Workmen*,[48] a three judge bench of the court deprecated the indiscriminate use of the weapon of strike. The court, in the facts and circumstances of the case, held that

the strike was unjustified. It was, therefore, held that the workmen were not entitled to even 50% of the wages for the period of strike. Similarly, in *Fertilizer Corpn. of India Ltd.* v. *Workmen*,[49] wages for the period of strike were denied to the workers, because the strike, though not illegal, was unjustified in the facts and circumstances of the case.

In *India General Navigation*[50], the court held that since the law makes a distinction between a strike which is illegal and one which is not, an illegal strike cannot be characterized as justified. Classification of illegal strike as justified and unjustified, according to the court, is wholly misconceived, more so in the case of employees of a 'public utility service'. Therefore, in order to entitle the workmen for wages for the period of the strike, the strike must be both legal and justified. This principle was conversely applied by a three judge bench of the court in the fact situation in *Churakulam Tea Estate (P) Ltd.* v. *Workmen*.[51] In that case, the court held that the strike was neither illegal nor unjustified and, therefore, the workmen were entitled to wages for the days on which they went on strike. It may be stated here that subsequently, the Supreme Court observed in *Gujarat Steel Tubes* that what was stated in *India General Navigation* was that any legal strike may not be 'perfectly' justified and, therefore, what was stated in that case cannot be said to have laid down the law that a strike which is illegal cannot be justified in any circumstances. The court observed that an illegal strike may be justified for taking a lenient view while deciding the quantum of punishment.

The issue whether workmen are entitled to wages during strike period was answered by the Supreme Court again in *Crompton Greaves Ltd.* v. *Workmen*[52] in the following unambiguous terms:[53]

> It is well settled that in order to entitle workmen to wages for the period of strike the strike should be legal as well as justified. A strike is legal if it does not violate any provision of the statute. Again a strike cannot be said to be unjustified unless the reasons for it are entirely perverse or unreasonable. Whether a particular strike was justified or not is a question of fact which has to be judged in the light of the facts and circumstances of each case.

It is to be noted that the Supreme Court has not followed any consistent approach while dealing with issues relating to strikes and lockouts. Till

1990, the court by and large adopted a consistent approach in evolving basic principles relating to strikes and lockouts by adopting the 'status' theory of workers.[54] But in 1990, it departed from the 'status' theory and resorted to purely 'contractual' theory.[55] In 1994, the court reverted to the 'status' theory again, after the change in its approach came under severe criticism.[56] However, in 2003, the court again took a complete 'U' turn, at least in respect of employees working in government departments, negating the right of government employees to resort to strike, without even going into the issue whether the strike in question relates to departments which are sovereign or non-sovereign, falling within the definition of 'industry' under the ID Act.[57] It is useful to examine the shift in the position of the Supreme Court from 1990 onwards.

A Division Bench of the Supreme Court in *Bank of India*,[58] in a complete departure from the earlier precedents on the issue of worker's right to wages during strike period, chose to rewrite the law. The court applied the principle of 'no work no pay' and held that workers are not entitled to wages during the strike period irrespective of the fact whether the strike was legal or illegal, thus treating the employer and employee relationship a pure and simple contractual relationship. One wonders whether the judges chose not to take cognizance of the earlier pronouncements of the court or whether attention of the court was not drawn to its earlier pronouncements.

In the instant case, the court was dealing with two appeals; one, raising the question of employer's power to deduct wages for the period of strike; and the other, with the power of the employer to deduct wages in a situation where employees resorted to go-slow tactics. The court in a common judgment dealt with both the issues. First, it addressed the question of employer's right to deduct wages during the period of strike. It ruled that where the contract or Standing Orders or the service rules/regulations are silent on the issue of worker's entitlement to wages during the strike period, the management has the power to deduct wages for absence from duty when the absence is a concerted action on the part of the employees and the absence is not disputed, irrespective of the fact whether the strike was legal or illegal. The court held that the question whether the deduction from wages would be pro-rata for the period of absence only or would be for a longer period would depend upon the facts of each case, such as, whether there

was any work to be done in the said period, whether the work was in fact done and whether it was accepted and acquiesced, etc. But where there is a dispute as to whether employees attended the place of work or put in the allotted time of work or not, the dispute has to be investigated by holding an enquiry into the matter. In such cases no deduction from wages can be made without establishing the act of omission or commission on the part of the employees concerned. Where the employees strike only for some hours but there is no work for the rest of the day, the employer may be justified in deducting salary for the whole day. On the other hand, where the employees put in work after the strike hours and the employer accepts it or acquiesces in it, the employer may not be entitled to deduct wages at all or be entitled to deduct them only for the strike hours. Further, the court held that if statutes, such as the Payment of Wages Act, 1936, or state enactments like the Shops and Establishments Act apply, the employer may be justified in deducting wages under the provisions of these statutes. The court went on to observe that even if these enactments do not apply, nothing prevents the employers from taking guidance from the legislative wisdom contained in these statutes to adopt measures on the lines outlined therein, when the contract of employment is silent about the entitlement of workers to wages for the strike period. The court held that the pro rata deduction of wages was not an unreasonable exercise of power.

P.B. Sawant J. held that the High Court had erred in granting wages during the strike period because it had proceeded on certain wrong assumptions. According to the judge, the first error was to confuse the question of legitimacy of strike as a weapon in workers' hands with that of the liability to lose wages for the period of strike. The judge observed:[59]

> The working class has indisputably earned the right to strike as an industrial action after a long struggle, so much so that the relevant industrial legislation recognises it as their implied right. However, the legislation also circumscribes this right by prescribing conditions under which alone its exercise may become legal. Whereas, therefore, a legal strike may not invite disciplinary proceedings, an illegal strike may do so, it being a misconduct. However, whether the strike is legal or illegal, the workers are liable to lose wages for the strike period. The liability to lose wages does not either make the strike illegal as a weapon or deprive the workers of it. When workers resort to it, they do so knowing full well its consequences. During the period of strike the contract of employment continues but the workers withhold their labour. Consequently, they cannot expect to be paid.

The court, in the instant case, observed that the argument that the contract of employment is an indivisible one in terms of the wage period, was fallacious as it overlooks the fact that, if the contract comes to an end amidst a month by resignation or death of a workman, he would not be entitled to the proportionate payment for the part of the month he served. The court did not agree with the argument of the employees that wages cannot be deducted *pro rata* for the hours or for the day or days for which the workers were on strike because the contract was monthly which cannot be subdivided into days and hours. The court felt fortified in its conclusion by reading Sections 2(rr) and 2(q) of the ID Act, 1947 together. The court held that a combined reading of these two definitions makes it clear that wages are payable only if the contract of employment is fulfilled and not otherwise.

It is equally fallacious, according to the court, to equate disputed individual conduct with admitted mass conduct. The court held that a disciplinary proceeding is neither necessary nor feasible in case of admitted mass conduct. However, the court made it clear that even in a case where action is resorted to on a mass scale, some employees may have either not been party to the action or may have genuinely desired to discharge the duty but could not do so for failure of the management to give the necessary protection or on account of other circumstances. The management will not be justified in deducting wages of such employees without holding an enquiry.

In the appeal dealing with deduction of wages during the period of the 'go-slow', the court held that unlike in the case of strike where a simple measure of a *pro-rata* deduction from wages may provide a just and fair remedy, the extent of deduction of wages on account of a go-slow action may in some cases raise complex questions. The court felt that the simple method of deducting uniform percentage of wages from all workmen calculated on the basis of the percentage fall in production, compared to the normal or average production may not always be equitable. It, therefore, stressed the need that in all cases where the *factum* of 'go-slow' on the extent of the loss or production due to it is disputed, principles of natural justice demand a proper enquiry on charges furnishing particulars of the 'go-slow' and the loss of production on that account. The court held that go-slow was a serious misconduct, being a covert and the more damaging breach of the contract of employment, and that the employer is within his right to make deduction from the wages of the workmen who resort to go-slow.

This approach of the court cannot be faulted as 'go-slow' does not fall within the ambit of the definition of 'strike' under the Act and has not been held as a permissible and legitimate form of industrial action in India by

the courts.[60] On the contrary, it is a serious misconduct under the model Standing Orders framed under the Industrial Employment (Standing Orders) Act. Indian courts have consistently been deprecating this practice of the workers.

But, with respect, one cannot accept the approach of the court on the question of entitlement of workers to wages during industrial action falling within the definition of 'strike' under the Act, as correct and desirable. The industrial adjudication in India has consistently followed the principle that entitlement of wages to the working class during the period of the strike has to be decided keeping in view whether the strike resorted to by the working class was legal and justified. It may not be out of place to mention here that the court has, in appropriate cases, awarded a percentage of the wages to workers even during illegal strike, in the facts and circumstances of those cases.[61] The issue of entitlement to wages for the strike period was at no time made dependent upon there being a specific term either in the contract of employment or the Standing Orders of the establishment providing for payment of wages during strike period. Granting of wages in cases of legal and justified strikes and also in some other cases where the strikes were technically illegal, being in contravention of the statutory provisions, but otherwise considered to be justified, notwithstanding the fact that terms of contract of employment or Standing Orders were silent on the issue, is necessitated by considerations of social justice. In the peculiar circumstances in which trade unions in India find themselves because of lack of resources and also social security measures for workers being conspicuously absent, outright denial of wages even in cases of legal and justified strikes 'strictly' is tantamount to denial of the right to strike. It may be that the court wanted to imbibe into the working class a work culture which of late has fallen to the lowest ebb. But the remedy chosen by the court

seems, for the reasons stated above, to be worse than the disease.

The court in *Bank of India* has treated employer-employee relationship as merely one of law of contract issue. In a welfare State, it is submitted, such relationships cannot be looked at merely from the standpoint of the law of contract and economics, but have to be considered in the broader context of social justice. It is submitted that instead of rewriting the law on workers right to wages for strike period on a clean slate, the court should have brought the desired modification on the already settled law by making payment of wages for the strike period dependent upon workmen satisfying the following three conditions: (i) that the object of the strike was justified; (ii) that the strike was legal; and (iii) that the workers sought help of redressal mechanism available under the law before resorting to strike.

Subsequently, a Constitution Bench of five judges of the Supreme Court was constituted in *Syndicate Bank* v. *K. Umesh Nayak*[62] to deal with a batch of appeals in view of the apparent conflict of opinions expressed in three decisions of the court — a three judge Bench decision in *Churakulam Tea Estate (P) Ltd.* v. *Workman*[63] and a two judge Bench decision in *Crompton Greaves Ltd.* v. *Workmen*[64] on the one hand and the two judge Bench decision in *Bank of India* v. *T.S. Kelewala*[65] on the other. In the first two cases, the view taken by the court was that the strike must be both legal and justified to entitle the workmen to wages for the period of strike, whereas in the latter decision the view taken was that whether the strike was legal or illegal the employees were not entitled to wages for the strike period. The question, therefore, for consideration of the five judge Constitution Bench was whether the workmen who proceed on strike, whether legal or illegal, were entitled to wages for the period of strike. Significantly, the five judge Constitution Bench included the two judges who constituted the two judge Bench in *Bank of India*. It is also a matter of interest that the judgment of the Constitution Bench was delivered by Sawant J. who had earlier delivered the judgement in *Bank of India*.

Sawant J. in *Syndicate Bank*, at the very outset stated that in *Bank of India*, the question whether the strike was justified or not was not raised and, therefore, not considered and, therefore, the further question whether the employees were entitled to wages if the strike was justified was neither discussed nor answered. He also stated that the first two decisions, viz., *Churakulam Tea Estate* and *Crompton Greaves*, were not cited before the court, while deciding the said case, and, hence, there was no occasion to consider the said decisions there. Sawant J. observed that these decisions were perhaps not cited because the question of justifiability or otherwise of strike did not fall for consideration.

It is submitted that the reasoning given by Sawant J. is hardly convincing for the simple reason that in every case relating to strike, including *Bank of India*, the main question that arises for consideration is entitlement or otherwise of workers to wages during a strike and this cannot be decided without going to the question of justifiability of the strike. It may be recalled that the question that came up for consideration in *Bank of India* was whether the circular issued by the bank ordering deduction of wages from the salary of the employees for the period of strike was not liable to be quashed being contrary to law. It is submitted that the court could not escape going into the question of legality and justifiability of the strike while considering the legality or otherwise of the impugned circular. It is very strange that

neither

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counsel assisting the court nor the judges on the Bench in *Bank of India* thought it necessary to acquaint themselves with the law already developed by the Court on the issue.

Be that as it may, happily the Constitution Bench in *Syndicate Bank* surveyed all important decisions on the subject and found that the law had already been settled on the issue and there were no compelling reasons to depart from the already well-settled position that workers are entitled to wages during legal and justified strike. The court reaffirmed this legal position and rightly stated that the question whether a strike or lockout is legal or illegal does not present much difficulty for resolution since all that is required to be examined is whether there has been breach of the relevant provisions of the Act. However, the question whether the action is justified or unjustified brings in a variety of considerations for examination. Invariably the prominent question that arises in almost all cases is whether the dispute was of such nature that its solution could not brook delay and await resolution by the machinery provided under the Act or the contract of service. Strike, though a legitimate weapon, is to be resorted to as a last weapon and any indiscriminate use of such weapon cannot be approved as it will tantamount to upholding the claim of 'might is right'. The court cautioned that hasty use of strike results in lawlessness, anarchy and chaos in economic activities, vital and fundamental to the survival of the society. Such action, when the legal machinery is available to resolve the dispute, is hard to justify. The court favoured use of strikes and lockouts as the last resort for redressal of grievances, when no other means existed or the available means were ineffective to resolve it. It has to be used mainly used to compel the other party to the dispute, to see the justness of the demand and not to strengthen the bargaining power at the expense of causing hardship to the general public. The justness or otherwise of the action of the employer or the employees has also to be examined on the anvil of the interest of the society which such action tends to affect.

The court emphasised the imperativeness of the need on the part of the employers and the employees in public sector not to abuse the right to strike or lockout, as the management thereof is not of the capitalist class and the labour an exploited lot. Both are paid employees and owe their existence to the direct investment of public funds, as such, both are expected to promote and represent public interest directly. In the result, the court directed the Central Government to refer the dispute with regard to the deduction of wages for adjudication to the appropriate authority under the law.

In *T.K. Rangrajan*,[66] the court attempted to rewrite the law on strike in complete departure from the legal position settled in the earlier judgments by holding that government employees (even if the departments they are

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working in are industries and they fall within the definition of 'workman' under the ID Act) have no constitutional, statutory, legal or equitable right to go on strike. In this case, the Supreme Court has taken an extreme view on strikes — contrary to the letter and spirit of the law including the court's own earlier pronouncements. The judgment completely avoided the principal issue of mass dismissals. The general law that has

been laid down by the court in earlier cases is that automatic termination for participating in a strike cannot be resorted to without hearing the employees.[67] The rules of natural justice to be given to the government employees is embedded in the Constitution and can be given a go by only if it is circumstantially impossible to give a hearing to each one of them. In *Satyavir Singh* v. *Union of India*,[68] a hearing was deemed impossible, whereas in *Union of India* v. *R. Reddappa*[69] it was not. Clearly, *T.K. Rangrajan*[70] was crying for natural justice which was abjured by mass dismissal through an Ordinance. The judgment is forceful against strikes but silent on mass dismissal. No one argues that strike is a fundamental right or that all strikes are legal and justified. It is settled law that legal strikes are permissible even in public utility services and if the strikes are legal and justified, the workers are entitled to wages during the strike period. Further, as V.R. Krishna Iyer, J. pointed out in the *Gujarat Steel Tube case* in 1980, even illegal strikes may be justified — so as not to attract dismissal.

In *T.K. Rangrajan*, the view of Shah, J. that there was no moral or equitable justification to go on strike was not correct appreciation of law. These observations of the judge militate against Ahmadi J.'s observations in *B.R. Singh* (1989) that "right to strike is an important weapon in the armory of the workers... recognized by almost all democratic countries...as a mode of redress". Shah, J's observation that even in government departments "strikes cannot be justified on any equitable ground" overstates the democratic tolerance of the law.[71] It has rightly been observed:[72]

> To avoid strikes is everyone's responsibility but to assert that strikes under any circumstances are illegal, immoral, inequitable and unjustified is contrary to our law and industrial jurisprudence.

It goes without saying that strikes and demonstrations are a democracy's hard fought weapons against oppression, victimization, exploitation and tyranny, the disciplined use of which has hitherto been supported by the Supreme Court.[73] After *T.K. Rangrajan*, what is at issue is the democracy

itself. Strikes enable the oppressed to fight against injustice in cases where no constructive option is left. This right of the oppressed cannot be wiped out in the few sentences which should not have been written. This calls for urgent review of *T.K. Rangrajan* by the Supreme Court. The court needs to be reminded often of the sobering thought that "it is supreme but not infallible". The court has itself been conscious that it makes mistakes and the invention of a new concept of curative petition to cure injustice[74] amply explains this. It is in this spirit that it is necessary to make a plea that observation of the division bench comprising of M.B. Shah and Laxmanan, JJ. in *T.K. Rangrajan* need to be reviewed.[75]

II. Civil Liability of the Unions for Workers Participating in Illegal Strike

The Supreme Court in *Rohtas Industries Ltd.* v. *Rohtas Industries Staff Union*[76] has held that the demand of the management for compensation against workers and/or their trade unions is not an 'industrial dispute' and as such the ID Act does not make provision for compensation for participating in an illegal strike. The restrictions contained in Sections 22 and 23 of the ID Act have been imposed in the interest of society. Non-compliance with these provisions is punishable as an offence under this Act. The ID Act being a complete code in itself, the remedy envisaged is only penalty and not compensation. However, if an employer brings action for compensation under general law of torts complaining losses caused to him by workers by participating in an

illegal strike, the registered trade unions, their office-bearers and members are within their right to establish that though the strike was illegal under ID Act, the same was motivated predominantly by legitimate trade union objectives and, therefore, the protection under Section 18 of the TU Act is available to them and no civil action is maintainable against them.

III. Conclusion

Now the position is that the right to strike and lockout is neither a fundamental nor a statutory right but a common law right. The Supreme Court has recognized the right to strike as a legal and as an essential right of workers for engaging in the collective bargaining process with the employer for improving their conditions of service. Under the ID Act, the legality or illegality of a strike is dependent upon compliance with the statutory provisions under the Act. Under the TU Act, protection against civil and criminal liability is dependent upon the object of combination because trade unions are expected to pursue only the legitimate trade union objectives envisaged

under the Act. The two legislations thus have adopted different yardsticks while dealing with the issues of strikes and lockouts. The Supreme Court, in order to bring some degree of uniformity and harmony in the two legislations, has emphasized the importance of the object of combination and availing of the services of conflict resolution machinery under the ID Act in the first place before taking recourse to strikes and lockouts as a general rule. The court has brought in the concept of 'justified' and 'unjustified' strikes for the entitlement of wages during strike period. The effect of strike on contract of employment, though has not been statutorily envisaged, the court through judicial process has defined with precision its effect.

Strike does not bring to an end the contract of employment but only suspends the same and the same is revived once the strike is over. The court, being conscious that workers in India do not have social security provision, has ruled that workers will be entitled to full wages during the period of strike if the strike is 'legal' and 'justified'. This principle was followed consistently except for a short period when the court tried to depart from status theory of the workers and looked at contract of employment from contractual angle. But in the face of severe criticism, the court soon restored the earlier position of making payment of wages during strike period dependent on the fact as to whether the strike was 'legal' and 'justified'. Further, workers participating in an illegal strike, make themselves liable for disciplinary action for which they can be proceeded against departmentally. The majority Court has also taken the stand that even if the strike is 'illegal' but if the same is 'justified' the punishment needs to be a lenient one. The court has also made a distinction between active and mute participation in the strike for the purposes of disciplinary action.[77]

There has, however, been some anxiety caused by the judgment that the government servants do not have the right to strike. It is submitted that this judgment is contrary to the well-settled legal position that the government servants or employees of public undertaking who are covered by the industrial law have acquired a legal right to strike.[78] This judgment, therefore, needs to be reviewed, sooner the better. It is one thing to deny the right altogether and it is another thing to emphasize sparing use of it. But for this lone judgment, by and large, there has been significant contribution by the judiciary in the development of law relating to strikes and lockouts through judicial process. However, one cannot ignore the fallacy of leaving a concept to be evolved by the judiciary. The strength and weakness, the length and breadth, and the nature and the content, of the concept might be dependant on the time,

mores and the personal philosophies of the judges. Different contours of the concept get worn out leading to its very extinguishment in the course of time.

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[1] *All India Bank Employees' Assn.* v. *National Industrial Tribunal*, AIR 1962 SC 171.

[2] Under Article 19(4), the state can impose reasonable restriction on the right to form associations or unions in the interest of sovereignty and integrity of India or public order or morality.

[3] Under Article 33, Parliament may by law, determine to what extent any of the fundamental rights conferred by Part III of the Constitution shall in their application to the members of the armed forces or the members of the forces charged with the maintenance of public order or dealing with state intelligence etc. be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

[4] *Supra* note 1.

[5] (1954) 1 LLJ 124 (Bom).

[6] *Id.* at 127.

[7] (1989) 4 SCC 710.

[8] Ludwig Teller, *Labour Disputes and Collective Bargaining*, Vol. 1, pp 236-37, S. 78.

[9] *Buckingham & Carnatic Co. Ltd.* v. *Workmen*, AIR 1953 SC 47 : (1953) 1 LLJ 181 (SC).

[10] *G.D. Dalvi* v. *Goodlass Wall Ltd.*, (1956) 1 LLJ 468 (LAT, Bombay).

[11] *Patiala Cement Co. Ltd.* v. *Certain Workers*, (1955) 2 LLJ 57 (LAT, Lucknow).

[12] *Ibid.*

[13] *North Brook Jute Co. Ltd.* v. *Workmen*, AIR 1960 SC 879 : (1960) 1 LLJ 580 (SC).

[14] *Punjab National Bank Ltd.* v. *All India Punjab National Bank Employees' Federation*, AIR 1960 SC 160 : (1959) 2 LLJ 666.

[15] *Bharat Sugar Mills Ltd.* v. *Jai Singh*, (1961) 2 LLJ 644 : (1962) 3 SCR 684; *Bank of India* v. *T.S. Kelawala*, (1990) 4 SCC 744.

[16] *Bharat Sugar Mills Ltd.* v. *Jai Singh*, (1961) 2 LLJ 644 : (1962) 3 SCR 684.

[17] *Ibid*.

[18] *Bank of India* v. *T.S. Kelawala*, (1990) 4 SCC 744 (these observations were made in Civil Appeal No. 855 of 1987 titled *S.U. Motors (P) Ltd.* v. *Workmen* which was heard alongwith the Civil Appeal of *Bank of India* v. *T.S. Kelawala*).

[19] *Ibid.*

[20] *Id.* at 766.

[21] *Feroz Din* v. *State of W.B.*, AIR 1960 SC 363 : (1960) I LLJ 244 (SC).

[22] Arjun P Aggarwal, *Indian and American Labour Legislation and Practices: A Comparative Study* 51 (1966).

[23] *Ibid.*

[24] *Chandramalai Estate* v. *Workmen*, AIR 1960 SC 902 : (1960) 2 LLJ 243; *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha*, (1980) 2 SCC 593; *Syndicate Bank* v. *K. Umesh Nayak*, (1994) 5 SCC 572.

[25] *Ibid.*

[26] *F.W. Heilgers & Co. Ltd.* v. *Employees*, (1950) 1 LLJ 231 (IT); *India Cycle Mfg. Co. Ltd.* v. *Workmen*, (1951) 1 LLJ 390 (IT); *Swadeshi Industries Ltd.* v. *Workmen*, (1955) 2 LLJ 404 (LAT, Cal).

[27] *Supra* note 25; *See* also *India Marine Service (P) Ltd.* v. *Workmen*, AIR 1963 SC 528 : (1963) 1 LLJ 122 (lockout); *Ramakrishna Iron Foundry* v. *Workmen*, (1954) 2 LLJ 372 (LAT, Cal).

[28] *Express Newspapers (P) Ltd.* v. *Michael Mark*, AIR 1963 SC 1141 : (1962) 2 LLJ 220.

[29] *Indian General Navigation and Railway Co. Ltd.* v. *Workmen*, AIR 1960 SC 219 : (1960) 1 LLJ 13.

[30] *Ibid.*

[31] AIR 1963 SC 1141 : (1962) 2 LLJ 220.

[32] (1971) 3 SCC 646.

[33] (1979) 1 SCC 590.

[34] *Id.* at 651.

[35] *Supra* note 29.

[36] *B.R. Singh* v. *Union of India*, (1989) 4 SCC 710.

[37] *Supra* note 32.

[38] See *I.M.H. Press* v. *Additional Industrial Tribunal*, AIR 1961 SC 1168 : (1961) 1 LLJ 499; also see *Bata Shoe Co. (P) Ltd.* v. *D.N. Ganguly*, AIR 1961 SC 1158 : (1961) 1 LLJ 303 [In this case, though the Standing Order of the concern, *inter alia*, provided for the dismissal of a workman participating in an illegal strike, the employer also had held a proper and regular inquiry. The Supreme Court, therefore, held the dismissal of the concerned workman was justified]; also see *Swadeshi Industries Ltd.* v. *Workmen*, AIR 1960 SC 1258 : (1960) 2 LLJ 78.

[39] *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha*, (1980) 2 SCC 593.

[40] *Punjab National Bank Ltd.* v. *All India Punjab National Bank Employees' Federation*, AIR 1960 SC 160 : (1959) 2 LLJ 666, Per Gajendragadkar J.

[41] *Supra* note 28.

[42] *Swadeshi Industries Ltd.* v. *Workmen*, AIR 1960 SC 1258 : (1960) 2 LLJ 78.

[43] *Supra* note 19, Krishna. Iyer J.

[44] *Id.* at 640.

[45] *Supra* note 28.

[46] (1964) 1 LLJ 436, 441 (SC), Gagendragadkar J.

[47] (1953) 1 LLJ 181 (SC), per Mahajan J.

[48] (1960) 2 LLJ 243, 246 (SC).

[49] (1970) 2 LLJ 25, 30 (SC).

[50] *India General Navigation and Railway Co. Ltd.* v. *Workmen*, AIR 1960 SC 219.

[51] (1969) 2 LLJ 405 : AIR 1969 SC 998.

[52] (1978) 3 SCC 155.

[53] *Id.* at 157-58.

[54] *India General Navigation and Railway Co. Ltd.* v. *Workmen*, AIR 1960 SC 219; *Chandramalai Estate* v. *Workmen*, AIR 1960 SC 902 : (1960) 2 LLJ 243 (SC); *Churakulam Tea Estate (P) Ltd.* v. *Workmen*, AIR 1969 SC 998 : (1969) 2 LLJ 405; *Crompton Greaves Ltd.* v. *Workmen*, (1978) 3 SCC 155; *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha*, (1980) 2 SCC 593.

[55] *Bank of India* v. *T.S. Kelawala*, (1990) 4 SCC 744.

[56] *Syndicate Bank* v. *K. Umesh Nayak*, (1994) 5 SCC 572.

[57] *T.K. Rangarajan* v. *Govt. of T.N.*, (2003) 6 SCC 581.

[58] *Supra* note 53.

[59] *Supra* note 53 at 761.

[60] See *Bharat Sugar Mills Ltd.* v. *Jai Singh*, (1961) 2 LLJ 644 (SC).

[61] *Statesman Ltd.* v. *Workmen*, (1976) 2 SCC 223; *Balmer Lawrie and Co. Ltd.* v. *Balmer Lawrie Employees' Union*, (1989) 2 LLJ 97 (Bom).

[62] *Supra* note 54.

[63] *Supra* note 52.

[64] *Supra* note 52.

[65] *Supra* note 53.

[66] *Supra* note 55.

[67] *Supra* note 42.

[68] (1985) 4 SCC 252.

[69] (1993) 4 SCC 269.

[70] *Supra* note 55.

[71] Rajeev Dhavan, 'The Right to Strike', *The Hindu* 22.8.2003 at p. 8.

[72] *Ibid.*

[73] *Ibid.*

[74] *Rupa Ashok Hurra* v. *Ashok Hurra*, (2002) 4 SCC 388.

[75] See *supra* note 69.

[76] (1976) 2 SCC 82.

[77] *Supra* note 20.

[78] *B.R. Singh* v. *Union of India*, (1989) 4 SCC 710.