4. Playboy Enterprises Inc vs. Calvin Designer Label, (985. F. Supp. 1220) (N.D.Cal. 1997)

Issues in brief : In this case, the playboy Enterprises Inc owned the federally registered trademarks for PLAYBOY and PLAYMATE and Calvin Designer used these marks as part of the domain names 'playboy xxx.com'' and 'playmate live.com' directly on their web pages and as meta tags on their web pages playboy Enterprises used for trademark infringement, dilution and unfair competition.

Decision : The Court ordered Calvin Designer to cease all use of the infringing domain names as well as all use of playboy's trademarks in meta tags on their web pages.

CONCLUSION : The goal of any trademark, service mark or trademark is to give companies, and their customers, a way to establish, cultivate, and profit from brand loyalty. If you put out the best product in its class, people will come to know it, remember it, and ask for it by name. That name should either be, or include, a trademark making it easy for buyers to name your brand is a great way to sell more of your product, and that's what trademark are for.

The newtrade mark Act 1999 seems to be working well. It is keeping in pace with advanced technology. A number of cases involving interest domain names have been taken note of and decided under this act.

END NOTES :

1. Article by Patrik D. Kelly, Patent Attorney, St. Louis.
2. Justice J.D. Kapoor restrained Anchor from using Colgate Colour combination of Red & White (Hindustan times).
3. Sec. 23 of Trade Mark Act 1999.
4. Sec. 27 of Trade Mark Act 1999.

REFERENCE :

1. Article by Patrik D. Kelly
2. Universal's Intellectual Property Laws
3. Law of Intellectual Property - Dr. S.R. Myneni
4. Commercial Law Publishers (India) Pvt. Ltd., Delhi - The Trade Market Act, 1999.
5. Law relating to Information Technology - T.V.R. Satya Prasad.

LAY OFF AND RETRENCHMENT

— Tools of atrocity in the hands of modern employers

By

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Under the traditional system of employment which was in place for centuries together the employer had an upper-hand in his relations with the employees. In several matters, the employer could dictate his terms to the employees because of which the employees had very few rights and remedy available to them against the employers. The relationship between the employer and employees was so delicate that the employer could terminate the service of the employee at will, and have such conditions accepted by the employee as were more advantageous to the employer and less advantageous to the

employees. This typical regime of the employer's hegemony gradually underwent a change. With the emergence of new ideas of legal safeguards against the authority of the State including the employers certain amount of protection had come to the employees under statutory provisions. But then there are certain situations in which the employer can still be considered as having the power of putting an end to the service relations on a temporary or permanent basis, leaving the employees with very few rights and remedy against employers. By virtue of the power conferred by the statute the employer can exercise the power in two specific situations which are known as 'lay-off and retrenchment'. These powers somehow look like the alternative methods which the employer exercised under the traditional rule of labour law. The traditional rules were the popular devices the employer could exercise against the employees. Lay off and retrenchment today are the modern tools of atrocity in the hands of the employers.

The object of this article is to discuss the statutory provisions and judicial decisions whereby the employer can put an end to the service relations and in which we find limited safeguard available to the employees.

I. THE EMPLOYER'S POWERS TO LAY-OFF THE WORKERS:

The term 'lay-off' is defined in Section 2(kkk) as follows:

> "Lay-off (with its grammatical variation and cognate expressions) means the failure, refusal or inability of an employer on account of shortage of coal, power, or raw materials or the accumulation of stock or the break down of machinery (or natural calamity or for any other connected reason) to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched."

It is short term removal from service of employees, whose names are borne on the muster rolls of the industrial establishment by the employer of their employment on account of shortage of coal, power, raw materials or because of accumulation of stock or break down of machinery or any other similar reasons. Thus if an employer fails to provide work or he refuses or he is unable to give work although he desires to give work to the workmen whose names are on the muster rolls due to aforesaid reasons, it is lay off.

The workmen are not given work on a particular time because the employer is compelled to put aside the workmen due to reasons or causes beyond his control such as the shortage of raw materials, shortage of power, coal or breakdown of the machines or any other natural calamity where the workmen were engaged. The employer has no intention to refuse work but he is compelled to do so because of such reasons, while he has every intention to give work in future.

The most important essential ingredient of lay-off is that the refusal or inability of the employer to give employment to such persons whose names are on the muster rolls of the industrial establishment must be caused on account of reasons specified in Section 2(kkk) of the Industrial Disputes Act.

In *Management of Kairbetta Estates, Kotagiri v. Rajamanickam,* AIR 1960 SC 1963, the Supreme Court has observed that the lay-off takes place for one or more of the reasons specified in the definition of 'lay-off' under Section 2(kkk) of the Act. It may be due to -

(a) Shortage of coal,

(b) Shortage of power,

(c) Shortage of raw materials or accumulation of stocks,

(d) Breakdown of machinery, or

(e) Any other reason.

The expression 'any other reason' to which the definition refers, must be a reason which is allied or analogous to reasons already specified in Section 2(kkk). The expression 'any other reason' should be construed to mean reasons similar to the preceding reasons specified in the definition. The provision has been made very clear by substituting the expression natural calamity or for any other connected reason' in the definition in 1982.

The industrial establishment cannot run without coal, power and raw material or without machinery in working order. Under such circumstances the employer has no work in the industrial establishment so he refuses to give work or employment to the workmen whose names are on the muster rolls. Similarly if there is accumulation of stock of the goods or articles manufactured and he finds no market he feels in such a situation to stop the work of manufacturing the goods or articles or products. In such a situation also he decides to refuse to give work because there is accumulation of stocks already which is to be supplied in the markets. In all such cases the refusal to give employment to the workmen whose names are on the muster rolls of the industrial establishment amounts to lay-off within the meaning of the Act. But if an employer shuts down his place of business as a means of reprisal or as an instrument of coercion or as a mode of exerting pressure on the employees, or generally speaking, when his act is what may be called an act of belligerency there would be a lock out, if, on the other hand, he shuts down work because he cannot, for instance, get the raw materials or the fuel or the power necessary to carry on his undertaking that would be lay-off. The expression 'any other reason' in Section 2(kkk) of the Industrial Disputes Act is to be construed *ejusdem generis* with the reasons specifically mentioned in the section.

Thus the employer's failure or refusal or inability to give employment may be caused by reasons beyond his control and he has no intention to refuse permanently to give work to the workers whose names are on the muster rolls of the industrial establishment therefore natural calamities being beyond his control may be valid reasons for lay-off and when the establishment would function in the normal way he would provide employment to them.

II. THE EMPLOYER'S POWERS TO RETRENCH THE WORKERS:

The term 'retrenchment is defined in Section 2(oo) of the Act as follows:- "Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action, but does not include—

(a) Voluntary retirement of the workman; or

(b) Retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(c) Termination of the service of the workman as the result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(d) Termination of the service of a workman on the ground of continued ill-health."

The definition of retrenchment as contained in Section 2(oo) shows that retrenchment means termination of service of a workman for any reason but termination of service must not be as a punishment inflicted by way of disciplinary action against the workman.

It has been observed that *prima facie* it may appear from the definition of the word 'retrenchment' that it may include every kind of termination. In fact the exclusion of the cases falling within the purview of clauses (b) and (c) in the definition would suggest that surplus age of labour is not the test of retrenchment. However in view of the decision of the Supreme Court in *Hari Prasad v. A.D. Divalker,* AIR 1957 SC 121, retrenchment, should be understood in the ordinary sense, that it is not every termination that can be retrenchmental but the termination in order to be retrenchment should be of surplus labour or staff and in an industry which is continuing and not closed or transferred. So far as the cases of closure and transfer are concerned, subsequent legislation has provided for compensation subject to certain conditions, factors and circumstances.

When a portion of the staff or labour force is discharged surplus in a running or continuing business, the termination of service which follows may be due to a variety of reasons, *e.g.* for economy, rationalization in industry, installation of a new labour saving machinery, *etc.* The Legislature in using the expression 'for any reasons whatsoever' says in effect: it does not matter why you are discharging the surplus; if the other requirements of the definition are fulfilled, then it is retrenchment.

It has been observed by the Supreme Court in *Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union* that the termination of the services of workmen on the closure of the business is not retrenchment. Retrenchment connotes, in its ordinary acceptation, that the business itself is being continued but that a portion of the staff or the labour force is discharged as surplusage. The termination of services of all the workmen as a result of the closure of the business, cannot therefore, be properly described as retrenchment.

In *Managing Director, Haryana Seeds Development Corporation Ltd. v. Presiding Officer and another,* AIR 1957 SC 95, where a number of units including the seeds sale counter were closed down and as a consequence services of the employees were dispensed with. The Labour Court took the view that it was a case of retrenchment within the meaning of Section 25-F of the Act. As a result without giving one month's notice or salary in lieu thereof, the retrenchment is bad in law. The High Court affirmed the award of the Labour Court. The Supreme Court held that as a consequence of closure of the industry, Section 25-F is not attracted and the rigour imposed thereunder stands excluded and thus the appeals were accordingly allowed.

It is also relevant to note that there is no legal duty on any other industrial establishment to employ the erstwhile employees of a closed undertaking. In *Government of India v. Workmen of State Trading Corporation and others,* where the Single Judge of the Madras High Court directed that the employees of the Leather Garment Unit of the State Trading Corporation, whose services were terminated on the closure of the unit, shall be continued in service by the Government of India on the same terms and conditions either in the Government Departments or in the Government Corporations within three months. Before the Supreme Court it was contended that it was for the State Trading Corporation to deal with the State Trading Corporation. And there was no master servant relationship between the petitioners and the Government of India and, therefore, it was not in any manner concerned with the closure of the Leather Garment unit of the State Trading Corporation. And the consequences thereof. The Supreme Court held that in the absence of any relation having been established of master and servant between the Government of India and the employees, it is obvious that no such direction could have been given to the Government

of India to employ 28 workmen, who were the erstwhile employees of the Leather Garment unit of the State Trading Corporation.

In *D. Macropollo and Co. (P.) Ltd. v. The D. Macropollo and Co. (P.) Ltd. Employees Union* where the company adopted the scheme of re-organisation and with the result certain persons were retrenched. The company mainly carried on the business of selling agency of various cigarette manufacturing concerns. Before 1946 the concern employed distributors for the purpose and the distributors so appointed used to employ salesmen. Due to communal riots in 1946 in Calcutta the concern took over the salesmen in its direct employment to recognize them on communal basis. However, in 1954 it decided to close down its own outdoor sales department and it reverted to the distributor system so certain workmen were retrenched on the basis of this scheme of reorganization of business.

The Supreme Court held that the appellant has adopted the re-organisation scheme in all the areas wherever it had business. It would be fantastic to suggest that in adopting this scheme over such a wide area, the appellant was actuated by malice against its employees in Calcutta as they alleged or that the scheme was a mere device adopted by the appellant for the purpose of discharging them. In such circumstances the fact that its implementation would lead to the discharge of some of the employees, would have no material bearing on the question as to whether the re-organisation has been adopted by appellant *bona fide* or not. Their discharge and retrenchment would have to be considered as inevitable, though very unfortunate, consequence of the scheme which the employer acting *bona fide*, was entitle to adopt.

The Management can retrench its employees only for proper reasons, which means that it must not be actuated by any motive of victimization or any unfair labour practice. It is for management to decide the strength of its labour force, for the number of workmen required to carry out efficiently the work involved in the industrial undertaking of any required to carry out efficiently the work involved in the industrial undertaking of any employer must be left to be determined by the management in its discretion. When the number of employees exceeds the reasonable and legitimate needs of the undertaking, if any workmen become surplus, it would be surplus, and it would be open to the management to retrench them.

It is settled law that it is the managerial discretion to organize his business in the manner he considers best. It is not competent for a workman to challenge the propriety of the same so long as the business is organized in a *bona fide* manner. While reorganizing business, if surplus employees are asked to quit, no employer can be burdened with carrying on with an economic dead weight and retrenchment has to be accepted, as inevitable. It makes clear that retrenchment means discharge of surplus labour or staff in a continuing industry. It means the removal of "the dead weight of uneconomic surplus." It is not necessary that removal of surplus must only be when the establishment runs in losses. It may operate at any level of profits. Though the reason may be any, but it must essentially the retrenchment *i.e.* discharge of surplus labour or staff by the employer. The definition of 'retrenchment' in Section 2(oo) though an artificial one is certainly very wide in its scope and would include termination of services even in pursuance of a standing order. The heading of Section 25-F leaves no doubt that the observance of the provisions thereof is a condition precedent to retrenchment of a observance of the provisions thereof is a condition precedent to retrenchment of a workman to whom the section applies. It would, therefore, follow that before action can be taken under standing orders the provisions of Section 25-F have to be complied with.

From the decisions referred to above it is clear that the safeguards proved to the employees are not adequate enough to protect the interest of the workers. On the other hand the powers of Lay-off and Retrenchment continue to be the new devices of tyranny against the employees.

EXPANDED SCOPE OF THE DEFINITION OF INDUSTRY

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In the post-independence era the Industrial Jurisprudence of India has undergone tremendous changes. Almost every aspect of industrial relations has witnessed a change in the wake of socio-economic changes in and outside the country. The one particular change to which we must make a reference is the expanded version of the concept of Industry.

When the Industrial Disputes Act, 1947 was enacted the term 'Industry' was defined by the Legislature to include only a few manufacturing units. But the later developments brought in such a change that several non-manufacturing units are also covered by the definition of the term 'Industry'. This expansion in the coverage of the definition is due partly to the action of the Legislature and partly due to that of the Judiciary.

This article explains how the Legislature has expanded the scope of Industry by including various units in the definition and how the Judiciary has by its interpretative mechanism expanded the scope of the definition of Industry.

I. EXPANSION IN THE DEFINITION OF 'INDUSTRY' AT THE INSTANCE OF THE LEGISLATURE:

When the Legislature enacted the Industrial Disputes Act, Section 2(j) of the Act defined the expression 'Industry' thus:

> "Industry" means any business, trade undertaking, manufacture or calling of employers and includes any calling, services, employment handicraft or industrial occupational or avocation of workmen;
>
> An 'industrial establishment or undertaking' means an establishment of undertaking in which any industry is carried on,
>
> Provided that where several activities are carried on in an establishment or undertaking and only one or some of such activities is or are an industries, then—
>
> (a) if any unit of such establishment or undertaking carrying on any activity, being an Industry, is severable from the other unit or units, such unit shall be deemed to be separate industrial establishment or undertakings;
>
> (b) if the Ipredominate activity or each of the predominant activities carried on in such establishment or undertaking or any thereof is an industry and the other activity or each of the other activities carried on in such establishment or undertaking or unit thereof is not severable from and is for the purpose of carrying on, or aiding the carrying on of, such predominant activity or activities, the entire establishment or undertaking or as the case may be, unit thereof shall