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Court : Orissa

Decided On : May-07-1999

Reported in : 88(1999)CLT686; 1999(II)OLR117

Judge : Pradipta Ray, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 9; Industrial Disputes Act - Sections 2 and 2A

Appeal No. : Civil Revision No. 246 of 1997

Appellant : Dulal Chandra Barik and anr.

Respondent : General Manager, Hotel Oberoi

Advocate for Def. : G.S. Rath, A. Mohapatra and S.K. Misra

Advocate for Pet/Ap. : J. Patnaik, T.K. Patnaik, H.M. Dhal, A.A. Das, S. Das, R. Rath, K.C. Kanungo, P.K. Patnaik and S.S. Behera

Judgement :

Pradipta Ray, J.

1. The petitioner No. 1 was employed as a driver in Hotel Oberoi, Bhubaneswar. Petitioner No. 2 is a Trade Union of the employees of Hotel Oberoi registered under the Trade Union Act. Petitioner No. 1 is a member of the petitioner No. 2-

Union.

2. The petitioner No. 1 was placed under suspension by an order dated May 10, 1997 passed by the opp. party. On the same day i.e. May 10, 1997 the opp. party issued a charge-sheet alleging misconducts as enumerated under the Certified Standing Orders applicable to Hotel Oberoi, Bhubaneswar. On May 26, 1997 the petitioner No. 1 submitted his reply to the charge-sheet stating inter alia, that the certified Standing Orders of the Hotel were still not operative and as such the charge-sheet on the basis of the Certified Standing Orders was unauthorised, illegal and non-existent in the eye of law. The opp. party, however, reiterated that the Certified Standing Orders had already become applicable and that the charge-sheet was legal and in order. The opp. party also called upon the petitioners to submit show-cause against the misconducts mentioned in the charge-sheet.

3. On June 23, 1997 the present petitioners filed Title Suit No. 138 of 1997 in the Court of the Civil Judge (Junior Division), Bhubaneswar for a declaration that the charge-sheet on the basis of inoperative Certified Standing Orders is void and illegal and for permanent injunction restraining the opp. party from proceeding any further in pursuance of the impugned charge-sheet. In the suit the petitioners have stated that the Standing Order was certified by the Certifying Officer on October 18, 1996 and on November 16, 1996 i.e. within 30 days an appeal was filed before the appellate authority in accordance with Section 6 of Industrial Employment (Standing Orders) Act, 1946 (hereinafter referred to as the 'Standing Orders Act')- The petitioners have relied upon Section 7 of the Standing Orders Act to claim that the certified Standing Orders have not come into operation as an appeal preferred within 30 days is pending.

4. The petitioners filed a Misc. Case in the trial Court for an interim injunction. After a contested hearing the trial Court by judgment and order dated July 2, 1997 granted an interim order restraining the opp. party from taking further action against the petitioner No. 1 on the strength of the Certified Standing Orders till the disposal of appeal before the appellate authority under the Standing Orders Act or till the disposal of the suit, whichever is earlier. On July 3, 1997 the opp. party filed an application Under Section 151, Civil Procedure Code for modification of the

interim order dated July 2, 1997. The said application Under Section 151, C.P.C. was rejected by the trial Court on July 2, 1997. The opp. Party moved this Court in its writ jurisdiction. The writ applications filed by the opp. party were dismissed inter alia on the ground that the trial Court order being appealable, it was open to the opp. party to file appeal.

5. It has been alleged by the petitioners that in spite of the interim injunction granted by the trial Court, the opp. party continued with the domestic enquiry in violation of the order dated July 2, 1997. Ultimately on September 12, 1997 the opp. party filed Misc. Appeal No. 88 of 1997 in the Court of the District Judge, Khurda at Bhubaneswar. By judgment and order dated October 3, 1997 the Misc. Appeal filed by the opp. party was allowed and the order dated July 2, 1997 passed by the trial Court was set aside by the District Judge, Khurda. On October 6, 1997 the petitioners filed the present revision before this Hon'ble Court during Puja vacation. On October 7, 1997 Hon'ble Justice P. K. Mishra, who was the Vacation Judge, issued notice of admission and granted an interim stay of operation of the impugned order dated October 3, 1997 passed in Misc. Appeal No. 88 of 1997. On October 9, 1997 the petitioners received a second show-cause notice from the office of the opp. party. It has been stated by the petitioners that they informed the opp. party about the order of stay passed by the High Court by submitting a detailed representation through Deputy Manager, Shri A.D.Lai. According to the petitioners, in spite of knowledge of the High Court's stay order the opp. party on October 10, 1997 passed an order of dismissal and communicated the same to the petitioners through post. The petitioners thereafter have filed a contempt application before this Court alleging violation of the High Court's order dated October 7, 1997. The said contempt application is pending.

6. It appears that after the order of dismissal of the employees including the petitioner No. 1 an Industrial Dispute was raised and the State Government by order dated February 10, 1998 had already referred the dispute to the Labour Court, Bhubaneswar.

7. The opp. party has entered appearance and denied that the order of dismissal was passed even after the knowledge of High Court's order dated October 7,

1997. On merits the main submissions of the opp. party are :

(i) The dispute relating to the charge-sheet issued under the Certified Standing Orders being an industrial dispute suit filed by the petitioners is not maintainable;

(ii) In view of the subsequent order of dismissal and reference of dispute relating to dismissal to the Labour Court by the State Government, the suit has become infructuous; and

(iii) In any event, there is no question of granting any stay order inasmuch as the petitioner No. 1 has already been dismissed from service.

8. In support of his first submission that the Civil Suit is not maintainable, Mr. G.S. Rath, learned counsel for the opp.party has relied upon a number of decisions including the decision of the Supreme Court in Rajasthan State Road Transport Corporation and Anr. v. Krishna Kant etc. reported in AIR 1995 SC 1715.

9. The suit has been filed by the petitioners for declaration that the charge-sheet was illegal and void inasmuch as the Certified Standing Orders were not still operative and for injunction. From the materials on record it prima facie appears that the petitioners have preferred an appeal Under Section 6 of the Standing Orders Act within the time prescribed and as such the Certified Standing Orders had not become operative in view of Section 7 of the Standing Orders Act. In paragraph 32 of the Rajasthan State Road Transport Corporation's case (supra) Supreme Court has summarised the principles. The principle (3) laid down by the Supreme Court is :

'(3) Similarly, where the dispute involves the recognition, observance or enforcement of rights and obligations, created by enactments like Industrial Employment (Standing Order) Act, 1946 - which can be called 'sister enactments' to Industrial Disputes Act - and which do not provide a forum for resolution of such disputes, the only remedy shall be to approach the forums created by the Industrial Disputes Act provided they constitute industrial disputes within the meaning of Section 2(k) and Section 2A of the Industrial Disputes Act or where such enactment says that such dispute shall be either treated as an industrial

dispute or says that it shall be adjudicated by any of the forums created by the Industrial Disputes Act. Otherwise, recourse to Civil Court is open'.

10. According to the Supreme Court, a dispute involving the recognition, observance or enforcement of rights and obligations created by sister enactments to Industrial Disputes Act is to be raised before the forums created by the Industrial Disputes Act provided same constitutes an industrial dispute within the meaning of Section 2(k) and for Section.2A of the Industrial Disputes Act (hereinafter referred to as the 'I.D. Act'). Applying the said principles it is to be first determined whether the dispute raised in the suit could be said to be an industrial dispute under the I.D. Act at the time of institution of the suit.

11. In order to find out whether a dispute is an industrial dispute within the meaning of the I.D. Act, one is to look at the dispute as pleaded and the relief's claimed. In the present case the petitioners have prayed for a declaration that the opp. party-management has no right to enforce the Certified Standing Orders and to take any action on the basis of any of the provisions of those Certified Standing Orders in view of Section 7 of the Standing Orders Act and for preventive relief of injunction. When the suit was filed there was no order affecting their employment excepting the order of suspension. The petitioners have not challenged the order of suspension, but have questioned the legality of the management's action invoking the Certified Standing Orders. They have not challenged the legality of any of the provisions of Certified Standing Orders, but sought for a general declaration that during the pendency of appeal the management does not have any right to enforce the Certified Standing Orders. This kind of dispute can be an industrial dispute only if it comes within the ambit of the words 'employment and non-employment'. The basis of the petitioners' claim is Section 7 of the Standing Orders Act, which provides that the certified standing orders will remain in abeyance during pendency of the appeal if filed within the prescribed time. It is to be seen whether the petitioners could have approached a forum under the I.D. Act to get the relief's prayed for at that particular stage. The relief's normally available in the forum under the I.D. Act are curative than preventive. Where action taken by the employer, just sets a process in motion which may ultimately culminate in a final decision against the employees, the employee cannot approach the forum

under the I.D. Act and obtain preventive relief. Supreme Court itself in Rajasthan State Road Transport Corporation's case has observed :

'There may be many disputes which would not fall within Section 2(k) or Section 2A. It is obvious in all such cases the remedy is only in a Civil Court or by way of arbitration svvotfing to law, if the parties so choose. The machinery provided by the Industrial Disputes Act for resolution of disputes (in short Section 10 or 10A) does not apply to such a dispute.'

In the present case the dispute is not regarding any particular provision of the Certified Standing Orders and the suit has been filed at the stage of pendency of the disciplinary proceeding. No decision has been cited from the bar to point out that a preventive relief, if required during pendency of a disciplinary proceeding can be obtained from an industria-1 forum under the I.D. Act.

12. The preventive aspect of an industrial dispute is contained in Section 33 of the I.D. Act. But Section 33 of the I.D. Act cannot always be an effective prevention. Firstly, an order passed by the employer in contravention of Section 33 is not void and the remedy of the employee is to be proceeded Under Section 33A. Secondly, the prohibition Under Section 33 of the I.D. Act operates from the commencement of conciliation proceeding. In non-public utility service commencement of conciliation is only from the date specified by the Conciliation Officer in his intimation to the parties declaring his intention to commence conciliation proceeding. Thus, where employees require an immediate preventive relief during pendency of a domestic enquiry the only avenue open to him is to file a suit for such preventive relief and to seek an interim relief therein. Otherwise, the employees will have to remain helpless enlooker and allow the employer to proceed with the domestic enquiry, however, illegal or unauthorised it may be. Even if the employee approaches the conciliation authority, the employer may move very fast and pass a final order of dismissal or termination on the basis of even an unauthorised proceeding.

13. Even applying the principles as laid down in the Rajasthan State Road Transport Corporation's case the dispute raised in the suit does not appear to be an Industrial dispute within the meaning of Section 2(k) of the I.D. Act and as such

it cannot be said that the suit was not maintainable at the time of institution of the suit or even at the time when the impugned order was passed by the District Judge.

14. Although several other decisions have been cited by the sides on the ground of maintainability, this Court does not feel it necessary to refer to those decisions in view of the pronouncement of the Supreme Court in Rajasthan State Road Corporation's case (*supra*).

15. The lower appellate Court has proceeded on the view that an appeal before the Labour Court Under Section 6 of the Standing Orders Act is a proceeding under the I.D.Act. If Rajasthan State Road Transport Corporation's case is read carefully, the distinction between a forum created by the Standing Orders Act and a forum created under the I.D.Act would have been appreciated. The very principle No. 3 as enunciated by the Supreme Court in the aforesaid case has made a distinction between a forum created by the Standing Orders Act and a forum for resolving an industrial dispute within the meaning of the I.D.Act.

16. However, whether the subsequent developments, viz., the dismissal of petitioner No. 1 and the reference Of the dispute relating to such dismissal to the Labour Court have made the suit infructuous and whether the reliefs prayed for in the suit are any longer available or not, cannot be considered in this revision because the scope of this revision is confined to the legality or propriety of the impugned order passed by the District Judge. It is open to the opp. party to raise any such issue as a preliminary issue in the suit and if any such issue is raised the trial Court will consider the same in accordance with law at the appropriate stage.

17. The impugned order shows that the District Judge has taken the view that the suit is not maintainable. The said view appears to be erroneous for the reasons stated herein above. But in the meantime that the domestic enquiry has been concluded and the petitioner has been dismissed from service. In view of such subsequent development, there is no scope for giving any interim order at this stage. Learned Advocate for the petitioners has strenuously urged that the impugned order of dismissal was passed in violation of the interim order passed by this Court on October 7, 1997. The petitioners have already filed a contempt

application alleging violation of the interim order dated October 7, 1997. The said interim order was passed by Hon'ble Justice P. K. Mishra. Accordingly, the said contempt application is to be heard by Hon'ble Justice P. K. Mishra and in the said pending contempt proceeding it would be decided whether the dismissal order was in violation of this, Court's order or not and appropriate order would be passed. This Court is, however, of the view that the District Judge committed error in holding that the suit as framed was not maintainable.

18. Revision is thus allowed in part to the extent indicated above. No order as to costs.

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