

Apollo Tyres Ltd. Vs. Sebastian

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Court : Kerala

Decided On : Sep-06-2001

Reported in : (2003)ILLJ608Ker

Judge : S. Sankarasubban and; K. Padmanabhan Nair, JJ.

Acts : [Industrial Disputes Act, 1947](#) - Sections 2 and 2A; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 9

Appeal No. : C.M.A. No. 114/2001

Appellant : Apollo Tyres Ltd.

Respondent : Sebastian

Advocate for Def. : T.N. Manoj and; Dinesh R. Shenoy, Adv.

Advocate for Pet/Ap. : M. Pathrose Mathai and; Saji Varghese, Adv.

Judgement :

S. Sankarasubban, J.

1. This appeal arises against the judgment and decree in A.S. No. 210 of 2000 on the file of Sub Court, Irinjalakuda. Original Suit is O.S. No. 2098 of 1999 of the Munsiff's Court, Irinjalakuda. The facts of the case are as follows:

2. The respondent-plaintiff filed the suit for a declaration that he is still a workman and continues to be a workman under the appellant defendant and entitled for wages and all other consequential benefits and for a further declaration that the order transferring him to West Bengal is irregular and illegal. According to him, he is one of the founder members of the trade union - Apollo Tyres Workers' Association. He was working as Radial Tyre Builder. As a trade union leader, he was stem in advocating for the better interest and welfare of the workers and naturally it led to expose the plaintiff to the ill-will of the management.

3. By 1999, the attitude of the management people against the plaintiff turned hostile. A false charge sheet was issued to the respondent alleging various misconducts. To facilitate an amicable settlement, the trade union had to agree that three workers including the respondent be transferred to the Cochin Office of the appellant on specific understanding that they shall be retransferred to Perambra within three months. On September 24, 1999, while the plaintiff was on E.S.I, leave, he received a communication dated September 22, 1999 to the effect that the Company has decided to promote him to the post of Junior Officer (Administration). According to the respondent, the actual intention of the management was to deny the protection available to the respondent as a workman under the pretention of an ostensible promotion and thereafter, to throw him out of the job. The promotion offered was against the precedents, practice and norms of promotion in the Company. According to the respondent, the next promotion post as per Rules from the post of a Radial Tyre Builder is to that of Production Assistant (Tyre Inspector). He is also not qualified for that post. According to the respondent, he had got right to accept the post or to refuse the promotion. The respondent refused the offer by reply dated September 22, 1999.

4. On October 6, 1999, the appellant sent a communication saying that they have promoted the respondent again. Further on October 8, 1999, the appellant sent a communication to the respondent purporting to transfer the respondent from Cochin Office to Factory at 24 Parganas North Dt. in the State of West Bengal. Thus, according to the respondent, the promotion as Junior Officer as well as his transfer to West Bengal was to victimise the plaintiff, because he was a trade union leader. Hence the suit was filed for the following reliefs: to declare that the

plaintiff is still a workman (Radial Tyre Builder) and continues to be a workman, declare that the order of transfer dated October 8, 1999 issued by the appellant transferring to West Bengal is irregular and illegal and to restrain the appellant from compelling the respondent by any mode to accept any promoted post which he is not willing to hold and also for other reliefs.

5. To the plaint, a written statement was filed by the appellant-defendant. In the written statement, the appellant raised the contention that the suit is not maintainable. According to the appellant, the remedy lies under the Industrial Disputes Act (hereinafter referred to as 'the I.D Act') and the suit before the civil Court is not maintainable. It is stated that the transfer and promotion are covered by Schedule to the I.D. Act and hence, the relief can be claimed as per the I.D. Act. Further, it is stated that since the respondent has already been promoted as Junior Officer, he is not entitled to the declarations as prayed for.

6. Since the maintainability of the suit was raised as a preliminary issue, the trial Court, after going through the records of the case and after hearing the parties, held that the suit is not maintainable. The civil Court has no jurisdiction to entertain the suit. The trial Court by order dated October 5, 2000 held that the suit is not liable to be proceeded with. Hence, the suit was dismissed. Against that the respondent- plaintiff preferred an appeal and in the appeal, the Appellate Court has held that the suit is maintainable and the case was remanded to the lower Court for disposal on merits. It is against the above order that the present appeal is filed by the appellant-defendant.

7. Sri Pathrose Mathai learned counsel appearing for the appellant submitted that as per the I.D. Act, a dispute has to be heard and decided by a competent Labour Court or other Authority, as the case may be. Further, it was stated that the fact of promotions or transfers are matters coming under the I.D. Act and hence, the dispute has to be decided as per the provisions of the I.D. Act. It was further contended that there was no common law right that could be enforced by the respondent-plaintiff. A right is created under the I.D. Act and hence, the remedy under the I.D. Act has to be persuaded.

8. Sri Dinesh R. Shenoy, learned counsel for the respondent- plaintiff submitted that the judgment of the lower Appellate Court was correct. According to him, a perusal of the definition of the I.D. Act shows that it is only a dispute between the employer and the workmen that is to be taken as industrial dispute. A dispute between the individual workman and the employer is not to be taken as an industrial dispute except those disputes coming under Section 2-A of the I.D. Act. Thus, here the dispute does not come within Section 2 of the I.D. Act. Any individual dispute can be agitated in the forum only if the union espouses the cause and the matter is referred to the Government and thereafter, the Government refers this dispute under the I.D. Act. Thus, in this case, according to the respondent, the respondent's union has not espoused the cause and so he cannot approach any forum under the I.D. Act. Thus, the case of the respondent is that the civil Court has got jurisdiction to entertain the suit.

9. Section 9 of the Code of Civil Procedure envisages jurisdiction of the civil Court. As per Section 9 of the CPC, all cases of civil nature, are entertainable in the civil Court except those which are expressly or impliedly barred. The question therefore is to find out whether the reliefs claimed in this case are within the exclusive jurisdiction of the Labour Court. There are three kinds of rights and remedies. One is where a right is created under the common law, in which case the right can be enforced through civil Court. The second is a case where the right may be created by statute. But remedy may not be provided under the Statute. In that case the remedy can be pursued in the civil Court. Another case is where both right and remedy are prescribed under the enactment. It is contended that the action of the authorities under the I.D. Act is mala fide and against the principles of natural justice or the provision under which the right is exercised is unconstitutional.

10. It is in this background that we have to approach the question raised in this case. Section 2(k) of the I.D. Act defines 'industrial dispute' as a dispute or difference between employers and employers or between employer and workmen or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person. Section 2-A of the I.D. Act says that where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual

workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute. Section 10 of Chapter III of the I.D. Act speaks of reference of disputes to Boards, Courts or Tribunals. It says thus:

'Where the appropriate Government is of opinion that industrial dispute exists or is apprehended, it may at any time, by order in-

- (a) refer the dispute to a Board for promoting a settlement thereof; or
- (b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry; or
- (c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication; or
- (d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication'.

First Proviso to the above Section says thus:

'Provided that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate Government may, if it so thinks fit, make the reference to a Labour Court under Clause (c)'.

Second Schedule relates to matters within the jurisdiction of Labour Courts. Serial Number 1 is with regard to the propriety or legality of an order passed by an employer under the Standing Orders.

11. The main question to be considered is whether the civil Court will have jurisdiction. Similar matter came before this Court in the decision reported in Kerala Rubber & Reclaims Ltd. v. Sunny, 1988 (2) KLT 874. Chief Justice

MALIMATH rendered judgment in that case. There, the question involved was regarding the transfer and the question is whether challenge of transfer can be entertained in a civil Court. The learned Judge observed as follows:

'As the definition of the expression 'Industrial Dispute' in Section 2(k) includes within its ambit disputes connected with the terms of the employment or conditions of labour of any person. The terms of employment or the conditions of employment are governed by the Industrial Disputes Act. One term of employment is that the workman is not liable for transfer in contravention of Section 25-T read with No. 7 of the Fifth Schedule. That an individual cannot seek relief against transfer under Section 10 does not mean that the statute does not provide a remedy for enforcing the right created by Section 25-T read with item No. 7 of the Fifth Schedule. The remedy has been provided in Section 10 of the Act. There are several conditions which are to be satisfied for invoking the remedy conditions for availing of that remedy, if the conditions for invoking the remedy cannot be conditions to be satisfied in such cases is that the dispute can be raised by a class of workmen. If the statute prescribes for a period of limitation for availing of no remedy, can it be said that no remedy is provided merely because the period of limitation has expired? Remedy has been provided but the person concerned is not in a position to avail of that remedy as one of the conditions for availing of that remedy cannot be satisfied by him.....'

Even though the cause has not been espoused by other workman and the matter has not been referred by the Government, it cannot be said that there is no power under the I.D. Act. In that view of the matter the Court held that the civil Court has jurisdiction.

12. In the decision reported in Jagdish Narain Sharma and Anr. v. Rajasthan Patrika Ltd. and Anr., 1994-II-LLJ-600, the High Court of Judicature, Rajasthan had occasion to consider similar matter. There, the matter is with regard to transfer of workman. The Court held as follows at p.p. 602 & 603 of LLJ:

'Section 2(k) defines the term 'industrial dispute'. Till 1957 there was a conflict of opinions amongst the High Court as to whether an individual dispute can be regarded as an 'industrial dispute'. Some High Courts and Tribunals took the view

that a dispute between an employer and a single workman cannot be an 'industrial dispute'. Others took the view that it can be an 'industrial dispute'. In yet another category of case, it was held that such cases cannot per se be 'industrial dispute', but, may become 'industrial dispute' if taken up by a trade union or large number of workmen. In *Central Provinces Transport Service Ltd. v. Raghunath Gopal Patwardhan*, AIR 1957 SC 104 : 1957-I-LLJ-27, their Lordships of the Supreme Court adopted the third view and held that, an individual dispute cannot ordinarily be treated as an industrial dispute. However, if such dispute is espoused by a union or substantial number of workmen employed in the establishment, such dispute will be treated as an 'industrial dispute'. Same view was reiterated in *Workmen v. Dharampal Prem Chand*, AIR 1966 SC 182 : 1965-I-LLJ-668 and *Workmen of Indian Express Newspapers (Pvt.) Ltd. v. Indian Express (Pvt.) Ltd.*, 1970-II-LLJ-132.

..... The Parliament, therefore, amended the Industrial Disputes Act by the Industrial Disputes (Amendment) Act, 1965. By this amendment, which became effective from December 1, 1965, Section 2-A came to be inserted. By virtue of the provisions contained in Section 2-A, any dispute or difference between a workman and his employer, in relation to discharge, dismissal, retrenchment or termination of service, is now deemed to be an 'industrial dispute' even though, such dispute may not be taken up by a legislative fiction, an individual dispute has been converted into an industrial dispute. But Section 2-A is limited to the cases of dismissal, discharge, retrenchment or termination of service of the workman. Other individual disputes can be regarded as an 'industrial dispute' only when the tests enumerated in the decisions of the Supreme Court in *Central Provinces Transport Service* case (supra), and other subsequent decisions are satisfied'.

In paragraph 11 of the above decision, the Court held as follows:

'..... It must, therefore, be held that the existence of 'industrial dispute' in relation to any of these matters is a condition precedent for conferment of jurisdiction on the Labour Court or the Tribunal to make an adjudication'. Finally, the Court held that the civil Court has got jurisdiction.'

13. In *Rajasthan S.R.T Corporation v. Krishna Kant*, AIR 1995 SC 1715 : 1995 (5) SCC 75 : 1995-II-LLJ-728, the Supreme Court had occasion to consider the jurisdiction of the civil Court with regard to matters covered by the I.D. Act. The Court laid down seven principles. Principle No. 1 is where the dispute arises from general law of contract, i. e., where reliefs are claimed on the basis of the general law of contract, a suit filed in civil Court cannot be said to be not maintainable, even though such a dispute may also constitute an 'industrial dispute' within the meaning of Section 2(k) or Section 2-A of the I.D. Act. Principle No. 2 is where the dispute involves recognition, observance or enforcement of any of the rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act. Third principle is where the dispute involves the recognition, observance or enforcement of rights and obligations created by enactment like Industrial Employment (Standing Orders) 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 I.D. Act provided they constitute industrial disputes within the meaning of Section 2(k) and Section 2-A of the I.D. 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 I.D. Act. Otherwise, recourse to Civil Court is open. The fourth principle says that it is not correct to say that the remedies provided by the I.D. Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate Government. The power to make a reference conferred upon the Government is to be exercised to effectuate the object of the enactment and hence not unguided. The rule is to make a reference unless of course, the dispute raised is a totally frivolous one *ex facie*. The power conferred is the power to refer and not the power to decide. Next, consistent with the policy of law, the Supreme Court thought it fit to commend to the Parliament and the State Legislatures to make a provision enabling a workman to approach the Labour Court/Industrial Tribunal directly i. e., without the requirement of a reference by the Government. Sixth principle says that the certified Standing Orders framed under and in accordance with the Industrial Employment (Standing Orders) Act are statutorily imposed conditions of service and are binding both upon the employer and employees, though they do not amount to 'statutory

provisions'. Any violation of these Standing Orders entitles an employee to appropriate relief either before the forums created by the I.D. Act or the Civil Court where recourse to Civil Court is open. Principle No. 7 says that the policy of law emerging from I.D. Act is to provide an alternative dispute resolution mechanism to the workmen. From the above, it could be seen that unless the dispute is espoused by the Union, the disputes cannot be termed to be industrial disputes. Only if it is industrial dispute and if it is espoused by the workmen and referred by the Government, the Labour Court has jurisdiction to decide the same. Hence, we cannot say that when a suit is filed by the workman for a declaration that he is a workman, it cannot be granted by the civil Court. Of course, the disputes coming under Section 2-A of the I.D. Act are to be referred to the Labour Court through the Government. Here in this case, we don't find that any remedy is open to the plaintiff.

14. In fact the decision, 1988(2) KLT 874, has taken the view that since individual workman with the support of the union, can approach the Labour Court through Government, it cannot be said that there is no bar. But we think that this view is not correct. It cannot be said that there is an automatic relief to the individual workman. In this case, we find that even though the workman was the General Secretary of the Union, the Union has not espoused his cause. In such a situation, we are of the view that the party can approach the civil Court.

15. In Assistant Personnel Officer, Southern Railway, Olavakkot v. K.T. Antony, 1978-II-LLJ-254, the question arose whether a person, whose service, was terminated, can approach the High Court under Article 226 of the Constitution of India instead of pursuing the remedy under the I.D. Act. The Division Bench of this Court in the above decision held thus at p. 257:

'4. Reference to Tribunal can only be at the instance of the Government on certain conditions mentioned in Section 10 of the Act. We cannot regard it as an alternative remedy available to the respondent for the purpose of holding that a petition under Article 226 is not maintainable.'

This was followed by KHALID, J. in John Fernandez v. Executive Engineer, 1978 KLT 857.

16. In the above view of the matter, we hold that the order of the Court below is correct. The civil Court has jurisdiction to entertain the matter. Accordingly, the judgment and decree of the Court below are confirmed. The suit shall be disposed of within three months.

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