

(1997) 04 AHC CK 0166

In the Allahabad High Court

Case No : Special Appeal No's. 213 and 214 of 1997

Ashok Kumar Mishra

APPELLANT

Vs

L.H. Sugar Factory Ltd.

RESPONDENT

Date of Decision : 21-04-1997

Acts Referred:

Constitution of India, 1950 — Article 226, 22G

Factories Act, 1948 — Section 2

Industrial Disputes Act, 1947 — Section 2, 25K, 25L, 25N, 2A

Citation : (1997) 04 AHC CK 0166

Hon'ble Judges : R.A. Sharma, J;A. Chakrabarti, J

Bench : Division Bench

Advocate : Suman Sirohi, for the Appellant;

Final Decision : Dismissed

Judgement

R.A. Sharma, J.—Service of the Appellant, who was an employee of L.H. Sugar Factory, Pilibhit (hereinafter referred to as the Sugar Factory) was terminated by the management in 1993. Against the said order, he filed a Writ Petition No, 11783 of 1993 before this Court in which an interim order was passed by this Court. During the pendency of the above writ petition, Petitioner was transferred by the management from Pilibhit to Lucknow. Against the transfer order, he filed a second Writ Petition No. 39915 of 1994. Both these writ petitions have been dismissed by the learned single Judge on two grounds, namely, (i) the Petitioner has an alternative remedy before the Industrial Tribunal/Labour Court constituted under the Industrial Disputes Act, and (ii) writ petition against Private Sugar Factory is not maintainable. Being aggrieved by the judgment of the learned single Judge, the Appellant has filed two Special Appeals Nos. 213 of 1997 and 214 of 1997.

2. Sri K. P. Agarwal, learned Counsel for the Appellant has made two submissions, namely, (i) as the service of the Appellant was terminated in violation of Section 25N of the Industrial Disputes Act, 1947 (hereinafter referred

to as the Act), the writ petition was not liable to be dismissed on the ground of alternative remedy; and (ii) writ petition filed against the order of sugar factory is maintainable. Sri Ashok Khare, learned Counsel for the sugar factory has disputed the submissions of Sri Agarwal. As the judgment of the learned single Judge in Writ Petition No. 11783 of 1993 filed against the order of termination of the service of the Appellant is being upheld by us in the appeal on the ground of alternative remedy before Labour Court/Industrial Tribunal, no argument, as regards the validity of the order of transfer challenged in Writ Petition No. 39915 of 1994, which has given rise to Special Appeal No. 213 of 1997, has been made by the learned Counsel for the Appellant.

3. It is well-settled that after a writ petition has been entertained and/or parties have exchanged the affidavit it is not liable to be dismissed on the ground of alternative remedy. But the position would be different if it is not possible to resolve the dispute under Article 226 of the Constitution for any good reason, such as disputed questions of fact and/or when the writ petition itself is not maintainable. The Appellant, who is Assistant Engineer in the sugar factory, claims to be a workman, because according to him, his service conditions are governed by the award of the Wage Board. His grievance is that his service could not have been terminated in violation of Section 25N of the Act. Section 25N is Chapter V-B of the Act. Section 25K has laid down the conditions precedent for applying the said Chapter to an industrial establishment. Section 25K is reproduced below:

25K. Application of Chapter V-B. -- (1) The provisions of this Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months.

(2) If a question arises whether an Industrial establishment is of a seasonal character or whether work is performed therein only intermittently, the decision of the appropriate Government thereon shall be final.

In order to attract the provisions of Chapter V-B, the following conditions must be satisfied:

- (i) the factory must be an industrial establishment,
- (ii) it must not be an establishment of a seasonal character or in which work is performed only intermittently, and
- (iii) in the establishment not less than one hundred workmen are employed on an average per working day for the preceding twelve months.

4. According to Section 25L, an industrial establishment means a factory as defined in Clause (m) of Section 2 of the Factories Act. The sugar factory is undoubtedly an industrial establishment as defined in Section 25L. But it has not been pleaded and proved that it is not an establishment of a seasonal character.

The production in sugar factories is not carried out throughout the year. If the Appellant wanted to establish that the sugar factory is not of a seasonal character, he should have pleaded and proved the same; but that has not been done. As regards the third condition relating to employment of more than one hundred workmen, In paragraph 6 of the writ petition the Appellant has stated as follows:

16. That it may be stated that in the Sugar Factory of the Respondent Company more than 100 workmen are employed and the provisions of Section 25N contained in the Industrial Disputes Act, 1947, hereinafter to be referred to as the Central Act, would apply for ready reference. Relevant clauses of Section 25N are being reproduced below:

25N. Conditions precedent to retrenchment of workmen.

(i) No workman employed in any Industrial establishment to which tills Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until:

(a) The workman has been given three months notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice wages for the period of the notice; and

(b) The prior permission of the appropriate Government or such Authority as may be specified by that Government by notification in the Official Gazette (hereinafter in this section referred to as the specified Authority) has been obtained on an application made in this behalf.

5. Although the Appellant in paragraph 6 of the writ petition has stated that more than one hundred workmen are employed in the sugar factory; but he has not stated that more than one hundred workmen were employed on an average per working day for the preceding twelve months. In the counter-affidavit filed by the sugar factory, the applicability of Section 25N to the Appellant's case has been disputed and denied. Therefore, the provisions of Chapter V-B including Section 25N cannot be applied to the case of the Appellant on the basis of the pleadings of the parties. Sri K. P. Agarwal, learned Counsel for the Appellant has submitted that judicial notice can be taken of the fact that the factory is not an undertaking of seasonal character and must be having more than one hundred workmen employed on an average per working day. This submission cannot be accepted, because these are the questions of facts, which have to be pleaded and proved. Unless the conditions precedent laid down for applying Chapter V-B are satisfied, the Appellant cannot take the advantage of Section 25N. The Appellant has failed to plead and prove the existence of conditions precedent. The sugar factory has disputed and denied the applicability of Section 25-N to the Appellant's case. In view of the want of adequate pleadings and serious factual dispute, it is not possible to decide the controversy on merit under Article 226 of the Constitution.

6. The proper forum for resolving such a dispute is the Labour Court/Industrial Tribunal. In this connection reference may be made to Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others, , to paragraph 32 of which the Supreme Court has laid down as under:

(2) Where, however, 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.

(3) Similarly, where the dispute involves the recognition, observance or enforcement of rights and obligations created by enactments like Industrial Employment (Standing Orders) 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 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.

(4) It is not correct to say that the remedies provided by the Industrial Disputes 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, though it may be that the Government is entitled to examine whether the dispute is ex facie frivolous, not meriting an adjudication.

In the instant case, the Appellant is claiming the benefit of Section 25N of the Act and, therefore, Clause (2) of paragraph 32 of the Supreme Court judgment is applicable to his case. Accordingly his remedy is to approach the Labour Court/Industrial Tribunal. A Full Bench of this Court in Chandrama Singh v. Managing Director, U.P. Co-operative Union, Lucknow and Ors. (1991) 2 UPLBEC 898, has also laid down that unless a workman pleads and proves that the remedy before the Industrial Tribunal/Labour Court is not efficacious, the writ petition is not to be entertained.

7. As these appeals and the writ petitions, which have given rise to the appeals, are liable to be dismissed on the ground of alternative remedy, it is not necessary to go into the other contention regarding the maintainability of the writ petition.

8. These appeals are accordingly dismissed. The Appellant will have the liberty to approach the Labour Court/Industrial Tribunal for redressal of his grievances. To cut-out the delay, we direct that if the Appellant approaches the appropriate authority for reference to the Labour Court/Industrial Tribunal, the said authority

will pass appropriate order in connection therewith within a period of two months of production of certified copy of this order before it. The Labour Court/Industrial Tribunal to which the reference is made shall decide the dispute at the earliest, as far as possible within six months of the receipt of the reference. In view of the facts and circumstances of the case, there shall be no order as to costs.