

(1992) 02 GAU CK 0003
In the Gauhati High Court
Case No : Civil Revision No. 195 of 1991

Bibhu Deb Roy

APPELLANT

Vs

J.M.Savery

RESPONDENT

Date of Decision : 17-02-1992

Acts Referred:

Citation : (1992) 1 GLJ 197

Hon'ble Judges : S.N.Phukan, J

Bench : Single Bench

Advocate : M.K.Sharma, D.Das , B.J.Ghosh , Advocates appearing for Parties

Judgement

1. This application under section 115 CPC read with Article 227 of the Constitution is directed against the order dated 4.5.91 passed by the Assistant District Judge No. 1 Cachar at Silchar in Misc. Appeal No.25 of 1990. By this impugned order, the lower appellate Court set aside the order of the Munsiff No.1, Silchar dated 14.1.90 passed in Misc. Case No. 381 of 1990. This Misc. Case arose out of a petition filed in Title Suit No. 59 of 1990 filed by the present petitioner as plaintiff. The Munsiff directed by the above order to give subsistence allowance during the suspension period to the petitioner.

2. Present petitioner as plaintiff filed the above title suit against the opposite parties herein viz District Manager, Schlumberger, Calcutta and Enginnerincharge of the company Stationed at Silchar praying for a decree for declaration that the petitioner was a regular employee in the establishment of the above firm and also for a declaration that the order of suspension of the plaintiffpetitioner and withholding of subsistence allowance are illegal. It may be stated that the plaintiff was appointed as Junior Operator of the company by opposite party No. 2 on probation. Thereafter, he was confirmed. He was placed under suspension with effect from 1.1.90 by order dated 30.12.89 passed by the defendantopposite party No.1. Plaintiff filed a written explanation and the District Manager viz opposite party No. 1 herein dropped all the charges except one charge regarding unauthorised use of the jeep of the company. The regular

departmental" enquiry was ordered, but plaintiff has not been paid anything from the date of his suspension. As stated above, plaintiff filed a petition under Order 39 Rule 1 and 2 CPC read with section 151 CPC for temporary injunction restraining the defendant from proceeding with the order of suspension order. Plaintiff has further prayed for a direction for payment of subsistence allowance.

3. On perusal of the impugned order which is available at Annexure IV to the petition, I find that in the written objection filed by the defendant it was stated that under the Service Rule of the company theirs was no provision for payment of subsistence allowance and that the claim is covered by the provision of Industrial Disputes Act. The lower appellate Court noted that there is no rule for payment of subsistence allowance in the Rules framed by the company and although the trial Court directed payment of such subsistence allowance, the question posed by the lower appellate Court as to who would pay this amount as the company was not made a party. It further held that such a direction by the trial Court would have created a confusion as a mere direction may not serve the purpose since the direction does not contain the rate of such allowance. Accordingly, the appeal was allowed.

4. In the petition before this Court, reference has been made to the Industrial Employment (Standing Orders) Act, 1946 and the Central Rules framed thereunder. That apart, it has been urged that in view of the law laid down by the Apex Court withholding of such subsistence allowance during the period of suspension can be considered to be tyrinical, highhanded and inhuman on the part of the management while dealing with its employees. Pontiffpetitioner has claimed half of the pay as subsistence allowance for the first month and thereafter 3/4th of total emoluments during the period of such suspension. The petitioner has also claimed some other amount such at bonus, overtime allowance etc.

5. In the counter filed on behalf or" the opposite party, it has been pleaded that the present relief cannot be entertained by the civil Court and is not enforceable under section 41 of the Specific Relief Act. It has also been alleged that prayer for payment of subsistence allowance being a monetary benefit is not available in a suit for declaration as this would amount to a mandatory direction by the Court. Nonjoinder of company has also been pleaded. It has been stated that the power of suspension follows from the power of appointment and the petitioner was suspended, but he is not entitled to any subsistence allowance as a matter of contract and the company does not follow any practice for such payment. It has been urged that the jurisdiction of civil Court is barred under the provisions of Industrial Disputes Act, 1947. According to the opposite party, under the Industrial Employment (Standing Orders) Act, 1946 there is a specific authority to implement the provisions of this Act.

6. Heard Dr.M.K. Sharma, learned counsel for the petitioner and Mr. S.K. Senapati, learned counsel for the opposite party.

7. It may be stated that although plea of maintainability has been taken, no issue has been framed and no decision given. It is, therefore, not proper on the part of this Court to express any opinion on this point at this stage.

8. Attention of this Court has been drawn to a decision of the Apex Court in *Premier Automobiles vs. K.S. Wadke*, AIR 1975 SC 2238 wherein the Apex Court considered the jurisdiction of the civil Court in relation to the industrial dispute and the principle was stated as follows :

"(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil Court.

(2) If the dispute is an industrial dispute arising out of a right of liability under the general common law and not under the Act, the jurisdiction of the civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.

(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.

(4) If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for its enforcement is either section 33C or the raising of an industrial dispute, as the case may be." The attention of this Court has also been drawn to another decision of the Apex Court in *Vaish Degree College vs. Lakshmi Narain*, AIR 1976 SC 888 wherein it was held that a contract of personal service cannot ordinarily be specifically enforced and a Court normally would not give a declaration that the contract subsists and the employees even after having been removed from service can be deemed to be in service against the will and consent of the employer. The Apex Court held that the above rule is subject to 3 exceptions and it is not necessary to refer to this exceptions.

9. In *J. Tiwari vs. Jawala Devi Vidya Mandir*, AIR 1981 SC 122, section 34 of the Specific Relief Act, 1963 was considered and it was held that rights and obligations of an employee of a private institution are governed by the terms of the contract entered into between the parties and where under those terms the service was liable to be terminated on three months' notice, all that the employee would be entitled to, even if the dismissal is wrongful, is a decree for damages and not an order of reinstatement or declaration notwithstanding the termination of services the employee shall be continued to be in service.

10. In *Nandganj Sihori Suger Co. Ltd. vs. Badri Nath Dixit*, AIR 1991 SC 1525, the Apex Court held that "a contract of employment cannot ordinarily be enforced by or against an employer and the remedy is to sue for damages." The Apex Court noted three exceptions to the above rules as stated in the earlier decision of the Court.

11. From the present petition, as well as, counter it appears that decree has

been prayed for either for reinstatement in service or enforcement of contractual right of employment. The grievance of the plaintiff is that he was placed under suspension although there is no provision for in the local staff manual of the company and that he has been deprived of the subsistence allowance as per principles laid down in the Industrial Employment (Standing Orders) Act, 1946, more particularly section 10 A of the Act.

12. It is a settled law that if an employee is put under suspension, the relation of employer and employee does not come to an end, it is only suspended temporarily. During this period, the employee can neither take any employment elsewhere or undertake any profession or trade etc. So for survival of the employee and his family, the employer has to pay subsistence allowance and this is the settled position of law.

13. Although a plea has been taken that in the local staff manual of the company, there is no provision for payment of subsistence allowance, on perusal of the said manual it also appears that there is no power of suspension. Of course, it cannot be disputed that the power of suspension of an employee is inherent with the appointment of an employee and as such an employee can be placed under suspension. In the case in hand it has been done for the purpose of drawing up disciplinary proceeding. It is not necessary at this stage to discuss different kinds of suspension as in the case in hand, the suspension was admittedly for the purpose of disciplinary proceeding.

14. Payment of subsistence allowance follows from suspension and an employee cannot be deprived of this right. I am, therefore, of the opinion that the impugned order is bad in law and is liable to be set aside. Of course, the order of the trial Court is not also clear regarding the amount of subsistence allowance to be paid. In my opinion and for ends of justice, the principles laid down in section 10A of the Industrial Employment (Standing Orders) Act, 1946 should be followed in quantifying the amount of payment of subsistence allowance per month.

15. Although various decisions of the Apex Court has been quoted above for the purpose of determining the powers of the civil Court, as stated above I am not expressing any opinion on this point. Attention of this Court has also been drawn to a decision of this in State of Assam vs. B.D. Patwari, (1985) 1 GLR 66 wherein this Court held that the order of temporary injunction issued by the trial Court cannot be said to be without jurisdiction merely because an objection has taken regarding maintainability of the suit.

16. I, therefore, direct that the trial Court to frame an issue of maintainability of the suit and it shall be decided immediately and preferably within a period of 2 months. As this is purely a question of law, it may not be necessary for the parties to adduce evidence. Till the issue is decided, the plaintiffpetitioner and his family cannot be allowed to starve and accordingly the petitioner is entitled to get subsistence allowance. In the event, the issue of maintainability of the sit is

decided against the plaintiff, he may seek remedies in the appropriate Court of law.

17. While deciding the question of maintainability, the question of nonjoinder of parties may also be taken up by the trial Court.

18. It was urged that the main suit v has been dismissed, for default and as such the present Civil Revision arising out of the Misc. Case of the said title suit has become intractuous. This was disputed. After conclusion of the argument and the judgment was reserved, the certified copy of the order, passed by the Court below has been filed to show that the original title suit has been restored to file. The certified copy of the order is placed on record of the present Civil Revision.

19. For what has been stated above, the impugned order is set aside and the respondents are directed to pay the subsistence allowance as per principles laid down in section 10A of the Industrial Employment (Standing Orders) Act, 1946 from the date of suspension till the question of maintainability is decided by the trial Court. The arrear shall be paid within a period of one month from today and thereafter it shall be paid regularly each month till the question of maintainability of the suit is decided by the trial Court

With the above direction and observation the petition is disposed of.