

(2009) 02 CHH CK 0019
In the Chhattisgarh High Court
Case No : Writ Petition No. 501 of 2002

B.K. Singh and Another

APPELLANT

Vs

Appellate Authority Under M.P. Shops and Establishments
Act, Assistant Labour Commissioner, Durg and Others

RESPONDENT

Date of Decision : 02-02-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2(f)
Madhya Pradesh Shops and Establishments Act, 1958 — Section 2, 2(23), 3, 3(j), 58
Workmens Compensation Act, 1923 — Section 30

Citation : (2009) 02 CHH CK 0019

Hon'ble Judges : Dharendra Mishra, J

Bench : Division Bench

Advocate : N.K. Shukla, with Mr. Dilip Dubey, for the Appellant; Rajeev Shrivastava, Advocate for Respondents No. 2 to 24, for the Respondent

Final Decision : Allowed

Judgement

Dhirendra Mishra, J.—The instant petition is directed against the order dated 18-1-2002 passed by the Appellate Authority u/s 58 of the M.P. Shops & Establishments Act, 1958 (for short "the Act 1958") whereby the appellants have been directed to reinstate the respondents with full back wages from 15-4-1997 to the date of reinstatement within 30 days from the date of order or in the alternative, to pay compensation to each of the respondents @ Rs. 1.97,078/- without reinstatement, 50% of the compensation was to be paid within 30 days and the remaining was to be paid within 7 months from the date of order. Briefly stated necessary facts for adjudication of this writ petition are that respondents No. 2 to 24 preferred an appeal u/s 58 of the Act, 1958 with the averments that they are working under petitioner No. 2 for a period ranging between 3 to 13 years. The petitioners are operating restaurant from the establishment of the Steel Club. The respondents were illegally stopped from doing their work without any notice and without paying any compensation though they discharged their

duties honestly. The other co-workers namely, Keshav and Madhu have been inducted as permanent workmen by the petitioners and the respondents are entitled for reinstatement with full back wages in the petitioners' establishment. The respondents applied for redressal of their grievances through Union before the Assistant Labour Commissioner, who vide his order dated 29-5-1997 after conciliation proceedings directed the petitioners to start catering work within 10 days. However, the order was not complied with and the respondents were not reinstated.

2. In reply to the above application, the petitioners raised preliminary objection and contended that the Assistant Labour Commissioner, Durg, after several meetings dropped the proceedings on 9-6-97. The matter is covered under the Industrial Disputes Act and the respondents are estopped from raising the same issue under the Act, 1958. It was further averred that present application under the Act, 1958 is not maintainable. The respondents were never engaged by the Steel Club for the last several years, They denied that the petitioners were employer. They further denied that Keshav and Madhu, the coworkers, were regularized as permanent employee in the said Club. They also denied the entitlement of the respondents to get back wages or reinstatement. It was specifically contended that the Act, 1958 is not applicable to petitioner No. 2, which is Steel Club as per the provisions of Section 3(j) of the Act. It is neither a residential hotel nor restaurant or eating house as defined under the Act, as no business of supply of meals or refreshment to the public is carried on in the premises.

3. The respondents examined Pilambar Nayak, whereas Hemant Kumar Shukla, member of the Steel Club, was examined by the petitioners during the proceeding before the appellate authority. The appellate authority referring to clauses 1 & 2 of the Bye-laws of the Steel Club has observed that if the only above clauses are considered, then establishment is a Club within the meaning of Section 3(j) of the Act. However, since catering services are being extended to a class of persons i.e. members of the club and other authorized persons, establishment does not fall within the purview of club and it is an establishment carrying on business of supply of meals or refreshment to a class of public, which would be an eating house within the meaning of Section 2(23) of the Act. It has been further held that the respondents were employees of the above establishment which was under the control of the petitioners and, therefore, the provisions of the Act, 1958 would be applicable. Rejecting the arguments of the petitioners that the respondents have already availed remedies under the Industrial Dispute Act, as they filed application before the Assistant Labour Commissioner for settling their dispute through reconciliation, it has been held that since the dispute was never referred to the Court for adjudication, it cannot be held that the respondents have availed remedy for redressal of their grievances. Accordingly, holding the termination of the respondents illegal, the appeal has been allowed by the impugned order.

4. Dr. N.K. Shukla, learned Sr. Advocate with Shri Dilip Dubey, Advocate, appearing for the petitioners contended that the Steel Club was established for providing facilities for cultural, social and intellectual advancement of its members. Membership is open only to the officers of the Bhilai Steel Plant and other ancillary units on payment of prescribed admission fee after approval of the Governing body, as per the provisions of byelaws of the Steel Club. The Assistant Commissioner of Labour, District Durg, is described as Appellate Authority under Rule 14-A of the M.P. Shops & Establishment Rules, 1959. Shri S.P. Verma, Appellate Authority, was transferred vide order dated 3-3-2001 (Annexure-P/9). Shri Verma challenged his transfer order before the State Administrative Tribunal. However, the Tribunal dismissed the petition vide order dated 15-2-2001 (Annexure-P/2). Thereafter he filed writ petition in the High Court and vide order dated 25-4-2001 the High Court directed to maintain status quo (Annexure-P/3). For the aforesaid reason, he could not function as Appellate Authority for Durg district. He further argued that as per provisions of Section 3(j), the Act of 1958 is not applicable to the Clubs not being residential clubs and the finding of learned authority that the establishment is restaurant and eating house is contrary to law and based on misinterpretation of Section 3(j). It was argued that a club which caters services to its restricted members for their recreation cannot be held to be an establishment as restaurant and eating house as defined in Section 2(23) of the Act, 1958.

5. On the other hand, Shri Rajeev Shrivastava, learned counsel appearing for respondents No. 2 to 24 contended that the instant writ petition is not maintainable, as the order impugned is appealable u/s 30 of the Workmen's Compensation Act, 1923 (for short "the Act, 1923") read with Section 63 of the Act, 1958, which specifically provides that the provisions of Workmen's Compensation Act and the rules made thereunder shall mutatis mutandis apply to every employee of an establishment under the Act. He further argued that the Tribunal on due appreciation of evidence available on record has held that the respondents, who are employees, are under the control of the petitioners. The establishment is a catering/restaurant, carrying on business of supply of meals or refreshment to a class of persons, which is an eating house as defined u/s 2(23) of the Act. The above finding is a finding of fact. In a petition under Article 226 of the Constitution of India, the High Court does not function as a Court of appeal. Interference can be made only where the finding is perverse. Jurisdiction under Article 226 can be exercised where the order is without jurisdiction, where power has been exercised in exercise of jurisdiction or the same has been exercised in flagrant disregard of law or rules or procedure or acting in violation of the principles of natural justice.

6. He vehemently argued that the provisions of Workmen's Compensation Act and the rules framed thereunder have been made mutatis mutandis applicable to every employee of an establishment. There is provision of appeal u/s 30 and, therefore, the same is also applicable and the petitioners could prefer appeal u/s 63 of the Act, 1958 read with Section 30 of the Act, 1923.

7. I have heard learned counsel for the parties. I have perused record of the Appellate Tribunal.

8. The questions for consideration in this petition are;-

(i) Whether the order of the Appellate Tribunal was appealable u/s 30 of the Workmen's Compensation Act?

(ii) Whether the petitioner establishment is a club for the purposes of Section 3(j) of the Act, 1958 or whether the establishment is a restaurant or eating house as defined in Section 2(23) of the Act, 1958, as held by the Appellate Tribunal?

9. The Act of 1958 has been enacted to provide for regulation of conditions of work and employment in shops, commercial establishments, residential hotels, restaurants, eating-houses, theaters, other places of public amusements or entertainment and other establishments. Section 58 deals with removal of an employee of an establishment. Section 58 of the Act, 1958 reads as under:

58. Notice of dismissal.--(1) No employer shall dispense with the services of an employee who has been employed for a period of three months or more except for a reasonable cause, and without giving such employee at least one month's notice or wages in lieu of such notice:

Provided that such notice shall not be necessary if the services of such employees are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an enquiry held by the employer for the purpose.

(2) (a) The employee discharged, dismissed or retrenched may appeal to such authority and within such time as may be prescribed either on the ground that there was no reasonable cause for dispensing with his services or on the ground that he had not been guilty of misconduct as held by the employer or on the ground that such punishment of discharge or dismissal was severe.

(b) the appellate authority may, after giving notice in the prescribed manner to the employer and the employee, dismiss the appeal or direct the reinstatement of the employee with or without wages for the period during which he was kept out of employment or direct payment of compensation without reinstatement or grant such other relief as it deems fit in the circumstances of the case.

(3) The decision of the appellate authority shall be final and binding on both the parties and be given effect to, within such time as may be specified in the order of the appellate authority.

10. Bare reading of Section 58 makes it abundantly clear that it provides for a procedure to be followed for dispensing with the services of an employee who has been employed for a period of 3 months or more. It also provides for remedy of appeal u/s (2)(a) to such employee who is discharged, dismissed or retrenched by an establishment and the procedure that is to be followed by the

Appellate Authority and also powers of Appellate Authority while deciding appeal. Sub-section (3) of Section 58 makes the decision of the Appellate Authority final and binding on both the parties. Thus, from perusal of the provision contained in Section 58 of the Act, 1958, it is manifestly clear that the provision is a complete code in the matters of discharge or dismissal or retrenchment of an employee of an establishment and the order passed by the Appellate Authority is final and binding on the parties.

11. In the matter of Prahlad Sharma Vs. State of U.P. and Others, dealing with import of expression *mutatis mutandis* it has been held that the expression "*mutatis mutandis*" itself implies applicability of any provision with necessary changes in points of detail. The rules which are adopted, as has been done in the present case, make the principles embodied in the rules applicable and not the details pertaining to particular authority or things of that nature.

12. In the instant case, in view of the express provisions in sub-section (3) of Section 58, decision of the appellate authority has been made final and binding upon the parties, question of filing appeal u/s 30 of the Workmen's Compensation Act with the aid of Section 63 does not arise. There is no force in submission of learned counsel for respondents that the petitioners have alternative remedy of appeal u/s 30 of the Workmen's Compensation Act.

13. The appellate Tribunal, referring to the bye-laws, has observed that plain reading of the rules undoubtedly shows that Club is an establishment within the meaning of Section 3(j) of the Act. However, on the basis of evidence of Pilambar Nayak, the witness examined by the respondent and Hemant Kumar Shukla, the witness examined by the petitioners, it has been held that the establishment is managed by the petitioners. Since food articles, liquor etc. are sold to the members of the Steel Club and as such, establishment is carrying on business of supply of meal and other edibles to the members who form class of a public and, therefore, establishment would be an eating house as defined u/s 2(23) of the Act and, therefore, the Act is applicable to the establishment. Club is not defined in the Act of 1958.

14. Halsbury, 4th Edn., Vol. 6, para 201, P. 56 defines Club as "Except a proprietary club or an investment club, it may be defined as a society of persons associated together, not for the purpose of trade, but for social reasons, the promotion of politics, sport, art, science or literature, or for any other lawful purpose; but trading, activities will not destroy the nature of a club if they are merely incidental to the club's purposes. Therefore, a club cannot be held to be a place of public entertainment even if the club supplies the goods to its members at a fixed price.

15. In the instant matter, it is not in dispute that the respondents, claiming themselves to be the employees of Steel Club, the Petitioner No. 2, filed an application before the Assistant Labour Commissioner against their illegal removal from services, thereafter they filed application u/s 58 of the Act, 1958

before the Appellate Tribunal claiming themselves to be the employees of the Steel Club, petitioner No. 2, an establishment of petitioner No. 1. The Appellate Tribunal, after extensively referring to the various provisions of bye-laws under which petitioner No. 2 has been constituted, has observed that as per the bye-laws, establishment in question is undoubtedly a Club as defined u/s 3(j). However, on the basis of oral evidence available on record, it has been further held that the respondents are employees of petitioner No. 2. The establishment is engaged in supply of meals, liquor and other edibles goods on payment to a class of persons i.e. members of the club and, therefore, establishment falls within the definition of "restaurant" or "eating house" as defined in Section 2(23) of the Act, and therefore, the provisions of the Act are attracted.

16. Section 3 exempts certain persons and establishments from application of the Act. Section 3 sub-section (j) exempts clubs not being a residential clubs from the application of the Act. There is no evidence available on record that petitioner No. 2 is a residential club. Even the Appellate Tribunal has not held that petitioner No. 2 is a residential club. It is neither a proprietary club nor any investment club. As per the bye-laws available on record, officers of the Bhilai Steel Plant, MECON, HSCL, BRP and SAIL are eligible to be the members of the club on payment of prescribed admission and monthly fee. The discretion is reserved to the governing body to admit other class of persons to induct as associate members of the club subject to payment of prescribed fee. Apart from above 2 clauses, temporary membership can be granted to the foreigners connected with Bhilai Steel Plant for a limited period. Entry in the club premises is restricted to its members and other persons authorized by the governing body. The aims and objectives as contained in clause 2 of the bye-laws are to provide the members and their families with facilities usually obtainable in clubs of this nature including indoor games, outdoor games, library, reading room, social gathering and to provide necessary facilities for their cultural, social and intellectual advancement-Learned Appellate Tribunal referring to Section 2 of the bye-laws of the establishment has observed that there is no mention of any eating house or catering to the extent of providing liquor or food requiring considerable work force, therefore, it has held that existence of restaurant is not in accordance with bye-laws.

17. In the considered opinion of this Court, the above finding of the appellate Tribunal is perverse, as in sub-clause (1) of clause 2 of the bye-laws, it has been specifically mentioned that the aims and objectives of the Steel Club are to provide to its members and their families with the facilities usually obtainable in clubs of this nature including other aims and objectives mentioned in subsequent part of clause 2, Existence of catering facilities in the club to its members alone would not convert the establishment into restaurant or eating house. The Steel Club is entitled for exemption from the application of the Act 1958, as per the provisions of Section 3 (j) of the Act.

18. Steel Club, petitioner No. 2, in view of the services rendered to its members,

may be held to be industry as defined u/s 2 (f) of the Industrial Dispute Act, as has been held in the matter of Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, and the respondents may be held to be its employees. However, the provisions of the Shops and Establishments Act cannot be made applicable to such Steel Club in view of exemption available u/s 3 (j) of the Act.

19. For the aforesaid reasons, the application of the respondents u/s 58 sub-section (2) of the Act against their removal from services before the Appellate Authority was not maintainable. Petitioner No. 2 club not being a residential club, the provisions of the Act were not applicable as per Section 3(j) of the Act.

20. In the result, the petition is allowed. The impugned order dated 18-1-2002 passed by the Appellate Tribunal is set aside. No orders as to costs.