

(2016) 09 OHC CK 0021
In the Orissa High Court
Case No : W.P.(C) No. 8393 of 2007

Pranab Ku. Acharya

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 14-09-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10(1), Section 12(4)

Citation : (2017) 152 FLR 929 : (2017) 152 FLR 721 : (2017) 1 LLJ 297

Hon'ble Judges : Kumari Sanju Panda and Shri Sujit Narayan Prasad, JJ.

Bench : Division Bench

Advocate : M/s. S.D. Das, H.S. Satapathy, A.N. Sahu, M. Panda, M.M. Swain, C. Biswal and H.K. Behera, Advocates, for the O.P. 2; M/s. B.S. Tripathy-1, J. Mohanty, A. Mishra and L.M. Patra, Advocates, for the Petitioner; Addl. Govt. Advocate, for the O.P. 1

Final Decision : Disposed Off

Judgement

Mr. S. N. Prasad, J. - This writ petition is against the order dated 7.12.2002 (Annexure-3) and 7.1.2004 (Annexure-6).

2. The fact leading to this case is that the petitioner was working under Krushna Chandra Memorial Trust which was established by one Krushna Chandra Tripathy to provide cooked food to destitute persons with free medical service. The aims and objectives as per Memorandum of

Association and for fulfilling the aforesaid aims and objectives, the management has engaged several employees including the petitioner, who had joined service in the year 1990 and continued to render his service till 25.02.1997, the date on which he was illegally been retrenched from service.

3. Being aggrieved, the petitioner has raised an industrial dispute, which was the subject matter in I.D. Case No.35 of 1998 before the Presiding Officer, Labour Court, Jeypore, Koraput and finally an award was passed on 20.07.1999 in which

the reference was allowed and the petitioner as workman therein directed to be reinstated in service with full back wages within three months from the date of award become enforceable.

4. Being aggrieved with the award, the management approached this Court by filing writ petition being OJC No.14061 of 1999 which was finally dismissed.

The petitioner was reinstated and thereafter he has filed series of representations seeking appropriate scale of pay but no response, the petitioner was denied his legitimate wages and salary which has been brought to the notice of the management. The President of the Management has issued notice on 7.12.2002 informing closure of the establishment on the plea of dearth of work as per the resolution dated 5.12.2002 and in the said notice of closure, the employees were requested to receive their service dues on 06.12.2002 at the office. It was further indicated that one month notice pay was paid in lieu of notice.

5. Aggrieved by the said illegal notice of closure, the petitioner on 09.12.2002 has made complaint before the Asst. Labour Commissioner, Jeypore, pursuant to which conciliation proceeding was initiated and on 3.4.2003, the management filed its counter statement stating therein that since Bank interest has come down to 6.5%, the management has decided to cut-short the expenses and accordingly the management had closed down the establishment w.e.f. 6.12.2002 and accordingly due information was given to the employees. So far as the petitioner is concerned, it is indicated that he did not come to receive the benefit of closure and also refused twice to receive the dues, hence the provision of Section 25F of the Industrial Disputes Act, 1947 (in short "the I.D. Act") is not applicable in the facts and circumstances of this case.

6. The Asst. Labour Commissioner finally has given a failure report on 21.05.2003 under Section 12(4) of the I.D. Act indicating that the opposite party no.2 continues to operate as usual and the management had not recruited any new workmen so far and in the subsequent letter dated 5.8.2003, the District Labour Officer, Jeypore had requested the Labour Commissioner, Orissa to refer the matter to the Government.

7. The petitioner has received a communication dated 07.01.2004 from the Under Secretary to Government, Labour and Employment Department by which the petitioner has been informed that the State Government has decided that there exists no cause for reference since the workman has refused to receive the legal dues offered by the management after closure of the undertaking/ establishment w.e.f. 06.12.2002.

8. Grievance of the petitioner is that the decision taken by the Conciliation Officer under Annexure-6 is bad in the eye of law as because under the provision of Section 12(5) of the I.D. Act, the appropriate Government if satisfied that there is a case for reference to a Board, it may make such reference and where the appropriate Government does not make such a reference it shall record and

communicate to the parties concerned its reasons thereof. According to the petitioner, the matter regarding closure of the establishment as to whether in consonance with the provision as contained in Section 25(o) of the I.D. Act, 1947 or not, needs adjudication and for that reference ought to have been made by the appropriate Government under Section 12(5) of the I.D. Act, 1947, instead of closing the entire issue for all the time to come.

9. The management has been represented by the learned senior counsel, Mr. S.D. Das and his associates who has submitted that since the unit has been closed, hence referring the matter before the Tribunal will only be a futile exercise and sheer wastage of valuable time of the Court, hence there is no infirmity in the order as contained in Annexure-6.

It has further been submitted that even from perusal from Annexure-5, it is evident that the closure compensation has been offered to all the workmen including the petitioner but the petitioner has refused to accept it, hence it cannot be said that there is no appropriate compliance of the statutory provisions before closure of the establishment and in view thereof, the petitioner cannot challenge the order as contained in Annexure-6.

10. We have heard learned counsel for the parties at length and on perusal of the material available on record, it is evident that the petitioner on earlier occasion has raised a dispute against his termination and the same was answered in his favour which was challenged before this Court and this Court has also found no illegality, thereafter the petitioner was reinstated in service. From the date of reinstatement, the petitioner has emphasized upon for disbursement of his legitimate dues but on one pretext or the other, the same has not been released and ultimately he has raised a dispute before the competent authority, when he has received a communication as contained in Annexure-6, he came to know that the establishment has been closed and hence reference has been refused to refer before the appropriate government for its adjudication.

11. In the facts and circumstances of this case, it is relevant to deal with the provision of Section 12 that contains the power of the Conciliation Officers which is being reproduced herein below:-

"Sec.12. Duties of conciliation officers.- (1) Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to public utility service and a notice under section 22 has been given, shall hold conciliation proceedings in the prescribed manner.

(2) The conciliation officer shall, for the purpose of bringing about a settlement of the dispute, without delay, investigate the dispute and all matters affecting the merits and right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.

(3) If a settlement of the dispute or of any of the matters in dispute is arrived at

in the course of the conciliation proceedings the conciliation officer shall send a report thereof to the appropriate Government (or an officer authorised in this behalf by the appropriate Government) together with a memorandum of the settlement signed by the parties to the dispute.

(4) If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.

(5) If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor.

(6) A report under this section shall be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government."

12. On failure of the conciliation report, the appropriate Government is supposed to make reference under the provision of Section 10 of the Industrial Disputes Act for its adjudication. The specific plea has been taken by the management that the factory since been closed as such there is no need to refer the dispute before the appropriate court of law, but this argument is not acceptable for the reason that the method of closure has been provided under the statute under the provision of Section 25(o) and it is only if the procedure laid down under Section 25(o) will be followed then only it will be said that the establishment has been closed down.

13. The petitioner has raised dispute but the conciliation having failed accepting the plea of the management that the establishment has been closed so, there is no need to refer the dispute before the appropriate court of law, but according to us the dispute has ought to have been referred to the appropriate Government in exercise of power conferred under Section 10 of the I.D. Act in order to adjudicate the fact as to whether closure of an undertaking was in consonance with the provision of Section 25(o) or not?

14. For deciding the issue regarding the closure of the establishment, the matter needs to be referred before the appropriate forum for its adjudication by leading evidence on behalf of the parties and if the finding would be given against the closure, then certainly the workman will have a case but the fact remains it has to be adjudicated.

15. Thus, in this case before adjudicating the issue the dispute has been closed

down which cannot be said to be a justified decision of the appropriate Government, even otherwise also Section 10(1), the authoritative pronouncement in this regard having been mentioned, which is being reproduced herein below for ready reference:-

"10. Reference of disputes to Boards, courts or Tribunals-

(1) Where the appropriate government is of opinion that any industrial dispute exists or is apprehended, it may at any time], by order in writing-

(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:

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):

(Provided that where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do. make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced:

(Provided also that where the dispute in relation to which the Central Government is the appropriate government, it shall be competent for that government to refer the dispute to a Labor Court or an Industrial Tribunal, as the case may be, constituted by the State Government]

(1A) Where the Central Government is of opinion that any industrial dispute exists or is apprehended and the dispute involves any question of national importance or is of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by, such dispute and that the dispute should be adjudicated by a National Tribunal, then, the Central Government may, whether or not it is the appropriate government in relation to that dispute, at any time, by order in writing, 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 National Tribunal for adjudication.]"

Section 10(1) starts with the words "if any industrial dispute exists or is apprehended" then the appropriate government may refer the dispute before the appropriate authority for its adjudication. Scope of section 10(1) of the Industrial Disputes Act, 1947 has been discussed by the Hon'ble Supreme Court in the case of *State of Madras v. CP Sarathy*, (1953) 1 LLJ 174(SC) wherein their Lordships have been pleased to lay down the following propositions:-

- (i) the government should satisfy itself, on the facts and circumstances brought to its notice, in its subjective opinion that an 'industrial dispute' exists or is apprehended;
- (ii) the factual existence of a dispute or its apprehension and the expediency of making reference are matters entirely for the government to decide;
- (iii) the order making a reference is an administrative act and it is not a judicial or a quasi-judicial act; and
- (iv) the order of reference passed by the government cannot be examined by the High Court in its jurisdiction under Article 226 of the Constitution to seek if the government had material before it to support the conclusion that the dispute existed or was apprehended.

In another judgment rendered by the Hon'ble Apex Court in the case of *Western India Match Co. v WIMCO Workers' Union*, AIR 1970 SC 1205, wherein it was so held presumably because the government cannot go into the merits of the dispute, its function being only to refer such a dispute for adjudication so that the industrial relations between the employer and his employees may not continue to remain disturbed and the dispute may be resolved through a judicial process as speedily as possible.

In another judgment rendered by the Hon'ble Apex Court in the case of *Sambhu Nath Goyal v. Bank of Baroda*, AIR 1978 SC 1088, while discussing the scope of Section 10(1) of the Industrial Disputes Act, 1947, the court pointed out that the power conferred on the government by this provision to refer the dispute can be exercised only when there is an existing or apprehended industrial dispute.

In *Telco Conveyors Drivers Mazdoor Sangh v. State of Bihar*, reported in (1989)3 SCC 271, it has been held at para-13 by Hon'ble Apex Court which reads here under as:

"Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power under Section 10(1) of the Act, the function of the appropriate government is an administrative function and not a judicial or quasi-judicial function, and that in performing this administrative function the government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act."

In the case of *Anz Grindlays Bank Ltd. v. Union of India*, reported in (2005) 12

SCC 738 wherein at paragraph-14 the Apex Court has held that:

"Mr Bhat, learned Counsel for the second respondent, has submitted that this Court should not interfere with the order of the Central Government making a reference under Section 10 of the Act, as the appellant can ventilate its grievances before the Industrial Tribunal itself and if the decision of the Tribunal goes against the appellant, the same may be challenged in accordance with law. According to learned counsel the writ petition is premature as the appellant has got a remedy before the Tribunal to show that the reference is either bad in law or is uncalled for. We are unable to accept the submission made. It is true that normally a writ petition under Article 226 of the Constitution should not be entertained against an order of the appropriate Government making a reference under Section 10 of the Act, as the parties would get opportunity to lead evidence before the Labour Court or Industrial Tribunal and to show that the claim made is either unfounded or there was no occasion for making a reference. However, this is not a case where the infirmity in the reference can be shown only after evidence has been adduced. In the present case the futility of the reference made by the Central Government can be demonstrated from a bare reading of the terms of the reference and the admitted facts. In such circumstances, the validity of the reference made by the Central Government can be examined in proceedings under Article 226 of the Constitution as no evidence is required to be considered for examining the issue raised."

16. There is no dispute about the fact that the industrial dispute is a piece of beneficent legislation and it has been promulgated for redressal of dispute relating to workmen and for that purpose Tribunal or Labour Court have been created in order to settle the dispute. For settlement of dispute when any dispute is being raised the first process is go for conciliation and if settlement has not been arrived at in course of conciliation proceeding, the Conciliation Officer in contemplation of power conferred under section 12(4) will submit failure report before the appropriate government and the appropriate government in exercise of power conferred under section 10(1) of the Industrial Disputes Act, 1947 is empowered to refer the dispute before the Labour Court or the Tribunal by making proper reference, meaning thereby the Reference since been based upon complex questions of facts and law and as such the dispute is to refer before the Tribunal or Labour Court for its adjudication by leading evidence in this regard by the parties. If at the threshold the Reference would be quashed by High Court sitting under Article 226 of the constitution or India the matter would be said to be thrown out before its initiation and certainly it would not be proper for the reason that if any dispute is being raised by any of the parties it has to be answered by proper adjudication.

17. In view of this authoritative pronouncement and in view of the discussion made by us herein above, the order as contained in Annexure-6 is not sustainable in the eye of law and accordingly, the same is quashed with the direction upon the appropriate Government to refer the dispute before the

competent court of law having its jurisdiction by making a proper reference within a reasonable period preferably within two months from the date of receipt of copy of this order. Accordingly, the writ petition is disposed of.