
(1996) 05 AHC CK 0166
In the Allahabad High Court
Case No : C.M.W.P. No. 4068 of 1981

Triloki Nath and Sons, Iron Foundry

APPELLANT

Vs

Chhedi Lal and Others

RESPONDENT

Date of Decision : 16-05-1996

Acts Referred:

Industrial Disputes (Central) Rules, 1957 — Rule 4, 4(1), 4(2), 4(3), 4(4)
Uttar Pradesh Industrial Disputes Act, 1947 — Section 2A, 4K, 5D

Citation : (1996) AWC 629 Supp

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : K.G. Srivastava, for the Appellant; G.C. Gahrana and S.C., for the Respondent

Final Decision : Dismissed

Judgement

D.K. Seth, J.—The Petitioner's case in the present writ petition inter alia is that the Respondent No. 1 workman worked upto 12.4.1978 in the Petitioner foundry and thereafter had voluntarily abandoned the employment and did not report for duty any further. On the allegation that the workman was not allowed to Join his duties w.e.f. 13.4.1978, the workman had raised a dispute which was referred to the Conciliation Officer. On 29.5.1978, the Petitioner Issued a registered letter to the workman asking him to report for duty. A copy of the said letter which is Annexure 1 to the writ petition was also forwarded to the labour court. Despite another registered letter to the same effect sent on 16.6.1978 to the workman the latter did not join. Pursuant to the dispute the Labour Commissioner proceeded with the conciliation proceeding numbered as C. B. Case No. 1685 of 1979. in which the Petitioner had appeared. The said conciliation proceeding ultimately was dismissed for default on 26.2.1980. On 10.12.1980, the Petitioner received by post a copy of the award given ex parte by the labour court passed on 8th October, 1980 which is Annexure 3 to the writ petition. Upon Inspection it was discovered that, though. in the order-sheet of the said disputed case which was registered as adjudication Case No. 132 of 1980, It was recorded that the

service was effected but no counter-foil of the summons as issued to the Petitioner was available on the record. Relying on the order-sheet which is Annexure 2 to the writ petition, in the adjudication Case No. 132 of 1980, the Petitioner contends that no summons were ever served upon Petitioner. It has been specifically assailed that the notice of the said case was never served upon the Petitioner. The said award has also been challenged on the ground that the Government Order dated 25th September, 1977 does not apply to the Petitioner's foundry which employees less than 25 workers Inasmuch as the said Government Order applied in foundries where there are less than 50 workers but more than 25 workers. Therefore, the said award cannot be sustained. On these grounds the Petitioner has assailed in the said award dated 8th October, 1980 (Annexure 3). Mr. K. G. Srivastava, learned Counsel for the Petitioner contends that since there was no conciliation proceeding and, therefore, there cannot be the question of failure report and as such no reference could be valid in the absence of failure report by the Conciliation Officer to the State Government inasmuch as without the same State Government cannot satisfy itself about the existence of any dispute. Secondly, he contends that since no notice was ever served upon the Petitioner, the entire proceedings have been proceeded ex parte, is Invalid and the resultant award cannot be sustained. He contends further that there is nothing to show that summons were duly served on the Petitioner. He contends further that even on merit the labour court has not considered the question properly as to whether the cessation of employment of the workman was a termination or abandonment. He contends further that since the Government Order referred to above does not apply in case of the Petitioner, the labour court could not have passed the award.

2. Mr. G. C. Gahrana, learned Counsel for the Respondent No. 1 on the other hand contends that after the order dated 26.2.1980 was recorded in the conciliation proceeding the workman had appeared and had filed his written statement. Therefore, the conciliation proceeding did not come to an end. He contends further that on 26.2.80, the Petitioner was not present, therefore, on account of non-participation of the Petitioner the conciliation having failed, the same amounts to a failure report on the basis whereof State Government has every right to make a reference. Therefore, there is no invalidity in the order of reference. He contends further by order dated 4th September, 1980 passed by the labour court in the said adjudication case before the labour court, the service upon the Petitioner has been accepted to have been made and the Petitioner having chosen not to appear, despite service he cannot complain of ex parte proceeding. According to him on merits it is finding of the labour court on fact which cannot be interfered with in exercise of writ jurisdiction. He contends further that the said Government Order very much applied to the Petitioner's foundry because it applied to all foundries where there are less than 50 workers. The minimum of 25 is wholly misconceived because nothing contained in the said Government Order supports the contention of the Petitioner. Therefore, the writ petition should be dismissed.

3. After having heard Mr. Srivastava, Mr. G. C. Gahrana, and Mr. Nurul Huda, admitted facts remains that by order dated 26.2.1980, the conciliation proceeding had ended in the absence of both the parties. But my attention is drawn to a subsequent order of the same date where it has been noted that the written statement was filed by the workman and, therefore, the proceeding was concluded according to the same. It does not appear from the said order-sheet that the first order dated 26.2.80 was ever recalled. The said first order stares on the fact of the second order dated 26.2.80. Unless the first order dated 26.2.1980 is recalled, the second order could not have been passed. Even then after the first order dated 26.2.80 is passed, if it is recalled, in that event, the Petitioner should have been given an opportunity. Even assuming that since the Petitioner was absent, therefore, he is not entitled to notice, then also there being no order of recalling the subsequent order is contradictory. Unless the first order is recalled, the Conciliation Officer loses his jurisdiction to record the second order. Moreover, the second order also speaks of the conclusion of the proceeding on the basis of the written statement filed by the workman. The date 26.2.1980 appears to have been fixed for filing reply by the Petitioner. The conciliation proceeding was initiated on 4.2.1980 and continued till 26.2.80. It does not appear from the order-sheet that prior to 26.2.1980 workman had filed by written statement. It is also not mentioned as to whether the workman had furnished a copy of the written statement upon the Petitioner. From the said order-sheet It does not appear that any failure report was ever submitted. The conciliation proceeding as contemplated in Section 5D of the U.P. Industrial Disputes Act, provides making of enquiry vested with the same power of the civil court. The procedure have been provided in Rule 4 of the U.P. Industrial Disputes Rules. But it does not appear that the conciliation was carried on according to the procedure laid down in Rule 4 of the said rules.

4. Now the question arises whether in the above circumstances, the reference can be said to be bad on account of non-compliance of Sub-rules (1), (2), (3) and (4) of Rule 4 of the said rules or in other words the State Government is empowered to make the reference on the face of such a conciliation proceeding. Mr. Gahrana relies on the decision in the case of Western India Match Co. Ltd. Vs. The Western India Match Co. Workers Union and Others, , in order to contend that it is not necessary that there must be a failure report by the conciliation officer. Even without the failure report the State Government is empowered to make a reference. It is the decision of the Government which it takes on the basis of the materials placed before it upon satisfaction as provided in Section 4K of the said Act.

5. No case has been made out to bring the case within the ambit of the exceptions provided in the said judgment. It is not a case that there was any urgency due to which the reference was made without awaiting for conciliation. It is also not a case that there was cogent reason or not for non-conclusion of the conciliation and that such conclusion was being delayed. Such a reference without the conciliation is to be made in extraordinary cases not in ordinary

cases as has been held in the said case of Western India Watch Company (supra) wherein it has been laid down "ordinarily the question of making a reference would arise only after conciliation proceedings have been gone through and the Conciliation Officer has made a failure report." While dealing with Section 4K of the U.P. Industrial Dispute Act, after having held as above, exceptions were mentioned in the following expression. "But the Government need not wait until such a procedure has been completed. in an urgent case, it can at any time even when such proceedings have not begun or still pending, decide to refer the dispute for adjudication." Therefore, a reference is competent even without a failure report where no conciliation proceeding has been initiated or has not yet been completed. The power of State Government to refer is there. But in the present case, nothing has been shown as to whether there is any failure report or not. On the other hand Mr. Gahrana contends that non-participation of the Petitioner itself indicates failure of the conciliation. Inasmuch as conciliation is a settlement which can be brought about through negotiations between the parties, through the good office of the Labour Commissioner. Absence of one itself indicates to be a failure of conciliation. He further contends that after the conclusion of the conciliation proceeding as aforesaid the Conciliation Officer must have submitted a failure report on the basis whereof the reference was made. The burden of proof lies on him who assails the existing fact as apparent from the record. It was the Petitioner who should have shown to this Court that there was no failure report. But the Petitioner has not asked for calling for the records of reference at any point of time. The record is also not before this Court. A Government Order or action shall be presumed to have been correct and according to the provisions contained in the Statute unless contrary is proved. in the absence of any proof of contradiction, It is to be presumed that the Government action has been taken properly, namely, that the Conciliation Officer had forwarded his failure report. The non-participation of the Petitioner indicates that there was a failure of conciliation. It is not the case of the Petitioner that he did not have any notice of the conciliation proceeding.

6. The reference cannot fall in view of the decision in the case of Shambu Nath Goyal Vs. Bank of Baroda, , wherein it has been held that Government can refer a dispute not only where industrial dispute exists but when it is apprehended. In the case of Ram Krishna Mills v. Government of Tamil Nadu. 1985 (2) LU 259 , it has been held that a reference can be made even before receiving the report of conciliation. In the case of Jaslok Hospital and Research Centre Vs. Industrial Tribunal and others, , it has been held that reference can be made even without initiating conciliation proceedings. Irregularity or infirmity in the order of reference does not invalidate the reference in every case.

7. The Court should not permit an industrial dispute to fail on technical grounds of irregularity committed by State Government in making the reference u/s 4K of the U.P. Industrial Disputes Act. The broad basis for invoking writ jurisdiction is guided by the rules of equity. It is not every irregularity which the Court will interfere having regard to the ends of justice. In the case of Elgin Mills Company

Ltd. v. Labour Court-II, U.P. Kanpur 1992 AWC 1161, this Court refused to interfere with the award made upon a reference of an industrial dispute made u/s 4K of the U.P. Act when provision in the nature of Section 2A of the Industrial Disputes Act, 1947 was not available despite the fact that technically the reference was incompetent.

8. So far as the question of ex parte proceeding is concerned, It appears that there has been a record of service that the service was effected. On the face of the said order, it cannot be said that there was no service of summons upon the Petitioner. The Petitioner had made statement in the writ petition to the effect that, though, service was recorded to have been effected on the Petitioner but the record did not contain any counter-foil of summons. The Petitioner has not taken steps for calling for the records to substantiate his contention. The burden was on the Petitioner to prove that the apparent is not the real. When the Petitioner himself contradicts the record, it is for him to show that the contradiction is correct. It does not appear that the Petitioner had taken any step to call for the record. Even in the writ petition, no such prayer was made for calling for the records, neither any steps were taken for securing production of the records.

9. In the circumstances, it is extremely unsafe to accept the contention of Mr. Srivastava. On the face of the record that summons were not served on the Petitioner. It is very difficult to draw presumption that no summons were served on account of conspicuous absence of the Petitioner in the proceeding throughout. It would be a dangerous proposition for a writ court to accept such a contention because the same is based on presumption. The writ Court is not supposed to undertake an exercise for finding of the facts or place itself in the realm of belief or disbelief for ascertaining certain facts. Such an exercise should be avoided while exercising writ Jurisdiction.

10. In that view of the matter, I am unable to accept the contention of Mr. Srivastava on this account.

11. So far as the question as to whether the workman had abandoned his service or he was terminated as have been found by the learned labour court is concerned, is a pure question of finding of fact with which this Court is very slow to Interfere.

12. Whether the Government Order dated 25th September, 1977 applies or not can be gone into by examining a copy of the said Government Order. A copy of the Government Order has been made available before the court by Mr. Huda. A perusal of the said Government Order dated 25th September, 1977 shows that the minimum wages were fixed for foundry workers. Therefore, the said Government Order is very much applicable to a foundry. Therefore, the contention of Mr. Srivastava to the contrary cannot be accepted.

13. It is contended by Mr. Srivastava that even despite order passed in writ petition, pursuant to which the Petitioner gave notice to the workman, the

workman has Joined the service only for three days and then again abandoned his service.

14. It is further contended that the said information was sent to the Labour Commissioner with the allegation that the workman had been working in another organisation. The Labour Commissioner submitted a report after enquiry which is Annexure RA-4 to the rejoinder-affidavit where he has recorded that the workman has not been attending his duty though repeated requests were made.

15. If that be so, in that event, the same question can be raised when the award would be sought to be implemented that the award is not executable because the workman himself has refused to Join duty despite the award and that he was engaged elsewhere was the reason for refusal to Join and, therefore, he is not entitled to any benefit of the award. If such question is raised, then the same should be gone into at appropriate stages in appropriate forum by the parties concerned. The said question cannot be decided within the ambit of the present case.

16. For the above reasons, I am unable to persuade myself to accept the contention of Mr. Srivastava. For all these reasons, the writ petition fails and is accordingly dismissed. There will, however, no order as to costs.