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(2016) 09 OHC CK 0031

ORISSA HIGH COURT

Case No: Writ Petition (C). No. 11766 of 2012

The Management of Chemflo Industries (India) Pvt. Ltd.		APPELLANT
	Vs	
Sri Sahadev Pandav		RESPONDENT

Date of Decision: Sept. 1, 2016

Acts Referred:

- Constitution of India, 1950 - Article 226
- Industrial Disputes Act, 1947 - Section 10, Section 25F

Citation: (2017) 153 FLR 90 : (2016) 4 LLN 759

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

Bench: Division Bench

Advocate: M/s Sidharth S. Mohapatra, P. Mohapatra and P.K. Hazary, Advocates, for the Petitioner; M/s. P.K. Padhi, A.K.M. Johanty and P.K. Kar, Advocates, for the Opposite Parties

Final Decision: Dismissed

Judgement

S.N. Prasad, J. - This writ petition is against the award dated 8.5.2012 passed by the Presiding Officer, Industrial Tribunal, Bhubaneswar in Industrial Dispute Case No.4 of 2011, whereby and where under the reference has been answered in favour of the opposite party-workman by directing the petitioner-Management to pay compensation of Rs.1,50,000/-. In the award, the following reference has been made:

"Whether the action of the management of M/s Chemflo Industries(India)Pvt.Ltd., in terminating the services of Sri Sahadev Pandab w.e.f. 4.10.2008, ex-Sales Executive is legal and/or justified ? If not, what relief Sri Pandab is entitled to ?"

2. Case of the petitioner-Management that there is relationship of employer-employee between the parties. Opposite party-workman was never appointed as an employee. He was engaged by the petitioner-Management on

commission basis to collect credit from different dealers and as such he cannot be said to be workman within the meaning of the Industrial Disputes Act and as such the opposite party-workman is not entitled for any relief.

3. While on the other hand, case of the opposite party-workmen is that he had been working as Sales Executive in the establishment of the first party since August,2003 with a monthly salary of Rs.5000/- which was revised from time to time and on the last date of his work he was getting Rs.5550/- per month. The principal work he used to perform was clerical in nature. He used to collect sale proceeds from different parties to deposit in the bank account of the petitioner-Management. While performing his duties he met with an accident on 30.7.1008 and remained under medical treatment for a period of about two months, but after his discharge from hospital when he resumed duties on 4.10.2008 the petitioner-Management refused employment to him, neither any disciplinary action has been initiated against him nor was he served with any notice under section 25-F of the Act, hence termination of service of the opposite party-workman is illegal and unjustified and he is entitled to be reinstated with back wages.

4. In order to appreciate rival submissions of the parties, the following three issues have been formulated.

1) Whether the action of the management of M/s Chemflo Industries(India) Pvt. Ltd., in terminating the services of Sri Sahadev Pandab w.e.f. 4.10.2008, Ex-Sales Executive is legal and/or justified ?

2) If not, what relief Sri Pandab is entitled to ?

3) Whether there exists employer-employee relationship between the parties.

5. Both the parties have examined their witnesses and exhibited their documents before the Tribunal. Petitioner-Management had disputed the relationship of employer-employee between the parties, while on the other hand, opposite party-workman has deposed that he was an employee of the petitioner-Management and was getting salary month to month basis subject to enhancement and the same was also enhanced from Rs.5000/- to Rs.5550/- per month, although he was designated as Sales Executive but he was doing duties of a clerk.

We find that the Tribunal in order to prove whether the opposite party-workman was working as Sales Executive, has relied upon documents which suggests that he was getting monthly emoluments, salary certificate produced by the opposite party-workman are exhibited as Exts. 1 and Ext.1/1. Ext.1 which was issued on 19.7.2004, reflects that the opposite party-workman was working under the petitioner-Management establishment as Sales Executive, used to get monthly emoluments of Rs. 5000/-. Ext.1/1 which was issued on 10.1.2006 reflects that the monthly emoluments of the opposite party-workman was subsequently revised to

Rs.5,250/-.Management Witness No.1 has admitted to have issued these salary certificates but with a suggestion that the salary certificates were issued on the request of the opposite party-workman only to facilitate him to get bank loan and as such these certificates cannot be taken as evidence to substantiate that the opposite party-workman was working in the regular capacity under the petitioner-Management. Salary certificates have been issued by the Director, one in July, 2004 and the other is in January, 2006 wherein opposite party-workman has been shown to be Sales Executive working under the petitioner-Management on getting monthly emoluments and putting reliance upon these two exhibits the Tribunal has answered the issue no. 3 holding therein that there exists relation of employer-employee between the parties. The Tribunal has not believed on the suggestions of the petitioner-management and rightly not relied for the reason that purpose may be other but fact remains that certificate issued to show that the workman has been paid salary, so merely on account of other purpose the certificate of salary cannot be disbelieved.

Thereafter, Issue Nos.1 and 2 has been answered by taking into consideration the fact that admittedly the opposite party-workman who met with an accident on 30.7.2008 and remained under medical treatment for about two months and after discharge from hospital when he resumed duties on 4.10.2008 he was not allowed to join. The fact about meeting with an accident has been found to be substantiated by putting reliance upon the medical expenses occurred in the treatment of the opposite party-workman. The Tribunal has taken into consideration Ext.2 and Ext.2/1 which reflects that he was directed to handover motorcycle along with helmet and key and other related papers on 22.10.2008. In the cross-examination Management Witness No.1 has stated that the workman has voluntarily did not come for work and taking into consideration these aspects of the matter the Tribunal has come to conscious finding that the opposite party-workman has been denied to resume his duties which amounts to retrenchment by way of refusal of employment. Before doing that, it was incumbent upon the petitioner-Management to follow provisions of section 25-F of the Act, but admittedly the same has not been followed and accordingly in spite of reinstatement, award of compensation to the tune of Rs.1,50,000/- has been passed.

6. Learned counsel for the petitioner-management has assailed the award on the ground that the Tribunal has not appreciated the fact that merely on the ground of submission of salary certificates it cannot be said that there is relationship of employer-employee, but this argument is not accepted to us for the reason that salary certificate is the basis of evidence for establishing the relationship of master and servant and admittedly the Director of the petitioner-management has issued salary certificates which goes to suggest that the opposite party-workman was working under direct control of the petitioner-management, which is sufficient evidence to prove master and servant relationship and after taking into these aspects of the matter the Tribunal has answered the specific issue framed in this

regard as Issue no.3 and answered the same in favour of the workman holding that there exists relationship of employer-employee between the parties. Since this issue has been answered based upon evidence of salary certificates, which has even been admitted by Management Witness no.1, hence we are not inclined to disturb that fact finding given by the Tribunal.

7. Since the issue regarding employer-employee relationship has been established in between the parties and the fact that the workman met with an accident has also been substantiated by providing sufficient evidence in this regard by the opposite party-workman and he was not allowed to resume his duties which amounts to retrenchment in service and once a conscious finding has been given in this regard, automatically provision of section 25-F will come into place which mandates that before termination or retrenchment of service of the workman, notice is required to be issued, for ready reference section 25-F of the Industrial Disputes Act,1947 is reproduced herein below:

"25F. Conditions precedent to retrenchment of workmen - No workman employed in any industry 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 one month''s 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;

(b) The workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days'' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

(c) Notice in the prescribed manner is served on the appropriate Government 3[for such authority as may be specified by the appropriate Government by notification in the Official Gazette]."

8. Although reference has been made to answer as to whether termination of the opposite party-workman is justified or not, but while dealing with the issue the Tribunal has taken note of the fact that Section 25-F of the Industrial Disputes Act,1947 does not mandatorily mandate reinstatement in service, rather it also mandates to compensate the workman in lieu of reinstatement and accordingly the Tribunal has awarded by directing to pay a sum of Rs.1,50,000/- by way of compensation in lieu of reinstatement with back wages in favour of the opposite party-workman.

9. We, after going through the award, is of the considered view that the same is in no way suffers with perversity, there is no error apparent on the face of the award and as such this Court, sitting under Article 226 of the Constitution of India by not assuming the power of appellate court, decline to interfere with the award since scope of High Court sitting under Article 226 is limited, reference in this regard

needs to be made of the judgment rendered by Hon''ble Apex Court in the case of **Syed Yakoob v. K.S. Radhakrishnan and others, AIR 1964 SC 477** wherein it paragraph 7 their Lordships have been pleaded to hold as follows:-

"7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of tact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the. Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was'' insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised."

10. The proposition laid down by the Hon''ble Apex Court in the case of Syed Yakoob (supra) still holds good since the same has been considered by Hon''ble Apex Court recently in the case of **M/s.Pepsico India Holding Pvt. Ltd. v. Krishna Kant Pandey, (2015) 4 SCC 270** wherein their Lordships while discussing the scope of Article 226 of the Constitution of India in the matter of showing interference with the finding of the Tribunal has been pleased to hold after placing reliance upon the judgment rendered in the case of **Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, (1986) 4 SCC 447** as follows:

"17. In case of finding of facts, the court should not interfere in exercise of its jurisdiction under Article 227 of the Constitution. Reference may be made to the observations of his Court in Bathutmal Raichand Oswal v. Laxmibai R. Tarta where this Court observed that the High Court could not in the guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the legislature has not conferred a right of appeal. The High Court was not competent to correct errors of facts by examining the evidence and re-appreciating. Speaking for the Court, Bhagwati, J. as the learned Chief Justice then was, observed at p. 1301 of the report as follows: (SCC p. 864, para 7)

"The special civil application preferred by the appellant was admittedly an application under Article 227 and it is, therefore, material only to consider the scope and ambit of the jurisdiction of the High Court under that article. Did the High Court have jurisdiction in an application under Article 227 to disturb the findings of fact reached by the District Court? It is well settled by the decision of this Court in Waryam Singh v. Amarnath that the ... power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in Dalmia Jain Airways v. Sukumar Mukherjee to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors.

This statement of law was quoted with approval in the subsequent decision of this Court in Nagendra Nath Bose v. Commr. of Hills Division and it was pointed out by Sinha, J., as he then was, speaking on behalf of the court in that case:

"It is thus, clear that the powers of judicial interference under Article 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the power under Article 226 of the Constitution. Under Article 226 the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Article 227 of the Constitution, the power of interference is limited to seeing that the tribunal functions within the limits of its authority."

11. There is no dispute about the settled proposition that this court sitting under Article 226 of the Constitution of India cannot act as a court of appeal to differ with the finding given by the Tribunal which is based upon cogent evidence and the materials placed before it subject to exceptions that if there is perversity in finding or there is error apparent on the face of record or order is without jurisdiction, but we find in this case that it is not coming under these exception warranting interference with the award.

12. Accordingly, we do not find merit in the writ petition, hence the same is dismissed.