

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.24229 of 2013

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Brij Bhushan Dwivedi, aged about 52 years son of late Gaugadhar Dwivedi, Hardev Niwas, House of Dr. Ranjan Kumar Singh, Shyam Mandir Road, New Bahadurpur, Patna-16

.... Petitioner/s

Versus

1. The State of Bihar through Secretary, Department of Labour, Govt. of Bihar, Patna
2. The Secretary, Department of Labour, Govt. of Bihar, Patna
3. Indo Hokke Hotel Pvt. Ltd. Through its Managing Director of Unit Rajgir Nalanda, Bihar
4. Managing Director, Indo Hokke Hotel Pvt. Ltd. DDA, Building a Bhikaji Gama Bhawan 11, Bhikaji Gama Palace, New Delhi-110066
5. Manager Indo Hokke Pvt. Ltd. Unit Rajgir, Nalanda (Bihar)- 803116.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Ajay Kumar Thakur, Adv.
Mr. Brij Bihari Tiwary, Adv.
Mr. Ajit Kumar, Adv.

For Respondent Nos. 3 to 5 : Mr. K. N. Gupta, Adv.

Mr. Pradeep Kumar, Adv.

For Respondent Nos.1 & 2 : Mr. Uday Prasad, A.C. to GP22

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

CAV JUDGMENT

Date: 08-01-2018

This writ petition has been filed by the petitioner for setting aside the order dated 25.09.2013 passed by the learned Presiding Officer, Labour Court, Patna in B.S.E. Case No. 1 of 2012 under Section 26 of the Bihar Shops and Establishments Act, 1953 (for short 'the Act') whereby and whereunder petitioner's application filed under Section 26(2) of the Act against his termination order by the Management has been rejected on the ground of non-maintainability. The petitioner has further prayed for his reinstatement in service along with back-wages with interest.



2. The admitted facts of the case are that the petitioner was appointed as an Accounts Assistant-cum-General Cashier with effect from 10.11.1984 by the Centaur Hokke Hotel, a single unit at Rajgir, Nalanda of Indo Hokke Hotels Limited, a subsidiary of Hotel Corporation of India Limited. The service of the petitioner was confirmed on the said post with effect from 01.05.1985 by the Centaur Hokke Hotel, Rajgir. He was promoted to the post of Front Office Receptionist with effect from 01.11.1987 and confirmed to the said post with effect from 01.05.1988. Subsequently, he was promoted as an Accountant with effect from 19.03.1997 and confirmed on the said post with effect from 19.09.1997. He was then promoted on the post of Assistant Manager (Accounts) with effect from 10.05.2001 vide order dated 11.05.2001.

3. On 26.03.2002, a share purchase agreement was signed between the Hotel Corporation of India Limited and M/s Inpac Travels (India) Pvt. Limited and Indo Hokke Hotels Limited for sale of shares of Indo Hokke Hotels Limited to M/s Inpac Travels India Pvt. Limited as per the decision conveyed by the Government of India. Thus, on 26.03.2002, the ownership of Indo Hokke Hotel Limited was taken over by M/s Inpac Travels India Pvt. Limited from Hotel Corporation of India Limited and accordingly the single unit Centaur, Rajgir of Indo Hokke Hotel Limited was privatized.



4. On 20.12.2010, a show cause notice was issued to the petitioner asking for reply regarding submission of forged medical bills, vide bill no.392 dated 26.04.2009 and bill no. 344 dated 10.04.2008 for reimbursement. Since the alleged act amounted to cheating, fraud, misappropriation and criminal breach of trust with employer, reply to the show cause notice had to be submitted as to why disciplinary action be not taken against him and the amount of medical bills reimbursed by the petitioner be not recovered from his salary. The petitioner replied to the show cause notice on 24.12.2010.

5. After having considered the show cause reply dated 24/12/2010, the management found the same unsatisfactory. Vide order dated 03.01.2011, the management informed the petitioner that a domestic enquiry has been initiated against him. He was asked to submit his opinion within three days of the receipt of the notice. Thereafter, the petitioner submitted his view, vide letter dated 07.01.2011, denying the allegations made against him. Thereafter, one man enquiry committee was constituted and the Enquiry Officer issued notice to the petitioner for participating in the enquiry before the said committee. The petitioner appeared before the Enquiry Officer on 26.02.2011 and asked for certain documents. Subsequently, after examination of witnesses, the Enquiry Officer held the petitioner guilty of the charges of reimbursement of forged medical bills. The



findings of the Enquiry Officer were handed over to the petitioner on 28.11.2011 and the petitioner was asked to submit his reply with respect to the findings. The petitioner submitted his reply on 17.12.2011 wherein he denied all the findings of the enquiry committee stating therein that the findings of the enquiry committee are mere an eye wash and the same has been carried out with sole intention to harass and humiliate the petitioner as the enquiry has been concluded contrary to the service norms and rules.

6. Having received the reply to the show cause notice after submission of enquiry report, the management terminated the service of the petitioner, vide order dated 19.01.2012, under the provisions of the Act read with the Bihar Shops and Establishment Rules, 1955 (for short 'Rules') holding him to be guilty of misconduct.

7. The said order of termination from service dated 19.01.2012 was challenged by the petitioner before the Labour Court, Patna, vide B.S.E. Case No. 1 of 2012.

8. The management raised a preliminary objection in the aforesaid B.S.E. Case No.1 of 2012 challenging the maintainability of the complaint case. It contended that the complaint is not maintainable under the provisions of the Act on the behest of the petitioner, who was admittedly posted and working as an Assistant Manager at the time of dismissal from service. The contention of the management



was that as the petitioner was holding a managerial post and was discharging managerial functions at the time when he was dismissed from service. It was contended that the Act does not contemplate the managerial rank person to be within the scope and ambit of an employee and, hence, the complaint filed by such a managerial rank person cannot be entertained and adjudicated under the provisions of the Act.

9. The Presiding Officer, Labour Court, having found merit in the objection raised by the management, rejected the complaint case, vide order dated 25.09.2013, holding the same to be not maintainable under the Act.

10. Being aggrieved by the aforesaid order dated 25.09.2013 passed by the Labour Court, Patna, the petitioner has filed the present writ petition.

11. Mr. A.K. Thakur, learned counsel appearing for the petitioner submitted that since the management itself held enquiry and passed an order of punishment in terms of the Act read with the rules and the punishment was recorded under the provisions of the Act, the Labour Court ought not to have entertained the preliminary objection raised by the respondent management. He submitted that if the Act was not applicable in the case of the petitioner then in that case the order of termination was also not in accordance with law and the said



order cannot be said to be a valid order. He submitted that the ground of maintainability taken by the management was based on certain casual appointments purposely done to maintain the record, which was also temporary in nature and by showing their appointment in the list of employees, such plea before the Labour Court was taken in order to frustrate the cause and, accordingly, the complaint preferred against the impugned termination order was turned down by the learned Presiding Officer by accepting the preliminary objection raised by the management. He submitted that the total number of employees from 01.04.2011 to 30.09.2011 was 14 whereas 17 new casual workers were employed with effect from 01.10.2011 to show that the petitioner was not covered within the definition of employee under the Act.

12. On the other hand, Mr. Pradeep Kumar, learned counsel appearing for the respondent nos. 3 to 5 (for short 'respondent management') submitted that the application filed by the petitioner under Section 26(2) of the Act has rightly been held to be not maintainable as the petitioner was not an employee, as such, B.S.E. Case No.1 of 2012 filed before the Labour Court was not maintainable and the same could not have been entertained for adjudication under that Act. He submitted that no writ of mandamus can be issued directing the respondents to reinstate the petitioner in



service as the validity of dismissal from service is not an issue in the writ petition. He submitted that the Labour Court upon analysis of submission etc. found that the petitioner falls under the exempted category as per Section 4(2) read with clause 5 of Schedule I of the Act and, thus, the Labour Court rightly upheld the preliminary objection raised by the respondent management regarding maintainability of the complaint and dismissed the complaint on the ground of maintainability.

13. I have learned counsel for the parties and perused the record.

14. The Act received the assent of the President on 17.3.1954 and is in force from 15.2.1955. The Act is a social piece of legislation of the State Government to regulate the condition of work and employment to secure maximum benefits to the employees working in different categories of establishment viz. shops, commercial establishments, residential hotels, restaurant, eating houses, theaters and other places of public amusements or entertainments. The employees are mainly protected by the provisions of this Act.

15. The word 'employee' has been defined under Section 2(4) of the Act, which reads as under :-

“Employee means a person wholly or partially employed for hire, wages including salary, reward, or commission in and in connection with any



establishment and includes 'apprentice' but does not include member of the employer's family. It also includes person employed in a factory who are not worker within the meaning of the Factories Act, 1948 (63 of 1948), and for the purpose of proceeding under this Act, include an employee, who has been dismissed, discharged or retrenched for any reason whatsoever."

16. As per serial no.5 of Schedule-I, none of the provisions of the Act would apply on a person occupying position of managerial or supervisory character in an establishment employing more than five persons, provided that not more than ten per centum of the total number of employees in an establishment shall be so exempted. Proviso to serial no.5 prescribes that where ten per centum of the total number of employees in an establishment comes to a fraction less than one such fraction shall be rounded off to one.

17. Section 26(2) of the Act provides that an employee, dismissed or discharged or whose employment is otherwise terminated, may make a complaint in writing in the prescribed manner, to a prescribed authority within 90 days of the receipt of the order of dismissal or discharge or termination of employment on the one or more of the following grounds :-

- (i) There was no reasonable cause for dispensing with his services;



or

- (ii) No notice was served on him as required by sub-section (1); or
- (iii) He has not been guilty of any misconduct as held by the employer; or
- (iv) No compensation as prescribed in sub-section (1) was paid to him before dispensing with his service.

18. Section 4 of the Act prescribes exceptions. Sub-clause (2) of Section 4 prescribes that notwithstanding anything contained in this Act, the provisions thereof specified in the third column of the Schedule shall not apply to the establishment, employees and other persons referred to in the corresponding entry in the second column.

19. It is not in dispute that the impugned order of termination of services of the petitioner, as contained in Annexure-18 to the writ petition, has been passed by the respondent management on having found the charges true under the provisions of the Act and the Rules.

The operative part of the impugned order reads as under :-

“In view of the above facts, primarily in the larger interest of our institution, the management has decided with heavy heart to terminate your services with immediate effect on having finding the charges true **under the provisions of the Bihar Shops & Establishment Act, 1953 read with Bihar Shops & Establishment Rules, 1955**. Since your services have been terminated for “misconduct” you are not



entitled to one month's salary for notice period nor any compensation for termination **under section 26 of the Bihar Shops & Establishment Act, 1953.**"
(emphasis mine)

20. It would be manifest from perusal of the order of termination, as contained in Annexure-18 to the writ petition, that the respondent management had passed the order under the provisions of the Act and the Rules. Thus, right from the beginning, the management was of the view that the petitioner was an employee covered under the provisions of the Act. However, when the petitioner challenged the said order of termination by filing a complaint under Section 26(2) of the Act before the Labour Court, Patna, the respondent management raised a preliminary objection that the petitioner cannot maintain a complaint as he was working in the managerial capacity. The stand taken by the respondent management was contrary to its own stand under which the impugned order was passed. The petitioner has taken a plea that in order to support such contention certain casual appointments were made purposely just to maintain record in order to frustrate the cause of the petitioner. Apparently, the Labour Court relied upon the list of employees filed by the respondent management without recording any evidence on behalf of the parties.

21. Be it noted that the proceeding under Section 26(2) of the



Act is in the nature of original trial. Under this provision the Labour Court is required to enquire into the dispute after recording the evidence adduced by the parties. In the present case, the documents filed by the respondent management were not tested by the Labour Court by giving an opportunity to the petitioner to lead evidence. It would be evident from perusal of Section 4(2) of the Act read with serial no.5 of Schedule-I of the Act that not more than 10 per centum of the total number of employees in an establishment shall fall in exempted category. Thus, the fact that the petitioner falls within the exclusive definition of employee under the Act and that he also falls in exempted category requires for detailed investigation.

22. Apparently, the learned Presiding Officer of the Labour Court while passing the impugned order failed to appreciate the facts and the law involved in the case in correct perspective.

23. In that view of the matter, the order impugned dated 25.09.2013 passed by the learned Presiding Officer, Labour Court, Patna in B.S.E. Case No.1 of 2012 cannot be sustained. Accordingly, it is set aside. The matter is remitted back to the Labour Court, Patna to decide the case afresh after hearing both the parties and after giving them opportunity to lead evidence in support of their claim.

24. Before parting with the matter, I may clarify that I have not expressed any opinion on the merits of the case one way or the



other. The Labour Court will consider the claim of the petitioner on its own merit without being influenced by any observation made in this judgment. All contentions of all the parties including the contention as to the maintainability or otherwise of the claim petition are kept open.

25. On the facts and in the circumstances of the case, however, there shall be no order as to costs.

(Ashwani Kumar Singh, J)

Pradeep/-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	09-01-2018
Transmission Date	

