5 Rapp App. no. 2 (1947)

EX PARTE STANDARD OIL CO.

Ex parte STANDARD OIL CO.

> Application for leave to file Petition for Writ of Mandamus or in the alternative Writ of Prohibition.

The application made to me March 17, 1947, was for a stay of an order of the District Court of the Western District of Missouri entered by Judge Collett on January 29, 1947, in the case of Smithey v. Standard Oil Company of Indiana.

The material facts are as follows. The suit was one brought under the Fair Labor Standards Act, originally in the state courts. Motion for removal to the federal court was denied in the state court, but after the denial the defendant Standard Oil Company removed the case to the Federal District Court pursuant to the statutory procedure providing for such action. The plaintiff in the state court suit moved in the federal court to dismiss the proceeding or to remand to the state court for want of jurisdiction in the federal court. Judge Collett entered an order remanding the cause. In doing so he stated that the district courts of the country are divided on whether there is jurisdiction in the federal court in such cases, splitting about 60-40 against the jurisdiction. (The theory against jurisdiction seems to be that the Fair Labor Standards Act, by giving the plaintiff a choice to sue either in the federal or in the state court, impliedly repeals the applicability of the general removal statute to such cases, a theory which seems to me as I am presently advised without substantial foundation.) Judge Collett went on to say in his order that his own view was that the federal district court has jurisdiction in such cases, but a majority of the judges of the United States District Court for the Western District of Missouri hold the contrary view. He then went on to say that there should not be two conflicting rules of law working out of the same courthouse and accordingly, though he thought the motion to remand should denied and that there was jurisdiction, still in view of the position held by the majority of his brethren he would order the remand. He expressly stated that this action would constitute an invitation for mandamus. Nevertheless he entered an order for remanding the cause to the state court, but in doing so suspended its effectiveness for twenty days, this obviously to enable the

defendant to apply for review of his action to the Circuit Court of Appeals or here by way of mandamus. The Standard Oil Company applied to the Eighth Circuit for such relief.

As of the time the case came to me for application for stay the suspension of the effectiveness of Judge Collett's order had been extended to Tuesday, March 18. The Eighth Circuit Court of Appeals in the meantime had heard the matter, had also indicated to counsel that its view that Judge Collett's order of remand is not reviewable and had further indicated it would hand down its decision to that effect on Tuesday, March 18.

In these circumstances counsel for Standard Oil applied to me for a stay order directed either to suspension of the proposed action of the Circuit Court of Appeals or to the going into effect of Judge Collett's order of remand pending application here for a writ of mandamus or in the alternative of prohibition or in the alternative of certiorari. Mr. R. F. O'Bryen, of St. Louis, and Mr. Robert F. Schlafly, also of St. Louis, appeared in person in my chambers at three o'clock in the afternoon of Monday, March 17, to present their application. After hearing them I denied the application without prejudice to further application to another Justice of this Court.

My reason for doing so was as follows: This Court has held repeatedly that orders of federal district courts demanding causes removed to state courts are not reviewable under 28 USC § 71. United States v. Rice, 327 U. S. 742, 751; Employers Reinsurance Corp. v. Bryant, 299 U. S. 374, 378-381; Metropolitan Casualty Co. v. Stevens, 312 U. S. 563, 568-569; McLaughlin Bros v. Hallowell, 228 U. S. 278; Missouri Pacific Ry. Co., 160 U. S. 556, 582-583. In entering my order of denial I cited the *Metropolitan Casualty* case as direct authority and the *Rice* case cf.

Before reaching final conclusion I discussed the matter with Justice Reed. Together we examined the authorities and came to the conclusions (1) that a federal court's order remanding a removed cause is not reviewable either directly or indirectly, that is, by certiorari or appeal or by extraordinary procedure such as mandamus, prohibition, etc. (2) It was our conclusion that the only available mode of review for denial of the right to remove, under the authorities cited above, is by the following procedure. When the defendant (party seeking to remove) moves for an order of removal in the state court proceeding and it is denied, he then has the choice of one of two courses. In the first place, he can then follow the statutory procedure and remove the cause to the federal court by filing the proper

application in that court. If the court then sustains the removal the litigation continues in the federal court and the question of the validity of the court's action in allowing the removal comes to this Court with the case on the merits. If then this Court determines that the removal was properly allowed, that is the end of the matter. If it determines that the order sustaining removal was improperly granted then the case may be reversed on that ground alone and the cause goes back to the state court for further proceeding, the question of removal having thus been finally determined.

On the other hand, if the federal district court concludes that removal is not proper and enters an order remanding the cause to the state court, that also ends the matter of removal. Under the authorities that action is not reviewable and the state court is bound by the federal court's actions. If the state court does nothing more than follow that action (that is, does not again deny removal but on different grounds from those first raised), and the cause then proceeds through the court of last resort of the state to this Court, the state court's action in following the federal court's decision presents no federal question and this Court in this situation will assume that the removal was proper and proceed to determine the cause on the merits. Metropolitan Casualty Co. v. Stevens, supra. Thus by removing the cause to the federal court and securing there an adverse decision upon the right of removal, the party removing actually forecloses his right to have review of the question of the propriety of the removal, either by the Circuit Court of Appeals or by this Court. In my opinion the foreclosure is effective against extraordinary modes of review, e. g., mandamus, just as it is against normal review procedures.

The only way therefore in which a person wishing to secure review by this Court of his right of removal can do so is by exercising his right to remove to the federal court after the state court denies his motion to remove. When that denial occurs the party must choose between going to the federal court on his own motion and running the risk that he will be foreclosed of review on removability if that court finds that removal is improper and, on the other hand, saving his exception to the state court's denial, proceeding with the cause on the merits through the state courts and then bringing to this Court along with the merits the question of the validity of the state court's action in denying removal. In this way it is the state court's judgment that removal is not improper rather than the federal court's which comes under review here.

This apparently has been the law since 1910, when the removal statute was amended following the decision in 213 U. S. by Justice Day in _____ v. _____. [Publisher's note: Blanks in original. The case referred to was probably *Chesapeake & Ohio Railway Co. v. McCabe*, 213 U.S. 207 (1909).]

In my judgment the statute as it is now interpreted constitutes something of a trap. Thus in this case I suspect that Standard Oil elected to remove to the federal court without realize [Publisher's note: "realize" should be "realizing"] that in doing so they were running the risk that its adverse decision would foreclose their right of review on removability. Nevertheless, I think that clearly is the law under repeated decisions and for that reason I was unwilling in this case to grant the stay. It should be added perhaps that, although I think the applicant here must now go forward with the cause in the state court, he may possibly preserve his question and secure a reconsideration of it by assigning error in that respect if and when the cause comes here on the merits. This would mean, however, that we would have to overrule the prior decisions, especially the Metropolitan case, in order to give him relief at that time.

The applicant made a further point, namely, that Judge Collett, by accepting the views of the majority of his brethren rather than his own expressly stated contrary ones, acted arbitrarily and not judicially and that this additional ground gives ground for the relief sought. I do not think it can be said that Judge Collett either substituted his personal judgment for his judicial judgment or that he acted arbitrarily. He was simply giving effect in his judicial action to a majority view of the law with which he disagreed. Although he was not at the time he acted bound by any decision of a higher court on the question, I think he did exercise a judicial judgment and I could not hold to the contrary on these facts.

Wiley Rutledge
Dictated March 18, 1947.