(1985) 10 RAJ CK 0064

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1321 of 1982

B.N.K. Sahakari Wholesale Upbhokta Bhandar Ltd.	APPELLANT
Vs	
Prescribed Authority under Rajasthan Shops and Commercial Establishment Act	RESPONDENT

Date of Decision : 08-10-1985

Acts Referred:
Constitution of India, 1950 — Article 226, 227
Payment of Gratuity Act, 1972 — Section 2

Citation : (1986) 1 WLN 605

Hon'ble Judges : Suresh Chandra Agrawal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Suresh Chandra Agrawal, J.—In this writ Petition filed under Articles 226 and 227 of the Constitution of India, the petitioner has prayed for a writ of certio-rari to quash the order (Annexure 6) dated 15th May, 1982 passed the Prescribed Authority under the Rajasthan Shops and Commercial Establish-ment Act, 1958 (here in after referred to as ''the Prescribed Authority'') where by the Prescribed Authority has allowed the application submitted by Shri Jeth Mal Lodha, respondent No. 2 u/s 28A of the Rajasthan Shops and Commercial Establishment Act, 1958 (here in after referred to as ''the Act'').

2. The petitioner is a Co-operative Society registered under the provisions of the Rajasthan Co-operative Societies Act, 1965(here in after referred to as ''the Co-operative Societies Act). Respondent No. 2 was employed as a Cashier with the petitioner. By order dated 1st July, 1980, passed by the Executive Officer of the petitioner the respondent No. 2 was retired from service on the ground that he had attained 55 years of age. Feeling aggrieved by the aforesaid order the respondent No. 2 filed a petition u/s 28A of the Act before the Prescribed Authority. In the said application respondent No. 2 submitted that he had been removed from service without any prior notice & without assigning any reason

and that the said order should be set aside and he should be ordered to be reinstated in service. The petitioner filed a reply to the said petition wherein it was submitted that according to law an employee of the petitioner can he retired from service when he attains the age of 55 years and that the date of birth, as recorded by respondent No. 2 himself, was 2nd Dec, 1924 and, therefore, the respondent No. 2 could not continue in service. In the said reply an objection was also taken that the provisions of the Act were not applicable to the petitioner. The petitioner in its reply aforesaid, further stated that after passing of the order dated 1st May, 1980, the respondent No. 2 submitted an application wherein he prayed that two months wages may be given to him by way of financial assistance so that he may be able to set up some other business and that the said application was accepted by the petitioner and respondent No. 2 was paid two months wages by way of financial assistance. The Prescribed Authority by its order dated 15th May, 1982, rejected the contention of the petitioner that the provisions of the Act were not applicable to the petitioner and that the Prescribed Authority had no jurisdiction to entertain the petition. The Prescribed Authority also found that there was no service rule prescribing the age of retirement for the employees of the petitioner. Relying on the provisions contained in Section 2(r) of the Payment of Gratuity Act, 1972 the Prescribed Authority held that in cases where there is no contract of condition of service prescribing the age of superannuation, the age of superannuation would be 58 years and that the retirement of respondent No. 2 at the age of 55 years was illegal. The Prescribed Authority was further of the view that the order dated 1st July, 1980 was passed in violation of the provisions of Section 28A of the Act because the respondent No. 2 had not been given one month''s notice. In view of the aforesaid findings, the Prescribed Authority set aside the order dated 1st July, 1980 as being illegal and directed reinstatement of respondent No. 2 in service with effect from 1st July, 1980 and to pay full wages to him. Feeling aggrieved by the aforesaid order passed by the Prescribed Authority, the petitioner has filed this writ petition.

3. In the writ petition, the petitioner has submitted that the petitioner being a Co-operative Society, is governed by the provisions of the Co-operative Societies Act and the directions of the State Government and the Registrar, Co-operative Societies (here in after referred to as ''the Registrar''). It has also been submitted that the Registrar, by circular letters dated 29th June, 1967, issued in exercise of the powers conferred under the Co-operative Societies Act, has directed that no employee who has completed the age of 55 years should be kept in service any more and that the age of retirement of the employees of the co-operative societies would be 55 years and no person above the age of 55 years should be appointed. According to the petitioner the aforesaid direction was repeated in the letter dated 2nd December, 1968 sent by the Registrar. The case of the petitioner is that the aforesaid letters of the Registrar have got statutory force when they prescribed the age of retirement of employees of the petitioner and that in view of the said letters the age of retirement of the petitioner has

been fixed as 55 years and that the Prescribed Authority was, therefore, not right in holding that no age of superannuation has been fixed for the employees of the petitioner. In the writ petition it has also been stated that the Prescribed Authority had erred in relying upon the provisions of the Payment of Gratuity Act, 1972 for the purpose of fixing the age of superannuation of the employees of the petitioner.

4. No reply to the writ petition has been filed on behalf of respondent No. 2. Shri Maloo, the learned Counsel for the petitioner has invited my attention to the provisions contained in Clause (xxx) of Sub-section (2) of Section 148 of the Co-operative Societies Act as well as Rule 41 of the Rajasthan Co-operative Societies Rules, 1966 (here in after referred to as ''the Cooperative Societies Rules''). Shri Maloo has also invited my attention to the Setter dated 11th July, 1967 addressed by the Assistant Registrar, Co-operative Societies, Ajmer to the Executive Officer of the petitioner which has been annexed as Annexure 2 to the writ petition and the circular dated 2nd Sept., 1968 addressed by the Registrar, Co-operative Societies to the petitioner, which has been annexed as Annexure 3 to the writ petition. On the basis of the aforesaid documents, Shri Maloo has submitted that one of the conditions of service of the employees of the petitioner was that they would retire at the age of 55 years.

5. Clause (xxx) of Sub-section (2) of Section 148 of the Co-operative Societies Act empowers the State Government to make rules to provide for the qualifications of a Manager, Secretary, Accountant or any other officer or an employee of the Society and the conditions of their service including the discipline and control. In exercise of the aforesaid power which has been conferred on the State Government u/s 148 of the Co-operative Societies Act, the State Government has framed the Co-operative Societies Rules. Rule 41 of the Co-operative Societies Rules deals with the officers and employees of Co-operative Societies and prescribes that the conditions of service of the employees of the societies shall be as specified by the Registrar. This would show that the Registrar has been empowered by Rule 41 of the Cooperative Societies framed u/s 148(2) (xxx) of the Act to specify conditions of service of the employees of the co-operative societies. In the persent case I find that by letter (Annexure 2) dated 11th July, 1967 the Assistant Registrar, Co-operative Societies, Ajmer informed the Executive Officer of the petitioner that the Government had taken decision that no statutory body, co-operative public sector, Corporation under the Corporation Act, registered society and also unregistered bodies created by Government order, where Government have powers of indirect control through Government nominated President/Chairman/Directors/Members etc. shall retain in service on or after the 1st July, 1967 any person whose age is 55 years or more on that date. By the said letter it was further directed that in order to comply with this policy decision it is necessary that service rules, standing orders, Regulations, Executive orders etc. which regulate the age upto which a person can be retained in service should be amended so as to make 55 the age of retirement of all employees other than those holding posts corresponding to

class IV posts under Government whose age of retirement should be 60. By the said order it was further directed that service of all persons of 55 years or above as on 1st July, 1967 should be terminated. The said letter was followed by circular (Annexure 3) dated 2nd September, 1983 sent by the Registrar wherein attention has been invited to the earlier circular dated 29th June, 1967 issued from the office of the Registrar for taking action against the employees who had attained the age of 55 years. In the said circular it was further stated that in case action had not. been taken in accordance with the aforesaid direction against the employees who had attained the age of 55 years, reasons for not so doing have to be communicated to the Office of the Registrar. By the said circular it was also directed that intimation be given about the steps that had been taken for carrying out necessary amendment in the service rules of the employees. The aforesaid documents indicate that the Registrar had specified that the age of retirement of the employees of the Co-operative Societies should be 55 years and the various co-operative societies, including the petitioner, were directed to take steps to give effect to the said circular by making necessary amendments in the service conditions of the employees. In so far as the petitioner is concerned, there was no service condition prescribing the age of superannuation for its employees at the time when the said circulars were issued. It was, therefore, not necessary for the petitioner to make any amendment in the service rules altering the age of superannuation. The directions contained in the aforesaid circulars of the Registrar can, therefore, be treated as conditions of service prescribed by the Registrar under Rule 41 of the Co-operative Societies Rules wherby the age of superannuation of the employees of the petitioners was fixed at 55 years. In the circumstances, it can be said that on the date of passing of the order dated 1st July, 1980, the conditions of service of the employees of the petitioner prescribed the age of superannuation as 55 years. Once it is held that the conditions of service for the employees of the petitioner, on the date of the passing of the order dated 1st July, 1980, prescribed the age of superannuation of the employees as 55 years, no fault can be found with the order dated 1st July, 1980 passed by the petitioner because on that date respondent No. 2 had admittedly crossed the age of 55 years.

6. Shri Maloo has submitted that the Prescribed Authority was in error in placing reliance on the provisions of Section 2(r) of the Payment of Gratuity Act, 1962 for the purpose of holding that the age of superannuation of the employees of the petitioner was 58 years. According to Shri Maloo the Payment of Gratuity Act, 1972 only makes provision for the payment of gratuity, but does not prescribe the age of superannuation in cases where the age of superannuation has not been prescribed by the contract or conditions of service. In support of his aforesaid submission, Shri Maloo has placed reliance on the decision of this Court in Mewar Textiles Mills Ltd. v. I.T. Raj. Jaipur and Ors. 1985 RLR 171. In my opinion it is not necessary to deal with the aforesaid contention of Shri Maloo since, I have held that in the present case the conditions of service applicable to the employees of the petitioner prescribed the age of superannuation as 55 years.

7. The Prescribed Authority has also held that the order dated 1st July, 1980 was passed in violation of the provisions of Section 28A of the Act because one month''s notice was not given to respondent No. 2. Shri Maloo has assailed the aforesaid finding of the Prescribed Authority and has submitted that the conditions laid down in Section 28-A of the Act have no application to the present case because the respondent No. 2 was not discharged from service but had been retired from service on attaining the age of superannuation as fixed in the conditions of service applicable to bins. The submission of Shri Maloo was that retirement on attaining the age of superannuation does not amount to discharge from service. In support of his aforesaid submission, Shri Maloo has placed reliance on the decision of the Orissa High Court Saroj Kumar Ghosh Vs. Chairman, Orissa State Electricity Board, and the decision of the Supreme Court in the The United Provinces Electric Supply Co. Ltd., Allahabad Vs. Their Workmen, In Saroj Kumar Ghosh v. Chairman Orissa State Electricity Board (supra), a division bench of Orissa High Court has observed that the termination and superannuation cannot be equated. Superannuation is an event which comes more or less in an automatic" process and there is no violation in the act where as termination is a positive act by which one party even against the desire of the other can bring about the end to an employment. In The United Provinces Electric Supply Co Ltd. v. T.N. Chatterjee and Ors. (supra), the Supreme Court has noticed the aforesaid decision of the Orissa High Court and the distinction between superannuation and termination. Section 28 A of the Act requires giving one month''s notice or payment of one month''s wages in lieu of such notice to an employee who has been in employment continously for a period of not less than six months for dismissal or discharge from employment and such a notice can be dispensed with only in those cases where the services of the employees are dispensed with for such misconduct as may be defined in the Rules made by the State Government in that behalf and supported by satisfactory evidence recorded in an inquiry held for the purpose in the prescribed manner. In my opinion the aforesaid provision contained in Section 28A of the Act would not cover a case where an employee is retired from service on his attaining the age of superannuation and in such an event it is not obligatory on the part of the employer to give one month''s prior notice or to pay to the employee one month''s wages in in lieu of such notice. Once it is held that the order dated 1st July, 1980 was passed with a view to retire respondent No. 2 on his attaining the age of superannuation as prescribed in the conditions of service applicable to him, it was not necessary for the petitioner to give one month''s prior notice to respondent No. 2 and the Prescribed Authority was, therefore, not right in holding that the order dated 1st July, 1980 was passed in contravention of the provisions of Section 28-A of the Act.

8. The writ petition, therefore, succeeds and the order (Annexure 6) dated 15th May, 1982 passed by the Prescribed Authority allowing the application of respondent No. 2 filed u/s 28 A of the Act is set aside arid the said application of respondent No. 2 shall stand dismissed. In the facts and circumstances of the

case, the parties are left to bear their own costs.